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CINA: OASDI benefits: due process

In Re: Ryan W.

No. 95 & 101, September Term, 2012

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

Opinion by Harrell, J.

Adkins, J. and Bell, C.J., (ret.) dissent.

Filed: September 26, 2013. Reported.

* Bell, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in reaching the decision in this case.

The juvenile court had no subject matter jurisdiction over a local DSS' allocation of a foster child's federal OASDI benefits, where the department was appointed representative payee by the Social Security Administration and applied the funds to reimburse itself for the CINA's current maintenance cost; however, the department must notify the child's CINA counsel whenever it applies to be appointed representative payee for the child's federal OASDI benefits and whenever it receives those funds.

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.

These combined cases[1] arose initially from a 16 June 2011 order entered by the Circuit Court for Baltimore City, sitting as the juvenile court, directing the Baltimore City Department of Social Services ("the Department") to hold in a constructive trust funds the Department received, in its capacity as representative payee, from the Social Security Administration ("SSA") on behalf of Ryan W. ("Ryan"), a Child in Need of Assistance ("CINA"). Born on 26 February 1993, Ryan entered the care of the Department at age 9 after a 4 June 2002 determination by the Circuit Court that he was a CINA. That determination rested on allegations that his drug-addicted parents neglected Ryan and his siblings. Ryan's parents died while he was in foster care. The Department filed an application with the SSA to be appointed his representative payee for Old Age and Survivor's Disability Insurance ("OASDI") benefits to which Ryan was entitled following his parents' deaths. After being appointed as Ryan's representative payee by the SSA, the Department received his benefit payments and applied them to reimburse itself partially for the current cost of Ryan's foster care. Ryan challenged subsequently in the Circuit Court this allocation of his benefit funds by filing a pleading styled as a "motion to control conduct," alleging that the Department failed to make an individualized determination of what was in Ryan's best interests in the application of the proceeds and that the benefits should have been conserved instead for his use in transitioning by age out of foster care. The Circuit Court agreed with Ryan's contentions, leading to establishment of the constructive trust and subsequent appellate scrutiny of that judgment.

We conclude that, under the Social Security Act and the Family Law Article of the Maryland Code, a local department of social services, acting in the capacity as an institutional representative payee appointed by the Commissioner of the Social Security Administration, has discretion to apply a CINA foster child's OASDI benefits to reimburse the Department for its costs incurred for the child's current maintenance, but must provide notice to the child and/or his or her legal representative that the Department applied to the SSA and received such benefits on the child's behalf. Thus, we shall affirm in part and reverse in part the judgment of the Court of Special Appeals in No. 95 and reverse that court's judgment in No. 101.

RELEVANT STATUTORY AND REGULATORY CONTEXT

Social Security Act and Federal Regulations

In 1939, Congress added OASDI to the Social Security Act, 42 U.S.C. § 401 *et seq.,* which provides for, among other things, monthly benefit payments to certain members of a deceased wage-earner's family. *Astrue v. Capato ex rel. B.N.C.,* ___ U.S. ___, ___, 132 S. Ct. 2021, 2027, 182 L. Ed. 2d 887, 895 (2012). A dependent child who survives his wage-earning parent may be entitled to receive survivor's benefits if the child is unmarried and under the age of 18 (or 19 if attending school full time). 42 U.S.C. § 402(d). "An applicant qualifies for such benefits if [he or] she meets the Act's definition of 'child,' is unmarried, is below specified age limits (18 or 19) or is under a disability which began prior to age 22, and was dependent on the insured at the time of the insured's death." *Astrue*, ___ U.S. ___, ___, 132 S. Ct. at 2027, 182 L. Ed. 2d at 895 (citing 42 U.S.C. § 402(d)(1)). The wages earned by the deceased parent prior to his or her death determine the amount of the benefit. *Id.*

A representative payee may be appointed for a child entitled to OASDI benefits if the Commissioner of the SSA determines that the interests of the beneficiary will be served by doing so. 42 U.S.C. § 405(j)(1)(A). "[E]very beneficiary has the right to manage his or her own benefits. However, *some beneficiaries due to a mental or physical condition or due to their youth may be unable to do so.*" 20 C.F.R. § 404.2001(b)(1) (emphasis added). Generally, a representative payee is appointed for child beneficiaries under the age of 18, unless the child "shows the ability to manage the benefits."[2] 20 C.F.R. § 404.2010(b).

The SSA aims to select "the person, agency, organization or institution that will best serve the interest of the beneficiary" when appointing a representative payee. 20 C.F.R. § 404.2020. In determining who will best serve the child's interests, the SSA considers:

> (a) The relationship of the person to the beneficiary;
>
> (b) The amount of interest that the person shows in the beneficiary;
>
> (c) Any legal authority the person, agency, organization or institution has to act on behalf of the beneficiary;
>
> (d) Whether the potential payee has custody of the beneficiary; and
>
> (e) Whether the potential payee is in a position to know of and look after the needs of the beneficiary.

20 C.F.R. § 404.2020(a)-(e). The SSA prioritizes also categories of persons or entities whom the Administration prefers to appoint as a child's representative payee:

> (1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;
>
> (2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary's support and is demonstrating strong concern for the beneficiary's well being;
>
> (3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary's well being;
>
> (4) A relative or stepparent who has custody of the beneficiary;
>
> (5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary's support and is demonstrating concern for the beneficiary's well being;
>
> (6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary's well being; and
>
> (7) *An authorized social agency or custodial institution.*

20 C.F.R. § 404.2021(c) (emphasis added).

The SSA provides beneficiaries with written notice that the Administration will appoint a representative payee before the payee is appointed officially, 20 C.F.R. § 404.2030(a), and before certifying payment to the payee. 42 U.S.C. § 405(j)(2)(E)(ii). If the beneficiary is "under age 15, an unemancipated minor under the age of 18, or legally incompetent, [the] written notice goes to [the beneficiary's] legal guardian or legal representative." 42 U.S.C. § 405(j)(2)(E)(ii); 20 C.F.R. § 404.2030(a).

The notice required by statute must include language explaining a beneficiary's right to appeal the appointment of a particular entity as the representative payee. 42 U.S.C. § 405(j)(2)(E)(ii); 20 C.F.R. § 404.2030(a). SSA regulations explicitly provide for both administrative and judicial review of, among other things, "initial determinations" made by the agency. 20 C.F.R. § 404.902. "Initial determinations" are defined by regulation (somewhat circularly) as decisions made by the SSA which are subject to administrative and judicial review. 20 C.F.R. § 404.902. The SSA's decision of who will serve as an OASDI beneficiary's representative payee is listed as an example of an "initial determination" and is thus subject to both administrative and judicial review. 20 C.F.R. § 404.902(q).

Once appointed, a representative payee is required to use the benefit payments solely for the beneficiary's "use and benefit in a manner and for the purposes [the representative payee] determines . . . to be in [the beneficiary's] best interests." 20 C.F.R. § 404.2035(a). The SSA views costs associated with the beneficiary's "current maintenance" to be valid expenditures satisfying the requirement that benefit payments be applied "for the use and benefit" of the beneficiary and in line with his or her "best interests." 20 C.F.R. § 404.2040(a)(1). "Current maintenance includes cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 C.F.R. § 404.2040(a)(1). For beneficiaries receiving institutional care because of a physical or mental disability, the definition of "current maintenance" expands to include "the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the insti-

tution." 20 C.F.R. § 404.2040(b) (emphasis added). Past debts of the beneficiary that arose before the first benefit payment was made to the representative payee are not regarded as a legitimate expenditure of benefit funds unless "the current and reasonably foreseeable needs of the beneficiary are met." 20 C.F.R. § 404.2040(d). Conservation and investment of benefit payments is required whenever there is a surplus after all required uses of the payments are made. 20 C.F.R. § 404.2045(a).

Maryland's Family Law Article and Related Regulations

The Family Law Article of the Maryland Code mandates that the Department of Human Resources ("DHR") provide "child welfare services" to foster children. Md. Code (1984, 2006 Repl. Vol.), Fam. Law § 5-524. When a foster child is unable to return to his parent or guardian, DHR must "develop and implement an alternative permanent plan for the child." *Id.* at § 5-524(3).

As a last resort, the Department will commit a child to foster care when no other placements are viable, for which the Department is required to pay for the services a foster care placement provides. Md. Code (1984, 2006 Repl. Vol.), Fam. Law § 5-526(a)(1) ("The Department shall provide for the care, diagnosis, training, education, and rehabilitation of children by placing them in group homes and institutions that are operated by for-profit or nonprofit charitable corporations."). The Department is required to reimburse these charitable corporations for the costs of services provided to the foster children at a rate set by the Department and in line with the State budget. *Id.* at § 5-526(b)(1).

All of a child's resources, including "survivor's disability insurance," are subject to allocation by the Department to reimburse itself for the "cost of care" of a foster child in an out-of-home placement. COMAR 07.02.11.29(A), (K)(1). Subsection (K)(1) of this regulation identifies explicitly "survivor's disability insurance" as an example of resources that may be tapped by the Department for self-reimbursement. Foster children over the age of 18 in an out-of-home placement, if entitled to survivor's disability benefits, may elect either to receive the payments themselves and then reimburse the Department, or to have the Department appointed as the child's representative payee for the benefits (assuming that the SSA has made a determination that the Department is the appropriate representative payee for the child). *Id.* at (K)(2).

The Department may use the child's resources subject to the following priorities: first, for the "cost of care;"[3] next, for the child's "special needs;" and, finally, if any resources remain, for "a savings account for future needs." *Id.* at (L). Excess funds from the child's resources not utilized consistent with regulation by the Department before the child leaves out-of-home placement must be returned to the child if he or she is 18 or older, *id.* at (M)(1), or "transferred to the legal parent or guardian with whom the child will reside," if he or she is under 18 years old. *Id.* at (M)(2).

FACTUAL AND PROCEDURAL BACKGROUND

Determination that Ryan was a CINA and the Statutory Framework for CINA

The Circuit Court for Baltimore City, sitting as the juvenile court, determined that Ryan W. was a CINA on 4 June 2002 when he was nine years old. The Courts and Judicial Proceedings Article ("CJP") of the Maryland Code, § 3-801 *et seq.,* provides the framework for determining whether a child is a CINA. When the Department learns that a child is being abused or neglected, or suffers from a developmental disability or mental disorder, and is not receiving proper care and attention to his or her needs, the particular locality's Department of Social Services may file a petition seeking a determination by the respective juvenile court that the child is a CINA. Md. Code (2001, 2006 Repl. Vol.) CJP §§ 3-801(f), 3-809(a). Once a petition is filed, the juvenile court must hold an adjudicatory hearing to determine if the facts alleged can be proven. Md. Code (2001, 2006 Repl. Vol.) CJP §§ 3-801(c), 3-817(a) and (c). If the allegations are proven to the satisfaction of the juvenile court, the court must determine whether the child needs assistance and how the court should intervene "to protect the child's health, safety, and well-being." Md. Code (2001, 2006 Repl. Vol.) CJP §§ 3-801(m), 3-819(a)(1). If the court determines the child is in need of assistance, it may commit, among other things, the child to the custody of the Department. CJP § 3-819(b)(1)(iii). The Department must establish then an out-of-home placement for the CINA in foster, kinship, group, or residential treatment care. Md. Code (1984, 2012 Repl. Vol.)[4], Fam. Law §§ 5-501(m), 5-525(b)(1)(ii). Further, the Department must prepare a "permanency plan" that outlines the goals aimed at a child's exit from commitment to foster care. *See* CJP § 3-823(d). The juvenile court must hold a hearing (called a "permanency planning hearing") to determine this plan initially, CJP § 3-823(b)(1), and must review the plan every six months until the child exits the Department's care. CJP § 3-823(h)(1)(i).

Here, the Department filed a petition with the Circuit Court for Baltimore City on 23 January 2002, seeking a determination that Ryan was a CINA. As a basis for the determination sought, the Department cited Ryan's mother's drug abuse and his father's alcohol abuse, their failure to provide adequate food and

clothing for their children, their lack of supervision, and their failure to ensure the children attended medical appointments and school on time. Following a hearing, Ryan was placed in emergency shelter care by order dated 13 February 2002, and was determined on 4 June 2002 to be a CINA and committed to the custody of the Department. As noted previously, Ryan was nine years old at that time.

Post-CINA Determination Actions

Subsequent to his commitment to the Department's custody, Ryan was placed in various group homes and non-relative foster homes. The Department paid the cost of his care. Ryan's mother died in August 2006. His father died in November 2008. In June 2009, Ryan's DSS-assigned caseworker at the time, Nathan Exom, submitted copies of Ryan's parents' death certificates to the Department's Foster Care & SSI Reimbursement Unit ("Reimbursement Unit"). In November 2009, the Reimbursement Unit filed an application with the SSA seeking appointment as Ryan's representative payee for his Old-Age, Survivor's and Disability Insurance ("OASDI") benefits.[5] *See* 42 U.S.C. § 405(j)(1)(A); *see also* COMAR §§ 07.02.11.29(K) and (L) (providing that the Department should seek all resources for which a child is eligible, including survivor's insurance benefits, and apply them to the costs of foster care). The application was approved shortly thereafter. The Department provided no notice to Ryan, his CINA counsel, or the juvenile court that it applied to be, and was approved as, Ryan's representative payee. The SSA sent its required notice to the Department in its capacity as Ryan's legal guardian. *See* 42 U.S.C. § 405(j)(2)(E)(ii); 20 C.F.R. § 404.2030(a).

A beneficiary child is entitled to OASDI benefits for each parent that dies. Here, Ryan was entitled to benefits from both his mother and father. The Department received two lump sum payments for OASDI benefits covering the interim between the deaths of Ryans' parents and the filing of the application. The Department received the first of these payments on 13 November 2009, in the amount of $8,481, which covered the benefits accrued between Ryan's father's death and the start of benefit payments (November 2008 to November 2009), and represents the benefits to which Ryan was entitled from his father's wages. The second lump sum payment, in the amount of $11,647.50, was received on 15 December 2009, and covered the period August 2006 to November 2008, representing the benefits to which Ryan was entitled based on his mother's wage earnings. From December 2009 until February 2011, when Ryan turned 18, the Department received a monthly $771 OASDI benefit payment on Ryan's behalf. Ultimately, as of the time of trial in this case, the Department received a total of $31,693.50 in its capacity as Ryan's representative payee for OASDI benefits and used the entire amount to reimburse itself for some of the costs of Ryan's foster care.

In re Ryan W.

Ryan W., through counsel, filed, on 5 April 2011, with the juvenile court a "motion to control conduct," alleging that the Department, as Ryan W.'s representative payee, applied for and received his OASDI benefits without notifying the child or his CINA attorney and misused the funds in violation of its statutory and fiduciary duties. Specifically, Ryan contended that the Department allocated improperly his benefits to reimburse itself for the costs of his foster care, without an individualized determination as to what other use of the funds might be in his best interests. *See* 42 U.S.C. 405(j)(1)(A) (mandating that representative payees apply benefits to the best interests of the beneficiary); *see also* 42 U.S.C. 405(j)(2)(C)(v)(III) (providing that representative payees are fiduciaries of the beneficiary).[6]

After a hearing, the juvenile court determined that the Department violated Ryan W.'s due process and equal protection rights by failing to notify him before applying his OASDI benefits toward the current costs incurred by the Department on his behalf. In its order, dated 16 June 2011, the juvenile court required the Department to hold $31,693.50, the total amount received by the Department on behalf of Ryan W., in a constructive trust in his name, pending a permanency planning hearing. The June 16 order also declared invalid COMAR §§ 07.02.11.29(K) and (L), which require the Department to seek appointment as payee for all potential resources of a child committed to its care and prioritize self-reimbursement for the child's cost of care over the child's individualized needs, because they extended improperly the Department's statutory authority under 42 U.S.C. § 405(j) (2012) and violated the fiduciary obligations the Department owed to the Petitioner. At the contemplated permanency planning hearing, the juvenile court determined that the best use of the OASDI benefits would be to continue the trust and prioritize Ryan W.'s education-related expenses; the court issued an order to that effect on 15 July 2011. The Department appealed.

A panel of the Court of Special Appeals ("COSA") reversed the juvenile court's order in part, concluding that the juvenile court lacked jurisdiction to order the creation of a constructive trust, although maintaining that the Department reimburse Ryan W. in the amount of $8,075.32 for benefits received on his behalf during a period in which the Department incurred lower costs for his care. *In re Ryan W.,* No. 1503, 2012 WL 3847359 (Md. Ct. Spec. App. Sept. 5, 2012); *superseded on reconsideration by* 207 Md. App. 698, 56 A.3d 250 (2012).

The Department filed a motion for reconsideration, asking the COSA to correct the amount ordered reimbursed and, alternatively, to hold that the COSA's rationale that "the Juvenile Court is not . . . vested with broad equitable powers to supervise the Department when it is acting in its role as representative payee for foster children committed to its care" barred any order for reimbursement of the funds. While that motion was pending, counsel for Ryan W. filed a petition for writ of *certiorari* with this Court, seeking review of the original COSA decision. On 21 November 2012, the COSA issued a reported opinion on reconsideration reiterating its view that the juvenile court acted outside its authority in establishing a trust, but reducing the amount to be reimbursed to Ryan from $8,075.32 to $660.[7] *In re Ryan W.,* 207 Md. App. 698, 756, 56 A.3d 250, 284 (2012). Because it found that a constructive trust was an improper remedy, regardless of the juvenile court's authority, the COSA declined to decide the question of sovereign immunity raised by the Department as a defense to the claims in Ryan W.'s action. *Id.* at 758, 56 A.3d at 285. The Department petitioned this Court to review that determination, arguing that funds for the constructive trust would have to come from the State Treasury and the State's sovereign immunity barred the relief sought.

We granted the parties' petitions for writs of *certiorari*. *In re Ryan W.,* 429 Md. 528, 56 A.3d 1241 (2012); *In re Ryan W.,* 430 Md. 11, 59 A.3d 506 (2013). The questions presented for our consideration are:[8]

> 1. Did COSA err in holding that a local department of social services has plenary authority to apply for and use a foster child's OASDI benefits without seeking an express grant of authority from the juvenile court to exercise control over the benefits and without providing the foster child with notice and the opportunity to be heard?
>
> 2. Did the COSA err in rejecting the juvenile court's exercise of its authority in determining that a total of $31,693.50 was to be conserved in Ryan's best interests?
>
> 3. Did the COSA err in upholding state practice and regulations that require automatic, non-discretionary application of all of a foster child's OASDI benefits and that are inconsistent with federal regulations requiring the proper exercise of discretion as a representative payee?
>
> 4. Did the COSA err in directing the juvenile court, on remand, to revise it's monetary award against the State by requiring the Department to deposit funds into a foster child's trust account because, as the COSA had already concluded, the juvenile court lacks jurisdiction to enter such an order and because such an order is barred by the doctrine of sovereign immunity?

STANDARD OF REVIEW

We review the juvenile court's findings of fact in CINA proceedings under the "clearly erroneous standard." *In Re Shirley B.,* 419 Md. 1, 19, 18 A.3d 40, 53 (2011) (citations omitted). Therefore, the juvenile court's factual findings will not be disturbed "[i]f any competent material evidence exists in support of the trial court's factual findings . . . ." *Figgins v. Cochrane,* 403 Md. 392, 409, 942 A.2d 736, 746 (2008). The juvenile court's conclusions of law are reviewed without deference. *In re Adoption/Guardianship of Amber R.,* 417 Md. 701, 708, 12 A.3d 130, 134 (2011). Errors of law are generally remanded to the trial court for further proceedings, unless the error is harmless. *In Re Shirley B.,* 419 Md. at 19, 18 A.3d at 53. Only where we find a "clear abuse of discretion" will we disturb a lower court's legally sound decision that is based upon factual findings that are not "clearly erroneous." *In Re Shirley B.,* 419 Md. at 19, 18 A.3d at 53.

Ryan's Appeal

Ryan asks this Court to reverse the COSA's determination that a local department of social services possesses plenary authority to apply for and use a foster child's OASDI benefits, without seeking an express grant of authority from the juvenile court to exercise control over the benefits. He asks further that we hold that a local department must provide a foster child with notice and an opportunity to be heard before using a child's survivor's benefits. Although we agree with the COSA that a local department of social services need not seek permission from a juvenile court in order to exercise its statutory and regulatory-guided discretion as a duly appointed representative payee in its use of a foster child's OASDI benefits, we agree with Ryan W. that due process requires that notice be afforded at least to a CINA's attorney when the Department applies to become a payee and as benefits are received.

A. The Juvenile Court is without jurisdiction to direct the Department's allocation of OASDI benefits for which it is a duly appointed representative payee by the SSA.

1. *The Social Security Act does not contemplate state court jurisdiction over the allocation of OASDI benefits by a duly appointed representative payee.*

The Department argues that, because federal law governs the appointment of representative payees and the allocation of OASDI benefits, *see* 42 U.S.C. 405(j), the juvenile court is without authority to direct an approved representative payee how to allocate a child's benefits. According to the Department, the proper forum for any available remedy for Ryan's claim lies in the federal administrative and judicial review process. Ryan counters that the juvenile court is a "court of competent jurisdiction" to review SSA determinations. *See* 42 U.S.C. 405(j)(1)(A) ("If the Commissioner . . . or a court of competent jurisdiction determines that a representative payee has misused any individual's benefit . . . the Commissioner of Social Security shall promptly revoke certification for payment of benefits to such representative payee . . . and certify payment to an alternative representative payee or, if the interest of the individual would be served thereby, to the individual."). We conclude that the juvenile court here did not have jurisdiction over the disputes between Ryan and his representative payee regarding the application of his OASDI benefit payments. Rather, such disputes are for resolution within the federal administrative process and subject to further federal judicial review.

We look first to the Supremacy Clause of the United States Constitution to determine if state courts may exercise jurisdiction over this dispute, outside of the statutorily-prescribed administrative process for reviewing SSA determinations. "When Congress is silent concerning [concurrent] state court jurisdiction over federal causes of action, there is a 'deeply rooted presumption in favor of concurrent state court jurisdiction.'" *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.,* 382 Md. 689, 715, 857 A.2d 1, 16 (2004) (quoting *Tafflin v. Levitt,* 493 U.S. 455, 459, 110 S.Ct. 792, 795, 107 L. Ed. 2d 887, 894 (1990)). This presumption, however, "can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 478, 101 S. Ct. 2870, 2875, 69 L. Ed. 2d 784 (1981). The Social Security Act provides explicitly that an individual seeking review of a decision made by the Commissioner may do so in a civil action, and that

> [s]uch action s*hall be brought in the district court of the United States* for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.

42 U.S.C. § 405(g) (emphasis added). Thus, while Congress was silent as to whether state courts have jurisdiction to review SSA determinations, it directs explicitly that federal courts have jurisdiction over civil actions seeking review of the Commissioner's determinations. The statutory language is expressed in mandatory terms that all such actions be brought in a federal district court.[9] *Id.; cf. Tafflin*, 493 U.S. at 460-61, 110 S. Ct. at 796, 107 L. Ed. 2d 887 (finding that a federal statute creating a federal cause of action did not exclude state courts from hearing the claims because the statute provided that such claims "may" be brought in federal court). Therefore, because Congress's use of the word "shall" suggests strongly that the jurisdiction of the federal courts is exclusive, we determine that Maryland's state courts are without concurrent subject matter jurisdiction to adjudicate disputes over the allocation of a child beneficiary's OASDI benefits by a duly appointed representative payee.

Generally, federal law governs representative payees and their use of a child beneficiary's OASDI benefits. *See* 42 U.S.C. 405(j); 20 C.F.R. § 404.2001. Once appointed, a representative payee is required to use the benefit payments solely for the beneficiary's "use and benefit in a manner and for the purposes [the representative payee] determines . . . to be in [the beneficiary's] best interests." 20 C.F.R. § 404.2035(a). The SSA considers costs associated with the beneficiary's "current maintenance" to be valid expenditures satisfying the requirement that benefit payments be applied "for the use and benefit" of the beneficiary and in line with his or her "best interests." 20 C.F.R. § 404.2040(a)(1). "Current maintenance includes cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 C.F.R. § 404.2040(a)(1). For beneficiaries receiving institutional care because of a physical or mental disability, the definition of "current maintenance" is expanded to include "the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the institution." 20 C.F.R. § 404.2040(b) (emphasis added). The SSA Commissioner is responsible for promulgating rules and regulations for implementing and executing the provisions of the Social Security Act, in addition to monitoring payees. *See* 42 U.S.C. 405(a). Because this authority is vested solely with the Commissioner, the Maryland juvenile court does not have authority under Maryland law to monitor the allocation of social security benefits by a representative payee. *See PLIVA, Inc.*

v. Mensing, 131 S.Ct. 2567, 2570 (2011) (holding that the Supremacy Clause requires that "[w]here state and federal law directly conflict, state law must give way").

If a child beneficiary suspects misuse of his or her OASDI benefits by his or her representative payee, the Social Security Act, as amended in 2004, provides the beneficiary with avenues for federal administrative and judicial review. The 2004 amendments include more stringent monitoring of institutional representative payees' use of benefits, as well as broader avenues in which to seek remedy for misuse of benefits by such institutional payees. *See* Social Security Protection Act of 2004, Pub. L. No. 108- 203, 118 Stat. 493, 493 (2004). The amendment, as enacted, defines "misuse" as occurring in any case in which the representative payee "receives payment under this title for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person." *Id.* at sec. 101(a)(2), § 405(j), 118 Stat. at 495 (codified at 42 U.S.C. § 405(j)(9)).

If a beneficiary is not satisfied with an initial determination made by the Commissioner as to either misuse, eligibility for benefits, or the appointment of a representative payee, the first step in the SSA's internal review process is reconsideration. 20 C.F.R. § 404.907. The SSA provides written notice to all parties of its reconsidered determination, and that decision is appealable to an administrative law judge ("ALJ"). *Id.*; 20 C.F.R. § 404.922. The decision of the ALJ is binding unless one of the parties requests and receives review of the decision by the Appeals Council. 20 C.F.R. §§ 404.967, 404.955(a). The decision of the Appeals Council is reviewable in federal district court, and if the Council declines to review a case, the ALJ's decision is likewise reviewable in a federal district court. 20 C.F.R. § 404.981.

Notwithstanding these provisions, Ryan contends that the juvenile court had subject matter jurisdiction over the Department's allocation of his OASDI benefits pursuant to the COSA's 2001 decision in *Ecolono v. Division of Reimbursements of Department of Health and Mental Hygiene,* 137 Md. App. 639, 769 A.2d 296 (2001). In *Ecolono,* the COSA determined that it had "subject matter jurisdiction to decide a dispute between the beneficiary of social security benefits and his representative payee with respect to the allocation of those benefits." 137 Md. App. 639, 654, 769 A.2d 296, 305. At the time *Ecolono* was decided, the Social Security Act and implementing regulations required only that the SSA provide restitution to a beneficiary for payee misuse if the SSA had been negligent in appointing that payee, or if the SSA recovered the misused funds from the payee. *See* Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, 493 (2004).

The appellee in *Ecolono* argued that, because there was an administrative review process for appointment of representative payees and a remedy for their breach of duty, state courts were without jurisdiction to interfere with a representative payee's allocation of social security benefits. COSA rejected this argument, reasoning that "nothing in federal law . . . indicate[s] an intent by Congress to limit interested parties to the federal administrative and judicial review process and to prohibit State courts from exercising jurisdiction . . . when the relief requested is not the removal of the payee but a reallocation of the benefits." *Id.*, 137 Md. App. at 654, 769 A.2d at 305. Notably, however, the 2004 amendments to the Social Security Act now permit the beneficiary to recover full restitution from the SSA where an institutional representative payee misuses the beneficiary's funds. *See* 20 C.F.R. § 404.2041(a). Therefore, unlike the cases relied on by the COSA in *Ecolono, see, e.g., Jahnke v. Jahnke,* 526 N.W.2d 159, 163 (Iowa 1994) ("Although the federal government may prosecute a payee who converts a beneficiary's funds, there is no federal mechanism to prevent such a conversion from occurring. Moreover, once the SSA pays the benefits to the proper representative payee, it has no liability to the beneficiary for misuse of the payments." (quoting 42 U.S.C. § 405(k) (1988))),[10] we are not presented with a scenario in which Ryan has no federal remedy upon a finding that his representative payee allocated his funds in a manner contrary to federal law and regulations.

Because the 2004 amendments to the Social Security Act enhanced the monitoring of institutional representative payees and made available federal remedies for misuse of benefits, the rationale underlying the result in *Ecolono* and cases from other jurisdictions which held that state courts possessed subject matter jurisdiction over disputes regarding the allocation of benefits by representative payees no longer exists. The appropriate forum for seeking review of disputes regarding SSA matters lies within the federal administrative and court systems. Accordingly, the juvenile court erred in directing the Department to establish a constructive trust on Ryan's behalf for funds it had received on his behalf. Having determined that the exercise of discretion by a representative payee in its use of a beneficiary's OASDI benefits is reviewable only in the federal administrative and judicial processes described in the applicable federal statute and regulations discussed *supra,* we hold that a state court does not have jurisdiction to direct a representative payee to allocate funds in a way that, while permitted under federal law, conflicts directly with a valid exercise of the payee's discretion under the federal law.[11] *See Washington Department of Social and Health Services v. Guardianship Estate of Danny Keffeler,* 537 U.S. 371, 390, 123 S.Ct. 1017, 1028, 154

L. Ed. 2d at 972 ("Keffeler II") (finding that the anti-attachment provision in 42 U.S.C. 405(j) prohibits a state from directing a representative payee, or a beneficiary, to pay their benefits over to the state). Because we conclude that Maryland state courts lack jurisdiction over disputes regarding a representative payee's allocation of OASDI benefits, we do not reach the issue of whether the Department's allocation of Ryan's benefits complied with federal law, to the extent that the COSA decided that question.

2. *The Courts & Judicial Proceedings Article of the Maryland Code does not grant to the juvenile court the authority to consider and resolve disputes regarding the allocation or use of OASDI benefits for CINA children.*

Ryan argues that the juvenile court, in directing the Department to conserve benefits received already and spent on his behalf, acted within its statutory authority over children deemed CINA and the Department as their fiduciary. CJP § 3-802(c) (providing that "the court may direct the local department to provide services to a child, the child's family, or the child's caregiver to the extent that the local department is authorized under State law"); *see also* CJP § 3-823(e) (providing for the juvenile court's authority over the child's permanency plan, including transition needs); *accord In re Damon M.,* 362 Md. 429, 436, 765 A.2d 624, 627-28 (2000) ("Services to be provided by the local social service department and commitments that must be made by the parents and children are determined by the permanency plan.") Ryan contends further that, because CJP § 3-821 permits the juvenile court to "direct, restrain, or control" the conduct of a person or entity whenever the court finds that such conduct is not in the child's best interests, the court acted within its statutory authority. The Department contends that the juvenile court misinterpreted its authority to "control the conduct" of a party, and, alternatively, that the "support" of a CINA should be interpreted as meaning "child support" only.

As a court of limited jurisdiction, the juvenile court may exercise only those powers granted to it by statute. *In re Franklin P.,* 366 Md. 306, 334, 783 A.2d 673, 689 (2001) ("[W]hen a court proceeds by way of a special statute rather than under its general common-law authority, that court has only the powers given to it under the special statute."); *see also Smith v. State,* 399 Md. 565, 574, 924 A.2d 1175, 1180 (2007). Pursuant to the Courts and Judicial Proceedings Article of the Maryland Code, the juvenile court possesses exclusive original jurisdiction over CINA petitions, CJP § 3- 803(a)(2), as well as concurrent jurisdiction over the "[c]ustody, visitation, support, and paternity of a child whom the court finds to be a CINA." CJP § 3-803(b)(1)(i).

The Courts and Judicial Proceedings Article does not provide explicitly that the juvenile court has jurisdiction to consider disputes in the allocation of federal OASDI funds as to CINA persons. In support of his position, Ryan argues that the juvenile court's jurisdiction over the Department's use of benefits derives from the court's powers over the "support" of a CINA. *See* CJP § 3-803(b)(1)(i); *see also* CJP § 3-819(c)(2) (providing the juvenile court with powers to determine custody, visitation, support or paternity of a CINA). He contends that, because OASDI benefits are meant to replace the "support" a child loses from his wage-earning parent(s) when the parent(s) die, *O'Brien v. O'Brien,* 136 Md. App. 497, 510 n.5, 766 A.2d 211, 218 n.5 (2001), the juvenile court's power to determine support of a CINA allows it to "make orders regarding support" of a CINA.

In construing whether the term "support," as used in CJP § 3-819, includes federal survivor's benefits, we must consider the use of the word in the context of the entire CINA statute and the word's "ordinary meaning, absent indications of a contrary intent by the Legislature." I*n re Roger S.,* 338 Md. 385, 391, 658 A2d 696, 699 (1995) (internal citations omitted); *See also City of Baltimore Dev. Corp. v. Carmel Realty Associates,* 395 Md. 299, 318, 910 A.2d 406, 417-18 (2006) ("The plain language of a provision is not interpreted in isolation. Rather, we analyze the statutory scheme as a whole and attempt to harmonize provisions dealing with the same subject so that each may be given effect.").

We have held consistently that the CJP uses the term "support," in regard to CINAs, synonymously with "child support," or the parental obligation to support a child financially. Although CJP § 3-819(c)(2) permits the juvenile court to *determine* support, subsection (1) of § 3-819 provides that the court may order parents to "pay a sum in the amount the court directs to cover wholly or partly the support of the child." CJP § 3- 819(l); *see also* Md. Code (1984, 2006 Repl. Vol.) Fam. Law § 5-203(b) (providing that "the parents of a minor child . . . are responsible . . . for the child's support"). Cases involving the "support" of CINA children also illuminate the plain meaning of the term as parental obligations to support their minor child. *See, e.g., Rosemann v. Salsbury, Clements, Bekman, Marder & Adkins, LLC,* 412 Md. 308, 319-20 (2010); *In re Katherine C.,* 390 Md. 554, 566-67 (2006); *In re Joshua W.*, 94 Md. App. 486, 494-95 (1993). Because the Department was not collecting or applying for "child support" from the Social Security Administration, we find no merit in Ryan's "support" argument.

Courts & Judicial Proceedings Article § 3-821 also does not provide authority for the juvenile court to act as it did here. CJP § 3-821 permits the juvenile court, where a party is before the court otherwise properly, to "direct, restrain, or control" the conduct of a person or entity whenever the court finds that such conduct is not in the child's best interests.[12] Although the juvenile court is empowered generally to issue orders to control the conduct of the Department, it may do so only regarding issues over which it otherwise has jurisdiction. Here, the agency was not before the court properly because the court lacked subject matter jurisdiction over the particular dispute between Ryan and his representative payee regarding the use of OASDI benefit payments. The COSA held, and we agree, that "a motion to control conduct is not a means by which a Juvenile Court may expand its statutorily enumerated powers." *In re Ryan W.,* 207 Md. App. at 756-57, 56 A.3d at 256.

3. *Because the juvenile court lacked subject matter jurisdiction over this particular dispute, the Department's sovereign immunity defense is moot.*

The Department, in No. 101, contends that the COSA erred in directing the juvenile court, upon remand, to order that $660 be returned to Ryan because of an error in the Department's accounting for the costs of foster care in May 2010.[13] Because we determine that the juvenile court lacked subject matter jurisdiction over the OASDI benefits dispute, the COSA was not entitled to direct the Department to return the benefits it had applied. We therefore decline to reach the Department's sovereign immunity defense because, without subject matter jurisdiction, the defense is moot. We therefore reverse the COSA's judgment to the extent that it ordered that Ryan be reimbursed for any of the OASDI benefit funds in dispute.

B. The challenged COMAR regulations are valid and in accordance with federal law and policy.

Ryan W. contends that COMAR 07.02.11.29(K) and (L) are invalid because they require "automatic, non-discretion[ary] taking of OASDI benefits without considering transition needs, among others." Specifically, he argues that, because the federal statute and accompanying regulations require that funds be spent in accordance with a beneficiary's "best interests," automatic application of a foster child's benefits to the costs of care violates federal law. In riposte, the Department contends that the COMAR regulations are in accordance with federal law regarding a representative payee's allocation of benefits because the uses of the benefits prescribed in the COMAR sections are permitted explicitly by the federal statute and regulations.

SSA regulations mandate that all representative payees use the OASDI benefits they receive "in a manner and for the purposes *he or she determines,* under the guidelines in [subpart U of 20 C.F.R. § 404] to be in [the beneficiary's] best interests." 20 C.F.R. § 404.2035(a) (emphasis added). Costs of a beneficiary's "current maintenance," which includes "food, shelter, clothing, medical care, and personal comfort items," are considered by the SSA to be appropriate uses of benefit funds. *See* 20 C.F.R. § 404.2040(a)(1). Additionally, institutional payees are permitted explicitly to use a beneficiary's OASDI benefits for "the customary charges made by the institution, as well as expenditures for those items which will aid in the beneficiary's recovery or release from the institution or expenses for personal needs which will improve the beneficiary's conditions while in the institution." 20 C.F.R. § 404.2040(b). The Department was duly appointed as representative payee by the SSA to receive OASDI benefit payments on Ryan's behalf, and thus was obliged to use the benefits according to federal regulations.

Ryan argues that Maryland regulations, in requiring automatic allocation of funds, are inconsistent with the discretionary nature of the allocation provisions in federal regulations. COMAR 07.02.11.29(K) provides:

> (1) Other resources available for the child may be in the form of cash assets, trust accounts, insurance (including survivor's disability insurance), or some type of benefit or supplemental security income for the disabled child.
>
> (2) While in out-of-home placement, if the child is 18 years old or older and is the beneficiary of insurance or survivor's benefits, the child shall choose whether to:
>
> (a) Receive benefits and pay the local department; or
>
> (b) Designate the local department as the payee.
>
> (3) The local department shall seek a representative payee for an incompetent child 18 years old or older.

COMAR 07.02.11.29(L) provides:

> The child's resources shall be applied directly to the cost of care, with any excess applied first to meeting the special needs of the child, and the net excess saved in a savings account for future needs. Any potential benefits

> from other resources shall be pursued and made available if possible to the local department as payee.

In *Conaway v. Social Services Administration,* 298 Md. 639, 471 A.2d 1058 (1984), we considered whether a representative payee could allocate a beneficiary's benefits towards the cost of caring for the beneficiary. We determined that reimbursement for the costs of providing foster care achieved by applying "current benefits to the current costs of care" was an appropriate use of federal benefits by a duly appointed representative payee. *Conaway,* 298 Md. at 648-49, 471 A.2d at 1063. We addressed specifically the legitimacy of COMAR 07.02.11.29(L), which was denominated as COMAR 07.02.11.07 at the operative time in *Conaway:*[14]

> Article 88A, 60 authorizes various payment rates for foster care; however, it does not delineate the source(s) of the funds to be used. The State Director of Social Services is responsible for administering these aspects of the foster care program. Therefore, regulations about foster care payment rates and the source of funds to make these payments are necessary to carry out duties imposed by law. The regulation at issue in this case has accomplished precisely that. COMAR 07.02.11.07 is entitled "Resources for Reimbursement towards Cost of Care." Federal benefits were paid to the State and could have been used to pay for the cost of the child's care. These benefits were committed to the department for the child's benefit. As resources that could offset the cost of care, their use was a proper subject for regulation. Because these regulations were within the statutory authority, they had the force of law; thus, they provided an adequate legal basis for the local department's actions.

Id. at 644, 471 A.2d at 1060.

In the present case, the juvenile court declared that subsections (K) and (L) of COMAR 07.02.11.29 were invalid because of the conflict with federal law providing for discretion to a representative payee in allocating a beneficiary's OASDI benefits. *See* 20 C.F.R. § 404.2035(a). The Department applied for Ryan's OASDI benefits on his behalf as representative payee and used the benefits, pursuant to this state regulation (and allowed by the federal statutes and regulations) to reimburse itself partially for the expenses it incurred for Ryan's foster care. This practice is consistent with federal law, which allows "current maintenance" and "customary charges" as appropriate expenditures by institutional payees. We agree with the COSA that the other contested provision, COMAR 07.02.11.29(K)(2), "was not implicated in Ryan's case as he was under 18 [years old] when the Department became his representative payee and, in any event, during proceedings before the Juvenile Court, a Department witness testified that the regulation is not enforced." *In re Ryan W.,* 207 Md. App. at 748, 56 A.3d at 280.

C. Due Process requires, however, notice at least to a child's legal representative whenever the Department applies for and receives OASDI benefits on the child's behalf as his or her representative payee.

Ryan asks us to overturn the COSA's holding that the Department's failure to provide notice or an opportunity to be heard did not violate his due process rights. He argues that the notice required to be given by the Commissioner is insufficient because, as the federal regulations applied to Ryan's situation, notice that the Department would become his representative payee was provided only to the Department as his legal guardian. Ryan contends that the Department's fiduciary obligations require it to notify a child or his or her counsel upon receipt of benefits.[15]

The Fourteenth Amendment of the U.S. Constitution, as well as Article 24 of the Maryland Declaration of Rights (usually read *in pari materia* with the federal analogue), prohibits the deprivation of life, liberty, or property without due process of law. *Roberts v. Total Health Care, Inc.,* 349 Md. 499, 509, 709 A.2d 142, 146-47 (1998) ("At the core of due process is the right to notice and a meaningful opportunity to be heard.") (internal citations omitted)). Prior to considering whether an individual's right to due process was violated, we must determine first that "(1) State action has been employed (2) to deprive that [individual] of a substantial interest in property." *Id.* at 510, 709 A.2d 142, 147. Here, the Department, a government actor, applied to be Ryan's representative payee (without notice to him or his CINA counsel) and used the OASDI benefits to reimburse itself for the costs of his foster care (also without notice). Because Ryan, like all OASDI beneficiaries, has a property interest in his benefits, *see Tucker v. Tucker,* 156 Md. App. 484, 492-93, 847 A.2d 486, 490-91 (2004) (holding that a child's social security benefits belong to the child and should not be included in the parent's "income" when determining child support obligations), the Department's actions implicate Ryan's due process rights.

In determining what process is due, this Court will balance both the government interests and the private interests affected. *Id.* (citing *Department of*

Transportation v. Armacost, 299 Md. 392, 416-20, 474 A.2d 191, 203-05 (1984)). The U. S. Supreme Court outlined three factors that courts should weigh in determining the process due in a given situation under the Fourteenth Amendment:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976).

The Washington Supreme Court, in *Guardianship Estate of Keffeler ex rel. Pierce v. State,* 151 Wash. 2d 331, 88 P.3d 956 (2004) ("Keffeler III"),[16] considered whether a Washington State department of social services violated children beneficiaries' due process rights when it used the benefits to reimburse itself for the costs of foster care. The court determined that "[t]he federal notice sent to beneficiaries and their guardians is sufficient to fulfill any procedural due process rights the children may have" and that "[a]ny potential private interest in additional notice is outweighed by the State's interest in efficient administration of its foster care program." *Keffeler III,* 151 Wash. 2d at 345, 88 P.3d at 956. The thrust of the court's reasoning was that the risk of deprivation was minimal because of the notice SSA provides before appointing a representative payee, and again subsequently before certifying payment to that payee. *Id.* at 344, 88 P.3d at 955. Additionally, the court emphasized that additional procedures (other than the notice provided already by the Commissioner in accordance with federal law) would be unnecessary because "the identity of a representative payee does not influence eligibility for benefits and all representative payees must use the benefits in accordance with federal and state laws and regulations." *Id.* at 344, 88 P.3d at 955.

We disagree with the conclusions of the Washington Supreme Court in analyzing the *Mathews* factors, as applied to the facts of the present case. *See Keffeler III,* 151 Wash. 2d 331, 345, 88 P.3d 949, 956 (finding that the Commissioner's notice was sufficient because there was only a minimum risk that childrens' interest in their benefit payments would be erroneously deprived, and because the state's interests in administrative efficiency outweighed the interests of the foster children in their benefits). The private interest at stake here is Ryan W.'s interest in the "free use of his social security benefits." *See McGrath v. Weinberger,* 541 F.2d 249, 253-54 (10th Cir.1976). The notice provided by the Commissioner, pursuant to 42 U.S.C. § 405(j)(2)(E)(ii) and 20 C.F.R. § 404.2030(a), before appointing a representative payee and before certifying the first benefit payment, in cases like Ryan's, goes directly to the representative payee (the Department as Ryan's legal guardian). Because the representative payee — in this case, the Department — has discretion in determining the proper allocation of a child's social security benefits, the risk that the child might be deprived erroneously of his or her interest in the benefits may also be substantial. *Contra Keffeler III,* 151 Wash. 2d at 345, 88 P.3d at 956. Congress recognized this risk when it amended the Social Security Act in 2004 to provide more remedies for payee misuse of benefits. *See* Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, 493 (2004) (adding federal remedies for misuse and removing the negligence requirement for restitution of benefits misused by institutional payees).

Central to our earlier conclusion here, that an institutional payee may exercise its discretion in allocating a child's social security benefits without the supervision of the juvenile court, is the presence of a federal administrative and judicial review process which serves a checks-and-balances function required to prevent, and remedy, where applicable, improper use of a child beneficiary's social security benefits. Without actual and direct notice, however, a child beneficiary, through his legal representative, is unlikely to know of and utilize timely the review process added by the 2004 amendments to the Social Security Act. *See id.* If the beneficiary is neither aware that he or she is entitled to benefits, nor that a representative payee is receiving and using those benefits on his or her behalf, he or she is unlikely to benefit from the presence of an adequate federal remedy to test perceived irregularities. Because the juvenile court holds regular hearings to review the permanency plan of every child committed to the Department, *see* CJP § 3-823(h)(1)(i), and because the Department is required to submit its recommendations for the child's permanency plan prior to the hearing, *see* CJP § 3-823(d), requiring the Department to provide notice to the child's appointed legal representative in the CINA proceeding that the Department has applied to the SSA to be the payee of the child's OASDI benefits and, if approved, is receiving the child's social security benefits on behalf of the beneficiary is not such a burden as to hinder meaningfully the "[s]tate's interest in efficient administration of its foster care system." *Keffeler III,* 151 Wash. 2d at 345, 88 P.3d at 956.

We therefore conclude that the Department (or its local department of social services) must notify a

CINA, through his or her legal counsel, contemporaneously with its application to be appointed as the child's representative payee, that it has so applied. Further, when the Department receives benefit payments for the period since the last permanency planning hearing, the child's CINA attorney must be notified by the Department of the amount and date of receipt. The child's attorney should be aware of all a child's resources, including OASDI benefits, in order to fulfill his or her duty in advocating with the Department for the child's best interests, which may include services needed for transitioning out of foster care. The notice to be provided by the Department is also for the purpose of allowing a child beneficiary, through his or her legal counsel, to facilitate the child's ability to seek federal administrative and/or judicial review of SSA determinations and of the Department's use of his or benefits. This holding as to notice should not be read to conflict with our earlier conclusion that the juvenile court lacks subject matter jurisdiction to direct the allocation of OASDI benefits. Additionally, this holding should not be construed to diminish the authority of the juvenile court in ordering that a local department of social services provide services prescribed by Maryland law to a child in foster care.

JUDGMENT OF THE COURT OF SPECIAL APPEALS IN CASE NO. 95 AFFIRMED IN PART AND REVERSED IN PART, CONSISTENT WITH THIS OPINION; CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AND TO DISMISS RYAN W.'S MOTION TO CONTROL CONDUCT IN THE CIRCUIT COURT; COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID TWO-THIRDS BY THE DEPARTMENT AND ONE-THIRD BY RYAN W.

JUDGMENT OF THE COURT OF SPECIAL APPEALS IN CASE NO. 101 VACATED AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO DISMISS THE APPEAL AS MOOT; COSTS IN BOTH COURTS TO BE PAID BY THE DEPARTMENT.

DISSENTING OPINION BY ADKINS, J., WHICH BELL, C.J. (RET.) JOINS

I disagree with the Majority's analysis of the jurisdictional issue. Ryan's claims against the Department arise from an alleged breach of fiduciary duty. The Majority concludes, however, that the appropriate forums for the resolution of such claims are "federal administrative and court systems." Maj. Slip Op. at 23. This may have been a proper conclusion had Ryan sought restitution of the allegedly misused benefits from the Social Security Administration (the "SSA") by relying on the provisions in the Social Security Act (the "Act") and the underlying regulations. But Ryan is not seeking restitution from the SSA. He sought to recover the allegedly misused funds by way of a common-law claim. As a court with supervisory authority over "support" of Ryan, a Child in Need of Assistance ("CINA"), the juvenile court had jurisdiction to hear Ryan's case.

As the Majority acknowledges, "[w]hen Congress is silent concerning [concurrent] state court jurisdiction over federal causes of action, there is a 'deeply rooted presumption in favor of concurrent state court jurisdiction.'" Majority Slip Op. at 17 (quoting *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.,* 382 Md. 689, 715, 857 A.2d 1, 16 (2004), in turn *quoting Tafflin v. Levitt,* 493 U.S. 455, 459, 110 S. Ct. 792, 795 (1990)). This presumption can only "be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 478, 101 S. Ct. 2870, 2875 (1981).

I submit that none of the three abovementioned rebuttals to the presumption of concurrent state jurisdiction are present in this case.

In holding that federal courts enjoy exclusive jurisdiction, the Majority does not take into account the crucial fact that Ryan's claims are against the Department, not the SSA. Rather, the Majority treats the jurisdictional issue in this case as if the question were as to which court had jurisdiction to review the SSA's determination regarding an alleged misuse of the benefits by a representative payee. In answering this hypothetical question, instead of the one presented in this case, the Majority offers several possible reasons for concluding as it does without picking a favorite.

One such possibility the Majority considers is that the Social Security Act itself reserves exclusive jurisdiction to federal courts. *See* Maj. Slip Op. at 18 (citing the "shall be brought in the district court" language from 42 U.S.C. § 405(g)). According to the Majority, "Congress's use of the word 'shall' **suggests strongly** that the jurisdiction of the federal courts is exclusive." Maj. Slip Op. at 18 (emphasis added).[1] Yet the Majority cites no case holding that federal courts have exclusive jurisdiction over a claim, not against the

SSA, but against a representative payee, and I have found none. The only claim that is authorized by the SSA for misuse of funds by a representative payee is a claim by a beneficiary **against the SSA** for recovery of those benefits. I submit that the term "shall" in the Act refers to filing a claim for judicial review of a decision made by the Commissioner of the SSA regarding such a claim.

A number of other states have found state court jurisdiction even with similar "shall" language in place. *See Ecolono v. Div. of Reimbursements of Dep't of Health and Mental Hygiene,* 137 Md. App. 639, 769 A.2d 296 (2001); *Grace Thru Faith v. Caldwell,* 944 S.W.2d 607 (Tenn. Ct. App. 1996); *Jahnke v. Jahnke,* 526 N.W.2d 159 (Iowa 1994); *In re J.G.,* 652 S.E.2d 266 (N.C. Ct. App. 2007). The Majority distinguishes those cases only by pointing out that they were decided prior to the 2004 amendments to the Act:

> Because the 2004 amendments to the Social Security Act enhanced the monitoring of institutional representative payees and made available federal remedies for misuse of benefits, the rationale underlying the result in *Ecolono* and cases from other jurisdictions . . . no longer exists.

Maj. Slip Op. at 23.

But the lack of a Federal remedy was not the only, or even the primary, basis for these cases. For example, in *Matter of Kummer,* the New York appellate court was clear:

> **[I]t is our view that whether or not a Federal cause of action exists is irrelevant.** The implication of a Federal cause of action for breaches of Federal statutes is of importance in many cases only because it furnishes the jurisdictional predicate for access to the Federal courts . . . and not, as the administratrix would have it, because absent such an implied Federal right of action an injured party is without a remedy for wrongs committed against him.

Matter of Kummer, 93 A.D.2d 135, 160-61, 461 N.Y.S.2d 845, 861 (N.Y. App. Div. 1983) (emphasis added).

The *Kummer* court distinguished cases involving the SSA's actions or decisions:

> The four cases cited by the administratrix dealt with eligibility, the amount of benefits, whether Federal officials had appointed an improper representative payee, and who should control the funds as representative payee. Our case deals with the representative payee's account, that is with the propriety of his expenditures of benefits.

Matter of Kummer, 93 A.D.2d at 156, 461 N.Y.S.2d at 858 (N.Y. App. Div. 1983).

The Tennessee Court of Appeals also rejected an argument similar to the Department's here, concluding:

> Therefore, the federal statutes and regulations allow for claims beyond those expressly provided for therein and contain no language indicating an intent to preempt state court jurisdiction. Moreover, a state claim by a beneficiary for recovery of funds misused by a payee does not conflict with the federal statutes and regulations.

Grace Thru Faith, 944 S.W.2d at 611 (Tenn. Ct. App. 1996).

Our own intermediate appellate court concluded that the state had jurisdiction over a similar claim, reasoning:

> Regardless of the extent of the duty of the SSA to monitor the expenditure of benefits by representative payees, **we find nothing in federal law to indicate an intent by Congress to limit interested parties to the federal administrative and judicial review process and to prohibit State courts from exercising jurisdiction,** in the case before us, when the relief requested is not the removal of the payee but a reallocation of the benefits. Consequently, we conclude that we have subject matter jurisdiction to decide a dispute between the beneficiary of social security benefits and his representative payee with respect to the allocation of those benefits.

Ecolono, 137 Md. App. at 654, 769 A.2d at 305 (2001).

Before the 2004 amendments, the SSA reimbursed beneficiaries whose benefits had been misused by their representative payees only if the SSA was negligent in appointing or monitoring the representative payee. The 2004 amendments to the Act expanded the remedy to beneficiaries in cases where the representative payee was not an individual, unless that individual serves 15 or more beneficiaries. 42 U.S.C. § 405(j)(5). In those types of misuse cases, the SSA will make restitution to the beneficiary even in the absence of the SSA's negligence. *Id.* Neither before nor after the 2004 amendments, however, did the representative payee provisions of 42 U.S.C. §§ 405 and

1383 give a private cause of action to a beneficiary against the representative payee. *See Bates v. Northwestern Human Servs., Inc.,* 466 F. Supp. 2d 69, 98 (D.D.C. 2006) (denying a claim under the Act because "it is clear that nothing in these statutes expressly states that a beneficiary may file a lawsuit against a representative payee who has misused his or her benefits payments or otherwise violated the terms of the representative payee provisions").

Notably, although denying Bates' federal claim under the Social Security Act, the Federal District Court for the District of Columbia ruled in favor of Bates' common-law claims for accounting and unjust enrichment against the representative payee. *Id.* at 102-03 ("The plaintiffs allege, and the defendants do not dispute, that (1) the defendants served as the plaintiffs' representative payees under the Social Security Act; (2) in that capacity, the defendants received federal benefits intended for the plaintiffs; and (3) the defendants owed a fiduciary duty to the plaintiffs as a result of their representative payee status. . . .These allegations are more than sufficient to sustain a claim of unjust enrichment at the pleading stage").

The Majority holds that federal courts have exclusive jurisdiction over claims such as Ryan's. Applying the reasoning of *Bates,* I strongly disagree. The Social Security Act does not afford beneficiaries a private right of action against representative payees. This is the nature of Ryan's action — it is an attempt to recover allegedly misused benefits directly from the Department. Ryan's "Motion for Order Controlling Conduct to Conserve Social Security Survivor's Benefits" is akin to an unjust enrichment claim under state law, and the facts alleged suffice under the *Bates* standard for viable breach of fiduciary duty or unjust enrichment claims.

Nor does the Act suggest that state law remedies against the representative payee are precluded. All that 42 U.S.C. § 405 has ever allowed a beneficiary to do is to seek to have the SSA enforce the statutory provisions and assist with obtaining restitution of misused benefits from the SSA. This is where the need to exhaust the administrative remedies comes in. In order to have the SSA reimburse the representative payee's misused benefits, the beneficiary must follow the administrative process.[2] *See Monet v. Mathews,* 535 F. Supp. 2d 132, 134 (D.D.C. 2008) (outlining all of the prerequisite steps in the administrative review process). If, after having exhausted the administrative remedies, the beneficiary is dissatisfied with the outcome, he can then seek judicial review of the SSA's determination in federal court. In that instance, the beneficiary's claim is not against the representative payee. Rather, it is for the judicial review of the SSA's determination, and any recovery will be from the SSA. *See* 42 U.S.C. § 405(g) ("Any individual, after any final decision of the Commissioner of Social Security . . . may obtain a review of such decision by a civil action . . . brought in the district court of the United States"); *see also* 42 U.S.C. § 405(c)(9). ("Decisions of the Commissioner of Social Security under this subsection shall be reviewable by commencing a civil action in the United States district court").

The failure of the Act to allow beneficiaries to bring direct claims against representative payees in federal courts is the reason why the D.C. Federal District Court dismissed a claim in which beneficiaries tried to do just that. *See Bates,* 466 F. Supp. 2d at 98. There, the Court dismissed certain counts against a representative payee alleging violations of 42 U.S.C. §§ 405 and 1383 and their implementing regulations because, as the court explained, "whether or not Congress intended to create a private right under the representative payee provisions of 42 U.S.C. §§ 405 and 1383, there is no indication of further congressional intent to fashion a privately enforceable remedy for such a right." *Bates,* 466 F. Supp. 2d at 97. Yet *Bates,* decided *after* the 2004 amendments to the Act, allowed a common-law claim to proceed. *Id.* at 102. Although the 2004 amendments to the SSA added a federal remedy against the Administration, it did not contain any language suggesting that a direct action against the representative payee in state court was prohibited. *See Tafflin v. Levitt,* 493 U.S. 455, 459, 110 S. Ct. 792, 795 (1990); *see also Charles Dowd Box Co., v. Courtney,* 368 U.S. 502, 507-508, 82 S. Ct. 519, 522-523 ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule"). As the Supreme Court has explained, "[t]o rebut the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal." *Tafflin,* 493 U.S. at 462, 110 S. Ct. at 797.

In sum, Ryan's claim against the Department is a common-law cause of action for unjust enrichment or breach of fiduciary duty that is not precluded by any provision of the Social Security Act.

Juvenile Court's Supervisory Jurisdiction Over CINA Matters

The juvenile court is well suited to hear and adjudicate this matter. At the time Ryan became aware of the Department's alleged misuse of his benefits, he was a Child in Need of Assistance. Then, and almost

the entire time since he was found to be a CINA in 2002, Ryan had been in the custody of the Department. In accordance with Section 3-823 of the Courts and Judicial Proceedings Article of the Maryland Code ("CJP"), Ryan and the Department came before the juvenile court for regular CINA review hearings. The purpose of those hearings was for the juvenile court to ensure that the services the Department provided to Ryan were consistent with his best interests. *See* Md. Code (2002, 2013 Repl. Vol) CJP § 3-819(g).

It was in that same juvenile court, which over the years presided over Ryan's numerous review hearings, that Ryan filed the "Motion for Order Controlling [the Department's] Conduct to Conserve Social Security Survivor's Benefits." He asked the juvenile court to order the Department to conserve in a trust account for Ryan's future needs the $31,693.30 in Social Security Old Age, Survivor, and Disability Insurance benefits that it had received as Ryan's representative payee from the SSA.

As Ryan and the amici correctly point out, the General Assembly has given Maryland's juvenile courts broad supervisory powers to protect the best interests of children who were found CINA. See CJP § 3-802. Indeed, as we have explained:

> In light of the [juvenile court] statute, and also in light of the language of some of the cases, it has become the practice to speak in terms of *the* juvenile court's "jurisdiction." The Constitution of Maryland, however, does not provide for a separate juvenile court. The Constitution provides that the courts of general jurisdiction are the circuit courts. Accordingly, a juvenile court, despite the statutory language, is part of the circuit court, and exercises the jurisdiction of that court.

In re Franklin P., 366 Md. 306, 311 n.2, 783 A.2d 673, 677 n.2 (2001) (emphasis in original).

There are also several statutory provisions that specifically address financial support of CINA children and the juvenile court's supervision of local departments of social services. First, CJP § 3-803, titled "Jurisdiction of court," expressly states that juvenile courts have "concurrent jurisdiction over: (i) Custody, visitation, **support,** and paternity of a child whom the court finds to be a CINA." CJP § 3-803(b)(1)(I) (emphasis added); *see also* CJP § 3-819(c)(2) (stating that the court may "[d]etermine custody, visitation, support, or paternity of a child"). This suggests that juvenile courts do indeed have the authority to resolve disputes involving financial support to CINA children.

