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COURT OF SPECIAL APPEALS

Unreported opinions

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Adoption/guardianship: termination of parental rights: stay pending appeal of permanency plan

In Re: Adoption/Guardianship of Jayden G.

No. 84, September Term, 2012

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

Opinion by Adkins, J., Bell, C.J., and Harrell, J., join in the Judgment only.

Filed: July 16, 2013. Reported.

**Bell, C.J., participated in the hearing of the case, in the conference in regard to its decision and in the adoption of the opinion, but he had retired from the Court prior to the filing of the opinion.*

Whether to stay TPR proceedings pending appeal of the change in the child's permanency plan in the CINA case is within the discretion of the juvenile court, which must be guided by the child's best interests. As part of the best-interest analysis, the juvenile court did not abuse its discretion when it took into consideration the child's attachment to his foster parents, who have expressed the desire to adopt him.

There is a presumption in our parental rights' jurisprudence that a continuation of the parental relationship is in a child's best interests. Yet, again, in this case, the child and the parent pursue antagonistic goals. The mother argues her parental rights should not have been terminated, while the child seeks adoption by his foster parents, with whom he has lived three quarters of his life.

To be sure, this case presents an unusual situation. After the child spent twenty-seven months in foster care without progress by his parents toward reunification, or a consistently active involvement by other relatives, the court decided it was time to pursue a plan of adoption by non-relatives. This order — changing the permanency plan to adoption — triggered the filing of the termination of parental rights ("TPR") petition. The mother, however, appealed the plan change and sought a stay of the TPR case. She succeeded on appeal but not on the motion to stay. As a result, by the time the Court of Special Appeals ruled in the mother's favor on the plan change, her parental rights had been terminated.

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

She argues the court should not have terminated her parental rights while her appeal of the permanency plan change was pending. But whether to stay a TPR case is within the juvenile court's discretion. In this case, the court did not abuse its discretion because a stay would not have been in this child's best interests. Nor did the court err when — in terminating parental rights — it took into account the child's attachment to his foster parents.

BACKGROUND

At the heart of this case is a five-year-old boy, Jayden G., born on September 26, 2007. Surrounding him, in the context of this case, are his two older siblings — Daeshawn E. and Victoria G.; and three adults — Jayden's mother, Jennifer S.; his father, Justin G.;[1] and Jayden's paternal grandmother, Darlene G. We will refer to Ms. S. as the "Mother," Mr. G. as the "Father," and Darlene G. as the "Grandmother."

On February 17, 2009, the three children were found to be Children in Need of Assistance ("CINA") and placed in foster care. Daeshawn and Victoria went to live in one foster home, while Jayden was placed in another. The Department worked long and hard toward the children's reunification with the Mother or the Father. When it became clear, however, that reunification was not likely, the juvenile court ordered a plan of adoption by a non-relative for Jayden and granted limited guardianship over Daeshawn and Victoria to the Grandmother. The Mother appealed the plan of adoption, but while the appeal was pending, the juvenile court terminated her parental rights. The Mother's appeal of Jayden's plan change, however, was successful. This is somewhat of an anomalous result: the Mother won her CINA appeal, but only after her parental rights had been terminated.

The CINA and TPR Statutes

Two intricately connected, yet separate legal mechanisms, come into play in this case. CINA proceedings are governed by sections 3-801 through 3-830 of the Courts and Judicial Proceedings Article ("CJP"), and TPR proceedings are governed by sections 5-313 through 5-328 of the Family Law Article ("FL"). Before we delve into the facts and the procedural history of the case, we give a brief overview of this statutory framework.

CINA Proceedings

When a local department of social services receives a complaint of child abuse or neglect, it is required by statute to file a petition with the juvenile court for a determination of whether the child is CINA. CJP §§ 3-801(f), 3-809(a). If the allegations turn out to be true, and the child is committed to an out-of-home placement, the court must hold a hearing to determine a "permanency plan" for the child. CJP §3-823(b)(1). We explained in *In re Damon M.* that a permanency plan "sets the tone for the parties and the court" and "provides the goal toward which [they] are committed to work." 362 Md. 429, 436, 765 A.2d 624, 627 (2001). In this regard, the permanency plan is "an integral part of the statutory scheme designed to expedite the movement of Maryland's children from foster care to a permanent living, and hopefully, family arrangement." *Id.*

There are five permanency plans to choose from "in descending order of priority:" (1) reunification with a parent or guardian; (2) placement with relatives for adoption, custody, or guardianship; (3) adoption by a non-relative; (4) custody or guardianship by a non-relative; or (5) another planned permanent living arrangement. CJP § 3-823(e)(1)(i). In determining which plan would be in the "best interests of the child," courts consider the child's emotional, developmental, and educational needs. *See* CJP § 3-823(e)(2); FL § 5-525(f)(1).

After the initial permanency planning hearing, the juvenile court is required to review the permanency plan at least every six months. CJP § 3-823(h)(1). At those review hearings, the court makes findings as to "the continuing necessity for and appropriateness of the commitment," "whether reasonable efforts have been made to finalize the permanency plan that is in effect," and "the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment." CJP § 3-823(h)(2). The court must "[c]hange the permanency plan if a change . . . would be in the child's best interest," and must be cognizant of the statutory requirement that "[e]very reasonable effort . . . be made to effectuate a permanent placement for the child within 24 months after the date of initial placement." CJP § 3-823(h)(2)(vi) & (h)(3).

The TPR

Many CINA cases do not end with reunification with a parent. But even if "it is determined that reunification is not possible and that adoption is in the child's best interests, the juvenile court lacks jurisdiction to finalize this plan." *In re Adoption/Guardianship No. 10941,* 335 Md. 99, 106, 642 A.2d 201, 205 (1994) (citing *In re Darius A.,* 47 Md. App. 232, 235, 422 A.2d 71, 72 (1980)). "[U]nless the parents consent to the adoption of their child, the department is required to petition the circuit court for guardianship pursuant to F.L. § 5-313." *Id.*

To obtain guardianship, the local department files a TPR petition, which "seek[s] to terminate the existing parental relationship and transfer to itself, hopefully for re-transfer to an adoptive family, the parental rights that emanate from that relationship." *In re Adoption/Guardianship of Rashawn H.,* 402 Md. 477, 496, 937 A.2d 177, 188–89 (2007). Like with the permanency plan considerations in the CINA context, in ruling on a TPR petition, the juvenile court is guided by the child's best interest. *Compare* CJP § 3-823(e), *with* FL § 5-323(d).

The CINA Journey of Jayden and His Siblings and the TPR

Three separate CINA cases overlap in this case: Jayden's, Daeshawn's, and Victoria's. There was also a TPR proceeding, which resulted in the termination of the Mother's parental rights to Jayden. Then, there were two appeals with respect to Jayden: one of the permanency plan change and the other of the TPR proceeding. We examine this complex procedural history below, focusing on the facts pertinent to this appeal and saving some details for the analysis section.

How Jayden and His Siblings Became CINA

The involvement of the Montgomery County Department of Health and Human Services (the "Department") in the lives of Jayden and his older siblings began in May of 2008. At that time, the Mother requested and was granted a protective order against the Father, "alleging that [he] had punched and kicked her, and jabbed a car key into her leg," and "had put a cutter to her throat, stating that he wanted to kill her." These allegations prompted the Department to open an investigation to determine whether the children were receiving proper care and attention.[2]

On January 30, 2009, while the Department's investigation was ongoing, Montgomery County police received phone messages from the Mother, in which she stated that the Father "was trying to poison her and her children were trying to communicate with her by underlining certain sentences in certain books." The next day, while staying at the Betty Ann Krahnke Center, the Mother jumped out of a window, claiming "they were after me." She was later found in the woods behind the Center by the police. After that incident, she was placed in the psychiatric unit at Washington Adventist Hospital.

On February 2, 2009, the Department met with the Mother at the hospital to discuss possible placement options for the children. The Mother "adamantly

requested that the children not be placed with [the Father or the Grandmother]," alleging that they "had been trying to poison her." She suggested two relative placement options, neither one of which was acceptable, however.[3] With no viable family placement options, the Department placed the children in shelter care and filed CINA petitions.

The CINA petition involving Jayden was heard on February 17, 2009 by the Circuit Court for Montgomery County, sitting as Juvenile Court. Based on the facts stipulated by the parties, in which the Mother and the Father agreed that they were unable or unwilling to care for Jayden, the court found Jayden to be a Child in Need of Assistance. Specifically, the court stated that "it is not currently possible to return the child to the home of the Mother because she is unable to give the Child proper care and attention, and the father is incarcerated."

Around the same time, the court made similar findings with respect to Victoria and Daeshawn and ordered all three children to be committed to the Department for placement in foster care. The Mother and the Father were ordered to undergo psychological and psychiatric evaluations, and to participate in a number of programs, designed to help parents achieve reunification with their children.

The children were placed in different foster homes. Daeshawn and Victoria changed placements three times. They stayed twenty-one months with the first foster family until there were allegations of abuse, and nine months with the second. On July 28, 2011, they were placed with the Grandmother. Jayden, however, has lived with the same foster parents since his original placement with them on February 3, 2009.

The Permanency Planning Hearings

During the next thirty-four months, from the time Jayden and his siblings were found CINA to December 21, 2011, when the Mother's parental rights to Jayden were terminated, the juvenile court conducted seven permanency planning hearings. Following the initial hearing, held on July 30, 2009, the court ordered a permanency plan of reunification with either parent. This plan was maintained at the next three review hearings, conducted on December 10, 2009; March 22, 2010; and June 11, 2010.

On September 20, 2010, after fourteen months of pursuing a sole plan of reunification with at least one of the parents, the juvenile court ordered that the children's permanency plans change to a concurrent plan of reunification with the Mother and placement with a relative for custody and guardianship. Eight months later, on May 25, 2011, the court established new permanency plans for the children: (1) custody and guardianship by a relative for Daeshawn and Victoria and (2) adoption by a non-relative for Jayden. We review these developments below.

Reunification with Either Parent

A plan of reunification with either the Mother or the Father was ordered when the children were first found CINA and was maintained for over a year. The evidence presented at the three permanency planning review hearings during that time was substantially the same: the Mother made some effort to give the Department hope that reunification was possible, but she was unable or unwilling to comply with most of the requirements imposed by the court.[4] The Department's reports and recommendations, adopted by the juvenile court, focused on four areas: visitation, employment, mental health, and placement of the children with relatives.[5]

Out of these, visitation is the area in which the Mother was more compliant, at least at the beginning. During the first three months the children were in foster care, she visited with them consistently, demonstrating affection, and informing the Department if she was running late. According to the Department, during that initial time in foster care, "[a]ll three children love[d] their mother and remain[ed] extremely attached to her despite their separation." As time went on, however, the Mother began to neglect her visitation obligations. In the March 2010 report, adopted by the court, the Department noted that, although the Mother "started off diligent in her pursuit to be reunified with her children," "[f]or the last five months, she has been less consistent with visits."

The situation with employment was even less encouraging. The Mother remained unemployed by the first permanency review hearing. At the time of the second permanency plan review hearing, she was employed at a Target, but by the fourth hearing, she was again without housing or employment.

Perhaps most worrisome was the Mother's inability to address her mental health needs. After the incident when she was found in the woods behind Betty Ann Krahnke Center, "exhibiting disorganized and delusional behaviors," she was diagnosed with acute stress and depression and hospitalized at a psychiatric unit for one month "due to suicidal ideations." She was also diagnosed with depression by history, obsessive compulsive personality traits, histrionic features, and narcissistic personality features. The psychologist, who evaluated her, recommended that she "continue seeing her psychiatrist and therapist" and "enroll in the Abused Persons Program." She would not follow up on treatment, however, missing appointments without ever rescheduling.[6] The Mother concedes she "did not comply with the requirement that she obtain psychiatric treatment and medication."

Finally, despite the Department's efforts to find a relative placement for the children, initially, the parents were not able to provide the Department with any adequate placement options.[7] With respect to the Grandmother specifically, the Mother "reported that [she] is not an option and has a past criminal history and . . . would not prevent [the Father] from having contact with the children." In the first six months, the Grandmother "only attended one visit on June 9, 2009 when she accompanied [the Mother]." Between July and December 2009, the Grandmother "attended several visits with the children . . . and . . . expressed an interest in having two children placed with her while the parents work towards reunification."[8]

Reunification with the Mother

A much bleaker picture of the parents' situation was presented at the fourth permanency planning hearing, conducted on June 11, 2010. In contrast to the Department's position in the earlier reports, where it consistently emphasized the goal of reunification with a parent, the Department began its fourth report by pointing out that "the children have now been in care for 16 months," but neither the Mother nor the Father "has satisfactorily demonstrated that they are in a position to have the children return to live with either one of them."

By then, Jayden "ha[d] been placed out of the home 15 of the last 22 months," and the Department was authorized by statute to file a TPR petition. It explained that it had not done so because it was still exploring relative placements for the children. The Department was awaiting results of the Grandmother's home study, and was planning to undertake a home study of a Mother's cousin. In light of these developments, the Department requested, and the juvenile court reaffirmed, a permanency plan of reunification with the Mother, but not with the Father, for all three children.

Concurrent Plan of Reunification and Placement with a Relative

The fifth permanency planning hearing took place on September 21, 2010, nineteen months after Jayden and his siblings were found CINA and placed in foster care. At that time, in accordance with the Department's recommendation, the court ordered that Jayden's permanency plan be changed from reunification with the Mother to a concurrent plan of reunification with her and placement with a Relative or Guardian.

The reason for the change was that Jayden had "been in care for 20 months," but neither the Father nor the Mother had made meaningful progress towards reunification. The Department did observe, however, that the Mother showed "improvement over the past 3 months in terms of her attitude towards the Department, in accepting responsibility for the position in which she finds herself today, and in setting better boundaries with [the Father]."

The Department continued to explore family placement options. The Grandmother failed to "follow up" on the home study request by Prince George's County Department of Social Services because the Mother "reportedly told her that the Department was just looking at reunification." By the time of this permanency planning hearing, the Grandmother had "moved to Montgomery County . . . into a home that can accommodate all three of the children." The Department expressed its intent to consider her as a placement.

The Abduction and Its Ramifications

The sixth permanency planning hearing was originally scheduled for December 21, 2010 but was rescheduled twice: first to February 8, 2011, then to April 15, 2011. During that time, certain important developments took place. First, on October 12, 2010, the Grandmother and the Mother made allegations that Victoria had been physically abused by her foster parents.[9] These allegations culminated in the Father and the Mother's abducting the children from a scheduled visit.[10]

The Department attributed some of the fault for this incident to the Grandmother and no longer wished to consider her as a relative placement option, filing a motion to that effect.[11] On November 1, 2010, the juvenile court granted the motion. The court also ordered that the visitation between the Father and the children be terminated and the visitation with the Mother continue but be supervised.

Three months later, on February 8, 2011, the juvenile court rescinded the order rejecting the Grandmother as a placement resource. The court also ordered supervised visitation between the Father, Victoria and Daeshawn, but not Jayden. Although the order did not address the Grandmother's right to visit with the children specifically, her visitation was conditioned on the Father's. Accordingly, in suspending the Father's visitation with Jayden, the order also suspended the Grandmother's visitation with him.[12]

The actual permanency planning review hearing took place two months later. On April 29, 2011, the court ordered the Department to "promptly conduct a Home Inspection of the home of [the Grandmother] for Jayden, Victoria, and Daeshawn for kinship care[.]" At the hearing on May 19, 2011, the Department indicated that it considered the Grandmother to be suitable for custody and guardianship over Daeshawn and Victoria.

With respect to Jayden, the Department stated: "The Department is still asking for a plan of adoption by a non-relative for Jayden. [T]he reason for that would be Jayden has bonded with the [foster parents]. He's spent two thirds of his life there. And the Department sees that as a very positive development for him." After reviewing the FL § 5-525(f)(1) factors, the juvenile court agreed with the Department and "concluded that it was in Jayden's best interest to change his permanency plan from a concurrent plan of reunification and placement with a relative, to adoption by a non-relative."

The Events Following the Plan Change

The Mother timely appealed the plan change to the Court of Special Appeals. She argued that the juvenile court abused its discretion in changing Jayden's permanency plan to adoption by a non-relative, when it could have placed Jayden with the Grandmother. Specifically, she alleged that the juvenile court gave too much weight to Jayden's time in foster care and the bond with his foster parents and failed to assess Jayden's ties with his siblings "as supportive of a plan of custody and guardianship."[13]

On June 24, 2011, while the Mother's appeal was pending in the Court of Special Appeals, the Department petitioned the juvenile court for guardianship over Jayden with the right to consent to adoption or other planned permanent living arrangement.[14] On July 13, 2011, the Mother sought a stay of the TPR case, arguing that proceeding with the TPR "would lead to the possibility of [the TPR court] terminating [her] parental rights only to have the appellate court decide the . . . pending appeal in her favor and remand the case."[15] On August 5, 2011, the juvenile court denied the Mother's motion.

The TPR trial took place in November and lasted five days: from November 14 through November 18, 2011. On December 21, 2011, the court granted the Department's petition, finding that the parents were unfit, that exceptional circumstances existed which made termination of their parental rights in Jayden's best interest, and that terminating the parental rights was in Jayden's best interest.

The Mother's appeal of Jayden's permanency plan change, however, was not resolved until January 19, 2012, which was almost exactly one month after her parental rights were terminated. The Court of Special Appeals held there was insufficient evidence "to support the circuit court's finding that it is in Jayden's best interest to be separated from his family." Thus, the intermediate appellate court vacated the juvenile court's order and remanded the case for a determination of which permanency plan was in Jayden's best interest.

The TPR case proceeded on a parallel appellate track, and the Court of Special Appeals affirmed the termination of the Mother's parental rights in an unreported opinion filed on August 7, 2012. The Mother filed a petition for writ of certiorari to this Court on September 6, 2012. On November 16, 2012, we granted certiorari, *In re Adoption/Guardianship of Jayden G.,* 429 Md. 303, 55 A.3d 906 (2012), to consider both questions she presented:

> 1. Did the Court of Special Appeals err in affirming the circuit court's order terminating parental rights, where the circuit court proceeded with the termination of parental rights hearing while the appeal challenging the CINA order changing the permanency plan from reunification to nonrelative adoption was still pending in the Court of Special Appeals, and where ultimately the order changing the permanency plan was vacated?
>
> 2. Did the circuit court err in basing its decision to terminate parental rights on Jayden's prospect of being adopted by, as well as the quality of care being provided by, his current foster care providers?

DISCUSSION

Despite the complex factual and procedural history, the first issue is easy to formulate: was it appropriate for the juvenile court to proceed with the TPR hearing while the CINA order, changing the permanency plan from reunification to non-relative adoption, was still pending in the Court of Special Appeals? We answer this question in the affirmative, but do so with the recognition that whether to stay the TPR proceedings pending a permanency plan appeal is within the juvenile court's discretion. In this case, the court did not abuse its discretion in proceeding with the TPR case. The court also did not err when, in finding that the termination of the Mother's parental rights was in Jayden's best interests, it took into consideration Jayden's strong attachment to his foster parents.

I.
The Right to Parent is Fundamental But Not Absolute

The relationship between a parent and a child holds a special place in the law.[16] As the United States Supreme Court has observed, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Wisconsin v. Yoder,* 406 U.S. 205, 232,

92 S. Ct. 1526, 1541 (1972). The role of parents in caring for their children is "established beyond debate as an enduring American tradition." *Id.,* 92 S. Ct. at 1541–42. In recognition of this principle, the Supreme Court and this Court have long protected the parents' right "to make decisions concerning the care, custody, and control of their children" under the Fourteenth Amendment of the United States Constitution. *Troxel v. Granville,* 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000); *see also Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S. Ct. 625, 626 (1923); *In re Adoption/Guardianship No. 10941,* 335 Md. 99, 112–13, 642 A.2d 201, 208 (1994).

Another paramount consideration is the child's best interest. Recently, in *In re Adoption/Guardianship of Ta'Niya C.,* we reviewed "33 years of Maryland jurisprudence on the topic" and concluded that "the child's best interest has always been the transcendent standard in adoption, third-party custody cases, and TPR proceedings." 417 Md. 90, 112, 8 A.3d 745, 758 (2010).

There is an interesting interplay between the parent's right to parent and the child's best interests. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J. R.,* 442 U.S. 584, 602, 99 S. Ct. 2493, 2504 (1979). Moreover, "historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* As a result, there is "a presumption of law and fact — that it is in the best interest of children to remain in the care and custody of their parents." *Rashawn H.,* 402 Md. at 495, 937 A.2d at 188.

But, "[a]s with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point." *Parham,* 442 U.S. at 602, 99 S. Ct. at 2504. Indeed, "[o]ne need not wander far into the thickets of family law before running into situations and circumstances where application of an absolute right of the parent would fail to produce a just result." *In re Yve S.,* 373 Md. 551, 568, 819 A.2d 1030, 1040 (2003). That is particularly obvious in cases of child abuse, neglect, and abandonment. *See, e.g., In re Adoption/Guardianship Nos. 2152A, 2153A, 2154A,* 100 Md. App. 262, 265, 641 A.2d 889, 890 (1994). It is in those cases that it becomes clear that, although the right to parent is essential in our cultural and legal understanding, it has limitations.

Resolving the conflict between the parent's right to parent and the child's best interest may get tricky. But, "our case law has been clear and consistent, that, even in contested adoption and TPR cases . . . , where the fundamental right of parents to raise their children stands in the starkest contrast to the State's effort to protect those children from unacceptable neglect or abuse, the best interest of the child remains the ultimate governing standard." *Rashawn H.,* 402 Md. at 496, 937 A.2d at 189. We have explained that the focus of the inquiry into the child's best interest — even with the parental presumption in place — must be on the child, not the parent. *Ta'Niya C.,* 417 Md. at 116, 8 A.3d at 760–61. Importantly, "[i]n balancing fairness to the parent and fulfilling the needs of the child, the child prevails." *In re Ashley S.,* ___Md.___, ___, A.3d ___ (2013) (No. 4, September Term, 2013) (filed May 30, 2013).

With this framework in mind, we turn to the present case.

II.
The Stay of TPR Proceedings

This appeal presents a situation where the rights and interests of the parent clash with the interests of the child. The Mother seeks a blanket rule requiring a stay in TPR proceedings whenever there is an appeal of a change in the permanency plan from reunification to adoption. Conversely, the Department fears that an automatic stay "will transform the periodic CINA review hearing — designed to speed [up] a child's exit from foster care — into a mechanism for delaying permanence for a child." It argues that, under FL § 5-319(a), TPR petitions are to be adjudicated within 180 days of filing. Jayden voices similar concerns, arguing that an automatic stay "will frustrate the statutory mandate to achieve a timely, permanent placement for the child — the very purpose of the CINA, permanency planning, and TPR proceedings."[17] At oral argument, however, Jayden conceded that a stay may nevertheless be appropriate in some cases.

We agree with Jayden that — when it comes to the best interests of a child — the one-size-fits-all approach does not work. The parent does have the right to appeal a permanency plan of adoption, but that right is not absolute. By the same token, the 180-day provision is not to be used as a sword against all motions to stay. The paramount concern here is the child's best interests. Neither automatic stays nor routine denials of motions account for that. Only the exercise of sound discretion does.

A. The Interests at Stake

The Mother asserts an immediate right to appeal a change in the permanency plan from reunification to adoption and complains that this right would be forfeited without an automatic stay of TPR proceedings. On the other end of the spectrum, the Department argues that any extension beyond the 180-day limit is prohibited by FL § 5-319(a) and carries with it the risk of harming the prospects of achieving permanency in a

child's life. Jayden takes a middle ground. He maintains that, although a stay was not in his best interests, courts should not routinely deny stays in other cases.

A Parent's Right to Appeal

A parent's right to appeal an interlocutory order changing the permanency plan from reunification to adoption originates in our decision *In re Damon M.,* 362 Md. 429, 436–38, 765 A.2d 624, 628–29 (2001). Under Section 12-303 of the Courts and Judicial Proceedings Article, interlocutory orders "[d]epriving a parent . . . of the care and custody of his child, or changing the terms of such an order" are immediately appealable. Md. Code (1974, 2013 Repl. Vol.), § 12-303(3)(x) of the Courts and Judicial Proceedings Article. The right to appeal a permanency plan change does not obviously flow from CJP § 12-303, however. When the court changes a permanency plan to adoption, the parent is not deprived of custody because by then the child is already in the Department's custody.

In Damon M., we explained that this type of an interlocutory order is nevertheless immediately appealable because "when the plan is reunification, there necessarily is . . . an expectation — more than a hope — that the parent will regain custody." 362 Md. at 436, 765 A.2d at 628. When the permanency plan is changed to adoption, however, the reasonable efforts to achieve reunification, "including the provision of services to the family," cease. *Id.* at 437, 765 A.2d at 628. This makes "[t]he amendment of the permanency plan to long-term or permanent foster care and adoption . . . a change in the terms of the custody order, whenever it was passed." *Id.*

In re Karl H.

In *Damon M.,* this Court's primary concern was the change in the level of services resulting from the change in the permanency plan. But in a subsequent case — *In re Karl H.* — we emphasized that the main reason orders changing the permanency plan to adoption are immediately appealable is because they have a detrimental effect on the parent's constitutionally protected right to parent. 394 Md. 402, 430, 906 A.2d 898, 914 (2006). Thus, we held *in Karl H.* that — in cases where the permanency plan includes adoption — it does not matter that reunification services continue; the plan change is still immediately appealable because, regardless of reunification efforts, such a plan "is sufficiently far enough along the continuum of depriving a parent of a fundamental right." *Id.* at 430–31, 906 A.2d at 914.

The procedural history in *Karl H.* is as complicated as the one in this case. Like here, there was a CINA case and a TPR case, with corresponding appeals traveling through the appellate channels on parallel tracks. After the permanency plan was changed to adoption in the CINA case, the parent appealed the plan change to the Court of Special Appeals. Meanwhile, the Department filed a TPR petition, which opened a separate TPR case. The juvenile court ruled on the TPR petition even before we heard oral arguments on the propriety of the permanency plan change in the CINA appeal. As a result, by the time we issued our opinion in the CINA case, the petitioner's parental rights had been terminated by the juvenile court in the TPR case.[18] *Id.* at 410, 906 A.2d at 902. We realized we were addressing an issue that was moot, unless the Court of Special Appeals reversed the TPR ruling.[19] *Id.* at 411, 906 A.2d at 903. We did not dismiss the CINA appeal as moot, however, in the belief that the case presented the type of an issue that is of "public importance," would "likely recur," but would "evade review." *Id.* at 410, 411, 906 A.2d at 902, 903.

The procedural aspects of *Karl H.* are important to its holding. The procedural posture of the case shows that, in solidifying the parent's right to appeal a permanency plan change to adoption, we were aware of the constraints imposed on that right by the CINA and TPR statutes. We were cognizant of the requirement under CJP § 3-823(g) that a TPR petition be filed within thirty days of the plan change. *Id.* at 431, 906 A.2d at 914. We knew very well that such a petition had not only been filed, but had been ruled on by the juvenile court before the CINA appeal was decided. *Id.* at 410, 906 A.2d at 902. Yet, we did not express any view with regard to the propriety of the juvenile court's action. Nor did we attempt to have any influence on the outcome of the TPR appeal. Rather, we accepted as a given that a juvenile court may terminate parental rights while the CINA appeal is pending, and took for granted the possibility that our own opinion in the CINA case may be rendered moot by the resolution of the TPR appeal in the Court of Special Appeals.

The Mother seeks to use *Damon M. and Karl H.* to place the parent's right to appeal on a pedestal above any and all considerations. But we did not write those cases that way and they should not be read that way. To be sure, the parent has a right to appeal the plan changing the permanency plan from reunification to adoption, but that right does not foreclose or forestall the pursuit of other, overlapping statutory processes. It must coexist with the statutory provisions encouraging expediency in the resolution of TPR cases and the child's paramount need for permanency, which underlies our CINA and TPR statutes. Although there is a right to appeal, neither *Damon M.* nor *Karl H.* stand for the proposition that there is also an absolute right to stay TPR proceedings pending CINA appeals.

Emileigh F. and the Stay

The Mother also relies heavily on *In re Emileigh F.,* 355 Md. 198, 733 A.2d 1103 (1999) to argue that terminating her parental rights while her CINA appeal was pending was a prohibited action. *In Emileigh F.,* a child was found CINA while in the mother's custody and later placed in the custody of her father. *Id.* at 200, 733 A.2d at 1103–04. The mother appealed the latter order, but while the appeal was pending in this Court, the juvenile court — finding the child was no longer a CINA — closed the case. *Id.* at 200–01, 733 A.2d at 1104. In the meantime, this Court issued an opinion, reversing the juvenile court's award of custody to the father. *Id.*

When this Court realized that the case had been closed, it issued certiorari on its own initiative and held that the juvenile court should not have terminated the case while the appeal was pending. *Id.* at 204, 733 A.2d at 1105. We explained: "the action taken by the juvenile court addressed matters that were clearly involved in the pending appeal [and], if permitted, would in essence defeat the right of [the parent] to prosecute her appeal with effect." *Id.* The Mother finds support in this language and argues that *Emileigh F.* should dictate the outcome of this case.

We agree with the Department, however, that *Emileigh F.* does not determine whether it was proper for the juvenile court in this case to proceed with terminating the Mother's parental rights. We do so for two reasons.

First, unlike in *Emileigh F.,* where there was no statutory provision instructing the juvenile court to take action, in this case we have a statute that directs the juvenile court to rule on TPR petitions within 180 days of filing. The Department emphasizes, citing *In re Deontay J.*, 408 Md. 152, 968 A.2d 1067 (2009), there is a difference "between prohibited action that frustrates a party's right to appeal and a juvenile court's permitted action, in a child's best interests, that has the incidental effect of rendering an appeal moot."[20]

In *Deontay J.,* a child was taken from the mother's custody, found CINA, and placed with the father. 408 Md. at 155–56, 968 A.2d at 1068–69. At a later time, he was moved into the Department's custody, and the father appealed. *Id.* at 156–57, 968 A.2d at 1069–70. While the appeal was pending, the Department's view regarding the father's parenting abilities changed, and it was willing to return the child to his custody. *Id.* at 162, 968 A.2d at 1072. The juvenile court, however, refused to take "further action until" the father's appeal was resolved, and "it received instructions from this Court." *Id.*

We held that the juvenile court erred in refusing to consider placing the child in the father's custody pending appeal. Noting the differences between that case and *Emileigh F.,* we observed that "[p]rohibited action by the trial court that defeats the right of a party to prosecute an appeal is distinguishable from permitted action by the trial court that renders a case moot." *Id.* at 163, 968 A.2d at 1073. We explained that the juvenile court was not prohibited from changing the child's custody pending appeal because it "has a duty to modify a custody order when persuaded that a modification is necessary to protect the health, safety and well-being of a CINA." *Id.* at 164, 968 A.2d at 1074. We held that "there is no reason why the appeal of a custody order divests the circuit court of jurisdiction to decide the merits of a claim that a change of custody is in the best interest of the child whose custody order is at issue in the pending appeal." *Id.* at 167, 968 A.2d at 1075.

In this case, like in *Deontay J.,* the termination of the Mother's parental rights was a permitted independent action that only had the incidental effect of rendering an appeal moot. As the Department emphasizes, the juvenile court's proceeding with the TPR case was expressly authorized by FL § 5-319(a), which provides that the juvenile court "shall rule on a TPR petition within 180 days of filing." If the statute expressly authorizes the court's action, it cannot reasonably be characterized as "prohibited" action.

The second reason *Emileigh F.* does not determine the outcome of this appeal is that the case that the juvenile court closed in *Emileigh F.* was the same case that was being reviewed by this Court at the same time. In contrast, in this case, the TPR ruling was made in one case, but the change in the permanency plan was being appealed in another case.[21] Although "a CINA adjudication must precede a TPR determination, it is a separate legal proceeding." *In re Adoption/Guardianship of Cross H.,* 200 Md. App. 142, 150, 24 A.3d 747, 752 (2011), *cert. dismissed,* 431 Md. 371, 65 A.3d 679 (2013). The two are governed by different statutes, serve different purposes, depend on different factors, require different standards of proof, and follow different case tracks. We address these differences below.

As we stated above, CINA proceedings are governed by the Courts and Judicial Proceedings Article, and TPR proceedings are governed by the Family Law Article. They serve different purposes: CINA proceedings are designed "[t]o provide for the care, protection, safety, and mental and physical development of" children found CINA; "conserve and strengthen the child's family ties;" ensure that parents and local departments work together to "remed[y] the circumstances that required the court's intervention;" and "achieve a timely, permanent placement for the child consistent with the child's best interests." CJP § 3-802(a). In contrast, when the Department initiates TPR proceedings, it

"seek[s] to terminate the existing parental relationship." *Rashawn H.,* 402 Md. at 496, 937 A.2d at 188–89. It files the TPR petition when it believes a child's welfare will be best served in the care and custody of others, rather than the natural parents. *See Yve S.,* 373 Md. at 572, 819 A.2d at 1043.

Further distinguishing CINA and TPR proceedings is that, in these two types of proceedings, courts consider different factors. The CINA statute focuses on factors that mostly have to do with the child's present well-being and the likely effect of a change or placement or remaining in foster care:

> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;
>
> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

FL § 5-525(f)(1)(i)–(vi); *see also* CJP § 3-823(e)(2).

Although the TPR statute likewise requires courts to "give primary consideration to the health and safety of the child," it covers a broader range of considerations. It requires juvenile courts to make specific findings with respect to the past actions of the parents toward the child, and efforts the parents and the department made towards reunification, including:

> (1)(i) all services offered to the parent before the child's placement . . . ;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home. . . ;
>
> (3) whether:
>
> (i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect . . . .

FL § 5-323(d). The TPR statute pays particular attention to the parent's efforts at remedying the circumstances that led to the court's intervention, requiring courts to consider, under the second category, the following factors:

> (i) the extent to which the parent has maintained regular contact with:
>
> 1. the child;
>
> 2. the local department . . . ; and
>
> 3. if feasible, the child's caregiver;
>
> (ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;
>
> (iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and
>
> (iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period.

FL § 5-323(d)(2).

That in TPR proceedings courts are required to take into consideration additional factors is not the only difference between CINA and TPR proceedings. Different evidentiary burdens also apply. TPR proceedings require a "clear and convincing" standard of proof, but CINA adjudications are made based on the lesser "preponderance of the evidence" standard. *In re Blessen H.,* 163 Md. App. 1, 16, 877 A.2d 161, 169–70 (2005), *aff'd,* 392 Md. 684, 898 A.2d 980 (2006). Furthermore, in a permanency plan review hearing, strict application of the Maryland Rules of Evidence is not required. Md. Rule 5-101(c)(6); *In re Ashley E.,* 158 Md. App. 144, 161, 854 A.2d 893, 903 (2004), *aff'd,* 387 Md. 260, 874 A.2d 998 (2005). It is, however, required in a TPR proceeding. *See* Md. Rule 5-101(c).

Finally, the changing of the permanency plan to adoption is not a prerequisite to the filing of a TPR petition. The Mother argues that "the circuit court

should not proceed with a TPR hearing until the appellate courts have conclusively determined that the decision to order a permanency plan of adoption was correctly reached," suggesting that a reversal of the change of the permanency plan to adoption necessarily undermines the footing on which the TPR proceedings stand. But, "the changing of the permanency plan from reunification, or adoption by a relative, to adoption by a non-relative, is not required before the Department can file a TPR petition." *Cross H.,* 200 Md. App. at 150, 24 A.3d at 752.

Under the CINA and Child Welfare Services provisions, there are three ways in which TPR proceedings may be initiated. First, as in this case, the department is required to file a TPR petition after the juvenile court finds that a permanency plan of adoption by a non-relative is in the child's best interests. *See* CJP § 3-823(g). Second, FL § 5-525.1(b) requires the department to file a TPR petition when "the child has been in an out-of-home placement for 15 out of the most recent 22 months." Third, if the department "determines that adoption . . . is in the best interest of the child," it is required to "refer the case to the agency attorney," and the attorney must file a TPR petition. FL § 5-525.1(a).

For these reasons, we reject the Mother's argument that TPR proceedings must be automatically put on hold when a parent appeals a CINA plan change. Although, without a stay of TPR proceedings, the outcome of the parent's appeal of a change in the permanency plan may be rendered moot, our holdings in *Damon M., Karl H.,* and their progeny, even when combined with our holding in *Emileigh F.,* simply do not add up to the conclusion the Mother advocates. Indeed, in *Karl H.* itself, in deciding to review an appeal rendered moot by a subsequent TPR, we acknowledged the possibility that this might happen in some cases. *See* 394 Md. at 411, 906 A.2d at 903. Thus, we reject the Mother's invitation to issue a blanket rule, which would require automatic stays in all TPR cases with pending CINA appeals.

The 180-Day Provision

The Department advances a different, but also a categorical, position. It maintains that FL § 5-319(a) leaves juvenile courts no choice but to deny motions to stay TPR proceedings. As we discussed above, FL § 5-319(a) provides that "a juvenile court shall rule on a guardianship petition . . . within 180 days after the petitioner is filed." Citing *Goins v. State,* the Department argues that "statutes and rules that govern 'procedure setting forth requirements in mandatory terms are not guides to the practice of law but precise rubrics . . . to be read and followed.'" 293 Md. 97, 109, 442 A.2d 550, 556 (1982) (citations omitted). Thus, in the Department's opinion, "[b]ecause the guardianship petition in this case was filed on June 24, 2011, the juvenile court was required to conclude and rule on the petition by December 24, 2011, a task the court would not have accomplished had it awaited the appellate court's decision in the CINA appeal."

Our intermediate appellate court had an opportunity to examine the import of the 180-day requirement in *In re Abiagail C.,* 138 Md. App. 570, 772 A.2d 1277 (2001).[22] The parent in that case attempted to use the 180-day time limit as a statute of limitations, arguing that the TPR petition should have been dismissed because the juvenile court failed to rule on it within 180 days. *Id.* at 579, 772 A.2d at 1283. The Court of Special Appeals disagreed, holding that the provision had no mandatory connotation. *Id.* at 584, 772 A.2d at 1286.

The intermediate appellate court began its analysis by discarding the argument that, just because the statute contained the word "shall," the juvenile court is required to rule on the TPR petition within 180 days. *Id.* at 581, 772 A.2d at 1284. The court pointed out that the word "shall" does not always constitute a mandatory term, but may be directory only:

> Depending on the context, placement, and use of the word "shall," and the nature of the constitutional provision or statute in which it appears, the word may have a mandatory connotation, so as to require that the action that "shall" be done must be done, or may be directory in meaning, so as to exhort the doing of the thing that "shall" be done without requiring it.

Id. In the context of "a constitutional provision or enactment appearing to impose a duty on the court," the word "shall," however, is more often "viewed as directory in meaning," not mandatory. *Id.*

Indeed, there is "reasonable continuity in the line of cases dealing with interpretation of the word 'shall' directed toward an arbiter's time constraints for issuing a decision." *G & M Ross Enterps., Inc. v. Bd. of License Comm'rs,* 111 Md. App. 540, 544, 682 A.2d 1190, 1192 (1996). Under this line of cases, "if a statute governs the actions of an arbiter, [be it a court or an administrative agency,] its use of the word 'shall' will generally be interpreted as directory, rather than mandatory."[23] *Id.* at 545, 682 A.2d at 1193. Thus, the presence of the word "shall" in FL § 5-319 does not at all necessitate a conclusion that the juvenile court must rule on a TPR petition within 180 days of filing.

Having found no mandatory connotation in the word "shall," the Court of Special Appeals in *Abiagail C.* went on to review the legislative history of FL § 5-319(a). It discovered that FL § 5-319(a), enacted in

1991 as House Bill 295 (1991 Md. Laws, chapter 173), was meant to be "an additional step in the 'speeding up' of the adoption and guardianship process." *Abiagail C.,* 138 Md. App. at 585, 586, 772 A.2d at 1286. That was apparent from the evidence in the legislative history that the 180-day provision was put in place to "assist the courts in assigning a higher priority to these cases." *Id.*

For instance, in supporting this legislation, the Department of Human Resources explained to the General Assembly its concerns over the increase in TPR petitions filed and the resulting delay in their adjudication:

> the recent enactments designed to streamline the guardianship/adoption process had brought about an increase in the number of guardianship cases being filed and, as a result, an increase by almost six months in the average length of time between the filing and disposition of those cases.

Id. It advocated for the enactment of HB 295, "'establishing [a] time frame[ ] for the courts to hear these cases . . . [to] assist the courts in assigning a higher priority to these cases and thus enable earlier implementation of adoption plans for children.'" *Id.* (alterations in original). Similar evidence was presented in the Senate on "an identical cross-filed Senate Bill (SB 656)," where the testimony was that the legislation was "intended to reduce the length of time involved in implementing adoption plans for foster children." *Id.* (quoting S. Jud. Proc. Comm. Rep., HB 295 (1991)) (quotation marks omitted).

That the provision encourages courts to rule on TPR petitions in an expedient manner, however, does not mean that this goal takes on a life of its own, leaving juvenile courts no choice but to rule on TPR petitions within 180 days or else risk dismissal, as the mother argued in *Abiagail C.,* or reversal, as the Department would argue. Without a doubt, the 180-day provision is not mandatory on the court.

In "real-time," even without a juvenile court granting a stay, many TPR petitions are not resolved within 180 days. For instance, in 2005, "the average time for TPR case processing" in Baltimore City "was 1,480 days, with only 39.84 percent of cases being resolved within 180 days, 65.04 percent of cases resolved within 271 days, and 76.42 percent of cases resolved within 365 days." Yolanda A. Tanner*, One Family–One Master Docketing in Juvenile Court,* Md. B.J., May–June 2009, at 26, 29. Faced with this reality, we are not persuaded that the juvenile court in this case was bound to deny the Mother's motion to stay because of the 180-day provision.

The Child's Best Interests

Our rejection, on the one hand, of the Mother's argument that the juvenile court had to stay the TPR proceedings and, on the other hand, the Department's argument that the juvenile court was required to deny the motion, brings us to the conclusion that the juvenile court was **not required** to rule in any particular way. Rather, as in many other contexts, the decision of whether to grant the Mother's motion to stay was within the court's discretion. *See Coppage v. Orlove,* 262 Md. 665, 666, 278 A.2d 587, 587 (1971) ("[I]n a proper case a court may stay proceedings pending the determination of another proceeding that may affect the issues raised." (quoting *Dodson v. Temple Hill Baptist Church Inc.,* 254 Md. 541, 546, 255 A.2d 73, 75 (1969) (quotation marks omitted)); *Vaughn v. Vaughn,* 146 Md. App. 264, 279, 806 A.2d 787, 796 (2002) ("Whether to grant or deny a stay of proceedings is a matter within the discretion of the trial court . . . ."). In exercising this discretion in the context of a TPR proceeding the court's paramount consideration is the child's best interests. See Ta'Niya C., 417 Md. at 94, 8 A.3d at 747.

A Child's Need of Permanency

A critical factor in determining what is in the best interest of a child is the desire for permanency in the child's life. *See* Nat'l Council of Juvenile and Family Court Judges, *One of the Key Principles for Permanency Planning for Children* (Oct. 1999) ("[A]ll children are entitled to a safe, permanent and nurturing home in order to reach their full potential as human beings."). Permanency for children means having "constant, loving parents," knowing "that their home will always be their home; that their brothers and sisters will always be near; and that their neighborhoods and schools are familiar places."[24] Pew Comm'n on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care 9* (2004), *available at* http://www.pewhealth.org/uploadedFiles/PHG/Content_Level_Pages/Reports/0012.pdf.

"[L]ong periods of foster care" are harmful to the children and prevent them from reaching their full potential. *See In re Adoption/Guardianship of Victor A.,* 157 Md. App. 412, 427–29, 852 A.2d 976, 985–86 (2004), *aff'd as modified*, 386 Md. 288, 872 A.2d 662 (2005). There are numerous studies to that effect. *See* David Fanshel & Eugene B. Shinn, *Children in Foster Care: A Longitudinal Investigation* (1978); Alan R. Gruber, *Children in Foster Case: Destitute, Neglected . . . Betrayed* 15 (1978); Henry S. Maas & Richard E. Engler, *Children in Need of Parents* 4 (1959); Leroy H. Pelton, *For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States* 53–54 (1989); Ann W. Shyne & Anita G. Schroeder, National Study of Social Services to Children and

Their Families: Overview (1978); Henry S. Maas, *Children in Long-Term Foster Care*, 48 Child Welfare 321 (1969). As one author described the detrimental effects of the lack of permanency,

> The status of a foster child, particularly *for* the foster child, is a strange one. He's part of no-man's land. . . . The child knows instinctively that there is nothing permanent about the setup, and he is, so to speak, on loan to the family he is residing with. If it doesn't work out, he can be swooped up and put in another home. It's pretty hard to ask a child or foster parent to make a large emotional commitment under these conditions . . . .

Joseph Goldstein, *Finding the Least Detrimental Alternative: The Problem for the Law of Child Placement, in* Parents of Children in Placement: Perspectives and Programs 188, n.9 (Paula A. Sinanoglu & Anthony N. Maluccio eds., 1981) (quoting speech by Art Buchwald). Yet, it is this "emotional commitment" and a sense of permanency that are absolutely necessary to ensure a child's healthy psychological and physical development.

Recognizing these needs, federal and state governments "have undertaken . . . steps to prevent childhoods spent in 'foster care drift' — the legal, emotional, and physical limbo of temporary housing with temporary care givers." *Victor A.,* 157 Md. App. at 427–28, 852 A.2d at 985. Indeed, "[t]he overriding theme of both the federal and state legislation is that a child should have permanency in his or her life. The valid premise is that it is in a child's best interest to be placed in a permanent home and to spend as little time as possible in foster care." *No. 10941.,* 335 Md. at 106, 642 A.2d at 205.

Permanency and Termination of Parental Rights

In accordance with this premise, Maryland's CINA and TPR statutory framework requires that "[e]very reasonable effort shall be made to effectuate a permanent placement for the child within 24 months after the date of initial placement." CJP § 3-823(h)(3). When reunification with a parent is not a viable option, under the CINA and TPR statutory framework, the adoption of the child is viewed — in terms of permanency — as the next best thing.[25] As we have explained in In re Adoption/Guardianship No. 10941:

> Only . . . a subsequent permanent placement, such as the adoption sought by the grandparents here, can provide [a child] with the permanency he needs and the Legislature has mandated. [A child's] continuation in foster care lacks the permanent legal status required by state law. He remains within the foster care system, and thereby subject to administrative review every six months. He also remains under the jurisdiction of the juvenile court, subject to periodic judicial review. This constant administrative and judicial supervision is disruptive to the lives of [the child] and his grandparents, and is the very type of uncertainty the child welfare statutes were designed to avoid.

335 Md. at 120, 642 A.2d at 212.

But, unless the natural parent gives consent, there can be no adoption (and no permanency) until the natural parent's rights to the child are terminated, which is done when "the circuit court finds by clear and convincing evidence, after considering the statutorily enumerated factors, that [TPR] is in the best interest of a child." *Id.* It is at that time that "the circuit court has authority to grant the department's petition for guardianship," enabling the Department to consent to the child's adoption by relatives or non-relatives. *Id.* Thus, in the event that reunification with the natural parent is not possible, the termination of parental rights serves as the segue to permanency.

A stay of TPR proceedings pending the appeal of a permanency plan, however, would inevitably cause a delay in achieving permanency. When we held in *Damon M.* that CINA orders changing permanency plans to adoption are immediately appealable, we were "[ ]mindful of the concern that . . . appeals will slow the realization of permanency for children whose permanency plan amendments are appealed."[26] 362 Md. at 438, 765 A.2d at 628–29. Staying a TPR proceeding, while a CINA appeal is pending, carries an even bigger risk to "the realization of permanency" because termination of parental rights usually takes place after "lengthy periods" of parents' non-compliance "for a year or more" with the service agreements aimed at helping them achieve reunification with the child. *In re Adoption/Guardianship of Amber R.,* 417 Md. 701, 712, 12 A.3d 130, 136 (2011).

For instance, in *Ta'Niya C.,* the TPR proceedings were initiated almost three an a half years after the child was placed in foster care, 417 Md. at 95–97, 8 A.3d at 748–49; in *In re Ashley E.,* sixteen months later, 387 Md. 260, 273–74, 874 A.2d 998, 1006 (2005); in *In re Adoption/Guardianship of Joshua M.,* almost two and a half years later, 166 Md. App. 341, 345, 888 A.2d 1201, 1203 (2005); and in *In re Adoption/Guardianship No. T00032005*, more than four years later, 141 Md. App. 570, 574–75, 786 A.2d 64,

67 (2001). If a stay of the TPR was required in those cases, the impermanency could continue for many more months or years, as potentially repeated appeals of permanency plan changes took time to resolve.

This is not to say that, in some instances, a stay would not be in accordance with the child's best interest. We agree with Jayden that "[t]he best interests of the child demand flexibility" and refuse to issue a rule that would fail to take into consideration the circumstances of a particular child. Whether a stay would be in a child's best interest depends on a given case.

B. The Stay of TPR Proceedings in This Case

The juvenile court denied the Mother's motion to stay TPR proceedings. At oral argument, Jayden posited that the juvenile court believed it had no choice but to deny the Mother's motion to stay in order to comply with the 180-day provision under FL § 5-319.

"When a court must exercise discretion, failure to do so is error, and ordinarily requires reversal." *Maus v. State,* 311 Md. 85, 108, 532 A.2d 1066, 1077 (1987) (citation omitted). There is a distinction, however, "between an explicit abdication of discretionary responsibility and the very different circumstance wherein a judge makes the required ruling but simply does so 'without setting forth any reasoning.'" *Smith v. Johns Hopkins Cmty. Physicians, Inc.,* 209 Md. App. 406, 425, 59 A.3d 1070, 1081 (2013) (quoting *Greater Metro. Orthopaedics, P.A. v. Ward,* 147 Md. App. 686, 699, 810 A.2d 534, 542 (2002)). In that event, "[t]he exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly." *Id.* (emphasis removed) (citation omitted).

In the record before us, we do not find any evidence that would shed light on the juvenile court's thought process in denying the Mother's motion to stay. Accordingly, we presume the court exercised the discretion and found that a stay of the TPR proceedings was not in Jayden's best interests. Under the abuse of discretion standard of review, we will only disturb a court's ruling if it "does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective." *King v. State,* 407 Md. 682, 697, 967 A.2d 790, 799 (2009) (quoting *North v. North,* 102 Md. App. 1, 13, 648 A.2d 1025, 1031 (1994)).

The Motion to Stay: the Focus on the Mother

In her motion to stay the TPR case, the Mother informed the juvenile court that she was challenging the change of the permanency plan from reunification to adoption by a non-relative in the CINA case. Citing *Rashawn H.,* she emphasized that "[t]he statutory scheme and case law recognize that the best interests of a child are served by allowing the child to maintain a meaningful and positive relationship with their parent unless the parent is found to be unfit or exceptional circumstances exist." She argued that the change of the permanency plan was not in Jayden's best interests because he "had a strong attachment to [her], his siblings, and his paternal relatives." The Mother also contended that "she demonstrated mental health stability, and was actively and continuously engaged in treatment." Finally, she highlighted her "strong bond" with the children, maintained "through visitations."

We consider the record in a light most favorable to the prevailing party. *Sifrit v. State,* 383 Md. 77, 93, 857 A.2d 65, 74 (2004). At no time during the twenty-seven months, which Jayden spent in foster care prior to the change in the permanency plan at issue, was the Mother "actively and continuously engaged in treatment." The most she did in terms of treatment was attend the initial screening appointments with a psychiatrist and a psychologist. In fact, the Mother concedes now that she "did not comply with the requirement that she obtain psychiatric treatment and medication."

But evidence showed that the Mother needed treatment in order to be reunified with the children. The examining psychologist "noted that while there is an absence of severe mental illness or disordered personality functioning, it should not mean that the children are safe in [the Mother's] care." The psychologist was troubled by the Mother's "history of placing the concerns of her romantic relationship above the safety of herself and the children and limited insight she demonstrated regarding how her judgment has potentially negatively impacted the emotional development of the children." Yet, the Mother never adhered to a treatment plan, missing several scheduled appointments without rescheduling.[27] It is not surprising then that the Mother's failure to attend to her mental health needs and to distance herself and the children from the volatile relationship with the Father were viewed by the Department as "major obstacles to the plan of reunification."

The Mother's visitation history is not encouraging either. While she "started off diligent in her pursuit to be reunified with her children," as time went on, she was not "consistent in visitation; [and] did not attend the Family Involvement Meeting regarding the children." And then, there was the abduction of the children by the Mother and the Father. After the abduction, the Mother's ability to be a responsible parent was placed into even bigger doubt.

Indeed, the Mother's efforts towards reunification were so weak that at the sixteenth month of Jayden's time in foster care, the Department wrote: "the children have now been in care for 16 months," but "[n]either [parent] has satisfactorily demonstrated that they are

in a position to have the children return to live with either one of them." Four months later, in recommending a concurrent plan of reunification with the Mother and placement with a relative, the Department once again stated that "the children have now been in care for 20 months," but neither the Mother nor the Father had made meaningful progress, which would make reunification with the children likely in the near future.

Thus, it was only expected that the Department eventually recommended a permanency plan of Another Planned Permanent Living Arrangement for Daeshawn and Victoria and adoption by a non-relative for Jayden. This is how the Department explained the reasons for this recommendation:

> Unfortunately, the encouraging progress that [the Mother] demonstrated over the summer in terms of setting appropriate boundaries with [the Father], demonstrating better judgment, and working cooperatively with the Department has once again deteriorated. The positive movement that [the Mother] made was quickly eroded by the [abduction] and the ensuing weeks thereafter. The Department has concerns not only about [the Mother's] behaviors but about the rapid and dramatic fashion in which these changes occurred.

As this brief overview of the Mother's reunification efforts demonstrates, the reality was far from the idealistic picture the Mother painted in her motion to stay. In truth, not even the Mother herself believed she was ready for reunification with Jayden or the other children even twenty-seven months after they were first placed in foster care. That explains why, in her appeal before the Court of Special Appeals, the Mother did not even argue that the plan of reunification with her should have remained in place. Rather, she maintained that the juvenile court erred in ordering a permanency plan of non-relative adoption instead of placing Jayden with the Grandmother. Thus, the entire premise of the Mother's appeal was not that a plan of reunification with her was in Jayden's best interests, but that custody and guardianship by the Grandmother should have been ordered.

Yet, the motion to stay does not even mention the Grandmother. The motion made it sound as if the appeal sought a reversal back to a plan of reunification with the Mother; hence, the arguments regarding her compliance with the mental health treatment and visitation. Twenty-seven months into reunification efforts, however, these allegations were unpersuasive. The Mother's motion — with the focus on her "mental health stability" and a "strong connection with" the children — simply failed to demonstrate that there was any likelihood the Mother would succeed on appeal. And, staying TPR proceedings pending resolution of an appeal that sounded impossible to win, "would not increase the fairness of the process or the accuracy of results," or advance the child's best interests. As the Department points out, all it "would accomplish would be delay, and unnecessary delay is contrary to the child's best interests." Without any likelihood of a successful appeal, the juvenile court did not abuse its discretion in denying the motion to stay.

The Appeal: the Focus on the Grandmother

The real reason the Mother appealed the permanency plan change and why she sought a stay of the TPR proceedings was because, in her opinion, rather than ordering a plan of adoption by a non-relative, the juvenile court should have allowed the Grandmother, "of whom the court approved as custodian of Jayden's siblings," to "take custody of him."

It should be noted that the Mother herself was probably responsible for the children not having been placed with the Grandmother when they were removed from the Mother's custody. At that time, the Department approached the Mother, seeking information on relatives with whom the children could be placed instead of foster care. The Mother insisted the children should not be placed with the Grandmother, alleging that the she tried to poison her, had a criminal record, and could not be trusted with the children because she would not prevent the Father from having contact with them.

The rest of the blame lies squarely with the Grandmother, however. From February, when the children were placed in foster care, to June 2009, she visited them only once. Then there was a time period when she accompanied the Father to the visits. But after the abduction in October 2010, for which the Department partially blamed the Grandmother, the Father's and the Grandmother's visitation with Jayden stopped. It was only in March of 2011, more than two years after the children were placed in foster care, that the Father filed a motion seeking independent visitation rights on the Grandmother's behalf.

Furthermore, it was not until nine months after Jayden was placed in foster care that the Grandmother even expressed an interest in being a placement resource. The Department initiated a home study, but after the abduction it was no longer willing to consider the Grandmother as a placement resource. Later, the Department's position changed. It initiated another home study, but at twenty months of the children being in foster care, the study was still not complete. By the Grandmother's own admission, she failed to "follow up" on that study claiming the Mother had told her that the

Department was only looking at parent reunification.[28] Meanwhile, the children spent more time in foster care.

In light of this evidence, even if the Mother had informed the juvenile court, ruling on the motion to stay, that her appeal was not about her but the Grandmother, the court would not have abused its discretion in denying the motion. The juvenile court had before it sufficient evidence to conclude that further delay was not in Jayden's best interest. Just like the Mother, the Grandmother had twenty-seven months to convince the Department and the juvenile court that she was a suitable placement resource. Yet, she failed to do that, becoming the guardian to Daeshawn and Victoria only in their twenty-seventh month in foster care. The Department viewed Jayden's situation differently: unlike Daeshawn and Victoria, who changed foster care placements, Jayden was fortunate to be cared for by the same foster family the entire twenty-seven months out of the Mother's custody. That family was willing to adopt him.

For Jayden, permanency was not an illusive concept. As Jayden emphasizes in his brief to us, he "only lived with his mother for the first sixteen (16) months of his life. When the permanency plan was changed on May 19, 2011, he had been out of his mother's care [and in his foster family's care] for twenty-seven (27) months — nine months longer than he had been in her care and sixty-three (63) percent of his life." As for the Grandmother, it was not at all clear that Jayden even had a relationship with her.[29]

Under the CINA and TPR statutory framework, the departments of social services and we, the courts, must make "[e]very reasonable effort" to ensure that every child who has found himself in foster care obtain permanency within twenty-four months of placement. CJP § 3-823(h)(3). We agree with Jayden that, in deciding whether to stay TPR proceedings, "[t]he fact-finding court must be able to address a child's current circumstances in a way that will permit the child to obtain permanence in the most expeditious manner possible." The juvenile court believed that the most expeditious and certain road to permanency was proceeding with the TPR case, not waiting to see if, perhaps, one day the Grandmother would be granted custody and guardianship over him.

In the twenty-seven months that Jayden was in foster care, both the Mother and the Grandmother had their chance to give Jayden permanency. Neither provided any tangible hope of doing so. Indeed, after the first fifteen months in foster care went by, giving the Department a statutory right to move for termination of parental rights, the Department explained the delay in filing a TPR petition by the efforts to arrange for a relative placement for the children. Yet, for twenty-seven months, neither the Mother nor the Grandmother stepped up. Considering the length of time the appellate process takes, the juvenile court did not abuse its discretion in not making Jayden wait another year or more before achieving permanency.

III.
The Findings Underlying the TPR Ruling

The juvenile court terminated the Mother's parental rights, finding that doing so was in Jayden's best interests. The Mother challenges this ruling, arguing that the court improperly took into account "Jayden's prospect of being adopted by, as well as the quality of care being provided by, his current care providers." Jayden and the Department argue that there is nothing wrong with considering Jayden's attachment to his foster family because FL § 5-323 expressly speaks of the child's "emotional ties with and feelings toward" persons "who may affect the child's best interests significantly."

The Department makes an additional argument: it maintains that the Mother's contentions should not result in a reversal of the TPR because they only pertain to factors leading to a finding of exceptional circumstances. The Department posits these factors have no bearing on the finding of parental unfitness, which the Mother did not challenge in her appeal. In the Department's view, "the juvenile court's finding of parental unfitness, standing alone, is sufficient to support the judgment in this case." Indeed, that was the approach taken by the Court of Special Appeals, which affirmed the termination of the Mother's parental rights without reaching the merits of this issue.

The Court of Special Appeals and the Department are mistaken. A finding of parental unfitness overcomes the parental presumption, but it does not establish that termination of parental rights is in the child's best interest. To decide whether it is, the court must still consider the statutory factors under FL § 5-323(d). We review the juvenile court's findings under the statute, and conclude that the court did not abuse its discretion in terminating the Mother's parental rights.

Overcoming the Presumption

The juvenile court found that (1) the Mother was an unfit parent, (2) there were exceptional circumstances overcoming the presumption that the continuation of Jayden's relationship with her was in his best interests, and (3) that termination of the Mother's parental rights was in Jayden's best interests. The Mother does not challenge these findings but rather focuses on the juvenile court's findings with respect to one set of factors under FL § 5-323(d)(4)(i)-(iv), in which the court addressed Jayden's attachment to his foster parents and sister, his adjustment to the foster

home, and his feelings on the severance of the relationship with the Mother.

The Court of Special Appeals concluded that these factors tend to show the absence or presence of exceptional circumstances, but have no bearing on whether a parent is unfit. In the belief that a finding of parental unfitness in and of "itself justifies termination" of parental rights, the intermediate appellate court decided it was not necessary for it to reach the merits of the Mother's argument.

The term parental unfitness (and exceptional circumstances) was added to the Maryland's TPR statute only recently. For years, the statute spoke only of the child's best interest. In *Rashawn H.,* however, we explained that beginning the analysis with the child's best interests was improper because it created the impression that the natural parents and a third party stood on the same footing. 402 Md. at 495, 937 A.2d at 188. Rather than deciding at the outset what living arrangement is in a child's best interests, courts first had to account for the "presumption of law and fact — that it is in the best interest of children to remain in the care and custody of their parents." *Id.* This could be done "by a showing that the parent is either unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest." *Id.* at 498, 937 A.2d at 190.

After this pronouncement in *Rashawn H.,* the General Assembly amended the TPR statute, codifying the parental presumption as follows: a court may only terminate parental rights after it "finds by clear and convincing evidence that [the] parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests."[30] FL § 5-323(b). The child's best interest language remained in the statute, however, as the ultimate consideration in TPR cases. FL § 5-323(b), (d). The statute requires courts to "give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests."[31] FL § 5-323(d).

The Court of Special Appeals erred in concluding that a finding of parental unfitness, in and of itself, justifies termination of parental rights. Such a conclusion contradicts the terms of the TPR statute and the spirit of *Rashawn H.,* which explained the need to overcome the parental presumption before — not instead of — considering the child's best interests. Under the intermediate appellate court's logic, simply overcoming the parental presumption automatically makes termination of parental rights proper. That is not so. Once the parental presumption is overcome, the juvenile court must still decide if terminating parental rights is in the child's best interests.[32] The only way to do that is to consider all of the factors enumerated in FL § 5-323(d).

Was TPR in Jayden's Best Interests?

"In reviewing a juvenile court's decision with regard to termination of parental rights, we utilize three different but interrelated standards." *Ta'Niya,* 417 Md. at 100, 8 A.3d at 750. We review for clear error the juvenile court's factual findings, but subject to de novo review legal conclusions. *Id.* If the court's factual findings are not clearly erroneous, and legal conclusions are correct, we review the court's "ultimate conclusion" for abuse of discretion. *Id.*

The Specific Findings

The juvenile court detailed its findings in a thirty-page opinion, addressing the statutory factors in the order in which they appear in the statute.[33] Under FL § 5-323(d)(1)(ii) — "the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and the parent," the court discussed in detail the numerous referrals for mental health treatment, the Abused Persons Program, and parenting classes, and the Department's efforts to encourage the Mother and the Father to take advantage of those services.

