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SUMMARIES OF ALL UNREPORTED FAMILY LAW CASES

IN BRIEF



FEATURES



# Top court orders recalculation of attorneys' fee award

Maryland's top court has thrown out a $30,000 attorneys' fee award to a father who defeated his ex-wife's claim in a custody case that he had sexually abused their daughter, sending it back to the circuit court for recalculation.

The Court of Appeals said a Wicomico County judge had placed too much emphasis on the fact Michael A. Petito Jr. had paid more than $70,000 for private counsel in his successful defense while his ex-wife, Joanna Davis, was represented at no charge by a legal services agency in bringing the claim.

The court said attorneys' fees, if awarded in a custody case, must be tempered by the respective financial status and need of each parent — and not augmented by the disparity in what they had paid their attorneys.

Davis' appellate lawyer hailed the decision, saying that tying an award to the differences in legal fees would be unfair to litigants who receive free legal aid in custody cases.

"It's great not only for my client but for everyone who receives pro bono services," said John R. Seward, of Skadden, Arps, Slate, Meagher & Flom LLP in Washington, D.C.

"This opinion reaffirms that you [the judge] need to do a full analysis" of the financial need of the parents when awarding attorneys' fees in custody cases, he said. "In doing that analysis, it's not appropriate to write off the value of pro bono legal services."

Petito's attorney, Laura E. Hay, did not return telephone messages seeking comment on the decision. Hay is with

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LEGISLATION

# *Marriage law may ring in cash for state*

ANNAPOLIS — The phones aren't ringing just yet at the Intercontinental Harbor Court hotel, but its marketing director can envision a day when calls from gay couples looking to book space for their wedding tie up the line.

The hotel, which has its reception hall booked about 35 weekends a year, could see an uptick in business if same-sex marriage legislation survives a likely voter referendum this fall and becomes law. John Stowell, the hotel's sales and marketing director, hopes the calls come in.

"It is a big part of our business," Stowell said of weddings. "If you have an opportunity to gain a new opportunity for revenue, that's always a positive. We would be open to hosting it."

Should Maryland become the seventh state, plus Washington, D.C., to allow same-sex marriages, the state could get an economic boost in the form of business activity and taxes on wedding-related expenditures.

It's who would be the driver of those purchases — and what they would mean in actual dollars — that is up for the debate, according to local experts and economists.

Anirban Basu, chairman and CEO of Sage Policy Group, Inc., a Baltimore-based economic and policy consulting firm, said there would certainly be some impact on the state economy.

"There are a number of impacts both short- and long-term," Basu said. "There's a lot of pent up demand for same-sex marriages in this country. … So, it is good for the wedding and hospitality industry; there's little question about that."

A 2007 study conducted by the Williams Institute at the University of California Los Angeles School of Law said

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# Living in limbo

## *Delaying adjudications in CINA cases can ultimately harm the child*

**By Angela White**
**Guest Column**

When a local Department of Social Services removes a child from a parent's custody due to an allegation of abuse or neglect, the department typically places her in emergency shelter care, either with a relative or, if no relatives are immediately available, in foster care.

Within 30 to 60 days of the child's removal, pursuant to Court and Judicial Proceedings Section 3-815, the trial court is to determine whether the allegations that led to the removal are true by a preponderance of the evidence (the standard used in Child In Need of Assistance cases in Maryland).

In the overburdened court system of Baltimore City, however, it can take much longer to adjudicate a complicated case. While relatively rare when compared to the thousands of children who travel through the city court's system at any given time, a child can remain with a relative or in foster care for months before her case is adjudicated.

In Baltimore City, all cases — pre- and post-adjudication — are almost always placed on a settlement docket first, with the understanding that, if the parties cannot reach an agreement on that date, it will be scheduled on a trial date.

At the initial emergency hearing following a child's removal, the court typically schedules the adjudication settlement hearing 30 to 60 days from the date of removal, in accordance with Section 3-815.

However, adjudications often do not settle due to fundamental disagreements among the parties — which typically include the local Department of Social Services, the parents, and the child — as to whether the alleged facts that led to the child's removal are true.

As adjudications involve the initial allegations that led to the child entering into care, they tend to be more sensitive in nature and the parents are more actively involved in advocating for judicial determinations that are in their interests. This leads to a more volatile environment that is often not prone to agreement, or even compromise.

If the parties cannot come to an agreement on the settlement date, the case is placed on the trial docket, usually another 30 to 60 days from the settlement date.

On the day of trial, any number of events can cause a postponement. Any of the attorneys representing the department, the mother, the father, the child — or even the court itself — may have a justified reason for needing to reschedule the adjudication.

In addition, if a necessary party, such as an incarcerated parent who has the right to be present, is not in fact produced, a post-

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## *Monthly Memo*

### Groner nominees sought

The Maryland State Bar Association's Family Law Section Council is seeking nominations for the 11th annual Beverly A. Groner Family Law Award, to be presented at the MSBA's annual meeting in Ocean City this June. Nominations may be sent to Vincent M. Wills at Dragga, Hannon, Hessler & Wills LLP in Rockville (vwills@draggalaw.com). The deadline for nominations is May 4, 2012.

### Dads v. Huggies settled

Score one for the dads: Kimberly-Clark, maker of Huggies diapers and wipes, replaced a series of supposedly "real life" video ads with more father-friendly ones after a social-media backlash. The original campaign on the company's Facebook page, which urged parents to "Have Dad Put Huggies To The Test," portrayed fathers as clueless and careless, according to bloggers like The Daddy Doctrines' Chris Routly. "We have listened and learned," Kimberly-Clark spokesman Joey Mooring said in a statement.

### Bowman verdicts affirmed

The Court of Special Appeals has affirmed Renee Denise Bowman's 2010 convictions for the first-degree murder of two of her three adopted daughters and first-degree child abuse convictions as to all three girls. Bowman argued, unsuccessfully, that the cases should have been tried separately and that police went beyond the scope of their warrant when they looked in her freezer and found what turned out to be human remains at her home in Lusby. The unreported opinion is available as RecordFax No. 12-0308-02, 34 pages.

— BARBARA GRZINCIC

# Same-Sex

*Continued from page 1*

legalizing gay marriage in Maryland would result in an additional $3.2 million in state revenue gains a year, largely related to hotel taxes and other wedding-tourism-related activity.

The largest state revenue gains would come from out-of-state couples traveling to Maryland to wed.

Non-residents could generate $218 million in wedding spending in the first three years of same-sex marriage, the study said.

Other tax revenue — like estate and transfer taxes, which are not applied when property goes to spouses — would be diminished if more couples are married in the state, but gains in sales tax through the tourism industry would more than make up for those losses, the study said.

Sam Rogers, executive vice president and chief marketing officer for Visit Baltimore, Baltimore's tourism agency, said the city and state would "absolutely" see an uptick in the wedding and hospitality spending should the legislation signed by Gov. Martin O'Malley survive the expected referendum this fall.

It helps that Maryland is already considered to be a "gay friendly" state, Rogers said, with Baltimore playing a starring role in that reputation. Marketing agents at Visit Baltimore have been directing a campaign aimed at attracting more homosexual tourists for the last three years, Rogers said.

There also could be more positive long-term impacts, Basu said, because marriage is associated with greater household stability.

"That could be good for the housing market for instance, or anything else that requires a long-term commitment," Basu said. "From a purely economic standpoint, household formation is a good thing for economies."

## 'It adds up'

Mark F. Scurti, an openly gay attorney in Towson who whose practice includes Lesbian, gay, bisexual and transgender law, said it was not a stretch to suggest that couples who live near Maryland could come to the state to get married, pumping money into the local economy.

Scurti and his partner drove to Massachusetts for nuptials after that state legalized marriage between same-sex couples in 2004.

"When I got married up in Massachusetts … the money we spent in just the restaurant, in travel, in lodging friends and family that were involved in the ceremony … It adds up," he said.

Scurti said he chose to get married because civil unions and domestic partnerships don't work.

"It's a second-class status, from a social standpoint," Scurti said. But he also said the law is not equipped to handle civil unions in many states, causing trouble for couples in the benefits and insurance realm.

"There are a lot of challenges in the insurance area, in workers compensation, where people have been denied access or benefits," he said. "The law was not equipped to handle a civil union partner. Insurance companies define policies based on marriage."

Because of that, Scurti said Maryland could see an influx of matrimony-minded couples from Pennsylvania, Delaware, West Virginia and some western areas of Virginia, even though same-sex marriage is already allowed in the District.

"My friends that have gotten married in D.C. [have gone there because] there wasn't another option," Scurti said.

## 'Creative class' appeal

But not everyone is convinced legalizing gay marriage would lead to an influx of money for the state.

Richard Clinch, director of economic development at The Jacob France Institute at the University of Baltimore, said any economic impact felt by the state could be minimal.

The question is whether same-sex couples getting married would bring any new money to the state, Clinch said. A couple not planning or not able to get married might save money to buy a new car, a better house or something else that would pump money into the Maryland economy.

With marriage suddenly an option, those couples may just choose to spend that money on the wedding — creating no net increase in the amount of cash getting spent in the state.

"I don't think you do this for economics. You do it for a moral question," Clinch said. "I don't think the economics of this are compelling. I think we're talking about small dollars here."

The better argument, Clinch said, is that by passing the legislation and creating a more tolerant state, people identified by economist and author Richard Florida as part of the so-called "creative class" are more likely to settle in Maryland.

There is a positive correlation, Clinch said, between open societies and economic performance.

"Areas that have a more welcoming environment … attract more of what's called the 'creative class,' and they have economic effect," Clinch said. "The reason to do this is equality, if you're going to do it. Economically, the more strong argument is that areas that are open attract more knowledge."

While Basu felt there would be economic impact regardless, he agreed with Clinch's assessment of the legislation's potential impact on the so-called creative class.

"Regions that are more gay-friendly tend to be more innovative, with faster business formation, more business growth and more shared prosperity," Basu said. "I think this makes Maryland more attractive to the creative class, whether these people are straight or gay. More progressive, welcoming, diverse communities tend to prosper."

## A go-to state?

That does not mean there wouldn't be immediate winners on a smaller scale should same-sex marriage survive referendum and become law, Clinch said.

The wedding industry — planners, florists and clothing stores — should benefit from any increase in the number of Marylanders suddenly getting married.

But Clinch wasn't sure the impact would go any further than that, and he doubted Maryland would become a go-to state for gay couples looking to wed.

"Yes, downtown [Baltimore] will benefit, but that spending comes from somewhere," Clinch said. "It comes from savings, it comes from vacations. It's not going to create huge amounts of new spending.

"Many states are grappling with this thing. … Are people going to flock to Baltimore or Ocean City for weddings? I don't think they're marriage destinations, anyway. I don't see us becoming the gay marriage Mecca."

Rogers, the marketing chief for Baltimore tourism, wasn't certain there would be a large influx of gay couples coming to the state, either, but he did say there would be some impact on the city, created by other state residents coming to Baltimore to get married.

"I think most people get married where they live," Rogers said. "There certainly should be an uptick in hotel business, restaurant business and catering business as a result.

"It may turn up in some of our research down the road. 'Why did you come to Baltimore? To get married'."

— ALEXANDER PYLES

# Davis

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Cockey, Brennan & Maloney PC in Salisbury.

The high court's decision addressed Family Law Section 12-103, which permits attorneys' fees to be awarded against a parent who lacked "substantial justification" for bringing or defending a claim for child custody, support or visitation. In awarding fees, the law requires judges to consider the financial status and need of each parent, the court said.

If each parent was substantially justified in bringing or defending the case, the judge can still award fees based on the relative financial status and need of the parents, the court added. It sent the case back to Wicomico County Circuit Court for a reconsideraton of the 12-103 factors.

"Section 12-103 contemplates a systematic review of economic indicators in the assessment of the financial status and needs of the parties, as well as a determination of entitlement to attorneys' fees based upon a review of the substantial justification of each of the parties' positions in the litigation, mitigated by a review of reasonableness of the attorneys' fees," Judge Lynne A. Battaglia wrote for the court. "The only time that the relative amounts of the parties' attorneys' fees should be considered is when both are determined to have a substantial justification for their positions… ."

Petito and Davis, who divorced in April 2006, had joint legal custody of their daughter, Sophia, with Davis having primary physical custody.

In December 2008, Davis filed a complaint for immediate sole legal and physical custody in Wicomico County Circuit Court, alleging Petito had sexually abused then-5-year-old Sophia. Petito denied the allegation, retained counsel and filed a counterclaim, seeking joint physical and legal custody.

Davis was represented pro bono through the Sexual Assault Legal Institute.

After a five-day hearing, Judge Kathleen L. Beckstead concluded Davis had not shown by a preponderance of the evidence that Petito had engaged in "any form of sexual abuse."

Petito moved for attorneys' fees of $76,052, saying Davis pursued the claim without substantial justification.

Beckstead awarded Petito $30,773.54 in attorney's fees, after taking Davis' financial situation into account. The judge said Petito had substantial justification in defending the allegation and that Davis' financial status after the litigation was better than Petito's because she had been represented pro bono.

The Court of Special Appeals upheld the award in February 2011, prompting Davis to seek review by the Court of Appeals.

## Another round

The fee award at issue before the Court of Appeals was not only one Petito received. The Court of Special Appeals, in an unreported opinion filed Jan. 18, affirmed another $9,385 in sanctions against Davis and her attorneys. (See Unreported Case in Brief, page ———).

That sanction stemmed from Davis' September 2010 quest for a domestic relations protective order, which she sought in Worcester County in September 2010. In the petition, Davis alleged again that Petito had sexually abused their daughter. The Maryland District Court judge in Worcester County granted the temporary order after an *ex parte* hearing; however, seven days later, rather than hold a hearing on a permanent order, the judge transferred the case back to Wicomico County Circuit Court.

Key to the award was the lack of any evidence of abuse after Feb. 12, 2010, when the circuit court had rejected Davis' allegations.

"[T]he petition was nothing more than an attempt to re-litigate Davis's claim that Petito had sexually abused Sophia prior to February 12, 2010," the Court of Special Appeals held.

DAVIS CASE IN BRIEF

## *Joanna Davis, et al. v. Michael A. Petito*

**ATTORNEYS' FEES: FINANCIAL STATUS AND NEEDS: PRO BONO REPRESENTATION**

CA No. 30, September Term 2011. Reported. Opinion by Battaglia, J. Filed Feb. 27, 2012. RecordFax #12-0227-20, 19 pages. Appeal from Wicomico County. Counsel: John R. Seward for petitioner; Laura E. Hay for respondent. Reversed and remanded.