Juvenile courts also have broad supervisory power over the local departments of social services, which sometimes, as in the present case, are entrusted with managing financial resources of a child found to be a CINA. Namely, CJP § 3-802(c) allows "the court [to] direct the local department to provide services to a child . . . to protect and advance a child's best interests." Specifically with respect to a child's property, CJP § 3-819(g) provides that a guardian, including the local department, "has no control over the property of the child unless the court expressly grants that authority." Accordingly, juvenile courts have broad supervisory powers over the Department generally and its handling of a CINA child's property.

Despite these statutory provisions, the Court of Special Appeals held that the juvenile court had no jurisdiction to hear Ryan's claims.[3] *In re Ryan W.,* 207 Md. App. 698, 757, 56 A.3d 250, 285 (2012). The court reasoned that the "statutorily enumerated authority over 'support' of children declared CINA" does not include "the Department's use of benefits it had received on his behalf as a duly appointed representative payee." *Id.* In the court's view, the term "support" only includes such obligations as "child support." *Id.* The intermediate appellate court did not provide support or an explanation for this conclusion but moved on to summarily conclude that, even if "support" encompassed more than "child support," "the Juvenile Court has [no] plenary equitable powers to order the Department to place monies already collected and disbursed in a trust for the benefit of the CINA." *Id.*

But that is not so. Setting aside the statutory sources of the juvenile court's specific authority to oversee the issues relating to financial support of children in CINA cases and to supervise the Department's conduct in these cases, "[i]t is a fundamental common law concept that the jurisdiction of [juvenile] courts is plenary so as to afford whatever relief may be necessary to protect the [child's] best interests." *Wentzel v. Montgomery Gen. Hosp., Inc.,* 293 Md. 685, 702, 447 A.2d 1244, 1253 (1982). The 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 re Mark M.,* 365 Md. 687, 707, 782 A.2d 332, 343–44 (2001).

While Ryan bounced from one group home to the next, sometimes staying at places that allegedly lacked basic necessities but cost $6,000 a month, the Department used Ryan's social security benefits to reimburse itself for the cost of this care. It is difficult to imagine any court — other than the juvenile court — more familiar with Ryan's circumstances and thus in a better position to determine whether the Department's use of the benefits in such a way was in Ryan's best interest.

Conclusion

In conclusion, because the Social Security Act does not preclude a common-law action for unjust enrichment or breach of fiduciary duty against a representative payee, and the juvenile court is authorized to adjudicate matters related to protecting the bests interests of children designated CINA, I would allow Ryan's action to go forward based on the allegations plead.

For these reasons, I most respectfully dissent.

Chief Judge Bell (ret.) authorizes me to state that he shares the views set forth in this dissenting opinion.

FOOTNOTES TO MAIN OPINION

1. The first three questions presented to the Court *infra* are raised by Ryan W. in case No. 95. The fourth question urged upon us, whether sovereign immunity bars Ryan W.'s claims in No. 95, is advanced by the Baltimore City Department of Social Services in No. 101.

2. Examples of situations allowing for direct payments to a child younger than 18 include:

> (1) Receiving disability insurance benefits on his or her own Social Security earnings record; or
>
> (2) Serving in the military services; or
>
> (3) Living alone and supporting himself or herself; or
>
> (4) A parent and files for himself or herself and/or his or her child and he or she has experience in handling his or her own finances; or
>
> (5) Capable of using the benefits to provide for his or her current needs and no qualified payee is available; or
>
> (6) Within 7 months of attaining age 18 and is initially filing an application for benefits.

20 C.F.R. § 404.2010. There is no evidence in this record that Ryan W. possessed an "ability to manage the benefits."

3. The "cost of care" includes "the board rate, clothing allowance, any medical care payments made on behalf of the child, and any supplemental purchases made to meet the child's special needs." *Id.* at (B).

4. This section has not been amended since 2002 and is substantively the same as the controlling provisions during the relevant time of the Department's conduct in Ryan's case.

5. Federal regulations allow payment to be made directly to a child who is under 18 if the child is "[c]apable of using the benefits to provide for his or her current needs" and if "no qualified payee is available." 20 C.F.R. § 404.2010(b)(5). Because Ryan W. was deemed incapable of managing his own benefits, and because the Department was available to serve as his representative payee, payments were not eligible to be made directly to Ryan W. He does not contend otherwise here.

6. Ryan argues also that the federal foster care and adoption assistance statutes, which provide financial aid to state social services departments and require compliance with permanency planning and other standards, support his claim that state departments of social services should consider foster child's needs in transitioning out of foster care as a top priority for allocating the child's OASDI benefits. *See* 42 U.S.C. 675(1)(D), 675(5)(C) and (H). These statutes, which contain permanency planning requirements similar to those of Maryland, do not mandate that a child's resources be applied to transition services. Rather, they require only that plans be made regarding a child's transition out of foster care. *See id.*

7. The COSA encouraged expressly, in its initial opinion, either party to submit a motion for reconsideration of its initial opinion if the amount ordered to be reimbursed was incorrect. According to the first COSA opinion, $8,075.32 was calculated to represent the amount the parties agreed should have been conserved for Ryan because it was received "at a time when it could not be applied to cover costs of current care." That sum included $7,415.32 of the lump-sum benefits the Department received initially, as well as $660, the latter being the difference between the actual cost of care for May 2010 and the amount received in OASDI benefits for that month. *In re Ryan W.,* 207 Md. App. at 67 n.30, 56 A.3d at 285 n.30. The Department's motion for reconsideration stated that $7,478.32 was deposited into Ryan's trust account in December 2011. The COSA, upon reconsideration, determined that although this amount was $63 higher than what was conceded by Department's counsel previously, the original concession was in error because the higher calculation was supported by an affidavit submitted in support of the Department's motion for reconsideration. *Id.* The $660 was not addressed in the motion, however, so the COSA ordered that sum to be paid into Ryan's trust account. *Id.*

8. As alluded to earlier in this opinion at n.1, the first three questions were raised by Ryan W. in his petition in Case No. 95. The fourth question was raised by the Department in Case No. 101.

9. In *Tafflin,* the Supreme Court analyzed a provision of the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute which created a cause of action for persons injured by a statutorily enumerated prohibited activity. That provision provided that "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . ." 18 U.S.C. § 1964(c) (emphasis added). The Court held that the provision granted federal courts jurisdiction over such causes of action, but did not require that all such actions be brought exclusively in federal courts. *Tafflin,* 493 U.S. at 460-61, 110 S. Ct. at 796, 107 L. Ed. 2d 887 (citing *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 507-508, 82 S.Ct. 519, 522, 7 L. Ed. 2d 483 (1962) ("The statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be.")).

10. Other states have struggled with the issue of subject matter jurisdiction in state courts over disputes regarding representative payees' use of social security benefits. *See Grace Thru Faith v. Caldwell,* 944 S.W.2d 607, 610 (Tenn. Ct. App. 1996) (finding state court jurisdiction over claims alleging misuse of funds by representative payees and emphasizing that absent a showing that the SSA had been negligent in appointing a repre-

sentative payee, or alternatively, a showing that the payee's breach of duty incurred criminal violations, there was no federal remedy for beneficiaries whose benefits had been misused); *see also In re J.G.,* 186 N.C. App. 496, 508, 652 S.E.2d 266, 273 (2007) (holding that state courts were allowed "to look into the expenditure of dependent social security benefits when an interested party questions the propriety of those expenditures" and reasoning that the trial court had properly acted within its "supervisory role[ ] in seeing to J.G.'s best interests" and that the *Keffeler II* decision "acknowledged that it was not always appropriate to use all of a juvenile's Social Security funds to reimburse itself, in particular in anticipation of 'impending emancipation.'" (quoting *Keffeler II,* 537 U.S. at 378-79, 123 S.Ct. at 1022, 154 L.Ed.2d at 981-82)); *but see O'Connor v. Zelinske,* 193 N.C. App. 683, 692, 668 S.E.2d 615, 620 (2008) (overruling the holding in *In re J.G.* and reaffirming that the "courts of North Carolina . . . [do not] have the power to determine that [the] defendant is misusing Social Security benefits paid to him on behalf of the children and to direct that he account for them to some other person" (quoting *Brevard v. Brevard,* 74 N.C.App. 484, 488-89, 328 S.E.2d 789, 792 (1985)). Both *Jahnke* and *Grace Thru Faith* were decided before the 2004 amendments to the Social Security Act, and are therefore not persuasive here.

11. Regarding the Department's compliance with federal law in its use of Ryan's benefit payments, the COSA erred in its interpretation of the regulation permitting institutional costs to be considered "current maintenance" by affording undue significance to certain facts within the illustration provided in 20 C.F.R. 404.2040(b). That illustration presents the following scenario:

> An institutionalized beneficiary is entitled to a monthly Social Security benefit of $320. The institution charges $700 a month for room and board. The beneficiary's brother, who is the payee, learns the beneficiary needs new shoes and does not have any funds to purchase miscellaneous items at the institution's canteen.
>
> The payee takes his brother to town and buys him a pair of shoes for $29. He also takes the beneficiary to see a movie which costs $3. When they return to the institution, the payee gives his brother $3 to be used at the canteen.
>
> Although the payee normally withholds only $25 a month from Social Security benefit for the beneficiary's personal needs, this month the payee deducted the above expenditures and paid the institution $10 less than he usually pays.
>
> The above expenditures represent what we would consider to be proper expenditures for current maintenance.

20 C.F.R. § 404.2040(b). The COSA's second opinion implies that the regulation addresses explicitly the issue of institutional charges in excess of the beneficiary's social security benefit payments. The regulation cited, however, does not clearly indicate that such a situation is pertinent to the rule set forth in subsection (b). Rather, the illustration provided does not indicate the total income or assets of the institutionalized beneficiary. Most likely, this information is left out because the focus of the illustration is to provide examples of acceptable personal expenses that the representative payee deems necessary, or at least is in line with the language of subsection (b). *See id.*

12. This authority is granted whenever the conduct at issue

> (1) Is or may be detrimental or harmful to a child over whom the court has jurisdiction;
>
> (2) Will tend to defeat the execution of an order or disposition made or to be made under this subtitle; or
>
> (3) Will assist in the rehabilitation of or is necessary for the welfare of the child.

CJP § 3-821.

13. The Department conceded in the trial court that $8,075.32 should have been conserved on Ryan's behalf ($7,415.32 of the lump sum retrospective OASDI benefits and $660 which was the amount of benefits received in excess of the total costs of care for the month of May 2010). Subsequently, both parties agreed this concession was a mistake of fact. The Department noted in its motion for reconsideration before the COSA that, in December 2011, $7,478.32 was deposited into Ryan's Foster Care Trust Account because that total was not permitted to be used for self-reimbursement because it was part of the lump-sum retrospective benefits. The remaining $660 has not been accounted for, and the COSA held that the Department "remains obligated to conserve an additional $660 for Ryan W." *In re Ryan W.,* 207 Md. App. at 758 n.30, 56 A.3d at 286 n.30.

14. The differences between the prior version of the regulation and its current iteration are non-substantive.

15. In Maryland, a child who is the subject of a CINA proceeding is entitled to counsel. CJP §§ 3-813(a), (d)(1).

16. The Washington Supreme Court considered *Keffeler III* on remand from the U. S. Supreme Court decision in *Keffeler II. See Washington State Dep't of Soc. & Health Servs. V. Guardianship Estate of Keffeler,* 537 U.S. 371, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) ("Keffeler II"). In *Keffeler II,* the Supreme Court addressed whether the Social Security Act permitted a state institution, serving as representative payee for children in foster care, could reimburse itself for a child's cost of care. The Court held that, because the Washington Department of Social and Health Services ("DSHS") was in lawful possession of the benefit moneys in its capacity as a duly appointed representative payee and had used those funds in accordance with federal regulations, its practice of self-reimbursement did not violate § 407 of the Social Security Act. *Id.* at 390, 123 S.Ct. at 1025, 154 L. Ed. 2d at 972. Further, although declining to consider whether DSHS had violated § 405(j) by using the funds for past care and for costs covered already by other federal assistance funds, the Supreme Court recognized expressly that the Commissioner's determination "that a representative payee serves the beneficiary's interest by seeing that basic needs are met," rather than "maximizing a trust fund attributable to fortuitously overlapping state and federal grants," was subject to judicial deference. *Id.* at 390, 123 S.Ct. At 1028, 154 L. Ed. 2d at 989.

FOOTNOTES TO DISSENT

1. That the phrase "shall be brought in the district court" necessarily carries a mandatory connotation is not a foregone conclusion. While there is no case interpreting the "shall" language in the Social Security Act, it has been interpreted in other contexts. For instance, many federal courts have held that, in the context of the Resource Conservation and Recovery Act" ("RCRA"), the "shall be brought" language "unambiguously demonstrates that federal courts have exclusive jurisdiction over RCRA claims." *See, e.g., Litgo New Jersey Inc. v. Comm'r New Jersey Dep't of Envtl. Protection,* 2013 WL 3985003 (3d Cir. 2013). Yet, the United States Court of Appeals for the Sixth Circuit has held that the "shall be brought in the district court" language in RCRA "does not affirmatively divest the state courts of their presumptive jurisdiction." *Davis v. Sun Oil Co.,* 148 F.3d 606, 612 (6th Cir. 1998); *see also Yellow Freight System, Inc. v. Donnelly,* 494 U.S. 820, 823, 110 S. Ct. 1566, 1569 (1990) (holding that the enforcement provisions of Title VII, which provide that federal courts "shall have jurisdiction," do not "expressly confine[ ] jurisdiction to federal courts or oust[ ] state courts of their presumptive jurisdiction").

2. The Department contends that the beneficiary must always seek resolutions of issues pertaining to benefits — even after they have been paid and spent by a representative payee — through the SSA. This argument is unconvincing. The Social Security Act expressly refers to determinations of "a court of competent jurisdiction" with regard to misuse of payments: "If the Commissioner of Social Security or a court of competent jurisdiction determines that a representative payee has misused any individual's benefit paid to such representative payee . . . , the Commissioner of Social Security shall promptly revoke certification for payment of benefits to such representative payee . . . ." 42 U.S.C. § 405(j)(1)(A).

3. Yet, before holding that the juvenile court had no jurisdiction, the Court of Special Appeals had resolved the case on its merits, at least in part.

Cite as 11 MFLM Supp. 21 (2013)

Divorce: prenuptial agreement: overreaching test

Barbara Ann Stewart
v.
James Edward Stewart

No. 0249, September Term, 2011

Argued Before: Krauser, C.J., Matricciani, Moylan, Charlie E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Krauser, C.J.

Filed: October 3, 2013. Reported.

Given the wife's knowledge of her husband's financial condition before marriage, a prenuptial agreement that omitted one asset and did not specify the value of the listed assets nevertheless satisfied the substantive prong of the "overreaching" test; and, even assuming it did not, the agreement would pass the procedural prong because the benefit to the wife was commensurate with what she relinquished and she entered the agreement "freely and understandingly."

Before appellant, Barbara Ann Stewart, married appellee, James Edward Stewart, in 1988, she signed a prenuptial[1] agreement, prepared by Mr. Stewart's attorney. In that agreement, she waived any interest she had in certain enumerated items of property owned by Mr. Stewart. Twenty-one years later, Mr. Stewart filed a divorce action in the Circuit Court for Charles County, requesting, among other things, the enforcement of the prenuptial contract. In response, Ms. Stewart filed an answer questioning the validity of that agreement together with a counter complaint for divorce.

A hearing was ultimately held to address the question whether the parties' prenuptial agreement was valid and enforceable. When the Charles County circuit court held that it was both, the Stewarts entered into a property settlement and separation agreement that incorporated the terms of the prenuptial. But that did not resolve all of the matters in dispute between the parties as, in the parties' settlement agreement, Ms. Stewart had reserved the right to appeal the circuit court's validation of the prenuptial agreement.

After the circuit court granted Mr. Stewart a divorce, Ms. Stewart predictably noted this appeal, challenging the lower court's decision to uphold the parties' prenuptial agreement. That agreement, she alleges, was neither valid nor enforceable, because of Mr. Stewart's failure to fully and frankly disclose all of his property interests and assets and because he presented the agreement to her so close in time to their impending marriage that she had no opportunity to consult with counsel before signing it. She further contends that it was unconscionable, because it was "clearly one-sided" and because she signed it "without valuable consideration or understanding of what rights she was waiving."

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.

We find no merit to any of Ms. Stewart's claims. The prenuptial agreement was valid and enforceable, and, furthermore, it was not, from either a procedural or substantive perspective, unconscionable.

Background

Ms. Stewart was a single, twenty-six-year-old woman when, in 1986, she met and engaged in an affair with Mr. Stewart, a married, twenty-four-year-old father of three. At that time, she worked at a daycare center for minimum wage, while, in stark economic contrast, Mr. Stewart owned a successful construction business. What began as an affair ultimately developed into a relationship, and the parties began to live together.

Planning to marry, once Mr. Stewart obtained a divorce from his current wife, the parties selected a wedding date of October 22, 1988. Because, at that time, he had approximately $2 million in assets and his pending bride had practically none, Mr. Stewart informed the future "Mrs. Stewart," that he would not marry her unless she agreed to sign a prenuptial agreement, waiving any and all interest in his assets. His attorney thereafter drafted such an agreement, and Mr. Stewart presented it to Ms. Stewart for her consideration and signature before the wedding.

As to the date on which that occurred, the parties do not agree. At the hearing below, Mr. Stewart claimed that he first gave Ms. Stewart a copy of the prenuptial agreement in "the last part of September 1988," while Ms. Stewart maintained that she did not receive it until the day she signed it. But the parties do agree that Ms. Stewart did sign the prenuptial agreement four days before their wedding date and that Mr. Stewart signed it, either the same day or the next. At the time Ms. Stewart signed the agreement, she was not represented by counsel and would later claim that she had no opportunity to consult with counsel, as she

was presented with the prenuptial just four days before the parties' wedding. But there is no indication in the record as to whether her impending wedding or any event or circumstance would have impeded an effort to consult with counsel.

The prenuptial agreement began with a preambular statement declaring: "WHEREAS, both parties have been afforded the opportunity to retain, advise, and consult with independent counsel of their own choice[.]" It then went on to avow that each party "hereby waives, releases, and relinquishes all right, title, estate, and interest" in any "property owned by [the other] at the time of the marriage . . . and in [the other's] estate upon . . . death."[2] The agreement thereafter listed the following items of property owned by Mr. Stewart or his company, Waldorf Concrete, Inc., that is: Waldorf Concrete itself; fifty acres of real property located near Maryland Route 231 and subject to a $190,000 deed of trust; four condominium units in Waldorf Business Square; a lot in West Virginia; and "[s]tock ownership and interest" in Brandywine Building Supply, Inc.

The agreement omitted, however, any mention of Mr. Stewart's individual retirement account ("IRA"), which was then worth, according to him, "around $60,000" or three percent of his $2 million worth of premarital assets. It also failed to mention any property owned by Ms. Stewart, though that omission was, to be sure, inconsequential, as, at the time Ms. Stewart signed the prenuptial agreement, the only property that she owned was a used Ford Maverick, which was worth, as she put it, "maybe" $500.

The agreement reserved for each party "the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime or by Will" and further provided that "neither party intend[ed] by this Agreement to limit or restrict in any way the right and power . . . to receive any such transfer or conveyance from the other," but added that "no representations or promises of any kind whatsoever have been made" by either party as to "any such transfer or conveyance."

Paragraph 5 of the agreement then declared that each party

> covenants and represents to the other that he or she has disclosed to the other the nature and extent of his or her various property, interest and sources of income, as disclosed herein, fully and fairly reflect the said property, interests and sources of income of each party, respectively.

Paragraph 6 added that Ms. Stewart

> declares that she fully understands the terms and provisions of the Agreement, that she has been fully informed of her legal rights and liabilities, that she believes that the provisions of this Agreement are fair, just and reasonable and that she signs this Agreement freely and voluntarily, acting under the advice of independent legal counsel.

A substantively identical provision, paragraph 7, applied to Mr. Stewart.

After the parties were married, Ms. Stewart left her daycare job and, less than seven months later, gave birth to the first of the parties' three children. To provide a residence for his new family, Mr. Stewart subdivided the fifty-acre parcel near Maryland Route 231 and built, on a nine-acre plot, a large house with a "big pool." He then titled the home in both his name and Ms. Stewart's, as tenants by the entireties. To pay off the mortgage on the parties' home, he later sold a number of the assets he had listed in the prenuptial agreement.

In addition to their marital home, the Stewarts acquired, during their marriage, two other properties, one near their home and the other in upstate New York. Both Stewarts were listed on the titles of the two properties, as tenants by the entireties. By the date of the hearing below, the Maryland property was worth a "minimum" of $800,000, while the New York property was worth a "minimum" of $625,000. Neither property was encumbered by a mortgage.

When he was in his mid-forties, Mr. Stewart "closed up" his company, Waldorf Concrete, Inc., and retired. But his marriage did not survive his retirement. Amid cross-accusations of adultery, Mr. Stewart filed a complaint for divorce in the Charles County circuit court, which, among other things, sought enforcement of the parties' prenuptial agreement. In response, Ms. Stewart filed an answer challenging the validity of the prenuptial agreement as well as a counterclaim for divorce.

After a hearing was held on the question of whether the prenuptial agreement was valid and enforceable, the court found that it was both. In so ruling, it said that, even assuming the truth of Ms. Stewart's "description of the history and circumstances" under which she signed the prenuptial agreement, her "mind set was that the substance of the agreement . . . didn't matter an awful lot to her because her position was she loved him, she was gonna marry him regardless." That is why, or so the court seemed to suggest, that although by her own account, she had "three or four days" to seek counsel, she, in the court's words, "elected not to do that."

That is not to say that she was unaware of the content of the prenuptial agreement. On the contrary,

according to the circuit court, "she read through the thing and she knew what it said, she was familiar with some of . . . the major assets that the document lists," including the property on Route 231 and the concrete business. Moreover, the document itself notified her that "Mr. Stewart and/or his company" owned the condominium units which housed the concrete business. And then, upon finding that there was no evidence of duress, coercion, or undue influence, the circuit court declared the parties' prenuptial agreement to be valid and enforceable.

Following that ruling, the parties entered into a property settlement and separation agreement, which was incorporated, but not merged, into an ensuing judgment of absolute divorce. That, in turn, was followed by a consent order addressing custody and child support matters. But, of particular significance, as it is the foundation of this appeal, the property settlement and separation agreement expressly reserved to Ms. Stewart the right to appeal the circuit court's earlier ruling upholding the validity of the prenuptial agreement, and, once judgment was entered, she did precisely that in noting this appeal.

Discussion

I.

Ms. Stewart contends that the circuit court erred in upholding the validity and enforceability of the prenuptial agreement because Mr. Stewart, she alleges, did not fully, frankly, and truthfully disclose the value of his property. Specifically, the agreement did not mention, she points out, Mr. Stewart's ownership of an IRA. Nor did it, she complains, indicate monetary values for the assets listed therein.

Because she did not have actual knowledge of the value of Mr. Stewart's assets, Ms. Stewart claims, relying on *Ortel v. Gettig*, 207 Md. 594 (1955), that the agreement was invalid. In *Ortel*, the Court of Appeals declined to uphold a prenuptial agreement because there was inadequate disclosure of the value of the husband's assets. It reasoned that the wife's "knowledge of the fact that the husband had an electrical business" and owned various real properties (but not their "actual value") was so "indefinite" that she could not be deemed to have "actual knowledge of his worth." *Id.* at 612. Ms. Stewart suggests that we should reach the same conclusion for the same reasons here. Maintaining that she too had, at best, "indefinite knowledge" of Mr. Stewart's worth, which fell "far short" of actual knowledge, Ms. Stewart claims that her prenuptial agreement, like the one in *Ortel*, was invalid for that reason.

To bolster her claim, Ms. Stewart adds that paragraph 3B of her prenuptial agreement stated that Mr. Stewart had an interest in Waldorf Concrete, Inc., but declined to address the value of that interest, stating, without further elaboration, the following:

> B. Waldorf Concrete, Inc., a corporation organized according to the laws of the State of Maryland. The property herein described and described within the provision of paragraph one [whereby Barbara purportedly waived any interest in James's property] shall include any appreciated value of the property described and shall further include any appreciated value which may be attributable to the reduction of any encumbrances.

Ms. Stewart insists that, without an accountant's statement, she "had no way to calculate" the present value of Waldorf Concrete, at the time she signed the agreement, nor did she have any means to perform a future earnings analysis. As a result, she neither knew nor had any way of knowing the value of Mr. Stewart's interest in Waldorf Concrete. Ms. Stewart further contends that the prenuptial agreement at issue was invalid for lack of consideration, specifically asserting that there was "no consideration . . . other than marriage," which, according to her, "is not to be deemed valuable consideration."

Because a prenuptial agreement is a contract, we review it "under the objective law of contract interpretation." *Cannon v. Cannon*, 384 Md. 537, 553 (2005). We do so, mindful that, unlike the normal run of contracts, prenuptial agreements invariably involve a confidential relationship that is "presumed to exist as a matter of law" between the parties entering into that kind of an agreement. *Id.* at 572. To establish the validity of such a contract, the agreement's proponent must show that there was no "overreaching," *id.* at 568, that is, that "in the atmosphere and environment of the confidential relationship," there was neither "unfairness" nor "inequity" in "the result of the agreement or in its procurement." *Hartz v. Hartz*, 248 Md. 47, 57 (1967).

That may be achieved in several ways. One of which is to show that the agreement "documents a full, frank, and truthful disclosure," *Cannon*, 384 Md. at 573, of the "worth of the property, real and personal, as to which there is a waiver of rights in whole or in part, so that he or she who waives can know what it is he or she is waiving." *Hartz*, 248 Md. at 56-57. Indeed, if this standard is met, the agreement may well be rendered resistant to attack. *Id.* In the absence of such a disclosure, "adequate knowledge"[3] of what that disclosure would have revealed "may serve as a substitute" for such disclosure and thereby confirm that there was no overreaching. *Id.* at 57; *accord Cannon*, 384 Md. at 574. "Proof of knowledge, unlike full, frank, and truthful disclosure, does not require that the enforcing party

demonstrate that the attacking party had knowledge of the discrete value of each asset. Instead, knowledge means that the attacking party must be shown to have adequate knowledge—knowledge of the existence of the assets subject to the waiver and knowledge of what those assets are worth in sum so that the attacking party may be found to know what it is he or she is waiving." *Cannon*, 384 Md. at 573-74 n.21.

As the Court of Appeals has explained, the "purpose behind a requirement of disclosure or knowledge is 'so that he or she who waives can know what it is he or she is waiving.'" *Id.* at 574 (quoting *Hartz*, 248 Md. at 56-57). If either disclosure or knowledge "is proven by the enforcing party and insufficiently rebutted by the attacking party, there can be no overreaching." *Id.*

If, however, there is neither full, frank, and truthful disclosure by the party seeking to enforce the agreement, nor "actual knowledge" by the party attacking the agreement, and if "the allowance made to the one who waives is unfairly disproportionate to the worth of the property involved at the time the agreement is made," then the validity of the agreement "must be tested by other standards." *Hartz*, 248 Md. at 57-58. Since the "real test" in determining the validity of a prenuptial agreement is whether there was "overreaching," the Court of Appeals has set forth a two-pronged test, derived from the definition of "overreaching" itself, a test which requires the court to ask, first, "was the benefit to [the party attacking the agreement] commensurate with that which she relinquished so that the agreement was fair and equitable under the circumstances," and, second, "did the subsequent would-be repudiator of the contract enter into the agreement freely and understandingly." *Id. Accord Cannon*, 384 Md. at 568-69. As the first prong of this "overreaching" test addresses the substantive fairness of the prenuptial agreement, while the second prong addresses the manner in which the repudiating party's assent to that agreement was obtained, we shall refer to the first of the two prongs as the "substantive prong" and the second as the "procedural prong."

Although the agreement in question does not reach the heights of a full, frank, and truthful disclosure of all of Mr. Stewart's assets, failing, as it does, to specify the value of each asset or their collective worth, it does, with one minor exception (an exception amounting to only three percent of his total assets), set forth all of Mr. Stewart's assets. And, given the number and nature of those assets (which, we stress, were not just numbered bank and investment accounts), it would have surely alerted Ms. Stewart that, by executing the agreement, she would be waiving any claim she might have to assets worth thousands of dollars.

Nor can Ms. Stewart rely on any claim that she did not review the agreement, as the court found that "she read through" the prenuptial agreement; that she "knew what it said"; and, lastly, that she "was familiar with" the "major assets that the document list[ed]." Indeed, the court observed that Ms. Stewart had admitted that she was "aware of the farm on 231," a fifty-acre enterprise, and of Mr. Stewart's "concrete business," two of Mr. Stewart's most valuable assets, a not unreasonable conclusion given that the parties had lived together for a year before their marriage.

In sum, although Ms. Stewart did not receive notice of the specific value of each asset or of their collective worth, she did unquestionably receive what amounted to, for all intents and purposes, just shy of a complete list of those assets via the agreement and knew of the existence, nature, and potential worth of the most valuable of Mr. Stewart's assets before she ever signed the prenuptial. And finally, we note that there is no indication, that, had she requested additional information as to the value of the assets, such information would not have been forthcoming. In short, the agreement plus Ms. Stewart's actual knowledge of Mr. Stewart's principal assets put her on notice that she was, in fact, about to execute a waiver of any claims she might have to substantial assets.

Nonetheless, out of an abundance of caution, we shall, for the moment, assume that she did not receive anything that came close to full disclosure of Mr. Stewart's assets or have adequate knowledge of their existence or value and turn to the two-pronged "overreaching" test, that is whether, even if there was neither full, frank, and truthful disclosure of the parties' assets nor a substitute for such disclosure, the prenuptial agreement is still valid and enforceable because the benefit to the party attacking it was "commensurate with that which she relinquished so that the agreement was fair and equitable under the circumstances" and because "the subsequent would-be repudiator of the contract" entered into the agreement "freely and understandingly." *Hartz*, 248 Md. at 58. *Accord Cannon*, 384 Md. at 568-69. Given what Ms. Stewart knew of Mr. Stewart's assets, before presentation of the agreement at issue, what she knew of the purpose and contents of the agreement, and the circumstances surrounding its execution, we find, under those "other standards," *Hartz*, 248 Md. at 58, that there was sufficient evidence to support the circuit court's conclusion that both the substantive and procedural prongs of the "overreaching" test were satisfied and that the agreement was, therefore, valid and enforceable.

"Overreaching" Test—Substantive Prong

We begin with the substantive prong of the "overreaching" test, that is, whether the benefit to the waiving party is "commensurate with that which she relin-

quished so that the agreement was fair and equitable under the circumstances." *Hartz*, 248 Md. at 58. In that regard, we note that the agreement did not require Ms. Stewart to waive alimony or her right to a monetary award, to which she might be entitled under Family Law Article § 8-205. At the time the parties entered into the agreement, these potentially valuable rights were retained by Ms. Stewart.

Furthermore, Ms. Stewart's complaint that there was "no consideration . . . other than marriage" to support the prenuptial agreement at issue is without merit. Though "consummation of the marriage is itself sufficient consideration" to support a prenuptial agreement, *Cannon*, 384 Md. at 553, the marriage also conferred upon Ms. Stewart potential economic benefits of a substantial nature, assets she did not waive under the prenuptial agreement, namely, the right to receive alimony and a monetary award upon the dissolution of that marriage.[4]

In sum, there was a sufficient factual basis for the circuit court's holding that, in the words of *Hartz,* the agreement was "fair and equitable under the circumstances." 248 Md. at 58.

"Overreaching" Test—Procedural Prong

We turn next to the procedural prong of the "overreaching" test: whether "the subsequent would-be repudiator of the contract" entered into the agreement "freely and understandingly." *Hartz*, 248 Md. at 58. To answer this question, we begin with a brief summary of the circumstances surrounding the formation of the agreement at issue.

When Ms. Stewart and Mr. Stewart met, two years before they married, she was a single, twenty-six-year-old high school dropout, who was working for minimum wage at a daycare center and whose principal asset was a car worth approximately $500; while he was a married, twenty-four-year-old high school graduate, with three children, who earned "around $100,000 a year" and had acquired a net worth of some $2.5 million through his construction business and related investments.

They began an extramarital affair which ultimately led to Mr. Stewart's divorce from his first wife. While that divorce was pending, the parties lived together for "a little more than a year." When Mr. Stewart's divorce was at hand, he and Ms. Stewart made plans for their wedding. At that time, notwithstanding the demands of the recent settlement he had reached with his former wife, Mr. Stewart's net worth was approximately $2 million.

Given that his marriage to Ms. Stewart might prove to be no more successful than his first, Mr. Stewart insisted upon a prenuptial agreement as a precondition to marrying Ms. Stewart.[5] After Mr. Stewart's attorney drafted the agreement at issue, Mr. Stewart presented it to Ms. Stewart and asked her to sign it. According to Ms. Stewart, that presentation took place four days before the wedding, and Ms. Stewart felt, in her words, "a lot of pressure" to sign it. She said that, when she was given the agreement, Mr. Stewart told her to "sign it" or else "he wasn't gonna marry [her]." She complied with that condition because, as she put it: "I felt, you know, I love him, I cared about him, so I signed it." That admission led the court to later conclude: "the substance of the agreement . . . didn't matter an awful lot to her because her position was she loved him, she was gonna marry him regardless."

Ms. Stewart testified that, at the time she signed the agreement, she was not represented by counsel, that she did not "really" read the agreement, and that she did not know what she was signing, though she admitted that she "briefly looked in" the agreement and, from that brief review, learned that Mr. Stewart owned the assets listed therein. She conceded, moreover, that, when she and Mr. Stewart met, she knew that he was "in business," that he "owned Waldorf Concrete," and that she was "aware of the assets, as far as the farm and stuff like that." In any event, she maintained that she signed the prenuptial agreement, fifteen minutes after it was presented to her.

The circuit court found that, regardless of when Ms. Stewart signed the agreement, she had "three or four days" during which she could have sought counsel and that "she elected not to" do so. In fact, it appears that she willingly declined to seek any professional advice. Finally, there is no suggestion by her that she was discouraged from seeking such advice. Consequently, the circuit court did not err in concluding that Ms. Stewart "elected not to" seek professional advice. Md. Rule 8-131(c).

In *Cannon v. Cannon, supra*, 384 Md. 537, as here, the party attacking the prenuptial agreement "did not avail herself of the opportunity to seek legal counsel" despite having had "at least several days" to examine the agreement in question. *Id.* at 578. In that case, the Court of Appeals declared that it was "loathe to craft a brightline rule where both sides are compelled to seek counsel prior to entering into an antenuptial agreement." *Id.* It was "enough" to tip the scales "in favor of the validity of the agreement," said the Court, that the attacking party "had the opportunity to seek counsel" and "was not discouraged" from doing so. *Id.*

Observing that Ms. Stewart had admitted that "she loved [Mr. Stewart]" and "was gonna marry him regardless," the circuit court found that "she chose to sign" the prenuptial agreement, or, in other words, that she entered into the agreement "freely." *Hartz,* 248 Md. at 58. Given the circuit court's finding that she would

have signed the agreement regardless of the circumstances attending its formation, a finding that was not clearly erroneous, Ms. Stewart can hardly claim here that she was prejudiced by the allegedly brief period of time she was given to consider the agreement. *See* Brett R. Turner & Laura W. Morgan, *Attacking and Defending Marital Agreements*, § 10.02, at 394 (2d ed. 2012) (noting that "if the shortness of time did not affect the attacking party's willingness to sign," prenuptial agreement "may still be enforceable").

As to whether Ms. Stewart also entered into the agreement "understandingly," *Hartz*, 248 Md. at 58, the circuit court found: that "she read through the thing"; that she "knew what it said"; that she "was familiar with" the "major assets that the document lists"; that she admitted being "aware of the farm on 231"; and that she was "aware of the concrete business" and where it was located. As to her claim that she did not know who owned the condominium units in Waldorf Business Square, the court found that Ms. Stewart "read that in [the] document" itself. In other words, the court found, in effect, that Ms. Stewart entered into the agreement "understandingly," regardless of her protestations to the contrary. *Hartz*, 248 Md. at 58.

Moreover, since application of the two-pronged "overreaching" test presupposes "inadequate disclosure," *see Cannon*, 384 Md. at 560, it follows that where, as here, there was disclosure of Mr. Stewart's specific assets but inadequate disclosure of their value, the agreement may nonetheless be valid and enforceable. In the instant case, there was substantial disclosure, by Mr. Stewart, as well as substantial knowledge, by Ms. Stewart, of the assets which Mr. Stewart owned, at the time the parties entered into the prenuptial agreement. Indeed, there was more than sufficient evidence to support the circuit court's conclusion that Ms. Stewart knew of essentially all of the assets and that those assets were valuable. Although there was no finding, by the court, that she actually knew that those assets were worth $2 million at the time the agreement was entered (despite Mr. Stewart's assurances that she did), there was more than enough evidence that Ms. Stewart had actual knowledge of at least the number, nature, and potential value of Mr. Stewart's premarital assets. In any event, given the court's finding that Ms. Stewart would have signed the prenuptial agreement regardless of the circumstances attending its formation, she may not now claim that she was prejudiced by any purported lack of information. *Hartz*, 248 Md. at 58 (noting that if attacking party is not prejudiced by lack of information, he or she may not repudiate prenuptial agreement on that basis).

We also note that Ms. Stewart never claims that she did not know either the nature and purpose of the agreement or what rights she was surrendering. Indeed, as she admitted at the hearing below, she read, at the top of the first page of the agreement, that it was, indeed, a prenuptial agreement, and she further testified that Mr. Stewart had told her the purpose of that agreement—that "he wanted to protect himself." We therefore conclude that the circuit court's finding that Ms. Stewart was not "hoodwinked or misled or threatened or pressured" was not clearly erroneous and that the procedural prong of *Hartz*, that the party challenging the agreement entered into it "freely and understandingly," was satisfied. *Cannon*, 384 Md. at 568-69 (citing *Hartz*, 248 Md. at 58).

As both the substantive and procedural prongs of *Hartz's* "overreaching" test have been met, we conclude that there was no overreaching by Mr. Stewart in procuring Ms. Stewart's assent to the prenuptial agreement and that it was therefore valid and enforceable.

II.

Ms. Stewart contends that the agreement in question was unconscionable, because it was "clearly one-sided" and was "disproportionate to the advantage of" Mr. Stewart, and because she signed it "without valuable consideration or understanding of what rights she was waiving." This contention is without merit.

An "unconscionable bargain or contract has been defined as one characterized by 'extreme unfairness,' which is made evident by '(1) one party's lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party.'" *Walther v. Sovereign Bank*, 386 Md. 412, 426 (2005) (quoting *Black's Law Dictionary* 1560 (8th ed. 2004)).

The first of these two "components," *see Doyle v. Finance America, LLC*, 173 Md. App. 370, 383 (2007), known as "procedural unconscionability," concerns the "process of making a contract" and includes such devices as the use of "fine print and convoluted or unclear language," as well as "deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms." *Walther*, 386 Md. at 426-27 (citations and quotations omitted). The second component, "substantive unconscionability," refers to contractual terms that are "unreasonably" or "grossly" favorable to the more powerful party and includes terms "that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law," provisions "that seek to negate the reasonable expectations of the nondrafting party," and terms "unreasonably and unexpectedly harsh . . . having nothing to do with . . . central aspects of the transaction." *Id.* (citations and quotations omitted).

"The prevailing view is that both procedural and substantive unconscionability must be present in order for a court to invalidate a contractual term as unconscionable." *Freedman v. Comcast Corp.*, 190 Md. App. 179, 207-08 (2010). The burden of establishing the

presence of both is on the party challenging the prenuptial agreement. *Cannon*, 384 Md. at 554. Moreover, unconscionability of a prenuptial agreement is determined as of "the time the contract was entered." *Id.*

Furthermore, according to a noteworthy authority, it "requires a greater showing of inappropriateness" to prove that a prenuptial agreement is unconscionable than it does to show that it is invalid under the "fair and reasonable" test, which it deems to be the same as Maryland's "overreaching" test. *See* Alexander Lindey & Louis I. Parley, *Lindey and Parley on Separation Agreements and Antenuptial Contracts*, § 110.66[1] at 110-57 & n.3; *id.* § 110.66[2] at 110-59 (2d ed. 1999 & 2012 Supp.). *Accord* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. Legis. 127, 138 (1993) (stating that "conscionability" standard is "more deferential" than "fair" and "equitable" standard—the latter being the same as the Maryland "overreaching" standard, *see Cannon*, 384 Md at. 573). Having just determined that there was no overreaching by Mr. Stewart, we may conclude, on that ground alone, that the parties' prenuptial agreement was not unconscionable.

Moreover, there was no basis upon which the circuit court could have found, in the instant case, either procedural or substantive unconscionability, based upon what Ms. Stewart has alleged. As for procedural unconscionability, Ms. Stewart claims only that Mr. Stewart told her that he would not marry her unless she signed the prenuptial agreement and that she "really didn't know" what she was signing. Notably absent from her brief is any allegation of "fine print," "convoluted or unclear language," "deception," or "a refusal to bargain over contract terms." *Walther*, 386 Md. at 426-27. And for good reason, as the agreement does not, on its face, suffer from either of the first two defects, and, as for the latter two, Ms. Stewart has never alleged that Mr. Stewart deceived her into signing the prenuptial, and she concedes[6] that she never attempted to bargain over its terms, though she had, according to her own testimony, four days to do so. Consequently, there was no procedural unconscionability.

As for substantive unconscionability, we note the prenuptial agreement was only applicable to property and did not preclude Ms. Stewart from receiving either alimony or a monetary award upon divorce.[7] Consequently, her waiver of her interest in certain enumerated properties,[8] owned by Mr. Stewart, hardly amounts to substantive unconscionability.

We find further support for this conclusion in *Martin v. Farber*, 68 Md. App. 137 (1986), the leading Maryland authority applying the doctrine of unconscionability to the subject of prenuptial agreements. In that case, we considered whether an "otherwise valid" prenuptial agreement could be set aside on the ground that its enforcement would be unconscionable, and we concluded that it could not. *Id.* at 143-45. The husband, Morris W. Farber, although "steadily employed as an electrician, had no accumulated wealth at the time of his marriage to Mrs. Farber." *Id.* at 139. The wife, the former Nettie Sue Goldberg (and soon-to-be Mrs. Farber), had previously been married to a Dr. Chester Goldberg and had inherited substantial assets upon his death. *Id.* To retain ownership and control over those assets, no matter what the future held, the future Mrs. Farber asked her intended to sign a prenuptial agreement, three days before their marriage, which provided, "in essence, that Mrs. Farber would retain sole control of the property she acquired either prior to or during the marriage" and that "Mr. Farber relinquished all rights in the property and estate of Mrs. Farber." *Id.*

During their ensuing forty-four year marriage, Mr. Farber remained steadily employed until his retirement, in 1967, and, during that employment, regularly "turned his paychecks over to his wife," as she "managed the couple's household and financial affairs." *Id.* Mrs. Farber, for her part, gave Mr. Farber "repeated assurances" that she "would take care of him." *Id.* at 146. Unfortunately, according to the court, she "abused" the couple's confidential relationship[9] by using Mr. Farber's "earnings to acquire assets which she titled or placed solely in her own name." *Id.*

In 1983, Mrs. Farber died intestate. By the time of her death, "she had accumulated in her own name assets valued at approximately $275,000." *Id.* at 140. Mr. Farber was thereafter appointed, by the orphans' court, as the personal representative of Mrs. Farber's estate. Unhappy with that appointment, Mrs. Farber's grandchildren filed a petition seeking his removal from that position on the ground that, under the prenuptial agreement, he had "renounced any claim to Mrs. Farber's estate." *Id.* Mr. Farber responded to that petition by filing a declaratory judgment action in the circuit court, in which he contended that the prenuptial agreement was invalid and that he was entitled to a spousal share of Mrs. Farber's estate, under Estates and Trusts Article, § 3-102.[10]

At the conclusion of a bench trial, the circuit court observed that, although Mr. Farber had "released any claim that he might have [had]" to his deceased wife's estate, "after some forty-four years of a seemingly happy marriage, in which [Mr. Farber] [had] turned everything he earned over to [Mrs. Farber] without question, and also upon her assurances that she would take care of [him], it would not only be unjust, but unconscionable for the court to enforce" the agree-

ment. 68 Md. App. at 140. It therefore imposed a constructive trust upon Mrs. Farber's estate, "for the benefit of Mr. Farber during his life; the remainder to be distributed equally to Mrs. Farber's heirs." *Id.*

Affirming in part and reversing in part that decision, this Court held that the circuit court had "erred in ruling that the agreement was unconscionable" because it had "palpably relied on circumstances arising after the execution of the agreement" and not "as of the time [the agreement] was made." *Id.* at 144. We noted that "[n]othing in the Farbers' antenuptial agreement or in the circumstances surrounding its execution render[ed] it unconscionable or otherwise legally objectionable" and that, "[n]o matter how disturbing" Mrs. Farber's behavior during the marriage was, it did not afford "an adequate basis" for ruling that the agreement at issue was unconscionable. *Id.* at 144-45. We did, however, uphold the imposition of a constructive trust upon Mrs. Farber's estate, though we limited it "to the extent Mr. Farber [was] able to trace his funds into his late wife's estate." *Id.* at 147.

As in *Farber,* the prenuptial agreement, in the instant case, was executed just a few days before the marriage. In both cases, the agreement provided that the party seeking to enforce the agreement "would retain sole control of the property" he or she acquired "either prior to or during the marriage" and that the non-enforcing party "relinquished all rights in the property and estate of" the party seeking enforcement. *Id.* at 139. Moreover, in both cases, the party seeking enforcement entered into the marriage with substantial assets, while the party opposed to that enforcement did not. *Id.* In light of *Farber,* we conclude that the terms of the prenuptial agreement before us were neither unconscionable nor "otherwise legally objectionable." *Id.* at 144.

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

FOOTNOTES

1. We use the term "prenuptial agreement" instead of its synonym, "antenuptial agreement," throughout this opinion, as the former is "far more common" in American English today. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 62 (2d ed. 1995).

2. The agreement also provided that each party waived any interest in property "acquired by [the other] at any time thereafter." But, as Ms. Stewart has not specifically challenged the validity of this provision, we have left it out of our burgeoning text.

3. The Court of Appeals has used the terms "adequate knowledge" and "actual knowledge" interchangeably, in discussing substitutes for full, frank, and truthful disclosure in the context of prenuptial agreements. *See Cannon v. Cannon*, 384 Md. 537, 568 (2005); *Hartz v. Hartz*, 248 Md. 47, 57-58 (1967).

4. That the rights Ms. Stewart retained under the prenuptial agreement ultimately proved to have considerable value was later confirmed when the parties entered into the property settlement and separation agreement. That settlement agreement provided, among other things, that, in exchange for Ms. Stewart's "waiver of a demand for alimony, maintenance, or support," Mr. Stewart was required to pay her $175,000; and, in exchange for Ms. Stewart's release of claims against Mr. Stewart for the marital property that was not subject to the prenuptial agreement, he was required to pay her $387,500, tax free. Thus, in fact, Ms. Stewart ultimately received $562,500 which was directly attributable to the rights she retained under the prenuptial agreement. Indeed, Ms. Stewart leaves the marriage having received assets worth at least $1.2 million, after accounting for the division of marital property.

5. There was also evidence that Mr. Stewart was motivated, in part, by a desire to protect the interests of his three children from his previous marriage.

6. At the hearing below, Ms. Stewart simply stated that there were no negotiations.

7. Of course, by limiting the scope of what might otherwise be or become marital property, the prenuptial agreement tended to limit the amount of a future monetary award.

8. As noted earlier, the agreement also provided that each party waived any interest in the other's property acquired "at any time thereafter," but Ms. Stewart has not challenged either the validity or enforceability of that provision.

9. Admittedly, the confidential relationship analyzed in *Martin v. Farber*, 68 Md. App. 137, 146 (1986), which arose during the marriage, is distinct from the confidential relationship we are considering here, which is presumed to exist, as a matter of law, between the parties who, not yet married, enter into a prenuptial agreement. In contrast, a confidential relationship arising during a marriage is not presumed to exist as a matter of law, but rather, is a question of fact. *See Cannon v. Cannon*, 384 Md. 537, 570-72 (2005).

10. That provision provides that the spousal share, "[i]f there is no surviving minor child, but there is surviving issue," is "the first $15,000 plus one-half of the residue" of the deceased spouse's estate. Md. Code (1974, 1986 Cum. Supp.), § 3-102(c) of the Estates and Trusts Article. An identical provision now appears in the 2011 Replacement Volume.

Cite as 11 MFLM Supp. 29 (2013)

Attorneys' fees: bad faith claim: pro se party

Shari Acosta
v.
Ellsworth White

No. 0394, September Term, 2012

Argued Before: Matricciani, Hotten, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Hotten, J.

Filed: September 12, 2013. Unreported.

The circuit court's denial of a motion for attorneys' fees as a sanction under Rule 1-341 was not clearly erroneous, where the court failed to find specifically that appellee acted vexatiously, for the purpose of harassment or other improper reasons; although the circuit court considered the fact that the plaintiff/appellee was acting *pro se,* it did not deny appellant's motion for attorneys' fees on that ground.

Appellant, Shari Acosta, filed a motion for sanctions and attorney's fees in the Circuit Court for Prince George's County, pursuant to Md. Rule 1-341 against appellee, Ellsworth White.[1] The circuit court denied the motion and appellant appealed to this Court.[2] We reversed and remanded to the circuit court because we were unable to ascertain the basis for the circuit court's denial. The circuit court ultimately denied appellant's motion once again. Appellant noted an appeal to this Court and presents, as we understand, two questions for our review.[3] We have rephrased and condensed those questions, to the extent properly before this Court, as follows:

> 1. Whether the circuit court was clearly erroneous in failing to find bad faith and/or lack of substantial justification in appellee's suit against appellant.
>
> 2. Whether the circuit court erred and exceeded its discretion in denying appellant's motion for sanctions and attorney's fees when it held that appellee did not violate Md. Rule 1-341 because he was not an attorney, did not have legal representation and one cannot impute knowledge of damages to a lay person.

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.

For the reasons outlined below, we shall affirm the judgment of the circuit court.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Appellee and his wife, Lucille White ("Ms. White"), were married in August 1985, and had one child, Britney Renee White ("Britney"). In 1999, appellee and his wife separated. Ms. White moved from the marital home and purchased a house in Upper Marlboro, Maryland (hereinafter "the Property"). The two were divorced by final decree in 2000.

In 2004, appellee and Ms. White entered into an agreement whereby she could refinance the Property at a lower interest rate under appellee's name.[4] Their agreement provided that Ms. White would pay all fees and mortgage payments. Ms. White did, indeed, pay all recordation fees, transfer fees, and, initially, the monthly mortgage payments.

Unbeknownst to appellee, on January 2, 2007, appellant notarized a deed (hereinafter "2007 deed") which conveyed title to Ms. White. On March 13, 2007, appellee's counsel drafted correspondence to Ms. White, ordering her to vacate the Property by April 14, 2007, due to her failure to pay the monthly mortgage payments.

In late March, appellee received a notice from Mortgage Service Center that taxes on the Property were outstanding. The following month, appellee received notice from PHH Mortgage Service that the mortgage was in default and overdue.

Ultimately, the Property was scheduled for a foreclosure sale on August 1, 2007. Prior to the sale, appellee remitted a check in the amount of $11,772.42 to PHH Mortgage Service Company to cancel the foreclosure sale. Appellee was successful, and the mortgage was reinstated. Because Ms. White neither vacated the property nor paid the mortgage, appellee, through counsel, filed a complaint for repossession of the Property and a complaint against a tenant holding over, in the District Court of Maryland for Prince George's County.

On September 10, 2007, during trial, Ms. White produced the 2007 deed that purported to transfer title

from "herself to herself." The case was eventually dismissed, and thereafter, appellee obtained a copy of the deed. The deed identified appellant as the notary who notarized the signatures of Ms. White, Britney, and appellee's alleged signature.

On May 5, 2008, appellee filed a complaint against Ms. White for a declaratory judgment, alleging that his signature on the 2007 deed was forged. He requested that the court set aside the deed, averring several arguments. Appellee sought (1) damages for breach of contract and for filing a fraudulent deed, (2) $11,772.42 for money he paid to prevent the foreclosure proceedings after Ms. White failed to pay the mortgage, (3) damages for intentional infliction of emotional distress, and (4) $275,000 regarding unjust enrichment.

On September 10, 2008, appellee filed an amended complaint, adding appellant as a defendant. He alleged the following claims: (1) fraudulent misrepresentation, (2) false certification of a forged signature, (3) conversion of real property, and (4) civil conspiracy. He asserted that appellant, who was employed as a notary public in the District of Columbia, fraudulently notarized his signature on the deed. Moreover, he averred that appellant notarized the deed pursuant to a conspiracy with Ms. White. He sought a declaratory judgment and requested that the court set aside the fraudulent deed and restore title to him. He also requested consequential and punitive damages, attorney's fees, and costs.

On October 22, 2008, appellant filed a motion to dismiss for lack of personal jurisdiction, averring that she neither resided, worked, or conducted business in Maryland, nor was she a party to a contract entered into or performed in Maryland. On November 14, 2008, appellee filed his opposition to appellant's motion to dismiss, asserting that appellant was subject to personal jurisdiction in Maryland. On December 12, 2008, the court denied appellant's motion to dismiss.

On January 14, 2009, appellant filed an answer to appellee's amended complaint. She again challenged the court's jurisdiction and alleged that venue was improper. Additionally, appellant denied engaging in a conspiracy to defraud appellee and notarizing the deed. She requested that the court dismiss appellee's claims against her and that she be awarded attorney's fees.[5]

On October 13, 2009, Ms. White and appellant deposed appellee. Appellee acknowledged that he never resided at the Property in dispute. He stated that he made a payment of approximately $11,700 on the Property in 2007 to prevent foreclosure. Furthermore, he alleged that the initial foreclosure proceedings irreparably damaged his credit. Appellee wanted title to the Property so that he could sell it and settle the refinanced mortgage. He ultimately stated, however, that the purpose of his lawsuit was to remove his name from the refinancing loan agreement.

On October 19, 2009, appellant filed a motion for summary judgment. During a motions hearing on December 11, 2009, appellant's counsel argued that the court lacked personal jurisdiction. Counsel further argued that appellee did not state a claim for compensatory damages, and therefore, the complaint against appellant should have failed. Moreover, counsel averred that appellee pursued his claim with "unclean hands," as he admitted in his deposition to making material misrepresentations regarding the original deed, the deed of trust, and other documents.[6] When appellee signed the deed of trust, he represented that the Property was his primary residence and he never disclosed to the mortgage company about the verbal agreement to reconvey title to Ms. White.[7]

Appellee, a *pro se* litigant, averred that he suffered damages, including incurring credit problems and legal fees to set aside the deed which, "prevented [him] from selling the [P]roperty and liquidating the mortgage loan[.]" He argued that appellant was liable because, by notarizing the 2007 deed, his interest in the Property was conveyed without his knowledge. Ultimately, appellee maintained that appellant breached a duty of care when she notarized the 2007 deed.

On January 4, 2010, the court granted appellant's motion for summary judgment, explaining that appellee's complaint failed to sufficiently allege personal jurisdiction over appellant. The court further noted that appellee admitted that appellant did not breach any duty owed to him, and that his complaint failed to plead that appellant was liable for any damages he sustained.

On February 24, 2010, appellant filed a motion for sanctions and award of attorney's fees, pursuant to Md. Rule 1-341. She contended that appellee pursued claims against her "in bad faith and/or without substantial justification." Appellant maintained that appellee listed her as a party in his lawsuit against Ms. White to facilitate discovery, and that she did not owe him a duty of care. Moreover, she averred that appellee acknowledged in his deposition that she did not enter into an agreement with Ms. White to deny him title. She further argued that appellee "failed to substantiate any viable claim against" her, and as a result, she incurred a total of $37,060.89 in attorney's fees and costs.

On March 29, 2010, appellee filed his response to appellant's motion for sanctions and award of attorney's fees. He continued to maintain that appellant was an accomplice in Ms. White's effort to secretly obtain title from him through filing a fraudulent deed, and he asserted that he discontinued his action against appel-

lant because he dispossessed the financial resources. He focused his attention on the circuit court's grant of summary judgment concerning the lack of personal jurisdiction, instead of his alleged meritless claims.

On March 30, 2010, the circuit court denied appellant's motion for sanctions and award of attorney's fees, and issued an order on April 14, 2010. Thereafter, appellant filed a timely appeal to this Court. Based on the lack of factual findings by the circuit court and the inability to ascertain from the record the basis for denying the motion, this Court reversed on September 29, 2011 and remanded for "an explicit recitation of findings."

On March 16, 2012, the circuit court held a hearing, again denying the motion for sanctions, explaining:

> [THE COURT]: [T]he reasons I am going to deny the request for attorneys fees are the following: The rule reads: In any civil action, if the Court finds that the conduct of any party, in this case [appellee], in maintaining or defending any proceeding was in bad faith, without substantial justification, the Court may require the defending party, the attorney or both, to pay reasonable attorneys fees, et cetera.
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> I could not find that the maintaining of this proceeding was in bad faith or that it was without substantial justification.
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> As was just indicated by [appellee's] counsel, this was a very unusual case. At the time of the summary judgment, which I did grant in [appellant's] favor, but obviously not every case in which summary judgment is granted is appropriate for [Md.] Rule 1-341 sanction.
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> There were some issues in this case that had some possibilities, if they had been developed properly, to proceed on with the case.
>
> [Appellee] always maintained that the deed was executed without his signature. He always maintained he was not present at the time of the notary. He could not articulate why [appellant] had owed a duty to him, and obviously without that duty, there could be no breach of the duty, and he could not articulate any damages.
>
> However, as was just pointed out by counsel, an attorney could have perhaps articulated whether they would have prevailed really isn't the issue.
>
> Additionally, [appellee] is not an attorney, so most lawyers know immediately that unless he can claim some compensatory damages, some-out-of-pocket damages in some way, I'm financially hurt; I can't ask for $500,000 in punitive or whatever amount of damages. You can't impute that knowledge to a lay person.
>
> This rule is an extraordinary remedy, and according to the case law it should be used sparingly.
>
> I also find it should be used only when there is intentional misconduct. And I don't find there was any intentional misconduct on [appellee's] part, so I'm going to deny the request for attorneys fees in this case.
>
> (Whereupon, the proceedings concluded.)

Appellant noted a timely appeal.

II.
STANDARD OF REVIEW

We review a circuit court's determination on whether a party or counsel maintained or defended an action in bad faith or without substantial justification under a clearly erroneous standard. *Garcia v. Foulger Pratt Dev., Inc., et al.,* 155 Md. App. 634, 677 (2003) (citing *Barnes v. Rosenthal Toyota, Inc.,* 126 Md. App. 97, 105 (1999); Md. Rule 8-131(c)).[8] In this regard, "[u]nless the factual findings of the [circuit] court are clearly erroneous, an appellate court may not arrive at different factual conclusions. If there is any competent material evidence to support the factual findings of the [circuit] court, those findings cannot be held to be clearly erroneous." *Major et al. v. First Virginia Bank–Central Maryland et al.,* 97 Md. App. 520, 531 (1993) (quoting *Nixon v. State,* 96 Md. App. 485, 491-92 (1993)) (additional citations omitted). Therefore, we shall review the circuit court's findings of fact and examine the record for evidence supporting those findings. Similarly, "the requirements for specific findings apply to us as well . . ." *Talley v. Talley et al.,* 317 Md. 428, 437 (1989).

III.
DISCUSSION

A. Whether The Circuit Court Was Clearly Erroneous In Failing To Find Bad Faith And/Or Lack Of Substantial Justification In Appellee's Suit Against Appellant.

Appellant maintains that the circuit court erred in denying her award of costs and attorney's fees because appellee's counts were allegedly filed in bad faith and/or without substantial justification. As previously indicated, appellant relied on her earlier motion for summary judgment for support.[9] Additionally, appellant contends that appellee failed to present evidence that: (1) she made fraudulent misrepresentations regarding the 2007 deed, (2) she converted his alleged real property, (3) she conspired with appellee's ex-wife to deprive him of such property, and (4) there was a specific amount of damages that resulted from her alleged improper behavior.