In addressing "the extent to which a local department and parent have fulfilled their obligations under a social services agreement," FL § 5-323(d)(1)(iii), the court noted that there were four written agreements, which covered "domestic violence, mental health issues, housing, employment, [and] identification of relative resources and visitation." With respect to the Mother, the court found that she "complied with a number of the Department's recommendations," but "was not able to maintain any consistency on [these] core issues, and repeatedly placed herself in positions of risk. . . . Consistency, sound judgment, an understanding of boundaries, and an appreciation of her children's welfare, both inside and outside of her relationship with [the Father], have eluded her."

Next, the court considered FL § 5-323(d)(2): "the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home." Here, the court observed that "visitation has been [the Mother's and the Father's] strongest area of compliance." But even in this area, the Mother persistently disregarded the court's order that she have no contact with the Father before, during, or immediately after visitation because of the recurring domestic violence incidents. And then, there was "[t]he visit culminating in the abduction [which] was, of course, a disaster."

Under the same group of factors, FL § 5-323(d)(2)(i), the court found that the Mother stayed in touch with the Department, although the interactions were not always positive. Namely, the court cited "a recurring pattern of belligerence and animosity, . . . which was neither productive nor wholly understandable." After the abduction, the Mother's attitude toward the Department deteriorated even more: "She revoked all her consents allowing the Department to access information from her mental health providers, and was increasingly rude and belligerent with the social worker."[34]

As for "the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time," FL § 5-323(d)(2)(iii), the court found that "[a]lthough both parents have mental health issues, neither of them presented to their respective evaluators with truly disabling . . . diagnoses." Nevertheless, the court observed that the Mother has "exhibited very troubling symptoms, especially when the children first came into care." That was why it was "recommended . . . that she continue seeing her psychiatrist and therapist, as well as enroll in the Abused Persons Program." Indeed, the court observed, the Mother's "inability to extricate herself from the cycle of violence involving [the Father] has been crippling."

Illustrative of the parents' persistent inability to reach any meaningful progress toward reunification were the court's findings under FL § 5-323(d)(2)(iv). That factor asks the court to determine "whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time." The court found that no additional services would be useful, emphasizing that Jayden had been in foster care for thirty-three months, but the Mother and the Father continued to struggle with the same issues that led to Jayden being found CINA, including "their respective unstable housing situations, their precarious financial conditions, . . . their largely untreated mental health needs, and, most significantly, their recurring pattern of domestic violence." During that entire time, from early February 2009 to May 2011, "the Department has been working with the parents to effectuate some meaningful resolution of their issues, such that reunification would be viable." The court concluded: "[h]owever one calculates the appropriate time-line, it is clear to this Court that additional services would not likely result in a lasting parental adjustment such that reunification could be attained."[35]

Of particular significance, in light of the Mother's arguments, is the court's examination of the factors under FL § 5-323(d)(4). These factors concern the child's emotional well-being:

> (4)(i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;
>
> (ii) the child's adjustment to:
>
> 1. community;
>
> 2. home;
>
> 3. placement; and
>
> 4. school;
>
> (iii) the child's feelings about severance of the parent-child relationship; and
>
> (iv) the likely impact of terminating parental rights on the child's well-being.

FL § 5-323(d)(4)(i)–(iv).

Here, the court first considered Jayden's "emotional ties with and feelings toward [his] parents, [his] siblings, and others who may affect [his] best interests significantly." The court found that Jayden retained an attachment to his Mother, Daeshawn, and Victoria, but also emphasized an attachment he had to his foster parents and sister. With respect to the siblings specifically, the court stated that it was "persuaded that the loss of [the foster sister] in his life will present for him a greater challenge" than the loss of Daeshawn and Victoria. Second, the court made findings with regard to Jayden's attachment to his community, home, placement, and school. Under this group of factors, the court found that Jayden has friends, with whom he goes to day care on play dates. He has adjusted well to his foster home and considers it "to be his home and family."

Next, the court looked into Jayden's "feelings about severance of the parent-child relationship." It observed that Jayden "is bonded and secure with the [foster parents], and he still has an attachment with [his biological parents]." Weighing "the loss to Jayden of his biological family against the loss of his long term foster family, the Court is convinced that his future physical and emotional health and welfare are best served by continuing to live with the [foster parents]." The court emphasized that the Mother and the Father "have not demonstrated a pattern of understanding what is in their children's best interests, so caught [up] have they been in their own turmoil and challenges."

Finally, with respect to "the likely impact of terminating parental rights on [Jayden's] well-being," the court concluded that "[t]he evidence demonstrates that termination of parental rights will allow Jayden to have permanence in the home of [his foster parents and foster sister, who] have been consistent in their love and support for him."[36] Applying "the clear and convincing

evidentiary standard to the totality of the evidence," and "after weighing the statutory factors in light of the requisite legal presumption," the juvenile court found that it was in Jayden's best interest that the Mother's parental rights be terminated.[37]

The Overwhelming Evidence Justifying TPR

This summary of the juvenile court's findings illustrates that there was ample evidence before the court from which to conclude that termination of the Mother's parental rights was in Jayden's best interests. Despite the Department's reasonable efforts over a period of thirty-three months, the Mother was unable to make a meaningful adjustment in her lifestyle, failing to address her mental health needs, continuing the destructive relationship with the Father, and being unable to maintain stable employment or housing. Indeed, the Mother herself "concedes that she was not in a position to resume custody of Jayden."

Against the backdrop of the juvenile court's methodical analysis of the statutory factors, the Mother's contentions fall flat. Out of the numerous fact findings, the Mother only challenges the court's findings dealing with Jayden's relationship with his foster parents. She alleges that the court "assumed that Jayden would be adopted by his foster care providers, . . . considered the effects on Jayden of not being adopted by them, and compared the life he would have with them to the life he would have with his biological family." She claims that by making those findings, "the court went above and beyond what was required and made findings that amounted to approving of the [foster parents] as Jayden's adoptive parents."

Comparing the Mother to Jayden's foster parents (his potential adoptive parents), as if they were on equal footing, indeed, would not have been proper. Such an approach would fail to account for the "presumption that the child's best interests are served by maintaining parental rights," placing "the most disadvantaged of our adult citizens . . . at greater risk of losing custody of their children than those more fortunate." *Yve S.,* 373 Md. at 571, 819 A.2d at 1042. But that was not what the juvenile court did in this case.

FL § 5-323(d)(4) requires courts to consider the child's "emotional ties" and "feelings" toward individuals "who may affect the child's best interests significantly," and the child's adjustment to community, home, placement and school. Thus, the juvenile court was required to consider Jayden's emotional attachment to his foster parents and the impact terminating parental rights would likely have on his well-being. And, that was what the court did when it found that Jayden was strongly attached to his foster parents and sister, that he adjusted well in the foster family community, that a severance of the relationship with the Mother would not have a detrimental effect on Jayden, but that it would allow him to achieve permanency.

The Mother would prefer the juvenile court to white out any positive influence the foster family has had on Jayden, but, as we have recently stated in another TPR case, "the best interests of the child do not permit the juvenile court to ignore the reality of a child's life." *Ashley S.,* ___Md. at ___, ___A.3d at ___. The court is not required to disregard "the existing attachment and emotional ties and, instead, imagine what those ties might have been in an alternate world." *Id.* Rather, "the court is to assess the reality of the children's circumstances and make findings accordingly." *Id.*

The reality of Jayden's life was such that he spent thirty-three months in foster care, while the Department worked with the Mother on addressing the issues that led to Jayden's being found CINA in the first place. For thirty-three months, the Mother was not able to make any lasting changes in any one of the problematic areas: domestic violence, mental health issues, employment, or housing. For thirty-three months, Jayden patiently waited for the Mother to get better and bring him home. But continuing to hold on to this concept of a parental relationship any longer — in the face of the Mother's persistent inability to take charge of her life — was contrary to Jayden's best interests.

Thus, in light of the evidence before it, the juvenile court did not abuse its discretion in finding that the Mother was unfit, that there were exceptional circumstances making continuation of the relationship with the Mother detrimental to Jayden, and that termination of her parental rights in his best interests.

Conclusion

Jayden will turn six years old in September. He was found to be CINA and placed in foster care when he was sixteen months old. When, after Jayden spent twenty-seven months in foster care, the juvenile court changed his permanency plan from reunification with the Mother to adoption by a non-relative, the Mother appealed, arguing that the new plan should have been custody and guardianship by the Grandmother. While the appeal was pending, the Mother's parental rights were terminated. She argues that the TPR proceedings should have been stayed and that, in any event, the juvenile court improperly terminated her parental rights.

We reject both arguments for the same reason: the denial of the Mother's motion to stay the TPR case and the ultimate termination of the Mother's parental rights were in Jayden's best interest. Thus, we affirm the Court of Special Appeals' ruling.

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

Chief Judge Bell and Judge Harrell join in the judgment only.

FOOTNOTES

1. Jennifer S. is the biological mother of all three children. Justin G. is the biological father of Victoria and Jayden, but not Daeshawn.

2. Some time later, the Mother reported to the police that the Father had sexually abused Daeshawn, but that allegation was not substantiated.

3. The Father was not a suitable placement because he was being investigated for sexual abuse following the Mother's accusations and had a number of convictions for possession of paraphernalia, disorderly conduct, and a second degree assault. Furthermore, on February 5, 2009, he was arrested for violating a Protective Order because he was living with the Mother in derogation of an existing court order.

4. We do not discuss the Father's efforts because he is not a party to this appeal.

5. The court also considered the Department's efforts to help the parents achieve reunification, including providing counseling to the Mother, coordinating psychiatric and abused person's services, and exploring relative placements. As for Jayden's progress, the Department indicated and the court found that Jayden is a "happy one year old boy who is doing well in his foster home. The foster parent ensures that his physical, emotional and social needs are being met. . . . Jayden attends daycare and is doing well."

6. The Mother did, however, complete Parent Power classes and attend some classes in the Abused Person's Program.

7. As time went on, the Department received more information on the relatives. Several relatives indicated a desire to be considered as relative placements, but then either failed to follow up with the Department or were unable to be used as placements for various reasons.

8. The report did not indicate which two children the Grandmother was willing to care for pending reunification.

9. These allegations were not substantiated, but the children were moved to a different foster home.

10. The children were found in the Father's home later that day.

11. Apparently, the Department thought the Grandmother had something to do with the abduction because she was the first person to see the children that day, at which time she "noticed some scratches on Victoria's face" and began to insist that it was "obvious abuse." When the Mother came to visit with the children later that day, she immediately requested a meeting with the social workers and became "frustrated that the meeting had to occur after the visit."

12. On March 18, 2011, the Father filed a motion requesting that the Grandmother have independent visitation rights and that the Department complete a home study for her. At that time, the Department's last contact with the Grandmother as a potential placement resource had been on October 12, 2010.

13. The Mother also challenged the juvenile court's permission for a social worker "to testify, as an expert witness, regarding Jayden's attachment to his foster parents and biological family."

14. On July 28, 2011, the juvenile court reaffirmed the permanency plan of adoption by a non-relative for Jayden. As for Daeshawn and Victoria, however, the juvenile court appointed the Grandmother a limited guardian.

15. Jayden filed a motion in support of the Mother's motion to stay. They also filed motions to stay with the Court of Special Appeals but were unsuccessful as well.

16. For a discussion on the evolution of the parental rights jurisprudence in Maryland, see Kristina V. Foehrkolb, *When the Child's Best Interest Calls for It: Post-Adoption Contact by Court Order in Maryland,* 71 Md. L. Rev. 490, 493–99 (2012).

17. Jayden's interests in this case are represented by the Legal Aid Bureau, Inc.

18. The timeline in the case was as follows: the permanency plan was changed to a concurrent plan of reunification and adoption on December 10, 2004. *In re Karl H.,* 394 Md. 402, 408, 906 A.2d 898, 901 (2006). The parent timely appealed the plan change to the Court of Special Appeals. The Department filed a TPR petition on April 5, 2005. *Id.* at 410, 906 A.2d at 902. The Court of Special Appeals dismissed the permanency plan change appeal in September 2005. This Court granted certiorari in the CINA appeal in December 2005. The petitioner's parental rights were terminated in March 2006. *Id.* The petitioner noted an appeal of the TPR order to the Court of Special Appeals on April 5, 2006. *Id.* at 410 n.10, 906 A.2d at 902 n.10. We issued our opinion in the permanency plan change appeal on September 6, 2006.

19. The Court of Special Appeals did not reverse the TPR, but did consolidate the TPR appeal with the CINA appeal. *In re Adoption of Karl H.,* (No. 2623, September Term, 2004) *& In re Adoption of Karl H.,* (No. 348, September Term, 2006) (filed August 1, 2007).

20. In support of this argument, the Department also cites *In re Julianna B.,* 407 Md. 657, 967 A.2d 776 (2009), which likewise supports the view that there are instances when a subsequent trial court order may render an appeal moot. In *Julianna*, the juvenile court amended a permanency plan and commitment order for a juvenile delinquent while the appeal of a previous order was pending. *Id.* at 662, 967 A.2d at 779. When the case reached us, we dismissed it, concluding — without disapproval — that the subsequent order rendered the appeal moot. *Id.* at 668, 967 A.2d at 782.

21. The intermediate appellate court was of the same view. It explained the differences between *Emileigh F.* and this case as follows:

> The situation in *Emileigh F.* was notably different from the facts of the present case. There, the mother appealed her daughter's adjudication as a CINA. We affirmed, and the Court of Appeals granted certiorari. While the case was pending before the Court of Appeals, the juvenile court granted the Department's motion for an order of rescission and termination of juvenile court jurisdiction, effectively closing the CINA case. The Court of Appeals held that this action was inconsistent with

> the pending appeal, and vacated the judgment closing the CINA proceedings. In the present case, on the other hand, when the TPR case was heard, the CINA appeal was pending before this Court. No action was taken to close the CINA case proceedings.

In re Adoption/Guardianship of Jayden G., (No. 2299, September Term, 2012) (filed August 7, 2012) (quoting *In re Adoption/Guardianship of Cross H.,* 200 Md. App. 142, 149–50, 24 A.3d 747, 752 (2011), *cert. dismissed,* 431 Md. 371, 65 A.3d 679 (2013).

22. To be exact, *In re Abiagail C.,* 138 Md. App. 570, 772 A.2d 1277 (2001) discussed an earlier version of the statute, which was codified at FL § 5-317(d).

23. For instance, it is well-settled that the word "shall," as used in Article IV, Section 15 of the Maryland Constitution, which concerns this Court's and the Court of Special Appeals' issuance of opinions is directory only. *See McCalls Ferry Power Co. v. Price,* 108 Md. 96, 113, 69 A. 832, 838 (1908). Likewise, the constitutional provision with respect to the circuit courts, providing that they "shall render their decisions . . . within two months," is directory in nature. *See Md. State Bar Ass'n v. Hirsch,* 274 Md. 368, 373–74, 335 A.2d 108, 111–12 (1975).

24. In the words of one former foster child, permanency is not "going crazy inside," because "you always have to move from foster home to foster home and you don't have any say in this and you're always having to adapt to new people and new kids and new schools." Pew Comm'n on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* 9 (2004), available at http://www.pewhealth.org/uploadedFiles/PHG/Content_Level_Pages/Reports/0012.pdf. In the words of another child, permanency means not having to "check[ ] every day to see if his belongings had been packed in anticipation of another move." *Id.* It is the ability to "believe in themselves," the confidence that they can "grow up to be somebody," that they have a "future." *Id.*

25. Adoption may not always be the most appropriate permanency solution, however. *See In re Adoption/Guardianship of Victor A.,* 386 Md. 288, 312, 872 A.2d 662, 676 (2005). Foster care placement on a long-term basis may be more appropriate in some instances, such as when "the child is being cared for by a relative, . . . DSS has a compelling reason why termination of parental rights would not be in the child's best interests, or . . . DSS has not provided timely reunification services for the parent and child." *Id.* (citing Md. Code (1987, 1999 Repl. Vol.), § 5–525.1(b)(3) of the Family Law Article).

26. We "note[d], however, Md. Rule 8–207(b) and suggest[ed] that, to the extent possible, appeals to the Court of Special Appeals from these kinds of orders proceed on an expedited basis." *In re Damon M.,* 362 Md. 429, 438, 765 A.2d 624, 629 (2001).

27. The only therapy the Mother completed was the Abused Person's Program and individual therapy sessions.

28. At that time, the Grandmother lived in Prince George's County. According to the Department's Report, dated September 8, 2010, "A home study of [the Grandmother] had been requested of the Prince George's County Department of Social Services (PGDSS). [The Grandmother] states that she had been contacted by PGDSS but did not follow up because [the Mother] reportedly told her that the Department was just looking at reunification."

29. The TPR court saw "no clear evidence of the actual level of any attachment."

30. In *In re Adoption/Guardianship of Amber R.,* we noted that, if a juvenile court makes a finding that a parent is unfit, it does "not need to make any findings with respect to 'exceptional circumstances' requiring the termination of parental rights." 417 Md. 701, 718 n.13, 12 A.3d 130, 140 n.13 (2011).

31. Since the statute was amended, we have been called to examine the significance of the enumerated factors for analyzing exceptional circumstances and parental unfitness and the relationship of these two concepts to the child's best interest. In *Ta'Niya C.,* we explained that "the factors under FL Section 5-323(d) serve both as the basis for a court's finding (1) whether there are exceptional circumstances that would make a continued parental relationship detrimental to the child's best interest, and (2) whether termination of parental rights is in the child's best interest." 417 Md. at 116, 8 A.3d at 761. In *Amber R.,* we held that "the existing statutory scheme [under FL § 5-323] is appropriate in evaluating parental fitness for the purposes of terminating parental rights." 417 Md. at 723, 12 A.3d at 143.

32. We have emphasized in *Ta'Niya* that the parental unfitness, exceptional circumstances, and the child's best interests considerations are not "different and separate analyses." 417 Md. at 105–06, 8 A.3d at 754. The three concepts are fused together, culminating in the ultimate conclusion of whether terminating parental rights is in a given child's best interests.

33. It began with considering the first factor, "all services offered to the parent before the child's placement," FL § 5-323(d)(1)(i), and mentioned the protective order the Mother obtained against the Father, the Father's criminal charges, and his probation.

34. The court noted that the next factor under FL § 5-323(d)(2)(ii), "the parent's contribution to a reasonable part of the child's care and support," was not applicable because "[t]he parents' financial status has always been an issue, . . . and there may have been little in the way of consistently available funds with which to contribute to the child's support."

35. With regard to the factors in FL § 5-323(d)(3), concerning "whether (i) the parent has abused or neglected the child," (ii) whether the child tested positive for a drug at the time of delivery, (iii) whether the parent subjected the child to chronic abuse, neglect, sexual abuse, or torture, and (iv) whether the parent has been convicted of a violent crime, the court found that when the children were found CINA, there was evidence of "the history of domestic violence between the parents and their children's awareness of this fighting."

36. Finally, the court considered whether there was a "waiver of local department's obligation" to provide reunification efforts under FL § 5-323(d)(e) but found none.

37. The court reached the same conclusion with respect to the Father.

Cite as 9 MFLM Supp. 23 (2013)

Custody: motion to change: attorney's fees

Bronson Yake
v.
Deborah Keith f/k/a Deborah Yake

No. 0065, September Term, 2012

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

Opinion by Eyler, James R., J.

Filed: July 11, 2013. Unreported.

The trial court did not abuse its discretion in denying the father's motion for attorneys' fees after the court rejected his ex-wife's attempt to modify custody, since the court's finding that there was insufficient evidence of a change in circumstances to support the modification did not amount to an implicit finding that the motion to modify was brought without substantial justification.

Following the denial, by the Circuit Court for Baltimore County, of appellee Deborah Keith's (f/k/a Deborah Yake) petition for change of custody in the absence of a showing of a change in material circumstances, appellant, Bronson Yake, moved to alter or amend the court's order to add an award of attorneys' fees in his favor. This appeal arises from the circuit court's denial of his motion. Mr. Yake presents the following question for our consideration:

> Did the trial court commit reversible error in denying Mr. Yake's motion to alter or amend judgment pursuant to Maryland Rule 2-535?

For the reasons that follow, we affirm the circuit court's order.

FACTS AND LEGAL PROCEEDINGS

In June 2006, Bronson Yake filed for absolute divorce from his wife, Deborah Yake.[1] In November 2007, the circuit court filed its order granting Mr. Yake a divorce and awarding him primary physical custody of the couple's three minor children.[2] In May 2008, Ms. Keith petitioned to modify custody, which petition was denied following a February 17, 2009 contested hearing, on the ground that Ms. Keith had not made an adequate showing of a material change in circumstances. Notwithstanding the court's denial of the petition, the parties agreed to certain modifications to the children's visitation schedule, which was entered as a consent order on March 23, 2009.

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

Represented by the same attorney who had argued at the February 2009 hearing on the petition to modify custody, Ms. Keith filed a second petition to modify custody on September 14, 2010, alleging a material change in circumstances in that she had remarried, purchased a single family home minutes away from the children's home, and obtained a job that permitted her flexible work-at-home hours. She sought primary physical custody, or in the alternative, joint physical custody, of the children. Mr. Yake opposed any modification of custody, denying any material change in circumstances in the lives of the children.

The circuit court heard argument on the petition on December 13, 2011. At the hearing, Ms. Keith's attorney reiterated the changes in her client's marital, living, and employment situations and advised that communication between Mr. Yake and Ms. Keith had broken down significantly, to the detriment of the children.

Mr. Yake's attorney averred that not only had there been no material change in circumstance since the February 2009 hearing, but there was "really no material change in circumstance since the date she walked out on her family which led to the divorce." The children were said to be "doing fine," "thriving," and "doing fantastic in school." Instead, the ultimate issue, he said, was that the parties simply do not get along.

The court ruled:

> There's nothing at all to indicate any material change in the circumstances in the house these children are living in. There's no material change on the father's part. There's no allegation of any change on his part. The mother's got a new house. She's moved closer.
>
> That's good. Also, the mother voluntarily gave up custody of these children from the very beginning when

> they split up. I mean, that's what I see reading the Court file. For whatever reason, she consented to her ex-husband having custody of the children. She felt he was a fit and proper person to have custody of these children.
>
> There's nothing to indicate that he's not in a stable family relationship. There's no wrongdoing alleged on his part or that of his spouse. There's no evidence of these children have been mistreated [sic]. There's no evidence that they're having problems in school. They're apparently thriving, they're healthy. [Ms. Keith's attorney], there's no change in circumstances.
>
> * * *
>
> Petition's denied.

During the hearing, Mr. Yake made no request for attorneys' fees. Prior to the hearing, his only mention of the issue had been a boiler plate request, in his response to Ms. Keith's petition to modify custody, for "reasonable expenses, including reasonable attorneys [sic] fees, and all reasonable costs related to this petition."

The court's order denying Ms. Keith's petition was filed on December 16, 2011. On January 12, 2012, Mr. Yake filed his "motion to alter or amend judgment pursuant to Maryland Rule 2-535," requesting an award of attorneys' fees. He stated that he had incurred $4190 in attorneys' fees and $699 in expenses as a result of Ms. Keith's attorney's waste of "many, many hours pursuing discovery on matters not material to the Petition pending before [the] Court." He added that Ms. Keith's petition for modification of custody had been brought in bad faith and in the absence of substantial justification.

It appears from the docket entries that the circuit court denied Mr. Yake's motion without a hearing on February 15, 2012. Mr. Yake filed his notice of appeal to this Court on March 6, 2012.

DISCUSSION

In his brief, Mr. Yake alleges that he is entitled to an award of reasonable attorneys' fees, pursuant to Md. Code (2012 Repl. Vol.), §12-103 of the Family Law Article ("FL"), which states, in pertinent part:

§12-103. Award of costs and counsel fees.

> (a) *In general*. — The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
>
> (1) applies for a decree or modification of a decree concerning custody, support, or visitation of a child of the parties[.]
>
> * * *
>
> (b) *Required considerations*. — Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceedings.
>
> (c) *Absence of substantial justification*. — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

Because the circuit court found that Ms. Keith had introduced no evidence at the December 13, 2011 hearing to indicate any material change in circumstances, he continues, the court implied that Ms. Keith lacked substantial justification to prosecute her petition for modification of custody. As such, he concludes, the circuit court erred in denying his motion to alter or amend.[3] Ms. Keith counters that the circuit court did not abuse its discretion in denying Mr. Yake's motion, especially in light of the fact that he had not previously requested attorneys' fees and had offered no evidence on the issue at the December 13, 2011 hearing.

FL §12-103 was not intended to be a punitive measure against a parent for bringing or defending an unjustified family law action. Instead, it was re-enacted in 1993 for the specific purpose of addressing the inability of some custodial parents to finance judicial enforcement of court-ordered child support when the non-custodial parent does not pay the child support. *Davis v. Petito,* 425 Md. 191, 202 (2012) (citing 1993 Session Laws, Chapter 514 and testimony provided in the file for House Bill 381). Although the circuit court does possess the discretion to award attorneys' fees, pursuant to FL §12-103, in a case in which one parent alleges the other parent has brought an action without substantial justification, it remains clear that before making an award of attorneys' fees the trial court is required to consider the parties' financial status, needs, and whether there was a substantial justification for bringing, maintaining, or defending a proceeding. *Id.* at 200.

Mr. Yake argues that the court implicitly made a finding, in denying Ms. Keith's petition to modify custody on the ground that she had failed to show a significant change in circumstances in the lives of the children, that she had no substantial justification for bringing the petition. We do not agree.

There is no support for a determination that the circuit court found a lack of substantial justification in Ms. Keith's filing of her petition simply as a result of its failure to rule in her favor on that petition; a finding otherwise would permit an argument in favor of an award of fees for every prevailing party in a custody or child support modification matter. Furthermore, Ms. Keith, who presumably believed, in good faith, that her own changes in residence and employment status warranted a finding of substantial change in circumstances, was entitled to petition for modification of custody. The court made no finding of lack of substantial justification in so moving, and it was not asked by Mr. Yake to do so.

Furthermore, under FL §12–103(b), "substantial justification is but one consideration in the triad, the others being financial status and needs, to support fee shifting." *Id.* at 201. Even if the circuit court, as Mr. Yake avers, had implicitly (or even explicitly) found a lack of substantial justification, it was not asked to, nor did it, make any finding on the financial status and needs of the parties so as to justify an award of fees. Consequently, the circuit court did not abuse its discretion in denying his motion to revise the order denying Ms. Keith's petition for modification of custody.[4]

ORDER DATED DECEMBER 16, 2011 OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT, BRONSON YAKE.

FOOTNOTES

1. Ms. Yake has since remarried and is now known as Deborah Keith.

2. The court awarded joint legal custody to the parties.

3. Mr. Yake entitled his motion "motion to alter or amend judgment pursuant to Maryland Rule 2-535." A post-trial motion to alter or amend a judgment is generally made pursuant to Md. Rule 2-534, but a motion filed under Rule 2-534 must be filed within 10 days after the entry of the judgment. *Pickett v. Noba, Inc.,* 114 Md. App. 552, 556 (1997). Because Mr. Yake filed his motion on January 12, 2012, more than 10 days after the court's December 16, 2011 denial of Ms. Keith's petition, we treat his motion as one requesting that the court exercise its revisory power pursuant to Rule 2-535. *See Miller v. Mathias,* 428 Md. 419, 441 (2012).

In considering a circuit court's denial of a motion for the court to exercise its revisory power, our standard of review is one of abuse of discretion. *Powell v. Breslin,* 430 Md. 52, 62 (2013). In applying that standard, the question is whether justice has not been done, and the judgment will be reversed only if "'there is a grave reason for doing so.'" *Das v. Das,* 133 Md. App. 1, 16 (2000) (quoting *Wormwood v. Batching Systems, Inc.,* 124 Md. App. 695, 700 (1999)).

4. Although Mr. Yake, in his brief, argues that attorneys' fees should have been awarded pursuant to FL §12-103, in his motion to revise, he also referenced FL §7-107 and Md. Rule 1-341 as authority for an award of fees. FL §7-107 is substantially similar to FL §12-103, but where §12-103 permits an award of attorneys' fees in a child support matter, FL §7-107 permits an award of attorneys' fees in a divorce matter. Like FL §12-103, however, FL §7-107(c) requires the court to consider the financial resources and financial needs of both parties and whether there was substantial justification for prosecuting or defending the proceeding, which, as noted above, the court did not do.

Rule 1-341 provides: "In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it." The Rule is intended to provide a monetary award for bringing or defending frivolous actions, but it is solely "intended to prevent parties and lawyers from *abusing* the judicial process by filing or defending actions and proceedings 'without substantial justification' or 'in bad faith.' It is not intended to punish legitimate advocacy." *Legal Aid Bureau, Inc. v. Farmer,* 74 Md. App. 707, 722 (1988) (emphasis in original).

Like FL §§7-107 and 12-103, Rule 1-341 requires that, before awarding sanctions, the circuit court must make explicit findings of fact that a proceeding was maintained or defended in bad faith and/or without substantial justification. *Major v. First Virginia Bank-Central Maryland,* 97 Md. App. 520, 530 (1993). As noted above, Mr. Yake's failure to request that the court make such a finding, and the court's resultant failure to do so, are fatal to his claim that the court abused its discretion in denying his motion to revise the order denying modification of custody.

NO TEXT

Cite as 9 MFLM Supp. 27 (2013)

Custody: stay-away order: opportunity to be heard

Shawn Carter
v.
Carolyn Ware

No. 3030, September Term, 2009

Argued Before: Meredith, Kehoe, Hotten, JJ.

Opinion by Kehoe, J.

Filed: July 11, 2013. Unreported.

The imposition of a stay-away injunction under FL §1-201(b) is not subject to the extensive procedural requirements for protective orders set forth in Maryland's Domestic Violence Law, FL §4-501 et seq.

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

Shawn Carter appeals from an order of the Circuit Court for Baltimore City enjoining him from having contact with Carolyn Ware, the mother of one of his children. He raises one issue, which we have reworded as follows:

> Did the circuit court err in enjoining Carter from having contact with Ware?[1]

We will affirm the judgment of the circuit court.

BACKGROUND

This appeal arises from a child custody dispute between Carter and Ware, in which Ware was awarded custody of the parties' natural child on March 6, 2006. On May 2, 2006, Ware filed a petition for contempt against Carter, alleging that Carter had failed to satisfy his child support obligations. On November 28, 2006, the circuit court found Carter in contempt and sentenced him to a term of two years incarceration, all of which was suspended. The contempt proceedings were subsequently postponed until a February 10, 2009 hearing, when the circuit court imposed a sentence of eighteen months incarceration with work release. Carter could purge his sentence by showing the court that he was completing ten employment applications per week. Carter was immediately committed to the Division of Corrections pursuant to his sentence, and the case was reset until March 26, 2009, at which time the court would determine if Carter had met his purge requirements. The March 26, 2009 hearing was postponed until May 21, 2009.

At that hearing, the circuit court released Carter from incarceration because he lacked the present ability to satisfy the purge conditions imposed at the February 10, 2009 hearing. The court, however, still held Carter to be in contempt of court and set a purge requiring Carter to make an effort to get his driver's license, which had been suspended, and to apply for at least ten jobs a week. The court ordered Carter to provide documentation supporting his efforts to find employment directly to Ware's counsel. Towards the end of the hearing, the following exchange took place:

> [WARE'S COUNSEL]: Your Honor, there is another issue of domestic violence that the Court is a —
>
> [CARTER'S COUNSEL]: Objection.
>
> [WARE'S COUNSEL]: Well, the Court is aware of it, Your Honor, and in the sense —
>
> THE COURT: Well, this court isn't aware. . . . If there's a domestic violence situation, then you need to go to court, have Ms. Ware file for a temporary protective order. If one's issued, then a final protective order will be set in. And then that will be taken care of then.
>
> [WARE'S COUNSEL]: Actually I was just going to request that Mr. Carter have no contact with Ms. Ware.
>
> [CARTER'S COUNSEL]: Your Honor, that has nothing to do with this case.
>
> THE COURT: That's true. But will [Mr. Carter] agree not to have any contact with Ms. Ware?
>
> [CARTER'S COUNSEL]: I would need a minute to talk with Mr. Carter because they do share a child.
>
> THE COURT: Sit down and take a minute then. Is there a visitation order in place in this case?
>
> [WARE'S COUNSEL]: No, Your Honor, it was rescinded.
>
> THE COURT: So there's no visitation?

[WARE'S COUNSEL]: There's no visitation.

THE COURT: No reason to see Ms. Ware.

[WARE'S COUNSEL]: None whatsoever.

[CARTER'S COUNSEL]: Mr. Carter does not plan on seeing Ms. Ware, but we do object for the record that that be included in any order in this case.

THE COURT: Okay. Well, I think maybe in an abundance of caution that's exactly what I will do. I will make part of his purge. He can only purge his contempt if he stays away from Ms. Ware between now and June 25th.

* * *

[CARTER'S COUNSEL]: Arrington [v. Department of Human Resources, 402 Md. 79 (2007)] makes also it clear that a purge must be something that is relevant to the issue that is at hand. And Mr. Carter making payments in regards to child support is not relevant to whether or not he has any contact with Ms. Ware.

The circuit court held a hearing on the disposition of the contempt finding on June 25, 2009. During the hearing, Ware's counsel brought up the "stay-away" order from the preceding hearing and asked the court that it be continued. Before addressing Ware's request, however, the circuit court first turned to the contempt issue, finding that Carter had failed to purge his contempt. The circuit court set a new purge, require Carter to present written evidence that he was applying to fifteen jobs a week. After stating the above disposition, the court directed Carter to "Stay away from Ms. Ware." The following exchange then took place:

[CARTER'S COUNSEL]: I need to actually address that aspect too, Your Honor. This is a civil contempt matter. There isn't a protective order. She feels threatened in any form or fashion, she needs to file a protective order. That's not proper in a civil contempt matter either.

THE COURT: Okay. Fine. It was already in the order. I'm going to continue it in the order.

The circuit court entered an order the following day, on June 26, 2009, postponing the disposition of the contempt issue, requiring the aforementioned purge and ordering that "Mr. Carter shall stay away from Ms. Ware."

On July 23, 3009, the circuit court entered an order setting a hearing for August 13, 2009, and holding that "all other terms of this Court's Order dated June 26, 2009 shall remain in full force and effect."

On the same day, Carter filed a motion to reconsider the June 26, 2009 order.[2] In his motion, Carter argued that, pursuant to Md. Rule 15-207(e)(4),[3] the circuit court was not within its authority to issue a stay-away order during the contempt disposition hearing, because the order had no correlation to purging his contempt for failure to pay child support. Carter also maintained that the order was improperly entered because he was not afforded substantive and procedural due process because he had not been given either notice of, or an opportunity to be heard on, those allegations. Finally, Carter asserted that a court could issue an order requiring him to stay away from Ware only if she filed a petition for a domestic violence protective order pursuant to Family Law Article ("FL") § 4-501 *et. seq.*

Ware filed an opposition to Carter's motion to reconsider in which she argued that, in matters of child support, Family Law Article § 1-201[4] provides the circuit court with the authority to issue orders to protect parties from physical harm or harassment.

On August 13, 2009, the circuit court postponed the previously-scheduled hearing and set September 18, 2009 as a hearing date for both the disposition of contempt proceeding and Carter's motion for reconsideration. The order also provided that the terms of its order of June 26, 2009 remained in effect.

This appeal concerns an order entered during the course of the September 18, 2009 hearing. As we have discussed, this hearing was scheduled for two purposes, first, to determine whether Carter was purging his contempt and, second, to consider Carter's motion to reconsider the order requiring him to stay away from Ware. Both Carter and Ware were represented by counsel but neither party was present in the courtroom — Ware had been specifically excused by the court prior to the hearing and a court-ordered summons requiring Carter's attendance had never been served.

The court first postponed proceedings on the contempt petition because Carter was not present. Next, the court suggested to counsel that it address the motion for reconsideration "[b]ecause the clients don't have to be here for the legal arguments . . . ." Both lawyers agreed. Carter's counsel first asserted that the provision of the prior order requiring Carter to report directly to Ware's counsel as to his efforts at finding employment violated the attorney-client privilege. Turning to the issue before us, she stated:

> *Arrington v. Department of Human Resources* specifies that if there is going to be something included in an order following the finding of contempt, it must be — let me read it exactly —"It must have some reasonable connection to enforcement of the support order."
>
> And that is found at page 103 within the case of *Arrington v. Department of Human Resources.* The stay away requirement that Mr. Carter stay away from Ms. Ware has absolutely nothing to do with enforcement of a support order.
>
> It also has never been presented to the court in a fashion outlined by due process. There's never been a petition asking for a stay away order. There's never been a hearing on whether or not Ms. Ware is eligible to get a stay away order.
>
> There's nothing to present to the court that has been done that has not violated Mr. Carter's due process rights to require him to stay away from Ms. Ware.
>
> In all of this, to say, Your Honor, I'm not saying Mr. Carter wants to have contact with Ms. Ware. I'm saying that it's unlawful to have such an order in the contempt disposition within that order for the disposition of the contempt simply because it has nothing to do with enforcement of the support order and that it violates Mr. Carter's right to due process and a hearing on the issue of having a stay away order.

Ware's counsel responded that the court has authority to issue a stay away order under Family Code §1-201(b) and that there is ample justifying evidence in the record to support such an order. Ware's counsel also argued that Carter was not harmed by the order because there was no reason that Carter needed to be in touch with Ware. As Ware's counsel explained, Ware had sole legal and physical custody over their joint child and Carter's visitation rights with that child had been suspended. Ware's counsel represented that there was a violent history between Carter and Ware and that there had been testimony in a prior hearing that Carter had tried to kill Ware. Furthermore, Ware's counsel stated that Carter had a "long history" of assault on others and had been arrested for handgun violations.

After listening to the above arguments, the court made the following statement:

> Let me say that I have reviewed the entirety of the file, and I appreciate [Ware's counsel's] observation that many judicial hands have touched the file.
>
> With regard to [Carter's counsel's] argument, I am going to grant the motion and vacate [the June 26, 2009] order, but not for the reasons that [Carter's counsel] says.[5]
>
> I'm also going to, in a new order, order [Carter] to stay away. I think that [Ware's counsel is] absolutely right that the law provides, the Annotated Code of the Family Law Article 1-201(b)(5) permits the court, in support situations to provide injunctive relief to the parties in order to keep them apart.
>
> So in my new order, I'm going to order them to stay away from each other.

That same day, the court entered an order which, in its entirety, read as follows:

> ORDERED that Plaintiff's Motion to Reconsider is GRANTED; and it is further
>
> ORDERED that the Court's Order dated June 26, 2009 is VACATED; and it is further
>
> ORDERED that the disposition in this matter shall be heard on January 28, 2010 at 2PM in courtroom F2; and it is further
>
> ORDERED that Shawn Carter stay away from Carolyn Ware; and it is further ORDERED that the Clerk send a summons to Shawn Carter only, Carolyn Ware has been excused.

On September 23, 2009, appellant filed a timely notice of appeal from the September 18, 2009 order.

DISCUSSION

"The trial court ordinarily has discretion to grant or deny a request for injunctive relief in general equity matters . . . and that decision is reviewed by this Court under the 'abuse of discretion' standard." *Colandrea v. Wilde Lake Community Ass'n,* 361 Md. 371, 394 (2000); *B & P Enterprises v. Overland Equipment Co.,* 133 Md. App. 583, 631 (2000) ("[T]he grant or denial of an injunction ordinarily lies within the sound discretion of the trial court. Absent a clear abuse of that discretion, we will not disturb the court's decision.") (internal citations omitted).

Carter argues the circuit court erred in entering the September 18, 2009 order enjoining him from having contact with Ms. Ware. On appeal, Carter supports this contention with several arguments that for purposes of analysis we will group into two. First, Carter suggests that Maryland's Domestic Violence Law, codified at FL § 4-501 *et seq*. is a comprehensive act by which the General Assembly set out very specific requirements for notice, burden of proof and duration of orders. Acknowledging that the circuit court in this case entered the injunction pursuant to FL § 1-201(b), Carter asserts that he was entitled to procedural protections consistent with those set out in the Domestic Violence Law. Second, he argues that the court was without jurisdiction to issue an injunction requiring him to stay away from Ware as part of a contempt proceeding. Neither of these arguments is persuasive.

Finally, Carter asserts that the procedure followed by circuit court in this case violated his constitutionally-protected rights to due process. We are not persuaded that his due process rights were violated in this case.

We will address Carter's challenges in order.

I. FL § 1-201(b)(5) and the Domestic Violence Law

Carter concedes that FL § 1-201 authorizes a circuit court to "to protect a party to [a custody, visitation or support] action from physical harm or harassment." However, he asserts that the General Assembly has also enacted a comprehensive statutory scheme addressing a court's authority to issue protective orders to guard against domestic violence, namely, FL § 4-501–4-512.1. He suggests:

> In Maryland there is both the general ability to issue injunctive relief between the parties in a custody case, *see* [FL] § 1-201(b)(5), and the specific statutory scheme [for the issuance of] protective orders . . . . To obtain a final protective order under § 4-506, a victim of domestic violence must affirmatively request such relief, the respondent must be provided both notice of the filing and an opportunity to defend the allegations, the requesting party must prove, by clear and convincing evidence, that they are entitled to such an order, and that order may only remain in effect for one year . . . . An order entered under [FL] § 1-201 is not exempt from the other procedural and substantive limitations upon a court's ability to grant such relief; to the contrary, the statutory scheme in [FL] § 4-501 *et seq.* and the party responding to such a request under § 1-201 must be afforded procedural and substantive protections which, at a minimum, are comparable to those found in the statutory scheme.

Carter cites to no case law, and we are aware of none, to support his contention that the specific provisions of the Domestic Violence Law were intended by the General Assembly to circumscribe a court's broad authority to issue a "stay-away" order under § 1-201.

The first rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature. *Bd. of Educ. v. Zimmer–Rubert,* 409 Md. 200, 214 (2009). In so doing, "[w]e presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope." *Lockshin v. Semsker,* 412 Md. 257, 276 (2010). Moreover, "[i]n attempting to harmonize [two statutes that address the same subject], we presume that, when the Legislature enacted the later of the two statutes, it was aware of the one earlier enacted." *Harvey v. Marshall,* 389 Md. 243, 271, (2005) (quoting *Ridge Heating, Air Conditioning and Plumbing, Inc. v. Brennen,* 366 Md. 336, 352 (2001)). A very brief summary of the legislative history of FL § 1-201 and the Domestic Violence Law is in order.

Although an equity court has long had the authority to issue injunctions as to property matters in family law proceedings, *see, e.g., Ricketts v. Ricketts,* 4 Gill. 105 (1846), this authority was not traditionally considered to extend to the protection of personal interests. In *Kapneck v. Kapneck,* 31 Md. App. 410, 420 (1976), this Court held that a court in a divorce action acted without authority when it enjoined a husband from harassing his wife and minor children. Our analysis culminated with a suggestion that the matter was one for the General Assembly. *Id.* at 423-24. In 1976, the Legislature amended what was then Courts and Judicial Proceedings Article § 3-603 to add a subsection (b), which read:

> A court of equity sitting in an action for divorce, alimony, or annulment has all the powers of a court of equity, and may issue an injunction to protect any party to the action from physical harm or harassment.

This statute is the direct ancestor of today's § FL 1-201(b)(5). *See Magness v. Magness,* 79 Md. App. 668, 675 n.5 (1989). The only substantial difference between the current and original versions of the statute is that, the current law extends the court's injunctive authority to guardianship, support, custody and visitation actions.

The Domestic Violence Law was enacted in 1980, in response to growing societal concerns about the problems of domestic violence. *Coburn v. Coburn,* 342 Md. 244, 252 (1996). The statute sets out detailed provisions for the issuance of domestic violence orders by judges of the circuit and district courts as well as district court commissioners, when access to the courts is unavailable. There are substantial differences between the two statutes. First, while § 1-201(b) authorizes a court to issue and injunction to protect a *party* to existing litigation from physical harm or harassment, the Domestic Violence Law seeks to protect a much broader class of persons[6] and there is no requirement for there to be pending litigation for a domestic violence order to issue. A domestic violence order can be issued only when "abuse"[7] has occurred, a court can issue an injunction pursuant to § 1-201(b)(5) to protect a party against harassment. More significantly, a party who violates a domestic violence order is subject to criminal prosecution, FL 4-509, whereas an injunction pursuant to § 1-2-1(b)(5) must be enforced through the civil contempt process.

In short, there are significant differences between an injunction issued pursuant to § 1-201(b)(5) and a domestic violence order. We are confident that, when it enacted the Domestic Violence Law in 1980, the General Assembly was aware of the existence of the statutory predecessor to § 1-201(b)(5), enacted just four years previously. We have no basis to conclude that, in passing the latter statute, the Legislature intended to limit a court's authority to issue an injunction under § 1-201(b).

For these reasons, we are not convinced by Carter's argument that the stay-away order in this case is improper because it has no expiration date. Citing to Family Law Article § 4-506, Carter argues that "Maryland law simply does not permit open ended stay away orders, except in very limited and non-applicable circumstances, § 4-506(i), and explicitly provides that in a case such as the one *sub judice,* a properly issued stay-away order may only last for one year." This Court considered a similar argument in *Davidson v. Seneca Crossing,* 187 Md. App. 60, 605-06 (2009). In that case, the trial court entered a permanent injunction prohibiting Davidson from harassing identified individuals and disrupting the meetings of his community association. Davidson argued that the appropriate relief was for the individuals to obtain "peace orders" pursuant to Courts and Judicial Proceedings Article 3-1501 *et seq.* and that such orders were limited to a duration of six months. *See* CJP § 3-1505(f). We found the argument unpersuasive:

> Maryland Rule 15–502(b) provides that "at any stage of an action and at the instance of any party or on [the circuit court's] own initiative, [the court] may grant an injunction *upon the terms and conditions justice may require."* Unlike a peace order, then, an injunction is not predicated upon a particular statutory scheme or enumerated forms of relief, and, notably, an injunction is not subject to a six month limitation.

187 Md. App. at 636 (emphasis added in Davidson).

We find the same reasoning persuasive in this case.

II. The Availability of Injunctive Relief in the Current Action

Carter contends that the stay-away order was improperly issued as an adjunct component of the disposition of the constructive civil contempt action against him. Carter points out that, when a court finds a defendant in civil contempt, the court must specify the sanction for the contempt and must further specify what the contemnor must do to purge himself of that contempt. Carter cites *Arrington v. Dep't of Human Resources,* 402 Md. 79, 103 (2007) for the proposition that, because the purge is to be coercive, and not punitive, it must have some reasonable connection to the enforcement of the support order. The main thrust of Carter's argument here is that, when the circuit court imposed the first stay-away order, issued on May 21, 2009, it did so as part of his purge. According to Carter, this order had no reasonable connection to the enforcement of the support order and was not relevant to the objective of ensuring that Carter remained current on his child support obligations. Carter concludes that "although the court may have had the ability to enter a free standing injunctive order in the parties' custody dispute (subject to the proper procedural and substantive limitations upon that power), it was improper to enter these orders as adjunct aspects of the civil contempt matter."

The problem with Carter's argument is that the order he claims is flawed — the May 21, 2009 order stating Carter could purge of his contempt by staying away from Ware — is not before us. He appealed the order of September 18, 2009, which, as we have noted, vacated the earlier order and postponed the disposition of Carter's contempt. The later order was explicitly issued pursuant to the circuit court's equity powers under Family Law Article §1-201(b)(5), and not as a purge to civil contempt.

III. Due Process

The circuit court had the authority to enter a stay-away order pursuant to FL § 1-201(b)(5).

Moreover, the court has the authority to issue an injunction at any stage in a civil proceeding. Md. Rule 15-502(b).[8] Nevertheless, the court's authority is constrained by the Due Process requirements of both the United States and Maryland Constitutions. We recently considered the interplay between a court's authority to enter an injunction and the requirements for due process in *Riffin v. Baltimore County,* 190 Md. App. 11, 31-33 (2010).

In *Riffin,* this Court held that Maryland Rule 15-502(b) is "clear authority" that a court, "at any stage of an action and at the instance of any party or on its own initiative, may grant an injunction upon the terms and conditions justice may require." *Id*. at 28-29; Maryland Rule 15-502(b). However, before the court may enter such an injunction, due process requires that the party to be subject to the injunction be afforded notice and an opportunity to be heard. *Riffin*, 190 Md. App. at 31.

Carter contends that the stay-away order is invalid because it was entered before he was given notice and an opportunity to be heard. Carter argues that, because Ware did not file a petition for a stay-away order, he had no notice that she was going to seek the order. Furthermore, Carter maintains, he had no notice of the allegations that formed the basis of the request for the stay-away order. Because he did not have sufficient notice, Carter argues, he could not properly defend himself against the request for the stay-away order and was therefore denied an opportunity to be heard.

Carter's arguments are misplaced. The record does not indicate that Carter had prior notice of Ware's intention to seek a stay away order when the order was first entered at the June 26, 2009 hearing. However, he did not appeal that order but rather filed a motion for reconsideration. On August 13, 2009, the hearing on the motion for reconsideration was postponed until September 18, 2009. Copies of this order were mailed to the parties and counsel on August 26, 2009. We conclude that Carter was on notice that, the propriety of the stay-away order would be a subject of the September 18, 2009 hearing. He had an opportunity to be heard at that hearing. Although Carter himself was not present, his attorney was.

Carter contends that, while he was aware that the hearing was going to address the stay-away order, he was not given sufficient opportunity to be heard because he was not aware of the allegations that Ware would use to form the basis of her argument in favor of the stay-away order. This argument is not persuasive because Ware, through counsel, clearly articulated the basis for her request for an injunction, namely, the long history of Carter's violent and threatening behavior towards her and others, behavior that is documented in the court's file.[9] On appeal, Carter contends that the circuit court erred in considering only the material in the court's file but his counsel neither objected to this procedure during the hearing nor asserted that the information in the court file was inaccurate. Accordingly, Carter's appellate contentions on this score are not preserved for our review and we will not consider them further. Md. Rule 8-131(a).[10]

We conclude that, under the unusual circumstances presented by this case, the circuit court did not err in entering the injunction.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED.

APPELLANT TO PAY COSTS.

FOOTNOTES

1. Carter phrases the issue thus:

> Did the lower court err in issuing a stay-away order as part of the disposition of a civil contempt matter where the party protected by that order had never filed a petition for a protective order, and sought that relief based solely on her attorney's proffer of a past "violent history between them," and the responding party was not afforded notice of, or a reasonable opportunity to respond to, the proffer?

2. Carter filed an appeal from the June 26, 2009 order but subsequently dismissed the appeal.

3. Rule 15-207 provides in pertinent part:

> (e) Constructive Civil Contempt — Support Enforcement Action.
>
> (1) Applicability. This section applies to proceedings for constructive civil contempt based on an alleged failure to pay spousal or child support, including an award of emergency family maintenance under Code, Family Law Article, Title 4, Subtitle 5.
>
> * * * *
>
> (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.

4. The statute reads in relevant part:

> **§ 1-201. Jurisdiction of equity court.**
>
> (a) An equity court has jurisdiction over:
>
> * * * *
>
> (5) custody or guardianship of a child except for a child who is under the jurisdiction of any juvenile court and who previously has been adjudicated to be a child in need of assistance;
>
> (6) visitation of a child;
>
> * * * *
>
> (9) support of a child.
>
> (b) In exercising its jurisdiction over the custody, guardianship, visitation, or support of a child, an equity court may:
>
> * * * *
>
> (5) issue an injunction to protect a party to the action from physical harm or harassment.

5. The court granted this portion of the motion to reconsider because "it's not [Ware's counsel's] responsibility to decide whether [Carter] in fact has or has not complied with the court order. It's the court's responsibility . . . ."

6. Specifically, FL § 4-504(a) permits a "petitioner" to seek relief under the statute. The term "petitioner includes a "person eligible for relief" or various persons or officials who file on such a person's behalf. FL § 4-501(o). FL § 4-501(m) defines a "person eligible for relief" as:

> (1) the current or former spouse of the respondent;
>
> (2) a cohabitant of the respondent;
>
> (3) a person related to the respondent by blood, marriage, or adoption;
>
> (4) a parent, stepparent, child, or stepchild of the respondent or the person eligible for relief who resides or resided with the respondent or person eligible for relief for at least 90 days within 1 year before the filing of the petition;
>
> (5) a vulnerable adult; or
>
> (6) an individual who has a child in common with the respondent.

7. Section -401(b) defines "abuse" as:

> (i) an act that causes serious bodily harm;
>
> (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm;
>
> (iii) assault in any degree;
>
> (iv) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
>
> (v) false imprisonment; or
>
> (vi) stalking under § 3-802 of the Criminal Law Article.
>
> 2) If the person for whom relief is sought is a child, "abuse" may also include abuse of a child, as defined in Title 5, Subtitle 7 of this article. Nothing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child.

8. Rule 15-502(b) states:

> Subject to the rules in this Chapter, the court, at any stage of an action and at the instance of any party or on its own initiative, may grant an injunction upon the terms and conditions justice may require.

9. Before stating its judgment, the circuit court stated "[l]et me say that I have reviewed the entirety of the file."

10. The relevant evidence in the record before the circuit court included a pleading that Ware filed on June 23, 2009 to oppose a motion to reinstate supervised visitation. Ware attached an affidavit and other exhibits to her pleading. The affidavit before the circuit court read as follows:

> 1. On August 6, 2003, while arguing over Plaintiff's participation in my pregnancy, in front of my apartment, Plaintiff attempted to strangle me to death. I escaped and when he pursued me I had to brace my apartment door to keep him from breaking in.
>
> 2. On January 24, 2004, Mr. Carter assaulted me again while arguing with me in my apartment by pushing me down. I was seven months pregnant at the time.
>
> 3. On Valentine's day, February 14, 2004, after accepting Mr. Carter's apology, I allowed him into my apartment. After a period of time I told him I was tired and asked him to leave. He became angry and assaulted me again. I was eight and a half months pregnant.
>
> 4. After that I told him I did not want to see him any more, but he continued to stalk and harass me and my family to the point that my landlord threatened to evict me because of the disturbance to my neighbors he was causing by loudly cursing me and banging on my door.
>
> 5. He finally stopped, when on April 16, 2004, I filed criminal charges against him for stalking and harassing me.

NO TEXT

Cite as 9 MFLM Supp. 35 (2013)

Divorce: alimony: intrinsic fraud allegation

Bernard G. Keirsey, III
v.
Debora Duncan f/k/a Debora Keirsey

No. 0794, September Term, 2011

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

Opinion by Meredith, J.

Filed: July 17, 2013. Unreported.

The motion to revise a three-year-old final judgment was properly denied because appellant had failed to allege extrinsic fraud, mistake or irregularity; even assuming arguendo that his ex-wife had given perjured testimony regarding her assets, perjury constitutes intrinsic fraud and cannot serve as a basis for a court to exercise revisory power over a final judgment pursuant to Rule 2-535(b).

This case comes to us from the Circuit Court for Anne Arundel County. On April 22, 2011, Bernard G. Keirsey, III, appellant, filed a motion to revise the June 6, 2008, denial of his motion to modify alimony. Debora Duncan, appellee, opposed this motion. The circuit court denied Mr. Keirsey's motion to revise on May 25, 2011. Mr. Keirsey's timely appeal followed.

QUESTION PRESENTED

We have re-worded the question presented to us by Mr. Keirsey as follows:[1]

Did the circuit court err in its denial of the motion to revise the June 6, 2008, judgment denying Mr. Keirsey's motion to modify alimony?

Because we answer this question in the negative, we affirm the judgment of the circuit court.

FACTS AND PROCEDURAL HISTORY

Mr. Keirsey and Ms. Duncan divorced on August 23, 2006. As part of the divorce decree, the Court ordered Mr. Keirsey to pay $1,000/month in alimony to Ms. Duncan. Mr. Keirsey almost immediately filed a motion to alter or amend that judgment. Ms. Duncan opposed that motion and moved to hold Mr. Keirsey in contempt for failing to pay alimony. The circuit court denied Mr. Keirsey's motion on October 5, 2006, and denied an amended motion to alter or amend on October 13. Mr. Keirsey then filed a notice of *en banc* review. Mr. Keirsey filed a line of dismissal of *en banc* review on January 23, 2007.

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

Then Mr. Keirsey filed a motion to modify alimony on February 16, 2007. Ms. Duncan opposed this motion and also filed a motion to hold Mr. Keirsey in contempt. On June 6, 2008, the parties appeared in court for a hearing on these motions. Mr. Keirsey testified that he received Social Security disability payments of $1,284/month. Mr. Keirsey stated that he pays rent and utilities on the property where he resides, and Lee Sawyer, a female companion, resides with him and contributes to the household expenses. Though Mr. Keirsey does not work, he maintains the lawn on the rented premises and also hunts. At the hearing, Mr. Keirsey testified that he never paid the alimony as ordered because he could not work. Mr. Keirsey said he underwent back surgery in 2003 and has had knee and back problems since then. Mr. Keirsey testified that he actually felt better at the time of the June 6 hearing than he did at the August 23, 2006, divorce hearing because he had a leg brace and had recently received a cortisone shot. Mr. Keirsey asked Ms. Duncan if she had listed all of her assets on a financial statement prepared for the hearing. Ms. Duncan testified that everything was correct.

The circuit court found that there had been no material change in circumstances since the time of the order establishing alimony in 2006. Accordingly, on June 6, 2008, the court denied Mr. Keirsey's motion to modify alimony, stating: "[T]his Court is not going to modify it [alimony] because the Court finds in this case that an order was passed by Judge Caroom at a time when the medical problems were in existence and had been in existence. And they were all taken into consideration by Judge Caroom." The circuit court also granted Ms. Duncan's motion and held Mr. Keirsey in contempt for failing to pay alimony. Ultimately, the circuit court found that Mr. Keirsey was $12,000 in arrears on the alimony payments.

On June 30, 2008, Mr. Keirsey filed a notice of *en banc* review, but he never filed a memorandum supporting this notice. Ms. Duncan filed a motion to dismiss the *en banc* review, which the court granted on November 3, 2008.

Mr. Keirsey filed another motion to modify alimony on March 24, 2010. In response, the parties entered into an agreement that was confirmed in a consent order on January 14, 2011. The parties agreed to eliminate Mr. Keirsey's alimony payments, but the court also entered a judgment against Mr. Keirsey in the amount of $12,000, the amount he owed in alimony at the time of the June 6, 2008, hearing.

On April 22, 2011, Mr. Keirsey filed a motion to revise the judgment of the June 6, 2008, modification hearing. At this late date, Mr. Keirsey alleged that Ms. Duncan had lied to the court about her assets at the 2008 hearing. The circuit court denied this motion on May 25, 2011. Mr. Keirsey's present appeal followed.

STANDARD OF REVIEW

Mr. Keirsey asserted that his 2011 motion was filed pursuant to Maryland Rule 2-535(b). In pertinent part, that rule states that, "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." Md. Rule 2-535(b). The Court of Appeals has noted that, "when a party files a motion to set aside a judgment more than thirty days after the judgment is entered, the grounds for setting aside the judgment are generally limited to instances of fraud, mistake or irregularity." *Canaj, Inc. v. Baker & Div., Phase III*, 391 Md. 374, 400 (2006). With respect to appellate review, the *Canaj* Court stated: "In reviewing the decision below, 'the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion.'" *Id.* at 400-01 (quoting *In re Adoption/Guardianship No. 93321055/CAD,* 344 Md. 458, 475 (1997)). Accordingly, we review a circuit court's disposition of a Rule 2-535 motion for legal error or abuse of discretion. *Voltolina v. Property Homes, LLC,* 198 Md. App. 590, 600, *cert. denied,* 421 Md. 559 (2011).

DISCUSSION

A motion under Rule 2-535 is limited in scope. The Court of Appeals has held that "[t]he terms 'fraud, mistake, or irregularity' as used in [the Rule], are narrowly defined and are to be strictly applied." *Early v. Early,* 338 Md. 639, 652 (1995) (citing *Autobahn Motors, Inc. v. Mayor & City Council of Balt.,* 321 Md. 558, 562 (1991)). In this case Mr. Keirsey contends that Ms. Duncan committed fraud because she lied to the circuit court during an evidentiary hearing.

This Court has held that "[a] litigant seeking to set aside an enrolled decree must prove extrinsic and not intrinsic fraud." *De Arriz v. Klingler-De Arriz,* 179 Md. App. 458, 470 (2008). *Accord Powell v. Breslin,* 430 Md. 52, 71 (2013). In *Schwartz v. Merchants Mortgage Co.,* the Court of Appeals explained that "fraud is extrinsic when it actually prevents an adversarial trial, but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit that truth was distorted by the complained of fraud." 272 Md. 305, 309 (1974). "[A]n enrolled decree will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds which are '*intrinsic*' to the trial of the case itself." *Id.* at 308. This Court has explained the rationale behind this policy as follows:

> [O]nce parties have had the opportunity to present before a court a matter for investigation and determination, and once the decision has been rendered and the litigants, if they so choose, have exhausted every means of reviewing it, the public policy of this State demands that there be an end to that litigation. . . . This policy favoring finality and conclusiveness can be outweighed only by a showing "that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy."

De Arriz, supra, 179 Md. App. at 470 (quoting *Manigan v. Burson,* 160 Md. App. 114, 121 (2004)).

In this appeal, Mr. Keirsey contends that Ms. Duncan committed fraud when she lied to the court about her assets. However, as we have just noted, even if he were correct — and we do not reach the correctness of his contention — perjured testimony would constitute intrinsic fraud and could not serve as a basis for a court to exercise revisory power pursuant to Rule 2-535(b) over a final judgment. We do not decide if Ms. Duncan lied under oath because the issue of whether or not she did is irrelevant to this appeal. Mr. Keirsey does not point to any instances of extrinsic fraud, and merely avers that "[t]hese facts [about Ms. Duncan's assets] which were concealed by the Appellee during the hearing would have possibly changed the outcome of the hearing."

Because Mr. Keirsey pointed to no instances of extrinsic fraud in this case, we find that the circuit court committed no error of law and did not abuse its discretion in denying Mr. Keirsey's motion. Accordingly, we affirm the judgment of the circuit court.

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

FOOTNOTE

1. Mr. Keirsey presented the following issue for our review: "The Circuit Court erred in its ruling of modification of [a]limony, [d]ue to misleading [f]acts by the Appellee."

Cite as 9 MFLM Supp. 37 (2013)

Child support: paternity: notice and opportunity to be heard

Jeffrey Metheny
v.
Garrett County Department of Social Services, Et Al.

No. 1608, September Term, 2011

Argued Before: Eyler, Deborah S., Woodward, Wright, JJ.

Opinion by Woodward, J.

Filed: July 17, 2013. Unreported.

While appellant waived his claim of lack of personal jurisdiction by failing to raise it before he filed a motion to modify child support, the evidence established that the trial court violated his due process rights in 2007 and 2009 by entering paternity and child support orders without affording him reasonable notice and opportunity to be heard.

On May 10, 2007, appellee, the Garrett County Department of Social Services, Bureau of Support Enforcement ("GCBOSE"), and Miranda Bageant ("Mother"), filed a complaint against appellant, Jeffrey Metheny, to establish paternity and child support for Mother's child, Laura B., born on June 12, 2006. After a hearing before a family law master on August 23, 2007, the Circuit Court for Garrett County entered an order on August 24, 2007, ordering appellant to pay temporary child support in the amount of $400.00 per month, effective May 2007.