The trial court's consideration that one party was represented on a pro bono basis, in order to award attorneys' fees to the other party, who had retained counsel, was erroneous under FL Section 12-103.

**"Joanna Davis, Petitioner, was ordered by the Circuit Court for Wicomico County to pay her ex husband Michael Petito, Jr., Respondent, $30,773.54 in attorneys' fees and costs, because the trial court determined that she was in a better financial position than Mr. Petito, due to her having received pro bono representation by the Sexual Assault Legal Institute (SALI), whereas Mr. Petito had accumulated over $70,000 in legal fees as a result of retaining private counsel.**

**The Court of Special Appeals affirmed the trial court's order in a reported opinion, *Davis v. Petito,* 197 Md. App. 487, 14 A.3d 692 (2011), even though Ms. Davis had argued that the trial court's order discounting any perceived value associated with her representation contravened this Court's decision in *Henriquez v. Henriquez*, 413 Md. 287, 992 A.2d 446 (2010), in which we interpreted Section 12-103 to permit an attorneys' fee award to a prevailing party, who also had received pro bono legal representation. We granted certiorari, 420 Md. 81, 21 A.3d 1063 (2011).**

**We shall hold that the consideration that one party was represented on a pro bono basis, in order to award attorneys' fees to the other party who had retained counsel was erroneous under Section 12-103, and we shall order a remand to the trial court for reconsideration of the statutory factors in light of this opinion.**

**The judge conflated Mr. Petito's substantial justification for defending the custody proceeding with Ms. Davis's use of pro bono legal services in bringing the claim.**

**Essentially, substantial justification, under both subsections (b) and (c) of Section 12-103, relates solely to the merits of the case against which the judge must assess whether each party's position was reasonable. A judge, after finding substantial justification, then must proceed to review the reasonableness of the attorneys' fees, and the financial sta-**

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# Limbo

*Continued from page 2*

ponement will occur.

Whatever the reason, the case is again postponed, typically for yet another 30 to 60 days. By the time the second trial date is reached, the child may have been residing in an out-of-home placement for as long as 180 days before it has even been determined whether the facts leading to the child's removal were true. And the case could be postponed again.

The children in these delayed cases who are residing in foster care face adjustment problems — not only in adapting to the new foster home, but also adjusting to returning to a parent's care if the case is adjudicated in the parent's favor, resulting in a dismissal of the case and perhaps the end of the department's involvement.

During the months between removal and the adjudication's conclusion, the child may have bonded with the foster family, made new friends, adjusted to a new school, and even been living in a better economic environment with the foster parent than with the parent.

Any of these can cause a child difficulties that could result in the need for psychological care, which the parent would have to arrange post-adjudication with the department out of the picture.

While these adjustment issues might be present in any case where a child returns to a parent's care after a prolonged period in foster care, in this instance adjustment problems could have been avoided had the adjudication been timely heard.

While certain circumstances leading to a delay in a court proceeding (such as an ill attorney) cannot be anticipated or avoided, some changes may help avoid other delays.

Placing all adjudications initially on the trial docket and requiring attorneys to commit to one trial at a time could shorten the time it would take to complete an adjudication. In Washington, D.C., for instance, adjudications are always initially scheduled for trial, and a mediation is scheduled outside of the courtroom beforehand to determine whether a trial is necessary.

Such changes would require additional resources, in that masters and attorneys would have to be available for the case on a shortened timeline. This luxury is nearly impossible to afford at a time when legal services are being severely cut, not expanded.

In the meantime, while most adjudications will eventually settle, there will be a few that get lost in the scheduling labyrinth — seemingly in a state of perpetual postponement — that could ultimately result in damaged families and confused children who are waiting for the court to provide them with safety and permanency.

**Angela White is a staff attorney in Maryland Legal Aid's Child Advocacy Unit in Baltimore.**

## DAVIS CASE IN BRIEF *Continued from page 4*

**tus and needs of each party before ordering an award under 12-103(b).**

**Section 12-103 contemplates a systematic review of economic indicators in the assessment of the financial status and needs of the parties, as well as a determination of entitlement to attorneys' fees based upon a review of the substantial justification of each of the parties' positions in the litigation, mitigated by a review of reasonableness of the attorneys' fees. The only time that the relative amounts of the parties' attorneys' fees should be considered is when both are determined to have a substantial justification for their positions; after which, it is clear from *Henriquez*, 413 Md. at 287, 992 A.2d at 446, pro bono legal services must be valued.**

**We remand this case for a reconsideration of the attorneys' fees award under Section 12-103. If the Circuit Court determines that Ms. Davis lacked substantial justification for bringing her claim and absent a finding of good cause to the contrary, then under Section 12-103(c), the reasonableness of Mr. Petito's attorneys' fees would be the only consideration. If the Circuit Court finds under 12-103(b), however, that Ms. Davis and Mr. Petito each had substantial justification, then the Circuit Court must value the legal services afforded to both parties, according to *Henriquez*, and determine their reasonableness, after which the court must proceed to assess Ms. Davis's and Mr. Petito's financial status and needs."** *Slip op. at various pages, citations and footnotes omitted. The full-text opinion will be published in April's Supplement.*

## UNREPORTED CASES IN BRIEF

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

### *John B. Atcheson v. Linda B. Atcheson**

**DIVORCE: PENSION CALCULATION: REVISORY POWER**

CSA No. 1584, September Term, 2010. Unreported. Opinion by Eyler, D.S., J. Filed Jan. 13, 2012. RecordFax #12-0113-05, 12 pages. Appeal from Montgomery County. Affirmed.

The circuit court lacked authority to revise a Qualified Court Order entered 15 years earlier, where the movant did not act with ordinary diligence and did not assert the kind of fraud, mistake, irregularity, or clerical mistake that would allow the circuit court to revise the order under Rule 2-535.

**"John Atcheson was divorced from Linda Atcheson in 1994. On October 23, 2009, John moved to modify the qualifying court order (QCO) that had been in place since December 20, 1994, alleging an inaccurate calculation of the marital portion of his pension from the federal government. On July 13, 2010 the circuit court denied the motion.**

**John presents the following questions, which we have reworded:**

**I. Could the incorrect number of months entered into the QCO have been the product of an agreement between the parties?**

**II. Did the circuit court lack revisory authority over the QCO pursuant to Md. Rule 2-535?**

**III. Did John fail to act diligently in moving to modify the QCO?**

**Because we answer questions two and three in the affirmative, it is not necessary for us to address question one.**

**FACTS AND PROCEEDINGS**

*See* UNREPORTED CASES IN BRIEF *page 6*

UNREPORTED CASES IN BRIEF *Continued from page 5*

The parties were married on June 2, 1975. Both were represented by counsel during the divorce proceedings. The parties oral agreement was put on the record in open court as to the division of marital property, alimony, and child custody and support. The agreement was incorporated but not merged into the judgment of absolute divorce. Regarding John's federal government pension, Linda's counsel stated that she "will be entitled to 50 percent of marital share and [John] will provide a … survivor's benefit annuity." John's counsel clarified "that the survivor benefit is in the same fractional proportion under [*Bangs v. Bangs*, 59 Md. App. 350 (1984)] as the retirement benefit will be." No evidence was adduced as to John's length of federal service or the marital share of his federal service.

In the judgment of absolute divorce filed December 20, 1994, the circuit court entered the QCO apportioning John's pension. The QCO stated that John accrued creditable service during the marriage for "200 months." The number "200" was handwritten three times on blank lines in the typed order.

On October 23, 2009, John, acting pro se, moved to modify the QCO. He asserted that he had discovered, while preparing to retire, that the QCO stated he had accrued 200 months of creditable service during the marriage. According to John, however, he only accrued 177 months. Linda filed an opposition.

The court found it lacked revisory power over the QCO under Rule 2-535 because John did not show fraud, mistake, or irregularity. Furthermore, John did not act with ordinary diligence in seeking to modify the QCO. Accordingly, the court denied John's motion. John noted this appeal.

DISCUSSION

In the context of Rule 2-535, fraud, mistake, and irregularity have special, narrow meanings which must be strictly applied. *Early v. Early*, 338 Md. 639, 652 (1995). "Fraud" refers to extrinsic fraud. "Fraud is extrinsic when it actually prevents an adversarial trial." *Manigan v. Burson,* 160 Md. App. 114, 121(2004) (quoting *Billingsley v. Lawson*, 43 Md. App. 713, 719 (1979), *cert. denied*, 446 U.S. 919 (1980)). "Mistake" is "limited to a jurisdictional error." "Irregularity" is "a failure to follow required process or procedure" and usually involves "a judgment that resulted from a failure of process or procedure by the clerk of a court." *Thacker v. Hale*, 146 Md. App. 203, 2 19-20, *cert. denied*, 372 Md. 132 (2002).

In addition to showing fraud, mistake, or irregularity, a party must show that he or she acted "with ordinary diligence and in good faith upon a meritorious cause of action or defense." *Bland v. Hammond*, 177 Md. App. 340, 357, *cert. denied*, 400 Md. 647 (2007).

Because John's motion was filed more than 30 days after the 1994 QCO was entered, he was required to show fraud, mistake, irregularity, or clerical mistake, and he must have acted with ordinary diligence in moving to amend the QCO. John did not assert the kind of fraud, mistake, irregularity, or clerical mistake that would allow the circuit court to revise the QCO. Although he argues that the insertion of the number "200" on the QCO was an irregularity, it was not the type of irregularity contemplated by Rule 2-535 as discussed in Thacker. There was no evidence as to who prepared the QCO or supplied the number handwritten on the typed order. There was no evidence or discussion at the June 15, 1994 hearing regarding the correct number. Even if there had been, such considerations would be moot because John's counsel signed the QCO as "consented to" on John's behalf, and there is no evidence counsel was acting without authority.

Furthermore, John did not act with ordinary diligence. Both the QCO itself and the information regarding the number of months were available to him December 20, 1994. Waiting nearly 15 years to investigate and file a motion to modify the QCO is not ordinary diligence. See, e.g., *Thacker*, 146 Md. App. at 230 (citing *Platt v. Platt*, 302 Md. 9, 16-17 (1984)); *Hughes v. Beltway Homes, Inc.,* 276 Md. 382, 389 (1975).

A court may avoid the strictures of Rule 2-535 by sufficiently reserving jurisdiction. See Mills v. Mills, 178 Md. App. 728 (2008). Here, however, the court only retained jurisdiction over the QCO "to modify the technical, but not the substantive, provisions of this Order [for] the purposes of its acceptance … as an order acceptable for processing by OPM and to accomplish the transfers and payments ordered herein." Changing the number of months would be a substantive, not a technical, change. The court's reservation of jurisdiction was simply too narrow to allow for the modification John requests.

John relies heavily on *Heger v. Heger*, 184 Md. App. 83 (2009), for the proposition that a court retains continuing jurisdiction over a QDRO (or QCO) to correct computational errors involving the Bangs formula. This reliance is misplaced. We classified the computational error in *Heger* as a "clerical error" because, as the circuit court supplied all of the data on which it relied in reaching its conclusion, the error was patently obvious. There is no such data in this case." *Slip op. at various pages, citations and footnotes omitted.*

## *Carolina Victoria Chelle v. Ramez Abdullah Ghazzaoui**

CUSTODY: JOINT CUSTODY: COOPERATION BETWEEN PARENTS

Consolidated cases: CSA Nos. 2052, September Term, 2010 and 80, September Term, 2011. Unreported. Opinion by Meredith, J. Filed Jan. 31, 2012. RecordFax #12-0131-02, 22 pages.

Although the parties had an acrimonious and uncooperative relationship, the trial judge satisfied *Taylor* by fully articulating the reasons for granting joint legal and physical custody, and also incorporated mechanisms intended to avoid or limit future battles between these "warring parents."

"Carolina Chelle (Mother) and Ramez Ghazzaoui (Father) were married on December 22, 2001. Daughter Maya was born in 2003. On July 1, 2008, Mother took Maya, along with some belongings and Father's computer, and left the marital home. Mother successfully sought a protective order on the basis of alleged abuse by Father; Father was almost immediately arrested for violating the protective order in Anne Arundel, Montgomery, and Howard Counties.

Although the legal proceedings between Mother and Father have been extensive, this appeal arise[s] from two orders: that rendered on October 8, 2010, awarding the parties joint legal and shared physical custody, and that rendered on March 10, 2011, dealing with the financial issues between the parties.

I. The Custody Order

Mother's argument is essentially that, because she and Father cannot get along, joint custody is impossible, and the court abused its discretion in ordering it.

*See* UNREPORTED CASES IN BRIEF *page 7*

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The ability of the parents to communicate and effectively co-parent is "clearly the most important factor" in determining whether parents can share legal and physical custody. The Court in Taylor [v. Taylor, 306 Md. 290 (1986)] opined: "In the unusual case where the trial judge concludes that joint legal custody is appropriate notwithstanding the absence of a "track record" of willingness and ability on the part of the parents to cooperate in making decisions dealing with the child's welfare, the trial judge must articulate fully the reasons that support that conclusion."

The chancellor concluded that this is such an "unusual case." The trial judge not only fully articulated the reasons but also incorporated mechanisms intended to avoid or limit future battles.

In the bench opinion, the trial court found Mother made "a myriad of unfounded accusations …against [Father], to anyone who would listen, of rape, pedophilia, possession of child pornography, child abuse, and other inappropriate conduct with and around the minor child. There is no credible evidence to support any of these allegations. … The Court does give significant weight to the report of Dr. Michael Gombatz, who conducted the most comprehensive and objective psychological evaluation of the parties. Dr. Gombatz stated in his report that "it is my clinical opinion with a reasonable degree of psychological certainty that Maya has not been sexually abused. There is no basis to conclude that she has been exposed to sexually inappropriate material by her father."

Notwithstanding its finding of the above conduct by Mother, the trial court recognized that its custody decision must focus on the best interest of the child. The court acknowledged its reservations that ongoing parental bitterness could render cooperation and communication difficult or impossible. To address those concerns, the court imposed conditions on the parties, including a requirement that they participate in counseling, both individually and as a family. The court ordered that such therapy would be non-privileged, to enable periodic review of the parties' "compliance, openness, and willingness to cooperate." Both Mother and Father are ordered to adhere to standards of parental conduct, requiring them to act in a civil manner toward each other. The court ordered the parties to work with a parenting coordinator.

