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COURT OF SPECIAL APPEALS

Unreported opinions

Cite as 3 MFLM Supp. 3 (2012)

Child custody and support: legal vs. physical custody: matters not before the court

Charles Warren Farmer

v.

Kimberly Ann Farmer

No. 237, September Term, 2011

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

Opinion by Woodward, J.

Filed: January 10, 2012. Unreported.

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.

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

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 for Washington County (1) awarded primary physical custody of their son, Wyatt Taft Farmer, who was born on January 17, 1995, to appellant, (2) awarded sole legal custody of Wyatt 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 based on Wyatt's social security benefits and part-time earnings, and (4) ordered that each party be allowed to claim the child dependency deduction for Federal and State income tax purposes on alternating years.

On appeal, appellant presents four questions for our review,[1] which we have rephrased:

1. Did the trial court err in modifying physical custody, but not legal custody?
2. Did the trial court abuse its discretion in awarding appellee four (4) weeks of summer visitation and not awarding appellant any extended summer access?
3. Did the trial court err in addressing matters related to child support when the issue of child support was not before the trial court?
4. 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?

For the reasons set forth herein, we answer "no" to questions 1 and 2, "yes" to question 4, and conclude that question 3 is moot. Accordingly, we shall affirm in part and vacate in part the judgment of the circuit court.

BACKGROUND

The long history of the instant case began in December 1996 when the parties filed for an absolute divorce and other relief. On October 25, 1999, the trial court entered an absolute divorce and awarded primary physical custody of Wyatt to appellant and joint legal custody. Appellant appealed to this Court, and in an unreported opinion, *Farmer v. Farmer*, No. 2977, Sept. Term 1999 (filed April 24, 2001), we affirmed.

On September 25, 2001, appellant filed a motion to modify custody/visitation and on October 2, 2001, appellee filed a counter-petition. Each party sought sole legal and physical custody. After a four day trial, the trial court found that a material change in circumstances had occurred and awarded shared physical custody to each party on alternate weeks and joint legal custody. Appellant appealed to this Court, and in an unreported opinion, *Farmer v. Farmer*, No. 577, Sept. Term 2002 (filed Jan. 28, 2003), we affirmed the trial court's award of shared physical custody and vacated the grant of joint legal custody, ordering the trial court to either award sole legal custody or articulate why joint legal custody was in Wyatt's best interest.

On remand, the circuit court took evidence, and in a February 12, 2004 written opinion, the court again awarded the parties joint legal custody of Wyatt. Appellant again appealed to this Court. In an unreported opinion, *Farmer v. Farmer*, No. 555, Sept. Term 2004 (filed March 4, 2005), we determined that "the

trial judge was required to articulate his reasoning for believing that joint legal custody is in Wyatt's best interest. This he failed to do." Our opinion continued:

> In its opinion after remand, the trial court found that, although there is some communication between the parties, including "some conversation and notes" that are exchanged when Wyatt is transferred between the parties, the parties "have difficulty communicating," and "fail to communicate effectively on all medical issues of Wyatt and where Wyatt should attend school." Further, the trial court determined that "the parties have trouble communicating on all issues, and their opinions differ as [to] what is in Wyatt's best interest, at least concerning medical issues." Notwithstanding these important findings, the court stated that it "is well aware that the status quo is not perfect, but at least each parent enjoys equal footing." The court maintained that "[t]his equal footing is important to maintain whatever stability we now have. . . ."
>
> The trial court failed to review the factors relevant to an award of joint legal custody and to articulate why such an award is appropriate in light of the parties' abysmal track record for communication and their inability to reach shared decisions. The written opinion of the court makes clear that the trial judge placed great weight on his desire to place the parties on "equal footing." In doing this, the court avoided choosing one parent and disappointing the other by simply awarding legal custody to both. As the *Taylor* court stated, "[b]lind hope that a joint custody agreement will succeed, or that forcing the responsibility of joint decision-making upon the warring parents will bring peace, is not acceptable. *Taylor*, 306 Md. at 307.
>
> The evidence adduced at the hearing on remand confirms what we wrote in our prior opinion: "Even with the passage of time . . . there is still no evidence of progress toward a detente."
>
> Our review of the evidence clearly indicates that an award of joint legal custody is erroneous and must be reversed. The evidence overwhelmingly demonstrates that sole legal custody was required in this case. Accordingly, we remand to the circuit court for entry of an order awarding sole legal custody to one of the parties. Although the record, as it stands now, strongly indicates that sole legal custody should be awarded to appellee, that is a decision reserved to the trial judge after full consideration on the merits.

Upon remand, the circuit court held a hearing on September 30, 2005, February 13, 2006, and May 26, 2006. The court found from the evidence presented that "the parties . . . cannot agree much less communicate concerning medical and education issues." After considering the factors for a "judicial determination of custody" set out in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1978), the trial court determined that the evidence strongly indicated that sole legal custody should be awarded to appellee. The court's opinion concluded with the following:

> As the trial judge throughout this entire legal journey since 1997, certain consideration should be given to this Court as to its opportunity to observe the demeanor and credibility of the parties and witnesses throughout, so long as any custody decision is legally founded without abuse of discretion. The Court, in this decision as to the only issue of legal custody, has reviewed the entire lengthy record accumulated since 2003 following the appellate court remand instructions, and considered the above 8 custody factors, and what is in the child's best interest as to legal custody.
>
> The Court of Special Appeals in unreported opinion No. 555, September Term 2005, filed March 4, 2005 in the last paragraph of the Opinion, page 28 stated:
>
> > The evidence overwhelmingly demonstrates that sole legal custody was required in this case. Accordingly, we remand to the circuit court for entry of an order awarding sole legal custody to one of the parties. Although the record, as it stands now, strongly indicates that sole

> legal custody should be awarded to appellee, (mother) that is a decision reserved to the trial judge after full consideration on the merits.
>
> The entire record now as to what was before the appellate court for review is essentially the same even though more cumulative, and **"the record, as it stands now, strongly indicates that sole legal custody should be awarded to appellee", the mother, and this court on remand so agrees and decides.**

(Emphasis added). An order consistent with the above opinion was issued on July 26, 2006.

Appellant appealed this decision, and we affirmed. *Farmer v. Farmer*, No. 1355, Sept Term 2006 (filed April 19, 2007).

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 appellee visitation time. In particular, appellee recounted an incident in which she gave Wyatt written permission to attend Family Life Education Unit classes at school, which were "designed to provide students with the information, decision-making skills, and resources that will encourage the values of respect, responsibility, and abstinence," as well as to educate students regarding "self-esteem, healthy relationships, bullying, etc." Even though appellee informed appellant that Wyatt would be attending these classes, appellant, without informing appellee, sent a note to the teacher of the Family Life Education Unit classes requesting that Wyatt not attend the classes, and he did not attend. On September 24, 2008, appellant filed a response to appellee's petition for contempt, in which he denied these allegations and asked the circuit court to dismiss the petition for contempt with prejudice.

On August 6, 2009, appellant filed a motion to modify custody, in which he noted that "the current visitation schedule is an alternating week schedule for each parent, with the non- custodial parent having visitation from Tuesday evening until Wednesday morning in the week in which the other parent has the minor child." Appellant alleged in the motion that there had been a material change in circumstances due to, among other things, the ongoing conflict between the parties and Wyatt's entry into high school. Appellant requested that he be awarded sole legal custody and primary physical custody of Wyatt. On August 21, 2009, appellee filed an answer to the motion to modify custody, in which she denied that there had been a material change in circumstances since the July 26, 2006 custody order. Appellee also alleged that appellant continued "to be uncooperative, hostile and employ[ed] a 'my way or no way' attitude which led to [appellee] being awarded sole legal custody of [Wyatt]" and that appellant had voluntarily relocated from Washington County to Frederick County "knowing that the distance between the parties' residences may be problematic." Appellee asked the circuit court to deny the relief requested by appellant.

The trial court held a merits trial on the petition for contempt and the motion to modify custody on February 1, May 11 and 18, June 16, September 22, and December 21, 2010. In an opinion filed on March 2, 2011, the court stated as to the contempt petition:

> [T]he Court finds [appellant] to be in contempt as to allegation 7 when [appellant] failed to have the minor child attend Family Life Education Unit, Smithsburg Middle School, February 4 – February 8, 2008, where [appellee] as legal custodian had previously approved and made commitment to the Family Life Education classes, when [appellant] then attempted by a note to have the teacher involved to allow the minor child not to participate in the program, without discussion or notice to [appellee] of [appellant]'s intentions. Therefore, [appellant] is found to be in contempt of the July 26, 2006 Custody Order which awarded sole legal custody to [appellee] with ruling on sanctions/purge to be specified in this Opinion, and Order.[2]

With regards to appellant's motion to modify custody, the trial court found that the relocation of appellant's residence, the change in Wyatt's age and school location, and appellant's living with two children from his second marriage represented a "material change in circumstances since 2006" that required the court to reconsider "what physical and legal custody arrangement is in the minor child's, Wyatt, best interest at this time."[3]

The trial court then reviewed each of the 13 considerations for modification of custody set forth in *Taylor v. Taylor*, 306 Md. 290, 304-11(1986). The trial court found, in relevant part, that (1) the parties, especially appellant, have difficulty communicating and reaching shared decisions affecting Wyatt's welfare and that this precluded joint legal custody; (2) appellee is willing to accept joint legal custody and that appellant is not; (3) the parties are both fit to be Wyatt's cus-

todian even though they disagree about what was best for him; (4) Wyatt enjoys good relationships with both parties; (5) Wyatt is sixteen and expressed that he wished to live with appellant and that he also wanted one weekend each month and one week in June, July, and August with appellee; (6) if the current joint physical custody arrangement is changed to a primary physical custody arrangement, any disruption to Wyatt's school and social life would be minimal, because Wyatt would continue to attend the same high school in Frederick County, where appellant resides; (7) the parties live only a half-hour away from each other; (8) appellant is disabled and appellee is employed as a social worker, and neither situation has caused any problems with the current custody arrangement; (9) Wyatt is the only child of the parties and is sixteen years old; (10) both parties sincerely want custody in order to serve Wyatt's best interest; and (11) appellee is gainfully employed, financially stable and able to provide for Wyatt's needs, and appellant, even though he relies on monthly disability benefits, is able to provide for Wyatt and his two half-siblings.[4]

The court also considered the factors for a "judicial determination of custody" this Court set out in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (l978).[5] 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 in which the parties share physical custody, and she has sole legal custody; (3) although the "long history of this case" has strained "meaningful communication" between the parties, Wyatt is healthy, bright, working part- time, involved in extra-curricular activities, and has been in long term beneficial counseling; (4) although Wyatt wishes for appellant to have primary physical custody 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.

In consideration of the aforementioned findings, the court ruled that "the present shared physical custody arrangement is no longer practical" and awarded primary physical custody of Wyatt to appellant, with reasonable visitation rights to appellee. The court then addressed legal custody:

> The issue of legal custody is somewhat complicated in that joint legal custody, which existed until July 26, 2006, is still not a realistic option as opined in the prior Opinion and the prior appellate review, which stated that sole legal custody should be awarded to one of the parties. Since 2006 [appellee]'s sole legal custody of Wyatt has worked reasonably well with some bumps in the road. [Appellee] has scheduled medical, dental, counseling appointments for Wyatt, worked with Wyatt's schools in Washington and Frederick counties. In addition, she consented and agreed to Wyatt changing schools from Washington to Frederick County when he entered high school in the 9th grade and now in the 10th grade. Even though [appellee] desired Wyatt to remain in school in Washington County, she deferred to Wyatt's preference, which indicates she has Wyatt's best interest at heart. In addition, her interaction with [appellant] has been reasonable. 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] and the sole legal custody provision as to both [appellee] and [appellant] contained in the Order of July 26, 2006 shall be included in the new Custody Order.

In addition, the court awarded appellee visitation rights on alternate weekends and every Wednesday evening, as well as four weeks of summer vacation. Given the change in physical custody, the court also recommended that

> for any modification of child support there should be [a] deviation from the Child Support Guidelines, in that the minor child, age 16, receives $601.00 per month in Social Security Benefits, and is employed part time 10-12 hours per week earning $8.00 per hour, $80.00 - $96.00 per week.

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 timely appeal followed. Additional facts will be set forth below as necessary to resolve the questions presented.

DISCUSSION

A.
Legal Custody

Appellant contends that the trial court erred by awarding sole legal custody of Wyatt to appellee when it had correctly awarded primary physical custody to appellant. Specifically, appellant claims that the court failed to apply the best interest of the child standard "as if it were making an original custody determination" and failed to consider the new physical custody arrangement in determining whether awarding sole legal custody to appellee was appropriate. Appellant also asserts that "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."

Appellee counters that the trial court "did not fail to consider the best interest of the minor child, and further did apply the appropriate standard when it considered the issue of legal custody." Appellee claims that the court "listened to five days of testimony and reviewed evidence, testimony, exhibits, closing arguments, and the [court]'s notes before determining that sole legal custody of the minor child should remain with [appellee]."

As this case was tried without a jury, "the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(e). The standard of appellate review in child custody cases is both limited and deferential. *McCarty v. McCarty*, 147 Md. App. 268, 272 (2002). We decide "whether the trial court abused its discretion in making its custody determination." *Barton v. Hirshberg*, 137 Md. App. 1, 24 (2001).

"[I]n any child custody case, the paramount concern is the best interest of the child." *Taylor,* 306 Md. at 303. "The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak." *Id.* The factors that the trial court should consider in determining custody include: (1) capacity of the parents to communicate and reached shared decisions affecting the child's welfare; (2) acceptability of joint legal custody to the parents; (3) fitness of the parents; (4) relationship between the child and each parent; (5) preference of the child, if of suitable age and discretion; (6) potential disruption of the child's social and school life; (7) proximity of the parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of the parents' request; (11) financial status of the parents; (12) impact on state or federal assistance; (13) benefit to the parents; and (14) any other circumstances that reasonably relate to the issue. *Id.* at 304-11. In *Sanders*, we identified such "other circumstances" as (1) the fitness of the parents; (2) the character and reputation of the parents; (3) the desire of the natural parents; (4) the potential for maintaining natural family relations; (5) material opportunities affecting the future life of the child; (6) the age, health, and sex of the child; (7) the preference of the child, when the child is of a sufficient age and capacity to form a rational judgment; (8) the residences of the parents and the opportunity for visitation; (9) the length of the separation of the natural parents; and (10) whether there was a prior voluntary abandonment or surrender of custody of the child. 38 Md. App. at 420.

In a thorough and well-reasoned opinion, which covered 18 pages, the trial court in the case *sub judice* made factual findings as to each of the applicable *Taylor* and *Sanders* factors and then considered those findings to "determine what physical and legal custody arrangement is in the minor child's, Wyatt, best interest at this time." Appellant does not challenge any of the court's factual findings. Instead, appellant claims error in the court's analysis that led to its award of sole legal custody to appellee.

First, appellant claims that the trial court improperly relied on whether "the existing legal custody arrangement was working." We believe that it was appropriate for the court 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 as legal custodian was an appropriate fact to consider. In its opinion, the trial court found that appellee 's "sole legal custody of Wyatt has worked reasonably well with some bumps in the road" and that "[t]he present legal custody [arrangement] has existed [for] 5 years with any custody order to terminate in 2 years when Wyatt attains 18 years of age. . . ." Clearly, the trial court was entitled to rely on these findings in reaching its determination on legal custody.

Second, appellant claims that the trial court failed to consider the new physical custody arrangement when making its legal custody decision. Although the court did not explicitly mention the new physical custody arrangement in articulating 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 physical custody arrangement.

After setting forth its findings under the *Taylor* and *Sanders* factors, the trial court stated that it "must

now determine what *physical and legal custody arrangement* is in the minor child's, Wyatt, best interest at this time." (Emphasis added). The court then reiterated each party's position on physical *and* legal custody. Immediately thereafter was the court's analysis and ruling on physical custody, followed by its analysis and ruling on legal custody. As previously indicated, the court expressly found that appellee's sole legal custody of Wyatt had worked "reasonably well," that appellee's interaction with appellant "ha[d] been reasonable," and that in the final analysis, appellee's decisions as legal custodian "indicate[d] she has Wyatt's best interest at heart." We perceive no error.

On this issue, it is instructive to note appellee's reasons for opposing the award of sole legal custody to appellant. On the final day of the merits trial, appellee explained her position during closing argument:

> In fact if you want to [give appellant] sole legal custody I believe I would be cut out of everything for Wyatt. I think that would include any kind of medical, educational, any kind of extracurricular activities. I don't think [appellant] would inform me. I think if he did it would be after the fact or after I found out inadvertently in some way.

Appellee's concern about being cut out of Wyatt's life is corroborated by the trial court's contempt finding against appellant. The court found appellant in contempt of the legal custody order, because appellant, without notice to appellee, advised Wyatt's teacher that Wyatt would not be participating in the Family Life Education Unit classes, when appellee, as sole legal custodian, had previously approved Wyatt's attendance. As previously stated, the court, in its opinion, found that the parties, especially appellant, had "difficulty communicating and reaching shared decisions affecting the child's welfare," while appellee's interaction with appellant "ha[d] been reasonable." Thus the award of sole legal custody to appellee is consistent with the goal of keeping both parties aware of major decisions involving Wyatt.

Finally, we reject appellant's argument that "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." The standard for the award of 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. In addition, in the case *sub judice*, the court found that appellee was more suited to the role of legal custodian based on her behavior and her proven dedication to Wyatt's best interest. Accordingly, the circuit court did not abuse its discretion in awarding sole legal custody to appellee.

B.
Summer Visitation

Appellant contends that the court erred in awarding appellee extended summer visitation with Wyatt and not awarding any to appellant. Specifically, appellant asserts that, given the fact that appellee has visitation on Wednesday evenings, the court's award "effectively [bars appellant] from being able to take a vacation of even one (1) week with the parties' minor child, much less for a time equal to that of [appellee]." According to appellant, such award does not provide a reasonable opportunity to develop a "close and loving relationship" with Wyatt. Finally, appellant asserts that "[t]here is no appropriate reason, stated or otherwise, to support" the court's ruling.

Appellee counters that the trial court did not err in awarding an extended summer vacation to appellee, because the court "award[ed] primary physical custody to [appellant] which . . . decreased [appellee]'s visitation from fourteen overnights per month to eight overnights per month." According to appellee, the court "recognized the importance of Wyatt being able to continue to have a longer stretch than two days of uninterrupted time with [appellee]." Appellee asserts further that "[i]t is apparent that [the court] believed that due to the increase of visitation [appellant] would enjoy with Wyatt, it wasn't necessary or best for Wyatt to order summer access for [appellant]." More importantly, appellee notes that "it is not unreasonable for [appellant] to assume that [appellee], given her previous history of flexibility regarding visitation and changes in visitation regarding Wyatt, would not forego one Wednesday overnight to allow Wyatt to enjoy a consecutive week of visitation with [appellant]."

In reviewing a court's visitation decision, we must determine whether the court abused its discretion in deciding what visitation arrangement would be in the best interest of the child. *Odunukwe v. Odunukwe*, 98 Md. App. 273, 288 (1993) ("Visitation is a matter affecting the best interest of the children and a matter over which the chancellor must exercise his or her own discretion.").

Appellee correctly observes that the practical effect of the trial court's award of primary physical custody to appellant is a decrease of her visitation with Wyatt during the school year from 14 overnights per month to eight overnights per month. During the trial, the court interviewed Wyatt and reported on the record that Wyatt wanted to live with appellant, but also wanted one week with appellee in June, July, and August.

Accordingly, the court granted appellee visitation with Wyatt for one week in June, two consecutive weeks in July, and one week in August.

We fail to see how appellant is effectively barred from taking a vacation of even one week with Wyatt. During summer weeks when appellee does not have weekend or week long visitation, appellant is free to take a vacation with Wyatt from 8:00 a.m. Thursday to 5:00 p.m. the following Wednesday, 15 hours shy of seven full days. More importantly, appellee articulated in her brief and has repeated at oral argument a willingness to forego one Wednesday evening of visitation to afford appellant and Wyatt an extended vacation. Indeed, during the trial, appellant's counsel acknowledged that appellee "has been willing to allow Wyatt to stay nights that were her nights with [appellant]."

Appellant also offers no reason why an extended summer vacation is necessary to develop a "close and loving relationship" with Wyatt. Given the court's award of primary physical custody to appellant, with a concomitant increase in time with Wyatt, appellant actually has a greater opportunity to develop a "close and loving relationship" with Wyatt. Because of the significant reduction in appellee's visitation with Wyatt, her willingness to forego one of her Wednesday evenings 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 summer vacation time to appellee, without a loss of any of her Wednesday evenings, is not an abuse of discretion.

C.
Child Support

In its order, the trial court recommended that

> for any modification of child support there should be [a] deviation from the Child Support Guidelines, in that the minor child, age 16, receives $601.00 per month in Social Security Benefits, and is employed part time 10-12 hours per week earning $8.00 per hour, $80.00-$96.00 per week.

Appellant contends that the trial court "erred by addressing matters related to child support when child support was not an issue before the Court." Appellant claims that the court "correctly recognized that it did not have the issue of child support before it," but then erred in prospectively instructing a finder of fact on the child support issue.

Appellee counters that appellant "brought the child support issue before the court and testimony was heard regarding both parties' ability to support the minor child." As a result, according to appellee, the court "was appropriate in addressing child support."

During the pendency of this appeal, appellant sought a modification of child support. On June 3, 2011, a hearing on appellant's request was held before a domestic relations master. On June 10, 2011, in his proposed findings and recommendations, the master disregarded the above recommendation for a departure from the child support guidelines based on Wyatt's income, stating "that Wyatt earned $80.00 – $96.00 per week working on a farm does not in the Master's eyes justify a departure from the child support guidelines." The master, however, agreed with the trial court that there should be a downward departure in the guidelines because of Wyatt's social security benefits.

On June 22, 2011, appellant timely filed exceptions to the master's recommendations. In an opinion filed on October 3, 2011, another member of the Circuit Court for Washington County disregarded both the trial court's and the master's child support recommendations and ordered that appellee pay appellant the full amount specified by the child support guidelines, $650.00 per month.

"A controversy may not be justiciable because it is not ripe or because it has become moot." *Stevenson v. Lanham*, 127 Md. App. 597, 612 (1999). "A case is moot when there is no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant." *Suter v. Stuckey*, 402 Md. 211, 219 (2007). Because the circuit court, in a subsequent proceeding, disregarded the recommendation for a deviation from the child support guidelines, there is no longer an existing controversy, nor is there an effective remedy that this Court can grant. Accordingly, the issue is moot.

D.
Child Support Dependency Tax Deduction

In its opinion, the trial court ordered that "each party on alternating 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." Appellant contends that the court "erred by addressing the child support dependency deduction, when the issue had not been raised by either party." Appellant claims that, because "neither party plead or requested such a ruling," the court "had no authority to make such a ruling."

Appellee counters that the court's order was a mere "continuation of what has been ordered historically, with [appellant] ordered to claim [the minor child] in even years and [appellee] to claim [the minor child] in odd years." Appellee asserts that the court "has discretion to order what is in the best interest of the minor child including but not limited to custody, visitation, and child support issues" and the court exercised this discretion in awarding alternating years of the dependen-

cy 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) (quoting *Gatuso v. Gatuso*, 16 Md. App. 632, 633 (1973)). 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 respective pleadings, nor was the issue raised during the trial. Neither party had notice or an opportunity to be heard on this matter. As a result, the trial court did not have the authority to rule upon the dependency tax deduction for income tax purposes. Accordingly, any ruling on the issue of the dependency tax deduction was error.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED IN PART AND VACATED IN PART; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID 75% BY APPELLANT AND 25% BY APPELLEE.

FOOTNOTES

1. In his brief, appellant raises a fifth question for our review, but withdrew that question at oral argument before this Court.

2. Having found appellant in contempt, the court ordered appellant to strictly comply with its new custody order and imposed a fine of $250.00 to be paid to a charity to be determined; however, the fine was deferred pending compliance with the custody order.

3. Earlier in its opinion, the circuit court stated that, having found a material change in circumstances, "this Court is now required to consider whether or not it is in Wyatt's best interest to have a change in the present custody arrangement." Appellant, at oral argument before this Court, contended that this statement constituted an incorrect standard to apply when a material change in circumstances had been found, because the court was obligated to consider the best interest of the child as if it was making an original custody decision. We disagree. As indicated in the text of our opinion, the trial court also described its standard as "what physical and legal custody arrangement is in the minor child's, Wyatt, best interest at this time." We perceive these standards, although articulated in slightly different words, to be functionally and substantively identical, because the court's opinion makes clear that its application of the *Taylor* and *Sanders* factors to the evidence was done with goal of deciding what custody arrangement would be in Wyatt's best interest.

4. The court also found that the twelfth and thirteenth *Taylor* considerations, "impact on state or federal assistance" and "benefit to the parents," were not applicable to this case. *See Taylor*, 306 Md. 290,310-11 (1986).

5. For some considerations, the court merely referred to its previous findings related to other considerations or repeated previous findings. For the sake of brevity, we do not reproduce those duplicated findings here.

Cite as 3 MFLM Supp. 11 (2012)

Separation agreement: contractual analysis: unconscionability

Dean Lake

v.

Carol Tadiarca Lake

No. 1700, September Term, 2010

Argued Before: Matricciani, Hotten, Sharer, J. Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Hotten, J.

Filed: January 12, 2012. Unreported.

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,[1] married on June 25, 2004 and had two minor children as a result of the marriage. On June 4, 2009, while still married, the parties executed a handwritten "Agreement," whereby the parties agreed to dismiss the domestic violence petitions they had filed against each other, to have shared legal and physical custody of their minor children, and to pay household bills as they had in the past. On July 27, 2009, appellant filed for an absolute divorce from appellee in the Circuit Court for Prince George's County. On August 20, 2010, the court issued an order granting appellant an absolute divorce. However, the court did not incorporate the June 4 agreement between the parties in its judgment of absolute divorce. Appellant timely appealed, arguing that the court erred in not enforcing the parties' agreement as part of the divorce.[2] For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

During the course of the marriage between appellant and appellee, the parties' relationship became rocky. Each party filed a domestic violence petition against the other, but before the final hearing on the cross-petitions on June 4, 2009, the parties, each represented by counsel, executed an agreement ("the agreement"), which stated:

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

> The parties agree to dismiss their respective Domestic Violence Petitions presently filed.
>
> The parties agree to have shared legal and shared physical custody of their minor children.
>
> The parties agree to pay household bills as they have in the past.
>
> This agreement remains in effect until replaced by a subsequent written agreement or by order of court.

Though handwritten, both parties and their counsel signed the document entitled "Agreement" and dated June 4, 2009.

The parties separated on July 20, 2009, but they continued making biweekly contributions into their joint bank account to be used for household bills.[3] Appellant filed for divorce from appellee on July 27, 2009. Appellee stopped contributing to the joint bank account around October 1, 2009.

On August 20, 2010, the circuit court orally announced its findings, which in pertinent part stated:

> The plaintiff is seeking damages under a contract theory for $40,435 from Mrs. Lake. When the parties were in court on their cross-petitions for protection from domestic violence in June of 2009, they agreed to dismiss the domestic violence cases. In court that day, they did a handwritten agreement which was entered into this proceeding as Plaintiffs Exhibit No. 5. That agreement provided that the parties would share legal and physical custody of their children, which, of course, under the law, they would, as they were continuing to reside together. It also provided that the parties would continue to pay the household bills as they have in the past.
>
> The parties then proceeded to go back into the home and to reside together and they continued to live

together until another altercation in July of 2009. The Court finds at the time the agreement was signed, it was the intention of the parties to continue to live together in the family home. The Court has found that Mrs. Lake had already found an apartment, so I don't know that — it's doubtful that she intended to stay permanently with Mr. Lake. But neither party negotiated this agreement with any intention of living separately at the time, and there is little law to maintain that agreements reached between spouses for an intact — in an intact family living together is an enforceable contract.

The Court finds that at the time the agreement was signed, that Mrs. Lake was putting $4,000 per month into a joint account, and Mr. Lake was putting $5,000 per month into the account. Mr. Lake was paying certain bills from that account. Each party had individual bank accounts in their own names from which other expenditures were paid. Mrs. Lake paid into the joint account in July, August, and September of 2009. Thereafter, she was living on her own in her own place. She began to pay for household expenditures for herself and the children from her own accounts and was no longer contributing to the joint account.

Both parties have filed financial statements which show expenses well in excess of their incomes. Mr. Lake submitted an exhibit that he prepared that purports to list the bills he paid and the deposits made by each party. It just gives amounts, not — and doesn't specify what they're for, so it's hard for the Court to determine what those individual expenses were, but I'm sure that they were all for just regular monthly household expenses.

The Court finds that the contract is void and unenforceable and the contract fails to state with sufficient specificity what household bills would be paid. Mr. Lake interprets this agreement to mean his household bills and not household food, utilities, day care or any other family expenditures incurred by Mrs. Lake in her own residence following the separation. And most importantly, the Court finds that the agreement was not intended to address the financial obligations of the parties in anticipation of a separation but, rather, was intended to confirm what they had been doing while they lived together and cohabitated in the family home. Accordingly, the plaintiff's request for contract damages is denied.

In a written order dated August 20, 2010, the circuit court granted appellant an absolute divorce from appellee, restored appellee to the use of her former name, awarded appellee sole legal and primary physical custody of the parties' two minor children, reserving specified visitation rights to appellant, and ordered appellant to pay appellee $647 per month in child support.

STANDARD OF REVIEW

Pursuant to Maryland Rule 8-131 (c),[4] "[w]e review the circuit court's decision without deference to determine if errors of law exist." *Hill v. Hill*, 118 Md. App. 36, 40 (1997). "All factual findings of the circuit court, however, are entitled to deference and must be upheld unless clearly erroneous." *Id.*

DISCUSSION

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." The agreement merely stated that appellant and appellee "agree[d] to pay household bills as they have in the past."

Pursuant to Md. Code (2006), § 8-101 of the Family Law Article, 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) (quoting *Goldberg v. Goldberg*, 290 Md. 204, 212 (1981)). "'[C]ourts cannot make a contract for the parties or supply missing terms,' and 'if a contract omits essential terms,' it is 'unenforceable.'" *Honey v. Horsey*, 329 Md. 392, 419 (1993) (quoting *Rocklin v. Eanet*, 200 Md. 351, 357 (1952)). 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 to the circuit

court, demonstrating that appellant had been depositing $5,000 per month in the parties' joint bank account, that appellee had been depositing $4,000 per month, and that the parties used the joint bank account to pay their household bills. Therefore, according to appellant, appellee paying "household bills as [she] had in the past" meant contributing $4,000 per month into the parties' joint bank 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 household 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 that the circuit court's factual conclusions were clearly erroneous, nor do we conclude that the circuit court legally erred.

Additionally, even if the circuit court and this Court were to accept appellant's interpretation of the agreement, 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.[5] 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. In that case, the husband and wife were married for approximately fifteen years and had three children together. *Id*. at 333. At the time of their separation, which was partially the result of the wife's infidelity, the husband and wife owned a family home as tenants by the entireties. *Id*. The husband was an engineer technician, and the wife was a housewife. *Id*. After experiencing marital difficulties, the parties separated. *Id*. The wife's attorney prepared a separation agreement, and the husband, without counsel, signed the agreement in hopes that by signing the wife would agree to reconcile their marriage. *Id*. at 333-34. The separation agreement required the husband to convey the marital home and a 1982 Thunderbird automobile to the wife. *Id*. at 334. The separation agreement also required the husband to pay indefinitely the mortgage on the marital home, the car loan, and all marital financial obligations. *Id*. As a result, the wife was to receive property valued at approximately $131,000, with the husband retaining property valued at about $1,100. *Id*. The trial court struck the separation agreement on the basis of unconscionability. *Id*. The Court of Appeals upheld the invalidation of the separation agreement, noting that "[m]ost significant . . . [was] the undisputed fact that the husband's total weekly financial obligations under the agreement would exceed his weekly net salary." *Id*. "[T]he consideration was grossly inadequate and the burdens on the husband were oppressive to the point that they were impossible to perform." *Id*. at 341.

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 parties' children, would have imposed an impossible burden on appellee. Unlike the situation in *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 parties' joint bank account until approximately October 1, 2009, after moving out of the residence on July 20, 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 to modify or not enforce the agreement.

Lastly, the circuit court determined that the parties did not intend for the agreement to address their financial obligations in anticipation of separation. Instead, the circuit court concluded that at the time of the agreement, the parties intended to continue to live together in the family home. While general contractual principles apply to separation agreements, 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) (affirming a judicial declaration of invalidity of a property settlement agreement entered into by a married couple ten years before the parties actually separated). Whether the married parties anticipated divorce and intended to limit the marital rights 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 to the circuit court 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 of fact that the parties did not intend to separate at the time they signed the agreement 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 that "the agreement was not intended to address the financial obligations of the parties in anticipation of a separation but, rather, [sic] was intended to confirm what they had been doing while they lived together and cohabitated," was not clearly erroneous. In light of this factual conclusion, we cannot hold that the circuit court committed an error of law.

Based on the above, we uphold the circuit court's decision not to incorporate the agreement into the parties' judgment of absolute divorce or to award appellant damages arising out of the agreement.

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

FOOTNOTES

1. As a result of the divorce, appellee was restored to her former name, Carolyn Delapena Tadiarca.

2. In his brief, appellant summarized the issue as "whether a contract between spouses prior to their separation is valid and binding." However, appellant also subdivided the issue into three iterations of the same question, which we quote:

> 1. Did the trial court err as a matter of law when it failed to enforce the valid and binding contract between spouses because it believed that agreements between spouses of an intact family are not enforceable contracts?
>
> 2. Did the trial court err as a matter of law when it determined the parties' agreement lacked specificity?
>
> 3. Did the trial court err as a matter of law when it determined that since the parties' agreement [did] not speak to post separation obligations, the agreement was unenforceable after the parties' separation?

3. The parties agreed before the circuit court that the provision in the agreement that they pay household bills "as they have in the past" meant that appellee would contribute $2,000 each pay period into the parties' joint bank account.

4. Maryland Rule 8-131(e) provides:

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

5. Expenses incurred on behalf of children are often intertwined with household expenses, including food, shelter, and transportation. *See Voishan v. Palma*, 327 Md. 318, 334 (1992) (citing Robert G. Williams, *Guidelines for Child Support Orders, Fam.* L. Q., Vol. XXI, No. 3 (Fall 1987)).

Cite as 3 MFLM Supp. 15 (2012)

Divorce: pension calculation: revisory power

John B. Atcheson
v.
Linda E. Atcheson

No. 1584, September Term, 2010

Argued Before: Eyler, Deborah S., Kehoe, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 13, 2012. Unreported.

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 ("John"), the appellant, was divorced from Linda Atcheson ("Linda"), the appellee, in 1994.[1] On October 23, 2009, in the Circuit Court for Montgomery County, 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 for our review, 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. For the following reasons, we shall affirm the order of the circuit court.

FACTS AND PROCEEDINGS

The parties were married on June 2, 1975. They had two children, Margaret, born in 1981, and William, born in 1987. They were granted an absolute divorce on December 20, 1994, by the Circuit Court for Montgomery County. Both parties were represented by counsel during the divorce proceedings. The parties reached an oral agreement that was put on the record in open court on June 15, 1994, 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 the Banks [*sic*] case as the retirement benefit will be."[2] 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 on December 20, 1994, the court directed:

> ORDERED, that [John] is a participant in the Civil Service Retirement System and that [Linda] be, and hereby is, awarded an equitable interest in said pension with her interest being declared as Fifty Percent (50%) of the "marital share" of [John]'s gross monthly benefit, the marital share being that fraction of the benefit whose numerator shall be the number of months of the parties' marriage during which benefits were being accumulated, and whose denominator shall be the total number of months during which benefits were accumulated prior to the time when the payment of such benefits shall commence to be paid as, if and when received. [Linda] shall receive Fifty Percent (50%) of the aforesaid marital share of any payments made from the pension to the participant, including a former spouse survivor's benefit annuity in proportion to the marital share; . . .

The court retained jurisdiction

> to amend this Judgment for the pur-

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> pose of maintaining its qualifications as a domestic relations order acceptable to the Civil Service Retirement System; and both parties and the Office of Personnel Management shall take whatever actions may be necessary to establish or maintain these qualifications, provided that no such amendment shall require the Plan to provide any type or form of benefits, or any option not otherwise provided under the Plan, and further provided that no such amendment or the right of the [c]ourt to so amend will invalidate this Order as a Domestic Relations Order under the Code of Federal Regulations; . . . .

Also on December 20, 1994, the circuit court entered the QCO apportioning the parties' share of John's pension from the federal government. The QCO stated that John accrued creditable service during the marriage for a period of "200 months." The number "200" was handwritten three times on blank lines in the typed order. The QCO provided that, upon John's retirement from federal service, his monthly gross annuity would be multiplied by fifty percent. This product would be multiplied by a fraction, the numerator of which would be the 200 months of creditable service during the marriage and the denominator of which would be the then-undetermined total period of John's creditable federal service. In the QCO the court retained jurisdiction "to modify the technical, but not the substantive, provisions of this Order [for] the purposes of its acceptance by the [Office of Personnel Management] as an order acceptable for processing by OPM and to accomplish the transfers and payments ordered herein." The QCO was signed as "consented to" by Linda and by John's attorney on John's behalf.

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

On January 11, 2010, through counsel, Linda filed an opposition to John's motion to modify. She argued that the circuit court did not have revisory authority over the then-15-year-old judgment. She further argued that the court did not retain jurisdiction over the 1994 judgment and QCO to make substantive changes. Linda argued that, in the absence of evidence of fraud, mistake, or irregularity, the QCO could not be modified. She asked to be awarded attorney's fees incurred in responding to John's motion.

On March 31, 2010, the parties appeared for a hearing in the circuit court. The court heard oral argument but did not receive testimony. Linda did not concede that the correct marital share of John's creditable federal service was 177 months.

On July 13, 2010, the circuit court filed a memorandum opinion and order. The court found that 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 to amend the QCO. It also denied Linda's request for attorney's fees.

John timely noted this appeal.[3]

DISCUSSION

As noted above, we hold that the circuit court properly concluded that it lacked revisory authority over the QCO pursuant to Rule 2-535 and, in any case, John did not act with proper diligence in moving to amend the QCO. Accordingly, it is not necessary for us to address the other question John presents for review. As the issues of the court's revisory power and John's diligence are intertwined, we shall discuss them together.

