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## April 2012

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Cite as 4 MFLM Supp. 3 (2012)

**Attorneys' fees: financial status and needs: pro bono representation**

# Joanna Davis
# v.
# Michael A. Petito, Jr.

*No.30, September Term, 2012*

*Argued Before: Bell, C.J., Harrell, Battaglia, Greene, Adkins, Barbera, Eldridge, John C. (Ret'd, Specially Assigned), JJ.*

*Opinion by Battalia, J.*

*Filed: February 27, 2012. Reported.*

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

We have been asked to consider whether the gratuitous cost of pro bono legal services,[1] provided to a party in a custody modification proceeding, may be considered in awarding attorneys' fees, pursuant to Section 12-103 of the Family Law Article, Maryland Code (1984, 2006 Repl Vol.),[2] to the other party, who had retained private counsel. Joanna Davis, Petitioner, was ordered by the Circuit Court for Wicomico County to pay her ex-husband Michael A. Petito, Jr., Respondent, $30,773.54 in attorneys' fees and costs, because the trial court determined that she was in a better financial position than Mr. Petito, due to her having received pro bono representation by the Sexual Assault Legal Institute (SALI),[3] whereas Mr. Petito had accumulated over $70,000 in legal fees as a result of retaining private counsel.

The Court of Special Appeals affirmed the trial court's order in a reported opinion, *Davis v. Petito*, 197 Md. App. 487, 14 A.3d 692 (2012), even though Ms. Davis had argued that the trial court's order discounting any perceived value associated with her representation contravened this Court's decision in *Henriquez v. Henriquez*, 413 Md. 287, 992 A.2d 446 (2010), in which we interpreted Section 12-103 to permit an attorneys' fee award to a prevailing party, who also had received pro bono legal representation.[4] We granted certiorari, 420 Md. 81, 21 A.3d 1063 (2012), to consider the following question:

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

> In determining an award of costs and attorney's fees in a custody case, Family Law Article § 12-103(b)(2) of the Maryland Code requires the courts to consider, *inter alia*, the financial status and needs of each party. In assessing the parties' financial status and needs, and ultimately ordering the Mother to pay $30,773.54 of the Father's legal expenses, was it appropriate for the lower court to consider the fact that the Mother was represented *pro bono* and to disregard her day-to-day financial needs, particularly as they relate to caring for the Child?

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

**Background**

Joanna Davis and Michael Petito were married on December 12, 1998 and have one daughter, Sophia, born on October 22, 2003. In April of 2006, the Circuit Court for Wicomico County granted them an absolute divorce and awarded them joint legal custody but primary physical custody of the child to Ms. Davis.

In December of 2008, Ms. Davis, through retained counsel, filed an Emergency Complaint for Immediate Custody, Injunctive Ex Parte and Pendente Lite Relief, in which she sought sole legal and physical custody of Sophia, because she alleged that Mr. Petito had sexually abused the child. Mr. Petito denied the allegations, initially without counsel and later, after having retained private counsel, filed a Counter Complaint for Modification of Custody, seeking joint physical and legal custody of Sophia and a decrease in his child support payments; he also specifically requested attorneys' fees. Eventually, Ms. Davis could not afford to pay an attorney and secured the services of SALI on a pro bono basis.

A hearing ensued but, after the first five days, the Circuit Court Judge determined that Ms. Davis had not

established by preponderance of the evidence that there was "any form of sexual abuse" by Mr. Petito specifically, she found that "none of [Ms. Davis's] experts are able to offer consistent credible opinions as to what exactly happened," while she found "convincing and credible" the testimony of Mr. Petito's expert, who was offered "for the general proposition that the minor child's statements in this case are insufficient to support a finding of sexual abuse." The parties then presented both oral and written comments regarding the award of attorneys' fees under Section 12-103.

As to attorneys' fees and costs, Mr. Petito submitted a request for $76,052, arguing that the judge should award him the total amount under Section 12-103, because Ms. Davis lacked substantial justification to seek a modification in child custody. He also asserted that Ms. Davis had "financial circumstances [that] far exceed[ed] Mr. Petito's financial circumstances" because she owned her own home and had pro bono representation, while he did not own property and had had retained private counsel; according to him, the Sexual Assault Legal Institute's representation of Ms. Davis meant that "her attorneys' fees have been paid in full whereas Mr. Petito has incurred debts in the sum of $61,340 . . . borrowed from his 401K and incurred significant unsecured liabilities. . . ."

Ms. Davis conversely submitted a request for an award of attorneys' fees and costs in the amount of $14,080.12, representing the amount she paid to her private attorney before she retained SALI. She urged that Mr. Petito was in a better financial position to pay for attorneys' fees because his family had given him interest-free loans, whereas Ms. Davis had "no ability to pay [his] counsel fees," having "less than $2,000.00 in cash." She maintained that she had substantial justification to bring her claim based on the allegations of sexual abuse.

The judge awarded Mr. Petito $30,773.54 in attorneys' fees,[5] reasoning that Mr. Petito had substantial justification for defending himself in this proceeding and that Ms. Davis's financial circumstances were better than that of Mr. Petito because she had been represented on a pro bono basis, whereas Mr. Petito had incurred significant debt as a result of retaining private counsel:

> The Court may order attorneys fees under Family Law Article § 12-103, Annotated Code of Maryland, but not before considering the financial status of each party, the needs of each party, and whether there was substantial justification for bringing or defending the proceeding. *Lieberman v. Lieberman*, 81 Md. App. 575, 601 (1990). The Court acknowledges that each party has expended significant financial resources as a result of this case. Mr. Petito, however, has suffered disproportionate financial hardship from these proceedings. His counsel was privately retained, unlike Ms. Davis's representation, which has been without charge since October 2009. He has exhausted his savings, credit, and taken loans in excess of $10,000 from his family. There can be no doubt that the needs of both parties are high, especially in light of the resources expended in these proceedings. The Court finds that Mr. Petito had a substantial justification in defending himself in these proceedings, initiated by Ms. Davis. While the Court recognizes the struggle that any parent must have when believing their child has been sexually abused, particularly when the suspected abuser is the other parent, the Court ultimately was unable to make a finding that the evidence supported that sexual abuse occurred. Without defending himself, Mr. Petito risked losing his parental relationship with Sophia. By contrast, Ms. Davis was represented pro bono by SALI, and should bear shared responsibility for the legal fees according to her income in light of the full record herein.

Ms. Davis thereafter filed a Motion to Alter or Amend the Order, arguing that the judge's consideration of the pro bono status of Ms. Davis's representation in awarding Mr. Petito attorneys' fees and costs under Section 12-103 was erroneous in light of our holding in *Henriquez*, 413 Md. 287, 992 A.2d 446, which had been filed within days before the judge's ruling. Ms. Davis argued that "it is without significance that Ms. Davis is currently under retainer with a legal services organization," and the Circuit Court should have instead focused on Ms. Davis's financial circumstances and needs, namely her inability to afford to pay Mr. Petito's fees; the judge denied Ms. Davis's Motion.

Ms. Davis timely appealed to the Court of Special Appeals,[6] which affirmed the trial court's order in a reported opinion, 197 Md. App. 487, 14 A.3d 692 (2012), concluding that the Circuit Court Judge properly considered the impact of the disparity in the cost of the parties' attorneys' fees on each party's financial status, needs and substantial justification for bringing or defending the proceeding. The Circuit Court's con-

sideration that Ms. Davis was represented pro bono was limited to "account[ing] for the amount of fees she had paid or was obligated to pay being substantially lower than what Petito would pay." 197 Md. App. at 533, 14 A.3d at 718. The intermediate appellate court rejected Ms. Davis's challenge that the Circuit Court Judge did not consider the relative needs of the parties, because the Circuit Court Judge considered the parties' monthly incomes and amounts of attorneys' fees incurred and determined that Mr. Petito's justification in defending himself in the proceeding was more substantial than Ms. Davis's justification in bringing it, and therefore justified his incurrence of more attorneys' fees than Ms. Davis as well as the court's decision that she share in the payment of the fees. *Id.* at 533, 14 A.3d at 719.

**Discussion**

The award of attorneys' fees and costs in child support proceedings is controlled by Section 12-103 of the Family Law Article, which provides:

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

Section 12-103 is an exception to the "American rule," the general rule in Maryland that requires litigants to be responsible for their own legal fees, *Thomas v. Gladstone*, 386 Md. 693, 699, 874 A.2d 434, 437 (2005) ("Under the common law 'American Rule' applied in Maryland, the prevailing party in a lawsuit may not recover the attorneys' fees as an element of damages or costs unless . . . there is a statute that allows the imposition of such"). Before making an award of attorneys' fees, Section 12-103 requires the trial court to consider the parties' financial status, needs and whether there was a substantial justification for bringing, maintaining or defending a proceeding. *Petrini v. Petrini*, 336 Md. 453, 468, 648 A.2d 1016, 1022 (1994). The present disagreement centers on the impact of one party having pro bono representation rather than privately-retained counsel.