Noting the contentious history between the parents, the custody order also provided the court would conduct periodic reviews "for the purpose of monitoring the parties' compliance." The court warned that noncompliance could be construed as a material change in circumstances warranting a change in custody.

We conclude that the circuit court did not abuse its discretion in granting joint legal and physical custody.

II. The Financial Order

The order of March 10, 2011, adjudged Mother responsible for attorney's fees. The court assessed 60% of Father's attorney's fees, or $62,055.14, plus $9,000 incurred by Father in computer-expert fees and $14,109.00 in supervision fees; neither of the latter two items would have been necessary absent Mother's misconduct.

The predicate finding of Mother's culpability for the appearance of the child pornography on Father's computer — a finding that was not clearly erroneous — supported the court's finding of "an absence of substantial justification" for Mother's litigation of the related issues, and, therefore, supported the award of reasonable and necessary expenses in this case. We will not disturb the portion of the financial order awarding Father $85,164.14.

III. Father's Cross-Appeal

Attorneys' fees

Father contends $85,164.14 is too low. The court recognized that both Mother and Father had amassed significant legal fees — for Father $273,395, and for Mother, $232,175. The court found that not all of Father's legal bills were attributable to this specific litigation, and that "both parties expended far in excess of what was necessary due to their own misconduct, pride, and stubbornness." As the trial court put it, Father's "obsessive tendencies have caused him to go far beyond what was necessary to defend these proceedings." It was not an abuse of discretion to discount Father's legal bills in light of such a finding.

The Best Interest Attorney's Fees

Father took an interlocutory appeal regarding the fee petitions of the Best Interest Attorney. Father's position was that he was entitled to a hearing at which he could examine the BIA, prior to being ordered to pay her fees. Our unreported opinion affirming the trial court's ruling was filed Nov.5, 2010. *Ramez Ghazzaoui v. Carolina Chelle*, No. 1585, Sept. Term 2009.

Father has not proffered what he expects to be able to prove at such hearing. Father's suggestion that the case would have come out better for him if he had been granted a hearing requires speculation. Father has not established reversible error. *Crane v. Dunn*, 382 Md. 83, 91(2004).

Retroactive child support

In its financial order, the trial court also considered Father's motion for modification of child support, which Father filed on March 15, 2010, after he became unemployed.

Father contends the court erred in ordering him to pay arrears without taking into account the fact that, during the period for which the arrearage was found, Father was caused to incur extraordinary expenses due to Mother's "outrageous behavior." Father specifically cites the fact that he was required during this time, pursuant to a pendente lite order, to continue paying the mortgage on the family home in which Mother and Maya were living.

A court, in determining whether a deviation from the guidelines would be appropriate, may consider "the terms of any existing separation or property settlement agreement or court order, including any provisions for payment of mortgages[.]" FL § 12-202(a)(2)(iii)(1).

The financial order reflects that the court did consider such a deviation, but concluded: "The Court does not find that it would be in the best interest of the minor child to depart from the guidelines, as [Father] suggests, because both parties have accumulated similar legal fees." Father has not persuaded us that this was either reversible legal error or an abuse of discretion." *Slip op. at various pages, citations and footnotes omitted.*

## *Barkley Creighton v. Mark Creighton**

**DIVORCE: MONETARY AWARD: FAILURE TO EXPLAIN SIGNIFICANT DISPARITY IN DISTRIBUTION**

CSA No. 2820, September Term, 2010. Unreported. Opinion by Eyler, J.R., J. Filed Jan. 24, 2012. RecordFax #12-0124-14, 22 pages. Appeal from Harford County. Vacated in part and remanded.

The circuit court failed to state why it decided to distribute 85 percent of the value of the marital property to appellee and 15 percent to appellant, and the award is not immediately justified by appellee's debt,

*See* UNREPORTED CASES IN BRIEF *page 8*

UNREPORTED CASES IN BRIEF *Continued from page 7*

alimony, or attorneys' fees obligations.

"Appellant challenges the circuit court's monetary award and child support award.

The circuit court must engage in a three step process to determine the amount of a monetary award. First, the court must designate each disputed item of property as marital or non-marital. Second, the court must determine the value of all marital property. Finally, if the division of marital property by title would be inequitable, the court may make a monetary award "as an adjustment of the equities and rights of the parties concerning marital property."

Here, after determining what items should be considered marital property, the court found the marital property had a value of $645,753.48. The court ordered that, out of this amount, appellant would receive assets valued at $100,589.24, consisting of half of appellee's retirement account ($51,164.24), half of the cash value of appellee's life insurance ($12,250), jewelry ($3,000), personal property ($4,175), and a monetary award of $30,000. Appellee would receive assets valued at $550,000, consisting of half his retirement account ($51,164.24), half the cash value of his life insurance ($12,250), jewelry ($11,000), personal property ($25,750), the net equity in the Kings View property ($475,000), and minus the monetary award of $30,000.

The court did not explain why it awarded appellee $30,000. Contrary to appellee's assertions, it does not appear that the circuit court tied the amount of its award to appellee's mortgage debt, alimony, or attorneys' fees obligations. First, the circuit court already accounted for most of appellee's debt, the marital portion of it, by subtracting it in order to determine the net equity of both of the properties in the second step of the monetary award process; thus, it is not plausible that it would do so again during step three when making an equitable distribution. Second, the circuit court correctly did not consider appellee's attorneys' fees obligations when making its monetary award, as it stated that the attorneys' fees are paid to appellant's "lawyer and do not directly benefit her or alleviate the precarious position she finds herself in." Finally, the circuit court also considered appellant's alimony obligations but specifically stated in the same paragraph that "Mr. Creighton comes out better in that regard" although it is unclear whether the circuit court is referring to appellant's alimony obligations or the amount of personal property he is keeping. Thus, the reasons why the court decided to provide appellee with 85 percent of the value of the marital property and leave appellant with 15 percent are unclear from the record and are not immediately justified by appellee's debt, alimony, or attorneys' fees obligations. Consequently, we must vacate the monetary award and remand for further proceedings consistent with this opinion.

Appellant next contends the circuit court erred in valuing appellee's 7.5 percent interest in a company at zero. Appellant argues appellee listed a value of $80,000 on a financial statement signed on October 27, 2010 and that because appellant was satisfied with this value, she did not conduct any further discovery. Appellee responds that he presented significant evidence at trial regarding the current value of the company, while appellant did not present any evidence to support a valuation of $80,000 other than appellee's financial statement.

The circuit court made the following statements regarding the value of appellee's interest:

"Mr. Creighton owns a 7.5% interest in Mid-Atlantic R F Systems, Inc. Mr. Creighton testified that Mid-Atlantic is involved in litigation with former customers, some of which is pending in this court. He also testified that Mid-Atlantic suffered some serious business declines. Mrs. Creighton on the other hand offered no evidence as to why I should value his interest in R F Systems at $80,000. No current valuation was obtained by either party. Mr. Creighton testified that if the litigation is successful there would be some inflow of cash into the company. However, we are trying this case now and not in the future or in the past."

Based on the evidence before it, the court did not err in valuing appellee's interest in the company at zero.

Next, appellant alleges appellee has an ownership interest in his mother's property in Wildwood Crest, New Jersey. The circuit court made the following statements regarding appellees' potential ownership interest:

"Mrs. Creighton believes that Mr. Creighton has a one-fourth interest in that property. Mr. Creighton, however, does not have any cognizable legal interest in the property. The fact that he and his brother and even perhaps Mrs. Constantine may have had some discussion about the future of the property does not make it a current asset of his."

Based upon the significant evidence before it, the court did not err in determining appellee did not have an ownership interest.

Next, appellant contends the circuit court erred in using shared custody guidelines to assess appellee's child support obligation for February 28, 2008 to September 4, 2008 because the children were in sole physical custody of the appellant. Additionally, appellant alleges the court erred in failing to order appellee to pay a share of the children's day care expenses during that time.

Based on the evidence presented, the circuit court erred. At least until the July 22, 2008 parenting plan came into effect, which provided for joint custody, there was insufficient evidence in the record to support a finding of shared custody. In fact, the evidence presented at the hearing more strongly indicates that Mrs. Creighton enjoyed sole custody during this time period. There is little evidence in the record as to why the master and circuit court judge saw fit to use the shared custody child support guidelines for this period.

Finally, appellant argues the circuit court erred in ordering appellee to pay retroactive child support beginning February 28, 2008, the date appellant filed her complaint for absolute divorce seeking child support, instead of from August 3, 2007, the date the parties separated. FL §12-101(a) clearly states the earliest a court may award child support is the date of the filing of the pleading requesting child support. Appellant could have sued appellee for unpaid child support pursuant to the Marital Settlement Agreement, but she waived that right when she moved the court to render the agreement unenforceable." *Slip op. at various pages, citations and footnotes omitted.*

## *Joanna Davis, et al. v. Michael A. Petito**

**PROTECTIVE ORDER: SANCTIONS FOR PURSUING: MATTERS PREVIOUSLY LITIGATED**

CSA No. 2241, September Term, 2010. Unreported. Opinion by Eyler, D.S., J. Filed Jan. 18, 2012. RecordFax #12-0118-07, 43 pages. Appeal from Wicomico County. Affirmed.

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The circuit court did not err in requiring the child's mother and her pro bono attorneys to pay the father's attorneys' fees in opposing a

*See* UNREPORTED CASES IN BRIEF *page 9*

## UNREPORTED CASES IN BRIEF *Continued from page 8*

domestic relations protective order, where the mother's allegations of sexual abuse of the child had been previously raised and litigated in a custody modification petition in another county.

"This appeal is from an order of the Circuit Court for Wicomico County ruling that Joanna Davis and Adam E. Hess and Matthew M. Saxon, her attorneys, appellants, violated Rule 1-341 by pursuing a domestic relations protective order against Davis' ex-husband, Michael A. Petito Jr., based upon allegations that Petito had sexually abused the couple's daughter.

Davis' petition was filed by counsel on September 10, 2010, in the District Court for Worcester County. At the time, Sophia was six. The district court held an ex parte hearing and granted a temporary protective order. On September 17, 2010, the day of the scheduled hearing for a final protective order, the district court transferred the case to the Circuit Court for Wicomico County because, earlier the same year, in that forum, Davis and Petito had engaged in a hotly contested and lengthy Custody Modification Case. The court in the Custody Modification Case had ruled, on February 12, 2010, that Davis did not prove any sexual abuse had occurred.

On September 28, 2010, the court heard argument on a motion for sanctions pursuant to Rule 1-341. The court [ordered] Davis and her lawyers to pay Petito's attorneys' fees in the stipulated amount of $9,385. We affirm.

DISCUSSION

Maryland courts have authority "to deter unnecessary and abusive litigation" by ordering parties and attorneys who misuse the judicial system to compensate their opponents for costs and attorneys' fees incurred in responding to bad faith or groundless actions. *Zdravkovich v. Bell Atlantic-Tricon Leasing Corp.*, 323 Md. 200, 212 (1991).

An assessment of Rule 1-341 fees and costs requires a two-part inquiry. The court first must make an express evidentiary finding of bad faith or lack of substantial justification (or both). If the court finds either bad faith or lack of substantial justification, it may choose to award costs and fees, or not.

In the case at bar, the circuit court found the action was maintained without factual substantial justification; the court did not find that the action was maintained in bad faith. Factual substantial justification exists when there is a colorable claim. *Needle v. White, Mindel, Clarke & Hill,* 81 Md. App. 463, 476-77, *cert. denied,* 319 Md. 582 (1990).

I.

Davis contends the circuit court could not find that she filed her petition for a protective order without substantial justification because the district court, through Judge Cathell, found her petition provided reasonable grounds for a temporary protective order.

The primary issue as to substantial justification was whether there was any reasonable basis to believe Petito had engaged in conduct *after February 12, 2010,* that could constitute sexual abuse of Sophia. As of February 12, 2010, the court in the Custody Modification Case had determined that sexual abuse had not been proven.

Judge Cathell "reluctantly," and with a stern admonition against "judge shopping," erred on the side of caution and granted temporary relief. On the other hand, the judge in the Circuit Court for Wicomico County was exceedingly familiar with the Custody Modification Case. The fact that Judge Cathell found reasonable grounds for temporary relief based on Davis' *ex parte* petition and testimony did not preclude a finding by the circuit court that Davis and her attorneys pursued the petition for final relief without substantial justification.

II.

Davis argues that the court's factual inquiry should have been limited to information available to Davis and her attorneys when the initial petition was filed, September 10, 2010. Second, she argues that the court clearly erred in finding a lack of substantial justification because she presented "actual evidence of sexual abuse" at the September 28, 2010 hearing.

We agree with Petito that sanctions were and could be imposed as a result of Davis' and her attorneys' filing and maintaining the action for a protective order without substantial justification, not just for filing the initial petition. In any event, neither when the initial petition was filed nor during the hearing did Davis or her attorneys have factual evidence of sexual abuse.

From the court's February 12, 2010 finding that sexual abuse had not been proven until June 19, 2010, Petito's only visits with Sophia took place in the office of Catherine Beers, a court-appointed social worker who was present at all times. The petition for a temporary protective order alleged no conduct by Petito after February 12, 2010, and relied solely upon the July 26, 2010 letter from the Worcester DSS. With no evidence of any new act of sexual abuse by Petito after February 12, 2010, the petition was nothing more than an attempt to re-litigate Davis' claim that Petito had sexually abused Sophia prior to February 12, 2010.

III.

Davis contends the circuit court erred by imposing sanctions without an express finding of intentional misconduct or abuse of process. When imposing sanctions based on the "bad faith" component of Rule 1-341, a court must make a specific finding of intentional misconduct. *Talley,* 317 Md. at 438. We are not persuaded that a court must find intentional misconduct when, as in this case, it imposes sanctions based solely on the "without substantial justification" component of Rule 1-341.

IV.

Davis and her lawyers argue that the circuit court penalized them for reasonably relying upon the July 26, 2010 Worcester DSS finding of indicated abuse and Sophia's behavior. They argue the court abused its discretion by casting a chilling effect over parents who are trying to protect their children from abuse. Davis' lawyers argue that the sanction against them was an abuse of discretion because it discourages lawyers from zealously advocating on behalf of their clients and from undertaking *pro bono* representation in domestic eases generally.

Rule 1-341 "is not, and never was intended, to be used as a weapon to force persons who have a questionable or innovative cause to abandon it because of a fear of the imposition of sanctions." Rather, Rule 1-341 sanctions are "judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so." *Bishop's Garth,* 75 Md. App. at 224.