Rule 2-535, captioned "Revisory Power," provides, in pertinent part:

> (a) **Generally**. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
>
> (b) **Fraud, mistake, irregularity**. On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.
>
> * * *
>
> (d) **Clerical mistakes**. Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of

> an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court)[4]

A court has general revisory power over a judgment, pursuant to paragraph (a), for 30 days after the judgment is entered. A court has limited revisory power over a judgment pursuant to paragraph (b) on motion by a party "at any time" to correct for "fraud, mistake, or irregularity," and pursuant to paragraph (d) "at any time" to correct for clerical mistakes. A party must show fraud, mistake, or irregularity by clear and convincing evidence. *Davis v. Att'y Gen. of Md.,* 187 Md. App. 110, 123 (2009).

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 but it is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, that truth was distorted by the complained of fraud." *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, i.e. where the court has no power to enter the judgment," and typically "occurs when a judgment has been entered in the absence of valid service of process; hence, the court never obtains personal jurisdiction over a party." *Leadroot v. Leadroot*, 147 Md. App. 672, 683-84 (2002), *cert. denied*, 373 Md. 407 (2003) (quoting *Tandra S. v. Tyrone W.*, 336 Md. 303, 317 (1994), *superseded by statute on other grounds*, 1995 Md. Laws, Chap. 248, as recognized in *Langston v. Riffe,* 359 Md. 396, 405 (2000)). "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, including, for example, failures to send notice of a default judgment, to send notice of an order dismissing an action, to mail a notice to the proper address, and to provide for required publication." *Thacker v. Hale*, 146 Md. App. 203, 219-20, *cert. denied*, 372 Md. 132 (2002) (quoting *Early*, 338 Md. at 652). "Clerical mistake" refers to a mistake by the clerk's office, such as an erroneous docket entry. *See Waller v. Md. Nat'l Bank*, 332 Md. 375, 379-80 n.1 (1993).

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) (quoting *J.T. Masonry Co., Inc. v. Oxford Const. Servs., Inc.*, 314 Md. 498, 506 (1989)). "Ordinary diligence" requires that a party move to amend the judgment "'as soon as' a party learns of the judgment and investigates the facts." *Id*.

In reviewing the denial of a Rule 2-53 5 motion to revise, the only issue before us is "whether the trial court erred as a matter of law or abused its discretion in denying the motion. Except to the extent that they are subsumed in that question, the merits of the judgment itself are not open to direct attack." *In re Adoption No. 93321055*, 344 Md. 458, 475-76 (1997) (citations omitted).

Because John's motion was filed more than 30 days after the 1994 QCO was entered, in order to prevail, 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 below (nor does he assert on appeal) 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 who supplied the number "200" that was handwritten on the typed order. There was no evidence or discussion at the June 15, 1994 hearing regarding what the correct number of months should have been. Even if there had been, however, such considerations would be moot because John's counsel signed the QCO as "consented to" on John's behalf, and there is no evidence that counsel was acting without authority in doing so.

Furthermore, the record makes plain that John did not act with ordinary diligence in bringing the alleged error in the QCO to the court's attention. The QCO was entered on December 20, 1994. Whether John received a copy shortly after that or not,[5] he was well aware that it was going to be entered. Both the QCO itself and the information on which John relies in his brief regarding the number of months he spent in federal service during the marriage were available to him as of December 20, 1994. As has long been the law in Maryland, "a litigant must keep himself informed in regard to what is occurring in a pending case." *Penn Cent. Co. v. Buffalo Spring & Equip. Co., Inc.*, 260 Md. 576, 582 (1971) (*citing Tasea Inv. Corp. v. Dale*, 222 Md. 474, 479 (1960)). Waiting nearly 15 years to investigate the matter and file a motion to modify the QCO is not ordinary diligence, and the circuit court did not err in so finding. *See, e.g., Thacker*, 146 Md. App. at 230 (holding that former husband did not exercise ordinary diligence when he waited twelve years to challenge acceleration clause in judgment of divorce) (citing *Platt v. Platt*, 302 Md. 9, 16-17 (1984) (finding lack

of ordinary diligence when former husband waited five years to challenge provision in divorce decree); *Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 389 (1975) (finding lack of ordinary diligence when purchaser waited six months to challenge judgment ratifying foreclosure sale)).

A court may avoid the strictures of Rule 2-535 by sufficiently reserving jurisdiction over the matter in the original order. *See Mills v. Mills*, 178 Md. App. 728 (2008). In *Mills*, the court retained jurisdiction in its original Qualified Domestic Relations Order ("QDRO")

> over the parties to this proceeding and continuing jurisdiction (i) to modify this Order as necessary to insure that it is an order acceptable by the Plan; (ii) to settle any and all disputes between the parties relative to the benefits provided in this Order; and (iii) to enter such orders *nunc pro tunc* as may be required to carry out the intention of the parties as expressed herein and in the aforesaid agreement of the parties.

178 Md. App. at 737. 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 by the [Office of Personnel Management ("OPM")] as an order acceptable for processing by OPM and to accomplish the transfers and payments ordered herein." The record does not suggest that the original QCO was in a form that was unacceptable to the Office of Personnel Management. Changing the number of months representing the marital share of John's pension would be a substantive, not a technical, change. The court's reservation of jurisdiction in the QCO 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. In *Heger*, we affirmed a circuit court's decision to amend its original order to correct for an obvious computational error resulting from the court's miscalculation of the number of months the working spouse was employed during the marriage. 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 in the original order, the error was patently obvious. *See id.* at 105-06, 110-12. There is no such data in this case. The record contains nothing but the handwritten "200" months. We can only speculate as to how the parties and/or the circuit court arrived at this number, or whether it represented a negotiated agreement between the parties. Furthermore, unlike in the case at bar, the aggrieved spouse in *Heger* acted with ordinary diligence in bringing the error to the court's attention.

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

FOOTNOTES

1. We shall use the parties' first names for ease of discussion, as they have the same last name.

2. John's counsel was *referring to Bangs v. Bangs*, 59 Md. App. 350 (1984). In *Bangs* we approved a formula whereby the marital share of a party's pension is calculated by a fraction, the numerator of which is the number of months that the party worked in the position through which the pension is earned and was married, and the denominator of which is the entire number of months the party worked in the position through which the pension is earned, up to the date of retirement.

3. Linda has not filed a brief in this Court.

4. Rule 2-535 minors Md. Code (1974, 2006 Repl. Vol.), section 6-408 of the Courts and Judicial Proceedings Article, which provides:

> For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule.

5. In his brief, John asserts that he did not receive a copy of the QCO nor did he know of its contents until he started preparing for retirement in the fall of 2009. This is insignificant, as the QCO was available for inspection as a public record and a reasonable person acting with ordinary diligence would likely have obtained a copy of the QCO much sooner. There is no plausible explanation for why John would not have taken steps to obtain a copy of the QCO after it was issued.

Cite as 3 MFLM Supp. 19 (2012)

CINA: change in permanency plan: passage of time

In re: Maria B.

No. 929, September Term, 2011

Argued Before: Meredith, Watts, Kenney, James A., III (Retired, Specially Assigned), JJ.

Opinion by Watts, J.

Filed: January 18, 2012. Unreported.

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, appeals the decision of the Circuit Court for Harford County amending the permanency plan for her daughter, Maria B., from a primary plan of reunification to a primary plan of adoption with a secondary plan of reunification. Appellant raises the following issue which we quote:

> I. Did the Circuit Court for Harford County 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?

We answer this question in the negative and, as such, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2009, the Harford County Department of Social Services ("HCDSS") filed a petition with the Circuit Court for Harford County requesting that Maria B. be found a Child in Need of Assistance ("CINA")[1] and placed in foster care. In the CINA petition, HCDSS alleged that on October 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. Due to failing health, Rose B. was unable to continue providing care for the children. On October 13, 2009, HCDSS removed the children and placed them in a licensed foster home. On October 14, 2009, a shelter care hearing was held in which the circuit court temporarily placed Maria B. in shelter care with Rose B. Adjudication of the case was scheduled for November 10, 2009.[2]

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

On November 10, 2009, at the adjudicatory hearing, the circuit court found the allegations in the CINA petition filed by HCDSS to be proven by a preponderance of the evidence. HCDSS recommended that Maria B. be found a CINA, committed to HCDSS, and placed in the care of Rose B. The circuit court adopted this recommendation. The circuit court ordered that appellant have supervised visitation as directed by HCDSS, that appellant 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 3, 2010, at the review hearing, HCDSS stated that appellant had not completed a Service Agreement. Despite several attempts by HCDSS to reach her, appellant had not submitted to mental health treatment, and had not attended parenting classes as previously ordered by the circuit court. Finding that the efforts made by HCDSS were reasonable, the circuit court ordered that Maria B. continue to be committed to HCDSS in the care of Rose B., and continued appellant's supervised visitation with Maria B. The circuit court ordered the primary permanency plan for Maria B. be reunification by September 2010. Appellant was again ordered to submit to mental health treatment and to establish and comply with a Service Agreement. A review hearing was scheduled for July 7, 2010.

On March 5, 2010, Maria B. was removed from Rose B.'s care. Rose B. had been scheduled for an outpatient medical procedure on March 5, 2010, during which Maria B.'s grandmother[3] was to care for Maria B. The outpatient procedure became an inpatient hospitalization, and Maria B.'s grandmother contacted HCDSS, stating that there was no one to care for Maria B., as appellant only had supervised visitation. Upon removal from Rose B., HCDSS placed Maria B. in foster care.

On April 14, 2010, a hearing was held at which HCDSS submitted a report recommending that Maria B. continue to be committed to HCDSS and remain in foster care. Appellant requested that Maria B. be placed in her care. The circuit court denied appellant's

request and ordered that Maria B. remain in foster care. The circuit court ordered that appellant have visitation every other weekend, supervised as directed by HCDSS, with the expectation that Rose B. would supervise these visits in her home. The permanency plan for Maria B. remained reunification by September 2010. Appellant was again ordered to submit to mental health treatment and to establish and comply with a Service Agreement. A permanency planning and review hearing was scheduled for June 23, 2010.

Between April 14, 2010, and June 1, 2010, appellant kept in contact with HCDSS regarding her progress, including using HCDSS resources to obtain transportation to her place of employment. Appellant, however, failed to provide HCDSS with documentation of: (1) attendance of parenting classes; (2) participation in therapy; or (3) pay stubs or proof of employment. Appellant's alternate weekend visitation with Maria B. at the home of Rose B. continued until June 1, 2010, at which time appellant was involved in an altercation with Nathan B., Maria B.'s father, during which the police were called. On the same day of the altercation, the HCDSS worker assigned to Maria B.'s case received several messages from appellant stating that she did not want a weekend visit. As a result, HCDSS suspended appellant's visitation with Maria B. until appellant could assure HCDSS that Maria B. would be safe during the weekend visits. Appellant did not contact HCDSS to discuss resuming visitation prior to the June 23, 2010, hearing.

At the June 23, 2010, hearing, HCDSS submitted a report detailing the steps taken by HCDSS to achieve the permanency plan of reunification. These measures included: (1) attempting several times to enter into a Service Agreement with appellant, as ordered by the court, which appellant never signed; (2) making referrals for appellant for mental health treatment at Emmorton Psych/Emmorton Treatment Services, to be paid for by HCDSS, with which appellant never followed through; (3) referring appellant to a parenting skills class beginning on February 24, 2010, which appellant never attended; and (4) offering to provide transportation and financial assistance for appellant to obtain her GED.[4]

At the June 23, 2010, hearing, the circuit court ordered that Maria B. continue in the custody of HCDSS and remain in foster care. Appellant continued to have supervised visitation at the direction of HCDSS. The permanency plan for Maria B. remained reunification, but the projected implementation date was moved to December 2010. Appellant was ordered to submit to parenting classes and mental health treatment and to establish and comply with a Service Agreement. A permanency planning hearing was scheduled for September 22, 2010.

On July 1, 2010, appellant was involved in another altercation with Nathan B. The police were called, and appellant was arrested. According to appellant's counsel at the September 22, 2010 review hearing, appellant "did have some difficulties with the legal system, beginning on July 1. She did eventually plead guilty to fourth degree burglary . . . and she got [probation before judgment]." After the hearing on the burglary charge, HCDSS became aware that appellant no longer lived in the same location. Appellant had been living with her grandmother, Rose B. who moved to Florida, leaving appellant with no permanent place to live.

From the June 1, 2010, incident to the September 22, 2010, permanency planning hearing, appellant had only sporadic contact with HCDSS. During that time, appellant attended two of five scheduled mental health therapy appointments and attended two parenting classes in June 2010. Appellant visited with Maria B. only once during this period.

At the September 22, 2010, permanency planning hearing, the circuit court ordered that Maria B. continue in the custody of HCDSS and remain in foster care. Maria B.'s primary permanency plan remained reunification, with the projected implementation extended to March 2011. Appellant continued to have supervised visitation as directed by HCDSS. Appellant was again ordered to submit to parenting classes and mental health treatment, and to establish and comply with a Service Agreement. A permanency plan and review hearing was scheduled for March 23, 2011.[5]

In November 2010, appellant obtained new housing and notified HCDSS of the change in January 2011. On February 4, 2011, HCDSS completed a home inspection, concluding that the home met basic health and safety standards. As appellant's boyfriend resided in the home, HCDSS notified appellant that a background check of appellant's boyfriend was required and that the boyfriend needed to be fingerprinted. Appellant's boyfriend never took steps to complete either of these tasks. At a June 10, 2011, hearing, appellant testified that her boyfriend no longer resided with her.

Prior to March 23, 2011, appellant attended three of seven scheduled mental health treatment appointments, the most recent missed appointment having been scheduled for a month before the hearing. Appellant cancelled the last appointment when a cab arranged by HCDSS to transport her to the appointment would not transport her boyfriend as well. On March 22, 2011, appellant enrolled in a parenting class. In April 2011, appellant signed a Service Agreement.

On March 23, 2011, a permanency planning hearing was held before a Master. At the hearing,

HCDSS recommended that Maria B.'s primary permanency plan be changed to adoption with a secondary permanency 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 circuit court's previous 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. The Master ruled orally from the bench as follows:

> [Appellant] has been given ample opportunities to demonstrate that she was up to the task of meeting her own needs, and also that she was ready, willing and able to have the child back in her care and meet the needs of the child on a full time basis.
>
> * * *
>
> [HCDSS] has made available resources, services, opportunities to participate, to visit, to do things, and [appellant] has run hot and cold on this question as to whether she is going to cooperate fully. There just has not been demonstration on the part of [appellant] that she has focused on the goal of working with [HCDSS], accepting services, following through on services, going to appointments, getting therapy, doing the things that demonstrate that she had accepted her responsibilities as a parent and was going to do everything within her power to reunify with her child.
>
> * * *
>
> After 17 months, I think [HCDSS] has made reasonable efforts to achieve reunification, but I don't believe [appellant] has made this a sufficient priority that I should just indefinitely continue reunification efforts. Therefore, after 17 months it is time for [HCDSS] to adopt a new plan, to pursue termination of parental rights, to pursue adoption.

Regarding appellant's progress immediately prior to the hearing, the Master stated: "I am persuaded by [appellant]'s recent activities, the big step being securing appropriate housing and employment, those are two positive steps in her life. For that reason, I think a secondary permanency plan is justified in this case[.]" As a result, the Master adopted the recommendation of HCDSS, changing Maria B.'s primary permanency plan to adoption, but adding a secondary permanency plan of reunification. Although visitation is normally reduced when a child's permanency plan is adoption, the Master stated that "because the reunification still remains on the radar in this case, [ ]visitation should be appropriate to that plan[,]" and consequently, appellant's visitation should continue at least every two weeks supervised by HCDSS. The Master recommended that appellant be ordered to attend parenting classes.[6]

On March 23, 2011, appellant filed Exceptions to the recommendations of the Master with the circuit court, requesting a *de nova* hearing on the Exceptions. A hearing was scheduled for June 10, 2011. At the hearing, according to Adrienna Christy of HCDSS, between September 2010, and June 10, 2011, appellant only visited Maria B. twice.[7] Appellant attended three parenting classes, and provided HCDSS with one pay stub. Upon hearing the 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 stated:

> [R]easonable attempts to provide services, efforts have been made, and [appellant] hasn't taken advantage of them to the extent that she needed to do so . . . She still has time, but I don't see any reason to make the primary plan reunification or return to [appellant] if she's not going to take the steps that she needs to at this time. So the Court finds that reasonable efforts have been made. She hasn't taken the opportunity to avail herself of all of the things that have been made available to her, not just in a timely manner but in a thorough enough manner, and that the burden — that she has had knowledge of what's been required and simply has fallen short.

The circuit court determined that appellant had not demonstrated sufficient commitment to Maria B. to justify changing the primary permanency plan back to reunification. As a result, the circuit court affirmed the Order of the Master changing Maria B.'s primary permanency plan to adoption with a secondary permanency plan of reunification. On June 16, 2011, appellant noted an appeal.

DISCUSSION

Appellant argues that the circuit court abused its discretion by changing Maria B's. permanency plan from a primary plan of reunification to a primary plan

of adoption with a secondary plan of reunification. Appellant contends that, in deciding to alter Maria B.'s permanency plan, 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 a sufficient grounds for a change of the permanency plan. At oral argument, appellant argued that the circuit court also erred in failing to take into account hardships in her life which made compliance with the court orders difficult.

In contrast, HCDSS[8] argues that the circuit court properly changed Maria B.'s permanency plan. HCDSS contends that, in altering the permanency plan, the circuit court considered not only the length of time Maria B. remained committed to HCDSS, but also efforts made by HCDSS to assist appellant in completing the requirements necessary before reunification became possible, as well as appellant's lack of response to those efforts. HCDSS asserts that the circuit court correctly based the change in Maria B.'s 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 Court of Appeals recently articulated the standards of appellate review in child custody cases:

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

In re Shirley B., 419 Md. 1, 18 (2011) (citing In re Yve S., 373 Md. 551, 586 (2003) (alterations in original).

In Maryland, when a child is adjudicated a CINA and placed in a foster home, the juvenile court is required to hold a hearing to determine a permanency plan for the child. CJP §3-823(b).[9] The permanency plan must be consistent with the best interests of the child, and may range from reunification with the child's parents to adoption by a non-relative, or some other, alternative living arrangement. CJP § 3-823(e).[10] Once an initial permanency plan has been put in place, the juvenile court must review the plan at least every six months. CJP § 3-823(h)(1).[11] Pursuant to CJP § 3-823(e)(2), at each review, the juvenile court must determine whether the current permanency plan is in the best interests of the child in light of the factors laid out in the Md. Code Ann., Family Law Art. ("FL") § 5-525(f)(1), including:

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

Based upon this determination, the juvenile court must:

> (i) Determine the continuing necessity for and appropriateness of the commitment;
>
> (ii) Determine and document in its order whether reasonable efforts have been made to finalize the permanency plan that is in effect;
>
> (iii) Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment;
>
> (iv) Project a reasonable date by which a child in placement may be returned home, placed in a preadoptive home, or placed under a legal guardianship;
>
> (v) Evaluate the safety of the child and take necessary measures to protect the child; and
>
> (vi) Change the permanency plan if a

> change in the permanency plan would be in the child's best interest.

CJP § 3-823(h)(2).

Application of these statutes must be tempered by both the recognition that "parents have a fundamental, constitutionally-based right to raise their children free from undue and unwarranted interference on the part of the State, including its courts" and the recognition of a rebuttable presumption that "it is in the best interest of the children to remain in the care and custody of the [biological] parent[]." In re Shirley B., 419 Md. at 21 (quoting In re Adoption/Guardianship of Rashawn H., 402 Md. 477, 495 (2007)) (alterations in original). Any court considering child custody, therefore, must balance these two interests with the State's interest in protecting children from abuse or neglect at the hands of those parents. In re Shirley B., 419 Md. at 21. This balance is altered somewhat in cases in which there has been a proven history of neglect. In such cases, the parent carries the burden of proof to show that there is no probability of further neglect or abuse. Id. at 21-22; In re Yve S., 373 Md. at 587.

Returning to the case at hand, after review of the record, we conclude that the circuit court based its finding on factors other than the mere amount of time that Maria B. had been in the care of others. 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 with court orders, stating that it had been made clear to appellant for over a year what she needed to do to regain custody of Maria B., but appellant had not taken appropriate steps to achieve those goals until immediately before the hearing. The requirements placed on appellant 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 of the juvenile court under FL § 5-525(f)(1) — "The local department shall consider the following factors in determining the permanency plan that is in the best interests of the child: (i) the child's ability to be safe and healthy in the home of the child's parent[.]" The circuit court considered evidence of appellant's progress toward fulfilling those requirements, and found that, even recently, appellant had not shown sufficient compliance to prove her commitment to providing a safe home for Maria B. Outside of the scope of the passage of time, the court found that it would be in Maria B.'s best interest to change the permanency plan to adoption with a secondary plan of reunification.

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 of these considerations necessarily involve the circuit court considering how long a child has been in foster care. Based on the circuit court's consideration of appellant's non-compliance, with prior court orders, coupled with the amount of time Maria B. remained in the care of others, the circuit court properly determined that a change in the permanency plan was in Maria B.'s best interest.[12]

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 court orders to attend parenting classes, mental health treatment, and enter into a Service Agreement/Safety Plan. One of the circumstances that prevented reunification 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, however, 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 to a primary plan of adoption with a secondary plan of reunification, the circuit court held review hearings of Maria B's status as a CINA and her commitment to HCDSS on five separate occasions—(1) March 3, 2010; (2) April 14, 2010; (3) June 23, 2010; (4) September 22, 2010; and (5) March 23, 2011. At each hearing, the circuit 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 to adoption with a secondary plan of reunification.

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

FOOTNOTES

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

> "Child in need of assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are

unable or unwilling to give proper care and attention to the child and the child's needs.

2. Prior to the adjudicatory hearing, appellant underwent a Substance Abuse evaluation at Emmorton Psych/Emmorton Treatment Services at the request of HCDSS. The evaluation indicated that appellant did not meet criteria for any substance abuse treatment.

3. The record does not disclose the name of Maria B's grandmother.

4. Appellant had expressed interest in obtaining her GED but never provided proof of participation in a program to HCDSS.

5. Prior to the March 23, 2011, hearing, HCDSS completed an Interstate Compact for Maria B. to potentially be placed with relatives in Florida. HCDSS was concerned about the distance the child would be from the Maryland family and that the Florida relatives had seen Maria B. only once. Additionally, appellant and Nathan B. both objected to Maria B. being placed with the Florida relatives. As a result, HCDSS referred Maria B. for a foster/adoptive home in Harford County.

6. A permanency planning review was scheduled for September 21, 2011.

7. Christy acknowledged that the number may have been "off."

8. 0n December 19, 2011, Maria B., through counsel, filed a Line Adopting the brief of HCDSS.

9. CJP § 3-823(b) provides:

> (I) The court shall hold a permanency planning hearing to determine the permanency plan for a child:
>
> (i) No later than 11 months after a child committed under § 3-819 of this subtitle or continued in a voluntary placement under § 3-819.1(b) of this subtitle enters an out-of-home placement; or
>
> (ii) Within 30 days after the court finds that reasonable efforts to reunify a child with the child's parent or guardian are not required based on a finding that a circumstance enumerated in § 3-812 of this subtitle has occurred.

10. CJP § 3-823(e) provides, in pertinent part:

> (1) At a permanency planning hearing, the court shall:
>
> (i) Determine the child's permanency plan, which, to the extent consistent with the best interests of the child, may be, in descending order of priority:
>
> 1. Reunification with the parent or guardian;
>
> 2. Placement with a relative for:
>
> A. Adoption; or
>
> B. Custody and guardianship under § 3-819.2 of this subtitle;
>
> 3. Adoption by a nonrelative;
>
> 4. Custody and guardianship by a nonrelative under § 3-819.2 of this subtitle; or
>
> 5. Another planned permanent living arrangement that:
>
> A. Addresses the individualized needs of the child, including the child's educational plan, emotional stability, physical placement, and socialization needs; and
>
> B. Includes goals that promote the continuity of relations
>
> with individuals who will fill a lasting and significant role in the child's life[.]

11. CJP § 3-823(h) provides, in pertinent part:

> (1) (i) Except as provided in subparagraphs (ii) and (iii) of this paragraph, the court shall conduct a hearing to review the permanency plan at least every 6 months until commitment is rescinded or a voluntary placement is terminated.

12. Appellant wrongly relies on McDermott v. Dougherty, 385 Md. 320 (2005), in which the Court of Appeals found that the amount time a father was away from his child was an insufficient basis on which to remove the child from the father's custody. The father in McDermott had never been adjudged an unfit parent. Id. at 325. Rather, the father was required to spend long periods of time away from his son as a condition of his employment. Id. The Court of Appeals stated that the passage of time alone did not make the father unfit and, as such, the Court would not interfere with the father's fundamental right as a parent to raise his child. Id.. at 418. Appellant also wrongly relies on In re Adoption/Guardianship of Alonza D., Jr., 412 Md. 442 (2010), a case in which the Court of Appeals held "there must first be a finding that the natural parents are unfit, or extraordinary circumstances detrimental to the welfare of the child must first be determined to exist, before the 'best interest of the child' test may be applied when private third-parties dispute custody with natural parents." Id. at 461 (citation omitted).

Cite as 3 MFLM Supp. 25 (2012)

Protective order: sanctions for pursuing: matters previously litigated

Joanna Davis, et al.

v.

Michael P. Petito

No. 2241, September Term, 2010

Argued Before: Eyler, Deborah S., Graeff, Watts, JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 18, 2012. Unreported.

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 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, the appellants, violated Rule 1-341 by pursuing a domestic relations protective order against Davis's ex-husband, Michael A. Petito, Jr., the appellee, based upon allegations that Petito had sexually abused the couple's daughter, Sophia.

Davis's petition was filed by her counsel on September 10, 2010, in the District Court of Maryland for Worcester County. At the time, Sophia was six years old. The district court held an *ex parte* hearing the same day and granted the petition, entering a temporary protective order against Petito. On September 17, 2010, the day of the scheduled hearing on Davis's petition for a final protective order, the district court transferred the case to the Circuit Court for Wicomico County. It did so because, earlier the same year, in that forum, Davis and Petito had engaged in a hotly contested and lengthy custody modification proceeding, in which Davis had alleged that Petito had sexually abused Sophia ("the Custody Modification Case"). The court in the Custody Modification Case had ruled, on February 12, 2010, that Davis did not prove that any sexual abuse had occurred.

On September 28, 2010, the circuit court reserved on a motion to dismiss filed by Petito, heard evidence on the petition for a final protective order, and denied it. The court also heard argument on a motion for sanctions Petito had filed against Davis and her lawyers pursuant to Rule 1-341. On November 1, 2010, the circuit court issued a memorandum opinion and order granting the motion for sanctions and ordering Davis and her lawyers to pay Petito's attorneys' fees, in the stipulated amount of $9,385. That sum was reduced to judgment.

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

In this appeal, Davis does not challenge the circuit court's denial of her petition for a final protective order. The appeal by Davis and her counsel is confined to the court's ruling imposing sanctions under Rule 1-341. The appellants pose four questions for review, which we have reworded:

I. Did the circuit court err in finding that Davis and her lawyers maintained the final protective order proceeding without substantial justification given that the temporary *ex parte* protective order was granted, and therefore must have been supported by reasonable grounds?

II. Did the circuit court err in finding that the petition for relief from abuse was maintained without substantial justification when there were colorable factual allegations of abuse and, at the final protective order hearing, material factual evidence of abuse was introduced?

III. Did the circuit court err in finding a violation of Rule 1-341 without making a finding of intentional misconduct or abuse of the legal process?

IV. Did the circuit court err in finding a violation of Rule 1-341 by a mother and her lawyers who reasonably relied upon evidence indicating that the mother's daughter had been sexually abused?

For the following reasons, we shall affirm the

order of the Circuit Court for Wicomico County.

FACTS AND PROCEEDINGS

Davis and Petito were married in 1998. Sophia, their only child, was born in 2003. Davis and Petito were granted a limited divorce on February 24, 2005, and an absolute divorce on April 11, 2006. Davis was awarded primary physical custody of Sophia, and Petito was granted overnight visitation every other weekend and every other Wednesday. Davis and Petito's relationship post-divorce was one of ongoing hostility.

In 2008, Davis and Petito noticed that Sophia was having anxiety problems in relation to her visits with Petito. On October 20, 2008, Sophia began therapy with Donna Leffew, a licensed clinical professional counselor ("LCPC"). Sophia told Leffew about a nightmare she had had in which a "monster" did "bad things to her." Based on this nightmare, Leffew thought that Sophia had been the victim of sexual abuse. On December 3, 2008, Leffew made a report of suspected child sexual abuse to the Wicomico County Department of Social Services ("Wicomico DSS").

On December 4, 2008, in the Circuit Court for Wicomico County, Davis filed a petition for a domestic violence protective order against Petito, alleging that he was sexually abusing Sophia. The petition did not specify the dates or locations of any of the alleged acts of abuse. The court entered an *ex parte* temporary protective order. On December 19, 2008, the court held a final protective order hearing and denied all relief.

On December 22, 2008, Davis filed the Custody Modification Case. She sought emergency relief, alleging that Petito had sexually abused Sophia when she was in his custody. The emergency complaint did not specify the dates or locations of the alleged acts of abuse.

In the meantime, on December 4, 2008, Jennifer Wehberg, M.D., began a forensic evaluation of Sophia. Wehberg finalized her forensic evaluation of Sophia on January 15, 2009, finding no physical evidence of sexual abuse.

Before then, on December 29 and 31, 2008, Farah Smith, a Wicomico DSS LCPC, conducted an extended forensic evaluation of Sophia. During the evaluation, Sophia described a monster — who resembled Petito — who came into her bedroom at night, "poked her in the butt," and made a "grunting noise." Based on this information, Smith recommended that the Wicomico DSS make a finding of indicated child sexual abuse against Petito.

On December 31, 2008, Petito was arrested and charged with a third-degree sex offense. The criminal case was placed on the stet docket on the condition that Petito have no contact with Sophia outside of court-ordered therapeutic supervised visitation pending the outcome of the Custody Modification Case. On the advice of Christy McGurgan, LCPC, one of the therapists treating Sophia, Davis did not permit Sophia to attend any of the court-ordered visitation sessions with Petito. On March 5, 2009, Petito counterclaimed for modification of custody.

In the Custody Modification Case, the circuit court bifurcated the issues of sexual abuse and custody modification, addressing sexual abuse first. The trial on sexual abuse took place over five days in November and December 2009 and February 2010. Both parties presented the testimony of expert and lay witnesses.

On February 12, 2010, the court issued a written opinion finding that Davis had failed to show by a preponderance of the evidence that Petito had sexually abused Sophia. Specifically, the court found that Sophia "has [never] independently connected the 'Monster' to [Petito] and [Petito] to sexual abuse," and that the statements Sophia had made that had been interpreted as meaning that she had been abused had been elicited "in response to leading, suggestive, or improper questions by biased interviewers." The court determined that McGurgan should not continue as a therapist for Sophia, as that would not be in Sophia's best interest; Pam Schulte, another therapist, was substituted in that role. Upon a request by McGurgan, the court ruled that McGurgan could see Sophia for one last visit in May 2010, just to say goodbye.

Trial on the remaining issues proceeded. On April 16, 2010, the court found that the deterioration of Davis and Petito's relationship, which had resulted from the unsupported accusation of sexual abuse, was a material change in circumstances. The court granted sole legal and physical custody to Davis, with visitation to Petito. At the same time, the court established a detailed tiered visitation schedule by which Sophia and Petito would resume their father-daughter relationship, first through supervised therapeutic visitation, then supervised visitation, and ultimately, beginning on August 18, 2010, unsupervised visitation.[1] The court also awarded Petito $30,773.54 in attorneys' fees.

Davis noted an appeal to this Court. On February 28, 2011, we affirmed the judgment in a reported opinion, *Davis v. Petito*, 197 Md. App. 487 (2011). Thereafter, the Court of Appeals granted *certiorari* on the question whether the court had erred or abused its discretion in its award of attorneys' fees to Petito. 420 Md. 81 (2011). That appeal remains pending.

In the meantime, as noted above, on September 10, 2010 — less than a month after resumption of unsupervised visits between Petito and Sophia under the operative court order — Davis filed the domestic

violence petition for a protective order from which this appeal stems. The petition was filed in the District Court for Worcester County, not in Wicomico County, where the Custody Modification Case had been filed and tried. In the petition, Davis gave a recitation of the Wicomico DSS investigation, the related criminal charges against Petito, and the proceedings in the Custody Modification Case. She alleged that, after the conclusion of the Custody Modification Case, McGurgan "realized during counseling sessions that Sophia was referencing new and different abuse by [Petito] in a different location," *i.e.*, at Petito's parents' house in Worcester County; and on that basis McGurgan had referred the case to the Worcester County Department of Social Services ("Worcester DSS") for investigation. (In fact, as we shall discuss, McGurgan's referral to the Worcester DSS was made on February 18, 2010, six days after the court issued its order ruling that sexual abuse had not been proven and that the statements Sophia had made that the various counselors had interpreted to mean she had been sexually abused were the product of leading, suggestive, or improper questions by the interviewers.) Davis did not include in her allegations specific dates of alleged abuse, citing "Sophia's young age and the fact that all of the abuse occurred outside of [Davis's] presence."

Once the referral to the Worcester DSS was made, Denise Burton, a child abuse investigator and social worker, interviewed Sophia twice, on March 2 and March 9, 2010. Burton had Sophia draw pictures of what Sophia believed had happened to her. Sophia drew a picture of a "stick" with which, Sophia said, Petito poked her "in the hiny." On July 26, 2010, Burton recommended a finding of "indicated" child sexual abuse against Petito.

The district court, Judge Dale R. Cathell, retired and specially assigned, held an *ex parte* hearing on Davis's petition the same day it was filed. Judge Cathell expressed strong misgivings about Davis's counsel's motivations for filing the petition in Worcester County:

> THE COURT: Okay. Gentlemen, I want you to explain to me why I shouldn't at least consider the fact that you guys are judge shopping, because you litigated this issue ad infinitum in Wicomico County, and Wicomico County judges have found to the contrary of what's in this report.
>
> [DAVIS'S COUNSEL]: Yes, Your Honor.
>
> THE COURT: You don't get 23 cracks at the apple in a sexual abuse case. If you litigate in one county, that's where you are. Why should this county — you're asking me to overrule what a Wicomico County judge has said because you say that whatever was alleged to have occurred in Wicomico County, which that judge said didn't occur, now is occurring in Worcester County, Maryland.
>
> * * *
>
> It seems to me from reading the statement that contains the petition, that the allegations of abuse in this case are very similar, if not identical, to the allegations of abuse that occurred over in Wicomico County, it's just a different place, a different place that it's alleged to have occurred, when a judge has found it didn't occur any other places.

When Judge Cathell asked Davis's counsel why the petition was not filed in Wicomico County, "on the grounds of a new allegation," Davis's counsel cited the then-pending appeal of the Custody Modification Case to this Court, saying, "we just felt that this was separate abuse in a different county, a different residence, and that, secondly, this is a newer abuse that was not adjudicated in that previous matter."

Davis testified at the *ex parte* hearing. She stated that she was seeking a protective order because "[Petito] abused my daughter. She's showing signs of it. She still, when she visits with him, she gets very upset. She has stomach issues because of it. She's having to see a therapist because of it." Davis testified that Sophia told her that, while she was in her room at Petito's parents' house in Worcester County, "[Petito] would come in and slam the door, and he would take his stick out and stuff would come out of it."[2] Davis also recounted the Worcester DSS investigation and stated her belief that Petito was "grooming [Sophia] to start abusing her again." Davis did not give any date on which she was contending the acts of abuse happened.

Stating he was doing so "very reluctantly," Judge Cathell granted a temporary protective order. He cautioned that he would not grant a final protective order "if I didn't have more evidence than this in light of the fact that I think you guys are judge shopping."

On September 15, 2010, Petito filed motions to transfer venue, to dismiss, and for sanctions. The motion to transfer venue was granted on September 17, 2010 — the day the final protective order hearing originally was scheduled to take place — and the case was transferred to the Circuit Court for Wicomico County.[3] On September 24, 2010, Davis filed a response in opposition to Petito's motion to dismiss

and a cross-motion for sanctions, seeking attorneys' fees incurred in responding to Petito's motion to dismiss.

By consent of the parties, the final protective order hearing was delayed until September 28, 2010. The judge who heard Davis's petition for a final protective order was the same judge who had presided over the Custody Modification Case. Davis and Petito were present and represented by counsel.

The court first entertained oral argument on Petito's motion to dismiss which, as the court noted, was converted to a motion for summary judgment upon consideration of matters outside of the pleadings. Petito argued that the petition for protective order was barred by *res judicata* because it was based on matters already litigated in the Custody Modification Case — specifically, allegations of abuse that took place prior to the court's February 12, 2010 finding that Davis had not proven that Petito had abused Sophia.[4] Davis's counsel stated that there would be testimony about Sophia's visits with her father on July 31, August 7, and August 18, 2010, that would indicate that something had happened. (This was the first mention of specific dates on which Petito allegedly abused Sophia.) The court further probed, asking whether these "behaviors" were different from those she already had heard evidence about in the Custody Modification Case. Counsel responded that the behaviors were not "completely different" but were "continuing new conduct." Emphasizing that Sophia's reactions to visitations with her father had been "fully litigated" in the Custody Modification Case, the judge instructed counsel to tell her "now" if something new had occurred. Counsel responded that the evidence of something new was a cell phone video taken by Davis on July 31, 2010, in which Sophia said, "he hurt me." Counsel also pointed to the July 2010 Worcester DSS finding of indicated abuse.

Explaining that she could not determine whether the alleged acts of abuse were the same acts that had been litigated in the Custody Modification Case without hearing evidence, the court reserved ruling on Petito's motion and allowed Davis to call witnesses.

Davis testified that during the week of July 26, 2010, she received a letter from the Worcester DSS stating there was an "indicated" finding that Sophia had been sexually abused and identifying Petito as the abuser. Davis stated that, after the court's February 12, 2010 order in the Custody Modification Case, Sophia had been having stomach problems, had suffered episodes of incontinence, had "drawn some violent things," had hit her male dolls, and had reenacted a funeral with her dolls. Davis emphasized that, pursuant to the order issued in the Custody Modification Case, Sophia had started having supervised visits with Petito in "June or July" 2010 and unsupervised visits on August 18, 2010. The visits took place at Petito's parents' house in Worcester County and at the house of Petito's girlfriend, Christina Torre, in Wicomico County.