Ms. Davis contends that the judge erred by considering the fact that SALI's legal services were of no cost to her as enhancing her ability to contribute to Mr. Petito's attorneys' fees. Ms. Davis argues that Mr. Petito's attorneys' fees award contradicts our decision in *Henriquez*, in which we recognized that legal representation on a pro bono basis should be considered indicative of meager financial status and needs that prevent an individual from affording an attorney. She asserts that ordering her to pay the attorneys' fees of a party who was capable of affording private counsel frustrates the purpose of pro bono legal service, which is to "facilitate access to the judicial system by alleviating the financial burden of paying for an attorney." Finally, Ms. Davis contends that the trial court erroneously failed to consider her needs, particularly relating to caring for Sophia, and limited finances in ordering the attorneys' fees award to Mr. Petito.

Mr. Petito, in support of the Court of Special Appeals's opinion and the trial court's order, argues that *Henriquez* does not apply to this case and that the trial court's consideration of SALI's pro bono services was to point out the disproportionate financial statuses of the parties. Specifically, Mr. Petito argues that the trial court correctly concluded that he had "exhausted his savings and credit, and was forced to take loans from family members in order to pay his legal expenses" whereas Ms. Davis "continues to have legal services provided free of charge." Finally, he maintains that a reversal in favor of Ms. Davis would introduce a new rule of law that "would allow individuals to use *pro bono* services as a shield to protect against awards of attorneys' fees. . . ."

In considering an award under Section 12-103, the "absence of substantial justification of a party for prosecuting or defending the proceeding," would, without good cause, result in an award of attorneys' fees

and costs to the other party, so long as those fees and costs are reasonable.[7] Under Section 12-103(b), however, substantial justification is but one consideration in the triad, the others being financial status and needs, to support fee shifting.

The award of attorneys' fees in this case lumped the perceived values of the respective attorneys' fees together and then applied a formula to assess Mr. Petito's fees. The judge conflated Mr. Petito's substantial justification for defending the custody proceeding with Ms. Davis's use of pro bono legal services in bringing the claim, reasoning that "Mr. Petito risked losing his parental relationship with Sophia," and "[b]y contrast, Ms. Davis was represented pro bono by SALI, and should bear shared responsibility for the legal fees according to her income. . . ." Substantial justification for each party's position, however, is measured by the issues presented and the merits of the case, not the amount of attorneys' fees charged.

In 1993, the Legislature repealed and reenacted Section 12-103 in order to introduce the mandatory award of attorneys' fees and costs under subsection (c). 1993 Session Laws, Chapter 514. Testimony provided in the file for House Bill 381, which contained the current language of subsection (c), reflects that its purpose was to address the inability of custodial parents to finance judicial enforcement of court-ordered child support. *See* Memorandum of Delegate Ellen R. Sauerbrey, Additional Testimony on HB 381, Alimony and Child Support — Mandatory Award of Expenses (Feb. 16, 1993), quoting Testimony of Jill Coleman ("But without child support coming in, who has the money to pay a lawyer to collect child support? This means that non-payment of child support is actually a powerful way of evading the obligation to pay child support.").

In support of House Bill 381, Judge Rosalyn B. Bell of the Court of Special Appeals, as a member of the Governor's Task Force on Family Law, provided written testimony that custodial parents, who were entitled to receive court-ordered child support payments, often did not because the non-custodial parent refused to pay, knowing that the custodial parent could not afford to hire an attorney and enforce the order. While judges already had discretion to award attorneys' fees, many did not choose to exact this toll:

> The Task Force often heard the same complaint from divorced persons, including single heads of households, that court-awarded alimony and child support cannot be collected because the proceedings necessary to enforce such awards are simply too expensive. In many instances, the responsible party is aware of the expenses involved in enforcement and ignores the court's directive to pay alimony or child support.
>
> At the present time, the law allows the court to award such expenses, but the reality is that this is rarely done, because enforcement never appears to be a "problem." By requiring the court to award costs and counsel fees, the Bill facilitates collection of alimony and child support. This helps a large segment of our children, and their custodians. This Bill also assists those persons who, after years of being out of the workplace, are unable to earn sufficient salaries to provide for themselves, let along enforce an alimony award to which they are entitled.

Letter from the Honorable Rosalyn B. Bell, to Delegate Joseph F. Vallario, Jr., Chairman of the House Judiciary Committee (Feb. 8, 1993).

Cases interpreting Section 12-103(b) generally also relate substantial justification to the merits of the case. In *Lieberman v. Lieberman*, 81 Md. App. 575, 600, 568 A.2d 1157, 1169 (1990), Judge Rosalyn B. Bell, in reviewing the award of attorneys' fees to Ms. Lieberman, considered whether Ms. Lieberman had substantial justification to bring the action and concluded that "the trial judge did find for Ms. Lieberman which carries with it an implicit finding of very substantial justification." *Id.* at 600, 568 A.2d at 1169.

Prevailing on the merits is a sufficient, but not a necessary, element of substantial justification in bringing, maintaining or defending a proceeding. Substantial justification under Section 12-103(b) may require a consideration of the merits of each party's position, including the non-prevailing party. In *Broseus v. Broseus*, 82 Md. App. 183, 570 A.2d 874 (1990), yet another custody battle between spouses, the trial court granted child custody to Dr. Broseus. Dr. Broseus and Ms. Broseus incurred attorneys' fees in the amount of $71,823 and $48,905.17, respectively, and the trial court, observing that the language of Section 12-103 permitted an award of attorneys' fees to either party, awarded Ms. Broseus $5,000 in attorneys' fees. Dr. Broseus appealed and the Court of Special Appeals affirmed, reasoning that "[j]ust because appellant [Dr. Broseus] prevailed on the custody issue does not preclude an award to appellee [Ms. Broseus], so long as there was substantial justification for bringing or defending the proceeding under . . . § 12-103." *Id.* at 200, 570 A.2d at 882.

Essentially, substantial justification, under both subsections (b) and (c) of Section 12-103, relates

solely to the merits of the case against which the judge must assess whether each party's position was reasonable.[8] A judge, after finding substantial justification, then must proceed to review the reasonableness of the attorneys' fees, and the financial status and needs of each party before ordering an award under Section 12-103(b).

In this case, the value of Mr. Petito's attorneys' fees also controlled the judge's perception of the financial status and needs of both parties. In factoring the needs of Mr. Petito, the Circuit Court Judge considered both the amount paid to his private counsel, $76,052, as well as the debt he incurred to pay for those fees, including loans from his family. In so doing, the judge considered the attorneys' fees for Mr. Petito twice. Ms. Davis's SALI representation was valued at zero and Ms. Davis's needs, such as her lack of savings or disposable income, however, were not considered in the award of attorneys' fees. The judge divided the amounts paid by the parties to their respective private counsel according to their relative income. No comparison, beyond their incomes, apparently was undertaken by the judge to determine the financial status and needs of each of these parties.

What we derive from the statute is that financial status and needs of each of the parties must be balanced in order to determine ability to pay the award to the other; a comparison of incomes is not enough.[9] *Henriquez*, 413 Md. at 301, 992 A.2d at 455 (upholding the Circuit Court's award of attorneys' fees to Mrs. Henriquez because the court "engaged in balancing under Section 12-103, finding that Mrs. Henriquez was 'wholly dependent' and 'virtually penniless,' warranting an award of attorneys' fees, given Mr. Henriquez's financial ability"); *Jackson v. Jackson*, 272 Md. 107, 112, 321 A.2d 162, 165-66 (1974) (concluding that the financial status of Mr. Jackson, who was ordered to pay an award of attorneys' fees to his ex-wife, "certainly permitted the award"); *Lemley v. Lemley*, 109 Md. App. 620, 633-34, 675 A.2d 596, 602 (1996) (vacating an award of attorneys' fees where the non-prevailing party represented himself pro se and earned half of the income earned by the prevailing party, concluding that "[it] is unreasonable to require Mr. Lemley to pay for the benefit of professional counsel for the opposing party, while being unable to afford that benefit for himself"); *Sczudlo v. Berry*, 129 Md. App. 529, 552-53, 743 A.2d 268, 280-81 (1999) (remanding to the trial court for further consideration because a disparity in the parties' income, without more, was insufficient to support an attorneys' fees award under Section 12-103(b)). The tern "needs" could include that which has not been paid to attorneys, pursuant to retainer agreements. *Lieberman*, 81 Md. App. at 600, 568 A.2d at 1170 (observing that a party's needs could be impacted by fees to an attorney that remain outstanding).

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

We remand this case to the Circuit Court for a reconsideration of the attorneys' fees award under Section 12-103. If the Circuit Court determines that Ms. Davis lacked substantial justification for bringing her child custody modification claim and absent a finding of good cause to the contrary, then under Section 12-103(c), the reasonableness of Mr. Petito's attorneys' fees would then be the only consideration. If the Circuit Court finds under Section 12-103(b), however, that Ms. Davis and Mr. Petito each had substantial justification for bringing or defending their respective positions in the proceeding, then the Circuit Court must value the legal services afforded to both parties, according to *Henriquez*, and determine their reasonableness, after which the Circuit Court must proceed to assess Ms. Davis's and Mr. Petito's financial status and needs.

**JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AND REMAND THE CASE TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BY THE PARTIES.**

**FOOTNOTES**

1. Pro bono is a shortened version of the latin term "pro bono publico," which means "[for] the public good." Black's Law Dictionary 1323 (9th ed. 2009). In Maryland, the provision of pro bono legal services, without fee or at a substantially reduced fee, is considered a professional responsibility of a lawyer. *See* Maryland Rule of Professional Conduct 6.1(a), cmt. 1.

2. Section 12-103 of the Family Law Article provides:

> (a) *In general.* — The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:

(1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or

(2) files any form of proceeding:

(i) to recover arrearages of child support;

(ii) to enforce a decree of child support; or

(iii) to enforce a decree of custody or visitation.

(b) *Required considerations.* — Before a court may award costs and counsel fees under this section, the court shall consider:

(1) the financial status of each party;

(2) the needs of each party; and

(3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

(c) *Absence of substantial justification.* — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

Statutory references to Section 12-103 of the Family Law Article ("Section 12-103") throughout are to the Maryland Code (1984, 2006 Repl. Vol.).

3. SALI, a program of the Maryland Coalition Against Sexual Assault (MCASA), "provides direct legal services for victims and survivors of sexual assault." Legal Services — SALI, MCASA, http://www.mcasa.org/law-public-policy/legal-services-sali/ (last visited Feb. 23, 2012).

4. In *Henriquez v. Henriquez*, 413 Md. 287, 992 A.2d 446, we affirmed the award of attorneys' fees on behalf of the prevailing party who was represented by a non-profit legal organization, concluding that pro bono legal services carry a quantitative value that must be considered in determining the amount of an attorneys' fees award under Section 12-103. *See also Weichert Co. of Maryland, Inc. v. Faust*, 419 Md. 306, 329 n.7, 19 A.3d 393, 407 n.7 (2012) (applying the rationale in *Henriquez*, that "the party still 'incurred' fees, despite her not being charged," to affirm the award of attorneys' fees to an employee pursuant to a fee-shifting clause in her employment contract, even though her legal representation was financed by a third party).

5. In the Memorandum Opinion, the trial judge explained her calculation as follows:

Mr. Petito requested $34,983 in attorneys' fees from Ms. Davis. This request was based on total fees, including expert witness fees, of $76,052. Multiplying Ms. Davis's income percentge of 46%, as stated in the child support guidelines, to the $76,052 yields $34,983 ($76,052 *.46). However, Ms. Davis incurred $9,153 in fees to Lenora Mihavetz, Esq., who was her attorney prior to retaining the Sexual Assault Legal Institute. We find it equitable to offset the $9,153 already paid by Ms. Davis from the balance due to Mr. Brennan, which leaves $66,899 to be divided among the parties ($76,052-$9,153). Applying Ms. Davis' income percentage to that total yields $30,773.54 ($76,052 * .46).

Ms. Davis's "income percentage" was calculated by adding together the parties' monthly incomes, $3,814 earned by Ms. Davis and $4,500 earned by Mr. Petito, which totaled $8,314, and Identifying the percentage of that joint income earned by Ms. Davis, 46 percent.

6. Ms. Davis presented the following three questions to the Court of Special Appeals, only one of which pertains to the issue before us:

1. To disqualify an opponent's expert witness for a conflict of interest, the party seeking disqualification must show that it had a confidential relationship with the expert and that it disclosed confidential information to the expert. The Father showed only that he and his attorney had a single conversation with the Mother's proposed expert where he discussed the facts of the case and inquired about the expert's availability. Did the trial court err in disqualifying the Mother's expert?

2. Maryland Rule 5-803(b)(4) provides a hearsay exception for statements made for the purposes of medical diagnosis and treatment. This Court has held that statements made by children under the age of five qualify for this exception. Did the trial court err in holding that Rule 5-803(b)(4) did not apply to statements made by the Child to her therapist based primarily on the fact that the Child was five at the time the statements were made?

3. In determining an award of costs and attorney's fees in a custody case, Family Law Article § 12-103(b) requires the courts to consider (1) the financial status of each party; (2) the needs of each party; and (3) whether there was a substantial justification for bringing or defending the proceeding.

a. The Mother's needs include maintaining the Child's primary residence, for which she is obligated to make mortgage payments. The Father lives rent-free and incurs only ordinary living expenses. Did the trial court err in not considering these relative needs when ordering the Mother to pay $30,773.54 of the Father's legal fees?

b. Did the trial court err in considering the case's outcome, instead of the Mother's justification for bringing the case, in ordering the Mother to pay $30,773.54 of the Father's legal fees?

*c. Did the trial court err in considering the fact that the Mother was represented by a legal services organization in ordering her to pay*

*$30,773.54 of the Father's legal fees?*

(italics added).

7. In a fee-shifting context, reasonableness of attorneys' fees is always a consideration, "taking into account such factors as labor, skill, time, and benefit afforded to the client. . . . " *Petrini v. PetrIni*, 336 Md. 453, 467, 648 A.2d 1016, 1022 (1994); *see also Monmouth Meadows Homeowners Ass'n v. Hamilton*, 416 Md. 325, 333, 7 A.3d 1, 5 (2010) ("[T]rial courts must routinely undertake an inquiry into the reasonableness of any proposed fee before settling on an award "), *Myers v Kayhoe*, 391 Md. 188, 892 A.2d 520 (2006).

8. This definition of "substantial justification" is derived from federal jurisprudence addressing the same standard in fee-shifting cases. Under the Equal Access to Justice Act, Section 2412(d)(1)(A), Title 28 of the United States Code (2006), "a prevailing party other than the United States" shall be awarded fees and other expenses "incurred by that party in any civil action . . . brought by or against the United States . . ., unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust." (italics added). To be substantially justified, the Supreme Court of the United States interpreted, the United States must be '"justified in substance or in the main' — that is, justified to a degree that could satisfy a reasonable person," or, in other words, have "the 'reasonable basis both in law and fact."' *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550, 101 L. Ed. 2d 490, 504-05 (1988).

9. Other statutory schemes embodying the term "financial status" provide some guidance as to what more may have been contemplated other than mere income. For example, the financial status of an applicant under the Maryland Economic Adjustment Fund, which is used in part to "make loans to new or existing companies in communities that suffer dislocation due to defense adjustments," Maryland Code (2008), Section 5-203(e)(1)(i) of the Economic Development Article, is determined by a current balance sheet, a profit and loss statement, and credit references. Section 5-205(b)(8) of the Economic Development Article, Maryland Code (2008). A candidate for public office seeking a waiver of the mandated filing fee under Section 5-401(c) of the Election Article, Maryland Code (2002, 2010 Repl. Vol.) may demonstrate an inability to pay the fee by submitting his or her net disposable income and liquidity of assets.

NO TEXT

Cite as 4 MFLM Supp. 11 (2012)

**Adoption/Guardianship: termination of parental rights: sufficiency of evidence**

# In Re: Adoption/Guardianship Of Na'imah S.

*No. 883, September Term, 2012*

*Argued Before: Krauser, C.J., Meredith, Sharer, J. Frederick (Retired, Specially Assigned), JJ.*

*Opinion by Meredith, J.*

*Filed: January 11, 2012. Unreported.*

**Termination of parental rights was upheld based on the juvenile court's exhaustive, fact-intensive opinion which found, among other things, that the mother minimized the abuse she inflicted upon her daughter and refused to sign a service agreement; and that the child had bonded with her foster mother, who nurtured a relationship with her half-sister. The juvenile court properly analyzed its findings in light of the mother's interest in continuing the parent-child relationship as well as the child's best interests, and FL § 5-323.**

Aaliyah S., appellant, appeals the judgment of the Circuit Court for Montgomery County, sitting as the juvenile court, that terminated her parental rights in her daughter, Na'imah S.

### QUESTION PRESENTED

Appellant presents a single question for our review:

1. Did the juvenile court err in terminating the parental rights of [appellant] in her daughter Na'imah?

We answer that question in the negative, and affirm the judgment of the Circuit Court for Montgomery County.

### FACTS AND PROCEDURAL HISTORY

Na'imah S. was born on December 30, 2005, to Aaliyah S. and Kevin C. Aaliyah S. and Kevin C. were never married and never resided together. Kevin C. began serving a ten-year prison sentence for drug possession in October 2009, when Na'imah was three years old. Prior to the events giving rise to this case, Na'imah resided with Aaliyah S. and Na'imah's two half-siblings, Zahrah and Tyreek, in an apartment in Gaithersburg. Kevin C. testified at the underlying merits trial, expressing his opinion, despite his knowledge

*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.*

of the abuse perpetrated on Na'imah and tolerated by Aaliyah S., that Aaliyah S. should retain her parental rights in Na'imah. There was no evidence presented that Kevin C. was ever very involved in Na'imah's life, nor was there any indication that Kevin C. could be involved in Na'imah's life as a custodial parent at any time in the near future. An appeal brief has not been filed on Kevin C.'s behalf in this case.