In the case at bar, because of the accusations of abuse, Petito did not see his daughter from fall 2008 until after December 2009. When the judge rejected the allegations of child sexual abuse in the Custody Modification Case, she wisely adopted a tiered visitation schedule designed to reintroduce Sophia and her father slowly, first through therapeutic supervised visitation, then supervised visitation, then unsupervised visitation. By the time of the first unsupervised visitation — August 18, 2010 — it had been almost two years since Petito had spent a single day alone with his daughter. The domestic violence petition was filed three weeks later.

*See* UNREPORTED CASES IN BRIEF *page 10*

So, after more than a year of not seeing his daughter at all, followed by structured visits and ultimately an ordinary unsupervised visit (or two), during which time he successfully fought a custody case, a DSS abuse finding, and criminal charges, Petito found himself back to "square one" of sexual abuse accusations. At the hearing on Petito's motion for sanctions under Rule 1-341, the judge asked Davis' counsel, "when will it stop?"

The judge's exercise of discretion will not have a chilling effect on parents who pursue orders of protection based upon evidence that their children have been abused, so long as that very evidence has *not* already been litigated and rejected. For parents who proceed in the courts with no colorable claim of abuse, Rule 1-341 will have its intended effect.

Finally, we do not share Davis' attorneys' concern that our decision will have a chilling effect on *pro bono* representation in domestic abuse cases. *Pro bono* representation is a laudable activity, to say the least. The *pro bono* aspect in this case is irrelevant, however. Rule 1-341 applies to counsel representing clients *pro bono* or for payment."

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

## *Charles Warren Farmer v. Kimberly Ann Farmer**

CHILD CUSTODY AND SUPPORT: LEGAL VS. PHYSICAL CUSTODY: MATTERS NOT BEFORE THE COURT

CSA No. 237, September Term, 2011. Unreported. Opinion by Woodward, J. Filed Jan. 10, 2011. RecordFax 12-0110-00, 22 pages. Appeal from Washington County. Affirmed in part and vacated in part.

"In modifying custody of a 16-year-old boy, the circuit court was under no obligation to transfer sole legal custody from the child's mother when it granted primary physical custody to his father; however, the court did err in addressing the child support dependency deduction for income tax purposes when the issue had not been raised by either party.

Following a five day trial on a motion to modify custody filed by Charles Warren Farmer, appellant, and opposed by Kimberly Ann Farmer, appellee, the Circuit Court (1) awarded primary physical custody of their son, Wyatt Taft Farmer, who was born on Jan. 17, 1995, to appellant, (2) awarded sole legal custody to appellee, along with visitation on alternating weekends, every Wednesday evening, and for four weeks during the summer, (3) recommended a deviation from the Child Support Guidelines and (4) ordered that each party be allowed to claim the child dependency deduction for Federal and State income tax purposes on alternating years.

Appellant presents questions which we have rephrased:

Did the trial court err in modifying physical custody, but not legal custody?

Did the trial court abuse its discretion in awarding appellee four (4) weeks of summer visitation and not awarding appellant any extended summer access?

Did the trial court err in addressing the child support dependency deduction for income tax purposes when the issue was not raised by either party and not before the trial court?

BACKGROUND

The long history of the instant case began in December 1996 when the parties filed for an absolute divorce and other relief. The proceedings leading to the instant appeal began on April 8, 2008, when appellee filed a petition for contempt, alleging that appellant was holding Wyatt out of school, cancelling appointments, creating scheduling conflicts, and denying visitation. Appellant denied the allegations, asked the court to dismiss the petition with prejudice [and] filed a motion to modify custody.

The trial court held a merits trial on Feb. 1, May 11 and 18, June 16, Sept. 22, and Dec. 21, 2010. On March 2, 2011, the court [found appellant] to be in contempt of the July 26, 2006 Custody Order which awarded sole legal custody to [appellee].

With regard to custody, the trial court found a "material change in circumstances since 2006." The court then reviewed the 13 considerations in *Taylor v. Taylor,* 306 Md. 290, 304-11(1986) [and] the factors set out in *Montgomery County DSS v. Sanders,* 38 Md. App. 406, 420 (1978). The court found, in relevant part, that (1) it did not question the character or reputation of the parties even though it has questioned the motives and litigation intent of appellant in the past; (2) appellant wants primary physical custody and sole legal custody, whereas appellee seeks to maintain the status quo; (3) although the "long history of this case" strained "meaningful communication" between the parties, Wyatt is healthy, bright, working part-time, involved in extra-curricular activities; (4) although Wyatt wishes for appellant to have primary physical and sole legal custody, "physical and legal custody are required to be determined and considered individually"; and (5) the parties have lived separately for fifteen years and were divorced on October 25, 1999.

The court ruled that "the present shared physical custody arrangement is no longer practical" and awarded primary physical custody to appellant, with reasonable visitation to appellee. The court then addressed legal custody [and found] "The present legal custody has existed 5 years with any custody order to terminate in 2 years when Wyatt attains 18 years of age, graduates from high school, or becomes emancipated. Therefore, sole legal custody shall remain with [appellee].

Finally, the court ordered that "each party on alternate years be allowed to claim the minor child as a dependent on Federal and State income tax returns, [appellant] in even years, [appellee] in odd years." This appeal followed.

DISCUSSION

Legal Custody

Appellant asserts "there should be a presumption that the best interests of a minor child are served by awarding sole legal custody to the parent having primary physical custody," because the alternative creates "the unworkable situation that the parties will need to work together to coordinate doctors appointments, schooling, religion and other matters related to the child."

Appellant does not challenge any of the court's factual findings. Instead, appellant claims error in the court's analysis. First, appellant claims the trial court improperly relied on whether "the existing legal custody arrangement was working." We believe it was appropriate to consider appellee's history of success as the legal custodian in determining whether to maintain that arrangement. In fact, at oral argument before this Court, counsel for appellant conceded that appellee's record of success was an appropriate fact to consider.

Second, appellant claims the trial court failed to consider the new

*See* UNREPORTED CASES IN BRIEF *page 11*

physical custody arrangement when making its legal custody decision. It is evident from a review of the opinion as a whole that the court did take into consideration the new arrangement.

The standard for legal custody is the best interest of the child, and that standard must be applied regardless of who has primary physical custody. There is no basis in the law for a presumption, and we see no reason to create one.

Summer Visitation

Appellant asserts that, given that appellee has visitation on Wednesday evenings, the court's award "effectively [bars appellant] from being able to take a vacation of even week with the child, much less for a time equal to that of [appellee]."

Given the award of primary physical custody, appellant actually has a greater opportunity to develop a "close and loving relationship" with Wyatt. Because of the significant reduction in appellee's visitation, her willingness to forego one Wednesday evening during the summer, and Wyatt's desire to have extended time with his mother during the summer, we conclude that an award of four weeks of vacation time to appellee, without a loss of any of her Wednesday evenings, is not an abuse of discretion.

Child Support Dependency Tax Deduction

It is well settled that "a trial court 'has no authority, discretionary or otherwise, to rule upon a question not raised as an issue by pleadings, and of which the parties therefore had neither notice nor an opportunity to be heard." *Ledvinka v. Ledvinka*, 154 Md. App. 429-30 (2003). From our review of the record, it is clear that the issue of the child support dependency tax deduction was not raised by the parties in their pleadings, nor during the trial. Neither party had notice or an opportunity to be heard on this matter. Accordingly, any ruling on the deduction was error." *Slip op. at various pages, citations and footnotes omitted.*

## *Mohammed Ghazy v. Pamela Awad-Ghazy**

CHILD SUPPORT: CONSTRUCTIVE CIVIL CONTEMPT: ABILITY TO PAY

CSA No. 2675, September Term, 2010. Unreported. Opinion by Watts, J. Filed Jan.18, 2012. RecordFax #12-0118-08, 20 pages. Appeal from Baltimore City. Affirmed.

In finding the appellant in constructive civil contempt for failure to meet his child support obligations, the lower court did not err in relying on testimony of appellant's ex-wife that she and appellant jointly owned three properties that could be sold to satisfy those obligations.

"Appellant argues the circuit court erred in finding him in contempt for nonpayment of child support. Appellant asserts the circuit court improperly rejected his defense that he 'never had the ability to pay more than the amount actually paid.'

Appellant contends the circuit court wrongly concluded he had the ability to pay the full amount of his child support obligation, because "he owns with [appellee] substantial assets in terms of three properties in Baltimore City." Appellant argues the circuit court erred because the value of the properties are unclear. Appellant asserts the circuit court's "correct conclusion" that "the properties 'have earned income streams in the past" was, "offset" by his unchallenged testimony that the tenant of one of the properties had not paid rent and evidence at trial that appellee received income from one of the properties. As such, appellant argues the circuit court's finding that the properties "have value and that [appellant] could apply his share of that value to his child support obligations was clearly erroneous."

Preliminarily, we conclude appellee demonstrated by clear and convincing evidence that appellant failed to make the court-ordered payments. Appellee demonstrated appellant failed to comply with the Judgment of Absolute Divorce, which obligated appellant to pay $797 monthly in child support, plus $50 per month toward arrearages, which at that time were $1,046.

The circuit court properly determined appellant had the ability to pay the full child support because he owns three properties in Baltimore with appellee. [T]he circuit court relied on evidence admitted at the contempt hearing which established that: (1) appellant has resisted selling the properties; (2) the properties are valuable and have earned income streams in the past; and (3) only one of the properties has a debt against it of somewhere between $50,000 and $75,000.

At the contempt hearing, appellant's counsel advised the court one of the properties is appellant's residence, "one of the properties is an income stream for [appellee]," and another property is "at least potentially an income [stream] for [appellant]." Appellant's counsel argued "I don't know that it is necessary or feasible to force a sale of these properties over what amounts to less than $10,000 in child support arrears." Appellant's counsel stated "there's not an indication that sale of the properties would generate that much income unless we're talking about the Inner Circle property[.]"

The circuit court considered the testimony of appellee who stated the parties owned three properties in Baltimore City "outright, except there is a loan on one of them for $50,000 that [appellant] lives in right now." Appellee testified "yes" when asked by the circuit court: "[I]f the properties were sold, there would be enough net proceeds from those properties to pay off the child support?" Based on this evidence, the circuit court found the properties were "assets from which [appellant] could use his share to pay off the child support arrearages." We agree.

Maryland Rule 15-207(e)(3) provides a contempt finding may not be made if appellant "proves by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing [he] (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment[.]" The circuit court determined appellant's ability to pay was predicated on his ownership of three properties in Baltimore City. [I]n this case, there was evidence presented that appellant "had or could possibly obtain the ability to pay the purge amounts." As such, we see no error in the circuit court's contempt finding.

II.

Appellant contends the circuit court erred in permitting appellee to introduce a computer printout from the Maryland Child Support Enforcement Program to demonstrate the arrearage. Appellant argues the printout was hearsay. Appellant maintains other evidence properly admitted demonstrated appellant was $4000 in arrears and the circuit court's finding that he was $8,869 in arrears supports his argument that the printout was hearsay, an out of court statement used for the truth of the matter asserted.

Appellant argues the printout was not properly authenticated. Appellant contends "[t]here was absolutely no evidence before the lower

*See* UNREPORTED CASES IN BRIEF *page 12*

court to show that this document was what its proponent claimed it to be, a log of all payments received by the Child Support Administration from [appellant] and corresponding disbursements to [appellee], tendered to show the amount of [appellant's] arrearage." Appellant argues the printout "was not of a static 'website,' but rather, was created with specific reference to [appellant's] child support obligations to [appellee]; it required a significant amount [of] interaction to create, and had specific reference to disputed factual matters in this case."

[W]e find appellant's argument is without merit. Appellee testified as to what she knew about the amounts on Plaintiff's Exhibit One. She testified that:

"[Appellant] is supposed to be paying $847 a month. And in June, he paid $200. In July, he paid $575. August, he paid $450. September, he paid $100. October, he paid $600. And November, it was $550, and December $500. And the total balance here — this is coming from Child Enforcement — is $8,869." Appellee explained the balance on Plaintiff's Exhibit One was based on the payments she received and, based on what she has received, she testified the amount on Plaintiff's Exhibit One was the "correct amount owed." Appellant's counsel had the ability to question appellee on cross-examination regarding the amount, and failed to do so. The record reflects that in addition to the admission of the document, appellee testified that $8,869 was the amount owed. Under these circumstances, admission of the document, "as a summary based on [appellee's] testimony about what payments she received,"if error, at all, it was harmless. The circuit court admitted the document only after appellee testified as to what payments she received in the past months and what she was owed. [W]e perceive no abuse of discretion." *Slip op. at various pages, citations and footnotes omitted.*

## *In Re: Adoption / Guardianship of Charles Dylan C.**

GUARDIANSHIP: DECISION-MAKING AUTHORITY: EDUCATIONAL DECISIONS

CSA No. 562, September Term, 2011. Unreported. Opinion by Zarnoch, J. Filed Jan. 30, 2012. RecordFax 12-0130-05, 15 pages. Appeal from Anne Arundel County. Affirmed.

In an order granting guardianship of a disabled boy to his grandparents, statements regarding the order's lack of effect on the county's public school system did not limit the guardians' power to make decisions regarding the child's "general health, welfare, and benefit"; nor did it create any present harm, since the guardians had not sought any services from the school system.

"Appellants are the paternal grandparents of Dylan, an eleven-year old boy with multiple disabilities including cerebral palsy, agenesis of the corpus callosum and generalized anxiety disorder. Dylan's biological parents, Charles Craft and Virginia Craft, are currently divorced and both reside in North Carolina. In March 2009, Dylan moved to Maryland to live with appellants to secure better access to health services at Johns Hopkins and the Kennedy Krieger Institute. Dylan currently attends the Harbour School, a private educational facility designed for children with disabilities, where he receives speech, language and occupational therapy as well as counseling.

On February 1, 2011, appellants petitioned for guardianship in the circuit court pursuant to Md. Code (1974, 2011 Repl. Vol), Estates and Trusts Article 13-702. Attached to the petition were affidavits from Dylan's biological parents, indicating that they agreed to the guardianship appointment and believed it was in Dylan's best interest to give appellants full legal authority to make "the necessary legal decisions regarding his medical, education and health care" needs. On February 28, 2011, the circuit court issued a show cause order to Dylan, Charles and Virginia, giving them 20 days to show cause why the guardianship petition should not be granted. No party filed an objection.

Without a hearing, the circuit court issued an order on April 20, 2011, appointing appellants as Dylan's guardians, using what appears to be standard form language.2 However, the guardianship order contained two provisions which appellants find objectionable, and serve as the basis for this appeal.