As previously indicated, Md. Rule 1-341 provides that:

> 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 to 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.

It is well-settled that Md. Rule 1-341 is to be "used sparingly because granting an award of attorney's fees under it is an extraordinary remedy." *RTKL Assocs. Inc. et al. v. Baltimore County,* 147 Md. App. 647, 658 (2002) (citing *Seney v. Seney et al.,* 97 Md. App. 544, 549 (1993)). *See also Garcia,* 155 Md. App. at 677; *Talley,* 317 Md. at 438.

To determine whether sanctions under Md. Rule 1-341 are appropriate, Maryland courts follow a two-step process: "First, the court must determine if the party or attorney maintained or defended the action in **bad faith or without substantial justification**."[10] *Garcia*, 155 Md. App. at 676 (citing *Barnes,* 126 Md. App. at 105) (additional citations omitted) (emphasis added). "The action(s) must be viewed at the time it was taken, not from judicial hindsight." *Id.* at 676-77 (citing *Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. P'ship,* 75 Md. App. 214, 221 (1988)). If "[a] trial judge [is] satisfied by a preponderance of the evidence that a party has acted in bad faith or without substantial justification," *Id.* at 677 (citing *Att'y Grievance Comm'n v. Alison,* 349 Md. 623, 635 (1998)), then it "determine[s] whether to award sanctions." *Id.* In the instant case, the circuit court did not reach the second factor, and, therefore, our analysis will focus solely on the first element.

Maryland courts have traditionally held that an act of bad faith is an *intentional* act. *Talley,* 317 Md. at 438 (emphasis added). Bad faith is an act performed "vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." *RTKL Assocs. Inc. v. Baltimore County,* 147 Md. App. at 658 (quoting *Inlet Assocs.,* 324 Md. at 268). It is difficult to establish bad faith because it requires, to some extent, inquiry into the actor's subjective thoughts. *Talley,* 317 Md. at 438.

The Court of Appeals' decision in *Talley* explains the challenge of assessing the bad faith component:

> As frustrating as it may be to courts and litigants at all levels to become involved in extra effort because an attorney or a party misreads a rule, or **overlooks a requirement,** or is otherwise negligent, careless, or **perhaps inept,** the bad faith component of [Md.] Rule 1-341 does not permit the award of attorney's fees as a sanction for such conduct. It is . . . intended to reach only intentional misconduct. The requisite intent, although sometimes difficult to prove, and more often than not provable only by inference from the surrounding circumstances, must nonetheless be proved.

Id. at 438 (emphasis added).

Regarding substantial justification, "[a]s a matter of law, an action is substantially justified when the party *reasonably believes* that the case will generate a factual issue for the fact finder at trial." *Johnson v. Baker et al.,* 84 Md. App. 521, 529 (1990) (emphasis added) (citing *Legal Aid Bureau, Inc.* 75 Md. App. at 223); *see also RTKL Assocs.,* 147 Md. App. at 658; *Inlet Assocs.,* 324 Md. at 268. To attain substantial justification, the litigant's position must be "fairly debatable" and "within the realm of legitimate advocacy." *Inlet Assocs.,* 324 Md. at 268 (quoting *Newman, II, et al. v. Reilly,* 314 Md. 364, 381 (1988)).

Notary Public

Before a title of property can be recorded in a county's land records, it must be notarized. See *Poole v. Hyatt,* 344 Md. 619, 630 (1997). Section 45 of Article IV of the Maryland Constitution provides that "[n]otaries [p]ublic may be appointed for each county . . . in the manner, for the purpose, and with the powers now fixed, or which may hereafter be prescribed by Law." Md. Const. art. IV, § 45. Furthermore, the office of notary public — a public office — requires a person holding such position "to perform essential and important duties with integrity, diligence and skill . . . ." *Moser v. Bd. of County Comm'rs of Howard County et al.*, 235 Md. 279, 283 (1964).

The Code of Maryland Regulations (hereinafter "COMAR") outlines specific procedures notaries must follow when notarizing documents (emphasis added):

> C. Notary as Official Witness. **To act as an official witness, a notary shall:**
>
> (1) Obtain satisfactory proof of the identity of the individual signing the document;
>
> (2) **Observe the signing of the document;**
>
> (3) Date, sign, and seal or stamp the document;
>
> (4) Note the date the notary's commission expires on the document; and
>
> (5) Record the notarization in the notary's register of official acts.[11]

COMAR 01.02.08.02 (2013)

In this country, notaries have been held liable for signing documents without the individual's presence. *See, e.g., Commonwealth v. Maryland Casualty Co. et al.,* 97 A.2d 46, 46-47 (Pa. 1953) (notary who falsely acknowledged a mortgage without observing act of signing held liable for surety bond in real estate transfer); *Strother v. Shain,* 78 N.E.2d 495, 495-96 (Mass. 1948) (notary falsely certified a deed without grantor's appearance and as a result, the deed was invalid).

Although Maryland's case law does not focus specifically on a notary's improper behavior, our Courts have examined cases where attorneys have acted either in their capacity as notaries, or in the place of a notary.

In *Att'y Grievance Comm'n of Maryland v. Maxwell,* 307 Md. 600, 601 (1986), an attorney, who was also a notary public, (hereinafter "attorney–notary") represented several clients relating to a business venture (hereinafter "business clients"), helping the business clients form a corporation, "Jaxon and Associates." Thereafter, acquaintances of the business clients (hereinafter "criminal clients") were incarcerated because of a narcotics trade. At the business clients' request, the attorney–notary agreed to represent the criminal clients in their narcotics case. *Id.* Thereafter, the business clients falsely indicated to a bail bondsman that their company owned property, and that they would exchange it for the criminal clients' debt security. *Id.* at 601-02. The business clients failed to transfer the property's title, but the attorney–notary still guaranteed the conveyance. *Id.* at 602. Subsequently, the attorney–notary delivered the deed, which stated:

> That on this 19th day of February, 1981, before me, the subscriber, a Notary Public of the State of Maryland . . . personally appeared Ronald Jaxon President of Jaxon and Associates, Inc., known to me (or satisfactorily proven) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained, and in my presence signed and sealed the same.

Id. (quotations omitted).

The trial court determined that "Ronald Jaxon" did not exist, but rather one of the business clients signed the deed. *Id.* "[T]he [j]udge further found that [the attorney–notary] knowingly made a false notarization, and falsely witnessed the deed." *Id.* at 602-03. Ultimately, the trial court ruled that the attorney–notary was in violation of disciplinary rules, and he thereafter appealed. *Id.* at 603. Upon review, the Court of Appeals agreed to the Attorney Grievance Commission's recommendation of a 90-day suspension as the appropriate sanction for the attorney–notary's "deliberate falsification of a solemn document . . ." *Id.* at 605.

In *Att'y Grievance Comm'n of Maryland v. Coppola,* 419 Md. 370, 383-84 (2011), although the attorney–defendant ("attorney") was not a notary as in *Maxwell,* this attorney engaged in similar improper behavior of falsely certifying documents. The attorney's client forged her dying mother's signature on estate-planning documents. *Id.* at 383. At the client's request, the attorney falsely certified the signature knowing it was forged. *Id.*

The Attorney Grievance Commission noted a petition against the attorney, *id.* at 374, and the hearing judge examined the facts, stating:

> He thereafter directed two of his employees to falsely attest that they witnessed [the mother's] [w]ill, despite the fact that [the mother's] signature was not on the [w]ill and neither employee was present to see [the mother] execute her [w]ill, and notarized their attestations despite knowing that they were false.
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> * * *
>
> The [attorney] notarized the falsely executed and initialed [will]; he notarized the falsely executed trust declaration and schedule; he notarized the falsely executed power of attorney naming [his client] as [her mother's] attorney-in-fact and he notarized the falsely executed deed transferring the property from [the mother] to the Elizabeth L. West Living Trust.

Id. at 383-84.

The hearing judge found that the attorney's behavior was untruthful and deceptive, and recom-

mended a suspension. *Id.* at 402-03. On appeal, the Court of Appeals agreed that the attorney's actions were dishonest, *id.* at 408, but opined that the behavior was so egregious that it warranted disbarment. *Id.* at 411.

Unlike the cases mentioned *supra,* appellant in the instant case was not an attorney, but a notary. In light of these cases, however, appellee could have reasonably believed that he had a valid claim against appellant for similar improper behavior. As mentioned above, appellee filed a complaint for (1) fraudulent misrepresentation, (2) false certification of a forged signature, (3) conversion of real property, and (4) civil conspiracy. The circuit court granted summary judgment in favor of appellant, and she thereafter filed a motion for sanctions and attorney's fees, averring that appellee "brought and maintained in bad faith and/or without substantial justification[.]" Upon our review, we conclude that the circuit court was not clearly erroneous in finding that appellee's suit against appellant was not filed in bad faith and/or without substantial justification for the reasons articulated below.

Appellee Maintains He Was Not In Appellant's Presence When The 2007 Deed Was Signed

As previously indicated, regarding public records relating to real estate, a notary must notarize the deed in the presence of the parties. *Poole,* 344 Md. at 630. The Court of Appeals has noted: "[A]n affirmative duty on the part of the notary (1) to require the actual presence of the grantor, and (2) to assure himself or herself that the person appearing and purporting to be the grantor is who he or she claims to be." *Id.* During the motions hearing, however, the circuit court noted that it was possible that appellee did not sign the document in appellant's presence, and that appellant had knowledge that it was not appellee's signature on the document when she notarized it, stating (emphasis added):

> [THE COURT]: [T]he reasons I am going to deny the request for attorneys fees are the following: The rule reads: In any civil action, if the Court finds that the conduct of any party, in this case [appellee], in maintaining or defending any proceeding was in bad faith, without substantial justification, the Court may require the defending party, the attorney or both, to pay reasonable attorneys fees, et cetera.
>
> I could not find that the maintaining of this proceeding was in bad faith or that it was without substantial justification.
>
> * * *
>
> **[Appellee] always maintained that the deed was executed without his signature. He always maintained he was not present at the time of the notary.**

Upon our finding of "competent material evidence to support the factual findings of the [circuit] court," *Major,* 97 Md. App. at 531 (quoting *Nixon,* 96 Md. App. at 491-92), we conclude that the circuit court's findings were not clearly erroneous. For example, appellant contends that "[Ms. White's] forensic document analyst rendered a report that clearly indicated that the signature on the [d]eed purporting to be [appellee's] was indeed [his] signature." However, we find evidence in the record that conflicts with this finding. Katherine Mainolfi Koppenhaver, an expert witness in the area of certified document examination, concluded that the signature was not appellee's, but a forgery. Furthermore, there is evidence that appellee consistently maintained that he was not present when the 2007 deed was notarized. For example, when asked about his civil conspiracy claim against appellant during appellee's deposition, he stated:

> [APPELLEE]: I wasn't there when [the 2007 deed] was signed.
>
> [APPELLANT'S ATTORNEY]: The question is, do you contend that [appellant] recorded that document in the land records for Prince George's County?
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> [APPELLEE]: I wasn't there when it was, when it was [sic] notarized. The document that was, that was [sic] filed was notarized by [appellant].

Given the contested facts present in this case, appellee had a reasonable basis to believe that he had a valid claim against appellant.

Appellee's Damages

Regarding appellee's actions for conversion of property,[12] as well as civil conspiracy,[13] the circuit court noted:

> [THE COURT]: He could not articulate why [appellant] had owed a duty to him, and obviously without that duty, there could be no breach of the duty, and he could not articulate any damages.
>
> However, as was just pointed out by counsel, an attorney could have perhaps articulated whether they would have prevailed really isn't the issue.
>
> Additionally, [appellee] is not an attorney, so most lawyers know immediately that unless he can claim some com-

> pensatory damages, some out-of-pocket damages in some way, I'm financially hurt; I can't ask for $500,000 in punitive or whatever amount of damages. You can't impute that knowledge to a lay person.
>
> This rule is an extraordinary remedy, and according to the case law it should be used sparingly.

As stated, we are unable to find that the circuit court's determination is clearly erroneous. Although an individual bringing an action for civil conspiracy must specify damages — which we recognize that appellee did not do — as we noted *supra*, "because an attorney or a party misreads a rule, or overlooks a requirement," this is not an action performed in "bad faith" in the context of Md. Rule 1-341. *Talley,* 317 Md. at 438. Furthermore, there is evidence in the record to support that appellee did not specify an amount of damages because he did not have the ability to assess it at the moment. For example, the following colloquy ensued during appellee's deposition:

> [APPELLANT'S ATTORNEY]: All right. What damages do you claim against my client, [appellant]?
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> [APPELLEE]: It's because of the deed is why I was unable to sell the property a year ago when we first attempted to look into selling the property to get my name, to get me out of this mess, and I couldn't do anything, and my attorney that I had before —
>
> [APPELLEE'S ATTORNEY]: Objection — okay. Go ahead.
>
> [APPELLEE]: My attorney that I had before told, explained to me that I would not be able to sell the property until I can get the deed clarified. It was a deed, that the deed was foul, and that's the deed that she, she certified, so which prevented me from selling the property.
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> [APPELLANT'S ATTORNEY]: So what are the damages that you claim against my client, [appellant]?
>
> [APPELLEE]: Damage to, continuous, continuous damage to my credit, my creditworthiness, my inability to, to refinance my own property because my damn credit is so messed up from her and my financial costs, my lawyers that I've had to pay to get out of this unnecessary mess, you know, and the stress I've had to go through, which have been innumerable considering what I've had to endure just trying to navigate this, this mess. If it wasn't for that deed, I probably would have been able to mitigate the damages that, that have been done to my credit by possibly getting rid of the property a year ago.
>
> [APPELLANT'S ATTORNEY]: Okay. You still haven't told me, what's the number? What's the number?
>
> [APPELLEE]: I don't know.
>
> [APPELLANT'S ATTORNEY]: What is the number of damages, what's the amount that you claim against my client, [appellant]?
>
> [APPELLEE]: I don't know exactly right now.
>
> [APPELLANT'S ATTORNEY]: What do you need to know exactly what you're claiming against [appellant]?
>
> [APPELLEE]: My lawyer fees, my lawyer fees [sic], any other expenses that I've had to, to pay out.
>
> [APPELLANT'S ATTORNEY]: Anything else?
>
> [APPELLEE]: I can't really say exactly right now.
>
> [APPELLANT'S ATTORNEY]: Okay. What expenses have you had to pay out specifically?
>
> [APPELLEE]: My attorneys.

Because the record supports the possibility that appellee did in fact believe he had damages against appellant, the circuit court's finding was not clearly erroneous.

Intentional Conduct On The Part of Appellee

Regarding the substantial justification component of Md. Rule 1-341, the circuit court stated:

> [THE COURT]: [I]t's intentional misconduct. Not that is was when you look at it, not that you believe, or that I believe, or that the attorneys believe it was without substantial justification, but that that [sic] was filed or defended by the person who believed it was, who knew there was no substantial justification.
>
> * * *
>
> But that's what I'm saying. Don't I have to find it's intentional misconduct, that if I find that he pursued the suit out of legal ignorance, I don't think Rule 1-341 applies.

* * *

> Doesn't the substantial justification in the context of [Md. Rule 1-341] mean, not that it was without substantial justification, but that when it was filed, the person knew it was without substantial justification?
>
> * * *
>
> I also find it should be used only when there is intentional misconduct. And I don't find there was any intentional misconduct on [appellee's] part, so I'm going to deny the request for attorneys fees in this case.

As mentioned *supra,* we agree that an act of bad faith is an intentional act. *Talley,* 317 Md. at 438. Based on the facts previously outlined and the oral opinion of the circuit court judge, we discern from the record no *specific* findings of fact regarding appellee's bad faith and/or lack of substantial justification in pursuing his causes of action. We find nothing that leads us to conclude that appellee acted vexatiously or for the purpose of harassment, or for other improper reasons. Finally, we are not convinced that appellee acted improperly or that he unreasonably believed that his claim was meritorious. Consequently, we hold that the circuit court's finding that appellee's suit against appellant was not filed in bad faith or without substantial justification was not clearly erroneous, and therefore, we decline to impose sanctions.

B. Whether The Circuit Court Erred And Exceeded Its Discretion In Denying Appellant's Motion For Sanctions And Attorney's Fees When It Held That Appellee Did Not Violate Md. Rule 1-341 Because He Was Not An Attorney, Did Not Have Legal Representation And One Cannot Impute Knowledge Of Damages To A Lay Person.

Appellant contends that appellee "knew or should have known that his claims against [her] were without substantial justification[.]" Moreover, appellant alleged that the circuit court judge improperly applied Md. Rule 1-341 when she denied the motion "because [appellee] was not a lawyer, had no legal training and one cannot impute knowledge of damages to a lay person." We disagree.

In the instant case, the circuit court's consideration that appellee was not an attorney and did not have legal representation is beside the point. The fact that appellee was *pro se* was not what the circuit court hinged its decision to deny the motion under Md. Rule 1-341. The "**necessary predicate**" for the implementation of Md. Rule 1-341 is the circuit court must "**specifically** find that appellant had acted either in bad faith or with a lack of substantial justification." *Merriken v. Merriken,* 87 Md. App. 522, 546 (1991) (emphasis added). The circuit court made quite clear its decision to deny the motion as we discuss *supra,* and therefore we do not entertain appellant's second issue.

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

FOOTNOTES

1. Maryland 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 to 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.

2. *See Acosta v. White,* No. 0520, Sept. Term 2010, (Filed Aug. 25, 2011).

3. In her brief, appellant presents her questions before this Court as follows (capitalization omitted):

> A. Whether appellant's argument and record shows that appellee's amended complaint was maintained and defended in bad faith and or without substantial justification.
>
> B. Whether the trial court erred and exceeded its discretion in denying appellant's motion for sanctions and attorney's fees when it held that appellee did not violate Maryland Rule 1-341 because he was not an attorney, did not have legal representation and one cannot impute knowledge of damages to a lay person.

4. The deed conveying title to the Property was officially executed on April 9, 2004.

5. Between January and September 2009, the parties filed a series of motions relating to discovery, however, the majority of the motions filed during that period related to the dispute between appellee and Ms. White.

6. On May 13, 2005, as part of the refinancing proceeding, appellee signed a document titled "Second Home Rider," which contained an "Occupancy" provision. This provision required that appellee live on the Property and prohibited him from sharing ownership or renting the property to others. However, appellee admitted in his deposition that he was never an occupant of the Property.

7. When Ms. White conveyed title to appellee in 2004, the two agreed that eventually, they would refinance the Property

again, and appellee would reconvey the Property to Ms. White.

8. "[A] motion under [Md.] Rule 1-341 is also subject . . . to scrutiny under [Md. Rule 8-131(c)]," *Garcia,* 155 Md. App. at 677, which states:

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

Md. Rule 8-131(c).

9. In appellant's brief, she states, "[i]nstead of arguing that his claims were not filed in bad faith or were substantial justified [sic], [a]ppellee sought to reargue his claims [in which] the [circuit court] [j]udge had previously dismissed and granted summary judgment[ ] . . . ." However, we agree with the circuit court's conclusion regarding this argument (emphasis added):

> [THE COURT]: As was just indicated by [appellee's] counsel, this was a very unusual case. At the time of the summary judgment, which I did grant in [appellant's] favor, but **obviously not every case in which summary judgment is granted is appropriate for [Md.] Rule 1-341 sanction.**

10. "In order to impose sanctions [, Md. Rule 1-341] requires the trial judge to find *one* or *both* of two predicates: 'bad faith' or 'lack of substantial justification.'" *Yamaner v. Orkin,* 313 Md. 508, 509 (1988) (emphasis added) (quoting *Century I Condominium Ass'n, Inc. et al. v. Plaza Condominium Joint Venture et al.,* 64 Md. App. 107, 115 (1985)).

11. A notary is an official witness to the signing of a document when he or she is "tak[ing] an acknowledgment," which is "the formal statement of the grantor to the official authorized . . . that the execution of the instrument [is] his [or her] free act and deed." *Poole,* 344 Md. at 632. Additionally, a notary is an official witness when "tak[ing] an individual's oath or affirmation." COMAR 01.02.08.02(A) and (B).

12. "A 'conversion' is any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it." *Allied Inv. Corp. v. Jasen,* 354 Md. 547, 560 (1999) (quoting *Interstate Ins. Co. v. Logan,* 205 Md. 583, 588-89 (1954)).

13. "A civil conspiracy has been defined in Maryland as 'a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff.'" *Mackey et al. v. Compass Marketing, Inc.,* 391 Md. 117, 128 (2006) (quoting *Hoffman et al. v. Stamper et al.,* 385 Md. 1, 24 (2005)). "The plaintiff must prove an unlawful agreement, the commission of an overt act in furtherance of the agreement, and that as a result, the plaintiff suffered actual injury." *Id.*

NO TEXT

Cite as 11 MFLM Supp. 39 (2013)

Child support: modification: changed circumstances

Scott W. DiBiasio
v.
Melissa DiBiasio

No. 1361, September Term, 2012

Argued Before: Meredith, Graeff, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Graeff, J.

Filed: September 12, 2013. Unreported.

An increase in the father's income was a material change in circumstances that justified a modification of the child support; contrary to the father's argument, there was no evidence that the modification was based on legislative revisions to the support guidelines in 2010.

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

Scott DiBiasio, appellant, appeals from an order of the Circuit Court for Anne Arundel County increasing his monthly child support obligation for his son, payable to his former spouse, Melissa DiBiasio (now Evans), appellee, from $930 a month to $1,074 a month. He raises the following questions for our review, which we quote:

> 1. Did the trial court err in proceeding directly to an evidentiary hearing on the child support modification request of the appellee that had been filed through an initiating tribunal in another state even though the appellee and the initiating tribunal failed to file a complaint, petition, or other formal pleading, and the child support enforcement agency providing services to the appellee in this State did not follow agency regulations in place at the time that dictated the process that the agency should have followed prior to initiating a legal proceeding for the modification of a child support order?
> 2. Did the trial court err in holding that the changes in the income and expense of the parties constituted a material change of circumstances since the matter was last before the court upon which a modification of the monthly child support obligation could be granted?
> 3. Did the trial court err in ordering an increase in the child support obligation of the obligor when the only material change of circumstances that had occurred since the issue was last before the court was a revision or modification to the child support guidelines by the General Assembly in 2010?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. DiBiasio and Ms. Evans were married on April 9, 2006. They had one child, Aaron, born on November 21, 2007. In January 2008, they voluntarily separated, and Ms. Evans moved with Aaron to Oklahoma.

On February 24, 2009, the Circuit Court for Anne Arundel County issued a Judgment of Absolute Divorce. The provisions of the parties' separation and property settlement agreement (the "Agreement") were incorporated but not merged into the Judgment of Absolute Divorce. Under the terms of the Agreement, Ms. Evans was granted sole physical and legal custody of Aaron, and Mr. DiBiasio would pay Ms. Evans child support in the amount of $930 per month.[1] Pursuant to the terms of the Judgment of Absolute Divorce, Mr. DiBiasio was ordered to pay child support through the Anne Arundel County Office of Child Support Enforcement (the "County").[2]

In December 2011, with the assistance of the child support agency in Oklahoma, Ms. Evans completed a "Child Support Enforcement Transmittal #1 Initial Request." The document requested that Maryland, the responding jurisdiction, take the follow-

ing action: modify the child support order; collect any arrears; and require income withholding.

On February 23, 2012, the County filed the documents in the circuit court. On the same date, a writ of summons was issued for Mr. DiBiasio, in which he was "summoned to file a written response by pleading or motion" in the circuit court "to the attached Complaint filed by: State of Oklahoma." Mr. DiBiasio was served on March 22, 2012, with a summons to appear for a hearing on April 10, 2012, in the circuit court.

On April 2, 2012, Mr. DiBiasio filed an "Answer to Uniform Support Petition." He denied that there had been a substantial increase in his earnings since entry of the original child support order, asserting that an increase in his income from $75,000 to $84,582.42 did not qualify as a "material change of circumstances" that justified modification of the child support order.

On April 10, 2012, a hearing was held before a master.[3] The master indicated at the start that the hearing would address Ms. Evans's "petition to increase the amount [of child support] that's presently ordered," i.e., $930 per month.

Ms. Evans testified that she was a public school teacher, and she earned $31,140 per year, a slight decrease in income since the time of the original support award in 2009. She paid $80 per month for private health insurance. Ms. Evans requested an increase in child support because Mr. DiBiasio had "stated repeatedly that he makes quite a bit more money than he did before," although he had not provided documentation of that information to Ms. Evans, as was required by the separation agreement. Ms. Evans paid $95 per week for daycare, which she was required to pay even when Aaron was visiting Mr. DiBiasio, to hold his placement in daycare. Aaron's daycare expenses were approximately $148 per month less than they had been at the time of the initial award.

Mr. DiBiasio testified that he worked as a lobbyist for the Appraisal Institute, earning $84,582.42 per year, or $7,049 per month. When asked by the master for documentation verifying his income, Mr. DiBiasio stated that he did not bring a pay stub or W-2 form with him to the hearing because he "was under the impression that [the hearing] was a pretrial kind of thing." The master informed him that this "is your hearing," and Mr. DiBiasio responded: "Okay. Fine." Mr. DiBiasio made no argument regarding any purported procedural errors.

At the conclusion of testimony, the master applied the guidelines and determined that Mr. DiBiasio's child support obligation would be $1,269. Based on the original agreement between the parties with respect to transportation costs associated with visitation, however, which reduced the original support award by $195 per month, the master recommended a downward deviation from the guideline amount by $195, to $1,074.

On April 11, 2012, the master filed his Report, Recommendations, and Findings of Fact, in which he recommended that Mr. DiBiasio pay $1,074 per month in child support. On April 20, 2012, Mr. DiBiasio filed exceptions to the master's report, asserting that Ms. Evans had failed to show a material change in circumstances, and requesting that the court deny Ms. Evans's request for modification.

On May 16, 2012, Ms. Evans filed exceptions to the master's report, asserting that Mr. DiBiasio had incorrectly reported his income and did not accurately portray all sources of income. On May 25, 2012, the County filed exceptions to the master's report, asserting that the master erred by failing to properly calculate travel expenses in its recommendations, resulting in Ms. Evans paying a higher proportion of travel than her income share.

On August 17, 2012, the court held a hearing on the parties' exceptions.[4] Mr. DiBiasio argued that there was no evidence of "a significant and material change of circumstances as is required," that a change in the child support guidelines is not a change in circumstances, and that modification of the child support order was not warranted. Mr. DiBiasio made no argument concerning any purported procedural errors. The County argued that Mr. DiBiasio's income had increased by $10,000 a year since the original order, which constituted a material change in circumstances.

At the conclusion of the hearing, the court denied all exceptions and approved the recommended order. It specifically found that Mr. DiBiasio's change in income was "a sufficient basis to find material change."

DISCUSSION

I.

Mr. DiBiasio first contends that the circuit court erred in conducting an evidentiary proceeding rather than dismissing the action due to a "multitude of errors" by the County. Those errors, he argues, include the County's "improper filing of an 'Initial Request' and 'General Testimony,'" which he asserts "did not rise even remotely close to being a formal complaint, petition or other comparable pleading, did not state with specificity the grounds and authorities in Maryland law upon which the [a]ppellee was requesting the modification, and did not state a claim upon which relief could be granted." Moreover, he contends, the court erred in not considering whether the County "complied with its own regulations regarding collection, and evaluation, of information from all parties prior to the filing of an action to modify a child support order.[5]

The County, on behalf of Ms. Evans, responds that Mr. DiBiasio's contention is unpreserved, as he

never raised below any issues regarding "these supposed procedural blunders." In any event, it argues, even if the issue were preserved, "the record dispels beyond any doubt Mr. DiBiasio's appellate claim that he did not understand that the pleadings were requesting the modification of his child support obligation." With respect to the regulations, it asserts that they "provide no support for his contention, raised for the first time on appeal, that the circuit court lacked authority to modify the 2009 support order."

We agree with the County that this issue is not preserved for review because it is raised for the first time on appeal. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court."). *Accord Leake v. Johnson,* 204 Md. App. 387, 406 (2012). *See also O'Leary v. Shipley,* 313 Md. 189, 208 (1988) ("It is manifestly unfair to reverse a trial judge on a ruling he was never allowed to make-on an issue that was never placed before him."). Accordingly, we decline to address the issue.

II. & III.

Mr. DiBiasio's next two contentions address the substance of the court's ruling increasing his child support obligation. He argues that the ruling was erroneous because: (1) the "nominal" increase in his salary was not a material change in circumstances to support a modification of child support; and (2) the "only" material change of circumstances that occurred was the revision to the child support guidelines in 2010.

The County argues that the court did not abuse its discretion in modifying Mr. Dibiasio's child support obligation. And it asserts that Mr. DiBiasio's "speculation that the circuit court modified its prior order only because the Maryland [General Assembly] changed the child support guidelines in 2010 is without merit," noting that "Mr. DiBiasio does not, and cannot, point to anything in the record supporting his conjecture that this was the basis for the trial judge's decision." We agree.

Both parties agree that the threshold question in a motion to modify child support is whether a material change in circumstances has occurred since the prior court order. *See Wheeler v. State,* 160 Md. App. 363, 372 (2004). The burden of proving a material change in circumstances is on the person seeking the modification. *See Haught v. Grieashamer,* 64 Md. App. 605, 611 (1985).

A change is "material" when it meets two requirements: (1) the change "must be relevant to the level of support a child is actually receiving or entitled to receive"; and (2) the change must be "of sufficient magnitude to justify judicial modification of the support order." *Wills v. Jones,* 340 Md. 480, 488-89 (1995). Thus, the court must focus upon "the alleged changes in income or support" that occurred after the child support award was issued. *Id.* A change "that affects the income pool used to calculate the support obligations upon which a child support award was based" is necessarily relevant. *Id.* at 488, n.1. Whether to grant a modification rests in the sound discretion of the trial court and will not be disturbed "'unless the court acted arbitrarily or its judgment was clearly erroneous.'" *Pettito v. Pettito,* 147 Md. App. 280, 307 (2002) (quoting *Lieberman v. Lieberman,* 81 Md. App. 575, 595 (1990).

Here, the court specifically found that the $10,000 increase in Mr. DiBiasio's income was a material change in circumstances that justified a modification of the child support. The court made no mention of the legislature's change in the statute, nor did Ms. Evans or the County attempt to justify a modification based on those changes. We perceive no abuse of discretion in the court's modification of child support.

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

FOOTNOTES

1. A child support guidelines worksheet was attached to the Agreement. The worksheet indicated that Ms. Evans had an income of $2,662 per month, and Mr. DiBiasio had an income of $6,250 per month. Although application of the guidelines generated a child support obligation of $1,125 per month, the parties agreed to the sum of $930 per month due to the allocation of transportation costs for visitation.

2.The Anne Arundel County Office of Child Support Enforcement (the "County") filed the brief of appellee on behalf of Ms. Evans.

3. Ms. Evans attended the hearing by telephone.

4. Ms. Evans attended the hearing by telephone.

5. Mr. DiBiasio cites the Code of Maryland Regulations ("COMAR"), 07.07.05.03, which he asserts dictates "how the agency is to proceed when it is representing a child support obligee in an action to modify a child support order."

NO TEXT

Cite as 11 MFLM Supp. 43 (2013)

Visitation: protective order: sufficiency of the evidence

Yoha B.

v.

Tania Butler

No. 1435, September Term, 2012

Argued Before: Zarnoch, Berger, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Zarnoch, J.

Filed: September 12, 2013. Unreported.

In deciding whether there was clear and convincing evidence that abuse occurred during supervised visitation, the court could reasonably conclude that a CINA with post-traumatic stress disorder was in fear of imminent serious bodily harm when her mother yelled at her, grabbed her, and hit the social worker who was supervising the visit on the back of the head with a Bible.

Appellant Yoha B. ("Ms. B.") seeks reversal of a 2012 judgment of the Circuit Court for Montgomery County granting a final protective order against her. Appellee Tania Butler, a social worker for the Montgomery County Department of Health and Human Services ("the Department"), sought the protective order for Ms. B.'s daughter, Chaida, after a supervised visit between Ms. B. and Chaida resulted in an altercation in a fast food restaurant.

Ms. B. asks this Court to consider the following issue:

> Was the evidence sufficient to show by clear and convincing evidence that a protective order should issue?

We find no error and therefore affirm the circuit court's ruling.

FACTS AND LEGAL PROCEEDINGS

Because this case marks the third appeal that Ms. B. has taken from rulings in circuit court proceedings related to the custody of and her visitation with Chaida,[1] we will only briefly summarize the background facts. The Department removed Chaida from Ms. B.'s care in March 2010, after receiving a report of physical abuse and neglect. Chaida has lived with a foster family since 2011. The circuit court ordered that Ms. B. have supervised visitation[2] with Chaida starting in February 2011, although Ms. B.'s failure to conform to the court-ordered terms led to several suspensions in visitation.

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.

Butler supervised a visit between Ms. B. and Chaida on July 11, 2012, at a Burger King. Unfortunately, the visit went poorly, and Butler left with Chaida after only a short period of time. Butler, on behalf of Chaida, filed a petition for a protective order as a result of the visit. The circuit court granted a temporary protective order on July 20. The Department also filed a motion to revise the visitation order, asking that the court suspend visitation between Chaida and Ms. B.

The circuit court held a hearing on the final protective order on August 15, 2012. Butler and Ms. B. both testified about the Burger King incident. Each presented a different account of the visit. According to Butler, the visit started out well but soon went downhill. Ms. B. asked Chaida when she was going to come home and what her plan was. Butler informed Ms. B. that given the court-ordered terms for visitation, these questions were inappropriate, and Ms. B. became agitated. Chaida then left the table and went to the restroom. Butler continued to tell Ms. B. that the conversation was inappropriate, and Ms. B. told her that she would talk to Chaida about whatever she wanted. Butler then informed Ms. B. that the visit was over and that she was going to get Chaida.

Butler testified that Ms. B. blocked her path to the restroom and refused to let her pass. When Butler tried to go around her, Ms. B. got in front of her and entered the restroom first, with Butler close behind. Ms. B. grabbed Chaida's arm and started yelling at her; Chaida started crying. Butler attempted to get Ms. B. to let Chaida go, and Butler and Ms. B. started grappling with each other. Butler kept saying that Ms. B. needed to let go of Chaida, while Ms. B. kept yelling that Butler was not going to take her daughter.

According to Butler, Ms. B. then seemed to calm down somewhat. She said that she wanted to show Chaida some Bible verses. She opened the baby-changing table in the restroom to use as a ledge for the Bible, opened her Bible, and asked Chaida to read some passages aloud. When Chaida read them quietly

to herself and declined to read them aloud, Ms. B. pushed Chaida's head towards the Bible. Butler then informed Ms. B. that she and Chaida were leaving, which caused Ms. B. to start screaming that Butler was not going to take her child. Butler then grabbed Chaida's arm, put herself between Ms. B. and Chaida, and pushed Chaida towards the restroom door. At some point, Butler felt something hit the back of her head; when she turned towards Ms. B., she saw Ms. B. raising her Bible at her. Butler eventually got Chaida to leave the bathroom and go to her car. Butler then followed Chaida outside, with Ms. B. close behind. After Butler and Chaida got in the car, Ms. B. approached the passenger side, continued yelling, and tried to give Chaida an index card with handwritten notes about Bible verses. Butler took the index card from Chaida and informed Ms. B. that she was not going to give Chaida the card. Butler and Chaida then left the Burger King parking lot. Ms. B. did not follow.

Ms. B.'s testimony corroborated some of Butler's version of events but varied greatly in her view of her demeanor and who was at fault for how the visit unraveled. She testified that Butler was aggressive towards her and refused to let her talk to her daughter the way that she wanted. Ms. B. also said that she never grabbed or struck Chaida and that Chaida was not upset at any point. Indeed, according to Ms. B., Chaida was interested in the Bible verses and wanted to stay with her at the Burger King.

Although Chaida did not testify, the Department submitted as evidence, without objection, a copy of a report from a child welfare investigator who had interviewed Chaida shortly after the Burger King incident. According to Chaida, Ms. B. asked her when she would be coming home and where she was living, and these questions made her feel uncomfortable. She said that she got up from the table and went to the restroom after Ms. B. and Butler started yelling at each other. Chaida said that Ms. B. and Butler followed her into the restroom and continued to yell at each other. Ms. B. then grabbed Chaida and made her read some Bible verses. Chaida said that she did not see Ms. B. strike Butler with the Bible, but she did hear a "whack" sound that was consistent with someone being struck. She said that by this point, she was crying and humiliated and wanted to leave the restaurant. She reported that Ms. B. followed her and Butler out to the car and threw an index card through the window of the car before Butler drove away.

The court summarized the evidence before it and found that the Department

> presented clear and convincing evidence, by virtue of Ms. Butler's testimony, and the investigation that was ordered by this Court, with the child also indicating that she watched her mother strike the social worker, attack is the word that Chaida used,[3] after this incident that I cannot imagine any scenario in which it would not have been humiliating to anybody, especially a 12-year-old child.
>
> And so the Court takes no pleasure in having to consider this request for a protective order. But under these circumstances, I find that there is clear and convincing evidence to warrant the issuance of this protective order. . . .
>
> . . . .
>
> And so I have no other recourse but to find that it is for the child's protection that this Court issue this protective order, and that the actions the mother engaged in on July 11th, 2012, with regard to the child, with regard to Ms. Butler, that that has already been dealt with by another Court. But specifically, with regard to the child being present, being subjected to questions about when she is coming home, when she has no control over that, and nor is it an appropriate question to be asking this 12-year-old, coupled with the mother's behavior in this restaurant, I find to be not in the child's best interest.
>
> . . . . And that there is clear and convincing evidence that the Court finds to believe that the respondent, Yoha. B. has committed the following acts of abuse. And I do also find that these acts of abuse include assault and false imprisonment, as well as placing the child in fear of imminent serious bodily harm.

The court issued a Final Protective Order for Chaida against Ms. B. on August 15, 2012, effective until August 15, 2013.[4] Ms. B. timely noted an appeal.

DISCUSSION

I. Standard of Review

A petitioner seeking a protective order bears the burden of demonstrating by clear and convincing evidence that abuse occurred. *Piper v. Layman,* 125 Md. App. 745, 754 (1999). Clear and convincing evidence can come from a single person, as it simply requires that "the witness to a fact must be found to be credible, and that the facts to which she has testified are distinctly remembered and the details thereof narrated exactly and in due order." *Cousar v. State,* 198 Md.

App. 486, 514 (2011) (Quotation omitted). When faced with conflicting evidence, a reviewing court "accept[s] the facts as found by the hearing court unless it is shown that its findings are clearly erroneous." *Piper,* 125 Md. App. at 754; *see also* Md. Rule 8-131(c). The appellate court considers the hearing court's "ultimate conclusion . . . by reviewing the law and applying it to the facts of the case." *Piper,* 125 Md. App. at 754.

II. Analysis

Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL"), § 4-506(c)(1)(ii) provides that a court may issue a protective order if it finds by "clear and convincing evidence that the alleged abuse has occurred." Abuse is defined 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, . . . [or] (v) false imprisonment," among other definitions. FL § 4-501(b)(1). In its oral ruling, the circuit court relied on three of these grounds: fear of imminent serious bodily harm, assault, and false imprisonment.

Ms. B. challenges the sufficiency of the evidence before the circuit court and the court's subsequent reliance on that evidence in issuing the protective order. She argues that although there was evidence that Ms. B. touched Chaida during the visit, "the evidence was not that the daughter regarded the touching as an impermissive touching." She also challenges the finding of false imprisonment by asserting that there was no evidence that Chaida wanted to leave the restroom at Burger King or that Ms. B. prevented her from leaving. Finally, she contends that there was no evidence that Chaida was in fear of imminent bodily harm when Ms. B. struck Butler with her Bible.

Although Ms. B. has accurately pinpointed certain inconsistencies and omissions in the evidence before the circuit court, she has not shown that the circuit court's decision was not based on clear and convincing evidence. Only the circuit judge is in the position "to determine the credibility of witnesses and come to his own conclusion about what and whom to believe and what he wanted to hear," *Ricker v. Ricker,* 114 Md. App. 583, 602 (1997). Thus, it was not error for the circuit judge to credit Butler's testimony over Ms. B.'s testimony.

Regarding the finding of assault, which is defined as "any attempt to apply the least force to the person of another," *Spencer v. State,* 422 Md. 422, 431 (2011) (quotation omitted), the circuit court heard testimony that Ms. B. grabbed Chaida by the arm, pushed her head toward her Bible, and attempted to reach past Butler to drag Chaida back into the restroom. There was likewise evidence of false imprisonment, which is the "deprivation of the liberty of another without his consent and without legal justification," *Montgomery Ward v. Wilson,* 339 Md. 701, 721 (1995) (Quotation omitted), as there was evidence that Ms. B. followed Chaida to the restroom, grabbed her by the arm and began shaking her, and refused to let go of her or let her leave the restroom.

Finally, there was sufficient evidence before the circuit court of fear of imminent serious bodily harm. The court heard that Ms. B. yelled at and grabbed Chaida, and hit Butler on the back of her head with her Bible. Chaida left the restroom in tears and was running away from Ms. B. None of these events occurred in a vacuum: Ms. B. has a history of abusing Chaida, and Chaida has been diagnosed with post-traumatic stress disorder. It was reasonable for the court to conclude that someone in Chaida's position would be in fear of imminent serious bodily harm when her mother yelled at her, grabbed her, and hit another person on the head. *See Katsenelenbogen v. Katsenelenbogen,* 365 Md. 122, 138 (2001) (inquiry into fear of imminent serious bodily harm is an individualized objective standard that "looks at the situation in the light of the circumstances as would be perceived by a reasonable person in the petitioner's position").

For all of these reasons we affirm the judgment of the circuit court.

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

FOOTNOTES

1. *See In re Chaida B.,* No. 133, Sept. Term 2012 (Md. Ct. Spec. App. Nov. 14, 2012) (affirming circuit court order setting visitation parameters); *In re Chaida B.,* No. 1456, September Term 2012 (Md. Ct. Spec. App. March 26, 2013) (affirming circuit court order suspending visitation).

2. The circuit court adopted terms for visitation based on the recommendations of Chaida's therapist:

> 1. Visits will take place as long as they are done in a productive comfortable setting for the Child,
> 2. If, *at any time,* the Mother engages in any conduct, including comments, expressions of opinions or any other actions that are not designed towards reconnecting, but rather to revisit past events;
> 3. The visit will end;
> 4. Shall be suspended until further court order.

(Punctuation and emphasis in original.) The court modified the visitation terms in October 2011 and added a fifth condition: "The Mother shall not be permitted to have any visits

with the Child outside the dictates of this provision. If such contact occurs, even inadvertently, the Department is to be notified immediately. If the Father is present, he is to notify the Department immediately."

3. The circuit court's description of Chaida's testimony appears to be inconsistent with the report of the child welfare investigator, which indicated that Chaida said she did not actually see Ms. B. attack Butler. However, because we conclude that there was sufficient evidence for the entry of the final protective order, as discussed *infra,* this apparent factual inconsistency does not negate the circuit court's reliance on the other available facts.

4. Although the protective order has expired, the case is not moot because Ms. B. has an interest in the collateral effects of the order that outlive the terms of the order itself. *See Piper v. Layman,* 125 Md. App. 745, 749-53 (1999). However, even if we were to reverse the entry of the protective order, which we do not, we note that Ms. B. is still not permitted to have any contact with Chaida, under the terms of a ruling in the related CINA proceedings.

Cite as 11 MFLM Supp. 47 (2013)

Child support: above-guidelines case: half-siblings' presence

Mary Staab
v.
Philip Stanley

No. 2624, September Term, 2011

Argued Before: Krauser, C. J., Graeff, Sharer, J. Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Sharer, J.

Filed: September 12, 2013. Unreported.

In an above-guidelines case, the court has wide latitude to determine the amount of child support and may use any method that promotes the guidelines' general objectives and considers the unique facts of each case. Although a downward departure based solely on the presence of half-siblings is not permitted, the court did not err or abuse its discretion in considering the presence of half-siblings as one factor affecting appellee's ability to pay.

Appellant, Mary Staab, appeals from an order of the Circuit Court for Anne Arundel County which *inter alia* directed appellee, Philip Stanley, to pay $2,120 in child support to appellant for their minor child, Catherine Staab.

Appellant presents two questions for our review:

1. Did the trial judge commit reversible error by departing from the extrapolated child support guideline amount of $4,620 per month by $2,500?
2. In the circumstances, did the trial judge abuse his discretion by awarding child support retroactive to July 1, 2011, rather than the filing date, March 4, 2011?

For the reasons set forth below, we affirm.

FACTS and PROCEDURAL HISTORY

Catherine Staab, born September 23, 1994, is the offspring of a relationship between appellant and appellee, though the two were never married. Catherine has always been in the care and custody of appellant. Beginning in 2008 and continuing into 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.

Catherine began to experience significant problems with truancy and mental health.[1] Dr. Scott Jakovics, a licensed clinical professional counsel, began treating Catherine in October 2009. He described, "[s]he was one of the top 10 kids that I had that fear about something bad happening to her, to her safety." Catherine was diagnosed as suffering from bi-polar disorder, alcohol abuse, cannabis dependancy, mathematics disorder, and oppositional defiant disorder.

In response to Catherine's problems, Jakovics referred her to a wilderness program which he believed would help her. Thus, Catherine was enrolled in the Aspiro Wilderness camp for 63 days in spring 2011 at a cost of $23,225. Following the conclusion of the wilderness camp, the staff there recommended that Catherine attend a therapeutic boarding school. Appellant enrolled her at Chrysalis therapeutic boarding school, which she still attends, in May 2011. Tuition at Chrysalis is $5,800 per month.

At trial, appellant was determined to have an income of $10,877 per month and appellee $12,211 per month. Appellee has four children in addition to Catherine, all with his wife.

On March 4, 2011, appellant filed a petition to establish paternity, and for related relief in the Circuit Court for Anne Arundel County. Catherine was 17 years old. The case was heard on December 9, 2011. After appellee was determined to be Catherine's father, the court addressed the matter of child support. Recognizing that this was an above-guidelines case, appellant argued that by extrapolating the guidelines to each of the parties income levels, she was entitled to $4,620 per month in child support. However, the court ordered appellee to pay $2,120 in child support and ordered the payment of that support to be retroactive to July 1, 2011. The court explained its reasoning:

> THE COURT: What I am going to do is I am going to accept your guidelines, child support guidelines sheet that you have offered into evidence. And I am going to reduce — I am going to deviate from the child support guidelines and I am going to reduce that amount by $2,500 which

> will bring a net obligation on his part of $4,620 less — I said 25, what did I say —
>
> [Appellant's Counsel]: That will make it $2,120.
>
> THE COURT: Yes, $2,120 and I am going to give my reasons. One, I know he has other children and that is one reason. He has four children he has to take care of. In addition to this child. The testimony is, it is very possible that he is going to have to go bankrupt if he is obligated to pay all of this money. Secondly, if he goes bankrupt, he probably will lose his security [clearance] and probably require him to lose his job. And if that is the case, all of you will suffer and thirdly, I think the parties should look for an alternative place for this child. This is not going to satisfy anybody. Both sides are I am sure, upset with my decision. But the fact is in this case, that somebody has to pay for this and Ms. Staab picked out this health place and she did it in the best interest of her child, she meant well. I can see she has had a battle on her hands with this child. She has tried to do the best she can.

Additional facts will be provided as they become relevant to our discussion.

DISCUSSION

I.

Appellant argues that the court erred in not ordering appellee to pay $4,620 in child support. Specifically, she argues that the court should have included extraordinary medical expenses in its calculation according to Family Law ("F.L.") § 12-204 and that an award of child support less than fifty percent of extrapolated guidelines was inequitable. Appellee argues that neither the method of calculation outlined in F.L. § 12-204, nor the extrapolated guidelines, control in this situation because this case was an above guideline case, and thus any award of child support is at the discretion of the court.

A trial court's determination of child support shall not be disturbed absent legal error or abuse of discretion. *Jackson v. Proctor,* 145 Md. App. 76, 90 (2002) (citation omitted). "Maryland's statutory child support scheme, codified at F.L. § 12–101 *et seq.,* is premised on an 'income shares' model that establishes child support obligations based on estimates of the percentage of income that parents in an intact household typically spend on their children." *Bare v. Bare,* 192 Md. App. 307, 310 (2010) (citation and internal quotation omitted). Section 12-204 of the Family Law article states, in relevant part:

> (a)(1) The basic child support obligation shall be determined in accordance with the schedule of basic child support obligations in subsection (e) of this section. The basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes.
>
> * * *
>
> (d) If the combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its discretion in setting the amount of child support.
>
> * * *
>
> (h)(2) Any extraordinary medical expenses incurred on behalf of a child shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted actual incomes.

The child support guidelines set forth in F.L. 12-204 generally apply, except when the parents' combined adjusted monthly income exceeds the statutory limit. *Richardson v. Boozer,* 209 Md. App. 1, 17-18 (2012). The court may exercise its discretion in setting the amount of child support in above guideline cases. *Id.* When the court exercises this discretion, it must balance the interests of the child against the parents' financial ability to meet their obligations. *Walker v. Grow,* 170 Md. App. 255, 267, *cert. denied,* 396 Md. 13 (2006) (citation omitted). Trial courts need not utilize strict extrapolation in order to determine child support in above guidelines cases; rather it may utilize any method which promotes the general objectives of the guidelines and considers the unique facts of each case. *Id.* at 290 (citation omitted). "Several factors are relevant in setting child support in an above Guidelines case. They include the parties' financial circumstances, the 'reasonable expenses of the child,' and the parties' 'station in life, their age and physical condition, and expenses in educating the child[ ].'" *Id.* at 266 (citation and internal quotation omitted). "Extraordinary medical expenses is statutorily defined to mean uninsured expenses over $100 for a single illness or condition. Such expenses include uninsured, reasonable, and necessary costs for orthodontia, dental treatment, asthma treatment, physical therapy, treatment for any chronic health problem, and professional counseling or psychiatric therapy for diagnosed mental disorders." *Bare,* 192 Md. App. at 312 (internal citations and quotations omitted).

We begin our analysis by noting that the trial court found appellant's monthly actual income to be $10,877 and appellee's monthly actual income to be $12,211, which combine to give the parents an actual monthly income of $23,088. That combined income places the parties well above the upper limit of $15,000 per month listed on the child support guidelines. F.L. § 12-204. As such, this is an above guidelines case, and the trial court was afforded discretion in its award of child support. *Richardson,* 209 Md. App. at 17-18. Here, the court analyzed the situation, balancing Catherine's needs and appellee's ability to meet those needs. As noted, the court asserted three reasons for its determination: 1) appellee has four additional children for whom he is financially responsible, 2) the court feared appellee would be bankrupt if required to pay at the amount appellant requested, 3) if appellee were to declare bankruptcy, he would lose his security clearance and potentially his job, thus producing a massively negative effect on all parties.

We find neither legal error nor abuse of discretion in the court's ruling. The court properly weighed Catherine's needs against appellee's ability to pay, taking several factors into account. A downward departure in child support awards **solely** on the basis of the presence of half-siblings in one parent's home is not permitted. *Beck v. Beck,* 165 Md. App. 445, 452 (2005). However, the court listed several factors, including potential bankruptcy and loss of income, in justifying its order. Thus, the chancellor did not rely only on appellee's child support burden involved with his current family. It is in the obvious best interests of all involved that appellee maintain his employment, and thus his ability to pay child support.

The court's order that the parties collaborate to find an alternative placement for Catherine, in addition to comments made during the hearing, indicates to us that the court believed the Chrysalis' expense of $5,800 per month was unsustainable. Thus, the court did not order appellee to contribute toward its payment, out of concern for catastrophic financial consequences. *Bare,* 192 Md. App. at 312 (holding that extraordinary medical expenses are defined as uninsured expenses over $100 for a single illness or condition and that these expenses include uninsured *reasonable* and necessary costs for counseling or psychiatric therapy for diagnosed mental disorders) (internal citations and quotations omitted, emphasis added). The court commented:

> But the fact is in this case, that somebody has to pay for this and Ms. Staab picked out this health place and she did it in the best interest of her child, she meant well. I can see she has had a battle on her hands with this child. She has tried to do the best she can. And in order to straighten that child out, she figured that this was the way to go. I think it would be — help both of them if they would look for some alternative place but in the meantime, I just don't think that the Colonel Stanley can handle all that is obligated on this — on the guidelines.

The court clearly implied, that the "extraordinary medical expenses" which appellant claims for Catherine's tuition at Chrysalis are unreasonable. Accordingly, the circuit court did not err in failing to include the cost of Chrysalis tuition as an extraordinary medical expense.

Moreover, "a judge is not bound by any rigid mathematical formula but may exercise discretion in determining the contribution that one parent may be ordered to pay toward a child's exceptional tuition expenses." *Dunlap v. Fiorenza,* 128 Md. App. 357, 372, *cert. denied,* 357 Md. 191 (1999) (citing *Witt v. Ristaino,* 118 Md. App. 155, 173 (1997)). On the record before us, we conclude that the court exercised its discretion in refusing to order appellee to pay educational expenses that it found to be unreasonable. Such discretion is permitted under *Dunlap*, *supra*.

II.

Appellant's second contention is that the court abused its discretion in not making its award of child support retroactive to March 4, 2011, the date the paternity action was filed. Specifically, appellant argues F.L. § 12-101(a)(1) controls, and required the court to award child support from the filing date. Appellee counters that this issue is properly analyzed under F.L. § 12-101(a)(3), and thus the court had discretion to determine the date of award.

Section 12-101 of the Family Law Article provides, in pertinent part:

> (a)(1) Unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading that requests child support *pendente lite,* the court shall award child support for a period from the filing of the pleading that requests child support.
>
> (2) Notwithstanding paragraph (1) of this subsection, unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading filed by a child support agency that requests child support, the court shall award child support for a period from the fil-

ing of the pleading that requests child support.

(3) For any other pleading that requests child support, the court may award child support for a period from the filing of the pleading that requests child support.

Appellant bases her argument on F.L. 12-101(a)(1), which makes specific reference to a request for child support *pendente lite.* In her reply brief, appellant urges us to overlook this requirement because there was no distinction between *pendente lite* and regular child support because this case was initially filed as a complaint for paternity.

However, F.L. 12-101(a)(3), covers "any other pleading that requests child support." While appellant is correct that she could not seek *pendente lite* support while filing a complaint for paternity, that fact is irrelevant to whether the court had discretion to make the child support award retroactive to July 1, 2011, and not the date the complaint was filed. By definition, a complaint for paternity is "any other pleading that requests child support" within the meaning of F.L. 12-101(a)(3), because it is neither a petition for *pendente lite* support nor a pleading filed by a child support agency. We look to the plain language of Section 12-101(a)(3) in our review, which plainly provides that the court may award child support from the date of filing. *See Caccamise v. Caccamise,* 130 Md. App. 505, 518, *cert. denied,* 359 Md. 29 (2000) (noting that retroactive support is allowed, but is not mandatory).

Accordingly, while the court below had the discretion to award child support from the date the complaint for paternity was filed, March 4, 2011, it did not abuse its discretion in awarding child support retroactive only to July 1, 2011.

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

FOOTNOTE

1. Catherine had begun smoking marijuana daily, abusing alcohol, sporadically using LSD, was defiant of her mother, and had severe difficulty controlling her anger. Catherine missed 28 days of school in 2008 and 36 days in 2009.

Cite as 11 MFLM Supp. 51 (2013)

Child support: above-guidelines case: extrapolation

Alaatum V. Nchami
v.
Prudence A. Mancho

No. 2112, September Term, 2012

Argued Before: Krauser, C.J., Salmon, James P. (Ret'd, Specially Assigned), Thieme, Raymond G. Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Krauser, C.J.

Filed: September 13, 2013. Unreported.

In an above-guidelines case, the court considered the parties' financial positions and did not err or abuse its discretion in using a computer program that extrapolated the support obligation based on the amounts set forth in the guidelines.

The Circuit Court for Prince George's County ordered Alaatum V. Nchami, appellant, to make monthly child support payments, in the amount of $1,939, to the mother of two of his children, Prudence A. Mancho, appellee. After the court denied both Mr. Nchami's motion for reconsideration of that order and his motion for a new trial, he noted this appeal, presenting four issues for our review, which are reducible to one: Did the court abuse its discretion when it ordered him to pay Ms. Mancho $1,939 in monthly child support? Finding no abuse of discretion, we affirm.

Factual and Procedural Background

The parties, who never married, are the parents of two minor children: Durell, who was born in February 2000, and Della, who was born in July 2006. Mr. Nchami is also the father of a seven-year-old daughter who lives in Texas and for whom he pays $500 in monthly child support, and a three-year-old son, with whom he resides, with his wife, in Upper Marlboro. Ms. Mancho resides in Silver Spring with her mother, the parties' two children, Durell and Della, and a fifteen-year-old daughter from another relationship.[1]

Pursuant to a court order entered in September 2001, Mr. Nchami began paying Ms. Mancho $525 monthly in child support for Durell. That order also awarded the parties joint legal custody of Durell and gave physical custody to Ms. Mancho, with alternating weekend visitation rights to Mr. Nchami. In 2006, after the birth of Della, Mr. Nchami voluntarily increased his monthly child support payment to $800 and, on occasion, gave Ms. Mancho an extra $100.

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In September 2011, Mr. Nchami filed a complaint with the circuit court seeking custody of Durell and Della or, alternatively, "liberal access" to the children. Ms. Mancho responded with a counter-complaint seeking custody of the children and child support. On June 12, 2012, the court entered a consent order that resolved the custody issues: the parties were to have joint legal custody of both children, Ms. Mancho was to retain primary physical custody of both children, and Mr. Nchami was to have visitation rights. But no agreement was reached as to child support.

On July 31, 2012, a hearing was held on the child support issue. The evidence established that Mr. Nchami had a monthly income of $10,703. Although there was some dispute about Ms. Mancho's income, the court ultimately calculated her income to be $9,280 per month.[2] Because the parties combined monthly income exceeded $15,000, this was an "above-guidelines" case.[3]

Ms. Mancho demanded an award of child support in an amount extrapolated from the child support guidelines set forth in Section 12-204(e) of the Family Law Article of the Maryland Code and that the child support award include funds for private school tuition. Opposing that demand, Mr. Nchami requested, instead, that the court award no more than the $800 to $900 per month in child support, the amount that he was then paying, but, if the court declined to do so, he asked for a "downward deviation" from the child support guidelines to reflect the fact that his monthly expenses exceeded his monthly income. As for private school tuition, Mr. Nchami pointed out that the parties had previously agreed that if Ms. Mancho chose to send the children to private school she would be solely responsible for their tuition.

The court took the matter under advisement in order to examine the parties' exhibits (including financial statements and tax returns) and, in the court's words, to "run numbers." On August 9, 2012, the court issued a decision. In its discussion of Ms. Mancho's

desire to re-enroll the children in private school, the court noted, among other things, that Ms. Mancho had "not proven that private school is in the best interest of the minor children" and further observed that "[b]oth parties' financial statements allege monthly expenses greater than monthly income." And the court further observed that the parties' had at one time agreed that Durell could attend private school as long as Ms. Mancho paid the tuition. Accordingly, the court concluded that "private school tuition will not be included in the child support calculations."

The court then calculated the custody award by extrapolating a figure from the child support guidelines: "The parties' combined adjusted actual income exceeds the highest level specified in the child support schedule and therefore the Court will use its discretion in using the formula in the SASI program to calculate child support."[4] The court ordered Mr. Nchami to pay Ms. Mancho $1,055 per month in child support,[5] rejecting claims by both for attorney's fees, stating: "On a monthly basis, the parties earn similar wages and are struggling to meet their existing financial obligations. Neither party is in the financial position to pay the other parties' attorney's fees."

Ms. Mancho filed a motion for reconsideration, asserting that the court had erred in calculating the child support award at $1,055 per month. She said that the court's worksheet indicated that it had assumed that the parties had shared physical custody of the children and that the children spent 128 overnights per year with Mr. Nchami. She pointed out that she had primary custody and, in accordance with the consent order, the children stayed overnight with Mr. Nchami no more 91 times per year.[6] Attached to her motion was a "correct support guideline" worksheet that she stated showed that Mr. Nchami should pay her $2,035 each month in child support.