Davis further testified that on Saturday, July 31, 2010, following a supervised visit Sophia had had with Petito at his parents' house, she (Davis) used her cell phone to make a video recording of Sophia. In the recording, which was admitted into evidence, Sophia is sitting in the back seat of Davis's car with someone who cannot be identified. She is whining and crying. She says, "I don't want to be at my father's." A voice (apparently Davis's) says, "Why?" Sophia responds, "Because he hurt me."

Davis proceeded to testify that on Saturday, August 7, 2010, the morning of Sophia's next scheduled visit with Petito, Sophia cried, screamed, vomited, refused to get dressed, and would not calm down. Davis telephoned Pam Schulte, who spoke to Sophia over the telephone but was unable to calm her down. Through Schulte, Petito agreed to delay the visit until later in the day. Davis delivered Sophia to Petito's parents' house. Although this was supposed to be an overnight visit, Davis returned at about 8:00 p.m. to take Sophia home "[b]ecause she [Sophia] was very upset."

Davis further testified that, on Wednesday, August 18, 2010, the day of Petito's first scheduled unsupervised visit with Sophia, Sophia again cried, vomited, and refused to get dressed. Davis delivered Sophia to the visit, which was at Petito's girlfriend's house. Petito drove Sophia back home the next morning. Davis found Sophia to be "exhausted. She had nightmares that night, waking up screaming in the middle of the night. She was very clingy. I would have to hold her hand to go to the bathroom. She just, she didn't want me to leave her side."

On cross-examination, Davis acknowledged that Sophia had exhibited these same anxiety problems ever since Davis's and Petito's divorce in 2006. She stated, however, that the problems were "more so" and had "escalated." Davis also acknowledged that during the Custody Modification Case hearings Davis had moved into evidence two videos of Sophia screaming and crying before going to visit her father, and that Sophia had been making "violent" drawings as far back as 2008. Davis agreed that when she took Sophia for visits with Petito Sophia got out of the car without incident.

As noted, Denise Burton interviewed Sophia on behalf of the Worcester DSS. Burton testified that she received the referral for evaluation of Sophia on February 18, 2010, [5] and that she interviewed Sophia twice, once on March 2 and once on March 9, 2010. At

the second interview, Sophia drew a picture of a "stick," which was admitted as an exhibit. Burton testified that, on July 26, 2010, based on her interviews with Sophia, she recommended a finding of indicated child sexual abuse against Petito. On cross-examination, however, Burton acknowledged that her July 26, 2010 recommended finding was based *solely* on incidents alleged to have occurred in 2008. Because those incidents had been the subject of the Custody Modification Case, and had been considered by the court and ruled upon in that case, the court struck Burton's testimony as irrelevant. (The drawing remained in evidence, however.)

Davis made known to the court that she wished to call McGurgan as an expert witness in childhood counseling and childhood sexual abuse. Davis's counsel proffered that McGurgan would opine, based upon interviews of Sophia that she had conducted between February 12, 2010, and June 2010, that Sophia had been sexually abused by Petito. As noted above, in the Custody Modification Case, the court had removed McGurgan as a counselor for Sophia in February 2010, allowing her to see Sophia one last time for the purpose of saying goodbye. Apparently, McGurgan had her final meeting with Sophia in June 2010. The court ruled that any therapeutic communications between Sophia and McGurgan were privileged pursuant to Md. Code (1974, 2006 Repl. Vol.), section 9-109 of the Courts & Judicial Proceedings Article ("CJP"), and that, notwithstanding her status as the custodial parent, the law was clear that Davis would have a conflict of interest in waiving Sophia's privilege because visitation was an issue in the proceeding. As a best interest attorney ("BIA") for Sophia had not been requested or appointed, the court concluded that Sophia's privilege could not be waived and, accordingly, prohibited McGurgan from testifying.[6]

During the argument of counsel about whether McGurgan could testify, counsel for Petito pointed out that, pursuant to the court's orders in the Custody Modification Case, from February 12, 2010, through June 19, 2010, the only visitations Petito had with Sophia were therapeutic, supervised visits, which took place in the office of Catherine M. Beers, LCSW, a court-appointed social worker, with Beers present and Petito and Sophia in her view the entire time. The court and counsel agreed that that was the case. There was no evidence presented that the therapeutic visits were not handled in that fashion; nor was there any evidence that any unsupervised visit took place before August 18, 2010, the date specified by the court for such visits to begin.

Davis called Petito as a witness in her case. He acknowledged that he had had an unsupervised visit with Sophia on August 18, 2010. During that visit, he took Sophia to his brother's house in Baltimore. The supervised visits he had with Sophia in July and early August took place at his parents' house, and one or both grandparents were present with Sophia throughout. Petito testified that he has had additional unsupervised visits with Sophia since August 18, 2010. He denied having been "sexually inappropriate towards Sophia" at any time and ever sleeping in the same bed with her.[7]

At the close of Davis's case, Petito moved for judgment, arguing, as he had in his motion to dismiss, that there was no factual basis for the issuance of a final protective order. Davis responded that Sophia's drawing of a phallic-looking stick during her interview with Burton on March 9, 2010, and the cell phone recording of Sophia made on July 31, 2010, after Sophia's visit with Petito, were sufficient evidence to prove that Petito had committed acts of sexual abuse against Sophia after the court's February 12, 2010 order in the Custody Modification Case.

From the bench, the court ruled in favor of Petito on the motion for judgment. The court found that Sophia's behaviors that Davis testified about with respect to the July 31, August 7, and August 18, 2010 visits were "if not identical, so similar as to be a continuum of what was always before the court during the entire [Custody Modification] case." The court pointed out that Davis was present throughout the "entire proceedings" in that case and had heard all the testimony about whether behaviors of that sort were "reflective of sexual abuse or if, in fact, they are symptoms that relate directly to a high-conflict custody battle." The court had ruled in the Custody Modification Case, by crediting the testimony of Petito's expert witness, that the latter conclusion was correct and not the former.

The judge went on to point out that the drawing by Sophia that Davis's counsel described as "phallic" was a picture of a stick, made during Sophia's March 9, 2010 meeting with Burton; and that it could not have related to any act allegedly perpetrated against Sophia after February 12, 2010, because, as was undisputed, the only visits Petito had with Sophia between that date and June 19, 2010, were in Cathy Beers's office, under her watchful eyes. The Worcester DSS finding was based on alleged events in 2008 and the basis for that finding was available to Davis and her counsel. The judge further noted that the allegations of abuse in the Custody Modification Case were not limited by the location of the abuse: *all* allegations of abuse were before the court, regardless of where they were alleged to have occurred.

The judge also found that, regardless of the prior litigation of all allegations of sexual abuse in the Custody Modification Case, the evidence Davis adduced in support of the petition for a final protective

order was not probative of any act of sexual abuse by Petito. Sophia's anxious behavior did not show that any act of sexual abuse had been committed against her.

In ruling, the judge noted that it did not appear that a referral to the Worcester DSS was made by Judge Cathell after he issued the temporary protective order, although that ordinarily is standard practice. As Burton still was in the courtroom, the judge asked her whether such a referral was made. She said no; and that during her March 2010 interviews with Sophia she had asked Sophia "about recent possible sexual inappropriateness at that time" and that Sophia "did not make a report of any."

The court granted the motion for judgment, ruling that there was no clear and convincing evidence to support the allegations in the petition; that the petition was "unsupported by the evidence"; and that the relief requested had to be denied as there was "no statutory basis" for it.

The court then entertained argument on Petito's motion for sanctions pursuant to Rule 1-341. Davis and Petito stipulated that a statement of attorneys' fees in the amount of $9,385 prepared by Petito's counsel was fair, reasonable, and generated as a result of the current proceedings. Petito argued that Davis had brought the action in bad faith and without substantial justification, without evidence of new alleged acts of sexual abuse, in an attempt to re-litigate the Custody Modification Case. Davis responded that she was substantially justified in bringing the action because of the July 26, 2010 finding of indicated child sexual abuse by the Worcester DSS and Sophia's behavior before and after her visits with Petito in July and August 2010. Davis's attorneys stated that, although they did not represent Davis in the Custody Modification Case, they had reviewed portions of the transcripts of the hearings in that case and were familiar with the evidence that had been adduced. The court held the motion *sub curia* pending submission of written argument, which Davis and Petito each filed on October 6, 2010.

On November 1, 2010, the court issued a memorandum opinion and order granting Petito's motion for sanctions under Rule 1-341 against Davis and her attorneys. It found that "[t]he petition and the testimony adduced at the hearing present absolutely no evidence of abuse occurring after [the February 12, 2010 order in the Custody Modification Case]," and that the "anxious behaviors exhibited by Sophia . . . represented an ongoing pattern dating back to 2006," which the court had considered when it issued its February 12, 2010 ruling. The court recounted that the evidence of severe anxiety symptoms adduced at the Custody Modification Case hearings, going back to, at the latest, 2008, included "sleeping problems, nightmares, digestion and bladder difficulties and resistance to visitation with [Petito]" — the same symptoms Davis testified Sophia was experiencing before her visits with Petito in July and August 2010. The court specifically referenced Davis's testimony *at the Custody Modification Cases hearing* that Sophia had said that Petito had "hurt her."

The court noted that the July 26, 2010 Worcester DSS finding of indicated abuse stated it was based on a referral made on February 18, 2010 — one day prior to the last day of trial in the Custody Modification Case — and was based entirely on conduct alleged to have happened in 2008. The court found that Davis and Davis's attorneys "knew or should have known that no factual issue not previously litigated in this [c]ourt would be generated by the instant [p]etition and testimony." The court concluded that Davis and her attorneys had filed the petition for a protective order without substantial justification, *i.e.*, without colorable evidence of any abuse having occurred after February 12, 2010. The court ordered Davis and Davis's attorneys to pay Petito's attorneys' fees of $9,385. That amount was reduced to separate judgments against Davis and her two attorneys.

This timely appeal followed. We shall discuss additional facts, including findings made by the trial judge, in our discussion.

DISCUSSION

Maryland courts have the 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). Rule 1-341 provides:

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.

Rule 1-341 is not meant to punish a party for misbehavior, but "to put the wronged party in the same position as if the offending conduct had not occurred." *Major v. First Va. Bank-Cent. Md.*, 97 Md. App. 520, 530 (1993), *cert. denied*, *sub nom Alison v. Hazel & Thomas*, 334 Md. 18 (1994). Courts only may order

payment of expenses and fees actually incurred, not the reasonable value of services rendered. *Worsham v. Greenfield*, 187 Md. App. 323, 336, *cert. granted*, 411 Md. 599 (2009). An award of expenses and fees is an "extraordinary sanction" that "should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Claibourne v. Willis*, 347 Md. 684, 693 (1997) (citing *Talley v. Talley*, 317 Md. 428, 434-36 (1989)).

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), explaining the basis for the finding. *Zdravkovich*, 323 Md. at 209-10; *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 106 (1999). We review this initial determination for clear error and erroneous application of the law. *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267 (1991). If the court finds either bad faith or lack of substantial justification, it may choose to award costs and attorneys' fees, or not. *Blitz v. Beth Isaac Adas Israel Congregation*, 115 Md. App. 460, 489 (1997), *rev'd on other grounds*, 352 Md. 31 (1998). We review this second determination for abuse of discretion. *Inlet*, 324 Md. at 267-68.

In the case at bar, the circuit court found that the action for protective order was maintained without factual substantial justification; the court did not find that the action was mainlined in bad faith. In other words, the court found that there was no factual basis (as opposed to no legal basis) to support the action for protection against abuse. Factual substantial justification exists when there is a reasonable basis to believe that the case will generate a factual issue for a fact-finder at trial, *i.e.*, when there is a colorable claim. *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463, 476-77, *cert. denied*, 319 Md. 582 (1990). *See also Black v. Fox Hills N. Cmty. Ass'n, Inc.*, 90 Md. App. 75, 84, *cert. denied*, 326 Md. 177 (1992) (stating that Rule 1-341 sanctions only may be imposed for proceeding without substantial justification "when a suit is patently frivolous and devoid of any colorable claim").

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 that her petition provided reasonable grounds for the issuance of a temporary protective order. She argues that the district court's finding of reasonable grounds precluded any subsequent finding that the action was filed without substantial justification. Petito responds that the issuance of an *ex parte* order by a district court judge in another jurisdiction did not foreclose the circuit court's determination that the action was maintained without substantial justification. He notes that Judge Cathell granted the temporary protective order "reluctantly," and argues that Judge Cathell was not in a position to determine whether Davis had filed the action without substantial justification because, given that the proceeding before him was *ex parte*, he heard only Davis's side of the case.

We are not persuaded that one court's decision to grant an *ex parte* petition for temporary emergency relief necessarily precludes another court's finding of lack of substantial justification as to a subsequent adversarial petition for final relief. By means of a temporary protective order, a court, acting *ex parte*, may provide emergency, immediate, but short-term relief to an alleged victim of abuse, upon a finding of "*reasonable grounds* to believe that a person eligible for relief has been abused." Md. Code (1984, 2006 Repl. Vol., 2011 Supp.), § 4-505 of the Family Law Article ("FL") (emphasis added). *See also, e.g., Coburn v. Coburn*, 342 Md. 244, 252-56 (1996) (discussing rationale behind Maryland's domestic abuse protection statutes). Although a temporary protective order may be extended, it is initially effective for a period of seven days. By contrast, a final protective order only may be issued after the respondent has been afforded notice and an opportunity to be heard and "if the judge finds by *clear and convincing evidence* that the alleged abuse has occurred, or if the respondent consents." FL § 4-506 (emphasis added). A final protective order ordinarily will be effective for a period of up to one year. FL § 4-506(j)(1).[8]

In the case at bar, the primary issue as to whether the action for protection from abuse was maintained without substantial justification was whether there was any reasonable basis to believe that 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 considered all the evidence presented of alleged sexual abuse up to that time and had determined that sexual abuse had not been proven. At the hearing in the case at bar, counsel for Davis acknowledged that the conduct prior to February 12, 2010, *could not* serve as a basis for the issuance of a protective order. The final protective order only could be issued upon proof (by a clear and convincing standard) that sexual abuse had been perpetrated by Petito against Sophia at a time subsequent to February 12, 2010, because there already was a judgment rendered by the court that sexual abuse did not take place before February 12, 2010.

In the district court, although Judge Cathell was aware that there had been a previous custody case between Davis and Petito in the Circuit Court for Wicomico County that involved allegations of sexual

abuse, he was not acquainted with the details of the Custody Modification Case. He had before him only the benefit of Davis's version of the earlier case and subsequent events, and therefore was in no position to determine whether her petition raised colorable allegations of abuse that occurred after the circuit court's February 12, 2010 finding that Davis had not proven that Petito abused Sophia. Without any response from or participation by Petito — who had not even been served — Judge Cathell "reluctantly," and with a stem admonition against "judge shopping," erred on the side of caution and granted temporary relief based upon Davis's as yet unchallenged claim of abuse.

On the other hand, the judge in the Circuit Court for Wicomico County who presided over the proceedings on the petition for a final protective order was exceedingly familiar with the facts and circumstances of the Custody Modification Case, as she had presided over that case as well. The circuit court had the added benefit of being able to hear from both Davis *and* Petito and was therefore in the best position to determine whether the alleged abuse already had been litigated in the Custody Modification Case. Davis and her attorneys knew they were facing a forum that was familiar with Davis's past allegations of abuse, that the circuit court proceeding would be adversarial instead of *ex parte*, and that they would have to meet a higher burden of proof. The fact that Judge Cathell found reasonable grounds for temporary relief based on Davis's *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 contends the circuit court clearly erred in finding that she pursued her petition for a final protective order without substantial justification. First, she argues that the court's factual inquiry should have been limited to the information available to her (Davis) and her attorneys when the initial petition for a temporary protective order was filed, on 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. Petito responds that the actions of Davis and her attorneys were properly judged "based on the facts and circumstances of this action throughout the entire judicial process," and that the domestic violence protective order proceeding was brought without substantial justification and was maintained throughout the full course of the proceedings without substantial justification.

In determining whether Rule 1-341 sanctions are warranted, a court must consider a party's actions "at the time [they were] taken, not from judicial hindsight." *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 676-77 (2003). When the issue is whether a pleading or motion was filed without substantial justification, a court must judge a party's conduct as of the time of the filing of the relevant paper. *Kelley v. Dowell*, 81 Md. App. 338, 343-44, *cert. denied sub nom Dowell v. Solomon*, 319 Md. 303 (1990). That does not mean, however, that only an initial filing can be brought without substantial justification. Rule 1-341 specifies that sanctions may be imposed for the conduct of a party in "maintaining or defending any proceeding . . . without substantial justification." One may "maintain" a proceeding by filing it initially, continuing to pursue it, or both. Moreover, "a finding that a cause of action was brought or maintained without substantial justification" necessarily requires "an examination of the merits of the case." *Bohle v. Thompson*, 78 Md. App. 614, 639, *cert. denied*, 316 Md. 364 (1989); *see also Beery v. Md. Med. Lab., Inc.*, 89 Md. App. 81, 91-93 (1991), *cert. denied*, 325 Md. 329 (1992).

We agree with Petito that sanctions were imposed and could be imposed in this case as a result of Davis's and her attorneys' filing and maintaining the action for a protective order without substantial justification, not just for filing the initial petition itself. Although the circuit court's order states that "[Davis] and her counsel filed this [p]etition without substantial justification," the court was clearly imposing sanctions against Davis and her counsel for maintaining the entire protective order action without substantial justification. The attorneys' fees assessed represent Petito's expenses in responding to and defending the entire action, not just the initial petition. Indeed, Petito incurred no fees in defending against the initial petition as it was conducted *ex parte* and he had no notice that it had been filed. Accordingly, the court properly considered the merits of the claim in determining whether it lacked substantial justification. In any event, it makes no difference whether the conduct of Davis and her attorneys is assessed based on their knowledge at the time the initial petition was filed or based on the ongoing course of the litigation. As the court found, and as we shall explain, neither when the initial petition was filed nor during the course of the hearing for a final protective order did Davis or her attorneys have factual evidence of sexual abuse.

The parties advance the following arguments respecting the court's finding of lack of substantial justification. Davis asserts that her petition set forth colorable allegations of post-February 12, 2010 abuse based on the July 26, 2010 Worcester DSS's finding of indicated child sexual abuse. She maintains that neither she nor her lawyers knew until Burton testified at the hearing on the final protective order petition on September 28, 2010 that the July 26, 2010 Worcester DSS finding of indicated abuse was based on conduct

alleged to have happened in 2008. She argues that the court clearly erred in finding that the Worcester DSS report was available to her and her attorneys for inspection before the September 28, 2010 hearing. Davis further asserts that the evidence she presented at the September 28, 2010 hearing generated a factual issue regarding sexual abuse by Petito that precluded a finding of lack of substantial justification. She relies on what she contends were sexually suggestive drawings made by Sophia in a March 9, 2010 interview with Burton; the symptoms of abuse Sophia exhibited following visits with Petito on July 31, and August 7 and 18, 2010; and the cell phone recording she made of Sophia after Sophia's July 31, 2010 visit with Petito. Davis disagrees with the circuit court's conclusion that any and all allegations of sexual abuse were properly before the court in the Custody Modification Case, without regard to location, and maintains that evidence of abuse in Worcester County presented substantial justification for filing the petition for relief from abuse, even if the alleged abuse was believed to have occurred before the court's February 12, 2010 order.

In advancing his argument to the contrary, Petito points out that Davis's initial petition for relief did not allege specific acts of abuse and did not identify specific dates on which acts of abuse allegedly occurred; rather, it merely recounted the parties' contentious history and the evidence presented in the Custody Modification Case. He emphasizes that the July 26, 2010 Worcester DSS report indeed was available to Davis before the September 28, 2010 hearing, as it was part of the court record transmitted from the district court to the circuit court. He notes that, although Davis identified three specific post-February 12, 2010 dates of alleged abuse for the first time at the September 28, 2010 hearing, she "failed to present even a scintilla of evidence of abuse occurring subsequent to the termination of the [Custody Modification Case)." Petito asserts that the court correctly found, based on the evidence and the lack thereof, that there was no reasonable basis offered to show an act of sexual abuse by him against Sophia post-February 12, 2010, and that the finding properly prohibited Davis and her attorneys from "relitigating pre-February 2010 allegations of abuse."

We find no clear error in the circuit court's factual finding that Davis and her attorneys maintained the protective order proceeding without substantial justification. Competent evidence in the record together with the absence of evidence to sustain Davis's accusations support the court's finding.

A brief review of certain undisputed chronological facts is in order. Petito's last contact with Sophia was sometime in 2008, before criminal charges were brought against him. Even though supervised therapeutic visitation was ordered on September 30, 2009, Davis did not allow Petito to visit with Sophia.[9] Thus, Petito had no contact with Sophia from 2008 until after the court issued a second interim custody order requiring therapeutic visitation on December 9, 2009. On April 16, 2010, the court adopted a tiered visitation schedule designed to reestablish the father-daughter relationship. 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.

In the meantime, within days of the court's February 12, 2010 written finding of no sexual abuse — which was based largely upon evidence that Sophia had not disclosed any act by her father that would constitute sexual abuse and that the professionals who had interviewed her had improperly led and suggested to her that her father had harmed her — and around the time that the court directed that McGurgan would no longer be Sophia's therapist, McGurgan made a report of suspected sexual abuse of Sophia against Petito to the Worcester DSS. (The Wicomico DSS already had investigated and found indicated abuse; it later changed that finding based on the court's decision in the Custody Modification Case.) Given that Petito's only possible contact with Sophia between February 12, 2010, and February 18, 2010 (the day McGurgan made her report to the Worcester DSS), would have been supervised by Beers, it was impossible for that report to have been based on any act taking place after February 12, 2010.

With that said, the record in the Custody Modification Case, which was before this Court when we issued our opinion in *Davis v. Petito*, 197 Md. App. 487 (2011), and which the circuit court in this case judicially noticed, does not suggest in any way that the allegations of sexual abuse were or for some reason had to be confined to acts occurring in Wicomico County. It was clear that any alleged act of sexual abuse was before the court for consideration in the Custody Modification Case. Thus, for Davis, who attended the Custody Modification Case hearings, and for her counsel in the case at bar, who had access to and said they had reviewed the transcripts of those hearings, there was no rational basis to believe that the drawings made by Sophia for Burton on March 9, 2010, had anything to do with any conduct by her father that had not already been litigated and rejected by the court as of February 12, 2010.

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. The circuit court's finding in the final protective order hearing that the content of the

Worcester DSS report was available to Davis, and hence to her lawyers, is supported by the evidence. The July 26, 2010 "intended action letter" Davis received, which was written by Lillian Wilkinson, Burton's supervisor, directed Davis to "please call me if there are any questions" and provided a telephone number. Moreover, the Worcester DSS file was made part of the court record during the temporary protective order hearing on September 10, 2010, was docketed in the circuit court case, and was available for review. It was not filed under seal. Burton — who testified that the Worcester DSS's finding of indicated sexual abuse was based on conduct alleged to have occurred in 2008 — was called as a witness by Davis's lawyers. It is inconceivable that neither Davis nor her lawyers knew *before* the September 28, 2010 hearing that the Worcester DSS finding of indicated abuse was *not* based on conduct occurring after February 12, 2010, and therefore was of no probative value in the proceedings for a final protective order on September 28, 2010.

At the September 28, 2010 hearing, Davis did not present any evidence of sexual abuse that had not been litigated in the Custody Modification Case. As we have explained, the picture Sophia drew for Burton on March 9, 2010, and the July 2010 Worcester DSS report could not have concerned acts alleged to have taken place after February 12, 2010, and Davis and her attorneys would have known this. Davis's only evidence at the September 28, 2010 hearing was that Sophia cried, vomited, had problems with digestion and incontinence, had nightmares before her visits with Petito on July31, August 7, and August 18, 2010, and in a cell phone recording on July 31, 2010, after the visit that day, said "he hurt me." The circuit court judge found that this behavioral evidence was exactly the same or merely a "continuum" of the evidence Davis had presented at the Custody Modification Case hearings — down to the same "he hurt me" words — that she herself had found did *not* support a finding of sexual abuse. On the contrary, the judge had found that the behaviors were the product of improper suggestions and leading and misleading interviews. As we have noted, Davis and her lawyers had every reason to know that this evidence would not support a factual finding of abuse, for that very reason. The judge in the Custody Modification Case hearing had not disbelieved that the anxious behaviors were occurring. Rather, she made a clear finding that the behaviors were not a symptom or indication of sexual abuse by Petito. Thus, a cell phone recording of Sophia saying precisely what Davis had testified Sophia was saying at the time of the hearings in the Custody Modification Case was not evidence of post-February 12, 2010 abuse, and Davis and her lawyers had to have known that. There was not one iota of new evidence that Petito had committed any act of sexual abuse against Sophia.

Finally, Davis's attorneys argue that they had expected to be able to call McGurgan at the September 28, 2010 hearing, and that her expert testimony would have lent substantial justification to their case. As we have explained, McGurgan was a prior treating therapist of Sophia's during the Custody Modification Case, and was not permitted to testify at that hearing first on the ground of hearsay and then because Sophia's BIA invoked Sophia's patient-psychologist privilege pursuant to CJP section 9-109; and, as part of the Custody Modification Case, in February 2010, the court ruled that McGurgan should no longer function as Sophia's therapist. Nevertheless, during the hearing in the case at bar, Davis's attorneys proffered that McGurgan would testify based on therapy conversations she had had with Sophia after February 12, 2010. Of course, any such conversations would be covered by the privilege, and Sophia was no longer represented by counsel and none had been requested. Davis's lawyers argued, nevertheless, that under *McCormack v. Bd. Of Educ. of Balt. County*, 158 Md. App. 292 (2004), Davis, as Sophia's custodial parent, could waive Sophia's privilege. The court read *McCormack* and found it not to support that proposition. The court ruled that Sophia's privilege could not be waived without a BIA and therefore McGurgan could not testify.[10]

With respect to legal (not factual) substantial justification, sanctions should not be imposed simply because "an innovative or tenuous legal theory was not embraced by the court, or the relied-upon expected testimony of a witness unravels when given under oath at trial." *Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. P'ship*, 75 Md. App. 214, 222, *cert denied*, 313 Md. 611(1988) (citing *Dent v. Simmons*, 61 Md. App. 122, 127-28 (1985)). *See also Newman v. Reilly*, 314 Md. 364, 381(1988) (Rule 1-341 sanctions are not available when a litigant's legal position is "fairly debatable" and "within the realm of 'legitimate advocacy.") (quoting *Legal Aid Bureau, Inc. v. Farmer*, 74 Md. App. 707, 722 (1988)).

Davis's attorneys' argument that Davis could waive Sophia's privilege as the custodial parent was not even tenuous. *McCormack* clearly states that a parent may not waive or assert his or her child's patient-psychologist privilege if the parent is affected by a substantial conflict of interest. 158 Md. App. at 311. The object of the protective order proceeding was to obtain a court order denying Petito — who had court-ordered visitation with Sophia — any access to Sophia. In a continuing visitation battle, as this case most obviously is, the feuding parents have a patent conflict of interest and neither can invoke or waive the

child's privilege. *Nagle v. Hooks*, 296 Md. 123, 127-28 (1983). Here, Sophia's privilege could not be waived by Davis (or Petito) and neither party had requested the court to appoint a BIA for Sophia. Legally, it was not fairly debatable that Davis could waive Sophia's privilege and call McGurgan to testify.

Moreover, as a matter of factual substantial justification, even if Davis's attorneys' assertion that Davis should be allowed to waive Sophia's privilege were fairly debatable, which it is not, they could not have had any reasonable expectation that McGurgan would have had anything relevant to say. McGurgan's February 18, 2010 report of suspected child sexual abuse to the Worcester DSS could not have contained any post-February 12, 2010 information; she was removed as Sophia's counselor during the Custody Modification Case; from the close of the custody Modification Case until June 19, 2010, Petitio's only contact with Sophia was during therapeutic visitation supervised by a court-appointed social worker; if McGurgan saw Sophia during that time, it was solely for the purpose of saying good-bye; and the first alleged new date of abuse was not until July 31, 2010. Davis's attorneys could not have reasonably believed that McGurgan possessed any evidence of sexual abuse by Petito against Sophia occurring after the close of the Custody Modification Case.

As we have explained, all allegations of abuse were before the court in the Custody Modification Case, regardless of where they took place, and there was no reason for Davis or her lawyers to think otherwise. With no evidence of any new act of sexual abuse by Petito after February 12, 2010, the petition for protection from domestic violence was nothing more than an attempt to re-litigate Davis's claim that Petito had sexually abused Sophia prior to February 12, 2010. We have previously affirmed courts' decisions to award attorneys' fees as a result of a party's attempt to re-litigate a claim that already had been litigated to a final judgment. *See, e.g., Shanks v. Williams*, 53 Md. App. 670 (1983); *Singer v. Steven Kokes, Inc.*, 39 Md. App. 180 (1978).[11] To be sure, a judgment has not been litigated to finality while an appeal is still pending. *See Century I Condo. Ass'n, Inc. v. Plaza Condo. Joint Venture*, 64 Md. App. 107, 118-19 (1985). In the appeal of the Custody Modification Case, however, the question whether Petito had sexually abused Sophia as of February 12, 2010, was not challenged. Therefore it is not significant that when the circuit court found that the instant action lacked substantial justification, the appeal in the Custody Modification Case still was pending.

III.

Davis contends the circuit court erred by imposing Rule 1-341 sanctions without making an express finding of intentional misconduct or abuse of the legal process. She argues that the court improperly applied a "knew or should have known" standard instead. Petito responds that the court's comment that Davis "knew or should have known" that no new factual issues would be generated by her petition was merely a recognition of "the apparent willful ignorance" of Davis and her attorneys. Petito maintains the court properly determined that "[Davis's] lack of credible evidence signified a lack of substantial justification."

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. A finding of bad faith requires, in that context, proof that a party engaged in litigation "with the purpose of intentional harassment or unreasonable delay." *Barnes*, 126 Md. App. at 105. The concepts of bad faith and lack of substantial justification often converge in Rule 1-341 cases, and cases addressing both components generally have required intentional misconduct. *See Blitz*, 115 Md. App. at 488 (noting requirement of intentional misconduct where both bad faith and lack of substantial justification were at issue); *Lebac v. Lebac*, 109 Md. App. 396, 410 (1996) (directing, on remand, that Rule 1-341 attorneys' fees may not be imposed "absent a finding that appellant had engaged in intentional misconduct or in unnecessary or abusive litigation" where trial court failed to make an explicit finding of either bad faith or lack of substantial justification); *Black*, 90 Md. App. at 83 (noting requirement of intentional misconduct when trial court found both bad faith and lack of substantial justification).

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. A finding that a claim or action has been maintained or defended without substantial justification either in fact or law is an objective determination that, based on the information available to the party and/or the party's counsel, the claim or action was moved forward or defended without any "reasonable basis for believing that [it would] generate a factual issue for the fact-finder at trial." *Inlet*, 324 Md. at 268 (quoting *Needle*, 81 Md. App. at 476). The circuit court's finding that, objectively, "[Davis] and her counsel knew or should have known that no factual issue not previously litigated in this [c]ourt would be generated by the instant [p]etition and testimony," was a legally proper assessment and was not clearly erroneous. Although Davis's attorneys in this case did not represent her in the Custody Modification Case, Davis herself had first-hand familiarity with the evidence adduced at trial in the Custody Modification Case, and her attorneys represented to the court that they had reviewed the transcripts of that trial. Davis and her attorneys reasonably knew or

should have known that they had no evidence of any alleged act of sexual abuse happening after February 12, 2010, either at the time they filed the initial petition or at the time of the September 28, 2010 hearing; and they had no reasonable expectation of developing evidence of "new" abuse through the testimony they could have expected to elicit at the hearing. This was a sufficient basis for the court's finding that Davis and her attorneys pursued the petition for protection without substantial justification, in violation of Rule 1-341.

IV.

In a final contention that essentially repeats many of their prior contentions, Davis and her lawyers argue that, by deciding to award attorney's fees to Petito under Rule 1-341, the circuit court abused its discretion. They argue that the court's decision was an abuse of discretion because it penalized them for reasonably relying upon the July 26, 2010 Worcester DSS finding of indicated abuse and upon Sophia's anxious behavior as evidence suggesting Sophia had been abused. They further argue that the court improperly awarded attorneys' fees without determining Davis's ability to pay; and that by imposing sanctions the court abused its discretion by casting a chilling effect over parents in her position who merely are trying to protect their children from abuse. Davis's lawyers argue that the court's sanction award against them was an abuse of its discretion because it discourages lawyers from zealously advocating on behalf of their clients and from undertaking *pro bono* representation in domestic cases generally.

Petito responds that the circuit court's decision to award fees was within its discretion and asks that we defer to the circuit court's judgment. He maintains that the fee award, which was in an amount stipulated to be fair, reasonable, and necessary, properly compensated him for the expenses he incurred in having to defend against a petition for protection that was brought and maintained without substantial justification. He points out that the court took judicial notice of all matters in the Custody Modification Case and was well aware of Davis's financial circumstances. He asserts that the award of attorneys' fees imposed in this case will not have a chilling effect on parents who in fact have some evidence that their children have been abused. Petito maintains that it was not merely zealous advocacy for Davis's lawyers to pursue a domestic violence protective order on evidence that already had been litigated against Davis and therefore could not support a colorable claim. Petito asserts that imposing sanctions on Davis's attorneys will not discourage other attorneys from undertaking *pro bono* representation; rather, it will discourage other attorneys, whether acting *pro bono* or for payment, from pursuing and maintaining proceedings without substantial justification.

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." *Bishop's Garth*, 75 Md. App. at 224. Rather, Rule 1-341 sanctions are "judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so." *Id.* A decision that is an abuse of discretion "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." *North v. North*, 102 Md. App. 1, 14 (1994) (*en banc*).

In the case at bar, the circuit court's decision to award attorneys' fees against Davis and her attorneys under Rule 1-341 was not an abuse of discretion. For the reasons we have explained, the petition for protection against domestic abuse was maintained, as the court found, without substantial justification. None of the evidence Davis presented or that she or her lawyers reasonably could have believed was admissible at any stage of these proceedings provided a reasonable basis to believe that some act of sexual abuse of Sophia by her father had occurred beyond the alleged acts that were found not to have occurred in the Custody Modification Case. The July 26, 2010 Worcester DSS finding of abuse had to have been based upon the allegations of abuse that were rejected in the Custody Modification Case; and the report regarding that finding was available to Davis and her counsel. Sophia's anxiety *vis-à-vis* her father was a continuum of behavior dating back to the parties' 2006 divorce, at the earliest, and 2008 at the latest, which was demonstrated during the Custody Modification Case hearings with videos recorded immediately before scheduled visits with Petito in September 2008 showing Sophia "crying hysterically, saying that she did not want to leave [Davis]'s home [to go] with [Petito]," and by Davis's testimony that Sophia said Petito had "hurt her." There was no new factual evidence adduced or adducible in the domestic violence case that was not already litigated in the Custody Modification Case.

The judge in the Custody Modification Case credited the opinion of Kathleen Killeen, Ph.D., an expert in the evaluation and treatment of child sexual abuse, that Sophia's resistance and adverse reaction to visits with her father resulted from leading, suggestive, and improper interview methods used upon her and a loyalty conflict consistent with the high conflict "ongoing hostility" of her divorced parents' relationship. Because of the accusations of abuse, Petito did not see his daughter from the fall of 2008 until after December 2009, *i.e.*, from the time Sophia was almost five years old until she was more than six years old. 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.

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's counsel, "when will it stop?":

> And I asked the question in good faith, would it be okay tomorrow? If the father has visitation and the child comes home and says, and the mother says the child is demonstrating anxiety and throwing up and doing behaviors that have been observed since back when this case was initiated in the domestic arena, would that be sufficient to warrant a new petition?
>
> So I asked that question as a real one. I wasn't attempting to be facetious in any way, but the question is, where do you draw the line?

At the September 28, 2010 hearing Davis stipulated to the amount of attorneys' fees Petito incurred. Accordingly, it is undisputed that Petito's fees in the amount of $9,385 were fair, reasonable, and generated as a result of the instant proceeding. As noted, Davis argues, however, that the circuit court abused its discretion by not inquiring into her ability to pay such a sum. In Needle, we opined that "[i]t may well be an abuse of discretion to impose a substantial monetary sanction on a litigant without first determining the financial ability of the litigant to pay the amount assessed." 81 Md. App. at 480. In this case, however, the circuit court was familiar with Davis's financial circumstances. It took judicial notice of all matters in the Custody Modification Case, which included extensive financial disclosures the court had used in determining child support, as shown in the court's May 19, 2010 order.

The judge's exercise of discretion to compensate Petito for the fees he incurred in defending himself in this case, and our affirmance of that decision, 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. Davis was clearly unhappy with the outcome of the Custody Modification Case. The petition for protection from abuse was an attempt to re-litigate Davis's previous allegations of abuse, without any evidence of new abuse. Under the circumstances, there was no abuse of discretion in the court's decision to assess attorneys' fees against Davis and her attorneys so as to make Petito whole.

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

ORDER AFFIRMED. COSTS TO BE PAID BY THE APPELLANTS.

FOOTNOTES

1. The court filed an amended order on May 19, 2010, to correct a mistake in the calculation of child support payments.

2. Davis did not specify when this was supposed to have happened. Also, Davis did not so testify at the hearing for final protective order.

3. The first order from the district court on September 17 inadvertently dismissed the case. This was corrected later the same day in a second order transferring the case to the Circuit Court for Wicomico County.

4. The court took judicial notice "of all matters in the [Custody Modification Case]."

5. Burton testified only after the court signed an order compelling her to do so and granting her immunity from suit "by any persons as a result of testimony and/or release of documents in this matter on this date only."

6. In the Custody Modification Case, Sophia had been represented by a BIA, who initially waived her privilege with respect to her communications with McGurgan. Petito objected on the ground that any statements by Sophia to McGurgan were inadmissible hearsay. The court recessed to consider the issue. In the meantime, on January 15, 2010, Sophia's BIA invoked Sophia's privilege with respect to any new communications with McGurgan. On February 1, 2010, the court prohibited McGurgan from testifying in the Custody Modification Case because, it determined, any statements Sophia made to McGurgan would not qualify for the hearsay exception for statements made for purposes of medical diagnosis or treatment because Sophia could not have understood that her statements were being made for such purpose when she made them. *See* Rule 5-803(b)(4). This evidentiary

ruling was affirmed on appeal. *Davis*, 197 Md. App. at 528.

7. Davis had testified that Sophia usually sleeps with her.

8. A final protective order may be effective for up to two years if based on abuse occurring within one year after the issuance of a prior final protective order that had been issued for a period of at least six months. FL § 4-506(j)(2). A final protective order issued after the violation of a prior final protective order, for which violation the respondent was convicted of certain sections of the Criminal Law Article and served a term of imprisonment of at least five years, is permanent unless terminated at the request of the victim. FL § 4-506(k).