First, the order stated:

"[S]uch appointment shall not be considered a waiver of any tuition that may be assessed by the Anne Arundel County Public Schools, and provided further that such appointment shall not be used to determine any requested school transfer withing the Anne Arundel County Public School System."

The next paragraph stated, "ORDERED, that the guardian shall have the authority to make all decisions regarding the general health, welfare, and benefit of the minor child."

On April 21, 2011 appellants asked the court to reconsider the wording of the guardianship order.3 On May 19, 2011, without a hearing, the judge denied this request. This appeal followed.

We review the trial court's guardianship order to determine "whether the trial court, in making its determination, abused its discretion or made findings of fact that were clearly erroneous." *In re Adoption/Guardianship No. 3598,347* Md. 295, 311 (1997). When the trial court enters a guardianship order under ET § 13-702, "the general overall standard guiding the court is the best interests of the minor." *In re Adoption/Guardianship No. 10935,* 342 Md. *615, 625* (1996).

Appellants contend that as a result of the disputed two provisions contained in the guardianship order, they do not have "full and unrestricted authority to make educational decisions on [Dylan's] behalf." They argue that as a consequence of this limited authority, Dylan may be unable to receive certain educational benefits under state and federal law. However, appellants make no allegation of current harm as a result of the order's language. Dylan is currently enrolled in private school, where tuition is paid for by appellants. And counsel for appellants have conceded that Dylan has not been turned down, or even sought, state or federally funded special education services or tuition reimbursement for his nonpublic education. However, according to counsel, appellants may seek such services for Dylan in the future.

From our reading of the guardianship order, we do not see how appellants are in anyway limited in their authority to make educational decisions for Dylan. To the contrary, the order provides that appellants, "shall have the authority to make *all* decisions regarding the *general health, welfare, and benefit* of the minor child." (emphasis added). In this court's view, appellants have been given the broadest scope of authority, and we do not see how providing for a child's "general welfare" does not also encompass education. *See, e.g., Anne Arundel County v. Halle Dev., Inc.,* 408 Md. *539, 544* (2009) (including the development of public schools as part of the requirement "to promote the health, safety, and general welfare of County residents"), *Kamp v.*

*See* UNREPORTED CASES IN BRIEF *page 13*

*Dep't. of Human* Servs., 410 Md. *645* (2009) ("to promote the *general welfare* and best interests of children born out of wedlock by securing for them, as nearly as practicable, the same rights to support, care, and *education* as children born in wedlock...")(emphasis added).

We remain puzzled about how and why the language regarding the waiver of public school tuition found its way into the guardianship order. Nevertheless, appellants' concerns regarding the impact of the provision appear to be unfounded. As we noted above, they have made no allegation of present harm as a result of this provision, they have not been charged tuition by the Anne Arundel County Board of Education, nor have they even attempted to use the resources of the public school system or sought tuition reimbursement for a non-public school placement.

We emphasize that educational authorities use their own statutes and regulations to make determinations regarding special education and tuition, not ambiguous language in guardianship orders. Additionally, the present order is not permanent, and appellants are always free to petition the court to amend the order, should their situation change or government officials question Dylan's entitlement to special educational services. Accordingly, we do not find that the circuit court abused its discretion, and affirm.

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

## *In re: Adoption/Guardianship of Daphane M.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: FITNESS FOR CONTINUING RELATIONSHIP SHORT OF CUSTODY

CSA No. 1331, September Term 2011. Unreported Opinion by Eyler, J.R., J. Filed Jan. 19, 2012. RecordFax #12-0119-07, 10 pages. Appeal from Prince George's County. Affirmed.

The circuit court properly decided to terminate the parental rights of a mother who sought a continuing relationship short of custody, since failure to terminate parental rights would mean placing the child in long-term foster care.

"This appeal is from an order granting a petition to terminate the parental rights of Elizabeth M., appellant, to her daughter Daphane M. Appellant contends the circuit court's decision was not supported by clear and convincing evidence that appellant was unfit to have an ongoing relationship with Daphane.

Background

This matter is before us on appeal for a second time. In an unreported opinion on April 19, 2011, we vacated the original circuit court judgment terminating appellant's parental rights and remanded the case to the circuit court for additional factual findings. *In Re Daphane M.,* No. 1609, September Term, 2010. Specifically, we required the court below to issue written findings in accordance with the requirements of § 5-323(d) of the Family Law Article.

Following our remand, the circuit court issued an opinion and order on July 5, 2011. This appeal followed.

In our previous unreported opinion, we explained:

Daphane was born … just weighing three pounds, 11 ounces, and she suffered from respiratory distress syndrome and anemia. She had feeding problems. [Appellant] did not exhibit any parenting behaviors while in the hospital.

[Appellant] advised the hospital staff that she could not keep the baby, but she was determined to be incompetent to make an agreement for adoption, due to her previously diagnosed schizophrenia and the active psychotic episode while hospitalized. A social worker created a safety plan for [appellant] and her father, Ebenezer M. , by which Mr. M. agreed to secure the safety of the infant at all times.

Following receipt of several family services, [appellant] still found it difficult to parent. At seven months of age, Daphane was found to be severely delayed in all areas of development.

On February 27, 2007, [DSS] removed Daphane from the M. home for the baby's safety. Daphane has lived in foster case since then. Daphane was adjudicated a CINA at a March 27, 2007 hearing.

On September 10, 2007, the juvenile court established a concurrent permanency plan of reunification and relative placement with the baby's maternal aunt, Elizabeth T. M. The placement was not approved.

After two failed foster care situations, Daphane was placed with Raina F., a veteran teacher with the Prince George's County Public Schools. Daphane thrived after being placed in Ms. F.'s foster care in November 2008, to the point that by the time of the March 2010 guardianship hearing, Daphane had tested within normal limits in all areas of development.

Daphane had bonded with Ms. F. and considered Ms. F. to be her mother. Ms. F. indicated a strong desire to adopt Daphane.

On December 2, 2008, the juvenile court changed Daphane's permanency plan to adoption. Following a May 28, 2009 permanency review hearing, the court further changed the plan from adoption to adoption by a non-relative, Ms. F.

At the TPR hearing, Daphane's attorney joined DSS in asking the court to find that Daphane's interests were best served in terminating parental rights.

[Appellant] requested that the court decline to terminate her parental rights. Stating that she was in compliance with her medical treatment, she advocated living with her sister, Elizabeth T. M., and being a parent to Daphane. Regardless of with whom Daphane was placed, [appellant] simply wanted the parties to "get along" and for her to be able to "just see her and say hi and present something to [Daphane]."

The juvenile court issued its written opinion and order on July 27, 2010, ruling that, under the clear and convincing standard, the facts demonstrated Ms. M's unfitness to have a continued parental relationship with Daphane, and deciding it was in the child's best interests to grant the DSS petition of guardianship.

Discussion

Appellant contends the evidence did not establish by clear and convincing evidence that she "was unfit to have an ongoing relationship with Daphane, even if she were unfit to have custody." Thus, appellant's primary argument is that the court should have left intact her parental rights while Daphane remained in a permanent foster relationship. Appellant does not contend on appeal that she potentially would be fit to have custody.

When a child cannot live with his or her natural parent, "[l]ong term foster care… is the least desirable option and should be considered only in exceptional circumstances as defined by rule or regulation." *In re Adoption/Guardianship No. 10941,* 335 Md. 99, 121 (1994). Further, FL § 5-525(f)(2) makes clear that adoption "by a current foster parent" is a higher priority option than is "another planned

*See* UNREPORTED CASES IN BRIEF *page 14*

permanent living arrangement," such as long term foster care.

Daphane faced either adoption or continuing foster care, and the law strongly favors adoption. Leaving intact appellant's parental rights would mean that Daphane would remain indefinitely in foster care and long term "foster care limbo" is "detrimental to [a child's] best interests." *In re Adoption of Candace B.*, 417 Md. 146, 163 (2010).

As the court below noted on remand, Daphane was "adjusting extremely well to her foster home with Ms. F. …Her expressive language has improved tremendously. She loves her family, her cats, and her home." In addition, the court was aware of expert testimony that "Daphane had no specific emotional attachment to or bond with [appellant]." The court stated that "Daphane sees Ms. F. as her psychological mother." After considering all of this evidence, the court granted the petition specifically so that "Daphane would become available for adoption by Ms. F," which would "ensure that Daphane ha[s] a stable, safe and healthy family and home in which to grow up." The court's decision to grant the petition was clearly supported by the evidence that it was in Daphane's best interest, and the decision complied with the relevant law. We affirm." *Slip op. at various pages, citations and footnotes omitted.*

## *In re: Adoption/Guardianship of Hailey E., Larah E., and Meadow E.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: LACK OF PROGRESS TOWARD REUNIFICATION

CSA No. 634, September Term 2011. Unreported. Opinion by Krauser, C.J. Filed Feb. 3, 2011. RecordFax #12-0203-00, 21 pages. Appeal from Baltimore County. Affirmed.

The juvenile court did not terminate appellants' parental rights solely because of homelessness, but because DSS showed there was no realistic likelihood that appellants, "within a reasonable time," would be able to provide suitable housing for their children, and appellants failed to produce evidence to overcome that showing.

"Larry E. and Sarah K. appeal from an order terminating their parental rights. Appellants are the natural parents of three children: Hailey E., born February 2003; Meadow E., born July 2005; and Larah E., born February 2007. As recently as 2006, both appellants were employed and living with their children in a three-bedroom house in Hampden. Ms. K. was an underwriter for an insurance company and Mr. B. was a driver for a landscaping company. They saved up some money and started a joint business venture, "Hailey's Landscape and Lawn Care," and, later that year, Ms. K., pregnant with Larah, left her insurance job to be at home with their children and assist her husband in his landscaping business. In 2007, that business failed and, meanwhile, both Mr. E. and Ms. K. struggled with growing addictions to prescription painkillers. In August 2007, appellants, by then unemployed, slid into homelessness.

In late October 2007, a staff member from a homeless shelter where appellants had been living contacted the Baltimore County Department of Social Services. On November 8, 2007, the juvenile court issued a shelter care order, and, several weeks later, the children were adjudicated CINA. Since then, the children have remained in foster care. In 2009, they were transitioned into a single pre-adoptive placement.

About a month after the children were placed in shelter care, Ms. K., while riding on an MTA bus, was assaulted by a group of adolescent middle school students. *[See Gus G. Sentementes and Brent Jones, Woman injured in bus beating, BALTIMORE SUN, Dec. 06, 2007.*] She sustained injuries which left her partially blind in her left eye, and suffers from "numerous fears" and "uncontrolled seizures."

Ms. K. has been unemployed for the entire time her children have been in foster care. Mr. E. has been employed sporadically.

As to visitation, Ms. K. averred that, at first, when unsupervised visitation was scheduled during the day at the Inner Harbor, she was able to visit regularly. But, later, when the Department required that visitation be supervised and re-scheduled to Wednesdays from 3:30 to 5:30 p.m., at the Catonsville public library, she had difficulty visiting as she suffered phobias related to riding the bus alone in the aftermath of the December 2007 assault.

After a three-day hearing, the juvenile court issued a memorandum opinion and order granting the Department's petition to terminate appellants' parental rights. The court set forth detailed findings of fact, applying the factors enumerated in section 5-323 of the Family Law Article as required under *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007).

Discussion

Appellants maintain that "there was insufficient evidence to show that the parents were unfit or that exceptional circumstances warranted terminating their parental rights" and that "[i]t is clear that the [circuit] court terminated their rights solely based on homelessness and then tried to distinguish its decision from *In re Adoption/Guardianship of Rashawn H.,*" where the Court of Appeals expressly stated that "homelessness, alone, or physical, mental, or emotional disability, alone," will not "justify such termination."

Appellants point out that there was no finding of parental unfitness, emphasizing the court's observation that "it seemed apparent that the parents genuinely love their children." They further emphasize that appellants "showed their commitment to reuniting their family" by completing "almost all of the objectives in their service agreements" with the Department, specifically, that they maintained compliance with their methadone programs, that Ms. K. participated in mental health treatment, and that she made efforts to obtain suitable housing.

In the case at bar, the juvenile court carefully weighed the statutory factors. The court also weighed what it deemed a non-statutory factor, and appeared to give it great weight, stating: "The most compelling other factor is the length of time these children have been in care with no progress toward reunification."

As a preliminary matter, we observe that the juvenile court's consideration of the time period, from November 2007 to the time of the hearing, in early 2011, during which the children remained in foster care, with no progress toward reunification, although characterized by the court as a non-statutory factor, appears to us as, in fact, part of its weighing of § 5-323(d)(2)(iv). In other words, the court considered appellants' lack of progress concluded that "the results of [their] effort[s] to adjust [their] circumstances, condition, or conduct" were so meager as to render it unlikely that any additional services provided by the Department would "bring about a lasting parental adjustment so that the child[ren] could be returned to the parent[s] within an ascertainable time not to exceed 18 months from the date of placement."

In finding exceptional circumstances, the court noted that, although the assault on Ms. K., followed by a year in witness protec-

*See* UNREPORTED CASES IN BRIEF *page 15*

tion, "arguably impeded the ability of the parents to reunify with their children," appellants' continued lack of progress since then "is without any real explanation," and, moreover, "there is no indication of any change or progress that is imminent or that makes a return home for these children a realistic likelihood."

Although "poverty, of itself, can never justify the termination of parental rights," FL § 5-323(d), properly applied as here, does not countenance that result. *Rashawn H.,* 402 Md. at 499. "What the statute appropriately looks to is whether the parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare." *Id.* at 499-500. "The State is not required to allow children to live permanently on the streets or in temporary shelters, to fend for themselves, to go regularly without proper nourishment, or to grow up in permanent chaos and instability, bouncing from one foster home to another until they reach eighteen and are pushed onto the streets as adults, because their parents, even with reasonable assistance from [the Department], continue to exhibit an inability or unwillingness to provide minimally acceptable shelter, sustenance, and support for them." *Id.* at 501. "Based upon evidence of the effect that such circumstances have on the [children]," the juvenile court could "reasonably find that the [children's] safety and health" was jeopardized. *Id.*

Because the Department had shown, by clear and convincing evidence, that there was no realistic likelihood that appellants, "within a reasonable time," would be able to provide suitable housing for their children, and appellants failed to produce evidence to overcome that showing, the juvenile court did not abuse its discretion in granting the order terminating parental rights." *Slip op. at various pages, citations and footnotes omitted.*

## *In re: Adoption/Guardianship of Michael S.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: EVIDENCE

CSA No. No. 1160, September Term, 2011. Unreported. Opinion by Davis, Arrie W. (retired, specially assigned). Filed Jan. 19, 2012. RecordFax #12-0119-05, 29 pages. Appeal from Prince George's County. Affirmed.