On December 22, 2009, after obtaining a DNA sample from appellant, another hearing was held before a family law master to establish paternity and set permanent child support. At the conclusion of the hearing, the family law master's recommendations included, among other things, that: (1) appellant was the biological father of Laura B.; (2) permanent child support be established at $400.00 per month effective May 2007; and (3) child support arrearage be found in the amount of $12,400.00 as of November 30, 2009. On December 30, 2009, the circuit court adopted the master's recommendations.

On January 18, 2011, appellant filed a motion to terminate child support and to eliminate or abate the arrearage. Following a March 10, 2011 hearing,[1] a family law master recommended the denial of appellant's motion, which the circuit court adopted in an Order dated August 25, 2011.

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Appellant presents three questions for our review, which we have consolidated and rephrased into two:[2]

I. Did the trial court err in failing to exercise its revisory power and set aside previous orders based upon the court lacking personal jurisdiction over appellant?

II. Did the trial court violate the due process rights of appellant in 2007 and 2009 by entering orders without affording appellant reasonable notice and opportunity to be heard?

For the reasons stated herein, we will answer question one in the negative and question two in the affirmative, and thus vacate and remand the case to the trial court for further proceedings consistent with this opinion.

BACKGROUND

On May 10, 2007, GCBOSE and Mother filed a complaint against appellant in circuit court, seeking to establish paternity and child support for Laura B. The complaint alleged that Mother, a resident of Maryland, had sexual intercourse with appellant, and as a result, gave birth to Laura B. on June 12, 2006. The complaint prayed that: (1) appellant be declared the father of Laura B.; (2) appellant be ordered to pay child support; (3) appellant be ordered to obtain and maintain medical insurance for Laura B.; and (4) the court grant an immediate earnings withholding order. On May 10, 2007, a writ of summons was issued to appellant, directing him "to file a written response by pleading or motion, within 60 days after service of this summons." Also on May 10, 2007, a subpoena was issued for a hearing to be held on August 23, 2007. The purpose of the hearing is unknown, because no copy of the subpoena was filed in the court file. According to the Affidavit of Service, appellant was personally served in Bruceton Mills, West Virginia on June 28, 2007, with

the "Summons; Paternity Complaint/Petition; [and] Financial Statement[.]"[3] The Affidavit of Service does not state that appellant was served with the subpoena for the August 23, 2007 hearing .

Nevertheless, on August 23, 2007, a hearing was held before a family law master. Counsel for GCBOSE and Mother attended the hearing, but appellant did not appear.[4] At the conclusion of the hearing, the master recommended, among other things, that appellant be ordered to pay temporary child support of $400.00 per month, effective May 2007. The circuit court adopted that recommendation in an order issued the next day, August 24, 2007.

On August 12, 2009, while appellant was incarcerated in Huntington, West Virginia,[5] an analysis of a DNA sample obtained from appellant demonstrated a 99.99 percent probability that appellant was the biological father of Laura B. A hearing was held before a family law master on December 22, 2009, in order to establish paternity and permanent child support. Appellant, who was incarcerated at the time,[6] again failed to appear.[7] There is nothing in the court file stating that a hearing was scheduled for December 22, 2009, or that a notice of the hearing was sent to appellant. The Report of the Master was issued on the same day, recommending that appellant be found the biological father of Laura B., permanent child support be set at $400.00 per month, and a child support arrearage of $12,400.00 be established.[8] On December 30, 2009, the circuit court entered an order adopting the December 22, 2009 recommendations of the family law master.

On October 27, 2010, appellant, representing himself, filed a petition to modify child support, claiming that he had been "incarcerated from Dec[ember] 9, 2009 til present [and was] unemployed," and thus was without income to pay the mandated child support. On January 18, 2011, through counsel, appellant filed a Motion to Terminate Child Support, and Motion to Eliminate or Abate Arrearage.

At a hearing on March 10, 2011, appellant withdrew his petition to modify child support and proceeded on his motion to terminate child support and to eliminate or abate the arrearage. After hearing testimony on the record, the family law master recommended a denial of appellant's motion. Appellant filed exceptions to the master's recommendation on March 18, 2011. On July 20, 2011, a hearing was held before the circuit court on appellant's exceptions. By Order dated August 25, 2011, the court denied appellant's exceptions, adopted the master's recommendation to deny appellant's motion, and directed appellant to pay the child support previously ordered. Appellant noted this timely appeal. Additional facts will be set forth below as necessary to resolve appellant's questions presented.

DISCUSSION

I. Personal Jurisdiction

Appellant contends that the trial court never had personal jurisdiction over him, because under Md. Code (1974, 2006 Repl. Vol.), § 6-103.2(3) of the Courts and Judicial Proceedings Article, the circuit court can exercise personal jurisdiction over appellant, a nonresident of Maryland, only if the act of conception is alleged to have occurred in Maryland, and the complaint does not make that allegation.[9] Appellant claims that this lack of personal jurisdiction constitutes a mistake within the purview of Maryland Rule 2-535(b), and that the trial court "erred when it failed to acknowledge the mistake . . . and set aside the orders." Appellant concludes that "[t]he mistake can only be corrected by vacating the previous orders [from 2007 and 2009] and begin[ing] the action anew." We disagree and will explain.

"Rule 2-322(a) clearly states that the defense of lack of jurisdiction over the person is waived if not made by motion to dismiss *before* the answer." *Beyond Sys., Inc. v. Secure Med., Inc.,* 168 Md. App. 186, 189 (2006) (emphasis in original). Maryland law provides that, when a party fails to file a separate motion to dismiss for lack of personal jurisdiction prior to filing an answer, the court will obtain personal jurisdiction over that party by consent. *See Hernandez v. Hernandez,* 169 Md. App. 679, 687 (2006). Moreover, when a party makes a voluntary appearance before the court without first challenging personal jurisdiction in a separate motion to dismiss, such party is submitting to the jurisdiction of the court by consent. *Guen v. Guen,* 38 Md. App. 578, 587 n.8 (1978) (stating that a voluntary appearance "supplies a valid basis for the acquisition of jurisdiction consent").

The record before our Court is uncontradicted that, at no time prior to October 27, 2010, did appellant file any responsive pleading to the complaint. As previously indicated, on October 27, 2010, appellant filed a petition to modify the child support order entered by the circuit court. Nowhere in that petition, however, does appellant raise the defense of a lack of personal jurisdiction, either by pointing out the failure of the complaint to allege conception in the State of Maryland or by otherwise challenging the trial court's jurisdiction over him. As a result, appellant waived the defense of a lack of personal jurisdiction and consented to personal jurisdiction by the circuit court. *See* Md. Rule 2-322(a); *Hernandez,* 169 Md. App. at 687; *Guen,* 38 Md. App. at 587 and n.8. Accordingly, we conclude that the trial court did not err by failing to exercise its authority under Rule 2-535(b) to vacate the trial court's orders for lack of personal jurisdiction over appellant.

II. Due Process

"Generally, due process requires that a party to a proceeding is entitled to both notice and an opportunity to be heard on the issues to be decided in a case." *In re Katherine C.,* 390 Md. 554, 572 (2006) (citations omitted). In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), the Supreme Court set forth the oft-recited foundation of due process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. **The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . .** But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314-15 (emphasis added) (internal citations omitted). In Maryland, whenever a court schedules an oral hearing, "it is axiomatic that [each party is] entitled to adequate notice of the time, place, and nature of that hearing, so that [each party may] adequately prepare." *Phillips v. Venker,* 316 Md. 212, 222 (1989). In order to identify the nature of the hearing, the notice given must convey those issues th at may be the subject of the hearing. *Van Schaik v. Van Schaik,* 90 Md. App. 725, 738-39 (1992). "[U]nless . . . a party otherwise receives adequate notice of an issue during the course of a proceeding, due process is denied." *Blue Cross of Maryland, Inc. v. Franklin Square Hosp.,* 277 Md. 93, 101 (1976).

A. August 23, 2007 Hearing and August 24, 2007 Order

As stated above, the Affidavit of Service states that on June 28, 2007, "in hand delivery" was made to appellant of the summons, paternity complaint/petition, and financial statement. The docket entries in the court file state that on the same day that the complaint was filed, a written subpoena was "[i]ssued for August 23, 2007." Now here in the Affidavit of Service does it indicate that a subpoena was served on appellant.

In addition, none of the papers actually served on appellant indicated that there was going to be a hearing on August 23, 2007, or that temporary child support would be the subject of that hearing. The summons merely directed appellant to file a written response, by pleading or motion, to the attached complaint within 60 days of service. The complaint failed to make a request for *pendente lite* relief. Nevertheless, on August 24, 2007, the circuit court entered an order granting *pendente lite* relief, by ordering temporary child support in the amount of $400.00 per month effective May 2007.

In our view, it is clear that appellant's due process rights were violated with regard to the circuit court's August 24, 2007 order. Maryland case law, as well as federal jurisprudence, provides the bedrock principle that due process, at a bare minimum, affords a party notice of an action against him or her and an opportunity to be heard. *See Sapero v. Mayor & City Council of Baltimore,* 398 Md. 317, 346 (2007) ("The core of due process is the right to notice and a meaningful opportunity to be heard.") (quoting *LaChance v. Erickson,* 522 U.S. 262, 266 (1998)). There is no evidence in the record that appellant was served with notice that the court was going to hold a hearing on August 23, 2007, nor was appellant advised of the nature of that hearing. Therefore, any action taken by the trial court based on the August 23, 2007 hearing is violative of appellant's due process rights. Accordingly, the Order dated August 24, 2007 cannot stand.

B. December 22, 2009 Hearing and December 30, 2009 Order

After obtaining a DNA sample from appellant while he was incarcerated in West Virginia, a second hearing was held before a family law master on December 22, 2009, in order to establish paternity and permanent child support. Appellant again failed to appear. The Report of the Master was issued on the same day, recommending, *inter alia,* that: (1) appellant be found as the biological father of Laura B.; (2) permanent child support be set at $400.00 per month; and (3) child support arrearage of $12,400.00 be established. By Order dated December 30, 2009, the trial court adopted the master's recommendations.

There is nothing in the record indicating that a hearing was scheduled by the court for December 22, 2009, or that notice of that hearing was sent to appellant. At the December 22, 2009 hearing, GCBOSE's attorney told the master that appellant "was given notice of today's hearing." Counsel, however, provided no evidence, or even a factual basis, for that assertion. Indeed, GCBOSE's attorney advised the master that appellant was no longer incarcerated, when, according to appellant's testimony, he had been incarcerated 13 days before the December 22 hearing and remained incarcerated until October 7, 2010. Thus, because appellant was not given notice of the time, place, and nature of the December 22, 2009 hearing, any action taken by the trial court based on that hearing is viola-

tive of appellant's due process rights. Accordingly, the circuit court's Order dated December 30, 2009 cannot stand.[10]

ORDERS OF THE CIRCUIT COURT FOR GARRETT COUNTY DATED AUGUST 24, 2007 AND DECEMBER 30, 2009 VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. GARRETT COUNTY TO PAY COSTS.[11]

FOOTNOTES

1. The front page of the transcript provided to this Court lists the hearing date as "March 10, 2010." The certification and context of the hearing (including a May 14, 2010 court order from West Virginia), however, make clear that the hearing in fact occurred on March 10, 2011.

2. Appellant's questions presented, as stated in his brief, are:

I. Whether the court violated the due process rights of the alleged father, when it entered orders following hearings wherein the alleged father was not afforded reasonable notice and opportunity to be heard.

A. Did entry of August 24, 2007 Order violate due process rights of alleged father.

B. Did entry of December 30, 2009 Order violate due process rights of alleged father.

II. Whether the court err[ed] in failing to exercise revisory power and set aside orders based upon the mistake that the court lacked personal jurisdiction.

III. Whether the court err[ed] in failing to exercise revisory power and set aside orders based up on irregularity.

A. Did August 23, 2007 hearing, held without notice and 4 days prior to answer being due constitute irregularity.

B. Did the award by the court of relief not prayed in the Complaint constitute irregularity.

C. Did the failure to notify party of Report of Master dated August 23, 2007 and/or the failure to notify party of entry of August 24, 2007 Order constitute irregularity.

D. Did the December 22, 2009 hearing, held without notice while alleged father was in jail constitute irregularity.

E. Did the failure to notify party of Report of Master dated December 22, 2009 and/or the failure to notify party of entry of order [on] December 30, 2009 constitute irregularity.

F. Did a child support order not based upon zero income of a party, when BOSE knew incarcerated alleged father had income of zero constitute irregularity.

3. The Affidavit of Service also was not filed in the court file.

4. The master found that appellant "failed to appear after being personally served on 6-28-07." There is nothing in the record, however, to support a finding of personal service of the subpoena on appellant.

5. Appellant was incarcerated from August 19, 2008 to August 19, 2009.

6. Appellant was incarcerated again from December 9, 2009 to October 7, 2010.

7. At the December 22, 2009 hearing before the family law master, GCBOSE's attorney represented that appellant "was given notice of today's hearing;" however, the attorney stated no basis for this assertion.

8. The $12,400.00 child support arrearage was calculated from May 2007 to November 30, 2009.

9. In its brief, GCBOSE does not respond to appellant's argument pertaining to personal jurisdiction.

10. Because the violations of appellant's due process rights were caused by the failure to provide him with notice of the time, place, and nature of the August 23, 2007 and December 22, 2009 hearings, the Orders dated August 24, 2007 and December 30, 2009 were subject to the revisory power of the trial court as an "irregularity" under Maryland Rule 2-535(b). *See Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc.,* 149 Md. App. 336, *cert. denied,* 374 Md. 583 (2003) (indicating that an "irregularity" under Md. Rule 2-535(b) is "a failure to follow required process or procedure" that usually occurs in the context of a failure to provide a required notice to a party) (citations and internal quotations omitted).

11. As appellee notes in its brief, appellant conceded the issue of paternity of Laura B. before the trial court. Therefore, on remand to the circuit court, the only issues will be the determination of appellant's current child support obligation and arrearages, if any, from May 10, 2007.

Cite as 9 MFLM Supp. 41 (2013)

CINA: revocation of relative's custody: sufficiency of evidence

In Re: Joseph B., Leah B., and Michael E.

No. 1939, September Term, 2012

Argued Before: Krauser, C.J., Moylan, Charles E., Jr. (Ret'd, Specially Assigned), Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Raker, J.

Filed: July 17, 2013. Unreported.

The circuit court acted properly by placing the children in foster care and vacating consent orders by which it had granted custody to their maternal grandmother, based on her demonstrated inability to provide a suitable environment for them; nothing in §3-819(b)(1), which governs dispositions after a CINA finding, required that the grandmother be given preference over the department in this case.

JoAnn S., appellant, is the maternal grandmother of Leah B., Joseph B., Jr., and Michael E. Appellant, Rebekah B. (the children's mother), and Joseph B., Sr. (Leah and Joseph, Jr.'s father) had joint custody of Leah and Joseph, Jr. Appellant had sole custody of Michael. She appeals the order of the Circuit Court for Caroline County, sitting as the Juvenile Court, that found Leah, Joseph, Jr., and Michael to be children in need of assistance ("CINA"), committed them to the care of the Caroline County Department of Social Services ("the Department"), and vacated any orders that granted her custody of Leah, Joseph, Jr., and Michael. She presents four questions for our review:

> 1. Did the Department make reasonable efforts to prevent removal of Leah, Joseph, Jr., and Michael from their home?
>
> 2. Was there sufficient evidence presented to the court to show that Leah, Joseph, Jr., and Michael were CINA?
>
> 3. Did the court err when it ordered that Leah, Joseph, Jr., and Michael be placed in foster care?
>
> 4. Did the court err when it rescinded its orders granting appellant custody of her grandchildren?

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

We shall affirm.

I.

Rebekah B. is the mother of Leah B. (born May 22, 2007), Joseph, Jr. B. (born May 18, 2009), Michael E. (born July 8, 2010), and Serenity E.[1] (born July 18, 2011). Appellant is the maternal grandmother of all four children. Joseph B., Sr. is the father of Leah and Joseph, Jr. Abraham E. is the father of Michael and Serenity.

The Department first became aware of the family in May 2009 when they initiated an investigation for neglect after Rebekah drove her car into a ditch while under the influence of prescription medications. Leah and Joseph, Jr. were in the car at the time of the accident and were not restrained properly. The Department made a finding of "indicated neglect."

In October 2009, appellant filed a complaint for custody of Leah and Joseph, Jr. in the Circuit Court for Caroline County. Joseph, Sr. also sought custody in this proceeding, citing Rebekah's drug use and appellant's dependency on narcotic medications as concerns. In February 2010, appellant, Rebekah, and Joseph, Sr. agreed to joint legal custody of Leah and Joseph, Jr.

At birth, Michael tested positive for barbiturates, allegedly because Rebekah took pain medication which doctors told her not to take during pregnancy. The Department entered into a safety plan with Rebekah and appellant on July 9, 2010,[2] in which Rebekah and appellant agreed that Rebekah would not have any unsupervised contact with Michael. This initial safety plan concerned only the care of Michael.

On July 20, 2010, the Department held a family meeting to modify the original safety plan because of information it received from Delaware about an incident in which, while driving Leah and Joseph, Jr., Rebekah passed out because she was under the influence. Appellant arrived at the meeting alone, and Rebekah, in violation of the safety plan, transported Leah, Joseph, Jr., and Michael while unsupervised.

Because appellant and Rebekah violated the July 9th safety plan, the Department formulated a second safety plan. The plan moved Leah, Joseph, Jr.,

and Michael to the home of their maternal aunt, Rachel H., where Joseph, Sr. was residing. The Court named Joseph, Sr. the primary caretaker of his children, Leah and Joseph, Jr., and Rachel H. the primary caretaker of Michael. Joseph, Sr. and Rachel were to ensure that neither Rebekah, nor appellant had any unsupervised contact with the children.

While Leah, Joseph, Jr., and Michael were living at Rachel's home, Joseph, Sr. disappeared for about a week. When Joseph, Sr. disappeared, Rachel sent Leah and Joseph, Jr. to live at appellant's home with appellant and Rebekah.

On August 16, 2010, the Department altered the safety plan to allow Michael to live with appellant and Rebekah, but required Orville S., Michael's step grandfather, and Abraham to ensure that neither appellant nor Rebekah have any unsupervised contact with Michael. On August 22, 2010, Michael was taken into shelter care after he sustained injuries from falling out of bed.

Meanwhile, Rachel initiated a civil custody proceeding to gain custody of Michael. The circuit court granted Rachel *pendente lite* custody of Michael. The circuit court granted appellant's motion to intervene in the custody proceeding. On May 5, 2011, the circuit court in the custody case granted appellant legal and physical custody of Michael pursuant to an agreement appellant, Rachael, Rebekah, and Abraham reached to settle the case. After the hearing, Michael again resided at appellant's home with appellant and Rebekah.

Ms. Ivy Lambert, an employee in the Department's Continuing Protective Services Unit, worked with appellant and Rebekah from November 2010 to June 2011. She stated that the Department's primary concern was that Rebekah take the correct dosage of her pain medications and the effect that her misuse of prescription medication may have on the safety and welfare of her children. During her time working with Rebekah, Ms. Lambert stated that there was minimal progress because the Department was unable to contact the doctor prescribing Rebekah medication, and because Rebekah failed to attend appointments in compliance with a court drug counseling program.

On December 11, 2011, Serenity was born and tested positive for barbiturates. On December 13, 2011, the Department formulated a safety plan for Serenity which gave appellant responsibility to supervise Serenity and Rebekah at all times.

In January 2012, as a result of the investigation following Serenity testing positive for barbiturates, the family was referred to the Family Preservation Unit. Ms. Mary Jo Hollingsworth, an employee in the Department's Family Preservation Unit, began working with the family in January 2012. She spent between five and twenty hours per week in the home. She stated that, during her discussions with Rebekah and appellant, appellant would ask to speak to Rebekah by herself in the hallway. When Rebekah and appellant returned, Rebekah would refuse to cooperate with the Department. The lack of cooperation with the Department inhibited the Department's ability to provide services. Nonetheless, the Department helped Rebekah manage her medicine and obtain mental health assessments and treatment.

On January 20, 2012, because appellant was hospitalized for morphine withdrawal, a fifth safety plan was implemented. Rebekah and Abraham were given responsibility for taking care of the children and were directed to request temporary respite at any time they felt overwhelmed or in need of help with the children. Abraham was to oversee Rebekah's medication use and contact the Department if she appeared incoherent or compromised.

Appellant returned home on January 28, 2012. Upon returning home, appellant had not recovered fully, and Orville had to assist in caring for appellant. By her own admission, appellant provided very little care for the children upon her return home from the hospital.

On February 17, 2012, Ms. Hollingsworth went to appellant's home to take Serenity and Rebekah to a doctor's appointment for Serenity. When Ms. Hollingsworth arrived at the home, Rebekah was the only adult caring for the children. Although Orville was present in the home, he was in his bedroom with the door closed.

The conditions in the home were deplorable, and the children were unkempt and dirty. Leah had make up applied heavily to her face as if "she had gotten into that herself." Joseph, Jr. wore shorts soaked with urine which smelled and looked like "old urine." Joseph, Jr. had a bottle of sour milk from which he had been drinking. In the bottom of the bottle was a two inch long screw. Michael, in lieu of a diaper, wore an oversized t-shirt, which was urine soaked. Ms. Hollingsworth opined that Rebekah was not aware of the condition of the children, appeared lethargic, and was slurring her speech.

Nonetheless, Rebekah prepared Serenity for her doctor's appointment. As she changed Serenity's diaper, Ms. Hollingsworth observed that Serenity had severe diaper rash. Rebekah then prepared a bottle for Serenity. Ms. Hollingsworth took the bottle from Serenity because she observed a foreign object in the bottle which was later determined to be ground meat.

Because of the conditions in the children's home, Ms. Hollingsworth left the home to obtain a Department van to enable her to remove the children

from the home. After driving for a few minutes, she felt so apprehensive about leaving the children alone with Rebekah that she returned to the home and called the Department.

The Department sent Ms. Lynn Holly, an investigator with the Department, to prepare to move the children to shelter care. When she arrived at the home, she found that Michael and Joseph, Jr. were only partially dressed, that Leah's clothing was dirty and that there were feces on a kitchen counter. Ms. Hollingsworth showed Ms. Holly the bottles from which Joseph, Jr. and Serenity drank.

Due to conditions in the home and Rebekah's lack of sobriety, the Department removed all four children from the home. Pursuant to Maryland Code (2006) § 3-815(c) of the Courts and Judicial Proceedings Article,[3] on February 21, 2012, the Department filed a petition for shelter care in the Circuit Court for Caroline County. On February 23, 2012, the circuit court ordered that the children remain in shelter care.

In the petition, the Department described the condition in which Ms. Hollingsworth and Ms. Holly found the children's home on February 17th and noted that appellant has been "hesitant to engage with INFPS Services and has been minimally cooperative with services to date." The Department recommended that the circuit court continue shelter care, find that the Department had made reasonable efforts to ensure the safety of the children in their home, that the children remain in the care and custody of the Department until the Department could resolve the care and custody of the children.

On March 16, 2012, the Department filed petitions to have the children declared CINA. Shelter care was continued after a court hearing on March 27, 2012, and the children remained in shelter care throughout the proceedings in circuit court.

On March 23, 2012, the Department held a "plan of care" meeting with all parties to form an agreement to ensure that tasks necessary to ensure the children's safety while residing with family members. The Department referred Rebekah and appellant to counselors and therapists. The Department recommended a drug evaluation after appellant tested positive for barbiturates, finding appellant in possession of medications "long past" their expiration dates, that were not in the correct containers, and not consistent with her discharge documents; however, appellant refused.

Pursuant to § 3-816(a), the Department filed a study concerning matters "relevant to the disposition of the case" on April 16, 2012.[4] In that memorandum, the Department states that during visits with the children at which appellant was present, there were prolong conversations with Leah regarding when the children would return home and comments, such as "Don't know why those bad people came and took you from us." Leah came to these visitations smiling, but became more withdrawn as the visit continued. The Foster Mother reported to the Department that Leah refused to get into the car and would cry on the ride back to the foster home. By contrast, at an appointment from which appellant was absent, Abraham and Rebekah played with the children, and Leah's separation from Abraham and Rebekah was not an issue.

In the April 16th study, as a result of these developments, the Department recommended that the circuit court make reasonable efforts to reunite the children with Rebekah, Abraham, and Joseph, Sr. and terminate any orders granting appellant custody of Leah, Joseph, Jr. and Michael.

The parties appeared before the Master on May 8, 2012 and July 11, 2012 for an adjudicatory hearing as to whether the Department made reasonable efforts to avoid removing the children from the home. The Master found that the Department made "reasonable efforts to prevent placement of the children in the local Department's custody." Further, the Master stated that the Department "did perform above and beyond the call of duty. These, this family had a, had services made available to them that a number of people would want to have made available to them."

As part of the disposition hearing with regard to whether the circuit court should declare the children as CINA, the Department presented testimony as to events following the children's removal from appellant's home.

Ms. Stacy Ward, a case worker in the Department's Inter-Agency Family Preservation Unit testified as to the family's cooperation with the Department as follows:

> "Throughout the, throughout our home visits, there were issues in regards to making appointments, medications, potential substance abuse issues that were brought up and tested for and identified I believe previously, as well as during my involvement with them. That there were definitely mental health issues that needed to be addressed. And that was in regards to Rebekah and Joanne at that time.
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> * * *
>
> Ms. S. had indicated that she didn't feel that she needed to see anyone in regards to any substance abuse, because she didn't need any of that because her medications were prescribed by a physician."

Further, she stated that throughout her involvement with the family, appellant continued to deny that she had substance abuse issues and refused to take responsibility for the actions that resulted in the removal of the children from her home.

The Master submitted her written report to the circuit court on August 10, 2012. In the report, she noted "all of the incidents alleged by the Department occurred while the Respondents were either in the care and custody of their maternal grandmother or residing in her home." The Master described the events leading to the removal of the children on February 17, 2012 as follows:

> "[T]he Respondents were sheltered after workers from the Caroline County Inter-Agency Intensive Family Preservation (INFPS) Team assigned to work with the family arrived at their home between 10:30 a.m. and 10:45 a.m. and found them in the home of Jo Ann S. under conditions that were determined to be unsafe. The youngest child was wearing an oversized urine soaked tee shirt with no diaper, his eldest sister had on heavy make-up and reeked of urine and the youngest female child had a bottle of sour milk in her hand. The sour milk bottle contained what was eventually verified to be a piece of ground meat and this child had dried feces on her bottom as well as a severe diaper rash. The eldest boy had a bottle of sour milk that contained an object that was later determined to be a screw. His clothes were also thoroughly urine soaked. The children's custodian, Jo Ann S. was not in the home, the workers passed her on their way to the house. It was subsequently learned that she was on her way to a doctor's appointment. She denies seeing the workers.
>
> The INFPS team was at the home to transport Rebekah and one of the children to a doctor's appointment. They had attempted to reach someone at the house prior to coming, without success to remind them of the appointment. Rebekah and her stepfather, Orville S. were at the home when the team arrived. He was in his bedroom. Rebekah was up and about but clearly not one hundred percent lucid. She struggled to put clothes on one of the children. She was not able to explain why the children were in the condition they were in. She did attempt to offer several explanations but none that would indicate she was aware of what was going on around her. The house was in total disarray, had a horrific odor and one worker noticed that feces of some kind was on the kitchen counter. The workers initially left to report conditions but after consulting with their supervisors, they returned to ensure that the children would be safe until they were removed from the home.
>
> The family has been known to the Caroline County Department of Social Services since May of 2009. Throughout the Department's involvement there have been allegations of substance abuse and misuse-illegal and prescription. Both Michael and Serenity were born with substances in their system that connoted drug abuse or misuse. The family has entered into a series of service agreements with the Department, the last one being executed on January 19, 2012, less than a month before the children were removed. This agreement as well as the others required that Rebekah not be left alone with her children. Ms S. testified that she did not understand that she was not supposed to leave her daughter alone with her children. It is possible the confusion arose from the Department's agreement upon learning that Ms. S. was going to be hospitalized or was hospitalized, to provide intensive home care services while she was out of the home. That however does not excuse Ms. S. for leaving her grandchildren in a dangerous situation.
>
> Prior to the hospitalization the workers assigned to the case notice that outside the sphere of the influence of her mother Rebekah appeared to function better. This pattern was also noted while Ms. S. was hospitalized. However, upon Ms. S.'s return from the hospital Rebekah's functioning deteriorated as evidenced by the scenario described above. . . .

* * *

> [Ms. S.] has Spinal Stenosis and a Herniated Disc among other things that cause her to be in a great deal of pain and require her to take a lot of pain medication. Her exact medical regimen is not known to the Department because she has reported various medications including but not limited to Norvasc, Zocor, Lavasom, Clonidine, Adderex, Toradol and Benedryl. Some eight weeks after her hospitalization she tested positive for Barbiturates which she attributed to her hospitalization. After reviewing her medicines with her the Department determined that there was a conflict between what she reported previously and also noted outdated prescriptions. Ms. S.'s pain is so severe that her husband feared for her life while she was hospitalized. It is very apparent that the pain she suffers limits what she is able to do and that she relies upon several different medicines to alleviate that pain. These medicines have at times altered her speech and ability to navigate from a vertical position. It is also possible that these meds have a negative influence upon her thinking capabilities."

The Master made the following conclusions regarding the efforts the Department made to keep the children in appellant's home:

> "The Caroline County Department of Social Services demonstrated by a preponderance of the evidence that reasonable efforts had been made to prevent the children's removal from the home. They are not required however to move mountains or continuously spoon feed adults to cajole them into fulfilling their responsibilities. *In re Shirley B.,* 191 Md. App. 678 (2010). The Department's efforts in this case can be described as extraordinary. They have offered assistance to the entire family as follows:
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> 1. Provided Intensive Family Preservation Services that extended to actually assisting with cleaning up the family home.
>
> 2. Assisted with linking members of the family with other community services, such as Mental Health.
>
> 3. Provided guidance on obtaining permanent repairs to the family home.
>
> 4. Provided the children with developmental services to address their educational and cognitive deficiencies.
>
> 5. Located and obtained a Trauma Therapist for Ms. S. and Ms. B.
>
> 6. Arranged for Psychological Evaluations of Ms. S. and Ms. B. to better assist them with methods to improve their functioning as a family unit.
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> 7. Set up weekly visits with all of the family members with the children.
>
> 8. Provided counselors and therapists for the children as it was determined what they needed.
>
> 9. Provided extensive in-home services and directed the parents.
>
> 10. Encouraged the parents to take advantage of parenting classes and other resources available to parents in their position.
>
> The question is not whether what they did was reasonably calculated to preserve the family unit, but rather what more could they have done? They attempted with the efforts above as well as providing other services to deal with every faucet of the families *[sic]* existence in an effort to maintain the Respondents in their home as a family unit.
>
> These efforts were made even though Ms S. in her role as custodian/protector was clearly ambivalent about the Department, accepting her daughter's addiction and acknowledging that she had some responsibility for what happened."

With regard to the Department's petition to have the children declared CINA and the children's subsequent placement, the Master made the following conclusions:

> "The facts and circumstances in this case clearly demonstrate by a preponderance of the evidence that the Respondents are Children in Need of Assistance. Reasonable efforts have been made to maintain the family despite the family's continued resistance to structure as delineate in the most recent service agreement. Family members have missed visits, arrived late for visits, and arrived for visits appearing to be under the influence of some mind altering substances.

> Ms. S. now offers herself once again as an appropriate person to place the children with. While she has made efforts in cleaning up the family home so that it reaches the level of minimal acceptable standards; that in and of itself is simply not enough to place the Respondents in an environment where they could be permanently harmed. While Ms. S. is a relative she has not demonstrated throughout the life of the case that she is a responsible custodian. Section 5-534 of the Family Law Article states that If a Kinship parent is available the local department **may**, if it is in the best interest of the child place the child with that Kinship parent. This section or any other provision of the Annotated Code Maryland does not require placement with someone simply because they are a relative. Ms. S. has repeatedly subjected these children to conditions that give rise to neglect, refused needed services on their behalf and demonstrated a total lack of judgment where there well being is concerned. The Court of Special Appeals in *In re Andrew A.,* 149 Md. App. 412 [(2003)], made it abundantly clear that one's past record can be taken into account in these cases. What better predictor of the future than the past. Do we wait until one of these children or all of them is seriously or fatally injured before acting? Ms. S. may have good intentions but the facts speak for themeselves. It really is not necessary at this juncture to determine if she is mentally ill or suffering from some malady, the simple fact is that she was entrusted with the care of three of these children by the Circuit Court of Caroline County and the Caroline County Department of Social Services and she was not able to follow through. As a result for more than two years the Respondents have been in harms way."

The Master recommended that the circuit court declare the children CINA, rescind custody of Leah, Joseph, Jr., and Michael, and for the Department to pursue reunification with the children's biological parents.

Appellant filed exceptions, and the parties appeared before the circuit court on October 23, 2012. With regard to the Master's disposition findings, the circuit court stated that "some of the Master's written findings regarding Ms. S.'s medication use is not clear from the record — namely that she is presently on lots of pain meds, that her thinking capabilities have been compromised due to the medication and that she is 'vertical' lots of the time." Nonetheless, the circuit court agreed with the Master's finding that "narcotic abuse by Ms. S. was a present valid concern and has been a continuing valid concern." The circuit court ordered the Department to "develop a permanency plan with the first goal being the reunification of the children with their parents." If reunification proved to be impossible, "the Department must look to other relatives such as Ms. S. to provide the care for the children." Finally, the circuit court dismissed appellant as a party because she no longer had custody of the children, but, in doing so, noted that appellant would have a right to intervene should reunification with the parents fail. This timely appeal followed.

II.

In reviewing the decision of a circuit court, sitting as the juvenile court, the appellate court applies three different levels of review. First, when reviewing the circuit court's factual findings, we apply the clearly erroneous standard. *In re Shirley B.,* 419 Md. 1, 18 (2011). Second, if the circuit court erred as a matter of law, further proceedings will be necessary unless we determine that the error is harmless. *Id.* Finally, we review the circuit court's ultimate conclusion "founded upon sound legal principles and based upon factual findings that are not clearly erroneous" for an abuse of discretion. *Id.*

III.

Appellant presents four issues for this Court's consideration. We begin by addressing appellant's argument that the circuit court abused its discretion when it ruled that the Department made reasonable efforts to prevent removal of the children from the home. She argues that the children's removal was unfounded because the most recent safety plan did not require her to supervise Rebekah's care for the children and Rebekah was at home caring for the children at the time the Department removed the children.

In the case *sub judice,* there are three parties who filed appellee briefs for this Court's consideration: Counsel for the Minor Children, the Department, and Joseph, Sr. The Department and Joseph, Sr. argue that appellant has failed to preserve for our review the circuit court's conclusion that the Department made reasonable efforts to prevent the children's removal from appellant's home. Assuming *arguendo* that appellant did preserve this issue for our review, all appellees argue that the Department made reasonable efforts to

prevent the removal of the children from appellant's home because the Department's on-going involvement with the family and the deplorable conditions the Department found upon arriving at appellant's home on February 17th justified removal.

We find that appellant has preserved for our review whether the Department made reasonable efforts to prevent the removal of the children from their home. Section 3-807(c) states that a party "may file written exceptions to any or all of the master's findings, conclusions, and recommendations." *See also* Md. Rule 11-111(a)(2). The statute does not require that a party file exceptions to preserve any issue for review in this Court. *In re Levon A.,* 124 Md. App. 103, 121-22 (1998), *rev'd on other grounds,* 361 Md. 626 (2000) (not requiring that a party file exceptions to preserve an issue for review when the issue presented does not involve a question of fact). Because the issue presented to us, whether the circuit court abused its discretion in finding that the Department made reasonable efforts to prevent the removal of the children from their home is the circuit court's ultimate decision and does not involve a question of fact, appellant has preserved the issue for our review. *See in re Shirley B.,* 419 Md. at 18-19; *see also* Md. Rule 8-131(c).

As to the merits, we agree with appellees that the Department made reasonable efforts to keep the children in their home. We determine on a case-by-case basis, whether the Department has made reasonable efforts. *In re Shirley B.,* 419 Md. at 25. The Department is required to provide services to prevent the children's removal from their home to the extent services are available. *See id.* at 26 (discussing reasonable efforts in the context of termination of parental rights). In attempting to maintain the family unit, the Department's primary duty is "to protect the health and safety of the children." *In re Adoption/Guardianship of Reshawn H.,* 402 Md. 477, 501 (2007). This duty "cannot be cast aside if the parent, despite that assistance, remains unable or unwilling to provide appropriate care." *Id.*

During its involvement with the family, the Department offered a litany of services. The Department offered to help appellant and Rebekah track medication, assistance in cleaning and repairing the family home, money to ensure transportation to appointments, and referrals to mental health professionals. During its intervention, responsible adults did cooperate to some extent, but appellant and Rebekah made only minimal progress in addressing the Department's concerns. Furthermore, appellant has a history of resisting the Department's attempts to intervene.

Although the testimony before the Master did reveal appellant's absence from the home, her absence was not the sole, or even the primary, factor that led to the children's removal. The conditions the Department found in the home on February 17th were deplorable. The state in which the Department found the children is evidence that no adult took responsibility for their care on that morning. Further, appellant has a history of narcotics abuse so severe that she required hospitalization because she was unable to obtain sufficient quantities of medication. The Department's involvement with the family also shows evidence of past instances of neglect. It is clear that the Department made reasonable efforts to keep the children in their home.

IV.

We next turn to the circuit court's declaration of the children as CINA. Appellant argues that the Department did not present sufficient evidence from which the circuit court could declare the children CINA. Specifically, she argues that the circuit court's conclusion that her narcotics use was a "present valid concern" was clearly erroneous because the Department never confirmed with appellant's doctors the medication she was taking.

All appellees agree that the circuit court had sufficient evidence to find the children to be CINA. Counsel for the Minor Children argues that the conditions the Department found at appellant's home on February 17th were sufficient to find the children to be CINA and that any reference to appellant's narcotics abuse was superfluous. Both the Department and Joseph, Sr. argue that once the Department presented evidence of appellant's drug use, appellant had a burden to produce evidence to refute the Department's allegations. Further, the Department argues that appellant's narcotic abuse was not the sole basis for declaring the children to be CINA.

The circuit court's factual finding that appellant's narcotics use was a "present valid concern" is supported by substantial evidence contained in the record. The Department reported that on several occasions appellant tested positive for barbiturates weeks after she received narcotics at the hospital. Once the Department produces evidence indicating that an individual has used a controlled substance, the burden is on the individual to produce evidence to the contrary. *In re Adoption/Guardianship of Amber R.,* 417 Md. 701, 721-23 (2011). Appellant refused help in tracking her medications and was in possession of medication that her discharge papers from the hospital did not indicate she was suppose to have. Appellant did not cooperate with the Department's offer of drug counseling services or provide a credible explanation for why she tested positive for barbiturates. From this evidence, the circuit court could conclude that appellant's narcotics use was a "present valid concern."

Nonetheless, even if the circuit court's finding that appellant's narcotics use was a present valid concern is unsupported by substantial evidence, the circuit court did not abuse its discretion in declaring the children CINA. The record indicates that the children, all four years of age or younger, were totally dependent on adults for their care, lacked adequate supervision, lived in deplorable conditions, and were dirty and unkempt. The children were clearly in danger of being injured as a result of living in appellant's home. The adults in their lives neglected them routinely. The circuit court need not wait until one of the children was injured as a result of neglect to declare the children CINA. *In re Nathaniel A.,* 160 Md. App. 581, 596 (2005).

V.

We next turn to the circuit court's placement of the children in foster care after it declared them CINA. Section 3-819(b)(1) lists the actions a circuit court may take upon finding a child to be CINA as follows:

> "(b) In making a disposition on a CINA petition under this subtitle the court shall:
>
> * * *
>
> (iii) Subject to paragraph (2) of this subsection, find that the child is in need of assistance and:
>
> 1. Not change the child's custody status; or
>
> 2. Commit the child on the terms the court considers appropriate to the custody of:
>
> A. A parent;
>
> B. Subject to § 3-819.2 of this subtitle, a relative, or other individual; or
>
> C. A local department, the Department of Health and Mental Hygiene, or both, including designation of the type of facility where the child is to be placed.
>
> * * *
>
> (3) Unless good cause is shown, a court shall give priority to the child's relatives over nonrelatives when committing the child to the custody of an individual other than a parent."

Appellant argues that the circuit court should have placed the children in her care because she is a relative. She argues that the statute gives priority to placement with a relative over placement with the Department because placement with a relative is listed before placement with the Department in § 3-819(b)(1).

All appellees agree that the circuit court did not err when it placed the children in foster care. They argue that the placement options in § 3-819(b)(1) are not listed "in descending order of priority." The Department argues that appellant's proffered reading of § 3-819 raises constitutional concerns because it would give priority in the children's placement to her, a non-parent custodian, over the children's parents and that the circuit court, pursuant to § 3-819(b)(3), had good cause to place the children with a non-relative. We agree with the Department.

The cardinal rule of statutory interpretation is "to ascertain and carry out the real legislative intention." *TravCo Ins. Co. v. Williams,* 430 Md. 396, 406 (2013). Statutory interpretation begins with an examination of the plain language of the statute. *Bush v. Pub. Serv. Comm'n,* Sept. Term 2012, No. 32, slip op. at 4 (Md. Ct. Spec. App. May 30, 2013). In discerning the meaning of the text, we consider the statute in context of the relevant statutory scheme as a whole. *In re Stephen K.,* 289 Md. 294, 298 (1981); *Buckley v. Brethren Mut. Ins. Co.,* 207 Md. App. 574, 585 (2012). If the plain language of the statute is clear, we adopt the plain meaning and our inquiry ends. *See Thompkins v. Mortg. Lenders Network USA, Inc.,* 209 Md. App. 685, 697 (2013). Where more than one reading is possible, a construction "giving rise to doubts as to its constitutionality should be avoided if the language permits." *In re Roberto d.B.,* 399 Md. 267, 284 (2007).

In interpreting § 3-819, an examination of § 3-823(e), which directs the circuit court to formulate a permanency plan, is instructive. Section 3-823(e) states that in formulating a permanency plan the court may order "in descending order of priority: reunification with the parent or guardian, placement with a relative for adoption or custody and guardianship, . . . adoption by a nonrelative, custody and guardianship by a nonrelative . . . or another planned permanent living arrangement." Section 3-819 does not include language indicating that the circuit court should consider placement options "in descending order of priority."

If the General Assembly intended the circuit court to consider the placement options listed in § 3-819(b)(1) "in descending order of priority," the General Assembly would have included those words, as it did in § 3-823(e). This argument is particularly persuasive in this case because the current language at issue in these subsections was added to the Code as part of the same bill. 2005 Maryland Laws ch. 404, at 1874-80.

Further, appellant's suggested interpretation of § 3-819(b)(1) is problematic because it disregards the

constitutional right of parents to raise their children. In most cases, biological parents have the right to raise their children as they wish with minimal interference from the State, unless a court has declared the parent unfit or exceptional circumstances exist. *In re Ashley S.,* Sept. Term 2013, No. 4, slip op. at 1 (Md. Ct. App. May 30, 2013). Third parties, including grandparents, do not have an analogous right. *Koshko v. Haining,* 398 Md. 404, 429 (2007). Maintaining the child's custody status is listed first in § 3-819(b)(1). Under her suggested interpretation, appellant, who has custody of Leah, Joseph, Jr., and Michael, would have priority in placement over the children's parents, even though Rebekah, Abraham, and Joseph, Sr., absent the termination of their parental rights, have a constitutional right to raise their children as they see fit. We reject appellant's interpretation of § 3-819(b)(1).

While we reject appellant's suggested interpretation of § 3-819(b)(1), we recognize that "[u]nless good cause is shown, a court shall give priority to the child's relatives over nonrelatives when committing the child to the custody of an individual other than a parent." In this case, the circuit court did not err in placing the children in foster care. An individual's past history of neglect and refusal to cooperate with the Department are a good predictor of her future care of the children. *In re Andrew A., 149* Md. App. 412, 422 (2003). Appellant's narcotics addiction, refusal to cooperate with the Department, and demonstrated inability to care for the children constituted good cause for the court not to give her priority when considering where to place the children.

VI.

Finally, we turn to the circuit court's order vacating its prior orders granting appellant custody of Leah, Joseph, Jr., and Michael and appellant's dismissal as a party from the case. Appellant argues that the court erred in vacating orders granting her custody of Leah, Joseph, Jr., and Michael because it gave less weight to consent orders than other orders of the court when it stated as follows:

> "The final issue is whether JoAnn S.'s custodial interest should be rescinded. She urges that she be permitted to continue to participate as a party in these cases in light of the fact that she was the court-ordered custodian of the three children. Again the Court agrees with the Master's recommendation that Ms. S.'s custodial interest in the children be vacated at this time. While a review of the testimony and the other related court files indicates that she has had court-ordered custody of these children at various times in their short lives, these arrangement[s] were made with the consent of the parties and adopted as such by the Court. There were no contested evidentiary hearings where this Court was able to make a factual determination that either parent was unfit or that exceptional circumstances existed that required the children's best interests be served by granting custody [to] Ms. S."

She argues that the court prejudiced her in vacating her custodial rights because, since she no longer has custody of Leah, Joseph, Jr., and Michael, the Department is not required to work toward reunification with her.

All appellees agree that the circuit court exercised its authority properly when it vacated its prior orders granting appellant custody and dismissing appellant as a party. The Department and Joseph, Sr. argue that the circuit court modified its prior order properly while exercising its jurisdiction in a CINA case. Appellees note also that appellant is a non-parent custodian of the children and that the circuit court dismissed properly her from the case, since appellant no longer had custody of Leah, Joseph, Jr., and Michael. The Department and Joseph, Sr. argue that, even if the circuit court did err, appellant was not prejudiced by her removal as a party, because, her status as custodian of Leah, Joseph, Jr., and Michael does not entitled her to reunification services. We agree with the Department and Joseph, Sr.

A circuit court may set aside or modify an order when it exercises its jurisdiction over the custody of a child. Maryland Code (1984, 2006 Repl. Vol.) § 1-201(b)(4) of the Family Law Article. Consent orders reached via an agreement of the parties to resolve issues in a case have "the same force and effect as any other judgment, including judgments rendered after litigation." *Kent Island, LLC v. DiNapoli,* 430 Md. 348, 360 (2013).

In the case *sub judice*, the circuit court vacated the orders in which it granted appellant custody of Leah, Joseph, Jr., and Michael because of her demonstrated inability to care for and provide a suitable environment for the children. In reaching this conclusion, the circuit court considered the history of the Department's contact with the family over a two and a half year period.

In the portion of the circuit court's ruling appellant cites, the circuit court does not diminish the force of its prior orders because the parties consented to them. Rather, the circuit court acknowledged that, by accepting agreements of the parents with regard to custody on previous occasions, it complied with the

parent's wishes. On those occasions, their wishes were presumptively in the best interests of the children because the circuit court did not find any parent to be unfit or exceptional circumstances to exist. *Troxel v. Granville,* 530 U.S. 57, 68-69 (2000).

Further, that the previous orders were reached with the agreement of the parents without a finding that they were unfit is essential to the court's ultimate decision that the Department formulate a permanency plan with the goal of reunification with the children's biological parents. Until the court declared the children CINA, Rebekah, Abraham, and Joseph, Sr, had the right to raise their children as they saw fit with minimal interference from the State. *In re Adoption of Ta'Niya C.,* 417 Md. 90, 107 (2010). However, had the circuit court found previously, after an adjudicatory hearing, that one or more of the parents were unfit, that parent would not have the right to raise his or her children as he or she saw fit, and an order directing the Department to seek reunification with that parent would make little sense. *See* Maryland Code (1984, 2006 Repl. Vol) § 5-323(d)(2)(iv) of the Family Law Article (stating that the circuit court in terminating parental rights must consider whether additional services the Department would provide would led to a lasting parental relationship); *but see in re Adoption/Guardianship Nos. 11387, 11388,* 354 Md. 574, 593-94 (1999) (stating that when there is a delay in adoption proceedings a parent has a renewed legal interest in the raising her child).

By contrast, appellant, as a non-parent custodian, has no such right to raise Leah, Joseph, Jr., and Michael as she desires, nor a right to reunification services. *See Koshko*, 398 Md. at 429, 440; *see also* § 3-823(e)(1)(i) (stating that to the extent consistent with the best interests of the child, the circuit court shall determine the child's permanency plan which may be "reunification with a parent or guardian" without mentioning reunification with a "custodian").

Because the circuit court exercised properly its discretion in vacating its previous orders granting appellant custody of Leah, Joseph, Jr., and Michael, it exercised properly its discretion to dismiss appellant as a party to the CINA action. Non-parent custodians are necessary parties to CINA actions. *See* Section 3-801(u)(1)(iii). After the circuit court vacated its previous orders granting appellant custody of Leah, Joseph, Jr., and Michael, appellant was no longer a party as of right. Md. Rule 2-211(a)(1) (stating that joinder of a party is required "if in the persons absence complete relief cannot be accorded among those already parties"). Once the circuit court vacated orders granting appellant custody, she may participate in the case by intervening at the appropriate time. Md. Rule 11-122(b) (stating that a circuit court may allow appellant to intervene in the proceedings as an individual seeking custody or guardianship at the appropriate time).

For the reasons stated in this opinion, the circuit court did not err or abuse its discretion in finding that the Department made reasonable efforts to prevent the removal of the children from their home, declaring the children CINA, placing the children in foster care, or vacating its previous orders granting appellant custody of Leah, Joseph, Jr., and Michael.

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

FOOTNOTES

1. Because no court has granted custody of Serenity E. to appellant, the custody and placement of Serenity E. is not an issue in this appeal.

2. During the hearing before the Master, the safety plans were accepted into evidence through Ms. Cara Calloway, the supervisor of Child Protective Services in Caroline County.

3. All subsequent statutory citations shall be to Maryland Code (2006) of the Courts and Judicial Proceedings Article.

4. Maryland Code (2006) § 3-816(c) of the Courts and Judicial Proceedings Article provides that a report filed pursuant to Maryland Code (2006) § 3-819(a) of the Courts and Judicial Proceedings Article is admissible in a disposition hearing, but not an adjudicatory hearing. When the Department filed a child in need of assistance (CINA) petition, the circuit court is required typically to hold adjudicatory and disposition hearings. Maryland Code (2006) §§ 3-817(a), 3-819(a)(1) of the Courts and Judicial Proceedings Article. The Master referenced findings in the report in his ruling following the disposition hearing, but did not do so in his findings following the adjudicatory hearing.

Cite as 9 MFLM Supp. 51 (2013)

Adoption/guardianship: termination of parental rights: statutory factors

In Re: Adoption/Guardianship of Sierra M. and Alissa M.

No. 2134, September Term, 2012

Argued Before: Meredith, Kenney, James A., III (Ret'd, Specially Assigned), JJ. Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Meredith, J.

Filed: July 17, 2013. Unreported.

The record established that the trial court addressed all the FL §5-323(d) factors, and that its findings of fact — including those concerning appellant's mental health, her lack of contact with the children, her inability to care for them financially, her noncompliance with service agreements offered to her by DSS and the best interest of the children — were not clearly erroneous with respect to any material matter.

The Circuit Court for Harford County granted the petition filed by the Harford County Department of Social Services ("DSS"), appellee, to terminate the parental rights of Leanna M.[1] ("the mother"), appellant, with respect to her two daughters, Sierra M. and Alissa M. (collectively, "the children"). The children's father, Joseph M., Sr., did not contest DSS's petition. The court entered orders granting guardianship to DSS on August 17, 2012. The mother noted this appeal.

QUESTION PRESENTED

The mother seeks this Court's review of one issue, namely:

> Did the trial court err in terminating the mother's parental rights?

For the reasons stated below, we answer mother's question in the negative and affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

Sierra M. (born December 21, 2000) and Alissa M. (born March 20, 2004) are the biological children of Leanna M. and Joseph M., Sr. At the time of the children's births and for a majority of the time DSS was involved, the couple was married. The couple also had an older child, Joseph M. Jr. (aka "Joey"), born July 23, 1993, who was not a part of these proceedings due to his age. The couple separated permanently in October 2010, following a number of separations and reconciliations. The father consented to a termination of his parental rights ("TPR").[2]

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

DSS first became involved with the children in September 2008 following a series of events involving Sierra. On August 6, 2008, Ms. M. brought Sierra to the emergency room at Sinai Hospital in Baltimore, Maryland. Ms. M. asked the emergency room staff to call Dr. Joseph Wiley, a pediatric oncologist who had treated Sierra previously for an unrelated condition.[3] Dr. Wiley testified that Sierra presented with left facial weakness. After Dr. Wiley performed a spinal tap that revealed increased white blood cells in the spinal fluid, he diagnosed Sierra with Lyme's disease. Dr. Wiley worked with staff at Sinai Hospital to develop an appropriate treatment plan for Sierra.

Dr. Wiley testified that he spoke with Ms. M. several times about Sierra's need to follow up with a primary care physician.[4] Dr. Wiley estimated that he spoke with Ms. M. about obtaining a primary care pediatrician "probably almost every single time" he saw Ms. M., which he estimated to be approximately ten occasions. Ms. M., however, did not obtain a primary care physician, even though Dr. Wiley referred her to Dr. Steven Caplan, who was, in Dr. Wiley's estimation, a "premiere" pediatrician.

On August 8, 2008, treating staff at Sinai Hospital referred Sierra to Patricia Keegan,[5] a social worker at the hospital who worked with families relative to discharge plans and services. Ms. Keegan testified that Sierra required discharge planning because she would be leaving the hospital with a PICC line for the delivery of IV antibiotics.[6] Ms. Keegan stated that a home infusion company would change the dressing on the PICC line on a weekly basis, and she made the proper arrangements with Ms. M. Ms. Keegan also stressed the importance of follow-up appointments with a primary care physician, in this case Dr. Caplan. Ms. M. failed, however, to bring Sierra to the follow-up appointments with Dr. Caplan. Dr. Wiley testified that, after a few missed appointments, Dr. Caplan refused to see Ms. M. and Sierra.

After Ms. M. missed her first appointment with Dr. Caplan, Ms. Keegan called Ms. M.'s cell phone number. Ms. Keegan could not reach Ms. M., but she did get in touch with Marie L.-N., the children's maternal grandmother ("the grandmother"), on August 15, 2008. Ms. L.-N. explained that they had missed the appointment because of Ms. M.'s medical issues. Ms. Keegan asked Ms. L.-N. to have Ms. M. call her so that Ms. Keegan could refer her to another pediatrician. On August 21, Ms. Keegan spoke with Ms. M. about finding a pediatrician for Sierra. Ms. M. stated that she had not yet found a pediatrician. Ms. Keegan later spoke with Ms. M.'s insurance provider and learned that Sierra had an appointment for September 3, 2008, with a pediatrician, but someone in the family had called to cancel the appointment.

On September 4, 2008, Sierra was admitted to the emergency room at Sinai Hospital because the PICC line had become infected. Ms. Keegan learned that Sierra had not seen a pediatrician following her discharge from Sinai Hospital. Ms. Keegan filed a report with Child Protective Services ("CPS") because Ms. M. had failed to meet Sierra's medical needs.

Dr. Susan Lipton, a pediatrician at Sinai Hospital specializing in infectious diseases, saw Sierra on September 11, 2008. Ms. M. told Dr. Lipton that CPS informed her that she needed to obtain a primary care pediatrician. Dr. Lipton had scheduled a 15-minute visit for Sierra, but the doctor performed a complete exam lasting approximately two hours. Dr. Lipton testified that Ms. M. wanted Dr. Lipton to prescribe chloralhydrate or lorazepam to help Sierra sleep, but Dr. Lipton opted for clonodine because the former two drugs are addictive. Dr. Lipton recommended developing a bedtime routine for Sierra and referred Ms. M. to a neurologist and opthamologist for Sierra.

After this visit, Dr. Lipton reviewed Sierra's medical records. Dr. Lipton testified that she developed multiple concerns regarding Sierra and Ms. M.; the areas of concern included Sierra's behavior, Sierra's education, and Ms. M.'s behavior relative to Sierra. Dr. Lipton was concerned that Ms. M. may have a condition known as Munchausen by proxy. Dr. Lipton testified that, during her examination of Sierra, she focused on things that were healthy about Sierra, while Ms. M. highlighted all the unhealthy things about Sierra. Dr. Lipton described Munchausen syndrome as a condition in which someone who has had a serious illness or interaction with the medical system develops an unhealthy reliance on that support group. Dr. Lipton testified that someone with Munchausen syndrome may seek attention from the medical system, even when there are no health concerns. Dr. Lipton stated that someone could use another individual as a vehicle to see physicians, hence Munchausen by proxy. Dr. Lipton recorded her concerns in a recommendation letter to CPS.

Tore Taxdal, an employee with CPS, received Ms. Keegan's referral concerning Sierra M. As a result of the referral, Mr. Taxdal visited Ms. M.'s home and questioned her about Sierra's treatment and hospitalization. After Mr. Taxdal received Dr. Lipton's recommendation letter, Mr. Taxdal made another home visit to develop a safety plan with Ms. M. Mr. Taxdal also wanted Ms. M. to see a psychologist for an evaluation. On September 24, 2008, Mr. Taxdal visited the home, but Ms. M. would not allow Mr. Taxdal to enter. On September 29, Mr. Taxdal visited again to see the children. During this visit, Ms. M. made several complaints to Mr. Taxdal and requested another worker.

Based on a referral from DSS, on October 3, 2008, Ms. M. saw Dr. Nelson Bentley, a psychologist, for a psychological evaluation. Dr. Bentley was, however, unable to complete his evaluation during this visit because Ms. M. complained of migraine headaches, and Dr. Bentley did not believe it was appropriate to continue the evaluation under those circumstances. Despite the incomplete evaluation, Dr. Bentley made some observations about Ms. M. following this visit which lasted three hours. Dr. Bentley observed several "red flags" during his evaluation. Specifically, Dr. Bentley testified that Ms. M. entered the visit barely walking, stating that she was experiencing pain from an automobile accident in April 2008. Dr. Bentley noticed, however, that Ms. M. exhibited no signs of physical distress during the interview. When Dr. Bentley was about to start testing Ms. M., she complained of a migraine and said she could not see. After Dr. Bentley halted the evaluation, however, Ms. M. was argumentative and demanded that Dr. Bentley schedule another appointment around her schedule. Dr. Bentley overheard Ms. M. speak "very angrily" with her attorney concerning the evaluation. Dr. Bentley testified that Ms. M. barged into his office, still arguing, and appeared quite capable of walking quickly when she left.

Shortly after Ms. M. left Dr. Bentley's office, Dr. Bentley contacted CPS and expressed grave concerns as to the safety of the children. Based on Dr. Bentley's call and the decision of supervisors, Mr. Taxdal went to the home to take Sierra M., Alissa M., and Joey M. into care. Renee Little, a foster care intake worker at DSS, placed Sierra and Alissa with the B. family; Ms. Little stated that Joey wanted to be sent to a different foster home because he wanted a "break" from caring for his sisters. Ms. Little worked with Ms. M. and Ms. L.-N. to schedule visitations, facilitate services, enroll the children in public school,[7] and help Ms. M. understand why DSS removed the children from her care.

On October 17, 2008, Ms. M. returned to Dr. Bentley's office to complete the psychological evaluation. Dr. Bentley diagnosed Ms. M. with: factitious dis-

order not otherwise specified ("NOS")[8]; major depressive disorder; generalized anxiety disorder; and a personality disorder NOS with borderline, histrionic, and narcissistic traits. Dr. Bentley testified about Ms. M.'s personality disorder as follows:

> I guess I saw a few symptoms that – and again this also came up in the results of the testing. I saw some marked reactivity of her mood, just the way she responded and the way her mood would change rapidly. So I saw her affect as being quite unstable. Based on her history, I could sense there were some problems or history of unstable interpersonal relationships. So those kinds of factors would contribute to borderline traits. The histrionic traits I think were a little more pervasive and people who have histrionic personality disorders tend to seek out attention. They look to be the center of attention. They can be very dramatic, they exaggerate, and I kind of described some of the behaviors I saw earlier that lead me to some of those conclusions. Then again the narcissistic traits – just a tendency to have a sense of entitlement, to be self-focused. I saw a lot of that in Ms. M[.] and again my clinical impressions were confirmed by her responses on the personality test. Or supported by.

As to the factitious disorder, Dr. Bentley confirmed Dr. Lipton's observations concerning Munchausen syndrome and Munchausen by proxy, and described the condition:

> "Intentional production or feigning of physical or psychological signs or symptoms. The motivation for behavior is to assume the sick role. External incentives for behaviors such as economic gain, avoiding legal responsibility, or improving well-being as in malingering or absentents." These are the criteria. There are different types with predominantly psychological signs or symptoms with predominantly physical signs and symptoms or combined psychological and physical signs and symptoms.
>
> Then we have another category, factitious disorder [NOS], which can also include by proxy, which means that a person may feign or create symptoms for their child or somebody else for the same basic reasons, as a way of getting attention, getting secondary gain.[9]

In the evaluation report he prepared for DSS, Dr. Bentley recommended that Ms. M. not be immediately reunited with her children, but DSS should facilitate supervised visitation. Dr. Bentley testified that Ms. M. would have difficulty being a parent to the children, given her psychological problems.

Ms. Little attempted to develop a service agreement with Ms. M. concerning the children in November 2008, but Ms. M. asserted illness as a reason not to sign anything at that time. DSS facilitated weekly visitation between Ms. M. and the children, however. DSS also recommended that Ms. M. take a parenting class and continue psychological therapy. Ms. Little testified that Ms. M. was inconsistent during the visitations, and Ms. M. never provided documentation to Ms. Little demonstrating her attendance and/or completion of a parenting class or psychiatric therapy. As an example, Ms. Little recalled a visit on November 26 in which Ms. M. arrived late, and she argued with the foster mother in front of the children. After a visit on December 4, Ms. Little spoke with Ms. M. about her behavior toward the children; Ms. Little worried that Ms. M. was making Sierra feel worse and focusing on her illnesses, which was contrary to DSS's goals for Sierra. On December 8, 2008, Ms. Little met with Ms. M. to discuss a proposed service agreement, but Ms. M. refused to sign it. At a meeting on December 23, Ms. M. stated that she would not sign the service agreement because she disagreed with some of the wording in it; specifically, Ms. M. stated that she did not agree that she had "severe mental health issues."

Throughout early December 2008, DSS worked with Ms. L.-N. to place the children with her. Ms. Little testified that DSS worried that Ms. L.-N. would have difficulty enforcing boundaries for Ms. M. and the children. In mid-December, DSS placed the children with the grandmother, subject to some conditions. DSS would supervise any contact between Ms. M. and the children, and the children were to attend public school. Additionally, because Ms. M. had revealed that her cousin — Tonk L.[10] — had sexually abused her as a child, DSS wanted the children to have no contact with Tonk. On December 18, 2008, the court declared the children to be children in need of assistance ("CINA"). At the end of January 2009, Ms. Little transferred the case to Noel Francis and Aimee Hiteshew.

On January 22, 2009, DSS referred Sierra to Michelle Sayre, a licensed clinical social worker ("LCSW") for an evaluation. Ms. Sayre testified that Sierra presented with significant hyperactivity and defiance toward the grandmother. Ms. Sayre diagnosed Sierra with post traumatic stress disorder ("PTSD")

based on neglect in the home. Ms. Sayre referred Sierra to receive psychiatric therapy at the Villa Maria Clinic.