9. On April 16, 2010, the court found Davis in contempt for failing to produce Sophia for scheduled therapeutic visitations with Petito from September 30, 2009, through December 12, 2009.

10. Davis has not challenged that ruling on appeal.

11. Although both of these cases interpreted former Rule 604(b), which made an award of attorneys' fees mandatory upon a finding that a proceeding "was had (1) in bad faith, (2) without substantial justification, or (3) for purposes of delay," the remaining principles of law are the same under the current Rule 1-341, which makes an award of attorneys' fees discretionary.

Cite as 3 MFLM Supp. 39 (2012)

Child support: constructive civil contempt: ability to pay

Mohammed Ghazy

v.

Pamela Awad-Ghazy

No. 2675, September Term, 2010

Argued Before: Eyler, James, R., Watts, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Watts, J.

Filed: January 18, 2012. Unreported.

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.

Mohammed Ghazy, appellant, appeals the order issued by the Circuit Court for Baltimore City finding him in contempt for the failure to pay child support to Pamela Awad-Ghazy, appellee,[1] in support of the parties' two minor children. Appellant noted an appeal raising two issues, which we quote:

> I. Did the lower court err in finding [appellant] in constructive civil contempt, because he, and the appellee, jointly owned property, acquired prior to when the obligation arose, which could have been sold to satisfy the support obligations?
>
> II. Did the lower court err in admitting, over [appellant's] objection, a computer printout introduced by [appellee] for the truth of the matter asserted, viz., to establish [appellant's] child support payment history and arrearage amount?

We answer both questions in the negative. We, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 14, 2007, appellee filed a Complaint for Absolute Divorce in the Circuit Court for Baltimore City. On January 22, 2008, appellant filed an Answer. On August 8, 2008, the circuit court issued a Judgment of Absolute Divorce granting appellee's Complaint for Absolute Divorce. The circuit court denied appellee's request for alimony and denied appellant alimony "by virtue of his failure to appear" at the hearing on the Complaint for Absolute Divorce. Appellee was awarded sole legal custody and primary physical custody of the parties' two minor children. The Judgment of Absolute Divorce provided, in pertinent part, as follows:

> **ORDERED**, that no determination regarding marital property is made as [appellant] failed to prove the existence of property by sufficient evidence; and it is further;
>
> * * *
>
> **ORDERED**, that effective September 1, 2008, [appellant] shall pay monthly child support in the amount of seven hundred and ninety-seven dollars ($797.00) through an Earnings Withholding Order; and it is further
>
> **ORDERED**, that as of August 8, 2008, the child support arrears are one thousand and forty-six dollars ($1046.00). [Appellant] shall pay an additional fifty dollars ($50.00) each month through an Earnings Withholding Order until the arrears are paid in full;

On April 16, 2009, appellee filed a Petition for Contempt.[2] On December 17, 2010, the circuit court held a hearing on the petition to determine whether appellant should be held in contempt. At the hearing, appellee[3] introduced as Plaintiff's Exhibit One a document from Child Enforcement, indicating that appellant owed $8,869 in arrears of child support.[4] Appellant objected to admission of the document arguing that the document was hearsay, lacked foundation, and was not properly authenticated. After the objection, the following exchange occurred:

> THE COURT: All right, [appellee], are you going to testify to the amounts

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

that are reflected on that sheet?

[APPELLEE]: Yes. There's amounts on each.

THE COURT: Okay. Well, why don't you tell me what you know about the amounts on that sheet?

[APPELLEE]: Well, [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.

[APPELLANT'S COUNSEL]: Objection, Your Honor.

THE COURT: All right. When there's an objection, just wait a moment. You say the balance coming forward. But this has been payments to you throughout the history of it?

[APPELLEE]: Yes.

THE COURT: And that balance, is that something that, based on what you've received, you believe is the amount that is owed?

[APPELLEE]: It is the correct amount owed.

THE COURT: All right. Objection's overruled. Plaintiffs 1 is admitted.

* * *

THE COURT: All right. Any objection asides from the hearsay objection?

[APPELLANT'S COUNSEL]: That it's not been properly authenticated, Your Honor.

THE COURT: All right. I'm admitting it as a summary based on [appellee's] testimony about what payments she's received.

All right, [appellee], so you're saying that based on these payments, you haven't received the full amount in each month covered by this summary?

[APPELLEE]: Since the order was in effect years ago.

THE COURT: All right.

The circuit court heard argument on why appellee contended appellant had the ability to pay the full amount of his child support obligation.

THE COURT: Now why do you maintain that [appellant] has the ability to pay the full amount?

[APPELLEE]: Okay, I have copies of three deeds to homes that we own outright, except there is a loan on one of them for $50,000 that he lives in right now. He is receiving rent off of one property.

* * *

THE COURT: . . . How do you know that he's receiving rent?

[APPELLEE]: I have in present courtrooms brought documentation from the renter that he was paying rent to [appellant].

* * *

THE COURT: Well, tell me what you know about the properties.

[APPELLEE]: Okay.

THE COURT: But just what you know yourself.

[APPELLEE]: I hired a lawyer . . . to try and settle these properties because I am no longer married to [appellant]. And he refuses to do so because he would have probably at least — the properties all together are worth about 500 to $600,000. If he — minus the $50,000 owed. If he would settle these properties, he would have $250,000. There are several e-mails here where he refused to go to see her. One day, he just showed up in her office unexpected without an appointment . . .

* * *

THE COURT: Now, you're saying, [appellee], that if the properties were sold, there would be enough net proceeds from those properties to pay off the child support?

[APPELLEE]: Yes, definitely.

THE COURT: And when you were married to [appellant], you were aware of the finances of the properties?

[APPELLEE]: The properties were paid outright. There was no lien or anything on them.

THE COURT: All right. But you said there was a $50,000 debt on one of them.

[APPELLEE]: Yes.

* * *

THE COURT: Okay. But when you got divorced, that was the only debt on any of the properties?

[APPELLEE]: Yes, yes.

The circuit court specifically asked appellant's counsel's why the court should not order that the properties be sold and the arrearages paid from whatever the proceeds were, to which appellant's counsel replied:

> [W]ell, initially one of the properties is an income stream for [appellee]. Her testimony was the she rents the property at Inner Circle and she receives rents from that.
>
> Another property, Your Honor, is at least potentially an income stream for [appellant] (sic). At times it's been the only income from which he's been able to make child support payments.
>
> Finally, the third property is [appellant's] residence, and while he's behind on some of the bills and the house has fallen into foreclosure, he's entitled to have a place to live.
>
> Further, Your Honor, 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.
>
> * * *
>
> Further, Your Honor, there's as you heard a $50,000 loan that was taken against the house on Washington Boulevard during the party's marriage that has not been routinely paid upon, and according to [appellant's] testimony is probably closer to $75,000. There are other judgments that would operate as liens against the properties which would further reduce their value — or the potential proceeds of the sale, rather.
>
> Finally, Your Honor, the only evidence concerning the actual value of the property is [appellee's] testimony, which with respect to the Inner Circle property may be more valuable, but with respect to the other two properties [appellee's] testimony was that she doesn't recall the last time she looked at the assessments, she hadn't inspected the properties, and I don't think her testimony concerning the value of those two properties should be given much weight by the Court, because it is not based on really much of anything other than her suppositions, and there's not an indication that sale of the properties would generate that much income unless we're talking about the Inner Circle property, and I'm not sure that that's even something [appellee] is asking for.

The circuit court noted that when the parties divorced, the properties were no longer owned by them as tenants by the entirety, but rather owned as tenants in common. As such, the properties could be sold and the proceeds divided. The circuit court found:

> [T]here's evidence that theses parties together have assets from which [appellant] could use his share to pay off the child support arrearages. And it may not be the wisest thing to do, but it's an asset that could be liquidated, and I have evidence that he has not cooperated in liquidating those assets and that's a source of possible payment.

The circuit court granted the petition for contempt, ruling orally from the bench as follows:

> I find by clear and convincing evidence that [appellant] is obligated to pay child support under the judgment of absolute divorce entered on August 18th, 2008, that that obligation is a basic obligation of $797 per month, plus $50 toward arrearages, which at that time were set at $1,046. Now the obligation is to pay on behalf of two different children of the parties.
>
> I find that in recent months since June of this year [appellant] has in fact made payments, although not payments of the full amount due each month. I find that he has paid $200 in June, $575 in July, $450 in August, $100 in September, $600 in October, $550 in November, and . . . a total of $700 in December because he has also made a $200 payment today.
>
> I find that the arrears as of today, including the credit for the $200 paid today, are $8,669.
>
> I find that [appellant] has the ability to pay the full amount, including the arrears, because he owns with [appellee] substantial assets in terms of three properties in Baltimore City.

> Now, I agree with [appellant] that the exact values of those properties is unclear, both because [appellee] just doesn't have any professional basis to appr[a]ise the properties. I do find however that based on his own testimony and her testimony they are valuable properties which have earned income streams in the past and which together have — only one of them has a debt against it of somewhere between 50- and $75,000. It is not critical in this case that I know the exact value of those propert[ies], but rather that I know that they have value and that [appellant] could apply his share of that value to his child support obligations.
>
> I find further that the properties were unfortunately not divided at the time of the divorce, which has led to continuing uncertainty about what the party's relative ownership and shares of those properties is, but that [appellant] has resisted attempts to sell the properties in order to resolve those issues.
>
> * * *
>
> I do not have evidence aside from the assets owned by the parties that [appellant] has had employment income in the period since the divorce which he has hidden or refused to use for the payment of child support. I base my finding solely on the existence of assets which could be applied once liquidated to payment of the child support amount.
>
> On the basis of those findings I find that [appellant] is in contempt of the obligation to pay child support contained in the judgment of absolute divorce.

On December 17, 2010, the circuit court issued an Order Finding Contempt and Postponing Disposition, which provided, in pertinent part, as follows:

> **FOUND** that [appellant] is in contempt for failure to pay child support pursuant to the Judgment of Absolute Divorce entered on August 8, 2008; and it is further
>
> **FOUND** that the arrears as of December 17, 2010 are $8,669.00; and it is further
>
> **ORDERED** that disposition shall be postponed to April 7, 2011 . . . and that, prior to the hearing date:
>
> 1. [Appellant] shall remain current with all payments of $797.00 per month plus $50.00 per month toward arrears; and
> 2. [Appellant] shall produce written documentation verifying his income from all sources, including rental income from any properties; and
> 3. Unless the parties agree otherwise in writing, [appellant] shall take all steps necessary promptly to sell the three real properties owned jointly by the parties; and
>
> * * *
>
> **ORDERED** that [appellant] may purge the contempt by being current with his child support obligation to [appellee] and by paying the full amount of the arrears by the next hearing date[.]

On January 4, 2011, appellant noted an appeal. On February 28, 2011, appellant filed a Motion to Stay Proceedings Pending Appeal. On April 7, 2011, the circuit court stayed the constructive civil contempt proceedings until conclusion of this appeal.[5]

DISCUSSION

I.

Appellant argues that the circuit court erred in finding him in contempt for the non-payment of child support. Appellant asserts that the circuit court improperly rejected his defense that, pursuant to Maryland Rule 15-207(e)(3)(A), he "never had the ability to pay more than the amount actually paid." Appellant maintains that since the divorce, as the circuit court acknowledged, he has not "hidden or refused to use" employment income for the payment of child support.

Appellant contends that the circuit court wrongly concluded that he had the ability to pay the full amount of his child support obligation, including arrears, because "he owns with [appellee] substantial assets in terms of three properties in Baltimore City." Appellant argues that the circuit court erred because the exact value of the properties are unclear and "while these properties may have some 'gross value,' it is equally clear that their 'net value' may have been nothing — or even less — given that at least one property was subject to a mortgage . . . but was in foreclosure, subject to eminent auction, and there was a lien (for non-payment of property taxes) against another property."

Appellant asserts that 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 that 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."

As this case was tried without a jury, "the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

Md. Rule 15-207, titled "Constructive contempt; further proceedings" provides, in pertinent part, the following:

> (e) Constructive civil contempt — Support enforcement action.
>
> (1) Applicability. This section applies to proceedings for constructive civil contempt based on an alleged failure to pay spousal or child support, including an award of emergency family maintenance under Code, Family Law Article, Title 4, Subtitle 5.
>
> (2) Petitioner's burden of proof. Subject to subsection (3) of this section, the court may make a finding of contempt if the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing.
>
> (3) When a finding of contempt may not be made. The court may not make a finding of contempt if the alleged contemnor proves by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing the alleged contemnor (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, . . .
>
> (4) Order. Upon a finding of constructive civil contempt for failure to pay spousal or child support, the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations, (B) any sanction imposed for the contempt, and (C) how the contempt may be purged. If the contemnor does not have the present ability to purge the contempt, the order may include directions that the contemnor make specified payments on the arrearage at future times and perform specified acts to enable the contemnor to comply with the direction to make payments.

In Dodson v. Dodson, 380 Md. 438, 448 (2002), the Court of Appeals discussed the distinction between civil and criminal contempt, stating: "[T]he law concerning contempt is clear, and that the purpose of civil contempt is to coerce present or future compliance with a court order, whereas imposing a sanction for past misconduct is the function of criminal contempt[.]" (Citation omitted). The Court stated:

> [T]he distinction between the two types of contempt has been preserved and is important. A civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience or orders and decrees primarily made to benefit such parties. These proceedings are generally remedial in nature and are intended to coerce future compliance. Thus, a penalty in a civil contempt must provide for purging. On the other hand, the penalty imposed in a criminal contempt is punishment for past misconduct which may not necessarily be capable of remedy. Therefore, such a penalty does not require a purging provision[.]

380 Md. at 448 (citation and quotations omitted).

In Arrington, 402 Md. at 100-01, the Court of Appeals described the procedure for constructive civil contempt, stating:

> If the proceeding is one for constructive civil contempt, the petitioner must prove by clear and convincing evidence that the defendant failed to comply with a valid support order; *i.e.*, that a prior court order directed [the defendant] to pay the support . . . and the [defendant] failed to make the court-ordered payments. Upon such proof, the court may find the defen-

> dant in contempt unless the defendant proves, by a preponderance of the evidence, that, despite making reasonable efforts, he or she never had the ability to pay more than was paid or that enforcement of the obligation with respect to the unpaid amounts through contempt is barred by the three-year statute of limitations set forth in Maryland Code, § 10-102 of the Family Law Article.

(Internal citation and quotations omitted).

"[I]n light of the coercive nature of civil contempt, a *present* inability to comply with the prior court order, or with the purging provision if it is different from the prior order, is a defense in a civil contempt action and precludes the imposition of a penalty." Dodson, 380 Md. at 449 (emphasis in original). The Court of Appeals in Elzey v. Elzey, 291 Md. 369, 374 (1981) stated:

> Consequently, with regard to civil contempt proceedings based upon the defendant's failure to comply with a decree ordering support payments, "imprisonment may be avoided by showing that one has neither the money nor the ability to pay." *Soldano v. Soldano*, 258 Md. 145, 146, 265 A.2d 263 (1970). Moreover, the issue is not the ability to pay at the time the payments were originally ordered; instead, the issue is his *present* ability to pay. As stated in *Johnson v. Johnson, supra*, 241 Md. at 419-420:
>
> "If the father was unable to meet his obligation because he had neither a sufficient estate nor the *then* ability to pay, as the record seems to indicate, the court was not justified in incarcerating him. * * * Until he was given an opportunity to show that he had neither the estate nor the ability to pay his obligation and failed to make such a showing, he should not have been incarcerated. The purpose of imprisonment for contempt is to compel compliance with a court order but where the person alleged to be in contempt can establish a valid defense, such as the unintentional inability to obey the order, imprisonment is not proper." (Emphasis supplied).

In Thrower v. State ex rel. Bureau of Support Enforcement, 358 Md. 146, 148-89 (2000), the Court of Appeals reversed the circuit court's finding of contempt and concluded that the purge amounts issued in the case were not based on any evidence admitted at the contempt hearing. The Court held that:

> There was **not a scintilla of evidence** to support a conclusion that Thrower, Mason, or Miles then **had or could possibly obtain the ability** to pay the purge amounts within the time set, in order to avoid incarceration. It defies any semblance of logic or human experience to suppose that, on $ 69/week unemployment benefits and with no other significant assets, Thrower would be able to pay $ 840 within a month or that on $ 75/week, Mason would be able to pay $900 in three weeks. And for the master to take *judicial notice* that jewelry worn by Miles, **who had no other assets** and no employment, and who was being supported entirely by his mother, was worth $ 4,190.76, is so far removed from reality as to suggest an actual disdain for proper judicial procedure and temperament.

Id. at 161 (emphasis added); see also, Ott v. Frederick County Dep't of Social Servs., 345 Md. 682, 689 (1997) (The Court of Appeals reversed a finding of contempt noting that "there was **absolutely no evidence** offered which tended to show that the petitioner had a present ability to comply with the court order. Indeed, just the opposite appears to be the case. As the court's remarks demonstrate, its findings as to contempt and the purge provisions were predicated on a belief that the petitioner could get the required amount, that he had access to funds. That belief, so far as the record reflects, was in turn based on no more than the court's speculation from the facts that the petitioner was working for his father's business, being run by his brother, and that the petitioner sometimes let his sister hold money for him." (emphasis added)).

Preliminarily, we conclude that appellee demonstrated by clear and convincing evidence that appellant failed to comply with a valid support order and failed to make the court-ordered payments. Appellee demonstrated by clear and convincing evidence that appellant failed to comply with the August 18, 2008, 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 set at $1,046. Appellant conceded at the contempt hearing and in his brief before this Court that "while he had not paid all of his child support obligations, he never had gone an entire month without paying child support."

The circuit court properly determined that appellant had the ability to pay the full amount of child support, including arrears, because he jointly owns three properties in Baltimore City with appellee. This was the sole basis on which the circuit court found that appellant had the ability to pay the full amount of child support. In making the finding that appellant had the ability to pay the full amount of child support, the circuit court relied on evidence admitted at the contempt hearing, as well as testimony from the parties, 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 that one of the properties is appellant's residence, "one of the properties is an income stream for [appelleej," and another property is "at least potentially an income [stream] for [appellant]." Appellant's counsel argued that "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 that "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 that 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 that she was aware of the finances of the properties while married to appellant and that was her basis for stating that the properties are owned "outright." According to appellee, she hired a lawyer in an attempt to get appellant to sell the properties, but as of the time of the hearing appellant refused to cooperate in those efforts. Appellee specifically 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 that 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 that 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 that appellant's ability to pay was predicated on his ownership of three properties located in Baltimore City. Unlike the facts presented in Thrower, 358 Md. at 148-49, in this case, there was evidence presented that appellant "**had or could possibly obtain** the ability to pay the purge amounts." (Emphasis added)[6] As such, we see no error in the circuit court's contempt finding.

II.

Appellant contends that the circuit court erred in permitting appellee to introduce a computer printout from the Maryland Child Support Enforcement Program, as Plaintiff's Exhibit One, at the December 17, 2010, contempt hearing to demonstrate the child support arrearage. Appellant argues that the printout was hearsay, lacked foundation, and was not properly authenticated. Appellant points out that the printout was used by appellee in support of the contempt petition and that the printout indicated that appellant owed $8,869 in arrears of child support. Appellant maintains that other evidence properly admitted at trial demonstrated that 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, *i.e.* an out of court statement used for the truth of the matter asserted.

Appellant argues that the printout was not properly authenticated by appellee. Appellant contends that "[t]here was absolutely no evidence before the lower court to show that this document was what its proponent claimed it to be, *viz*., 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 that 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."

"The admission or exclusion of evidence is a function of the trial court which, on appeal, is traditionally viewed with great latitude. . . . An appellate court will only reverse upon finding that the trial judge's determination was both manifestly wrong and substantially injurious." Angelakis v. Teimourian, 150 Md. App. 507, 525 (2003) (citations and internal quotations omitted) (alterations added).

Md. Rule 5-801 defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-901, titled "Requirement of authentication or identification," provides, in pertinent part, as follows:

> (a) General provision. The requirement of authentication or identification

as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

(Emphasis added).

Returning to the case at hand, we find appellant's argument that the circuit court improperly admitted the document as it was hearsay 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 that the balance on Plaintiff's Exhibit One was based on the payments she received and, based on what she has received, she testified that 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. Stanley v. State, 118 Md. App. 45, 53 (1997), aff'd in part and reversed in part on other grounds, 351 Md. 733 (1998) ("Hearsay is considered to be generally unreliable because the opponent does not have the opportunity to cross-examine the declarant."). 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. Viamonte v. Viamonte, 131 Md. App. 151, 157 (2000) ("On matters of law, we apply the harmless error standard." (citation omitted).

The circuit court did not abuse its discretion in overruling appellant's objection to Plaintiff's Exhibit One as lacking authentication. Maryland Rule 5-901 provides that a document may be properly authenticated by "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." The circuit court admitted Plaintiff's Exhibit One "as a summary based on [appellee's] testimony about what payments she's received." 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. As such, we perceive no abuse of discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellee did not file a brief in this case.

2. Numerous pleadings were filed with the circuit court between August 8, 2008, and December 17, 2010, none of which are relevant to the issues raised on appeal.

3. Appellee appeared *pro se* at the hearing.

4. Although admitted into evidence at trial, Plaintiff's Exhibit One is not contained in the record.

5. The Court of Appeals in Arrington v. Dep't of Human Res., 402 Md. 79, 90-91 (2007), explained that: Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 12-304(a) "expressly permits a person to appeal 'from any order or judgment passed to preserve the power or vindicate the dignity of the court and adjudging him in contempt of court' and that the statute did not require, as a condition to the appeal, that the adjudication of contempt be accompanied by a sanction. We observed as well that '[a] finding of contempt, even without the immediate imposition of punishment or sanction, leaves the defendant adjudged to have wilfully violated a court order and may well leave the defendant subject to future punishment at the will of the court.'" (Citation omitted) (alteration in original).

6. In this case, the circuit court provided a purging provision. In the December 17, 2010, Order, the circuit court ordered "that [appellant] may purge the contempt by being current with his child support obligation to [appellee] and by paying the full amount of the arrears by the next hearing date[.]" The purge amount was set at $8,669.

Cite as 3 MFLM Supp. 47 (2012)

Adoption/Guardianship: termination of parental rights: evidence

In re: Adoption/Guardianship of Michael S.

No. 1160, September Term, 2011

Argued Before: Krauser, C.J., Woodward, Davis, Arrie W. (Retired, Specially Assigned), JJ.

Opinion by Davis, J.

Filed: January 19, 2012. Unreported.

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.

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

This appeal arises out of a decision by the Circuit Court for Prince George's County to terminate the parental rights of Dennis B., appellant, over his minor son, Michael S. (Michael), and grant guardianship with the right to consent to adoption or other planned living arrangement to the Prince George's County Department of Social Services (the Department). Michael, who was born on August 4, 2000, is the biological son of Flora S. and Dennis B.[1] 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.[2] In January 2002, the Department filed petitions in the Circuit Court for Prince George's County alleging that all three children were children in need of assistance (CINA).[3] On April 19, 2002, the court found all of the children to be CINAs. Michael remained in foster care until May 2003, when he was reunified with Flora S. In August 2003, the court granted sole legal custody of Michael, Anthony U., and Emmanuel U. to Flora S., and 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.

Neither parent attended the initial permanency planning hearing on February 4, 2008, at which the court determined the appropriate permanency plan to be reunification with Dennis B., or the permanency-planning review hearing on July 28, 2008. Dennis B. attended the next permanency planning review hearing on December 15, 2008, at which the court continued the plan of reunification.

At another 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 from that order. At subsequent permanency planning review hearings, the court reaffirmed the plan of termination of parental rights and adoption.

In September 2009, the Department filed a petition 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, which the Department moved to strike as untimely. After a hearing, the court granted the Department's motion to strike. Thereafter, the court held an uncontested termination of parental rights hearing and awarded guardianship of Michael to the Department. Dennis B. appealed to this Court in *In re Adoption/Guardianship of Michael S.*, No. 1724, September Term 2010. By consent of the parties, that appeal was remanded to the circuit court for a contested termination of parental rights hearing. The hearing was held 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.

ISSUES PRESENTED

Dennis B. presents two questions for our consideration, which we have rephrased slightly as follows:

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

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

FACTUAL BACKGROUND

Dennis B.'s first contact with the Department occuned in August 2006, when he contacted social worker Mary Rafferty because he was in need of assistance with rent and child care for Michael. The Department made a payment for Dennis B.'s rent, made a safety assessment of his home and referred him to a program known as the Family Tree for family therapy. According to Ms. Rafferty, Dennis B. worked with the Department, and was responsive and engaged.

The next contact with Dennis B. occurred on January 5, 2007, when child protective services investigator Angel Belt received a report that Michael was left home alone and was not attending school. Ms. Belt visited Dennis B.'s apartment where she found Michael home alone. She contacted Michael's mother, but was unable to make contact with Dennis B. Ms. Belt ascertained that Michael was school age and should have been attending school. She left a pamphlet in Dennis B.'s apartment and took Michael back to her office. Later that evening, about three to four hours after Michael had been removed from the home, Dennis B. contacted Ms. Belt. When Dennis B. arrived at her office, he explained that he left Michael in the care of an uncle who was supposed to be watching Michael, who had stayed home from school because he was not feeling well. Ms. Belt entered into a safety plan with Dennis B., who agreed never to leave Michael home alone again. According to Ms. Belt, Dennis B. did not comply with the safety plan and failed to arrange for care givers for Michael. Between January 25 and March 25, 2007, Ms. Belt followed up with Michael's school and obtained other information regarding his well being. According to Ms. Belt, there came a time when she was unable to locate Dennis B. and he only contacted the Department "when he needed money." Between January 25 and April 23, 2007, Ms. Belt never met face-to-face with Dennis B. Although she tried to convene a family facilitation meeting, she was never successful in getting Dennis B. to attend.[4]

On April 23, 2007, after Ms. Belt's initial investigation was closed, Dennis B. appeared in her office and stated that he wished to place Michael in foster care. At that time, Dennis B. was living in a different location and needed assistance paying arrears for his rent and child care, which Ms. Belt arranged. She also referred Dennis B. to a program known as the Family Connection, which provides services to stabilize families and prevent placement of a child in foster care. On May 23, 2007, Dennis B. signed a service agreement.

On June 29, 2007, the Department received a report that Dennis B. had been arrested and that his roommate was no longer able to provide care for Michael. Michael was placed in emergency care and a shelter care hearing was held on July 2, 2007. At some point after Dennis B. was released from jail, and prior to the merits hearing, he advised Ms. Belt that he had housing and "everything that he would need for Michael to come home to him. . . ."

At the merits hearing on July 24, 2007, the court dismissed the Department's CINA petition and returned Michael to the custody of his father. As Ms. Belt and one of her co-workers were leaving the courthouse, they heard Dennis B. say to Michael, "you go with these nice ladies." Ms. Belt tried to explain that Michael was now in Dennis B.'s custody, but he told her that he had to go to work and did not have anyone to care for Michael. Ms. Belt "had to wait around for the afternoon session, [and] get the Master to rehear" the case. As a result of the rehearing, Michael was found to be a CINA, and was placed, once again, in foster care.

Senaida Sharif is a case work specialist for the Department who was assigned to foster care reunification. Her first contact with Dennis B. occurred at the end of 2006, when he called because he was interested in having Michael placed in foster care. At that point, Ms. Sharif learned that child protective services was already involved and that Dennis B. was receiving family preservation services. At some time thereafter, but before Michael was placed in foster care, Dennis B. went to the Department and met with Ms. Sharif, again inquiring about having Michael placed in foster care. Ms. Sharif directed him to Ms. Belt, who was his previous family preservation worker.

Ms. Sharif accompanied Ms. Belt to the July 24, 2007 hearing that occurred after Dennis B. was released from incarceration. She testified that Dennis B. told the judge that he was "ready, willing, and able to care for [his] son," and that foster care had been necessary only because he was incarcerated. Ms. Sharif gave the following account of what occurred after the judge placed Michael in Dennis B.'s custody:

> We got outside the courtroom, you know, we kind of gave Michael a hug, and you know, Mr. B. walked off, and we were like, hey, you know, you're forgetting Michael, and he's like, no, I'll — tell the foster parents I'll come and get him at the end of the

> week. And we're like, no, he's no longer in the care of the Department, you know — you know, your son needs to go with you.
>
> And it was kind of — you know, I felt really bad for Michael because he was kind of going between the Department and his dad.
>
> And Mr. B. came back in the courtroom and asked after the judge came back from lunch if she could reopen the case and give him some time to get I believe it was daycare and housing secured. And she asked him how much time did he need, and you know, it went from two weeks to a month, and when we came back for that month's hearing [on August 20, 2007] Mr. B. did not show up and Michael came into care.

Michael was placed in foster care with his half-brothers, Anthony and Emmanuel. Ms. Sharif did not have any contact with Michael's mother, Flora S., after July 2007. She helped to get Michael enrolled in school, referred him for individual counseling to deal with some problems with aggressive behavior, urinating in a hallway, and bathing in a sink. Ms. Sharif testified that it was difficult to get in contact with Dennis B., and the next time she saw him was in November or December 2007. Between July 24, 2007 and August 20, 2007, he did not contact her about scheduling visitation with Michael and did not present a plan for housing or daycare. Ms. Sharif had a cell phone number for Dennis B., but did not get any response from him.

In November or December 2007, Dennis B. contacted Ms. Sharif, but did not leave a phone number where she could reach him. Eventually, he called again and she obtained a new phone number for him. He stated that he had moved, and Ms. Sharif set up an appointment to meet with him to assess his new home and give him information about daycare options and schools in the area.

Dennis B. was not at home when Ms. Sharif arrived for the first scheduled home visit. A short time later, on January 10, 2008, she conducted a home visit of a two-bedroom apartment that Dennis B. said he was sharing with his fiancee, Adella Brewer, and her five-year-old daughter. Ms. Sharif advised Dennis B. that Michael could not share a bedroom with Ms. Brewer's daughter, so they would need a bigger apartment, and that Ms. Brewer would need to provide fingerprints to ensure that there were no child abuse or neglect charges against her. She asked Dennis B. about schools in the area and he responded that "he had given Ms. Brewer that task." He also stated that he would have to get information about after care from Ms. Brewer. Dennis B. and Ms. Sharif signed a service agreement while she was at his apartment for the home visit. Dennis B. was referred to the Department's Family Tree program for parenting classes, and to Dr. Fago for a psychological evaluation, which he obtained. Ms. Sharif also referred Dennis B. to Michael's therapist so he could participate with Michael in family therapy.

A hearing was held on February 4, 2008, but neither of Michael's parents attended. Another permanency planning hearing was held in July 2008. At that point, Ms. Brewer had not submitted her fingerprint cards, overnight visitation had not yet been approved and Ms. Sharif was advised that Dennis B. had a new address in Silver Spring. After the July hearing, Dennis B. was referred for a substance abuse assessment, but he had not completed that assessment by the next hearing in December 2008. Ms. Sharif testified that Dennis B. had visits with Michael, but after he moved to Silver Spring he had difficulty getting to the foster parents' home to pick up Michael and she had to mediate disputes between Dennis B. and the foster parents regarding the scheduling of visits. The visits, however, were "very sporadic, very inconsistent."

In December 2008, Ms. Sharif reconimended that the permanency plan for Michael be changed to adoption because of "the inconsistencies . . . in reference to the visitation, not completing the parenting classes, [and] still the issue of daycare or knowing the surrounding school areas was never given" to her. Ms. Sharif noticed a change in Michael from mid-2007 to the end of 2008. Initially, he was enthusiastic about having visits with Dennis B., but then "he didn't want them, he wasn't interested, he didn't care whether they occurred."

After the court hearing in December 2008, Ms. Sharif scheduled a family facilitation, which was intended to establish a visitation schedule for Dennis B. and Michael and, to ensure that other requirements were met, the family facilitation included the parenting classes, the substance abuse evaluation and family therapy. Dennis B. called and said he could not make the scheduled facilitation; yet, on the same day, he appeared at the Department to pick up new fingerprint cards for Ms. Brewer. While he was there, Ms. Sharif contacted the Health Department, which is located in the same building and arranged for Dennis B. to complete his substance abuse assessment, which he did. Dennis B. did not attend the second scheduled facilitation. Ms. Sharif never received fingerprint results from Ms. Brewer and, as a result, overnight visits with Dennis B. were never approved. By April 6, 2009, Dennis B. still had not completed the parenting classes

or attended family therapy with Michael. Ms. Sharif's work with Michael ended after the court hearing in April 2009, when Michael's plan was changed to adoption and Francelina Kage became his adoption worker.

Ms. Kage was assigned to work on Michael's case in April 2009. She contacted Dennis B. and he told her that he had started attending parenting classes at the Department. Ms. Kage made arrangements to have Dennis B. enter a service agreement and conduct a home visit. Dennis B. never attended a family therapy session and did not complete the parenting classes. Ms. Kage scheduled a home visit; however, when she called to confirm the appointment on the scheduled date, Dennis B. told her to go to a different address. Ms. Kage testified that Dennis B. never told her that he had moved. Dennis B. claimed that he shared the apartment with his wife and her daughter. Ms. Kage stated that she did not see anything to indicate that a girl lived in the apartment and there were no men's belongings in the master bedroom. It appeared to Ms. Kage that Dennis B. stayed in the small bedroom that he claimed was for Michael. When asked to see Michael's things, Dennis B. pulled some socks and a pair of underwear from a small carry-on bag. Dennis B. said he was a DJ and the living room contained a neat pile of electronic equipment. On several occasions, Ms. Kage asked to meet with Dennis B.'s wife, but he never brought her to the appointments. Nor was Ms. Kage able to confirm that Dennis B. was listed on the lease for the apartment.

On May 3, 2010, Ms. Kage and Dennis B. entered into a service agreement in which they agreed, *inter alia*, that he would attend and participate in family therapy with Michael, that he would contact the foster parents twenty-four hours prior to the day of a visitation to make arrangements, that he would provide transportation to and from visitations with Michael, that he would provide employment information and check stubs and that he would obtain a three-bedroom apartment. According to Ms. Kage, Dennis B. attended one family therapy session, but visitation with Michael was irregular. In July 2010, Ms. Kage met Dennis B. at a hearing and Michael was with him. Dennis B. told Ms. Kage that "he couldn't take Michael for the duration of the arrangement that he and the foster parents had made." Accordingly, Ms. Kage took Michael back to the foster parents early that day. Michael's last visit with his father occurred in July 2010. Dennis B. provided Ms. Kage with a security identification card from his place of employment and a checkstub, but never notified her to say that he had moved to a three-bedroom apartment.

Ms. Kage testified that, at some time in October or November 2010, Michael stated that he did not want to visit with his father. At that time, the court ordered visitation only upon Michael's request. In December 2010, Michael's attorney contacted Ms. Kage and said that Michael would like to visit his father, but Ms. Kage was not able to reach him at any of the three or four telephone numbers she had for him, and he did not respond to a letter she sent to his last known address.

In February or March 2011, Dennis B. called Ms. Kage, and she made an appointment to meet with him to discuss a service agreement and visitations. The meeting did not occur, however, because Dennis B. cancelled it and a subsequently rescheduled meeting as well.

On the third scheduled meeting, Ms. Kage entered a service agreement with Dennis B. that was dated March 18, 2011. As part of that service agreement, Dennis B. agreed to provide Ms. Kage with a copy of his driver's license. When asked why that was included in the service agreement, Ms. Kage explained:

> [Ms. Kage]: Well, when I hadn't heard from Mr. B., like I do with most foster parents that I haven't heard — not — excuse me, not foster parents, but biological parents, I kind of look them up in the Maryland Judiciary system just to see what's going on with them.
>
> So when I looked up Mr. B., it appeared that there were several incidences between November 2010 and January of 2011 where there — being pulled over, license suspended, fake tags, and I was just looking to see if he was arrested, maybe he was in jail, maybe that's why I haven't heard from him in such a long time. Just trying to get his whereabouts.
>
> So when I finally did meet him, since we were setting up visitations for Michael, he would be transporting Michael back and forth picking him up and dropping him off, I mean, I had to make sure that Michael would be safe, so I asked for a copy of his driver's license, and that's something that we do at the Department with any parent that will be transporting a child, or even foster parent.
>
> [Counsel for the Department]: So when you wrote this in the service agreement, did you discuss it with Mr. B. before it was written down?
>
> [Ms. Kage]: We did. We did. I requested it, Mr. B.'s response was, why do I need that why do you need that, and again, I told him the same thing I just

said to you or to the Court, and Mr. B. eventually said that his license was taken away from him, the police officer took his license away, and he had a court hearing, I believe that same week to get his license back.

So I explained to Mr. B. that, you know, since we're setting up visitations, that would be an issue. Michael could not ride in the car with him because he had a suspended license. So we came up with, you know, what would be the alternative. And then he said his wife would be transporting him to the Department, him and Michael, you know, to do visits. She brought him here to the Department that same day.

And so I said, well, okay, I need to actually speak with your wife, you know, I've never met her, and I need to speak with her — excuse me, I'd met her in the car, but never come to the Department and had a meeting about her intentions with Michael, and I needed a copy of her driver's license, he said no problem, she's picking him up.

* * *

So we ended the meeting. Mr. B. said he had to go, and we both signed the service agreement and agreed that Wednesdays would be the day, and next Wednesday would be when he met me at the Department for a visit with Michael. And I also offered to meet him, take Michael to meet him somewhere since he didn't have a license, maybe somewhere that was convenient for him and he was happy to hear that.

So Mr. B. left. I never saw his wife. He walked outside, and I looked out the window, then I went upstairs to my office and looked out the window, and I notice[d] Mr. B. like pacing in a circle. So I was just kind of wondering if he was okay, looking, and then I saw him walk to a white car, a two-door car. He opened up the back seat, put something in the back seat, and then he got in the driver's side and then he started the car and proceeded to drive off the premises.

Ms. Kage sent a letter scheduling a visit with Michael for March 23, 2011, from 3:00 to 6:00 p.m. at the Department, but Dennis B. canceled the visit because his mother was sick. Dennis B. did not contact Ms. Kage to schedule a home visit or a visit with Michael. Nor, to Ms. Kage's knowledge, did he attend family therapy or participate in any recommended parenting class. Further, he did not provide a copy of his marriage certificate. Ms. Kage testified that she had not seen or heard from Dennis B. since March 24, 2011.