Evidence of the child's emotions and state of mind, which were directly relevant to the guardianship proceeding, were not inadmissible hearsay; nor did the court err in finding it was in the child's best interest to terminate father's parental rights before an adoptive resource had been identified.

"This appeal arises out of a decision to terminate the parental rights of Dennis B. over his son, Michael S. Michael, who was born on August 4, 2000, is the biological son of Flora S. and Dennis B. In December 2001, Michael and his two older half brothers, Anthony U. and Emmanuel U., were placed in foster care by their mother, Flora S. Michael remained in foster care until May 2003, when he was reunified with Flora S. The CINA cases were closed. Michael remained in the custody of his mother until May 2006, when she left him with appellant.

Between August 2006 and June 2007, Dennis B. had several contacts with the Department. On June 29, 2007, the Department filed a shelter care petition alleging that Michael was a CINA. Thereafter, the court granted shelter care and awarded temporary custody of Michael to the Department.

At an adjudicatory hearing on July 24, 2007, the court dismissed the CINA petition and granted custody of Michael to Dennis B.; however, Dennis B. was unable to care for Michael and requested more time before taking him home. The court continued Michael in the custody of the Department and scheduled a disposition hearing for August 20, 2007. Dennis B. did not appear at the disposition hearing and the court found Michael to be a CINA.

On February 4, 2008, July 28, 2008 [and] December 15, 2008, the court continued the plan of reunification [with Dennis B.] At a permanency planning review hearing on April 6, 2009, Michael, through counsel, consented to changing his permanency plan to termination of parental rights and adoption, and the court entered an order to that effect. Dennis B. did not appeal.

In September 2009, the Department filed for guardianship with the right to consent to adoption or other planned permanent living arrangement for Michael. Dennis B. filed a notice of objection on January 22, 2010, The court held a contested termination of parental rights hearing on June 20, 21, 22, 27 and 28, 2011. At the conclusion of the hearing, the court terminated Dennis B.'s parental rights and granted guardianship of Michael to the Department. This appeal followed.

Dennis B. presents two questions which we have rephrased:

I. Did the trial court err in admitting hearsay statements made by Michael to social workers?

II. Where there was no prospective adoptive resource for Michael, did the trial court en in determining that it was in Michael's best interest to terminate parental rights?

DISCUSSION

Dennis B. first contends that the circuit court erred in admitting hearsay statements by two social workers, Ms. Kage and Ms. Sharif, regarding Michael's feelings toward his father and about being adopted.

Section 5-323(d)(4)(i) of the Family Law Article required the juvenile court to consider Michael's emotional ties with and feelings toward his parents, siblings and others who may significantly affect his best interest. Section 5-323(d)(4)(iii) required the court to consider Michael's feelings about the severance of his parent-child relationship.

Maryland Rule 5-803(b)(3)6 permits trial courts to admit an out-of-court statement that would otherwise be hearsay if it is a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition that is offered to prove the declarant's then existing condition.

The statements at issue were expressions of Michael's state of mind and emotions, which were directly relevant to the guardianship proceedings. Ms. Kage's testimony that Michael did not want to be reunited with his father was admitted to demonstrate Michael's state of mind and emotion regarding his desire to terminate his relationship with his father during a specific and relevant period of time. Similarly, Ms. Sharif's testimony that Michael had become disinterested in visits with his father demonstrated his state of mind and emotion regarding his desire to terminate his relationship with his father during the time that Ms. Sharif was meeting with him. As a result, the statements were properly admitted pursuant to Md. Rule 5-803(b)(3).

Even if the statements were not properly admitted, any error in admitting them would have been harmless because Michael's feelings and positions regarding his permanency plan and visitation with his father were established in numerous court documents and other evidence at trial. The burden is on Dennis B. to show "that it is likely that

*See* UNREPORTED CASES IN BRIEF *page 16*

the outcome of the case was negatively affected by the court's error." *In re: Ashley E.,* 158 Md. App. 144, 164 (2004). This, he cannot do, because there are numerous instances in the record of statements made by Michael to social workers which were not objected to and, in some instances, were elicited by counsel for Dennis B.

Even if the court had erred in admitting the testimony of the social workers — and we do not hold that it did, the court had ample evidence upon which to determine Michael's emotional ties and feelings with regard to visitation with his father and the termination of his father's parental rights.

II

Dennis B. next contends the circuit court erred in determining it was in Michael's best interest to terminate parental rights when there was no prospective adoptive resource for the child. He argues that Michael "would become a legal orphan with only a speculative prospect of avoiding foster-care drift." According to Dennis B., although "he may not have been an ideal parent, at least he was fighting to remain Michael's parent, and Michael could continue to have at least the possibility of permanency" with him.

Although there is a legal presumption favoring continuation of the parental relationship, that presumption was rebutted by clear and convincing evidence of Dennis B.'s unfitness, and of exceptional circumstances that would make continuation of the parental relationship detrimental to Michael. Moreover, the fact that Michael was not in a pre-adoptive home did not preclude termination of parental rights. It has long been established that "a child's prospects for adoption must be a consideration independent from the termination of parental rights." *In re Adoption/Guardianship of Victor A.,* 386 Md. 288, 317 (2005); *Cecil County Dep't. of Soc. Servs. v. Goodyear,* 263 Md. 611,615-17 (1971); *Winter v. Director, Dep't of Pub. Welfare of Baltimore City,* 217 Md. 391, 394 (1958), *cert. denied,* 358 U.S. 912 (1958).

Accordingly, the circuit court did not abuse its discretion in terminating Dennis B.'s parental rights." *Slip op. at various pages, citations and footnotes omitted.*

## *In re: David H.**

CINA: REQUIRED FINDINGS: SUBSTANTIAL RISK OF HARM

CSA No. 0589, September Term, 2011. Unreported. Opinion by Moylan, Charles E. Jr. (retired, specially assigned). Filed Jan. 20, 2012. RecordFax #12-0120-09, 9 pages. Appeal from Baltimore City. Reversed and remanded.

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The CINA determination was not supported by the juvenile court's findings, which acknowledged the child's preference for his foster family but failed to articulate how his health or welfare had been harmed or placed at a substantial risk of harm by either parent.

"The problem with respect to the custody of David came to light on December 10, 2009, when David telephoned 911. When police responded, David reported he had been "inappropriately disciplined" by his Father and the discipline had left "visible marks" on his body. David was taken to Johns Hopkins Hospital where an examination revealed "linear marks" on his leg, arm, and face. David required no treatment and was released. The Department filed an immediate petition with a request for shelter care.

Judge Robert B. Kershaw granted shelter care to the Department and ordered that any contact between David and his Father be supervised by the Department and that contact only be made with David's consent. An initial placement with a male foster parent did not work because of David's behavioral problems. On February 4, 2010, David was placed with his foster family, with whom he has not experienced any of his former difficulties.

At the disposition hearing on November 8, 2010, the Master recommended David be found CINA and committed to the Department. The Father took exceptions to the recommendations.

At a *de novo* exceptions hearing before the circuit court on February 7, 2011, the court interviewed David, accepted the agreed adjudicatory facts of the parties, and bifurcated the disposition hearing. At the final disposition hearing on April 19, 2011, the Mother testified. The trial judge denied the exceptions, found David to be CINA and committed him to the Department. The Father has taken this appeal; the Mother has not appealed.

The Father makes a persuasive case that, because of the 16-month delay between December 10, 2009, and April 19, 2011, the finding that David was CINA, which might have been very appropriate in January 2010 was without a firm foundation in April 2011. The Father does not deny having been guilty of physical abuse in administering excessive punishment on December 10, 2009. He points out, however, that his conduct has been exemplary in the 16 intervening months.

The Father has cooperated with the Department in every way. He signed the service contract the Department presented to him. That contract provided he would maintain his home, maintain employment, complete anger management classes, and complete parenting classes. The Father testified he has maintained his home and is gainfully employed as a master electrician. He lives with his wife and their three children, who are half-siblings of David. He testified he is fully capable of taking care of David financially and that he would take care of David's educational needs, making sure he would go to school. The Father also testified he would take care of David's emotional needs, including the continuing of David in therapy if needed. He stated he wants to be a father to his son and that his duty as a father to David is very important to him.

Upon signing his contract with the Department, the Father enrolled in an anger management class and a parenting class, both of which he completed. The Father has taken part in regular visits with David, supervised by Sheila Baskerville, David's caseworker. Baskerville testified each visit went well; that the Father and David talked, played games, and went out to eat; and that at the conclusion of the visits, they would frequently embrace. She testified she was disposed to recommend that David be returned to his Father but ultimately did not do so only because David said that was not what he wished to happen.

The court did not mention why the Father remained unable to take proper care of David, but mentioned only David's reluctance to return to his Father's custody. Neither Ms. Baskerville nor any other witness expressed fear that David remained at risk of harm if returned to his Father or that the Father was unable or unwilling to provide proper care for David. When the court asked David about living with his Father, David said it was "ok." He testified, "I'm not afraid of [his Father] anymore but, like, I just don't want to go back there."

The Father's position is actually double-barreled. At the hearing on April 19, 2011, the Father's contention was that if he were not awarded physical custody of David, then physical custody should be awarded to

*See* UNREPORTED CASES IN BRIEF *page 17*

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David's Mother, "as there are no allegations against Mother and Father does not want [David] to grow up in foster care." David indicated that if he could not stay with his foster family, his second choice would be to go back to Jamaica with his Mother. The Mother, who lives with her father in Jamaica, expressed reluctance at assuming responsibility for David but indicated she would if ordered by the court. David's reason for not wanting to go back to Jamaica was simply "because I like it here."

The Father's argument is there was no evidence to show either the Father or the Mother were unable or unwilling to give proper care to David. The only thing on the other side was David's preference to stay with his foster family.

The Department itself takes the very unusual position of agreeing with the Father:

The findings by the court and offered in support of its decision appeared to be little more than a statement about David's preference.

The juvenile court also failed to articulate how David's welfare had been harmed or placed at a substantial risk of harm to require his continued placement in foster care. The court stated Mr. H.'s discipline was strict, but that "strict households can be very good ones for the child." Indeed, the juvenile court expressed "reluctance" about its decision – even as it granted the CINA petition – because, unlike "parents who really have treated their children extraordinarily badly," David's parents are "not badly motivated parents and they're not incompetent parents." The court remarked, "I don't know that this is going to be a long-term placement, because I think the father has in fact made progress .. and because I think the father and the mother may be in a position over time if not to reconcile between each other, at least to work out some of the issues with the child."

The juvenile court signaled David's forthcoming return to his parents after having failed to state a factual basis for declaring him a CINA. Accordingly, this case should be remanded to the juvenile court for further findings to articulate evidence explaining why David H. is a CINA and why continued removal from Mr. H.'s custody is warranted." *Slip op. at various pages, citations and footnotes omitted.*

## *In re: Jayden G.**

CINA: CHANGE IN PERMANENCY PLAN: INSUFFICIENCY OF EVIDENCE TO SUPPORT CHANGE

CSA No. 1291, September Term, 2011. Unreported. Opinion by Kehoe, J. Filed Jan. 19, 2012. RecordFax #12-0119-06, 21 pages. Appeal from Montgomery County. Vacated and remanded for new hearing.

While a social worker's opinion that the child had bonded with his foster family was admissible, it formed an insufficient evidentiary basis to support a change in permanency plan that would separate the child from his siblings and grandmother.

"During permanency plan hearings, Jacobs, a Department social worker, provided expert testimony regarding Jayden's attachment to his foster parents and biological family. Jacobs testified she was a social worker in the Treatment Foster Care Unit in the Montgomery County Child Welfare Service and had been a licensed clinical social worker for twelve years and a social worker for fifteen years. She testified she had attended "probably four or five" training classes on attachment, each of which lasted between a few hours to a day, and had read a number of books about the subject. Jacobs stated she incorporates the information she learned from her studies into her day-to-day practice as a social worker.

To this Court, appellants present two reasons Jacobs should not have been permitted to testify as an expert.

First, they argue Jacobs was not qualified to testify as an expert because she lacked the necessary knowledge, skill, experience and education in the area of emotional attachment between young children and caregivers. In response, the Department asserts it was within the circuit court's discretion to admit Jacobs' expert testimony because her training, education, and experience qualified her to testify as such. We agree with the Department.

Second, appellants contend that, even if Jacobs was qualified to testify as an expert, there was an insufficient factual basis for her to render an opinion as to possible emotional trauma Jayden would suffer if he were to be removed from his foster parents. In response, the Department asserts appellants did not raise this at trial and it is therefore not preserved for appellate review. The Department is correct.

The main issue in this appeal is whether the circuit court appropriately changed Jayden's permanency plan from a concurrent plan of reunification and placement with a relative, to adoption by a non-relative.

Several statutes make clear the General Assembly's intent that, if reunification with parents is not a possibility, there is a preference for placement with other family members.

At the most recent plan review hearing, Jayden and Jennifer recommended his permanency plan remain either reunification with the parents or placement with a relative.

The Department recommended Jayden's permanency plan be changed to adoption by a non-relative.

In adopting the Department's recommendation, the circuit court reasoned that:

> Jayden has been in his current placement since . . . he was about a year and a half old. . . . The stability and permanency consideration, and considering the attachment and emotional ties to the caregiver with respect to Jayden, that is a strong factor in favor of Jayden not being returned to the parents. That the Court believes, *based upon the evidence, that if he were to be removed from his current placement, it would have serious permanent impact on his ability to attach to others, it would be extremely disruptive to his emotional stability, and the sense of safety and security and permanency would be very seriously harmed* by his return to the parents.
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> * * *
>
> The potential emotional development and educational harm of moving Jayden, I believe I've discussed that pretty well as to what the Court's rationale is. Jayden has thrived in this current placement. I believe that his emotional and developmental, *his emotional and developmental well-being would be traumatically impacted by removal, by in essence tearing him away from what he perceives as family, and that it would be a defining issue* in his development if he were to be removed.