On January 28, 2009, Ms. Francis and Ms. Hiteshew took over the case from Ms. Little. Ms. Francis and Ms. Hiteshew worked in the kinship care unit of DSS, which works with families who have children placed out of the home with other family members. Ms. Francis testified that she had many concerns as to the children and Ms. M., namely Ms. M.'s refusal to sign a service agreement, the children's need for mental health treatment, and Sierra's school attendance. Ms. Francis presented a service agreement — the same service agreement drafted by Ms. Little — to Ms. M. three times before Ms. M. agreed to sign it on March 11, 2009. Ms. M. signed the service agreement at a court hearing for the change of placement of the children.

DSS sought a change of placement of the children because Ms. L.-N. was not abiding by the conditions. For example, Gregory Smith, an administrator with Harford County Public Schools, testified that Sierra had a 49% school attendance record during the period she was in the care of the grandmother.[11] Additionally, DSS learned that Ms. L.-N. had taken the children to see Ms. M. without any DSS supervision following a domestic violence incident in which Mr. M. had punched Ms. M. Ms. M. does not dispute the domestic violence incident, but she denies seeing the children in the hospital. Ms. Francis also stated that, during an unscheduled home visit, Tonk was present, but the children were not. Tonk's presence in the home nevertheless raised concerns for the children's safety. Furthermore, DSS learned that Ms. L.-N. was in financial straits, as she was some three months behind on rent.[12] Accordingly, DSS sought a change of placement for the children.

DSS removed the children from Ms. L.-N.'s care on February 27, 2009. DSS placed Sierra with the B. family again, but that family did not have room for Alissa. Accordingly, DSS placed Alissa with the G. family.

DSS continued to provide services — including weekly visitation — to Ms. M. in an effort to reunite her with the children. Ms. Francis testified that DSS abided by its obligations under a service agreement signed on March 26, 2009, but Ms. M. did not. Ms. M. was to participate in mental health treatment, but she failed to provide any documentation of attending this therapy. Ms. Francis testified that Ms. M. failed to undergo psychiatric treatment and demonstrated inappropriate behaviors in her interactions with others. Additionally, Ms. Francis noted that Ms. M. moved frequently during this time, and DSS routinely documented problems with each residence that would present safety concerns to the children.[13] Ms. Francis testified that Ms. M. interacted poorly with DSS and the foster parents:

> I had many concerns in my interaction with Ms. M[.] with her behavior, specifically yelling at me directly, hanging up on me on the phone, calling me a bitch, threatening me. She was threatening to the foster parents, yelling at the foster parents, specifically [Ms. B.], about incidental things like iced tea. Screaming at me that I needed to turn off the child support, that I needed to do that right away. Threatening to harm the foster parents, specifically [Ms. B.], making numerous comments about Ms. B[.] in front of the children saying that Ms. B[.] runs her home like a Nazi camp and that she's a dictator. All being said in front of the children. Yelling and screaming at the CASA worker. Making inappropriate discussions in the lobby, in the playroom.

Ms. Francis also noted:

> She completely ignored the rules during visitations.
>
> * * *
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> She would repeatedly discuss with the children about court. She would repeatedly discuss about that she was unsatisfied [with the children's attorney], that she was going to get them a new attorney. She repeatedly told, whenever she got angry at the foster parents, or me, or at Sierra, she would say to Sierra, "I'm going to remove you from Ms. B[.]'s home." And Sierra would start crying and begging and pleading, "Please don't take me away from Ms. B[.]" These were almost daily threats made to Sierra about having her removed from the foster home.

Ms. Francis testified that DSS terminated Sunday visits following an incident involving Alissa. On April 14, 2009, Mr. G. took Alissa to Kernan Hospital in Baltimore for dental surgery.[14] Initially, Ms. M. and Ms. L.-N. were allowed to be present at the hospital, see Alissa after the surgery, and drive her to the G. family's home following the procedure.[15] Immediately after the procedure, while Alissa was still recovering from general anesthesia, Donna Odell, a nurse at the hospital, brought Mr. G. back to see Alissa and go over the discharge instructions. Ms. Odell testified that she wanted to go over the discharge instructions with Mr. G. — the

person she understood to be the caretaker — before bringing Ms. M. and Ms. L.-N. back for Alissa's awakening. Ms. M. and Ms. L.-N. — wearing scrubs – barged into the hospital's post-care unit, however, and "were very disruptive." Ms. M. yelled at the medical staff and Mr. G. Ms. Odell testified that, when Alissa awoke, she "was very tearful, very upset. . . . There was an incredible amount of drama going on around the bedside. The mother was loud, the grandmother was loud, in spite of repeatedly being asked to quiet and settle down."

Mr. G. described events after Alissa awoke as follows:

> There was what appeared to me a cycle, a feedback cycle that started to go where Ms. M[.] was telling Alissa that, you know, I'm sorry you can't come home with us, which lead [sic] to a response from Alissa that was — well, initially in the time after the surgery Alissa's initial responses were not much of anything because she was still coming off the anesthesia. She wasn't really awake yet. But she started to get upset and then Ms. M[.] got more upset and then Alissa got more upset and then Ms. M[.] got more upset. They seemed — it seemed to escalate pretty quickly and it turned into a shouting match. It turned into a shouting match with hospital administration that was there, the discharge nurse who was trying to calm the situation by saying there are other patients here, we need to be quiet. The whole thing degenerated rapidly into shouting matches and there was an instance where Ms. M [.] was demanding that somebody be brought so Alissa could make a statement and that Alissa does not want to go home with him. There was — the anesthesiologist actually came in at one point and said, "Ms. M[.], this is a hospital, we don't take statements and we certainly don't take statements from five year olds that are just coming out from under general anesthesia."
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> * * *
>
> By the time I pulled up [in a vehicle to take Alissa home], Ms. M[.] was holding Alissa and placed her in the car and Alissa was absolutely frantic. She was in absolute hysterics, screaming and crying. Quite frankly, Ms. M[.] was egging her on.
>
> * * *
>
> She wasn't trying to calm her. She was saying "I know, I know." She wasn't responding with ways to calm her down. She was responding with – you know, it's hard to describe precisely because what Ms. M[.] would say is "you don't want to go home with him, no, you don't want to go home with him" and "you don't like Aaron," which is my son, "you don't like Aaron, he's not allowed to play with any of your toys." And Alissa would say "yes, he's not allowed to play with any of my toys." It was not a calming, soothing kind of activity. It was a winding up kind of — it appeared to me to be a winding up kind of activity. The response that was enlisted was definitely that it was becoming more and more agitated.

Ms. Francis testified that there were other ways in which Ms. M. failed to meet her obligations under the service agreement, as well. For example, of 68 visits scheduled with the children, Ms. M. was late to 21 and cancelled or failed to show for 15 of them.

Ms. M. also failed to provide evidence of employment to DSS, as she was required to do under the service agreement.[16] Ms. M. gave DSS a copy of a check in the amount of $700 for the period of one week in March 2009 in which Ms. M. claimed she was providing in-home care for a Ms. Bauers.[17] Ms. M. also provided several tax documents and bank statements to Ms. Francis, but these documents demonstrated only that Ms. M. had money in her bank account. Ms. M. claimed to operate a commercial cleaning business, but she did not provide any business or financial records to DSS.

Additionally, Ms. Francis noted that Ms. M. failed to provide documentation of her continuing participation in mental health treatment. Ms. M. initially provided some evidence demonstrating that she sought therapy with a Rosie Behr from August 2008 to February 2009, but Ms. M. did not provide evidence of continuing treatment.

Ms. M. asserted that she did provide documentation to Ms. Francis and even instituted a practice of having Ms. Francis initial documents to demonstrate that she received them. Ms. M. contended that DSS intentionally acted to thwart her efforts to reunite with the children. For example, Ms. M. testified that, at the end of a visit, Ms. Francis told her that she could not pray with her children, or give the children Christian jewelry. Ms. Francis stated that praying with the chil-

dren was acceptable, but she warned Ms. M. against whispering with the children or keeping the children beyond the time scheduled for visitation.

In May or June of 2009, DSS referred Sierra to Stephanie McMillan, an LCSW, for psychotherapy sessions. Ms. McMillan attempted to begin family therapy sessions with Sierra and Ms. M. in an effort to reunite the mother with Sierra. Ms. McMillan, however, stopped the family therapy sessions shortly after they began because she felt they were detrimental to Sierra: "Her mother [*i.e.,* Ms. M.] was not able to separate her own anger and upset at the situation so that she could focus on the relationship with her daughter." Ms. McMillan filed a report with DSS on November 23, 2009, documenting confrontations between Ms. M. and Sierra during therapy sessions as an example of harm to the child. Ms. McMillan continued to provide individual therapy to Sierra.

On August 3, 2009, the court appointed Mary Lou Clark to serve as a court-appointed special advocate ("CASA") for the children. Ms. Clark stated that Ms. M. provided health information to her so that Ms. Clark could monitor the children. Ms. Clark testified, however, that Ms. M.'s information did not "add[ ] up" because Ms. Clark observed healthy young girls, whereas Ms. M. conveyed to Ms. Clark an image of sickly children. Ms. Clark also referred to difficult interactions with Ms. M.

In October 2009, the G. family requested that Alissa be placed in another foster home. Mr. G. testified that, at a neighborhood party, he, his wife, and a neighbor discovered Alissa and a neighborhood boy engaged in mutual oral sex. DSS placed Alissa with the W. family in a treatment foster home and referred her to Caroline Garfield.

Ms. Garfield is a therapeutic foster care social worker for the Chesapeake region. She works with children deemed to have a higher level of need than other foster children. Ms. Garfield assisted in the supervision of visits between the children and Ms. M. Ms. Garfield described Ms. M.'s behavior at these visits as "inconsistent." Ms. Garfield estimated that Ms. M. acted inappropriately during the visits "half to three quarters" of the time. Ms. Garfield testified that, at times, Sierra was openly hostile to Ms. M. during the visits and occasionally refused to enter the visiting room. As to Alissa, Ms. Garfield testified that Alissa "made tremendous progress" with the W. family.

In February 2010, the Cecil County Department of Social Services referred Alissa to Rachel Glickman, a licensed clinical professional counselor ("LCPC"). Ms. Glickman provided therapy to Alissa on a weekly basis. Ms. Glickman diagnosed Alissa with attention deficit disorder ("ADD") and neglect. Ms. Glickman testified that Alissa was adjusting well to her foster family, and she recommended that visits with Ms. M. be suspended. DSS did, in fact, suspend visits between Ms. M. and Alissa in June 2010.

In April 2010, Ms. M. initiated therapy with Dr. Charito Quintero-Howard, a psychiatrist in Cockeysville, Maryland. Dr. Quintero-Howard diagnosed Ms. M. with major depression, PTSD, and generalized anxiety disorder. Dr. Quintero-Howard testified that she disagreed with Dr. Bentley's evaluation (which had been completed approximately a year and a half prior to initiation of treatment with Dr. Quintero-Howard). Dr. Quintero-Howard stated that factitious disorder cannot be diagnosed in a single visit. Additionally, she testified that Ms. M.'s prognosis for treatment is good, and would improve with medication and the resolution of her interaction with DSS. On cross-examination, however, Dr. Quintero-Howard admitted that she relied on a history of events as reported to her by Ms. M., Ms. L.-N., and Ms. M.'s lawyers. Dr. Quintero-Howard had also seen Ms. M. only three times in the eight months preceding trial, including the day before her testimony on February 17, 2012.

In June 2010, at the request of DSS, the court changed the permanency plan for the children from reunification to adoption. Ms. Francis agreed with the change, testifying that Ms. M. had failed to meet the goals of the service agreement, despite DSS's provision of services. When asked to describe Ms. M.'s progress during her time on the case, Ms. Francis stated: "No difference in the level of cooperation or communication. Very argumentative. Very up and down with her behavior. You know, one minute she could be crying, the next minute she could be screaming. Just emotions all over the place. Just a lot of demanding. Just an inability to control her behavior . . . ." Ms. M. did complete three parenting classes, but Ms. Francis noted that Ms. M. was unable to apply what she learned to her interactions with DSS or her children. Ms. Francis described a "systemic" problem. Accordingly, Ms. Francis transferred the case to Deborah DiEdoardo.[18]

Ms. DiEdoardo, an employee at DSS, took the case from Ms. Francis when the permanency plan was changed to adoption in June 2010. Ms. DiEdoardo testified that Ms. M. was uncooperative and never allowed Ms. DiEdoardo to visit any residence in which Ms. M. resided. Ms. DiEdoardo also testified that Ms. M. failed to meet her obligations under the applicable service agreement. For example, because Ms. M. was arrested for driving under the influence on October 28, 2010, DSS was concerned about alcohol abuse. Ms. M. never completed an alcohol evaluation that Ms. DiEdoardo asked for. Ms. M. asserts, however, that she underwent a substance abuse evaluation sometime in late October 2011.

In June 2010, Ms. M. began therapy sessions with Carol Barlow, a licensed professional counselor at Community Behavioral Services ("CBS"). Ms. Barlow testified about seeing Ms. M. on a weekly basis. Ms. Barlow diagnosed Ms. M. with PTSD due to her interactions with DSS and the removal of the children. Ms. Barlow testified that, despite her PTSD, Ms. M. could be a good parent to the children. Ms. Barlow admitted, however, that most of her information came from Ms. M. or Ms. L.-N., and Ms. M. failed to attend approximately 20% of her therapy sessions. Ms. Barlow testified that Ms. M. authorized her to provide DSS with documentation of these sessions, and Ms. Barlow did so.

During the course of DSS's interaction with the children, both girls made accusations of sexual abuse. In June 2010, Alissa alleged that Tonk had touched her in her vaginal area on top of her clothing. Alissa also reported that Ms. M. knew about the abuse but did nothing to punish Tonk. Ms. M. testified that she did not believe Alissa's allegations and believed that Alissa was imagining the entire thing. Tracy Stofko, a forensic investigator with the Harford County Child Advocacy Center ("Harford CAC"), interviewed Alissa concerning this allegation. Ms. Stofko testified that her partner in the investigation — Maryland State Police Trooper Michelle Workman — attempted to contact Tonk in order to interview him. Ms. M. agreed to bring Tonk to an interview, but this never occurred. Tonk had obtained an attorney who would not allow Harford CAC to interview him.[19] Accordingly, Harford CAC was unable to proceed further with this investigation, and the matter was dropped.

Sometime in November 2010, Sierra alleged that her brother Joey had sexually abused her. Ann Vorsteg, an employee with the Baltimore County Child Advocacy Center ("Baltimore CAC"), investigated. On November 30, 2010, Ms. Vorsteg interviewed Sierra, who disclosed that Joey touched her on top of her clothes on her vaginal area and buttocks. Ms. Vorsteg attempted to interview Ms. M. and/or Joey, but she was never able to do so. Accordingly, Ms. Vorsteg reported that Sierra's allegations were unsubstantiated, meaning that Baltimore CAC could neither affirm nor rule out Sierra's accusations. Nevertheless, Sierra's regular therapist at this time, Ms. McMillan, recommended that visits between Sierra and Ms. M. be suspended because of the sexual abuse allegations. DSS suspended visits between Ms. M. and Sierra in November 2010.

In November 2010, Sierra was again referred to Ms. Sayre for therapy sessions. Ms. Sayre testified that Sierra was a different child: "She was calm, there wasn't any indication of hyperactivity. She was easily engaged." Ms. Sayre testified that Sierra appeared to fare poorly following visits with Ms. M. Ultimately, Ms. Sayre concluded that Sierra loves her foster parents, and they had provided a good environment for Sierra. Indeed, Sierra told Ms. Sayre that she wanted to be adopted by the B. family.

Ms. DiEdoardo attempted to reinstitute visits between Ms. M. and the children, but Ms. DiEdoardo could not initially reach Ms. M. Ms. DiEdoardo testified that DSS sent a certified letter to Mr. M. and Ms. M. directing Ms. M. to contact DSS to schedule visits. Although Ms. M. signed for the letter, she never contacted Ms. DiEdoardo. Eventually, when Ms. DiEdoardo spoke with Ms. M. about visitation, Ms. M. stated that she did not want to sign another service agreement. Ms. DiEdoardo testified that this conversation was an example of Ms. M. putting her legal case or her own needs above the best interests of the children. In February 2011, DSS reinstituted visits between Ms. M. and Sierra, and Ms. M. visited Sierra on a weekly basis in February and March 2011. DSS again suspended visits, however, based on the advice of Sierra's therapist, Ms. Sayre.

The court initiated the TPR hearing on May 23, 2011. The court heard testimony in the case on twenty other days, finally concluding testimony on February 21, 2012. The parties introduced over 6,000 pages of documents into evidence, and forty witnesses testified.

In the summer of 2011, Ms. M. was ordered to bed rest by her physicians due to complications with a pregnancy. In August 2011, without notifying DSS, Ms. M. moved to Aiken, South Carolina, to live with her new boyfriend, Mark S.,[20] and his parents. Ms. DiEdoardo testified on December 5, 2011, that, since moving, Ms. M. had contacted her only twice regarding the children and had not visited the children since DSS suspended visits.

On September 11, 2011, Ms. M. gave birth to a son in South Carolina,[21] and the Aiken County Department of Social Services ("SC DSS") initially took the boy from Ms. M. at the hospital due to the open case in Maryland. The SC DSS files revealed that Ms. M. considers herself a permanent resident of South Carolina, that she has applied for public assistance in that state, that she has no job, and that she resides with Mr. S. — who is also unemployed — and his parents. The South Carolina records also included a November 6, 2011, psychological evaluation conducted by a Dr. Connie Stapleton, Ph.D. Dr. Stapleton listed depression, anxiety, and panic disorder as Ms. M.'s conditions. Contrary to Dr. Quintero-Howard's opinion, however, Dr. Stapleton wrote: "The fact that she needs this level of being medicated does not bode well in terms of being able to care for a child/children." Nevertheless, by order of the family law court in

South Carolina, entered March 9, 2012, SC DSS returned the baby boy to Ms. M's custody.

On February 17, 2012, Dr. Michael Bogrov, a psychiatrist at Sheppard Pratt in Towson, Maryland, testified as to Alissa's current condition. Dr. Bogrov stated that Alissa was admitted to the hospital on January 7, 2012, and stayed for ten days. Dr. Bogrov diagnosed Alissa with mood disorder NOS, attention deficit hyperactivity disorder ("ADHD"), and reactive attachment disorder ("RADS"). Dr. Bogrov testified that, for Alissa, the RADS diagnosis "means that attachments are complicated for her in that she can react again for very little reason . . . . She can be, on the one hand, overly sort of attached, involved, attention seeking; then, on the other hand, she can also be sort of withdrawn." Dr. Bogrov determined that Alissa's RADS originated with her care under Ms. M. Dr. Bogrov testified that in order for Alissa to improve, she needed stability and continuity.

Testimony concluded on February 21, 2012. On April 5, 2012, the court granted Ms. M.'s motion to supplement the record with the SC DSS records. On July 20, 2012, over two years after DSS had filed its petition to terminate Ms. M.'s parental rights in the children, the court granted DSS's petition. On August 17, the court issued orders granting guardianship to DSS for the children. Ms. M. filed a motion to alter or amend, which the court denied on November 8, 2012. Ms. M. then noted this appeal.

As noted above, only the mother appealed. The attorney for the minor children filed a brief asking this Court to affirm the judgment of the circuit court.

STANDARD OF REVIEW

Our review of a trial court's termination of parental rights invokes three different, but inter-related standards, explained by the Court of Appeals as follows:

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

In re Adoption of Ta'Niya C., 417 Md. 90, 100 (2010) (quoting *In re Adoption/Guardianship of Victor A.,* 386 Md. 288, 297 (2005)).

When a parent, such as Ms. M., seeks our review of the ultimate conclusion of the trial court to terminate the parent's rights, we will reverse only if we find an abuse of discretion. The Court of Appeals has defined an abuse of discretion as follows:

> "[T]here is 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 principles.' An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court[ ]' . . . or when the ruling is 'violative of fact and logic.'
>
> Questions within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts, and the decisions of such judges should be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.' In sum, to be reversed '[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."

Aventis Pasteur, Inc. v. Skevofilax, 396 Md. 405, 418-19 (2007) (quoting *Wilson v. John Crane, Inc.,* 385 Md. 185, 198-99 (2005)). This Court has noted that "'the greatest respect must be accorded [to] the opportunity the [trial court] had to see and hear the witnesses and to observe their appearance and demeanor.'" *In re Adoption/Guardianship of Harold H.,* 171 Md. App. 564, 570 (2006) (quoting *In re Adoption/Guardianship No. J970013,* 128 Md. App. 242, 248 (1999)).

Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 5-323 governs this case. FL § 5-323(b) states: "If, after consideration of factors as required in this section, a juvenile court finds by *clear and convincing evidence* that a parent is unfit to remain in a parental relationship," or "that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child," then the court may terminate the parental rights of the parent in that child. (Emphasis added.) FL § 5-323(d) lists the factors that a court must consider in determining whether or not to terminate the parental rights of a parent in the child and admonishes courts that "the primary consideration [is] the health and safety of the child . . . ." We have noted that FL § 5-323(d) "'does not require a trial court to

weigh any one statutory factor above all others. Rather, the court must view all relevant factors and consider them together.'" *In re Adoption/ Guardianship No. T98314013*, 133 Md. App. 401, 424 (2000) (quoting *In re Adoption/Guardianship No. 94339058,* 120 Md. App. 88, 105 (1998)).

The Court of Appeals has noted: "In TPR cases, a parent's right to custody of his or her children 'must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect.'" *In re Adoption/Guardianship of Amber R.,* 417 Md. 701, 709 (2011) (quoting *In re Adoption/Guardianship of Rashawn H.,* 402 Md. 477, 497 (2007)). Although we are mindful that reunification with the child's biological parent(s) is the presumptively best option, **"the child's best interest remains the 'transcendent standard in . . . TPR proceedings.'"** *In re Adoption of Cadence B.,* 417 Md. 146, 157 (2010) (quoting *Ta'Niya C., supra,* 417 Md. at 112) (emphasis added).

DISCUSSION

Ms. M. contends that the court abused its discretion in terminating her parental rights as to Sierra and Alissa, and she advances five arguments in support of this proposition: 1) that the court credited Dr. Bentley's testimony and discounted Dr. Quintero-Howard's diagnosis; 2) that the court cited a lack of contact with the children as a reason to terminate parental rights even though DSS prohibited such contact; 3) that the court erred in its consideration of Ms. M.'s ability to parent; 4) that Ms. M. complied with the service agreements; and 5) that the court did not consider the best interests of the children. DSS counters that the court had ample justification to terminate Ms. M.'s parental rights in the children. After reviewing the transcripts and the circuit court's opinion, we are satisfied that the court's factual findings were not clearly erroneous with respect to any material matter, the court properly applied the law, and the court's ultimate disposition was not an abuse of discretion.

Ms. M. contends that the court erred in its analysis of Dr. Quintero-Howard's testimony. Ms. M. contends that Dr. Quintero-Howard had treated Ms. M. more recently than Dr. Bentley, and, therefore, her diagnosis should have been given more weight than Dr. Bentley's. Ms. M. asserts that the court's statements discrediting Dr. Quintero-Howard's testimony demonstrate clearly erroneous fact finding.

In discussing this witness's testimony, the court noted: "Dr. [Quintero-]Howard's apparently rosy outlook for Ms. M[.] is contradicted by her prior diagnoses and evaluations at CBS and her testimony that her working diagnosis had been, and continues to be, major depression, [PTSD], and generalized anxiety disorder." Additionally, the court noted it had concerns about the persuasiveness of Dr. Quintero-Howard's testimony, such as Dr. Quintero-Howard's assertion that Ms. M. had made good progress because of the continuation of her marriage, even though the marriage to Mr. M. had, in fact, ended. We defer to the trial court's determinations as to the weight to be given Dr. Quintero-Howard's testimony vis-a-vis the other 39 witnesses and 6,000 pages of exhibits. The court heard the testimony and had the opportunity to observe both Dr. Quintero-Howard and Dr. Bentley on the stand. We also defer to the court's credibility judgments as to witnesses. *See Harold H., supra,* 171 M d. App. at 570.

With regard to any asserted error in the court's consideration of Ms. M.'s mental health, we perceive no clearly erroneous finding. The court heard testimony from no less than five mental health professionals — several of whom treated Ms. M. exclusively — and considered a plethora of documentary evidence concerning her psychological and psychiatric problems. Ultimately, the court determined: "There can be no doubt . . . that Ms. M[.] suffers from serious mental illness. . . . It is absolutely clear to me that her mental health issues ***have had, and will continue to have, a serious adverse effect on the children."*** (Emphasis added).

Next, Ms. M. criticizes the court's discussion of her lack of contact with the children. Ms. M. contends that DSS actively thwarted her attempts to maintain contact with the children and communicate with the foster parents. Ultimately, Ms. M. asserts, this should not have been a basis for the court's decision because DSS forbade contact between her and the children.

In our view, the court's statements which criticized the amount of contact between Ms. M. and her children were not materially in error. The court found significant the fact that Ms. M. traveled to South Carolina during the continuation of hearings on the TPR case without notifying DSS or the court of her whereabouts. On that point, the court stated:

> Ms. M[.] has [present tense] little, if any, contact with the girls. From a practical standpoint, she has in essence abandoned them by fleeing to South Carolina. Despite Ms. M[.]'s testimony that she went to South Carolina for a "better life," that is clearly not the case. I find as a fact that the evidence is overwhelming that Ms. M[.] went to South Carolina because she was convinced that if she had her new child in Maryland, the child would immediately be taken by DSS. . . .
>
> There is also absolutely no factual dispute that she did not notify DSS, or this court for that matter, of

her move to South Carolina. She has now been in South Carolina for several months and there is absolutely no evidence of her return to the State of Maryland. Apparently she believes that if the girls are returned to her, she will take them to South Carolina.

Ms. M[.] has no relationship and/or contact with the girls' foster parents nor has she made any attempt to do so either directly or through DSS. If she were so interested in the health and well being of the girls, I would have expected her to take the initiative in advising DSS about her move to South Carolina and to demonstrate her concerns. She has clearly abandoned the girls.

(Footnotes omitted). In support of this finding, Ms. DiEdoardo testified that, after moving to South Carolina, Ms. M. contacted DSS only twice by telephone to inquire about the girls and did not seek visitation. There was evidence that neither Ms. M. nor her attorney requested any visitation with the girls during the summer of 2011. The court also commented on the extent of contacts between Ms. M. and the children:

> Even preceding her move to South Carolina, the stopping and starting of visitation with the children had primarily to do with Ms. M[.]'s own conduct and the attempts of the various DSS workers to try to help.
>
> From what I know, Ms. M[.] has [present tense] no contact with the girls nor does she have any contact with their foster families. She has no contact with DSS workers and there is no evidence that she has made any attempt to follow the girls' progress or maintain communication with them. To the extent that Ms. M[.] blamed DSS for her lack of communication with the children, that is simply not the case. As noted, Ms. M[.]'s contact with the children has been the subject of ongoing battles ever since the children were determined to be CINA. The stopping and starting of visitation was primarily because of the actions of Ms. M[.] and her mother, Ms. L[.]-N[.]

In the context of the status as of the date of the court's ruling, the court's comments about Ms. M.'s recent actions and her lack of contact with the children were not clearly erroneous. Various DSS officials had testified as to the lack of recent communication from Ms. M. and her repeated incidents of refusing to cooperate with DSS.

Ms. M. next asserts that the court erred in its determination of Ms. M.'s ability to parent and provide for her children. Ms. M. contends that there was no evidence that she was ever unable to provide financially for the children, and she always maintained a safe home for the children. We disagree that the court's findings in this regard were clearly erroneous.

As to Ms. M's ability to provide for the children, the court found:

> [T]here is not a single shred of evidence that Ms. M [.] has done anything to contribute to the support of the girls nor is there a single shred of evidence that she might be able to do so in the future. Of course, poverty standing alone, does not provide sufficient justification to grant a TPR. Nevertheless, the ability of Ms. M[.] to provide some modicum of support for the children and/or her seeming ability to do so in the future is a factor that needs to be considered.
>
> On September 1, 2010, after almost two years, DSS, as they had a right to do, instituted a child support enforcement action in this court . . . . Ms. M[.] was served and did not respond. [The court] thereafter entered an Order of Default on November 10, 2010. A Master's hearing was set on February 17, 2011. Ms. M[.] failed to appear at the Master's hearing even though she had been notified at the last known address that she had given. The Master filed a Report and Recommendation on February 18, 2011, recommending that Ms. M [.] pay child support in the amount of $354.00 per month. No exceptions were taken and on March 10, 2011, [the court] signed an Order implementing the Master's recommendation. Ms. M[.] never responded. Thereafter, on September 20, 2011, the court issued a Summons for her to appear to show cause why she should not be held in contempt for failure to comply with the support Order. When she failed to respond to any of these efforts, a body attachment was authorized by [the court]. Ultimately, that body attachment was recalled by [the court]. Ms. M [.] knew that she had

failed to respond and also knew that a body attachment and Show Cause Order had been issued. By this time she was in South Carolina. Getting her to return from South Carolina to complete this case was a problem because of the existence of the attachment. In order to try to move the matter along, DSS took the extraordinary step in asking [the court] to recall the body attachment to remove another impediment to completion of this case. [The court] did so and DSS does not currently seek any financial support for the children from Ms. [M].

From the evidence produced, Ms. M[.] did two kinds of work during the relevant period. She claims to have worked as a [CNA] and she also claims to have worked cleaning houses. From time to time, DSS would ask Ms. M[.] to provide proof of employment. [Ms.] Francis testified that despite these requests, Ms. M[.] never provided any such proof. According to Ms. Francis, the only documentation Ms. M[.] ever produced was one check allegedly covering the period from March 14-20, 2009. Ms. M[.] did, however, complete a training program to become a nursing assistant. Her completion of the training program was verified by Ms. Florence Barclay who ran the program at the Baltimore Academy of Nursing Assistants. According to Ms. Barclay, however, Ms. M[.] did not complete the program the first go round and had to come back and re-enroll again. DSS, in fact, paid part of the costs for her to take the program and to sit for the required examination. According to the testimony of Ms. Barclay, Ms. M [.] actually never completed the program nor took the examination. Ms. Barclay testified that Ms. M[.] never picked up all the necessary documents to take the State examination and that from time to time, Ms. M[.] did not appear when she was supposed to. Ms. Barclay gave her one referral for an in-home care job. The customer, however, wanted a replacement. Ms. M[.] claims that DSS caused her to lose at least one job because DSS made a referral to the Baltimore County Department of Social Services. DSS, as a result of seeing a check, was concerned because Ms. M[.] showed [Ms. Francis] a check made payable for $700.00 for five days of caring for an individual identified as Ms. Bowers. Because of the concerns expressed, the Baltimore County Department of Services, at the request of DSS here, did an investigation. Ms. Bowers verified the payment to Ms. M[.] but also told Baltimore County that Ms. M[.] no longer provided care for her because Ms. M[.] had "a lot on her plate."

In his continuing attempt to verify Ms. M[.]'s financial status, counsel for DSS wrote to counsel for Ms. M[.] by letter of March 16, 2010. The letter speaks for itself. The only thing that Ms. M[.] ever provided to DSS was, in fact, a letter from Sun Trust Bank dated March 1, 2010, . . . simply advising deposits in the months of January and February. Tax return transcripts . . . shed no light on her earnings. They are only for the years 2006 and 2007. As pointed out by counsel for DSS in the letter of March 16, 2010, the documentation provided "makes analysis all but impossible." Ms. M[.]'s attempts to show some earnings are not very persuasive. [One example] is a check made payable to Ms. M[.] in the amount of $5,000.00 from an individual identified as Chorisa [S]. It says it is for medical care for 3 hours at $525.00 an hour. That does not amount to $5,000.00 and if that is her hourly rate, it is more than that charged by many major law firms. I would also note that the writer of the check has the same last name as her current boyfriend. The same thing can be said for [another document] which is simply a letter from Sun Trust Bank saying how much money was deposited in her account in the month of April [ ] 2010.

As noted elsewhere, *infra*, Ms. M[.] had a number of civil judgments entered against her in various courts in Baltimore County and also filed [for] bankruptcy.

There are two other incidents that reflect not only on Ms. M[.]'s finances, but also on her character. She apparently had a long time family acquaintance by the name of Brian Willner. Mr. Willner died on May 9, 2008. Somehow, Ms. M[.] was listed as his daughter. In fact, she had to admit that she was not his daughter. She was likewise listed as an interested person in Mr. Willner's Estate in the Baltimore County Orphans Court. Ms. M[.] could not explain satisfactorily why that was done. She knew it was done and there is no evidence that she ever took any steps to correct that misstatement. Her only explanation is that the late Mr. Willner may have "considered her his daughter."

* * *

At the present time, Ms. M[.] seems content to allow herself to be supported by Mr. S[.]'s parents with whom she lives. The only thing that comes close to any desire on her part to support herself, much less the children, was a statement that she hoped to work as a nursing assistant in South Carolina. She obviously cares very little about trying to help support the children and is obviously content to let other people do that.

* * *

The safety and health of the girls are critical in this case. . . . Other issues relating to their health and safety have to do with whether or not Ms. M[.] did or could provide adequate food, clothing, shelter and education for the children. Of course, as discussed *infra,* she is clearly financially unable to do so.

Prior to the time that the children were removed from Ms. M[.] she apparently attempted to "home school" them. After they were removed and placed in foster care, it was clearly determined that they were lagging behind in their educational progress. Ms. M[.] has no qualifications to home school the girls. Once, however, the girls were placed in foster care and over the period of time since then, their academic performance has tremendously improved. When the girls were at least initially placed with Ms. M[.]'s mother, Ms. L[.]-N[.], the children were not attending school as they were supposed to. The girls' problems at school were related by several witnesses including Rachel Glickman, Greg Smith, Renee Little, Mary Lou Clark, [Ms. B.] and Noel Francis.

During the course of the proceedings in this case, beginning with the initial CINA case, Ms. M[.] lived in several different residences. Almost all of them were found to be unacceptable after visitation and inspection by DSS personnel. In fact, two previous landlords testified about the conditions in the residences upon their vacation by Ms. M[.] and various members of her family. Her various residences includ[ed], for a period of time, a motel. Conditions in the residences were verified by Ms. Dietz, Mr. Paavola, Mr. Winter, and others who visited the various residences as a part of the CINA case including CASA volunteers. Suffice it to say, it is clear from the testimony of the witnesses that none of the various residences were suitable for the girls. Also, we know nothing about the living arrangements in South Carolina. All we really know is that Ms. M[.], her new son, her new son's father and his parents all live together. We also know that neither Ms. M[.] nor Mr. S[.] work. On the other hand, the girls with their respective foster parents have provided more than adequate homes for the children. DSS workers have maintained regular contact with the current foster parents and have monitored the girls' progress. The girls are getting regular medical treatment and counseling which they were not getting with Ms. M[.] or her mother. It goes without saying that the girls have adjusted very well to their current home, school and community environment. This includes being involved in activities outside the home such as sports.

* * *

There can be no doubt that based on the voluminous testimony in

> this case, that it would be in the best interest of the children for purposes of their safety, health and their provision of adequate food, clothing, shelter and education for this court to grant the Department's request.

(Parenthetical references omitted). Based on the evidence in the record, the court's findings as to Ms. M.'s ability to provide for the children were not clearly erroneous.

Ms. M. concedes that DSS provided reunification services to her, but Ms. M. contends that she met her obligations under the applicable service agreements and that DSS could have provided more services, as evidenced by a DSS-commissioned referral to the University of Massachusetts.

The court discussed DSS's provision of services and Ms. M.'s progress as follows:

> There were three actual Service Agreements dated October 3, 2008, March 4, 2009, and January 27, 2010. There were no others after that. With regard to DSS'[s] obligations under all three agreements, DSS provided the services it agreed to. When it came to further services after the Service Agreement of January 27, 2010, Ms. M[.] simply refused to cooperate with DSS on any new agreements. Despite her increasing lack of cooperation, DSS continued to provide services and assistance to her. Ms. L[.]-N[.] was out of the picture after the October 3, 2008[,] Service Agreement because the girls were removed from her care. The services and resources provided to Ms. M[.] included psychological counseling and mental health treatment, financial assistance, supervised visitation, medical care and treatment for the girls, parenting skill classes, employment assistance, anger management, visitation and family therapy.
>
> Mr. Taxdal of DSS was the first worker to try to assist Ms. M[.] He went to Ms. M[.]'s then home on September 5, 2008, and again on September 15 and 24, 2008. Ms. M[.] was not very cooperative but ultimately an initial safety plan was done for the girls. While Mr. Taxdal was involved in the case, it was "staffed" on five occasions and Mr. Taxdal made 23 phone calls to collateral contacts. Mr. Taxdal was also involved in making the referral to Dr. Bentley.
>
> Renee Little, another DSS worker, got involved in October 2008. She helped with placement and case management services. Ms. Little assisted with medical and dental services with the girls, parenting classes and other services. Ms. Little made herculean efforts to work with Ms. M[.] but to no avail. The case was ultimately transferred to workers Noel Francis and Aimee Hiteshew. Ms. Francis started working on the case in January of 2009. The goal at that time remained reunification. Ms. Francis gave us the history of the Service Agreements and pointed out that Ms. M[.] had refused to sign all of them except the March 4, 2009[,] agreement. Ms. M[.] did not comply with her obligations. For several months between August of 2008 and February of 2009, Ms. M[.] did not provide any proof of mental health treatment nor proof of actual employment. Despite Ms. M[.]'s increasing lack of cooperation, DSS was instrumental in getting family therapy started. DSS even provided financial assistance to Ms. M[.] to obtain nursing assistant training. As discussed, *infra,* the family therapy was terminated because it was not working primarily due to a lack of cooperation. Ms. Francis tried to assist by making appointments and arrangements for therapy and services to Ms. M[.], which were mostly unsuccessful due to Ms. M[.]'s lack of cooperation.
>
> Later the case was transferred to Deborah DiEd[o]ardo in June of 2010. Ms. DiEd[o]ardo was then an adoption social worker. Ms. DiEd[o]ardo had the same problems with Ms. M[.] as the other workers. Ms. DiEd[o]ardo tried to get Ms. M[.] to cooperate with DSS but to no avail. Ms. DiE d[o]ardo had multiple contacts with Ms. M[.] and her attorneys about continuing assistance. All she met was a stone wall. In fact, Ms. M[.] told Ms. DiEd[o]ardo that her lawyers told her not to cooperate with DSS. There is some support for this in that there is some correspondence from counsel to the effect that there would

be no cooperation unless DSS agreed to their visitation demands.

During the 21 days of trial, I heard testimony from eight different DSS workers who had been involved in one way or another with this case. In addition, the files in the CINA cases contained voluminous reports, services, progress and cooperation or lack thereof. Counsel for Ms. M[.] tried to convince me that most of the DSS workers were prejudiced against Ms. M[.] because she would "not play ball." Nothing could be further from the truth. I can't imagine a more difficult person with whom to deal than Ms. M[.] To be sure, there was some evidence of some isolated heated exchanges primarily between Ms. M[.] and Ms. Francis. It did not, however, affect the bottom line.

It is absolutely clear and without doubt that DSS provided every service that they could and then some. Every service Ms M[.] wanted she got. Some services that were offered to her she rejected. To be sure, Ms. M[.] did, from time to time, display flashes of cooperation, but, overall she did not hold up her end of the bargain.

(Parenthetical references om itted).

Ms. M. contends that DSS did not implement the recommendations from the University of Massachusetts report which Ms. Svrjcek alluded to in her testimony. Accordingly, Ms. M. asserts, DSS did not provide *all* of the services it could have. In our view, this is not a material discrepancy with the court's findings with respect to the sufficiency of the services offered to the mother by DSS. As the court recounted, several of the DSS workers involved in the case testified as to the service agreements, services provided by DSS, and Ms. M.'s failure to meet her obligations. We detect no material error in the court's finding that DSS made "Herculean" efforts to reunite Ms. M. with her children.

In her final assignment of error, Ms. M. contends that the court failed to properly consider the effect of terminating her parental rights with respect to the children. Specifically, she asserts that the court failed to assess the factors found in FL § 5-323(d)(4)(I), (iii), and (iv). These subsections require a court to consider: 1) the child's emotional ties towards the parent and siblings; 2) the child's feelings about severance; and 3) the impact of TPR on the parent-child relationship. Ms. M. contends that the court's failure to address these factors mandates reversal.

We disagree. As DSS notes in its brief:

> [T]he juvenile court is not required to provide a formulaic opinion or recitation of the statutory factors when its narrative demonstrates consideration of each factor. *See In re Adoption/Guardianship Nos. T97036005 & T98097021*, 358 Md. 1, 23 (2000) (the statute "does not require the court to make express findings on the record as to each 'required consideration' mandated by the statute, the record must reflect that the court considered each statutory factor").

Although the court may not have labeled each and every part of its opinion with a FL § 5-323(d) factor, the court expressly stated: **"I have considered each and every factor required by [FL § 5-323(d)]."** (Emphasis added). We further note that the court clearly focused on the best interests of the children, which is the paramount consideration in a TPR proceeding. Notably, after a factual summary of the children's medical and mental health issues, the court stated: "There is absolutely no evidence that Ms. M[.] would be capable of or even been [sic] interested in the girls' continuing mental health and medical needs." Accordingly, we are satisfied that the court addressed all of the FL § 5-323(d) factors, and we perceive no abuse of discretion in the court's ultimate conclusion.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The mother's name is spelled either "Leanna" or "LeAnna" in court records. For this opinion, we shall use the former spelling.

2. Father did not note an appeal, but, on May 30, 2013, the father filed a "line" in this Court supporting the mother's brief.

3. Dr. Wiley had examined Sierra shortly after her birth for a nevus on her scalp. Dr. Wiley feared that the nevus — which had the appearance of a large freckle — might lead to melanoma or melanosis. Dr. Wiley testified that initial tests came back negative for cancer. Ms. M. subsequently took Sierra to Florida in order to have another pediatric oncologist perform a biopsy on the nevus. During this procedure, doctors removed a "fairly sizable" portion of Sierra's scalp, which revealed no malignancy. Following this procedure, Ms. M. moved back to Maryland with Sierra. Dr. Wiley monitored Sierra's condition but performed no further procedures to treat the nevus.

4. Dr. Wiley testified that he had previously asked Ms. M. to find a primary care physician for Sierra because he could not be Sierra's primary pediatrician. Sometime in 2005, Ms. M. brought Sierra to Dr. Wiley because of Sierra's persistent headaches. Dr. Wiley, still concerned about the nevus, performed a spinal tap, which brought Sierra's spinal fluid pressure down to a normal level. Dr. Wiley testified that he told Ms. M. that Sierra's condition was not his specialty and that she should follow up with a neurologist or opthamologist. Dr. Wiley did not see Sierra for any follow up treatment regarding this condition.

5. Ms. Keegan's last name has since changed to Leonette.

6. Dr. Wiley stated that a PICC line is a peripherally inserted central use catheter. Dr. Wiley testified that the standard treatment for Lyme's disease is a course of antibiotics, administered via the PICC line. The PICC line allows patients to leave the hospital while still receiving the IV therapy, but PICC lines require monitoring and follow up with a primary care physician.

7. Prior to removal from the home, Ms. M. home schooled Sierra. There was testimony at trial that Sierra was behind her peers in academics, initially, as a result of the home-schooling. Ms. Little testified that DSS requires children to be enrolled in public school when they are in an at-home placement.

8. Dr. Bentley testified that "not otherwise specified" simply means that he believed Ms. M. had a factitious disorder, but she did not display all of the traits of that condition as found in the *Diagnostic and Statistical Manual of Mental Disorders-IV* ("DSM-IV").

9. Dr. Bentley quoted from the DSM-IV as part of his testimony.

10. Ms. M. testified that Tonk has a learning disability and is mentally handicapped. Tonk is one year younger than Ms. M.

11. Mr. Smith testified that Sierra's school attendance improved remarkably after her placement in foster care.

12. Mary Lou Dietz co-owned the rental unit occupied by Ms. M., Ms. L.-N., the children, and Tonk from January 2008 to May 2009. Ms. Dietz testified that when Ms. L.-N. vacated, she left the premises in bad condition, such that it cost approximately $6,000 to repair, and the rent was $11,000 in arrears.

13. There was testimony at trial as to Ms. M.'s changing living arrangements. Frank Winner, the manager of the La Quinta Inn in Rosedale, Maryland, testified that Ms. M. rented a room at the hotel at intermittent times from November 2010 to March 2011. Mr. Winner testified that he sometimes saw Ms. M. at the hotel with Mark S. Matt Paavola testified that he rented housing to Ms. M. and Mr. M. from February 2010 to February 2011. Mr. Paavola filed three ejectment actions in the District Court for Baltimore County, and when Ms. M. left in February 2011, she was four months in arrears on rent.

14. Ms. B. testified that most of Alissa's teeth were rotten when she came into her care in October 2008. Mr. G. stated that Alissa had had surgery appointments scheduled prior to being placed with the G. family, but she never had the procedure done.

15. There was some discussion at trial as to a change of plans that occurred the day prior to the procedure. Mr. G. testified that the original plan was for him to meet Ms. M. and Ms. L.-N. at a neutral location before the surgery, and Ms. M. and Ms. L.-N. would then drive Alissa to the hospital. When Mr. G. learned that Alissa had to be at the hospital at 6 a.m., however, he asked DSS to allow him to drive Alissa to the hospital to permit her as much time as possible to sleep. DSS agreed.

16. Florence Barclay, a registered nurse instructor, testified that Ms. M. twice enrolled in courses to become a certified nursing assistant ("CNA"). Ms. Barclay stated that Ms. M. attended classes but did not complete the program because she never took the proper paperwork to the Board of Nursing, nor took the exam to become a CNA, despite registering for it twice.

17. Ms. Bauers's name is sometimes spelled Bowers.

This check concerned Ms. Francis because the check was in Ms. M.'s handwriting. Ms. Francis, acting under orders from her supervisor, Jill Svrjcek, made an anonymous referral to Adult Protective Services ("APS") in Baltimore County on June 25, 2009. APS investigated and concluded that Ms. M. had provided in-home care to Ms. Bauers, Ms. Bauers was aware that Ms. M. had written the check, and that Ms. M. no longer worked for Ms. Bauers.

This incident caused Ms. M. to complain to the Maryland Department of Human Resources ("DHR") and seek Ms. Francis's removal from the case. Ms. Svrjcek, the Assistant Director for the Services Division at DSS, participated in the review of the case and testified that DHR approved of DSS's actions.

18. Ms. DiEdoardo's name is sometimes spelled DiEduardo by the parties.

19. There was testimony at trial that Tonk obtained legal representation at the behest of the grandmother or Ms. M.'s attorney.

20. Ms. M. admitted that Mr. S. would be reluctant to return to Maryland because he has two open criminal cases against him in this state.

21. Initially, Ms. M. claimed that Mr. M. was the father of the child, but later testing revealed that Mr. S. was the father.

NO TEXT

Cite as 9 MFLM Supp. 67 (2013)

CINA: substantial risk of harm: sufficiency of evidence

In Re: Shanice B.

No. 2389, September Term, 2012

Argued Before: Eyler, Deborah S., Berger, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 17, 2013. Unreported.

Ample evidence supported the finding that a newborn was a Child in Need of Assistance, including both parents' history regarding their older children, the father's failure to comply with random urinalysis testing, the parents' behavior at the hospital, and the mother's lack of any workable plan regarding where she and the newborn would be living or how she would provide for the newborn's day-to-day needs.

Ashley F., the appellant, challenges an order of the Circuit Court for Montgomery County, sitting as the juvenile court, finding that her daughter, Shanice B., is a Child in Need of Assistance ("CINA") and granting custody of her to the Montgomery County Department of Health and Human Services ("the Department"), the appellee, for placement in foster care.

Ms. F. poses two questions for review, which we have combined and rephrased as follows:

> Did the juvenile court abuse its discretion by determining that Shanice is a CINA and determining that Shanice should be placed in the physical custody of the Department not Ms. F.?

For the reasons that follow, we shall affirm the order of the juvenile court.

FACTS AND PROCEEDINGS

Introduction

Shanice B., born October 30, 2012, is the third child born to Ms. F. and Andre B. Her two older siblings are Amayia B. (born March 17, 2010), and Hope B. (born June 4, 2011).

This case is not the first instance of parental problems facing Ms. F. and Mr. B. On July 29, 2011, shortly after Hope's birth, the juvenile court issued a shelter care order for Hope and Amayia. On August 18, 2011, the Department filed CINA petitions for Amayia and Hope. The juvenile court held a hearing that same day. The court found that both children were neglected and the parents were unable or unwilling to attend properly to their needs. It found both children to be CINA. In addition, because the parents lacked stable housing, were involved in a turbulent domestic relationship, and Mr. B. was an admitted drug user, the juvenile court found that it would be contrary to the welfare of the children to return them home. It placed Amayia and Hope in the custody of the Department, with supervised visitation for the parents. The CINA histories of Hope and Amayia are germane to the instant case because, in determining that Shanice is a CINA and deciding to grant the Department custody of her for placement in foster care, the juvenile court considered facts related to the parents' treatment of Amayia and Hope.[1]

After finding Hope and Amayia to be CINA in August 2011, the juvenile court held periodic CINA review hearings for each child. These hearings took place on January 31, 2012, June 18, 2012, and October 23, 2012, shortly before Shanice's birth. After each hearing, the juvenile court ruled that Amayia and Hope continued to be CINA, and that each child should remain in the custody of the Department, with supervised visitation for the parents.

On October 30, 2012, Shanice B. was born at Shady Grove Hospital in Gaithersburg. Before she was discharged from the hospital, Shanice was removed from the legal and physical care of her parents. Then, on November 5, 2012, when she was discharged from the hospital, she was ordered by the juvenile court to be placed in shelter care.

An adjudicatory hearing, pursuant to Md. Code (1974, 2006 Repl. Vol., 2012 Supp.), section 3-803 of the Courts and Judicial Proceedings Article ("CJP"), took place on December 3 and 7, 2012. Through counsel, Shanice agreed with the Department's assertion that it would be unsafe for her to return to the custody of her parents. After making factual findings that placing newborn Shanice in the care of her parents would pose a danger to her, the juvenile court continued Shanice's shelter care order, pending disposition.

At the disposition hearing on December 27, 2012, pursuant to CJP section 3-819, the juvenile court ruled that Shanice is a CINA, and committed her

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

to the custody of the Department for placement in foster care. The juvenile court also ordered that the parents would have supervised visitation with Shanice. Ms. F. noted this appeal.

Family History Before Shanice's Birth

After Amayia was born in March 2010, she and Ms. F. were living at the home of Ms. L.E., Amayia's maternal grandmother (and Ms. F.'s mother). Several weeks later, at Ms. L.E.'s home, Mr. B. got into a physical fight with Ms. F.'s brothers. Ms. L.E. filed a petition for a protective order "as a result of the parents' combativeness and lack of resources to care for the child." A protective order was issued against Ms. F. Under the terms of the protective order, Ms. L.E. was granted custody of Amayia for one year. On January 6, 2011, Amayia was returned to the custody of Mr. B. At that point, Ms. F., Mr. B., and Amayia moved into a town house.

Early in January of 2011, the Department received a report expressing concern for Amayia's safety. After initial unsuccessful attempts to locate Ms. F. and Mr. B., the Department found them, with Amayia, toward the end of February 2011. At a meeting on February 24, 2011, Mr. B. denied child neglect, abuse, domestic violence, or criminal activity. He admitted to marijuana use and agreed to undergo evaluation and treatment for that.

During February and March 2011, the Department received several calls concerning the parents' turbulent relationship and the potential homelessness of Ms. F. Ms. F.'s sister reported that Mr. B. had thrown Ms. F. out of their town house several times, often late at night, while keeping Amayia with him. Ms. L.E. reported being fearful of Mr. B. On March 16, 2011, the Department held a Family Involvement Meeting ("FIM") to address the parents' lack of basic necessities to care for Amayia, Mr. B.'s marijuana use, and issues concerning housing and employment. An informal plan was established to place Amayia with Ms. H.-B., her paternal grandmother, but it only lasted for a few days.

On April 6, 2011, the Department learned from Emergency Services ("ES") that the parents had contacted ES to obtain housing, but had given conflicting accounts of who was caring for Amayia. While at the offices of ES, Mr. B. tested positive for marijuana and PCP. A second FIM took place on May 25, 2011, at which time Ms. F. reported that she was four months pregnant with her second child, but was sleeping on the floor at night. The parents agreed to a plan by which they would return Amayia to the care of Ms. L.E., and thereafter would have supervised visitation.

On June 4, 2011, Hope was born prematurely at 24 weeks' gestation, weighing only one pound. Ms. F. had not received any prenatal care, and Hope's birth was further complicated by a Chlamydia infection. As of July 28, 2011, Hope weighed only two pounds, was intubated, and required assistance with breathing. On September 27, 2011, Hope was transferred to the HSC Pediatric Center ("HSC"). On December 29, 2011, she was treated at the children's National Medical Center for the surgical implantation of a feeding tube. Hope was returned to HSC on January 3, 2012. On February 16, 2012, she was placed in a treatment foster home.

Although Ms. F. and Mr. B. had agreed to participate in various programs, acquire housing and employment, and comply with drug evaluation and testing (for Mr. B.) through the Department, they failed to do so by July 2011. At a Department office meeting in late July 2011, Mr. B. acted aggressively while staff members were explaining the steps necessary for the parents to regain custody of Hope and Amayia. Mr. B. became belligerent, yelling that the circumstances were "bullshit" and that the staff members were just "friends" with Ms. L.E. Mr. B.'s behavior was such that he was made to leave the Department's offices.

On July 28, 2011, the Department placed both Amayia and Hope in shelter care. The Department filed a CINA petition for both children on August 18, 2011, and a hearing took place that same day. Both parents and the children were represented by counsel.

The juvenile court entered adjudication and disposition orders finding Hope and Amayia to be CINA and committing them to the Department's custody. In the orders for both children, which were entered on August 19, 2011, the juvenile court found each child had been neglected and that the parents were unwilling or unable to give proper care and attention to the child's needs. In addition, pursuant to Rule 11-114 and CJP section 3-817, the allegations in the Department's CINA petition were "sustained by the Court by agreement of the parties," and the court found it to be contrary to the welfare of each child to be returned home. The court specifically noted the parents' lack of stable housing, their turbulent relationship, and Mr. B.'s admitted drug use. The court also found the Department had made reasonable efforts to return the children home, including two FIMs, multiple conferences with the parents and relatives, and referrals to the Addiction Services Coordination ("ASC") and crisis center.

On August 18, 2011, the juvenile court ordered each parent to obtain and maintain housing and a means of support, to attend Department-directed parenting classes, to participate in the Abused Person's Program ("APP"), and to undergo psychological evaluation and treatment. Mr. B. also was ordered to participate in drug evaluation and treatment at ASC and to follow all recommendations for treatment. Neither par-

ent noted an appeal of the juvenile court's CINA order regarding either Amayia or Hope.

Amayia was placed with Ms. L.E., and the original plan was that, after her release from the hospital, Hope also would be placed with Ms. L.E. Later, Ms. L.E. realized that, because of the complexity of Hope's special needs,[2] she would not be able to care for both children. As a result, the Department placed Hope in a treatment foster home.

After Amayia and Hope were found to be CINA, and before Shanice was born, the Department worked with the parents in an effort to reunify them with their children. The family's assigned social worker was Teresa Solomon, LCSW-C ("Licensed Certified Social Worker-Clinical"). [3]

As noted above, CINA review hearings for Amayia and Hope took place on January 31, June 18, and October 23, 2012. Throughout this time, the parents did not have stable, appropriate housing, and the Department often had difficulty obtaining a valid address for either parent. Even though the parents married on July 30, 2012, they did not live together. In July 2012, Ms. F. moved into a women's shelter, where she expected to stay after giving birth to Shanice.[4] Also in July 2012, Mr. B., who was living with his mother, began working full time at a Home Depot.

Neither parent successfully completed all of the services or programs ordered by the juvenile court, including parenting classes and referrals to the APP to address issues of domestic violence.[5] The parents often blamed their failure to attend on lack of transportation, even though the Department had provided them with cash and dozens of transportation tokens for travel purposes. The tokens frequently were used for inappropriate personal matters.

The parents' supervised visits with Amayia, who was living with Ms. L.E., were regular and appropriate. By contrast, their visits with Hope were sporadic, especially when she was in HSC. Because the parents failed to comprehend Hope's medical problems and requirements,[6] the Department concluded that parental resources were necessary to teach the parents how to safely care for their children. In December 2011, the parents refused to authorize the surgical placement of a feeding tube for Hope that would avoid damage to the cartilage in her nose. The Department had to obtain consent for this surgery from the juvenile court.

A psychological evaluation of Ms. F. revealed that because of her limited abilities and dependent style she had made little progress toward mastering the developmental tasks of adulthood,[7] and had "not achieved the stability necessary to provide the day-to-day care, structure, nurturing, and constructive discipline that children need to develop properly." A similar evaluation of Mr. B. revealed him to be likable but unwilling to accept any responsibility for the difficulties in which he found himself. "Over and over he preferred to blame Ms. F.'s mother and his own mother for his assorted misfortunes, rather than considering what his contribution to his various problems might have been." The doctor's report stated that Mr. B. had not achieved the personal and financial stability necessary to take on the responsibilities of child care.

At the CINA review hearing on October 23, 2012, one week before Shanice was born, the juvenile court found: "Neither Parent is able to care for the Children at this time." The court was especially concerned that Mr. B. had not enrolled or participated in the Abused Persons Program and that there were no random urinalysis test results. Nevertheless, the juvenile court denied requests by the Department and the children to change their permanency plans from reunification to adoption,[8] finding that, although the parents still had not fulfilled most of the requirements set forth in the August 2011 CINA order, they were slowly making progress, and had conducted their supervised visits in a "loving, caring way." The court warned the parents once again that the plan would change in the future if they did not "continue to make steady, consistent progress in following the Court's Order with a view toward reunification."

Events After Birth of Shanice on October 30, 2012

Shanice was born without complications at Shady Grove Hospital on October 30, 2012. She was a healthy baby, weighing six pounds, eight ounces. Ms. F., whose pregnancy had been considered high-risk because of Hope's premature birth, had received prenatal care at Shady Grove. In the structured hospital setting, no remarkable concerns were raised regarding Ms. F.'s care of Shanice.

Given the family's existing open cases, on November 1, 2012, Michelle Sears, LCSW- C,[9] the Department's Child Protective Services social worker, met with Ms. F. at the hospital, before Shanice's scheduled discharge. When Ms. Sears asked Ms. F. about her plan post-discharge, Ms. F. said she was expecting to take Shanice to a hotel, paid for by ES through the Department. Ms. Sears informed Ms. F. that ES would not fund a hotel. Ms. F. then advised Ms. Sears that she had no other housing resources, and that living with Mr. B. was not an option because he was living with his mother, where she was not able to go. During their conversation, Ms. Sears and Ms. F. agreed that Ms. F. and Shanice would remain in the hospital that night, and that all family members would attend a meeting at the Department's office the following morning to "sit down and try and come up with a plan for where Shanice and Ms. F. could go."

Upon leaving Shady Grove Hospital, Ms. F. informed the hospital's social worker, Michelle Taylor, that she and Shanice would reside in a family shelter. Ms. Taylor began contacting the shelter system to arrange transportation to a family shelter. Before Ms. F. and Shanice left the hospital, however, Mr. B. arrived and told Ms. Taylor that Ms. F. would not be going to a shelter because "they had a place to go" with him. When Ms. Taylor asked him for his address, he refused to provide it. She explained that, because the family had an open case, the Department needed to know where they would be living with the new baby. Mr. B. refused to accept that he had to reveal his new address and declined to do so.

Ms. Taylor contacted the Department's crisis center to inform them of Ms. F.'s change in plans for Shanice upon discharge. The on-call supervisor decided to place Shanice in shelter care, and forwarded the paperwork to Shady Grove.

When Mr. B. learned of the shelter care order, he "became quite angry, very verbally assertive." He questioned the authenticity of the shelter order, and raised his voice a number of times, going "round and round" with Ms. Taylor as she tried to explain the process to him regarding his open case, why she had asked for his new address, and why the order had been issued.

After Mr. B. had been at the hospital for close to two hours, officers with the Montgomery County Police Department arrived and intervened. The officers confirmed that the shelter order was valid, and repeatedly asked Mr. B. to leave the hospital, which he refused to do. Finally, the officers removed him forcibly.[10] During this entire encounter, Ms. F. was in bed, holding Shanice. When she would try to say anything, Mr. B. would tell her to let him handle it.

On November 2, 2012, a FIM was held at the Department, at which time the parents provided Mr. B's new address, 866 West Side Drive in Gaithersburg, and stated that that was where they wanted to live with Shanice. Ms. Sears testified that Ms. F. had not previously known about this address, which was a room in a basement apartment. The Department did not agree with this living option because of the parents' "noncompliance with some of the court orders, the domestic violence, the substance abuse, the inability to possibly care for an infant. . . ."

At a shelter care hearing on November 5, 2012, the juvenile court found the room the parents had proposed to live in lacked adequate facilities for Shanice. The court also found that, because of the emergency nature of the situation, including the young age of the child and the two siblings who already had been adjudicated CINA, returning Shanice to the care of her parents would be contrary to her welfare. The juvenile court ordered that Shanice would be placed in shelter care pending an adjudicatory hearing on December 3, 2012, with the parents having supervised visitation.

The adjudicatory hearing lasted two days, beginning on December 3 and continuing on December 7, 2012. After considering all of the testimony and documentary evidence,[11] the juvenile court used the Department's First Amended CINA Petition to mark the facts it was crediting. In addition, the court found that prior to the birth of Shanice "safety concerns existed because of the circumstances surrounding the births of the Child's older siblings and history of the Parents' inability to care for the older siblings"; that Ms. F. had resided at a shelter but was unable to state where she would live with the baby; that Mr. B. "refused to state the address where the family would be living after being repeatedly asked by the hospital," and "became disruptive at the hospital," having to be removed by police; that the parents' two older children were found to be CINA in August 2011 due to parental neglect, and both parents had failed to comply fully with services offered by the Department; that Mr. B. admittedly used marijuana and PCP, and was involved in a physical altercation in the home; that Ms. F. slept on the floor while four months pregnant with her second child; that the parents did not fully comply with the Abused Persons Program, as ordered in their other children's cases; that, although the parents were continuing to make some efforts toward complying with the court orders, they "both continue to deny any issues with domestic violence"; that the parents were denying having previously stipulated to the facts in the petitions of the older children's cases, notwithstanding that the records in the cases showed they had done so; and that Mr. B. had failed to undergo random urinalyses. Finally, the juvenile court found that, given

> that the Parents have been non-compliant with services, the proven history of neglect for the other siblings and in accordance with *In re William B.,* (73 Md. App. 68) 1987, the Court need not wait until an injury occurs to the infant Child before finding that she is neglected. The adjudicatory proceeding is preventative, not just remedial, and as such, the Court finds that the Child has been neglected and the parents are unable to give proper care and attention to the Child and her needs.

Shelter care was continued, with a reunification permanency plan, and disposition was continued until December 27, 2012.