When asked to described Michael's emotional ties and feelings with his father, Ms. Kage stated, over objection, that "there's been a disconnect," that "Michael doesn't necessarily talk about his father," and has "never said, well, did you talk to my father." According to Ms. Kage, there "just doesn't seem to be like a son and a father connection." In addition, Ms. Kage testified that Michael does not want to be reunified with his father. She stated that "we talk about who do you want to live with, you know, do you want to go back and live with your father and the answer's always been no. . . . Michael wants to be adopted, he wants to be adopted." Although Michael had been living in a foster home with his two half-brothers, in June 2011, just prior to the hearing, the foster mother advised Ms. Kage that she no longer wanted to adopt Michael, and there were allegations of some form of abuse against Michael. Michael was placed in a treatment foster home, with no adoptive resource identified at the time of the hearing.

Moses Keita, a former friend of Dennis B.'s, rented a room in his Hyattsville home to Dennis B. and Michael for approximately a six month period beginning around February 2007. Mr. Keita, who works as a building engineer at Hyattsville Elementary School, testified that Michael did not attend school regularly, that Dennis B. "used to leave [Michael] by himself in the house," and that he and Dennis B. used to argue about that. On one occasion, Dennis B. left Michael unattended all night. When Dennis B. returned home, Mr. Keita told him that, if he did not stop leaving Michael unattended, he would not let him in the house. According to Mr. Keita, Dennis B. called the police and claimed that Keita was harassing him, but when the police arrived, they arrested Dennis B. Mr. Keita stayed home from work for "like three days" until social services picked up Michael. Mr. Keita testified that he observed Dennis B. drinking alcohol "always" and "like every day," and that "when he drink he's calm, when he don't drink he'll get a problem. . . . like shouting some time, shouting at his son, get out of here, go there, go there, go sit down." In addition, when asked about how Dennis B. disciplined Michael, Mr. Keita stated that, on at least two or three occasions, he "shout at him some time, beat him up." As for the beatings, Mr. Keita testified that Dennis B. "would beat [Michael] with his

hands," but that Michael was not injured.

Dennis B. testified that he was forty-six years old, although on cross-examination, he stated that he was born on September 24, 1962 and that the error in calculating his age was because "I'm clogged here. I'm clogged, you understand? I'm clogged out here. If you ask me my — the day I was born, I will tell you, and then you figure out the date. . . . that's not something you should hold against me." He was married to Idella Brewer on July 27, 2010, and had only one child, Michael. He was originally from Sierra Leone, West Africa, but for more than twenty years had resided in the United States. At the time of the hearing, he resided at 5827 Cherrywood Terrace in Greenbelt. He earned a masters degree in industrial and civil engineering at Kalini State University in Russia, but at the time of the hearing, was employed as "a security-special police officer," earning $35,000 per year. He did not know the whereabouts of Michael's mother, Flora S.

Dennis B. stated that he first learned of Michael's birth when the child was fourteen months old. At that time, Flora S.'s brother called and informed him that Flora S. had given birth to a boy and, in March 2002, Dennis B. had paternity testing that revealed he was Michael's father. In January 2006, Flora S. brought Michael to Dennis B.'s home and said that she could no longer care for him. When Dennis B. opened the door, Flora S. pushed Michael inside and ran away. At that time, Dennis B. was working two jobs, but "somewhere around November" 2006, he became unemployed because he "had to stay with [Michael] 24/ — you know — 7 at home." Eventually, his savings ran out.

According to Dennis B., on January 24, 2007, Michael had a headache. When he returned from a Safeway store across the street where he had gone to obtain some medication for Michael, he found the pamphlet left by Ms. Belt. According to Dennis B., he had an agreement with his cousin who lived in a neighboring apartment that he would watch Michael when Dennis B. was not around. Dennis B. denied that Ms. Belt was in his apartment for three and a half hours, but admitted that Michael was not enrolled in school because he did not have any of Michael's records that were necessary to enroll him.

After losing his jobs and savings, Dennis B. was evicted, and he subsequently moved into a room at Moses Keita's house. Dennis B. said that that arrangement did not work out because the Department "never sen[t] its money as early as they could," so Mr. Keita bothered him every day about the unpaid rent and stole things out of his apartment. Dennis B. denied that he drank every day or smoked, and testified that his job reviews his record every six months, so he could not be a drunkard. On one occasion, while arguing with Mr. Keita, Dennis B. called the police. After the police arrived and asked for identification, Dennis B. was arrested because he had an outstanding warrant for failure to appear in a traffic case. Michael was taken into custody by the Department.

Dennis B. denied that the Department did not hear from him between July 2007 and December 2008. He testified that, during that period, he visited with Michael every weekend and that the visits were facilitated by the foster parents, Mr. Jones and Ms. Jackson. Ms. Kage confirmed that the visits were arranged between Dennis B. and the foster parents and the Department stipulated that, at some point, the fingerprints for Ms. Brewer were received and overnight visits were approved. Dennis B. also testified that he gave financial assistance to the foster parents and provided such things as a Playstation and fire truck for Michael.

Dennis B. stated that he completed a parenting class, that, between April and June 2010, he had six meetings with Dr. Manor, who was Michael's psychiatrist and works with the Department and that he was not opposed to participating in family therapy. Ms. Kage testified that she only received a report from Dr. Manor for one therapy session.

At the conclusion of the contested hearing, the court granted guardianship of Michael to the Department, finding both unfitness and exceptional circumstances, because "the parents have been virtually absent in Michael's life for half of his life," and even when Michael has been in his parents' care, "they haven't provided appropriate supervision."

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I

Dennis B. first contends that the circuit court erred in admitting in evidence hearsay[5] statements by two social workers, Ms. Kage and Ms. Sharif, regarding Michael's feelings toward his father and about being adopted. Specifically, Dennis B. directs our attention to the following testimony by Ms. Kage:

> [Counsel for the Department]: Have you discussed with Michael whether he wants to be reunified with his father, go back to live with him?
>
> [Ms. Kage]: I have.
>
> [Counsel for the Department]: And what'd he say?
>
> [Counsel for Dennis B.]: Objection.
>
> THE COURT: Overruled.
>
> [Ms. Kage]: He said no.

Similarly, Ms. Sharif testified:

[Counsel for the Department]: You recommended to the Court at that time that the permanency plan for Michael be changed to adoption. Could you explain to His Honor why you made that recommendation?

[Ms. Sharif]: It was based on the inconsistencies of Mr. B. in reference to the visitation, not completing the parenting classes, still the issue of daycare or knowing the surrounding school areas was never given to this worker.

Michael, you know, I noticed the change in working with Michael in that year and a half where he was enthusiastic about having visits with his father, to you know, just becoming very — he didn't want them, he wasn't interested, he didn't care whether they occurred.

[Counsel for Dennis B.]: Objection.

[Ms. Sharif]: This is what Michael —

[Counsel for Dennis B.]: As to what Michael was thinking.

[Ms:Sharif]: said.

THE COURT: Overruled.

[Counsel for the Department]: You may — you may answer your question.

[Ms. Sharif]: Yeah. I remember asking Michael if he could be anywhere in the world where would he be, and he said, he'll be on — he would like to be on an island. And I said, if you can take anyone with you who would you take? And he said, that he will take his brothers and he will take Mr. and Mrs. Jones — I mean Mr. Jones and Ms. Jackson [his foster parents] if he could. And I asked him, you know, anyone else? And you know, he sat for a moment and he thought and then he said, well, you know, I guess it'd be okay if my dad could come visit, but he didn't want him to stay on the island. And this was, you know, this kind ofjust stuck with me because for the most part what I asked —

[Counsel for Dennis B.]: Objection, Your Honor.

THE COURT: Overruled.

[Ms. Sharif]: — when I asked Michael about, you know, his visits, and you know, how they went with his dad —

[Counsel for Dennis B.]: Objection as to his response.

THE COURT: Overruled.

* * *

[Ms. Sharif]: You know, he went from being excited to being disappointed to just not wanting to be bothered.

Dennis B. argues that this testimony by Ms. Kage and Ms. Sharif "constituted extrajudicial statements made to them by Michael and were offered in court for the truth." In addition, the court relied upon this testimony to support its findings concerning Michael's emotional ties with and feelings toward his parents, siblings and others who may affect his best interests significantly, and his feelings about severance ofthe parent-child relationship. Dennis B. asserts that the testimony did not fall within a recognized exception to the rule barring hearsay, and the court erred in admitting it and relying upon it. We disagree and explain.

Two of the factors set forth in the guardianship statute required the court to consider Michael's feelings. 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 proponent of the statement need not demonstrate that the declarant is unavailable to testify in order to admit the statement. Md. Rule 5-803(b)(3).

The statements at issue were expressions of Michael's state of mind and his 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 at issue were properly admitted pursuant to Md. Rule 5-803(b)(3).

Even if the statements were not properly admitted, any error in admitting them in evidence 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 admitted at trial. In Maryland, it is well established that "a judgment in a civil case will not be reversed in the absence of a showing of error and prejudice to the appealing party." *In re: Ashley E.*, 158 Md. App. 144, 164 (2004). The burden is on Dennis B. to show "that it is likely that the outcome of the case was negatively affected by the court's error." *Id.* at 164. 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.

For example, on direct examination by counsel for the Department, Ms. Kage was questioned, without objection, about Michael's feelings about the severance of his parents' parental rights:

> [Counsel for the Department): Okay. And do you have knowledge as to Michael's feelings about the severance of his parents' parental rights? Have you talked to him about that concept?
>
> [Ms. Kage]: Well, Michael is ten, so the language I use has to make sense to him, you know. So I wouldn't necessarily say parental rights, but we talk about who do you want to live with, you know, do you want to go back and live with your father and the answer's always been no.
>
> Q. And what about the concept of adoption, have you talked to him about that?
>
> A. We have talked about that.
>
> Q. And what is Michael's feeling about that?
>
> A. Michael wants to be adopted, he wants to be adopted.

Similarly, on several occasions, counsel for Dennis B. questioned the social workers about Michael's feelings. When questioning Ms. Sharif the following occurred:

> [Counsel for Dennis B.]: Michael changes — his attitude towards his father occurred after being placed with Mr. Jones. That's what your testimony was.
>
> [Ms. Sharif]: No.
>
> Q. You (indiscernible) after the placement there.
>
> A. Right, over a period of a year and a half Michael's behavior in reference to consistently being disappointed in reference to visits with his dad, because what we observed was that when Michael was told he was having a visit — And I'm being told this by the foster parent because I didn't see Michael every week. But when it — when visitations were about to occur and they told Michael okay, well, you're having a visit. . . tomorrow with your dad, and the visit did not occur the foster parents had to deal with Michael . . . kicking and screaming or being aggressive with his brother.
>
> Q. His disappointment?
>
> A. Yes, it's been expressed as disappointment. There was a — an incident where Michael became aware of a birthday party that was being thrown for Ms. Adella's daughter and it was around the same time of Michael's birthday, and Michael was promised. . . toys and gifts and a birthday party of his own and that didn't happen, but Michael was invited to come and participate in the birthday party of this other.. . of Ms. Adella's daughter. He was very upset by that.
>
> Q. Now you said that didn't happen and you were told that, you don't know.
>
> A. I was told this. I was told this by the —
>
> Q. You don't know — but you don't know that from your own personal knowledge do you?
>
> A. No, other than Michael — and when I talked to Michael in reference to the birthday, because he said that his dad promised him I think it was a game or something, and he didn't get it, and he said that he was upset by that, he was saddened by that.

Although counsel for Dennis B. clearly questioned Ms. Sharif about the source of her knowledge about Michael's feelings, he did not move to strike the testimony or otherwise prevent it.

> A short time later, counsel for Dennis B. questioned Ms. Kage as follows:
>
> [Counsel for Dennis B.]: And Michael still wishes to have a relationship with his father, correct?
>
> [Ms. Kage]: The last time I asked

> Michael was — it's been more than three months ago, so the last conversation we had we did — he said he wanted a visit and that's when I tried to organize a visit with his father.

In addition to questioning by counsel for Dennis B., other evidence supported the court's findings regarding Michael's wishes. For example, a report prepared by Ms. Kage, dated April 27, 2010, which was admitted in evidence without objection as Petitioner's Exhibit 57, provides, in part:

> According to the foster parents Mr. B. participates, at most, in one to two overnight visitations per month rather than once a week. On multiple occasions, this worker has arranged with Mr. B. for visitations to occur on the weekends after Michael's football and basketball games. Meeting the foster parents at Michael's football or basketball games would allow Mr. B. to attend his son's games while providing an opportunity for support and bonding related to Michael's passion for athletics. On the one occasion when Mr. B. did pick Michael up at the football field for a weekend visit, he arrived at the end of Michael's game. The foster parents reported that Michael was not happy to see his father and did not want to spend the weekend with him. The foster parents stated that they encouraged Michael to go with his father. Michael did spend that weekend with his father but repeatedly called [the foster parents] requesting that they pick him up. This worker requested that the foster parents not insist that Michael see his father and notify the Department when Michael does not want to do overnight visits with his father. Mr. B. has indicated he is not willing to attend Michael's football games or transport him to games during the weekend visits.
>
> * * *
>
> Over the years, Mr. B. regularly cancelled scheduled visitations at the last minute or failed to arrive. When Michael was initially in foster care, these cancellations would engender strong behavioral outbursts from Michael. Over the years Michael seems to prefer his weekends with his brothers participating in sports activities or other outings with the foster parents, over spending time at Mr. B.'s apartment watching television.
>
> * * *
>
> According to the foster parents and past social worker, Senaida Sharif, Mr. B. has made many promises to Michael but failed to deliver on them. For example, Mr. B. promised to give Michael something for his birthday last year. He did not fulfill his promise nor did he call Michael to wish him a Happy Birthday. However, he did have a birthday party for Ms. B's child to which he brought Michael.

Similarly, in a report prepared by Ms. Sharif and admitted in evidence without objection as Petitioner's Exhibit 53, the social worker wrote:

> Mr. B.'s visits with Michael continue to be sporadic. According to Michael, his father promised him some money for his birthday but when he participated in the visit with his dad, "they didn't do anything." He stated that they ate food and watched television. This is in stark contrast to another visit Michael had with his father at the beginning of November, when Michael was able to attend the birthday party of Mr. B's fiancee's daughter.

As these examples indicate, 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 that the circuit court erred in determining that it was in Michael's best interest to terminate parental rights when there was no prospective adoptive resource for the child. He argues that "it was not in the best interests of Michael for guardianship to be awarded to the Department because he 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. As a result, Dennis B. contends that granting guardianship to the Department was not in Michael's best interest. Again, we disagree and explain.

Section 5-323 of the Family Law Article authorizes a juvenile court to terminate the legal relationship between a CINA and his or her parents if the court finds by clear and

convincing evidence that termination is in the child's best interests. Md. Code (2006, 2010 Supp.) §5-323(b) of the Family Law Article ("F.L."). In making the best interests determination, the court is required to consider the factors delineated in subsection (d) of the statute while giving "primary consideration" to the child's "health and safety." F.L. §5-323(d). In addition, the court must make specific factual findings as to each of the relevant statutory factors and determine expressly whether those findings demonstrate parental unfitness or exceptional circumstances "that would make a continuation of the parental relationship detrimental to the best interests of th child[.]" F.L. §5-323(b); *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007).

In an appeal from a guardianship decision, we review factual findings under a clearly erroneous standard, errors of law under a *de novo* standard, and the ultimate conclusion of the juvenile court under an abuse of discretion standard. *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010). An abuse of discretion is found "where no reasonable person would take the view adopted by the [trial] court" or when the ruling violates "fact and logic." *In re Yve S.*, 373 Md. 551, 583 (2003)(quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295 (1997)).

In the case at hand, the circuit court found, by clear and convincing evidence, that Dennis B. was "unfit to remain in a parental relationship with his child by virtue of his consistent failure to provide care, supervision, and guidance, or even to provide companionship to his son, and also his failure to make any reasonable efforts to achieve reunification." The court fhrther found that

> the facts demonstrate exceptional circumstances that would make a continuation of the parental relationship detrimental to the best interest of the child because the parents have been virtually absent in Michael's life for half of his life, half of the time that Michael has been on this earth. They have not been there, even when they've — he's been in their care, they haven't provided appropriate supervision, and I find that to be an exceptional circumstances [sic].

Dennis B. does not challenge these findings or any of the court's factual findings. Instead, he argues that the lack of an adoptive resource for Michael precluded the court's finding that guardianship with the Department would be in Michael's best interest. Although he correctly observes that there is a legal presumption favoring continuation of the parental relationship, there is no doubt that that presumption was rebutted, in this case, by clear and convincing evidence of Dennis B.'s unfitness, and clear and convincing evidence 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 in Maryland 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.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Flora S. did not object to the Department's petition for guardianship, did not participate in the underlying hearing, and is not a party to this appeal. She was served by publication with the Department's petition for guardianship and was deemed to have consented to the grant of guardianship over Michael S. by operation of law. *See* Md. Code (2006, 2010 Supp.) § 5-320(a)(1)(iii)(C) of the Family Law Article.

2. Appellant is not the father of Anthony U. or Emmanuel U., and neither Anthony U. nor Emmanuel U. are parties to this appeal. Guardianship over both Anthony U. and Emmanuel U. was granted to the Department in other proceedings.

3. A CINA is a child who requires court intervention because he or she has been abused or neglected, or has a developmental disability or mental disorder, and whose parents, guardian, or custodian cannot, or will not, give proper care and attention to the child and the child's needs. Md. Code (2006, 2010 Supp.) § 3-801(f) of the Courts and Judicial Proceedings Article.

4. On April 5, 2007, a report was made that Michael was being neglected. Although that allegation was found to be unsubstantiated, Ms. Belt determined at that time that Michael was not enrolled in school.

5. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." Maryland Rule 5-801(c). Such evidence is inadmissible unless it falls within a recognized exception to the general rule of exclusion. Maryland Rule 5-802.

6. Maryland Rule 5-803(b)(3) provides:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Cite as 3 MFLM Supp. 57 (2012)

CINA: change in permanency plan: insufficiency of evidence to support change

In re: Jayden G.

No. 1291, September Term, 2011

Argued Before: Krauser, C.J., Kehoe, Kenney, James A., III, JJ.

Opinion by Kehoe, J.

Filed: January 19, 2012. Unreported.

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.

Jayden G. and his mother, Jennifer S., appeal an order of the Circuit Court for Montgomery County changing Jayden's permanency plan from a concurrent plan of reunification or placement with a relative, to adoption by a non-relative. Appellants present a number of questions, which we have reworded and reorganized as follows: [1]

> I. Did the circuit court err in permitting a social worker for the Montgomery County Department of Social Services (the "Department") to testify, as an expert witness, regarding Jayden's attachment to his foster parents and biological family?
>
> II. Did the circuit court abuse its discretion by changing Jayden's permanency plan from the concurrent plan of reunification and placement with a relative, to adoption by a non-relative?

We conclude that the circuit court did not err in allowing the social worker to testify as an expert. However, even with her testimony, there was insufficient evidence before the court to justify changing Jayden's permanency plan from reunification and placement with a relative, to adoption by a non-relative. Accordingly, we will vacate the order of the circuit court and remand for further proceedings.

Background

The procedural history of Jayden's and his siblings' CINA cases is complex. While the parties cite to orders, pleadings, and transcripts which were filed or recorded in this case as early as February 3, 2009, the record transmitted to this Court does not include any papers filed prior to March 18, 2011, nor any transcripts of hearings which were held before the final permanency plan hearing, which took place on April 15, 2011, April 27, 2011 and May 15, 2011. We therefore rely on the docket entries and documents admitted as exhibits during that hearing to reconstruct the relevant events.

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

The issues presented in this appeal center around three children, three adults, and their interactions with the Department and the foster care system. The children are Jayden G. (born September 26, 2007), Victoria G. (born September 21, 2006), and Daeshawn E. (born October 22, 2004). The adults are Jennifer S., the mother of all three children; Justin G., the father of Jayden and Victoria, but not Daeshawn; and Darlene G., Justin's mother and Jayden and Victoria's grandmother. Darlene has a very close relationship with Daeshawn, and considers him to be a grandson. (For brevity's sake, we will refer to all three adults by their first names.)

Jayden and Victoria were declared CINA and were placed in foster care on February 17, 2009. About three weeks later, Daeshawn was also declared a CINA and was placed in foster care. At the time of the permanency plan hearing at issue here, Victoria and Daeshawn were in their third foster care placement. Jayden's foster care experience has been quite different; he was placed in a separate foster home and has remained there since his original placement. He has thrived in this environment and his foster parents are interested in adopting him.

The question in this case concerns whether Jayden's permanency plan, which was a concurrent plan of reunification and placement with a relative, should have been changed to placement with a relative, instead of adoption by a non-relative. Specifically, Jayden and Jennifer contend that Jayden's permanency plan, if it required change at all, should have been changed to make placement with Darlene the new priority.

Placement with the parents is not an issue in this case. No one contends to this Court that reunification

with either Jennifer or Justin is a viable option for these children at this time. Under these circumstances, a logical placement resource for all three children would be Darlene, who has expressed an interest in caring for all three children. She is a long-time employee of the Food and Drug Administration, has an associates degree in applied science and a certificate in early childhood development, and has a home large enough to accommodate the children. However, in adopting the Department's recommendation, the court approved Darlene as a placement resource for Daeshawn and Victoria, but not for Jayden. How this came about requires some explanation.

Jennifer and Justin's relationship has been a turbulent one. As a result, they have separate arrangements for supervised visitation with the children. With the approval of the Department, Darlene accompanied Justin on his visits but, at the beginning of the events relevant to this appeal, she had no independent visitation rights. It appears that the visitation arrangements for Justin and Jennifer were scheduled on the same day but at different times. With the stage thus set, we turn to the relevant events.

On October 13, 2010, Justin was scheduled for a supervised visit with the children at the Department. Darlene arrived early and noticed what she thought were scratches and raised bruises on Victoria's face and concluded that Victoria might have been physically abused by a foster parent. Darlene spoke to the children's social worker, Barbara Jacobs, about her suspicions, and Darlene discussed the matter with Jennifer when she arrived for her own visitation session. Later that day, Jennifer and Justin, without authorization from the Department, removed all three children from the Department premises, took them to a restaurant in Hyattsville, Maryland and then brought the children to Justin's home. That night, the children were recovered by police and were returned to their foster parents. The Department attributes some degree of responsibility for this incident to Darlene.

As a result of these events, the Department requested emergency hearings to suspend Jennifer's and Justin's visitation rights. In addition, Jennifer, and counsel for Daeshawn and Victoria, requested an emergency hearing regarding the children's foster home placement.

The court held a three-day hearing on these motions, but the transcript of that hearing is not included in the record. On November 1, 2010, the court entered an order placing Daeshawn and Victoria in a new foster home. The court also suspended visitation between Justin and the children, which had the effect of suspending Darlene's visitation opportunities as well. The court further ordered that Darlene not be considered as a placement resource for the children. As a result of the November 1 order, the Department ceased efforts to determine whether Darlene was suitable to become a kinship care provider for any of the children. The Department's efforts to identify family placement resources turned towards Jennifer's grandparents.[2]

Justin then filed a motion to rescind the portion of the November 1, 2010 order that eliminated Darlene as a placement resource. The court held a hearing on the motion on November 8, 2011, after which it entered an order "to correct" the portion of the November 1, 2010 order "stating the child's mother and/or grandmother shall not be considered as a placement at this time." The November 8 order characterized the portion of the November 1 order pertaining to Darlene's status as a potential placement resource as an "error."

Also during the hearing on November 8, the court considered a motion that Jennifer filed requesting to change Daeshawn and Victoria's placement from their foster parents to Jennifer's grandparents. In considering Jennifer's motion, the court concluded that, at the time, it was in the children's best interest to remain in the foster care placements. However, the court ordered a home study of Jennifer's grandparents for Victoria and Daeshawn, and ordered visitation with the grandparents, which was to progress from supervised visitation at the Department to non-supervised overnights. The court did not order a home study for Jayden, finding that it was not in his best interest to be placed with Jennifer's grandparents because Jayden "has a strong connection in his current placement, and he only knows [Jennifer's grandparents] in a very limited way."

After a review hearing on December 21, 2010, the Court reinstated the parents' visitation and Jennifer and Justin resumed their weekly supervised visits with the children.[3] Darlene participated in visits with Justin. Jennifer's grandparents participated in the visits as well.

On February 18, 2011, the circuit court explicitly rescinded that portion of the November 1, 2010 order pertaining to Darlene's status as a potential placement. The court also ordered continued supervised visitation between Justin, Darlene, Victoria, and Daeshawn, but suspended visitation between Justin and Jayden. While it is not addressed in the order, it appears that, at this time, Darlene's visitation was still conditioned on Justin's visitation. Accordingly, in suspending Justin's visitation with Jayden, the order also suspended Darlene's visitation with Jayden.

On March 18, 2011, Justin filed a motion requesting that Darlene have supervised visitation with the children independent of Justin's visits, and that the Department perform a home study for Darlene, so that

she could be considered as a placement resource for the children. At that time, the Department's last contact with Darlene as a potential placement resource had been on October 12, 2010.

While Justin's motion was pending, the court initiated a permanency plan hearing. This hearing spanned three days: April 15, April 27, and May 19, 2011. On April 29, 2011, the court granted Justin's motion and entered an order requiring the Department to "promptly conduct a Home Inspection of the home of Darlene Gilbert for Jayden, Victoria and Daeshawn for kinship care[.]"

At the hearing on May 19, 2011, the Department acknowledged that Jacobs had visited Darlene's home for the ordered inspection. The Department made the following proffer:

> [I]t looks good. [Darlene] looks good. She has a relationship with the children. And what the Department is recommending at this point with regard to Daeshawn and Victoria is a plan of custody and guardianship to a relative. Understanding that's the plan of the statute . . . the focus would be on Darlene G. . . . [Darlene] has shown a lot of interest and willingness to step up. So that would be the reason why the Department is now recommending for those two children custody and guardianship to a relative.
>
> The Department is still asking for a plan of adoption by a non-relative for Jayden. And just briefly the reason for that would be Jayden has bonded with the [foster parents]. He's spent two thirds of his life there. And the Department sees that as a very positive development for him.

After hearing closing arguments from the parties, the court reviewed the Family Law Article § 5-525(f)(1) factors and concluded that it was in Jayden's best interest to change his permanency plan from a concurrent plan of reunification and placement with a relative, to adoption by a non-relative. Later in the opinion, we will discuss the Court's findings as to Jayden. At this point, it is sufficient to note that the court subsequently ordered new permanency plans for Daeshawn, Victoria, and Jayden as recommended by the Department. Daeshawn's and Victoria's permanency plans were changed from reunification and placement with a relative, to custody and guardianship with Darlene. The court ordered that Daeshawn and Victoria remain in their existing foster care until they could be transitioned to Darlene. Jayden's permanency plan was changed from a concurrent plan of reunification and placement with a relative, to adoption by a non-relative, namely, his current foster parents.

Jennifer and Jayden filed timely appeals from the order changing Jayden's permanency plan.

ANALYSIS

I. The Expert Testimony from the Social Worker

During the permanency plan hearings, Jacobs, a Department social worker assigned to the children, provided expert testimony regarding Jayden's attachment to his foster parents and biological family. On direct examination, Jacobs testified that she was a social worker in the Treatment Foster Care Unit in the Montgomery County Child Welfare Service and that she had been a licensed clinical social worker for twelve years and a social worker for fifteen years. Jacobs detailed the training she had undergone in the field of social work with regard to attachment. She testified that 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 that she incorporates the information she learned from her studies into her day-to-day practice as a social worker. She acknowledged that she had never previously testified in court about attachment. Over Jennifer's objection, the court accepted Jacobs as an expert witness on issues of attachment.

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

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

It is well established in Maryland that under Rule 5-702, "the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal unless clearly erroneous." *Blackwell v. Wyeth*, 408 Md. 575, 618 (2009) (quoting *Wilson v. State*, 370 Md. 191, 200 (2002)); *see also Rollins v. State*, 392 Md. 455, 500 (2006). Moreover, a proposed expert may derive his or her knowledge through education and study. *Ditto v. Stoneberger*, 145 Md. App. 469, 498 (2002) ("A witness may qualify if he possesses special and sufficient knowledge regardless of whether such knowledge was obtained from study, observation or experience. A law professor may be an expert on trial procedure even though he has never

tried a case.") (quoting *Rotwein v. Bogart*, 227 Md. 434, 437 (1962)). In light of Jacobs's description of her education, training, and experience, the circuit court did not err in concluding that she was qualified to offer an expert opinion in the instant case.

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 that Jayden would suffer if he were to be removed from his foster parents. In response, the Department asserts that appellants did not raise this ground as an objection at trial, an assertion that appellants do not challenge, and that it is therefore not preserved for appellate review. The Department is correct. *See* Md. Rule 5-103(a)(1); *Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 622 (2006) (quoting *Hall v. State*, 119 Md. App. 377, 389-90 (1998) (explaining why the requirement of a contemporary objection to admissibility is so important)). To be clear, we emphasize that appellants have not preserved the right to challenge the *admissibility* of Jacobs's testimony; they have not waived their ability to argue to us that Jacobs's opinion lacked probative value, an issue that we will consider in Part II.

II. The Change to Jayden's Permanency Plan

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.

In reviewing a circuit court's decision regarding a change of a permanency plan, we employ three related standards:

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003) (emphasis and citations omitted)).

Courts and Judicial Proceedings Article ("CJP") § 3-823(e)(1)(i) sets out five categories of permanency plan goals that a court can select for a child in foster care, listed here in descending order of priority:

> 1. Reunification with the parent or guardian;
>
> 2. Placement with a relative for:
>
> A. Adoption; or
>
> B. Custody and guardianship under § 3-819.2 of this subtitle;
>
> 3. Adoption by a nonrelative;
>
> 4. Custody and guardianship by a nonrelative under § 3-819.2 of this subtitle; or
>
> 5. Another planned permanent living arrangement [("APPLA")]. . . .

Once the permanency plan is set initially, the plan is then reviewed before the juvenile court, pursuant to CJP § 3-823(h), approximately every six months until the commitment can be rescinded or the voluntary placement terminated. At these review hearings the court is required to, among other things, "[d]etermine the continuing necessity for and appropriateness of the commitment[,]" "[e]valuate the child and take necessary measures to protect the child[,]" and "[c]hange the permanency plan if a change in their permanency plan would be in the child's best interest." CJP § 3-823(h)(2)((i), (v), (vi)).

If the court concludes at a review hearing that it is in the child's best interest for the established permanency plan to be changed, the court is required to consider the factors set forth in Family Law Article ("FL") § 5-525(f)(1) to determine an appropriate permanency plan. CJP § 3-823(e)(2). The factors in FL § 5-525(f)(1) are:

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

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. *See* CJP § 3-819(b)(2) ("Unless good cause is shown, a court shall give priority to the child's relatives over nonrelatives when committing a child to the custody of an individual other than a parent."); CJP § 3-823(e) ("[T]he court shall: (i) Determine the child's permanency plan, which, to the extent consistent with the best interests of the child, may be, in descending order of priority: 1. Reunification with the parent or guardian; 2. Placement with a relative for [adoption or custody and guardianship]; 3. Adoption by a nonrelative. . . ."); FL § 5-525(e)(1) ("reasonable efforts shall be made to preserve and reunify families"); FL § 5-525(f)(2) ("To the extent consistent with the best interests of the child in an out-of-home placement, the local department shall consider the following permanency plans, in descending order of priority: (i) returning the child to the child's parent . . . ; (ii) placing the child with relatives . . . ; (iii) adoption . . . by a current foster parent.").

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

The Department recommended that Jayden's permanency plan be changed to adoption by a nonrelative.

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, that it would have serious permanent impact on his ability to attach to others, that it would be extremely disruptive to his emotional stability, and that the sense of safety and security and permanency would be very seriously harmed* by his return to the parents. In weighing this factor, the Court is not just considering that he has been there in that family for a long period of time, but is looking at the quality of the attachment to that family, looking at his stage of development, his age. And the court is not unaware of the issue of the siblings, and [that] he is in a different residential situation than his half-brother and his sister. But when the Court looks at the overall emotional attachment issue with respect to the caregivers, it just *finds that it is a, not alone a factor, but a particularly overwhelming factor for the Court to consider* with respect to Jayden.
>
> * * *
>
> 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.

(Emphasis added).

Appellants argue that the evidence presented to the circuit court did not provide a sufficient basis from which the circuit court could reasonably arrive at this conclusion. A critical element in appellants' argument is that Jacobs's 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 counters that, in addition to Jacobs's testimony, there was "ample evidence that placement with [Darlene] would not be in [Jayden's] best interest." The Department points to the fact that Jayden has resided with the same foster family since he was seventeen months old, has thrived in that environment and that Jacobs's testimony was based on her observation of Jayden and his foster parents for a year prior to the hearing. The Department continues:

> In contrast, there was very little information about the quality of Jayden's relationship with [Darlene], other than an acknowledgment that Jayden knows her as his grandmother. Similarly, the record did not specify the frequency of [Darlene's] contact with Jayden. [Darlene] testified that her visits were restricted to those times that [Justin] was visiting, and the record reveals that there were some lapses in his visitation. . . .
>
> Moreover, [Darlene] was not an ideal caregiver. She demonstrated

> questionable judgment when she urged as anxious [Jennifer] to take some immediate action regarding Daeshawn and Victoria on October 12, 2010. In addition, [Darlene] continued to maintain frequent contact with [Justin] and did not view him as a threat to the children, despite his violent history. Placing Jayden with [Darlene] would have presented two potential risks to Jayden: (1) the risk that Jayden would have difficulty adjusting to a new parent figure . . . and (2) the risk that he would be moved yet again if [Darlene] ultimately was unable to protect him from [Justin].

We agree with appellants. Other than Jacobs's testimony, which we will discuss shortly, the probative weight of the other "evidence" cited by the Department is negligible, to the extent it exists at all. Darlene certainly expressed to Jennifer and the Department that she was concerned about the scratches and marks on Victoria's face during the October 13, 2010 visitation. However, there is no evidence that Darlene had any role in Justin's and Jennifer's decision to remove the children from the Department's premises later that day. It is also correct that Darlene's visitation with her grandchildren was intermittent but, for most of the relevant period, her visitation rights were derived from Justin. The court periodically suspended Justin's visitation rights. From what we can discern from the record, his visitation was suspended at the Department's request and for reasons unrelated to Darlene's conduct; so it is difficult to understand how any responsibility for this state of affairs is relevant to whether she is an appropriate placement for Jayden. Finally, there is nothing in the record before us to suggest that Darlene is incapable of protecting the children from Justin, and the Department's speculation to the contrary is utterly inconsistent with its recommendation to the circuit court that Darlene is an appropriate placement resource for Victoria and Daeshawn. This brings us to Jacobs's testimony.[4]

During her direct testimony, before she was qualified as an expert witness, 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. Shortly thereafter, in response to an objection that Jacobs was giving expert testimony without being qualified to do so, the circuit court admitted her as an expert after a *voir dire*. The Department's examination of her resumed:

> Q: [H]ave you formulated an opinion to a reasonable degree of professional certainty as a social worker who works and evaluates attachment in your cases, do you have an opinion as to whether or not Jayden [is] attached to [his foster parents]?
>
> A. Yes, Ido.
>
> Q. What's your opinion?
>
> A. That he is attached to them.
>
> Q. And can you quantify that? Are you able to say with more specificity —
>
> A. He has a healthy attachment to them.
>
> Q. And what does that mean?
>
> A. Then he goes to them for comfort; that they are reliable; that he can, when a child has a healthy attachment, they are able to explore the world, and they can adapt to different situations because they know that they can come back safely to that sort of base of operations. So, that's what we see with him. He's growing. He's learning. He's, you know, gone to a new school, and he really doesn't have any emotional problems. He's just a very, you know, adaptable young, young man.

A short while later, 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. (At a different point in the hearing, Darlene testified that Jayden knows Darlene as his grandmother. This testimony was not challenged by the Department.)

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 this context, we find the analysis of the Court in *In re Adoption/Guardianship of Alonza D.*, 412 Md. 442, 463-64 (2010), to be especially instructive.

In that case, the circuit court terminated the biological father's parental rights after finding that, while there was no evidence that the father was an unfit parent, "exceptional circumstances" existed such that terminating his parental rights was in the children's best interest; specifically, the length of time (six years) that the children had been living with the foster mother and the relationship that the children had with her. *Id.* at 452-53. This Court affirmed. The Court of Appeals reversed, holding that the passage of time and the positive relationship between children and foster parents, absent any other evidence regarding the best interests of the children, is not sufficient to constitute the "exceptional circumstances" necessary to sever parental rights. *Id.* at 465 ("[N]either the length of time [the child] had been in foster care nor the bond that had developed between [the child] and his foster parents, either alone or in conjunction, warranted a conclusion by clear and convincing evidence that termination of the [parental] rights was in the child's best interests."). As the Court explained, "presumably, a successful foster care placement has as its foundation a level of bonding by the children with the caretaker. Were bonding to be the dispositive factor, . . . , then reunification with a parent would be a mere chimera." *Id.* at 463-64.

In re Alonza was a termination of parental right case; the statutory preference for placement with relatives does not possess the same weight as a parent's constitutionally-protected interest in his or her children. However, permanency plans play a critical role in finding safe, permanent living arrangements for foster children. A plan:

> provides the goal toward which the parties and the court are committed to work. It sets the tone for the parties and the court and, indeed, may be outcome determinative. Services to be provided by the local social service department and commitments that must be made by the parents and children are determined by the permanency plan.

In re Damon M., 362 Md. 429, 436-437 (2001). 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's 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 will 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, his natural parents, and his 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.

THE ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS VACATED AND THIS CASE IS REMANDED TO IT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.

FOOTNOTES

1. The question posed in Jennifer's brief is:

> I. Did the court err in ordering a permanency plan for Jayden of nonrelative adoption, where his grandmother, of whom the court approved as custodian of Jayden's siblings, was ready, willing, and able to take custody of him?

The questions presented in Jayden's brief are:

> I. Did the trial court err when it changed Jayden's permanency plan from a concurrent plan of reunification and custody and guardianship to a relative to a statutorily less-favored plan of

adoption by a non-relative and in finding that the Department had made reasonable efforts to achieve the plan of relative placement?

II. Did the trial court err in determining that Jayden's time in foster care and bond with his foster parents was sufficient to overcome his fundamental right to be with his biological family?

III. Did the trial court en in only assessing the Family Law § 5-525 factors under a plan of reunification and not assessing Jayden's ties with his siblings under Family Law §5-525 as supportive of a plan of custody and guardianship?

These contentions overlap. In addressing them, we will not distinguish which appellant makes which argument, unless necessary.