Appellants argue the evidence presented to the circuit court did not provide a sufficient basis from which the court could reasonably arrive at this conclusion. A critical element in appellants' argument is that Jacobs' testimony was the only evidence before the court regarding Jayden's attachment to his foster parents and the trauma that could result from his removal from the foster home. The Department coun-

*See* UNREPORTED CASES IN BRIEF *page 18*

ters that, in addition to Jacobs' testimony, there was "ample evidence that placement with [Darlene] would not be in [Jayden's] best interest." The Department points to the fact Jayden has resided with the same foster family since he was seventeen months old, has thrived in that environment and that Jacobs' testimony was based on her observation of Jayden and his foster parents for a year prior to the hearing.

We agree with appellants. Other than Jacobs' testimony, the probative weight of the other "evidence" cited by the Department is negligible, to the extent it exists at all.

During her testimony, Jacobs was asked to address § 5-525(f)(1)(v)'s requirement that the court consider "the potential emotional, developmental, and educational harm to the child if moved from the child's current placement." Jacobs responded: "[Jayden] has a stable environment where he has thrived, where he has grown and developed, and that this [i.e., his foster home and family] is his base, this is his security. And to disrupt that, at this point, would be very detrimental to his development and his emotional stability."

Jacobs did not explain the basis for her conclusion.

Jacobs testified that, when Jayden was returned to his foster parents after he had been abducted from the Department by his natural parents in 2010, "he went right to them. They were safe. He, there was just no question about that, you know, that was a moment of, kind of a defining moment for me to watch."

Jacobs also stated that Jayden calls his foster parents "Mommy and Daddy;" refers to his foster sister as his sister; goes to his foster parents readily; is comforted by his foster parents; was placed with his foster parents when he was young; and has thrived in this placement. Jacobs also testified that anytime a child is moved from one home to another, there is some degree of harm to the child. Jacobs acknowledged, however, that Jayden calls his biological parents "Mommy and Daddy," and considers Victoria and Daeshawn to be his siblings.

This evidence certainly demonstrates that Jayden has a positive, loving relationship with his foster parents. However, an inevitable byproduct of a safe and healthy foster home is that the foster child will become attached to his or her foster parents. Removing a child from such a placement must inevitably result in a difficult adjustment for the child but this adjustment process, by itself is not sufficient to overcome the statutory preference of placing Jayden with a relative in order to serve his best interest.

In reviewing and, where necessary, changing permanency plans, the clearly articulated public policy of this State in favor of placement with relatives as the preferred substitute for reunification with parents is not to be lightly set aside. The relevant evidence in this case, which boils down to Jacobs' description of a normal and desired attachment between Jayden and his foster family coupled with her speculation, without any factual basis, that removing Jayden from his foster family "would be very detrimental to his development and his emotional stability," even though he is "just a very.., adaptable young, young man," is simply an insufficient evidentiary basis to support the circuit court's finding that it is in Jayden's best interest to be separated from his family.

We vacate the order of the circuit court and remand this case for a new hearing. At such a hearing, the parties will have an opportunity to present more specific evidence as to the strength of Jayden's attachment to his foster parents, natural parents, and siblings, and the likely negative effects that a change in placement would have upon Jayden, as well as Darlene's suitability as a placement resource." *Slip op. at various pages, citations and footnotes omitted.*

## *In re: Maria B.**

**CINA: CHANGE IN PERMANENCY PLAN: PASSAGE OF TIME**

CSA No. 929, September Term 2011. Unreported. Opinion by Watts, J. Filed Jan. 18, 2012. RecordFax # 12-0118-10, 18 pages. Appeal from Harford County. Affirmed.

The court's decision to change the permanency plan for the child from reunification to adoption with a secondary plan of reunification was properly based on a variety of statutory factors, and not solely on the length of time the child had been in foster care.

"Mary B., appellant, raises the following issue: Did the Circuit Court abuse its discretion when it changed the permanency plan for Maria B. from a primary plan of reunification to a primary plan of adoption with a secondary plan of reunification?

BACKGROUND

On Oct. 14, 2009, the Harford County Department of Social Services filed a petition with the Circuit Court requesting that Maria B. be found a CINA and placed in foster care. HCDSS alleged that on Oct. 9, 2009, appellant left Maria B. and Maria B.'s sibling in the care of their great-grandmother, Rose B. Appellant did not leave any contact information and did not return for four days. The circuit court temporarily placed Maria B. in shelter care with Rose B.

On Nov. 10, 2009, at the adjudicatory hearing, the circuit court found the allegations in the CINA petition proven by a preponderance of the evidence.

The circuit court ordered that appellant have supervised visitation, attend parenting classes and submit to mental health treatment, and comply with any Service Agreement/Safety Plan. A review hearing was scheduled for March 3, 2010. On March 5, 2010, Maria B. was removed from Rose B.'s care. Rose B. had been scheduled for an outpatient medical procedure which became an inpatient hospitalization. HCDSS placed Maria B. in foster care.

On April 14, 2010, a hearing was held. HCDSS submitted a report recommending that Maria B. remain in foster care. A permanency planning and review hearing was scheduled for June 23, 2010. The permanency plan remained reunification, but the projected implementation date was moved to December 2010. A permanency planning hearing was [held] September 22, 2010. Maria B.'s primary permanency plan remained reunification, with the projected implementation extended to March 2011.

A permanency plan and review hearing was [held] March 23, 2011. HCDSS recommended Maria B.'s primary permanency plan be changed to adoption with a secondary plan of reunification. The Master stated that, during the seventeen months Maria B. was committed to HCDSS, appellant had not shown substantial compliance with the court's orders to prove her commitment to obtaining custody of Maria B., and thus her actions did not warrant maintaining Maria B.'s primary permanency plan of reunification.

Appellant filed Exceptions. Upon hearing testimony, the circuit court stated that, while appellant had fulfilled some of the requirements placed on her, she had not done so in a timely or thorough manner. The circuit court affirmed the Order changing Maria B.'s primary permanency plan to adoption with a secondary permanency plan of reunification.

DISCUSSION

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Appellant contends that the circuit court relied solely on the length of time Maria B. had been committed to HCDSS and the length of time it took appellant to begin complying with HCDSS and court orders. Appellant argues that the mere passage of time does not constitute sufficient grounds for a change of the permanency plan. At oral argument, appellant argued that the court also erred in failing to take into account hardships in her life which made compliance with the orders difficult.

HCDSS asserts that the court correctly based the change in permanency plan on a variety of factors, including: (1) Maria B.'s best interest; (2) appellant's refusal to sign Service Agreements with HCDSS; (3) appellant's inconsistent and infrequent visits with Maria B.; and (4) appellant's inability to fulfill the requirements of the court orders despite HCDSS providing appellant "with appropriate services to address each of these requirements."

HCDSS contends that these factors together provided a reasonable basis for the decision to change Maria B.'s permanency plan. We agree.

The circuit court found that appellant failed to work with HCDSS and comply with court orders. The court noted the amount of time it took for appellant to begin complying, stating that it had been made clear to appellant for over a year what she needed to do to regain custody, but appellant had not taken appropriate steps to achieve those goals until immediately before the hearing.

The requirements included mental health treatment and parenting classes, both of which directly concern appellant's ability to provide a safe and healthy home for Maria B., a required consideration under §5-525(f)(l). The circuit court considered evidence of appellant's progress and found that, even recently, appellant had not shown sufficient compliance to prove her commitment to providing a safe home for Maria B.

Although the circuit court referred to the passage of time as a factor, this consideration is permissible pursuant to FL §5-525(f), under which the court is instructed to consider the length of time the child has been in a current placement and the potential harm to the child by having to remain in foster care for an excessive period of time. Both necessarily involve considering how long a child has been in foster care.

We find no merit to appellant's argument that the circuit court erred in failing to consider her circumstances or hardships as reasons for her failure to comply with the orders. One of the circumstances involved appellant living with a man who failed to get fingerprinted by HCDSS. Another involved appellant being arrested and, according to her attorney, pleading guilty to fourth degree burglary and receiving probation before judgment. Regardless of the nature of appellant's hardships, the circuit court repeatedly granted appellant the opportunity to comply with the court orders, each time extending the deadline for reunification. Prior to changing the permanency plan, the circuit court held review hearings on five separate occasions. At each hearing, the court provided appellant the opportunity to be heard and to demonstrate sufficient compliance with the court orders. In changing Maria B.'s primary permanency plan to adoption with a secondary plan of reunification, the circuit court has left open an opportunity for reunification. We conclude that the circuit court did not abuse its discretion in changing Maria B.'s primary permanency plan." *Slip op. at various pages, citations and footnotes omitted.*

## *In re: Zanelle D.**

CINA: CHANGE IN PERMANENCY PLAN: PARENT'S EFFORTS

CSA No. 884, September Term, 2011. Unreported. Opinion by Woodward, J. Filed Feb. 3, 2012. RecordFax #12-0203-01, 15 pages. Appeal from Montgomery County. Affirmed.

In changing a permanency plan from reunification to adoption by a non-relative, the juvenile court properly considered the mother's efforts and concluded they produced no positive results in ameliorating the conditions that had necessitated the child's commitment.

"Ms. D. contends that the juvenile court abused its discretion in changing the permanency plan from reunification with the mother to adoption by a non-relative. Specifically, Ms. D. claims that the court failed to consider certain "positive elements" that would support a permanency plan of reunification.

MCDHHS counters that the "juvenile court correctly made the required statutory findings on an ample evidentiary record and properly exercised its discretion in changing Zanelle's permanency plan." MCDHHS noted that "the juvenile court did consider the positive element[ ]" that Ms. D. had given birth to Zanelle, but asserted that "there was little positive evidence that Ms. D. had made any progress toward alleviating or mitigating the causes necessitating Zanelle's commitment." MCDHHS also contends that "considering the permanency plan that would be in Zanelle's best interest, the court properly put Zanelle's needs above Ms. D.'s."

In her brief, Zanelle contends that the trial court properly considered the required statutory factors in determining the appropriate permanency plan for Zanelle. Zanelle asserts that she "has spent her entire life in a safe, stable foster home" and that Ms. D. "ha[s] not yet demonstrated her ability to provide a safe and stable home for [Zanelle]."

We review a juvenile court's decision to change a permanency plan for a child in need of assistance from reunification to adoption by a non-relative for abuse of discretion: In sum, to be reversed the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

In CINA cases where a child had been removed from the family home, a juvenile court is required to periodically conduct "a permanency planning hearing to determine the permanency plan for a child[.]" Thereafter, the court must review the child's permanency plan "at least every 6 months until commitment is rescinded ... ." CJP § 3—823th)(l)(iii).

Ms. D. does not contend that the juvenile court failed to consider the required statutory factors or that the court's findings of fact were clearly erroneous. Rather, Ms. D. asserts that the court abused its discretion in failing to consider facts that supported a permanency plan of reunification. Ms. D.'s argument, set forth in its entirety, is:

> Defense counsel argued at trial that the mother loves Zanelle and had done what [MCDHSS] asked her to do, in attending parenting classes and beginning individual therapy. She had established a bond with Zanelle by consistently visiting for 16 months. The mother took appropriate care of her recent medical problem, a detached retina. The mother is trying to get a job, get housing, attend school. The trial judge was wrong in not considering these positive elements in deciding what would be in the best interest of the child. The fact that the child has been out of the home for 16 months should not be dispositive.

As correctly noted by MCDHHS, the juvenile court did in fact con-

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sider some of the "positive elements" identified by Ms. D. The court acknowledged Ms. D.'s love for Zanelle and their bond when it found that Ms. D. was "to be admired and credited for bringing Zanelle into the world" and that there was "some attachment" between them. But the court found Ms. D.'s love for Zanelle and Zanelle's attachment to Ms. D. insufficient to overcome the "very substantially unsafe, risky environment for the child to be returned."

The court not only found Ms. D. had psychological and mental health issues that would require long term and intensive therapy "with questionable results," but characterized her demeanor during the review hearing "as combative and her perceptions of reality as delusional." The court concluded that Ms. D. had a significant personality disorder that "substantially impairs her functioning from everything" and that to return Zanelle to Ms. D. under the circumstances of this case "would be of the utmost height of recklessness."

Although the juvenile court did not specifically mention Ms. D's efforts in attending parenting classes, beginning individual therapy, obtaining appropriate medical care for her eye, and "trying" to get a job, housing, and attend school, the court did find that Ms. D. made "limited progress with services that she's engaged in during the course of this case." In other words, the "positive elements" relied upon by Ms. D. were found to be nothing more than actions taken by Ms. D., during the 16 months Zanelle had been in foster care, that produced no positive results in ameliorating the conditions that necessitated Zanelle's commitment. Ms. D. does not dispute this finding. In deciding to change the permanency plan to adoption by a non-relative, the court clearly and properly focused on Zanelle's best interests, not on Ms. D.'s alleged good intentions.

Therefore, because the juvenile court considered the required statutory factors, made findings of fact that were not clearly erroneous, and rendered a decision amply supported by the record, we perceive no abuse of discretion in changing Zanelle's permanency plan from reunification to adoption by a non-relative." *Slip op. at various pages, citations and footnotes omitted.*

## *Dean Lake v. Carol Tadiarca Lake**

SEPARATION AGREEMENT: CONTRACTUAL ANALYSIS: UNCONSCIONABILITY

CSA #1700, September Term, 2010. Unreported. Opinion by Hotten, J. Filed Jan. 12, 2012. RecordFax # 12-0112-06, 11 pages. Appeal from Prince George's County. Affirmed.

The parties' agreement during marriage 'to pay household bills as they have in the past' was not specific enough to incorporate into the divorce agreement; and if the appellant's interpretation were to be accepted, the result would be unconscionable in that it would impose an impossible burden on appellee.

"Appellant, Dean Lake, and appellee, Carol Tadiarca Lake, married on June 25, 2004 and had two minor children. On June 4, 2009, while still married, the parties executed a handwritten "Agreement," whereby the parties agreed to dismiss domestic violence petitions they had filed against each other, to have shared legal and physical custody of their children, and to pay household bills as they had in the past. On July 27, 2009, appellant filed for an absolute divorce. On August 20, 2010, the court issued an order granting appellant an absolute divorce. However, the court did not incorporate the June 4 agreement in its judgment. Appellant appealed.

We begin our analysis with the circuit court's conclusion that the agreement was "void and unenforceable and … fail[ed] to state with sufficient specificity what household bills would be paid."

Pursuant to [F.L.] §8-101, a husband and wife may enter valid and enforceable agreements that relate to alimony, support, property rights, or personal rights. Separation agreements are subject to objective contractual interpretation, so we are "bound to give effect to the plain meaning of the language used." *Feick v. Thrutchley*, 322 Md. 111, 114 (1991). Moreover, "for a contract to be enforceable, it is necessary that it be sufficiently specific to enable a court to determine the intention of the parties." *Geo. Bert. Cropper, Inc. v. Wisterco*, 284 Md. 601, 619(1979).