During the disposition hearing, the juvenile court found Shanice to be a CINA, based on evidence

established during the adjudicatory hearing, ruling as follows:

> Okay. All right. With regard to the CINA finding, the Court did preside over the trial in this matter and certainly heard the testimony and received in evidence the Exhibits which included this court's orders with regard to the older siblings of Shanice who were found to be children in need of assistance over a year ago.
>
> And one of the things that stands out in the Court's mind in this proceeding is the fact that in this trial, both parents denied what they previously agreed to in the CINA finding for their older two children that any of those events took place.
>
> And I don't know if that was because this proceeding was going on or because they have gone down the path of revisionist history or exactly what took place.
>
> But that coupled with the fact that the father has not been consistent with his drug testing, that the parents have complied with services somewhat, but not as previously ordered for the older two siblings, and given the circumstances that developed at the hospital when this child was ready to be discharged, including the mother preparing to go to a hotel to then be guided to a shelter for herself and the infant and then the sudden change in that path to going to this residence where it was not at all clear that she was actually residing, all give the Court great concern **that at this particular time, this child is not in a position, notwithstanding the parents' desire to have her home, to be residing in the home until the Court is assured that all of its orders for her siblings as well as for this child has been complied with** so that the Court has an ability to at least understand that the parents have received all the services that the Court has ordered for their benefit as well as their collective family.
>
> So on that basis, the Court does find that Shanice B. is a child in need of assistance. . . .

(Emphasis added.) Through an amended adjudication and disposition order, the court determined that it would be contrary to the newborn child's welfare to be placed with her parents, and granted custody to the Department for placement in a foster home. The permanency plan was reunification with her parents, and both Ms. F. and Mr. B. were granted supervised visitation. As noted, Ms. F. filed the instant appeal.

DISCUSSION

We review the juvenile court's factual findings in a CINA case for clear error and its legal decisions *de novo*.

> An erroneous legal determination by the juvenile court will require further proceedings in the trial court unless the error is deemed to be harmless. The final conclusion of the juvenile court, when based on proper factual findings and correct legal principles, will stand unless the decision is a clear abuse of discretion.

In re Ashley S. & Caitlyn S., ___ Md. ___, No. 4, September Term 2013, Slip op. at 27 (filed May 30, 2013) (citing *In re Yve S.,* 373 Md. 551, 586 (2003)). An abuse of discretion occurs when "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Shirley B.,* 419 Md. 1, 19 (2011) (quoting *Yve S.,* 373 Md. at 583-84 (internal quotation marks omitted)); *Ashley S. & Caitlyn S.,* Slip op. at 27. "'Questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.'" *Shirley B.,* 419 Md. at 19 (quoting *Yve S.,* 373 Md. at 583).

Ms. F. contends the juvenile court erred in determining Shanice to be a CINA because there was no evidence of any abuse or neglect of Shanice; and that, even if the court properly adjudicated Shanice a CINA, it erred by refusing to place Shanice with her.

On the first point, Ms. F. argues that neither her conduct nor Mr. B.'s conduct at the hospital at the time of Shanice's birth, nor the allegations sustained against them in the CINA cases of their other two children, provided sufficient evidence for the juvenile court to conclude that Shanice would be abused or neglected by them in the future. The Department responds that there was overwhelming evidence that Shanice was at substantial risk of harm due to her parents' prior neglect of their two older children and their failure

and inability to adjust their circumstances to ensure Shanice's safety and well being.

A CINA is

> a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

CJP § 3-801(f). It is not necessary for a juvenile court to wait until a child suffers an actual injury before making a determination that a child has been neglected. *In re Nathaniel A.,* 160 Md. App. 581, 596 (2005).

> The parents' ability to care for the needs of one child is probative of their ability to care for other children in the family. . . .
>
> * * *
>
> The judge need not wait until the child suffers some injury before determining that he [or she] is neglected. This would be contrary to the purpose of the CINA statute. The purpose of the act is to protect children – not to wait for their injury. . . . .

In re William B., 73 Md. App. 68, 77-78 (1987). *See also In re Andrew A.,* 149 Md. App. 412, 419-20 (2003) (parent's neglect of older children demonstrated a substantial risk of harm to younger child); *In re Dustin T.,* 93 Md. App. 726, 735 (1992) (juvenile court must look at mother's track record in order to predict what her future treatment of new child will be).

Although Ms. F. does not challenge the factual findings made by the juvenile court at the adjudicatory hearing, which were based almost entirely upon the allegations made by the Department in its petition, she criticizes the court's dispositional determination, pursuant to CJP section 3-819(b), arguing that "Shanice should not have been found to be a CINA because the record does not reflect that she was at a substantial risk of harm."

In the instant case, there was a full record of evidence about the "substantial safety issues" regarding Shanice, as described above. In addition to the parents' history regarding their older children, both adjudicated CINA, the juvenile court considered Mr. B.'s failure to comply with random urinalysis testing, the parents' behavior at the hospital, and Ms. F.'s lack of any workable plan regarding where she and the newborn Shanice would be living and how she would be providing for Shanice's day-to-day needs. After at first deciding to live at a family shelter, Ms. F.'s plan quickly changed at the command of Mr. B., who, while Shanice still was in the hospital, refused to reveal the actual address where she would be living.

The juvenile court was required to evaluate the facts to determine whether Shanice was at substantial risk of harm based on the parents' prior neglect of her siblings and the parents' failure to give assurances of their ability to properly care for a newborn. The neglect of a sibling is relevant in determining whether a child is a CINA, *William B.,* 73 Md. App. at 77, and the parents' "past conduct is relevant to a consideration of [their] future conduct." *Dustin T.,* 93 Md. App. at 731. The record evidence supported the juvenile court's determination that Shanice was a CINA.

Ms. F.'s second, and related, argument is that the juvenile court erred by deciding that Shanice could not be placed in her physical custody. She maintains that, even if the court properly found Shanice to be a CINA, its "decision to place her in foster care, instead of the physical care of her mother was in error as there was no evidence to show that the mother's residence was unsuitable for her, or that living with her mother could cause her harm." The Department responds that the "juvenile court properly exercised its broad discretion in granting custody of newborn Shanice to the Department when the evidence demonstrated that she would be placed in substantial risk of harm if she were released to her mother's custody."

As noted, "[i]t has long been established that a parent's past conduct is relevant to a consideration of the parent's future conduct." *In re Adriana T.,* 208 Md. App. 545, 570 (2012).

> In making our decision as to the future of the infant at issue we should not gamble about that future. We can only judge the future by the past. Reliance upon past behavior as a basis for ascertaining the parent's present and future actions directly serves the purpose of the CINA statute.

Id. (citation s, alterations, and internal quotation marks omitted).

In juvenile cases, when there has been a proven history of past neglect, the juvenile court must decide properly whether there is sufficient evidence that further neglect is not likely to happen. *In re Adoption of Cadence B.,* 417 Md. 146, 157 (2010). The previously "neglectful parent shoulders the burden of proving that the past conduct will not likely be repeated." *Id.* Ms. F., pointing out that she and Mr. B. had purchased a crib and supplies for Shanice, argues that there was no evidence that their home was unsafe, and that the court was "simply waiting for an assurance that the child would never be

harmed." No such assurance is required, she argues; the court only must be capable of finding no likelihood of future neglect. *Id.* at 158.

As the Court of Appeals noted in *Yve S.:* "[I]t is within the sound discretion of the chancellor to award custody according to the exigencies of each case, and as our decisions indicate, a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion." 373 Md. at 585-86 (quoting *Davis v. Davis,* 280 Md. 119, 125 (1977)); *see also In re Mark M.,* 365 Md. 687, 707 (2001) (a juvenile court, "acting under the State's *parens patriae* authority, is in the unique position to marshal the applicable facts, assess the situation, and determine the correct means of fulfilling a child's best interests.").

In its ruling, the juvenile court explained that until Mr. B. completed the program to address his problem with engaging in domestic violence and successfully complied with random urinalysis testing, there was no way to ensure, given his history, that he was drug-free and therefore less likely to be physically abusive. At the time of disposition, the court did not have that assurance. "[G]iven the well-known difficulty of overcoming drug addiction, and the likelihood that addiction will persist if untreated, a court can infer that a parent will continue to abuse drugs unless he or she seeks treatment." *In re Adoption/Guardianship of Amber R.,* 417 Md. 701, 722 (2011). When birth parents have drug abuse problems, there is an increase in the risk of child abuse. *Id.* at 722. In addition, here, Mr. B. had demonstrated in the past a tendency to be physically abusive.

The juvenile court also heard expert testimony that Ms. F. required supervision in order to provide the day-to-day care a new born infant needs. The parental education programs the Department had required in its service agreement were necessary for Ms. F. to be able to safely care for Shanice. In addition, as noted, Mr. B. initially had refused to reveal the address at which he, Ms. F., and Shanice would be living. Without that information, and unless home inspections were permitted, the court could not reasonably find that Shanice would be safe from harm if placed with Ms. F.[12] Moreover, when Mr. B. finally revealed the address, it turned out to be a room that Ms. F. had known nothing about and that was an inadequate setting for Shanice to live.

For all these reasons, we conclude that the juvenile court did not err or abuse its discretion in declaring Shanice a CINA and ordering her to be in the custody of the Department for placement in foster care.

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

FOOTNOTES

1. Excerpts from the juvenile court record for Amayia's CINA proceedings were moved into evidence as the Department's Exhibit 2, and excerpts from the record of Hope's CINA proceeding were moved into evidence as the Department's Exhibit 3. The Department sought admission of these excerpts in accordance with *In re Faith H.,* 409 Md. 625, 645 (2009), Rule 5-803(b)(8), and the doctrine of *res judicata.* Ms. F. agreed that the records were authentic, in accordance with Rule 5-901.

2. When Hope was released from HSC on February 16, 2012, she required the use of a gastrointestinal tube, an oxygen machine, and a nebulizer. She also had to attend multiple physical, speech, and occupational therapy appointments.

3. In the hearings below, the parties stipulated that Ms. Solomon is an expert in the field of risk and safety assessment.

4. When she moved into the women's shelter, Ms. F. did not realize that she would not be able to stay there after Shanice was born, but would have to relocate to a family shelter.

5. As noted, Mr. B. also had been referred to substance abuse assessment and treatment. His attendance was limited. He submitted to eight negative urinalysis tests, but because they were not conducted randomly, but when Mr. B. decided to go in for testing, the Department found the results unacceptable.

6. For example, although Hope was being tube fed, Mr. B. inappropriately attempted to give her food and liquid by mouth, even after being told that her physical limitations prohibited him from doing so. Ms. Solomon testified that Mr. B. would "try and make her walk when this [wa]s a child that [wa]s not even turning over yet."

7. Evaluations of both Ms. F. and Mr. B. were performed by Dr. Linda Meade on October 20, 2011, and October 29, 2011, respectively.

8. Amayia was to be adopted by her maternal grandmother, Ms. L.E., and Hope was to be adopted by her therapeutic foster mother, with whom she started living on February 16, 2012, upon being discharged from HSC.

9. Ms. Sears testified as an expert social worker in safety and risks.

10. Mr. B. testified that one of the police officers "threw" him into a wall, then hit him for several minutes in the elevator, and that, after being escorted to the front door of the hospital, he went to the emergency room, where he was admitted for the night. No documentary evidence of this admission was produced.

11. Exhibits consisted of a progress report from Shady Grove, which documented the parents' behavior at the hospital, and excerpts from the CINA proceedings of Amayia and Hope.

12. Before the juvenile court, counsel for Shanice took the position that the factual findings of the court established that it "really [was] not safe" for Shanice to be placed with her parents and that it was in her best interest to be in a foster home until such time as the parents could demonstrate that their home was stable and secure for her.

NO TEXT

Cite as 9 MFLM Supp. 75 (2013)

Divorce: monetary award: alimony

Maria D. Benfield

v.

Gregory M. Benfield

No. 0234, September Term, 2012

Argued Before: Meredith, Hotten, Raker, Irma S., (Ret'd, Specially Assigned), JJ.

Opinion by Meredith, J.

Filed: July 18, 2013. Unreported.

The trial court erred in failing to set a payment schedule or benchmarks for payment of the monetary award, and in denying appellant indefinite alimony without first determining her maximum financial progress and what her Husband's earning capacity would be at that time.

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

On March 12, 2012, the Circuit Court for Baltimore County, ruling from the bench, granted an absolute divorce to Maria D. Benfield, appellant or "Wife," and Gregory M. Benfield, appellee or "Husband." On April 26, 2012, the court filed a written order reflecting its ruling. The court's order addressed multiple aspects of the divorce proceedings, as to which Wife seeks this Court's review of only certain provisions, namely: 1) the timetable for payment of the monetary award; 2) the court's failure to award indefinite alimony; 3) the award of child support; and 4) the court's failure to award her attorney's fees.

QUESTIONS PRESENTED

Wife presents five questions for our review:

I. Did the court err in failing to set a payment schedule for the monetary award owed by Mr. Benfield to Ms. Benfield?

II. Did the court err in not awarding indefinite alimony to Ms. Benfield?

III. Did the court err in not using the revised child support guidelines, effective October 1, 2010, to calculate child support?

IV. Did the court err in imputing income to Ms. Benfield in the child support calculation?

V. Did the court err in not granting an award of attorney's fees to Ms. Benfield?

For the reasons stated below, we remand for further proceedings regarding Wife's first and second questions. We answer Wife's remaining questions in the negative. Accordingly, we will remand the case to the trial court for further proceedings regarding the issues of the monetary award and indefinite alimony, and we will affirm the remainder of the rulings.

FACTS AND PROCEDURAL HISTORY

Husband and Wife married on November 18, 1994, in Arizona. The couple moved to Harford County in Maryland shortly after the wedding so that Husband could work in his family's business — Benfield Electric Company ("BECO"). Husband eventually became president of BECO and engaged in several other business ventures, including part-ownership of a brewery and management of rental properties. Wife has a college degree and is fluent in Spanish. After moving to Maryland, Wife worked as an assistant first grade teacher for English as a second language, an interpreter and administrative assistant at a law firm, and a Spanish teacher. Upon the birth of their first child, the parties agreed that Wife would leave the workforce and be a stay-at-home parent. The couple subsequently produced another child.

The couple began experiencing marital difficulties in 2008, and Wife filed a complaint for limited divorce in December of that year. Husband filed a counter complaint for limited divorce. The parties attempted to reconcile, however, and attended counseling. In July 2010, the couple decided to cease reconciliation efforts and separate. Husband moved out of the marital home. On February 17, 2011, Wife filed an amended complaint for absolute divorce, and Husband responded in kind on August 4, 2011.

The court began conducting a trial on August 15, 2011, and held hearings on August 16-17, November 8, and December 7 and 9, 2011. Trial concluded on March 12, 2012, at which time the court issued an oral ruling. The court reduced its judgment to a written

order of absolute divorce, which was filed on April 26, 2012. Wife timely noted this appeal to challenge certain provisions of the order.[1]

On appeal, Wife contends that the court erred in 1) failing to set up a payment plan for her monetary award; 2) erred in refusing to a ward her indefinite alimony; 3) erred in failing to properly calculate child support; and 4) erred in denying her request for attorney's fees. We will present additional facts below as necessary to place Wife's arguments in context.

DISCUSSION

In describing appellate review of divorce cases, this Court has remarked: "'Appellate courts will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings.'" *Digges v. Digges,* 126 Md. App. 361, 386 (1999) (quoting *Tracey v. Tracey,* 328 Md. 380, 385 (1992)).

A. The Marital Award

In the course of delivering its oral ruling, the court reviewed the marital property of the couple and granted Wife a marital award as follows: "Thus, a marital award of $1,027,650.00 is granted to Maria Benfield to balance the equities. Included in this award is the $260,000.00 BECO 401-K Plan which shall be divided pursuant to an Executed Qualified Domestic Relations Order." The court's written order elaborated on the monetary award:

> 10. Ms. Benfield is hereby granted a monetary award against Mr. Benfield in the total amount of One Million Twenty Seven Thousand Six Hundred Fifty Dollars ($1,027,650), as follows:
>
> (A) Pursuant to M d. Code Ann., Fam. Law § 8-205(a)(2)(i), an amount equal to fifty percent (50%) of Mr. Benfield's interest in the BECO 401(k) Plan as of March 12, 2012 shall be transferred and assigned to Ms. Benfield pursuant to a Qualified Domestic Relations Order to be prepared by Mr. Benfield and submitted to the Court. The amount to be transferred and assigned shall further include a *pro rata* share of earnings, gains and losses on Ms. Benfield's fifty percent (50%) interest for the period beginning March 13, 2012 until the valuation date immediately preceding the transfer and assignment to Ms. Benfield (the total to be transferred and assigned, including earnings, gains, and losses, being known as "Ms. Benfield's Share"). Each party shall fully cooperate in order to timely transfer and assign Ms. Benfield's Share to her. For purposes of satisfying the monetary award due by Mr. Benfield, the value of Ms. Benfield's Share shall be a credit against the total monetary award of One Million Twenty Seven Thousand Six Hundred Fifty Dollars ($1,027,650); and
>
> (B) The balance of the monetary award equal to (i) One Million Twenty Seven Thousand Six Hundred Fifty Dollars ($1,027,650), MINUS (ii) the value of Ms. Benfield's Share described in Paragraph 10A of this Judgment shall be paid by Mr. Benfield to Ms. Benfield.

Neither party challenges the court's classification or valuation of marital and non-marital assets, nor does either party contest the amount of the award. Rather, Wife contends that the court erred because it failed to set forth a payment plan or schedule for Husband's payment of the marital award. Wife argues that the court was required to include a payment plan for the marital award in its order, pursuant to Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 8-205(b). The statute directs courts to "determine the amount and the method of payment of a monetary award" after considering a non-exhaustive list of factors. *Id.* On its face, however, nothing in § 8-205(b) *requires* the creation and imposition of a payment plan for a marital award.

Preliminarily, Husband contends that this issue is not preserved for our review because Wife failed to file a post-judgment motion to alter or amend pursuant to Rule 2-534. But the court did grant a monetary award. Whether that award was properly granted is a question Wife is entitled to argue on appeal.

Wife contends that this Court's decision in *Caccamise v. Caccamise,* 130 Md. App. 505 (2000), supports her argument. In that case, the circuit court instituted a payment plan for a post-divorce marital award. *Id.* at 522. We vacated this judgment, stating: "The purpose of the award is to put the parties in roughly equal financial positions, and indeed the trial judge stated that was his intent. We fail to see how a payout of $30,000.00 per year over a fourteen year period with no interest accomplishes that goal." *Id.* Based on that ruling, Wife argues in the present case: "[I]f a [t]rial [c]ourt's decision to set an extended payment schedule with no interest was reversed, a decision wherein no payment schedule is set at all **must** be reversed."

This Court has noted that questions regarding payment terms of a monetary award are within the dis-

cretion of the trial judge: "Decisions regarding the method of payment of a monetary award lie within the sound discretion of the trial court." *Thacker v. Hale,* 146 Md. App. 203, 214 (2002) (citing *Grant v. Zich,* 53 Md. App. 610, 614 (1983)). "'The entire award can be made immediately due and payable or all or part of it can be made payable in the future.'" *Schaefer v. Cusack,* 124 Md. App. 288, 302 (1998) (quoting *Scott v. Scott,* 103 Md. App. 500, 517 (1995)). Despite this broad discretion, we agree with the Wife that it is important for the court to provide certainty whenever possible in its resolution of marital disputes. Without some sort of payment schedule, the parties cannot know for certain what is required for compliance with the court's award.

Husband's brief states: "The Judgment of Absolute Divorce requires the marital home to be sold and the balance of the monetary award to be paid. When the marital home is sold, [Husband] can pay the monetary award from his share of the proceeds and other assets he has available." In response in her reply brief, Wife describes this timetable for potential payment as "interesting." In deed, this "interesting" suggestion that Husband's ability to pay is contingent on the sale of the marital home may require some sort of flexibility in the schedule for payment. But that does not preclude the court from declaring what it finds to be a reasonable schedule for payment of the award.

Accordingly, pursuant to Maryland Rule 8-604(d)(1), we remand the case to allow the trial judge an opportunity to further consider this issue and establish an installment plan or set a deadline for payment of the monetary award. On remand, the court should provide the parties with objectively ascertainable benchmarks for compliance with the award.

B. Alimony

In its oral ruling, the court discussed at length its findings as to alimony, stating:[2]

> Alimony. Each party acknowledges that an award of alimony is appropriate in this case. The dispute lies in the amount in [sic] type, be it rehabilitative or indefinite. The purpose of alimony is to assist the economically dependent spouse in becoming either solely or partially self supporting. In making such a determination the Court is guided by Family Law Title 11 which sets forth twelve factors that must be considered in making a determination of alimony. These factors are the ability to become wholly or partially self supporting. The time needed to return to the work force. Standard of living during the marriage. The duration of the marriage. Contributions of the parties. Circumstances leading to divorce. The ages of the parties. Physical and mental health of the parties. Ability of the party from whom alimony is sought to pay the alimony. Any agreements between the parties. The financial needs of the parties and the affect [sic] if any on the eligibility for medical assistance earlier than necessary.
>
> Applying each of these factors to the facts in this case[,] the Court finds that Maria Benfield has the ability to become wholly or at least partially self supporting. She has a college degree from the University of Miami. She is bilingual in both English and Spanish. She has previous work experience as a professional translator and as a teacher at a private school. She has expressed an interest and a desire to return to the work force.
>
> With regard to the time to return to the work force Mrs. Benfield has testified that she would need about one year to get full accreditation to teach in all jurisdictions in Maryland. It was noted that accreditation is not needed to teach in some private schools. In the meantime opportunities exist to substitute teach or seek employment as a translator.
>
> The parties both describe a very high standard of living throughout the marriage. Their children attend private schools and have very active social calendars. There was testimony of the exchange of rather expensive gifts and parties for holidays and special occasions. The family belongs to country clubs. They lived in a spacious home and went on very nice vacations.
>
> The parties were married in 1994 and separated after fourteen years in 2008. After a brief reconciliation in 2009 when they separated for good on July the 9th of 2010, thus the duration of the marriage.
>
> With regard to the contributions of the parties, Gregory Benfield has overwhelmingly been the financial provider for the marriage, which [sic] Maria worked early in the marriage as

a teacher and a translator it was mutually decided that she would be a stay at home parent as the children came along. Gregory Benfield's income has steadily increased along with his rise in the family business as well as branching out into other business endeavors. Most recently Maria has expressed an interest in rejoining the work force. Both parties have shared an active role in raising the two children.

The circumstances leading to the divorce in this case are not a factor, as all agree to the voluntary separation. The ages of the parties are thus. Mr. Gregory Benfield is age forty, while Ms. Maria Benfield is age forty-one. There has been no evidence that has been introduced to suggest that either party is in anything other than excellent physical and/or mental health.

With regard to the ability of the, [sic] Mr. Benfield to pay alimony[,] the Court finds it is well within the means of Mr. Gregory Benfield to pay alimony to Maria Benfield. Based on the evidence and testimony presented to the Court[,] the Court finds that Gregory Benfield makes over $41,000.00 monthly. When factoring in salary, benefits and pre-requisites as President of [BECO] and other business ventures. Throughout the separation[,] he has continued to pay all household expenses for both his residence and that of Maria Benfield. This includes mortgage, utilities, tuition's [sic], memberships and $3,000.00 monthly directly to Mrs. Benfield. The testimony was that the monthly household expenses at Burwick [the marital home] were approximately $25,000.00 by them-self. As previously stated he is the president of a very successful family business. And the evidence suggest[s] that he has access to bonuses and distributions that he chooses not to avail himself of, but are otherwise available if needed.

There are no agreements between the parties relative to [ ] alimony or any other property distributions. With regard to the financial needs of the parties[,] they are substantial based mostly upon the lifestyle that they have established for themselves during the marriage. As per the marital award[,] Mrs. Benfield will be getting $1,027,650.00 as well as one half of the jointly titled assets, including the sale of the Burwick property. While a divorce changes the dynamics of the family structure[,] all connections to the prior lifestyle need not change, but obviously cannot be replicated. Each will have to find places to live for themselves and their children. There is every reason to expect Mr. Benfield's income to continue to rise, while it may take time for Mrs. Benfield to make the necessary adjustments to re-enter the work force and earn a suitable income.

Finally, there has been no evidence presented to suggest that eligibility for medical assistance is an issue at this, in this case at all.

Considering all of these factors[,] the Court finds that Gregory Benfield shall pay alimony to Maria Benfield in the amount of $5,000.00 per month for a period of five years unless she shall remarry or either shall die prior thereto. This award gives Maria Benfield the opportunity to adjust to her new lifestyle while pursuing whatever educational, vocational training necessary to re-enter the work force with the goal to either becom[ing] wholly or at least partially self supporting.

The Court does not consider this an indefinite alimony case, as I do not find that the disparity in income or lifestyle of the parties is unconscionable. While Gregory Benfield does earn a comfortable income, his assets are likewise are, are being, his assets are being substantially reduced pursuant to his obligation to pay the marital award. Likewise, Maria Benfield is receiving a substantial marital award and has substantial skills and qualifications to re-enter the work force at a marketable age. Five years of alimony gives her sufficient time to

reestablish herself and have a substantial career for years to come.

(Emphasis added).

On appeal, Wife does not directly challenge the amount awarded for rehabilitative alimony or the court's findings as to the statutory factors. Rather, she contends that the court should have granted her request for indefinite alimony. FL § 11-106(c) permits a court to award indefinite alimony if the court finds: 1) that the party seeking alimony will be unable to become self-supporting by reason of age or disability; *or* 2) "even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." Wife argues that the latter subsection applies in this case.

The Court of Appeals has remarked: "It is well settled in Maryland that the 'statutory scheme generally favors fixed-term or so-called rehabilitative alimony,' rather than indefinite alimony." *Solomon v. Solomon,* 383 Md. 176, 194 (2004) (quoting *Tracey, supra*, 328 Md. at 391). The Court explained: "Underlying Maryland's statutory preference is the conviction that 'the purpose of alimony is not to provide a lifetime pension, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently.'" *Id.* at 194-95 (quoting *Tracey, supra,* 328 Md. at 391).

We have identified two scenarios in which post-divorce standards of living will be considered unconscionable: 1) where "the disparity in the post-divorce standards of living of the parties [ ] work[s] a 'gross inequity'"; or 2) "a situation in which one spouse's standard of living is 'so inferior, qualitatively or quantitatively, to the standard of living of the other as to be morally unacceptable and shocking to the court.'" *Whittington v. Whittington,* 177 Md. App. 317, 339 (2007) (internal citations omitted).

Although we normally review a court's findings regarding disparity by applying the "clearly erroneous" standard of review, *Solomon, supra,* 383 Md. at 196 ("[t]he determination of whether an unconscionable disparity exists, according to [FL § 11-106(c)(2)], is a finding of fact, reviewed under a clearly erroneous standard."), we are unable to apply that standard in this case because the court did not provide findings on key points.

This Court has outlined the procedure that courts should undertake when analyzing whether an unconscionable disparity exists for purposes of applying FL § 11-106 (c)(2):

> **Whether there will be a post-divorce unconscionable disparity in the parties' standards of living usually begins with an examination of their respective earning capacities. In so doing, the court must "project[ ] forward in time to the point when the requesting spouse will have made maximum financial progress, and compar[e] the relative standards of living of the parties at that future time."**

Whittington, supra, 172 Md. App. at 338 (quoting *Simonds v. Simonds,* 165 Md. App. 591, 607 (2005)) (emphasis added); accord, *Francz v. Francz,* 157 Md. App. 676, 692 (2004). The court's ruling in this case did not provide findings on these points.

Wife argues that the court erred in denying her request for indefinite alimony, and she advances two theories in support of her argument. Wife contends that the court did not follow the proper procedural steps in determining her need for indefinite alimony. She asserts that the court did not project forward in time to ascertain her maximum financial progress at the point when Husband would cease paying alimony and then compare her standard of living at that time to Husband's. *See* Appellant's Br. at 9-10. Alternatively, she contends that Husband's income dwarfs hers — and will continue to outpace hers — to the point that a comparison of their standards of living should shock the conscience of a court. In support of this proposition, she cites cases in which this Court and the Court of Appeals found an unconscionable disparity based on such a comparison. Wife cites: *Boemio v. Boemio,* 414 Md. 118, 126, 994 A.2d 911 (2010); *Solomon v. Solomon,* 383 Md. 176, 857 A.2d 1109 (2004); *Blaine v. Blaine,* 336 Md. 49, 646 A.2 d 413 (1994); *Tracey v. Tracey,* 328 Md. 380, 393, 614 A.2d 590 (1992); *Innerbichler v. Innerbichler,* 132 Md. App. 207, 752 A.2d 291 (2000); *Digges v. Digges,* 126 Md. App. 361, 730 A.2d 202 (1999); *Caldwell v. Caldwell,* 103 Md. App. 452, 653 A.2d 994 (1995); *Melrod v. Melrod,* 83 Md. App. 180, 574 A.2d 1 (1990); *Broseus v. Broseus,* 82 Md. App. 183, 570 A.2d 874 (1990); *Bricker v. Bricker,* 78 Md. App. 570, 577, 554 A.2d 444 (1989); and *Kennedy v. Kennedy,* 55 Md. App. 299, 462 A.2d 1208 (1983).

Having reviewed the decision of the trial court in this case, we note that the court considered all of the FL § 11-106(b) factors and explained its findings as to each of them in determining the amount of rehabilitative alimony to award. In its consideration of whether or not to award indefinite alimony, however, the court did not make any finding as to Wife's maximum financial progress, nor did the court make any finding as to what the Husband's earning capacity will be at the point in time when Wife will have made maximum

financial progress. It follows, then, that the court did not compare the parties' future standards of living as of the time when Wife is projected to achieve maximum financial progress. Without making such a comparison, the court could not complete a proper analysis for making a finding of an unconscionable disparity or lack thereof. Clearly, there will be a large disparity in the parties' respective incomes. If the court concludes that, under the circumstances of this case, the disparity — despite its magnitude — is not unconscionable, the court should set forth the facts that support that conclusion in sufficient detail for us to review whether that conclusion is clearly erroneous. Accordingly, pursuant to Maryland Rule 8-604(d)(1), we will remand without affirming, reversing, or modifying the judgment on the issue of alimony in order to permit the trial court an opportunity to make these factual findings and render a decision on whether or not to award indefinite alimony.

C. Child Support

The court ordered Husband to pay $1,680 per month in child support for the couple's two minor daughters. Additionally, Husband agreed to continue paying for the children's educational and medical expenses. The court explained the order as follows:[3]

> With regard to child support, the Court finds that Gregory Benfield has a monthly income of $41,667.00. While Maria Benfield is not presently working[,] she has worked as a teacher at a private school and has been so far unsuccessful in becoming re-employed at that same school for a job that paid approximately $40,000.00 annually.
>
> The Court finds that she is at least capable of working in some capacity, possibly a substitute teacher, a teacher[']s aide, a part-time Spanish teacher, a translator, et cetera until fully employable. Thus the Court imputes income of $1,666.00 per month to Mrs. Benfield which is one half of the salary of the full time job she unsuccessfully sought.
>
> Gregory Benfield has been paying and has agreed to continue paying private school tuition's [sic] for the children, $3,193.00 monthly as well as their healthcare insurance, $380.00 monthly. . . .
>
> Thus applying the Child Support Guidelines it is calculated that Gregory Benfield's monthly child support obligation for [the children] is $1,680.00. The Court finds that Gregory Benfield has more than adequately provided this amount in child support in the best interest of the children throughout the separation.

Wife takes issue with the court's order in two respects: 1) she contends that the court applied the wrong guidelines; and 2) she argues that the court erred in imputing income to her. Husband points out that this is an "above-the-guidelines" case, and the guidelines do not apply.

FL § 12-204 governs child support payments. This Court has noted that awards made under the statute will be disturbed only if there is a clear abuse of discretion. *Frankel v. Frankel,* 165 Md. App. 553, 587 (2005). We have also noted, however, that the guidelines do not apply when the combined monthly incomes of the parents are above the maximum amount in the statute. *See id.* at 586-87 (citing *Smith v. Freeman,* 149 Md. App. 1, 19 (2002)). We explained: "'In above Guidelines situations, the statute confers discretion on the trial court to set the amount of child support.' In exercising that discretion, the court 'must balance the best interest and needs of the child with the parents' financial ability to meet those needs.'" *Id.* at 587 (internal citations omitted). The conceptual underpinnings of the guidelines, however, should still guide the circuit court. *See Malin v. Mininberg,* 153 Md. App. 358, 410-11 (2003). So long as the court employs a "'rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it,'" we will not disturb an above-the-guidelines child support award, absent an abuse of discretion. *Id.* at 410 (quoting *Anderson v. Anderson,* 117 Md. App. 474, 478 n.1 (1997), *vacated on other grounds,* 349 Md. 294 (1998)).

Effective October 2010, the General Assembly amended FL § 12-204 and enacted new guidelines for child support calculations, with a higher upper limit of applicability. Wife argues that the court erred when it utilized the pre-2010 child support guidelines to determine Husband's child support obligation, instead of the post-2010 guidelines. Although we agree with Wife's contention that the guidelines which took effect October 1, 2010, were the appropriate guidelines to be used in a calculation of child support on or after October 1, 2010, the present case remained an above-guidelines case, even after the October 2010 amendment. Because this was an above-the-guidelines case, the court had discretion to consider the needs of the children and Husband's ability to pay.

D. Imputed Income

Wife also contends that the court erred in imputing income to her in its determination of child support.

Ordinarily, courts may impute income to a voluntarily impoverished parent under FL § 12-204(b). As we have noted, however, the guidelines do not control the outcome in this case. Accordingly, the court was at liberty, in making its analysis, to impute income to Wife in this case if doing so was rational and not an abuse of discretion. *See Durkee v. Durkee,* 144 Md. App. 161, 187 (2002) (noting that imputation of income requires speculation, but the court will affirm if the imputation is rational and not an abuse of discretion). Furthermore, we have held that a circuit court does not need to explicitly make a finding of voluntary impoverishment on the record in order to impute income to a parent. *See Stull v. Stull,* 144 Md. App. 237, 246 (2002) (citing *Lapides v. Lapides,* 50 Md. App. 248, 252 (1981)). In light of Wife's testimony that she had pursued a teaching position with double the income the court imputed to her, it was not an abuse of discretion for the court to impute the modest amount of income to Wife.

Finding no abuse of discretion in the trial court's consideration and determination of child support in this case, we affirm the court's judgment in that regard.

E. Attorney's Fees

Wife seeks to have Husband pay approximately $130,000 in attorney's fees, pursuant to FL §§ 8-214 & 11-110. *See* Appellant's Br. at 31-32. The former section permits a court to award attorney's fees in divorce actions, generally, while the latter statute focuses on proceedings for alimony. The circuit court rejected Wife's request:

> Lastly, with regard to counsel fees. The Court finds that each party is well positioned to pay their respective counsel fees, expert fees and other cost[s] and fees for this litigation. They shall each come out of this situation with substantial assets from which to draw upon. As this was a voluntary separation situation[,] no burden or blame is assessed to either party for the instigation of this action. Likewise, neither party shall bear the sole financial obligation of paying for it.

The factors that a court considers when deciding whether or not to award attorney's fees are the same under either statute. A court should assess: 1) the financial resources and needs of both parties; and 2) whether there was substantial justification for the action. FL §§ 8-214(c) & 11-110(c). The circuit court's determination of whether or not to award attorney's fees is afforded great deference: "[T]his Court 'will not disturb the award unless that discretion was exercised arbitrarily or the judgment was clearly wrong.'" *Ridgeway v. Ridgeway,* 171 Md. App. 373, 386-87 (2006) (quoting *Broseus, supra*, 82 Md. App. at 200). *See also Simonds, supra,* 165 Md. App. at 616-17.

Wife has failed to persuade us that the circuit court abused its discretion in refusing to award her attorney's fees. The court considered the statutory factors and rejected Wife's request. Accordingly, we perceive no error in the judgment of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REMANDED IN PART. JUDGMENTS AS TO THE MARITAL AWARD AND ALIMONY REMANDED WITHOUT AFFIRMANCE OR REVERSAL FOR FURTHER PROCEEDINGS. OTHERWISE, THE JUDGMENTS OF THE CIRCUIT COURT ARE AFFIRMED. COSTS TO BE PAID HALF BY APPELLANT, HALF BY APPELLEE.

FOOTNOTES

1. On May 31, 2012, Husband noted a cross-appeal, but stated in his brief that "he is not pursuing it," and he did not challenge any part of the court's order in his brief. *See* Appellee's Br. at 2 n.3.

2. We have added paragraph breaks to this transcript excerpt.

3. Again, we have added paragraph breaks to the transcript excerpt.

NO TEXT

Cite as 9 MFLM Supp. 83 (2013)

Protective order: corporal punishment: failure to exercise discretion

Neely Daniel Johns
v.
Jennifer Lynn Moore

No. 2158, September Term, 2012

Argued Before: Krauser, C.J., Moylan, Charles E., Jr., (Ret'd, Specially Assigned) Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Moylan, J.

Filed: July 22, 2013. Unreported.

By ruling that the use of a belt is per se unreasonable corporal punishment, the trial court failed to consider whether 'the chastisement was moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances,' and therefore failed to exercise its discretion.

The parties agree that the appellant, Neely Daniel Johns, struck his thirteen-year-old son, William, with a belt on November 4, 2012. In response, the appellee, Jennifer Lynn Moore, now known as Jennifer Lynn Teets, filed a petition for a protective order in the Circuit Court for Carroll County. The question before us in this appeal is whether the circuit court abused its discretion in finding that Mr. Johns's actions exceeded the scope of "reasonable corporal punishment" permitted by Md. Code (1984, 2006 Repl. Vol.), § 4-501(b)(2) of the Family Law Article ("FL"). We find that the court failed to exercise its discretion, and so we shall vacate the court's order and remand for further proceedings.

Facts and Proceedings

Mr. Johns and Ms. Teets were married and had two children. William was born in 1999 and Clayton was born in 2001. The parties separated sometime around the time of Clayton's birth and were divorced in the Circuit Court for Frederick County.[1] Although Ms. Teets was originallyawarded primary custody of the children, she became unable to care for them due to a medical condition, and custody was reassigned to Mr. Johns. Mr. Johns was the custodial parent at the time of the events giving rise to this appeal.

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

According to William, he and his brother, Clayton, were at their father's house on Sunday, November 4, 2012. William and Clayton were in the living room with some other children, including their half-brother, seven-year-old Daniel, trying to decide what to watch on television. An argument ensued and William was sent to his bedroom. Daniel followed William to the bedroom. William was "frustrated" and "angry," and he sent Daniel away. At a hearing on November 30, 2012, William gave the following testimony about what happened after Daniel left:

> [WILLIAM]: ... Dad came up and I stood up because it looked like he was about to slap me. So, I put my arms up like this to try to stop him from getting me from the sides. He tried to do that a couple of times.
>
> [MS. TEETS'S COUNSEL]: Tried to do what?
>
> [WILLIAM]: Slap me in the face.
>
> [MS. TEETS'S COUNSEL]: Okay.
>
> [WILLIAM]: A couple of times. So then what happened was he went back downstairs and he came back upstairs with a belt. And he had it folded in half. And he said to turn around. And you need to get what you are supposed to deserve. I said no, I don't want to. I don't want that. And so, he said it again, and I said no. So, then he tried to get it to go around me but I kept blocking it. I think I blocked it with my arm maybe three times. Lifted my legs four times maybe, kind of jumped over it. And then one time he got me in my thigh, my right thigh. And then he stopped and sat down. And we started talking and he eventually told me to leave the house. Find a place to calm down. Come back once you have not been angry or chilled out.

William sustained three bruises on his arms and one on his leg. William recalled that he had been disci-

plined with a belt four other times, "give or take," the last time in August 2012. William explained that he was afraid of his father,

> [b]ecause if you see a man like him coming at you with a belt folded with a raging face, I think anyone being the age of me, above or below, would be startled and/or scared.

William acknowledged that he and other family members had been to about eight sessions of family therapy because he had been "picking on Daniel." William's relationship with Daniel was one of the topics William and his father discussed on November 4. Specifically, William recalled his father telling him that

> he's having trouble trying to figure out what to do to try to get [William] to stop picking on [Daniel] because he said that it needs to stop and it's unacceptable.

Heather Mackie, William's math teacher, noticed "odd" bruising on William's arm at some point in "the beginning of November." When she asked him how he got it, he replied that his father had hit him with a belt. Ms. Mackie reported it to the school counselor, as she was required to do. Ms. Mackie was present when William discussed the incident with the counselor. William explained that he had been hit with a belt in the past for lying, but that this time he was hit for picking on one of his siblings.

Donte Abron, a caseworker with the Carroll County Department of Social Services, investigated by interviewing Mr. Johns, William, and Clayton, on November 26, 2012. Mr. Abron summarized these interviews in a written report. All three interviews were consistent with William's November 30 testimony.[2] At the time of the November 30 hearing, Mr. Abron had not yet concluded his investigation. Mr. Abron also remembered investigating Mr. Johns's use of a car seat strap on either William or Clayton in October 2011.

William's mother, Ms. Teets, did not find out about the November 4 incident until some time after it occurred. On November 20, 2012, she filed a petition for a protective order in the Circuit Court for Carroll County. At that time, a motion to modify custody that Ms. Teets had filed was pending in the Circuit Court for Frederick County, with a hearing scheduled for December 20, 2012. The Carroll County court held an ex parte hearing on Ms. Teets's petition and granted a temporary protective order on November 20, 2012; the temporary order was renewed on November 28, 2012. The court held an evidentiary hearing on November 30, 2012, at which Mr. Johns and Ms. Teets were present and represented by counsel.

At the November 30 hearing, Mr. Johns did not dispute William's account of the November 4 incident. Instead, he argued that he had acted reasonably and that Ms. Teets was trying to circumvent the authority of the Frederick County court by filing her petition in Carroll County.

After acknowledging that William was "a handful" "in this episode," the court found that Mr. Johns had committed child abuse. The judge explained:

> I am called upon in this case to basically put a stamp of approval on the use of a belt as a reasonable discipline tool in the year 2012. And I cannot do that. I do not believe that in the year 2012 that the use of a belt, even for the most recalcitrant child, is a reasonable form of corporal punishment. So I do not find in this case that although it was a brief episode — and that is what — that is what the shame is in this case because I think that Mr. Johns sat down with this child. He talked to him. He reasoned. He worked through it after he lost control. But I am called upon to pass first on the issue of whether there was an act of child abuse. And I find that there was.

(Emphasis supplied). Mindful that he was prohibited from granting custody to a person whom he found had abused a child unless he also specifically found that there was "no likelihood of further child abuse," see FL § 9-101(b), the judge awarded temporary custody of William and Clayton to Ms. Teets, with Mr. Johns to have unsupervised visitation.[3] This custody arrangement was to be effective only until further modified by the Circuit Court for Frederick County in the pending custody case. The court also entered a final protective order, effective for one year, directing that Mr. Johns not abuse, threaten to abuse, or harass his children, and ordered that Mr. Johns not use corporal punishment during visitation.

Ms. Teets informs us that the Circuit Court for Frederick County awarded her sole legal and physical custody of William and Clayton on April 15, 2013.

Discussion

Mr. Johns contends that the court erred as a matter of law in ruling that use of a belt constitutes child abuse per se. He also contends that the court erred in finding that child abuse occurred in this case. In Mr. Johns's view, his conduct constituted reasonable corporal punishment in response to thirteen-year-old William's "bullying" of his seven-year-old brother, Daniel.

Ms. Teets argues, preliminarily, that the court's decision was rendered moot by the April 15, 2013 decision in Frederick County to award her custody of both children. On the merits, Ms. Teets argues that the court was correct in finding that "violent corporal punishment" is not "necessary" "in today's times."

We note first that this appeal is not rendered moot by the decision of the Circuit Court for Frederick County to continue the custody arrangement put in place in Carroll County. The record of the Frederick County custody case is not before us. We do not know why that court decided to award custody of the children to Ms. Teets. Nevertheless, given FL § 9-101(b)'s prohibition on awarding custody to a parent who has been found to have committed abuse (absent a finding that there is no likelihood of future abuse), it is only reasonable for us to assume that the abuse finding had some effect on the outcome of the Frederick County case that was adverse to Mr. Johns. As child custody may always be modified upon a material change in circumstances, a hypothetical reversal of the abuse finding could have some bearing upon future custody arrangements.

The issue before us is not a purely legal question. Rather, we must decide whether the court properly applied the law to the facts before it. In other words, we must determine whether the court abused its discretion in determining that Mr. Johns's conduct constituted child abuse, not reasonable corporal punishment. See, e.g., Viamonte v. Viamonte, 131 Md. App. 151, 157, 748 A.2d 493, 496 (2000) ("On the ultimate issue of which party gets custody — the application of law to the facts — we will set aside a judgment only on a clear showing that the chancellor abused his discretion.").

Maryland law defines "child abuse," in part, as "an act that causes serious bodily harm; . . . an act that places a person eligible for relief in fear of imminent serious bodily harm; . . . assault in any degree;" or "the physical or mental injury of a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed." FL §§ 4-501(b)(1); 5-701(b)(1). On the other hand, parents retain a limited privilege to exert "a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare." See Bowers v. State, 283 Md. 115, 126, 389 A.2d 341, 348 (1978). FL § 4-501(b)(2) provides, in pertinent part:

> Nothing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child.

As the Court of Appeals has explained, "[r]easonable corporal punishment, by definition, is not child abuse. ... In short, child abuse and reasonable corporal punishment are mutually exclusive; if the punishment is one, it cannot be the other." Charles County Dep't of Soc. Servs. v. Vann, 382 Md. 286, 303, 855 A.2d 313, 323 (2004).

The parental privilege derives from common law, under which parents were free to discipline their children as they saw fit "[s]o long as the chastisement was moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances." Bowers, 283 Md. at 126, 389 A.2d at 348. "On the other hand, where corporal punishment was inflicted with 'a malicious desire to cause pain' or where it amounted to 'cruel and outrageous' treatment of the child, the chastisement was deemed unreasonable, thus defeating the parental privilege[.]" Id. In Anderson v. State, 61 Md. App. 436, 443, 487 A.2d 294, 297, cert. denied, 303 Md. 295, 493 A.2d 349 (1985), we quoted with approval from W. LaFave & A. Scott, Handbook on Criminal Law, 389-90 (1972):

> "The parent of a minor child is justified in using a reasonable amount of force upon the child for the purpose of safeguarding or promoting the child's welfare. Thus the parent may punish the child for wrongdoing and not be guilty of a battery or of a violation of a statute punishing cruelty to children if the punishment is inflicted for this beneficent purpose, and if the punishment thus inflicted is not excessive in view of all the circumstances (including the child's age, sex, health, his misconduct on the present occasion and in the past, the kind of punishment inflicted, and the degree of harm done to the child thereby). The parent's right to use reasonable force has been extended to those, not parents, who are 'in loco parentis' – such as a stepfather or even a paramour living with the child's mother without benefit of matrimony, a guardian, or the director of an orphanage."

Although the circuit court might arguably have been justified in finding that child abuse occurred here, that question is not before us in this appeal, because that is not the question the circuit court actually answered. The court was tasked with deciding whether, based on the evidence that had been

adduced, child abuse had occurred on November 4, 2012. The record reveals that the court did not do so. Instead, the court applied a pre-conceived, uniform rule that the use of a belt always constitutes abuse, without regard to the particular facts before it. The failure to exercise discretion is itself an abuse of discretion. As we explained in Maddox v. Stone:

> Although the abuse of discretion standard for appellate review is highly deferential to the many discretionary decisions of trial courts, see, e.g., Wilson v. John Crane, Inc., 385 Md. 185, 198–99, 867 A.2d 1077 (2005), we nevertheless will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion. As the Court of Appeals stated in Nelson v. State, 315 Md. 62, 70, 553 A.2d 667 (1989):
>
> > A trial judge is blessed with discretion in the exercise of many of his functions. The discretion is broad but it is not boundless. If the judge has discretion, he must use it and the record must show that he used it. He must use it, however, soundly or it is abused. Discretion is abused, for example, if the judge in his exercise of it is arbitrary or capricious, or without the letter or beyond the reason of the law.
>
> . . .
>
> As noted in Nelson and other cases, the record must reflect that the judge exercised discretion and did not simply apply some predetermined position.

174 Md. App. 489, 502-03, 921 A.2d 912, 919-20 (2007). In Gunning v. State, for example, the Court of Appeals further explained:

> As Chief Judge Bond observed in Lee v. State, 161 Md. 430, 441, 157 A. 723, 727 (1931), "the discretion being for the solution of the problem arising from the circumstances of each case as it is presented, it has been held that the court could not dispose of all cases alike bya previous general rule." Hence, a court errs when it attempts to resolve discretionary matters by the application of a uniform rule, without regard to the particulars of the individual case.

347 Md. 332, 352, 701 A.2d 374, 384 (1997) (emphasis supplied).

Instead of considering the particular facts before it, the circuit court applied an absolute rule that "in the year 2012 . . . the use of a belt, even for the most recalcitrant child, is [not] a reasonable form of corporal punishment." The court's absolute rule would result in a child abuse finding in every situation involving the use of a belt — even, for example, where the parent is of much smaller size and physical capability than the child, such as a 5', 100-lb. mother against her 6'5", 250-lb., sixteen-year-old son, who happens to be a star defensive lineman on his high school football team. The court was not called upon "to basically put a stamp of approval on the use of a belt as a reasonable discipline tool in the year 2012." Rather, it was asked to carefully consider the facts before it and, based on those particular facts, determine whether "the chastisement was moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances." See Bowers, 283 Md. at 126, 389 A.2d at 348. The court abused its discretion by failing to exercise it. Accordingly, we shall vacate the November 30, 2012 order and remand for further proceedings.

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

FOOTNOTES

1. At an ex parte hearing held November 20, 2012, Ms. Teets testified that she and Mr. Johns had been separated for "eleven or twelve years."

2. According to the report, Mr. Johns and William both told Mr. Abron that Mr. Johns attempted to hit William with the belt seven times. Mr. Johns recalled that he made contact with William on three or four of those attempts; William recalled being hit four times.

3. FL § 9-101(b) requires that,

> [u]nless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological,

psychological, and emotional well-being of the child.

Although the judge expressed hope that Mr. Johns and William could resolve their differences in the future by talking about them, he did not specifically find that there was no likelihood of future abuse. Under a proper application of the statute, the court should not have ordered unsupervised visitation with Mr. Johns. As neither party has challenged this part of the court's order – which may have been modified, in any event, by the Frederick County court in the custody case – we shall not address it further in this appeal.

NO TEXT

Cite as 9 MFLM Supp. 89 (2013)

Divorce: monetary award: alimony

Amanda M. Whisler
v.
Stephen D. Whisler

No. 0048, September Term, 2012

Argued Before: Krauser, C.J., Matricciani, Watts, JJ.

Opinion by Matricciani, J.

Filed: July 25, 2013. Unreported.

The evidence before the trial court was insufficient to determine the proper amount of a monetary award or alimony; on remand, the parties must present evidence to enable the court to address their respective financial needs, abilities and resources, both at present and when the would-be recipient reaches her maximum earning potential.

Appellant Amanda M. Whisler was divorced from appellee Stephen D. Whisler by judgment of the Circuit Court for Baltimore County dated December 14, 2011 and docketed on January 6, 2012. Appellant subsequently filed a motion to alter or amend the judgment.[1] The original judgment ordered appellant to make a $10,000 payment to appellee as a monetary award, did not award alimony to either party, and shifted a minimal amount of appellant's attorney's fees. An amended judgment dated February 14, 2012 made modest corrections to the original one, none relevant to the current appeal. Appellant then noted this timely appeal from the court's amended judgment.

QUESTIONS PRESENTED

Appellant presents two questions for our review, which we rephrase to comport with our discussion as:[2]

> I. Was the circuit court presented with sufficient evidence, enabling it to make properly supported factual determinations?

For the reasons that follow, we answer no and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL HISTORY

On April 8, 2010, appellant filed a complaint for absolute divorce in the Circuit Court for Baltimore County. A three day trial followed, culminating on November 23, 2011. The original judgment of absolute divorce addressed the legal and physical custody of the two minor children, Mr. Whisler's child support obligation, the children's health insurance, use and possession of the marital home and family use personal property, none of which are relevant to the questions originally presented for our review by appellant. It also awarded Mr. Whisler a $10,000 monetary award from his ex-wife's retirement account, ordered him to contribute $5,000 to her attorney's fees, denied alimony to both parties, and divided the court costs.

As previously noted, Mrs. Whisler moved to amend that judgment and, *inter alia,* raised the two issues presented in her brief, i.e., the lack of a ruling on Mr. Whisler's military retirement pension and the denial of alimony. She filed a supplemental motion to further address her alimony claim. Following a hearing on February 7, 2012, the trial court issued an opinion and amended judgment (docketed February 21, 2012) resolving both issues against appellant. Her timely appeal to this Court ensued.

DISCUSSION

Because divorce proceedings are conducted as bench trials, we apply Maryland Rule 8-131(c) to our review. That rule states:

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

Id. "[T]he appellate court must consider the evidence produced at trial in a light most favorable to the prevailing party." *Ross v. Hoffman,* 280 Md. 172, 186 (1977). "If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Meyr v. Meyr,* 195 Md. App. 524, 545 (2010) (quoting *Friedman v. Hannan,* 412 Md. 328, 335 (2010)). "The trial court is not only the judge of a witness's credibility but also of the weight to be attached to the evidence." *Pleasant v.*

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Pleasant, 97 Md. App. 711, 722, (1993) (quoting $*3,417.46 U.S. Money v. Kinnamon,* 326 Md. 141, 149 (1992)). "It is thus plain that the appellate court should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence." *Id.* Questions of law, however, require our non-deferential review. *Karsenty v. Schoukroun,* 406 Md. 469, 502 (2008).

Appellant's allegation of error

As mentioned *supra,* the judgment of absolute divorce granted appellee a monetary award of $10,000. Appellant moved to amend that portion of the judgment, suggesting that the trial court had overlooked appellee's Navy pension because it did not appear on the Marital Property Statement,[3] as it was in "pay status."[4] Arguing that the pension had been accumulated throughout the parties' marriage, Mrs. Whisler sought a 50% interest in the military pension. On appeal, she takes the position that the court failed to treat appellee's pension in accordance with established Maryland precedent, *viz., Collins v. Collins,* 144 Md. App. 395, 422 (2002) (quoting *Andresen v. Andresen,* 317 Md. 380, 384 (1989)) ("[P]ensions generally, including military pensions, are marital property.").

Mrs. Whisler also complains that the court erred by failing to award indefinite alimony to her. She contends that, consistent with Md. Code Ann., Fam. Law § 11-106(c)(2), despite her rejoining the workforce, the difference in living standards between herself and appellee will be "unconscionably disparate." *Id.* Appellant maintains that she is entitled to indefinite alimony and that the court's failure to award it requires our correction.

We cannot address the merit of these allegations, however, because we conclude that the record before us contains insufficient evidence of the parties' finances, in particular the characterization of each party's employment, the ownership of the purported joint-debt, and the resulting disparity in standards of living. The trial court attempted to weave a cohesive narrative out of the piecemeal evidence before it; ultimately, however, we are unable to affirm its judgment. *Meyr,* 195 Md. App. at 545. In all other respects the judgment below is affirmed,[5] but, on the current state of the record, we cannot affirm the court's findings with respect to the monetary award or alimony (including appellee's Navy pension, although the court did not make a specific finding with respect to it). We explain.

In the present case, as required by section 11-106 of the Family Law article, in its oral and written opinions, the trial court addressed the parties' history, their contributions to the family, their estrangement, their physical and mental capacities and the length of the marriage and then focused upon their economic circumstances. The trial court found that Mrs. Whisler maintained approximately $71,000 in retirement assets in her name, while Mr. Whisler's retirement assets had been substantially depleted to support the family up to the date of divorce. He was left with only $7,000 in his Northrop Grumman Savings Plan. Additionally, the court specifically found no dissipation of those assets, but rather that the bulk of the $107,000 from his depleted retirement funds was expended on family expenses during the period of their separation. The trial court remarked on the unfortunate circumstances the parties found themselves in — their home was "upside down;" Mr. Whisler faced another $50,000 in credit card debt; and Mrs. Whisler would received "butkus." (The transcript states "butkus", but the stenographer obviously meant "bupkis"[6]). Taking all of this into consideration, the trial court concluded that a 50/50 split of marital property was not appropriate. It ordered only a minimal adjustment of $10,000 to appellee.

Although the record contains evidence sufficient to establish the figures cited above, other significant portions of the court's findings lack adequate foundation. For example, the court found that Mr. Whisler's employment–and the industry in which he works–is volatile. Although Mr. Whisler testified to this effect, the only factual basis was his single year of unemployment from October 30, 2009 to November 15, 2010. Similarly, the court found that Mrs. Whisler is likely to progress through the ranks at her job, and is, therefore, likely to experience a salary increase. Although she testified that her skill was "critical[,]" the record contains no evidence to support a finding that she is likely, in the near future, or ever, to earn a promotion. She testified to her current grade, as well as to the application process that resulted in her re-employment with the NSA. Her testimony neither suggested that a raise is imminent, nor included a statement that she solicited government as opposed to private employment (causing an allegedly lower salary). Mr. Whisler *argued* these points, but he did not *testify* to them and neither party presented a vocational expert. Additionally, Mr. Whisler claimed that he is *solely* responsible for the parties' substantial debt, but then undercut his claim by dividing the debt on his financial statements. Ms. Whisler testified that she relinquished responsibility for accounting to her husband and that she was unaware of the parties' finances. At trial, she took the position that her ignorance should relieve her of this joint financial burden. There is no basis in law for this proposition.

The evidence here resembles an impressionist painting–from afar the picture appears composed, but a close-up reveals scattered, non-linear brush strokes.

The court, as recognized above, attempted to smooth the transition between what evidence it heard and what evidence it needed to comply with the requirements of the Family Law article. We conclude, however, that because the court's unsupported factual determinations impermissibly commingle with its supported ones, we must remand this case to provide the parties with the additional opportunity to present evidence.

We are mindful that in applying the section 11-106 factors,[7] the court need not act with robotic precision. *Hollander v. Hollander,* 89 Md. App. 156, 176 (1991). Rather, the record as a whole must support the application of the statute. *Doser v. Doser,* 106 Md. App. 329, 356 (1995). But the record here does not contain sufficient evidence applicable to each factor. Therefore, the court was incapable of applying the law properly–it was deprived of the evidence it needed to do so. *Ware v. Ware,* 131 Md. App. 207, 228-29 (2000). On remand, the parties must present further evidence, enabling the court to address more specifically, factors 9 (the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony) and 11 (the financial needs and financial resources of each party). The record also lacks the evidence necessary to project into the future when Mrs. Whisler has reached her maximum earning potential for the purpose of applying section 11-106(c)(2). *Whittington v. Whittington,* 172 Md. App. 317, 338 (2007). Although the burden of justifying indefinite alimony remains with appellant, *Thomasian v. Thomasian,* 79 Md. App. 188, 195 (1989), both parties must supplement the testimony and other evidence in the record as it now stands in order for the court to apply section 11-106 of the Family Law article properly.

In sum, there are too many factual gaps in the record before us. There was insufficient proof that appellee bore the brunt of the on-going marital debt and that his retirement funds were expended in a way that benefitted appellant. Based upon a more complete factual record, the trial court will be in a position to determine whether to award appellant half of the marital portion of appellee's Navy pension and/or whether she is entitled to alimony. Thus, we reverse the circuit court's judgment concerning Mr. Whisler's Navy pension, the monetary award and the denial of alimony and remand those issues to the circuit court for reconsideration.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED 50%-50%.

FOOTNOTES

1. The court received a letter from appellee which it also treated as a motion to alter or amend the judgment.

2. The questions as presented by appellant are:

> (1) Whether the trial court erred in refusing to declare, and make an award with respect to, defendant's in-pay military pension as marital property, at trial and upon plaintiff's post-trial motions.
>
> (2) Whether the trial court erred in refusing to grant indefinite alimony, where the overwhelming weight of the evidence would support a finding of an unconscionably disparate standard of living.

3. Pursuant to Md. Rule 9-207, the parties must file a Joint Statement of Marital and Non-Marital Property when either party seeks a monetary award.

4. At the time of these proceedings, Mr. Whisler worked with Northrop Grumman and Mrs. Whisler for the National Security Agency.

5. We recognize that the trial court may be required to adjust its child support findings after receiving additional financial evidence.

6. A Yiddish term generally understood to mean "nothing of value." http://en.wiktionary.org/wiki/bupkis (last visited July 1, 2013).

7. The factors are:

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

(iii) the nature and amount of the financial obligations of each party; and

(iv) the right of each party to receive retirement benefits; and

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

Cite as 9 MFLM Supp. 93 (2013)

Child support: contempt: failure to produce evidence of income

Consolidated Cases

Anthony Crews

v.

Anna Burns

No. 2205, September Term, 2011

Anthony Crews

v.

Renee Wells

No. 2206, September Term, 2011

Argued Before: Wright, Matricciani, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Thieme, J.

Filed: July 30, 2013. Unreported.

By producing evidence of his income, appellant purged the contempt finding entered against him for failure to produce that evidence; however, he did not also purge the separate contempt finding for failure to pay child support arrearages.

Appellant, Anthony Crews, appeals from an order of the Circuit Court for Baltimore City denying his request to purge a contempt order entered against him on April 26, 2007 for failure to pay child support for two separate children. The appealed-from order, dated December 7, 2011, was entered in two cases, brought by Anna Burns and Renee Wells, the mothers.[1] Mr. Crews presents one question which we have recast for review as:[2]

> Did the circuit court err in denying appellant's motion to purge the contempt order entered against him in 2007?

For the reasons that follow, we shall affirm.

BACKGROUND

A. Crews was born on July 30, 1993 to Anna Burns. Appellant was found to be A.'s father in a paternity judgment entered in the Circuit Court for Baltimore City on March 14, 1995. As a result, appellant was ordered to pay child support of $60 per week. In May of 2006, the child support order was modified to require appellant to pay $260 per month. Renee Wells gave birth to a daughter in June 1999. On October 23, 2000, the Circuit Court for Baltimore City found appellant to be the child's father. Appellant was also ordered to pay child support to Ms. Wells.

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

Appellant has failed to meet his child support obligations in each case, and has developed significant arrearages. On May 17, 2006, appellant was found in civil contempt in both cases for failure to pay child support. A bail review hearing was held on February 16, 2007. At that hearing, the court issued a show cause order, and postponed appellant's contempt hearing until April 26, 2007. The court ordered appellant to make child support payments in the interim, and to bring evidence of each of his sources of income to the next hearing.

At the April 26, 2007 hearing, the court found appellant in civil contempt for failure to pay child support to Ms. Burns and Ms. Wells. The arrearages as of April 26, 2007 totaled $39,857.93 in Burns' case and over $10,000 in Wells' case. The contempt order postponed disposition until October 15, 2007. This was not the final postponement, however, because further disposition of each case was postponed sixteen times between April 2007 and August 2011. In each instance, the court ordered appellant to bring written verification of employment to the next hearing. The record does not show he complied with this straightforward requirement. Indeed, appellant failed to appear on at least two occasions and showed up only pursuant to bench warrants.