2. Eventually the Department determined that they were not an appropriate placement due to insufficient housing and financial resources.

3. The order reinitiating the visitation is not contained in the record. Docket entries indicate that the court entered an order regarding visitation at this time. Furthermore, a Department report recounts that "[v]isits between the children and the parents have been held weekly since the last court hearing on December 20, 2010."

4. The foster parents did not testify and the Department's other witness, Ellen Levin, did not testify regarding Jayden's attachment to his foster parents or any trauma that could result from moving him from his foster parents. The only evidence as to the effects that a possible relocation would have on Jayden came from Jacobs's testimony.

Cite as 3 MFLM Supp. 65 (2012)

Adoption/Guardianship: termination of parental rights: fitness for continuing relationship short of custody

In re: Adoption/Guardianship of Daphane M.

No. 1331, September Term, 2011

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

Opinion by Eyler, James R., J.

Filed: January 19, 2012. Unreported.

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 entered by the Circuit Court for Prince George's County, granting a petition to terminate the parental rights of Elizabeth M., appellant, to her daughter Daphane M.[1] Appellant contends that the circuit court's decision was not supported by clear and convincing evidence that appellant was unfit to have an ongoing relationship with Daphane. We shall affirm the decision of the circuit court.

Procedural Background

This matter is before us on appeal for a second time. Appellant gave birth to Daphane M. on October 24, 2006. On February 27, 2007 Daphane was placed in foster care, and on March 27, she was adjudicated a child in need of assistance ("CINA"). From March 29 through March 31, 2010, the circuit court held a hearing on a petition for guardianship with the right to consent to adoption in regard to Daphane brought by the Prince George's County Department of Social Services ("DSS"). The court granted the petition in a written opinion and order issued on July 27, 2010, and appellant sought review in this court.

In an unreported opinion issued 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, filed April 19, 2011. Specifically, we required the court below to issue written findings in accordance with the requirements of Md. Code (2006, 2009 Supp.), § 5-323(d) of the Family Law Article ("FL").

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

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

Factual Background

On October 24, 2006, appellant gave birth to Daphane via caesarian section after 32 weeks gestation. Appellant had been hospitalized for seizures and was unaware of her pregnancy at the time of the birth. Appellant had a history of mental illness, beginning at age 18, including visual and auditory hallucinations, and had been diagnosed variously with bi-polar disorder, schizophrenia and schizoaffective disorder. After the delivery appellant denied having given birth, attributing the pain from the caesarian section to a stab wound in her stomach. She was transferred after the birth to the hospital's psychiatric unit for treatment of her mental illness.

In our previous unreported opinion, we explained the events in Daphane's life as follows:

> Daphane was born . . . just weighing three pounds, 11 ounces, and she suffered from respiratory distress syndrome and anemia. She further had feeding problems, requiring a feeding tube and special formula for a period of time. [Appellant] did not exhibit any parenting behaviors while in the hospital, such as diapering, swaddling, or holding Daphane.
>
> [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 she suffered while hospitalized. A county social worker created a safety plan for [appellant] and her father, Ebenezer M. ("Mr. M."), by which Mr. M. agreed to secure the safety of the infant at all times, to

include not leaving [appellant] alone with the infant and notifying a therapist and the police if [appellant] entered a mental crisis. If the safety issue could not then be resolved, the parties agreed the child would be removed from the M. household.

Following receipt of several family services, [appellant] still found it difficult to parent Daphane. At seven months of age, Daphane was found to be severely delayed in all areas of development, including cognition, vision, hearing, fine motor skills, gross motor skills, communication, social and emotional skills, and adaptive self help skills.

On February 27, 2007, [DSS] removed Daphane from the M. home after an unscheduled visit found [Appellant] home alone with Daphane, in violation of the safety agreement, and disoriented, confused, and disheveled. During the visit, [appellant] refused to put the baby down, and she continuously patted Daphane's bottom and rubbed her head nervously. The baby was extremely cold, her hands and lips were blue, and she appeared to be dehydrated. She also had a six inch herniation of her belly button.

Worried for the baby's safety, Casey Chase of the DSS contacted the police to issue limited custody. The police were forced to remove the front door to the M. apartment to gain entry.

Daphane was placed in foster care on February 27, 2007, and she has lived in foster case since then. The DSS filed a CINA petition on February 28, 2007, and Daphane was adjudicated a CINA at a March 27, 2007 hearing. At that time, the DSS was given limited guardianship for the purposes of medical and educational decision making.

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. As Elizabeth T. M. lived in North Carolina, the court required her to fulfill several obligations before granting custody to her. She did not fulfill those obligations, and the interstate placement was not approved.

After two failed foster care situations, Daphane was placed with Raina F. ("Ms. 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. She was doing very well in preschool and was socializing with a group of friends. She had also adjusted well to living in Ms. F.'s home. Ms. F. indicated a strong desire to adopt Daphane.

On the other hand, from February 27, 2007 through March 29, 2010, [appellant] had visited Daphane only approximately 20 times, although she was not restricted from doing so in any way by the court, DSS, or Ms. F; each visit was supervised and lasted only a few hours in the DSS offices. On those occasions, Daphane did not clearly recognize her mother and did not seem bonded to her.

On December 2, 2008, the juvenile court changed Daphane's permanency plan from reunification and relative placement 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, the DSS alleged that [appellant] was unfit to parent her child due to severe and chronic mental illness. As a result of her illness, [appellant] was unable to care for Daphane independently and had not formed a significant maternal relationship with the child. The DSS therefore sought to terminate [appellant's] parental rights and obtain guardianship of Daphane.

Daphane's attorney joined the DSS in asking the court to find that

> Daphane's interests were best served in terminating [appellant's] parental rights and allowing her to remain with her foster mother, Ms. F. The child's attorney advocated ultimate adoption by Ms. F.
>
> [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. Perhaps realizing her goal was not realistic, however, she also said she wanted to "have [Daphane] wherever Your Honor sees to benefit the child, that's all." 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 did not make a verbal ruling on the record, instead holding the matter *sub curia*. The 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.

We shall supply additional facts below as needed.

Question Presented

In this appeal, appellant asks, "[d]id the trial court err by terminating the mother's parental rights to Daphane M.?" We find no error and shall affirm.

Standards of Review

When reviewing the decision by a juvenile court to terminate parental rights, we employ three related standards. Specifically,

> [w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(0)] applies. [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Adoption/Guardianship of Ta'Niya C., 417 Md. 90, 100 (2010) (citations and quotations omitted, brackets in original).

Discussion

Appellant contends that 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 living 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). In that case, the Court of Appeals explained that the minor child's "continuation in foster care lacks the legal status required by state law. . . . This constant administrative and judicial supervision is disruptive to the lives of [the child and the foster care providers] and is the very type of uncertainty the child welfare statutes were designed to avoid." Id. at 120. As a result, "it is in a child's best interest to be placed in a permanent home and to spend as little time as possible in foster care." Id. at 106. Further, FL § 5-525(f)(2) makes clear that adoption "by a current foster parent" is a higher priority option for a child such as Daphane than is "another planned permanent living arrangement," such as long term foster care. Although In re Adoption/Guardianship No. 10941 dealt with adoption by grandparents, its reasoning applies here with equal force. Additionally, while FL § 5-525(f)(2) places a higher priority on permanent placement with a relative than it does adoption by a foster parent, here appellant's father was "inconsistent and uncooperative" with DSS efforts, as noted in the circuit court's opinion after remand. In addition, as noted in our prior opinion, efforts to place Daphane with appellant's sister never went beyond the planning stage. Thus, both caselaw and the Family Law Article make clear that, absent a better alternative, it is in Daphane's best interest to live as the adoptive child, not the foster child, of Ms. F.

On remand, the circuit court demonstrated an understanding of the above principles. The court stat-

ed that "[t]he likely impact on Daphane's well-being of terminating [appellant's] parental rights would be that Daphane would become available for adoption by Ms. F. and thereby ensure that Daphane have a stable, safe, and healthy family and home in which to grow up. To disturb the nurturing environment and guidance which she has received from Ms. [F.] for the last 32 months would not be in Daphane's best interest."

The court's decision was backed by clear and convincing evidence and was legally correct. 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). The permanency a child can enjoy after adoption, however, is in the child's best interest. Id. at 164. Here, the court based its decision in part on its finding that termination of appellant's parental rights would open the path to adoption of Daphane by Ms. F, and thus to a permanent family arrangement for her outside of the foster care system.

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]." During the 17 months prior to trial, the court noted, Ms. F. "never placed restriction on the natural family's ability to contact Daphane," but appellant and her father only took advantage of the offer "once or twice." 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.

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

FOOTNOTES

1. Daphane's putative father did not participate in any stage of this litigation and has been deemed to have consented to the termination of his parental rights.

Cite as 3 MFLM Supp. 69 (2012)

CINA: required findings: substantial risk of harm

In re: David H.

No. 0589, September Term, 2011

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

Opinion by Moylan, J.

Filed: January 20, 2012. Unreported.

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.

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

The immediate decision being appealed from is the April 19, 2011 decision by the Circuit Court for Baltimore City that David H. was a Child In Need of Assistance ("CINA") and that David H. would be committed to the Baltimore City Department of Social Services. It is the Father, David H., Sr., who has taken this appeal from that decision.

David was born in Jamaica on October 28, 1999 and resided in Kingston, Jamaica with both his Mother and Father for the first eight years of his life. In 2006 the Father came to the United States, but David continued to reside in Jamaica with his Mother. The Father, however, provided both for David's health insurance and for his educational needs. David came to the United States to live with his Father on April 23, 2009.

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

At the shelter care hearing on December 10, 2009, shelter care was initially granted to David's stepmother on the condition that she neither allow the Father in the home nor allow him to have any contact with David. That shelter care arrangement did not work out and the Department, on January 11, 2010, filed a Request for Review of the shelter care order. On that same day, 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 out because of David's behavioral problems and lack of discipline. On February 4, 2010, David was placed with his present foster family, with whom he has not experienced any of his former difficulties.

On April 23, 2010, David was, however, referred for a psychiatric evaluation because he was wetting the bed, not listening to directions, and bullying others. As a result, he attended weekly individual therapy sessions. The bullying and the bedwetting ultimately ceased. At the time of the de novo disposition hearing before the circuit court, David was still receiving individual weekly therapy.

For a variety of reasons, including the fact that the Mother was in Jamaica, the adjudicatory hearing had originally been scheduled for February 11, 2010, but the final disposition hearing was not held until April 19, 2011, fourteen months later. On February 11, 2010, when the first hearing had been scheduled, the courts were closed due to inclement weather (snow). That hearing was rescheduled for April 28, 2010, but on that date the parties could not reach an agreement and a contested adjudicatory hearing was scheduled for June 8, 2010. On June 8, the court again postponed the hearing to allow for the appointment of an attorney for the Mother and ordered the Department to request an InterCounty Compact Investigation of the Mother's home in Jamaica. The court scheduled a preliminary hearing for the Mother on July 7, 2010, and the contested adjudicatory hearing for July 20, 2010.

At the July 20 hearing, counsel for the Mother requested a postponement to permit the Mother time to obtain a visa so that she could attend the hearing in person. The request was granted. At the rescheduled hearing on September 27, 2010, the Mother still had not obtained her visa, but she did participate via telephone in the hearing before Juvenile Court Master

Kristen Peacock. Master Peacock recommended that "the adjudicatory facts be sustained" and that the disposition hearing be bifurcated. At the disposition hearing on November 8, 2010, the Master recommended that David be found CINA and that he be committed to the Department. The Father took exceptions to the Master's 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 was present and 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 of 2010 was without a firm foundation in April of 2011. The Father does not deny having been guilty of physical abuse in his administering of excessive punishment on December 10, 2009. He points out, however, that his conduct has been exemplary in the 16 intervening months.

The Father has, indeed, cooperated with the Department in every way. He signed the service contract the Department presented to him. That contract provided that he would maintain his home, maintain employment, complete anger management classes, and complete parenting classes. The Father testified that he has maintained his home and is gainfully employed as a master electrician. He lives with his wife and their three children, who are the half-siblings of David. He testified that he is fully capable of taking care of David financially and that he would take care of David's educational needs, making sure that he would go to school, preferably a private school. The Father also testified that he would take care of David's emotional needs, including the continuing of David in therapy if needed. He stated that 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 service contract with the Department, the Father enrolled in both an anger management class and a parenting class, two ten-week courses, both of which he completed in May of 2010. The Father, moreover, has taken part in regular visits with David, set up and supervised by Sheila Baskerville, David's caseworker. Ms. Baskerville testified that 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 that she was tentatively 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, in ruling as it did, did not make mention of any reason 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 any fear that David remained at any 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 that it was "ok." He testified, "I'm not afraid of [his Father] anymore but, like, I just don't want to go back there." See In re Jertrude O., 56 Md. App. 83, 99 (1983) ("[C]hildren should not be uprooted from their family but for the most urgent reasons.").

The Father's position is actually a double-barreled one. At the hearing on April 19, 2011, the Father's contention was that if he, the Father, were not awarded physical custody of David, then physical custody should be awarded to David's Mother, "as there are no allegations against Mother and Father does not want [David] to grow up in foster care." David, for his part, 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 (David's grandfather) in Jamaica, expressed reluctance at assuming responsibility for David but indicated that she would do so if ordered to do so by the court. David's reason for not wanting to go back to Jamaica was simply "because I like it here."

In contending that the evidence does not support the trial court's finding that David is CINA, the Father points to the two-part conjunctive definition of CINA spelled out in Maryland Code, Courts and Judicial Proceedings Article, § 3-801(f):

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

(Emphasis supplied).

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

The Department itself; ostensibly the appellee in this matter, with commendable candor, takes the very unusual position of agreeing with the Father:

> The Department agrees with the appellant, Mr. H.. that the juvenile court's findings are insufficient to support its CINA determination. The Department therefore urges the Court to remand the case for further proceedings in the juvenile court, allowing the juvenile court to articulate the basis for its findings and to state how those findings support a conclusion that David is at sufficient risk of harm to be declared a CINA.

(Emphasis supplied).

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

> The fact that it's apparently a strict household I discount as being important, because strict households can be very good ones for the child. So that's not so much the issue for me. But the fact that the child may feel like a fifth wheel in the household, I think, is a significant problem.
>
> That the child may very well feel that there is favoritism, that there is a ready-made family, that he is not a part of the family, and that he is desperately unhappy in that household, I think, is in fact a significant issue.
>
> The foster placement appears to be a successful one. And although I have some reluctance in the sense that — again normally when I see cases of this type, you see parents who really have treated their children extraordinarily badly, out of either bad motive or out of complete incompetence, and these are not badly motivated parents and there not incompetent parents.

But I am inclined in this case to grant the CINA petition and to award the guardianship to DSS.

(Emphasis supplied).

The Department's position, essentially a concession, is that the court has not justified the prolonging of David's removal from one or the other of his natural parents:

> The juvenile court also failed to articulate how David's health or welfare had been harmed or placed at a substantial risk of harm to require his continued placement in foster care. The court stated that Mr. H.'s discipline was strict, as was the household, but that "strict households can be very good ones for the child. So that's not so much the issue for me." Indeed, the juvenile court expressed "reluctance" and misgivings about its decision — even as it granted the CINA petition — because the court believed that, 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 also 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 thereby 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.

(Emphasis supplied).

We agree with the Department's conclusion.

JUDGMENT REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS; COSTS TO BE PAID BY APPELLEE.

NO TEXT

Cite as 3 MFLM Supp. 73 (2012)

Divorce: monetary award: failure to explain significant disparity in distribution

Barkley Creighton
v.
Mark Creighton

No. 2820, September Term, 2010

Argued Before: Eyler, James R., Woodward, Wright, JJ.

Opinion by Eyler, James R., J.

Filed: January 24, 2012. Unreported.

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, alimony, or attorneys' fees obligations.

On January 7, 2011, the Circuit Court for Harford County granted an absolute divorce to appellant, Barkley S. Creighton, and appellee, Mark E. Creighton. The court also granted appellant sole legal and physical custody of two minor children. The court ordered appellee to pay appellant child support, alimony, attorneys' fees, and a monetary award of $30,000. This timely appeal, disputing the monetary award and child support, followed. Because the circuit court did not adequately explain the basis for its monetary award, we shall vacate the monetary award and remand to the circuit court for further proceedings. In addition, we shall vacate the circuit court's child support award for the period of February 28, 2008 to September 4, 2008 so that the circuit court may determine whether the use of the shared custody guidelines was appropriate and whether to adjust the award for daycare expenses during this period. On all other issues, we shall affirm.

Factual and Procedural Background

The parties were married on April 13, 1996 and separated in August 2007. The parties have two children. At trial, appellee stipulated that he earns approximately $150,000 per year. Appellant has worked for the Harford County government since May 2007 and earns approximately $54,000 per year. The parties own two properties: the marital home at 1601 Kings View Drive in Bel Air, Maryland ("the Kings View property") and a townhouse at 1955 Sarah Way in Forest Hill, Maryland ("the Sarah Way property"). Each property is marital property, titled in appellee's name, and is subject to mortgage liens.

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

The parties executed a Marital Settlement Agreement on August 3, 2007. Appellant filed for absolute divorce on February 28, 2008. On July 22, 2008, the parties agreed to a Parenting Plan providing for joint custody. On September 5, 2008, appellant filed a supplemental complaint for absolute divorce requesting that the Marital Settlement Agreement be set aside. On November 9, 2009, after a seven day trial, the Circuit Court for Harford County rescinded the Marital Settlement Agreement on the basis of fraud by appellee. The finding of fraud was based on a finding that the parties had a "side agreement" whereby appellee agreed to purchase the Sarah Way property for appellant to live in, and at a later point in time, convey it to appellant. Appellee purchased the property, appellant moved into it, but appellee refused to convey it. At the time of trial, appellant was living rent free in the Sarah Way property, but as the court noted in its opinion, appellee had the right to evict appellant.

Protracted and acrimonious litigation followed. After several master's hearings, the parties' divorce action was tried before the Circuit Court for Harford County from November 15, 2010 through November 18, 2010. The court issued an extensive opinion and a judgment of absolute divorce on January 7, 2011. The court awarded appellant sole legal and physical custody of the parties' minor children, rehabilitative alimony, a monetary award of $30,000, and attorneys' fees. An amended judgment of absolute divorce, entered on January 21, 2011, awarded appellant one-half of appellee's 401k and one-half the cash value of appellee's life insurance. This timely appeal followed.

We shall include additional facts when we discuss the issues.

Question Presented

The following questions, as phrased by us, are presented for our review:

> 1. Whether the circuit court abused its discretion in awarding appellant a monetary award of only $30,000 in light of the significant

financial disparity between the parties and the finding that appellee was largely at fault for the dissolution of the marriage?

2. Whether the circuit court erred in determining that the value of appellee's interest in Mid-Atlantic RF Systems, Inc. was zero?

3. Whether the circuit court erred in finding that appellee did not have an ownership interest in property located in Wildwood, New Jersey?

4. Whether the circuit court erred in determining appellee's child support obligations for the period of February 28, 2008 to September 4, 2008?

5. Whether the circuit court erred in failing to make appellee's child support obligation retroactive to the date of the parties' separation as opposed to the date of the divorce filing?

Standard of Review

Maryland Rule 8-131(c) states that:

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

We review a circuit court's determinations of law *de novo. Flanagan v. Flanagan*, 181 Md. App. 492, 521 (2008). We review the court's ultimate decision of whether to grant a monetary award, and the amount of such award, for an abuse of discretion. Id.

Discussion

Appellant challenges the circuit court's monetary award and child support award on several grounds. We shall address each in turn.

1. Monetary Award

The first issue on appeal is the amount of the monetary 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 property. Maryland Code (2006 Repl. Vol.) § 8-203 of the Family Law Article ("FL"). Second, the court must determine the value of all marital property. FL § 8-204. 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." FL § 8-205(a). In determining the amount of a monetary award, the court must consider each of the following factors:

> 1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> 2) the value of all property interests of each party;
>
> 3) the economic circumstances of each party at the time the award is to be made;
>
> 4) the circumstances that contributed to the estrangement of the parties;
>
> 5) the duration of the marriage;
>
> 6) the age of each party;
>
> 7) the physical and mental condition of each party;
>
> 8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;
>
> 9) the contribution by either party of property described in 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;
>
> 10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
>
> 11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

FL § 8-205(b).

Here, after determining what items should be considered marital property, the court found that the marital property, excluding motor vehicles, had a total 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 of his retirement account ($51,164.24), half of 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 arrived at the net equity in the Kings View property by finding a value in the amount of $690,000 and subtracting the mortgage balance, owed by appellee, in the amount of $215,000. The property was also subject to a line of credit in the amount of $112,885.32 for which appellee was liable, but the court found it was nonmarital debt. The court found that the Sarah Way property had a value of $295,000 and was subject to mortgages (marital debt), for which appellee was liable, in the approximate amount of $325,000.[1] Thus, the property had no net equity. Appellee was also liable on unsecured notes in the approximate amount of $79,000.[2] Appellant was liable on personal loans totaling $78,818.00

Thus, after the monetary award, appellant would receive approximately 15 percent of the total value of all marital property and appellee would receive approximately 85 percent. Nonmarital property and nonmarital debt are appropriate considerations in the third step of the monetary award process, however. After the monetary award, appellant had a total net worth in the amount of $21,771.24 (assets in the amount of $100,589.24, consisting of one-half of appellee's retirement account in the amount of $51,164.24, one-half of appellee's life insurance cash value in the amount of $12,250.00, jewelry valued at $3,000.00, personal property valued at $4175.00, and a monetary award of $30,000.00, less $78,818.00 in loans). After the monetary award, appellee had a net worth in the amount of $323,278.92 (assets in the amount of $1,085,164.24 consisting of one-half of the retirement account in the amount of $51,164.24, the Kings View property valued at $690,000.00, the Sarah Way property valued at $295,000.00, one-half of life insurance cash value in the amount of $12,250.00, jewelry valued at $11,000.00, personal property valued at 25,750.00, less the monetary award in the amount of $30,000.00, less total debt in the amount of $731,885.32).

When determining the amount of the monetary award, the circuit court made the following statements:

> Mrs. Creighton seeks a monetary award pursuant to FL 8-205. There are a number of factors that this court must consider in determining whether or not such an award is appropriate.
>
> The value of all of their property interests have been discussed extensively in various sections of this opinion and need not be recited in any additional detail here. Suffice it to say that Mr. Creighton has by far greater property interests than Mrs. Creighton.
>
> The circumstances that attributed to the separation of the parties is also discusssed extensively supra. As I have otherwise explained, that the scale tips in favor of Mrs. Creighton.
>
> While Mr. Creighton was the financial engine, Mrs. Creighton's contributions, especially of a non-monetary nature to the well-being of the family, were substantial. In many respects because of his job, Mr. Creighton was an absent partner. It was Mrs. Creighton who kept things going. She was primarily responsible for the children. She took care of all of the parties' homes and she was responsible for the financial administration of the marriage. There can be no doubt that her being primarily responsible for all of these tasks was a substantial contributing factor in Mr. Creighton's success in his employment. The parties are relatively close in age and neither of them has any physical or mental disabilities. The duration of the marriage was not overly long. Mr. Creighton provided the majority of the money used to run the family.
>
> None of the real property purchased during the course of their marriage was titled as tenants by the entireties even though substantial contributions towards the acquisition thereof were made by Mrs. Creighton and by definition it was all marital.
>
> I have granted Mrs. Creighton an award of alimony of $500.00 per month for a period of three years. Both of them are going to keep the personal property in the respective residences. Again, Mr. Creighton comes out better in that regard.
>
> This court may consider other equitable factors pursuant to FL 8-205(b)(11). Judge Waldron's rescission of the parties' proposed agreement has worked a very substantial disadvantage to Mrs. Creighton. As discussed, supra, Mrs. Creighton is in

> the Sarah Way residence at the sufference of Mr. Creighton. She has no lease, no agreement, and no right to stay there. As discussed, supra, the Sarah Way property was acquired by Mr. Creighton with money advanced from his employer and a trust. It was two years after the Sarah Way proper was acquired before any kind of security instrument was filed obligating Mr. Creighton to repay the money. As of the time of trial, he has made no payments on that indebtedness. The only thing that has happened is that his employer, through counsel, has notified Mr. Creighton that he is "expected" to repay the money. Who knows when and if any payments will be made on the Sarah Way property. Mrs. Creighton can be forced by Mr. Creighton out in the street at any time. This would require her to find another residence for herself and the children with the attendant expenses associated therewith. That is simply not fair.
>
> Mrs. Creighton gets nothing out of Kingsview Drive or Sarah Way. She does get one-half of Mr. Creighton's 401K account which gives her approximately $51,000.00 and an award of attorney's fees. The award of attorney's fees, however, goes to her lawyer and do not directly benefit her or alleviate the precarious position she finds herself in.
>
> As noted elsewhere, Mr. Creighton's post divorce assets will be very substantial. His earning capacity is likewise far superior to Mrs. Creighton's, especially when considering the pattern of largesse to him from his employer.
>
> This is a case that clearly warrants a monetary award to Mrs. Creighton for the reasons stated herein. Mr. Creighton's economic circumstances are far superior to hers.
>
> I shall, therefore, grant her a monetary award of $30,000.00 to be paid by Mr. Creighton at the rate of $6,000.00 per year on or before March 1st of each year for a period of five years.

(Emphasis added). Elsewhere in the opinion, and prior to the monetary award, the circuit court also noted that "Mrs. Creighton is in debt as her liabilities exceed her assets even when her gross income is factored into the equation compared with her outstanding obligations . . . Mrs. Creighton has a negative net worth." The court also noted that Mrs. Creighton "has a negative net worth of about $40,000.00 and a deficit of expense over income of $633.00, without any consideration for purposes of analysis of deductions for income tax, social security, retirement and insurance. When they are factored in with her monthly salary, her monthly deficit is approximately $2,100.00."

Appellant argues that, even though the court was concerned that appellant resided in a residence at the whim of appellee, the monetary award will not in any way provide appellant with the ability to afford a home of her own and will still leave her with a negative net worth. Appellee responds that the circuit court did not abuse its discretion in the amount of the monetary award because appellee was also ordered to pay appellant $50,000 in attorneys' fees and $32,500 in alimony over three years. Appellee also alleges that the court did not abuse its discretion because appellee is still responsible for debt incurred on both properties, which exceeds the total value of the parties' marital estate. Finally, appellee alleges that appellant's actions contributed heavily to the dissolution of the marriage and her "unclean hands" should not permit her to receive a larger monetary award.

In Ward v. Ward, this Court found reversible error where the balance of factors between the two parties was even but the court made a monetary award on a "five to one ratio" and the "effect of the chancellor's award [was] to give the husband the entire value of the marital property." 52 Md. App. 336, 343-44 (1982).

In Long v. Long, we reversed the circuit court's monetary award because it granted the wife an award less than 20 percent of the value of the marital assets. 129 Md. App. 554 (2000). In that case, we noted that the circuit court considered all of the mandatory factors included in FL § 8-205 and found that

> [t]he chancellor noted that Husband was the source of the marital fault. He noted Wife's mental health problems, her present unemployment and lack of job training, and her non-monetary contribution to the marriage. Yet he awarded less than 20 percent of the marital assets to Wife, who held title to under one percent of those assets.

Id. at 575. We determined that the 'judgment here defeats the purpose of the monetary award, which is to achieve the equity between the spouses where one spouse has a significantly higher percentage of the marital assets titled [in] his name." Id. at 577-78.

Finally, in Flanagan v. Flanagan, we reversed the

circuit court's monetary award to the wife of 90% of the value of the marital property because the court did not adequately explain its basis for the amount of the award. 181 Md. App. 492, 522 (2008). We reasoned that the circuit court "did not explain the enormous percentage on the basis of appellant's conduct leading to the parties' estrangement, or indeed on any particular basis" and that we have reversed other monetary awards "when the trial court's disposition demonstrated a great disparity in light of the statutory factors." Id. at 526-27.

Similar to Flanagan, the court here did not explain why it awarded appellee $30,000 and that is particularly important here, in light of the fact that most of the court's comments favored appellant. 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.

2. Value of Appellee 's interest in Mid-Atlantic RF Systems, Inc.

Appellant next contends that the circuit court erred in valuing appellee's 7.5 percent interest in a company at zero. Appellant argues that 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 into the issue. Appellee responds by stating that he presented significant evidence at trial regarding the current value of the company, including tax returns, while appellant did not present any evidence to support a valuation of $80,000 other than appellee's financial statement. Appellant states that the court had evidence of appellee's lack of credibility and argues that a statement made on a party's financial statement may be used as an admission at trial, citing Beck v. Beck, 112 Md. App. 197 (1996).

The circuit court made the following statements regarding the value of appellee's interest in Mid-Atlantic RF Systems, Inc.:

> Mr. Creighton owns a 7.5% interest in a company known as Mid-Atlantic R F Systems, Inc. Mid-Atlantic RF Systems, Inc. is another corporation associated with Mr. Creighton's overall employer. Mr. Creighton admitted that in prior years he had gotten a distribution from the company. Mr. Creighton claims that his interest in Mid-Atlantic R F Systems at the time of trial has no value and Mrs. Creighton claims it is worth $80,000.00. Mid Atlantic's corporate tax return for 2009 (DX 20) shows that the business incurred a loss of $490,787.00. The company is in the business of manufacturing computer circuitry. In 2009 it had no retained earnings and no distributions were made to Mr. Creighton. The distribution that Mr. Creighton got from his ownership interest in Mid-Atlantic came about in 2007 (DX 21, 22). In 2008, Mid-Atlantic also had a net loss of $289,672.00. Likewise, he got no distribution in 2008 (DX 23). 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 $80,000.00. 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. I cannot just pull an $80,000.00 figure out of the air as Mrs. Creighton suggests without some current evidence supporting it. Mr. Creighton's evidence, however, points the other way. For purposes then of calculating Mr. Creighton's financial resources, I can-

> not ascribe any value to his 7.5% interest in Mid-Atlantic R F Systems for the reasons stated.

The circuit court did not err in its determination. Although the court was allowed to consider appellant's admission in his financial statement in reviewing the evidence, it was certainly not required to afford more weight to this statement than any of the other significant evidence presented on this matter. Based on the evidence before it, the court did not err in valuing appellee's interest in the company at zero.

3. Appellees New Jersey Ownership Interest

Next, appellant alleges that appellee has an ownership interest in his mother's property located in Wildwood Crest, New Jersey and that this interest, including both the non-marital and marital components, should have been considered when determining an appropriate monetary award. Appellant supports this contention with the fact that appellee stated in his financial statement and under oath at an earlier master's hearing in this case that he owned one-quarter of the property.

The circuit court made the following statements regarding appellees' potential ownership interest in the New Jersey property:

> Mr. Creighton's mother owns a home in Wildwood Crest, New Jersey with an estimated value of $400,000.00 (JX1). She owns that home in her own name. Mrs. Creighton believes that Mr. Creighton has a one-fourth interest in that property, which has no encumbrances, and thus another $100,00.00 should be added to Mr. Creighton's assets. She bases this claim on discussions back and forth between the parties at earlier times and incidents involving Mr. Creighton's brother. There was testimony that Mr. Creighton advanced money to his brother and paid certain expenses for him with an alleged oral agreement that Mr. Creighton's brother would sign over his interest in the Wildwood Crest property to Mr. Creighton. She also believes that Mr. Creighton, in previous filings in this case as it went along, had stated an ownership interest therein. He, however, does not have any legal ownership interest in the property. It is solely titled in the name of his mother and there have been no life estates or other conveyances. Mr. Creighton's mother, Betty Constantine, testified that she and her then husband bought the property (DX 12). She testified that her children have no legal interest in the property, even though it may be her intention at some point in the future that the property pass to the children. Mr. Creighton, however, does not have any cognizable legal interest in the Wildwood Crest 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 that appellee did not have an ownership interest in the New Jersey property. Similar to the valuation of appellee's interest in Mid-Atlantic RF Systems, Inc., the court was entitled to weigh the testimony of both parties as well as other evidence presented at trial, including appellee's financial statement, and its determination was not clearly erroneous.

4. Shared Child Support Guidelines

Next, appellant contends that the circuit court erred in using shared custody guidelines to assess appellee's child support obligation for the period of February 28, 2008 to September 4, 2008 because the children were in the sole physical custody of the appellant at that time. Additionally, appellant alleges that the court erred in failing to order appellee to pay a share of the children's day care expenses during that time. Appellee responds by contending that any error stemming from these issues was harmless error.

In determining appellee's child support obligation for the period of February 28, 2008 to September 4, 2008, the circuit court stated:

> [i]n his Recommendations and Report filed November 9, 2010, Master Hatem recommended that Mr. Creighton pay child support to Mrs. Creighton in the amount of $1,183.00 per month for the period of February 28, 2008 to September 4, 2008 and $1083.00 per month beginning September 5, 2008 and continuing pendente lite. The Master's recommendations were based on a shared custody calculation, as the Parenting Agreement was still in effect, to which they had agreed (and the court had approved). Having carefully reviewed the Master's Report and the evidence

> he considered, I agree with his recommendations as to temporary child support and his reasoning, and I shall incorporate his recommendations in my judgment.

In Master Hatem's Recommendations and Report, he merely stated that

> [a]ttached hereto and incorporated herein is a child support guideline calculation utilizing the shared custody formula in accordance with the parenting agreement entered between the parties.

Appellant alleges that the parenting agreement upon which the Master's recommendations relied did not become effective until July 22, 2008 and therefore should not have been used to determine that the shared custody guidelines applied for February 28, 2008 through September 4, 2008. Appellee does not dispute this but instead argues that the court's use of shared custody guidelines to determine child support during this period was harmless error.

Based on the evidence presented, the circuit court erred in incorporating the Master's recommendation as to child support for the period between February 28, 2008 and September 4, 2008 based on shared custody guidelines. 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. For example, the Marital Settlement Agreement, which had not yet been rescinded by the court at the time, provided that "the children shall reside primarily with Wife," with appellee having limited visitation. Appellee admits in his brief that "[t]he Marital Settlement Agreement provided that Appellant would have sole physical custody of the children." Appellant testified at trial that during this period the parties adhered to the custody guidelines laid out in the Settlement Agreement and that during the first year of the separation, from August 2007 to August 2008, the children were with her 90 percent of the time. In fact, the circuit court states in its opinion that before July 22, 2008 "the children were with Mrs. Creighton most of the time, except for some dinners with Mr. Creighton." 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 time period.

Contrary to appellee's argument, this error is not harmless. This Court will not reverse a circuit court if an error is harmless, and the complaining party has the burden to show prejudice as well as error. Flores v. Bell, 398 Md. 27, 33-34 (2007). "Prejudice can be demonstrated by showing that the error was likely to have affected the verdict below; an error that does not affect the outcome of the case is harmless error." Id. Although appellee's arithmetic conveys a potential shortfall of less than one thousand dollars if the court used the shared custody guidelines when it should have used the sole custody guidelines, it is not for us to say that the loss of a few hundred dollars to which the appellant is otherwise entitled is harmless.

Appellant also alleges that the circuit court failed to adjust the child support award for this same time period to account for day care expenses made predominantly by appellant. Specifically, appellant alleges that from the time of separation, August 3, 2007, through August 2008 appellant paid $14,300 in day care expenses while Mr. Creighton paid only $1,400.00. In its opinion, the circuit court merely stated that "[t]here is no need to make any child support adjustments for daycare as the parties have separately agreed to share the daycare expense on a 70/30 basis, which they will handle between themselves." However, the record reflects that the parties did not come to this agreement until September 2008. Although, as discussed *infra*, the court could not have made any adjustments to child support predating the initial pleading filed in this case on February 28, 2008, it is unclear why the circuit court failed to adjust the child support award to account for daycare expenses for February 28, 2008 to September 4, 2008 when the parties had not yet made a separate daycare expense agreement. As discussed *supra*, such an error is not harmless. As we cannot conduct fact-finding of our own to determine whether the use of the shared custody guidelines was appropriate and as the circuit court did not examine whether to adjust the child support award for daycare expenses during this time period, we must vacate the circuit court's child support finding for the period of February 28, 2008 to September 4, 2008 and remand for further proceedings consistent with this. opinion.

5. Retroactivity of Child Support Award

Finally, appellant argues that the circuit court erred as a matter of law in ordering appellee to pay retroactive child support beginning on 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. Appellant argues that she did not initially file a request for child support at the time of the parties' separation because she relied on a Marital Settlement Agreement, which was later rendered unenforceable due to fraud by appellee. Appellee responds that FL § 12-101(a) clearly states that the earliest a court may award child support is the date of the filing of the

pleading requesting child support. Appellee also states that appellant could have sued appellee for unpaid child support pursuant to the Marital Settlement Agreement, but that she waived that right when she moved the court to render the agreement unenforceable.

We agree with appellee. FL § 12-101(a) provides that:

> (1) Unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading that requests child support pendente lite, the court shall award child support for a period from the filing of the pleading that requests child support.
>
> (2) Notwithstanding paragraph (1) of this subsection, unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading filed by a child support agency that requests child support, the court shall award child support for a period from the filing of the pleading that requests child support.
>
> (3) For any other pleading that requests child support, the court may award child support for a period from the filing of the pleading that requests child support.

There is no support for appellant's assertion that the existence of fraud is an exception to this general rule. Appellant did not file a pleading requesting child support until February 28, 2008; therefore, the circuit court did not err in ordering appellee to pay retroactive child support beginning on February 28, 2008 as opposed to August 3, 2007.

MONETARY AWARD VACATED. CHILD SUPPORT AWARD FOR THE PERIOD OF FEBRUARY 28, 2008 TO SEPTEMBER 4, 2008 VACATED. ALL OTHER ISSUES AFFIRMED. CASE TO BE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEE.

FOOTNOTES

1. Although the court did not make a specific factual finding on the mortgage amount for the Sarah Way property, it discusses two promissory notes reflecting $62,000 and $265,000 respectively. Appellee points to evidence in the record that the total debt, when interest was added, was closer to $388,694.00 near the time of trial.

2. Although the court did not make a specific factual finding on the amount appellant owed, $79,000 is reflected in the appellee's financial statement, to which the court cites.

Cite as 3 MFLM Supp. 81 (2012)

Guardianship: decision-making authority: educational decisions

In re: Adoption/Guardianship of Charles Dylan C.

No. 562, September Term, 2011

Argued Before: Zarnoch, Graeff, Matricciani, JJ.

Opinion by Zarnoch, J.

Filed: January 30, 2012. Unreported.

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.