On September 19, 2012, the court issued a revised decision, which, unlike its original decision, recognized that Mr. Nchami paid $500 per month in child support for his daughter residing in Texas and, therefore, the court deducted that amount from his monthly income. Then, using the formula in the SASI-Calc program, the court calculated the parents' basic child support obligation at $3,701 monthly and Mr. Nchami's proportionate share of that total at $1,939. Based on that new calculation, the court ordered him to pay Ms. Mancho $1,939 each month.

Mr. Nchami then filed a motion for new trial, or to alter or amend, requesting that the court reinstate the initial child support award of $1,055 per month as that amount, he claimed, "satisfie[d] the needs and expenses of the parties children." In that motion, Mr. Nchami further asserted that the monthly award of $1,939 "ignores the fact" that he "has an on-going legal obligation" to support his 3-year old child who resides with him; that his financial statement made clear that he was unable to pay Ms. Mancho more than $1,055 per month; and that the court's "utilization of the child support guideline . . . alone ignores" his expenses, as delineated in his financial statement.

Ms. Mancho opposed the motion, stating that, even though this is an above-guidelines case, "the use of a computer program to extrapolate what the guideline would be is routine" and, the $1,055 Mr. Nchami was willing to pay was significantly lower than what his support obligation would be "if this were a guideline case and he was making $75,000 a year instead of $125,000 a year." In other words, Mr. Nchami was seeking to pay significantly less than what he would have been required to pay if the parties' combined monthly income was at the top of the guidelines, namely, $15,000.[7]

The court denied Mr. Nchami's motion to alter the judgment or grant him a new trial, prompting this appeal.

DISCUSSION

"'[T]he parents of a child are his [or her] natural guardians and, quite apart from the moral obligations of parenthood, owe the child a legal, statutory obligation of support.'" *Reichart v. Hornbeck,* 210 Md. App. 282, 314 (2013) (quoting *Walker v. Grow,* 170 Md. App. 255, 265 (2006) (further citation omitted). Consistent with this tenet, Title 12 of the Family Law Article sets forth a comprehensive scheme regarding parental child support to ensure that child support awards reflect the actual cost of raising a child, improve the consistency and equity of child support awards, and facilitate the efficiency of court processes in adjudicating child support issues. *Voishan v. Palma,* 327 Md. 318, 322 (1992).

Section 12-204 of the Family Law Article provides, in part:

> (a)(1) The basic child support obligation shall be determined in accordance with the schedule of basic child support obligations in subsection (e) of this section. The basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes.
>
> * * *
>
> (d) If a combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its discretion in setting the amount of child support.

The schedule of basic child support obligation set forth in Section 12-204(e), commonly referred to as

"the guidelines," is based on a formula using the parents' monthly "combined adjusted actual income" and the number of children due support. Underlying the guidelines is the premise "that a child should receive the same proportion of parental income, and thereby enjoy the standard of living, [that] he or she would have experienced had the child's parents remained together." *Voishan*, 327 Md. at 322. "Accordingly, the model establishes child support obligations based on estimates of the percentage of income that parents in an intact household typically spend on their children." *Id.* at 322-23 (citation omitted).

The child support obligation usually begins with a calculation of the combined adjusted actual income of the parents. Then the court determines whether that figure falls within the range of incomes found in the Section 12-204(e) schedule. If it does, the court locates the corresponding "basic child support obligation" for the given number of children.[8] The court next divides the basic child support obligation between the parents in proportion to each of their adjusted actual incomes. *Id.* at 323 (explaining how a court calculates a support award based on the guidelines). "The amount of child support calculated in this manner is presumed to be correct, although this presumption may be rebutted by evidence that such amount would be unjust and inappropriate in a particular case." *Id.* at 323-24 (citing Family Law, § 12-202 (a) (2) (I) & (ii)).

Presently, the highest combined adjusted actual income reflected in the statutory schedule is $15,000. If the parent's combined adjusted monthly income exceeds $15,000 and thus is "above-guidelines," as here, the statute provides that "the court may use its discretion in setting the amount of child support." Family Law, § 12-204(d). In doing so, the court must bear in mind that "the rationale of the guidelines still applies." *Malin, supra,* 153 Md. App. at 410-411.

Thus, although the guidelines are not strictly applicable in an above-guidelines case, extrapolating from the guidelines is frequently employed as a guide in determining child support where the combined monthly income exceeds the guidelines. The Court of Appeals in *Voishan* elaborated: "Extrapolation from the schedule may act as a 'guide, but the judge may also exercise his or her own independent discretion in balancing 'the best interests and needs of the child with the parents' financial ability to meet those needs.'" 327 Md. at 329 (internal footnote omitted; quoting *Unkle v. Unkle,* 305 Md. 587, 597 (1986)).

The *Voishan* Court further stated that "the guidelines do establish a rebuttable presumption that the maximum support award under the schedule is the minimum which should be awarded in cases above the schedule." 327 Md. at 331-32. "Beyond this," the Court noted, "the trial judge should examine the needs of the child in light of the parents' resources and determine the amount of support necessary to ensure that the child's standard of living does not suffer because of the parents' separation." *Id.* at 332. The Court rejected the notion that "the legislature intended to cap the basic child support obligation at the upper limit of the schedule," as that would conflict with the statutory discretion given to the court to determine the appropriate child support award in an above-guidelines case. *Id.* at 325-26.

An award of child support in an above-guidelines case will not be disturbed on appeal absent a legal error or a "clear abuse of discretion." *Id.* at 331. In discussing the discretion given to the trial court in determining a child support award in an above-guidelines case, this Court has observed that "'[t]he legislative history and case law do not obscure the fact that the Legislature left the task of awards above the guidelines to the chancellor precisely because such awards def[y] any simple mathematical solution.'" *Chimes v. Michael,* 131 Md. App. 271, 289, *cert. denied,* 359 Md. 334 (2000) (citation omitted). Accordingly, when calculating a child support obligation in an above-guidelines case, "the court may employ any 'rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it.'" *Mailin, supra,* 153 Md. App. at 410 (quoting *Anderson v. Anderson,* 117 Md. App. 474, 478 n.1 (1997), *vacated on other grounds,* 349 Md. 294 (1998)).

Mr. Nchami contends that the court erred in setting his monthly child support obligation at $1,939 because, he claims, the court failed to "balance the best interests and needs of the child[ren] with the parties' financial ability to meet those needs." He asserts that the court's order "is silent with regard to the issues and factors that must be considered in this above-guideline child support case," including the "reasonable expenses" of the children and the "parties' financial circumstances." Rather, than consider "the relevant factors," the court, Mr. Nchami claims, "focused solely on the child support calculation and its extrapolation of the SASI calculation when determining the above-guideline support in this matter."

We are not persuaded that the court abused its discretion in awarding Ms. Mancho $1,939 in monthly child support, a figure extrapolated from the statutory child support schedule. In excluding private school tuition from its child support calculations, and in declining to award either party attorney's fees, the court noted that both parties "are struggling to meet their existing financial obligations." Thus, the record is clear that the court was well aware of their financial circumstances and obviously mindful of their adjusted combined monthly income of $19,483.

When determining basic child support, a trial court is not bound by the parents' estimates of the children's expenses; indeed, the guidelines were established, in part, because parents often underestimate the true cost of supporting a child. *Voishan, supra,* 327 Md. at 333 n.6. Thus, the model upon which the guidelines is based includes the amount a typical intact household with a specified income spends on children of that household. *Id.* at 322-23.

Here, having considered the parties financial circumstances, the court, in its words, chose "to use its discretion in using the formula in the SASI to calculate child support." We, therefore, are not convinced that the court mechanically extrapolated from the guidelines to arrive at the child support obligation in this case. Finding no clear abuse of discretion, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellee's 15-year old daughter also resides, at least part-time, with her father.

2. Appellant does not challenge that figure in this appeal.

3. Pursuant to Section 12-204 of the Family Law Article of the Maryland Code, the basic child support obligation shall be determined in accordance with a schedule based on the parents' combined monthly income. If the combined adjusted actual income of the parents is $15,000 or less, the court must calculate the amount of child support using the statutory child support guidelines set forth in Section 12-204(e). If the combined monthly income is greater than $15,000, the amount of child support is left to the courts discretion, but courts frequently use the statutory child support guidelines to extrapolate a figure which may "guide" the court in its determination. *Voishan v. Palma,* 327 Md. 318, 329 (1992).

4. SASI-Calc is a computer software program used to determine child support obligations based on the parents' combined monthly income model. The program is utilized when the parents' combined monthly income exceeds $15,000, which is currently the highest level specified in the schedule of basic child support obligations in Family Law, § 12-204(e). The program "extends" the figures in the statutory schedule to extrapolate what the guideline would be when the parents' combined monthly income is over $15,000. *See*, www.sasi-calc.com.

5. Although the order referenced an "attached worksheet," the worksheet utilized by the court in calculating the child support figure is not in the record before us. Ms. Mancho, however, included a copy of it in the appendix to her brief.

6. Family Law, § 12-204(m), provides a formula for calculating the child support obligation in cases of shared physical custody.

7. If the parties' adjusted combined income was at the top of the guidelines, namely $15,000, the basic child support obligation would have been $2,847 and Mr. Nchami's proportionate share $1,492.

8. The basic child support obligation set forth in the guidelines, however, may be adjusted to reflect certain expenses, not relevant here, such as child care expenses and extraordinary medical expenses. Family Law §12-204(g).

Cite as 11 MFLM Supp. 55 (2013)

CINA: suspension of visitation: sobriety

Mary Ann Duke
v.
Jarlath M. H. Ffrench-Mullen

No. 2502, September Term, 2012

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

Opinion by Berger, J.

Filed: September 13, 2013. Unreported.

In light the mother's documented long-term substance abuse problems and the lack of evidence to support her testimony that she had stopped drinking, the court did not abuse its discretion in suspending the mother's access to her child; nor was it impermissibly vague to structure the denial of access as a suspension, thereby allowing the mother to seek access in the future.

This case involves a dispute over access to a minor child between appellant, Mary Ann Duke ("Mother") and appellee, Jarlath M. H. Ffrench-Mullen [sic] ("Father"). The minor child was found to be a Child In Need of Assistance ("CINA")[1] in 2003 due to Mother's need for substance abuse treatment and her inability to properly care for the minor child. Father was granted full custody, with liberal visitation to Mother. Beginning in 2006, Mother was subject to various court orders providing for supervised visitation with the minor child. Thereafter, Father filed a motion in the Circuit Court for Montgomery County to indefinitely suspend visitation between Mother and the minor child, as well as a motion to relocate the minor child to Florida. The circuit court held a hearing, which commenced on May 24, 2011, and ultimately entered an order suspending Mother's visitation with the minor child. This order was based upon findings of fact that Mother had alcohol and drug problems, as well as behavioral and emotional issues which compromised the safety of the minor child during visits. This appeal followed.

Mother presents three questions for review on appeal, which we have rephrased as follows:

1. Whether the circuit court erred or abused its discretion by dismissing Mother's Exceptions without a hearing.
2. Whether the circuit court's findings of fact were clearly erroneous regarding Mother's sobriety, and whether the circuit court abused its discretion by suspending Mother's access to the minor child on this basis.
3. Whether the circuit court erred in dismissing Mother's motion for contempt without a hearing.

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.

For the reasons set forth below, we affirm the decision of the Circuit Court for Montgomery County.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother are the parents of Isabelle, who was born on August 14, 2002.[2] On November 25, 2003, Isabelle was found to be a CINA child.[3] The adjudication and disposition order stated that the reason for the finding that Isabelle was a CINA child was "the mother's need of substance abuse treatment" and her "inability to provide proper care and attention to the Respondent or her needs[.]" Isabelle was then placed in the care and custody of Father. On May 21, 2004, the juvenile court closed the case, reaffirming the order of custody to Father with "liberal visitation" to Mother.

On September 29, 2006, Father filed a complaint for visitation in the Montgomery County Circuit Court. After a two day trial on the matter of access, the trial judge issued a written order, which was entered on March 19, 2007. The order imposed certain conditions on Mother's visitation with Isabelle due to Mother's alcohol and prescription drug addictions. Mother was required to have her visits with Isabelle supervised by Mother's friends.

Mother filed a motion to modify legal custody on February 5, 2008. A hearing was held on June 16, 2008. The trial judge issued an order with the following findings of fact:

> Defendant presented testimony from the child's therapist, Miriam Bloom, M.D., a board certified psychiatrist. Dr. Bloom testified that, in her opinion,

> Plaintiff should not have visitation of any kind for at least several years because the child fears and dislikes her mother. Dr. Bloom acknowledged that it is unusual to recommend that a mother and her child have no contact, but believed it appropriate in this case because of Plaintiff's history of aberrant behavior in front of the child, including drinking, bizarre behavior, acts of violence, and threats of suicide.

Despite this recommendation, the trial judge was reluctant at that time to suspend all visitation. Accordingly, he ruled that:

> The Court is hesitant to deprive Plaintiff of all visitation with her child, believing that there is still an opportunity for mother and child to improve their relationship. Visitation, however, must occur in a supervised setting, such as the Family Crisis Center, and, if this is not possible, Plaintiff must find a suitable person or persons to supervise, who will be acceptable to Defendant.

Many different supervisors were enlisted, commencing from the date of the trial judge's order, but all supervisors eventually refused to continue their supervisory efforts. Mother continued to file subsequent requests for modification of custody and access. On September 30, 2009, Mother and Father executed an agreement regarding supervised visitation, which was incorporated into an order signed by the circuit court. At the end of October, 2010, the named supervisor at the time, April Tyson, refused to supervise any more visits. At a later hearing, she testified that the reason was because Mother came to the last visit smelling of alcohol. Ms. Tyson further testified that this was not the first time that Mother had done so. Accordingly, Ms. Tyson did not permit the last scheduled visit to occur "for the safety of the child." Ms. Tyson also characterized Mother as "uncontrollable" and said she frequently refused to follow rules for the visits. She cited Mother's tendency to get "loud and boisterous trying to make reason for her reason to drink[.]"

Thereafter, Father filed a "Motion to Indefinitely Suspend Visitation Between the Plaintiff and the Minor Child[.]" The motion, coupled with a motion to reduce child support, was set to be heard on May 24, 2011. In the interim, Mother filed a motion titled "Plaintiff's Emergency Motion to Revise Visitation Rights through the Appointment of Alternate Supervisor[.]" A hearing was set for Mother's motion, and the parties agreed to a consent order, which was entered on March 10, 2011. The consent order set forth the terms and conditions of future supervised visits, and designated Sergeant Oniel Ormsby, a Montgomery County Police Officer, as the supervisor for all of Mother's future visits with Isabelle. In turn, Father agreed to dismiss his motion to suspend visitation, and the hearing on Father's motion was removed from the court's calendar.

Father subsequently lost his job. He found new employment in Florida, and on June 3, 2011 filed a number of motions, including a "Notice of Intent to Relocate the Permanent Residence of the Defendant of the Minor Child Outside of Maryland" and a "Petition to Permit Relocation of a Minor Child from State of Maryland to State of Florida[.]" The court ordered that the matter be set for hearing on an expedited basis. A scheduling conference was held on June 30, 2011. The trial date was scheduled for September 14, 2011. Mother, through her then-counsel, filed a response to Father's petition. Shortly thereafter, Mother filed a motion to strike the appearance of her counsel, and filed an amended *pro se* response to Father's motion. She later filed a motion titled "Plaintiff's Counter Petition to Permit Relocation of Minor Child, Contact, Visitation, Et Al., and Second Amended Response to Petition to Permit Relocation of Minor Child Et Al." Father filed a response to Mother's motion.

The hearing commenced on September 14, 2011. Mother was at that time *pro se*. The hearing did not finish, and was continued until November 30, 2011. However, for various scheduling reasons attributable to requests of the parties and the court, the hearing was not reset until September 5, 2012.

On July 11, 2012, Father filed a motion to dismiss his request to transfer jurisdiction of the minor child to Florida because his contract for employment in Florida did not work out. However, Father remained in Florida, and the child remained in Florida with him, while he continued his job search there.

At the hearing on September 5, 2012, Sergeant Ormsby testified that he began supervising visits "sometime in either 2010 or early 2011." He testified that he supervised ". . . maybe in the neighborhood of a dozen or more or so [visits.]" Regarding his role in the visits, he testified that ". . . he had made it very clear to [Mother] that it's not my role to encourage or discourage the visitation. My role is only to make, be an observer and to make sure that [Mother] doesn't act in a way that's dangerous to Isabelle."

Sergeant Ormsby also testified about a particular visit that occurred in December 2011, when Father had returned to Maryland with Isabelle for vacation. A three-hour visit was arranged between Mother and Isabelle, to take place at the Montgomery Mall. Sergeant Ormsby testified that he remembered the

visit. He observed that "From the beginning of the visit, Isabelle wanted to leave." He further testified that "When Ms. Duke tried to walk next to her, Isabel [sic] refused to walk. She would stop and she would tell her mother to leave her alone, get away from her. Her mother tried to talk to her. She would say, 'I don't want to talk with you[.]'" Sergeant Ormsby, therefore, decided to terminate the visitation. He directed Mother to say goodbye to the child, but she refused. Mother then began to get very emotional and spoke unfavorably about Father, telling Isabelle that she didn't have to listen to her Father. Sergeant Ormsby testified that he then called Father and told Isabelle to go to the door of the mall to wait for her father to pick her up. Sergeant Ormsby instructed Mother to leave, but she refused to do so, and tried to follow Isabelle. Sergeant Ormsby described Isabelle as "noticeably shaken by the whole thing[.]" Sergeant Ormsby further testified that when he attempted to intercept Mother and redirect her, "[a]t this point she flares her hands back and slaps me in the chest and in the upper torso and in the face. And she says get your hands off me or what have you[.]" He went on to say, "I had absolutely no choice at this point. If I had done nothing, she would have gotten to Isabelle and I don't know what would have happened after that."

Tom Homvik, Mother's former husband, and father of Mother's other three children, also testified at the hearing. He described several incidents that illustrated Mother's continued problems with addictions and control of her emotions. In describing one such incident, he stated that, shortly after Mother had lunch with her son, the child returned to Mr. Homvik's home very upset. He explained:

> . . . and shortly after he came home, [Mother] showed up at our house uninvited and was standing on the back porch of our house, and screaming and yelling profanities at my current wife and my parents, who were currently visiting. It was very unpleasant for everyone that was there, including the children, who overheard all of this.

Mr. Homvik also testified regarding an incident that occurred on Father's Day in 2012:

> After we'd had breakfast my wife, Wendy, and I were sitting in our back room overlooking our back yard . . . And at approximately 11 o'clock [Mother] shows up, knocking on our back door and carrying a bag and demanding to speak to the kids. I told her that only one of the kids were home and she was in the shower, but I would be happy to take whatever she had in the bag for the children.
>
> This was not satisfactory to her. And she became belligerent. I closed the door, walked into the kitchen, and she opens the door and tries to gain access to our house. I turn around, go back to the door and tell her to back up and get out of the house. I close the door and then lock it.
>
> She then took a few steps down the stairs into our back yard. And, while standing there very loudly went on for about five to ten minutes, screaming and yelling profanities, again directed at me and my wife. And then she walked out into the alley where she was approved by the police offer that after a while, I believe about ten minutes, managed to calm her down and she left.

At the same hearing, Father testified that he was unwilling to provide Mother with his address or the name of Isabelle's school in Florida because of prior incidents when he alleged she was disruptive. Father further testified that he will not accept Mother's telephone calls because "they were abusive." When asked how they were abusive, he stated, "well, they're demanding. She's yelling and half the time I can't understand what she is saying." Father also testified that he refuses to accept emails from Mother, and is not willing to supervise any visit between Isabelle and Mother. When asked to explain, Father testified:

> Because there's been too many other incidents, not just with me, but with other people, where Dr. Duke has accused us of various matters, or she becomes abusive, like the incident with Ms. Tyson.

The law partner of Father's counsel testified to threatening, profanity-laced telephone calls made in rapid succession by Mother to their law office, which occurred immediately after Mother learned from the court that the hearing date originally rescheduled for May 21, 2012 had been rescheduled to September 5, 2012.

Mother testified at the hearing on September 5, 2012. When her counsel asked her, "What do you think the visitation should be?" she replied:

> I should get her, well I have filed for custody of her because I think because I think he [Father] is ruining her. Besides, what your question is as often as possible to get her away from him, as often as possible. And he

> should be required to move back to Maryland since he's now unemployed in Florida. And I should have regular visitation, unsupervised all the time. Every other weekend, during the week. I'm going for custody.

Regarding her alcohol use, Mother testified that, "I have not drank in quite some time." However, Mother could not be more precise about the duration of her claimed abstinence. Additionally, she refused to answer whether or not she had been drinking at the time of the September 14, 2011 hearing. During her redirect examination, Mother testified that she was not consuming alcohol at the present time, that she had never had any positive tests for alcohol in over five to six years, and that she had been involved in Alcoholics Anonymous off and on since 2003 or 2004, and that she had a sponsor who was present in the courtroom. No evidence was entered at the hearing reflecting the urine screening results and/or Alcoholics Anonymous participation.

At the conclusion of the hearing, the Best Interest Attorney for Isabelle stated:

> I don't think these visitations are in my client's best interest. My recommendation would be that they be suspended. If [Mother] can come back to this Court at some point and show that she has in fact cleaned up her act, we don't have any more of these incidents where she's involved in physical altercations, she's involved in shouting matches, she show [sic] or she shouldn't show up screaming at people having the police called on her, then maybe the Court can take another look at this.

On December 18, 2012, the domestic relations master put her oral recommendations on the record. After providing a review of the record of the case, and a description of the factual basis on which she based her decision, including her observations about the demeanor and credibility of the parties and witnesses presented, and of the exhibits admitted into evidence, the master concluded:

> For all of these reasons, I do not believe it is in Isabelle's best interest to be subjected to anymore scenes such as have been described in these hearings. I cannot conceive of any set of restrictions or conditions of supervision that will be adequate to protect her. For the last almost seven years, Isabelle has seen her mother irregularly and only in a shopping mall with a supervisor present and with increasingly restrictive conditions imposed by court order. Still, Isabelle has been subjected to conflict and has been made unhappy, fearful, and to use the plaintiff's words, horrified. I find it in her best interest that the plaintiff's access be suspended, and that is my recommendation.

The master also recommended that Father's motion to permit relocation be granted. As to the matter of Mother's motion for contempt, she stated:

> Although not before me, for reasons I already recited, as a housekeeping matter, I'm also recommending that the plaintiff's motion for contempt, which was pending, be dismissed . . . If exceptions are taken to these recommendations are sustained as to the access issue, then, certainly, the Court can reinstate the contempt petition at that time if it sees fit to do so. But, at this point there really wouldn't be much point to the contempt hearing unless and until exceptions are sustained to this.

Mother noted Exceptions to the recommendations on December 26, 2012.

On January 18, 2013, the circuit court entered an order affirming the recommendations of the domestic relations master. The circuit court also dismissed Mother's motion for contempt, and denied Mother's Exceptions for failure to comply with Maryland Rule 9-208(g). Mother timely noted an appeal of the order suspending visitation, denying Mother's exceptions, and dismissing Mother's motion for contempt.

STANDARD OF REVIEW

"In reviewing a decision regarding custody or visitation, we apply the procedure mandated in *Davis v. Davis,* 280 Md. 119, 125-26, *cert. denied,* 434 U.S. 939 (1977) *reh'g denied,* 434 U.S. 1025 (1978):

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. 9-131(c)] applies. If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required, unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be dis-

> turbed only if there has been a clear abuse of discretion.

North v. North, 102 Md. App. 1, 12-13 (1994).

"In addition, the Davis court recognized that appellate courts should not exercise 'their own 'sound judgment' in determining whether the conclusion of the chancellor was the best one.'" *Id.* at 13 (citing *Davis*, 280 Md. at 125). Rather, "it is within the sound discretion of the chancellor to award custody according to the exigencies of each case . . . " *Davis,* 280 Md. at 125. Further, "a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion." *Id.* "Such broad discretion is vested in the chancellor because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor. *Id.*

Moreover, we have previously observed that, "[w]e know of no decision by our Court of Appeals which suggests the clear and convincing standard is required to be utilized either in custody or adoption cases . . . . The traditional measure of persuasion in civil cases is by a preponderance of evidence." *Coffey v. Dept. of Social Services,* 41 Md. App. 340, 387 (1979).

DISCUSSION

A. Mother's Exceptions

First, Mother argues that she did not fail to comply with Md. Rule 9-208(g), and was entitled to a hearing on her Exceptions. Father contends that Mother was not entitled to a hearing because she failed to comply with Md. Rule 9-208(g). We agree with Father that Mother failed to comply with Md. Rule 9-208(g), and, therefore, the circuit court did not err or abuse its discretion in dismissing Mother's Exceptions and declining to hold a hearing.

i. Failure to Comply with Md. Rule 9-208(g)

The Maryland Rule governing Exceptions provides that:

> (g) **Requirements for Excepting Party.** At the time the exceptions are filed, the excepting party shall do one of the following: (1) order a transcript of so much of the testimony as is necessary to rule on the exceptions, make an agreement for payment to ensure preparation of the transcript, and file a certificate of compliance stating that the transcript has been ordered and the agreement has been made; (2) file a certification that no transcript is necessary to rule on the exceptions; (3) file an agreed statement of facts in lieu of the transcript; or (4) file an affidavit of indigency and motion requesting that the court accept an electronic recording of the proceedings as the transcript. Within ten days after the entry of an order denying a motion under subsection (g)(4) of this section, the excepting party shall comply with subsection (g)(1). The transcript shall be filed within 30 days after compliance with subsection (g)(1) or within such longer time, not exceeding 60 days after the exceptions are filed, as the master may allow. For good cause shown, the court may shorten or extend the time for the filing of the transcript. The excepting party shall serve a copy of the transcript on the other party. The court may dismiss the exceptions of a party who has not complied with this section.

Md. Rule 9-208(g).

Here, Mother filed "Exceptions to Report and Recommendations of Master" on December 26, 2012 with a certificate of service to Father. Mother claims that she complied with Md. Rule 9-208(g)(1) because a "transcript was not only timely ordered, but was filed with the Clerk of the Circuit Court for Montgomery County on January 14, 2013[.]"

Our analysis of Md. Rule 9-208 demonstrates that Mother was required to comply with one of the options set forth in Md. Rule 9-208(g) "*[a]t the time the exceptions are filed[.]*" (emphasis added). By electing to proceed under Md. Rule 9-208(g)(1), Mother was required not only to order a transcript when filing the exceptions, but also to "make an agreement for payment to ensure preparation of the transcript, and file a certificate of compliance stating that the transcript has been ordered and the agreement has been made[.]" The record is devoid of any evidence that Mother filed a certificate of compliance. Additionally, pursuant to Md. Rule 9-208(g), Mother was required to "serve a copy of the transcript on the other party." However, Mother did not serve a copy of the transcript on Father.[4] Md. Rule 9-208 expressly provides that "[t]he court may dismiss the exceptions of a party who has not complied with this section." Here, Mother did not fully comply with Md. Rule 9-208. Accordingly, we hold that the court did not err as a matter of law or abuse its discretion in dismissing Mother's Exceptions.

ii. Failure to Hold a Hearing on Exceptions

Next, Mother argues that, regardless of her compliance with Md. Rule 9-208(g), the circuit court was required to conduct a hearing on the Exceptions because she requested a hearing. The Rules contain the following provision concerning hearings on Exceptions:

> **(i) Hearing on Exceptions.**
>
> (1) Generally. The court may decide exceptions without a hearing, unless a request for a hearing is filed with the exceptions or by an opposing party within ten days after service of the exceptions. The exceptions shall be decided on the evidence presented to the master unless: (A) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the master, and (B) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the master to hear and consider the additional evidence or conduct a de novo hearing.

Md. Rule 9-208(i).

A careful review of Md. Rule 9-208(i) demonstrates that a hearing is required, if requested by a party, only when *deciding* exceptions. The Rule elaborates that such "deciding" of exceptions shall be based upon the "evidence presented to the master[.]" In short, Md. Rule 9-208(i) governs the manner in which the *merits* of Exceptions are decided. By contrast, Md. Rule 9-208(g) sets forth the procedural requirements for filing Exceptions, and provides that "[t]he court may dismiss the exceptions of a party who has not complied" with Md. Rule 9-208(g). In reading these provisions together, we conclude that Exceptions must be validly filed pursuant to Md. Rule 9-208(g) as a prerequisite to any entitlement to a merits hearing under Md. Rule 9-208(i). Here, the circuit court exercised its authority to dismiss Mother's exceptions for failure to comply with Md. Rule 9-208(g). It follows, therefore, that there were no Exceptions upon which any merits hearing could be conducted pursuant to Md. Rule 9-208(i). Accordingly, we hold that the circuit court did not err or abuse its discretion in declining to hold a hearing.

B. Trial Court Order Suspending Visitation

Next, Mother contends that the circuit court order should be vacated because it "suspended" Mother's access to the minor child, which is impermissibly vague. In the same vein, Mother argues that her visitation should not have been suspended because her alcohol problems have been rectified. In support, Mother cites her testimony at the hearing, during which she testified that she "is no longer drinking." Father posits that the circuit court order's use of the term "suspension" is appropriate, because it allows Mother the opportunity to seek visitation rights in the future. Additionally, Father argues that the circuit court reviewed an extensive history of the custody and access dispute between the parties, which included evidence of Mother's alcohol problems, as well as drug addiction and emotional issues. In Father's view, it was the circuit court's role to weigh the evidence and assess the credibility of the witnesses. Accordingly, Father urges, we should not disturb the circuit court's determination that it would be in the best interests of the minor child to suspend Mother's access. We agree with Father.

First, Mother argues that her visitation should not have been suspended because her alcohol problems have been rectified. Mother's sole support for this contention is the fact that Mother testified at the hearing that she "is no longer drinking." The circuit court reviewed the extensive history of the custody and access dispute between the parties involving Isabelle. The circuit court took judicial notice of the sequence of orders issued by various triers of fact in the Montgomery County Circuit Court. In the orders, all such triers of fact noted Mother's addiction issues. Each, in turn, ordered some form of treatment and monitoring to assure that Mother would not continue to abuse alcohol and/or prescription drugs. Each order also, in turn, attempted a slightly different form of visitation supervision. The circuit court recited these facts in the final order suspending Mother's access.

Additionally, on the first day of the hearing, Mother testified that she ". . . is simply a mother with an alcohol problem." Mother later testified that "I have not drank in quite some time." Mother further testified that she had never had any positive tests for alcohol in over five to six years, and that she had been involved in Alcoholics Anonymous off and on since 2003 or 2004, and that she had a sponsor who was present in the courtroom. The master, however, did not credit Mother's testimony and explained her rationale. First, the master noted that Mother's access to visits with her daughter since 2007 have been conditional on her providing evidence of regular urinalysis. The master then observed:

> The Plaintiff testified that she is sober and attends AA meetings regularly and has submitted to urinalysis for the last five years without ever testing positive for alcohol. She could not document that she, in fact, had submitted samples as ordered or attend-

> ed AA meetings as ordered. During the time she was supposed to be reporting for regular urinalysis, the plaintiff was arrested DWI.

Moreover, the evidence demonstrated that during the time that Mother was under court orders not to consume alcohol in order to have access to the minor child, Mother arrived at a supervised visit under the influence of alcohol. Mother was unable to remember when she took her last drink. When Mother was questioned at the hearing whether she had been drinking at the time of the first day of the hearing, she refused to answer, citing her continued probationary status and her Fifth Amendment right not to incriminate herself.

There was also ample evidence on the record that Mother was unable to control her behavior and emotions. This evidence included testimony from Mother's former husband, as well as Father's counsel's law partner, and Isabelle's Best Interest Attorney.[5] Some of the incidents occurred in front of Isabelle as well as Mother's other children. The circuit court master observed:

> I've had the opportunity to observe the plaintiff in the courtroom for two hearings, almost one year apart. I observed that her mood and demeanor were erratic, she was easily agitated, easily reduced to tears, and just as easily became angry. She seems unaware of the severity of her mood swings and unable to control her behavior.

Additionally, the master found that:

> Every designated supervisor eventually has refused to continue [Mother's supervised visits]: First, [Mother]'s friends, Pat and Susan Moran, then Family Trauma Services; then Ms. Tyson, then Sargeant [sic] Ormsby. The last two supervisors described the plaintiff's being unable or unwilling to comply with their directives, as attempting to have inappropriate adult conversations with Isabelle, and as prone to belligerent conduct and escalating hysteria when a visit wouldn't go the way she would like.

The master ultimately concluded that "[f]or all of these reasons [her findings of fact], I do not believe it is in Isabelle's best interest to be subjected to any more scenes as have been described in these hearings. I cannot conceive of any set of restrictions or conditions of supervision that will be adequate to protect her."

In reviewing the circuit court's findings of fact, we reiterate that the "clearly erroneous" standard applies. *See In re Shirley B., supra,* 419 Md. at 18. Here, there was extensive evidence over a period of many years that reflected Mother's alcohol problems, drug addiction, and behavioral issues. The only evidence to the contrary was Mother's testimony at the hearing that she was no longer drinking. As the circuit court readily observed, this testimony was not supported by any evidence. It was the circuit court's role to weigh the evidence and assess the credibility of the witnesses. We hold that the circuit court's findings of fact were not clearly erroneous.

Next, Mother takes issue with the circuit court's order providing that Mother's "access to [Isabelle] . . . hereby is *suspended*." (Emphasis added). Mother contends that "[t]he question the word 'suspended' leaves open is when and how the suspension can be lifted." Black's Law Dictionary defines the word "suspend" as follows: "To interrupt; to cease for a time; to postpone; to stay away or hinder; to discontinue temporarily, but with an expectation or purpose of resumption." Black's Law Dictionary 4th. Ed. (1968). Pursuant to *McReady v. McReady,* 323 Md. 476 (1991), custody orders — and, by implication, access orders — may be changed upon a sufficient showing of a "material change in circumstances which relates to the welfare fo the child." Thus, the order here may, in effect, be only a temporary discontinuance of access. Mother has the right to request a modification of this order at any time upon a material change in her circumstances.

We, therefore, hold that it was appropriate for the circuit court to structure Mother's denial of access as a "suspension," thereby allowing Mother the opportunity to seek access to the minor child in the future. Additionally, in light of the evidence of Mother's problems with not only alcohol, but also with drug addiction and behavioral issues, the circuit court did not abuse its discretion in determining that it would be in the best interests of the minor child to suspend Mother's access.

C. Motion for Contempt

Finally, Mother argues that the circuit court erred and abused its discretion in dismissing Mother's "Motion for Contempt of Court" filed on August 31, 2011. Mother contended in the motion that she had not received two visits in August 2011 and that she could not telephone the minor child. Father posits that this issue is moot. We agree with Father.

Mother filed her motion five days prior to the child access hearing scheduled to commence on September 14, 2011. The relief requested was a sanction of "granting the reasonable contact [with the minor child] in Plaintiff's First Amended Response of July 26, 2011." This contact desired by Mother included having Isabelle reside with her, alternative Christmas breaks and other holidays, and other visitation provisions to

be supervised by Mother's psychiatrist, with whom she was residing at the time of filing the motion.

At the conclusion of the child access hearing, the hearing master recommended that it was in the best interests of the minor child that all visitation be suspended. The master further recommended that Mother's motion for contempt be dismissed, explaining:

> . . . I'm also recommending that the plaintiff's motion for contempt, which was pending, be dismissed . . . If exceptions are taken to these recommendations are sustained as to the access issue, then, certainly, the Court can reinstate the contempt petition at that time if it sees fit to do so. But, at this point there really wouldn't be much point to the contempt hearing unless and until exceptions are sustained to this.

The recommendations were incorporated into an order entered on January 18, 2013.

Md. Rule 15-206(c) requires a pre-hearing conference, a hearing on the merits, or both, in a constructive civil contempt case. On the other hand, however, "[a] question is moot, if at the time before the Court there is no longer an existing controversy between the parties so there is no longer any effective remedy which the court can provide." *Thorne v. Thorne,* 70 Md. App. 77 (1987).

Here, there was no longer any effective remedy which the court could provide regarding Mother's contempt motion. Mother's requested remedy of access to the minor child is not a remedy that the court could provide in light of the order suspending all visitation between Mother and the minor child. Similarly, even if Father was found to be in contempt of a prior visitation order, it would be impossible for Father to purge the contempt since the present circuit court order suspends all visits between Mother and the minor child.[6] Accordingly, we hold that the circuit court did not abuse its discretion in dismissing Mother's contempt petition regarding visitation rights because the issue was moot.

For the foregoing reasons, we hold that the circuit court's findings of fact were not clearly erroneous. Additionally, we hold that the circuit court's suspension of Mother's access to the minor child, and dismissal of Mother's motion for contempt, did not constitute an abuse of discretion. Accordingly, we affirm the judgment of the Circuit Court for Montgomery County.

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

FOOTNOTES

1. Sections 3-801(f) and (g) of the Courts and Judicial Proceedings Article respectively define "Child in Need of Assistance" and "CINA":

> (a) In this subtitle the following words have the meanings indicated.
>
> * * *
>
> (f) "Child in Need of Assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.
>
> (g) "CINA" means a child in need of assistance.

Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (LexisNexis 2012) ("CJP"). *See In re: Adriana T.,* 208 Md. App. 545, 551 n. 6 (2012).

2. Father and Mother were never married to each other.

3. *See supra*, note 1.

4. On May 9, 2013, after the court dismissed Mother's exceptions and entered the final order, Mother's counsel sent a letter and a copy of the transcript to Father.

5. *See* Facts and Procedural Background, *supra*.

6. We also point out that the hearing master observed that if Exceptions were sustained after the hearing, such that the order to suspend visits was also modified in some way to permit visitation, the court would then consider the matter of the alleged contempt. In our view, unless and until that happens, we must abide by the principle that "appellate courts do not sit to give opinions on abstract or moot questions." *In re Sophie S.,* 167 Md. App. 91, 96 (2006).

Cite as 11 MFLM Supp. 63 (2013)

Adoption/guardianship: termination of parental rights: consent

In Re: Adoption/Guardianship of Landen W. and Hayden H.

No. 2736, September Term, 2012

Argued Before: Krauser, C.J., Kehoe, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: September 13, 2013. Unreported.

The mother's consent to termination of her parental rights was valid, pursuant to Fam. Law Art. §§5-320 and 5-321, based on the totality of the advice she was given and the terms she consented to in writing and on the record in court. While the statutes do not anticipate a hybrid approach to consent, neither do they prohibit it.

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, Tia W., the mother of Landen W. and Hayden H.C., appeals from a judgment of the Circuit Court for Anne Arundel County, sitting as a juvenile court, terminating her parental rights and granting guardianship of Landen and Hayden to the Anne Arundel County Department of Social Services ("DSS") with the right to consent to their adoption. Ms. W. presents one issue on appeal:

> Did the court err by terminating parental rights to the children, where the parent's conditional consent, pursuant to Md. Ann. Code, Family Law ("FL") § 5-321, was invalid?

Because we conclude that Ms. W.'s consent was valid, we will dismiss her appeal because she is not entitled to appeal from a judgment to which she consented. *See In re Nicole B.,* 410 Md. 33, 64 (2009).

BACKGROUND

Ms. W. is the mother of Hayden, born May 16, 2007, and Landen, born June 18, 2008. Hayden and Landen are half-brothers. Hayden's father is Kelly H. and Landen's is Dustin W. Neither Kelly H. nor Dustin W. is a party to this appeal. On June 3, 2010, the juvenile court declared Landen to be a Child in Need of Assistance ("CINA").[1] On June 6, 2011, the juvenile court declared Hayden to be a CINA.[2] After being declared CINA, the children were committed to the custody of DSS. DSS placed both children in the home of Ms. Melissa M. and Ms. Kaycee C., the children's prospective adoptive parents (the "Adoptive Parents"), in June, 2011. Hayden and Landen have lived with the Adoptive Parents since that time.

On April 23, 2012, DSS filed a petition for guardianship seeking to terminate Ms. W.'s and Dustin W.'s parental rights to Landen. The court issued a show cause order on April 30, 2012 and, the same day, issued an order appointing counsel to represent Landen in the proceeding.[3] On May 18, 2012, Landen, through his counsel, consented to the termination of Ms. W. and Dustin W.'s parental rights on condition that he be adopted by the Adoptive Parents. The same day, Ms. W. filed a written objection to the termination of her parental rights to Landen. On June 7, 2012, Dustin W. also filed a written objection to the termination of his parental rights.

On May 17, 2012, DSS filed a petition for guardianship seeking to terminate Ms. W.'s and Kelly W.'s parental rights to Hayden. The court issued a show cause order on May 23, 2012, and, the same day, issued an order appointing counsel to represent Hayden in the proceeding. On June 5, 2012, Ms. W., filed a written objection to the termination of her parental rights to Hayden. On June 19, 2012, Hayden, through his counsel, consented to the termination of Ms. W. and Kelly H.'s parental rights on condition that he be adopted by the Adoptive Parents. Kelly W. did not file an objection.

The juvenile court ordered that all parties to Landen's and Hayden's guardianship proceeding participate in mediation. Although the order directing mediation did not include the Adoptive Parents, they appear to have participated in the mediation process nonetheless. Kelly H. did not participate. A mediation session was conducted on or about August 9, 2012. A follow-up session was held on August 22, 2012, which was the date of the pre-trial conference. During the mediation process, the parties reached an agreement and then requested permission to appear before the circuit court in order to present their agreement on the record. The court granted the request and the hearing

was held the same day, namely August 22, 2012. During that hearing, the following took place:

At the beginning of the hearing, counsel for DSS, counsel for Landen and Hayden, counsel for Ms. W., and counsel for Dustin W. informed the court that the parties had resolved the matter by agreement and were in the process of signing written agreements to that effect. We first discuss the documents signed by Ms. W. and Dustin W.

First, Ms. W. signed written consents to the termination of her parental rights to Landen and Hayden, as well as the instruction sheets attached to the front of those consents. The instruction sheets included information about: (i) her right to be provided information and to consent in a language she understood; (ii) her right to speak to a lawyer; (iii) the option of a post-adoption agreement;[4] (iv) her consent options, namely either to consent outright to the children's adoption by any adoptive parent or to conditionally consent to their adoption by specific adoptive parents;[5] (v) the effect of her consent, namely that the result of signing the consent form is to relinquish all rights and responsibilities relating to the children; (vi) her right to revoke consent within 30 days of its filing with the court; (vii) her right to notice of future guardianship and adoption proceedings; and (viii) her right to prevent the disclosure of information about herself in birth and adoption records by filing a disclosure veto.[6]

By her signature on the instruction sheets, Ms. W. verified that she had read and understood the information contained therein. She then, in writing, conditionally consented to the termination of her parental rights to Hayden and Landen (formatting in original):

> I WANT TO COMPLETE THIS CONSENT FORM BECAUSE:
>
> X I already have spoken with a lawyer . . . . I have read the instruction in front of this form, and I am ready to consent to the guardianship with the right to consent to adoption.
>
> * * * *
>
> X I voluntarily and of my own free will consent to the ending (termination) of my parental rights and to the appointment of Anne Arundel County Department of Social Services to be the guardian of my child as long as my child is adopted by [the Adoptive Parents].

The written consent stated that Ms. W. would have the right to revoke this consent "**within 30 days after it is filed in Juvenile Court**" (bold in original) and that (formatting in original):

> **I UNDERSTAND THAT IF I SIGN THIS CONSENT FORM, AND GUARDIANSHIP IS GRANTED, I WILL BE GIVING UP ALL RIGHTS AND RESPONSIBILITIES RELATING TO THE CHILD, EXCEPT THOSE RIGHTS THAT I HAVE KEPT UNDER ANY WRITTEN POST-ADOPTION AGREEMENT.**

The written consent then stated: "I have read carefully and understand the instructions at the front of this consent form. I am signing this consent form voluntarily and of my own free will." Ms. W. signed the consent.

Next, Dustin W. consented in writing to the termination of his parental rights to Landen, on the condition that Landen was adopted by the Adoptive Parents. Dustin W. signed the written consent, as well as an instruction sheet attached to the front of the consent. These documents were identical to the those signed by Ms. W.

Finally, Ms. W. signed a post-adoption agreement with the Adoptive Parents which set forth the terms by which Ms. W. could contact and visit Hayden and Landen. This document committed the parties to what is sometimes referred to as an "open adoption." Specifically, Ms. W. and the Adoptive Parents agreed that, contingent upon Ms. W.'s conditional consent: (1) both Adoptive Parents and Ms. W. would maintain and provide each other with their respective valid telephone, email, and mailing addresses; (2) Ms. W. would have a minimum of four visits a year with the children, scheduled 21 days in advance and confirmed 24 hours in advance, which adoptive parents will encourage, but not compel, Landen and Hayden to attend; (3) Ms. W. would be able to contact the children in writing at any time and to send gifts to the children which the Adoptive Parents, in turn would share with and give to children; (4) the Adoptive Parents would provide Ms. W. with Landen's and Hayden's art and school work, photographs, and school progress information at least twice a year; and (5) the Adoptive Parents would contact Ms. W. if either Landen or Hayden has a major medical occurrence.

Dustin W. was not a party to the post-adoption agreement, but his consent to the termination of his parental rights was conditioned upon the post-adoption agreement between Ms. W. and the Adoptive Parents.

While Ms. W. and Dustin W. were in the process of signing these documents the court addressed a request by DSS that the court deem Kelly H. to have consented to the termination of his parental rights to Hayden because of his failure to file a timely objection. The court granted the motion. Additionally, while Ms. W. and Dustin W. were still signing the documents, counsel for DSS provided more information to the

court about the written agreements that, once signed, would be submitted to the court (emphasis added):

> [The Court]: [W]e are waiting to get the fully signed documents . . . .
>
> [Counsel for DSS]: Right. There will be one copy of each post-adoption contact agreement, one for each child with each parent[7] that would be filed in this termination of parental rights case . . . . And then we will also be filing the conditional consents today. *And it is my understanding that the parents will be waiving their 30 day[revocation right] today, and that we will be finalizing the hearing today.*

Directly thereafter, counsel for Ms. W. and counsel for Dustin W. requested the court voir dire Ms. W. and Dustin. W. (emphasis added):

> [Counsel for Ms. W.]: *Your Honor, [Ms. W.] - - - did not have a conversation about the waiving [of the 30 day revocation period]* and being what has happened this morning, *I am going to [request] the Judge to make that decision.* He can voir dire my client about that. . . . I will share with the Court, this morning we *spoke to another attorney, who my client has consulted to get a second opinion.* I - - - believe that any and all parents should have the right to get a second opinion as to the - - - agreement and as to their rights, and as to making a decision. So I am totally comfortable with my client having done that. *However, because I want to be sure that she fully understands and agrees, I am going to [request] Your Honor, instead of myself, voir dire her to make sure that there is* - -
>
> The Court: And the Court is happy to do that.
>
> [Counsel for Ms. W.]: - - there is no issue of coercion. That she was not forced or made to agree to this. *And so Your Honor can voir dire if she is in agreement of waiving the 30 days, but based on . . . what has occurred today, I am not - - I am not going to give a position as to whether or not my client will or will not waive the 30 days.*
>
> [Counsel for Dustin W.]: And Your Honor, I am in the same position. So I would ask the Court voir dire - - -
>
> The Court: Okay. So I am going to let the parents finish signing what they have to sign. And then as we are discussing, the Court will have a number of questions for [Ms. W. and Dustin W.] that we will go over and make sure you understand this.

The court did not begin the voir dire of Ms. W. and Dustin W. until they had finished signing the documents described earlier in this opinion. Because the court's voir dire is critical to this appeal, we set it out at length (emphasis added):

> The Court: [L]et me confirm, you both know why you are here, that this is a case that the Department of Social Services filed seeking guardianship, which would give them [ ] permission to allow for the adoption of Landen and Hayden by [the Adoptive Parents]?
>
> [Dustin W.]: Yes
>
> The Court: You both understand that?
>
> Ms. W.: Yes.
>
> The Court: And you both understand that if the Court approves that, and when the legal process is completed, that that would mean that [the Adoptive Parents] would become parents for the children, and that you would still have the rights of contact, which are agreed to, but basically would be their whole - - the *whole job would be theirs of acting as parents, and that would not be your responsibility or your right anymore except in terms of maintaining the personal contact in the agreement.* Do you each understand that?
>
> [Dustin W.]: Yes.
>
> Ms. W.: Yes.
>
> The Court: And let me confirm, you each were served with copies of the papers in this case. There was a show cause order and this petition from [DSS] asking permission for the Court to grant these orders. And you had a chance to go over them with your attorneys, and you initially filed objections. Is that correct, sir?
>
> [Dustin W.]: Yes.
>
> The Court: Ma'am?
>
> Ms. W.: Yes.
>
> The Court: And you each have had the assistance of an attorney, an in fact have attorneys sitting with you today. Sire, your attorney is, I think,

[Counsel for Dustin W.], sitting with you?

[Dustin W.]: Yes.

The Court: And ma'am, you attorney has been [Counsel for Ms. W.] sitting with you?

Ms. W.: Yes.

The Court: *[H]ave you had the opportunity to spend a good amount of time discussing the case with your attorneys to understand the legal process and what your rights are in connection with it?* Sir?

[Dustin W.]: Yes.

The Court: *Ma'am?*

Ms. W.: *Yes.*

The Court: And so the attorneys have been retained and would be ready to help you, representing you at trial, to ask questions and test all of the evidence that [DSS] or anyone else would offer in the case. They would also assist you in offering evidence on your side if you were continuing to object as to why the Court should perhaps not grant the termination of parental rights, should not grant the guardianship for the possible adoption, and should just keep things with your rights as they are. Do you each understand that is the attorneys' jobs and they are basically ready to do that, or when the trial date came? The trial date is actually a couple of weeks from now, but they would be ready to do that at that point. Do you each understand that?

[Dustin W.]: Yes.

Ms. W.: Yes.

The Court: And so by the Court reviewing this with you and confirming your consent, which I think is in written form now, and which we are doing orally, as we speak, that would mean that there would not be a trial. That basically you would just consent that it is okay for the Court to approve those orders and for [DSS] to go forward and permit the adoption. Do you understand that?

[Dustin W.]: Yes.

Ms. W.: Yes.

The Court: And do you understand that if there were a trial that it is a high standard that the Department would have to meet. The Court would have to go through a whole list of statutory factors and find did this apply, did that apply, did that apply?

And it would only be if they proved their case by what we call clear and convincing evidence, a pretty high standard, that the Court would be able to grant that guardianship and to terminate your parental rights in favor of the adoptive parents. Do you each understand that is a high standard that the Court applies? . . .

[Dustin W.]: Yes.

The Court: Ma'am?

Ms. W.: Yes.

The Court: *And today, has either of you had any medicine, drugs, alcohol, or do you have any mental problems understanding what is going on?* Sir, does that apply to you?

[Dustin W.]: No.

The Court: *And ma'am, does that apply to you?*

Ms. W.: *No.*

The Court: *And are you, today, able - - are you taking any medicine or anything else that would prevent you from thinking clearly and understanding what is going on?* Sir?

[Dustin W.]: No.

The Court: *Ma'am?*

Ms. W: *No.*

The Court: *And has either of you previously been a patient in a mental institution or under the care of psychologist or psychiatrist?* Sir?

[Dustin W.]: Excuse me?

The Court: Have you ever been a patient in a mental institution or under the care of a psychiatrist or a psychologist?

[Dustin W.]: Yes.

The Court: And in terms of whatever that was that you are in treatment for does that prevent you from understanding what is going on today?

[Dustin W.]: No.

The Court: *Ma'am, have you ever been treated as a patient for mental health as we discussed?*

Ms. W.: *Yes*.

The Court: *And does that condition prevent you from understanding what is going on today?*

Ms. W.: *No.*

The Court: Other than the things that we have been talking about that you are making this decision, considering your situation, the welfare of your children, considering the agreement that we are talking about would permit ongoing contact except for that, has anyone made any promises to you, or did anyone threaten you, or do anything else to try and force or coerce you to make this agreement today? Sir?

[Dustin W.]: No.

The Court: Ma'am?

Ms. W.: No.

The Court: *And do you understand that, again, if the Court does, after hearing your answers to all of these questions, approve the consent, that that could be irrevocable. In other words, you couldn't wake up tomorrow and change your mind. There would not be waiting 30 days if we approve the arrangements today.* Sir, is that your understanding?

[Dustin W.]: Yes.

The Court: *Ma'am?*

Ms. W.: *Yes.*

The Court: *And - -*

[Counsel for Ms. W.]: Y*our Honor, my client has a question about that, so I think you better go over the matter again.*

The Court: *Ma'am, do you have a question?*

Ms. W.: Yo*ur Honor, I was asking [my counsel] like you cannot change your mind. That's what you're saying?*

The Court: *Correct.* The idea of bringing everyone in court and asking you every possible question is so that you would not need to take more time to understand it, because we want to make sure you understand every single thing today.

Ms. W.: *Right. I understand.*

The Court: *And at this point do you have other questions for the Court or for your attorney about your rights or about what is going on today?*

[Dustin W.]: No.

The Court: *Ma'am, do you have any other questions?*

Ms. W.: *No.*

The Court: And you understand that with the Court approving it that the rights and any future contact that you have with the children would be what is contained in your agreement.

It would not, as to that also, be something that you could go back and change your mind on in the future. You would basically be accepting this agreement, and that agreement also would be something that you could not change unless the folks on the other side agreed to do something different as well. Sir, you had a question?

[Dustin W.]: They can't do something different as well, that's what you just said?

The Court: They could not - -

[Dustin W.]: They can't go less than what they have promised in the agreement. Correct?

The Court: Unless there was some future court action that found that it was harmful for the child. They couldn't unilaterally say, you know what, we changed our minds. They can't change their minds without a court order that would possibly permit that.

[Dustin W.]: Okay.

The Court: And ma'am, do you understand that as well?

Ms. W.: Yes.

The Court: And are there other questions that counsel want to ask or put on the record before the Court makes findings as to the voluntariness of their consent?

[Counsel for Dustin W.]: I don't have anything, Your Honor.

The Court: [Counsel for Ms. W.]?

[Counsel for Ms. W.]: *Okay. My client said she thinks she's good, Your Honor.*

Thereafter, the court concluded:

Okay. Then based on the consents that the Court has received in writing,

> as well as the consent that we have received orally, and the answers to these questions, I do find that the consents of both parents for Landen and of Ms. W. for Hayden are freely, voluntarily, and intelligently made. And the Court will accept that as a consent to the petition for guardianship.

Immediately after this, counsel for Ms. W. and DSS stated (emphasis added):

> [Counsel for Ms. W.]: Your, Honor, I would also just like to indicate to the Court that we [met] previously. *The parents were given copies of the disclosure veto, the proposed agreement, and the consent. And they were given the opportunity to review them.* As you know now, they went and spoke to another attorney. So there was opportunity, which is a rare occurrence in these cases that we actually allow the week break to allow the parties to think about and process this agreement. So I think that is also additionally part of the parents participating in this matter.
>
> The Court: Okay.
>
> [Counsel for Ms. W.]: And Your Honor, I want to make it clear that - - I know that everyone understands, but this is a conditional consent, and it is an agreement if . . . the [Adoptive Parents] adopt.
>
> [Counsel for DSS]: That is the Department's understanding as well. And if the condition fails, obviously we would go back to opening the termination of parental rights case.
>
> The Court: Okay.
>
> [Counsel for Ms. W.]: I just wanted to make sure that was clear as well that it is the father's position as well that it is conditional consent.
>
> [Counsel for DSS]: Absolutely.
>
> The Court: Very good . . . .

Later in the hearing, counsel for Ms. W. stated "Your Honor, I need to, on my client's behalf, withdraw her objection." Counsel for Dustin W. then also stated that she "on behalf of [Dustin W.], at this point . . . need[ed] to also withdraw his objection and enter a conditional consent." Thereafter, the court made best interest findings as required by FL § 5-317, *see In re Adoption/Guardianship No. T97036005*, 358 Md. 1, 6 (2000) ("When each parent affirmatively consents, or is deemed to have consented, FL § 5-317 provides that the court may grant the decree of guardianship only after any investigation and hearing the court considers necessary."), and Md. Code Ann., Cts & Jud. Proc. ("CJP") § 3-819.2(f)(1)(ii) (providing that before a court grants guardianship to a relative or non-relative, it shall consider "[a]ll factors necessary to determine the best interests of child").[8] The court then issued written orders terminating Ms. W.'s and Dustin W.'s parental rights to Landen; terminating Ms. W.'s and Kelly H.'s parental rights to Hayden; and granting guardianship of both children to DSS with the right to consent to their adoption.

On September 6, 2012, Ms. W. sent a letter to the juvenile clerk for the circuit court stating:

> Please be advised that I . . . do hereby immediately revoke/withdraw my previous consent of the adoption of Hayden [and] Landen . . . .
>
> Be further advised that it is my intent to regain the custody of my children as named above and [t]o continue with my parental rights as their Mother . . . .

On September 20, 2012, Ms. W., by counsel, appealed the court's order of guardianship. DSS filed a motion to strike the appeal, which the court initially granted. Ms. W. filed a motion for reconsideration stating that "due to her mental health concerns[, Ms. W.] did not fully understand the [consent] proceeding" on August 22, 2012. Ms. W.'s motion for reconsideration contained no further elaboration or documentation as to what these issues were. The court granted the motion for reconsideration and reinstated the appeal. As previously stated, neither Dustin W. nor Kelly H. are parties to this appeal.

STANDARD OF REVIEW

We will review the trial court's finding *de novo* because the issue before us pertains to whether Ms. W.'s consent complied with the applicable statutory requirements. *See In re Yve S.,* 373 Md. 551, 586 (2003).

DISCUSSION

We begin our discussion by examining the pertinent statutory authority. Section 5-301 *et seq.* of the Family Law Article ("FL") governs petitions for guardianship and the adoption of a minor child committed to a local DSS as CINA. One of the purposes of the subtitle, as identified in FL § 5-303(b), is to "protect parents from making hurried or ill-considered agreements to terminate parental rights." FL § 5-303(b)(4).

Sections 5-320 and 5-321 set out procedural safeguards aimed at achieving that purpose. Section 5-320(a)(1)(iii) states that, where parental consent is

required for a court to grant the guardianship of a child, a parent can either be deemed to have consented or affirmatively consent. A parent is deemed to have consented to the termination of his or her parental rights upon his or her "failure to file a timely notice of objection after being served with a show-cause order in accordance with [FL §5-301 *et seq*.]". A parent can affirmatively consent either:

> A. in writing; [or]
>
> B. knowingly and voluntarily, on the record before the juvenile court . . . .

Section 5-321 sets forth specific information which must be disclosed to a consenting parent and procedures which must be followed in order for a consent in writing or a consent on the record to be valid. Specifically, § 5-321(a) provides (emphasis added):

> (2) Consent to guardianship entered into before a judge on the record *shall include a waiver of a revocation period.*
>
> (3) Consent of a party to a guardianship is not valid unless:
>
> (i) the consent is given in a language that the party understands;
>
> * * * *
>
> (iii) the party has received written notice or on the record notice before a judge of:
>
> 1. the revocation provisions in subsections (a)(2) and (c)(1)[9] of this section;
> 2. the search rights of adoptees and parents under § 5-359 of this subtitle and the search rights of adoptees, parents, and siblings under Subsection 4B of this title; and
> 3. the right to file a disclosure veto under § 5-359 of this subtitle.
>
> (iv) if signed after counsel enters an appearance for a parent, the consent is accompanied by an affidavit of counsel stating that:
>
> 1. counsel reviewed the consent with the parent; and
> 2. the parent consents knowingly and voluntarily; and
>
> (v) the consent is accompanied by an affidavit of counsel appointed under § 5-307(a) of this subtitle stating that a parent who is a minor or has a disability consents knowingly and voluntarily.

Returning to the present appeal, as we see it, the dispositive issue in this case is whether Ms. W. received the information and protections required by FL § 5-321 during the August 22, 2012 hearing. To answer this question, we look to §§ 5-320 and 5-321 of the Family Law Article.

An issue of statutory construction may be resolved on the basis of judicial consideration of three general factors: 1) text; 2) purpose; and 3) consequences. As this Court articulated in *Town of Oxford v. Koste*, 204 Md. App. 578, 585-86 (2012) (internal citations omitted), *aff'd*, 431 Md. 14 (2013):

> Text is the plain language of the relevant provision, typically given its ordinary meaning, viewed in context, considered in light of the whole statute, and generally evaluated for ambiguity. Legislative purpose, either apparent from the text or gathered from external sources, often informs, if not controls, our reading of the statute. An examination of interpretive consequences, either as a comparison of the results of each proffered construction, or as a principle of avoidance of an absurd or unreasonable reading, grounds the court's interpretation in reality.