The children of Aaliyah S. first came to the attention of the Montgomery County police on November 3, 2009, when 7-year-old Zahrah called the police to report that she was home alone and scared. Police responded to the apartment, and waited with Zahrah until Aaliyah S. showed up approximately thirty minutes later. Two days later, Debra Korth, a licensed, certified clinical social worker employed by Montgomery County's Child Welfare Services agency (hereinafter "the Department"), went to Aaliyah S.'s apartment for a routine follow-up visit to check the children's welfare. While there, she was told by Zahrah that, after the police left two nights earlier, Aaliyah S. expressed her displeasure at her 7-year-old for having involved the police; Aaliyah S. grabbed Zahrah around the neck with both hands and pushed her up against a wall, "chok[ing] her out," in the words of Zahrah, to the point that the child "saw spots," "got dizzy," and became scared that her mother was going to kill her. Aaliyah S. also screamed and cursed at Zahrah after the police left, and warned her:

"Don't you ever call the police again. I will fucking kill you." Aaliyah S. also called the child a "fucking bitch."

Ms. Korth testified that she interrupted Zahrah's recitation of these events and asked to see the child's neck. Zahrah, who was wearing traditional Muslim garb, told her, "I can't. I'm not allowed to show anybody. I'm not allowed to remove my headscarf." Ms. Korth was able to persuade Zahrah that she would be safe, and Ms. Korth testified, "as soon as she took off the headscarf I clearly saw two or three finger marks" on the left side of Zahrah's neck. Ms. Korth knew that she would be leaving the apartment with Zahrah and Na'imah that evening, and asked Aaliyah S. to provide her with a list of relatives who might be able to take

the girls in. According to Ms. Korth, Aaliyah S. "adamantly refused," and went on to say, "No, I'm not calling any relatives. You're not calling any of my relatives. Take them if you need to take them." Ms. Korth, having assessed the situation as one presenting an imminent risk of harm to the children, did just that. The children have not been in Aaliyah S.'s care since that night.

Ultimately, Zahrah and Na'imah were both declared to be children in need of assistance ("CINA"). Zahrah was eventually turned over to the care of her biological father, Christopher McCallum. This appeal follows the judgment entered in Na'imah's case.

After being removed from Aaliyah S.'s care, Na'imah was briefly placed in foster care with a Muslim family. But the foster mother's working hours changed, requiring her to be gone overnight, leaving Na'imah (and Zahrah, who was initially placed with her) alone with the foster mother's husband and son. Both Na'imah and Zahrah expressed to Ms. Korth "their concern and feelings of being unsafe around boys and men in general." As a result, Ms. Korth placed the girls in the licensed foster care home of Joann H. Na'imah has been with Ms. H. since mid-November 2009, has bonded with her, and wants to be adopted by Ms. H. Ms. H. shares positive feelings toward Na'imah, and also testified at the termination of parental rights ("TPR") trial; her testimony will be discussed *infra*.

Following the removal of Zahrah and Na'imah, Aaliyah S. was arrested by Montgomery County police for her abuse of Zahrah on November 3, 2009. Aaliyah S. was incarcerated pre-trial from November 18, 2009 until March 6, 2010, and on April 27, 2010, Aaliyah S. pled guilty to second-degree child abuse. She was required to wear an ankle monitor until her sentencing on July 13, 2010. On that date, Aaliyah S. was sentenced to five years' supervised probation. Pursuant to the terms of the plea agreement, the State agreed to ask for no further jail time, upon satisfactory proof that Aaliyah S. had completed parenting and anger management classes. Such proof was furnished at sentencing. The sentencing court also continued the no-contact order that was already in place as a result of the CINA proceedings, with the proviso that the no-contact provision was subject to modification should the Department recommend it.

On January 20, 2010, Na'imah was adjudicated to be a child in need of assistance (CINA) by the Circuit Court for Montgomery County, sitting as the juvenile court. She remained in the care of Joann H., while guardianship was vested in the Department.

On November 1, 2010, the Department filed its petition to terminate the parental rights of Aaliyah S. and Kevin C. The Department requested that it be granted guardianship with the right to consent to adoption.

On November 16, 2010, Aaliyah S. filed her notice of objection, and counsel was appointed for her. On November 22, 2010, Kevin C. filed his notice of objection, and counsel was appointed for him. A scheduling order was issued, setting the merits trial in this matter for two days beginning March 21, 2012, and ordering mediation. On January 24, 2012, Aaliyah S. filed a motion to stay the TPR proceedings, pending the outcome of an appeal to this Court of the juvenile court's September 30, 2010, order in the CINA case changing Na'imah's permanency plan from reunification to termination of parental rights and adoption by a non-relative. The Department opposed the motion to stay, and on February 4, 2012, the circuit court denied it. However, on March 7, 2012, pursuant to what appears to have been Aaliyah S.'s motion for injunction pending appeal, this Court stayed the March TPR trial.

On April 4, 2012, this Court, in an unreported opinion, affirmed the change in permanency plan. *In re: Na'imah S.*, No. 2053, Sept. Term 2010. The TPR merits trial took place on June 8 , 9, and 10, 2012. On June 23, 2012, the circuit court issued a 32-page "Findings of Fact and Conclusions of Law," along with an order terminating the parental rights of Aaliyah S. and Kevin C. This appeal followed.

**STANDARD OF REVIEW**

In *In re: Cross H.*, 200 Md. App. 142 (2012), this Court outlined the standard of review applicable to appeals of judgments terminating parental rights:

> When the State seeks to terminate parental rights without the consent of the parent(s), the standard is whether the termination of rights would be in the best interests of the child. Md. Code (1984, 2006 repl. vol.), Family Law article ("FL") § 5-323. *See Washington County Dep't. of Social Services v. Clark*, 296 Md. 190, 198 (1983). To determine what is in the child's best interest, the court must consider the factors enumerated in FL § 5-323(d), which provides:
>
> > (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 departmentand 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 has been 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 subitem 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:
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> 1. community;
> 2. home;
> 3. placement; and
> 4. school;
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> (iii) the child's feelings about severance of the parent-child relationship; and
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> (iv) the likely impact of terminating parental rights on the child's well-being.

The Court of Appeals explained the juvenile court's role as follows in *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007):

> The court's role in TPR cases is to give the most careful consideration to the relevant statutory factors, to make specific findings based on the evidence with respect to each of them, and, mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make a continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. If the court does that — articulates its conclusion as to the best interest of the child in that manner — the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.
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> The standard of review on appeal is more limited. In reviewing a circuit court's decision to terminate parental rights, we must "ascertain whether the [court] considered the statutory criteria, whether its factual determinations were clearly erroneous, whether the court properly applied the law, and whether it abused its discretion in making its determination." *In re Adoption/Guardianship/CAD No. 94339058*, 120 Md. App. 88, 101 (1998). We explained in *In re Abiagail C.*, 138 Md. App. 570 (2001):
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> > On review, our function . . . is not to determine whether, on the evidence, we might have reached a different conclusion. Rather, it is to decide only whether there was sufficient evidence — by a clear and convincing standard — to support the chancellor's determination that it would be in the best interest of [the child] to terminate the parental rights of the natural [parent]. In making this decision, we must assume the truth of all the evidence, and of all of the favorable inferences fairly deducible therefrom, tending to support the factual conclusion of the trial court.
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> *Id.* at 587 (citing *In re Adoption No. 09598*, 77 Md. App. 511(1989)). *Id.* at 153-56.

The Court of Appeals observed in *In re Yve S.*, 373 Md. 551 (2003), that appellate scrutiny of such TPR cases requires the reviewing court to "simultaneously apply three different levels of review": (1) as to the juvenile court's factual findings, the appellate court looks for clear error; (2) if the juvenile court committed error as to a matter of law, a remand for further proceedings will be the ordinary result unless harmless error is present; and (3) "[f]inally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.* at 586.

We also note that, in *In re: Shirley B., Jordan B., Davon B., and Cedric B.*, 419 Md. 1 (2012), the Court of Appeals held that, in TPR appeals attacking the "reasonable efforts" of the local Department toward reunification, the "reasonable efforts" requirement is examined on a case-by-case basis, "and must be considered in light of the services at the Department's disposal." *Id.* at 7.

The Court of Appeals, *In re Shirley B.*, also recognized that, in cases

> with a proven history of abuse or neglect, "the proper issue before the hearing judge [is] whether there was sufficient evidence that further abuse or neglect [is] unlikely." *In re Yve S.*, 373 Md. [551] at 593 [2003]. See also FL § 9-101(b) ("Unless the court specifically finds that there is no likelihood of further child abuse or neglect by [the parent], the court shall deny custody or visitation rights to that party[.]") The burden of proof rests

> upon the parent to show that the past neglect or abuse will not be repeated. *See Yve S.*, 373 Md. At 587 ("The burden is on the parent previously having been found to have abused or neglected his or her child to adduce evidence and persuade the court to make the requisite finding under [Section] 9-101(b).") Yet, "even upon substantial evidence of past abuse or neglect, [Section 9-101] does not require a finding that future abuse or neglect is impossible or will, in fact, never occur, but only that there is no likelihood — no probability — of its recurrence." *In re Adoption No. 12612*, 353 Md. 209, 238 (1999).

*Id.* at 22.