In April of 2011, the Circuit Court for Anne Arundel County appointed Appellants, Robert and Ruth Craft guardians of their minor grandson, Charles Dylan C. ("Dylan"). Because the court inserted language in the order which appellants find objectionable, they have appealed to this Court. Appellants are the only parties who have briefed the issues in this case.[1]

FACTS AND LEGAL PROCEEDINGS

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, ("ET"), § 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.

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

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.

QUESTIONS PRESENTED

Appellants present the following questions for our review:

> 1. Did the Circuit Court exceed the scope of its authority in deciding issues regarding the educational rights of the minor and restricting the legal authority of the guardians to make educational decisions when no justiciable issue was before the court?
>
> 2. Did the Circuit Court abuse its discretion by restricting the legal authori-

ty of the guardians regarding education matters without making a determination that it was in the best interests of the child?

DISCUSSION

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. 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.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

FOOTNOTES

1. We note from the outset that the record in this case in sparse, and we make our decision without the benefit of a hearing in or an opinion from the circuit court. Additionally, we did not have briefing or argument of an appellee or a representative from any interested government entity.

2. The original order, entered on April 12, 2011 contained a clerical error and had to be amended.

3. What counsel calls a "Motion for Reconsideration" was actually a letter to the circuit court which included a proposed guardianship order.

Cite as 3 MFLM Supp. 83 (2012)

Divorce: pension rights: waiver

Alvenia K. Pitts
v.
Ronald G. Pitts

No. 1255, September Term, 2010

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

Opinion by Matricciani, J.

Filed: January 31, 2012. Unreported.

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.

On August 20, 2008, appellant, Alvenia Pitts, filed a complaint for absolute divorce against appellee, Ronald Pitts, in the Circuit Court for Prince George's County. On May 18, 2010, the circuit court entered an order granting the divorce and awarding Mr. Pitts a thirty-five percent interest in Ms. Pitts's Civil Service Retirement System ("CSRS") pension. Ms. Pitts filed a motion to alter or amend the judgment on May 28, 2010, which the circuit court denied in an order entered on July 8, 2010. Ms. Pitts noted a timely appeal to this Court on July 30, 2010.

QUESTIONS PRESENTED

Appellant presents two questions for our review, which we have consolidated and rephrased as follows:[1]

> I. Did the circuit court abuse its discretion in holding that Mr. Pitts did not waive his right to the CSRS pension?

For the reasons that follow, we answer no and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

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's rights to Ms. Pitts's 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.

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

Mr. Pitts had three retirement assets: (1) a Veterans Administration pension that the parties agree is not marital property; (2) a 401(a) account from his time as an employee of the District of Columbia General Hospital; and (3) a 457(b) plan from a second term as an employee of D.C. General Hospital.[2] Ms. Pitts had two retirement assets: (1) the CSRS pension from her thirty-four year employment with the United States Department of Agriculture; and (2) a Thrift Savings Plan account.

In early 2002, Mr. Pitts desired to fund a trip to Jamaica with his 401(a) account. He asked Ms. Pitts to consent to the withdrawal in exchange for a waiver of his rights to Ms. Pitts's Thrift Savings Plan account. On March 8, 2002 they executed a Spouse's Consent to Survivor Election wherein Mr. Pitts waived his right to a survivor annuity in Ms. Pitts's CSRS pension. Part one of the form contained a checked box that read: "[n]o regular or insurable interest survivor annuity for my current spouse." The form also had type-written language that said "includes Thrift Savings Plan." Part two of the form, which Mr. Pitts signed, stated "I freely consent to the survivor annuity election described in Part 1." The document did not indicate that Mr. Pitts waived his interest in Ms. Pitts's CSRS pension (other than his survivor annuity).

Also on March 8, 2002 the parties executed a Consent to Withdrawal Funds from Mr. Pitts's 401(a) account. Mr. Pitts withdrew all of the funds and used the money for a vacation, bills, and living expenses.[3]

On August 14, 2007 the parties executed a second Spouse's Consent to Survivor Election.[4] This document was identical to the March 8, 2002 consent form. It also included hand-written language reflecting that the agreement included Ms. Pitts's Thrift Savings Plan. It did not, however, indicate that Mr. Pitts waived his interest in Ms. Pitts's CSRS pension (other than his survivor annuity).

Regarding these agreements, Mr. Pitts testified as follows:

Q Okay. Now you see that she has her Civil Service Retirement that's in payment status at this point, correct?

A Yes.

Q Did you — there was some discussion that you and she waived each other's rights to your pensions. Can you tell us what happened in that respect?

A To the best of my knowledge, I — I had a retirement package at D.C. General Hospital. Under the law, the spouse — either spouse is entitled to 50 percent. So when I got — when I was unemployed at D.C. General Hospital, she had to sign off so that I could withdraw that money.

* * * * *

Q Okay. Did you sign any waiver of her Civil Service Retirement System?

A Not a civil service retirement.

Q Okay. What did you sign a waiver of?

A I'm not certain at this time what that was that I signed. But to my knowledge, I don't believe it was a Civil Service Retirement System Plan.

Q Now are you familiar with the Thrift Savings Plan that your wife had?

A Yes.

Q Okay. Did — to your knowledge, did you waive any right to that Thrift Savings Plan?

A I believe I did.

On October 29, 2002, Mr. Pitts sent Ms. Pitts a lengthy e-mail that summarized the issues arising from the termination of their marriage. The e-mail stated in relevant part, "[r]etirement waivers have been signed by both of us." It made no other mention of retirement assets. The circuit court admitted the e-mail into evidence. Counsel for Mr. Pitts cross-examined Ms. Pitts as follows:

Q Okay. Well you had an e-mail admitted into evidence, Plaintiff's Exhibit 15, and that's an e-mail from Mr. Pitts to you, correct?

A Correct.

Q Where is your response?

A (No audible response)

Q Did you respond to this e-mail?

A I, I, I really don't know. If I had —

* * * * *

A I don't know what else is attached to that. I didn't respond to every e-mail that he sent me

Q Well did you think that e-mail that talks about marital property and disposition of marital property was important?

A Yes.

Q And did you respond?

A I really don't how. I'm, I'm quite sure I did either by phone and I could have responded by e-mail, but I don't have that e-mail if I did.

Ms. Pitts did not offer any testimony or evidence to explain the substance of her response to this email. Regarding the 2007 and 2002 Spouse's Consent to Survivor Election forms, the cross-examination continued:

Q So this document is basically saying that Mr. Pitts is not going to seek survivor's annuity from your pension, is that correct?

A I would assume so.

Q And you read this when you gave it to him, didn't you?

A Yes.

* * * * *

Q So what this meant was that nothing was coming out of your paycheck for survivor's annuity. And you understood that would reduce the amount you received monthly, correct?

A My understanding was that he was waiving his rights to my retirement.

Q Okay. Nowhere on this document does it say (indiscernible)?

* * * * *

Q Okay. So — and can you look and see if you can point out anywhere in there where it says he's waiving his rights to your civil service retirement pension?

A The form does not say that —

Ms. Pitts filed the complaint for absolute divorce on August 20, 2008. Mr. Pitts filed a counterclaim for absolute divorce on October 10, 2008 that he amended on November 14, 2008. The circuit court conducted a bench trial on July 14, 2009 and November 3, 2009. On May 18, 2010 the circuit court entered an order granting the divorce on the basis of a two-year separation, settling custody and child support issues, and dividing the marital assets. The circuit court's order awarded Mr. Pitts thirty-five percent of Ms. Pitts CSRS

pension, retroactive to December 1, 2009.[5] Ms. Pitts filed a motion to alter or amend the judgment on May 28, 2010, thus tolling the time for filing an appeal. Md. Rule 8-202(c). The circuit court denied the motion in an order entered on July 8, 2010, and Ms. Pitts appealed timely to this Court on July 30, 2010.

DISCUSSION

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. Pitts's 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."

Standard of Review

We review the legal rulings of a trial court *de novo*. *Allen v. Allen*, 178 Md. App. 145, 148 (2008). As to factual findings, we "will not set aside the judgment of the trial court on the evidence unless clearly erroneous." Md. Rule 8-131(c). "We are bound by this oft enunciated principle, especially in the arena of marital disputes where notoriously the parties are not in agreement as to the facts." *Painter v. Painter*, 113 Md. App. 504, 517 (1997). Therefore, we must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). The circuit court's findings are not clearly erroneous "if there is competent or material evidence in the record to support the court's conclusion." *Painter*, 113 Md. App. at 517. Moreover, "[u]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) (citation omitted). Instead, our task is limited to deciding whether the circuit court's factual findings were supported by substantial evidence in the record. To that end, we view all the evidence "in the light most favorable to the prevailing party below." *Id*.

I. Ms. Pitts's CSRS Pension

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, (Plaintiff's Exhibit No. 15) 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) (citing 5 U.S.C.A. § 8345(j)). 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 circuit court applied a "waiver' analysis" instead of adhering to contract interpretation principles. Second, that the circuit 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's 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's position.

As the circuit court noted, it was possible for Mr. Pitts to waive his entire interest in Ms. Pitts's pension. 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's interest in Ms. Pitts's CSRS pension benefits. That is not, however, what the 2002 and 2007 Spouse's Consent to Survivor Election forms did. They waived Mr. Pitts's interest in a survivor annuity in Ms. Pits's CSRS pension, but did not waive his interest in the pension benefits themselves. Mr. Pitts's 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); *Pleasant*, 97 Md. App. at 726.

Further, the October 29, 2002 e-mail does not establish an agreement between Mr. Pitts 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) ("An essential feature of every contract is the parties' mutual assent, which is crystallized in a certain and definite offer and a knowing and sufficient acceptance.") (citations omitted). By Ms. Pitts's 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 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.

CONCLUSION

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. Pitts 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.

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

FOOTNOTES

1. The issues as originally phrased in appellant's brief are as follows:

> 1. Did the trial court err in considering the issue of the Appellant's CSRS pension as a legal matter of "waiver," when the legal and factual question instead involved the distinct issue of whether there was an "agreement" by the parties to not include the Appellants' pensions as part of marital property, and thus "waiver" was the incorrect legal standard to examine and apply?
>
> 2. Whether the agreement of the parties on the Appellant's CSRS pension was sufficiently unambiguous at the time of agreement, that the trial court erred in not enforcing said agreement and/or acknowledging that the Appellee ratified post-agreement the potential ambiguity, so that the agreement included the Appellant's CSRS pension?

2. The 457(b) account no longer exists. Mr. Pitts withdrew the money, less taxes and fees, and closed the account.

3. Mr. Pitts actually withdrew the funds on August 31, 2001, six months before Ms. Pitts gave her consent.

4. Ms. Pitts sought a second waiver on the advice of an Office of Personnel Management employee.

5. Ms. Pitts did not challenge the circuit court's computation of Mr. Pitts's interest in her pension.

Cite as 3 MFLM Supp. 87 (2012)

Custody: joint custody: cooperation between parents

Carolina Victoria Chelle
v.
Ramez Abdullah Ghazzaoui

No. 2052, September Term, 2010

No. 80, September Term, 2011

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

Opinion by Meredith, J.

Filed: January 31, 2012. Unreported.

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 (hereinafter "Mother"), appellant/cross-appellee, appeals from the judgment entered against her and in favor of Ramez Ghazzaoui (hereinafter "Father"), appellee/cross-appellant, by the Circuit Court for Anne Arundel County in a custody dispute. Mother challenges the order for joint custody and the judgment that was entered against her for a portion of Father's attorney's fees. Father's cross-appeal challenges the amounts of the judgments for attorney's fees, monetary award and retroactive child support. The following questions are presented for our review:

MOTHER'S APPEAL

1. Did the trial court abuse its discretion by entering an order for joint custody?
2. Did the trial court abuse its discretion in entering a judgment against [Mother] for attorney's fees as [Father's] reasonable and necessary expenses?

FATHER'S CROSS-APPEAL

1. Did the trial court abuse its discretion in entering a judgment for [Father's] reasonable and necessary expenses that failed to adequately compensate him?
2. Did the chancellor commit an abuse of discretion and/or reversible error when he failed to give full force and effect to the prenuptial agreement and failed to consider [Father's] non-marital contribution to the acquisition and maintenance of marital property when denying him a monetary award and/or when he failed to transfer the marital home to [Father]?
3. Did the chancellor commit reversible error when he failed to provide a hearing to [Father] with respect to the part of the B[est] I[nterest] A[ttorney]'s fees for which the court obligated him?
4. Did the chancellor commit reversible error in awarding retroactive child support to [Mother] and not to [Father]?

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

Because the trial court neither abused its discretion, nor committed reversible error, we answer "no" to each question, and will affirm.

FACTS AND PROCEDURAL HISTORY

Mother and Father were married on December 22, 2001, in Montevideo, Uruguay. One daughter, Maya, was born to the marriage on December 6, 2003; she was six years old at the time of the custody trial herein. 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 in the District Court for Anne Arundel County 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[1]. Although the legal proceedings between Mother and Father have been extensive, the questions that are the subject of this appeal arise from two orders of court: that rendered on October 8, 2010, awarding the parties joint legal and shared physical

custody ("the custody order"), and that rendered on March 10, 2011, dealing with the financial issues between the parties ("the financial order").

Our review is conducted pursuant to Md. Rule 8-131, which provides:

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

As this Court observed in *McCarty v. McCarty*, 147 Md. App. 268 (2002):

> Appellate review of a trial court's custody determination is limited. The standard of review is whether the trial court abused its discretion in making its custody determination. *See Robinson v. Robinson*, 328 Md. 507, 513 (1992) [.] In *Davis v. Davis*, 280 Md. 119 (1977), the Court explained that "when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion." *Id.* at 126. Again, "particularly important in custody cases is the trial court's opportunity to observe the demeanor and the credibility of the parties and witnesses." *Petrini v. Petrini*, 336 Md. 453, 470 (1994).

Id. at 272-73.

I. The Custody Order

In making its custody determination, a trial court's paramount concern is the best interest of the child. *Taylor v. Taylor*, 306 Md. 290, 303 (1986). "The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak." *Id.*

In this case, Mother argues that the trial court abused its discretion in ordering joint legal and shared physical custody because Mother and Father cannot co-parent in a productive manner. In support, Mother points to a variety of litigation activities undertaken by Father subsequent to the orders appealed from in this case. In her opening brief, Mother attached an appendix illustrating Father's post-merits-trial activities. On December 22, 2011, prior to oral argument in this matter, Father filed a motion to dismiss Mother's appeals, or, in the alternative, to strike portions of Mother's briefs, specifically those portions "which are neither part of nor derived from the record on appeal in this case." We agree with Father's contention that the extraneous material presented by Mother in her opening and reply briefs is neither "reasonably necessary" nor "material" within the meaning of Rule 8-504, nor is it germane to our consideration of this appeal. We decline to dismiss Mother's appeal, but Father's motion to strike will be granted such that we have disregarded Mother's appendix and her arguments regarding Father's activities subsequent to the orders appealed from in this case. *See, e.g., Hosain v. Malik*, 108 Md. App. 284 (1996).

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. Mother cites, among other cases, *Taylor v. Taylor*, 306 Md. 290 (1986), in support of her argument that joint custody should not have been awarded in this instance. But, the court did not simply order joint custody without considering the acrimony between the parents. Rather, the chancellor took full account of the problems the parents have experienced in dealing with each other, and the circuit court went to great lengths in crafting its custody order to ensure that Maya's best interests were served.

In *Taylor*, the Court of Appeals noted:

> The resolution of a custody dispute continues to be one of the most difficult and demanding tasks of a trial judge. It requires thorough consideration of multiple and varied circumstances, full knowledge of the available options, including the positive and negative aspects of various custodial arrangements, and a careful recitation of the facts and conclusions that support the solution ultimately selected.

Id. at 311. Although the so-called "*Taylor* factors" are often recited in custody cases, the *Taylor* Court was careful to recognize that, "[a]t best we can discuss the major factors that should be considered in determining whether joint custody is appropriate, but . . . none has talismanic qualities, and . . . no single list of criteria will satisfy the demands of every case." *Id.* at 303. The Court observed that "[t]he question of whether to award joint custody is not considered in a vacuum, but as a part of the overall consideration of a custody dispute." *Id.*

The ability of the parents to communicate and effectively co-parent is "clearly the most important fac-

tor" in determining whether the parents can share legal and physical custody. The Court in *Taylor* opined:

> Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.
>
> * * *
>
> When the evidence discloses severely embittered parents and a relationship marked by dispute, acrimony, and a failure of rational communication, there is nothing to be gained and much to be lost by conditioning the making of decisions affecting the child's welfare upon the mutual agreement of the parties. Even in the absence of bitterness or inability to communicate, if the evidence discloses the parents do not share parenting values, and each insists on adhering to irreconcilable theories of child-rearing, joint legal custody is not appropriate. The parents need not agree on every aspect of parenting, but their views should not be so widely divergent or so inflexibly maintained as to forecast the probability of continuing disagreement on important matters.
>
> * * *
>
> Ordinarily the best evidence of compatibility with this criterion will be the past conduct or "track record" of the parties. We recognize, however, that the tensions of separation and litigation will sometimes produce bitterness and lack of ability to cooperate or agree. The trial judge will have to evaluate whether this is a temporary condition, very likely to abate upon resolution of the issues, or whether it is more permanent in nature. Only where the evidence is strong in support of a finding of the existence of a significant potential for compliance with this criterion should joint legal custody be granted. Blind hope that a joint custody agreement will succeed, or that forcing the responsibility of joint decision-making upon the warring parents will bring peace, is not acceptable. **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.**

Id. at 304-07. (Emphasis added).

The chancellor concluded that this is such an "unusual case." The trial judge in this instance not only fully articulated the reasons for the grant of joint legal and physical custody between "warring parents," but also incorporated mechanisms intended to avoid or limit future battles.

In the bench opinion that preceded issuance of the written custody order, the trial court found that Mother had made

> a myriad of unfounded accusations . . . against [Father]. [Mother] has continuously made 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.
>
> [Mother] has accused [Father] of showering, watching pornography, displaying his genitals, masturbating, and forcing [Mother] to have sexual intercourse in the presence of the minor child. No professional evaluation conducted revealed that the minor child was exposed to any of these things. The disposition of the Howard County Department of Social Services case noted that there was no credible evidence [that] an incident involving sexual molestation or exploitation occurred. As far as statement[s] made to the minor child's therapist, Dr. Kinlin, on October 13, 2008, multiple professionals have reviewed the recorded sessions and all found that Dr. Kinlin was suggestive and leading.
>
> Many professionals have been involved in this case, conducting evaluations and proffering their opinions about [Father], [Mother], and the

minor child. The Court cannot, and need not, address every statement made by these individuals. While their analysis and recommendations were considered by the Court, none of them were presented with the fourteen (14) days of testimony and numerous exhibits presented to the Court.

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. In November and December of 2008 and 2009, Dr. Gombatz met with the parties, individually and together, and with their minor child and reviewed extensive materials provided to him. 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."

In early to mid-July 2008, [Mother] took [Father's] computer to her attorney's office and claims that she and the computer expert discovered online chats with and about minors of a sexual nature and child pornography. [Father] denies having conducted any on-line chats with minors or referencing child pornography. He testified that he had a friend visiting his home in 1997, at the time the chats were conducted, who used his computer. The Court finds this testimony credible.

Regarding the child pornography, [Mother's] attorney at the time, Mr. Marvin Liss, Esq., arranged for [Father] and [Father's] attorney at the time, Samuel William[ ]owsk[y], Esq., to view the pornography. Mr. William[ ]owsk[y] testified that almost immediately after viewing the material, [Father] responded that the child pornography was not his and [that] they should call the police. He also testified that approximately two weeks later, Mr. Liss suggested that they could "make all this go away" if [Father] would consent to [Mother's] having sole custody of the parties' minor child. [Father] and Mr. William[ ]owsk[y] rejected any such agreement.

Ultimately, [Mother] brought the photographs to the attention of social services, the custody evaluator, Ms. Terri Harger, and the child's best interest attorney, Ms. Barbara Taylor, who alerted the Maryland State Police. The Court does not fault any of these individuals for doing so. [Father] has consistently denied downloading child pornography. The Maryland State Police found no basis to conclude that [Father] committed any crime. Following his psychological evaluation, Dr. Gombatz stated that "it would be an error to conclude that [Father] is a pedophile or child molester."

The Court finds credible the testimony of [Father's] witness, Mr. Jeffrey Gross, regarding the origin of the child pornography. Mr. Gross testified that the child pornography was inconsistent with the adult pornography on the computer and was put on the computer during the period when only [Mother] and those under her control had access to the computer. The Court does not find [Mother's] reason for taking [Father's] computer credible. Moreover, the Court does not find credible [Mother's] story that she did not know her attorney attempted to use the planted child pornography as a bargaining chip in the parties' custody dispute. Of note is Dr. Gombatz's comment that "[Father] said quite poignantly, and in my opinion quite accurately, if the child pornography was mine, I shouldn't have custody. If [Mother] planted it, she shouldn't have custody."

[Father] testified that he was confronted by the custody evaluator, Ms. Terri Harger, about claims made by [Mother] that he filed a mail forwarding request with the United States Postal Service in November of 2008 to have the minor child's mail forwarded to his P.O. box. [Father] testified that he did not forward the mail and believes the request was made by [Mother], so that she could later accuse him of it. [Mother] offered no

> evidence to contradict this claim. The exhibit submitted by [Father] shows that the electronic request to forward the mail of Maya Ghazzaoui-Chelle was made by "CHEL003." In the absence of expert testimony, but based on review of the other forwarding requests, both electronic and in writing, the Court finds that this notation indicates that the request was made by [Mother].
>
> [Mother] used these and other tactics to manipulate the judicial system, limit [Father's] access to the minor child, and damage [Father's] reputation. [Mother] has presented the same baseless accusations to the judicial system, Maryland State Police, Howard County and Anne Arundel County Department[s] of Social Services, multiple mental health professionals, the public school system, friends, countless others, and her own daughter. [Mother's] allegations ultimately resulted in [Father's] visitation with the minor child being limited to every other weekend and Wednesday overnights, with the requirement of supervision, for the past twenty (20) months. That supervision resulted in significant expense to [Father] and became the source of much of the discord between the parties.

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 noted that its joint custody decision took into consideration the following:

- that "[i]t is in Maya's best interest that both [parents] have an equal role in her care and upbringing";
- that Dr. Gombatz "observed both parents interact with the minor child in his office. He noted the positive and appropriate relationships that the minor child has with each parent and recommends that these relationships be preserved";
- that the court was "not persuaded that there is, nor ever was, any basis to require" that Father's visitation with Maya be supervised;
- that "it is clear to the Court that the minor child has a positive and healthy relationship with each parent and clearly wants to be with both parents";
- that "[w]hile [Father] has expressed a willingness to co-parent throughout these proceedings, [Mother] is more insistent on maintaining sole custody. However . . . [Mother] did express a willingness to co-parent and utilize a parent coordinator if the Court determines that joint custody is in the best interest of the minor child";
- its finding that Father is a fit parent, and that while it found Mother's conduct to have been "calculated, malicious, and unacceptable . . . absent [that] [Mother] has proven herself to be a fit parent";
- that "[n]otwithstanding the degradation, embarrassment, and frustration he has undergone, [Father] is willing to work with [Mother] for the best interest of their minor child";
- that "[b]oth parents have positive contributions to make to the rearing of the minor child";
- Dr. Gombatz's observation that Father is "gentle, focused, and relaxed" with Maya, his recommendation that Father have substantial, unsupervised time with her, and that Father "should take full access to his parental rights and privileges";
- Dr. Gombatz's statement that Mother "has maintained a nurturing and supportive relationship with the minor child despite her conflict with [Father]" and his recommendation that Mother's relationship with the minor child be preserved;
- that "[b]oth parties care for their child deeply and have demonstrated an ability to make decisions in her best interest."

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 by the court of the parties' "compliance, openness, and willingness to cooperate." The custody order granted Mother final decision-making authority over issues concerning the health and religious upbringing of the minor child, and granted Father final decision-making authority over extracurricular activities and educational decisions beginning with the 2011-12 school year. 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.

To address sharing of physical custody, the court ordered use and possession of the family home to Father for a period of eight months beginning November 6, 2010. The order also contemplated that, on November 6, 2010, the minor child would move into the family home with Father and remain with him until

June 30, 2011, at which point she would reside with Mother for a period of six months. During the six-month period in which the child resides with either Mother or Father, the parent not having residential custody would have visitation with the child every other weekend from Thursday evening through Monday morning, and during the week in which the non-residential parent does not have weekend visitation, the non-residential parent would have an overnight visit with the child on Wednesday evening.

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

Under the circumstances of this case, we conclude that the circuit court did not abuse its discretion in granting the parties joint legal and physical custody of Maya[2].

II. The Financial Order

Both parties appeal from the court's order of March 10, 2011, which adjudged Mother responsible for $81,164.14 of Father's attorney's fees, and found that those were reasonable and necessary expenses occasioned by Mother's "misconduct and unfounded accusations." The judgment was later amended on April 21, 2011, to correct a mathematical error. It appears from the docket entries that the court entered a supplemental judgment in the amount of $4,000.00 against Mother and in favor of Father on that date, to account for a $4,000.00 error in computing the earlier judgment. Accordingly, the total amount of the judgments against Mother for attorney's fees and expenses was $85,164.14. In the financial order, the court assessed 60% of Father's attorney's fees, or $62,055.14, plus $9,000.00 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. Mother complains, on appeal, that the court's finding that she was responsible for the child pornography was the underpinning for the award of a portion of Father's expenses. We have already dealt with the computer issue in footnote 2, *supra*. As noted, there was substantial evidence in the record to support that factual finding by the court.

Once the trial court reasonably concluded that Mother was at fault for creating the child pornography issue, it was then within the court's discretion to deviate from the "American Rule," and instead employ the provisions of Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL") § 7-107, specifically subsection (d), which provides:

> (d) Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party the reasonable and necessary expense of prosecuting or defending the proceeding.[3]

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. Although Mother does not challenge "the hourly rates, the skill, or the nature of the work undertaken" by Father's attorneys, she does dispute that her actions caused Father's expenses to escalate. Mother acknowledges that the court has wide discretion in making an award for attorney's fees, but insists that Father made litigation decisions that inflated his own bills, and he should have to "shoulder them alone." Mother does not address the $23,109.00 in fees for Father's computer expert and supervision fees that the court found were incurred only because of the child pornography Mother planted.

As we have found that the trial court did not err in finding that no substantial justification existed, we will not disturb the portion of the financial order awarding Father $85,164.14.

III. Father's Cross-Appeal

A. Father's attorney's fees

Father contends that the court abused its discretion in entering the judgment for $85,164.14 because that sum is too low to adequately compensate him for the legal expenses he incurred. In the financial order, the court recognized that both Mother and Father had amassed significant legal fees — attorney's fees for Father alone were stated to be $273,395.00, and for Mother, $232,175.68. The court found Mother to be in a financially superior position to Father. Mother conceded in the parties' joint financial statement that her pension is worth at least $140,000.00, although in her brief she argues that the value of her pension is "vastly overstated in the court's calculation." The court used Mother's own valuation of her pension in its finding on the financial status of the parties, and we will not disturb that finding. Father's pension, by contrast, is worth less than $16,000.00.

The parties' respective salaries at the time of the merits trial were "approximately the same," and the respective values of their non-marital property was in the same range, with Father's valued at $27,250.00 and Mother's at $22,750.00. The two major areas of difference were, as previously noted, in the respective values of the parties' retirement accounts, and in the amount of attorney's fees and other legal expenses. Each of these items is supported by substantial evidence in the record, including the parties' joint financial statement, and we will not disturb the court's calculation in this regard. Nor will we disturb the court's finding that Mother is in a financially superior position to Father.

The trial court also found, with regard to the vast sums expended by the parties for legal fees, that "at least a significant portion" of both parties' legal bills had been paid by third parties. In the Father's case, the court found that sums expended on his behalf were loans, meant to be repaid, while in Mother's case, the monies were a gift. The court noted that Mother did not dispute that characterization. Finally, with regard to the question of whether the proceedings were justified, the court found that Mother had acted in a "calculated, malicious, and unacceptable" manner, which caused "the costs of this litigation to rise significantly." This, too, is a finding that is supported by substantial evidence in the record, and not clearly erroneous.

But the court found that not all of Father's legal bills were attributable to this specific litigation — some of the bills related to ancillary litigation — and that "both parties expended far in excess of what was necessary in this litigation due to their own misconduct, pride, and stubbornness." Therefore, the court concluded it was appropriate to assess against Mother only a portion of Father's reasonable fees. The court examined the bills submitted by Father from each of his three attorneys, and found overlap in some of the bills. Father's bills for attorney's fees, when submitted, totaled $273,395.00. Each of the three attorneys charged what the court termed a "reasonable hourly rate" of $225.00. The court excised periods of overlap, and, based on its finding that many more hours had been expended than was reasonable, adjusted the bills downward to arrive at a final total of $103,425.24. The court then determined, based on its earlier findings in accordance with FL §§ 7-107, 8-214, and 12-103, that Mother should pay sixty percent of the adjusted fees: *i.e.*, $62,055.14. Father argues that this "discount" was an abuse of discretion. Mother's position, expressed in her Reply Brief, is that "he is entitled to zero."

An award of fees was appropriate once the court found that Mother litigated without substantial justification. Father takes issue with the precise amount decided by the circuit court. But Father's argument ignores the basis for the court's "discount" — its finding that Father's three attorneys all overlapped, to some extent, and that each of them, "likely at the request of [Father], expended many hours in this case in excess of what was necessary."

In *Petrini v. Petrini*, 336 Md. 453 (1994), the Court of Appeals discussed the award of attorney's fees under FL § 12-103:

> **Decisions concerning the award of counsel fees rest solely in the discretion of the trial judge.** *Jackson v. Jackson,* 272 Md. 107, 111-12 (1974). The proper exercise of such discretion is determined by evaluating the judge's application of the statutory criteria . . . as well as the consideration of the facts of the particular case. *Id.* at 112. Consideration of the statutory criteria is mandatory in making the award and failure to do so constitutes legal error. *Carroll County v. Edelmann*, 320 Md. 150, 177 (1990). **An award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong.** *Danziger v. Danziger*, 208 Md. 469, 475 (1955). *See also Broseus v. Broseus*, 82 Md. App. 183, 200 (1990).

Id. at 468 (emphasis added).

Here, the trial court made its finding that Mother should pay a portion of Father's reasonable and necessary fees, but also found, in its discussion of the relevant statutory factors, that Father was not entirely blameless. As the trial court put it, Father's "obsessive tendencies have caused him to go far beyond what was necessary to defend these proceedings." Accordingly, it was not an abuse of discretion for the court to discount Father's legal bills in light of such a finding.

B. The prenuptial agreement

Father contends that the court abused its discretion both in declining to make a monetary award in his favor, and in declining to transfer the family home to him, pursuant to the parties' prenuptial agreement. Father's brief does not point to a place in the record where this argument was made, from which we conclude that this argument was not preserved. Only the parties' April 30, 2008, postnuptial agreement was discussed in the financial order, and the court found that agreement to be unenforceable.

C. The Best Interest Attorney's fees

During the pendency of the case, Father took an interlocutory appeal to this Court pursuant to Md. Code (1973, 2006 Repl. Vol.), Courts and Judicial

Proceedings Article ("CJP"), § 12-303(3)(v) ("an order . . . for the payment of money"), regarding the fee petitions of the Best Interest Attorney ("BIA") appointed in this case. Father's position was that he was entitled to a hearing at which he could examine the BIA, prior to being ordered, even on a *pendente lite* basis, to pay her fees. Our unreported opinion affirming the trial court's ruling that Father was not entitled to such a hearing was filed on November 5, 2010. *Ramez Ghazzaoui v. Carolina Chelle*, No. 1585, Sept. Term, 2009.

Although it is clear from his brief that Father maintains his position that he is entitled to a hearing pursuant to Rule 2-311(f) — a hearing at which he desires "to examine the BIA as to what she did and not just how long it took her and the hourly fee she charged," because Father "has serious 'issues' with the actions taken by the BIA that reach far deeper than the superficial information" set forth in the BIA's fee petitions — Father has not proffered to us what he expects to be able to prove at such hearing. In a civil suit, a party asserting error is obligated to "show prejudice as well as error." *Crane v. Dunn*, 382 Md. 83, 91 (2004). In the present case, Father's suggestion that the case would have come out better for him if he had been granted a hearing requires speculation. Under such circumstances, Father has not established reversible error. *Id.*

D. Retroactive child support

In its financial order, the trial court also considered Father's motion for modification of child support, which Father had filed on March 15, 2010, after he became unemployed. On May 6, 2010, the court specifically reserved ruling on this motion until the merits were considered. In arriving at the arrears figure that Father now disputes, the court performed three discrete sets of calculations in determining what Father's child support obligation would have been: 1) for the time period from March 15, 2010, through September 30, 2010, when the new child-support guidelines went into effect; 2) for the time period from October 1, 2010, through November 30, 2010; and 3) for the time period from December 1, 2010, through March 31, 2011.[4] The court also took into account that, "[d]uring each relevant period, the parties incurred monthly health insurance expenses for the minor child of approximately $46.00," and that Mother incurred day-care expenses of $600.00 when she was not working, and $910.00 when she was working full-time.

For the March 15, 2010, to September 30, 2010, time period, the court found that Father earned $1,383.00 per month in unemployment compensation, and Mother earned $1,427.50. The court specifically declined to find Father voluntarily impoverished, as Mother requested, and, using the child support guidelines then in effect, found that Father's child support obligation for this time period was $408.00. The arrears figure for that six-month-and-seventeen-day time frame was thus $2,676.03.

For the October 1, 2010, to November 30, 2010, time period, the court found that Father earned $1,383.00 per month in unemployment compensation, and that Mother earned $3,039.00. Father's child support obligation from that time frame was calculated to be $255.00, and the arrears figure was $510.00.

Father was employed as of December 1, 2010. Therefore, his monthly income for the December 1, 2010, to March 31, 2011, time period was $3,750.00, while Mother's remained $3,039.00. During that period, Father's monthly child support obligation was $487.00, resulting in arrears of $1,948.00.

Adding the arrears figures together, the court arrived at a total arrears amount of $5,134.03. The court ordered Father to make up the arrears by paying an extra $250.00 per month on his $29.00 per month current child support obligation, with the arrears payments to continue until satisfied.

Father contends that the court erred in ordering him to pay arrears without taking into account, or crediting Father for, the fact that, during the time 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. Father also contends that the court had "no documentary evidence" on which to base its computation of Mother's child-care expenses, and he claims that the court erred in failing to impute an annual salary of $76,000.00 to Mother, as the domestic relations master did in the January 23, 2009, pendente lite order. Father cites no law in support of his argument, nor does he direct us to where in the record the numbers he believes the court should have used might be found.

An appellate court "will not disturb the trial court's determination as to child support, absent legal error or abuse of discretion." *Jackson v. Proctor*, 145 Md. App. 76, 90 (2002). Parents are required to support their minor children. *See, e.g.*, FL § 5-203(b)(1); *Petrini v. Petrini* 336 Md. 453, 459 (1994). There is a rebuttable presumption that the child support guidelines are correct. FL § 12-202(a)(2)(i). This presumption "may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(2)(ii). A court, in determining whether a deviation from the guidelines would be appropriate under this section, **may** consider, among other things, "the terms of any existing separa-

tion or property settlement agreement or court order, including any provisions for payment of mortgages[.]" FL § 12-202(a)(2)(iii)(1).

Father was required to pay the mortgage on the marital home under a January 23, 2009, *pendente lite* order. The above-referenced statute is clear that a court **may** consider court-ordered mortgage payments in considering whether to deviate from the guidelines; in this case, the financial order reflects that the court did consider such a deviation, but, after such consideration, 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 a reversible legal error or an abuse of discretion.

APPELLEE'S MOTION TO STRIKE IS GRANTED. JUDGMENT OF TUE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID 1/2 BY APPELLANT/CROSS-APPELLEE AND 1/2 BY APPELLEE/CROSS-APPELLANT.

FOOTNOTES

1. There were multiple protective orders sworn out by both parties, but all criminal charges emanating from alleged violations of those orders ended by way of entries of *nolle prosequi.*

2. Mother devoted several pages of argument in both her opening and reply briefs to attempting to re-litigate the court's finding of fact that Mother was responsible for the child pornography on Father's computer. However, despite Mother's emphasis on this topic, it was not one of her questions presented on appeal. It stands as a factual finding of the trial court that was not clearly erroneous.

3. Similar statutes permitting the court to award attorney's fees are found at FL §§ 8-214 and 12-103.

4. October 1, 2010 was "when [Mother] became employed and the revised child-support guidelines became effective," and November 30, 2010, was "when [Father] became employed."

NO TEXT

Cite as 3 MFLM Supp. 97 (2012)

Child support: constructive civil contempt: personal jurisdiction

Bareaster Williams
v.
Monique Brown

No. 2708, September Term, 2010

Bareaster Williams
v.
Kyra T. Jackson

No. 2709, September Term, 2010

Argued Before: Eyler, Deborah S., Kehoe, Raker, Irma S. (Retired, Specially Assigned), JJ.

Opinion by Raker, J.

Filed: January 31, 2012. Unreported.

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.

In these consolidated cases Bareaster Williams, appellant, was found in constructive civil contempt by the Circuit Court for Baltimore City for failure to pay child support in accordance with two separate paternity and child support consent judgment decrees. In this appeal, he presents the following question for review: 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 over his person to find him in contempt. Accordingly, we shall affirm.

I.

Ashley M. Williams was born to Monique Kennette Brown on January 2, 2001. In September 2005, Brown filed in the circuit court a petition to establish paternity of Ashley, alleging that appellant was the father. On November 8, 2005, appellant entered into a consent judgment decree acknowledging paternity of Ashley and agreeing to pay $178 per month in child support to Brown.

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

Kyrell Barry Williams was born to Kyra Tiffany Jackson on February 8, 1994. In January 2004, Jackson filed in the circuit court a petition to establish the paternity of Kyrell, alleging that appellant was the father. On February 19, 2004, appellant entered into a consent judgment decree acknowledging paternity of Kyrell and agreeing to pay $153 per month in child support to Jackson.

In March 2009, before either child was emancipated, appellant stopped paying child support. Six months later, the Department of Human Resources, Baltimore City Office of Support Enforcement (the "Department"), sought to initiate contempt proceedings against him. To obtain appellant's current address, Department staff searched numerous record databases, such as those for real property, voter and vehicle registration, inmates in Maryland correctional institutions, state benefits, and social security. The Department found appellant's address, 5520 Robinwood Avenue, Gwynn Oak, Maryland, on the Maryland Judiciary Case Search website.[1] Although the Department had additional addresses for appellant, staff believed Robinwood Avenue was the most current.