I. Text

From the plain language of FL §§ 5-320 & 5-321, it is clear that the General Assembly did not contemplate that a parent would use a method of consent combining written and on the record components. Importantly, though, the language of these provisions also does not explicitly prohibit a parent from employing such hybrid consent.

II. Purposes and Consequences

We next conclude that the process employed in this case fulfilled the purpose of §§ 5-320 and 5-321. As previously discussed, these sections aim to "protect parents from making hurried or ill-considered agreements to terminate parental rights." FL § 5-303(b)(4). The statutes achieve this purpose by setting forth requirements which must be met and which aim to ensure that a parent makes a knowing and voluntary decision as to whether to consent to the termination of his or her rights.

We conclude that, whether in writing or in the open proceeding before the court, Ms. W. received all the information required by FL § 5-321. Before the court's voir dire, Ms. W. received and signed the instruction sheets attached to the front of her written

consents for Hayden and Landen, which stated (formatting in original):

I. Access to Birth and Adoption Records

> When your child is at least 21 years old, your child, your child's other parent, or you may apply to the Maryland Secretary of the Department of Health and Mental Hygiene for access to certain birth and adoption records. If you do not want information about you to be disclosed (given) to that person, you have the right to prevent disclosure by filing a disclosure veto. Attached to this document is a copy of the form that you may use if you want to file a disclosure veto.

J. Adoption Search, Contact, and Reunion Services

> When your child is at least 21 years old, your child, your child's other parent or siblings, or you may apply to the Director of Social Services Administration of the Maryland Department of Human Resources for adoption search, contact, and reunion services.

Ms. W., after receiving advice of counsel, signed both instruction sheets, indicating by her signature that she had read and understood the information contained therein. The signed instruction sheets and consents were introduced as exhibits, such that the court knew that Ms. W. had notice, pursuant to FL § 5-321(a)(3)(iii), of the search rights of adoptees and parents under FL § 5-359, the search rights of adoptees, parents, and siblings under § 5-4B-01 *et seq.;* and her right to file a disclosure veto under FL § 5-359.

Ms. W. and the Adoptive Parents also entered into a post-adoption agreement, which was also before the court, wherein they specifically agreed that, in order to facilitate a positive relationship between Ms. W. and the Adoptive Parents, Ms. W. and the Adoptive Parents would provide each other with a valid address, telephone number, and email address to facilitate contact and would cooperate to facilitate at least four visits a year between Ms. W. and the children, among other things. Under these "open adoption" circumstances, where Ms. W. and the Adoptive Parents agreed to contact and visitation, Hayden and Landen would not need to search for Ms. W. and there would be, practically speaking, no reason Ms. W. would have filed a disclosure veto. And, the court knew that Ms. W. had made the decision to enter into an open adoption arrangement with the Adoptive Parents.

Finally, the court conducted an inquiry in order to determine whether or not Ms. W. knowingly and voluntarily consented to the termination of her parental rights and the guardianship. Ms. W.'s sworn responses to the court's questions confirmed that she understood the nature of the proceedings, that her parental rights would be terminated as a result of her consent, and that the post-adoption agreement would govern her post-adoption contact with Hayden and Landen. Ms. W. also testified that her decision making ability was not impaired by the effect of any medication, alcohol, other substances, or mental illness. She stated that her consent was not coerced and verified that she had had assistance of counsel to make her decision. Ms. W. also stated that she understood that, by consenting on the record, she waived her right of revocation, satisfying FL § 5-321(a)(2).

The third element of the *Koste* analysis, 204 Md. App. 585-86, requires us to consider the consequences of our proposed construction of FL §§ 5-320 and 5-321. We conclude that the purpose of these statutes would not be served by considering what Ms. W. consented to in writing in isolation from what Ms. W. consented to in open court. Both methods of consent, taken together, formed the whole of Ms. W.'s consent and it is that whole which should be considered. Looking at this whole, Ms. W. received the statutory notice and the benefit of the statutory procedures meant to ensure that her consent was knowing and voluntary. Pending instruction by the Court of Appeals as to this issue, we conclude that Ms. W.'s consent was valid pursuant to FL §§ 5-320 and 5-321.

As such, we conclude that Ms. W.'s consent was valid and, accordingly, dismiss her appeal. *See In re Nicole B.,* 410 Md. 33, 64 (2009) ("It is well settled in Maryland that the right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal") (quoting *Osztreicher v. Juanteguy,* 338 Md. 528, 534 (1995)) (internal quotation marks and citations omitted in *In re Nicole B.*)).

APPEAL DISMISSED.
APPELLANT TO PAY COSTS.

FOOTNOTES

1. Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-801(f) defines a CINA as follows:

> (f) "Child in need of assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a develop-

mental 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.

2. The court appointed counsel for Landen and Hayden during the CINA proceedings.

3. Section 5-307(b) of the Family Law Article provides:

> (b) *Child.* – (1) In accordance with paragraph (2) of this subsection, in a case under this subtitle, a juvenile court shall appoint an attorney to represent a child.
>
> (2) Unless a juvenile court finds that it is not in a child's best interests, the juvenile court:
>
> (i) if the attorney who currently represents the child in a pending CINA case or guardianship case is under contract with the Department to provide services under this subsection, shall appoint that attorney; and
>
> (ii) if the attorney who currently represents the child is not under contract with the Department, shall strike the appearance of that attorney,

4. Pursuant to FL § 5-308(a)(1), "[a] prospective adoptive parent and parent of a prospective adoptee . . . may enter into a written agreement to allow contact, after the adoption, between: (i) the parent . . . of the adoptee; and (ii) the adoptee or adoptive parent."

5. Section 5-320(b) provides that a parent may "condition consent or acquiescence on adoption into a specific family that a local department approves for the placement."

6. Sections 5-359 and 5-4B-01 *et seq.* deal with disclosure of information in the context of adoption. Section 5-359(d) provides:

> (d) *Applications for record.* – (1) An adoptee who is at least 21 years old may apply to the Secretary [of Health and Mental Hygiene] for a copy of:
>
> (i) the adoptee's original certificate of birth;
>
> (ii) all records that relate to the adoptee's new certificate of birth, if any; and
>
> (iii) the report of the adoptee's order of adoption filed by the clerk of the court under § 4-211 of the Health-General Article.
>
> (2) If an adoptee is at least 21 years old, a biological parent of the adoptee may apply to the Secretary for a copy of:
>
> (i) the adoptee's original certificate of birth;
>
> (ii) the new certificate of birth, if any, that was substituted, under § 4-211 of the Health-General Article, for the adoptee's original certificate of birth;
>
> (iii) all records that relate to the adoptee's new certificate of birth; and
>
> (iv) the report of the adoptee's order of adoption filed by the clerk of the court under § 4-211 of the Health-General Article.

Section 5-359(e) provides that:

> (e) *Disclosure veto.* – (1) A biological parent may:
>
> (i) file with the [State Director of Social Services ("Director")] a disclosure veto, to bar disclosure of information about that parent in a record accessible under this section;
>
> (ii) cancel a disclosure veto at any time; and
>
> (iii) refile a disclosure veto at any time.
>
> (2) An adoptee at least 21 years old may:
>
> (i) file with the Director a disclosure veto, to bar disclosure of information about the adoptee in a record accessible under this section;
>
> (ii) cancel a disclosure veto at any time; and
>
> (iii) refile a disclosure veto at any time.

Section 5-4B-01 *et seq.* also provide a means by which parties involved with an adoption may apply for information about other parties to the adoption. Section 5-4B-01(g) defines "search, contact, and reunion services" as services:

> (1) to locate adopted individuals, biological parents of adopted individuals, siblings of adopted individuals, and, as provided in § 5-4B-11 of this subtitle, relatives and members of the adoptive family;
>
> (2) to assess the mutual desire for communication or disclosure of information:
>
> (i) between adopted individuals and biological parents of adopted individuals;
>
> (ii) between adopted individuals and siblings of adopted individuals; and
>
> (iii) as provided in § 5-4B-11 of this subtitle, between:
>
> 1. adopted individuals and relatives; and
>
> 2. biological parents and members of the adoptive family;
>
> (3) to provide, or provide referral to, counseling for adopted individuals, biological parents of adopted individu-

als, siblings of adopted individuals, relatives, and members of the adoptive family; and

(4) if siblings of a minor in out-of-home placement were adopted through a local department, to contact the siblings to develop a placement resource or facilitate a family connection with the siblings of the minor.

Section 5-4B-02 provides in relevant part that:

(a) *Who may apply*. — (1) An adopted individual at least 21 years old may apply to the Director to receive search, contact, and reunion services.

(2) If an adopted individual is at least 21 years old, the following individuals may apply to the Director to receive search, contact, and reunion services:

(i) a biological parent of the adopted individual;

(ii) a sibling of the adopted individual; and

(iii) a director of a local department acting on behalf of a minor in out-of- home placement .

* * * *

(d) *Persons prohibited from applying for services.* — A parent who has had his or her parental rights terminated under Subtitle 3 of this title may not apply to receive search, contact, and reunion services under this subtitle.

A confidential intermediary will conduct the search, contact, and reunion services on the applicant's behalf. If found by the confidential intermediary, and still living, those persons whose information is sought by the applicant may then either consent or not consent to the disclosure of their specified information. *See* FL §§ 5-4B-07, 5-4B-08, and 5-4B-09.

7. As previously discussed, only Ms. W. signed a post-adoption agreement.

8. Because these findings are not at issue in the present appeal, we will not include discussion of them in this opinion.

9. Section 5-321(c)(1) provides:

(c) *Revocation period; waiver.* — (1) Subject to paragraph (2) of this subsection, a person may revoke consent to guardianship any time within the later of:

(i) 30 days after the person signs the consent; or

(ii) 30 days after the consent is filed as required under this section.

(2) Consent to guardianship under subsection (a)(2) of this section is irrevocable.

Cite as 11 MFLM Supp. 73 (2013)

Divorce: Pendente lite order: motion to vacate

Christopher Elliott

v.

Kena Raquel Custage Elliott

No. 1786, September Term, 2012

Argued Before: Meredith, Matricciani, Berger (Ret'd, Specially Assigned), JJ.

Opinion by Meredith, J.

Filed: September 18, 2013. Unreported.

While the husband conceded that he had filed exceptions to the master's report under the wrong case number, he was entitled to the hearing he requested on the exceptions under Rule 9-208(i), and the court's error in denying the hearing was not harmless because it deprived the husband of an opportunity to argue the merits of his exceptions.

On August 16, 2012, a family law master for the Circuit Court for Baltimore City mailed copies of a report and recommendations for a *pendente lite* order to counsel for the parties to this appeal — Christopher Elliott, "Husband" or appellant; and Kena Raquel Custage Elliott, "Wife" or appellee. Husband's counsel timely filed exceptions to the recommendations and requested a hearing, but counsel mistakenly captioned the exceptions with an incorrect case number. On September 11, 2012, the Circuit Court for Baltimore City, perceiving no exceptions filed in the current case, entered a *pendente lite* order adopting the master's recommendations. Husband filed a motion to vacate the *pendente lite* order, which the court subsequently denied. Husband then noted this appeal, challenging the court's denial of his motion to vacate.

QUESTION PRESENTED

Husband presents a single question for our review:

> Was the trial court's denial of the Appellant's Exceptions and Motion to Vacate the *pendente lite* Order Filed September 11, 2012, without holding any hearings before a judge, legally correct?

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.

In addition to defending as to the merits of Husband's appeal, Wife has moved to dismiss the appeal on various grounds. Wife argues that this Court should dismiss Husband's appeal due to: 1) Husband's failures to comply with the provisions of Rules 8-501, 8-503, and 8-504; 2) Husband's filing of an erroneous information report pursuant to Rule 8-205;

3) Husband's improper request for an expedited appeal under Rule 8-207; and 4) the lack of an appealable order.

For the reasons stated below, we deny Wife's motion to dismiss; we reverse the ruling which denied the motion to vacate the *pendente lite* order; we vacate the *pendente lite* order dated September 11, 2012, and remand the case for further proceedings.

FACTS AND PROCEDURAL HISTORY

Husband and Wife married in Baltimore, Maryland, on November 2, 2009. The couple had one child during the marriage — born in January 2011. One year after the child's birth, however, the couple separated, and Wife moved out of the marital home, relocating with the child to Boca Raton, Florida.

Shortly after separating, Husband and Wife filed complaints for absolute divorce (Case No. 24-D-12-000173). The parties disputed child visitation and child support. Additionally, Wife requested *pendente lite* and indefinite alimony. The matter proceeded to a *pendente lite* hearing before a master on July 23, 2012.

Both parties appeared with counsel at the hearing. The parties had reached an agreement as to *pendente lite* visitation, and the master heard testimony regarding the remaining *pendente lite* issues. On August 16, 2012, the master mailed copies of her findings of fact and recommendations to counsel for Husband and Wife.

Husband filed with the clerk of court exceptions to the master's recommendations and a request for a hearing pursuant to Rule 9-208(i)(1), but Husband's counsel mistakenly filed the exceptions and hearing request under a caption with an incorrect case number — Case No. 24-D-11-002010, which was a "previous divorce and custody case involving the same parties," according to Husband. Husband served a copy of his

exceptions and request for hearing upon Wife's counsel, and requested a transcript of the proceedings in preparation for the anticipated hearing before the circuit court.

On September 11, 2012, the court reviewed the file in chambers, and, seeing no exceptions in the case file with respect to the master's *pendente lite* recommendations in Case No. 24-D-12-000173, the court issued a *pendente lite* order which adopted the master's recommendations and ordered Husband to pay to Wife *pendente lite* alimony of $500 per month, $2,500 for alimony arrearages, *pendente lite* child support of $785 per month, and $3,925 for child support arrearages.

On September 20, 2012, Husband filed a motion to vacate the *pendente lite* order, contending that, pursuant to Rule 9-208(f)-(g), he is entitled to a circuit court judge's review of the master's recommendations, and asking the court to "[s]et a hearing date before a judge of the Circuit Court on the Exceptions attached hereto. . . ." Attached to the motion was a copy of the incorrectly-captioned exceptions, which reflected that they had been time- stamped by the clerk's office on August 27, 2012, at 3:51 p.m. Wife opposed this motion. By order dated October 31 (docketed on November 1), the court denied Husband's motion to vacate the *pendente lite* order. On November 12, 2012, Husband noted this appeal.

DISCUSSION

Husband contends that the court violated his due process rights in rendering a *pendente lite* order adopting the master's recommendations without first conducting a hearing as to his exceptions pursuant to Rule 9-208(i). He concedes that counsel provided the wrong case number when the exceptions were filed, but he argues that this Court "has explicitly and repeated[ly] rejected arguments that favor procedural technicalities over the merits of appellate review." Husband urges this Court to reverse the denial of his motion to vacate because, he contends, "uphold[ing] the trial court's decision[ ] . . . would completely disregard the Appellant's due process rights and prefer form over substance . . . ."

Wife's Motion to Dismiss

In addition to addressing the merits of Husband's appeal, Wife contends that we should dismiss this case on any one of several grounds. She argues that the order from which Husband appeals is not a final order, as defined by Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 12-301. She further asserts it is not an interlocutory order that is immediately appealable pursuant to CJP § 12-303. Furthermore, she notes that the court did not certify the October 31 order as a final order pursuant to Rule 2-602(b), and Husband did not argue for review under the collateral order doctrine. Additionally, Wife contends that we should dismiss Husband's appeal because Husband filed a "misleading" information report pursuant to Rule 8-205, improperly sought an expedited appeal under Rule 8-207, and failed to observe many of the requirements for appellate briefs and record extracts, found in Rules 8-501, 8-503, and 8-504.

Husband contends that the court's denial of his motion to vacate was an interlocutory order that is appealable under CJP § 12-303, and disputes that dismissal is justified by any shortcomings in the brief and record extract. We agree.

The Court of Appeals has noted: "'[A]ppellate jurisdiction is determined entirely by statute, and . . . therefore, a right of appeal must be legislatively granted.'" *Addison v. Lochearn Nursing Home, LLC,* 411 Md. 251, 262 (2009) (quoting Gruber v. Gruber, 369 Md. 540, 546 (2002)). Generally, subject to certain exceptions inapplicable in this case, CJP § 12-301 permits appeals only from final judgments. *See also Schuele v. Case Handyman & Remodeling Servs., LLC,* 412 Md. 555, 565 (2010) (quoting CJP § 12-301). The Court of Appeals has defined a final judgment as follows: "Generally, to constitute a final judgment, a trial court's ruling 'must either decide and conclude the rights of the parties involved or deny a party the means to prosecute or defend rights and interests in the subject matter of the proceeding.'" *Id.* (quoting *Nnoli v. Nnoli,* 389 Md. 315, 324 (2005)). Put another way, "'a final judgment, must, among other things, be an unqualified, final disposition of the matter in controversy.'" *Addison, supra,* 411 Md. at 262 (quoting *Gruber, supra,* 369 Md. at 546).

Husband is not appealing from a final judgment. The court's October 31 order merely denied his motion to vacate the *pendente lite* order. The October 31 order was not a final disposition of the case; the parties continued to litigate the divorce. Furthermore, the *pendente lite* order itself is not a final judgment. *See In re Katherine C.,* 390 Md. 554, 557 n.4 (2006); *Bussell v. Bussell,* 194 Md. App. 137, 147 (2010); *Guarino v. Guarino,* 112 Md. App. 1, 10 (1996) (noting that the purpose of *pendente lite* orders "'is to maintain the status quo of the parties pending the final resolution of the divorce proceedings'" (quoting *Speropulos v. Speropulos,* 97 Md. App. 613, 617 (1993))).

There are, however, exceptions to the finality requirement of CJP § 12-301, including certain appealable interlocutory orders as defined by CJP § 12-303. *See Kurstin v. Bromberg Rosenthal, LLP*, 191 Md. App. 124, 134 (2010), *aff'd*, 420 Md. 466 (2011). CJP § 12-303 permits appeals from interlocutory orders "***[f]or*** the sale, conveyance, or delivery of real or personal

property or ***the payment of money, or the refusal to rescind or discharge such an order*** . . . ." CJP § 12-303(3)(v) (emphasis added). Courts of this State have recognized that *pendente lite* orders may qualify as appealable interlocutory orders under CJP § 12-303 if they concern vacation of the marital home, alimony, child support, or child custody because they fit into the exception described in CJP § 12-303(3)(v). *See Bussell, supra,* 194 Md. App. at 147 (citing cases).

Husband did not note this appeal within 30 days after the entry of the court's September 11 *pendente lite* order. See Md. Rule 8-202 ("Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken."). The only judgment or order entered during the 30 days preceding Husband's filing of his notice of appeal was the court's October 31 order denying his motion to vacate. Nevertheless, that ruling is an appealable interlocutory order because CJP § 12-303(3)(v) permits interlocutory review of an order refusing to rescind or discharge an order compelling a party to pay money. Husband's motion to vacate, in essence, asked the court to rescind the court's *pendente lite* order. Accordingly, Husband has sought review of an appealable interlocutory order.

Wife asserted additional grounds for dismissal. Wife contends that Husband failed to comply with several requirements of Rules 8-501, 8-503, and 8-504, which address the preparation, format, style, and contents of appellate briefs and record extracts. Wife asserts that Husband failed to consult with Wife's counsel as to the contents of the record extract, failed to include material necessary to the appeal in the record extract, failed to properly bind the opening brief or include a back cover, and neglected to include an attorney's e-mail address on the front cover of the brief, among other asserted errors. This Court has the authority under Rule 8-602(a)(8) to dismiss an appeal for violations of this nature.

Furthermore, Wife alleges, Husband filed a "misleading" appellate information report — required by Rule 8-205 — and improperly sought an expedited appeal pursuant to Rule 8-207. Wife contends that Husband misled this Court when he indicated on the appellate information report that this case concerned a custody order and was appropriate for expedited appeal. Rule 8-602(a)(4) provides this Court with the power to dismiss the appeal for failing to comply with Rule 8-205.

Rule 8-205 requires appellants to file an information report with this Court in civil cases. Rule 8-207 provides for an expedited appeal process in cases concerning adoption, guardianship, termination of parental rights in a child, and children in need of assistance. Rule 8-207(a).[1] Husband indicated in the information report that an expedited appeal was appropriate in this case.[2] This Court ordered the appeal to proceed pursuant to Rule 8-207. It is not apparent that this ruling had any negative consequences for Wife.

Although courts of this State have frequently observed that the Rules "'are precise rubrics to be strictly followed . . . ,'" *Dove v. State,* 415 Md. 727, 742 (2010) (quoting *Noble v. State,* 293 Md. 549, 557 (1982)), this Court has also held: "'In the decisions of the Court of Appeals and of this Court . . . it is well *settled that the decision to grant or deny a motion to dismiss is discretionary with the appellate court.'" Joseph v. Bozzuto Mgmt. Co.,* 173 Md. App. 305, 348 (2007) (quoting *Kemp Pontiac-Cadillac, Inc. v. S & M Constr. Co., Inc.,* 33 Md. App. 516, 524 (1976)). Additionally, this Court has stated: "We recognize that dismissing an appeal on the basis of an appellant's violation of the rules of appellate procedure is considered a 'drastic corrective' measure." *Rollins v. Capital Plaza Assocs., L.P.,* 181 Md. App. 188, 202 (2008) (quoting *Brown v. Fraley,* 222 Md. 480, 483 (1960)). "[R]eaching a decision on the merits of a case 'is always a preferred alternative.'" *Id.* (quoting *Joseph, supra,* 173 Md. App. at 348). We "will not ordinarily dismiss an appeal 'in the absence of prejudice to appellee or a deliberate violation of the rule.'" *Id.* at 202-03 (quoting Joseph, supra, 173 Md. App. at 348).

In this case, even though Husband failed to comply with numerous provisions of the Rules, we will exercise our discretion and address the merits of the appeal. Wife did not demonstrate that she suffered any prejudice due to Husband's violations of the Rules. Additionally, Husband's counsel did not appear to deliberately violate the Rules, nor was Husband's brief and record extract so rife with errors as to render his appeal unintelligible. Accordingly, we deny the motion to dismiss.

Motion to Vacate *pendente lite* order

Turning now to the merits of the appeal, Husband contends that the circuit court should have vacated the *pendente lite* order because he had filed (although under an erroneous caption) exceptions to the master's recommendations and a request for a hearing pursuant to Rule 9-208. Husband asserts that permitting the court to issue an order without holding a hearing on his exceptions would violate his due process rights and elevate "form over substance." Husband avers that the court's refusal to vacate the *pendente lite* order permitted a master's recommendations to override the discretion of the court. *See* Appellant's Br. at 4 (citing *Ross v. Ross,* 327 Md. 101, 105 (1992)). Wife contends that Husband has not demonstrated that the circuit court abused its discretion in refusing to vacate the *pendente lite* order. Furthermore, Wife

points out that the court was unaware of Husband's exceptions due to his counsel's clerical mistake.

As noted above, we are not considering the merits of the court's September 11 *pendente lite* order in this appeal. Husband has not presented any argument as to the merits of the *pendente lite* order itself. Accordingly, Husband has waived any appellate argument as to the substance of the *pendente lite* order. *See Ochoa v. Dep't of Pub. Safety & Corr. Servs.,* 430 Md. 315, 328 (2013) ("We have held that 'arguments not presented in a brief or not presented with particularity will not be considered on appeal.'" (quoting *Klauenberg v. State,* 355 Md. 528, 552 (1999))). We express no opinion relative to the substance of the September 11 *pendente lite* order. But we nevertheless conclude that the circuit court erred in refusing to grant Husband's request for a hearing after the request was brought to the court's attention in the motion to vacate.

This Court generally reviews the denial of a motion to vacate under the abuse of discretion standard. *See Davis, supra,* 187 Md. App. at 124 (citing *Bland v. Hammond,* 177 Md. App. 340, 346-47 (2007); *Wells v. Wells,* 168 Md. App. 382, 394 (2006)); *Green v. Brooks,* 125 Md. App 349, 362 (1999) ("'Rather, the standard of review is whether the trial court abused its discretion in declining to revise the judgment.'" (quoting *Blitz v. Beth Isaac Adas Israel Congregation,* 115 Md. App. 460, 469 n.4 (1997), *rev'd on other grounds,* 352 Md. 31 (1998))). This Court has noted that "'an exercise of discretion based upon an error of law is an abuse of discretion,'" *Bass v. State,* 206 Md. App. 1, 11 (2012) (quoting *Brockington v. Grimstead,* 176 Md. App. 327, 359 (2007), *aff'd,* 417 Md. 332 (2010)), because "'the court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case.'" *Id.* (quoting *Arrington v. State,* 411 Md. 524, 552 (2009)). Stated differently, a court abuses its discretion when it fails to apply the correct legal rules and principles. *See Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.,* 418 Md. 231, 241-42 (2011).

Husband cites *Bond v. Slavin,* 157 Md. App. 340 (2004), for the proposition that the fact that counsel filed his exceptions under an incorrect case number should not have barred circuit court review of the underlying exceptions. In Bond, Mr. Bond was married to the former wife of Mr. Slavin. *Id.* at 346. Mrs. Bond and Mr. Slavin had been involved in several cases concerning their two minor children. *Id.* In a child custody action, Mr. Slavin requested Mr. Bond to turn over certain financial records. *Id.* at 346-47. Mr. Bond filed motions for a protective order and a restraining order, but his counsel filed them under a different case caption. *Id.* at 348 & n.7. Mr. Slavin opposed these motions and requested a hearing. *Id.* The court denied Mr. Bond's motions without a hearing. *Id.* at 348. On appeal, we vacated the court's judgment — citing Rule 2-311(f) — and remanded for a hearing. *Id.* at 354-55. We also noted: "We do not know why the circuit court denied these motions, but we refuse to infer that the circuit court would impose such an extreme sanction simply because the wrong case number appears on the motions." *Id.* at 355. "It is for the circuit court to (1) hold the hearing to which the parties are entitled, and (2) provide an explanation for its rulings so that any aggrieved party will have an opportunity for meaningful appellate review." *Id.*

More recently, in *Cave v. Elliott,* 190 Md. App. 65, 75 (2010), we reviewed the ramifications of an attorney filing a motion bearing the wrong case caption. We noted that the Maryland rules provide that "the 'date that a pleading or paper is "filed" is the date that the clerk received it. . . .'" *Id.* (quoting *Bond, supra,* 157 Md. App. at 351). We also noted that the Court of Appeals had observed that the Maryland rules do not include "'any requirement that the paper be properly captioned. . .'" in order for it to be deemed timely filed. Id. (quoting *Cherry v. Seymour Bros.,* 306 Md. 84, 92 (1986)). We observed that the motion had been hand-delivered to a clerk of the circuit court and time-stamped as having been timely received. *Id.* at 76. Accordingly, we concluded: "The fact that the caption of the motion incorrectly stated the name of the court *and the docket number* does not alter the effectiveness of its filing." *Id.* (emphasis added).

In this case, Husband timely filed exceptions to the master's recommendations and requested a hearing. Additionally, Husband sent a copy of his exceptions to Wife and ordered a transcript of the *pendente lite* hearing. Husband requested — both in the title of the exceptions document and in a separate "Request for Hearing" — a hearing on his exceptions to the master's recommendations, pursuant to Rule 9-208(i), which states, in pertinent part: "The court may decide exceptions without a hearing, ***unless a request for a hearing is filed with the exceptions*** or by an opposing party within ten days after service of the exceptions." (Emphasis added). In the motion to vacate the *pendente lite* order, Husband conceded that the exceptions had been filed under the wrong case number, but he nevertheless asked the court to "[s]et a hearing" on the exceptions that he had filed with the clerk on August 27, 2012. He was clearly entitled to such a hearing under Rule 9-208(i). As the Court of Appeals has stated, if a party timely notes exceptions to a master's recommendations, "the court must hold a hearing on them, if a hearing is requested." *O'Brien v. O'Brien*, 367 Md. 547, 555 (2002).

Once a party proves error on the part of the circuit court, then the party must also persuade us that

the error was not harmless in order to merit reversal.[3] The Court of Appeals has held: "'It has long been the policy in this State that this Court will not reverse a lower court judgment if the error is harmless.'" *Barksdale v. Wilkowsky,* 419 Md. 649, 657 (2011) (quoting *Flores v. Bell,* 398 Md. 27, 33 (2007)). The Court explained the rationale for harmless error analysis as follows: "The harmless error rule 'embodi[ies] the principle that courts should exercise judgment in preference to the automatic reversal for error and ignore errors that do not affect the essential fairness of the trial.'" *Id.* at 657-58 (quoting *Williams v. State,* 394 Md. 98, 120 (2006) (Raker, J., dissenting)). An error is not harmless if the complaining party suffered prejudice. *Id.* at 658.

There is no bright line test as to prejudice in cases where the circuit court failed and/or refused to hold a required, properly requested hearing. In *Adams v. Offender Aid & Restoration of Baltimore, Inc.,* 114 Md. App. 512, 516-17 (1997), this Court noted that the Rules Committee clearly intended that certain motions not be decided without a hearing if one had been requested. In *Adams,* the circuit court granted a motion to dismiss for improper venue without holding a required, requested hearing. *Id*. at 514. We reversed, finding that the appellant never had an opportunity to present arguments as to venue to the circuit court. *Id.* at 517-18 (distinguishing *Baker, Watts & Co. v. Miles & Stockbridge,* 95 Md. App. 145, 161 (1993), because the appellant in Baker had been subsequently given an opportunity to present arguments to the circuit court rebutting the motion for summary judgment). But, in *Worsham v. Ehrlich,* 181 Md. App. 711, 731-32 (2008), we held that, although the circuit court erred in failing to hold a properly requested hearing on a motion to dismiss, that error was harmless because the appellant "had a full and fair opportunity to present his arguments with respect to the law at [another motions hearing against other appellees]." *See also Green v. Taylor,* 142 Md. App. 44, 60 (2001) (finding failure to hold requested hearing was harmless error because granting of motion to amend was no more prejudicial to appellant than original order).

Having concluded that Husband was entitled to a hearing on his exceptions, we are satisfied that the error was not harmless because Husband was never provided an opportunity to argue the merits of his exceptions at a hearing as contemplated by Rule 9-208.

Accordingly, we reverse the order which denied the appellant's motion to vacate the *pendente lite* order of September 11, 2012, and we vacate the *pendente lite* order of September 11, 2012 (docketed September 12, 2012) to enable the circuit court to conduct a hearing on appellant's exceptions that were filed (under the incorrect case number) on August 27, 2012.

APPELLEE'S MOTION TO DISMISS IS DENIED. ORDER OF THE CIRCUIT COURT FOR BALTIMORE CITY DOCKETED NOVEMBER 1, 2012, IS REVERSED. THE CIRCUIT COURT'S *PENDENTE LITE* ORDER FILED SEPTEMBER 11, 2012, IS VACATED. THE CASE IS REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY APPELLEE.

FOONOTES

1. The parties may also jointly elect to pursue an expedited appeals process. Rule 8- 207(b). Neither Husband nor Wife asserts that this occurred in this case.

2. Wife filed a supplemental information report, permitted by Rule 8-205(d), disputing Husband's request for an expedited appeal.

3. We note that Wife did not argue in her brief that the error was harmless. She took another approach, contending that the circuit court had properly reviewed the master's report before issuing the *pendente lite* order.

NO TEXT

Cite as 11 MFLM Supp. 79 (2013)

Child support: motion to disestablish paternity: final judgment rule

David Marion Connors, III

v.

Kayla Marie Wilkinson

No. 0548, September Term, 2012

Argued Before: Zarnoch, Hotten, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Davis, J.

Filed: September 23, 2013. Unreported.

In an action for child support, neither the denial of a motion to disestablish paternity nor an order denying a motion to reconsider that denial is a final judgment or an appealable interlocutory order; therefore, the appeal is premature.

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.

David M. Conners, III, appellant, seeks to avoid a child support award, by challenging his previously admitted paternity of a child born to Kayla Marie Wilkinson. The Circuit Court for Carroll County denied Conners's "Motion to Disestablish Paternity and Request for Paternity Test," as well as Conners's motion to reconsider that decision. Conners noted this appeal, presenting the following issues for our review:

> 1. Whether an affidavit of paternity, made by an individual with a ninth grade education, is conclusive, or may be subsequently attacked for fraud and deception.
>
> 2. Whether the alleged [putative] father's affidavit, support[ed] by photographs placed by the biological mother on Facebook, indicating that another person is the child's father, is sufficient to make out a *prima facie* case of fraud.
>
> 3. Whether an alleged [putative] father, after demonstrating through a DNA test that he is probably not the father of an infant less than one year old with whom he never had any relationship, and in a detailed affidavit shows that he is the victim of fraud and overreaching, may obtain a court ordered DNA test and challenge paternity.

In response, Wilkinson moves to dismiss this appeal on the ground that neither the order denying Conners's "Motion to Disestablish Paternity" nor the order denying his motion to reconsider are appealable interlocutory orders. Alternatively, on the merits, Wilkinson contends that the court "appropriately exercise[d] its discretion in denying [Conners's] motion for reconsideration[.]"

Because we agree that Conners prematurely appealed non-final orders and then failed to note an appeal from the final judgment, we are constrained to dismiss this appeal.

FACTUAL BACKGROUND

Wilkinson gave birth to a daughter on May 30, 2011. The following day, Conners signed an affidavit admitting paternity of the child and acknowledging that the document "constitutes a legal finding of paternity."[1]

On September 29, 2011, Wilkinson filed a *pro se* complaint in which she named Conners as the father and requested a custody and visitation order. The Carroll County Bureau of Support Enforcement (the Bureau) subsequently filed the complaint in this action, seeking a child support order on behalf of the mother and child.

Conners filed an answer denying paternity. In support, he attached a copy of a DNA analysis report stating that the probability that he fathered Wilkinson's child is zero. The report, however, also states that "[t]he collection, transport, and testing of specimens for the purpose of generating data shown above were not performed in compliance with established chain of custody guidelines."

At a scheduling conference on December 20, 2011, counsel for Conners attempted to proffer a form signed by Conners in which he purports to rescind his affidavit of parentage. Because the document was not signed within sixty days of the original affidavit of parentage, the master determined that Conners had not validly revoked that affidavit. As a result, the master did not recommend a paternity test. The circuit court adopted that recommendation and denied

Conners's motion to dismiss the child support complaint.

Conners thereafter filed a "Motion to Disestablish Paternity and Request for Paternity Test," averring that Wilkinson had fraudulently procured his signature on the paternity affidavit. The Bureau opposed the motion, citing Conners's failure to timely rescind the parentage affidavit and the unreliability of the proffered DNA test results.

The circuit court denied Conners's motion on February 22, 2012. Conners timely moved for reconsideration, presenting a new affidavit in which he claimed, *inter alia,* that, during her pregnancy, Wilkinson received messages from other men asking whether they were the father and that she also posted photos on social media identifying another man as the child's father. After considering the Bureau's opposition, the court denied Conners's motion on April 27, 2012. On May 17, 2012, Conners noted this appeal.

On December 18, 2012, after further proceedings, the circuit court ordered Conners to pay child support in the amount of $409.42 per month. Conners did not note an appeal from that order.

DISCUSSION

"Whether a matter is appealable is a jurisdictional matter[.]" *Gruber v. Gruber,* 369 Md. 540, 546 (2002). "In Maryland, the right to seek appellate review is statutory; the Legislature can provide for, or preclude, the right of appeal." *Fuller v. State,* 397 Md. 372, 382 (2007). The legislature has expressly authorized by statute appeals from final judgments and certain interlocutory rulings. *See* Md. Code, § 12-301 of the Courts & Judicial Proceedings Article ("CJP") ("Except as provided in § 12-302 of this subtitle, a party may appeal from a final judgment in a civil or criminal case by a circuit court."); CJP § 12-302(b) ("Section 12-301 . . . does not apply to appeals in contempt cases"); CJP § 12-302(c) (permitting appeals by the State from specified interlocutory rulings). "[T]he underlying policy of the final judgment rule is to avoid piecemeal appeals." *Gruber,* 369 Md. at 546.

In addition to authorizing appeals from final judgments, the legislature has permitted appellate review of certain other non-final orders, including orders certified as final judgments with respect to fewer than all claims or parties under Md. Rule 2-602(b), orders from which an appellate court has granted leave to appeal and rulings that qualify for appellate review under the common law collateral order doctrine. *See Shoemaker v. Smith,* 353 Md. 143, 165 (1999).

Wilkinson urges this Court to dismiss Conners's appeal from the order denying his motion to reconsider on the ground that it is neither a final judgment nor an appealable interlocutory order. In support, she argues that neither of those rulings adjudicated "all of the claims, rights, and liabilities of the parties at issue in this case" and that the final appealable judgment was the subsequent child support order.

We agree that neither the order denying Conners's motion to disestablish paternity nor the order denying his motion to reconsider are appealable as final judgments. A "final judgment" is "a judgment, decree, sentence, order, determination, decision, or other action by a court . . . from which an appeal, application for leave to appeal, or petition for certiorari may be taken." CJP § 12-101(f). To be final, a judgment must have (1) been "intended by the trial court as an unqualified and final disposition of the matter in controversy," (2) adjudicated all claims against all parties, and (3) recorded by the court clerk. *B & P Enters. v. Overland Equip. Co.,* 133 Md. App. 583, 623 (2000).

Here, none of these finality requirements was satisfied. In an action for child support, the final judgment is the child support award and order to pay. *See, e.g., Haught v. Grieashamer,* 64 Md. App. 605, 611 (1985) ("An order establishing child support, or determining any other matter over which a continuing jurisdiction exists, if possessing all other required attributes of finality, is a judgment"). The orders denying Wilkinson's motions were interlocutory orders, rather than final judgments, because the court did not intend either one to be a final disposition of this child support matter, as established by the fact that the court did not enter the child support award until months later.

Furthermore, neither of the orders denying Conners's paternity-related motions was certified for appellate review under Md. Rule 5-602. Nor has this Court granted leave to appeal those orders. And they are not appealable under any other statute or rule. Thus, as Conners acknowledges, his appeal may proceed only under the collateral order doctrine, a common law principle that "treats as final and appealable a limited class of orders which do not terminate the litigation in the trial court," *Pub. Serv. Comm'n v. Patuxent Valley Conservation League,* 300 Md. 200, 206 (1984), but otherwise "conclusively determine the disputed question; resolve an important issue; [are] completely separate from the merits of the action; and [are] effectively unreviewable on appeal from a final judgment." *Jackson v. State,* 358 Md. 259, 266-67 (2000). Because this is "a very limited exception to the principle that only final judgments terminating the case in the trial court are appealable," *In re Foley,* 373 Md. 627, 633 (2003), "[a]ll four requirements 'are very strictly applied and appeals under the doctrine may be entertained only in extraordinary circumstances.'" *Jackson*, 358 Md. at 503 (citations omitted). *See also In re Franklin P.,* 366 Md. 306, 327 (2001) (recognizing

that these four elements are "conjunctive in nature" so that "each of the four elements must be met").

Conners contends that the orders denying his paternity motions satisfy all four elements of the collateral order doctrine. First, he points out that the orders conclusively determined the disputed question of whether appellant was the biological father of the child and, thus, whether he had a statutory duty to support the child. Second, he maintains that, because the orders effectively determined paternity by denying his request for genetic testing, they resolved an important issue. Third, Conners asserts that his paternity-related motions were severable from the merits of the underlying child support action because paternity could easily be determined separately from the child support obligation. Finally, he maintains that the paternity orders were effectively unreviewable on appeal from a final judgment and had an actual effect on the outcome of the child support case because they denied him the opportunity to prove that he was not the child's father and, therefore, could not be ordered to pay child support.

Wilkinson argues that the orders denying Conners's paternity-related motions do not fall within the collateral order doctrine because "[t]he issue of paternity is not collateral to the principle issue of child support," given that "the issue as to Mr. Conners's paternity is directly related to the merits of the action – if he is not [the child's] father, he will not be subject to the court's child support order." We agree that the orders denying Wilkinson's requests to disestablish paternity do not meet the requirement that they must be "completely 'separable from' and 'collateral to' the merits of the action." *Harris v. State,* 420 Md. 300, 318 (2011). To be reviewable under the collateral order doctrine, an order may not resolve an issue that is "critical to the ultimate determination" of the underlying action. *Hudson v. Hous. Auth. of Baltimore City,* 402 Md. 18, 26 (2007). Rather, the order must involve a "situation far removed from the facts of the instant case." *In re Foley,* 373 Md. 627, 636 (2003).

The question raised by Conners's motions, *i.e.,* whether he is the child's father, is neither "collateral" nor "far removed from the facts" of this child support action. To the contrary, a paternity finding is a necessary foundation for any award of child support because "the legal obligation to support children arises out of parenthood." *Bledsoe v. Bledsoe,* 294 Md. 183, 193 (1982). *See generally* Md. Code, § 5-203(b) of the Family Law Article ("The parents of a minor child . . . are jointly and severally responsible for the child's support, care, nurture, welfare, and education."); *Lacy v. Arvin,* 140 Md. App. 412, 422 (2001) ("The parents of a child are his natural guardians and, quite apart from the moral obligations of parenthood, owe the child a legal, statutory obligation of support."). Indeed, paternity is critical to the ultimate determination of child support because "[i]n the absence of 'parenthood' status, the duty that is normally cast upon parents, *e.g.* the duty of child support, can no longer exist." *Walter v. Gunter,* 367 Md. 386, 396, 403 (2002) ("dependent paternity orders are invalid once the paternity declaration is vacated").

Moreover, Conners cannot satisfy the fourth requirement that the contested ruling must be effectively unreviewable on appeal from a final judgment. The Court of Appeals has cautioned that this "fourth prong, unreviewability on appeal, 'is not satisfied except in 'extraordinary situations.'" *Nnoli v. Nnoli,* 389 Md. 315, 329 (2005). When the contested interlocutory ruling can be challenged in the course of an appeal from a final judgment, the interlocutory ruling is not reviewable under the collateral order doctrine. *See, e.g., id.* ("The mere fact that an order denies a claim of a right to participate in some aspects of the legal proceedings . . . does not mean the order presents an extraordinary situation"). Here, the denial of Conners's motions challenging his paternity did not present an extraordinary situation warranting an immediate interlocutory appeal, because such orders easily could have been reviewed in the course of a properly noted appeal challenging the final child support award.

Accordingly, we conclude that this appeal was premature because neither the denial of Conners's motion to disestablish paternity nor the denial of his motion to reconsider that ruling were appealable as either a final judgment or an appealable interlocutory order. Although Conners could have obtained appellate review of those orders by simply noting an appeal from the final judgment adjudicating his child support obligation, he failed to do so.

This Court cannot remedy that omission. In these circumstances, we do not have discretion to treat Conners's premature notice of appeal as having been filed after the entry of final judgment. Specifically, the "savings" rule that allows an appellate court to treat a prematurely filed notice of appeal as having been filed after entry of final judgment does not apply when, as in this case, the notice of appeal was taken from an order that was not intended to finally dispose of all claims. *See generally* Md. Rule 8-602(d) ("A notice of appeal filed after the announcement or signing by the trial court of a ruling, decision, order or judgment but before entry of the ruling, decision, order or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket."); Md. Rule 8-602(e) (similarly permitting retroactive entry of judgment on the basis of an order that adjudicates all claims against a single party in a multi-party proceeding). *Cf. Appiah v. Hall,* 183 Md. App. 606, 617 (appel-

late court exercised discretion to retroactively enter final judgment where appellants appealed summary judgment order adjudicating rights and liabilities of all parties), *aff'd on other grounds,* 408 Md. 148 (2008); *Carr v. Lee,* 135 Md. App. 213, 224, 226 (2000) (recognizing that the savings provision in 8-602 (e) "is only applicable in multi- claim cases when there has been a complete decision with respect to a party or claim" and that Rule 8-602(d) cannot be used to save a premature appeal from an order that "did not resolve all issues, and was not a final judgment"), *cert. denied,* 363 Md. 206 (2001).

Because the lack of a final judgment or appealable interlocutory order is a jurisdictional defect, we are required to dismiss this appeal. *Cf. Carr,* 135 Md. App. at 228- 29 (dismissing prematurely filed appeal because "[w]e may not confer appellate jurisdiction on our own initiative[,]" and the appeal "was not filed within the time prescribed by Rule 8-202, and does not fit within the any of the applicable savings provisions"). Although dismissal may seem to "be a harsh measure," it has been deemed necessary "to promote the judicial system's interest in finality of judgment and confidence in the judicial disposition of disputes.'" *Id.* at 229 (citation omitted).

APPEAL FROM ORDER DENYING RECONSIDERATION OF APPELLANT'S MOTION TO DISESTABLISH PATERNITY DISMISSED.

COSTS TO BE PAID BY APPELLANT.

FOOTNOTE

1. Under Md. Code, section 5-1028(d) of the Family Law Article,

> An executed affidavit of parentage constitutes a legal finding of paternity, subject to the right of any signatory to rescind the affidavit:
>
> (i) in writing within 60 days after execution of the affidavit; or
>
> (ii) in a judicial proceeding relating to the child:
>
> 1. in which the signatory is a party; and
>
> 2. that occurs before the expiration of the 60-day period.
>
> (2)(i) After the expiration of the 60-day period, an executed affidavit of parentage may be challenged in court only on the basis of fraud, duress, or material mistake of fact.
>
> (ii) The burden of proof shall be on the challenger to show fraud, duress, or material mistake of fact.
>
> (iii) The legal responsibilities of any signatory arising from the affidavit, including child support obligations, may not be suspended during the challenge, except for good cause shown.

Cite as 11 MFLM Supp. 83 (2013)

Custody and visitation: modification: material change in circumstances

Michael L. Tinelli

v.

Volha Titovets a/k/a Volha Butkouskaya

No. 2061, September Term, 2012

Argued Before: Krauser, C.J., Woodward, Sharer, J., Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Sharer, J.

Filed: September 23, 2013. Unreported.

The circuit court did not abuse its discretion by denying a father's motion to modify a custody and visitation arrangement that had been filed a few months earlier, where nothing in the motion indicated that a material change in circumstances had occurred, and where the asserted violations of the order by the mother were not so egregious as to require the court's immediate intervention to protect the children.

In this, the next chapter of the ongoing dispute between these two parties, appellant, Michael Tinelli, appeals from the November 14, 2012 Order of the Circuit Court for Worcester County, *inter alia* denying his October 5, 2012 Motion for Enforcement and Modification of the terms of the June 21, 2012 Consent Order between himself and appellee, Volha (née Butkouskaya) Titovets. In his *pro se* appeal, Mr. Tinelli challenges the circuit court's denial of his motion, asserting that the court's actions constituted an error of law. Discerning no legal error or abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

By Order of the Circuit Court for Worcester County entered on August 7, 2007, the parties were granted a judgment of absolute divorce. Since their divorce, Ms. Titovets has retained sole legal custody and primary physical custody of the parties' two minor children, Michael, age 12, and Elana, age 10. Mr. Tinelli was permitted regular visitation with the children in accordance with the terms of the Consent Order between the parties, as modified by the court following three days of hearings, in an Order filed on June 21, 2012.

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

On October 5, 2012, Mr. Tinelli filed a *pro se* Motion for Enforcement and Modification of Visitation, asserting that Ms. Titovets had failed to comply with the terms of the June 21, 2012 Consent Order. In his motion, Mr. Tinelli sought to obtain legal and physical custody of Michael and Elana. In the alternative, Mr. Tinelli requested that the court order an inspection of the suitability of Ms. Titovits's new home, require Ms. Titovits to attend anger management classes and a counseling program, and modify the existing Consent Order to implement terms and conditions that were more favorable to Mr. Tinelli in regard to custody, visitation, and child support.

On October 10, 2012, Ms. Titovits filed, through counsel, a Motion for Clarification of Order, stating the parties' differing interpretations of the terms of the June 21, 2012 Consent Order relating to visitation. In her motion, Ms. Titovits further sought the court's appointment of a Parenting Coordinator to assist the parties in resolving any future disagreements between the parties regarding their rights and responsibilities in parenting Michael and Elena.

On October 17, 2012, Ms. Titovits filed a response and counter-claim to Mr. Tinelli's Motion for Enforcement, denying any breach of the terms of the Consent Order and seeking remuneration for attorney's fees incurred in responding to Mr. Tinelli's motion, which she characterized as frivolous and filed in bad faith. Additionally, on October 17, 2012, Ms. Titovits re-filed a Petition for Contempt, alleging Mr. Tinelli's willful failure to comply with the terms of the Consent Order, the consideration of which had been previously deferred by the court pending resolution of related criminal charges filed against Mr. Tinelli. Mr. Tinelli responded, filing a Motion to Dismiss Ms. Titovits's Motion for Contempt on November 2, 2012.

On October 19, 2012, Mr. Tinelli filed his own Motion for Contempt, asserting that during the pendency of the previously filed motions, Ms. Titovits had again acted in contravention of the terms for visitation stated in the Consent Order. In a Response, filed

through counsel on October 21, 2012, Ms. Titovits again denied that she had committed any breach of the terms of the Consent Order.

On November 14, 2012, the circuit court issued an Order denying all of the outstanding motions in the instant case except for Ms. Titovits's motion to clarify the terms of the June 21, 2012 Consent Order. Additionally, in lieu of immediately appointing a Parenting Coordinator as requested by Ms. Titovits, the court ordered the parties to attend two mediation sessions to address all outstanding parenting and visitation issues. Mr. Tinelli timely filed the instant appeal on December 14, 2012.

ANALYSIS

Mr. Tinelli asserts that by denying his Motion to Enforce, the circuit court failed to comply with the requirements of the Maryland Code which provide that all parties are bound by the custody determinations made by the court. Ms. Titovits responds, contending that the circuit court did not abuse its discretion by denying Mr. Tinelli's requested relief and instead clarifying the terms of the June 21, 2012 Consent Order and ordering the parties to attend mediation to resolve their disagreements.

As this Court recently opined in *Karanikas v. Cartwright*, 209 Md. App. 571, *cert. granted*, 432 Md. 211 (2013):

> "Where modification of a custody award is the subject under consideration, equity courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child." *Montgomery County v. Sanders*, 38 Md. App. 406, 419 (1977). We have recognized, however, that "there is no litmus paper test that provides a quick and relatively easy answer to custody matters." *Id*. "The best interest standard is an amorphous notion, varying with each individual case . . . [t]he fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future. At the bottom line, what is in the child's best interest equals the fact finder's best guess." *Id*.
>
> In particular, the court must examine "numerous factors" and weigh the advantages and disadvantages of the alternative environments. *Id*. at 420. "The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents . . . 2) character and reputation of the parties . . . 3) desire of the natural parents and agreements between the parties . . . 4) potentiality of maintaining natural family relations . . . 5) preference of the child . . . 6) material opportunities affecting the future life of the child . . . 7) age, health, and sex of the child . . . 8) residences of parents and opportunity for visitation . . . 9) length of separation from the natural parents . . .; and 10) prior voluntary abandonment or surrender . . ." *Id*. (internal citations omitted). "While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor . . ." *Id*. (internal citations omitted).

Id. at 589-90 (parallel citations omitted).

This court reviews child custody determinations utilizing three interrelated standards of review:

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

In re Yve S., 373 Md. 551, 586 (2003). In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id*. at 584. We recognize that:

> [I]t is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion

> is vested in the [trial court] because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

Id. at 585–86.

We hold that the circuit court did not abuse its discretion by denying Mr. Tinelli's motion to again modify the custody arrangement between the parties. The court was very familiar with these parties and their respective concerns after hearing three days of testimony regarding custody and visitation issues only a few months prior to the filing of Mr. Tinelli's motion. The Modified Consent Order filed on June 21, 2012, represented the court's carefully considered judgment as to what visitation schedule would best serve the best interests of the parties' children. Nothing in Mr. Tinelli's October 5, 2012 motion indicates that a material change in circumstances has occurred necessitating a change in the terms of the established Order. Nor are the asserted violations of the terms of the court's Order by Ms. Titovits about which Mr. Tinelli complains in his motion so egregious as to require the court's immediate intervention to protect the safety and well-being of the parties' children. *See e.g. Kalman v. Fuste*, 207 Md. App. 389, 408-09 (2012)(upholding circuit court's decision not to exercise temporary emergency jurisdiction and modify agreed upon custody and visitation arrangements where the evidence failed to establish "actual or threatened 'mistreatment or abuse'").

The circuit court's Order of November 14, 2012, clarified the terms of the June 21, 2012 Order about which the parties were arguing. The court further required the parties to engage in two mediation sessions to resolve their disagreements about the visitation schedule and any other outstanding issues, while reserving the possibility that a Parenting Coordinator could be appointed if the parties continued to be unable to resolve their differences.

We conclude that none of the circuit court's factual findings in the November 14, 2012 Order were clearly erroneous. Moreover, we are persuaded that the circuit court's ruling was founded upon sound legal principles and cannot in any way be characterized as "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Yve S.*, 373 Md. at 583–84. Accordingly, we affirm the circuit court's denial of Mr. Tinelli's motion filed on October 5, 2012.

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

NO TEXT

Cite as 11 MFLM Supp. 87 (2013)

Custody and child support: modification: voluntary impoverishment

Kirby Lee Bowling

v.

Stephanie Michelle Knarr

No. 2511, September Term, 2012

Argued Before: Wright, Matricciani, Pierson, W. Michel (Specially Assigned), JJ.

Opinion by Wright, J.

Filed: September 23, 2013. Unreported.

Given the parties' past experience, the determination that reducing the amount of forced interaction between a father and daughter would improve their relationship was not an abuse of discretion; also, the evidence supported a finding that the father voluntarily impoverished himself by choosing to pursue his Ph.D. full time, although he had completed the coursework several years earlier, had no clear time frame for completing his dissertation and no clear job prospect requiring it.

This appeal arises from a custody determination and order entered by the Circuit Court for Carroll County. Appellant, Kirby Lee Bowling, and appellee, Stephanie Michelle Knarr, filed cross-motions seeking to modify the custody and child support order set forth in their divorce decree. On January 23, 2013, the trial court entered its opinion and order granting Knarr sole legal custody and primary physical custody of the parties' minor daughter, Rachel, and instituting a modified visitation schedule for Bowling and Rachel. The trial court also found that Bowling had voluntarily impoverished himself and imputed income to him as part of its modification of the parties' child support obligations. On February 22, 2013, Bowling filed this timely appeal.

Questions Presented

Bowling presents two questions for our review, which we quote *verbatim*:

> 1. Whether the trial court was clearly erroneous when it did not modify custody by granting Appellant sole legal custody of the minor children and primary custody of Rachel.
>
> 2. Whether the trial court was clearly erroneous when it found that Appellant had voluntarily impoverished himself and imputed income when calculating child support.

We find no error or abuse of discretion and affirm the decision of the trial court.

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

Facts and Procedural History

The parties were divorced on January 30, 2008, in Howard County. Two children were born of the marriage — Rachel in 1998 and Luke in 2002. In the parties' divorce decree, the Circuit Court for Howard County ordered that the parties would share joint physical and legal custody, with Knarr having tie-breaking authority as to medical, dental, and mental-health care issues and religious training, and Bowling having tie-breaking authority on issues related to the minor children's education, extracurricular activities, and social activities. The physical custody was to be shared on a 50/50 basis with the children alternating full weeks with each parent.

Following the divorce decree, the parties continued to litigate issues arising out of their divorce in Howard and Prince George's Counties. Ultimately the divorce case was removed to Carroll County on June 12, 2012. On January 23, 2013, the trial court entered its Memorandum Opinion, noting that from August 4, 2010, through June 2, 2011, the physical custody arrangement set forth in the divorce decree was "largely followed." Thereafter, the custody arrangement went awry.

In short, after June 2, 2011, Knarr began to allow Rachel to stop participating in her custodial weeks with Bowling. Rachel was allegedly the instigator for stopping the visitation, based on a pattern of incidents that began in 2010 when Bowling disciplined her. Bowling testified that, on one occasion,[1] when Rachel refused to get into his vehicle, he picked Rachel up and tried to force her in the vehicle whereupon she splayed her arms and legs to prevent entering and was injured as a result.

On another occasion, in September 2010, Bowling picked up the children from their soccer prac-

tice and the children were allegedly fighting because Luke drank Rachel's water. Rachel was in the front seat of Bowling's truck and Luke was in the rear seat. Rachel allegedly tried to strike Luke with the water bottle when Bowling grabbed her wrist, causing her wrist to twist and her body to bend forward. Bowling then pulled the vehicle over and told Rachel to get out and walk. After Rachel exited the vehicle, Bowling drove to the next intersection to wait for her. A medical report dated September 25, 2010, stemming from that incident notes that Rachel told medical personnel that she did not feel safe with Bowling and reported that "my dad twisted my arm as a punishment on Thursday." While the report notes no "obvious physical indication of abuse," it did note mild swelling, a slight decrease in motion, a "small bruise on right forearm from 'bumping door,'" and that Rachel was "generally tender to distal forearm."

On November 30, 2010, the Howard County Department of Social Services ("DSS") conducted an investigation into allegations of child abuse of Rachel by Bowling. The investigation stemmed from a third incident that occurred in Bowling's vehicle after he had picked the children up for his visitation. Following a disagreement with Rachel,[2] Bowling pulled his vehicle over to the side of the road at Graeloch and Leishear Roads and instructed Rachel to get out of the vehicle and walk home. Rachel reported being afraid of her father based on the previous incident in which Bowling forced her to get out of the car and walk. Rachel told DSS that after Bowling drove away, she walked to a friend's house and called Knarr, who picked her up, called police, and obtained a temporary protective order. Luke's and Bowling's accounts essentially corroborated Rachel's recollection.

In the November 30, 2010, report, DSS stated that it had spoken to Knarr and that Knarr "does not desire to keep the children apart from one another or from their father," but that Knarr "has chronic worries when the children are with their father noting that he has been unsafe with the children in the past, specifically referring to guns, bicycles, and rooftops." The DSS report states that it would support denial of a final protective order based on the incident, but it "would recommend that custody issues be addressed in a proper venue."

On April 7, 2011, Bowling filed a motion to modify custody. A medical report dated June 3, 2011, indicates that Rachel reported pain, based again on Bowling twisting her wrist backward while in his vehicle, because she did not want to go to Luke's football practice on June 2. According to the report, Bowling had Rachel exit his vehicle but then let her back in and the group went to the practice. The report assessed Rachel as having an injury and noted that she was having pain and some spasms. A follow-up medical report dated June 7, 2011, indicated that Rachel's pain was "getting worse," noted that she was experiencing pain even with a "gentle touch," and questioned if fear was the cause.

On June 24, 2011, the police were called to Bowling's home and Rachel was taken to the Howard County General Hospital ("HCGH") for an emergency psychiatric evaluation after she expressed suicidal thoughts. Bowling attempted to pick Rachel up from the hospital as it was his custodial week, but the hospital had discharged her to Knarr and Knarr refused to return Rachel to Bowling. As a result of Knarr's refusal, Bowling filed criminal kidnapping charges against Knarr and her husband.

On June 27, 2011, Knarr filed a petition to modify legal custody and find Bowling in contempt. On July 22, 2011, Knarr filed a motion to modify custody based on a material change of circumstances.

Meanwhile, in 2011, Rachel attended counseling at Kennedy Krieger Institute ("KKI") in Columbia, Maryland. On one occasion, Bowling arrived as Knarr and Rachel were leaving and blocked Knarr's vehicle with his truck. According to Knarr, Bowling threatened to "ram" her vehicle containing Rachel and Knarr's infant if Rachel did not leave with him. On a separate occasion, one week later, in August 2011, Bowling stood in front of the door to the therapist's office at KKI as Knarr tried to leave with Rachel. Knarr was holding on to both Rachel and her infant's car carrier. Bowling attempted to separate Rachel from Knarr in order to have Rachel leave with him and, as a result, Rachel was knocked down and injured her back on a chair. Rachel was taken to the emergency room at HCGH. KKI terminated its services to the family as a result of that incident.