**DISCUSSION**

In this case, the juvenile court heard three days of testimony, and ultimately rendered a lengthy opinion that made extensive findings of fact. The court then analyzed those facts according to the relevant law, FL § 5-323, by separately breaking out each subpart of FL § 5-323 and making detailed findings of fact, based on evidence adduced at the merits trial, as to each. For example, the juvenile court's findings of fact, and analysis of law, as to § 5-323(d)(1)(ii), "the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the Child and the parent," covered two and a half pages. The court described some of the relevant procedural history, including the CINA case, and outlined what efforts had been made by the Department, and what efforts had been made, or not made, by Aaliyah S. In our view, the juvenile court's opinion is, in all respects, in keeping with the description of that court's role set forth by the Court of Appeals in *Rashawn, supra*, where the Court stated:

> The court's role in TPR cases is **to give the most careful consideration to the relevant statutory factors, to make specific findings based on the evidence with respect to each of them**, and, mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make a continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. If the court does that —articulates its conclusion as to the best interest of the child in that manner—the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.

*Rashawn*, 402 Md. at 501 (emphasis added). The juvenile court in this case rendered such an opinion.

Aaliyah S. nevertheless attacks selected portions of the juvenile court's opinion. Specifically, Aaliyah S. contends the following:

> 1. "The juvenile court erred in its application of . . . § 5-323 in determining that it was in Na'imah's best interests to terminate her mother's parental rights where such an action would irreparably server [*sic*] her relationship, not only with her mother who had been her sole care giver until November of 2009, but also with her extended family with whom she had continuous contact over the course of her life; and who were ready, willing, and able to care for her. Moreover, the act of terminating Na'imah's mother's parental rights severed Na'imah's cultural and religious ties to the Muslim/Islamic community that her mother was part of and she was raised in."
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> 2. "The juvenile court's application of the statutory factors to the facts in the instant case constituted an abuse of discretion given that the mother was unable to receive services during the majority of the time that Na'imah was in foster care. Specifically, subsections (1)(i)[,] (ii), and (iii) were lacking because the Department was unable to create service agreements that would assist the mother in reunifying until immediately prior to the hearing . . . the mother, through no fault of her own, was not provided with a therapist to help her understand how her actions harmed her daughters until the months immediately prior to the hearing."
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> 3. "Further, Ms. S was not able to see Na'imah between the fall of 2009 and the termination hearing, rendering it impossible to [*sic*] the court to evaluate whether services could repair their relationship. The court's error in failing

to allow those services to be provided to Ms. S prior to termination was great because Ms. S was clearly willing to make an 'effort to adjust [her] circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to [her] home."

4. "The record shows that Ms. S participated in every service that the Department offered to her. And even though she did not seem to appreciate the impact of her actions on Na'imah when the case was initiated, it is clear that she was willing to learn from her mistakes and conform her conduct to regain a relationship with her daughter. As a result, this was not a situation where continuing services would be futile."

5. "Most importantly, the court failed in its consideration of subsection (4) and its mandate to consider '(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."

6. "In determining Na'imah's best interests the juvenile court failed to consider the impact of severing not only Na'imah's relationship with her mother on her, but also the impact of severing Na'imah's relationship with her biological family that her mother links her to. By severing Ms. S.'s parental rights, Na'imah is forever excluded from a close and loving family including her aunt and uncle who made great efforts to care for her, maintaining her relationship with her grandmother and maternal aunt who she has known since birth, and most importantly her relationship with her sister Zarrah [*sic*], who is still living with a parental family member and has routine access to her mother's family."

We will address each of Aaliyah S.'s contentions in turn, but will first discuss, in greater detail, the testimony that was given at the three-day merits hearing.

**I. The Trial**

**A. Witnesses for the Department**

**1. Testimony of Larissa Halstead**

Larissa Halstead, the supervisor of the child sex abuse and fatalities investigation unit for the Department, testified that Aaliyah S. and her family first came to her attention on November 24, 2008, when it was reported that Tyreek, Aaliyah S.'s 12-year-old son, had sexually assaulted his sister Zahrah, then 6 years old. Ms. Halstead interviewed Aaliyah S. about this allegation. Aaliyah S. confirmed that she believed Tyreek was sexually abusing Zahrah, and, as a consequence, Aaliyah S. had sent Tyreek to live with her aunt, Charlene Pace, six weeks before the interview. During a subsequent interview, Tyreek admitted sexually abusing his sister, and was arrested. The Department did not remove Zahrah from Aaliyah S.'s custody at that time because, in their view, "she made an adequate safety plan" by sending Tyreek to live elsewhere, and she additionally agreed with the Department that Tyreek would stay out of her home. Ms. Halstead confirmed this arrangement with Charlene Pace, and the case was closed in January 2009, as "indicated" sexual abuse, with the perpetrator "not named" because he was a juvenile.

Ms. Halstead next interacted with Aaliyah S. on April 30, 2009, when the Department received a report of sexual abuse of Na'imah by Tyreek. It was eventually determined that the alleged abuse of Na'imah actually predated the abuse of Zahrah, and after Ms. Halstead confirmed that Tyreek was still living outside the home, she closed the April 2009 case as "indicated, not named" sexual abuse, as above. Ms. Halstead also testified that Aaliyah S.'s method of disciplining Tyreek for raping his 6-year-old sister was to put Tyreek out on the balcony of the family's apartment for the night. Ms. Halstead testified that, during the course of the November 2008 and April 2009 investigations, she found Aaliyah S. to be "fairly resistant to engaging with us [the Department] and engaging with ongoing services."

**2. Testimony of Debra Korth**

As noted above, Debra Korth was the Department staff person who initially performed the November 5, 2009, welfare check that ultimately resulted in the removal of Zahrah and Na'imah from Aaliyah S.'s custody. Ms. Korth was qualified as an expert in the area of risk assessment, and opined that Na'imah would have been at "great risk of harm" had she been left in Aaliyah S.'s custody.

Prior to traveling to Aaliyah S.'s apartment for the welfare check, Ms. Korth learned of Aaliyah S.'s "extensive history" with the Department, including the 2008 and 2009 cases against Tyreek for the sexual abuse of his sisters; a 2006 investigation, resulting in indicated neglect, against Aaliyah S. for leaving Tyreek, then approximately 10 years old, at home alone to supervise Zahrah, then 4, and Na'imah, who was then 6 months old; and a 1998 investigation for leaving Tyreek, then 2 years old, home alone.

In addition to the testimony regarding the November 5, 2009, welfare check noted above, Ms. Korth testified that she observed a rollaway cot in the apartment, and asked who it belonged to. Aaliyah S. did not answer. Both Zahrah and Na'imah told Ms. Korth later that it belonged to Tyreek; and that he slept on it, in their bedroom, when he would stay over at their apartment. The girls told Ms. Korth that they also had unsupervised contact with Tyreek at the home of the aunt with whom he was staying. Ms. Korth asked Aaliyah S. about this, but, apart from denying that the girls had any unsupervised contact with Tyreek, Aaliyah S. "didn't respond to anything I asked her."

At the time Zahrah and Na'imah were removed, Aaliyah S. had not yet been arrested. She was permitted visitation with the girls under the supervision of the Department. Ms. Korth testified that there were three such visits before Aaliyah S.'s arrest, and that they caused her "several concerns":

> [Aaliyah S.], at one point, pulled both of them onto her lap and was whispering to them, and I heard her. It was a small, supervised room, and I was sitting, maybe, five or seven feet from her at the most.
>
> And what she was whispering was, "We don't follow these people's rules. You don't follow these people's rules. We're under a different law, and nobody's in trouble. I'm not in trouble. This isn't going to stick."

Upon hearing those remarks, Ms. Korth had the girls wait with a colleague while she again explained the rules to Aaliyah S., but Aaliyah S.'s behavior "deteriorated." She laughed at Ms. Korth and told her: "I don't need to listen to you." As a consequence Ms. Korth ended the first visit about twenty minutes early. The second and third visits also ended early because of Aaliyah S.'s defiance and lack of cooperation. After Aaliyah S. was arrested on November 18, 2009, there was a no-contact order, and no further visits thereafter.

Ms. Korth also testified about her investigation of the choking incident:

> A [MS. KORTH] . . . I interviewed Tyreek and he disclosed severe physical abuse at the hands of Aaliyah, and offered that as the reason he had sexually abused his siblings.
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> Q [COUNSEL FOR DEPARTMENT] What did he tell you about the physical abuse he received at the hands of Aaliyah S.?
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> A He was, quote, "Choked [ ]way more than Zahrah ever got it." He was the main target of her anger. On one occasion when his mother discovered that he had sex, had raped Zahrah, she whipped him with a wet belt, choked him, hit him, punched him, and then set him out on the porch, on their balcony that they lived at when I investigated, so, at least the second floor, possibly the third floor, at that point, on the balcony, and closed the door and left him to be cold and sleep out there as punishment.
>
> Q All right. And so, you didn't have the date and time necessarily on, on any indication of physical abuse against Tyreek, but you still made an indicated finding of the physical abuse?
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> A Yes.
>
> Q And you also made a finding of physical abuse as to . . . Na'imah? . . . [W]hat indications do you have that there has been physical findings, physical abuse against Na'imah?
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> A Na'imah indicated that she was slapped in the mouth until her lip bled and her nose hurt, by the mom, at a grocery shopping trip, while she was sitting in the cart facing [Aaliyah S.], just a week prior to the removal.
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> Q Were there any physical findings that you could see on Na'imah?
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> A She had a swollen lip, and she said that it hurt a lot, and that she bled, and Zahrah corroborated that it bled.
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> Q And in addition to the incidents you've discussed, did you, were you able to ascertain there had been a long history of physical abuse by Aaliyah S. to the children?
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> A Yes.
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> Q And do you have any idea as to how long . . . they sustain[ed] that kind of interaction with their mother?
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> A Their entire lives.