On December 3, 2009, the Department filed two petitions titled "REQUEST FOR A SHOW CAUSE ORDER FOR CONTEMPT" in the circuit court. Show cause orders were issued on January 13, 2010, setting a contempt hearing date of April 7 and prescribing service by the Baltimore City Sheriff's Office. On January 27, 2010, when the server attempted to serve process on appellant at 5520 Robinwood Avenue, 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 April 7 contempt hearing, the circuit court issued paternity contempt warrants for his arrest in both cases. Notice of these warrants was sent to appellant at 5520 Robinwood Avenue address.

In August 2010, appellant was arrested and incarcerated at the Baltimore County Detention Center pending trial for burglary and related criminal offenses.

Upon discovering his whereabouts, the sheriffs office lodged detainers with the detention center on August 26, requesting that the facility notify the sheriff's office before releasing appellant so that he could be taken into custody on the outstanding paternity warrants. On October 11, 2010, appellant, apparently still incarcerated on the criminal charges, wrote a letter to the circuit court requesting a hearing on the detainers. The court heard arguments on October 14 from defense counsel and the State's Attorney with appellant, Brown, and Jackson present. Appellant stated that his address was 5520 Robinwood Avenue but asserted that he was never served with process. As such, he argued that the contempt warrants were invalid 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 January 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 copies of the petitions or the court's 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 January 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 timely[2] appeals followed, and this Court ordered that the cases be consolidated for appeal purposes.

II.

Before this Court, appellant argues that the circuit court erred in denying his motions to dismiss the contempt proceedings because service of process was not effected and the court did not obtain personal jurisdiction over him. Specifically, he asserts that: (1) the purported service in January 2010 was defective and not cured either by alternative attempts at service or a finding that appellant evaded service purposefully; (2) the paternity contempt warrants were issued illegally and, therefore, could not constitute service of process; and (3) service of process was not accomplished at the October 14 hearing because appellant was not served with copies of the contempt petitions.

In response, the State admits that the January 2010 attempt at service was deficient and does not attempt to argue that the paternity contempt warrants, lodged as detainers, cured the deficiency. The State does argue, however, that personal jurisdiction was established through proper service prior to the court finding appellant in contempt on January 4, 2011. This proper service was effected, the State contends, when, at the October 14, 2010, hearing, the State's attorney handed appellant's counsel copies of the contempt petitions, the circuit court issued new show cause orders, and appellant signed a summons.

III.

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). Personal jurisdiction cannot be established "unless the defendant has been notified of the proceeding by proper summons, for the court has no jurisdiction over him until such service is properly accomplished." *Lohman v. Lohman*, 331 Md. 113, 130 (1993). These basic principles are effectuated through the Maryland Rules that govern service of process and contempt proceedings; "failure to comply with those Rules constitutes a jurisdictional defect that prevents a court from exercising personal jurisdiction over the defendant." *Flanagan*, 412 Md. at 624.

Maryland Rule 15-206 outlines constructive civil contempt proceedings, and provides that "where the alleged contempt is based on failure to pay spousal or child support, any agency authorized by law may bring the proceeding," Md. Rule l5-206(b)(3), which the Department did in this case. The Rule further states that the court must set a hearing date that "allow[s] a reasonable time for the preparation of a defense." Md. Rule 15-206(c)(2). Section (d) of the Rule addresses specifically how a copy of the court's show cause order must be served and provides, as it did in 2010, as follows:

> "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 or, if the alleged contemnor has appeared as a party in the action in which the contempt is charged, in the manner prescribed by the court."

Md. Rule 15-206(d) (emphasis added). 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 as follows:

> "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 otherpapers filed with it*; (2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion; or (3) by mailing to the person to be served a copy of the summons, complaint, and all other papers filed with it by certified mail requesting: 'Restricted Delivery — show to whom, date, address of delivery.' Service by certified mail under this Rule is complete upon delivery. Service outside of the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice."

Md. Rule 2-121(a) (emphasis added); *accord* Md. Rule 3-121(a). 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*, the position of the parties that the attempt at service on January 27, 2010, was not adequate because appellant was not served personally and because the individual with whom the process was left stated that appellant no longer lived at 5520 Robinwood Avenue, even though this latter fact was belied by appellant's statement to the circuit court at the October 14 hearing that his address was 5520 Robinwood Avenue. Moreover, the State does not contend that the improperly issued contempt warrants effected service of process—wisely, since the Court of Appeals has rejected such an argument, *see Flanagan*, 412 Md. at 629-31. 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 October 14, 2010, hearing with copies of the Department's original contempt petitions and copies of the newly-issued show cause orders, which directed him to reappear before the court on January 4, 2011. He was served with the order and copies of the petitions as required by Rule 15-206(d). The procedures set forth in Rules 2-121(a), 3-121(a), and 1-321(a) were satisfied. The documents informed appellant of the specific allegations against him and the penalties he faced, and the hearing date gave him more than two months in which to prepare a defense. Thus, the record before us shows that the circuit court acquired personal jurisdiction over appellant and that he was not denied due process.

Appellant argues that the Court of Appeals's decision in *Flanagan v. Department of Human Resources* "is squarely on point" and mandates dismissal of the petitions here because he "was served only with another incarceration show cause order, and not with the contempt petition itself." In that case, the Court held that each of the several attempts to serve process upon Flanagan, a delinquent child support payer, was insufficient. A contempt petition was filed and a show cause order was issued, but these documents were simply slipped under the door of one of the numerous potential addresses where he might have been found. *See Flanagan*, 412 Md. at 621. Flanagan failed to appear at the show cause hearing, and the court issued a contempt arrest warrant. Unlike the instant case, Flanagan was arrested on the outstanding contempt warrant. *See id*. At his bail review hearing, Flanagan informed the court that he had not been served and was given an incarceration show cause order directing him to return to court for a later hearing; he was not given a copy of the original contempt petition. *Id*. at 633. The Court of Appeals ruled that the under-the-door service was improper, and that service of the show cause order alone at the hearing was insufficient under Rule 15-206(d) to give the circuit court personal jurisdiction over Flanagan. *See id*. at 633-34. [3]

We agree with the State, however, that the record in the instant case shows that appellant *did* receive copies of the original contempt petitions. The transcript of the October 14 hearing contains the following statement of the State's Attorney: "I am providing counsel with copies of the Request for Show Cause in, in both of these matters." As we noted earlier, the full title of each of the contempt petitions in this case was "REQUEST FOR A SHOW CAUSE ORDER FOR CONTEMPT." This Court finds such language dispositive.

Appellant does not address this evidence that appears to refute his claims of nonreceipt. Rather, he alleges simply that neither of the petitions appearing in the record indicates that it was stapled or attached to the respective show cause order. In light of the language in the transcript, the absence of perforations in

the relevant documents is unpersuasive. *Cf State v. Prue*, 414 Md. 531, 546-47 & n.8 (2010) (stating that the record of proceedings reflected in the transcript prevails over any conflicting entries in the record file). We hold that appellant was served properly in compliance with Rule 15-206(d) at the October 14 hearing, and that this service gave the circuit court jurisdiction over his person.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. An entry on this website that indicated appellant had pending matters before the Maryland District Court in Anne Arundel County listed this as appellant's address.

2. Notwithstanding the absence of a final disposition by the circuit court in this matter—normally a prerequisite for appellate jurisdiction—an order finding contempt may be appealed "without regard to whether an immediate sanction is imposed." *Bryant v. Howard County Dep't of Soc. Servs.*, 387 Md. 30, 45 (2005).

3. The Court notes that appellant here, unlike Flanagan, was taken into custody before the October 14 hearing, and returned to custody afterward, based upon unrelated criminal charges. The failure to serve process properly in Flanagan's case—and the wrongfully issued paternity contempt warrant resulting therefrom—was the sole basis for his incarceration and effected a denial of Flanagan's due process rights that appellant never experienced.

We do not understand appellant to be arguing that the invalidly issued paternity contempt warrants somehow tainted the legal efficacy of the service upon him at the October 14 hearing. Even if he were, however, we would consider such an argument to be of no moment.

Cite as 3 MFLM Supp. 101 (2012)

Adoption/Guardianship: termination of parental rights: lack of progress toward reunification

In re: Adoption/Guardianship Of Hailey E., Larah E., And Meadow E.

No. 634, September Term, 2011

Argued Before: Krauser, C.J., Eyler, Deborah Sweet, Meredith, JJ.

Opinion by Krauser, C.J.

Filed: February 3, 2012. Unreported.

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.

Appellants, Larry E. and Sarah K., appeal from an order, issued by the Circuit Court for Baltimore County, sitting as a juvenile court, terminating their parental rights. Because we conclude that the juvenile court properly considered and applied the relevant statutory factors, in reaching its decision, we affirm.

Background

This matter came before the juvenile court for a three-day hearing. The factual summary which follows is largely derived from testimony taken at that hearing.

Appellants are the natural parents of three children: Hailey E., born February 1, 2003; Meadow E., born July 19, 2005; and Larah E., born February 15, 2007. As recently as 2006, both appellants were employed and living with their children in a three-bedroom house in Hampden, a middle-class north Baltimore neighborhood. 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., while pregnant with Larah, left her insurance job to be at home with their children and to assist her husband in his landscaping business. In 2007, that business failed and, meanwhile, both Mr. E. and Ms. K. struggled with their growing addictions to prescription painkillers. In August 2007, appellants, by then unemployed and no longer able to make ends meet, slid into homelessness.

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

In late October 2007, a staff member from Sara's Hope Shelter, a homeless shelter where appellants had been living, contacted the Baltimore County Department of Social Services ("Department") to report that appellants appeared to be "high" and that the children were "dirty and malodorous." Later that day, the children were taken to the home of Ms. K.'s mother, Elizabeth K. The same day, a case worker from the Department visited Elizabeth K.'s home to observe the children and discovered that they were "very sick," and Meadow and Larah "had diarrhea and were vomiting." The children had not been taken to a doctor.

The following day, appellants met with the caseworker at her office. Ms. K., who "appeared disheveled," could not produce the children's medical assistance cards, nor could she recall who their pediatrician was or the last time the children had been seen by a doctor. She further acknowledged that the children had not received immunizations and that she suffered from an addiction to prescription drugs. Several weeks earlier, she had been arrested for selling drugs to an undercover officer. Mr. E., who "had poor hygiene" and appeared "out of it," also admitted that "he abused [Oxycodone]" and that he was unemployed and unable to support his family.

Both appellants had been participating in a methadone maintenance program administered by Man Alive, Inc. The caseworker contacted appellants' respective substance-abuse counselors at Man Alive. According to Ms. K.'s counselor, although she took methadone daily, she did not participate in any other treatment programs offered at the center, and, on multiple occasions during the preceding six months, Ms. K. tested positive for cocaine, heroin, and benzodiazepine. As for Mr. E., his counselor advised the Department's caseworker that he, too, tested positive for drugs and that, at that time, he was "not attending any treatment the program offers."

A week later, after appellants failed to show up at a FTDM,[1] and the children's maternal grandmother,

Elizabeth K., informed the Department that she was no longer able to take care of the children, the Department removed the children from Elizabeth K.'s home and filed CINA petitions and requests for emergency shelter care in the Circuit Court for Baltimore County, sitting as a juvenile court. 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.

At first, Hailey and Meadow were placed in one home, and Larah, the youngest, was placed in another, as the permanency plan called for reunification. But, in 2009, they were transitioned into a single pre-adoptive placement, since, by then, the Department had begun to consider the possibility of pursuing termination of appellants' parental rights.

About a month after the children were initially placed in shelter care, Ms. K., while riding on an MTA bus in Baltimore City, was assaulted by a group of adolescent middle school students.[2] As a consequence of that attack, she sustained injuries to her eyes and face which left her partially blind in her left eye, and she suffers from "numerous fears" and "uncontrolled seizures." Ms. K. applied for disability benefits, but her application was denied on two separate occasions; her subsequent appeal from that denial was pending at the time of the hearing on this matter.

In the aftermath of the assault, Ms. K. and Mr. E. were placed in a witness-protection program until the delinquency proceedings for the perpetrators had concluded in the summer of 2008. As part of that program, they were provided with housing in a motel room. After the conclusion of the witness-protection program, appellants were given a security deposit and one month's rent, and they moved to suitable housing. But, after experiencing "problems" with the other occupant of that house, appellants moved. Since then, appellants have lived in a succession of single rooms and homeless shelters. At the time that the hearing was held in this matter, Mr. E. and Ms. K. were living in a single room in a north Baltimore row house. The Department, however, was not consistently notified of appellants' whereabouts, and it was forced to rely on a third party, the Franciscan Center, whenever it had to communicate with them.

Ms. K. professed to experiencing a feeling of shock[ ] as the result of the "isolat[ion]" she endured while in the witness-protection program, and, upon being released, both she and Mr. E. had a difficult time adjusting and finding employment. The economic collapse in 2008 hit them hard; Ms. K. stated that, after they left the witness-protection program, "it seemed like we came out into like an almost different America." She has been unemployed for the entire time that her children have been in the foster care system and remains so up to the present time.

Mr. E. has been employed sporadically, having worked full-time for about ten months in 2010, earning $13 per hour. At the time the hearing was held in this matter, Mr. E. was working "under the table," performing demolition and various odd jobs for a contractor, earning $300 per week in cash, with no taxes withheld.

Sometime after the children were first removed, but prior to June 2008, the Department presented Mr. E. and Ms. K. with service agreements, which they both signed a few months later. The terms of those agreements required, among other things, that: they maintain contact with their children and with the Department; participate in medical care and educational planning; release necessary information to the Department; support the children financially (as applicable); and keep the Department informed of their "whereabouts, employment, etc." Both parents further agreed to attend and be in compliance with their substance-abuse treatment programs and to "explore the idea of being [weaned] off" methadone maintenance, as well as submitting to mental health evaluations and prescribed treatments. Moreover, appellants agreed to "obtain and maintain safe, stable, and drug-free housing appropriate for" them and their children; Ms. K. agreed to "obtain income appropriate to support her family"; and Mr. E. agreed to maintain his employment.

Abbey Niland, a social worker from the Department who was assigned to the children's case, testified that appellants participated in methadone maintenance programs and, generally, were in compliance with that aspect of their service agreements. Ms. K. also complied with the requirement that she participate in mental health treatment, but Mr. E. did not. The principal areas where appellants were in non-compliance were in finding and maintaining employment, finding suitable housing, maintaining contact with the Department, and attending all scheduled visitation sessions with their children.

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 her children regularly and that she and Mr. E. "used to speak with the children almost every night." But, later, when the Department required that visitation be supervised and that it be re-scheduled to Wednesdays from 3:30 to 5:30 p.m., at the Catonsville public library, she had difficulty visiting regularly, as she suffered phobias related to riding the bus alone in the aftermath of the December 2007 assault. By the time the hearing was held in this matter, however, appellants were eligible for weekly, eight-hour visitation sessions, "[t]ypically . . . held on Saturdays," and, every other Friday evening,

the children's maternal grandmother, Elizabeth K., had visitation.

There was also testimony as to the condition of the children, their adjustment to their foster homes, and their relationships with their foster parents.

After a three-day hearing, the juvenile court issued a memorandum opinion and order granting the Department's petition to terminate appellants' parental rights. In that opinion, the court set forth detailed findings of fact, applying the factors enumerated in Maryland Code (1984, 2006 Repl. Vol., 2010 Supp.), section 5-323 of the Family Law Article ("FL"), as required under *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007).

As to the first of the FL § 5-323(d) factors, the nature and extent of the services offered to appellants, the court found that they were "relatively minimal." The court found that appellants complied with the requirement that they participate in substance abuse treatment and that Ms. K. "has been compliant" with her ongoing mental health treatment program. As to the other "major 'service,'" housing assistance, the court found that "the Department has done little" in that regard, but that its hands were largely tied because there was "little the Department could offer." The juvenile court also found that Ms. K. "was quite diligent in locating and pursuing" housing assistance.

As to the second factor, appellants' efforts to adjust their circumstances so as to enable reunification with their children, the court found that they "maintained regular contact with their children until approximately six months" prior to the hearing, when visitation was moved to the Catonsville public library. The juvenile court deemed it "noteworthy that [appellants] have been unable to overcome that visitation barrier, even during periods when [Mr. E.] was employed and they had some income." The court further found that appellants' efforts to maintain contact with the Department were "somewhat sporadic" and that the Department's "ability to communicate with [Ms. K.] effectively has been continually hampered by the transient nature of their housing." Observing that the "real issue" is "whether additional services could be offered to enable . . . some lasting parental adjustment so that return home could occur within some ascertainable time," the court concluded that it was "unable to identify any change that would occur in the foreseeable future that would make substantial progress towards stability a likelihood."

As to the third factor, abuse and/or neglect, the court found that there was no evidence of abuse but that there was evidence of neglect of all three children. The juvenile court attributed this neglect to appellants' "active substance abuse, which related directly to their homelessness."

As to the fourth factor, the children's emotional ties and adjustment, the court observed that "[v]ery little evidence was presented." Specifically, the juvenile court noted that "not a single witness commented on [the children's] relationship with their parents or their bond with them." It found, however, that "it seemed apparent that [appellants] genuinely love their children." And, there was testimony that "the children are happy and well-adjusted" in their foster home, that they engage in age-appropriate activities in that home, and that "the foster parents would love to adopt all three girls and provide a permanent home for them."

The court further weighed what it deemed an additional, "most compelling," non-statutory factor: "the length of time these children have been in care with no progress toward reunification." It then concluded that, by clear and convincing evidence, "exceptional factors exist which would make continued custody with [appellants] detrimental to the best interest of these children." Accordingly, the court entered an order terminating appellants' parental rights, and, thereafter, they noted this appeal.

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.*, [402 Md. 477 (2007),] by finding that termination was appropriate here because of the parents' pervasive homelessness, or unspecified 'issues' which rendered the parents homeless." They further contend that the lower court erred in "directly violat[ing] the ruling" in *Rashawn H.*, where the Court of Appeals expressly stated that "homelessness, alone, or physical, mental, or emotional disability, alone," will not "justify such termination." *Id.* at 499.

In support of their contentions, 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.

When faced with a petition to terminate parental rights, a juvenile court must follow the dictates of Maryland Code (1984, 2006 Repl. Vol., 2010 Supp.), section 5-323 of the Family Law Article ("FL"),[3] which

requires that it consider various factors and, then, if it "finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests," the juvenile court may "grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection," thus, terminating the parents' rights. *Id.* § 5-323(b). The factors the court must weigh are enumerated at subsection (d) of the same statute and include the nature and extent of any services the Department has provided to the parents; the "results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home"; whether the parents have committed child abuse or neglect; and the children's emotional ties to their parents, their adjustment to their surroundings, their "feelings about severance of the parent-child relationship," and the "likely impact" on their well-being as a result of termination of their parents' rights. *Id.* § 5-323(d).

The list of factors in FL § 5-323(d) is not, however, exhaustive, as "courts may consider 'such parental characteristics as age, stability, and the capacity and interest of a parent to provide for the emotional, social, moral, material, and educational needs of the child." *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 104 n.11 (2010) (quoting *Pastore v. Sharp*, 81 Md. App. 314, 320 (1989)). Nevertheless, the enumeration of factors in FL § 5-323(d) is intended to limit a juvenile court's discretion in making its best interest determination, so as to afford heightened protection of parents' fundamental rights. *See In re Adoption/Guardianship of Alonza D.*, 412 Md. 442, 458-59 (2010); *Rashawn H.*, 402 Md. at 498-500.

Because parents have a fundamental right in the care and upbringing of their children, a juvenile court, in applying the best interest standard, must do so harmoniously with that fundamental right. *Rashawn H.*, 402 Md. at 498-99. But, "the best interest of the child remains the ultimate governing standard." *Id.* at 496. *Accord Ta'Niya C.*, 417 Md. at 94 ("[W]e reexamine the law in this area and confirm once again that the child's best interest is the prevailing standard in these deteminations.").

In making its best interest determination, the juvenile court must "give the most careful consideration to" the factors set forth in FL § 5-323(d), *Rashawn H.*, 402 Md. at 501, giving "primary consideration to the health and safety of the child." The court is required "to make specific findings based on the evidence with respect to each" statutory factor and, "mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show" parental unfitness or exceptional circumstances "that would make a continuation of the parental relationship detrimental to the best interest of the child." *Id.*

We apply a three-fold standard of review to a guardianship decision: we review the juvenile court's factual findings for clear error, its legal conclusions de novo, and its ultimate decision, applying the law to the facts, for abuse of discretion. *Ta'Niya C.*, 417 Md. at 100. Since appellants do not challenge any of the lower court's factual findings, nor do they contend that the court applied an incorrect legal standard, our review must focus on whether that court abused its discretion in reaching its ultimate decision, namely, that there were exceptional circumstances sufficient to overcome the presumption that parental custody of these children was in their best interests.

In the case at bar, the juvenile court carefully weighed the statutory factors, setting forth its factual findings and its ultimate decision in a written opinion. The court also weighed what it deemed was a non-statutory factor, which it may do in its discretion, *see Ta 'Niya C.*, 417 Md. at 104 n.11, 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 FL § 5-323(d)(2)(iv) requires that the court consider "the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including . . . whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period." Thus, 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 by appellants toward reunification, although characterized by the court as a non-statutory factor, appears to us as, in fact, part of its weighing of FL § 5-323(d)(2)(iv). In other words, the court considered appellants' lack of progress during that protracted time period and 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." FL § 5-323(d)(2)(iv).

Indeed, the juvenile court stated as much. In finding

that there were exceptional circumstances, the court noted that, although the assault on Ms. K., near the end of 2007, followed by a year in witness protection, "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." The court found it "most telling" that Mr. E. worked ten months in 2010, earning $13 per hour,[4] during a time when, "presumably," appellants were not actively using drugs, had food stamp assistance, and were eligible for limited[5] housing assistance, and yet, throughout that entire period, they made essentially no progress, "function[ing] at barely a subsistence level in a single room," without transportation or even telephone service.

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. Rather, "[w]hat 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. Thus, "[t]he 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. *In re Adoption/Guardianship of Amber R. and Mark R.*, 417 Md. 701, 719-23 (2011).

ORDER OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.

FOOTNOTES

1. FTDM stands for "Family Team Decision Making," which is "an intervention for children and families that have entered the child welfare system that involves the supportive engagement and empowerment of families, community members, and service providers by child welfare workers in the decision making process related to the placement of children." *See* "Family Team Decision Making," *Advocates for Children and Youth,* available at http://www.acy.org/articlenav.php?id=123 (last visited Jan. 22, 2012).

2. *See* Gus G. Sentementes and Brent Jones, *Woman injured in bus beating*, BALTIMORE SUN, Dec. 06, 2007.

3. In relevant part, Maryland Code (1984, 2006 Repl. Vol., 2010 Supp.), § 5-323 of the Family Law Article ("FL"), provides:

> (b) Authority. — If, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.
>
> * * *
>
> (d) Considerations. — Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1)(I) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
>
> (I) the extent to which the parent has maintained regular contact with:
>
> 1. the child;
>
> 2. the local department to which the child is committed; and
>
> 3. if feasible, the child's caregiver;
>
> (ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;

(iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and

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

(3) whether:

(I) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

(iv) the parent has been convicted, in any state or any court of the United States, of:

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

2. aiding or abetting, conspiring, or soliciting to commit a crime described in item 1 of this item; and

(v) the parent has involuntarily lost parental rights to a sibling of the child; and

(4) (I) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

(iii) the child's feelings about severance of the parent-child relationship; and

(iv) the likely impact of terminating parental rights on the child's well-being.

4. Assuming a 2,000-week year (40 hours weekly for 50 weeks), this means that Mr. E. earned roughly $21,670.00 in 2010 (10/12 * 13 * 2000).

5. Appellants were eligible for assistance with a security deposit and the first month's rent. The court did not mention programs such as the federal Section 8 program but did observe that Ms. K. "is ineligible for some assistance programs because of a past record for criminal convictions." (App. 31) *See* 42 U.S.C. § 1437f (d)(1)(B)(iii) (providing that Section 8 tenancy may be terminated for "any drug-related criminal activity on or near" premises); *id*. § 1437f (d)(1)(B)(v)(II) (providing that Section 8 tenancy may be terminated where tenant is violating "a condition of probation or parole imposed under Federal or State law").

Cite as 3 MFLM Supp. 107 (2012)

CINA: change in permanency plan: parent's efforts

In re: Zanelle D.

No. 884, September Term, 2011

Argued Before: Meredith, Woodward, Alpert, Paul E. (Ret'd, Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: February 3, 2012. Unreported.

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.

Appellant, Gwendoline D. ("Ms. D."), challenges the judgment of the Circuit Court for Montgomery County sitting as a juvenile court, whereby the court granted appellee's, the Montgomery County Department of Health and Human Services ("MCDHHS"), request to change the permanency plan of, Ms. D.'s daughter, appellee, Zanelle D. ("Zanelle"), from reunification to adoption by a non-relative. Zanelle's father, Karl D. ("Mr. D.") did not join in this appeal.

Appellant presents one question for our review, which we have slightly rephrased: Did the trial court abuse its discretion in changing the permanency plan from reunification with Ms. D. to adoption by a non-relative?

For the reasons set forth herein, we shall affirm the judgment of the juvenile court.

BACKGROUND

On February 16, 2010, Ms. D. was admitted to George Washington University Hospital for abdominal pain related to her pregnancy with Zanelle. Ms. D., who was HIV positive, refused medically necessary treatment for both herself and Zanelle, both before and after Zanelle's birth. Ms. D. refused to consent to blood draws and other tests and treatment for potential infectious diseases, including treatment for HIV; refused to speak with hospital staff about her care; initially refused to consent to a medically necessary Caesarean section delivery; and refused to consent to tests or medical treatment for Zanelle. MCDHHS received a report questioning the ability of Mr. and Ms. D. to care for Zanelle. Mr. D. was present at the hospital only sporadically and agreed to many of Ms. D.'s medical decisions. On February 24, 2010, Ms. D. gave birth to Zanelle, and on March 4, 2010, MCDHHS placed Zanelle in shelter care in the home of Marie and Cyruss T. ("Mrs. T" and "Mr. T."). On March 5, 2010, following an emergency shelter care hearing, the juvenile court ordered that Zanelle remain in shelter care. Ms. D. remained quarantined at the hospital until April 22, 2010.

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

On March 31, 2010, the juvenile court adjudicated Zanelle as a child in need of assistance ("CINA") and ordered that her placement in shelter care be continued. The court also ordered supervised visitation with Zanelle, psychiatric evaluations, and parenting classes for Mr. and Ms. D.

On May 28, 2010, Dr. Mario Pruss conducted psychological evaluations of both Mr. and Ms. D. and in a written report, dated June 1, 2010, rendered his diagnosis and recommendations to the MCDHHS. Dr. Pruss indicated that Ms. D. may have a primary delusional disorder with paranoid content, a condition "known to not respond convincingly to antipsychotic drugs or to psychotherapy." Dr. Pruss suggested that a psychological assessment "may disclose more areas of deficient reality testing and faulty reasoning" and recommended "[a]n observation period of at least another 6 months . . . to further estimate medical and psychological functionality." Dr. Pruss also recommended the appointment of a "guardianship or curatorship over [Ms. D.]" Dr. Pruss found that Mr. D. had failed to show the "appropriate participation or average father skills . . . that would be sorely needed to compensate for [Ms. D.'s] sustained shortcomings," but Dr. Pruss could not "[arrive] at any psychiatric diagnosis for [Mr. D.]," because Mr. D. "went out of his way to not give information about his life."

On January 14 and 20, 2011, Dr. Giselle Hass conducted a psychological assessment of Ms. D. In her written report on Ms. D., Dr. Hass noted:

> [Ms. D.] was eloquent and spontaneous, but there were themes she refused to address because she believed they were irrelevant to her agenda. The theme of her narrative was that, since she came in contact

> with hospital staff due to a swollen fingertip, all professionals involved have deceived her, betrayed her, lied to her, and abused her. Most of all, they have kept secrets and strategized against her and she does not understand why they are doing such. [Ms. D.] came to the evaluation with the objective of presenting her case to obtain support in gaining custody of her daughter. When she believed that she was not being understood, supported, or the tasks or questions were unrelated to her goal or questioned her credibility, she became defensive and avoidant.

Dr. Hass determined that Ms. D.'s intellectual functioning is "poor, particularly due to her significant obsession that leads to mental confusion." Dr. Hass suggested that

> [Ms. D. is] suffering from severe paranoid ideation. . . . [S]he feels persecuted, believes that there is a concerted effort by others to undermine her goals, and believes that others are trying to discredit her in a devious way. . . . Even if [Ms. D.] has suffered inequitable treatment and has been discriminated against, her reaction seems obsessive, melodramatic, and counterproductive.

Dr. Hass diagnosed Ms. D. with delusional disorder and personality disorder not otherwise specified (mixed personality disorder paranoid and narcissistic features).

On February 28, 2011, the juvenile court held a review hearing during which MCDHHS recommended that the court maintain the plan of reunification. The court affirmed the permanency plan of reunification, maintained Ms. D.'s weekly visitation with Zanelle, and scheduled a permanency plan review hearing for June 14, 2011.

On April 7, 2011, Ms. D. submitted a letter to the juvenile court requesting that Zanelle be removed from the care of Mr. and Mrs. T. Ms. D. alleged in the letter that (1) there were sores on Zanelle's scalp from Mr. and Mrs. T. braiding her hair; (2) Zanelle was constantly constipated with blood in her stool; and (3) Zanelle was not being fed properly or dressed appropriately for the weather. On April 29, 2011, the juvenile court held a hearing to address Ms. D.'s request. Due to time constraints, the court continued the hearing on Ms. D.'s request to June 14, 2011, when the court also conducted the scheduled review of the permanency plan. MCDHHS and Zanelle requested that the permanency plan be changed to adoption by a non-relative, specifically, Mr. and Mrs. T., and Ms. D. requested that the court return Zanelle to her immediately.

During the hearing, Mrs. T. and two MCDHHS employees, Carla Matal and Cristina Brown, testified and denied each of the allegations contained in Ms. D.'s April 7 letter. Brown, Matal, and Mrs. T. denied ever seeing blood in Zanelle's stool. Matal testified that Zanelle was always dressed appropriately and that her clothing and diapers fit her. Brown stated that "[Zanelle] eats all the food that [Ms. D.] gives. Sometimes she doesn't want it . . . she's refusing, she's pulling on the side." Brown and Matal testified that they never saw any sores on Zanelle's head. Mrs. T., a physician's assistant, stated that she was unaware of any impact of the braiding on Zanelle's head.

Matal testified to Ms. D.'s behavior during her visitations with Zanelle:

> At the beginning it's everything about looking for what is missing in the diaper bag, yelling, complaining, anger, calling people names.
>
> * * *
>
> And the word stupid is every other second. Everybody is stupid. The foster parents are referred to as the monkeys and even if I try to tell Ms. D., "we don't need this right now, you have two hours to spend with your daughter," she will yell and scream at me, I don't know anything, I'm no one, I'm nobody. She knows everything about her daughter because she's the mother. No one knows anything. And things are done different in Africa and that's why she won't accept any of my guidance or comments.

Matal stated further that, since she began supervising the visits in February 2011, Ms. D.'s behavior had grown worse over time.

Juatina White, a MCDHHS graduate licensed social worker, testified at the hearing that Zanelle would not be safe and healthy in Ms. D.'s care because of Ms. D.'s narcissism, lack of support system, and her inability to calm herself during stressful situations. White noted that Zanelle has "some attachment" to Ms. D., but claimed that it is "not significant where the child is distressed when [Ms. D.] leaves the room or when she leaves the Visitation House." Specific to Zanelle's attachment to her foster parents, White testified that Zanelle has lived with them since she left the hospital in March 2010, that she "runs the house," that Mr. T. constantly observes her, and that Zanelle "goes to [Mr. T.] to get her needs met. She's checking in with him even if she walks away for awhile. She comes back to

where he is as her safety base." White also stated that Mr. and Mrs. T. are "the only family [Zanelle] knows."

Eric Brooks, a foster care supervisor for MCDHHS, testified as an expert in clinical social work with an expertise in risk assessment and safety. Brooks, having reviewed Dr. Hass's evaluation of Ms. D., expressed concern that Ms. D.'s narcissistic features of her personality disorder would make her unable to "look after the interests of others over periods of time." Brooks testified that treatment for Ms. D.'s disorder[ ] would require "persistent, ongoing, intensive psychotherapy over years" and that Ms. D. "may never fully be able to overcome [this] disorder[ ]." Brooks opined that Ms. D. "poses a tremendous risk to Zanelle [ ] if reunified with her."

At the close of the evidence, the juvenile court found "that the allegations in [Ms. D.'s] letter of mistreatment and maltreatment, inattention or neglect or whatever by the current foster parents are unfounded and that the care being provided to Zanelle by the foster parents is superb." The court then reviewed each of the required considerations for the determination of a permanency plan set forth in Maryland Code (1984, 2006 Repl. Vol., 2009 Supp.), § 5-525(f)(1) of the Family Law Article ("F.L.").[1]

The juvenile court found, with respect to the health and safety of the child, that returning Zanelle to Ms. D. "under the evidence and certainly today would be of the utmost height of recklessness." In reaching this finding, the court considered Ms. D.'s "disruptive" and "combative" behavior during her visitations, the pendency of the case, and during her own examination on the witness stand, as well as her "delusional" perceptions of reality. The court found that she "has a significant personality disorder [that] substantially impairs her functioning from everything." The court also noted that the reasons offered by Ms. D. for returning Zanelle to her "today" were "self-centered on the focus of the mother" and "not in any way related to the best interests of the child."

The juvenile court did note that Ms. D. "bravely gave birth to the child" and credited her "for bringing Zanelle into the world." The court, however, found that "that is not the justification in the context of all the other circumstances in this case for the child to be returned to the mother," because "it would be a very substantially unsafe, risky environment for the child to be returned." The court expressed concern about Ms. D.'s long term psychological and mental health issues, which would require "long-term and intensive therapy . . . *with questionable results*" and found such issues to be a substantial factor supporting the permanency plan of adoption by a non-relative. (Emphasis added).

Regarding Zanelle's attachment and emotional ties to Ms. D., the juvenile court acknowledged "some attachment," but found that it was not significant. On the other hand, the court found that Zanelle's attachment and emotional ties to Mr. and Mrs. T. were "substantial" and that "the evidence does support that the child sees the current foster parents as parents."

With respect to the length of time that Zanelle has resided with Mr. and Mrs. T., the juvenile court found that "this is the only home that the child knows since approximately eight days of age and that is a significant factor weighing in favor of" adoption by a non-relative.

In reference to the potential emotional, developmental, and educational harm to Zanelle if moved from Zanelle's current placement, the juvenile court found a "devastating potential harm to the child to pull her from the only foundation she has had in this life with care givers that are in an excellent position to take care of her."

With respect to the potential harm to the child by remaining in State custody for an excessive period of time, the juvenile court found that "it is in Zanelle's best interest to find stability. She's now, I think, 16 months or so in care, literally, but for days, 100 percent of her life and stability would be appropriate."[2]

On November 3, 2011, in consideration of the aforementioned findings, the juvenile court ordered, among other things, that the permanency plan of reunification be changed to adoption by a non-relative. This timely appeal followed.

Additional facts will be set forth below as necessary to resolve the question presented.

DISCUSSION

The Parties' Contentions

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 "[i]n 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]."

Standard of Review

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 re Shirley B.*, 419 Md. 1, 18-19 (2011). In *In re Shirley B.*, the Court of Appeals recently summarized the statutes and standards governing our review of such cases, as follows:

> [W]e must be mindful that
>
> > [q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. 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[.]" Md. Code (1974, 2006 Repl. Vol., 2009 Supp.), § 3-823(b) of the Courts and Judicial Proceedings ("CJP") Article. Thereafter, the court must review the child's permanency plan "at least every 6 months until commitment is rescinded . . . ." CJP § 3-823(h)(1)(iii). . . .
>
> > The permanency plan is an integral part of the statutory scheme designed to expedite the movement of Maryland's children from foster care to a permanent living, and hopefully, family arrangement . . . . Services to be provided by the local social service department and commitments that must be made by the parents and children are determined by the permanency plan.
>
> It is the court's "responsibility [to] determin[e] the permanency plan, . . . and [to] justify[ ] the placement of children in out of home placements for a specified period or on a long-term or permanent basis. . . ."
>
> At the hearing, the court must consider the following factors:
>
> > (i) the child's ability to be safe and healthy in the home of the child's parent;
> >
> > (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
> >
> > (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
> >
> > (iv) the length of time the child has resided with the current caregiver;
> >
> > (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
> >
> > (vi) the potential harm to the child by remaining in State custody for an excessive period of time.
>
> [F.L. § 5-525(f)(1).]
>
> > Moreover, at the hearing, the court shall:
> >
> > (i) Determine the continuing necessity for and appropriateness of the commitment;
> >
> > (ii) Determine and document in its order whether reasonable efforts have been made to finalize the permanency plan that is in effect;
> >
> > (iii) Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment;
> >
> > (iv) Project a reasonable date by which a child in placement may be returned home, placed in a preadoptive home, or placed under a legal guardianship;
> >
> > (v) Evaluate the safety of the child and take necessary measures to protect the child; and
> >
> > (vi) Change the permanency plan if a change in the permanency plan would be in the child's best interest.
>
> CJP § 3-823(h)(2).

Id. at 18-22 (case citations omitted) (emphasis in original deleted).

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. *In re James G.*, 178 Md. App. 543 (2008).

As correctly noted by MCDHHS, the juvenile court did in fact consider some of the "positive elements" identified by Ms. D. The court acknowledged Ms. D.'s love for Zanelle and their 16 month old 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. to be insufficient to overcome the "very substantially unsafe, risky environment for the child to be returned." The court not only found that 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 that Zanelle had been in foster care, that produced no positive results in ameliorating the conditions that necessitated Zanelle's commitment. Ms. D.'s argument 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.

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

FOOTNOTES

1. F.L. § 5-525(f)(1) provides:

> (1) In developing a permanency plan for a child in an out-of-home placement, the local department shall give primary consideration to the best interests of the child, including consideration of both in-State and out-of-state placements. The local department shall consider the following factors in determining the permanency plan that is in the best interests of the child:
>
> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;
>
> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

2. The juvenile court also considered the reasonable efforts of MCDHHS to finalize the permanency plan of reunification. The court determined that, in light of its coordination of visitation and maintenance of contact with Ms. D., MCDHHS had made reasonable efforts to achieve the permanency plan.

NO TEXT

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