The parties presented evidence that appellant had been depositing $5,000 per month in the joint bank account, that appellee had been depositing $4,000 per month, and that the parties used the joint account to pay household bills. According to appellant, appellee paying "household bills as [she] had in the past" meant contributing $4,000 per month into the joint account. However, the agreement failed to specify which bills qualified as "household bills." The circuit court stated that appellant "interprets this agreement to mean his household bills and not food, utilities, day care, or any other family expenditures incurred by [appellee] in her own residence following the separation." As such, the court could not determine from the agreement which bills were to be included as "household bills," and did not include the agreement in the judgment of absolute divorce. We cannot conclude the circuit court's factual conclusions were clearly erroneous, nor do we conclude the circuit court legally erred.

Even if this Court were to accept appellant's interpretation, the result would be unconscionable. As the circuit court pointed out, appellant seeks reimbursement for a percentage of his household expenses, leaving appellee and the parties' children, who were residing with appellee, to shoulder appellee's household expenses as well. In *Williams v. Williams*, 306 Md. 332 (1986), the Court of Appeals upheld a trial court's setting aside of a separation agreement on the grounds that the agreement was so oppressive on the husband that it shocked the conscience of the court.

Here, the circuit court noted that both parties' expenses exceeded their incomes. Adopting appellant's interpretation of the agreement and requiring appellee to continue to contribute $2,000 biweekly into the parties' joint bank account, all while paying her own household bills and providing for the children, would have imposed an impossible burden on appellee. Unlike *Williams*, appellee was represented by counsel when the parties signed the agreement. Nevertheless, adopting appellant's bold interpretation would result in appellee being financially responsible for herself, her children, and appellant, who was gainfully employed, for the year between the time appellee moved out of the parties' residence on July 20, 2009, and the circuit court's order on August 20, 2010. Though appellee continued contributing to the joint bank account until approximately October 1, 2009, we cannot say that appellee's few continued contributions waived her ability to challenge the validity of the agreement or divested the circuit court of its equitable jurisdiction.

Lastly, the circuit court determined that the parties did not intend for the agreement to address their obligations in anticipation of separa-

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tion. While general contractual principles apply, a separation agreement must be freely and voluntarily entered into by married parties in contemplation of ending the marital relationship and limiting marital rights to be valid. See *Cannon v. Cannon*, 384 Md. 537, 556 n.8 (2005) (citing *Williams*, 306 Md. at 337); see also *Eaton v. Eaton*, 34 Md. App. 157 (1976). Whether the parties anticipated divorce is "a question of fact that may be proven by the party seeking to attack the agreement in order to shift the burden of proof to the party seeking to enforce the agreement." *Cannon*, 384 Md. at 556 n.8 (citing *Williams*, 306 Md. at 337).

Here, appellee had the burden of demonstrating that she and appellant did not intend for the agreement to serve as a separation agreement in contemplation of divorce. Based on the circuit court's findings of fact and ruling, appellee did so. Appellant did not present sufficient evidence to persuade the court to find that the parties intended for the agreement to serve as a separation agreement. Even though appellee had already signed a lease for an apartment, the circuit court's finding is supported by the fact that they continued to reside in the marital home for a time after signing the agreement and that appellee continued to contribute to the parties' joint bank account. Therefore, the circuit court's factual conclusion was not clearly erroneous. In light of this factual conclusion, we cannot hold that the circuit court committed an error of law." *Slip op. at various pages, citations and footnotes omitted.*

## *Alvenia K. Pitts v. Ronald G. Pitts**

DIVORCE: PENSION RIGHTS: WAIVER

CSA No. 1255, September Term, 2010. Unreported. Opinion by Matricciani, J. Filed Jan. 31, 2012. RecordFax #12-0131-00, 12 pages. Appeal from Prince George's County. Affirmed.

Evidence that appellee had twice waived his right to a survivor's annuity under his wife's Civil Service Retirement System pension, and had mentioned in an email that "retirement waivers have been signed by both of us," was insufficient to establish that he had waived any rights under the CSRS pension other than the survivor's annuity.

"The parties were married on September 14, 1974. They separated on August 29, 2001 and have lived apart without cohabitation since that time. The Pittses acquired various real and personal property over the course of their marriage: The only dispute on appeal, however, is Mr. Pitts' rights to Ms. Pitts' CSRS retirement pension. The pension entered payment status when Ms. Pitts retired in 2007. Ms. Pitts began receiving a monthly annuity payment of $5,896 (before taxes) from the CSRS pension.

Ms. Pitts contends that the parties waived all interests in each other's retirement accounts, including her CSRS retirement. Mr. Pitts responds that he waived only his rights to Ms. Pits' Thrift Savings Plan account and a survivor annuity in the CSRS pension. The circuit court held that Ms. Pitts "did not prove by a preponderance of the evidence that Mr. Pitts waived his interest in her [CSRS] retirement benefits."

The circuit court classified the CSRS pension as marital property not excluded by agreement, and held as follows:

It is undisputed that Mr. Pitts did not sign any documents which waived his interest in her CSRS retirement. [Ms. Pitts] relies on her[ ] understanding of their agreement, and an email sent by Mr. Pitts in 2002 attempting to settle the issues arising from their marriage, in which he references the "retirement pension releases signed by both of us." It may well be that Mr. Pitts thought that the only retirement benefits accrued by the parties were his 401(a) plan and her Thrift account, not realizing that Mrs. Pitts had a very substantial defined benefit retirement. It may well be that Mr. Pitts had a very substantial defined benefit retirement. It may also be that he intended to waive all interest in all her retirement benefits. But as of the trial, there was no proof of a waiver or an intent to waive his interest in her CSRS retirement. The Court finds the CSRS is all marital property and subject to an equitable division by the Court.

Pension benefits are "an economic resource acquired with the fruits of the wage earner spouse's labors which would otherwise have been utilized by the parties during the marriage to purchase other deferred income assets." *Deering v. Deering,* 292 Md. 115, 124 (1981). Pensions are marital property to the extent they are acquired during the marriage. *id.* at 128. To that end, federal law permits state divorce courts to treat CSRS pension benefits as martial property. *Heyda v. Heyda,* 94 Md. App. 91, 94 (1992). Further, Maryland trial courts have the authority to enter a money judgment by transferring a portion of a party's CSRS pension to his or her spouse. *See* FL § *8-205(a).* Spousal survivor annuities provide for continued payment to the spouse after the employee's death. *Pleasant v. Pleasant,* 97 Md. App. 711, 726 (1993). An interest in the pension benefits themselves is distinct from an interest in a survivor annuity to the same pension. *Id.* Thus, a waiver of a survivor annuity is not a waiver of an interest in the spouse's pension benefits.

Ms. Pitts asserts two errors by the circuit court. First, that the court applied a "waiver' analysis" instead of adhering to contract interpretation principles. Second, that the court set aside an unambiguous agreement between the Pittses to waive their interests in any and all of each other's retirement and pension benefits. These arguments are each based on an underlying premise not supported by the evidence — that there was an agreement between the parties that Mr. Pitts would waive his interest in Ms. Pitts' CSRS pension. The circuit court found that the evidence before it — the testimony of the parties, the two Spouse's Consent to Survivor Election forms, and the October 29, 2002 e-mail — did not establish such an agreement. In reviewing the record, we agree with the circuit court that there was not enough evidence to compel the court to adopt Ms. Pitts' position.

The CSRS pension benefits enjoyed by federal employees are governed by "the complex world of federal governmental organizational law and its corresponding OPM. regulations." *Heyda,* 94 Md. App. at 96. Somewhere in that complex world there may exist a form that, if properly executed, would have waived all of Mr. Pitts' interest in Ms. Pitts' CSRS pension benefits. That is not, however, what the 2002 and 2007 Spouse's Consent to Survivor Election forms did. They waived Mr. Pitts' interest in a survivor annuity in Ms. Pitts' CSRS pension, but did not waive his interest in the pension benefits themselves. Mr. Pitts' waiver of a survivor annuity in the CSRS pension did not affect his right to receive proceeds under the pension. *See East v. Paine Webber, Inc.,* 131 Md. App. 302, 311 (2000).

Further, the October 29, 2002 e-mail does not establish an agreement between Mr. and Ms. Pitts to waive any and all interests in each other's retirement accounts. *Peer v. First Federal Sat. & Loan Assoc.,* 273 Md. 610, 614 (1975). By Ms. Pitts' own testimony, it is not clear whether she ever responded to the e-mail. Even if she did respond to the e-mail, Ms. Pitts presented no evidence that her response was a

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knowing and sufficient acceptance of a certain and definite offer. Absent any such evidence, the circuit court was not clearly erroneous in determining that Ms. Pitts did not prove that Mr. Pitts waived his interest in her CSRS pension benefits.

The circuit court held, after considering the testimony of both parties, that Ms. Pitts did not prove by a preponderance of the evidence that Mr. Pius waived his interest in the CSRS pension. Giving due regard to the circuit court's opportunity to judge the credibility of the witnesses, we agree that there was substantial evidence in the record to support the circuit court's conclusion." *Slip op. at various pages, citations and footnotes omitted.*

## *Bareaster Williams v. Monique Brown/ Bareaster Williams v. Kyra T. Jackson**

CHILD SUPPORT: CONSTRUCTIVE CIVIL CONTEMPT: PERSONAL JURISDICTION

Consolidated cases; CSA Nos. 2708 and 2709, September Term, 2010. Unreported. Opinion by Raker, Irma S. (retired, specially assigned). Filed Jan. 31, 2012. RecordFax #12-0131-04, 10 pages. Appeal from Baltimore City. Affirmed.

The circuit court had personal jurisdiction over appellant in a contempt proceeding in Jan. 2011 because he had been served with process and signed a summons in October 2010, when he appeared in court to challenge his detainer based on earlier defects in service.

"Bareaster Williams was found in constructive civil contempt for failure to pay child support in accordance with two separate consent judgment decrees. In this appeal, he presents the following question: whether the circuit court lacked personal jurisdiction over him as a result of improper service of process. We shall hold that appellant was served properly and that the circuit court, therefore, had jurisdiction to find him in contempt.

Ashley M. Williams was born to Monique Kennette Brown on Jan. 2, 2001. On November 8, 2005, appellant entered into a consent judgment decree acknowledging paternity and agreeing to pay child support to Brown. Kyrell Barry Williams was born to Kyra Tiffany Jackson on Feb. 8, 1994. On Feb. 19, 2004, appellant entered into a consent judgment decree acknowledging paternity and agreeing to pay child support to Jackson.

In March 2009, appellant stopped paying child support. Six months later, the Department of Human Resources, Baltimore City Office of Support Enforcement sought to initiate contempt proceedings. Department staff searched numerous record databases and found appellant's address on the Maryland Judiciary Case Search website. Although the Department had additional addresses for appellant, staff believed Robinwood Avenue was the most current.

When the server attempted to serve appellant, he was told by a resident of the house that appellant no longer lived there and that his address was unknown. No further attempts to serve appellant were made. When appellant did not appear at the contempt hearing, the circuit court issued paternity contempt warrants for his arrest in both cases.

In August 2010, appellant was arrested and incarcerated at the Baltimore County Detention Center pending trial for criminal offenses. The sheriff's office lodged detainers with the detention center, requesting that the facility notify the sheriff's office before releasing appellant so he could be taken into custody on the paternity warrants. On Oct. 11, 2010, appellant, apparently still incarcerated, wrote to the circuit court requesting a hearing on the detainers. The court heard arguments on Oct. 14. Appellant asserted he was never served with process and requested release on his own recognizance prior to the show cause hearing. The State did not object to his release but made the following request of the court: "We would ask that Mr. Williams be advised that the Court sign an Incarceration Show Cause Order and that these cases be set for hearing on January the 4th of 2011 at 9:00 a.m. *And I am providing counsel with copies of the Request for Show Cause in, in both of these matters."* (Emphasis added.)

Thereupon, the circuit court quashed the paternity contempt warrants, lifted the detainers, and set a hearing date of Jan. 4, 2011. The court further issued show cause orders for appellant to appear on that date and suggested that "in an over-abundance of caution, the Defendant should sign a summons," which he did.

Before the hearing, appellant filed motions to dismiss the contempt proceedings, arguing that the failures to serve him with the petitions or show cause orders, and to provide him a hearing before issuance of the contempt warrants, deprived him of due process. The court denied the motions. At the Jan. 4, 2011, hearing, appellant admitted his failure to pay child support, and the court found him in contempt in both cases but postponed disposition. These appeals followed.

It is a fundamental tenet of due process that a court may not impose liability on an individual or extinguish a personal right unless the court first obtains jurisdiction over the person. See *Flanagan v. Department of Human Resources*, 412 Md. 616, 623 (2010). The Maryland Rules govern service of process and contempt proceedings.

Md. Rule 15-206(d) addresses specifically how a copy of the court's show cause order must be served: "The order, together with a copy of any petition and other document filed in support of the allegation of contempt, shall be served on the alleged contemnor pursuant to Rule 2-121 or 3- 121 … ."

Rules 2-121 and 3-121 specify methods of serving process with respect to matters in the circuit court and district court, respectively, and in relevant part are identical. They provide, "Service of process may be made within this State or, when authorized by the law of this State, outside of this State (1) *by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it;…* ." Furthermore, Rule 1-321, which covers service of papers "other than original pleadings," states that such documents may be served, *inter alia,* by handing them to a party or the party's attorney. *See* Md. Rule 1-321(a).

The Court accepts, *arguendo,* that the attempt at service on Jan. 27, 2010, was not adequate. We agree, therefore, that appellant had not been served with process properly prior to appearing before the circuit court. Nevertheless, the record shows that appellant was served at that Oct. 14, 2010, hearing with copies of the original contempt petitions and the newly-issued show cause orders, which directed him to reappear on Jan. 4, 2011. He was served as required by Rule 15- 206(d). The procedures in Rules 2-121(a), 3-121(a), and 1-321(a) were satisfied. The documents informed appellant of the allegations against him and the penalties he faced, and the hearing date gave him more than two months to prepare a defense. Thus, the record shows the circuit court acquired personal jurisdiction over appellant and he was not denied due process." *Slip op. at various pages, citations and footnotes omitted.*

## TOPIC INDEX

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

## CASE INDEX

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