On September 27, 2011, appellant failed to bring evidence of his income with him to his disposition hearing. In response, the court stated "Send him over to BCDC. When he gets my documentation of why he hasn't paid and what he's earned, he can come on back over." That same day, the court issued two separate orders. The first order found appellant in contempt of court and ordered incarceration and referenced the April 26, 2007 contempt finding, setting the purge as

"to produce evidence of income from every source (current pay stubs)." The second order also referenced the April 26, 2007 finding of contempt and ordered appellant to pay $70.67 per month in arrears and set the matter in for review on September 29, 2011. The second order was identical to the orders previously issued in these cases.

At the review hearing on September 29, 2011, the court explained its actions of September 27, 2011:

> I dismissed him summarily based on his failure to produce any evidence of his earning and his failure to pay any money since he was last in court. Tied into it, not because he didn't have money to pay that day but because it was impossible for me to make a determination, frankly, without his having produced evidence of his earnings.

Appellant's counsel produced pay stubs and copies of garnishment paperwork at the September 29, 2011 hearing. Accordingly, the court released appellant. The commitment record indicates that the purge had been met and that appellant was released on his own recognizance. Following the September 29, 2011 hearing, the court issued an order finding contempt for failure to pay child support and postponing disposition until December 7, 2011.

At the outset of the December 7, 2011 hearing, appellant requested that he be deemed to have been purged of the contempt order originally issued on April 26, 2007. Appellant noted that each order issued on September 27, 2011 references the April 26, 2007 finding of contempt, and that one of the orders indicated that to purge the contempt, appellant should produce all evidence of income from every source. Appellant argued that because he had produced all evidence of income from every source, thus meeting the purge on one of the September 27 orders, that he be deemed to have been purged of the original contempt of April 26, 2007. The court disagreed with appellant's position and denied his request. Appellant appeals from this denial.

Additional facts will be provided as necessary to address the argument.

DISCUSSION

Appellant argues that he should be deemed to have been purged of the finding of contempt issued on April 26, 2007. Specifically, he argues that the April 26, 2007 contempt finding is the only contempt finding in the case. He argues that his submission of the required earnings documentation effectively satisfied all extant conditions and purged the contempt orders. He analogizes this issue to a criminal case in which a court mistakenly announces a sentence and does not correct it before the defendant leaves the courtroom. The court is bound by that sentence, he asserts, regardless of what it intended. Appellees respond that the finding of contempt should not be purged. Specifically, they argue that the court based its finding of contempt upon its August 24, 2011 order which required him to produce all evidence of income from every source. Appellees point out that this requirement was imposed under Md. Rule 15-207(e)(4) in order to help appellant comply with the original child support orders and that it did not impact the effect of the original finding of contempt made on April 26, 2007. In the alternative, the appellees argue that the court did not have the authority to essentially relieve appellant of his duty to pay child support because no party had filed a motion for modification in this matter.

In a situation where an individual did not comply with an order which provided that they bring evidence of all income from every source, a court may find that individual in contempt. That contempt finding may be civil, as it was here, or criminal. *See* Md. Rule 15-207(e) Committee note,[3] *see also Arrington v. Dep't. Of Human Res.,* 402 Md. 79, 98 (2007). Civil contempt proceedings are intended to preserve and enforce the rights of private parties and compel obedience to orders. *Arrington,* 402 Md. at 93. However, an individual may not be incarcerated for failure to comply with a support order unless the purge provision is something with which appellant has the present ability to comply and thus avoid incarceration. *Id.* at 94 (citation omitted); *Bradford v. State,* 199 Md. App. 175, 195-196 (2011). The purge must have some reasonable connection to enforcement of the support order. *Arrington* 402 Md. at 103 (citation omitted).

Here, appellant violated a provision of the order issued on August 24, 2011 requiring him to bring evidence of all income from every source to the next hearing. The court found that it was unable to dispose of appellant's case without appellant's employment information. The court incarcerated him "because it was impossible for [THE COURT] to make a determination, frankly, without his having produced evidence of his earnings." This incarceration was the result of a finding of constructive civil contempt for failure to comply with the requirement that appellant bring evidence of all income from every source as ordered on August 24, 2011. The purge set on September 27, 2011 was that appellant provide the court with all evidence of income from every source. At the time of his incarceration, appellant had the ability to produce the information to the court, but failed to do so. As the court ordered appellant incarcerated, it inquired as to appellant's ability to satisfy the purge:

> THE COURT: Who else lives in your client's home?

> [DEFENSE COUNSEL]: Who else lives in client's home?
>
> THE COURT: Yes.
>
> [DEFENDANT]: My mom.
>
> THE COURT: Okay. Send him over to BCDC. When he gets my documentation of why he hasn't paid and what he's earned, he can come back over. Tell your lawyer how to get in touch with the people who can get me that documentation.

The court inquired into who might be able to access the required information to satisfy the purge and directed appellant to coordinate securing that information with his attorney. This clearly satisfies *Arrington's* requirement that, in a case of civil contempt, a purge be set, the purge be related to the support order, and the purge be something with which appellant has the present ability to comply.

We note that both appellant and appellee agree that on September 27, 2011, the court intended to find appellant in contempt for not bringing evidence of all income from every source to the hearing. The transcripts show this to have been the case.

Generally, when a conflict exists between the transcript and the commitment record or docket entries, the transcript controls, unless it is shown to be in error. *Lawson v. State,* 187 Md. App. 101, 108 (2009). There is an obvious conflict between what the court said and intended, what the parties understood, and what is contained in the September 27, 2011 order of contempt incarcerating appellant. Given this discrepancy, and being mindful of our reliance on transcripts in situations closely related to this one, we hold that the transcript controls.

On September 27, 2011, appellant was found in contempt and incarcerated for violating the evidence of income provision of the August 24, 2011 order, not for failure to pay child support arrearages. Appellant was released when he complied with the purge by submitting evidence of his income, and a separate order was issued continuing the April 26, 2007 finding of contempt and setting it in for hearing on September 29, 2011. The circuit court properly denied appellant's request to be purged of the April 26, 2007 contempt finding in all respects.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The cases have been heard together and contain otherwise identical orders.

2. In his brief, appellant asks:

> Was Mr. Crews's contempt purged when he was ordered incarcerated with a purge provision requiring the production of certain documentation, and then released upon the production of that documentation two days later?

3. If the contemnor does not have the present ability to purge the contempt, an example of a direction to perform specified acts that a court may include in an order under subsection (e)(4) is a provision that an unemployed, able-bodied contemnor look for work and periodically provide evidence of the efforts made. If the contemnor fails, without just cause, to comply with any provision of the order, a criminal contempt proceeding may be brought based on a violation of that provision.

NO TEXT

Cite as 9 MFLM Supp. 97 (2013)

Divorce: constructive desertion: property division

Calin Constantinescu

v.

Annie Constantinescu

No. 1935, September Term, 2010

Argued Before: Krauser, C.J., Meredith, Sharer, J. Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Meredith, J.

Filed: August 1, 2013. Unreported.

The grant of absolute divorce based on constructive desertion was supported by evidence that Husband engaged in a persistent pattern of conduct that was so demeaning to Wife's self-respect as to be intolerable. Having properly granted an absolute divorce, the trial court was permitted to order the partition and sale of the marital home. Also, the court did not err in determining Wife's income without regard to possible overtime.

Appellant, Calin Constantinescu ("Husband"), appeals from the judgments entered by the Circuit Court for Montgomery County in connection with his divorce from Annie Constantinescu ("Wife"), appellee.

QUESTIONS PRESENTED

Husband presents the following questions for our review:

1. Whether the trial court erred in granting appellee a judgment of absolute divorce on the ground of constructive desertion?
2. Whether by granting the appellee a judgment of absolute divorce on the ground of constructive desertion, the trial court erred in ordering the sale of the parties' marital home?
3. Whether by granting the appellee a judgment of absolute divorce on the ground of constructive desertion, the trial court erred in its distribution of appellant's retirement interests, both by ordering any sort of distribution, and further by failing to award appellant his non-marital portion of his retirement interests?
4. Whether the trial court erred in its calculation of child support, both prospectively and retroactively?

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

We conclude that the court did not err in granting the Wife an absolute divorce based on constructive desertion, nor did it err in its order for the sale of the marital home, in its judgment regarding Husband's retirement accounts, or in its calculation of child support. We affirm the judgments of the Circuit Court for Montgomery County.

FACTS AND PROCEDURAL HISTORY

The parties were married on December 6, 1997. One daughter was born of the marriage on June 24, 1998. The family lived in Germantown, Maryland, until June 17, 2009, at which time Wife took their minor daughter and moved out, with the intention of ending the marriage. On July 1, 2009, Husband filed a complaint for custody of the daughter, reciting that Wife had left the marital home with the child two weeks prior. On August 26, 2009, Wife filed an answer seeking sole legal and physical custody of the daughter, and a pleading captioned "Counter-Complaint for Limited Divorce, or in the Alternative, Absolute Divorce, Custody, and Other Relief." Husband filed a timely answer.

The parties were able to agree on custody and visitation for the daughter. On February 3, 2010, the consent order spelling out those arrangements was filed, and it was later incorporated, but not merged, into the judgment of absolute divorce at issue herein. Consequently, custody and visitation were not in dispute in these proceedings.

On February 22, 2010, Husband filed an amended and supplemental complaint for limited divorce. In that pleading, Husband represented that Wife had abandoned and deserted the marriage on June 17, 2009, and requested that the court grant him a limited divorce on those grounds. Husband's complaint also requested that marital property be valued, that a monetary award be made in his favor, and that the court determine child support. Husband later withdrew that complaint on April 12, 2010, well in advance of the trial

in this matter. As a result, at the time of trial, Husband did not have a claim pending for a monetary award.

The merits of the case were heard over the course of three days, on June 29 and 30 and July 13, 2010. Wife testified to a pattern of control by the Husband that extended throughout the course of the marriage. According to Wife, Husband micromanaged their finances to the extent that Wife was either not permitted to spend any money without the Husband's express approval, or else she was chastised after the fact for having spent money on items Husband had not approved in advance.

Wife also testified about abusive conduct by Husband, including an episode that occurred during a family vacation in Virginia Beach in 2003. On that occasion, the family was at a water park and had become separated. Wife fell and injured her head, eventually requiring emergency transport to the hospital, where she was diagnosed to have a fractured tailbone, and she received 24 stitches to her scalp. Wife testified that Husband insisted, because the hotel room was prepaid, that they stay and finish out their vacation despite Wife's injury. Wife also testified that, within hours of her return from the hospital, Husband woke her up at 2 a.m. because he was hungry, and he demanded that she fix him a steak.

Wife also testified that Husband once became angry with her about a discipline issue involving their daughter, and that he smacked her in the back of the head, in the area of her injury. Husband, in his testimony, did not deny hitting Wife in the head. He minimized her reaction to it, but did not deny that it occurred.

Following the family's return to Germantown from Virginia Beach in 2003, Wife left the marital bed and never returned. She testified that she moved out on June 17, 2009, once the daughter finished the academic year, and that her reasons for leaving were not only to preserve her own sanity and sense of self-respect, but also that she was troubled over what she perceived as Husband's lack of boundaries where the prepubescent daughter was concerned. As to this issue, Wife testified, with corroboration from her adult daughter, that Husband would insist on "checking" their daughter after a bath to make sure she was "clean," and refused to listen to Wife's complaints about the need for him to respect their daughter's privacy. Husband denied this ever occurred.

Wife also testified to Husband's parsimoniousness, which extended to getting a watermelon rind out of the trash to show Wife where she had missed some of the fruit; not allowing Wife to access their joint account; and not giving Wife even enough walking-around money to buy a cup of coffee. The picture of the relationship depicted by Wife's testimony was that her self-esteem had been eroded by Husband over a period of years, and the final reason for her to leave the marriage was she did not want their daughter to be negatively affected by Husband's attitudes.

For his part, Husband either denied the events Wife described, or he downplayed Wife's reaction to them. As noted above, Husband did not deny hitting Wife in the head within days of her having received 24 stitches in that area, but he characterized his blow as a "correction" needed because of Wife's inadequate discipline of their daughter, and he testified that Wife's reaction was "overblown." He testified that he paid for Wife's nursing school education, which she started in 2003, but that he found her schedule "exasperating," because it meant she was getting home late. When asked to respond to Wife's earlier testimony that he would squeeze the daughter's arm to the point of tears when he became frustrated while helping the daughter with her homework, Husband said that "it only happened once."

After hearing conflicting versions of events, the trial court made the following findings:

> [Wife] recited a history of, as I said, controlling behavior by [Husband]. Really, controlling in pretty much every aspect. But I guess something that became rather a leitmotif through this history was his control of their money. Now, I heard some contradictory testimony. [Wife's] testimony was such that she had very little access to money and everything had to be approved by him. She was relegated to searching at garage sales and other low budget venues for her clothes and other items. She may have had access to some credit cards or credit card, but it was he that required her to show all receipts. And it was he that basically was in charge of finances, buying and controlling the entire financial situation within their household. Such that [Wife] felt demeaned by this entire way of life within their marriage.
>
> She also testified as to behavior that the Court would characterize as bullying on his part, bullying of [Wife] in a way, I guess not so much as overt abuse, although I will get to some incidence [sic] of that in a moment, but such that this was not a marriage that had two decision makers in it. It was without compromise and he was the decision maker, period. And [Wife] was made to understand that, at every occasion.

There were some incidents that I think can fairly be characterized as physical abuse. There was the event in Ocean City in early I think it was either 2001 or 2002 where there was some pushing over a very minor item, some type of a coupon to go to the arcade in front of other people, such that there was at least a thought that police ought to be called. They were not called.

There was another event in Virginia Beach which did not start out as physical abuse. Turns out that [Wife] fell and hurt herself rather badly and [it] sounded like an accidental fall. But by her description of it, the reason she fell was because he was controlling the pocketbook to the extent that she didn't eat all day or she didn't drink adequately. Regardless of that, she fell. We'll call it an accident. But thereafter, she testified that despite her — she had stitches as I recall — they had to stay in Virginia Beach because [Husband] was not going to leave because they had paid for this full vacation and she also had to cook for him and pretty much had to again subsume her interests to his, but this time her interests were really amounting to a health issue.

We then had an incident over a credit card shortly thereafter and this was back at home where it appeared that [the daughter] had her hands on it and was coloring on it or somehow just fooling with it, and [Wife] told her not to do it and may have cuffed her a little bit, was not happy. But what after that was that [Husband] then hit [Wife], hit [Wife] by his own account to correct her and to show her what it feels like because [he] was so upset that she had dared to lay hands on [the daughter].

We heard from the [Wife] in this case that [Husband] makes all the decisions. That was borne out by the testimony of [Oana], [Wife's] grown daughter [from a previous marriage], and also the godmother who really had befriended both [Wife and Husband] and seemed quite fond of them in her testimony. But basically said she had given up trying to reason with [Husband] and had reached the very same decision herself and that he is the one that decides everything and it's like talking to a brick wall to try to talk him out of that.

There were various incidents related about how he treated [Oana] which was not well reported. How he treated one of his own friends who came to help him paint the house and get it ready for sale at one point with a thought of perhaps moving to New Jersey, and basically then kicking his friend out because he somehow was unhappy with that arrangement; being unhappy with [Oana's] boyfriend such that he wasn't allowed even in the house; being unhappy with the fact that [Oana] would even choose to buy a non-American made car and threatened to slash tires and et. cetera. Whether he meant this, I don't know, I would rather doubt it that he would do such a thing. But I don't know that that's really the issue.

The issue is that what we have is a picture, a profile, a portrait of somebody who controls everything, whether it's reasonable, whether it's rational or not. And this eroded this marriage to the extent that it was no longer a viable relationship.

Further findings of the court will be recited below.

On July 30, 2010, the court delivered its oral ruling in this matter. On August 11, 2010, a judgment of absolute divorce was entered. The court granted the Wife's counterclaim for divorce based on constructive desertion. It also ordered the sale of the marital home, with the proceeds to be equally divided between the parties, and declined to make a monetary award to Husband, noting that he had withdrawn his claim for one. Finally, it considered the issue of child support; the court determined the arrearage was $6,573.00, and determined that Father's monthly support obligation to the daughter would be $1,092.00. Husband filed a post-trial motion to alter or amend, which the court granted in part, and the child support obligation was reduced from $1,092.00 to $969.00. Husband attacks all of these rulings.

STANDARD OF REVIEW

Because this was an action tried without a jury, our review is governed by Md. Rule 8-131(c), pursuant to which we will

review the case on both the law and the evidence. [This Court] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

DISCUSSION

I. There was ample evidence to support the entry of judgment of absolute divorce on grounds of constructive desertion

In *Lemley v. Lemley,* 102 Md. App. 266 (1994), this Court summarized the proper considerations for a trial court when it is asked to grant a divorce based on constructive desertion:

> The question . . . is whether [the offending spouse] has engaged in "such conduct as would make a continuance of the marital relationship inconsistent with the health, self-respect and reasonable comfort of the other." There must be "a pattern of persistent conduct which is detrimental to the safety or health of the complaining spouse, *or so demeaning to his or her self-respect as to be intolerable."* As the italicized language suggests, it is not necessary in every case to show that the safety or physical health of a spouse is threatened; a grave threat to a spouse's self-respect alone may be sufficient . . . . In a case involving constructive desertion, the central issue is whether the offending conduct is so intolerable that the complaining spouse was justified in leaving. Unlike a case involving ordinary desertion, there is no need to show that the "pattern of consistent conduct" was intended to end the marital relationship. . . . One single straw will never break the camel's back; but the camel's back may nonetheless be broken. The chancellor must consider the totality of the circumstances, and "where a husband habitually addresses his wife in vile and profane language, and occasionally resorts to acts of physical violence, the entire course of conduct" may constitute grounds for divorce, even though the language or violence alone may not be sufficient.

Id. at 282 (internal citations omitted).

The trial court found that "the entire course of conduct of Husband" amounted to constructive desertion, and provided the following comments in support of that finding:

> There seems to have been very little, if any, emotional support given to anybody in this family other than [the daughter]. [Husband] did not support, at least emotionally, the mother's choice of schooling and career although he did pay tuition for her nursing training at some point, perhaps all of it. But, he was against it. He thought that she should pursue banking or finance. Regardless of what she said or what her reasons were for why she thought nursing was important, she wanted to be helpful to others in need, and she ultimately did graduate with a nursing degree and now works as a nurse. This was not supported emotionally by her husband. He did not attend her graduation. He did not attend his stepdaughter's graduation when she graduated. . . [Oana] was a burden [to Husband] and she finally left the house.
>
> What the Court sees here is a pattern that eroded the marriage to the extent that [Wife] could no longer live in it or within it with any integrity, with any self respect and with some, I guess, recurring incidents of violence that made the situation, I should say exacerbated what can only be characterized as a dead marriage. I don't know whether it was ever alive. Perhaps it was in the very, very early months when the child had not yet been born, in the very early young years. But the history that [Wife] recited was one of long-standing sacrifice on her part and just humiliation year in and year out.
>
> So, the question becomes, is that enough to support a constructive desertion under Maryland law? Actually, I read the case law and I thought rather hard on this because there are difficult marriages and what is the line that separates a difficult marriage from one that supports a finding of constructive desertion. And it certainly is the case that we need corroboration because we do for all of

our grounds. And so I looked at that as well.

It is also a fact that when grounds are contested and when they're highly contested as they were in this case, the court need [sic] only some, I won't call it minimal, but it certainly doesn't have to be overwhelming corroboration. Just the whole point of the corroboration factor is to prevent collusion. And when you have a hotly contested divorce, one would, I think rightly reach the conclusion that there isn't any collusion and this was highly contested.

It's not quite clear to me why it was so hotly contested because in the [Husband's] own filing and his amended complaint, he said under oath that there was no hope of reconciliation, no expectation of reconciliation, no expectation of reconciliation, he said that. He withdrew that then when he withdrew his claims, but he affirmed that very thing in his own filings.

Having weighed the entirety of the evidence, I do find that this marriage had reached a state that had devalued the wife to such an extent that she could no longer live within it and maintain her self respect and her well being.

What in essence had happened in this marriage is that she became expendable. Her real reason for being here and in this marriage was to provide this child, and she did. And so she. . . fade[d] into a position of not being a necessary party anymore in this marriage. And the necessary party became and is still the child, [the daughter].

I do find that there are ample grounds to support a finding of constructive desertion and I will so find and grant the judgment of absolute divorce. Based on that ground, I find also that there is ample corroboration as provided by [Oana's] testimony and also the parties' godmother.

In this appeal, Husband does not challenge the legal sufficiency of the corroboration provided at trial by Wife's witnesses: her adult daughter, Oana, and the parties' "godmother," Angelica Mihnea[1]. Oana testified that she lived with the parties for "give or take" seven years, while she was attending college. She referred to the marital home as "the house of pain" because there was "never peace in that house, they would always fight, always about everything, almost every other day, all the time." Oana also supported Wife's testimony about Husband's controlling and penny-pinching ways, and provided her own stories about Husband's character, which included banning her boyfriend from entering the marital home because of his race and threatening to slash Oana's tires if she purchased a non-American car. Oana related that Husband made Wife retrieve some sour milk from the trash because it was not yet past its expiration date, and that he called Wife "fat and stupid."

Oana's testimony, together with the Wife's testimony about incidents of Husband's offensive behavior, created a record that was sufficient for the trial court to grant the divorce based on constructive desertion. There was evidence that Husband engaged in a persistent pattern of conduct aimed at controlling and belittling Wife in a manner that was "so demeaning to [her] self-respect as to be intolerable." *Murphy v. Murphy,* 248 Md. 455, 460 (1968). The grant of absolute divorce based on constructive desertion was not an error of law, was supported by the evidence, and will not be disturbed.

II. Having properly granted an absolute divorce, the trial court was permitted to order the partition and sale of the marital home

Husband's argument regarding the sale of the marital home is premised on his argument — rejected above — that the trial court erred in granting Wife an absolute divorce. However, as we have explained above, the trial court did not err in granting the divorce. Accordingly, it did not err in ordering the partition and sale. *See, e.g.,* Md. Code (1984, 2006 Repl. Vol.), Family Law ("FL") article, § 8-202.

III. Husband withdrew his request for a monetary award

Husband contended at trial that 41% of his Ameriprise account was non-marital, and that the trial court erred in not awarding him that portion. He further complains that the court erred in considering the approximately $47,670 Husband withdrew from his investment and retirement accounts after the separation as an offset of the non-marital funds Husband initially invested in those accounts. (In other words, he claims the court erred in determining that, because Husband withdrew what could otherwise have been viewed as his pre-marital contribution, the balance of the retirement funds was marital.) Wife's primary counter-argument is, as noted above, that Husband, having dropped his request for a monetary award, did not preserve this issue for review on appeal.

At trial, Husband argued that he was entitled to 41% of the value of his Ameriprise account, because, in his view, that represented the total of the non-marital contributions he made to the account. He requested that the court consider that portion of the Ameriprise account as his non-marital property, and not "artificially restore[ ] [it] back for division". Wife argued, in part, that Husband withdrew a large chunk of the money in his retirement and investment accounts, including marital funds, after the separation, and that he had at least partially dissipated it by paying $3,800.00 for new bedroom furniture for the daughter. The court's findings on this issue were as follows:

> In terms of the 41 percent interest in Ameriprise, again, the husband is claiming that, you know, it was his back retirement accounts that went into kind of funnel Ameriprise and that this happened prior to the marriage, and then it did grow during the marriage, certainly a fair portion of it. So it will be characterized as marital.
>
> There was a lot of evidence as to tracing in this case. There was also a counter argument that the tracing was not accurate and it wasn't dispositive. There was also counter evidence and counter arguments, I should say, that the father, the original plaintiff in this case had withdrawn such sums from these retirement accounts that equity require[s] the court to consider that in the awarding of any of the percentage of Ameriprise. They are held in his name, titled in his name, all of these retirement accounts are. And the value now of Ameriprise is $64,314.77. That's final value that I could glean from the evidence. There's also the smaller Roth account which is now valued at $1,062.58. So let's just for the sake of ease call it $65,000, though it is a little bit more than that. There's also a Fidelity account and that has [$]81,178 and that's all marital, both parties agree on that.
>
> It seems to me that [Husband] did put a fair portion of his non-marital money, funneled it into this Ameriprise account, although a lot of this occurred immediately prior to the marriage in anticipation of the marriage, in anticipation of the birth of the child. I'm not going to spend any time creating new law by saying that therefore it's marital, even though it preceded the marriage. When I look at what [Husband] withdrew from these accounts from the time of the separation, it is a fair amount of money. **There were various withdrawals from Ameriprise, approximating $41,000. There's a $6,670 withdrawal from the Fidelity account.** [Wife] is asking me to find that that was dissipation or some portion of it was, plus [the daughter]'s bedroom which was $3800. The request is that I include that as dissipation as well. I cannot find that it's dissipation under our law. It's a fair amount of money, there's no question about it. But, I am not convinced that it was expended for the purpose of depleting marital resources. The testimony was that it was withdrawn, cashed out to support lifestyle because he wasn't working, and also to pay attorney's fees, neither of which amount[s] to dissipation. But it is, as I said, a significant amount of money. And what it amounts to is really an offsetting of the very claim he makes now that he should get 41 percent of these retirement funds. **In effect, he has taken out his 41 percent or better by taking this money the end of 2009 and 2010 by virtue of these withdrawals.**
>
> **So what is left will be divided evenly between the parties** and that accounts for the Ameriprise IRA, the Roth IRA, [and] the Fidelity.

(Emphasis added.)

We note that no evidence was presented as to what the value of the Ameriprise and Fidelity accounts were before Husband withdrew in excess of $47,000 from them following the separation. At the time of trial, the court valued Ameriprise at $64,314.77 and Fidelity at $81,178, and of the latter, noted that the parties agreed that "that's all marital." However, Husband had withdrawn $6,670 from the "all marital" Fidelity account, and $41,000 from the Ameriprise account, which was partially marital and partially non-marital. On appeal, Husband presses his contention that he is entitled to have 41% of the Ameriprise account considered non-marital property; at its value as of the time of trial ($64,314.77), a 41% portion would be $26,369.05.

Husband cites a single case, *Gravenstine v. Gravenstine,* 58 Md. App. 158 (1984), in support of his argument, and quotes it for the proposition that, "[w]here property is purchased and paid for in part before marriage and in part during marriage with non-marital and marital funds, the property is nonmarital in part and marital in part." *Id.* at 168. *Gravenstine* then goes on to quote from *Harper v. Harper,* 294 Md. 54 (1982), and the Court of Appeals's discussion in that case about the "source of funds theory":

> Under that theory, when property is acquired by an expenditure of both nonmarital and marital property, the property is characterized as part nonmarital and part marital. Thus, a spouse contributing nonmarital property is entitled to an interest in the property in the ratio of the nonmarital investment to the total nonmarital and marital investment in the property. The remaining property is characterized as marital property and its value is subject to equitable distribution.

Id. at 80.

We perceive no clearly erroneous ruling by the trial court in its findings as to the equities in the Ameriprise account. Husband asserted a 41% interest in Ameriprise due to contributions he made prior to the marriage. Had he made no withdrawals, that would be nonmarital interest, with the balance marital and subject to equitable distribution. But, in this case, the court concluded that Husband's personal withdrawals effected a pre-trial return of his 41% nonmarital interest, such that no further compensation for his nonmarital interest was necessary. Husband has not persuaded us that the trial court erred or abused its discretion in this regard.

IV. Child support

Husband's final contention is that the court erred in calculating Wife's income for purposes of determining Husband's child support obligation. In the original judgment of absolute divorce, the court ordered Husband to pay $1,092.00 per month in child support for the daughter, and entered a judgment of $6,573.00 in arrears. Later, due to the partial grant of Husband's motion to alter or amend, the court reduced Husband's monthly child support obligation to $969.00, and reduced the arrears to $5,283.00. On appeal, Husband contends that the court erred in computing Wife's monthly income at $6,456.75 per month, or $77,481.00 per year, rather than calculating her monthly and annual earnings by way of extrapolation from Wife's most recent paycheck, entered into evidence at trial as Defendant's Exhibit 15. That document, dated June 14, 2010, and reflecting earnings through the pay period ending June 11, 2010, showed year-to-date gross wages for Wife of $39,881.00. Husband argues that this figure should have been used to determine Wife's true annual salary, and that if this is done, her monthly income becomes $7,454.00 — almost a thousand dollars more per month than the salary as calculated by the court in this case. If one used such a monthly income for Wife, Husband's child support obligation, obviously, would be dramatically reduced.

Wife rejoins that Husband's desired monthly income figure of $7,454.00 would require the court to assume, in its calculations, that Wife would work 40 hours per week, at her hourly wage of $36, for 52 weeks a year (Wife testified she is not paid for leave or vacation), plus roughly 300 hours per year of overtime. Wife also points to *Brown v. Brown,* 119 Md. App. 289 (1996), wherein this Court made clear that prospective overtime may be used in calculating child support obligations where overtime is "a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income for working overtime." *Id.* at 294. That notion is not supported by the evidence in this case, where Wife testified that there was no current opportunity for overtime available at the doctor's office where she was employed, and that she might only be asked to work overtime "occasionally . . . in kind of emergency situation[.]" This testimony is the opposite of what this Court said in *Brown* about overtime employment; it is not a regular part of Wife's employment in this case and clearly not something she can "actually expect to earn regularly." Based on the evidence in the record, we conclude that the trial court's finding as to the Wife's income was not clearly erroneous. Accordingly, the court did not err in its child support determination in this case.

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

FOOTNOTE

1. Both parties testified that it is a Christian Orthodox tradition for a couple to designate "godparents" to advise and counsel them.

NO TEXT

Cite as 9 MFLM Supp. 105 (2013)

Divorce: economic relief: calculation

Christopher W. Pisano

v.

Katherine F. Pisano

Consolidated Cases

No. 1391, September Term, 2011

and

No. 0017, September Term, 2012

Argued Before: Graeff, Kehoe, White, Pamela J. (Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: August 2, 2013. Unreported.

The trial court properly determined which of the parties' assets constituted marital property, but an irreconcilable discrepancy between the marital award and the alimony analysis required remand; therefore, the monetary award and child support determination were also vacated to provide the trial court with remedial flexibility.

This a consolidated appeal. In No. 1391, September Term, 2011, Christopher W. Pisano challenges various aspects of the economic relief granted by the Circuit Court for Baltimore County to his former spouse, Katherine F. Pisano, in their divorce proceeding.[1] Katherine has filed a contingent cross-appeal in No. 1391 and asserts that the trial court erred in determining the amount of her monetary award and the term of her alimony. In No. 17, September Term, 2102, Christopher asserts that the trial court erred in entering certain orders to assist Katherine in her efforts to collect the monetary award granted to her in the divorce proceeding. We will deal with the two appeals separately.

— Appeal No. 1391 —

Christopher presents seven issues, which we have consolidated and reordered for purposes of our analysis:

I. Did the trial court abuse its discretion by granting Katherine a monetary award of $1,290,754.10 and setting deadlines for its payment?

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

II. Did the court abuse its discretion in determining the amount and duration of its alimony award to Katherine?

III. Did the court abuse its discretion in ordering Christopher to pay child support of $1,750 per month for the parties' minor child?[2]

In her contingent cross-appeal, Katherine presents two issues, which we have reworded:

I. Was the trial court clearly erroneous in finding that severance payments to be received by Christopher were not marital property?

II. Was the trial court clearly erroneous when it failed to adjust the value of the martial home for an $80,000 lien against it, when calculating the value of Katherine's marital assets?

We find no error in, and therefore will affirm, the circuit court's resolution of the parties' disputes as to which of their respective assets should be treated as marital property. We conclude that there was an oversight in the circuit court's valuation of the marital home. That asset's value should be reduced from $1,350,000 to $1,269,515. We will otherwise affirm the court's findings as to the value of the marital property. For the reasons that we will explain, we will vacate the court's alimony award and, even though we find no error or abuse of discretion in the courts' decisions as to the monetary and child support awards, we vacate them as well to provide the court with remedial flexibility on remand.

Background

After a multi-day trial, the circuit court entered an amended opinion and order, setting out its findings of facts and the grounds for its exercise of discretion. We adopt the circuit court's recounting of the underlying facts:

> The parties were married in Chicago, Illinois on October 7, 1989. Two children were born to the marriage, Christopher William Pisano, Jr., born December 11, 1992 and George Nicholas Pisano, born November 10, 1995. The older child is over 18 years of age and graduated from high

school in June, 2011.

The parties met while both were attending Kenyon College, where they graduated in the mid-eighties. [Christopher] had always worked for Citrus and Allied Essences, [his] family['s] company, since his mid-teens, and went to work for that company full time after college. [Katherine] became certified as a paralegal and worked briefly after the marriage, but stopped when the parties decided it was time to have a child. The parties agreed that [Katherine] would not work outside the home but would stay home and raise the family, take care of the home, children and property. They agreed that [Christopher] would provide the financial support to the family.

[Christopher] worked energetically and was required to travel a great deal. His income continued to increase exponentially from a starting salary of about $16,000 annually.

In 1987, Citrus and Allied decided that the company had outgrown its physical facilities, and the company purchased nine acres of property in Belcamp in Harford County, Maryland. [Christopher] was Vice President of the company at that time, and was relocated to the Baltimore area. The family moved to Baltimore County in 1993, [eventually] relocating to a large house on four acres on Garrison Forrest Road. The location was chosen because the two sons were attending the Garrison Forrest School at the time, and the family had joined the Greenspring Country Club and St. Timothy's Church. The home is a large four-bedroom home with . . . an in-ground pool and substantial improvements described by [Christopher] as costing "hundreds of thousands of dollars." The parties were living there when they separated.

[Christopher] continued working hard and traveling frequently, and [Katherine] continued to care for the family. The two children attended private schools, the family owned a boat purchased for $175,000.00 for which the marina fees were $500.00 per month and gasoline and maintenance for an additional $500.00 per month. In addition to the Greenspring Country Club, the family belonged to a beach club in New York and the Maryland Golf and Country Club, health and fitness clubs, and they owned at least four vehicles. [Katherine] had jewelry valued at over $130,000.00. They enjoyed the services of a housekeeper. The children spent summers away at camp. The family dined out frequently. The tax returns for the years 2004-2010 declared income in the following amounts:

2004: $ 754,274.00
2005: $ 857,912.00
2006: $ 972,189.00
2007: $ 969,885.00
2008: $ 572,996.00
2009: > $1,000,000.00
2010: > $1,400,000.00

[Christopher] was also receiving large amounts of stock held in the Citrus and Allied companies, which began undergoing a number of corporate reorganizations. [We will discuss the corporate reorganizations in greater detail later.]

Both parties testified that the marriage suffered from a lack of communication, especially about finances, as early as 1993. However, the parties also agree that [Christopher]'s infidelity was the cause of the dissolution of the marriage.

This infidelity became known to [Katherine] in August, 2007. She had taken her younger son to New England to pick up her older son, who had been in camp for eight weeks, and had to return to Baltimore to begin high school at the Friends School. When [Katherine] and the two sons pulled into the driveway of the family home at 11:30 p.m., they found [Christopher] at the house with his secretary of many years, Marianne Peters. Some days later, [Christopher] confessed to [Katherine] that he had been having an illicit sexual relationship with Peters for several years. [Subsequently], [Christopher] told

> [Katherine] that he had also had a long-term illicit sexual relationship of 7 years duration with Corrine Andiorio, beginning [in 1997], and a brief affair with Meg Skidmore in 2005, a woman with whom he had attended high school . . . .
>
> Nevertheless, [Katherine] attempted to work on saving the marriage by requesting that [Christopher] attend counseling with a mental health professional, a minister at her church, and his medical doctor. These efforts fell short of effecting a reconciliation.

On February 28, 2008, Katherine filed a petition for absolute divorce seeking sole custody of the minor child, child support, alimony, use and possession of the marital home, continued use and possession of marital property, property determinations, a monetary award, and attorney's fees and expenses. Some time thereafter, Christopher filed his counter-complaint for absolute divorce.

The circuit court held a four-day trial beginning June 13, 2011, at the conclusion of which the court issued an amended judgment of absolute divorce on August 12, 2011. Therein, the court memorialized that the parties' agreements, namely that the parties stipulated that Katherine had the potential to earn $40,000 per year, that Christopher agreed to pay tuition for the minor child at the Friends School and for the boys' college educations, and that the parties would have joint legal custody of the children with wife having primary physical custody. Additionally, the parties agreed that they would evenly divide the funds in Christopher's two retirement accounts.

The court went on to order that Katherine receive child support in the amount of $1,750 per month and a monetary award of $1,290,754.10. The court also awarded Katherine alimony of:

> $15,000 per month for the next 27 months, when [Christopher]'s consulting and severance payments ends, [and]
>
> $12,000 per month for 141 months until [Katherine] turns 62, at which time alimony payments will end unless she remarries before that time.

The trial court's memorandum opinion contained explanations of its reasoning as to each form of relief. We will refer to the pertinent portions of the trial court's opinion as appropriate.

Standard of Review

The resolution of disputes as to alimony, monetary awards, and child support are vested in the sound discretion of the trial court.[3] A court can abuse its discretion when it makes a decision based on an incorrect legal premise or upon factual conclusions that are clearly erroneous. We review the contentions that the circuit court erred as to a matter of law on a *de novo* basis. *See In re Adoption/Guardianship of Ta'niya C.,* 417 Md. 90, 100 (2010).

We set aside a trial court's factual findings only when they are clearly erroneous, deferring to the trial court's ability to weigh the credibility of witnesses and its conclusions as to the probative value of conflicting evidence. Md. Rule 8-131(c). "A trial court's findings are clearly erroneous when they are not supported by substantial evidence." *Garcia v. Foulger Pratt Dev., Inc.,* 155 Md. App. 634, 654-55 (2003). In weighing whether there is substantial evidence, we must "consider the evidence produced at trial in a light most favorable to the prevailing party." *Id.* at 654.

Finally, in very rare cases, a court can abuse its discretion by reaching an unreasonable or unjust result even though it has correctly identified the applicable legal principles and applied those principles to factual findings that are not clearly erroneous. Writing for this Court in *North v North,* 102 Md. App. 1, 14 (1994), then Chief Judge Wilner explained that an appellate court will set aside a trial court's exercise of its discretion under these circumstances only when the decision in question is:

> well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

Discussion

I. The Court's Findings as to Marital Property and the Monetary Award

Maryland's Marital Property Act, codified at MD. CODE ANN., FAM. LAW ("FL") § 8-201 *et. seq.,* empowers courts to make a monetary award where such an award would overcome an inequity created by "a division of the parties' property [only] according to its title." *Malin v. Mininberg,* 153 Md. App. 358, 427 (2003) (emphasis in original omitted) (quoting *Ward v. Ward,* 52 Md. App. 336, 339 (1982)). In this arena, the circuit court has broad discretion to reach such an equitable and fair result. *See Hart v. Hart,* 169 Md. App. 151, 160-61 (2006).

The Marital Property Act contemplates a three-step process. First, the court will resolve all disputes as to whether property is marital or non-marital. FL § 8-203. Second, the court must "determine the value of all marital property." FL § 8-204(a). The court must perform these tasks in all cases. Finally, the court may make a monetary award to adjust the parties' equities and rights where required. FL § 8-205; *see also Paradiso v. Paradiso,* 88 Md. App. 343, 349 (1991) (explaining that the statutory provisions amount to the three steps). In deciding whether to make a monetary award and, if so, in what amount and pursuant to what terms, the court must consider each of the factors set out in FL § 8-205(b).[4]

In the present case, the circuit court first resolved the parties' disputes concerning whether certain assets titled in Christopher's name were marital property and the valuation of other assets. At the conclusion of this step in its analysis, the court concluded that marital property totaled $5,623,640. The court noted that, prior to trial, the parties had agreed to divide equally Christopher's retirement accounts, valued at $1,042,605, and did not consider those assets in its monetary award analysis.[5]

The court then reviewed each of the FL § 8-205(b) factors. After so doing, the court stated:

> Because [Katherine] will receive [the property titled solely in her name, which includes] the house at 325 Garrison Forrest Road, valued at $1,350,000 as well as her own jewelry valued at $137,332 and her checking account valued at $139,000, she will receive $1,626,332 in property titled to her. All of that is marital property, so ½ of that amount will be deducted from the $4,501,035 pool of marital assets, leaving $3,687,869 from which the Court can make a monetary award. Considering all of the statutory factors as discussed above, and recognizing that this award is intertwined with the alimony award, and considering the tax consequences, the Court awards [Katherine] 35% of that amount or $1,290,754.10.

Christopher presents a number of arguments as to why the monetary award should be vacated. For purposes of analysis, we consolidate his contentions into five: (1) the court clearly erred by concluding that certain assets held by him in his sole name were marital property; (2) the court's marital property and monetary award analyses were undermined by two fundamental legal errors: first, it proceeded on the incorrect premise that Maryland is a "title state" and second, it omitted part of the analysis required by FL § 8-205; (3) the court was clearly erroneous in several of its findings during its FL § 8-205(b) factor analysis; (4) the court erred as a matter of law in the method it employed to calculate the monetary award; and (5) the trial court abused its discretion in making the monetary award because the award grossly exceeded any equitable division of the parties' marital assets.

A. The Court's Findings as to Marital Property

A. (1) Christopher's Contentions

Christopher contends the trial court erred in deciding that certain assets titled in his name were marital property. Some — actually, a great deal — of additional information about Christopher's career and former employer is necessary to place his arguments in context.

From 1985 until 2008, Christopher worked in his family's business, advancing from a part-time sales person to vice president. Originally, this company was known as Citrus and Allied Essences, Ltd. ("C&A Essences"). C&A Essences supplied essential oils, extracts, and other flavoring agents to seasoning, food, and perfume companies. C&A Essences was established in the 1930's by Christopher's grandfather and remains controlled by his father, Richard Pisano, Sr., and other members of the Pisano family.

At the time of the parties' marriage in 1989, Christopher owned approximately 4.5% of the stock of C&A Essences. In 1989, C&A Essences had a value of $4,000,000 and Christopher's interest therein was worth approximately $178,000. During the parties' marriage, C&A Essences grew substantially in size, in profitability, and in overall value. There was substantial evidence — in the form of the testimony of Michael Duca, CPA, the chief financial officer of the C&A companies — that the increase in value was due in large part to the efforts of Christopher, his father, and his siblings, all of whom held management positions. After his marriage, Christopher acquired additional shares in C&A Essences. In 1996, as part of a corporate reorganization, Christopher exchanged his stock in C&A Essences for stock in Citrus & Allied Holdings International, Ltd. ("C&A Holdings"). C&A Essences continued in existence as a subsidiary to C&A Holdings.

In 2007, C&A Holdings[6] itself was reorganized. The evidence indicates that there were two reasons for this: the first was to provide Richard Pisano, Sr. (Christopher's father) with estate planning options; and the second was to divide the company's operations in order to improve after-tax profitability as well as operational and managerial efficiency. To these ends, some of C&A Holdings' assets were divided among four new entities: Trilogy Spice Extracts, Inc. ("Trilogy Spice

Extracts"), Trilogy Flavors, Inc. ("Trilogy Flavors"), C&A Service, Inc. ("C&A Service"), and C&A IP, Inc. ("C&A IP"). The transfer of assets from C&A Holdings to Trilogy Spice Extracts was structured as a tax-free reorganization so that Christopher's equity interest in the successor entity was the same as his stake in C&A Holdings. On the other hand, Christopher, along with other family members involved in the family business, purchased their shares in Trilogy Flavors, C&A IP, and C&A Service. Christopher did not pay cash for his stock in these entities, but rather executed promissory notes to C&A Essences for the subscription price for his stock in each company.

In 2006, Christopher started two businesses of his own, Silver Cloud Estates, LLC ("Silver Cloud") and Nothing But Salt, LLC ("Nothing But Salt"), both spice and flavoring businesses which sold directly to retail customers. In 2008, the parties' separated and Christopher's relationship with his secretary became clear. After consulting with members of the family, Richard Pisano, Jr., one of Christopher's brothers and the chief operating officer of C&A Holdings, asked Christopher to take a paid leave of absence to address his personal problems. Christopher resigned instead. His severance agreement included the following pertinent matters:

1. C&A Holdings and its affiliates agreed to pay $1.8 million as a severance payment, payable in $30,000 monthly increments for five years;
2. C&A Service entered into a consulting agreement with Christopher for five years at an initial monthly rate of $8,000 with a five percent annual increase. Additionally, the consulting agreement allowed Christopher to act as a salesman for C&A Service on a commission basis with reasonable travel, entertainment and other out-of-pocket expenses to be reimbursed by the company.
3. Christopher sold his interests in C&A Holdings[7] and C&A Service. The sale price for the C&A Holding stock was paid as follows:
   (a) a promissory note from C&A Holdings to him in the principal amount of $1,381,485.81 payable in 240 monthly payments of $11,555.30 of principal and interest at the rate of 8% (the "Installment Note");
   (b) a promissory note from C&A Holdings to him in the principal amount of $900,000, payable to the mortgage lender of the marital home in 24 monthly payments of $40,704.56 each (the "Mortgage Note");
   (c) forgiveness of Christopher's promissory notes with which he purchased his stock in Trilogy Flavors, C&A Service, and C&A IP;[8] and
   (d) a cash payment of $430,000.

These transactions did not completely sever Christopher's relationship with the family companies because he still owned shares in Trilogy Flavors, Trilogy Spice Extracts, and C&A IP. In 2010, Trilogy Flavors purchased the operating assets of Trilogy Spice Extracts.

At trial, the parties requested that the court determine whether the $1.8 million severance payments, the proceeds of the sale of the C&A Holding and C&A Service stock, as well as Christopher's stock in Trilogy Flavors, C&A IP, and Trilogy Spice Extracts were marital or nonmarital property.[9] Christopher asserted that the: (1) severance and consulting payments were earnings, and not property; and (2) proceeds of the stock sale, including the Installment Note and his remaining stock were directly traceable back to gifts of stock from family members. For her part, Katherine argued that the: (1) consulting and severance payments were marital property; and (2) stock was transferred to Christopher as a form of compensation rendering it marital or, alternatively, that Christopher failed to trace the stock back to gifts and, therefore, had not adequately established that the stock was nonmarital property.

The circuit court found that the payments that Christopher received from the consulting agreement and the severance package were not marital property but represented future earnings. The court also concluded that Christopher's stock holdings and assets from the sale of his stock were marital property for two reasons. First, the court found that "the stock received by [Christopher] after the marriage was attributable to his active and strenuous efforts on behalf of the company and were part of his salary and compensation package . . . ." Second, the court concluded that Christopher failed to demonstrate that the Installment Note and his current stock holdings were traceable to stock given to him.

Christopher argues to this Court that the circuit court erred by concluding that his stock and the Installment Note were marital property. Specifically, Christopher contends (emphasis in original):

> The trial court erred in determining that all of the "C&A assets" titled in [Christopher's] name, including the

> promissory note and the stock, [were] marital property. The basis of the trial court's fin[d]ing was that the stock interests were given to [Christopher] *as part of his compensation package.* The trial court made this finding despite the unequivocal testimony of [Christopher] and Mr. Duca that the stock was gifted and the provisions of the stockholder agreements that provided Richard Pisano could make a gift of his stock to his children . . . .
>
> * * * *
>
> Additionally, [Katherine's] counsel admitted that stock amounted to 4.48% of the value of the C&A companies was pre-marital. Using the September 2007 valuation, [Christopher's] pre-marital stock value would have been $792,154. The pre-marital stock value should have been carved out from any stock the court determined as marital since it was acquired before the marriage.

These contentions are unpersuasive. Christopher's characterizations notwithstanding, the evidence as to the circumstances under which Christopher acquired stock in the family companies was anything but "unequivocal." The two witnesses who testified on this issue were Christopher and Michael Duca. On cross-examination, Christopher testified:

> [Katherine's Counsel]: [Y]ou also don't know, you can't pinpoint or tell the Court what stock you received when or whether you paid for it or whether it was by gift, can you?
>
> [Christopher]: It would depend on the individual companies. It's, your, it's a, you know, they're now a handful of companies. Each of those companies have, has different stock. Since I've left there have been at least one, possibly two reorganizations now so it's, it's a little bit muddled.
>
> * * * *
>
> [Katherine's Counsel]: [C]an you tell the Court now which stock you got by virtue of gift and which stock you got by virtue of purchase, either from the company by purchasing treasury stock [or] from your younger brothers?
>
> [Christopher]: Are we talking specifically [about] Citrus and Allied?
>
> [Katherine's Counsel]: Yes.
>
> [Christopher]: Yes I can.
>
> [Katherine's Counsel]: So what stock did you purchase?
>
> [Christopher]: Let me, let me correct that. I can't tell you today exactly which stock I purchased and which stock was gifted to me.

The other witness who testified as to the origins of Christopher's stock in the family businesses was Duca, the chief financial officer of the Pisano companies. He testified that "for the most part" Christopher's shares in C&A Holdings were given to him by his father but that "[t]here was a small amount of shares that he purchased along the way. I'm not sure which amount it was, but it was a small amount of shares." Moreover, Duca testified that Christopher paid for stock with a bonus from C&A Holding: "it [i.e. the purchase price of the stock] was bonused to [Christopher and his brothers] on their W-2[s]."

"Marital property" "means the property, however titled, acquired by [one] or both parties during the marriage" and which "includes property held by the parties as tenants by the entirety unless . . . excluded by valid agreement." FL § 8-201(e). Marital property does not include property:

> (i) acquired before the marriage;
>
> (ii) acquired by inheritance or gift from a third party;
>
> (iii) excluded by valid agreement; or
>
> (iv) directly traceable to any of these sources.

FL § 8-201(e)(3) (emphasis added).

The evidence is clear that, prior to the parties' marriage in 1989, Christopher owned 47 shares of C&A Holdings's predecessor, C&A Essences, and accumulated more after that time. His stock in C&A Essences was converted into stock in C&A Holdings when that corporation was established in 1996. Christopher acquired his stock in Trilogy Spice Extracts in 2007 by means of a tax-free distribution of some of C&A Holdings's assets to Trilogy Spice Extracts in 2007. That same year, Christopher purchased shares of Trilogy Flavors, C&A Service, and C&A IP in 2007 by executing three promissory notes. Finally, he surrendered his C&A Holdings and C&A Service stock in 2008 in return for, among other consideration, the Installment Note.

The Installment Note and the stock in Trilogy Spice Extracts, Trilogy Flavors, and C&A IP were acquired by Christopher during the parties' marriage. As such, these assets were marital property unless these assets were "directly traceable" to either the stock he owned prior to marriage or to the stock or other gifts Christopher received during the marriage. This is a question of fact.

See Lowery v. Lowery, 113 Md. App. 423, 438 (1997) ("[A] determination of whether something is marital property is a question of fact for the court to resolve . . . ."). Christopher had the burden of proof as to this issue. *See Innerbichler v. Innerbichler,* 132 Md. App. 207, 227 (2000) ("[T]he party seeking to demonstrate that particular property acquired during the marriage is nonmarital must trace the property to a nonmarital source. If a property interest cannot be traced to a nonmarital source, it is considered marital property.") (internal citations and quotation marks omitted)). Neither Christopher nor Duca was able to inform the trial court exactly what portion of Christopher's current holdings were traceable to nonmarital sources. In light of the equivocal testimony of these witnesses, we conclude that the circuit court's finding that Christopher failed to meet his burden of persuasion was not clearly erroneous. *See Byers v. State,* 184 Md. App. 499, 521 (2009) ("[I]t is nearly impossible for a verdict to be clearly erroneous or an abuse of discretion or legally in error when it is based not on a fact finder's being persuaded of something but only on the fact finder's being unpersuaded."); *see also Pollard's Towing, Inc. v. Berman's Body Frame & Mechanical, Inc.,* 137 Md. App. 277, 289–90 (2001) ("Far less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something.").[10] Moreover, the stock in C&A IP and Trilogy Flavors was purchased by Christopher during the marriage. This stock was marital property and the circuit court was correct in so holding.

A. (2) Katherine's Contentions as to Marital Property

First, Katherine contends that the court erred in finding that Christopher's severance payments were future earnings and not marital property. We see no error on the court's part. Maryland courts have characterized certain kinds of payments received at termination of employment as marital property. *See Solomon,* 383 Md. at 204-05 (A workers' compensation award for loss of earning capacity, pension rights, stock option plans, and other benefits in an employee's compensation plan are marital property.); *Smith v. Smith,* 193 Md. App. 29, 39-40 (2010) (A lump sum reimbursement for unused accumulated leave paid upon termination of employment is marital property.). The severance payments at issue in the present case are not payable in a lump sum but are instead spread out over 60 months and are more analogous to future earnings than to an end of employment lump sum reimbursement or accrued but unpaid bonus. Maryland's child support guidelines support this interpretation, providing that a court may consider severance pay as actual income when calculating a parent's child support obligation "[b]ased on the circumstances of the case . . . ." FL §12-201(b)(4)(i). We conclude that the court was not clearly erroneous in finding that the installment severance payments made to Christopher were more akin to income than marital property.

Second, Katherine contends that the court erred in failing to accept her proposed valuation of the Installment Note. On the parties' joint Maryland Rule 9-207 statement, Christopher asserted that the Installment Note had a value of $1,295,233; Katherine's position was that it should be valued at $2,391,947. The court ultimately valued the asset at $1,295,233. In her brief to this Court, Katherine argues that "at trial, [she] put on testimony that the then unpaid balance of the note was $2,391,947," and that Christopher did not rebut this. Therefore, according to Katherine, the court erred in its valuation. Katherine did not include a reference as to where in the extract her evidence is located, thus waiving the issue. *Pulte Home Corp. v. Parex, Inc.,* 174 Md. App. 681, 760–61 (2007); *Konover Prop. Trust, Inc. v. WHE Assocs., Inc.,* 142 Md. App. 476, 494 (2002). In any event, we do not believe the court was clearly erroneous in not accepting Katherine's contention that a note, payable over 20 years, should be valued at the total income stream, including interest, without any present value discount.

Finally, Katherine contends that the circuit court clearly erred in its valuation of the former marital residence, which had been transferred to her name alone prior to trial. She states:

> In the [Md. Rule 9-207] Statement, the parties agreed that there was a lien or encumbrance directly attributable to 325 Garrison Forest Road in the amount of $80,485. The court valued the property at $1,350,000 without deducting the lien of mortgage. In this respect, it was clearly erroneous.

Katherine is correct. It is clear from the record that, both at trial and in post-trial motions, Katherine and Christopher agreed that the marital home was subject to a home equity lien of $80,485. In its opinion, the circuit court accepted Christopher's proposed value for the home, $1,350,000, but did not subtract the $80,485 lien from this amount. This represents an isolated oversight on the court's part and, as such, we vacate the court's marital property valuation only in this regard. On remand, we direct the circuit court to adjust the value of the marital home from $1,350,000 to $1,269,515.

B. Christopher's Contentions as to the Monetary Award

B. (1) "Maryland remains a title state . . . ."

Christopher contends that the court erroneously stated that Maryland was a title state and that this erroneous statement of law rendered erroneous the

court's monetary award. We can dispose of this contention quickly. Christopher is correct that, in its opinion, the trial court stated that "Maryland remains a title state, even with the passing of the Marital Property Act in 1980." However, in making its monetary award, the trial court explicitly applied the analysis required by FL § 8-205. We view the trial court's comment as nothing more than a reflection upon the limitations upon a court's authority to change title to property in a divorce action. *See* FL §§ 8-202 and 8-205.[11] In any event, because the court applied the correct legal standards in its monetary award analysis, any error was harmless.

Christopher also contends that there are inconsistencies in the trial court's opinion. As we will explain, as regards the monetary award, the inconsistencies are minor and the thread of the court's reasoning is easy to follow. An inconsistency in the court's alimony analysis is more problematic.

B. (2) Compliance with the Three Step Analysis Required by FL § 8-205

Christopher next contends that the court erred by failing to state in its written opinion that the distribution of the parties' marital property based on title alone would be inequitable and, therefore, did not adequately perform the third step required by the Marital Property Act. We disagree. Here, it is clear from the court's opinion that, after determining what property was marital and the value of that property, the court concluded that there would be an inequitable result if it distributed property based on title alone. This is unquestionably so because the court promptly began its § 8-205 factor analysis, implicitly indicating that it thought it necessary to make a monetary award to correct an inequity. It is not necessary for the court to state every step in its reasoning, *see Malin,* 153 Md. App. at 416 (providing that a court "need not use formulaic language or articulate every reason for its decision with respect to each statutory alimony factor[, r]ather the court must clearly indicate that it considered all factors") (internal quotations and citation omitted), nor will this Court parse opinions looking for error. *See Tochterman v. Baltimore County,* 163 Md. App. 385, 390 (2005) ("We are not marking the [circuit court]'s paper or deciding whether it lapsed into inartful phraseology or inapt characterization, and we do not intend to parse every sentence of the . . . opinion as if we were exegizing a sacred text.").

B. (3) The Court's Analysis of the FL §8-205(b) Factors

In its memorandum opinion, the trial court addressed each of the § 8-205(b) factors in detail. Christopher focuses his challenges to three of the statutory criteria: (A) the value of the parties' property interests (FL § 8-502(b)(2)); (B) the economic circumstances of each party (FL § 8-205(b)(3)); and (C) his contributions throughout the marriage and separation (FL § 8-205(b)(11)). We address these arguments in turn.

A. The Parties' Assets (FL § 8-502(b)(2))

Christopher contends the court was clearly erroneous in its evaluations of § 8-205(b)(2) because it stated that "aside from the Garrison Road house, everything else is titled in [Christopher]'s name." This sentence is incorrect as Katherine owned jewelry and had a bank account in her own name. The misstatement was harmless because, in its analysis, the court that noted that Katherine held title to the marital home, her own jewelry, and her bank account and included those assets when valuing her titled marital property.

B. The Parties' Economic Circumstances (FL § 8-205(b)(3))

Christopher presents numerous arguments to support his contention that the court was clearly erroneous when it analyzed the economic circumstances of the parties. We address these arguments in turn.

First, Christopher contends that the court was clearly erroneous because it overstated Christopher's share of the marital property when it stated that "[p]roperty valued in excess of $3.5 million is titled in [Christopher]'s name." Prior to the parties' pre-trial agreement as to custody and some of the economic issues, Christopher had title to $3,916,357.50 in assets. The parties agreed to divide his retirement accounts (totaling $1,042,605) equally prior to trial and the court explicitly noted that its marital property analysis did not include the retirement accounts. To the extent there was any inaccuracy — and we think there was none — it was neither here nor there because the court's analysis leading to its monetary award is clearly based on the parties' marital assets less the proceeds of the retirement accounts.

Second, Christopher argues that the court clearly erred by characterizing Katherine's income potential as limited. While the parties stipulated that she had the present ability to earn $40,000, this figure is indeed "limited" when compared to Christopher's annual income, which ranged from $754,000 to more than $1.4 million in the period from 2004 through 2010. In its opinion, the court used the stipulated figure for Katherine but noted that "[i]n reality, she makes much less." While at one time she worked as a certified paralegal, she did not work outside of the home for almost 20 years and has not maintained her certification or training during that time. Moreover, the court noted that she "would be competing with job candidates 25 years her junior." A trial court may decline to accept a

stipulation if it finds that the facts underlying the stipulation are inaccurate. *See Peddicord v. Franklin,* 270 Md. 164, 175 (1973) ("Indeed, it has been held that a trial court, on its own motion, may decline to accept a stipulation when it finds that a fact set up in the stipulation is untrue."). The trial court's reservations about the stipulated income potential are reasonable.

Third, we are not convinced that the court clearly erred by failing to explicitly note that Christopher rented an apartment and that he paid the children's tuition (both private high school and college) because the court noted both of those facts previously in its opinion. In reaching its decision, the court explicitly incorporated by reference the entirety of the facts section in its detailed opinion and, moreover, made its analysis in the context of its written opinion as a whole. That this single paragraph does not re-hash the extensive analysis already performed by the court does not affect the substance of its determination. As we stated in *Davidson v. Seneca Crossing Section II Homeowner's Ass'n,* 187 Md. App. 601, 628 n.4 (2009) (quotation marks and citations omitted; emphasis in original):

> The trial judge need not articulate each item or piece of evidence she or he has considered in reaching a decision. Unless it is clear that he or she did not, we presume the trial judge knows and follows the law. The fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal.

Fourth, Christopher's contention that the court erred by not considering the liquidity of his assets is not preserved for appellate review because it was not raised before the circuit court. *See* Md. Rule 8-131(a). At trial, Christopher testified that he currently had an interest in the Installment Note as well as shares of Trilogy Flavors, C&A IP, and Trilogy Spice Extracts. Although it was clear that Christopher received monthly payments from the Installment Note, there was no argument or testimony regarding the liquidity of the note or Christopher's ability to receive an advance on the note. Additionally, based on our review of the record, there was no evidence presented by Christopher as to the liquidity of his shares of Trilogy Flavors, Trilogy Spice Extracts, and C&A IP. Even if, by chance there is some evidence to support that contention, Christopher points us to no citation in the record, and we find none, indicating that Christopher argued liquidity to the circuit court.

C. Christopher's Contributions Throughout the Marriage and Separation (F.L. § 8-205(b)(11))

Christopher argues that the court was clearly erroneous because it did not discuss his financial generosity when discussing the other factors relative to doing equity between the parties as required by § 8-205(b)(11). Specifically, Christopher argues:

> Throughout the marriage and separation, [Christopher] voluntarily demonstrated great generosity to [Katherine] and the children. He acted contrary to his own economic interests even after the separation. By way of example, when [Christopher] resigned from the family business he used $900,000 of the proceeds from the sale of the stock to pay off the mortgage on the [marital home] titled in [Katherine]'s name even though he knew the marriage was very troubled. Also, during the pendency of this litigation, [Christopher] voluntarily made payments of $8,000 a month, paid the education expense of the children ($8,000/month) and paid the expenses of the [marital home] ($3,800/month). The *pendente lite* payments are never mentioned in the Amended Opinion. Most certainly, these selfless actions should have been considered an equitable factor in [Christopher]'s favor especially as compared to other really despicable types. *See e.g., Digges v. Digges,* 126 Md. App. 361 (1999).

As we have previously stated, a court is not required to discuss every piece of evidence and every step of its reasoning in its factor analysis. *See Davidson,* 187 Md. App. at 628 n.4 ("The fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal.").

Additionally, we are not persuaded by Christopher's contention that he is owed any particular credit for paying off the mortgage on the marital home with funds from the sale of the stock upon his resignation from the family businesses. As we discussed in Part I of this opinion, the court determined that the marital home and the stock (and therefore the funds from the sale of the stock) were marital property. As such, that Christopher used marital funds to pay off an encumbrance on marital property does not work in his favor. The court did account for the fact that the marital home's mortgage was satisfied in valuing the property.

Next, Christopher takes issue with the court's word choice when discussing the circumstances which contributed to the estrangement of the parties.

Specifically, Christopher contends that it would have been "far more accurate to say that [Christopher] was ambivalent and troubled rather than to puritanically declare that his 'tawdry behavior was amplified by his efforts to 'reconcile.'" At trial, Katherine presented evidence that she discovered Christopher at the family home with Marianne Peters, his then current extramarital partner, when Katherine was returning from picking up one of the parties' children from summer camp. Katherine later found a suitcase hidden in a closet in the family home with items used by Ms. Peters when she and Christopher stayed at the parties' marital home. Attempts at reconciliation between the parties broke down when Christopher stated that he wished to remain in his marriage with Katherine but was unwilling to end his extramarital relationship. Ms. Peters was but the most recent of Christopher's extramarital partners. Whether we characterize Christopher's behavior as "tawdry," "ambivalent and troubled," or something else, it is clear that his marital misconduct was a major factor in the breakup of the parties' marriage. We cannot say that the court erred or abused its discretion in giving weight to this aspect of Christopher's marital behavior in making the monetary award.