A medical report dated August 10, 2011, following the incident at KKI, indicated under previous history that Rachel reported being physically abused two prior times by Bowling. The report found "diffuse tenderness" of Rachel's lower back although no bruising or swelling was noted. Another report, dated August 24, 2011, regarding Rachel's treatment on August 10, 2011, includes details of Chaplain John Dunlavey's visit with Rachel at HCGH on that day. After first speaking to Rachel, Dunlavey left the room to speak with Knarr and returned to find Bowling in the room with Rachel. Dunlavey reported that Rachel was visibly agitated and "shaking all over." Dunlavey reported that Bowling became argumentative and refused to leave, despite Rachel's stating twice that she wanted Bowling to leave. Bowling was escorted out by security, after which the report notes that Rachel "appeared to calm down noticeably." Notes by the attending nurse corroborate Dunlavey's observations — "Dad entered childs [sic] room — child became extremely upset, wanted

Dad to leave. Dad refused. . . . Dad was not cooperative at all, was threatening to come back."

On September 7, 2011, all pending motions for contempt filed by both parties were denied. By order entered September 9, 2011, the Circuit Court for Howard County ordered that Knarr was to enroll Rachel in a counseling program to address Rachel and Bowling's relationship no later than September 30, 2011. The same order required Bowling, by September 19, 2011, to enroll in an anger management program to specifically address his relationship with Rachel. The circuit court further ordered that the visitation schedule established in the parties' divorce decree was suspended. In its place, the circuit court ordered that Bowling was to have visitation with Rachel on Saturday, October 8, 2011, between noon and 5:00 p.m. and every Saturday thereafter but did not specify a set length of time for the visits.

The Mobile Crisis Team ("MCT")[3] responded to incidents three times in 2011: July 23, September 6, and October 15. The MCT was requested on two occasions by the police and once by Rachel's school. On July 23, 2011, Rachel called police and threatened to kill herself or to run away if she was forced to go to Bowling's house for the scheduled custodial week.[4] On September 6, 2011, Rachel refused to leave her school with Bowling to start his custodial week with her and the school called for assistance. On October 15, 2011, the MCT report indicates that Rachel called 911 after Bowling took her backpack from her while she was in his custody.

On September 26, 2011, Bowling filed a supplemental motion to modify custody. Bowling filed motions to cite Knarr for contempt on November 14, 2011, December 1 and 16, 2011, January 30, 2012, March 1, 2012, and April 2 and 20, 2012. On February 9, 2012, the Circuit Court for Howard County entered an order finding Knarr for contempt for "failure to facilitate Court ordered visitation" between Bowling and Rachel for the weeks of November 11 and 27, 2011, December 9 and 23, 2011, and January 6 and 20, 2012. As a sanction, the circuit court ordered that Knarr deliver Rachel to Bowling's residence on February 10, 2012, for a one-week visitation period, and that Knarr cooperate with Bowling to select a "mutually agreeable parenting/co-parenting counseling program in which the two of them will enroll and participate."

On March 5, 2012, Knarr filed a motion to change venue. On May 18, 2012, the motion was granted upon reconsideration and venue was changed to the Circuit Court for Carroll County. On July 2, 2012, citing Knarr's alleged failure to facilitate visitation, Bowling filed a "Motion to Cite Plaintiff/Counter Defendant in Contempt for Violation of Permanent Injunction." On May 10, 2012, Bowling filed a motion to modify custody. On June 19, 2012, Knarr filed an amended motion to modify custody due to change in circumstances. On June 20 and 29, 2012, Bowling filed motions to cite Knarr in contempt. It is the disposition of these motions for custody that form the basis of this appeal.

On October 4, 2012, following a hearing, the trial court entered an order finding Knarr in contempt of the divorce decree for failing to facilitate visitation between Rachel and Bowling. Knarr was sentenced to 179 days incarceration, suspended, pending compliance with purge provisions. To purge the contempt, Knarr was ordered to begin counseling at the National Family Resiliency Center ("NFRC") in Columbia, Maryland, with Bowling within 30 days in order to work towards resuming the normal custody schedule. Knarr satisfied the purge provisions.

On October 31, 2012, a hearing was held on the motions to modify child support and custody. Testimony from the contempt hearing was incorporated into the record and additional testimony was taken to supplement the record. The Best Interest Attorney ("BIA") appointed earlier to represent the children, in closing argument, stated that shared legal custody "does not work for these children." As recommendations for Rachel, the BIA told the court that Rachel should be in the sole legal custody of her mother and regarding physical custody:

> we need to acknowledge the reality of what has been going on, going on two years now. I don't believe that this is because mom has created an issue for Rachel. I think there are real issues between Rachel and her dad, however, I believe it is in her best interest to have a relationship with her father and for actions to be taken to ensure that there is every opportunity for that relationship to heal.
>
> But in terms of where she lives, it is my belief that it is in Rachel's best interest to reside with her mother and to have regular access with her father.

The BIA further recommended that Rachel spend "at least three hours every week with her father on the weekend. And then beginning with Christmas night, she will hopefully be ready to have an overnight . . . ."

The trial court, in ruling, considered evidence beginning from August 4, 2010, the date of the last modification hearing.[5] In its Memorandum Opinion entered January 23, 2013, the trial court categorized Knarr's complaints as 1) Bowling's "autocratic and physical method of parenting of Rachel, whereby [Bowling] attempts to physically force Rachel to comply with his parental orders" and 2) Bowling's "refusal to seek employment to support his children." The trial

court found that a material change in circumstances had "occurred with respect to the legal custody of both children and the physical custody of Rachel" and conducted a *de novo* analysis of the custody issues except for the shared physical custody of Luke, which it left intact.

The trial court went through the factors set out in *Shunk v. Walker*, 87 Md. App. 389 (1991); *Mont. Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977); and *Hild v. Hild*, 221 Md. 349 (1960). The court found that "the parties do not have that capability" in regard to the "capacity of the parents to communicate and to reach shared decisions affecting the children's welfare." The court found that the parties did not agree on shared custody. Regarding fitness of the parents, the court found that Knarr is "more permissive and [Bowling] is more autocratic" but that with the support of the non-custodial parent, either style can be successful. The court found that Knarr had failed to facilitate "father/daughter custody" and Bowling "has shown poor decision making in the physical manner in which he disciplines Rachel." The court found that Bowling's disciplinary style does not appropriately deal with Rachel's behavior and that her "oppositional behavior" is exacerbated by the conflict between the parties.

Regarding the relationship established between the child and each parent, the court found that "Rachel appears to have a good relationship with [Knarr], but a problematic relationship with [Bowling]." As to the preference of the children, the court found that "[t]he only evidence adduced on this point was that Rachel prefers to be with [Knarr]." The court found that "[p]otential disruption of the children's social and school life" would not be a factor because of the close proximity of the parties' residences to each other.

Regarding the "demands of parental employment," the court found that both parents have flexibility — Knarr because she works from her home and Bowling because he "works little at this time." The court found that both parties were sincere in their requests although both parties "exhibited deficiencies in being able to parent Rachel." The court found that Bowling's use of physical force to be "a major issue," while Knarr had an inability or unwillingness to help Rachel find "common ground with her father." The court further found that the "parties enflame the situation by repeatedly calling the police and/or involving Court processes."

The court found that Rachel's physical well being "is not promoted by repeated corporal discipline" and that the "moral well being of the children is not promoted by the constant mutual warfare between these parties." Regarding the environment and surroundings in which the children will be reared, the court found that the parties' respective spouses were positive influences and the physical environment of each home was appropriate. As to the influences likely to be exerted on the children, the court found Knarr's "enmity towards and lack of willingness to co-parent" to be negative and Bowling's "lack of industry and authoritarian parenting skills" to be negative. The court found positives in both parties' level of education and likelihood to encourage the children to pursue education, in Knarr's industry to provide for her family, and in Bowling's "service to his country."

The court found that the parties have good character and reputation, "except in relation to their treatment of the other." The court cited Bowling's use of false information to the District Court Commissioner to obtain criminal kidnapping charges against Knarr and her husband. Regarding the potentiality of maintaining natural family relations, the court found that Knarr does not co-parent and does not keep Bowling apprised of the children's medical, school, or social issues, and that her actions "impair [Bowling]'s ability to meaningfully participate in his children's lives."

The court found that both parties' residences were suitable and that the close proximity to each other would allow for frequent exchanges. Lastly, regarding the material opportunities affecting the future life of the children, the court found that Knarr "works more than a normal work week to provide for her children" while Bowling is supported by the G.I. Bill[6] and works part-time.

The court ruled:

> As to physical custody, the Court is satisfied that the shared physical custody of Luke should continue. While not having Rachel and Luke on the same schedule with their father is not ideal, it is far better for [Bowling] to maximize his time with his son, even if that is at the expense of the children being on the same schedule.
>
> As to the physical custody of Rachel, the Court has previously found [Knarr] to be in Contempt for failing to facilitate Rachel's custody with her father. At the same time, however, the Court found that [Bowling]'s autocratic and inflexible parenting style is at least part of the reason why Rachel refuses to see her father per the current custody Order. The Court finds that under the present circumstances a shared physical custody arrangement with Rachel would not be in Rachel's best interest; rather, Rachel's best interests would be

served by granting sole physical custody of Rachel to [Knarr] with a visitation schedule for [Bowling]. It is the Court's hope that by reducing the frequency of scheduled contact between Rachel and [Bowling], that visitation that is ordered would be more meaningful and will reduce the stress on Rachel that can be expected with greater scheduled contact.

As to legal custody of Luke, [Bowling] has a right to be involved in the decision making for his son, but this will not take place under the current joint legal custody. The Court is therefore forced to make the decision as to which parent should have the sole legal custody of Luke. History proves that [Knarr] has not worked and will not in the future work to protect [Bowling]'s rights. The court has confidence [Bowling]'s repeated attempts to co-parent with [Knarr] indicate that he will keep [Knarr] informed as to issues in Luke's life. The Court also finds that [Bowling] is fully capable and competent to have the sole legal custody of Luke. Accordingly, the Court will grant sole legal custody of Luke to [Bowling], except for decision making in educational issues, which shall be vested in [Knarr] to promote educational continuity.

As to the legal custody of Rachel, the fact that [Knarr] has the sole legal custody of Rachel for all practical purposes precludes [Bowling] having sole legal custody, and joint legal custody between these parties has been an abysmal failure. The parties acknowledge, however, that is is important for Rachel to continue at Atholton high school, and that goal can be achieved by [Bowling] retaining the authority to make educational decisions for his daughter. The Court further finds that [Bowling] is an all respects a fit and proper person to exercise this decision making authority. Accordingly, the Court will grant sole legal custody of Rachel to [Knarr], except that [Bowling] shall make education decisions for Rachel.

Finally, notwithstanding what has transpired to date, it is important for each party to know from the other party current issues dealing with the medical, educational and social issues relating to each child. The willingness of the party to keep the other party so informed is an essential part of sole legal custody, and the failure to do so is not in the best interest of either child. Accordingly, the Court will require that the parties communicate via ourfamilywizard.com[7] as frequently as necessary but no less frequently than weekly as to non-emergency issues relating to the children.

Regarding child support, the court found that Bowling's G.I. Bill stipend did not

> satisf[y] [Bowling]'s obligation to support his family, nor was it intended to. The Defendant has made a conscious and voluntary choice to reduce his income that is available to pay child support. The fact that he claims to be undergoing this reduction for career advancement and the ultimate betterment of his children does not change this conclusion. The needs of a child for support do not go on hiatus when a parent decides that he or she can live on less or that other non-employment funds available to the family are sufficient for their perceived purposes.

The trial court noted that in August 2010, the Circuit Court for Howard County found Bowling's income to be $5000.00 per month even though his W-2 income indicated he only made $29,841.00 for the year. In 2011, Bowling's W-2 income was $61,660.00. The trial court found, based on the evidence adduced at the hearing, that Bowling's claimed 2012 income was $33,291.00, or 54% of what his 2011 income was. The court cited Bowling's availability "at all times" to attend the children's games and practices but explained that "[h]is desire to support his children by being at their activities cannot supplant his obligation to support them financially."

Citing *Gordon v. Gordon*, 174 Md. App. 583 (2007), and *Malin v. Mininberg*, 153 Md. App. 358 (2003), the trial court considered several factors in making its determination of voluntary impoverishment. The trial court found that Bowling proffered no evidence that he suffered from any sort of disability, that Bowling is "researching topics for his doctoral dissertation in sociology, while Dr. Knarr has her Ph.D.," that Bowling left his full-time employment to live on his G.I.

Bill stipend in 2012, that the parties' relationship "is among the worst this Court has ever encountered," that Bowling had offered no evidence on his efforts "to find and retain employment," that Bowling had offered no evidence as to "efforts to secure any necessary retraining" but assumed that "with his doctorate he will have more employment opportunities at better pay than without it," that Bowling has paid all the child support he was ordered to pay, that Bowling was an Air Force officer but that exactly what he did was unclear, and that no evidence was offered on the "area in which parent lives and status of that job market." The court found that "[b]ut for Mr. Bowling's free and conscious choice to pursue his education, he could be earning at his 2011 level," and that there was no evidence that he was "limited to the minimum number of hours he currently works in his lucrative part time work."

The trial court ordered that Knarr pay child support for Luke in the amount of $463.00 per month and that Bowling pay child support for Rachel in the amount of $679.00 per month. The trial court determined that no child support should be backdated based on Knarr's failure to make a bona fide effort to facilitate Bowling's custody with Rachel.

As to visitation, the trial court ordered that Bowling was entitled to visitation with Rachel every Saturday from "January and through February 16, 2013, from 10:00 a.m. until 4:00 p.m., and commencing Friday, February 22, 2013, on alternate weekends overnight from Friday at 6:00 p.m. until Sunday at 6:00 p.m." The trial court also ordered that Bowling was to alternate visitation on holidays, spring break, and Thanksgiving, and that the week of the school Christmas break was to be split evenly. The trial court ordered that the exchanges for custody and visitation were to occur in the parking lot of the Howard County Police Station in Laurel, Maryland.

Additional facts will be included as necessary in the relevant sections below.

Discussion

I. Modification of Custody

Bowling acknowledges that the trial court "individually stated the facts it found to be relevant" for each factor in its analysis but argues that the trial court "seemed to neglect significant facts that were a part of the record." Bowling takes issue with nearly every finding of the trial court and argues that the evidence supports a finding opposite of what the trial court found and that "the trial court's findings were supported by a portion of the evidence but not by substantial evidence." Bowling contends that the trial court "completely disregards" Knarr's statements that she would not co-parent with him. Bowling maintains that the trial court "disregarded [his] testimony that he had been willing to share legal custody of the minor children if [Knarr] was able to modify her behavior." Bowling asserts that the two incidents of physical discipline occurred over a year apart, were found not to be child abuse, and therefore the court unduly weighed those incidents. Bowling avers that the court disregarded the statements made by DSS and MCT workers and did not evenly weigh the parties' use of the police and "other agencies" in their dispute. Overall, Bowling maintains that the trial court abused its discretion when it did not recognize that Knarr is the cause of all conflict between Rachel and himself.

Knarr responds that the trial court essentially followed the recommendations of the BIA, and that Bowling misrepresents the facts in the record and the court's findings. Knarr argues that the trial court properly considered Rachel's preference and that the relationship between Bowling and Rachel could improve as a result of the custody change and new visitation schedule. Knarr avers that Bowling's argument supports the court's finding that he blames Knarr and accepts no responsibility for the state of his relationship with Rachel.

In rebuttal, Bowling argues that Rachel's behavior in "willingly and voluntarily" going to his house several days after the June 2, 2011, incident refutes any finding that Rachel was unwilling to continue the shared custody. Bowling asserts that Knarr engaged in parental alienation by inappropriately exposing the children to court materials, making public rants against him, and actively keeping Rachel from him. Bowling reiterates that the trial court erred by not finding that Knarr's actions are the reason Rachel opposes shared custody and the parties' relationship is dysfunctional. We reject Bowling's argument and agree with Knarr.

"[T]his Court reviews child custody determinations utilizing three interrelated standards of review." *Reichert v. Hornbeck*, 210 Md. App. 282, 303 (2013) (citing *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012)). First, we scrutinize the circuit court's factual findings for clear error. *Maness v. Sawyer*, 180 Md. App. 295, 312 (2008). Second, if the circuit court erred as a matter of law, we will remand for further proceedings unless the error was harmless. *Id.* "'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.'" *Reichert*, 210 Md. App. at 304 (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). So long as the record contains facts on which the trial court reasonably based its determination of the child's best interest, there is no abuse of discretion. *See, e.g., Metheny v. State*, 359 Md. 576 (2000) (discussing abuse of discretion standard in fact-finding in criminal case).

We said in *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996), that "[u]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case. Instead, our task is to search the record for the **presence of sufficient material evidence** to support the chancellor's findings." (Emphasis added). "Substantial evidence has been defined as "[e]vidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla." BLACKS LAW DICTIONARY 599 (8th ed. 2004); *see Doe v. Allegany Cnty. Dep't of Soc. Servs.*, 205 Md. App. 47, 55, *cert. denied*, 427 Md. 609 (2012) (defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (citations omitted).

"Particularly important in custody cases is the trial court's opportunity to observe the demeanor and the credibility of the parties and witnesses." *Petrini v. Petrini*, 336 Md. 453, 470 (1994). We defer to the circuit court's judgment as to the credibility of the witnesses absent a clear showing of an abuse of discretion. *Reichert*, 210 Md. App. at 304 (citation omitted). The circuit court is not required to articulate every aspect of its thought process in determining credibility or list every fact it relied upon in evaluating the evidence. *See, e.g., State v. Chaney*, 375 Md. 168, 179-81 (2003) (it is well-established that judges are presumed to know the law and apply it correctly, even in the absence of explicit findings on the record).

When deciding if a modification of custody is warranted, the court performs a two-step analysis by first determining if a material change of circumstances exists and if so, then considering the best interest of the child "as if it were an original custody proceeding." *Wagner v. Wagner*, 109 Md. App. 1, 28-29 (1996). "The trial judge has the authority to determine custody, regardless of whether 'joint custody has existed in the past, or award custody to one of the parents, or to a third person, depending upon what is in the best interests of the child.'" *Leary v. Leary*, 97 Md. App. 26, 36 (1993) (quoting *Taylor v. Taylor*, 306 Md. 290, 301 (1986)). The best interest of the child standard involves looking at the future rather than the past. *See Domingues v. Johnson*, 323 Md. 486, 499 (1991) (citations omitted). In making its determination, the trial court is to consider, among other factors:

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Sanders, supra, 38 Md. App. at 420 (internal citations omitted); *see also Petrini*, 336 Md. at 469 (quoting *Hild*, 221 Md. at 357).

Generally, "[t]he circuit court "will . . . not weigh any one [factor] to the exclusion of all others." *Sanders*, 38 Md. App. at 420. However, in *Taylor*, 306 Md. at 304, the Court of Appeals stated that the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare was "clearly the most important factor in the determination of whether an award of joint legal custody is appropriate, and is relevant as well to a consideration of shared physical custody." The *Taylor* Court continued:

> Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.
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> * * *
>
> When the evidence discloses severely embittered parents and a relationship marked by dispute, acrimony, and a failure of rational communication, there is nothing to be gained and much to be lost by conditioning the making of decisions affecting the child's welfare upon the mutual agreement of the parties. Even in the absence of bitterness or inability to communicate, if the evidence discloses the parents do not share parenting values, and each insists on adhering to irreconcilable theories of child-rearing, joint legal custody is not appropriate.

Id. at 304-05.

The parties do not dispute the trial court's determination that a material change in circumstances warranted a modification. Since 2010, increasing incidents of physical altercations had occurred between Bowling and Rachel, and Rachel had begun refusing to participate in scheduled custody weeks with her father. We agree that a material change in circumstances was shown and must now consider whether the trial court's findings were clearly erroneous. Our review of the

record reveals substantial evidence to support the trial court's findings and ultimate decision regarding legal and physical custody of Rachel.

While Bowling contends that the trial court "completely disregard[ed]" Knarr's statements that she would not co-parent with him, we find that the record does not support Bowling's argument. The trial court found that the parties could not reach shared decisions, Knarr's "lack of willingness to co-parent" was a negative influence on the children, and Knarr's unwillingness to co-parent was an impairment. In fact, the court's opinion specifically references Knarr's unwillingness to co-parent at least three times. However, the trial court's acknowledgment of Knarr's unwillingness to co-parent does not automatically mean that the court should have granted legal custody to Bowling over Knarr, discussed *infra*.

Bowling's argument that the "evidence was overwhelming that [Knarr] is incapable of sharing custody" and "[e]ven if she stated that she was willing to try, she lacks the ability to do so" does not change the equation. Knarr acknowledged in her testimony that she needed to work on her patience level when dealing with Bowling and was willing to work with him as a "visiting parent." Knarr stated that her intention was for Rachel and Bowling "to have a healthy relationship," and she thought that could best be accomplished through "shorter visits." Knarr testified that after Rachel began refusing to meet with Bowling, Knarr threatened to take away Rachel's privileges if Rachel would not visit with Bowling but Rachel nonetheless refused to participate. Knarr testified that Rachel only became willing to meet with Bowling after he began showing up at her volleyball practices and games. Knarr testified that Rachel expressed fear when Bowling first began showing up but that she encouraged Rachel to work through it. According to Knarr, because Bowling did not insist that Rachel leave with him on those occasions and respected Rachel's request that he not attend her practices,[8] Rachel became more comfortable with seeing him again.

Bowling testified that Knarr had "acknowledged . . . that she is willing to have Rachel visit me once in October, a couple times in November, and a couple times in December . . . [a]nd then . . . if things work out, then maybe she would consider fifty/fifty custody." Bowling admitted that Knarr told him that Rachel "could stay more than an hour" over Thanksgiving even though Rachel had expressed only wanting to stay an hour. Bowling also testified that other than requesting November 3, 2012, for a specific visit, he had not requested "any specific times or dates." Bowling also testified that Knarr had agreed via e-mail to schedule a visit between Rachel and Bowling immediately following the hearing, and that Rachel had attended one of Luke's football games that season. E-mails in the record demonstrate that Knarr was willing to involve Bowling in Rachel's life and was making sure that Rachel understood that she would have to interact and have visitation with Bowling.

However, the evidence showed that Bowling was unwilling to accept anything short of a resumption of the fifty/fifty custody schedule, regardless of whether that would accommodate Rachel's needs. On cross-examination by the BIA, Bowling expressed no personal goals as to things he needed to improve to facilitate reunification and placed all blame on Knarr. Bowling testified that if a counselor recommended a gradual reunification he "would . . . be prepared to listen" but then testified that a six month plan was "too long," and that he wanted overnight visits to occur within 30 days and in 60 days have things "back on track." Bowling testified that he did not think that 30 days was unreasonable to resume the 50/50 visitation. We cannot agree that the court "disregarded" Bowling's willingness to share custody when the record demonstrates that the parties could not agree on shared custody, and that Bowling was inflexible in how he wanted any reunification to happen.

The trial court, despite Bowling's assertions to the contrary, found that Knarr had "failed to facilitate" the father/daughter custody. Our review of the record shows that the BIA did not believe Knarr was the source of Rachel's unwillingness to see Bowling, and Knarr testified as to how she had encouraged Rachel to develop a better relationship with Bowling while the DSS reports indicate some concern that Knarr was engaging in parental alienation. We cannot say that the trial court's findings are clearly erroneous when the evidence is at best in equipoise and we are, on appeal, constrained to review the record in the light most favorable to Knarr as the prevailing party. *Liberty Mut. Ins. Co. v. Md. Auto. Ins. Fund*, 154 Md. App. 604, 609 (2004).

Regarding the court's findings as to the fitness of the parents and Bowling's use of physical discipline, Bowling argues that Knarr allowed Rachel to exaggerate her injuries and supported Rachel in provocative behavior towards Bowling and therefore the court's findings were erroneous. We disagree. The evidence in the record supports the trial court's finding that Bowling's disciplinary style and attempts to coerce visitation resulted in injury to Rachel and instilled fear in her on more than one occasion. While the record contains evidence that Knarr disagreed with Bowling's parenting style, there is no evidence that she encouraged or otherwise supported provocative behavior from Rachel.

Moreover, the record supports the trial court's finding that Bowling's parenting style was "autocratic" and, although the court acknowledged that such a

style could be a successful one, in this case it was negatively affecting Bowling's relationship with Rachel. Rachel expressed fear of Bowling on more than one occasion to multiple individuals, and she told Bowling via e-mail that she was angry about having her belongings searched and being "patted down" and was only willing to go to his house if he did not touch her "at all." Bowling testified that he monitored the children's communications with Knarr and her husband, and that, on more than one occasion, he had used physical force to keep Rachel from doing something or to make her do what he wanted, such as get in his vehicle. Bowling may find the incidents insignificant, but we cannot say that the trial court's decision, which was based on numerous reports, e-mails, and testimony, was unsupported by substantial evidence.

The trial court considered testimony from Bowling and his wife, Knarr and her husband, documentary evidence from the parties including e-mails between themselves and from Rachel, DSS reports, hospital reports, previous court decisions, and the findings of the BIA. The trial court was required to, and did, sift through conflicting evidence, make credibility determinations, and determine the ultimate persuasiveness of the evidence when making its findings. It is not our role to second-guess the trial court's credibility determinations or weighing process. See *McCarty v. McCarty*, 147 Md. App. 268, 273 (2002) (citing *Davis v. Davis*, 280 Md. 119, 131-32 (1977)). Our role is limited to deciding if the trial court had reasonable grounds to believe the facts it found. *Volodarsky v. Tarachanskaya*, 397 Md. 291, 307 (2007) ("The issue is not whether some other person or entity could reasonably believe Fact X to be so, but whether that court, from the evidence presented in that proceeding, has reasonable grounds to believe it is so."). We conclude that the trial court did not err.

We next consider whether the trial court abused its discretion in the way it allocated custody. It did not. Bowling argues, essentially, that because Knarr is the sole source of Rachel's unwillingness to participate in the 50/50 custody arrangement, the trial court should have granted him sole legal and physical custody. The Circuit Court for Howard County and the BIA both determine this not to be the case. The trial court, while finding that Knarr had not facilitated Rachel and Bowling's relationship, also did not find that Knarr was the sole source for the conflict. The trial court did not lose sight of the fact that, above all, it was to consider Rachel's best interest in making its custody determination.

As to legal custody, the BIA recommended that Rachel should be in Knarr's sole legal custody because Knarr had a more stable relationship with Rachel. The evidence demonstrated that Bowling had tried to keep Knarr from obtaining dental services for Rachel, that the parties wanted Rachel to continue at Atholton High School, and that the parties disagreed on Rachel's extracurricular activities. The trial court facilitated the goal of having Rachel continue at Atholton High School by giving Bowling legal custody as to educational decisions. Ordering that Knarr was to retain legal custody as to all other matters allowed Rachel to have continuity in her activities, such as volleyball and horseback riding, about which Bowling had disagreed with Knarr previously.

The evidence in the case demonstrates that Knarr kept Bowling at least minimally informed as to Rachel. Bowling testified regarding information about Rachel: "I don't think there's anything really big that I can think of that I've asked and haven't received." E-mails in the record reveal that Knarr and Bowling communicated regarding Rachel's grades, her volleyball, and horseback riding, even if the communication was not to Bowling's complete satisfaction. The trial court found that joint legal custody between the parties had been "an abysmal failure," and its ruling that the parties continue to communicate on a set schedule using the ourfamilywizard.com portal was a reasonable method of resolving a major source of conflict in the children's lives.

We now turn to physical custody. The MCT noted in a September 6, 2011 report that "Rachel reports that she does eventually want a relationship with [Bowling] but not now and believes it is something that she has to work up to." Transcripts from the September 8, 2011 hearing before the Circuit Court for Howard County reveal that the court found that Rachel "harbors anger against her father," and that Bowling "needs some sort of therapy or counseling to address his anger management to help him address the anger that the evidence says results primarily from Rachel's attempt to provoke him and aggravate him." The court did not find that "at this point that Rachel's failure to have a meaningful relationship with her father is directly attributable to the mother. I assume it's a product of many factors." The BIA reiterated this belief, telling the court that Knarr was not the source of the conflict between Rachel and Bowling, and that Rachel's best interest would be to live with Knarr and have regular visitation with Bowling.

The trial court's ultimate determination of what would be in Rachel's best interest was based on past experiences of the parties. In the case at bar, the trial court determined that reducing the amount of time that Rachel was **required** to interact with Bowling would ultimately be the best way to improve their relationship over time and lead to a willingness in both Rachel and Knarr to increase Bowling's access to Rachel. The court's determination is in line with the evidence in the record, which showed that when Bowling stopped trying to force Rachel to comply with the 50/50 custody schedule and exhibited a respect for her wishes, she

became more willing to participate and Knarr began to assist in facilitating visitation. As such, we cannot say that the trial court's ruling was an abuse of discretion.[9]

II. Voluntary Impoverishment

Citing no authority, Bowling argues that there was "absolutely no testimony nor any evidence" from which the trial court could infer that Bowling had voluntarily impoverished himself. Bowling asserts that the only testimony on this point was that his work schedule was such that he could devote his time to finishing his Ph.D. Bowling contends that his deployment time "essentially represent[s] the fluctuation of his income over the past several years." Bowling argues that, because he has never been required to pay child support, he could not have made a conscious decision to work less to avoid paying child support.

Knarr responds that the intentions of a parent regarding paying child support are irrelevant. Knarr argues that the trial court properly recognized that Bowling's fluctuations of employment were not "entirely represented by overseas deployment for the military and are also represented by [Bowling]'s choice as to whether or not to engage in full time employment when he is not deployed." Knarr maintains that the record contains substantial evidence to support the trial court's finding that Bowling chose to reduce his income by working part-time employment and working full-time on his Ph.D. in 2012 instead of continuing to do the reverse as he had in 2011.

We have explained that "[a] parent is voluntarily impoverished 'whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources.'" *Gordon, supra*, 174 Md. App. at 644 (quoting *Digges v. Digges*, 126 Md. App. 361, 381 (1999)). As the Court of Appeals explained in *Wills v. Jones*, 340 Md. 480, 494 (1995) (emphasis omitted):

> In determining whether a parent is voluntarily impoverished, the question is whether a parent's impoverishment is voluntary, not whether the parent has voluntarily avoided paying child support. The parent's intention regarding support payments, therefore, is irrelevant. It is true that parents who impoverish themselves "with the intention of avoiding child support . . . obligations" are voluntarily impoverished. *John O.* [*v. Jane O.*], *supra*, 90 Md. App. [406, 421 (1992)]. But, as the court recognized in *Goldberger [v. Goldberger*, 96 Md. App. 313, 326-27 (1993)], a parent who has become impoverished by choice is "voluntarily impoverished" regardless of the parent's intent regarding his or her child support obligations.

In *Goldberger*, 96 Md. App. at 326, the Court stated that "[w]hether the voluntary impoverishment is for the purpose of avoiding child support or because the parent simply has chosen a frugal lifestyle for another reason, doesn't affect that parent's obligation to the child." *See also Malin*, 153 Md. App. at 395 (citation omitted).

In making a determination of voluntary impoverishment, a court must consider the following factors: 1) the parent's current physical condition; 2) the parent's respective level of education; 3) the timing of any change in employment or financial circumstances relative to the divorce proceedings; 4) the relationship of the parties prior to the divorce proceedings; 5) the parent's efforts to find and retain employment; 6) the parent's efforts to secure any necessary retraining; 7) whether the parent has ever withheld support; 8) the parent's past work history; 9) where the parties live and the status of that area's job market; and 10) any other considerations presented by the parties. *Gordon*, 174 Md. App. at 644-45 (citing *Goldberger*, 96 Md. App. at 327). We review the trial court's determination for clear error. *Id.* at 646.

Our review of the record reflects that the court considered the evidence and the factors relevant to the issue of voluntary impoverishment, and we conclude that the trial court's decision was supported by substantial evidence. Bowling testified that in 2011, he worked full-time, forty hours per week, and earned $61,660.00. In 2012, Bowling testified that he worked as a contractor, a "researcher, a military sociologist," an average of four to six hours per week at a rate of $52.00 per hour for the United States Department of Defense. Bowling testified that prior to 2012, he worked full-time at regular employment and worked part-time on his Ph.D., but that in 2012, he had decided that because he "didn't make very much progress on [his] dissertation" he was "trying a different approach."

Bowling's new wife, Candice, testified that in 2012, Bowling taught a class, had another job, and earned $1,911.00 per month from the G.I. Bill. Bowling, meanwhile, testified that he had no other source of income other than the part-time consulting and the G.I. Bill. Bowling testified that, in 2012, he sought no additional employment and told the court that "with the GI Bill [sic], I'm able to pay the bills." However, on cross-examination, Bowling testified that he was "short" money in February of 2012 and withdrew $4,000.00 from his retirement account to cover bills and that in January through March of 2012, he was overdrawn on his credit card. Bowling testified that

he normally earned between $6,000.00 and $7,000.00 per year as an Air Force reservist, but he had "not been able" to get any hours in during 2012 and "so it doesn't look like I'll be able to get in my reserve time this year." Bowling offered no reason for his failure to serve any hours during 2012 although he testified that he was still considered an active reservist.

Bowling admitted to completing the course work for his Ph.D. in 2007 or 2008, although Knarr testified that it was completed earlier. Bowling testified that he was working on his dissertation proposal, which had yet to be accepted. Bowling testified that for "various reasons" his prior dissertation proposals had been "dropped." Bowling speculated that *if* his proposal was accepted, he *might* complete his Ph.D. program in Summer 2013 or later. Bowling testified that he hoped to secure a teaching position upon completion of his Ph.D.

The evidence supports the trial court's finding that Bowling chose of his own free will to alter his pursuit of his Ph.D. from part-time to full-time and reduce his ability to work. While Bowling testified that his contract work was project dependent, he offered no evidence that he was unable to secure work at the same level as he did in 2011, or that a lack of contract work was the cause of his reduced income. Our review of the record supports the trial court's finding that Bowling could have worked more, as he volunteered many hours for Luke's sports and his church, and testified to only spending approximately thirty hours per week on his dissertation. The record demonstrates that Bowling, until 2012, had always pursued his Ph.D. part-time, he had no clear time frame for its completion, no clear job prospect requiring the Ph.D., and chose to spend his time focusing on pursuits that were non-work related.[10] Therefore, we cannot say that the trial court's finding that Bowling had voluntarily impoverished himself in 2012 was clearly erroneous.

Upon a finding of voluntary impoverishment, the trial court must then determine the parent's potential income in accordance with Md. Code (1984, 2006 Repl. Vol.), Family Law Article § 12–201(b)(3). *Wills*, 340 Md. at 497. That section "lists fifteen items that must be included in a parent's actual income, including salaries and wages, interest, dividend, and pension income, expense reimbursements or in-kind payments, and various government benefits." *Id.* In determining the parent's income, so long as the court's factual findings are not "clearly erroneous, the amount calculated is realistic, and the figure is not so unreasonably high or low as to amount to abuse of discretion, the court's ruling may not be disturbed." *Malin*, 153 Md. App. at 407 (citation and internal quotation marks omitted). Here, the trial court imputed Bowling's earnings from 2011. Bowling does not dispute the amount on appeal and, therefore, the trial court's determination in that regard is not preserved for our review.

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

FOOTNOTES

1. The date of this incident is unclear.

2. The DSS report indicates that Rachel reported that prior to being picked up by her father, she had showered and fixed her hair at her mother's house. Once in Bowling's vehicle, he told Rachel and her brother that they both had to shower upon reaching Bowling's house. Rachel protested and Bowling pulled the vehicle over. Rachel reported that Bowling offered to let her back in the vehicle if she agreed to shower at his house. Rachel reported that after she refused, Bowling drove away. Bowling testified that Rachel was let out of his vehicle just over one mile from his home, near her school.

3. The MCT is operated by Grassroots Crisis Intervention Center in Columbia, Maryland. According to the testimony of Andrea Ingram, Grassroot's Executive Director, the MCT is composed of two "master's level of mental health professionals, who respond with the police to psychiatric emergencies in the community, to intense family crisis or conflict, and traumatic death situations in the community."

4. Rachel was not in Knarr's care at the time she made the call. Rachel had gone to the beach for vacation with friends, neighbors of Bowling's, and was to go directly from the neighbor's house to Bowling's home to begin her custodial week with him

5. In his recitation of the facts, Bowling refers to numerous events that occurred before the modification hearing on August 4, 2010. The only reference in the record to the events cited by Bowling occurred during the September 8, 2011 contempt hearing, in which the actions of neither party were found to support a ruling of contempt of court. The record indicates that the transcripts were offered at the modification hearing in 2012 to prove that the Circuit Court for Howard County had ordered Bowling to attend anger management counseling, and that the court found that Rachel's unwillingness to be with Bowling was not a result of Knarr's actions. The actions that preceded the 2010 modification hearing, in which a modification of custody was denied, were not before the trial court in 2012 and accordingly, we will not address them.

6. The G.I. Bill is a program administered by the United States Department of Veterans Affairs and provides financial support for education and housing to individuals with at least 90 days of aggregate service after September 10, 2001, or individuals discharged with a service-connected disability after 30 days. The G.I. Bill provides up to 36 months of education benefits, generally payable for 15 years following the release from active duty and may be transferable to dependents. *The Post-9/11 GI-Bill*, UNITED STATES DEPARTMENT OF

VETERANS AFFAIRS (July 23, 2013), http://gibill.va.gov/benefits/post_911_gibill/index.html.

7. www.ourfamilywizard.com is a custody solution website to offer families to help themselves track parenting time, reduce divorce conflict, and remove the "he said/she said" that keeps families returning to court. (Last visited on September 4, 2013).

8. The testimony was that Rachel was embarrassed because Bowling was the only parent present at the practices.

9. In a footnote in her brief, Knarr states that since January 2013, Rachel has had weekend visits with her father every other weekend and went on a summer vacation week with him as well.

10. *Compare Lorincz v. Lorincz*, 183 Md. App. 312 (2008). In *Lorincz,* the mother was found not to have voluntarily impoverished herself by changing from a Ph.D. program to law school because while in law school she increased her earnings by fifty percent, had a set graduation date, and had secured a post-graduation job paying nearly four times what her earnings were projected to be had she stayed in the Ph.D. program. The Court in *Lorincz* noted that at all times, the mother's financial status was moving upward. *Id.* at 337-38. In contrast, Bowling chose to reduce his income, testifying that his G.I. Bill stipend was sufficient to meet his needs.

Cite as 11 MFLM Supp. 99 (2013)

Adoption/guardianship: termination of parental rights: exceptional circumstances

In Re: Adoption/Guardianship of Lydia B.

No. 0163, September Term, 2013

Argued Before: Eyler, Deborah S., Zarnoch, Sharer, J. Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Zarnoch, J.

Filed: September 25, 2013. Unreported.

In terminating a mother's parental rights, the circuit court properly considered the level of progress she had made in recovering from drug use, her continued inability to provide a safe home for the child, the termination of her parental rights with regard to the child's sibling, and the child's demonstrated bond with her foster parents.

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 Jennifer B. ("Ms. B.") appeals from an order of the Circuit Court for Worcester County, which terminated Ms. B.'s parental rights to her daughter, Lydia B. ("Lydia"). The order also granted guardianship to the Worcester County Department of Social Services ("Department") with the right to consent to adoption or long-term care. Ms. B. presents the following question, which we have rephrased,[1] for our review:

> Did the circuit court abuse its discretion in terminating Ms. B.'s parental rights?

We find no error and therefore affirm the circuit court's ruling.

FACTS AND LEGAL PROCEEDINGS

This Court, like the circuit court, takes judicial notice of the proceedings in Lydia's related CINA matter and the termination of parental rights case pertaining to Lydia's older brother, Shawn.[2]

On February 5, 2011, Ms. B. gave birth to Lydia, her fourth child.[3] Ms. B. and Lydia both tested positive for cocaine. Lydia was classified as a "drug-exposed newborn" and protected under the Drug Addiction at Birth Act, Md. Code (1984, 2012 Repl. Vol.), Family Law Article ("FL") § 5-323(d)(3)(ii)(1). On February 14, 2011, the court issued a Shelter Care Order and removed Lydia from Ms. B.'s custody. The Department placed Lydia in foster care with the C.'s, a certified foster care family that also takes care of Ms. B.'s son Shawn.[4] Lydia was subsequently declared a CINA.

On February 18, 2011, Ms. B. signed a service plan with the Department but she was not compliant. She tested positive for cocaine and benzodiazepine at Family Recovery Court intake, tested positive for cocaine at two hearings, missed therapy sessions and was terminated from Family Recovery Court. On June 1, 2011, Ms. B. was arrested on an outstanding warrant relating to drug charges. She was incarcerated until July 8, 2011.

Since being released from incarceration, Ms. B. has started improving her circumstances. On July 13, 2011, Ms. B. signed another service plan with the Department. She also entered an intensive outpatient program. Ms. B. had a neuropsychological evaluation in October 2011, and her diagnoses include Post-Traumatic Stress Disorder, Bipolar Disorder, Substance Abuse Mood Disorder, long-term drug dependency, and symptoms of dependant personality. In August 2012, she completed parenting classes through the Department and graduated from Family Recovery Court. In January 2013, the Department reported that Ms. B. has been taking her prescription medication, participating in counseling, and refraining from drug use. She currently lives with an elderly relative who pays Ms. B. a monthly stipend in exchange for in-home care.

On August 10, 2012, the circuit court approved a change in Lydia's permanency from reunification to adoption.[5] Subsequently, the Department filed a Petition for Guardianship with respect to Lydia. Ms. B. objected to the petition and the court held a contested termination of parental rights hearing. On February 21, 2013, the court issued the termination of parental rights order and granted the Department's Petition for Guardianship. Ms. B. noted a timely appeal. Additional facts will be provided as necessary in our discussion of the issues.

DISCUSSION

1. Standard of Review

To review a decision regarding termination of parental rights, an appellate court uses three interre-

lated standards of review. *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md 90, 100 (2010). An appellate court reviews findings of fact under a clearly erroneous standard. *Id.* For findings of law, an appellate court uses a non-deferential standard and will order further proceedings in the trial court unless the error is harmless. *Id.* Finally, for ultimate conclusions of the trial court that are "founded upon sound legal principles and based upon factual findings that are not clearly erroneous," an appellate court uses a deferential abuse of discretion standard. *Id.* An abuse of discretion is evident 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 *In re Yve S.*, 373 Md. 551, 583 (2003)). When reviewing a court's decision, this Court notes that questions within the discretion of the trial court, like credibility of witnesses, are better decided by the trial judges than appellate courts. *Id.*

2. FL § 5-131(c) and (d)

Ms. B. contends that the court abused its discretion when it assumed that Lydia would be adopted by her foster care providers. She admits that the court properly considered the factors in FL § 5-131(c) and (d) but argues that it improperly went beyond what was required in the statute when it compared Lydia's well-being in the custody of Ms. B. with her well-being with the C.'s. Ms. B. argues that it is impermissible to consider potential adoptive resources during a termination of parental rights proceeding. Additionally, Ms. B. contends that the court erred by placing dispositive weight on the length of time Lydia had been in the C.'s care and the resulting bond Lydia formed with them. She argues that the length of time cannot be the only factor for determining that a termination of parental rights is in Lydia's best interest, and that the existence of a bond with foster care providers is not dispositive.

The Department responds by contending that the court properly exercised its discretion in terminating Ms. B.'s parental rights. The Department argues that the court properly considered each of the factors in FL § 5-323(d) and did not go beyond what the statute requires. It argues that the court's consideration of Lydia's bond with the C.'s was proper because it concerns Lydia's ties towards individuals who affect her best interests significantly and Lydia's adjustment to community, home, placement, and school, as required by FL §§ 5-323(d)(4)(iii)-(iv). The Department argues that Ms. B.'s assertion that adoption considerations must be considered independently from termination of parental rights is not binding law; it is *dicta* from *In re Adoption/Guardianship of Victor A.,* 386 Md. 288 (2005), and not a final determination of the court. The Department argues that even if the proposition is binding, the court only considered the factors mandated by the statute.

Similarly, counsel for Lydia contends that the court did not improperly compare the circumstances of Ms. B. to those of the C.'s. Counsel for Lydia argues that though the court discussed the prospect of adoption, the discussion was in the context of the likely impact that termination of parental rights would have on Lydia. Counsel for Lydia also contends that the court did not place impermissible weight on the likelihood that Lydia would be adopted, but even if the court did it would be harmless error because of the overwhelming weight of the other evidence supporting termination of Ms. B.'s parental rights to Lydia.

Under FL § 5-323(b), a court can terminate parental rights if it finds clear and convincing evidence that termination is in the child's best interest. The court must make specific factual findings on the factors listed in this statute, with primary consideration to the child's health and safety. FL § 5-323(d). The court must review all the factors and consider them together; it is not required to weigh any above the others. *In re Adoption/Guardianship No. 94339058*, 120 Md. App. 88, 105 (1998). When terminating parental rights, a court must balance the parent's right to her child against the responsibility of the state to protect children from abuse and neglect. *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007).

The factors that Ms. B. argues went beyond the statute are in fact required considerations. Under § 5-323(d)(4)(i), a court must consider the child's ties with individuals who may affect the child's best interests significantly, including the child's siblings and others. The court found that Lydia

> has a close attachment with her brother Shawn; she has resided with Shawn and the C.'s on a full-time basis for her entire life. Likewise, the child is closely bonded with the three other children residing the C.'s home. The C.'s and their children, including [Lydia's] biological brother, are the only family that Lydia has ever known, and she is fully integrated therein.

The court went on to discuss Lydia's emotional ties to the C.'s, who clearly fall in the category of "others who may affect the child's best interests significantly." The court found that the results of the bonding study, which evaluated Lydia's bond with the C.'s and Ms. B., were relevant to consider the child's ties. The court did not put dispositive weight on a bare comparison between the C.'s results and Ms. B.'s results.

Additionally, under § 5-323(d)(4)(ii), a court needs to consider the child's current adjustment to

community, home, placement, and school. Here, the court looked to Lydia's current placement to show that she is well-adjusted to her home with the C.'s. The Court did not compare this to Ms. B's circumstances. We agree with the Department and Counsel for Lydia that a court may consider a child's pre-adoptive placement to "assess the reality" of the child's circumstances. *See In re Adoption/Guardianship of Jayden G.,* No. 84, Sept. Term 2012, __ Md. __, slip op. at 60 (July 16, 2013) (Citation omitted). Ms. B. is correct in arguing that the length of time a child spends with a foster family is not sufficient on its own to terminate parental rights. *See In re Adoption/Guardianship of Alonza D.*, 412 Md. 442, 460 (2010). However, the court specifically stated that the "bond has been strengthened not just by the length of time that the child has been in the care of the C.'s, but also by the quality and loving nature of the care." The court did not abuse its discretion when it analyzed the factors of FL § 5-131(c) and (d).

3. Exceptional Circumstances.

Ms. B. contends that the court abused its discretion in finding that exceptional circumstances existed to support the termination of parental rights. She argues that she has addressed or is currently addressing issues that necessitated the removal of her children from her care. She asserts that she has been clean of drugs since June 2011, has completed an intensive outpatient program, currently takes medications prescribed by a psychiatrist and attends various types of therapies. She argues that the court's finding is based on an unfounded fear of relapse.

The Department contends that exceptional circumstances do exist that make a continued relationship with Ms. B. contrary to Lydia's best interest. The Department argues that though there is recent progress, Ms. B. is still unable to provide Lydia with a safe and stable home. The Department points to Ms. B.'s pattern of neglect and lack of credibility concerning her drug use.

Counsel for Lydia similarly contends that the court did not abuse its discretion in finding that exceptional circumstances exist to support the termination of parental rights. Counsel for Lydia argues that there was sufficient evidence to support the finding that Ms. B.'s recovery was not timely enough or likely enough to continue.

Under FL § 5-323(b), a court must expressly determine whether unfitness of a parent or exceptional circumstances make a continuation of the parental relationship detrimental to the best interests of the child. *See In re Adoption/Guardianship of Rashawn H.*, 402 Md. at 501 (a court must find unfitness or exceptional circumstances before terminating parental rights). The factors in the statute also serve "as criteria for determining the kinds of exceptional circumstances that would suffice to rebut the presumption favoring continued parental relationship and justify termination." *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. at 104. Notably, the inability to care for other children is probative of the ability to care for the child at issue. *In re William B.*, 73 Md. App. 68, 77 (1987).

The court found that exceptional circumstances existed to make a continued relationship with Ms. B. detrimental to Lydia's best interest. This decision was based on the court's well-reasoned findings relating to each factor of the statute coupled with the demonstrated bond between Lydia and the C.'s. The court acknowledged that Ms. B. had made "reasonable efforts to address her main needs in an earnest attempt to reunify with Lydia," but found that "[r]egrettably, the level of adjustment is insufficient and not expeditious enough to make it in Lydia's best interest to be placed with Mother." Additionally, the court found Ms. B. lacked credibility regarding her drug use, relapses, and job prospects. *See In re Adoption/Guardianship No. J970013*, 128 Md. App. 242, 247-48 (1999) ("[I]n a case involving termination of parental rights, the greatest respect must be accorded the opportunity [the court] had to see and hear the witnesses and to observe their appearance and demeanor.") (citation and internal quotation omitted). The court pointed to the recent termination of Ms. B.'s parental rights to her son, Shawn:

> There is no doubt that Shawn was harmed by the neglect *and* by the disruption of the attachment bond with the C.'s and then the disruption of the subsequent bond with his Mother. This history cannot be allowed to repeat itself to the detriment of Lydia. . . . Given this very recent history, the harm that was occasioned upon Shawn, Mother's unresolved mental health issues, the strong bond that has developed between Lydia and her pre-adoptive family (including her biological brother Shawn), Mother's history of neglect and parenting deficiencies, Mother's addiction issues and her documented propensity for relapse, Mother's instability as to housing and income, and in light of all of the other findings set forth herein, this Court finds by clear and convincing evidence that Lydia's return to Mother's custody poses an unacceptable risk to the child's future safety.

The court made its decision based on the facts and sound legal reasoning. Under all the circum-

stances, we conclude that the court did not abuse its discretion in terminating Ms. B.'s parental rights to Lydia.

For all of these reasons we affirm the judgment of the circuit court.

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

FOOTNOTES

1. In her brief, appellant asks:

> 1. Did the court err in assuming that Lydia would be adopted by her foster care providers, and placing dispositive weight on the length of time that Lydia had been in their fare and the resulting bond she had formed to them?
> 2. Did the court err in finding that the mother was unfit and that exceptional circumstances existed to support terminating parental rights?

2. This Court affirmed the change in Lydia's permanency plan from reunification to adoption. *In re Lydia B.*, No. 1415, Sept. Term 2012, (Md. Ct. Spec. App. May 3, 2013). This Court also affirmed the termination of Ms. B.'s parental rights to Shawn, Lydia's brother. *In re Adoption/Guardianship of Shawn L.*, No. 1286, Sept. Term 2012 (Md. Ct. Spec. App. April 23, 2013).

3. Ms. B.'s four children have all been classified as a CINA at some point in their lives.

4. Shawn was born in August 2008 and also classified as a "drug-exposed newborn." He lived with the C.'s for the first 15 months of his life, and then returned to custody of Ms. B. However, he was returned to the C.'s after six months with Ms. B. because of reports of neglect. On August 10, 2011, Shawn's permanency plan changed from reunification to adoption. The Master noted that Ms. B. had made progress but that it was very recent. On September 27, 2011, the Department filed a Petition for Guardianship with the Right to Consent to Adoption or Long-Term Care Short of Adoption for Shawn. On July 26, 2012, the court issued an opinion terminating the parental rights of Ms. B. with respect to Shawn. This Court affirmed the termination of parental rights. *In re Adoption/Guardianship of Shawn L.*, No. 1286, Sept. Term 2012 (Md. Ct. Spec. App. April 23, 2013).

5. A Master reviewed Lydia's permanency plan in a hearing on April 9, 2012 and found that exceptional circumstances existed based on the neglect Shawn experienced when reunited with Ms. B. Ms. B. noted her exceptions and the circuit court reviewed the decision and agreed with the Master to change the permanency plan based on Ms. B.'s history of drug relapse and neglect, and the disruption to Lydia's secure attachment to the C.'s that would be detrimental to Lydia. This Court affirmed the change in Lydia's permanency plan on May 3, 2013. *In re Lydia B.*, No. 1415, Sept. Term 2012, (Md. Ct. Spec. App. May 3, 2013).

Cite as 11 MFLM Supp. 103 (2013)

Custody: modification: material change in circumstances

Aimee Ellen Gillis

v.

Mark Leslie

No. 1461, September Term, 2012

Argued Before: Meredith, Kehoe, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Thieme, J.

Filed: September 26, 2013. Unreported.

The mother's improved health and stability, combined with the children's being a little older, were sufficiently material changes to warrant consideration of a custody modification; however, the court did not abuse its discretion in ultimately declining to modify custody but expanding the mother's visitation schedule; nor did it abuse its discretion in denying a motion for a child sexual abuse evaluation in the absence of any objective evidence of sexual abuse.

Aimee Ellen Gillis, appellant, appeals from the custody and visitation orders entered in the Circuit Court for Frederick County on August 4, 2012 and November 28, 2012. The court ordered that Mark R. Leslie, appellee, shall continue to have legal and physical custody of the couple's two minor children and established a summer visitation schedule for appellant. The second order established a school year visitation schedule. In this consolidated appeal, appellant presents three questions, which we have rephrased to facilitate review:[1]

1. Did the court abuse its discretion by granting appellee sole legal and primary physical custody of the couple's two minor children?
2. Did the court err in following this Court's mandate by decreasing appellant's visitation?
3. Did the court abuse its discretion by denying appellant's Motion for Child Abuse and Child Sexual Abuse Evaluation in favor of reappointing the previous evaluator to perform an updated custody evaluation?

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.

Finding no error, we affirm the judgments of the circuit court.

BACKGROUND

Appellant and appellee were married on September 20, 2002 and had two children during their marriage: J. Leslie, born October 11, 2004, and M. Leslie, born January 27, 2008.[2] Appellant testified that appellee was physically violent towards her on numerous occasions throughout their marriage and recalled that on one occasion appellee choked her until she passed out. Appellant called the police and appellee was arrested, but the charges were dropped when she invoked her marital privilege not to testify against her husband. The parties resumed their marital relationship, but according to appellant, the abuse continued. In February of 2008, appellant was diagnosed with Stage 3 Hodgkin's lymphoma.

According to appellant, the parties separated in September of 2008 after appellee assaulted appellant and she filed for a protective order. On September 26, 2008, the court granted the protective order and appellant was awarded full legal and physical custody of the children, as well as occupancy of the marital home.

On September 18, 2009, the parties consented to a custody arrangement giving appellee sole legal and primary physical custody of the children and appellant access to the children pursuant to the established visitation schedule. The custody agreement was incorporated, but not merged into the consent judgment of absolute divorce entered by the court on November 23, 2009. Appellant testified that she agreed to the custody arrangement in part, because of financial concerns, her health condition at the time, and the recent death of her father.

In 2010, both parties petitioned for protective orders against each other. The court granted appellant's temporary protective order on May 5, 2010, but denied the final protective order. The court, however, granted appellee's final protective order and appellant's visitation was completely suspended, as of June 10, 2010. The court found that appellant made "the children unwitting subjects of multiple baseless child abuse claims and investigations alleging sexual abuse

at the hands of their father[.]" The court held a subsequent hearing on July 16, 2010 and amended the protective order to allow appellant supervised visitation. During this time both parties also filed emergency motions to modify custody.

Appellant appealed the court's decision granting appellee's protective order. In an unreported opinion, filed February 1, 2011, we vacated appellee's final protective order and remanded the case for further proceedings with respect to the denial of appellant's final protective order.[3]

The circuit court held a *pendente lite* hearing on March 8 and 9, 2011 and entered a *pendente lite* order on March 17, 2011, granting appellee continued legal and physical custody of the children. The court's order granted appellant visitation with the children for one seven-hour day per week, occurring on Sundays between 10 am and 5 pm. Additionally, the court reappointed Rebecca L. Snyder, Psy. D. to perform a comprehensive custody evaluation and/or update the previous evaluation.

A trial on the merits of the cross-petitions for modification of custody was held June 20-22, 2012. A recurring theme throughout the testimony was that the transitions between parents were stressful on the children. According to appellant, the transitions were difficult because the children did not want to leave at the end of their visitation with her and they would grab on to her neck, waist, or legs, to prevent her from leaving. Appellee, appellee's live-in girlfriend, the children's teachers, and the experts all confirmed that the transitions between homes were a significant source of stress on the girls.

Appellant claimed that the children's physical and mental well-being had deteriorated since the custody agreement was entered. Appellant testified that during one particular visitation, J. Leslie told her that appellee rubbed "her really hard down there" and she saw a greenish discharge on her daughter's underwear, which caused appellant to file for a protective order. Appellant explained that J. Leslie was diagnosed with vaginitis, but that the tests came back negative for urinary tract infection. Both children were interviewed multiple times by Child Protective Services and no evidence of physical abuse, sexual or otherwise, was ever found. In December of 2011, appellant noticed bruises and fingernail marks on J. Leslie's arms, which J. Leslie said were caused by appellee. Appellant reported the incident to Dr. Snyder, who then reported the incident to the Department of Social Services.

Appellant asked the court to change the custody order, so that she would have custody of the children and could provide daycare for them during the day. She explained that instead of the appointed special master, she would like to see a parenting coordinator, so that she and appellee could co-parent the children because they are getting older and need contact with both parents. Appellant testified that she believed the arrangement where she had full custody and appellee had visitation privileges would be in the best interests of the children.

Dr. Yvette Kasamon, appellant's oncologist, testified that appellant's cancer has been in complete remission since December of 2011. Dr. Kasamon opined that the chance of cure, which "means that someone achieves complete remission and stays that way[,]" was about fifty percent. Finally, Dr. Kasamon testified that she did not believe that appellant's cancer had "any adverse impact on her ability to parent her children."

Appellee denied ever abusing appellant, explaining "[t]here had been heated verbal exchanges, but I, I don't believe any of [appellant's] representations about the patterns of abuse that she's put out there dating back to a year after marriage." Appellee testified that appellant "made lots of criminal accusations against [him,]" but that they have "always been dismissed as being without merit." After the divorce proceedings, appellee testified that "everything was relatively stable until we got to [appellant's] filing for a protective order" in early May of 2010. Appellee recalled that appellant's mother and former fiancé contacted Child Protective Services on different dates in January of 2010 and that appellant contacted Child Protective Services and the Frederick City Police Department in April of 2010. Both departments conducted investigations and ruled out any allegations of abuse.

Appellee asked the court for sole legal and physical custody of the children and requested that any visitation with appellant be supervised. He testified that in his opinion, appellant was mentally ill and should not have overnight visitation with the girls, but proposed increasing the number of visitation days for shorter periods of time, such as dinners during the week. Appellee expressed concerns about appellant forgetting to give the children their medication during overnight visits because the girls are "symptomatic when they come back to [his home.]" He asked the court to clarify certain provisions of the *pendente lite* order regarding appellant's ability to obtain emergency care for the children and requested that the court continue to keep the gatekeeper in place to vet any further legal actions filed between the parties. Finally, appellee testified that he believed he was a fit and proper parent and that the custody arrangement he proposed was in the best interests of the children.

Dr. Rebecca Lynn Snyder was ordered by the court to perform both the initial and an updated custody evaluation. Dr. Snyder interviewed both children, both parents, the educators at each school, appellant's

therapist, appellant's oncologist, and the Child Protective Services worker assigned to the case. Dr. Snyder found no evidence to support that the children were physically mistreated by either parent. She explained that J. Leslie was more affected by the circumstances than her younger sister:

> Well, [J. Leslie's] had a family where domestic violence has been a presence in her life since she was three years old. She's had a very ill mother at, at various periods of time. She's had parents who to date have not been able to work together or even to adequately disengage and function sufficiently in, in a more parallel parenting mode. She's well familiar and can repeat what she believes her parents think about the other parent, which no surprise is very negative. . . . She has knowledge that her mother believes she's been sexually abused by her father.

Dr. Snyder also noted that J. Leslie experienced significant stress during transitions between appellant's care and appellee's care and that J. Leslie's teacher recommended that these transitions not occur on school days. Dr. Snyder opined that "the girls really miss their mom. They want to be with her. They enjoy their time with her. There is a hunger and a longing to have more mommy time."

Dr. Snyder explained the strengths and weaknesses of each parent. She described the strengths of appellee's parenting, as follows:

> [Appellee] is very structured. He has a, an authoritative but not an authoritarian approach with the girls so they're very clear on what the house rules are, what the consequences for misbehavior are. He's created a, an increasing step-wise movement toward more responsibility and privileges as you get older . . . he imbues a sense of independence and self-confidence for the girls in that kind of authoritative parenting approach.