Ms. Korth further supported her assessment of the girls as having been in imminent risk of harm while

in Aaliyah S.'s care by pointing out that they had seen Tyreek, who had sexually abused them both, as recently as October 31, 2009. She indicated Aaliyah S. expressed at the outset of the investigation that she "wasn't going to cooperate with anything. We had no authority."

**3. Testimony of Mohogany Pillay**

Mohogany Pillay is a 21-year employee of the Department, and she testified as an expert in social work at the merits trial. Ms. Pillay first got involved with this case in May 2010, following the departure of the original social worker assigned to the S. family. Ms. Pillay testified that she first met Aaliyah S. on May 21, 2010. At that time, Aaliyah S. had been released from jail and had pled guilty to second-degree child abuse, but had not yet been sentenced. One of the reasons Ms. Pillay met with Aaliyah S. was to try to ascertain her progress with the service agreement Aaliyah S. had entered into with Ms. Pillay's predecessor at the Department, Denise McCullen. At the time that service agreement was operative, and at all times until the permanency review hearing on September 30, 2010, the permanency plan in place called for reunification.

Ms. Pillay testified that Aaliyah S. was presented with the service agreement on March 8, 2010, two days after her release from incarceration. It does not appear that Aaliyah S. ever signed it. The service agreement recognized that Aaliyah S. had a pending criminal case, and required her to get a psychological evaluation after the case resolved. Aaliyah S. eventually did obtain such an evaluation, on August 10, 2010. Another requirement of the service agreement was that Aaliyah S. "will demonstrate and verbalize an understanding of the safety concerns and risks to Zahrah and Na'imah being home unsupervised . . . to assist [Aaliyah] in gaining insight" into why leaving young children unsupervised is not appropriate. As to this aspect of the service agreement, Ms. Pillay testified:

> When I talked to her on the 21st of May, at that time she still did not acknowledge or accept the fact that she had left the kids unsupervised, that she had abused, or physically abused Zahrah. She believed that those were just, that it was, it was an accident, that she was a good parent, that she would never hurt her children, that she, she just didn't, didn't acknowledge and accept that she had done something wrong, that the kids had suffered at her hands and at the hands of Tyreek.
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> Although, she did say that, she did acknowledge that Tyreek had abused the girls . . . sexually, and, therefore, she had taken action to remove him from the home. From her talking to me I didn't get the feeling that she fully understood how she could keep the girls safe, what it, what it means to keep the girls safe.
>
> And at that time, she had completed the parenting class, so I did get the feeling then that she was doing things complying with the service agreement, court orders, criminal court orders, just to get them completed, but she was not benefitting from any of those programs and that her mind had not changed, her feelings had not changed, understanding had not changed.

Ms. Pillay testified that she kept in "regular contact" with Aaliyah S. during this period of time. She acknowledged that there were certain requirements of the service agreement, including participating in family therapy, that were precluded by the fact that Aaliyah S. was under a no-contact order regarding Zahrah and Na'imah. She noted that Aaliyah S. did suggest her brother, Rashid S., as a possible placement resource for the girls. Ms. Pillay met with Rashid and his wife, Laura S. Ms. Pillay visited their home and determined that it was a "very appropriate" setting for the girls to visit. Visitation between the girls and Rashid S. began, and was supervised by Ms. Pillay.

Initially, the visits went "very well," but Rashid S. was eventually eliminated as a possible placement resource for a number of reasons. For one, there were concerns about Rashid's criminal background, as well as that of his stepson, Joshua. Ms. Pillay requested, but never received, documentation from them regarding the status of their previous criminal cases. The second issue arose when Na'imah had two overnight visits, on August 27 and 28, 2010. Ms. Pillay reported that those visits did not go as well:

> Na'imah was very, very upset because she had missed her foster mother, she was afraid that she wasn't going to go back to her foster mother, and begged her foster mother never to let her go and stay again, and begged her therapist never to let her go again. That she never wanted to leave her foster mother. Things like that.
>
> So, I explained all of that to [Rashid S.]. That she was having real, she was really stressed out by that overnight visit and that we should go

> slow and not have any more until she is ready. And he understood, Mr. S. understood fully.

Overnight visits with Rashid S. were attempted again in September 2010. The Department believed, based on what Na'imah reported to her therapist, that Rashid S., during the course of that visit, permitted Na'imah to talk on the phone to her mother and grandmother, in violation of the no-contact order. Ms. Pillay testified that, at the next overnight visit, in February 2012, Na'imah

> reported to her therapist that she was left alone in the van and she was terrified. She also regressed in terms of her behaviors in the foster home. Wasn't following directions, having nightmares, afraid that her foster mother was going to die. So, she was really, really stressed by that visit. And [the Department] began working with the court to change that visitation order to be supervised visits only.

Subsequent to the February 2012 overnight, Rashid S. visited with Na'imah three more times. One was a supervised visit in his home that "went well." The next visit was at the Department's "visitation house," and Ms. Pillay testified that it went "okay":

> Although, there was some level of discomfort by Na'imah. She didn't seem very comfortable. The uncle [Rashid S.] seemed preoccupied. He did have [his] baby with him, and, of course, he had to pay a lot of attention to the baby, but there didn't seem to be that close relationship between [Na'imah and Rashid] that I had observed before. The uncle was so preoccupied and wanting to leave that he had even forgotten to say goodbye to Na'imah until I brought it to Na'imah's notice that you needed to go say good bye. And then, he said, 'Okay, come and give me a hug.'
>
> That visit, to me, was kind of strange and really uncomfortable for Na'imah. She didn't seem to know what her place was, why she was there, and why was that happening at the visitation house, and so forth. She was very confused.
>
> There were no visits and no calls for visits, there were no other visits in the home.

Ms. Pillay further testified that Rashid S. came along on a visit that his mother made to see Na'imah at the visitation house, but that he left after five minutes, and there had been no further visits between Na'imah and Rashid S.

Ms. Pillay testified that, on August 10, 2010, Aaliyah S. completed her psychological evaluation by Dr. Sabine Himmelfarb. The results of that evaluation contributed to the Department's decision to recommend that Na'imah's permanency plan be changed from reunification to adoption by a non-relative; this change was agreed to the court at the September 30, 2010, permanency plan review hearing.

> As Ms. Pillay testified, Dr. Himmelfarb's report:
>
> basically said that [Aaliyah S.] was not, did not have the abilities to parent Na'imah; to provide any nurturing, loving, caring of Na'imah. Her diagnosis was a concern, given her diagnosis of narcissism and with . . . narcissistic personality disorder with obsessive compulsive . . . and histrionic traits. There was also concern that she had limitations, cognitive limitations, intellectual limitations, and this did not allow her to, she had difficulty understanding the children's needs and meeting their emotional needs.
>
> Given her personality disorder, she wasn't able to provide them with enough and the nurture that they needed. And all of that was very concerning. She did not have the ability to keep them safe.
>
> She was also in great, great denial of the issues that caused the children to be placed in foster care. And given that, it was seen as her being, she was seen as being very resistant to getting any help, and she did not believe she needed help and that the children needed help.

Another requirement imposed on Aaliyah S. by the service agreement (or series of service agreements) was that she participate in individual therapy; Dr. Himmelfarb recommended that the Department refer her to a Muslim therapist. Ms. Pillay recommended such a therapist in September 2010, but Aaliyah S. did not have insurance, and the Department lacked the funds to send her. Ms. Pillay then referred Aaliyah S. to the Family Services Agency, on September 13, 2010. Ms. Pillay testified that the Family Services Agency could accept payment on a sliding scale or waive the fee altogether based on the patient's diagnosis, but Aaliyah S. never followed up with the Department regarding this referral, nor did she return any of Ms.

Pillay's messages.

Ms. Pillay testified that Aaliyah S. has had no contact whatsoever with her after the permanency plan hearing on September 30, 2010, and that her cooperation level had been declining even before then. Aaliyah S. refused, for example, to sign any releases so that Ms. Pillay could talk to her therapist. Ms. Pillay testified that Aaliyah S. was not in compliance with her service agreements in the time frame of September 2010 through March 2012.