Finally, Christopher also contends that the court erred by not considering his contribution of the stock he held in C&A Essences before the parties' marriage towards paying off the mortgage on the marital home. The short answer to this argument is that, as we explained earlier in this opinion, the C&A Essences stock was marital property.

C. The Court's Calculation of the Monetary Award

Christopher raises two additional contentions regarding the monetary award. First, he argues that the process by which the court calculated the monetary award improperly and prejudicially favored Katherine and her marital property.[12] We disagree. The Marital Property Act does not mandate a specific formula by which a court is to calculate the appropriate monetary award. Instead, the Marital Property Act gives the court discretion to calculate a monetary award, requiring only that the court discuss each of the factors in § 8-205(b) in the process of making an award to do equity between the parties. *See Innerbichler*, 132 Md. App. at 230 ("With respect to the ultimate decision regarding whether to grant a monetary award and the amount of such an award, a discretionary standard of review applies. This means that we may not substitute our judgment for that of the fact finder, even if we might have reached a different result.") (internal citations omitted).

Christopher's second argument is that the $1,290,754.10 monetary award resulted in a sizeable and unexplained disparity between the parties' respective shares of the marital property, with Katherine receiving 65% of the marital property while Christopher received only 35%. This, Christopher asserts, shows that the trial court abused its discretion. In so arguing, Christopher relies on *Flanagan v. Flanagan,* 181 Md. App. 492 (2008), in which this Court vacated a monetary award which created a sizeable and unexplained disparity between the parties. Specifically, in *Flanagan,* we found an abuse of discretion where the court's $30,000 monetary award left husband with approximately 13% of the marital property and his former-spouse with approximately 87% of the total marital property because "the court did not explain the enormous percentage [given to wife via the monetary award] on the basis of appellant's conduct leading to the parties' estrangement, or indeed on any particular basis." *Id.* at 526-27.

Flanagan is factually inapposite to this case for several reasons. Before the monetary award, Katherine had title to approximately 38.8% (namely, $2,148,585.50 of the total marital assets (as Determined by the court)[13] of $5,543,640.50) of the parties' marital property (with her share including her half of the retirement accounts and including the retirement accounts in the pools of marital property), while Christopher had title to approximately 61.2% of the pool (*viz.*, $3,395,055/$5,543,640.50) (treating the retirement account in the same manner). The court's $1,290,754.10 monetary award raised Katherine's percentage to approximately 62% ($3,439,339.60 of the total of $5,543,640.50) and lowered Christopher's percentage to approximately 38% (namely, ($2,104,300.90 of the total of $5,543,640.50).

The resulting 24% difference between the parties' post-award shares of the marital assets pales in comparison to the 74% discrepancy which we vacated in *Flanagan.* 181 Md. App. at 526-27. Moreover, in determining a monetary award, a court must consider the parties' future earnings capacities. *See* FL § 8-205(b)(3) (listing "the economic circumstances of each party at the time the award is to be made" among the factors a court is required to consider). Between 2004 and the time of the divorce, Christopher's income varied from $572,996 to in excess of $1.4 million, while Katherine's earning capacity was stipulated to be $40,000. In contrast, in *Flanagan*, husband earned $39,696 annually while wife, to whom the court's monetary award gave 87% of the property, earned $47,844. In light of the significant discrepancy in the parties' earing abilities in the present case, the court did not abuse its discretion in making the monetary award.

Christopher also argues that the court abused its discretion by ordering him to pay $250,000 to Katherine within 60 days of the order and the remaining $1,040,754.10 balance by June 24, 2012[14] because

he had no ability to comply with that schedule based on the illiquidity of the assets to which he had title. Specifically, Christopher contends (emphasis in original):

> The undisputed evidence establishes that it is *impossible* for [Christopher] to make the payments on the monetary award by June 24, 2012. The face value of the marital assets titled in [Christopher's] name are only accessible to him as monthly payments to be distributed over a 20 year time period. The promissory note from C&A by its terms cannot be sold. The amount of payments due on that promissory note to [Christopher] from the date the monetary award was made until June 24, 2012, equal $115,555. The total value of the remaining stock owned by [Christopher] is less than the monetary award. Most importantly, [Christopher]'s right to sell that stock is limited by the stockholder agreement. The payment of the purchase price is set at $25,000 at closing with the balance payable over a 20 year term. [Christopher's] life insurance policy is already pledged as collateral. [Christopher] has no ability to sell assets in order to raise sufficient funds to pay the monetary award in the time required.[ ]

As we have already discussed, Christopher did not present evidence or argue to the circuit court that the marital property titled to him, including his shares of C&A IP, Trilogy Flavors, or Trilogy Spice Extracts, were illiquid, or that his life insurance policy was pledged as collateral.[15] As such, it is not properly before us and we will not consider it. *See* Md. Rule 8-131(a).

II. Alimony

Christopher presents a number of arguments that the court abused its discretion by making its alimony award to Katherine. These arguments group into two categories: (1) the court erred in making its multi-step analysis of the criteria set out in FL § 11-106(b); and (2) the court abused its discretion by making the alimony award because of its structure, amount, and duration. Because we conclude it is necessary to vacate the court's alimony award for two reasons, we need not address all of Christopher's specific contentions.

It is a bedrock principle of Maryland family law that a trial court awards alimony in order to do equity between the parties. *See Long v. Long,* 129 Md. App. 554, 577-78 (2000). The primary purpose of Maryland's alimony statute, F. L. § 11-101 *et seq.,* is economic rehabilitation and, therefore, there is a preference for rehabilitative alimony. *See Boemio v. Boemio,* 414 Md. 118, 140-43 (2010); *Solomon v. Solomon, 3*83 Md. 176, 194-95 (2004). Nonetheless, indefinite alimony is appropriate when fairness requires it. As the Court of Appeals stated in *Boemio,* 414 Md. at 141 (quoting *Tracey v. Tracey,* 308 Md. 328, 388 (2010) (emphasis added in *Boemio*)):

> We have previously defined the purpose of the statute as providing for an appropriate degree of spousal support in the form of alimony after the dissolution of a marriage. In regard to the appropriateness of such support, the statute itself requires that the trial court weigh all factors *relevant to "a fair and equitable award.*" [F. L. §] 11-106(b). The statute elsewhere invokes the *equitable concept of unconscionably disparate standards of living.* [F. L. §] 11-106(c)(2). Its sister provision governing the extension of an alimony period permits the court to act to avoid "*a harsh and inequitable result.*" [F. L. §] 11-107(a)(1). We conclude from these provisions that the *paramount goal of the legislature was to create a statutory mechanism leading to equitably sound alimony determinations by judges.*

Where equity requires, a court may also structure an award which combines aspects of both rehabilitative and permanent alimony. As this Court stated in *Innerbichler,* 132 Md. App. at 246, "[a] trial court has broad discretion in awarding alimony, which may include both rehabilitative and indefinite components." *See also Dover v. Dover,* 106 Md. App. 329, 352 (1995) ("[I]f the court is satisfied that, based on the evidence, rehabilitative alimony would provide a useful incentive to a party, the court may structure the alimony award to include *both* rehabilitative and indefinite components.").

Section 11-106(b) and (c) of the Family Law Article[16] set out the factors a court must consider when determining whether to award alimony, and if so, in what amount and for what duration. Among the factors a court is required to consider is any monetary award made by the court. *See* FL § 11-106(b)(11)(ii); *see also Williams v. Williams,* 71 Md. App. 22, 37 (1987) ("[W]hether to award alimony, be it rehabilitative or permanent, must be decided in light of all the factors in the case, including any monetary award made.").

We review a court's award of alimony under an abuse of discretion standard. As the Court of Appeals stated:

> [A]n alimony award will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong. [A]ppellate courts will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings. Thus, absent evidence of an abuse of discretion, the trial court's judgment ordinarily will not be disturbed on appeal.

Boemio, 414 Md. at 124-25 (internal citations and quotation marks removed).

Returning to the present appeal, it is necessary to vacate the alimony award for two reasons. First, there is an irreconcilable discrepancy between the court's marital award and its alimony analysis. FL §11-106(b)(11)(ii) requires a court to consider the monetary award when making its alimony award. During the course of its §11-106(b) analysis, the court correctly noted that it had granted Katherine a $1,290,754.10 monetary award. However, the court also stated that "[Christopher] is receiving 65% of the martial property . . . ." This is clearly incorrect; as we have noted, Christopher's post-award share of the marital property was 38%. While it is possible that the court's reference to 65% was an instance of the sort of "inartful phraseology or inapt characterization" that is not normally a basis for reversal, *see Tochterman,* 163 Md. App. at 390, the court's opinion can be read otherwise. It is impossible for us to resolve the ambiguity.

Second, the court's alimony award terminated Katherine's entitlement to alimony at age 62 without explanation. As such, under the circumstances and in the interests of justice, we vacate and remand on the issue of alimony.

On remand, the court should determine whether or not Katherine should receive alimony and, if so, in what amount and duration according to § 11-106. If it decides Katherine is entitled to indefinite alimony, but the court decides to terminate that alimony after a finite number of years, as did the trial court in the initial proceeding, the court should explain the basis for its decision in that regard.

III. Child Support

Christopher argues that the circuit court abused its discretion in making a child support award without making findings as to the parties' income and expenses. This contention is unpersuasive. In "above the guidelines" cases such as this, a court "may use its discretion" in setting the amount of child support. FL § 12-204(d). Unlike the analogous statutory provisions in the Family Law Article pertaining to monetary awards and alimony, § 12-204 does not require formal findings of fact. More to the point, the circuit court's analysis of the monetary award and alimony issues in this case contains a detailed discussion of the parties' income. After noting that "[m]uch Court time was spent on the 'spending habits' and 'expenses' of each of the parties," the court found that each party had monthly expenses of $30,000. As Christopher does not assert that this finding was erroneous, we conclude that he has not demonstrated that the circuit court abused its discretion in its award of child support.

Conclusion

We affirm the court's findings made pursuant to FL § 8-203 as to which of the parties' assets are marital property. As noted, there was an oversight in the court's valuation of the marital home. That asset's value should be reduced from $1,350,000 to $1,269,515. We otherwise affirm the court's findings, made pursuant to FL § 8-204, as to the value of the marital property. We vacate the court's alimony award and, although we find no abuse of discretion in the court's monetary award or child support determination, we vacate them as well to provide the court with remedial flexibility on remand. *See, e.g., Turner v. Turner,* 147 Md. App. at 400-01; *Strauss v. Strauss,* 101 Md. App. 490, 511 (1994); *Murray v. Murray,* 190 Md. App. 553, 572-73 (2010). The alimony and child support awards will remain in effect *pendente lite* but subject to further order of the circuit court.

— Appeal No. 17 —

In this appeal, Christopher challenges an order of the circuit court holding him in contempt for failing to pay an installment of the monetary award. After the appeal was filed, the court vacated the order of contempt. The appeal is moot. *See Suter v. Stuckey,* 402 Md. 211, 219-20 (2007) ("A case is moot when there is no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant.").

APPEAL NO. 1391, SEPTEMBER TERM, 2011:

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED IN PART AND VACATED IN PART. THE CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED BETWEEN THE PARTIES.

APPEAL NO. 17, SEPTEMBER TERM, 2012:

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. We will hereafter refer to the parties by their first names.

2. Christopher presents the following issues in his brief to this Court:

> 1) Did the trial court make multiple errors of law making the monetary award an abuse of discretion?
>
> 2) Did the trial court err in ordering that the total monetary award of $1,290,754.10 be paid by June 24, 2012?
>
> 3) Did the trial court abuse its discretion in the award of alimony?
>
> 4) Did the trial court err in its determinations as to stock titled in [Christopher]'s name?
>
> 5) Did the trial court err and misconstrue the agreements made by [Christopher]?
>
> 6) Did the trial court err in the amount of child support?
>
> 7) Did the trial court err in finding [Christopher] in contempt for failing to pay an installment of the monetary award?[ ]

3. *See, e.g. Boemio v. Boemio,* 414 Md. 118, 124 (2010) ("An alimony award will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong.") (internal quotation marks and citations omitted); *Flanagan v. Flanagan,* 181 Md. App. 492, 521 (2008) (While the determination whether property is marital in nature is factual, "the ultimate decision regarding whether to grant a monetary award, and the amount of such an award, is subject to review for abuse of discretion."); *Shenk v. Shenk,* 159 Md. App. 548, 554 (2004) ("Child support orders ordinarily are within the sound discretion of the trial court.").

4. Section 8-205 reads:

§ 8-205. Marital Property—Award

> (a) *Grant of award.*
>
> (1) Subject to the provisions of subsection (b) of this section, after the court determines which property is marital property, and the value of the marital property, the court may transfer ownership of an interest in property described in paragraph (2) of this subsection, grant a monetary award, or both, as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded.
>
> (2) The court may transfer ownership of an interest in:
>
> (i) a pension, retirement, profit sharing, or deferred compensation plan, from one party to either or both parties;
>
> (ii) subject to the consent of any lienholders, family use personal property, from one or both parties to either or both parties; and
>
> (iii) subject to the terms of any lien, real property jointly owned by the parties and used as the principal residence of the parties when they lived together, by:
>
> 1. ordering the transfer of ownership of the real property or any interest of one of the parties in the real property to the other party if the party to whom the real property is transferred obtains the release of the other party from any lien against the real property;
>
> 2. authorizing one party to purchase the interest of the other party in the real property, in accordance with the terms and conditions ordered by the court; or
>
> 3. both.
>
> (b) *Factors in determining amount and method of payment or terms of transfer.* The court shall determine the amount and the method of payment of a monetary award, or the terms of the transfer of the interest in property described in subsection (a)(2) of this section, or both, after considering each of the following factors:
>
> (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (2) the value of all property interests of each party;
>
> (3) the economic circumstances of each party at the time the award is to be made;
>
> (4) the circumstances that contributed to the estrangement of the parties;
>
> (5) the duration of the marriage;
>
> (6) the age of each party;
>
> (7) the physical and mental condition of each party;
>
> (8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;
>
> (9) the contribution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;
>
> (10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
>
> (11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.
>
> (c) *Award reduced to judgment.* The court may reduce to a judgment any monetary award made under this section, to the extent that any part of the award is due and owing.

5. Christopher contends that he was prejudiced by this but fails to explain how. We will not address the argument. *See*

Poole v. State, 207 Md. App. 614, 633 (2012).

6. By 2008, there were at least eleven companies, some organized in Mexico and the Virgin Islands, affiliated with or owned by C&A Holdings.

7. In the same transaction, Christopher also transferred his stock in Citrus and Allied Essences de Mexico, S.A. to C&A Holdings. The relationship of these two entities to one another is unclear from the record.

8. The language of the agreement provided that C&A Holdings would provide to Christopher:

> an acknowledgment signed by the Purchaser's wholly owned subsidiary Citrus and Allied Essences Ltd. ("Essences") of receipt of (x) $61,002.22 representing principal and interest (including past due interest) payments due from Seller under, and the remaining principal amount of, that certain Promissory Note dated September 5, 2007 made by the Seller in favor of Essences in the original principal amount of $56,666.67 (the "IP Note" and (y) $57,869.11 representing principal and interest payments due from the Seller under, and the remaining principal amount of, that certain Promissory Note dated September 5, 2007 made by the Seller in favor of Essences in the original principal amount of $53,750.00 (the "Flavors Note").

9. The mortgage on the marital home was paid off using the Mortgage Note payments by late 2010.

10. We do not address the alternative basis of the trial court's decision, *i.e.,* that Christopher's stock in C&A Essences and C&A Holdings were not gifts at all, but rather a form of compensation.

11. Section 8-202 of the Family Law Article provides:

§ 8-202 Ownership of personal and real property.

> (a) *Determination of ownership.* —
>
> (1) When the court grants an . . . absolute divorce, the court may resolve any dispute between the parties with respect to the ownership of personal property.
>
> (2) When the court grants . . . an absolute divorce, the court may resolve any dispute between the parties with respect to the ownership of real property.
>
> (3) Except as provided in § 8-205 of this subtitle, the court may not transfer the ownership of personal or real property from 1 party to the other.
>
> (b) Decree and order. – When the court determines the ownership of personal or real property, the court may:
>
> (1) grant a decree that states what the ownership interest of each party is; and
>
> (2) as to any property owned by both of the parties, order a partition or a sale instead of partition and a division of the proceeds.

12. This argument is separate and apart from Christopher's argument that the court should have included the retirement accounts in calculating the value of the parties' marital property. *See supra* note 5.

13. This figure reflects the numbers used by the circuit court. As explained, the court overstated the parties' assets by failing to deduct the balance of the home equity loan from the value of the marital home.

14. In its amended order, the court ordered the following:

> ORDERED, that [Christopher] shall pay to [Katherine] a monetary award in the amount of $1,290,754.10, $250,000.00 within 60 days of this Amended Judgment of Absolute Divorce and the balance by June 24, 2012 . . . ."

15. Christopher neither argued this point during the trial nor in his motion for reconsideration. In his motion, Christopher argued that he should not be forced to liquidate his assets, not that they were illiquid:

> In the event the Court did not make a mathematical error when awarding Plaintiff the $1,318,754.15, [Christopher] asks to be heard in open Court on the payment structure of the award. After paying for private school and college in the next two months, along with the alimony and child support, [Christopher] does not have the ability[ ] to pay $250,000 by August 24, 2011. Likewise, [Christopher] would not be able[ ] to pay the balance due of the $1,068,754.15 in June 2012. The monetary award should be fashioned in a manner that does not force him to liquidate all remaining assets.

16. The statutory factors in § 11-106(b) are:

> (b) *Required considerations.* — In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:
>
> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (6) the circumstances that contributed to the estrangement of the parties;
>
> (7) the age of each party;
>
> (8) the physical and mental condition of each party;
>
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;

10) any agreement between the parties;

11) the financial needs and financial resources of each party, including:

(i) all income and assets, including property that does not produce income;

(ii) any award made under §§ 8-205 and 8-208 of this article;

(iii) the nature and amount of the financial obligations of each party; and

(iv) the right of each party to receive retirement benefits; . . . .

If awarding indefinite alimony, the court must also consider the factors provided by § 11-106(c) of the Family Law Article, which provides:

(c) *Award for indefinite period.* — The court may award alimony for an indefinite period, if the court finds that:

(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or

(2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

NO TEXT

Cite as 9 MFLM Supp. 121 (2013)

Divorce: discharge of counsel: attorneys fees

Benjamin Igboemeka
v.
Nkem Igboemeka

No. 0397, September Term, 2010

*Argued Before: Krauser, C.J., Woodward, *Watts, Shirley M., JJ.*

Opinion by Woodward, J.

Filed: August 5, 2013. Unreported.

*Shirley M. Watts, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a specially assigned member of this Court.

The trial court did not err or abuse its discretion: in denying requests for a continuance so that appellant could obtain another new attorney; in imposing a sanction for not complying with a discovery order because he had not retained counsel; or in awarding counsel fees to the appellee, based in part on those actions by appellant.

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

By Judgment of Absolute Divorce, entered on March 9, 2010, the Circuit Court for Prince George's County granted Nkem Igboemeka ("Nkem"), appellee, an absolute divorce from Benjamin Igboemeka ("Benjamin"), appellant. Among other things, the circuit court awarded Nkem sole legal custody and primary physical custody of their four minor children, as well as a $37,210.00 monetary award, $5,844.00 in alimony and child support arrears, and $5,358.00 in attorney's fees. The circuit court also ordered Benjamin to pay Nkem $500.00 per month in rehabilitative alimony from December 1, 2009 through November 2013, and $2,222.00 per month in child support.

On March 1, 2010, Benjamin filed a Motion for New Trial or in the Alternative to Amend Judgment, to Stay Enforcement of Judgments and for Appropriate Relief ("motion for new trial"). The circuit court denied Benjamin's motion for new trial in an order entered on April 28, 2010.

On appeal, Benjamin presents four issues for review by this Court, which are, as stated in his brief:

1. Whether the Court erred by allowing Appellant's attorney to strike her appearance on the morning of the scheduled trial date and in denying Appellant's request for a postponement to obtain new counsel[.]
2. Whether the Court erred in awarding Appellee alimony, child support, and associated arrearages[.]
3. Whether the Court erred in granting Appellee a monetary award[.]
4. Whether the Court erred in its award of counsel fees to Appellee[.]

For the reasons set forth herein, we shall affirm the judgment of the circuit court.

BACKGROUND

On November 3, 2008, Nkem filed a complaint for absolute divorce from Benjamin in the circuit court. In the complaint, Nkem requested, *inter alia*, sole legal and physical custody of their four minor children, as well as child support, alimony, a monetary award, and attorney's fees. On December 19, 2008, Benjamin filed an answer and a counter-complaint for absolute divorce. At the February 17, 2009 scheduling conference, the circuit court scheduled a *pendente lite* hearing for March 25, 2009, on the issues of alimony, child support, attorney's fees, and access. The trial date was scheduled for August 17, 2009.

After the March 25, 2009 *pendente lite* hearing before the family division master and a May 29, 2009 exceptions hearing before the circuit court, the court issued an order on June 20, 2009, awarding Nkem $1,922.00 per month in *pendente lite* child support and $250.00 per month in *pendente lite* alimony. On July 9, 2009, Benjamin filed a motion to continue the August 17, 2009 trial date. On July 13, 2009, the trial court granted Benjamin's motion to continue the trial over Nkem's objection and reset the trial date for October 27, 2009.

On September 28, 2009, Benjamin filed a letter directed to the circuit court, dated August 28, 2009, advising the court that he had discharged his attorney

and requesting a 120-day continuance of the trial date to obtain new counsel. Attached to Benjamin's letter to the court was a letter dated September 28, 2009, from Benjamin to his attorney in which he "relieve[d] [her] of the responsibility of being my legal representative" and then set forth detailed reasons for his action. On October 9, 2009, Benjamin's counsel filed a Motion to Withdraw and Request for Continuance and requested a "brief continuance" for Benjamin to retain new counsel. On the same day, the court denied Benjamin's motion. By Order dated October 13, 2009, the court denied the motion of Benjamin's counsel to withdraw and for a continuance, but stated that the motion could be renewed at trial.

Prior to the start of the merits hearing on October 27, 2009, the circuit court ruled on several pending motions. The court granted Benjamin's counsel's motion to withdraw her appearance, but denied Benjamin's motion for a continuance; Benjamin proceeded *pro se* for the duration of the three-day merits hearing. Additionally, the court granted Nkem's motion for sanctions and motion in limine, which stemmed from Benjamin's failure to timely "file or participate in the preparation of" a joint marital property statement as required under Maryland Rule 9-207. As a result, Benjamin was prohibited from submitting evidence to contradict the values listed on Nkem's marital property statement.

At the conclusion of the three-day merits trial, the court found that Nkem was entitled to an absolute divorce from Benjamin, but reserved on the issues of alimony, child support, a monetary award, and attorney's fees. On February 16, 2010, the court issued a Judgment of Absolute Divorce and Child Access and Parenting Order, which was entered on March 9, 2010. In its judgment, the court, among other things, (1) awarded Nkem rehabilitative alimony in the amount of $500.00 per month for four years; (2) ordered child support to be paid by Benjamin in the amount of $2,222.00 per month, accounting from December 1, 2009; (3) granted a judgment in favor of Nkem in the amount of $5,844.00 for *pendente lite* alimony arrears ($2,000.00) and *pendente lite* child support arrears ($3,844.00); (4) granted a monetary award to Nkem in the amount of $37,210.00; and (5) ordered Benjamin to contribute $5,358.00 towards Nkem's attorney's fees.[1]

On March 1, 2010, Benjamin filed a motion for new trial, which was denied by the court. This timely appeal followed. Additional facts will be set forth below as necessary to resolve the questions presented.

DISCUSSION

I.

Motion for Continuance

Benjamin argues that the trial court abused its discretion in denying both his request and his counsel's request for a continuance of the trial. According to Benjamin, the letters and pleadings that he and his counsel filed before the trial date "should have alerted the Court of the coming problems" and the lack of communication between Benjamin and his counsel. Benjamin contends that this lack of communication and "irreparably fractured" attorney/client relationship "shaped and affected every aspect of the case." As a result, Benjamin asserts that the trial court's decision to allow his counsel to strike her appearance on the day of the trial is "inextricably linked" to his necessity for a continuance.

In particular, Benjamin takes issue with the two reasons that he claims were articulated by the circuit court for denying his request for a continuance. First, Benjamin argues that the court abused its discretion by using the Differential Case Management ("DCM") calendaring plan as a reason to deny postponement of his case. Second, Benjamin claims that the court denied his continuance because of "skepticism that [he] would be ready to proceed on a subsequent trial date." According to Benjamin, the court "ignored his efforts" to consult with attorneys and explain "the time frames those attorneys said they required to competently represent him."

Finally, Benjamin argues that the trial court abused its discretion in denying his request for a continuance by failing to provide him with 15 days to file a response to appellee's amended complaint for absolute divorce and motion for sanctions, which appellee filed on the day of the trial.

In response, Nkem argues that the trial court did not abuse its discretion when it denied Benjamin's request for a continuance. Nkem points out that Benjamin told the court that he did not want his counsel to continue in the case if his motion for continuance was denied. Nkem thus contends that it is "disingenuous" for Benjamin to claim that the court's decision to strike his counsel is "inextricably linked" to the request for a continuance.

Nkem further argues that the trial court did not use the DCM as the "sole criteri[on]" to determine whether to grant Benjamin's motion for a continuance; instead, according to Nkem, the court used the DCM "as a benchmark to judge the reasonableness of the effect of a continuance on the timeline of the case." Nkem claims that the trial judge also considered his own docket — including three murder trials — and possible hardship to Nkem if the trial were delayed for an extended period of time.

In addition, Nkem claims that the court considered Benjamin's "history of discharging attorneys and seeking continuances on the eve of trial" in making its decision. In support of this contention, Nkem notes that Benjamin "already had two months to hire a new attorney before the trial date, and [Benjamin] was pre-

viously granted a continuance on the eve of the August, 2009[ ] trial date."

Finally, Nkem argues that Benjamin did not claim to the trial court prejudice or unfair surprise as a result of the amended complaint and motion for sanctions she filed on the day of the trial. Indeed, according to Nkem, Benjamin never mentioned these pleadings in his argument for a continuance. Nkem concludes that this issue has not been preserved for appellate review.

Maryland Rule 2-508(a) provides that, "[o]n motion of any party or on its own initiative, the court may continue a trial or other proceeding as justice may require." The Court of Appeals discussed the meaning of Rule 2-508(a) in *Touzeau v. Deffinbaugh,* 394 Md. 654 (2006):

> We have not specified what the phrase "as justice may require" means, but have said that **the decision to grant a continuance lies within the sound discretion of the trial judge. Absent an abuse of that discretion we historically have not disturbed the decision to deny a motion for continuance.** We have defined abuse of discretion as "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." . . . *See also Garg v. Garg,* 393 Md. 255, 238 (2006) ("'The abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. **Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.'")**

Id. at 669 (emphasis added) (some citations omitted).

The Court of Appeals has concluded that a trial court abused its discretion in denying a continuance when (1) it was mandated by law, (2) "when counsel was taken by surprise by an unforeseen event at trial, when he had acted diligently to prepare for trial," and (3) when counsel diligently acted to mitigate the effects of an unforeseen surprise. *Id.* at 669-70. On the other hand, the Court of Appeals has concluded that a trial court did not abuse its discretion when it denied a continuance, because counsel failed to adequately prepare for trial or in the absence of counsel at trial. *Cruis Along Boats, Inc. v. Langley,* 255 Md. 139, 143 (1969).

In the case *sub judice,* the trial court was not mandated by law to grant Benjamin a continuance, and there is also no evidence of an unforeseen surprise or event that occurred at trial. Prior to striking the appearance of Benjamin's counsel, the court asked Benjamin whether, if the motion to strike was *not* granted, he would still want his attorney to represent him; Benjamin replied no. Indeed, Benjamin himself notified the court of his intent to relieve his counsel of her duties prior to the trial in a letter dated August 28, 2009 and filed on September 28, 2009.

Furthermore, the court did not exercise its discretion in an arbitrary or capricious manner. Rather, the court considered several factors before rendering its decision to deny the continuance.

First, the trial court questioned Benjamin regarding his past attorneys. Benjamin admitted that over the course of his domestic disputes with Nkem he had retained three attorneys before his current attorney, Laticia Jones. Benjamin then discussed the various problems that led to their termination. Concerned that it "would be faced with the same problem" if the case were to be continued, the trial court attempted to discern the steps that Benjamin would take to prevent such reoccurrence, as well as what efforts he made to secure new counsel for the trial:[2]

> THE COURT: Here today, knowing that you were seeking to end the relationship between you and Ms. Jones as client attorney, what[ ] steps had you taken to contact an attorney to succeed Ms. Jones? And I ask this question within this context.
>
> [BENJAMIN]: Okay.
>
> THE COURT: When a new attorney appears, the new attorney can enter his or her appearance and that automatically somewhat strikes the appearance of the other attorney. So you could have gone out and gotten a new attorney and that would have relieved Ms. Jones of being required to be here today. So, what have you done in terms of getting a new attorney?
>
> [BENJAMIN]: Your [sic] correct, Your Honor. I tried, but each one I contacted they said they need at least two months . . . to prepare the case. If they entered their appearance today they would be expected to argue the case, which they wouldn't be ready and it wouldn't be to their own petition. I contacted a number of attorneys, but they need some time.
>
> THE COURT: What is there that you would be able to say to me that would cause the court to have confi-

> dence that if this case was continued as you have requested that we would not be standing here with some disagreement between you and the new attorney?
>
> * * *
>
> [BENJAMIN]: Well, I don't think there should be any concern about that because I make the attorney clear, this is what I want. . . .
>
> . . . So I don't think you should be concerned about that, because I make the attorney know this is the issue at stake.

The trial judge also considered the potential scheduling conflicts with the three murder trials over which he was scheduled to preside, and thus was unable to provide Nkem's counsel with a prompt new hearing date. Finally, the trial court detailed the consequences of granting a continuance in its final ruling:

> The affect [sic] of granting a continuance would cause the trial of this matter to occur more than one year after the date that the answer to the complaint for absolute divorce was filed. And the complaint having been filed in November, so we're already at one year from the filing of the complaint and we've been asked to have the matter filed — heard more than a year after the answer. **The Court, considering the history of this case, and the Court not having confidence that even were it to continue the case we would not once again be met with the same circumstance,** although that's not – that's of little weight right here, the Court denies Defendant's motion for continuance.

(Emphasis added).

Contrary to Benjamin's assertion, we conclude that the trial court did not use the DCM as the sole criterion to determine its decision regarding appellant's motion to continue. It is clear from the trial transcript that the court considered several factors before deciding to deny Benjamin's motion to continue, including the history with his attorneys, Benjamin's efforts to secure new counsel (or lack thereof), and the scheduling requirements of the court.[3] We therefore conclude that the trial court did not abuse its discretion in denying Benjamin's motion for continuance.

II.
Alimony

Generally, "[a]n alimony award will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Tracey v. Tracey*, 328 Md. 380, 385 (1992). "We review the *amount* of the alimony itself under an abuse of discretion standard." *Solomon v. Solomon,* 383 Md. 176, 196 (2004) (emphasis in original). As stated above, the trial court awarded Nkem $500.00 per month in rehabilitative alimony for a period of four years, beginning in December 2009.

In the instant appeal, however, Benjamin is not arguing that the trial court abused its discretion in awarding Nkem rehabilitative alimony. Rather, Benjamin argues that the evidence in the record does not support the trial court's award. Benjamin claims that the trial court erred in finding that (1) Nkem only earns $1,286.00 per month, suffers a back injury that affects her employment, requires additional post-graduate education, and thus is not self-supporting; and (2) Benjamin has the ability to pay alimony. On review of these factual findings, we "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). We have held:

> [I]f, considering the evidence produced at trial in a light most favorable to the prevailing party . . . , there is evidence to support the trial court's determination, it will not be disturbed on appeal. Moreover, [i]f there is any competent, material evidence to support the factual findings below, we cannot hold those findings to be clearly erroneous.

Beck v. Beck, 112 Md. App. 197, 202-03 (1996) (second and third alterations in original) (citations and internal quotations omitted).

1.
Whether Nkem is "Self-Supporting"
Calculation of Nkem's Monthly Income

Benjamin argues that the trial court erred in its calculation of Nkem's monthly income. According to Benjamin, Nkem earned a total of $616.00 weekly from two part-time jobs, amounting to an average of $2,699.33 per month, rather than the $1,286.00 determined by the court. In response, Nkem claims that the court's finding as to her monthly income was correct, because her work is "sporadic, on a contract basis." Nkem contends that she is unable to continue to work both of her part-time jobs, because she is a full-time student in the University of Maryland Pharmacy

Program. As a result, Nkem explains that the trial court used her base hourly part-time rate of employment to arrive at $12,468.75 as of October, 2009, or $1,286.45 per month. With $5,129.00 in monthly expenses, as evidenced by her financial statement, Nkem asserts that she is "not wholly self-supporting."

In its memorandum of findings, the trial court evaluated the economic circumstances of both parties. Although the court noted that it calculated Benjamin's monthly income using a bi-weekly salary of $4,273.50, the court did not specify its method for calculating Nkem's monthly income. The court did, however, arrive at the same number — $1,286.00 — as did Nkem's counsel in his closing argument. Nkem's counsel extrapolated Nkem's monthly income by using her year-to-date income, as listed on a recent pay stub from Continuum Nursing Services, one of Nkem's two part-time employers. Nkem's counsel "then divided the year-to-date by 42 [weeks] and multiplied that by 52. And [he] divided that by 12 and [ ] came to a monthly income."

The evidence produced at trial supports the trial court's determination. Although the monthly income of $1,286.00 was extrapolated from the year-to-date income of only one of Nkem's part-time jobs, Nkem testified that, although she is typically able to work 16 hours per week at Continuum Nursing Services, she "just started" with Compassionate Healthcare and is working on an "on call basis." Nkem further testified that she is able to work, at most, approximately 24 hours per week. Moreover, Nkem testified that, when she begins her pharmacology degree in fall 2010, she does not intend to work more than 10 hours a week or every two weeks, as advised by the school. Nkem further testified that, if she worked a ten-hour week, she would be paid about "$240 before tax." Thus, Nkem's income, using a base hourly rate of $24.00 per hour ($240.00 divided by 10), would be reduced to between $120-240.00 per week or $520-$1,040.00 per month, depending on her ability to work.

It is clear from the record that Nkem's income was not only variable from week to week, but her income was projected to sharply decrease within the year once she began pharmacology school. Because the evidence in the record supports the court's finding that Nkem's monthly income was $1,286.00, the trial court's determination was not clearly erroneous.[4]

Alleged Back Injury

The trial court found that Nkem "sustained a back injury in 2001 that has resulted in a medically recommended limit of 50 pounds for lifting." Benjamin asserts that Nkem's testimony regarding this injury was later contradicted by her own testimony, and should not have been considered by the trial court as a reason to not work full time. In response, Nkem argues that it is "uncontroverted" that she suffered a back injury in 2001, preventing her from lifting over 50 pounds. Nkem contends that the trial court "[c]learly . . . found [her] testimony credible," and thus the finding was not erroneous. We agree with Nkem.

Contrary to Benjamin's assertion, Nkem's testimony regarding her back injury was not inconsistent. On the first day of the trial, Nkem testified: "Back in 2001 I had a back injury at work and ever since then I had the back pain and I'm not able to lift heavy weights anymore." On the second day of the trial, Nkem explained her medical conditions *other than* her back injury:

> [COUNSEL FOR APPELLEE]:
> Okay. What, if any, health conditions do you have other than those associated with the lifting of objects over 50 pounds?
> [NKEM]: Health conditions?
> [COUNSEL FOR APPELLEE]:
> Yeah.
> [NKEM]: I don't have any health condition, but what happened was, when I went for my physical this year, my doctor did the EKG and told me that my heart was hardening. The EKG wasn't good. I ha[d] to have a cardiology follow-up. . . .

Because Nkem's testimony supports the trial court's finding that she sustained a back injury in 2001, the trial court did not clearly err.

Additional Education to Become Self-Supporting

The trial court found that, "[w]ith additional education, [Nkem] has the ability to become wholly self-supporting." With respect to the time necessary for Nkem to gain such additional education to become self-supporting, the trial court found that Nkem's acceptance into the University of Maryland School of Pharmacy and a successful completion of this program would "position [Nkem] to earn $95,000 to $100,000.00 once she passes the boards."

Benjamin claims that, at the time of the trial, Nkem was self-supporting, well-educated with several advanced degrees, and had "a strong earning history." Accordingly, Benjamin argues that the trial court "erroneously stated that [Nkem] would need yet another post-graduate degree to be self-supporting."

Although Nkem has prior degrees and has worked as a nurse, the evidence supports the finding that Nkem was not self-supporting at the time of the trial. Nkem testified that she has been a licensed practical nurse for over ten years, but she has been restricted from certain cases and placed on light duty

as a result of her back injury in 2001. With respect to her education and training, Nkem testified at trial that her Bachelor's Degree in Physics from Nigeria was not transferrable to the United States. As a result, Nkem testified that, after receiving her Associate Degree from Prince George's Community College, she enrolled at the University of Maryland, College Park in the fall of 2009 to complete the prerequisites for the Pharmacy School.

The evidence supports the trial court's determination that Nkem requires, and would benefit greatly from, additional education. Thus, the trial court did not clearly err.

2.

Whether Benjamin has the Ability to Pay Alimony

The trial court made the following findings regarding Benjamin's economic circumstances:

> 19. Defendant's Financial Statement (Plaintiff's Exhibit 41) is not a reliable measure of his financial circumstances. Gross monthly income is indicated as $8,547.00 per month, less than the $9,259.25 per month supported by the evidence. Additionally, Defendant's time with the Minor Children does not support attribution of one-third of his monthly mortgage cost to them. The relationship between Defendant's daily living and his credit card debt was not established.

The trial court also made the following finding: "Defendant's Financial Statement identifies his Gross Monthly Wages as $8,547.00. Plaintiff's Exhibit 41. However, his monthly gross is $9,259.25 and, though the Financial Statement indicates a monthly deficit of $2,005.00, the Court is not persuaded that the deficit exists."

Benjamin argues that the trial court "erroneously concluded [that he] had the present ability to pay alimony," because "[t]he trial court discounted [his] financial statement." Although Benjamin admits that the trial court correctly "reassess[ed] his monthly income upwards," he claims that "absolutely no evidence was produced that would allow the trial court to conclude that the modest expenses stated in the financial statement were in fact not accurate."

In response, Nkem notes that Benjamin "concedes that the trial court was correct in calculating his salary" and admits that his financial statement contained errors, including "$1,380.00 in non-existent expenses." Nkem claims that Benjamin's financial statement and testimony are evidence that his financial statement was "greatly inflated and inaccurate." In particular, Nkem further points out that Benjamin did not frequently visit with the children in 2009, and thus his monthly expenses with respect to the children are inaccurate.

The evidence in the record supports the trial court's conclusion that Benjamin's financial statement was not a reliable measure of his economic circumstances and ability to pay Nkem alimony. Benjamin testified that he was working a maximum of 77 hours every two weeks at Rite Aid. The trial court "accepted $4,273.50 as [Benjamin's] bi-weekly salary," which is equivalent to working 77 hours every two weeks at an hourly rate of $55.50. On his financial statement, Benjamin listed his monthly income as $8,547.00, which is only double his bi-weekly salary. The trial court correctly concluded that this was a miscalculation, and re-adjusted Benjamin's monthly income to $9,259.25.

Furthermore, Benjamin listed on his financial statement several expenses for his children as "monthly," but was unable to support them during his testimony at trial. Benjamin listed $265.00 per month in recreation and entertainment expenses for his children and $30.00 per month in clothing expenses. Benjamin, however, could not remember the last time that he bought any bedding or clothing for the children, and he agreed that he had only visited the children three times in 2009. When asked if these were expenses that he incurred only when he was actually with the children, Benjamin responded: "Of course. That's why I put them there." Because Benjamin saw his children only three times in 2009, the evidence also did not support Benjamin's attribution of one-third of his monthly mortgage cost to the children. Therefore, the evidence at trial supports the trial court's rejection of the monthly expenses claimed by Benjamin for his children on his financial statement.

Finally, Benjamin listed a $601.00 retirement contribution on his financial statement as "suspended because it is unaffordable at this time," but then subtracted the amount from his monthly wages, resulting in an inaccurate depiction of his current income. This error was confirmed at trial, when Benjamin testified that he was no longer contributing to that account.

The evidence presented at trial thus supports the trial court's finding as to Benjamin's income and rejection of many of his claimed expenses, such that no deficit existed. Accordingly, the court did not err in finding that Benjamin had the ability to pay alimony.

III.

Child Support and Arrearages

The trial court made the following findings regarding Benjamin's child support obligations:

> 45. By Order dated June 20, 2009, Defendant was ordered to pay *pendente lite* child support in the monthly sum of $1,922.00, "effective April 1, 2009." The August 18, 2008, Final Protective Order provided for payment of $2,000.00 per month to Plaintiff as Emergency Family Maintenance. Plaintiff Exhibit 2. Payments were made throughout the period of the protective order. Relative to the June 20, 2009 Order, as of November 5, 2009, the last payment received was for September in the ordered amount.
>
> 46. Child support arrears, assessed, as of November 5, 2009, are $3,844.00. This amount will be reduced to judgment.
>
> 47. The ongoing child support obligation of $2,222.00 will become effective December 1, 2009, in light of the overlap between the Final Protective Order and the Order establishing *pendente lite* child support.

Benjamin's only complaint regarding child support is that the trial court erred in not granting him a $528.00 credit toward his child support arrearages. Benjamin arrives at this figure by noting an $88.00 overpayment each month from April to September 2009, because his requirement to pay $1,922.00 per month in *pendente lite* child support superseded the $2,000.00 per month previously required by the protective order.[5] Benjamin claims that the trial court "found that the money was paid," but he did not receive a credit for the difference between the two figures.

Nkem disputes Benjamin's assertion that he paid $2,000.00 from April to September 2009. According to Nkem, Benjamin began paying the reduced $1,922.00 payment following the May 2009 exceptions hearing. We agree with Nkem. The evidence in the record, specifically photocopies of checks from Defendant's Exhibit 36, supports the finding that Benjamin paid $1,922.00 per month from June to September 2009. These checks indicate that Benjamin paid $1,922.00, and not $2,000.00. Therefore, the trial court did not err in not granting Benjamin a credit of $528.00 toward his child support arrearages.[6]

IV.
Monetary Award
1.
Sanctions for Violation of Rule 9-207

Benjamin argues that the trial court abused its discretion in sanctioning him for failing to provide evidence of the value of the marital property in a Rule 9-207 statement. According to Benjamin, the lack of communication with his attorney and the failure of his attorney to timely comply with Rule 9-207 resulted in severe sanctions, even though "[he] brought evidence of his valuations of all property in court with him on the day of trial." Furthermore, Benjamin argues that the trial court "overlooked the evidentiary requirements [Nkem] should have been held to [to] prove values of the property which is taken into consideration for a Monetary Award" by "simply adopting [Nkem's] values as to all property." Benjamin claims that the trial court "overlooked" Nkem's burden in order to sanction him.

In response, Nkem argues that Benjamin was properly sanctioned for refusal to comply with Rule 9-207, because he never responded to multiple requests to provide his "contentions regarding the joint marital property statement." Nkem notes that Benjamin brought a draft version of a Rule 9-207 statement to the trial, but refused to provide her with a copy until instructed to do so by the trial judge. Nkem thus claims that appellant was "aware of his obligation to provide a Md. Rule 9-207 statement, and had ample time to do so, but he refused because he did not believe that Nkem should have the information contained therein."

Nkem also disputes Benjamin's contention that the trial court erred by accepting her valuation of the property. According to Nkem, the trial court has the authority to do so when Rule 9-207(d) sanctions are assessed. Furthermore, Nkem claims that Benjamin never objected to the value of the properties that she listed in her statement.

Maryland Rule 9-207(a) provides, in pertinent part:

> (a) **When required**. When a monetary award or other relief pursuant to Code, Family Law Article, § 8-205 is an issue, the parties shall file a joint statement listing all property owned by one or both of them.
>
> * * *
>
> (c) **Time for filing; procedure**. The joint statement shall be filed at least ten days before the scheduled trial date or by any earlier date fixed by the court. At least 30 days before the joint statement is due to be filed, each party shall prepare and serve on the other party a proposed statement in the form set forth in section (b) of this Rule. At least 15 days before the joint statement is due, the plaintiff shall sign and serve on the defendant for approval and signature a proposed joint statement that fairly reflects the positions of the parties. The defendant

> shall timely file the joint statement, which shall be signed by the defendant or shall be accompanied by a written statement of the specific reasons why the defendant did not sign.
>
> (d) **Sanctions**. If a party fails to comply with this Rule, the court, on motion or on its own initiative, may enter any orders in regard to the noncompliance that are just, including:
>
> (1) an order that property shall be classified as marital or non-marital in accordance with the statement filed by the complying party;
>
> (2**) an order refusing to allow the noncomplying party to oppose designated assertions on the complying party's statement filed pursuant to this Rule, or prohibiting the noncomplying party from introducing designated matters in evidence.**

(Emphasis added).

The trial court did not abuse its discretion in issuing sanctions under Rule 9-207 that prohibited Benjamin from introducing evidence of the value of properties listed in Nkem's marital property statement. At trial, Benjamin admitted that he received Nkem's proposed statement in August 2009, but only contacted his attorney to arrange a meeting to discuss it in October 2009, and never responded to the statement. Although the court noted Benjamin's issues with his attorney, the court made the following findings:

> [T]he court is satisfied that there was an opportunity to present a joint marital property statement. The court understands and accepts that there was a rift between counsel for you, [appellant], and . . . between you.
>
> The court does not accept that that in and of itself was an excuse for failing to provide a joint marital property statement prior to today's date.

Under Rule 9-207(d), the trial court had the discretion to enter *any* orders with regard to noncompliance that were just under the circumstances of the instant case. Therefore, we cannot conclude that the trial court abused its discretion when it chose to accept the valuations provided by Nkem as a part of the sanctions imposed on Benjamin.

2.
Errors in Trial Court's Factual Findings

Benjamin argues that the trial court made several errors in its factual findings when granting the monetary award. We will review the trial court's factual findings under the clearly erroneous standard. *See* Md. Rule 8-131(c).

Second Mortgage Attached to Marital Property

First, Benjamin claims that the trial court failed to consider a second mortgage on the marital home in the amount of $11,435.55. According to Benjamin, the existence of this debt in his name reduced his ability to pay a monetary award to Nkem. In contrast, Nkem claims that the second mortgage may not be deducted from the value of the marital home, because Benjamin "did not allege that the [second] mortgage was marital debt."

At trial, Benjamin testified that he re-financed the marital home and used some of the money for repairs. In addition, Benjamin introduced evidence of the second mortgage during his testimony. In this Court, Benjamin admits that he never claimed that this mortgage and related expenses were a "[m]arital [d]ebt." Moreover, the sanctions imposed by the court under Rule 9-207 prohibited Benjamin from introducing evidence to contradict the value of the marital residence, and its accompanying debt, listed in Nkem's marital property statement. Thus the trial court did not err in failing to deduct the balance on the second mortgage when determining the value of the marital home.

Nkem's Assets

Second, Benjamin argues that the trial court erred in failing to consider all of Nkem's assets. Benjamin claims that he was unable to enter documents into evidence to prove the existence of these assets because of Nkem's assertion that such documents were not disclosed in discovery, and his lack of counsel prevented him from adequately responding to Nkem's assertion. Because Benjamin agreed that his attorney should be discharged, he has no ground to complain about his lack of counsel. The trial court did not clearly err.

Date of Marriage

Third, Benjamin argues that the trial court erroneously found that he and Nkem were married to each other in September 1989. Benjamin contends that the parties were married in November 1991, when they were married in a ceremony recognized as legal by the United States. As a result of this error, Benjamin argues that the trial court's calculation of Nkem's marital share of Benjamin's 401(k) account was inaccurate.

The trial court did not clearly err in finding that Benjamin and Nkem "married each other in September of 1989 by way of a traditional ceremony in Awka, Anambra State of Nigeria." Both Nkem and her mother testified that the parties were married in Nigeria in

September 1989, and Benjamin did not present any evidence at trial to challenge the validity of the Nigerian marriage. Instead, Benjamin merely insisted throughout the trial that the parties were married in November 1991, because the marriage ceremony in 1991 was the one recognized by the United States government for immigration purposes. Benjamin has cited no authority for the proposition that a valid foreign marriage should not be recognized by Maryland unless such marriage is valid under the United States immigration laws.

3.

Reducing the Monetary Award to Judgment

Benjamin argues that the trial court abused its discretion in immediately reducing the $37,210.00 monetary award to judgment in favor of Nkem, because there was no finding that Benjamin had funds available to pay the award. In support of his argument, Benjamin relies on *Rosenberg v. Rosenberg,* 64 Md. App. 487 (1985), and argues that *Rosenberg* required the trial court to make a finding of his ability to pay before reducing the monetary award to judgment.

Nkem counters that the monetary award was properly reduced to judgment, because Maryland Code (1984, 2006 Repl. Vol.), § 8-205(b) of the Family Law Article ("F.L.") does not require a trial court to determine the source of the funds that will be used to pay the monetary award. Nkem further disputes Benjamin's reliance on *Rosenberg*. We agree with Nkem.

Pursuant to F.L. § 8-205(b), a "court shall determine the amount and the method of payment of a monetary award . . . after considering each of the following factors:

> (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (2) the value of all property interests of each party;
>
> (3) the economic circumstances of each party at the time the award is to be made;
>
> (4) the circumstances that contributed to the estrangement of the parties;
>
> (5) the duration of the marriage;
>
> (6) the age of each party;
>
> (7) the physical and mental condition of each party
>
> (8) how and when specific marital property or interest in property . . . was acquired . . . ;
>
> (9) the contribution by either party of property described in § 8- 201(e)(3) of this subtitle . . . ;
>
> (10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
>
> (11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both."

Id.

Although a trial court is required to consider the above factors, there is no indication in the statute that a court is required to find that funds are available to pay the monetary award before reducing the award to judgment. Because the trial court in the instant case was not required to consider Benjamin's ability to pay the monetary award, the court did not abuse its discretion in reducing the monetary award to judgment.

Benjamin's reliance on *Rosenberg* to support his argument is misplaced. In *Rosenberg*, this Court reviewed whether the trial court erred in applying factors to be considered in determining the amount of the monetary award. 64 Md. App. at 518-23. The court ordered that the appellant pay a $1,750,000.00 award within 120 days of the divorce decree. *Id.* at 498. In determining the method of payment, the court considered as a factor the appellant's "substantial borrowing capacities." *Id.* at 522. On appeal, however, we concluded that the trial court did not receive any direct evidence of the appellant's alleged borrowing ability. *Id.* at 522-23. Thus we remanded the case for reconsideration of the monetary award in light of the appellant's ability to pay or to borrow and repay. *Id.* at 523.

In the instant case, unlike *Rosenberg,* the trial court did not specify a time frame in which Benjamin was required to pay the award. Nor did the court base its method of payment on Benjamin's ability to borrow funds to pay the award.

D. Attorney's Fees

Benjamin argues that the trial court clearly erred when considering the economic circumstances of each party at the time of granting an award of attorney's fees. In particular, Benjamin argues that the trial court "erroneously discounted" his debts and expenses, and failed to make a finding regarding his ability to pay such award.

In response, Nkem argues that the trial court examined the requisite factors under F.L. § 7-107(c) for the award of attorney's fees. In addition, Nkem notes that Benjamin testified concerning his income and expenses. Thus Nkem argues the trial court's award was not clearly erroneous.

The decision to award attorney's fees is within the discretion of the trial court, and is reviewed for an abuse of discretion. *See Ware v. Ware,* 131 Md. App. 207, 242 (2000). The court shall consider the "financial resources and financial needs of both parties," as well as "whether there was substantial justification for prosecuting or defending the proceeding," before awarding attorney's fees. F.L. § 7-107(c).

In its memorandum of findings, the trial court found that Nkem "had substantial justification for seeking relief in these proceedings" with regard to attorney's fees. The court also found that "[Benjamin's] discharge of prior counsel, including his then-current counsel, on the day of the merits hearing has contributed to some of [Nkem's] legal fees." Finally, the court found that Benjamin's "[f]ailure to provide timely discovery resulted in sanctions that precluded [Benjamin] from having received into evidence certain disputes as to evidence produced by [Nkem]." Thus the trial court decided that, "[g]iven the respective economic circumstances of each party, it would be appropriate . . . to grant [Nkem's] request that [Benjamin] be ordered to contribute to her attorney's fees and costs to the extent of one-third of the fees and costs . . . , $5,358.00."

Because the trial court considered the financial circumstances of each party, as well as Nkem's justification for prosecuting the proceeding, the trial court did not abuse its discretion in awarding Nkem a portion of her attorney's fees.

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

FOOTNOTES

1. The circuit court further found that Nkem was entitled to sole legal custody and primary physical custody of the parties' four children, with Benjamin receiving reasonable access to the children on alternating weekends and holidays. Benjamin does not challenge the custody and visitation rulings on appeal.

2. The trial court's concerns are also supported by the letter Benjamin filed with the court on September 28, 2009, dated *August 28, 2009*, informing the court that he had terminated Jones's representation. Based on the date of the letter – August 28, 2009 – it is clear that Benjamin and Jones had a disagreement *two months* prior to the October 27, 2009 trial. In this letter, Benjamin requested a 120-day continuance. At the October 27, 2009 trial, however, Benjamin admitted that the attorneys with whom he had consulted informed him that they only needed *two months* to prepare for the trial.

3. Nkem objected to the continuance on three grounds: (1) the motion to continue was Benjamin's second (the first being in July, which was granted by the court); (2) Benjamin knew well in advance of the trial that he was dissatisfied with Jones, and failed to secure new counsel; and (3) Nkem would be financially burdened by the granting of a continuance.

4. On the other hand, Benjamin's calculation of Nkem's income was erroneous. It appears that Benjamin combined a paycheck from Continuum Nursing Services in the amount of $400.00 for the October 11, 2009 to October 17, 2009 pay period with a paycheck from Compassionate Healthcare Nursing Services in the amount of $216.00 for the October 5, 2009 to October 11, 2009 pay period. There is no evidence in the record to support the finding that Nkem worked at both agencies every week for this amount of compensation. Moreover, this calculation does not take into account Nkem's employment on a contract or on-call basis with these two agencies, or the effect of school on her employment.

5. We note briefly that the difference between the *pendente lite* child support amount and the amount required by the protective order is $78.00, not $88.00.

6. It does appear that Benjamin overpaid his child support for April and May of 2009 in the amount of $78.00 each month, for a total of $156.00. Benjamin should receive a credit of $156.00 on the arrearage judgment.

Cite as 9 MFLM Supp. 131 (2013)

Divorce: marital property: pensions

William Larry Corey
v.
Bettie Corey

No. 1003, September Term, 2010

Argued Before: Krauser, C.J., Woodward, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: August 5, 2013. Unreported.

The trial court did not err or abuse its discretion in awarding each party a one-half share of the marital interest in the other's pension, nor, in fashioning that award, by refusing to consider the appellee's income from employment after the divorce, as that is not marital property and not a factor enumerated in F.L.§ 8-205(b).

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

By Judgment of Absolute Divorce, entered on February 24, 2010, the Circuit Court for Prince George's County granted William Larry Corey ("William"), appellant, an absolute divorce from Bettie Corey ("Bettie"), appellee. In addition, the court awarded William 50% of the marital share of Bettie's Civil Service Retirement System ("CSRS") pension, to be paid on an "if, as, and when" basis, and awarded Bettie 50% of the marital share of William's Office of Personnel Management ("OPM") pension, to be paid on an "if, as, and when" basis.[1]

On appeal, William presents one question for review by this Court, which we have re-phrased: Did the trial court err or abuse its discretion in awarding each party a one-half share of the marital interest in the other's pension? For the reasons set forth herein, we shall answer this question in the negative and therefore affirm the judgment of the circuit court.

BACKGROUND

On August 3, 1971, William and Bettie were married in Washington, D.C. At the time of trial, William was 59 years old and Bettie was 61 years old. They have two children who were born in 1972 and 1976, respectively, and who are emancipated by age.

William and Bettie's Finances and Pensions

William testified that he began his employment with the D.C. Housing Authority in July 1971 and retired in January 2005. William receives $4,405.00 per month gross income as a retirement pension from OPM. William also testified that he served in the Marine Corps from 1968-1970, and in the Reserves from 1973-1993. Because of a disability stemming from his service, William also receives a monthly benefit from the Department of Veterans Affairs ("VA") of approximately $1,228.00 ("VA allotment"), which includes a cost of living adjustment. Although William stated that he worked part-time doing "handyman work" and made $100.00 over two months, he claimed to not have any contracts at the time of trial. William is also entitled to a military pension, but no evidence was introduced as to when such pension will be in payout status, nor how much William will be paid.

Bettie has been employed with the U.S. Department of Energy ("DOE") for approximately 34 years, and her salary at the time of trial was $65,531.00 per year, or $5460.92 per month. Although Bettie was eligible to retire and receive her CSRS pension three years prior to the trial, Bettie testified that she anticipated working "at least another two or three years" so that she can afford a "decent . . . senior citizen place." Thus, Bettie's CSRS pension is not currently in payout status.

Marital Home

In 1977, William and Bettie, as tenants by the entirety, purchased their marital home for approximately $55,000.00. Between 1977 and 2006, the parties refinanced the home four times. According to William, the additional money was used "[t]o relieve personal debt and . . . to bring the debt under one payment," as well as "to replace some items in the house." Bettie, however, testified that the refinances were not used to remodel the home, and that she only received a "very small amount" of the additional money. The property was appraised in August 2009 at $231,082.00, and as of July 1, 2009, the property was subject to a $262,947.42 mortgage.

After leaving the marital home in 2007, William paid the entire mortgage for over two years while

Bettie resided in the home. At trial, William sought a contribution of $28,628.80 for those payments.

Divorce Proceedings

On January 8, 2009, William filed a complaint for absolute divorce in the trial court. On August 4, 2009, William filed an amended complaint. In addition to the absolute divorce, he also requested that the court determine the ownership and value of all marital property, order a sale of the marital home, and grant him a monetary award "as an adjustment of the equities and rights of the parties in the marital property." In her answer to the amended complaint, filed on September 4, 2009, Bettie claimed that William deserted her "without just cause or reason," and requested a monetary award.

On November 23, 2009, the trial was held, and the circuit court heard testimony from William, Bettie, and their son, William Corey, Jr. On January 8, 2010, the court issued a written opinion and a judgment of absolute divorce. In its opinion, the court, among other things, did not grant either party a monetary award; instead the court awarded William 50% of the marital share of Bettie's CSRS pension, to be paid "if, as, and when it is received by [Bettie]," and awarded Bettie 50% of the marital share of William's OPM pension to be paid "if, as, and when it is received by [William]." The court also awarded Bettie 50% of the marital share of William's military pension, to be paid in the same manner. The court specified that the marital share for all three pensions would be calculated in a manner "consistent with the *Bangs* [*v. Bangs*, 59 Md. App. 350 (1984)] formula." (Underlines omitted). In addition to awarding William and Bettie 50% of the marital share in each other's pensions, the court ordered that William and Bettie be entitled to the maximum survivor annuities attributed to each other's pension plans. The court, however, found that William's VA allotment was non-marital property and that Bettie was not entitled to any portion thereof. Finally, the court denied William's request for contribution.

In the Judgment of Absolute Divorce, the trial court incorporated the rulings contained in its opinion. The court also granted William an absolute divorce and ordered that the marital home be sold and proceeds evenly divided between William and Bettie. The court further ordered that: (1) each party shall remain the sole owners of the vehicles titled in their names; (2) William "shall be the sole owner of his personal effects, the tools, lawn mower, and tractor;" and (3) Bettie "shall be the sole owner of the remaining furnishings in the marital home." The Judgment of Absolute Divorce was entered on February 24, 2010.

On March 8, 2010, William filed a motion to alter or amend the trial court's judgment, which was denied by the trial court in an order entered on May 14, 2010. On June 9, 2010, William filed a timely notice of appeal to this Court. Additional facts will be set forth below as necessary to resolve the question presented.

DISCUSSION

I.

Existence of Inequity Between the Parties

William argues that the trial court erred in awarding 50% of the marital share of his OPM pension to Bettie. Specifically, William claims that his income at the time of trial was $67,596.00, and Bettie's income was $66,531.00. According to William, the transfer of a portion of his pension to Bettie will decrease his income to $41,166.00 until Bettie retires, when he is able to collect 50% of her CSRS pension. At the same time, William claims that Bettie's income will increase to $94,026.00, as she continues to work and collect 50% of his OPM pension. In his own words:

> There exist no previous reported opinions to support the trial Court's apparent contention, that parties whom have almost identical incomes from well respected career paths and concomitant retirement and pension plans, throughout a 2 year separation, up through and including the trial and Divorce decree, can and should be subject by a Court to an inherently unequal "adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded." [Md. Code (1984, 2006 Repl. Vol.),] § 8-205(a) [of the Family Law Article ("F.L.")].

Because of the difference in the parties' income that will result in the future from this transfer of pension rights, William argues the trial court violated F.L. § 8-205(a) by failing to achieve equity between the two parties. We disagree.

From a conceptual standpoint, William's argument blurs the distinction between an equitable division of marital property and an award of alimony. The purpose of an equitable division of marital property is to "counterbalance any unfairness that may result from the actual distribution of property acquired during the marriage, strictly in accordance with its title." *Ward v. Ward,* 52 Md. App. 336, 339 (1982). A trial court may transfer the ownership of an interest in certain property, grant a monetary award, or both, "as an adjustment of the equities and rights of the parties concerning marital property." F.L. § 8-205(a)(1). Marital property is defined as "property, however titled, acquired by 1 or both parties during the marriage." F.L. § 8-201(e)(1). In *Gravenstine v. Gravenstine,* 58 Md. App. 158, 177

(1984), we further clarified the parameters of marital property:

> It is our view that the **marital property which generates a monetary award must ordinarily exist as "marital property" as of the date of the final decree of divorce** based on evidence adduced at the trial on the merits or a continuation thereof. Therefore, property disposed of before commencement of the trial under most circumstances cannot be marital property. Although "marital property" is defined as "all property, however titled, acquired by either or both spouses during their marriage . . . ," **the legislative scheme of the 1978 Marital Property Act contemplates determination of marital property at the time the marriage is dissolved, *i.e.,* when the absolute divorce is granted.**

(Bold emphasis added) (footnotes omitted). Because marital property includes only property in existence "as of the date of the final decree of divorce," marital property does not include property acquired *after* the final decree of divorce. *See Gravenstine,* 58 Md. App. at 177.