On the other hand, she described the weaknesses of appellee's parenting:

> [Appellee] has not yet adjusted his expectations to what's appropriate to the co-parenting situation in which he finds himself. A whole lot more things need to roll off his back and not just personally in terms of his own reaction to things, but for the girls. A lot of the stuff needs to be not a big deal and, and communicated to them. I think he operates, as does [appellant], with such an incredibly focused hypervigilance toward the girls being harmed, neglected, mistreated, medicines not given or give too much of.

Dr. Snyder explained that

> [appellant] is absolutely delightful to observe with the girls. When [appellant] is at her best she is like [M. Leslie], warm, bubbly. She has also that same infectious smile and laughter. . . . I think [the girls] light up and particularly right now with [M. Leslie]. I mean she idealizes her mom and, really likes to see her and be with her. The flip side of that emotional expressiveness, Your Honor, and I've already alluded to it, both girls expressed to me again very clearly being concerned about Mom and concerned about Mom being sad, concerned about Mom being alone. [J. Leslie] to a certain degree I think believes at times she should be taking care of Mom.

Dr. Snyder noted that since appellant's cancer went into remission and her health was getting better, some of the stress and anxiousness was relieved. Dr. Snyder cited faults with both parents, explaining:

> Neither parent, Your Honor, has insight into the limitations of their own perspective. . . . The focus is almost, um, I won't say exclusively, but it is consistently the eye is on what the other parent, weaknesses, sins, in quotes, um, what their omissions of good parenting have been and both parents tend to see things in a very black and white I'm right, you're wrong.

When asked her opinion of what the visitation schedule should be, Dr. Snyder stated:

> The girls as I said would like more time with Mom. The conundrum comes in how to get, how to head toward a more balanced schedule while keeping the continuity and the regularity that the girls need in terms of routine. So whatever schedule, Your Honor, the Court orders it needs to be rigid, it needs to be regular. The girls need a pattern.

Dr. Snyder also recommended that each parent and the children see therapists that can remain neutral

and that the therapists then collaborate to reach a viable solution. Dr. Snyder testified that she considered the history of domestic violence and the allegations of sexual abuse in making a determination about the custody arrangement that would be in the best interests of the children.

Dr. Dennis Petrocelli, an expert in forensic and clinical psychiatry, reviewed evidence that pertained to allegations regarding sexual abuse of J. Leslie and to allegations of domestic violence. Dr. Petrocelli was asked to render an opinion on the impact of domestic violence that was witnessed by the children. Dr. Petrocelli disagreed with numerous aspects of Dr. Snyder's report, but mainly that her report omitted "the reality base from which [appellant's] anxiety derives" and opined that the fact that the children witnessed at least three episodes of domestic violence while the parties were married "is an essential thing to consider in terms of custody and visitation." Dr. Petrocelli explained that the "issue here is not only that they witnessed this, but now they are in the primary physical custody of the perpetrator of it . . . [which] puts the kids in, in a very, very difficult situation." He clarified: "In other words it, it's telling the kids this is of no import that this happened and that's, that's the specific thing that I think is so damaging. It's okay for you to primarily reside with someone that assaulted your mother." Dr. Petrocelli opined that "there has got to be a, a vastly greater amount of contact between this mother and her girls" and that he has not "seen anything in, in [appellant's] actions that indicates that she should not have custody." He conceded, however, that he had not examined the children and that all his information came from appellant or the documents entered into evidence.

Appellant argued that her improved health condition was a change of circumstance, which "certainly would help the Court consider expanding her time or even granting her custody under the circumstances." Appellant also argued that the children's longing to see more of their mother and their sadness of having short visits was a change of circumstances. Finally, appellant told the court that the "biggest changed circumstances" is the "growth in [appellant]."

The children's best interest attorney suggested that visitation with appellant occur every other weekend, beginning on Friday evenings and concluding on Sunday evenings, so that the drop off transitions did not interfere with school.

The court struggled with the custody determination and explained, that under normal circumstances, it would not award custody to appellee, but that the problem with awarding custody to appellant was that "we're all afraid of what next, what will come next in terms of those suspicions." The court found that there was not even a "scintilla of evidence" of sexual abuse and that there were other logical and reasonable explanations for the green discharge and red vagina. The court did, however, find by clear and convincing evidence that appellee committed domestic violence, which the court took into account in arriving at its decision. Finally the court concluded that

> there's sufficient change in circumstances for me to review all of this and take a look at it. Certainly I agree [appellant] in terms of her health, some stability I think, and in terms of children being a little older, cause me to have, find sufficient change in circumstances to reexamine the whole thing . . . I'm not ready to change the custody though. I'm gonna leave that where it is, with the physical and legal custody with [appellee].

The court ordered that during summer vacation, appellant have visitation with the children every weekend from Friday at 6:00 pm until Sunday at 5:00 pm, with exchanges to occur at the Frederick supervised transfer location. The court scheduled a subsequent hearing to discuss visitation during the school year.

At the review hearing on July 27, 2012, the court addressed appellant: "I'd like you to have more time than I'm giving you, okay? And I hate to say it this way, but you gotta earn it." The court also explained: "there ought to be much more time in the summer and perhaps not depriving [appellee] of every weekend, but some other way to open up the access. I just, I just feel constrained by the facts that I've been hearing over the years and it has been years, that, ah, I, I just don't trust folks." The court ultimately ordered that appellant have visitation with the children during the first, second, and fourth weekends of every month from 5:00 pm on Friday until 5:00 pm on Sunday. The court further ordered that if a holiday occurs on a Monday and appellant had the children for the weekend, that her visitation would be extended until Monday at 5:00 pm. The court also established a rotational visitation schedule for major holidays, such as Christmas and Thanksgiving.

Additional facts will be discussed below, as they pertain to the questions presented.

I.

Appellant argues that the court abused its discretion by awarding legal and physical custody to appellee. Appellant contends that the custody determination was not supported by the facts or the judge's findings and accordingly, reversal is required. Appellee responds that the trial judge's findings were supported by the record and that the court did not abuse its discretion by awarding him continued custody of the children.

When considering a motion to modify custody, courts must follow a two-step process: "'First, the circuit court must assess whether there has been a material change in circumstance. If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody.'" *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012) (quoting *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)) (internal citations and quotation marks omitted). "Therefore, we first consider whether the trial court erred in finding that a material change in circumstances occurred. Second, we consider whether the court abused its discretion in modifying custody." *Id*.

On appeal, we review child custody determinations, as follows:

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

Id. (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (internal quotation marks omitted) (alterations in original). "In our review, we give 'due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses.'" *Id*. at 171 (quoting *Yve S.*, 373 Md. at 584). Broad discretion is given to the trial judge because "only he sees the witnesses and the parties, [and] hears the testimony, . . . ; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id*. (quoting *Yve S.*, 373 Md. at 586).

A. Material Change of Circumstances

"'In [the custody modification] context, the term material relates to a change that may affect the welfare of a child.'" *Gillespie*, 206 Md. App. at 171 (quoting *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996)) (internal quotation marks omitted). "'The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed.'" *Id*. at 171-72 (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)).

Neither party disputes that there was a material change of circumstances in this case. Appellant testified that she agreed to the terms of the initial custody arrangement in part, because of her financial situation, her health condition at the time, and the recent death of her father. After hearing testimony from appellant, appellant's oncologist, and the custody evaluator, the court found that appellant's improved health, appellant's increased stability, and the children being a little older, collectively, constituted a sufficient change in circumstances to satisfy the first prong of the test. We conclude that the factors considered by the court were material, in that they relate to significant changes that could possibly affect the welfare of the children, and, therefore the court did not err by finding that there was a material change in circumstances.

B. Modification of Custody and/or Visitation

After having determined that there was a sufficient change in circumstances to warrant a review of the custody determination, we next consider whether a change in custody is in the best interests of the children. "When making a custody determination, a trial court is required to evaluate each case on an individual basis in order to determine what is in the best interests of the child." *Gillespie*, 206 Md. App. at 173. There are several factors a trial court may consider in determining custody, including:

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

Id. (quoting *Wagner*, 109 Md. App. at 39) (internal citations and quotation marks omitted). "'In determining whether joint custody is appropriate, the capacity of the parties to communicate and reach shared decisions regarding the children's welfare is of paramount importance.'" *Id.* (quoting *Taylor v. Taylor*, 306 Md. 290, 303 (1986)).

In this case, the judge found that while there was a sufficient change in circumstances to warrant review, a change in custody at that point in time was not in the children's best interest. First and foremost, the court found that there was no evidence that appellee abused either of the children. The court expressed concern that if custody was granted to appellant, there would be no way to know "what [would] come next in terms of those suspicions." In that regard, the judge was not satisfied that he saw good behavior from either parent,

but conveyed his belief that children need both their parents and found that it was in the children's best interests to have expanded unsupervised visitation with appellant.

The court heard all the testimony and evidence presented over the course of the two-day *pendente lite* hearing and the three-day merits hearing and had the opportunity to judge the credibility and the demeanor of both parents. In reaching a final custody determination, the court considered numerous factors, which included: the fitness and stability of the parents, the children's current living environment, the influences that each parent would exert on the children, and the moral well-being of the children. The court also noted the volatile history between the parties, which reasonably explains why the court did not grant joint custody. The court substantially increased appellant's visitation with the children from one seven-hour day every Sunday, under the *pendente lite* order, to overnight visits every weekend over the summer and three out of four weekends during the school year.

We conclude that the court's factual findings were not clearly erroneous and that the court's decision was based on sound principles of law. Based on the facts of this case, the court did not abuse its discretion in awarding appellee continued sole legal and physical custody of the children, nor did it abuse its discretion in granting expanded visitation to appellant. Accordingly, we affirm the decision of the circuit court.

II.

Next, appellant contends that the trial court erred by failing to comply with this Court's 2011 mandate during the remanded custody proceedings. Specifically, appellant argues that based on this Court's mandate, the trial court was "duty-bound" to follow the visitation schedule established by the September 18, 2009 consent agreement. Appellee maintains that the trial court followed this Court's mandate and did not abuse its discretion in establishing a new visitation schedule.

Section 1-201(a)(5) of the Family Law Article establishes that the trial court has jurisdiction over "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[.]" Section 1-201(b) grants the court the authority to:

> (1) direct who shall have the custody or guardianship of a child, pendente lite or permanently;
>
> (2) determine who shall have visitation rights to a child;
>
> (3) decide who shall be charged with the support of the child, pendente lite or permanently;
>
> (4) from time to time, set aside or modify its decree or order concerning the child; or
>
> (5) issue an injunction to protect a party to the action from physical harm or harassment.

The trial court was well within its jurisdiction to make a custody determination at the *pendente lite* hearing as well as at the trial on the merits. Further, the court had the authority to determine visitation and most importantly, had the authority to modify both the original consent order and the *pendente lite* order.

This Court's mandate in no way directed the trial court to reinstate the provisions of the September 18, 2009 custody agreement. Rather, we vacated the protective order granted in favor of appellee and remanded the case for a hearing on appellant's petition for a protective order to allow her to present evidence of prior domestic abuse. While this Court vacated the terms of the final protective order that granted custody to appellee, there was absolutely no directive that required the trial court to revert back to the 2009 custody agreement. The trial court properly followed this Court's mandate by vacating the protective order and allowing appellant to present testimony of domestic abuse.

During the pendency of the previous appeal, the parties filed cross-petitions to modify custody, which the court considered first, on a *pendente lite* basis, in March of 2011 and then on the merits, in June of 2012. With regards to those proceedings, the trial court maintained the children in appellee's custody, but modified appellant's visitation schedule after each hearing to increase her access to the children. The modification proceedings were separate and distinct from this Court's mandate to vacate and remand. Accordingly, we conclude that the trial court properly complied with this Court's mandate and did not abuse its discretion by declining to reinstate the September 18, 2009 custody agreement.

III.

Finally, appellant argues that the court abused its discretion by denying her motion for a child abuse and child sexual abuse evaluation. Appellee responds that the court did not abuse its discretion by ordering "an updated custody evaluation rather than ordering another sexual abuse examination." Appellee contends that there was "ample evidence to support that another forensic exam was unmerited" and that Dr. Snyder was qualified to perform the evaluation.

Appellant filed a motion for child abuse and sexual child abuse evaluation on October 4, 2010, before the decision in the previous appeal was rendered and prior to the March, 2011 *pendente lite* hearing. Appellant asked the court to appoint Joyanna Lee

Silberg, a specialist in the field of child abuse, to conduct a sexual abuse evaluation of the children. The court considered, but ultimately denied appellant's motion and instead reappointed Dr. Snyder as the evaluator to either complete a new evaluation or update her previous report from 2009. The court explained:

> Now, as far as the custody evaluation, and there should be one, and we've used the term, we weren't contradicted using the term updated evaluation. The evaluation that did take place, that was, uh, submitted that is, was submitted in July of 2009. So, whether we're talking about an updated evaluation or just an evaluation, I don't know. The terminology doesn't matter. Uh, I'm perfectly content for Dr. Snyder to conduct that evaluation, um, Dr. Snyder is a professional. If she believes there's a sexual component that needs to be looked at beyond her capability, uh, she will refer that, I have no doubt.

Dr. Snyder testified at both the March, 2011 *pendente lite* hearing and at the June, 2012 merits hearing that while she was aware of the allegations that appellee had sexually abused the children, she found no evidence of abuse in either evaluation. At the June, 2012 trial on the merits, after hearing all the evidence presented in the case, the judge concluded:

> Nobody is going to say that the children were abused. . . . I don't accept from the objective evidence that came, was brought at the time that there was sexual abuse. I think over the course of time, it's clear to me that I couldn't find it by even a preponderance of the evidence. I can't find a scintilla of evidence.

The court, therefore, did not abuse its discretion in denying appellant's motion for child sexual abuse evaluation when there was no objective evidence of sexual abuse presented to the court.

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

FOOTNOTES

1. Appellant's questions were phrased, as follows:

> Question 1: Whether the court abused its discretion or otherwise erred by granting [Appellee] father sole legal and primary physical custody where the court found by clear and convincing evidence that the father had abused the mother, that it would not normally award custody to the father, that changed circumstances had occurred, and where there were no findings and scant evidence that an award to the Appellant mother was contrary to the children's best interests?
>
> Question 2: Whether the court erred by refusing to implement the decision the Court of Special Appeals that had vacated the trial court's earlier protective orders when the lower court on remand lessened Appellant mother's access to the children than what was provided under the original court-sponsored custody agreement?
>
> Question 3: Whether the court abused its discretion by ordering a new evaluation by the same evaluator who had previously provided an incomplete custody evaluation rather than appointing a new evaluator with expertise in diagnosing and treating children for potential abuse and sexual abuse?

2. To respect the privacy of the minor children, we refer to them by their first initials and last name. *See Muthukumarana v. Montgomery County*, 370 Md. 447, 458 n.2 (2002).

3. We held that "[t]he court's rulings to keep out evidence of the prior finding of abuse were contrary to its requirement under the statute and caselaw. Thus, the court erred in excluding this information."

NO TEXT

Cite as 11 MFLM Supp. 111 (2013)

CINA: change in permanency plan: visitation

In Re: Abraham K.

No. 0098, September Term, 2013

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

Opinion by Hotten, J.

Filed: October 1, 2013. Unreported.

Despite the father's progress, the circuit court did not abuse its discretion by changing the child's permanency plan to non-relative adoption, given concerns regarding the parent-child relationship and the length of time in foster care; also, the court did not abuse its discretion in changing visitation from weekly unsupervised visits to supervised visits every other week, even though the father was not suspected of abuse or neglect.

This appeal arises from a decision of the Circuit Court for Montgomery County, sitting as a juvenile court, to change the permanency plan for minor child, Abraham K. ("Abraham"), from reunification with appellant-father, Crepson K. ("Father"), to adoption by a non-relative and to adjust Father's visitation schedule with Abraham from unsupervised visits once a week to supervised visits twice a month. Abraham was determined to be a child in need of assistance ("CINA") shortly after birth and was subsequently placed in foster care. The Montgomery County Department of Health and Human Services ("the Department") eventually recommended adoption by a non-relative because of concerns regarding Father's parenting skills and the length of time that Abraham had been in foster care.

Father noted an appeal, and presents the following three questions[1] for review:

1. Did the trial court err or abuse its discretion in changing the permanency plan to adoption when the father was fully compliant with all tasks, was visiting regularly with the child, had made significant progress during the last review period and where the evidence consisted of opinions, the facts and conclusions of which were disputed by other evidence?
2. Did the trial court err in finding reasonable efforts on the part of the Department where the Department failed to make any referrals suggested by father's psychological evaluation and where the efforts made were designed to effect a change of plan?
3. Did the trial court err in changing father's visitation with the child from unsupervised to supervised and by reducing the frequency of visits where no articulable or legally sufficient reason for the change was presented and where the court relied solely on the opinions of an expert who was not qualified to express an opinion?

For the reasons outlined below, we shall affirm the judgment of the circuit court.

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.

FACTUAL AND PROCEDURAL BACKGROUND

Rhonda J. ("Mother")[2] gave birth to Abraham[3] on December 12, 2010. At the time, both parents were homeless and suffering from mental health disorders. Father was unaware of Mother's pregnancy until she asked him to consent to a private adoption. He refused, and Abraham was subsequently placed in emergency shelter care under Md. Code (1974, 2013 Repl. Vol.), § 3-815(b) of the Courts and Judicial Proceedings Article [hereinafter Cts. & Jud. Proc. § 3-815(b)][4] on December 23, 2010.

On December 27, 2010, the Department filed a CINA petition pursuant to Cts. & Jud. Proc. § 3-809,[5] alleging that neither parent was able to care for Abraham. During a mediation on January 18, 2011, Father admitted that he was unable to properly care for his son and agreed to Abraham's continued placement in foster care. In an order dated January 24, 2011, the juvenile court (1) allowed Father supervised visitation once a week and (2) adopted the Department's recommendation that the "permanency plan" be reunification with Father. It also directed Father to:

1. Keep the Department informed of his current telephone number at all times;
2. Sign any releases necessary for the Department to communicate with his mental health providers and access any mental health evaluations;
3. Undergo any further evaluations as required, and follow all recommendations for treatment, under the direction of the Department;
4. Undergo a substance abuse evaluation and follow all recommendations for treatment under the direction of the Department;
5. Participate in parenting classes appropriate to the Child's age, under the direction of the Department;
6. Continue to participate in and complete the Abused Persons Program, under the direction of the Department;
7. Continue to actively participate with all services he is currently receiving at St. Luke's House ["St. Luke's"], including but not limited to job coaching and all mental health services provided and available;
8. Continue to actively seek housing and employment[.]

Following a review hearing on May 18, 2011, the juvenile court reaffirmed Father's visitation schedule and the permanency plan of reunification. In addition to its previous directives, the juvenile court ordered Father to obtain legal U.S. residency and submit to a psychological evaluation.

At the next review hearing on November 7, 2011, the juvenile court modified Father's visitation from supervised to unsupervised. While the Department continued to recommend that Abraham be reunited with Father, counsel for Abraham requested that the juvenile court change the permanency plan to adoption by a non-relative. Although it took notice of the fact that Abraham had lived in foster care for the past eleven months, the juvenile court reaffirmed the permanency plan of reunification. Counsel for Abraham made the same request at a review hearing on April 12, 2012. Nevertheless, the juvenile court adopted the permanency plan of reunification.

Before the next review hearing, Father was assessed by a psychologist, Kelly Zinna, Psy.D. ("Dr. Zinna"). Dr. Zinna interviewed and administered tests to Father. In a report dated June 22, 2012, Dr. Zinna diagnosed Father with several mental disorders, including generalized anxiety disorder, bipolar disorder, chronic major depressive disorder without psychotic features, and narcissistic personality disorder. She cautioned that these conditions could impact Father's parenting abilities, stating:

> Of concern is that [Father]'s narcissistic and paranoid personality traits may interfere with his judgment and overall functioning, and ultimately, his parenting abilities. Truly [Father]'s narcissistic qualities are of the utmost concern as these may translate into his placing his own needs above those of his young son. Evidence of this was seen in the clinical interview in his insistence on talking about his own past victimization and behaviorally refusing to focus conversation on his son's needs.

The Department expressed concern with Dr. Zinna's conclusions in its report dated September 14, 2012. It also noted that Father had missed appointments with Dr. Zinna and St. Luke's. Despite these issues, the Department continued to recommend reunification. At the following review on September 24, 2012, counsel for Abraham again requested that the permanency plan be modified to adoption by a non-relative. While the juvenile court adopted the Department's recommendation and reaffirmed the permanency plan of reunification, it expressed concern regarding the length of time that Abraham had remained in foster care and the bond that he had formed with his foster parents. It therefore ordered the Department to arrange a parent-child assessment addressing the following questions:

1. Can the assessment identify obstacles related to attachment issues now?
2. What effect would reunification have on the child at this point in his life?
3. What services are available that would strengthen the relationship between the father and the child?
4. How would the reunification process begin and how would it be accomplished in a way that would reduce the negative impact on the child in light of the bond with the foster parents?

The Department retained a "child placement consultation team" at the Lourie Center ("the Center") to

conduct the assessment. The Center addressed the juvenile court's concerns in a report dated December 14, 2012. It expressed reservations regarding Father's "psychological functioning" and concluded that "the obstacles that [he] would need to overcome in order to develop a healthy attachment relationship with his son are daunting." The Center "[could not] predict a positive developmental outcome if Abraham were placed in [Father]'s care." In place of recommending services, it determined that "[Father] should first demonstrate that he is capable of utilizing his own therapeutic services and achieving a level of self sufficiency. . . . " Finally, it concluded that reunification would cause "severe, irreversible damage" to Abraham.

Subsequently, in a report dated January 7, 2013, the Department modified its recommendation from reunification to adoption by a non-relative. The report heavily relied on Dr. Zinna's diagnoses and the Center's conclusions. It also cited the length of time that Abraham had remained in foster care:

> The Department has made consistent, supportive, and substantial reasonable efforts toward reunification in the past 24 months. Despite these efforts, [Father] has shown an inability to be a proactive caregiver for Abraham. Given the length of time Abraham has been in care and the persistent barriers to reunification, the Department respectfully recommends a change of plan to Adoption by a Non-Relative.

The juvenile court conducted a hearing on February 15, 2013 to determine whether Abraham's permanency plan should be modified. The Department called Elizabeth Kaplan, Ph.D. ("Dr. Kaplan"), a member of the Center's assessment team, and submitted the Center's report into evidence.

The Department also called the assigned social worker, Jill Kelly ("Ms. Kelly"). Ms. Kelly testified regarding the services provided for Father, including parenting classes, a psychological evaluation, and the Center's report. She also stated that she communicated with Father's service providers at St. Luke's. Although Ms. Kelly admitted on cross-examination that she had not referred Father to "reunification therapy," she also indicated that "services . . . work as well as the client can work them" and provided that Father was not regularly attending his individual therapy.

Father called Dominique Keuper ("Ms. Keuper"), a "work force development specialist" at St. Luke's. Ms. Keuper testified that Father was employed at a construction company and that she met with him regularly. She also stated that she was arranging for his transition to a service provider in the District of Columbia, where he had recently moved, so that he could continue to receive support. Father also called his roommate, Matilda Robinson ("Ms. Robinson"). Ms. Robinson testified that she had observed Abraham with Father and that they had a "good relationship." Father also testified that he had a "good bond" with his son and that he believed that he was better able to care for Abraham than Abraham's foster parents.

The juvenile court announced its decision at a hearing on February 22, 2013. There, the juvenile court subsequently weighed the six factors outlined in Md. Code (1984, 2012 Rep. Vol.), § 5-525(f)(1) of the Family Law Article [hereinafter Fam. Law § 5-525(f)(1)][6] to determine Abraham's permanency plan:

> The first factor is the child's ability to be safe and healthy in the home of the child's parent. In this case, the evidence was that, while [Father] has, at the moment, a room that he rents on a month-to-month basis from Ms. Robinson, it is not substantially more than that in terms of the stability of that home. It is a place that, I believe, the Department has been to, and they've seen. They thought that physically it was adequate for a child, but, in looking at this statute, my judgment is that physical surroundings are not the only issue. The issue is the child's ability to be safe, and this is where the Lourie Center's findings I found very persuasive. What the Lourie Center's findings were was that [Abraham] had not developed the kind of attachment to [Father] that was necessary to allow [Abraham], over the long run . . . to feel emotionally secure and safe in [Father]'s care . . . while other people did suggest that there was a bond, I found that the Lourie Center's opinion on this was simply more persuasive . . . So, I do think that the child's ability to be safe and healthy in the home of [Father] is very questionable.
>
> The next factor was the child's attachment and emotional ties to the child's natural parents . . . it was clear to the people at the Lourie Center that it was the quality of the bond . . . was not the kind of thing that had long-term – was going to be of long-term promise to the child.
>
> * * *
>
> If there are going to be problems in a situation like this, the parent has to be able to anticipate them, adjust for

them, take care of them, and address them. In this case, [Father] wasn't willing to admit that they might even occur.

The next factor I considered was the child's emotional attachment to the child's current care giver and care giver's family . . . [t]he comparison between [the Lourie Center's] view of the child with [Father] and the foster parents was stark. While watching Abraham with [Father], they were afraid that Abraham may have some speech delays based on his lack of response. With the foster parents, they had no such concern, because Abraham reacted with them in a way that was just much more what one would expect for a child of this age. And, so, what they observed was that the child was very bonded and very appropriate with his care givers, and had a very healthy emotional attachment to them.

The next factor that I considered was the length of time the child has resided with the current care giver. As we've indicated, this child has been in foster care with these people since December 23rd of 2010; that is now 25 months, at this point.

The next thing that we considered was the potential emotional developmental and educational harm to the child if removed from the current placement. And, again, this is an area in which the Lourie Center was most concerned. Looking at page 11 what they said was . . . "'CPCT cannot foresee a reunification process between [Father] and Abraham without causing severe, irreversible damage to Abraham, and seriously impairing his ability to achieve his developmental potential. With due respect to the Court, and the best interest of the child, we cannot support reunification. Any planning, at this time, that might mitigate the impact of disrupting Abraham's bond with his foster parents does not seem feasible.'"

It really cannot be stated more strongly than that. And, based on everything that they've said and all the evidence, I did find that persuasive. It was an opinion, not just voiced by the Lourie Center, it was also an opinion that was voiced in some respects by M[s]. Zinna where she said that she had grave concern about [Father]'s ability to be a parent.

Finally, the last factor was the potential harm to the child by remaining in state custody for an excessive period of time. There was no specific testimony about that, but what the lawyers and everybody indicated was that how lucky, in some ways, this little boy was to have been with one foster family the whole time while he has grown up from being an infant, a newborn.

And we all know, given what sometimes happens in these cases, is that there is no guarantee in its current status that these foster parents are going to be willing to continue just as foster parents. And, so, that to me is a risk of potential harm to the child if the child remains in state custody under a plan of reunification.

After the juvenile court indicated that Father's suggestion of reunification therapy was unfeasible, it determined that it was in Abraham's best interest to modify his permanency plan from reunification to adoption by a non-relative. Thereafter, Father noted his appeal.

STANDARD OF REVIEW

The Court of Appeals in *In Re: Yve S.,* 373 Md. 551, 586 (2003) outlined the applicable standards of review in CINA cases. The Court established that there are:

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

Id. at 586 (citations and internal quotation marks omitted) (quoting *Davis v. Davis,* 280 Md. 119, 122-26 (1977).

DISCUSSION

I.

A. The CINA Statutory Scheme

A parent has a constitutionally protected right to raise his or her children "as he or she sees fit, without undue interference by the State." *Yve S.,* 373 Md. at 565; *In re Adoption/Guardianship of Victor A.,* 386 Md. 288, 299 (2005). However, this right is not absolute. *Yve S.,* 373 Md. at 568. The State will intervene if:

> (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.

Cts. & Jud. Proc. § 3-801(f). At all CINA proceedings, juvenile courts are guided by Cts. & Jud. Proc. § 3-802(a), which states:

> (a) *Purposes.* – The purposes of this subtitle are:
>
> (1) To provide for the care, protection, safety, and mental and physical development of any child coming within the provisions of this subtitle;
>
> (2) To provide for a program of services and treatment consistent with the child's best interests and the promotion of the public interest;
>
> (3) To conserve and strengthen the child's family ties and to separate a child from the child's parents only when necessary for the child's welfare;
>
> (4) To hold parents of children found to be in need of assistance responsible for remedying the circumstances that required the court's intervention;
>
> (5) Except as otherwise provided by law, to hold the local department responsible for providing services to assist the parents with remedying the circumstances that required the court's intervention;
>
> (6) If necessary to remove a child from the child's home, to secure for the child custody, care, and discipline as nearly as possible equivalent to that which the child's parents should have given;
>
> (7) To achieve a timely, permanent placement for the child consistent with the child's best interests; and
>
> (8) To provide judicial procedures for carrying out the provisions of this subtitle.

The juvenile court implements this statutory scheme through a "permanency planning" hearing held within eleven months of an out-of-home placement. Cts. & Jud. Proc. § 3- 823(b)(1)(i). At these hearings, a "permanency plan" for the child is determined. § 3- 823(e)(1)(i). The default plan is reunification with either parent. *Id.* However, reviews are held every six months to determine if it is in the best interest of the child to modify the plan. § 3-823(h)(1)(i). The overarching purpose of any plan is to "'. . . expedite the movement of Maryland's children from foster care to a permanent living, and hopefully, family arrangement.'" *In re Joseph N.,* 407 Md. 278, 285 (2009) (quoting *In re Damon M.,* 362 Md. 429, 436 (2001).

When determining how to modify the permanency plan, the Department and the juvenile court are required to consider the following plans in order:

> (2) To the extent consistent with the best interests of the child in an out-of- home placement, the local department shall consider the following permanency plans, in descending order of priority:
>
> (i) returning the child to the child's parent or guardian, unless the local department is the guardian;
>
> (ii) placing the child with relatives to whom adoption, custody and guardianship, or care and custody, in descending order of priority, are planned to be granted;
>
> (iii) adoption in the following descending order of priority:
>
> 1. by a current foster parent with whom the child has resided continually for at least the 12 months prior to developing the permanency plan or for a sufficient length of time to have

established positive relationships and family ties; or

2. by another approved adoptive family; or

(iv) another planned permanent living arrangement that:

1. addresses the individualized needs of the child, including the child's educational plan, emotional stability, physical placement, and socialization needs; and

2. includes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life.

Fam. Law § 5-525(f)(2). The Department must also balance the factors in § 5-525(f)(1). *In re James G.,* 178 Md. App. 543, 569 (2008).

As there is a statutory preference for reunification, the Department is required to make "reasonable efforts" towards this goal:

> (e) *Reasonable efforts.* – (1) Unless a court orders that reasonable efforts are not required under § 3-812 of the Courts Article or § 5-323 of this title, reasonable efforts shall be made to preserve and reunify families:
>
> (i) prior to the placement of a child in an out-of-home placement, to prevent or eliminate the need for removing the child from the child's home; and
>
> (ii) to make it possible for a child to safely return to the child's home.
>
> (2) In determining the reasonable efforts to be made and in making the reasonable efforts described under paragraph (1) of this subsection, the child's safety and health shall be the primary concern.
>
> (3) Reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with the reasonable efforts described under paragraph (1) of this subsection.

Fam. Law § 5-525(e). However, "there are some limits . . . to what the State is required to do." *In re Rashawn H.,* 402 Md. 477, 500 (2007). For instance, the State, and, therefore, the Department, is not required to ". . . cure or ameliorate any disability that prevents the parent from being able to care for the child." *Id.* Therefore, if the parent, despite reasonable assistance, ". . . remains unable or unwilling to provide appropriate care[,]" the welfare of the child prevails. *Id.*

We applied the "reasonable efforts" standard in *James G.,* 178 Md. App. at 543. In that case, the Department sought to change the permanency plan for the minor child, *James G.* ("James"), from reunification with his father, Mr. G., to placement with a relative for custody and guardianship. *Id.* at 550. The juvenile court conducted a hearing to determine James' permanency plan. *Id.* At that hearing, the Department sought to change the plan because Mr. G. did not have stable housing or employment. *Id.* at 552. However, the Department admitted that it did not assist Mr. G. with finding housing. *Id.* at 553. Furthermore, the only employment assistance it provided was a single referral. *Id.* at 556.

The juvenile court adopted the Department's recommendation and modified the permanency plan. *Id.* at 564. In its order, it held that the Department made ". . . reasonable, although certainly not exemplary, efforts to achieve reunification" and noted that ". . . more could have been done to help [Mr. G.] get a job, which would in turn have helped with getting housing." *Id.* We reversed, stating:

> In this case, [assigned case worker] testified that the only impediments to appellant regaining custody of James were appellant's lack of stable employment and lack of housing, but the Department claimed it could not provide housing assistance until appellant was employed. And yet, the only effort the Department made to address appellant's unemployment was a single referral to an organization that could not address appellant's employment needs.

Id. at 599. Thus, we concluded that the Department had not made reasonable efforts towards reunification. *Id.* at 601.

In the instant case, Father's objection to the juvenile court's "reasonable efforts" finding is a preliminary question to whether the juvenile court abused its discretion in changing the permanency plan from reunification to adoption by a non-relative. Therefore, we will review this issue first.

B. Whether the Juvenile Court Erred in Determining that the Department Made Reasonable Efforts at Reunification

As a threshold matter, the Department argues that the issue of whether it made reasonable efforts towards reunification is not properly preserved for appeal because "[Father] never argued . . . that the

Department's efforts at reunification were not reasonable, despite having an opportunity to do so." Thus, ". . . by not raising the issue, [Father] tacitly agreed to the reasonableness of the efforts outlined in the Department's January 7, 2013 report." We disagree.

The scope of our review is governed by Md. Rule 8-131(a), which states:

> (a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in **or** decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(emphasis added). Thus, an argument that was raised *sua sponte* by the trial court may still be reviewed. *See Bradley v. Bradley,* 208 Md. App. 249, 257-58 (2012).

Here, Father never explicitly raised the issue of reasonable efforts towards reunification at the hearing. However, the Department argued reasonable efforts to support its new permanency plan. Moreover, the juvenile court made a reasonable efforts finding. This was an issue raised by the Department and decided by the juvenile court. Thus, it is properly preserved for our review.

A finding that the Department has made reasonable efforts towards reunification is a factual finding that we will not set aside unless clearly erroneous. *In re Shirley B.,* 191 Md. App. 678, 708 (2010). Before reviewing the juvenile court's findings for error, we briefly address a conflict between Father's contentions and the record.

Father argues that "[a]t trial, the Department, in its presentation, and the [juvenile court], in its findings and written order, did not detail any reasonable efforts made by the Department in furtherance of the sole plan of reunification." This is simply untrue. The Department's report that it prepared for the hearing outlined the reasonable efforts it had pursued during the review period. Ms. Kelly, the assigned case worker, testified to the reasonable efforts that she and the Department had pursued during the review period. The juvenile court, both in its oral findings and in its written order, determined that the Department had made reasonable efforts during the review period and stated what those efforts were. Accordingly, Father's contention has no basis in the record.

Father also asserts that, while the Department ". . . certainly received information concerning the therapies offered [sic] [F]ather at St. Luke's and did receive the psychological evaluation on [F]ather," it "did not follow any of the recommendations made therein, instead expending its efforts on the [Center] report, *which was created for the primary purpose of achieving a plan of adoption*." (emphasis added). This contention is also patently false. The record indicates that the Department coordinated with the Center to evaluate the best way to reunite Father and Abraham. However, the Center concluded that it was not able to complete that task because there was no "best" way to reunite Father with his son. The Center's report was the catalyst for the adoption plan, not the other way around.

Father has been inconsistent regarding what "reasonable efforts" the Department should have made. At the hearing, he indicated that the Department should have provided reunification therapy. On appeal, he faults the Department for failing to (1) follow up with Dr. Zinna's therapy recommendations and (2) refer him to reading classes. We do not find either argument persuasive.

The juvenile court found that the Department made the following "reasonable efforts" to achieve reunification:

> a. Regular face to face contact with Abraham during the visits in his licensed foster home;
> b. Transportation of Abraham weekly, often in evenings, to and from visitation with his father;
> c. Maintained communication with Abraham's foster parent to coordinate visits and other appointments;
> d. Communicated with staff at [St. Luke's] to confirm [Father]'s participation in services and his progress with meeting his goals;
> e. Discussed with [Father] the expectations for reunification with Abraham;
> f. Frequent contact and attempted contact with [Father] to schedule appointments and visitation with Abraham that fits into his schedule;
> g. Arranged for and coordinated a parent-child assessment through the [Center];
> h. Provided transportation for [Father] to attend scheduled appointments with the [Center] for

completion of the parent-child assessment; and

i. Made arrangements to inspect [Father]'s new residence after he informed the Department of the move to the new residence.

This case is clearly distinguishable from *James G.* While in that case the Department made a single referral, here the Department made numerous efforts to provide direct services to Father and to coordinate with community service providers. Ms. Kelly indicated that she was in continuous contact with St. Luke's, a service that was able to secure both housing and employment for Father. However, the most important distinction between *James G.* and the instant case is that in *James G.,* the services that the Department failed to provide would have addressed its concerns about reunification. Here, the Department's concerns were not as simple as lack of housing or employment. Its reasons for modifying the permanency plan were (1) Father's mental health problems; (2) the worsening attachment between Father and Abraham; and (3) the length of time that Abraham had been in foster care. Regarding the first issue, Father was already receiving individual therapy. The Center's report concluded that the second issue did not have a solution. Finally, the Department was clearly unable to address the last issue. The Department was not able to offer any more services. Thus, the juvenile court did not err in finding that the Department made reasonable efforts towards reunification.

C. Whether the Juvenile Court Abused its Discretion in Changing the Permanency Plan from Reunification to Adoption by a Non-Relative

Father contends that the juvenile court erred when it modified Abraham's permanency plan from reunification with him to adoption by a non-relative. His argument is predicated on both the manner in which the juvenile court applied the law and its ultimate conclusion. We will first review the juvenile court's decision for legal error.

1. Legal Error

If we determine on review that the juvenile court misapplied the law, we must remand the case back for further proceedings. *Yve S.,* 373 Md. at 568. We conduct this review *de novo. In re Adoption of Sean M.,* 204 Md. App. 724, 733 (2012). Father argues that the juvenile court erred "in its application of the governing statutes[.]" Specifically, he alleges that the juvenile court did not afford sufficient weight to his rights as a parent. This contention has no merit.

The record indicates that the juvenile court considered the correct statutory scheme in altering Abraham's permanency plan. Before outlining the basis for its ruling, the juvenile court stated:

> Of course, in determining what the permanency plan should be, we are mandated by [Cts. & Jud. Proc. § 3-823(e)(2)] to consider the factors specified in [Fam. Law 5-525(f)(1)], and what the statute tells us is that in developing a permanency plan for a child who is in and out of home placement, the Department has to give primary consideration to the best interest of the child, and consider the following factors. Of course, this is what the Court must consider, as well, in determining what is the permanency plan that is in the best interest of the child.

Thus, the juvenile court did not favor ". . . the foster parents' legally unprotected interests in raising the child over the father's liberty interest[,]" as Father avers. Instead, it focused where it was required to: on Abraham's best interests.

Father further relies on two subsections of Cts. & Jud. Proc. § 3-802(a): § 3-802(a)(3), which states that one of the purposes of CINA proceedings is to strengthen family ties, and § 3-802(a)(5), which establishes that another purpose is to hold the local department responsible for assisting parents. However, Cts. & Jud. Proc. § 3-802(a) outlines other, countervailing goals that Father does not reference. For example, § 3-802(a)(1) provides that CINA proceedings should be concerned with the ". . . care, protection, safety, and mental and physical development" of the minor. Furthermore, § 3-802(a)(4) concerns the parents' responsibility for their child's welfare.

Contrary to Father's contention, a juvenile court cannot focus on the parent's interests to the detriment of their child. *In re Adoption of Ta'Niya C.,* 417 Md. 90, 114-15 (2010). *In Adoption of Ta'Niya C.,* a juvenile court declined to terminate the mother's parental rights because "she did much of what she was asked[.]" *Id.* at 114 (quotations omitted). It failed to address the child's emotional circumstances or needs. *Id.* at 114-15. The Court of Appeals held the juvenile court in error, stating that "the ultimate focus of the juvenile court's inquiry must be on the child's best interest[,]" instead of what the parent may have done to aid reunification. *Id.* at 116.

Here, the juvenile court acknowledged that Father loved Abraham and was making an effort at reunification:

> [Father], let me say that I've thought about this case very carefully as we do all of our cases. And I know that

> this has been – I know that you believe that you have done everything that the Department has asked of you. And everybody here appreciates your efforts, and I don't want to minimize your efforts. And this is a difficult and sad situation, but, ultimately, what I'm required to do is not to act in your best interest; I am required to act in your child's best interest. And, so, for all of these reasons, this is the decision that I think I have to make.

As in *Adoption of Ta'niya C.,* this is a situation where consideration of the parent's efforts at reunification was simply not as important as concern for other circumstances affecting the child's best interests. Therefore, the juvenile court correctly applied the governing statutes in making its determination.

2. Error in Ultimate Conclusion

Father further contends that, because he substantially complied with the Department's recommendations, the juvenile court abused its discretion by changing the permanency plan from reunification to adoption by a non-relative. Specifically, he argues that the Department should have assigned more weight to his progress.

By the time of the February 15, 2013 permanency planning hearing, Father had secured employment and housing. This remedied two concerns that the Department had when Abraham was born. However, the Department had developed new concerns: (1) the lack of attachment between Abraham and Father, and (2) the length of time that Abraham had been in foster care. The Center's report concluded that the first issue could not be remedied, while the second issue could only worsen. Again, unlike the case in *James G.,* where the Department was able to provide solutions to the problems preventing reunification, here there were no available solutions. Therefore, the juvenile court did not abuse its discretion by abandoning reunification.

II.

Finally, Father contests the juvenile court's decision to modify his visitation with Abraham from unsupervised visits once a week to supervised visits once every two weeks. We review this ultimate conclusion for abuse of discretion. *In re Barry E.,* 107 Md. App. 206, 220 (1995); *see Yve S.,* 373 Md. at 568.

We have established that, although visitation is a privilege that "may [not] be easily denied," it "must yield when inconsistent with the best interest of the children." *In re Barry E.,* 107 Md. App. at 220; *accord In re Billy W.,* 387 Md. 405, 447 (2005). While the legislature has created an affirmative obligation to modify visitation if abuse or neglect is suspected, Fam. Law § 9-101,[7] there is no indication that a juvenile court abuses its discretion if it modifies visitation without such suspicion. Juvenile courts are only required to consider the best interests of the child in determining visitation. *See Billy W.,* 387 Md. at 447.

At the hearing, Father and counsel for Abraham requested that visitation remain weekly, while the Department recommended that it be reduced to once a month. The juvenile court then turned to Ms. Kelly and asked for her recommendation. She indicated that supervised visits once every two weeks would be in Abraham's best interests because it would allow him to gradually adjust to less time with Father. Thereafter, the juvenile court made the following ruling:

> What I'm going to do, at this point, is, with all due respect to counsel, I am going to accept the recommendation of the mental health professional in the room, the social worker, on this, and I'm going to order that visits be supervised every other week at this time, because there has been — that is what, as . . . common sense, the mental health professional is telling us is the best thing for the child.

Father alleges that adopting Ms. Kelly's recommendation was improper because the juvenile court did not exercise its discretion. We disagree. The record indicates that the juvenile court considered the positions of each party before receiving Ms. Kelly's recommendation. In adopting her opinion, the juvenile court stated that it was acting in Abraham's best interest, as required by law. Therefore, there was no abuse of discretion.

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

FOOTNOTES

1. As discussed *infra,* several of Father's questions misstate the applicable standard of review.

2. Mother did not wish to be a party to this case.

3. Abraham did not receive a name at birth and was referred to as "Baby boy J." and "Ty J." until August 2011.

4. Cts. & Jud. Proc. § 3-815(b) is under the heading entitled **"Shelter care for child alleged to be in need of assistance"** and reads:

> (b) *Emergency shelter care.* – A local department may place a child in emergency shelter care before a hearing if:
>
> (1) Placement is required to protect the child from serious immediate danger;

(2) There is no parent, guardian, custodian, relative, or other person able to provide supervision; and

(3) (i) 1. The child's continued placement in the child's home is contrary to the welfare of the child; and

2. Because of an alleged emergency situation, removal from the home is reasonable under the circumstances to provide for the safety of the child; or

(ii) 1. Reasonable efforts have been made but have been unsuccessful in preventing or eliminating the need for removal from the child's home; and

2. As appropriate, reasonable efforts are being made to return the child to the child's home.

5. Cts. & Jud. Proc. § 3-809 is entitled **"Filing of petition; notice for decision not to file; request for review"** and states, in pertinent part:

(a) *Filing of petition.* – On receipt of a complaint from a person or agency having knowledge of facts which may cause a child to be subject to the jurisdiction of the court under this subtitle, the local department shall file a petition under this subtitle if it concludes that the court has jurisdiction over the matter and that the filing of a petition is in the best interests of the child.

6. Fam. Law § 5-525(f)(1) is within the subsection titled *"Development of a permanency plan"* and states:

In developing a permanency plan for a child in an out-of-home placement, the local department shall give primary consideration to the best interests of the child, including consideration of both in-State and out-of-state placements. The local department shall consider the following factors in determining the permanency plan that is in the best interests of the child:

(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 length of time the child has resided with the current caregiver;

(vi) the potential harm to the child by remaining in State custody for an excessive period of time.

7. Fam. Law § 9-101 is entitled **"Denial of custody or visitation on basis of likely abuse or neglect."** and states:

(a) *Determination by court.* — In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.

(b) *Specific finding required.* — Unless 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.

Cite as 11 MFLM Supp. 121 (2013)

CINA: change in permanency plan: reasonable efforts

In Re: Caleb T.

No. 0221, September Term, 2013

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

Opinion by Hotten, J.

Filed: October 1, 2013. Unreported.

The change in the child's permanency plan from reunification to adoption by a non-relative was proper when the parent failed to overcome a substance abuse problem and the relatives chosen as prospective guardians did not cooperate in the placement process.

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.

In this case, we are asked to determine whether the Circuit Court for Calvert County, sitting as a juvenile court, abused its discretion in changing the permanency plan for Caleb T. from reunification to adoption. Mr. T., appellant, presents one question for our review[1] which we have rephrased:

1. Did the circuit court abuse its discretion by changing the permanency plan from reunification with a concurrent plan of relative placement to a plan of adoption?

For the reasons that follow, we shall affirm the judgment of the circuit court.

BACKGROUND AND PROCEDURAL HISTORY

Caleb's parents, appellant and Ms. H., lived together for four years. During this time, they used and sold prescription drugs together. Caleb was born in early 2010, with a heart condition that required surgery within days of his birth.[2] On October 21, 2011, when Caleb was nineteen months, the Calvert County Department of Social Services ("the Department"), accompanied by Calvert County Sheriff's Detective Homer Rich ("Detective Rich"), investigated a report that Caleb was being mistreated by his parents. The Department knocked on the outside front door for several minutes, before receiving a response. The Department identified its reason for the visit and was informed that appellant, Ms. H., and Caleb lived in the upstairs apartment. The Department, Detective Rich and an adult resident proceeded upstairs. They knocked and shouted for Ms. H. to open the door, however there was no response for at least eight minutes. Throughout this time, a child could be heard crying inside. After Detective Rich threatened to forcibly open the door if she did not answer, Ms. H. opened the door. Her appearance was disheveled, she was wearing only a t-shirt and the apartment was in disarray. The Department observed dirty dishes, trash, and laundry throughout the apartment. Caleb was crying in a playpen wearing a heavily soiled diaper. The playpen also appeared to serve as Caleb's bed, however there was no bed linen in it. Appellant was not present in the apartment because he was at work. Ms. H. admitted to taking Xanax and oxycodone that day but was unable to produce a prescription for either. She agreed to submit to a urinalysis which was positive for THC, oxycodone, and benzodiazepines. Before leaving the apartment, the Department entered into a safety plan with Ms. H. In the plan, she agreed to clean the home, provide clean bed linen for Caleb and attend a substance abuse assessment. The Department returned on October 24, 2011 and found the apartment clean, with bed linen in Caleb's playpen. Ms. H. had also scheduled a substance abuse assessment for October 26, 2011, however, she did not attend the assessment. On November 3, 2011, the Department and Detective Rich again visited the apartment. They knocked on the door and could hear voices and movement inside, but no one answered. The next day, the Department and Detective Rich returned and Ms. H. answered the door. There was a strong odor of marijuana and Ms. H. refused to be tested for narcotics. She admitted to taking three to four oxycodone tablets each day, although she again could not produce a prescription. The Department removed Caleb from the home and filed a CINA[3] petition. Caleb was placed in shelter care[4] on November 7, 2011. Appellant was informed of the proceedings, but did not attend. At the hearing, Ms. H. was ordered to perform a substance abuse evaluation and submit to toxicology tests when requested. Ms. H. did not complete the substance abuse evaluation and did not attend a developmental assessment for Caleb. Appellant did not contact the Department during the one month time span between the shelter care hearing and the CINA hearing and did not attend the CINA

hearing. The juvenile court found Caleb to be a CINA, placed him in the custody of the Department, and ordered the parents to follow recommendations for substance abuse and mental health treatment.

Caleb's Out-of Home Placements

Caleb was placed with a licensed foster home upon his removal from appellant and Ms. H., however, ten days later he was placed in the home of his paternal great grandmother ("Joyce M."). He lived with Joyce M. for seven weeks until she requested that he be removed because she felt "overwhelmed at having to care for an active toddler." She stated that she could care for him for short periods of time, but not on a full-time basis. On January 4, 2012, Caleb was placed in the licenced foster home of Mr. and Ms. C., with whom he has remained. Joyce M. continued to have alternate weekend overnight visitation with Caleb.

Permanency Plan Review Hearings

During Caleb's first six months in foster care, appellant did not visit him or attend the permanency plan review hearing in December 2011. During this same six months, Ms. H. only visited Caleb twice and did not compete the court ordered substance abuse assessment. In February 2012, Ms. H. was charged with possession of a controlled dangerous substance and did not attend her subsequent court hearing, which resulted in a warrant for her arrest. In May 2012, she surrendered and was incarcerated for one week.

Ms. H. stated at the June 4, 2012 permanency review hearing, that the incarceration "opened [her] eyes a bit." The circuit court set the permanency plan as reunification. After this hearing, Ms. H. began complying with the court ordered services. She enrolled in a substance abuse treatment program and while her first urinalyis was positive for amphetamines, the next ten were negative. She also attended eight out of eight treatment sessions and resumed supervised visits with Caleb.

Appellant did not maintain regular contact with the Department and only saw Caleb sporadically between June 2012 and September 2012. He did submit two negative drug tests between June 2012 and September 2012.

At the September 24, 2012 review hearing, the circuit court changed the permanency plan to reunification with a concurrent plan of relative placement. At this hearing, appellant expressed concern that Ms. H. still had substance abuse problems because she had asked him to purchase her oxycontin, which he did. After the hearing, she tested positive for opiates and morphine. The court ordered appellant and Ms. H. to attend substance abuse treatment, mental health therapy and parenting classes.

After the September hearing, appellant's efforts to remain in contact with the Department did not improve. In October 2012, the Department appealed to Joyce M. and appellant's father because it could not locate appellant. A few days later, appellant contacted the Department by telephone, but shouted and used profanity. He did not attend a subsequent case planning meeting, the court ordered parenting classes or mental health counseling. Besides one phone call to Caleb's foster mother, appellant did not attempt to arrange any visits with Caleb. Joyce M. testified that while Caleb was visiting her, appellant would visit occasionally.

Ms. H. relapsed after the September 2012 hearing. She admitted to the Department that she had used heroin, and failed to complete the mental health and parenting classes. She also did not visit Caleb or contact him after January 2013. On February 1, 2013, she appeared at a child support hearing under the influence of narcotics. She was stumbling, unable to walk, her speech was slurred and she acted belligerently toward the judge. The court held her in contempt. A toxicology test came back positive for opiates, morphine, quinine, cocaine, benzodiazepines and oxycodone. Ms. H. was incarcerated for both the contempt and drug charges and was therefore unable to attend the March 18, 2013 permanency hearing.

Permanency Plan Hearing

At the March 18, 2013 hearing, appellant was present. He argued that Caleb should be placed back with Joyce M. on a full time basis because circumstances had changed and she could now care for Caleb. The Department and counsel for Caleb requested that the permanency plan be changed to adoption. Joyce M. testified that she would be able to care for Caleb with the help of Caleb's paternal aunt and paternal grandfather for "as long as he need[ed her]." It was revealed on cross examination that Joyce M. was sixty-nine years old, suffered from arthritis, back pain, high cholesterol and a thyroid condition. She also expressed some concern regarding long term care for Caleb, opining: "[w]ho would be responsible for him if I died, you know?"

Heather W., Caleb's paternal aunt, testified that she would be available to help her grandmother, Joyce M. raise Caleb. She had a two year old child with whom Caleb had a relationship with. Heather W. testified that she worked nights and cared for her own son in the daytime so she would be available to assist Joyce M. with Caleb as well. She testified that she was unable to help Joyce M. the first time she had Caleb because her own child was recently born and she was working different hours. However, now that her child was older and her work schedule had changed, she "would be there for" Joyce M., whenever she calls. Appellant's father did not testify, however appellant's

counsel proffered that he would provide financial support to Joyce M. to help with Caleb. Appellant did not testify.

At the end of the hearing, the circuit court changed Caleb's permanency plan to adoption. The court reasoned that neither Ms. H. nor appellant had the ability to address Caleb's health issues; provide a safe home environment; and they had not complied with the reunification service agreements. The court noted that Caleb was adjusting well in his foster home, and was bonded to the C family. The court also observed:

> [The Department] found a relative who was willing to take the child. The relative themselves said – [Joyce M.] said can't do it. They continued on. They worked with the natural mother. The natural father made no real attempt to cooperate in any way, shape, size, or form. He absented himself from this whole process basically. The mother was making great progress. Then she relapsed.
>
> * * *
>
> Court does not find now after all this period of time that placement . . . with a 69 year old woman with arthritis with this very active three-year-old is a viable alternative is in the best interest of this child. It clearly is not. Relative or not. And I have no doubt that she loves this child. Of course she does. But she was able to take care of the child for a short period because her daughter was living there. Her daughter left the home, is gone. So now she once again contacted someone who might provide help, but her testimony was very vague. But what the court found was that the niece was willing to help on an as-needed basis. Well, we really don't know what that means, and it might mean an awful lot more than she's willing to do because clearly this lady is now 69. This child – just do the math. As he gets older what she will be and what the situation will be. It's uncertain. It's not consistent with the best interest of the child.

Thereafter, appellant noted a timely appeal. Ms. H., does not join in this appeal. Additional facts shall be provided, *infra,* to the extent they prove relevant to addressing the issues presented.

STANDARD OF REVIEW

In *In re Adoption/Guardianship of Ta'Niya C.,* 417 Md. 90, 100 (2010), the Court of Appeals outlined the standard for reviewing a juvenile court's decision to terminate parental rights:

> Namely, [w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies.[5] [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (quoting *In re Yve S.,* 373 Md. 551, 586 (2003)) (citations omitted).

Therefore, we review the circuit court's factual findings under a clearly erroneous standard, *In re Adoption/Guardianship of Amber R. and Mark R.,* 417 Md. 701, 709 (2011), and will reverse "'where no reasonable person would take the view adopted by the [trial] court,'" or when the court does not refer to any guiding principles or rules. *In re Yve S.,* 373 Md. at 583 (quoting *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 312-13 (1997)). "Questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." *In re Caya B.,* 153 Md. App. 63, 74 (2003) (quoting *In re Adoption/Guardianship No. 3598,* 347 Md. at 312) (internal quotation omitted).

DISCUSSION

When a parent is found unfit by a court for health or safety reasons, the child may be removed from the parent's care and the parent could possibly have their rights terminated. *See In Re Adoption/Guardianship of Rashawn H. and Tyrese H.,* 402 Md. 477 (2007). While a state may take a child away from his or her parents, an "important interest [ ] must be considered, however, [ ] the right of a parent to raise his or her child. This right, recognized by constitutional principles, common law and statute, is so fundamental that it may not be taken away unless clearly justified." *In Re Adoption/Guardianship No. 10941,* 335 Md. 99, 112 (1994). Maryland Courts "have made clear, however,

that the controlling factor in adoption and custody cases is not the natural parent's interest in raising the child, but rather what best serves the interest of the child." *Id.* at 113.

Maryland employs a statutory procedure for protecting children from biological parents who may be abusing or neglecting them. The Court of Appeals outlined the process in *In Re Adoption/Guardianship No. 10941,* 335 Md. 99, 103-04 (1994):

> Subtitle 7 of Title 5 of the Family Law Article concerns the protection of children who have been abused or neglected by their biological parents. Pursuant to this subtitle, certain authority figures, such as health practitioners, police officers, educators and human service workers, are required to report cases of suspected abuse or neglect. F.L. § 5–704. The local department of social services is then required to investigate such reports. F.L. § 5–706. Thereafter, in accordance with its findings and treatment plan, the local department is required to render appropriate services in the best interests of the child, [ ]including, when indicated, petitioning the juvenile court to commit the child to its care and custody. F.L. § 5–710(a). If the juvenile court determines that the child is a child in need of assistance (CINA), [ ] it has discretion to order that the child be committed to the local department "on terms that the court considers appropriate . . . including designation of the type of facility where the child is to be accommodated, until custody . . . is terminated with approval of the court" or the child turns 21 years old. Md. Code (1974, 1989 Repl. Vol.) §§ 3–820(c)(1)(ii) and 3–825 of the Courts & Judicial Proceedings Article. Such out-of-home placement can include placement in a licensed foster home, F.L. § 5–525, or placement with relatives.

A. Reunification with Ms. H.

Preliminarily, we note that appellant does not contend that Caleb's permanency plan should be reunification with him. His argument challenges the circuit court's denial of reunification with Ms. H., Caleb's mother. Appellant never argued that he be awarded custody. He made little effort to see his child, and as observed by the circuit court, appellant "made no real attempt to cooperate in any way, shape, size or form. He absented himself from [the] whole process basically." Nonetheless, appellant challenges the circuit court's ruling, arguing that it erred by changing the permanency plan from reunification with Ms. H. because she demonstrated compliance with the service agreement. In contrast, the Department asserts first, that appellant lacked standing to appeal for reunification with Ms. H. when she herself chose not to appeal, and second, the Department and Caleb, argue that the circuit court properly determined that Ms. H. was not progressing towards reunification.

We will first address the Department's standing argument. In *In Re Nicole B. and Max B.,* 410 Md. 33 (2007) [hereinafter *Nicole B.*], the Court of Appeals addressed an issue similar to the instant case. Nicole and Max B. were removed from their parent's home due to neglect. *Id.* at 39. The investigation performed by the Montgomery County Child Welfare Services ("Chid Welfare") revealed that both parents had drug addictions to oxycontin and cocaine. *Id.* at 40. The children were adjudicated CINA's and placed with their paternal aunt with a permanency plan of reunification with a parent. *Id.* The parents were given a list of tasks to complete, including obtaining stable housing and addressing their substance abuse problems. *Id.* at 43. Over the course of approximately four months, the father attended only four of ten scheduled visits with his children. *Id.* at 44. He continued to test positive for cocaine and marijuana and Child Welfare had difficulty contacting him. *Id.* at 45. Similarly, the mother was difficult to reach by telephone and would schedule appointments with Child Welfare then cancel them. *Id.* In one instance, the mother arrived at a scheduled visitation under the influence of prescription drugs and alcohol. *Id.* At the children's review hearing, Child Welfare noted that the children were thriving in their aunt's home and bonding with her. *Id.* The permanency plan was later changed from reunification with a parent to relative placement. *Id.* at 48. Over the course of nearly eight months, both parents failed to show much progress towards addressing their substance abuse issues or obtaining stable housing. *Id.* at 57. The father admitted that he could not care for the children but requested that the court place the children with the mother. *Id.* Child Welfare indicated to the court that a few days before the hearing, the father had informed a social worker that the mother's home was not a safe environment for the children. *Id.* at 58. The mother also admitted she could not care for her children at that time but requested that the court not change the permanency plan and give her more time to improve her situation. *Id.* At the hearing, the trial court indicated that the mother had more than a year to address her substance abuse issues, without success. *Id.* at 59. The court then changed the permanency plan, grant-

ing custody of the children to the paternal aunt.