> Ms. Pillay expressed her expert opinion that Na'imah
>
> could definitely not be placed with [Aaliyah S.]. [Aaliyah S. has] been convicted of child abuse, is on probation for five years, supervised probation. [Aaliyah S.] has not demonstrated that she is remorseful, that she's, needs help, intensive, individual therapy. That she has abused her children, has failed to supervise the children appropriately. She does not understand their needs, emotional needs . . . And I think it would be a great harm to Na'imah if she had to be returned to her mother. And, also, given the fact that Na'imah's been out of her mother's care for the past more than 18 months, she's been with the current foster parent for 18 months, she was just 3 and a half years old, she's now 5, she's shown us over the past months that she is very, very attached and bonded to her foster parent. That she cannot even endure being separated from them for, for one night.
>
> [Na'imah has] made tremendous progress in her current placement, in all areas. She is a very outgoing, loving, intelligent child with great potential, and I think if we had to remove her from her current placement and be placed with a caregiver that's most inappropriate and has not demonstrated any change whatsoever, I think, would be very devastating for the child.

Ms. Pillay also related that, as recently as a March 21, 2012, hearing, Aaliyah S. denied having abused or neglected her children, and expressed a belief that they are all — including Tyreek — "happy, well children . . . [v]ery mentally well and are doing very well. [Aaliyah S.] does not believe that they have any problems, whatsoever. That they need any help, whatsoever."

Regarding Na'imah's wishes for her future, Ms. Pillay testified that it was her expert opinion that Na'imah would not be negatively affected by the termination of the parental rights of Aaliyah S. and Kevin C., and furthermore,

> I think Na'imah's has [*sic*] indicated over and over again, to both me, her foster parent, her therapist, that she wants to stay with her foster mother. At no time did she ask me about her mother. At no time did she indicate, indicate to me that she wanted to return to her mother's care. She does ask her grandmother about Tyreek, how he was. Has never asked her grandmother about her mother. She is, she's not indicated to us at all that there is any kind of relationship or any kind of loss as far as her mother is concerned. . . . Has never mentioned her father. I don't think she knows of his existence.

Ms. Pillay lauded the relationship Na'imah had established with her foster mother, Joann H.:

> It's a very close relationship. And that relationship formed very quick. It's very, very good emotional relationship attachment. She is completely happy in the home. Very attached to her older foster siblings. She is really traumatized when separated from her foster mother, whenever she has to visit overnight with her uncle [Rashid S.]. She does have overnight visits with her sister, Zahrah, but she knows that that's just a visit and she's going to come back. She understands that. But she's terrified of the loss, if she had to go anywhere else and not be returned to her foster mother. So, that is a very close, close bond.

Na'imah also has "very good relationships" with Joann H.'s older foster daughters, older biological daughter, and grandchildren. Na'imah is doing "very well" in pre-K, has overcome some mild delays in motor skills, and should be ready for kindergarten next year. And because Joann H. and Zahrah's biological father, Christopher McCallum, have worked in tandem to make sure the girls remain close, the grant of the TPR petition would not sever the bonds between Na'imah and Zahrah.

Ms. Pillay concluded by testifying that there are no further Department services that would result in a change in Aaliyah S.'s circumstances, given that it was Dr. Himmelfarb's assessment that Aaliyah S. needs

years of intensive therapy. In Ms. Pillay's expert opinion, it was "definitely" in Na'imah's best interest to be adopted.

#### 4. Testimony of Janeen Rao

The parties stipulated that Janeen Rao is an expert in psychotherapy. She has been Na'imah's therapist since March 27, 2010. Ms. Rao has seen her at least weekly since then, although following some overnight visitation with Rashid and Laura S. that was upsetting to Na'imah, there was a ten-week period, between September and November 2010, when the therapy visits were increased to twice weekly.

Ms. Rao testified that her primary therapy modalities with Na'imah were play therapy, art therapy, and cognitive behavioral therapy. Na'imah impressed her initially as being "advanced verbally, very smart. She did have some problems with social skills, and she was aggressive." Na'imah opened up to Ms. Rao about her former home life with Aaliyah S. She told Ms. Rao that her mother "beat" her "all the time," and "allowed [her] to be beat[en] by [Tyreek]." Disclosing the abuse made Na'imah appear "anxious and somewhat fearful . . . at least in the beginning."

In describing the sexual abuse inflicted on both girls by Tyreek, Na'imah related that:

> she witnessed her brother 'humping' her sister. . . . [S]he drew a picture of the anatomy and said that his penis was in her sister. . . . [S]he said that Tyreek was humping her sister when the sister pooped on the bed . . . . She also said that one incident Tyreek took her and Zahrah into the bathroom and put them in the tub and he peed on them. He also had, forced her [Na'imah] to give him oral sex . . . . She also said that they, when they were left alone, quite frequently, the three of them together, that he would force them to take off their clothes for extended periods of time . . . . She believed that her mother was aware. . . . She said there was an incident that happened where the mother came home and saw Zahrah and Tyreek having sex. The mother got mad, and she said, beat Zahrah.

Ms. Rao found that 4-year-old Na'imah had an unusually "wide knowledge of sex beyond her years" and "could practically go into detail about what is sex." Although they eventually cultivated a trusting, therapeutic relationship, Na'imah would be "very agitated and fearful" talking about the sexual abuse.

Ms. Rao testified that the sexual-abuse disclosures, like "all" the disclosures Na'imah has made in the course of her therapy, have been "very consistent" accounts. Other disclosures Na'imah made included an incident when Aaliyah S. stabbed the family cat and put it in an oven.

Ms. Rao and her clinical team diagnosed Na'imah with post-traumatic stress disorder ("PTSD"), and began seeing her twice a week in September 2010. Ms. Rao testified:

> [Na'imah] was starting to have a lot of flooding of memories and remembering what had happened to her, what had happened to her sister, Zahrah. She was having a lot of PTSD symptoms, as well . . . She was having a lot of nightmares, and she would wake up screaming and crying. She would have flashbacks. She would become shaken if somebody in the house was even talking a couple of syllables louder. She was just very anxious. Had intrusive thoughts. She would, the foster mother had told me that sometimes she would just, they would be eating dinner and she would just immediately start just talking about it; how Tyreek would hump her sister, and she was definitely bothered by these memories.

Ms. Rao expressed concern about the two incidents that occuned during overnight visitation with Rashid and Laura S., referenced above. Na'imah reported that, in September 2010, her uncle had put her on the phone with Aaliyah S., and she also reported that, in February 2012, her aunt and uncle had left her alone in a vehicle for a period of time, "and that caused her a lot of distress." Na'imah's PTSD symptoms increased after both these incidents, and the February 2012 incident led to Ms. Rao recommending that there be no more overnight visitation between Na'imah and Rashid and Laura S.

Ms. Rao testified that Na'imah "definitely has an attachment to Joann [H.]. They are very loving with each other, appropriately. She hugs her. When it's needed, she does discipline with her with timeouts. It's consistent, and it's a, a safe environment for her. And it's very clear that [Na'imah] also feels that way." By contrast, Ms. Rao testified that Na'imah has "no recollection of [Kevin C.] at all,"and "is afraid of her mother." Ms. Rao testified that it was her opinion that it was in Na'imah's best interest to be adopted, and she recommended the same.

#### 5. Testimony of Joann H.

Joann H., Na'imah's foster mother since mid-November 2009, was also a potential adoptive mother. She testified that Na'imah was "scared" when she first

came to live with Ms. H., but that she is now a happy, affectionate child who loves school, is doing well there, and has friends. Ms. H. and Zahrah's father, Christopher McCallum, are in regular contact, and have worked to keep Na'imah and Zahrah close as well. The girls talk on the phone twice a week for an hour and half each time, and visit with each other at least twice a month. Ms. H. has three adult biological children, eleven grandchildren, and two teenage adopted daughters. She testified that Na'imah is "very close" with her family. Na'imah calls Ms. H. "grandma" and wishes to be adopted by her.

Ms. H. testified that Na'imah used to have nightmares about Aaliyah S. hurting her. Na'imah used to ask about Aaliyah S. when she was first placed with Ms. H., but she no longer does, although she sometimes expresses that she is afraid of Aaliyah S. She has never mentioned Kevin C. Na'imah was crying and upset for a couple of days after her first overnight visit with Rashid and Laura S.; this was the visit at which it was alleged that Rashid put Na'imah on the phone with Aaliyah S. And Ms. H. testified that after the February 2012 overnight with Rashid and Laura S. — the visit at which it was alleged that Na'imah was left alone in a vehicle — Na'imah was "afraid" and upset for "about a month or two."

**6. Testimony of Dr. Sabine Himmelfarb**

At the conclusion of the proceedings on June 9, the court and all counsel discussed scheduling, and everyone was instructed to be present and ready to go at 12:30 p.m. on June 10. Dr. Himmelfarb was the only witness scheduled to testify on June 10. Aaliyah S. did not come to court on the day of Dr. Himmelfarb's testimony.

Dr. Himmelfarb has a Ph.D. from Ohio State University and has been practicing as a clinical psychologist for thirty years. She evaluated Aaliyah S. on August 10, 2010, for about six hours, which included a clinical interview and a full battery of psychological testing, including the Bender-Gestalt test, Wechsler Adult Intelligence Scale-TV, Rorschach Inkblot Technique, Thematic Apperception Test, Milton Clinical Multiaxial Inventory-III, Wide Range Achievement Test-3, Incomplete Sentences, and Kinetic Family Drawing. Dr. Himmelfarb testified that one benefit of these tests is that they are objective, and can take into account whether the test-taker is faking or malingering.