In contrast, the purpose of alimony is to "provide an opportunity for the recipient spouse to become self-supporting" following the dissolution of the marriage. *Tracey v. Tracey,* 328 Md. 380, 391 (1992). In the event that the party seeking alimony "cannot reasonably be expected" to become self-supporting, "or in cases where the dependent spouse will become self-supporting but still a gross inequity will exist, a court may award alimony for an indefinite period." F.L. § 11-106(c); *Roginsky v. Blake-Roginsky, 129* Md. App. 132, 141 (1999). In the latter case, the trial court considers whether there will be "unconscionably disparate standards of living between former spouses *after divorce*." *Tracey,* 328 Md. at 391 (emphasis added). The trial court necessarily looks at the parties' future income, and "project[s] forward in time to the point when the requesting spouse will have made maximum financial progress, and compar[es] the relative standards of living of the parties at that future time." *Whittington v. Whittington,* 172 Md. App. 317, 338 (2007) (internal quotations omitted).

In determining whether an unconscionable disparity in living standards exists, the trial court may consider the "mathematical comparison of income" of the parties post-divorce. *Brewer v. Brewer,* 156 Md. App. 77, 103 (2004). In reviewing a trial court's award of indefinite alimony, we also consider the percentage of the dependent spouse's income relative to the other spouse's income. *See Solomon v. Solomon,* 383 Md. 176, 198 (2004) (citing several cases in which appellate courts in Maryland found that the trial court did not err in granting indefinite alimony based on the percentage of disparity between the parties' incomes); *see also Brewer,* 156 Md. App. at 103 n.8 (same).

In the instant case, it is clear that the only marital property of significance is the parties' pensions. The trial court made a precisely equal division of the marital portion of the pensions, as is the normal practice upon the termination of most long-term marriages. *See Caccamise v. Caccamise,* 130 Md. App. 505, 521 (2000). This division could only be inequitable if a consideration of the F.L. § 8-205(b) factors would lead to it being inequitable. William argues that the analysis should include a consideration of non-marital property — Bettie's income from her job *after* the divorce. This is not an enumerated F.L. § 8-205(b) factor to be considered by the trial court in achieving an equitable division of marital property. Instead, as discussed *supra,* the potential disparity in income post-divorce is a factor to be considered in determining whether an unconscionable disparity in living standards exists, such that an award of indefinite alimony is appropriate. *See* F.L. § 11- 106(c); *Brewer,* 156 Md. App. at 103. The discussion that follows will address the trial court's consideration of the relevant factors under F.L. § 8-205(b) that the court employed in arriving at its decision regarding the parties' pensions.

II.
F.L. § 8-205(b) Factors

William argues that the trial court failed to properly consider the factors listed in F.L. § 8-205(b)(3), (6), (7), (8), and (11) when it granted Bettie 50% of his OPM benefits, currently in payout status, and granted William 50% of Bettie's CSRS benefits, which are not currently in payout status. In response, Bettie argues that "[t]he trial court considered each of the . . . statutory factors, and based on the evidence and the law reached a fair and equitable decision."

Applicable Law

In order to make an equitable division of marital property, the trial court must first determine "which property is marital property." F.L. § 8-205(a)(1). Following a valuation of the marital property, "the court may transfer ownership of an interest in property," such as "a pension, retirement, profit sharing, or deferred compensation plan," "grant a monetary award," or both, "as an adjustment of equities and rights of the parties concerning marital property." F.L. § 8-205(a)(1)-(2). When determining whether to transfer ownership of an interest in a pension or to grant a monetary award, the court must consider the following factors under F.L. § 8-205(b):

(1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

(2) the value of all property interests of each party;

(3) the economic circumstances of each party at the time the award is to be made;

(4) the circumstances that contributed to the estrangement of the parties;

(5) the duration of the marriage;

(6) the age of each party;

(7) the physical and mental condition of each party;

(8) how and when specific marital property or interest in property described in subsection (a)(2)[2] of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;

(9) the contribution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;

(10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and

(11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

After considering each of the above factors, the trial court "shall determine the amount and the method of payment of a monetary award, or the terms of the transfer of the interest in property . . . ." F.L. § 8-205(b). The decision to grant a monetary award or to transfer ownership of an interest in property, such as a pension, "is generally within the sound discretion of the trial court." *Alston v. Alston,* 331 Md. 496, 504 (1993); *see also* F.L. § 8-205(a). "This means that we may not substitute our judgment for that of the fact finder, even if we might have reached a different result." *Innerbichler v. Innerbichler,* 132 Md. App. 207, 230 (2000).

In the instant case, the trial court issued a 10-page opinion in which it expressly considered each of the 11 factors listed in F.L. § 8-205(b) and made detailed findings of fact under each factor. William does not challenge the court's factual findings; he claims instead that the court did not properly consider the factors under F.L. § 8-205(b)(3), (6), (7), (8), and (11). We will review each of these factors in turn.

1.
F.L. § 8-205(b)(3)

F.L. § 8-205(b)(3) requires the trial court to consider "the economic circumstances of each party at the time the award is to be made." William claims that the trial court failed to consider the "significant adverse effect [of] a $26,000 decrease in [his] income," or the "need" for an increase in Bettie's income. Bettie disputes the "large disparity of income" resulting from the trial court's award, because "nothing in the record reflects that [William]'s disability affects his ability to earn income." Bettie points out that William admitted to refinancing the marital home to obtain funding for his "handyman improvement business," and will be receiving an unknown amount of money from an additional military pension.

The trial court made the following findings regarding the economic circumstances of the parties at the time of trial:

> [William] currently receives $4,405.00 per month gross or $3,930.26 per month net from his OPM retirement plan plus $1,228.00 per month from the VA, for a total of $5,633.00 per month or $67,596.00 annually. He has worked part-time as a handyman earning approximately $100.00 per month, but claimed to have had no contracts as of the time of the hearing. He has earned a military pension, but the timing and amount of payment were not identified.
>
> [Bettie] is employed at the U.S. Department of Energy where she has worked for thirty-four years. She is a GS-9, step 10, with no promotional opportunities. She grosses $65,531.00 per year or $5,461.00 per month. In 2008, she worked part-time as a merchandiser and earned approximately $15,000.00 annually. She claimed to have ceased said work in March 2009.
>
> [William]'s financial statement listed monthly expenses of $6,331.48. This included $2,618.53 for the family home, which will be sold, and an

> unexplained monthly credit card payment of $1,541.00, in addition to ongoing expenses. He has purportedly incurred $66,505.68 of consumer debt, after having paid off $45,849.00 of consumer debt upon refinancing the family home in March 2006.
>
> [Bettie] listed monthly expenses of $4,246.00, which sum included neither rent nor a mortgage. Amongst the monthly expenses listed were $100.00 for credit cards, $500.00 for a 2007 tax debt, a $200.00 religious contribution[ ], $470.00 for life insurance, and a $261.00 [Thrift Savings Plan] repayment.

It is clear from the above findings that the court considered the economic circumstances of William and Bettie at the time the award was made; indeed, William admits in his brief that the trial court "discussed the parties' economic status at the time of trial." Under F.L. § 8-205(b)(3), there was no requirement that the trial court consider the economic circumstances of the parties *after* the award.[3]

Nevertheless, William argues that the award was "unsustainable" because of the "large disparity" of income that would result. Appellant cites to *Flanagan v. Flanagan,* 181 Md. App. 492, 527 (2008), for the proposition that a "sizeable" disparity resulting from the monetary award is not fair and equitable. *Flanagan,* however, is distinguishable from the instant case.

In *Flanagan,* this Court vacated a monetary award in which the appellee retained 86.7% of the total marital property, and the trial court did not explain its reasoning for doing so "on any particular basis." 181 Md. App. at 526-27. In the instant case, the trial court granted each party an equal portion of the marital share in the other's pension(s), which is the default distribution method for pensions. See F.L. § 8-204(b) (stating that if notice is not given in accordance with subsection (b)(2), "any objection to a distribution [of a pension] on an 'if, as, and when' basis shall be deemed to be waived unless good cause is shown"). There is no evidence in the record of any disparity in the division of the marital property that rises to the level of disparity in *Flanagan.* The only disparity in the division of marital property is in favor of William: apart from the pensions, William received $25,171.22 of marital property, whereas Bettie received $14,325.47 of marital property.

2.
F.L. § 8-205(b)(6), (7)

F.L. § 8-205(b)(6) requires the court to consider the age of each party, and F.L. § 8-205(b)(7) requires the court to consider the physical and mental condition of each party. William claims that the trial court did not properly consider the age and physical and mental condition of the parties, including his "disabled status as a retired veteran," in determining the division of the pensions.

The trial court found that William "was one month short of 60 as of the hearing" and that Bettie "is 61 years old." With respect to the physical and mental condition of the parties, the trial court made the following findings:

> [William] suffers from [Post-Traumatic Stress Disorder] as a result of his military service in Viet Nam. When he first returned home, the problem went undiagnosed. The disability was later assigned a 30% rating. In 2008, the VA determined that the service-connected condition had worsened and the rating was increased to 70%. [William] testified that he also had knee problems that interfered with his ability to do handyman work. No medical records or other verification of knee problems was introduced.
>
> [Bettie] is in good health.

(Footnote omitted).

The trial court clearly considered the parties' ages, William's disability, and his alleged knee problems. The court noted, however, William did not present any verification of his knee problems at trial. Therefore, the court properly considered the age and mental and physical condition of the parties.

3.
F.L. § 8-205(b)(8)

F.L. § 8-205(b)(8) requires the court to consider "how and when specific marital property or interest in property . . . was acquired, including the effort expended by each party in accumulating the marital property or the interest in property." The trial court found that "[t]he parties acquired their pensions as government employees in the course of the marriage." William, however, argues that the trial court should have considered the "significant inequality [ ] of unknown future length" resulting from the trial court's award to Bettie.

We disagree. The trial court properly considered this factor, as the plain language of the statute only required the court to consider how and when the parties' pensions were acquired, and not the length of time until Bettie will receive payments from her pension.

4.
F.L. § 8-205(b)(11)

F.L. § 8-205(b)(11) allows the court to consider "any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in [the pension, retirement, profit sharing, or deferred compensation plan], or both." Although William acknowledges that the trial court did discuss this "catchall" factor, William claims that the trial court never considered the consequences of the award, including the "immediate devastating impact" on his finances.

Under F.L. § 8-205(b)(11), the trial court made the following findings:

> The parties have been married for thirty-seven years. They have two grown children. Their home has served as a source of cash for many years and the mortgage is now underwater. The only assets of note are the parties' pensions.
>
> [William] expended $8,000.00 of savings over the past year. On his 2007 tax returns, he claimed a business loss of $17,430.00. [William] claimed a $17,714.00 business loss on his 2008 tax returns.
>
> [Bettie] withdrew/borrowed $9,000.00 from her [Thrift Savings Plan] in 2008, $7,437.35 of which remained unpaid at the time of the hearing.
>
> The debt on the timeshare is greater than the equity therein.
>
> But for the [Thrift Savings Plan], any withdrawals from which will be taxed, the marital property is not liquid. The furnishings and belongings would likely cost more to replace than would be realized upon sale. The agreed upon value is minimal. The parties have agreed to keep their own cars. Their bank accounts are minimal. While [William] has a Prudential Life Insurance policy worth $15,000.00, [Bettie] has a FELGI policy of unknown value.
>
> If the parties are awarded *Bangs* formula shares of each other's pensions, [Bettie] will earn $65,531.00 per year from her job plus half of [William]'s OPM pension, while [William] will receive half of his OPM pension plus his VA allotment. Each will eventually receive half of [William]'s military pension, but no evidence was presented as to when the pension will be in pay status, nor how much will be paid. [Bettie] argued that should she not be awarded an interest in [William]'s OPM retirement, she will suffer when she retires. Her date of retirement was not established, nor was the amount of the anticipated monthly CSRS payments.[4]
>
> **Based on all of the foregoing as well as the contribution considerations below, the Court deems it equitable to award [William] a *Bangs* formula interest in [Bettie]'s CSRS retirement plus such survivor benefits as are available, and to award [Bettie] a *Bangs* formula interest in [William]'s OPM and military retirements plus such survivor benefits as are available in each.**
>
> The party opting for survivor benefits will be responsible for any costs incurred thereby.

(Bold emphasis added) (footnote omitted).

Although the trial court did not cite the exact numbers that would result from the transfer of interests in the pensions, the court clearly considered the consequences of such transfer: the court found that "[Bettie] will earn $65,531.00 per year from her job plus half of [William]'s OPM pension, while [William] will receive half of his OPM pension plus his VA allotment." (Footnote omitted). Furthermore, the trial court was entitled to find credible Bettie's testimony regarding potential hardship if she were to retire without William's OPM pension.

As stated in its opinion, the trial court also based its decision on the facts surrounding William's request for "contribution of $26,628.80 for mortgage payments made subsequent to the time he left the marital home."

The court said:

> The property was purchased for approximately $55,000.00 in 1977 and was refinanced three times during the marriage to cover family debt. In March 2006 when the parties were estranged but still sharing the residence, [William] unilaterally decided to refinance the property again, telephoning [Bettie] just hours before closing to secure her signature. The debt on the property at the time was $201,280.99. An additional $72,469.01 of debt was incurred,

> $9,532.26 in settlement charges, $17,087.85 in cash paid to [William], $1,000.00 of which was given to [Bettie], and the balance of which was used to retire [William]'s consumer debt. There was no evidence that any of these disbursements, except perhaps $1,434.00 owed to American General Finance, covered debts incurred for marital purposes.
>
> Had [William] not refinanced the property in 2006, the parties would have had equity in the home. As a result of the 2006 refinance, at the time of the hearing, the debt secured by the property exceeded the fair market value by $32,947.42. If there is a shortfall and if the lenders seek to collect, [William]'s income cannot be garnished; [Bettie's] may be.
>
> The foregoing considerations militate against contribution.

The court's refusal to grant William contribution for the mortgage payments made by him was another reason for the pension award, as the court essentially put the blame on William for the lack of equity in the marital home. This consideration, together with "all of the foregoing [factors]," led the trial court to "deem[ ] it equitable to award [William] a *Bangs* formula interest in [Bettie]'s CSRS retirement . . . , and to award [Bettie] a *Bangs* formula interest in [William]'s OPM and military retirements."

For the reasons stated above, we conclude that the trial court properly considered all of the required factors under F.L. § 8-205(b) in making its decision to grant each party 50% of the marital share in the other's pension(s). Thus the court did not abuse its discretion.

III.
Length of Time Until Bettie's Retirement

Finally, William argues that the trial court was required to consider the length of time before Bettie would be eligible to receive her pension, as well as the risks inherent in a contingent, future benefit. By not taking these considerations into account, William argues that the pension award "significantly shifted the 'equities'" of the parties, and analogizes the pension award in this case to an award of alimony.

According to William, the trial court's award to Bettie was an "impermissive incentivisation" to delay retirement as long as possible to continue earning her salary in addition to receiving her portion of William's OPM pension. To avoid this inequity, William suggests that the trial court could have conditioned Bettie's receipt of 50% of William's OPM pension on Bettie herself retiring and collecting her CSRS pension.

In support of his argument, William cites language from *Ohm v. Ohm,* 49 Md. App. 392 (1981), and the two out-of-state cases cited therein: *Wilder v. Wilder,* 534 P.2d 1355 (Wash. 1975) and *Rogers v. Rogers,* 609 P.2d 877 (Or. Ct. App. 1980). *Ohm,* however, does not support William's argument.

In *Ohm,* this Court reviewed the trial court's decision to equally divide each individual item of marital property. 49 Md. App. 405. We noted that the marital property statute "does not require that the total value of the property and money awarded to the respective spouses be equal. . . . What is required is that the [court] reach a fair and equitable award after consideration of each of the factors . . . ." *Id.* We also cited to the following language from *Rogers,* which suggested guidelines for benefits distribution:

> "(4) Where courts determine that the parties will share in the benefits on a proportional basis, the parties should also share the risks of future contingencies, e.g., death of the employe[e] spouse or delayed retirement of the employe[e] spouse, and payment should be to the receiving spouse as the employe[e] spouse receives the retirement pay."

Id. at 408 (quoting *Rogers,* 609 P.2d at 882-83).

It should be noted that, when *Ohm* was decided in 1981, the marital property statute simply stated that the trial court was required to "determine the value of all marital property." *Ohm,* 49 Md. App. at 403. In 1994, the statute underwent significant revisions that rendered the "if, as, and when" distribution of pensions the default option, as it is today. 1994 Md. Laws, Chap. 653; F.L. § 8-204. As a result, many of the concerns regarding valuation of a pension, *e.g.,* delayed retirement or death of a spouse, are no longer an issue for the trial courts, as the non-member spouse will only receive a payment if, as, and when the member spouse receives the pension payment.

Thus, in the instant case, because the pension award was on an if, as, and when basis, any delay in Bettie's retirement would not constitute a risk of a future contingency that *Ohm* suggests should be shared by the parties. Accordingly, the trial court was not required to consider the length of time until Bettie would receive her CSRS pension. Indeed, because William's OPM pension is currently in payout status, any delay in Bettie's receipt of her proportionate share, as requested by William, would result in Bettie not receiving 50% of the marital share of William's OPM pension.[5] There was no abuse of discretion in the trial court's pension award.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; APPELLANT TO PAY COSTS.

FOOTNOTES

1. The court also awarded Bettie 50% of the marital share of William's military retirement, which was not yet in payout status. William does not challenge such award in the instant appeal.

2. F.L. § 8-205(a)(2) permits the court to transfer ownership of, among other things, an interest in a pension, retirement, profit sharing, or deferred compensation plan.

3. *See* Part I, *supra*.

4. William also argues that the trial court erred in finding that the amount of Bettie's anticipated monthly CSRS pension payments was not established. Although William notes that the amount appears in the Joint Statement of the Parties, in Bettie's closing argument, and in Bettie's opposition to William's motion to alter or amend the judgment, the amount actually varies from $3,500.00 per month to $4,055.00 per month. Because the amounts presented to the trial court were inconclusive, the court did not err in finding that the amount of Bettie's anticipated monthly CSRS pension payments was not established.

5. At the end of his brief, William concludes that the trial court's pension award to Bettie was "wholly unnecessary . . . as the parties already ha[d] equalized income assets," and he only "had approximately $10,000 more marital property than [Bettie]." (Emphasis omitted). William speculates that the "sole additional matter . . . for equity purposes" to be considered by the trial court was the refinancing done on the marital home, resulting in an additional $72,000.00 of debt. As discussed in Part I, *supra,* however, the similarity of William and Bettie's incomes at the time of trial does not preclude a monetary award to adjust the "equities and rights of the parties concerning marital property." F.L. § 8-205(a)(1).

Cite as 9 MFLM Supp. 139 (2013)

Visitation: contempt: constitutionality of remedy

Beth Michelle Katz
v.
Jerold P. Katz

No. 0890, September Term, 2012

Argued Before: Eyler, Deborah S., Kehoe, Kershaw, Robert B. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, Deborah S., J.

Filed: August 6, 2013. Unreported.

In a contempt proceeding alleging that Father interfered with Mother's twice-weekly visitation rights to two children, the trial court did not violate Mother's fundamental parenting rights by imposing a sanction only as to one weekly visit with one child; also, the requirement that Father ensure the visit happens, or pay $1,000 per hour, was unenforceable only to the extent that it requires him to ensure the child acts "pleasantly."

On July 12, 2011, in the Circuit Court for Baltimore County, Beth Michelle Katz ("Mother"), the appellant and cross-appellee, filed a seven-count "Petition for Contempt, Specific Performance, and for Enforcement of Consent Orders" against her ex-husband, Jerold Paul Katz ("Father"), the appellee and cross-appellant. Mother alleged among other things that Father had violated several terms of an August 10, 2010 Amended Supplemental Interim Consent Order ("August 2010 Consent Order") pertaining to her right to visitation with the parties' children, twins Jordan and Ari, and to family and individual counseling. Mother sought attorneys' fees.

A merits hearing on the contempt petition took place over the course of five days: October 24, 2011; October 26, 2011; December 21, 2011; January 3, 2012; and March 22, 2012. On June 15, 2012, the court issued a memorandum opinion and order granting Counts I and II of the petition upon a finding that Father failed to comply with those provisions of the August 2010 Consent Order that gave him physical custody of the children but required that the children have visitation with Mother every other weekend, Wednesday overnights during the summer, and Wednesday dinners during the school year. The court found that Father had engaged in an extreme level of parental alienation, which resulted in Jordan's refusing altogether to visit with Mother and Ari's participating only in the Wednesday night visitations, and then sporadically.

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

The court denied the next four counts of the contempt petition, and granted the final count, in part, awarding Mother $3,347.50 in attorneys' fees.

As a sanction for Father's violation of the weekend and Wednesday visitation provisions of the August 2010 Consent Order, the court ordered that Father ensure that Ari attend the Wednesday dinner visitations with Mother, and that, if Ari did not attend each such visitation and do so "pleasantly," Father would pay $1,000 per hour of that visitation. The court did not include any such directive as to visitation with Jordan, finding that requiring Jordan to participate in visitation pursuant to the August 2010 Consent Order could pose a risk of harm to him and to others.

Mother noted an appeal and Father noted a cross-appeal. Mother poses six questions on appeal, which we have condensed and rephrased:

I. Did the trial court err by exceeding its authority or misapplying standards of civil contempt in not holding Father in contempt under Counts III, IV, V, and VI of the contempt petition?

II. Did the trial court's order granting Mother's contempt petition under Counts I and II violate Mother's fundamental constitutional right to raise her children by effectively terminating her visitation with one child (Jordan), severely limiting her visitation with the other child (Ari), and terminating all mental health care for both children; by failing to properly apply the Best Interests of the Child standard in making its rulings; and by modifying provisions of the August 10 Consent Order with respect to visitation, counseling/therapy (mental health), and reunification?

III. Did the trial court err in its award of attorneys' fees?

In his cross-appeal, Father poses one question:

> Did the court err by establishing a vague purge provision with an immediate financial penalty?

Father also moves to dismiss Mother's appeal to the extent that it challenges the trial court's findings that Father was not in contempt under Counts III, IV, V, and VI of the contempt petition.

For the reasons to follow, we shall dismiss Mother's appeal from the trial court's denial of four counts of the contempt petition, as an order denying a contempt request is not appealable. *The Pack Shack, Inc. v. Howard County,* 371 Md. 243, 254 (2002). We otherwise shall hold that the trial court did not abridge Mother's constitutional right to parent her children in fashioning a remedy for its findings of constructive civil contempt and that it did not err or abuse its discretion in its award of fees. In Father's cross-appeal, we shall affirm the court's order imposing a financial penalty upon Father for any future failure to ensure that Ari attends Wednesday night visits, but direct that the word "pleasantly" be stricken from the trial court's order.

FACTS AND PROCEEDINGS

Mother and Father were married in 1993. Their twin children Ari and Jordan were born on December 2, 1997. The parties were divorced on December 29, 2000, soon after the children turned three years old. Their Judgment of Divorce incorporated a Voluntary Separation and mutual Settlement Agreement of September 16, 1999 ("Separation Agreement"), which included, among other things, the resolution of issues related to custody and visitation. The parents shared legal and physical custody of the children at that time on a week-on-week-off schedule. The Separation Agreement also included a term requiring a party in breach of the agreement to pay the non-breaching party's legal fees.

By consent order dated July 18, 2003, the Judgment of Divorce was modified to give Mother sole legal custody. The parties continued to share physical custody on a week-on-week-off schedule. The parties entered into a modified consent order concerning child access, visitation, support, and medical expense payments on January 17, 2005; and a modified consent order as to support only on January 5, 2006. The shared physical custody schedule was unchanged under those orders.

In August of 2009, at age 11, while Jordan was with Mother, he unilaterally moved out of Mother's house and into Father's house. Father lives with Suzanne Segal,[1] and their child, Isabelle. Four months later, on the twins' twelfth birthday, Ari also moved out of Mother's house and into Father's house. On each occasion, Father arranged to pick up Ari and Jordan when they were in Mother's custody without prior notice to Mother.[2]

On October 13, 2009, Father filed a complaint to modify custody and child support, seeking sole legal and physical custody of the twins. On December 23, 2009, Father filed an amended custody modification complaint. On May 19, 2010, the parties entered into an Interim, Temporary Consent Order. On July 9, 2010, they entered into a Supplemental Interim Consent Order, and on August 10, 2010, they entered into an Amended Supplemental Interim Consent Order, which is the aforementioned August 2010 Consent Order. These orders all are designated "*pendente lite*." For reasons we do not understand, Father's complaint to modify custody and child support has not yet gone to a merits hearing, even though it has been pending for more than three and one-half years.

In the August 2010 Consent Order, which was docketed on August 13, 2010, the parties agreed to joint legal custody and that Father would have primary physical custody. They also agreed to "access and visitation" for Mother to take place, at a minimum, every other weekend from Friday afternoon to Sunday evening; Wednesday overnights during the summer; Wednesday dinners during the school year; and additional time as recommended by a co-parenting coordinator. The parents agreed to cooperate and not to interfere with "the visitation and access of the other party"; that Father would not be present during Mother's Wednesday visitations unless required for bar mitzvah preparation; that the parents would be free to attend the children's activities and school events, notwithstanding the times of visitation; that the parties and the children would begin individual counseling/therapy within 30 days and the parents would cooperate in that; that the parents would begin co-parenting counseling and follow the counselor's recommendations; and that Mother and the children would continue in family reunification counseling with Dr. Larry Raifman. The parents also agreed how payment for counseling would be made and that terms of the two prior interim consent agreements that were not contained in or altered by the third interim consent agreement would continue.

On July 13, 2011, Mother filed her seven-count contempt petition against Father. In Count I, she alleged that Father had interfered with her agreed/ordered Wednesday night visitation; in Count II, she alleged that Father had interfered with her agreed/ordered overnight-weekend visitation. In Counts III through V, she alleged, respectively, that Father had failed to comply with provisions of the operative consent orders requiring individual counseling for the twins, family reunification counseling with Dr. Raifman, and individual counseling for each parent. In

Count VI, Mother alleged that Father had failed to comply with certain provisions of the Separation Agreement incorporated into the Judgment of Divorce, which still were in effect, pertaining to holiday and vacation time the parents would spend with the children and access to school records; and, in Count VII, she alleged that Father had failed to comply with certain provisions of the Separation Agreement and that, as a result, he was obligated to pay her counsel fees incurred in an attempt to enforce that agreement.[3]

Father filed an opposition in which he denied Mother's allegations.

As noted, an evidentiary hearing on the contempt petition was held over a five day period, on October 24 and 26, 2011, December 21, 2011, January 3, 2012, and March 22, 2012. During the first two hearing days, Mother called Father (adversely); Wanda Frazier, Assistant Principal of Pikesville Middle School, where the twins were attending; Robert Zissel, a family therapist who had met with Mother and the twins; and Susan Todd, a therapist who had met with Mother and Jordan together and then had met with Father and Ari together. Father called one witness out of order: Blane Gilbert, Mother's father (and the children's grandfather).

The evidence showed that, on December 31, 2010, the boys were at Mother's house for visitation when Jordan became upset because his girlfriend had broken up with him. While Mother was in the shower, he scratched himself, intentionally. Mother told Jordan she needed to take him to the hospital. Jordan and Ari used their cell phones to call Father and Ms. Segal. Despite Mother's asking to speak to Father, Father refused to speak to her. Mother spoke to Ms. Segal briefly about what had happened. Ultimately, Father came and picked up the boys outside of Mother's house after midnight, without telling Mother. Father claimed that he was in fear for Jordan's health, because this was a "cutting" incident; however, he did not take Jordan to the hospital or any other health care facility for treatment, and did not have Jordan evaluated by a mental health care provider. He merely placed a bandage on the scratched area. That was the last time that Mother had any visitation with Jordan.

The evidence further established that when Mother would arrive at Father's house to pick up the children for visitation, Jordan would not go with her. Ari would go with Mother on Wednesday non-overnight visitations sometimes. Neither child had had overnight visitation with Mother since January of 2011.

Father testified that he could not force the boys to go to visitation with Mother. He said that when Mother came to his house to pick the boys up, he would tell them to go with her and then would retire to his office, which was in the basement of his townhouse. According to Father, he was "not there to do anything," and he did not take any action when the boys would not go with Mother because he "ha[d] work to do." Father claimed that he stopped e-mailing Mother about the visitation issue because he became convinced that someone was ghost writing Mother's e-mails. Father acknowledged that he did not punish the children for refusing to go to visitation with Mother.

In May of 2011, Ari was suspended from school for two days after he drew a picture depicting stick figures "engaging in a lewd sex act." The picture was shown to a substitute teacher by Ari and several other students. Father did not inform Mother of Ari's suspension. Mother learned of the suspension from another parent while she was attending Ari's soccer game. Father did not believe it was his responsibility to tell Mother about Ari's suspension.

Mother also introduced into evidence copies of two forms from the twins' school listing contact information for Mother and Father. The forms, which had been prepared by the school, incorrectly stated that Mother lived at Father's address and did not include Mother's e-mail address. Father had made hand-written corrections to the form, adding Ms. Segal's name as an additional contact and adding his e-mail address. He did not, however, correct Mother's address on the form or add her e-mail address.

The evidence on therapy and counseling was as follows: At various times, the twins, Mother, and Father had been in family counseling with at least four therapists. Most recently, Mr. Zissel had met with Mother individually, in February of 2011, and had met with Mother, Ari, and Jordan together on three occasions in February and March of 2011. In April of 2011, Mr. Zissel terminated therapy because the boys were "not . . . invested" and there was "too much anger and frustration for it to be productive." According to Mr. Zissel, the twins, most notably Jordan, were "oppositional and noncompliant" with the therapy. Mother displayed "appropriate emotional reactions . . . to the situation" and was not a reason for the termination of therapy.

Prior to seeing Mr. Zissel, the parties briefly entered family therapy with Ms. Todd. In September of 2010, Ms. Todd met with Mother and Jordan in one session and Father and Ari in a separate session. Ms. Todd diagnosed Jordan with major depression and recommended that he begin individual counseling in addition to family therapy. Ms. Todd diagnosed Ari with mood disorder, but did not recommend individual counseling for him. During Ms. Todd's sessions, both boys accused Mother of verbal abuse and inappropriate conduct. After Mother advised Ms. Todd that she suffered from a "medical condition" that affected her cognitive abilities, Ms. Todd advised Mother that she needed to undergo neuro-psychological testing to rule

out an executive function disorder before family therapy could continue. Mother was unwilling to submit to this testing, in part because her neurologist did not believe it to be necessary. For this reason, family counseling did not go forward with Ms. Todd.

Prior to seeing Ms. Todd, Mother and the twins had participated in family therapy with Dr. Larry Raifman for many months. The August 2010 Consent Order provided that family therapy continue with Dr. Raifman. Father testified that Dr. Raifman was not a covered provider under his health insurance plan, however, and Father was unwilling to pay out of pocket for his services.

When it became apparent that the two-day hearing that took place on October 24 and 26 would have to be continued, the court issued an oral directive from the bench, stating that the visitation as required by the August 2010 Consent Order was to be followed until court reconvened to complete the hearing. The first such visit — a Wednesday night dinner with the twins — was scheduled for the evening of October 26, 2011.

On December 20, 2011, the hearing resumed. On that date and the following hearing date, January 3, 2012, the court heard testimony concerning two incidents surrounding visitation exchanges that had occurred in the interim on October 26, 2011 and December 16, 2011. At the hearing, Mother called Officer Melnyk, of the Baltimore County Police Department, and Paul Merenbloom, a private investigator with Mother's lawyer's firm, both of whom witnessed parts of the events on December 16.[4] Mr. Merenbloom also witnessed attempted visitation exchanges on November 9, 2011, and on November 23, 2011. Mother once again called Father to testify adversely. She also called Lanny Schuster, her second cousin, who accompanied her to the attempted visitation with the children on October 26, and Mother testified on her own behalf.

With respect to the incident on October 26, which was the previous hearing date, the evidence showed that Mother had arranged during the hearing for Mr. Schuster to accompany her to Father's house to pick up the boys for dinner. Father learned of this plan and told Mr. Schuster he should not come because Jordan did not like him.

That evening around 5:30 p.m., Mr. Schuster drove Mother to Father's house. When they arrived, Father, Jordan, Ari, Ms. Segal, and Sandy Gilbert, who is Mother's step-mother, were present. As soon as Mother and Mr. Schuster approached the house, Jordan ran outside screaming, "I'm not fucking going with you." He told Mr. Schuster he wished he (Mr. Schuster) had been run over by a car and his "guts" were scattered on the ground. He said if Mother tried to force him to come to dinner, he would "jump out of the car." Father responded, "he'll do it." Jordan continued to scream at Mother, twice saying, "I hate you, you fucking cunt." Father did not react negatively to Jordan's doing so. Mr. Schuster asked Father how he could allow Jordan to speak to his Mother in that manner. Father responded, "It's not my fault. . . . It's [Mother's] fault for twelve years of bad parenting." Throughout the entire exchange, Ari was silent.

At some point, Mother gave Mr. Schuster a cassette player so he could record what was happening. Father and Jordan accused Mr. Schuster of recording them without their permission. Mr. Schuster played the cassette for them, to show that nothing had been recorded. Mr. Schuster gave the cassette player to Ms. Gilbert. Father grabbed the cassette recorder from her, removed the cassette tape, threw it to the ground, and stomped on it, breaking it into pieces. Jordan reacted by saying that that is why his Father is his favorite parent.

Ultimately, Father and Ms. Gilbert decided that the boys would go with Ms. Gilbert to Mother's father's house for dinner. Mother grudgingly agreed given that the boys refused to get into Mr. Schuster's car. Mr. Schuster drove Mother back to her house to get her car and she then drove to her father's house for dinner.

Mr. Merenbloom, who as mentioned is an investigator with Mother's lawyer's firm, observed two attempted visitation exchanges on November 9 and 23, 2011. On both occasions, the boys refused to go with Mother. On the first date, Mr. Merenbloom video recorded Mother speaking to Ari and Jordan outside of Father's home for several minutes. In the video, which was played in court, Father can be seen watching through a window inside the home.

On December 16, 2011, a Friday, Mother attempted to pick up the boys for her weekend visitation. Mr. Merenbloom again came to video record the exchange. He arrived prior to Mother and parked his car outside of Father's house. He recorded as Mother arrived, parked her car, and walked up to the front door of Father's house. Ari came outside. Mother and Ari spoke for several minutes. Ari told Mother that he did not want to spend the night, but that he would go to a movie and dinner with her the following day. Mother told Ari that she loved him and that she was never "giving up" on him. They embraced. Mother briefly returned to her car to get her phone, before returning to the porch so that she and Ari could look at the movie theater schedule and pick a time for the following day.

While Ari and Mother were talking, Father arrived home from a business trip to Philadelphia. He drove up, saw Mother's car, and saw Mr. Merenbloom sitting in his car recording Mother and Ari. Father became irate. He parked his car immediately in front of Mr.

Merenbloom's car, head to head, and came over to Mr. Merenbloom's window. He screamed at Mr. Merenbloom. Father then began using his cell phone camera to take pictures of Mr. Merenbloom. Mr. Merenbloom stayed in his vehicle and, after a few minutes, drove away. The video recording of these events taken by Mr. Merenbloom was played in court.

The situation continued to deteriorate after Mr. Merenbloom left, and resulted in the police being called to the scene by Father and in Mother's filing in the District Court for Baltimore County a petition for protection from Father and Jordan. Mother was granted a temporary order of protection and the case was transferred to the circuit court to be heard in conjunction with Mother's contempt petition. The court heard testimony on the petition for an order of protection on January 3, 2012.

The evidence showed that after Mr. Merenbloom left, Father began berating Mother, asking her why Mr. Merenbloom had been recording the attempted visitation. He told Mother he was going to call the sheriff's office, as per his understanding of the trial court's instructions. Ari asked Father not to call the police and went back inside. Father contacted the sheriff's office and was advised that he needed to call 911, which he did. Mother got back in her car and said she was going to go home. At some point, Jordan, Ms. Segal, and Isabelle came outside. Father, Ms. Segal, and Jordan stood in front of Mother's car, blocking her from leaving. Isabelle began to cry and Ms. Segal took her inside. Ms. Segal then came back out. Father repeatedly told Mother she could not leave until the police arrived. Ms. Segal and Jordan also yelled at Mother.

At some point, according to Father, Mother attempted to leave, hitting him with her car. When the police arrived on the scene Father told an officer that he was standing in front of Mother's car and she had "bumped [him] on his right knee with [her car]." He did not have any injuries. Ms. Segal corroborated Father's version of events. Mother denied that she hit Father, saying she just wanted to go home, but that Father would not let her leave. The police directed her to go home and she did. Father did not press charges against Mother.

The following day, December 17, 2011, Mother filed her petition for an order of protection. She asserted that both Father and Jordan had threatened her and that she was in fear of both of them. In her testimony she was unable to identify any threats made by Father on December 16, 2011, however.

Father denied that he had threatened Mother, but acknowledged that he stood in front of her car and prevented her from driving away. He said that he did so because he thought she needed to wait for the police to arrive before she left.

At the conclusion of this testimony and after hearing argument, the court ruled on the protective order petition. It found that Father had not assaulted Mother on December 16, 2011, but that he had falsely imprisoned her. The court granted Mother a final order of protection against Father on that basis and ordered Father not to harass, abuse, or threaten Mother for a period of one year. The court did not include a no contact provision in the protective order, however, because it did not believe that it would be in Ari's and Jordan's best interests for visitation exchanges to occur at a police station.[5]

On the continued contempt hearing on January 3, 2012, Mother's testimony established that she has a brain condition called cavernous malformations that causes capillaries in her brain to hemorrhage, which can result in seizures. The condition affects her memory and her word retrieval ability. Mother otherwise is healthy. She works as a psychotherapist. She was attending individual counseling as required by the August 2010 Consent Order.

Mother recounted an incident that took place in May of 2011. She had gone to Pikesville Middle School to pick up Ari and Jordan for a Wednesday night dinner. Her mother accompanied her. The school called Ari and Jordan to the office to meet Mother. Upon arriving, Ari was upset and did not want to leave with Mother. Jordan had a "meltdown," and began screaming that he hated Mother and would not leave with her. He ran out of the office, disappearing, and apparently called Father using his cell phone. A police officer assigned to the school searched for Jordan for some time.

While Jordan was missing, Father called Ms. Frazier, who as mentioned is an assistant principal at the school. Ms. Frazier put Father on speaker-phone so that Mother could speak to him. Father made rude and derogatory comments about Mother's mother that were overheard by school personnel. A few minutes later, Ms. Segal arrived at the school. She picked up Jordan, who had since been located, and Ari and took them to Father's house. Mother also went to Father's house, but the boys refused to go with her for dinner.

At the close of Mother's testimony, the court questioned her about her "goals" for visitation with her sons in the "short-term." Mother replied that she wants to continue to have Wednesday night dinners with Ari and that she would like to have Ari spend Friday nights with her on her weekends even if he is unwilling to spend the entire weekend at her house. Mother said she would be willing to "wait and see" with Jordan given recent events. She wanted him to restart therapy and to work towards reunification with him as well.

Father testified on his own behalf and, on the final hearing date on March 22, 2012, called Ari and

Jordan. The twins were 14 at that time. Ari testified that he moved out of Mother's house because he did not feel that his life was "stable there." As an example, he stated that dinner at Father's house always was at 6:00 p.m., but that dinner at Mother's house could be at 7:00 p.m. or could be "a lot later." He also testified that Mother blamed him for a lot of things that were not within his control.

According to Ari, neither Father nor Ms. Segal speak in a derogatory manner about Mother in his presence. In contrast, he claimed that Mother had made derogatory comments about Father, stating on occasion that Jordan "act[ed] like [Father]" with a clearly negative connotation. She also had told Ari she wanted to "protect [him]" from Father. Ari explained that he did not think he needed to be protected from his Father.

Ari testified that he enjoyed his Wednesday night dinners with Mother. He did not feel "comfortable" sleeping over at Mother's house, however. In the past, when Ari told Father he did not want to spend the night at Mother's house, Father had told him that "[he] should go and that it's the right thing to do." Father did not discipline him if he refused to go to court ordered visitation, however.

With respect to the October 26, 2011 visitation attempt, Ari confirmed that his Father had stomped on the audio cassette, but stated that this was "reasonable" under the circumstances. The court asked Ari how he had been punished by Father for failing to go to dinner with Mother that night. Ari had great difficulty recalling any consequences for his actions in defying the court order, eventually stating that he thought he had had "a few things taken away" as a result.

Jordan testified that he moved out of Mother's house and into Father's house because he was not "feeling safe or comfortable living with [Mother]" and because he and Mother were getting along "[q]uite terribly." He alleged "physical, mental, emotional and sexual abuse." He said that his and Mother's relationship improved for a brief time after he moved out, but had since deteriorated again following an incident when Mother hit him and called him a "worthless motherfucker" while he was staying at her house. He testified that he currently did not "have [a relationship with Mother] and [he] [did not] want one."

With respect to the December 16, 2011 incident, Jordan testified to having witnessed Mother hit Father with her car. Since that time, Mother had texted Jordan a number of times, but that had been the extent of their communication. He also testified that Mother "bad mouth[ed]" Father and Ms. Segal to him, but that Father did not speak ill of Mother in his presence. As an example, Jordan described an incident prior to his moving out of Mother's house when she read to him from legal papers concerning the parties' custody and visitation dispute. Mother also had called Ms. Segal profane names.

According to Jordan, Father "encourage[d]" him to attend the court-ordered visitation. Jordan stated that were Father physically to force him to get in Mother's car, he would "fight it." Nevertheless, he had no recollection of Father's ever taking him "by the hand, walk[ing] [him] outside, [telling him to] get in [Mother]'s car, and shut[ting] the door." He also could not "recall" Father's ever having punished him for refusing to go with Mother for a visit.

The court questioned Jordan about whether Father ever had taken "privileges" away from him as punishment for his refusing to attend court-ordered visitation. Jordan replied that Father was not "okay with" denying Jordan the things he loved. The court asked Jordan how he would respond if Father told him he could not participate in musical theater, a hobby of Jordan's, unless he attended court-ordered visitation with Mother. Jordan replied that he would give up musical theater rather than attend visitation.

On June 15, 2012, the court issued a memorandum opinion and order setting forth its findings and rulings. The twins were 14 years old and still were attending Pikesville Middle School. The court found that the evidence clearly established that Father had denigrated Mother and that his conduct had prompted Jordan to move out of Mother's house in August 2009, and Ari to move out of Mother's house four months later. Then, after the August 2010 Consent Order regarding visitation was in effect, Father failed to abide by its terms, interfering with visitation by giving the children carte blanche to refuse to visit with Mother without making any effort to get them to attend visitation or to punish them for refusing to do so. The court observed:

> The "visitation" situation is in clear contravention of the [August 2010] Consent Order, and is clearly the fault of [Father]. Although he protests that he "can't make the boys go," he has established a pattern of parental alienation where there is no sanction for failing to comply with the Court Order. The situation has reached the point where the boys are in charge, due solely to the complete abdication of parental authority on the part of [Father].

The court found that Father had cast himself in the role of the "de facto sole physical custodial parent" and then, in what he tried to justify as merely his parenting "style," allowed the boys to engage in outrageously offensive and misogynistic conduct toward Mother, with impunity.

The court found that Father's conduct constituted a "clear picture of parental neglect" that warranted granting Counts I and II of Mother's contempt petition. The court stated:

> [Father] is required by this order to determine that Ari comply with the Wednesday night dinners and movies every Wednesday. Jordan is exempt from visitation. The Court finds that the level of animosity resulting from Jordan's personality and coupled with the level of parental alienation has reached the point where he may pose an actual threat to his own safety or the safety of others.

The judge stated that she had considered incarcerating Father for his contempt violations, "but felt the children would hold that against [Mother] and would hold her in even greater disdain. This is not to imply that incarceration is not within the realm of appropriate sanctions in this case, just to explain the Court's failure to impose it." The court then stated:

> Therefore, for every hour that Ari does not spend (pleasantly) with [Mother] on Wednesday nights from 5 pm until 10:30 pm, [Father] will be fined one thousand dollars ($1,000.00) per hour.

As noted, in the other counts of the petition, except the last, in which Mother sought attorneys' fees, Mother alleged that Father had not abided by portions of the August 2010 Consent Order pertaining to mental health and reunification counseling, and provisions of the Settlement Agreement, as incorporated in the Judgment of Divorce, that granted the parents vacation and holiday visitation.

The evidence about counseling showed that the children had been seen by six counselors without any benefit. The court denied the contempt petition on Counts III through VI. The judge explained:

> One wonders what value additional "counseling" would have for a family that has been to six (6) family counselors with no indication of improvement and with a continuing deterioration of family relationships. Nonetheless, the question is moot because the Court does not find [Mother] has proven that [Father] is in contempt under Counts III, IV, V, and VI of the Petition for Contempt, Specific Performance, and for Enforcement of Consent Orders.

Finally, as stated, the court awarded attorneys' fees and costs of $3,347.50 to Mother.

DISCUSSION.

I.

Civil Contempt Generally

There are two varieties of civil contempt recognized under Maryland law: direct civil and constructive civil. *Bahena v. Foster,* 164 Md. App. 275, 286 (2005); *Pearson v. State,* 28 Md. App. 464, 481 (1975). Contempt is direct when it involves conduct that "interrupt[s] the order of the courtroom and interfere[s] with the conduct of business and is within the sensory perception of a presiding judge." *Arrington v. Dep't of Human Resources,* 402 Md. 79, 92-93 (2007) (internal quotation omitted). In the instant case, there is no dispute that Father was found to be in constructive civil contempt of the August 2010 Consent Order.

"A civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties." *State v. Roll & Scholl,* 267 Md. 714, 728 (1973). As this Court explained in *Royal Investment Group, LLC v. Wang,* 183 Md. App. 406, 447-48 (2008):

> "Before a party may be held in contempt of a court order, the order must be sufficiently definite, certain, and specific in its terms so that the party may understand precisely what conduct the order requires." *Droney v. Droney,* 102 Md. App. 672, 684, 651 A.2d 415 (1995). Moreover, "one may not be held in contempt of a court order unless the failure to comply with the court order was or is willful." *Dodson* [*v. Dodson,* 380 Md. 438, 452 (2004)]. Civil contempt must be proven by a preponderance of the evidence. *Bahena v. Foster,* 164 Md. App. 275, 286, 883 A.2d 218 (2005). " 'This Court will only reverse such a decision upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous.' " *County Com'rs for Carroll County v. Forty West Builders, Inc.,* 178 Md. App. 328, 394, 941 A.2d 1181 (quoting *Droney,* 102 Md. App. at 683–84, 651 A.2d 415), *cert. denied,* 405 Md. 63, 949 A.2d 652 (2008).

Civil contempt is remedial, not punitive, with the ultimate goal being "to coerce compliance with court orders for the benefit of a private party or to issue ancillary orders for the purpose of facilitating compliance or encouraging a greater degree of com-

pliance with court orders." *Dodson,* 380 Md. at 448; *see also Roll & Scholl,* 267 *Md.* at 728 (civil contempt proceedings "remedial in nature and [ ] intended to coerce future compliance."); *Long v. State,* 371 Md. 72, 89 (2002) (same). In keeping with this purpose, the sanction for a finding of civil contempt must include a purge provision. *See* Md. Rule 15-207(d)(2) (court shall issue a "written order that specifies the sanction imposed for the contempt . . . [and] specify[ing] how the contempt may be purged"); *Roll & Scholl,* 267 Md. at 728 ("penalty in a civil contempt must provide for purging); *Fisher v. McCrary Crescent City, LLC,* 186 Md. App. 86, 120 (2009), *cert. denied,* 131 S. Ct. 637 (2010) ("Absent a purging provision, the sanction is no longer coercive and remedial."). "In this way, a civil contemnor is said to have the keys to the prison in his own pocket." *Jones v. State,* 351 Md. 264, 281 (1998).

APPEAL

I.

Denial of Counts III, IV, and V of the Contempt Petition

Mother asserts the court erred in denying the counts of her contempt petition in which she had alleged that Father had violated the provisions of the August 2010 Consent Order with respect to mental health counseling, effectively terminating the requirements of that order respecting counseling. Mother argues that the court did not take the best interests of the children into account in terminating all mental health care for the children, when they clearly are in need of counseling and the August 2010 Consent Order required counseling to take place. She also maintains that denial of Count V, pertaining to shared holiday and vacation access, was in error.

Father responds that the propriety of these findings are not properly before us in this appeal. We agree.

In *The Pack Shack, Inc. v. Howard County,* 371 Md. at 254, the Court of Appeals held that Md. Code (1974, 1998 Repl. Vol.), section 12-304 of the Courts and Judicial Proceedings Article ("CJP") plainly and unambiguously permits appeals in contempt cases only from a finding "adjudging any person in contempt" and only brought by the adjudged contemnor.[6] *See also State Comm'n on Human Relations v. Baltimore City Dep't of Recreation and Parks,* 166 Md. App. 33, 40 (2005). Thus, the court's findings that Father was not in contempt of the provisions of the August 2010 Consent Order requiring that the twins be enrolled in individual counseling and participate with Mother in family reunification counseling; that Mother and Father participate in individual counseling; and that Father comply with certain other provisions of the Divorce Judgment not altered by the interim consent orders are not subject to review on appeal, as a matter of law, and for that reason we shall not consider Mother's challenge to those rulings.

II.

Grant of Counts I and II of the Contempt Petition

In her appeal, Mother contends that, although the court ruled in her favor by granting the first two counts of her contempt petition against Father, the manner in which it did so violated her constitutional right to participate in raising her children and did not consider the best interests of the children. She complains that the ruling in her favor on those two counts resulted in the court's approving the continuation of what had become the visitation *status quo* as to Jordan and Ari, which (contrary to the requirements of the August 2010 Consent Order) is that Mother has no visitation with Jordan whatsoever and limited visitation with Ari. According to Mother, the court's ruling had the effect of modifying the August 2010 Consent Order to eliminate her right to visit with Jordan and to place new limits on her right to visit with Ari.

Father concedes that the trial court's finding that he violated the provisions of the August 2010 Consent Order regarding visitation was supported by the evidence (although he disagrees with the number of violations the court found). He points out that the contempt proceeding concerned an interim *pendente lite* consent order that will be supplanted by whatever order the court enters when Father's motion to modify custody is heard and decided.

The court found Father in constructive civil contempt of the visitation provisions of the August 2010 Consent Order based upon his "complete abdication of parental authority." It ordered him to "determine that Ari comply with the Wednesday night dinners and movies" and, as we shall discuss, *infra,* imposed a sanction for his failure to comply with that aspect of the August 2010 Consent Order. It declined to impose a sanction for noncompliance with the provisions of the August 2010 Consent Order pertaining to visitation with Jordan or with weekend and overnight visitation with Ari.

Mother characterizes the trial court's ruling on her contempt petition as effecting a modification of the terms of the August 2010 Consent Order. This contention is without merit. The August 2010 Consent Order remains in effect pending the result of a merits hearing on Father's motion to modify custody and visitation. In ruling on Mother's contempt petition, however, the trial court had broad discretion to fashion a remedy for Father's contemptuous conduct intended to coerce his future compliance with the August 2010 Consent Order.

The sanction imposed on Father was designed to coerce his future compliance with the provisions of the August 2010 Consent Order pertaining to Wednesday night dinners with Ari. The evidence at trial suggested that, in the short-term, the remaining visitation terms were unenforceable. Mother's own testimony was that she did not expect or desire visitation with Jordan in the short-term. On the fourth day of the contempt hearing, January 3, 2012, the court specifically inquired as to Mother's "short-term goals with respect to visitation," noting that Mother recently had filed for an order of protection from Jordan. Mother replied that, "given the circumstances," she wanted the court to order that Ari attend the Wednesday night dinners and that he spend, "maybe one night . . . [per alternating] weekend" with her. Mother also testified at the December 22, 2011 hearing that she was "in fear" of Jordan. In light of this testimony and the court's finding that the level of alienation from Jordan was so extreme that visitation could result in him causing harm to himself or Mother, the court did not attempt to coerce Father's future compliance with the provisions of the August 2010 Consent Order pertaining to Jordan. We perceive no abuse of discretion by the court.

The court also necessarily took into consideration Father's ability to comply with a provision requiring him to produce Jordan for weekly dinner visits and to produce either twin for bi-weekly overnight visits. *See Lynch v. Lynch,* 342 Md. 509, 529 (1996) ("a finding of contempt, where there is no possibility of enforcing compliance with the court order to which it relates, simply labels the defendant a contemnor and imputes guilt to him or her. That is a form of punishment."). The twins each had testified that they would refuse any attempts by Father or Mother to require them to attend overnight visits and the evidence was that, in past practice, the twins had so refused. Under these circumstances, the court reasonably determined that sanctioning Father for future non-compliance with those terms would be punitive, rather than remedial.

To be sure, the court also found that Ari's refusal to spend overnights with Mother and Jordan's refusal to see Mother at all were products of parental alienation by Father. Nevertheless, this issue is properly the subject of a merits hearing on Father's pending motion to modify custody, not a contempt proceeding to enforce an interim, *pendente lite* custody order. At a merits hearings, the court will (and, indeed, must) consider the best interests of the children and assess if, how, and on what terms custody and visitation should be shared between Mother and Father. Among other possibilities, the court may consider transfers through "neutral" family members, in "neutral locations," to minimize the evident high conflict between Mother and Father.

III.
Attorneys' Fees

Mother argues the trial court erred by not awarding her all of the attorneys' fees she sought. She asserts that, under the terms of the parties' valid and binding Separation Agreement, which was incorporated, but not merged, into the parties' Judgment of Divorce, they agreed that a party in breach of that agreement would be "responsible for any legal fees incurred by the other party seeking to enforce [the] Agreement." Based on this provision of the Separation Agreement, it is Mother's position that the court was obligated to award her all of the fees she incurred.

Father responds that the trial court's award of fees was supported by the evidence and was not clearly erroneous.

As already discussed, the court found in favor of Mother on Counts I and II of the contempt petition, but found in favor of Father on Counts III, IV and V. Count V was the only count alleging a violation of the terms of the Separation Agreement.[7] Thus, the court did not find that Father had breached the terms of the Separation Agreement and, as such, the provision of that agreement pertaining to legal fees was inapplicable.

Instead, the court analyzed Mother's fee request under Md. Code (1984, 2012 Repl. Vol.), section 9-105 of the Family Law Article. That statute provides, in relevant part:

> In any custody or visitation proceeding, if the court determines that a party to a custody or visitation order has unjustifiably denied or interfered with visitation granted by a custody or visitation order, the court may . . . take any or all of the following actions:
>
> * * *
>
> (3) assess costs or counsel fees against the party who has unjustifiably denied or interfered with visitation rights.

The trial court found that Father plainly had "unjustifiably denied and interfered with [Mother]'s visitation rights." Father does not dispute this finding.

As the trial court explained, however, this finding was only the beginning of the inquiry. In assessing any fees or costs against Father for his "unjustifiabl[e] deni[al]" of visitation, it had to analyze the reasonableness of the fees incurred and determine how much of those fees were related to Mother's attempt to enforce visitation, as opposed to other terms of the August 2010 Consent Order and of the Separation Agreement that the court did not find Father to have violated. The court found that much of the time at trial was devoted

to issues other than the denial of visitation. For example, the first day of the hearing was consumed with testimony about the issue of mental health counseling and Father's alleged failure to provide Mother with communications from the twins' school.

Ultimately, the court concluded that Mother failed to offer the court any proof as to how the fees she incurred were allocated between enforcing the various terms of the August 2010 Consent Order. In light of this failure of proof, the court declined to award Mother any fees incurred for trial preparation. Instead, the court awarded Mother the reasonable attorneys' fees incurred for "court hours" spent on the issue of the denial of visitation, amounting to $3,347.50. We perceive no clear error or abuse of discretion by the court in its assessment of fees in this manner.

CROSS-APPEAL

As discussed, the trial court ordered Father to produce Ari for Wednesday night visits and imposed the following sanction designed to coerce Father's future compliance: "[F]or every hour that Ari does not spend (pleasantly) with [Mother] on Wednesday nights from 5 pm until 10:30 pm, [Father] will be fined one thousand dollars ($1000.00) per hour."

In his cross-appeal, Father contends the court erred in the sanction it imposed for the contempt findings. Specifically, he asserts that the requirement that he ensure both that Ari attend Wednesday night dinners with Mother and that Ari behave "pleasantly" during the visits is not enforceable and "imposes a term that is beyond [his] control." Father suggests that this Court order the "[r]edaction of the word 'pleasantly'" from the trial court's order. Father also argues, however, that the "purge provision" imposed by the court is "overreaching" because it is in the nature of a penalty.

Mother agrees that the term requiring Ari to behave pleasantly is "subjective in nature and is also unenforceable." She contends, moreover, that the fine imposed by the court for Father's future non-compliance is "non-responsive to the contempt finding."

We agree with the parties that the requirement that Father ensure that Ari behave "pleasantly" during Wednesday evening visits with Mother is unenforceable and must be stricken. Father will not be in attendance during these visits and has no power to control Ari's behavior then. Moreover, the pleasantness, *vel non,* of a teenage boy's behavior is far too subjective to trigger the imposition of a civil fine.

We disagree, however, that the court erred or abused its discretion in imposing a $1,000 fine for each hour Ari fails to spend with Mother on Wednesday nights. As discussed, *supra,* in Maryland any sanction imposed for civil contempt must be designed to coerce present or future compliance by the adjudged contemnor *and* must include a purge provision. Both of those requirements were satisfied in the instant case. The trial court's order imposed a monetary fine upon Father for every hour that Ari does not attend Wednesday night visits, while permitting him to purge his contempt by complying with the court order that he produce Ari for visits. There is no question that the sanction imposed is coercive in nature. Father is not being punished for his past failure to ensure that the twins attend court ordered visits with Mother. Rather, the possibility of a monetary sanction, *i.e.,* a future fine, serves to motivate Father to exercise his authority over Ari and persuade or if necessary compel him to attend future visits.

Contrary to Father's assertion, the Court of Appeals decision in *Dodson, supra,* 380 Md. at 438, does not prohibit such a fine. In that case, the Court held that, absent exceptional circumstances, an award of compensatory damages is not permissible in the context of civil contempt. There, a wife brought a contempt action against her husband to enforce a *pendente lite* order in their divorce case requiring, *inter alia,* the husband to pay the insurance premiums for a condominium owned by the parties. The husband did not pay the premium and the insurer canceled the insurance policy as a result. Subsequent to its cancellation, a fire broke out at the condominium, causing substantial damage and loss of personal property. After the wife learned that the insurance policy had lapsed, she filed her contempt petition, seeking a finding that the husband was in contempt for failing to pay the insurance premium and ordering him "to reimburse [her] for her loss." *Id.* at 442. After a hearing, the court found the husband in civil contempt and ordered him to pay the wife $19,311 in compensatory damages. On appeal, this Court affirmed.

The Court of Appeals granted *certiorari* and reversed. It explained that the court's order awarding the wife compensation for losses arising out of the fire was not designed to coerce the husband's present or future compliance with the *pendente lite* order requiring him to pay the insurance premium for the condominium. Compliance with that term of the *pendente lite* order, moreover, would not have the effect of reinstating the insurance policy retroactive to the date of the fire. The Court reasoned that the wife's "purpose" in bringing her contempt action was to "sanction" the husband for his past failure to comply and that that was not appropriately accomplished *via* a civil contempt action, but through a tort or breach of contract action. *Id.* at 452. The Court summarized its holding as follows:

> [W]e hold that compensatory damages may not ordinarily be recovered in a civil contempt action. The Court

> of Special Appeals' decision in *Jones v. Wright, supra,* 35 Md. App. 313, 370 A.2d 1144, relied on by the courts below, is inconsistent with this holding and is overruled. Furthermore, we specifically hold that compensatory damages may never be recovered in a civil contempt action based upon a past negligent act by the defendant. This case does not present the issue of whether, under exceptional circumstances, a willful violation of a court order, clearly and directly causing the plaintiff a monetary loss, could form the basis for a monetary award in a civil contempt case. We shall leave the resolution of that question for another day.

Id. at 454.

The case at bar is unlike *Dodson*. There, the wife sought and was awarded compensation for monetary losses she had sustained as a result of the husband's past noncompliance with a court order. Here, Mother sought to coerce Father's compliance going forward with the terms of the August 2010 Consent Order. In *Dodson,* the amount awarded was in the nature of damages and the husband had no means of avoiding payment. In this case, the amount that may be awarded is a civil fine and Father has the power to avoid the fine by ensuring that Ari attends visits with Mother.

Moreover, this Court has approved the imposition of a fine to coerce compliance in the context of constructive civil contempt. In *Gertz v. Md. Dep't of Environment,* 199 Md. App. 413, *cert denied,* 423 Md. 451 (2011), Robert Gertz was adjudged in contempt of a prior contempt order requiring him to close a landfill on his property "in accordance with specified deadlines and regulations." *Id.* at 418. The trial court imposed a fine of $50,000 "as a stipulated penalty" for Gertz's noncompliance with the prior order and imposed an additional fine of $22,000, which it "suspended on the condition that Gertz compl[y] with future inspection and monitoring requirements." *Id.* Gertz appealed from the judgment of contempt arguing, *inter alia,* that the trial court abused its discretion in imposing the $22,000 fine because it was punitive and not subject to being purged. We disagreed, explaining:

> In our view, because it was subject to suspension by Gertz's compliance with the inspection and monitoring requirements in the [prior] Contempt Order, the $22,000 portion of the $72,000 penalty clearly qualifies as a remedial sanction designed to compel future compliance. The court gave Gertz an opportunity to avoid payment of this amount by complying with these easily satisfied obligations. Therefore, this portion of the contempt sanction is both remedial and capable of being purged.

Id. at 426.

The analysis in *Gertz* is equally applicable to the facts of this case. The $1,000 per hour fine only will be imposed upon Father if he fails to comply with the court directive that he produce Ari for Wednesday night visits. It is a strong incentive for Father to exercise the parental authority over Ari (and Jordan) the court had found he had been abdicating. For all these reasons, we perceive no error or abuse of discretion by the court in ruling that Father shall be fined for any ***future noncompliance*** with the court's order directing that Father produce Ari to Mother for Wednesday night visitation.

APPEAL OF DENIAL OF COUNTS III, IV, V, AND VI OF PETITION FOR CONTEMPT DISMISSED. GRANT OF COUNTS I AND II OF PETITION FOR CONTEMPT AFFIRMED EXCEPT THAT THE WORD "PLEASANTLY" IN THE SANCTION IMPOSED SHALL BE STRICKEN BY THE CIRCUIT COURT. GRANT OF COUNT VII OF PETITION FOR CONTEMPT AFFIRMED. COSTS TO BE PAID ONE-HALF BY THE APPELLANT/CROSS-APPELLEE AND ONE-HALF BY THE APPELLEE/CROSS-APPELLANT.

FOOTNOTES

1. Father testified that he and Segal were married in a religious ceremony in October of 2009. It became apparent during the proceedings, however, that they were not legally married.

2. Jordan was picked up outside of Mother's then boyfriend's house. Ari was picked up outside of a restaurant where he and Mother had shared dinner for his birthday.

3. Mother attached bills for legal services totaling more than $80,000.

4. The record does not reflect Officer Melnyk's first name.

5. The court did not grant Mother a final order of protection against Jordan.

6. CJP section 12-304, entitled "Appeals in contempt cases," provides in pertinent part that "[a]ny person may appeal from any order or judgment passed to preserve the power or vindicate the dignity of the court and adjudging him in contempt of court, including an interlocutory order, remedial in nature, adjudging any person in contempt, whether or not a party to the action."

7. Specifically, Mother alleged that Father had failed to produce Ari and Jordan for visits on certain holidays and had failed to share information with her regarding the twins' schooling as required under the terms of the Separation Agreement.

NO TEXT

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