After the hearing, neither counsel for the father nor the mother filed a notice of appeal. *Id.* at 60. Twenty-eight days after the hearing, the father filed a *pro se* notice of appeal with this Court. *Id.* He wrote his and the mother's name at the bottom of the form and signed. The mother did not sign the document. *Id.* Child Welfare filed a motion to dismiss the appeal as to the mother, alleging that she did not file a notice of appeal and therefore could not be a party to the appeal. *Id.* We denied the motion, concluding that the father's *pro se* appeal established the intent of both parties to appeal. *Id.* This Court vacated and remanded the case. *Id.* Child Welfare filed a petition of *certiorari* which the Court of Appeals granted. *Id.* at 61.

On appeal, Child Welfare argued that this Court should have dismissed the mother's appeal. The Court of Appeals noted that a party from the trial court must file a notice of appeal in order to confer appellate jurisdiction, and observed that the mother neither instructed her counsel to file a notice of appeal, nor did she file a *pro se* notice of appeal. *Id.* at 62. The mere fact that the father filed an appeal notice and wrote the mother's name at the bottom did not serve as a notice of appeal on her behalf. *Id.* The Court reversed and remanded to this Court, ordering that the motion to dismiss the mother's appeal be granted. *Id.* at 71-72.

In the instant case, like in *Nicole B.,* appellant never sought custody of Caleb at the permanency hearing. He supported the plan of reunification with the mother with a concurrent plan of relative placement. The circuit court found that it was not in the best interest of Caleb to be reunified with Ms. H. because of her failure to comply with the service agreement and her failure to overcome her substance abuse problem. Ms. H. chose not to appeal. She was represented by counsel and if she desired to appeal, she was able to do so. Appellant may not now advance an appeal asserting claims that Ms. H. should have asserted on her own behalf. Accordingly we conclude that appellant does not have standing to challenge the denial of a permanency plan of reunification with Ms. H.

B. Relative Placement Plan

Next, appellant contents that the Department did not make reasonable efforts to achieve the permanency plan of placement with a relative. The Department and Caleb respond that the Department did make efforts for relative placement, but Joyce M. was not a viable and stable option.

When developing an out of home placement, Maryland requires the Department to consider the placements in the following order:

> 1. Reunification with the parent or guardian;
>
> 2. Placement with a relative for:
>
> A. Adoption; or
>
> B. Custody and guardianship. . .;
>
> 3. Adoption by a nonrelative;
>
> 4. Custody and guardianship by a nonrelative . . . ; or
>
> 5. Another planned permanent living arrangement that:
>
> A. Addresses the individualized needs of the child [. . .] and
>
> B. Includes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life [. . . .]

In re James G., 178 Md. App. 543, 569 (2008) (citing Md. Code (1974, 2013), § 3-823(e) of the Courts and Judicial Proceedings Article).

In *In re Adoption/Guardianship of Cross H.,* 200 Md. App. 142 (2011) this Court held that the circuit court did not err when refusing to place a child with his paternal grandmother. Cross was born suffering from pre-natal exposure to drugs and alcohol. Immediately after his birth, he was adjudicated a CINA and placed in foster care. *Id.* at 146. Cross' mother was suffering from a number of psychiatric conditions which she was hospitalized for several times. *Id.* When Cross was one year old, his permanency plan was changed to reunification with his father. *Id.* However, the father was dealing with several criminal charges and was not in compliance with the department's service agreement to attend parenting classes and an inpatient drug treatment program. *Id.* at 147. Because neither parent was in a position to care for Cross, the father requested that the department consider a permanency plan of placement with Cross' paternal grandmother. *Id.* at 147. The department conducted a home and bonding study with the paternal grandmother. *Id.* As a result, the department recommended that the paternal grandmother would not be a suitable placement and that Cross' permanency plan be changed to adoption. *Id.* The paternal grandmother thereafter filed a motion to intervene in the termination of parental rights proceedings, but this motion was denied. *Id.* at 148. The mother objected and following a hearing, the court adopted the department's recommendation, changing the plan to adoption by a non-relative. *Id.* Both parent's appealed to this Court.

On appeal, the parents contended that the circuit court committed error by refusing to consider granting custody to the paternal grandmother. *Id.* at 151. They argued that the court should have allowed evidence regarding the paternal grandmother's suitability as a placement. *Id.* This Court disagreed, concluding that the circuit court did in fact consider the paternal grand-

mother as a placement. *Id.* We noted that the department conducted studies to determine whether she was a viable option. *Id.* The department reported that not only were there limited signs of attachment or bonding between Cross and the paternal grandmother, but she did not seem appropriate for long term placement. *Id.* This Court was concerned with Cross' ability to achieve permanency as a result of placement, as opposed to merely a temporary situation. *Id.* at 152. Therefore, we affirmed the circuit court's findings. *Id.*

The instant case is similar. Here, due to substance abuse and failure to comply with the Department's service agreement, neither of Caleb's parents were suitable for placement. At the initial request of Ms. H., the Department considered Joyce M. and subsequently placed Caleb with her. The Department expected Caleb to remain with her, but seven weeks later, she requested he be moved because she could no longer care for him. During the permanency hearing, the following colloquy occurred during appellant's cross examination of the Department:

> [APPELLANT]: Now we will go to [Joyce M.]. It was your testimony that [Joyce M.] had Caleb for a period of time – is that correct – between the time he came into care and the time he went to the transitional foster place; is that correct?
>
> [THE DEPARTMENT]: Yes.
>
> [APPELLANT]: And that in fact [Joyce M.] called the department to remove Caleb because she said she was overwhelmed?
>
> [THE DEPARTMENT]: Yes.
>
> [APPELLANT]: And what did the department do, if anything, to assist [Joyce M.] to relieve her of her feeling of being overwhelmed?
>
> [THE DEPARTMENT]: Well, [Joyce M.] indicated that she could not care for Caleb and was not receptive to any intervention from the department. She indicated she wanted him moved from her home.
>
> [APPELLANT]: Okay. What did the department offer?
>
> * * *
>
> [THE DEPARTMENT]: The department would have offered alternatives, and there were alternatives; however, [Joyce M.] was not receptive. She very adamantly indicated to the department, I would like Caleb placed in a foster home. I cannot care for him.
>
> [APPELLANT]: And I'm sorry, Your Honor. I'm going back to the same question because I wanted the department to state what alternatives were offered her, what it is that she refused to have, what it is that the department offered this placement resource that she refused to have.
>
> THE COURT: I'll let her answer if she wants to answer, but that's irrelevant if she said adamantly I want the child removed.

Later, during Joyce M.'s direct examination, she explained that when Caleb was initially placed with her, Caleb's grandmother, her daughter, was living with her and helping care for him. But her daughter later moved, leaving Joyce M. to care for Caleb alone. At the time, Caleb was an active two year old and Joyce M. was sixty-eight years old. Joyce M. testified that it was overwhelming to care for a child that young.[6] The Department in the case at bar went further than the department in *Cross H.* Here, not only did it perform an investigation into whether the paternal great grandmother would be suitable, it determined that she was in fact suitable and placed Caleb with her. When Joyce M. requested that Caleb be removed, the Department did so. Furthermore, after Joyce M. was found to no longer be a suitable placement, the Department pursued other family members. The paternal grandfather offered himself as a placement option, however, after he stopped visiting Caleb, he was no longer seen as a suitable placement.[7]

We conclude that the Department made reasonable efforts to achieve relative placement. Within ten days of him being adjudicated a CINA, the Department placed Caleb with a relative, at the request of Ms. H. It was only after Joyce M. indicated that she could no longer care for him that he was placed in a non relative foster home. Later, while continuing to work with both parents, the Department considered and initiated the process of reviewing the paternal grandfather for placement. The paternal grandfather did not cooperate in the process and therefore was not a suitable placement for Caleb. At the permanency hearing, Joyce M. again offered herself as a placement, asserting that her situation had changed. However, there was no certainty that placement with Joyce M. now would be any different than it was the first time. The circuit court opined:

> THE COURT: Court does not find now after all this period of time that placement — guardianship placement — and that's really what we're talking about because clearly [Joyce M.] has not even considered the notion of adop-

> tion until she was asked today — that placement with a 69-year-old woman with arthritis with this very active three-year-old is a viable alternative is in the best interest of this child. It clearly is not. Relative or not. And I have no doubt that she loves this child. Of course she does. But she was able to take care of the child for a short period because her daughter was living there. Her daughter left the home, is gone. So now she has one again contacted someone who might provide help, but her testimony was very vague. But what the court found was that the niece, [Heather W.] was willing to help on an as-needed basis. Well, we really don't know what that means, and it might mean an awful lot more than she's willing to do because clearly this lady is now 69. This child — just do the math. As he gets older what she will be and what the situation will be. It's uncertain. It's not consistent with the best interest of the child.

The Department used reasonable efforts, over the course of sixteen months, attempting relative placement before it recommended that the plan be changed to adoption. As required by the factors outlined in § 3-823 of the Courts and Judicial Proceedings Article, it first attempted reunification with the parents. When the parent's exhibited non-compliance, the Department accepted a plan of reunification with a concurrent plan of placement with a relative. At least two relatives were considered for placement, but neither appeared to serve the best interests of Caleb. Accordingly, the circuit court did not err in changing the permanency plan from relative placement to adoption.

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

FOOTNOTES

1. In his brief, appellant presented his question for review as:

> 1. Did the court err in changing Caleb's Permanency Plan to a sole plan of adoption by a non-relative?

2. Appellant and Ms. H. should have scheduled a six month follow up cardiac appointment for Caleb, but they failed to do so. However, Caleb did receive his cardiac follow up on December 6, 2011, after he was placed in the Department's custody.

3. A "Child in Need of Assistance" is a child who requires court intervention because he or she has been abused, neglected, has a developmental disability and/or a mental disorder, and his or her parents, guardian, or custodian, are either unwilling or unable to provide proper care and attention to the child and the child's needs. Md. Code (1974, 2013), § 3-801(f) of the Courts and Judicial Proceedings Article.

4. Shelter care is defined as "a temporary placement of a child outside of the home at any time before disposition." Md. Code (1974, 2013), § 3-801(y) of the Courts and Judicial Proceedings Article.

5. Md. Rule 8-131(c) reads:

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

6. At the permanency hearing on March 18, 2013, when Caleb was three years old, he was brought into the court room so the circuit court could observe him. The court described him as "a very active three-year-old."

7. The Department was in the process of completing backgrounds checks of the paternal grandfather and his fiancé in order to determine whether their home would be a suitable placement for Caleb. However, in October 2012, before the process was completed, the paternal grandfather engaged in a verbal and physical altercation with the Department. After this instance, he ceased contact with the Department and arranged no further visits with Caleb. As a result, the Department no longer considered him as a potential placement. At the time of the permanency hearing, he had not seen Caleb in approximately six months.

NO TEXT

Cite as 11 MFLM Supp. 129 (2013)

Child support: uniform interstate family support act: service of process

Kenneth L. Blackwell, Sr.

v.

Joanne Bisquera, et al.

No. 2681, September Term, 2011

Argued Before: Krauser, C.J., Berger, Kenney, James A., III (Ret'd, Specially Assigned), JJ.

Opinion by Berger, J.

Filed: October 1, 2013. Unreported.

The circuit court is owed deference regarding its conclusion that a father was properly served notice in a child support case, despite his claim that the process server had dropped the papers on the ground. The circuit court also had broad discretion to reject the father's request for a continuance.

Appellant, Kenneth Blackwell ("Blackwell") appeals from an order of the Circuit Court for Prince George's County denying his motion to vacate the circuit court's registration of an out-of-state child support order. In July 2008, pursuant to the Uniform Interstate Family Support Act ("UIFSA"), a child support agency in the State of Washington, where appellee, Joanne Bisquera ("Bisquera") resides, forwarded to Maryland a completed child support enforcement transmittal ("Transmittal") requesting registration in Maryland of a support order issued by the Superior Court of King County, Washington. On July 15, 2008, the Prince George's County Office of Child Support Enforcement (the "local child support office") filed these documents in the Circuit Court for Prince George's County. On July 16, 2008, the court issued a notice of registration of foreign order of support, and mailed this notice, along with the Transmittal and all of its attachments, to Blackwell and the local child support office.

On September 17, 2009, the local child support office filed a petition for contempt, which the court dismissed on January 12, 2010 because Blackwell was not served with a show cause order. On November 24, 2010, the local child support office filed another petition for contempt. Blackwell failed to appear at a hearing on January 26, 2011, and the court issued a writ of attachment. On May 16, 2011, Blackwell filed a motion to quash writ of attachment, which the court granted June 1, 2011. The court issued a new show cause order setting a hearing for July 20, 2011, but Blackwell failed to appear at the hearing. The court issued a writ of body attachment on July 30, 2011.

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

On October 17, 2011, Blackwell filed a motion to vacate the writ of attachment and dismiss for lack of jurisdiction. The court held a hearing on January 19, 2012. On February 8, 2012, the court entered an order granting, in part, Blackwell's motion by dismissing, with the local child support office's consent, the writ of attachment. The court did not grant the motion as it pertained to Blackwell's request that the registration case be dismissed for lack of jurisdiction. This appeal followed.

Blackwell presents three questions for review on appeal, which we have combined and rephrased as follows:

1. Whether the circuit court properly determined that Blackwell was served with the notice of registration of foreign order of support?

For the reasons set forth below, we affirm the decision of the Circuit Court for Prince George's County.[1]

FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2008, the local child support office filed in the circuit court the Transmittal requesting that the court register for enforcement a support order issued in the State of Washington. Specifically, the Washington State child support agency sought enforcement of an order entered in that state on January 31, 2011, ordering Blackwell to pay $549.16 per month in child support. The Transmittal indicated that Blackwell made his last payment of support on November 8, 2004, and that he owed an arrearage under that order of $47,866.90, as of February 29, 2008. The Transmittal, together with a certified copy of the support order entered in the State of Washington, and a notice of registration of foreign order of support, were mailed to Blackwell on July 16, 2008.

On October 17, 2011, Blackwell filed a motion to vacate the writ of attachment and dismiss for lack of jurisdiction. He claimed in his motion that a writ of

attachment, issued after his failure to appear at a contempt hearing in the present case on July 20, 2011, should be quashed because he was not properly served with the show cause order. He also asked the court to vacate the registration of the support order from Washington State because he claimed that he was never served with the notice of registration.

At a hearing on January 19, 2012, Blackwell requested a continuance because he wanted time to have the court issue a subpoena for a Ms. Tucker. The court denied the request. The local child support office withdrew its request that Blackwell be apprehended with a writ of attachment that had been issued in a contempt case, and the court vacated the writ. Blackwell asserted that the circuit court lacked personal jurisdiction to register the Washington State support order for three reasons. First, he claimed that he was never served with the registration request on the following theory: "[T]he process was never handed to me. I was never touched by the process and service is in doubt for this reason." Second, in the alternative, he asserted that an employee of the local child support office could not properly effectuate service on him because "that person [Mary Peters] is a party to the action." Third, Blackwell argued that he had immunity from personal jurisdiction in the present case because he was appearing in the circuit court for another case. Blackwell withdrew his immunity claim at the hearing.

Blackwell testified that he was at the circuit court on November 12, 2009, to attend a hearing in *Allen v. Blackwell*.[2] After that hearing, he stated that the following occurred:

> I left the courthouse and we went to the vehicle along with Ms. Tucker. And on the way — I left out the front of the building — and on the way walking towards the parking lot, a lady did run towards me and called my name, but I continued to walk.
>
> I continued towards the car. The lady could not approach me because I didn't want to be contacted with her, so I deliberately kept walking.
>
> The lady then dropped the paper on the ground and said, you've been served. And I, I continued to walk. That's what happened.

On cross-examination, Blackwell stated that his home address is 3101 Pennsylvania Avenue, S.E., Washington, D.C. 20020, and that he was lived at this location since January of 2011. Before moving to the District of Columbia, Blackwell lived in Hyattsville, Maryland for four years. Blackwell acknowledged that he confirmed on a sign-in sheet at the hearing on November 12, 2009 that he was living in Maryland at that time. He also admitted that the address that he put on the pleadings filed in the present case was not his home address. Blackwell further informed the court that he is an attorney.

Mary Perry testified that she is a supervisor at the local child support office, where she has been employed for ten years. She explained that she was in the circuit court on November 12, 2009, to attend hearings being held by Master Woodall in two contempt cases in which Blackwell was the defendant. Ms. Perry left the master's courtroom while the case of *Allen v. Blackwell*[3] was being heard in order to make copies of the notice of registration in the present case. However, when she returned to the courtroom to serve Blackwell, he was not there. She testified that the following then occurred:

> So I ran down the hall, ran out of the courtroom, court building. It was raining that day. I called Mr. Blackwell and I asked him, I said, "Mr. Blackwell, you're supposed to wait. I was supposed to give you some paperwork." He, he ignored, he said, "no." He kept walking.
>
> I gave him the paperwork. I was on his right hand side. He did not want to take the paperwork. The paperwork hit him on his right shoulder. He allowed it to drop and hit the ground. I said, "you have been properly served" and came back in the courtroom and completed the certificate of service."

On cross-examination, Ms. Perry stated that she had been out of the master's hearing room for just a few minutes to make copies of the interstate papers. On her return to the courtroom, the master informed her that Blackwell had left. Blackwell's case was one of the last cases heard by the master on the court's morning docket. Ms. Perry saw Blackwell when she left the courthouse by its front entrance. Blackwell turned around and looked at her when she approached him and called out his name, and he stopped walking. She further testified in response to questions from Blackwell:

> I called you [Mr. Blackwell]. You stopped. You looked at me to the side. I said, "Here's your paperwork." I said, "You left without receiving your paperwork." Then you ignored me. I put the paperwork on you and I said, "you've been served." You allowed the paperwork to hit the ground.
>
> You [Mr. Blackwell] stopped when I came, when I approached your right side. You looked at me. You tried to

> ignore me. You didn't want to take the paperwork. You didn't take the paperwork. I served the paperwork on you. You allowed it to hit the ground and then I turned around and came back to the courtroom. The court building.

Ms. Perry stated that she served Blackwell with the notice of registration, and with the other papers that were in the court file. An affidavit executed by Ms. Perry, in which she certified that she served Blackwell, was filed with the court.

STANDARD OF REVIEW

Blackwell argues that (1) the circuit court erred as a matter of law in its interpretation of Md. Rule 2-123; and (2) abused its discretion in denying his motion for a continuance; and (3) that it was clearly erroneous in judging the credibility of witnesses.

First, "[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." *Dunlap v. Fiorenz*, 128 Md. App. 357, 363 (1999).

Second, appellate review of a trial court's denial of a continuance is reviewed for abuse of discretion. *Abeokuto v. State*, 391 Md. 289, 329 (2006). Judicial discretion is "a reasoned decision based on the weighing of various alternatives." *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (internal quotation marks omitted). "'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.'" *Kearney v. Berger*, 416 Md. 628, 663 (2010) (quoting *Falik v. Hornage*, 413 Md. 163, 183 (2010)). An appellate court may find an abuse of discretion only where "'no reasonable person would take the view adopted by the trial court[,] . . . when the court acts without reference to any guiding rules of principles[,] . . . 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.'" *Id.* (quoting *Falik,* 413 Md. at 182-83); *see also Das v. Das,* 133 Md. App. 1, 15-16 (2000) (stating that an abuse of discretion constitutes "an untenable judicial act that defies reason and works an injustice") (internal quotations omitted)).

Finally, where a matter being reviewed involves the interpretation or application of Maryland statutory or case law, our review is *de novo*. *Walter v. Gunter*, 367 Md. 386, 392 (2002).

DISCUSSION

A. Service of Process

First, Blackwell argues that the circuit court's decision was clearly erroneous by concluding that Blackwell had been properly served with process on November 1, 2009. We agree with Bisquera that the circuit court's decision was not clearly erroneous.

Ms. Perry testified that she followed Blackwell out of the courthouse on November 12, 2009. She explained that Blackwell acknowledged her when she called out his name, and stopped walking. However, when she physically handed the notice of registration to Blackwell, "[T]he paperwork hit him on the right on his right shoulder. He allowed it to drop and hit the ground."

Blackwell confirmed the accuracy of most of Ms. Perry's account, but offered a different account of how the encounter ended. According to Blackwell, "[T]he lady [Ms. Perry] could not approach me because I didn't want to be contacted with her, so I deliberately kept walking. The lady then dropped the paper on the ground and said, 'you've been served.' And I, I continued to walk."

The circuit court was entitled to find Ms. Perry's testimony credible. Based upon that testimony, the trial court reasonably concluded that Blackwell was served with process. We observe that 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." *Dunlap, supra,* 128 Md. App. at 363. Accordingly, we hold that the trial judge's conclusion that Blackwell was served on November 12, 2009 was not clearly erroneous.

B. Continuance

Next, Blackwell argues that the circuit court abused its discretion when it denied Blackwell's request for a continuance. In support, Blackwell asserts that under "both the United States Constitution and the Constitution of Maryland, a person has a right to compulsory process in order to call witnesses to testify on his behalf." We agree with Bisquera that the circuit court did not err or abuse its discretion.

"The decision of whether to grant a request for continuance is committed to the sound discretion of the court." *Abeokuto*, 391 Md. at 329 (citing *Ware v. State*, 360 Md. 650, 706 (2000)). An appellate court will not disturb a ruling on a motion to continue "unless the court acts arbitrarily and prejudicially." *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 28 (1974).

The Maryland Rules contain the following provision regarding a motion for continuance on the ground that a witness is absent:

> (c) **Absent Witness**. A motion for a continuance on the ground that a

> necessary witness is absent shall be supported by an affidavit. The affidavit shall state: (1) the intention of the affiant to call the witness at the proceeding, (2) the specific facts to which the witness is expected to testify, (3) the reasons why the matter cannot be determined with justice to the party without the evidence, (4) the facts that show that reasonable diligence has been employed to obtain the attendance of the witness, and (5) the facts that lead the affiant to conclude that the attendance or testimony of the witness can be obtained within a reasonable time. The court may examine the affiant under oath as to any of the matters stated in the affidavit and as to the information or knowledge relied upon by the affiant in determining those facts to which the witness is expected to testify. If satisfied that a sufficient showing has been made, the court shall continue the proceeding unless the opposing party elects to stipulate that the absent witness would, if present, testify to the facts stated in the affidavit, in which event the court may deny the motion.

Md. Rule 2-508(c).

Here, Blackwell did not submit an affidavit, and his proffer was not under oath. *See Brooks v. Bast*, 242 Md. 350, 354 (1966) (stating that court can treat sworn testimony as the equivalent of the affidavit required by Rule 2-508(c)).

Even assuming, *arguendo*, that an unsworn proffer could satisfy Rule 2-508, Blackwell claimed only that a woman (whom he described as his friend Ms. Tucker) was with him when he exited the courthouse on November 12, 2009, and would "attest to the fact that I've never received that notice." Based on Blackwell's proffer of the facts to which Ms. Tucker was expected to testify, Ms. Tucker would have added no additional information. Further, Blackwell did not explain why the case could not proceed without testimony that merely duplicated his own description.

In short, Blackwell failed to comply with the requirements in Rule 2-508(c) to request a postponement due to an allegedly necessary witness. Accordingly, it was well within the trial court's discretion to deny Blackwell's request for a postponement. Moreover, Blackwell admitted that he had not been putting his home address on his own pleadings in this case. Rather, he claimed that he used this address only as his "mailing address," to avoid unspecified problems getting mail at his residence, and that he had not received court notices mailed to that address. Blackwell's failure to disclose his home address, while providing an apparently unreliable address on court documents, provides no grounds for holding that the trial court abused its discretion in denying a postponement to obtain the testimony of a witness whose testimony would have added little to Blackwell's claim.[4] Under the circumstances, we hold that the trial court did not abuse its discretion when it denied Blackwell's request for a continuance.

C. Ms. Perry's Authorization to Serve Process

Finally, Blackwell claims that the local child support office violated Md. Rule 2-123(a) by having Ms. Perry, an employee of the local child support office, serve him with the notice of registration. We disagree.

Rule Md. 2-123(a) provides that: "Service of process may be made by a sheriff, or, except as otherwise provided in this Rule, by a competent private person, 18 years of age or older, including an attorney of record, but not by a party to the action." The Court of Appeals has held that an employee of a party can serve process when his or her employer is a party. *Palmisano v. Baltimore Cnty. Welfare Bd.*, 249 Md. 94, 102 (1968).[5] In *Palmisano*, an employee of the Baltimore County Welfare Board, not herself a party to the case, served papers on the appellants in the circuit court. *Id.* at 100. In rejecting appellants' claim that this action violated the rule stating that a party may not serve process, the Court of Appeals stated, "the Court [of Appeals] has never held that an *employee* of a party to be under such a disability." *Id.* at 102.

Similarly in the instant case, Ms. Perry was an employee of the local child support office when she served process on Blackwell. Under *Palmisano,* Ms. Perry does not qualify as a "party to the hearing." Accordingly, we hold that the circuit court properly interpreted Md. Rule 2-123(a) in ruling that the service of process in this case did not violate this rule.

For the foregoing reasons, we hold that the trial judge's conclusion that Blackwell was served on November 12, 2009, and that Ms. Perry was authorized to serve Blackwell was not clearly erroneous. Additionally, we hold that the circuit court did not abuse its discretion in denying the postponement. Accordingly, we affirm the order of the Circuit Court for Prince George's County.

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

FOOTNOTES

1. Blackwell recently filed a motion to postpone decision in this case and vacate the judgment of the circuit court. Bisquera filed their response in opposition, and Blackwell filed a reply. We deny Blackwell's motion to postpone the decision in this case. We note, however, that the State of Washington filed a new uniform support petition in the District of Columbia. Our opinion, therefore, is without prejudice to the issues under consideration by the District of Columbia Superior Court.

2. This is a reference to a separate child support case in Prince George's County in which Blackwell is a defendant. *See Cinzia Allen v. Kenneth Blackwell*, Case No. CASR-06-26045.

3. *See supra,* footnote 2.

4. In his reply brief, Blackwell maintains that Bisquera concedes that Blackwell's witness "would have added" to Blackwell's defense. We do not agree with Blackwell's assessment of Bisquera's claim, nor do we agree with Blackwell's assessment that the trial judge rejected Bisquera's contention that Blackwell evaded service. Although Ms. Murphy testified that she believed that Blackwell was evading service, the trial judge sustained Blackwell's objection and limited her comments to the evidence. That does not amount, as Blackwell suggests, to the trial judge rejecting Bisquera's argument that Blackwell "evaded service."

5. The *Palmisano* court analyzed former Maryland Rule 116(a), which is the predecessor of current Rule 2-123.

NO TEXT

Cite as 11 MFLM Supp. 135 (2013)

Divorce: marital property: retirement account

Sonya Hanna Baier
v.
Dieter A. Baier

No. 0069, September Term, 2012

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

Opinion by Wright, J.

Filed: October 2, 2013. Unreported.

The ex-husband's use of retirement account funds to pay *pendente lite* alimony was improper because it reduced the amount of marital assets available for distribution and the husband had ample income to pay the alimony, as evinced by the numerous trips he took to visit his paramour.

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

This appeal results from Memorandum Opinions and Orders of the Circuit Court for Talbot County entered December 6, 2011, and February 23, 2012, granting appellant, Sonya Hanna Baier ("Wife"), an absolute divorce from appellee, Dieter A. Baier ("Husband"), and awarding alimony, a monetary award, and attorney's fees. On March 22, 2012, Wife filed this timely appeal.

Questions Presented

Wife presented four questions for our review, which we have consolidated as follows:[1]

> 1. Did the circuit court err in awarding Wife $5,000 per month for five years instead of indefinite alimony?
>
> 2. Did the circuit court err in its findings regarding Husband's retirement accounts?
>
> 3. Did the circuit court err in its grant of attorney's fees to Wife?

For the reasons discussed below, we answer no to question one and yes to question two. Because we are remanding this case, we need not address the third question.

Facts and Procedural History

On October 11, 1987, the parties were married in Massachusetts. Three children were born of the marriage: Christy in 1992, Eric in 1995, and Kathleen in 1998. Until 2004, Husband worked as an executive in the music industry earning up to $400,000.00 per year. After Husband was terminated from his position, the parties relocated to Talbot County, Maryland, in 2005 or 2006. Husband then bought Cabinetry Unlimited ("CU"), an existing business, using funds obtained from the parties' retirement accounts and loans from Wife's family. Wife is a guarantor on loans for CU even though the business was titled solely in Husband's name.

Husband earned in excess of $220,000.00 as President of CU.[2] Wife has a Master's degree in International Business but did not work during the majority of the parties' marriage, except for part-time human resources and payroll duties for CU.

In early 2010, Husband reconnected with a former girlfriend on the internet and began an affair. On July 19, 2010, Wife filed a complaint for absolute divorce on the ground of adultery and on August 30, 2010, she filed an amended complaint. Wife's employment with CU was terminated by Husband on October 11, 2010, the parties' anniversary.

On October 8, 2010, Wife filed a Motion to Account for Assets and for an Injunction to Prevent Dissipation of Assets which was denied on November 15, 2010. The parties filed cross-complaints for child custody. A hearing was held before a Domestic Relations Master on January 19, 2011. The circuit court subsequently awarded, *pendente lite*, joint legal custody of the minor children with Wife to have primary physical custody, and ordered Husband to pay $5,325.00 in alimony and $2,685.00 in child support per month.

A merits hearing was held on October 18-19, 2011. The parties submitted written closing arguments and trial memoranda. In his closing argument, counsel for Husband argued that Wife could earn between $58,587.00 and $75,624.00 per year. On December 7, 2011, the circuit court entered its order and opinion granting the parties an absolute divorce. In its opinion, the circuit court stated that the parties agreed that CU, Fidelity Individual Retirement Account ("IRA") # 9492, United Bank of Switzerland ("UBS") IRA # UN 12006, TD Bank account # 7822, PNC Bank checking

accounts # 8683 and # 2282, PNC Money Market Tax Accrual account # 2511, PNC Money Market acounts # 7957 and # 5176, CU 401K account # 4139, AXA Equitable Life Insurance policy # 732, a judgment from a lawsuit, security deposits for Outram Street and Decatur Place, household rugs and furnishings, and frequent flyer miles were undisputed marital property. The parties disputed whether U.S. Financial Life Insurance policy # 349714; West Coast Life Insurance policy # 31972; a Bertelsmann Pension,[3] Deutsche Bank account # 4161; PNC Bank checking accounts # 2654, # 6969, and # 6627; PNC Bank accounts # 851 and # 0978; a 2005 Audi A6; a Toyota RAV4; and china and crystal items were marital property. The circuit court found that the disputed U.S. Financial Life Insurance policy, 7/10 of the West Coast Life Insurance policy, PNC Bank account # 8851, the Audi A6, and the Toyota RAV4 were all marital property. The court excluded from marital property the china and crystal; the Deutsche Bank account; PNC Bank account # 0978 (but noted that Husband closed the account prior to the divorce and Wife received none of the funds from the account); and PNC Bank checking accounts # 2654, # 6969, and # 6627; and found that the Bertelsmann pension no longer existed.

In valuating the marital property, the circuit court found Husband to be more credible and accepted his valuation of the Fidelity IRA # 9492 at $82,205.88. Regarding the UBS IRA # UN 12006, the court valued the account at $594,925.00 and accepted Husband's explanation that he had withdrawn $18,500.00 to pay for college tuition and alimony and $8,000.00 to pay taxes and that the remaining difference between the account's value of $674,206.10 on August 15, 2011, and the value at trial was due to market decreases. As to PNC Bank checking account # 2282, while the court noted "concern" that Husband "spent or otherwise removed" $45,357.35 in approximately one month in 2011 from the account with no explanation as to "the destination of the bulk of said money," the court valued the account at $3,580.04. The court valued PNC account #2511 at $1,687.00 despite evidence that Husband had moved $15,000.00 from the account to PNC account # 2282 on August 9, 2011.

Husband admitted that he had received $2,886.24 of a $127,000.00 judgment but that he had not paid Wife any portion of the recovery. Wife testified that the parties' frequent flier rewards points totaled 400,000 and were worth $8,000.00, and Husband testified that the rewards points totaled only 2,912 because he had used the majority of the miles flying to meet his paramour. The circuit court found that the parties' frequent flier rewards points had no value. The circuit court found that, according to the policies, neither life insurance policy had any cash value to be used in determining a monetary award because benefits were only payable upon Husband's death. As to the 1996 Audi A6 automobile, the court accepted Husbands's valuation of $9,000.00 instead of Wife's valuation of $15,000.00.

The circuit court found:

> it [is] important to note that, since the parties' separation, [Husband] has spent thousands of dollars of marital funds flying to California, New Orleans, and Florida to meet with his paramour. The two have spent thousands more dining out and staying in luxurious hotels. [Wife] argues that this constitutes dissipation of marital assets. This Court agrees . . . . Clearly, [Husband] was using these funds for his own benefit, to carry on an endeavor unrelated and at odds with the marriage, at a time when the marriage was undergoing an irreconcilable breakdown.
>
> * * *
>
> In addition, this Court is concerned by the fact that [Husband] spent at least $2,201.10 (plus an additional $2,032.7 [sic] in rewards points) personally on airfare during the above recounted months, during a time when [Husband] has testified that he was experiencing financial difficulty. In light of this evidence, this Court finds it necessary for [Husband] to replenish these dissipations into the marital fund, and that [Wife] should accordingly be awarded 50% of the $3,257.62 in total dissipated expenditures, excluding rewards points, as part of a monetary award.

Discussing alimony, the circuit court found:

> *1. The ability of the party seeking alimony to be wholly or partly self-supporting.*
>
> [Wife] currently holds no substantial employment. She has not worked full-time in 15-20 years. However, [Wife] did work part-time for [CU] during the latter part of the marriage. Since her termination at [CU], she has been actively seeking employment opportunities, and, despite holding an undergraduate and Master's degree, she has thus far been unsuccessful at landing a new job. [Wife] testified that her lack of recent, substantial employment and

the fact that [Husband] has refused to provide her with a letter of recommendation have made obtaining employment very difficult.

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

In theory, [Wife] currently has sufficient education and training to enable her to find sufficient employment. [Wife] has both a college and a Master's degree in International Management. [In a footnote, the court noted that "there are few, if any, employment positions in Talbot County for someone looking to work in the field of international management."] [H]owever, since [Wife] earned her Master's degree approximately twenty-five years ago, since she has not used or maintained the knowledge and skills she acquired via the degree, and since [Wife] has not held full-time and independent employment for such a substantial period of time, [Wife] may need to take additional measures or seek further education to become more marketable in this downturned economy. This Court believes that a period of five years is sufficient time for [Wife] to take said additional steps to become more marketable and to find gainful employment. [(Footnote omitted).] Therefore, this Court has determined that an award of rehabilitative alimony for a period of five years is appropriate on these facts.

In the order granting the divorce, the circuit court granted Wife a monetary award totaling $3,071.93; a 50% interest in each of the retirement accounts, the 401K, and the lawsuit judgment; a 40% interest in CU; and $5,000.00 per month in alimony for a five year period.

On December 19, 2011, Husband filed a motion to alter or amend the judgment as to the grant of a 40% interest in CU to Wife. The same day, Wife filed a motion to reconsider attorney's fees and the circuit court reopened the case. On January 19, 2012, Husband's motion was granted in part. On January 27, 2012, Wife filed a motion for reconsideration. On February 16, 2012, the court held a hearing on the open motions. On February 16, 2012, the court ruled that Wife's motion for reconsideration was granted, and the previous grant of Husband's motion for reconsideration was withdrawn on procedural grounds. On February 23, 2012, the circuit court entered its memorandum opinion and order.

In its February 23, 2012 opinion, the circuit court rejected Wife's argument that she be granted a greater than 50% share in the retirement assets in exchange for Husband retaining full title, control, and liability for the debt of CU. The court also rejected Wife's request that it reconsider its denial of permanent alimony, stating in a footnote that "the evidence presented at trial was insufficient to establish that any resulting disparities between the parties, once rehabilitative alimony has expired, if said disparities exist, would be morally unacceptable or shocking, or unconscionably disparate."

The circuit court stated:

Lastly, this Court has found that the evidence presented at trial established that both the parties contributed to the purchase of and successes or failures of [CU]. First, it is undisputed that both [Husband and Wife] contributed substantial amounts of money toward the purchase of [CU]. The relevant facts in this respect are as follows: the parties at one time jointly owned a home in Connecticut. This home was sold, and the proceeds divided into two UBS IRA Accounts, one titled in [Husband]'s name, and the other titled in [Wife]'s name. Approximately $250,000 worth of proceeds from the sale of the home was placed in each account. Thereafter, in order to purchase [CU], [Husband] liquidated his $250,000 account, and [Wife] liquidated what was left of her UBS Account (approximately $150,000).[4] Also, the parties borrowed substantial funds from third parties, and personally guaranteed an approximately 1.1 million dollar purchase note, debts for which both parties remain equally liable. Secondly, this Court found that the evidence sufficiently established that both parties contributed to the successes or failures of [CU]. [Husband] worked long hours as the company's President. [Wife] also worked for the company for many years, although her employment was on a part-time basis. However, [Wife] additionally kept the house and raised the kids, which allowed

> [Husband] to work longer hours than he otherwise would have been able. It is clear to this Court that, despite the company being titled in [Husband]'s name, [CU] was intended by both parties to be a family business that provided income and support to [Husband], [Wife], and the children. That each party contributed substantial monies and guaranteed substantial debts of the company evidences this fact. That [Wife] spent her time working for the company as opposed to obtaining outside employment and advancing an independent career also evidences this fact. That, until the rise of this divorce litigation, [Husband] understood [Wife] to have an undefined interest in the company also evidences this fact.

(Footnotes omitted).

Addressing attorney's fees in its opinion, the circuit court found:

> [Husband] currently earns $225,000 as President of [CU]. [Wife] remains unemployed but is presumably still searching for acceptable employment. This Court ordered [Husband] to pay [Wife] alimony in the amount of $5,000 per month, totaling $60,000 per year. Additionally, this Court ordered [Husband] to pay [Wife] child support in the amount of $2,455 per month, totaling $29,460 per year. Ultimately, therefore, [Husband] pays to [Wife] a total of $89,460 per year, and retains $135,540 before taxes. This Court has also hereby established a constructive trust upon this Court's grant to [Wife] of a 40% interest in [CU].
>
> Additionally, this Court granted to [Wife] a 50% interest in the various marital retirement accounts. The evidence presented at trial indicated that these accounts are worth approximately $690,000 before taxes. Therefore, split in half, each party shall hereto have access to approximately $345,000 worth of marital retirement assets before taxes. However, the parties also carry substantial debts, both jointly and personally. The largest of these joint debts include the [CU] purchase note guarantee in the amount of 1.1 million, and a more than $500,000 judgment to [Wife]'s parents. Additionally, [Wife] has borrowed approximately $85,000 during the course of this litigation from banks and family members, which has been paid toward her attorney's fees. [Husband] has additionally guaranteed a $750,000 note for [CU] (balance of $243,184.48) and a $600,000 revolving line of credit (balance of $304,296). Each party additionally holds other debts as well, as recounted in this Court's December 6, 2011 memorandum opinion.

The circuit court found that Wife had incurred $162,792.50 in attorney's fees and costs while Husband had incurred approximately $169,000.00. The circuit court found that the marriage broke down as a result of Husband's infidelity. The court found that Husband had used approximately $54,000.00 in marital funds and Wife had used approximately $28,000.00 in marital funds to pay attorney's fees. The court noted that Wife had requested Husband pay "a substantial portion" of her fees and found that, while both parties "engaged in a scorched-earth policy of litigation," it was reasonable for Husband to contribute $50,000.00 toward Wife's attorney's fees.

Additional facts will be included as necessary below.

Discussion

I. Alimony

Wife argues that the circuit court failed to analyze how her age, lack of employment for 20 years, and difficulty in finding employment would affect her prospects of becoming self-supporting. Wife contends that the circuit court did not consider that an unconscionable disparity would result in five years because Husband would simultaneously be relieved of paying alimony and child support at the same time that she would, as the court found, finally be able to "dedicate her full time and efforts toward her career." Wife further asserts that no comparison between the parties' respective incomes could have been made because the circuit court "did not project her future or prospective income." Wife maintains, as proof that an unconscionable disparity exists despite the alimony award, that Husband is able to continue "liv[ing] in luxury" while she is forced to take out loans to satisfy her monthly obligations.

Husband responds that Wife does not contend that the findings of the circuit court are clearly erroneous. Husband avers that the circuit court considered the parties' financial statements, evidence of Husband's income, and testimony regarding the parties' lifestyle

from which it properly determined that $5,000.00 per month for five years was a sufficient award. According to Husband, the circuit court had evidence before it that Wife "could earn between $58,587 and $75,624 annually" and, therefore, with her projected income between 26-34% of his, the circuit court properly found no unconscionable disparity. Husband argues that the circuit court considered all the factors, including his substantial debt in finding no unconscionable disparity.

"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." *Tracey v. Tracey*, 328 Md. 380, 385 (1992) (citing *Brodak v. Brodak*, 294 Md. 10, 28-29 (1982)). "This standard implies that appellate courts will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Id.* (citation omitted). "The law, however, factors rehabilitative alimony over indefinite alimony." *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 142 (1999) (citation omitted). "Rehabilitative alimony is intended to ease the transition from dependence to self-support, and is consistent with the policy of this State . . . to limit alimony, where appropriate, to a definite term in order to provide each party with an incentive to become fully self-supporting." *Malin v. Mininberg*, 153 Md. App. 358, 416 (2003) (citations omitted).

"An alimony award should reflect the desirability of each spouse becoming self-supporting and the undesirability of alimony as a lifetime pension. Thus, indefinite alimony should be awarded only in exceptional circumstances." *Roginsky*, 129 Md. App. 132 at 142 (citation omitted). The modern view is that the dependent spouse "should be required to become self-supporting, even though that might result in a reduced standard of living." *Tracey*, 328 Md. At 391 (citing *Holston v. Holston*, 58 Md. App. 308, 321 (1984)). "The party seeking indefinite alimony bears the burden of satisfying the statutory criteria." *Turner v. Turner*, 147 Md. App. 350, 389 (2002) (citations omitted).

Alimony is governed by Md. Code (1984, 2006 Repl. Vol.), § 11-101 *et seq.,* of the Family Law Article ("FL"), which provides in pertinent part:

> (a) *Court to make determination*. –
>
> (1) The court shall determine the amount of and the period for an award of alimony.
>
> (2) The court may award alimony for a period beginning from the filing of the pleading that requests alimony.
>
> (3) At the conclusion of the period of the award of alimony, no further alimony shall accrue.
>
> (b) *Factors considered*. – In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:
>
> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (6) the circumstances that contributed to the estrangement of the parties;
>
> (7) the age of each party;
>
> (8) the physical and mental condition of each party;
>
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
>
> (10) any agreement between the parties;
>
> (11) the financial needs and financial resources of each party, including:
>
> (i) all income and assets, including property that does not produce income;
>
> (ii) any award made under §§ 8-205 and 8-208 of this article;
>
> (iii) the nature and amount of the financial obligations of each party; and
>
> (iv) the right of each party to receive retirement benefits; and
>
> (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.
>
> (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.

FL § 11-106.

Wife testified, at both the *pendente lite* and merits hearings, that her goal was to go into the foreign service with the U.S. State Department. During the *pendente lite* hearing, Wife testified that the entry level salary for such a position in the Washington, D.C., area was approximately $40,000.00. During the merits hearing, Wife testified that she had taken the foreign service exam but had not passed all portions and had to wait until the following year to retake it. Meanwhile, Husband testified that he expected Wife to be able to obtain a job in the "$50,000 or something like that" range and attempted to enter statistics from the Census Bureau. Wife objected on the grounds that the evidence was inadmissible without a vocational expert to testify, which Husband did not disclose or provide.

Our review of the record reveals no resolution as to the introduction of the statistical evidence and only reveals the admittance of testimony as to the high and low end of what Wife could possibly earn.

As the Court explained in *Solomon v. Solomon*, 383 Md. 176, 196 (2004), "[t]he statute places strict limits on a trial court's ability to grant indefinite alimony and requires a comprehensive case-by-case analysis." In *Solomon*, the circuit court ordered an employment assessment to determine the wife's reasonable earning potential upon her becoming self-sufficient. *Id.* at 183; see also *Whittington v. Whittington*, 172 Md. App. 317, 327-28 (2007) (parties stipulated that the vocational expert witness retained by the husband would testify that the wife had the present ability to earn $35,000 annually in full-time employment and wife's testimony indicated she could make more if she worked full-time in her present job). In the case at bar, Husband's evidence was that Wife could make between $50,000.00 and $75,000.00. Wife testified that the only job she sought paid $40,000.00. She failed to offer any evidence that she did not have the ability to be wholly or partly self-supporting.

"The exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly," *Stern v. Stern*, 58 Md. App. 280, 300-01 (1984) (quoting *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981)). The circuit court, taking into account the numerous difficulties that Wife was experiencing in finding employment, concluded that "five years is sufficient time for [Wife] to take said additional steps to become more marketable and to find gainful employment." The circuit court stated in its February 16, 2012 opinion, denying reconsideration of permanent alimony, that "the evidence presented at trial was insufficient to establish that any resulting disparities between the parties, once rehabilitative alimony has expired, if said disparities exist, would be morally unacceptable or shocking, or unconscionably disparate."

The trial court considered the factors contained in FL §11-106. The court found that, in a period of five years, Wife may need additional measures or seek further education beyond her Master's degree to become more marketable in what was a downturned economy. The court believed that five years was sufficient time to take additional steps to become *more* marketable and to find gainful employment. Wife failed to satisfy her burden for indefinite alimony. Accordingly, we affirm the judgment of the circuit court.

II. Dissipation of Assets

Wife contends that Husband used funds from the retirement accounts that were marital property to pay, *inter alia*, back-due alimony and child support payments. According to Wife, as a result, "unless the amount of those payments is deducted from any marital property awarded to [Husband], [Wife] will have effectively paid for one-half (or more) of her own back-due alimony (and paid taxes on the income) and child support, while [Husband] took the alimony deduction on his taxes." Wife cites the circuit court's notations that some of Husband's money transfers were "concerning" and argues that the court erred by failing to equalize the amount of funds. Wife avers that the circuit court did not consider that Husband was able to fund his frequent trips to visit his paramour in accepting Husband's contention that he could not afford the support payments and college tuition for the parties' oldest daughter without withdrawing funds from the retirement accounts. Wife maintains that the trial court abused its discretion by 1) not valuing the retirement accounts at $850,037.90 and including the $20,000.00 removed from PNC account # 0978 as marital property, 2) failing to award her "substantially all of this marital property," and 3) absolving her liability for CU's debt in recognition of her monetary and non-monetary contributions to the family and business.

Husband responds that his use of marital funds to pay college tuition and living expenses does not constitute dissipation, and the circuit court properly found that he had used the funds for "family purposes." Husband contends that Wife misstates the record and

made no argument at trial that the "withdrawals for alimony, child support, and tuition were a dissipation of assets." Husband argues that the circuit court awarded Wife a 40% interest in CU in the form of a constructive trust, half of Husband's retirement accounts, and a monetary award, and therefore, no basis exists for awarding Wife a higher award.

"A trial court's judgment regarding dissipation is a factual one and, therefore, is reviewed under a clearly erroneous standard. 'If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous.'" *Solomon*, *supra,* 383 Md. at 202 (quoting *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002)). As the *Solomon* Court explained, *id.*:

> To include property that was disposed of during the marriage, the trial court must be persuaded that there is evidence of dissipation, and "[t]he party alleging dissipation has the initial burden of production and burden of persuasion." *McCleary* [*v. McCleary*], 150 Md. App. [448, 463 (2002)]. If the evidence presented in support of a finding of dissipation is insufficient, the trial court reasonably may conclude that the previously relinquished asset should not be included in the marital property.

As a threshold matter, Husband is incorrect in his assertion that Wife did not raise the issue of dissipation at the trial level. Our review of the record reveals that Wife filed a "Motion to Account for Assets and for an Injunction to Prevent Dissipation of Assets" on October 7, 2010,[5] and Wife's cross-examination of Husband involved dissipation of a marital IRA to pay for the oldest daughter's college expenses.

Dissipation occurs when one spouse "uses marital property for his or her own benefit for a purpose unrelated to the marriage at a time where the marriage is undergoing an irreconcilable breakdown" where the "principal purpose" is to "reduc[e] the funds available for equitable distribution." *McCleary,* 150 Md. App. at 462-63 (citations omitted). The Court of Appeals has said that "[d]issipation occurs when marital assets were taken by one spouse without agreement by the other spouse." *Omayaka v. Omayaka,* 417 Md. 643, 652 (2011) (citation and internal quotation marks omitted). "The party alleging dissipation has the initial burden of showing dissipation has taken place. Once the *prima facie* case of dissipation is proven, the burden shifts to the other party to show that the assets were expended appropriately." *Collins v. Collins,* 144 Md. App. 395, 417 (2002) (citation omitted). Then the circuit court must determine, "either implicitly or explicitly, whether the joint funds were dissipated." *Id.* (citation omitted).

The circuit court expressly found that Husband had dissipated marital funds in the amount of $3,257.62, based on his expenditures to visit his paramour.[6] We find no discussion of dissipation in regards to the retirement or bank accounts in the circuit court's opinion. Husband seems to argue that the lack of reference to those funds equates to a finding by the court that he did not dissipate those funds. Our review of the record, however, indicates that the circuit court did not account for all of the funds about which Wife complains. In addition, the circuit court did not address whether Husband was permitted to expend marital assets, namely retirement accounts, on back due alimony support payments, when Husband had sufficient income to fund those expenditures.

The circuit court addressed the UBS IRA # UN 12006, which Wife alleged had a balance of $734,790.68 on December 31, 2010, Husband alleged had a balance of $674,206.10 on August 15, 2011, and which had a balance of $594,925.00 on October 18-19, 2011, the dates of the merits hearing. Wife satisfied her initial burden of dissipation, and Husband explained that he had withdrawn $26,500.00 since August 15, 2011, to pay college tuition, alimony, and the tax for making an early withdrawal from the account. Husband attributed the remaining decrease in funds to "market decreases" and the court accepted his explanation. The court's opinion does not explain whether the "market decreases" alleged by Husband relate only to the $52,781.10 difference between the account's balance on August 15, 2011, and the date of the hearing, minus the withdrawals, or also includes the decrease of $60,584.58 between December 31, 2010, and August 15, 2011.[7] Husband testified that he was penalized with a 30% tax on withdrawals which, even accepting the court's finding that Husband was credible, results in numbers that still do not add up and must be clarified on remand.[8]

Regarding PNC Bank account # 2282, the circuit court found that the balance of the account on September 12, 2011, was $3,580.04. The court stated: "It does concern the court that [Husband] appears to have spent or otherwise removed $45,357.35 out of this account during the period of August 10, 2011 to September 12, 2011." The court also stated that "no evidence [was] produced as to the destination of the bulk of said money" but it made no finding as to whether Husband had dissipated those funds. The court also recognized that Husband had transferred $15,000.00 from PNC account # 2511 to PNC account # 2282 after July 12, 2011, but made no finding as to why or what happened to those funds. The burden shifted to the Husband to show that the assets were expended appropriately.

As to the use of marital assets to make his support payments, Husband argues that *Omayaka* is determina-

tive. We find *Omayaka* factually distinguishable. In *Omayaka*, the wife, accused of dissipation, testified that she had spent $80,000.00 accumulated during the marriage on household goods, mortgages, clothes, to pay off credit card debt, and to send money to her minor children overseas. *Id.* at 649-50. The case at bar involves the use of marital funds to pay alimony and child support obligations, among other expenditures. The *Omayaka* Court, *Id.* at 653-54 (quoting *Heger v. Heger*, 184 Md. App. 83, 96 (2009)), explained:

> In litigating a claim that one spouse has dissipated marital assets, the critical time is that between the separation or the time when "the marriage is undergoing an irreconcilable breakdown," *Sharp v. Sharp*, 58 Md. App. 386, 401, 473 A.2d 499 (1984), on the one hand, and the ultimate divorce, on the other had [sic]. The other critical factor is the purpose on the part of the spending spouse for the expenditure. What matters is not that one spouse has, post-separation, expended some of the marital assets, what is critically important is the purpose behind the expenditure. The doctrine of dissipation is aimed at the nefarious purpose of one spouse's spending for his or her own personal advantage so as to compromise the other spouse in terms of the ultimate distribution of marital assets.

The parties direct us to no authority regarding the use of marital funds to make *pendente lite* support payments, and we have found no Maryland case squarely addressing this issue. However, our sister jurisdictions have held that the use of marital assets to make support payments constitutes dissipation. *See Azizo v. Azizo*, 859 N.Y.S.2d 113, 116 (N.Y. App. Div. 2008) ("Since *pendente lite* payments should not be made from marital property, the trial court properly required defendant to reimburse the marital estate for marital assets he liquidated in order to comply with the *pendente lite* order." (Internal citation omitted)); *Goldman v. Goldman*, 589 A.2d 1358, 1362 (N.J. Super. Ct. Ch. Div. 1991) (if Husband had depleted marital assets to discharge his *pendente lite* obligations instead of in an effort to keep his business solvent, he would have been charged with the amount of the depletion); *Grandovic v. Grandovic*, 564 A.2d 960, 964 (Pa. Super. Ct. 1989) ("abuse of discretion for the trial court to approve appellee's use of marital assets to resolve a support issue"); *Griffin v. Griffin*, 558 A.2d 86, 92 (Pa. Super. Ct. 1989) (trial court "abused its discretion in allowing a marital asset to be utilized and entirely consumed for the purpose of making child support payments required of Husband when Husband has other funds available from which to make the payments"). *Cf. Collins, supra*, 144 Md. App. at 417 (husband found not to have dissipated funds because, as he was in the process of retiring, his retirement account was his sole source of income and he had no other source of funds from which to pay support); *Allison v. Allison*, 160 Md. App. 331, 338-40 (2004) (husband found not to have dissipated funds when he used marital property to pay for his "reasonable attorney's fee," as well as his wife's attorney's fees, which the court directed him to pay, because "[d]ivorcing spouses usually do not have their own separate funds to pay their lawyers") (citation omitted).[9]

In the case at bar, Husband admitted to using marital funds from the retirement accounts to make his *pendente lite* support payments. Husband had ample income and received a tax deduction for the support payments while Wife did not. Husband claimed financial difficulty as the reason he chose to pay his support payments using funds from the retirement accounts even though he was able to finance his numerous trips to visit his paramour using non-retirement account funds. Husband thereby reduced the amount of marital assets available for distribution. On remand, the circuit court must consider the amount of funds used from the marital retirement accounts to pay *pendente lite* support when determining an equitable division of marital property.

III. Award of Attorney's Fees

Wife argues that because of an extreme disparity in the parties' incomes, the circuit court should have awarded her all of her attorney's fees, totaling $151,942.50, and expert fees, totaling $7,866.00. Husband responds that the circuit court properly considered and made findings for each of the factors under FL § 7-107[10] when it determined that an award of $50,000.00 in attorney's fees was appropriate. Husband contends that Wife, in arguing the disparity in incomes, did not account for her "net income" of $7,455.00 in child support and alimony payments.

Because of our disposition of the dissipation issue, we must vacate the award of counsel fees. *Malin, supra*, 153 Md. App. at 433; *see also Whittington,* 172 Md. App. at 349. Nevertheless, for the guidance of the court and the parties on remand, we shall briefly address the issue of the attorney's fees.

"The standard of review for the award of counsel fees and costs in a domestic case is that of whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002) (citation omitted); *see also Gillespie v. Gillespie*, 206 Md. App. 146, 176 (2012); *Meyr v. Meyr*, 195 Md. App. 524, 552 (2010) ("award of counsel fees is reviewed under the abuse of discretion standard"); *Lemley v. Lemley*, 109 Md. App. 620, 633 (1996);

Frankel v. Frankel, 165 Md. App. 553, 590 (2005); *Ledvinka v. Ledvinka*, 154 Md. App. 420, 432 (2003). Thus, "[a]n award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citations omitted).

The circuit court addressed attorney's fees in its February 23, 2012 opinion. Under its findings of the "financial resources, needs, and status of both parties," the court found that Wife receives $60,000.00 per year in alimony and $29,460.00 per year in child support. The circuit court correctly did not discuss the child support payments in terms of Wife's income as such payments are not to be imputed as income. *See, e.g., Tucker v. Tucker*, 156 Md. App. 484 (2004) (explaining that Social Security benefits paid for the benefit of the minor children are not to be included as wife's income in computing child support obligations). The circuit court found that Wife's fees were necessary and reasonably incurred, and that both parties were justified in prosecuting and defending the proceeding. The circuit court explained that Wife had access to $345,000.00 in before-tax retirement assets, alimony, and her 40% interest in CU from which she could make payments against her attorney's fees. The court noted that while Wife had $50,000.00 in outstanding attorney's fees, she had incurred loan debts of $85,000.00 in order to achieve that balance, and she also had joint debts with Husband. The circuit court then found that some of Wife's fees were unnecessary and, therefore, found it appropriate for Husband to "contribute to *some* of [Wife]'s attorney's fees" in the amount of $50,000.00. (Emphasis in original). We find no abuse of discretion based on the circuit court's analysis of the FL § 7-107 factors.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY VACATED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID AS FOLLOWS: 2/3 BY APPELLANT AND 1/3 BY APPELLEE.

FOOTNOTES

1. Wife presented the following questions in her brief (footnote omitted):

> 1. Did the lower court err in awarding Mrs. Baier only $5,000 per month in alimony for a period of five (5) years?
>
> 2. Did the lower court abuse its discretion and err in denying Mrs. Baier's request for indefinite alimony based upon an unconscionable disparity of incomes and standards of living between the parties when Mr. Baier earned approximately $225,000 plus benefits in the year immediately preceding the divorce and Mrs. Baier, who had been out of the workforce caring for the parties' children for more than twenty (20) years, earned a nominal amount in that year?
>
> 3. Did the lower court err in finding that Mr. Baier had dissipated his retirement and checking accounts, but denied Mrs. Baier one-half of those dissipated amounts or refused to readjust Mr. Baier's retirement accounts?
>
> 4. Did the lower Court [sic] err in denying Mrs. Baier's total claim for contribution of counsel fees?

2. The exact of amount of Husband's income is disputed.

3. Bertelsmann was the company Husband worked for in the music industry. The German company creates and markets mass media, which at the time Husband was employed by the company included records, cassette tapes, and compact discs. *See* http://www.bertelsmann.com/Bertelsmann/Structure.html (Last visited September 20, 2013).

4. Wife had previously withdrawn $100,000.00 from her UBS IRA account and given it to Husband to invest in a car wash business in Colorado. The business venture failed when one partner embezzled the investments. Litigation stemming from the embezzlement is the source of the $127,000.00 judgment in Husband's favor.

5. This motion was denied on November 15, 2010.

6. The circuit court valued the parties' rewards points as zero in determining a monetary award, notwithstanding that Husband had used the points to facilitate some of his many trips to visit his paramour. Wife was not afforded the benefit of using the points to travel to visit her family, for example, nor was she compensated in any apparent way for the discrepancy.

7. Wife asserted that the account's balance on July 29, 2011, was $666,034.42.

8. Husband testified that $18,500.00 was for tuition and that $8,000.00 was the tax on that withdrawal. Thirty percent of $18,500.00 equals $5,550.00, not $8,000.00.

9. By contrast, "the husband . . . is chargeable" for expenses that wife continues to incur during the pendency of the suit. *Kalben v. King*, 166 Md. 632, 638 (1934). Such is the reason that *pendente lite* alimony is "usually allowed indigent wives as a matter of course." *Id.* Likewife, because the amount of child support is dependent on both parties' incomes – including any alimony awarded – *pendente lite* child support cannot be paid from marital property. *See* FL § 12-204.

10. FL § 7-107 states in pertinent part:

> (b) At any point in a proceeding under this title, the court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.
>
> (c) Before ordering the payment, the court shall consider:
>
> (1) the financial resources and financial needs of both parties; and
>
> (2) whether there was substantial justification for prosecuting or defending the proceeding.

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