Dr. Himmelfarb was accepted as an expert in the field of clinical psychology, and her evaluation of Aaliyah S. was admitted in evidence as Exhibit 17. Dr. Himmelfarb diagnosed Aaliyah S. with a narcissistic personality disorder with obsessive-compulsive and histrionic features. This condition is on Axis 2 of the DSM-IV; when asked to explain the difference between Axis 1 and Axis 2, Dr. Himmelfarb testified:

> Axis 1 refers to immediate, the conditions that have immediate symptoms. Axis 2 refers to conditions that are long standing, have maladaptive patterns of interpersonal relaying. . . . Axis 1 refers to conditions that have symptoms such as depressive symptoms, anxiety symptoms, attention deficit disorder, those kinds of things. Axis 2 refers to more long-standing pathology or maladaptiveness in and relating to other people. Patterns of behavior that are, that are chronic and deeply rooted.

Dr. Himmelfarb testified that Axis 1 disorders generally respond better to medication and short-term therapy than do Axis 2 disorders; while medication might sometimes help with symptoms associated with an Axis 2 disorder, medication "does not change the deep underlying personality features."

Dr. Himmelfarb reviewed the child-welfare records in this case, "[b]ecause people don't often present themselves as they truly are[.]" When she was asked a hypothetical containing a description of Aaliyah S.'s therapy with the therapist she had selected (Ms. Spenadel), Dr. Himmelfarb opined that Ms. Spenadel's approach would not result in significant progress in dealing with a narcissistic personality disorder. Dr. Himmelfarb agreed that someone with narcissistic personality disorder would deny having abused their children even in the face of insurmountable evidence (such as a plea of guilty to child abuse) to the contrary. And Dr. Himmelfarb testified that someone with untreated narcissistic personality disorder is going to have difficulty keeping her children safe:

> Because . . . if children are not perfect, parents are not perfect. If a parent, if a parent is unable to accept the imperfections in themselves and acknowledge that they have imperfections, they are more likely to act out that tension on their children. Because any time the child might misbehave, that becomes a personal criticism and people with personality, with narcissistic personality disorders react to criticism with rage.

Dr. Himmelfarb further opined that a parent with narcissistic personality disorder lacks empathy and the ability to understand and sympathize with the child, and termed Aaliyah S.'s disorder as "pretty deeply entrenched. . . . [I]t's a pretty severe personality disorder."

Dr. Himmelfarb indicated that it would require at least a couple of years of "therapy directed at chang-

ing her underlying features and her personality disorder" before change might be seen. She testified that deep breathing exercises such as therapist Spenadel was using might be a "tool to calm . . . down" a person, but would "not cure a narcissistic personality disorder."

**B. Witnesses for Aaliyah S.**

**1. Testimony of Laura S.**

Laura S. testified that she married Aaliyah S.'s brother Rashid two and a half years before the trial in this matter, and she has known Na'imah since the child was eight months old. She and Rashid have six children. She works as a site coordinator for Montgomery County Public Schools. Regarding the incident in February 2012, she did not deny leaving Na'imah in the car alone, but contended it was only for a brief time, and that Rashid was within view of the vehicle. Laura S. testified that she first heard about "everything that had been going on with Na'imah and Zahrah" in May 2010, and that she contacted Ms. Pillay to offer herself and Rashid as a placement resource. She testified that they "did whatever [the Department] asked of us" in order to be able to have Na'imah live with them permanently.

Laura S. testified that she does believe Aaliyah S. abused Na'imah. She also testified that, if Na'imah were placed with her, she would follow any court orders regarding contact "to the letter," and denied ever allowing Na'imah to have contact with Aaliyah S. while the child was having overnight visitation. She testified that the family sees Tyreek "once in a while," and that she would allow contact between Na'imah and Tyreek if the court ordered it, but she did not think that was in Na'imah's best interest "right now."

**2. Testimony of Rashid S.**

Rashid S. characterized the incident where Na'imah reported being left alone in the van in the following manner: "I guess Na'imah went to her psychiatrist and said that she had got left in the car and that she was scared and something like that." He denied allowing Na'imah to talk to Aaliyah S. on the phone during the September 2010 overnight. Rashid testified that Na'imah has asked about Aaliyah S. before, but that he redirects her when she does so. He testified that the Department told them it was no longer considering him as a placement resource, but that he does not know why, and that if Na'imah were placed with him, he would abide by whatever the court ordered in terms of contact. When asked about the incident Na'imah related to Ms. Rao regarding Aaliyah S. killing and cooking a cat, Rashid replied, in part, "My sister doesn't even like cats. There's no cats." He denied knowing anything about this cat incident and asserted that Aaliyah S. had never had a cat.

Rashid S. was asked, on cross examination, about his failed motion to intervene in the CINA case, on which there was a hearing on March 21, 2012, at which time he was told that the court would consider reinstating unsupervised visits with him upon the completion of four supervised visits. More specifically, he was asked why it was that, in the eleven weeks and five days since that hearing, he had only completed two and a half supervised visits. His response was: "Because we went on vacation. We got back from vacation and we had things going on with the family where we wasn't able to get there. And we had to reschedule. And that's why."

Like his wife, Rashid S. acknowledged that he does believe that Aaliyah S. abused Na'imah and Zahrah.

**3. Testimony of Marilyn Spenadel**

Ms. Spenadel is the "clinical community counselor" that Aaliyah S. had been seeing for weekly, one-hour therapy sessions since March 8, 2012. Ms. Spenadel has a master's degree in clinical community counseling from Johns Hopkins University, and has been licensed for two years. She testified that her sessions with Aaliyah S. are focused on "stress and anger management and learning new coping skills," and that twenty minutes of each sixty-minute session are spent on deep breathing exercises. She also employs word association. She never reviewed any child welfare records in this case and did not profess to know much of the history of Na'imah's case: "I don't know what's true and what's not true." Ms. Spenadel indicated that she did not review all of Dr. Himmelfarb's report, but was of the view that "it's fine that I didn't read the whole thing" because Aaliyah S. told her "it might not be accurate." She also stated that "we have a different diagnosis, so I'm going with our diagnosis, not one that was given to us by another."

Ms. Spenadel testified that Aaliyah S. was initially "diagnosed" by the "intake person" at her practice with depressive disorder, not otherwise specified, which is an Axis 1 diagnosis under the DSM-IV. Ms. Spenadel was not sure what the intake person/diagnostician's name was. Nevertheless, Ms. Spenadel testified that, after "about the tenth session," Ms. Spenadel, in concert with an unnamed psychiatrist who saw Aaliyah "once or twice," had diagnosed Aaliyah with "adjustment disorder, unspecified." This diagnosis was not based on any testing: "No, no, no, no. It was just I guess from the [DSM-IV] with the definition of what that diagnosis is" based on Aaliyah S.'s self-reported symptoms, according to Ms. Spenadel. Ms. Spenadel's therapeutic focus was on "skills to help [Aaliyah S.] — let's see — learn her mind/body connection, what stress she has in her body and enable her to let it go, to cleanse her body of any stress that she has so she can move on and be done with any kind of stresses she has and not dwell on anything from the past." Ms.

Spenadel testified that she envisions Aaliyah S.'s therapy ending in June 2012.

Aaliyah S. pays for her sessions with Ms. Spenadel via Medicaid. Aaliyah S. did not sign any releases for Ms. Spenadel to speak with anyone from the Department.

**4. Testimony of Aaliyah S.**

Aaliyah S. recalled just one visit with Zahrah and Na'imah after they went into the Department's care, and she admitted whispering in their ears as Ms. Korth testified, but characterized the whispering as just a "game we played." She feels Zahrah and Na'imah were "snatched away" from her, although she admitted putting her hands around Zahrah's neck, which she described as "an error." She also claimed it was the first time she had ever choked any of her children, and that she stopped hitting them in 2005, the year Na'imah was born. Aaliyah S. testified that her current method of discipline was to make the children stand in a corner, arms outstretched, with books in each hand, for one minute for each year of their ages.

Aaliyah S. does not agree with Dr. Himmelfarb's diagnosis, and still thinks the choking incident with Zahrah was blown out of proportion. Aaliyah S.'s explanation of the events of November 3, 2009, was provided in the following testimony:

> [BY THE DEPARTMENT ATTORNEY]: And your testimony earlier that the entire incident that brought the children into care in 2009, the choking incident in particular, was blown out of proportion. Do you recall testifying to that earlier?
>
> [BY AALIYAH S.]: Yes.
>
> Q Do you still think it was blown out of proportion?
>
> A Yes, because I explained to you why I thought that. Because it wasn't nothing to do with Zahrah. It was something that happened during that day. And then by me acting like that towards my daughter, everything got blown out of proportion like I'm this monstrous mom and mean and evil and from hell. And it's not even like that.
>
> Q And it was your testimony that actually you weren't punishing [Zahrah] with choking her with your hands around her neck because of the fact that she had called the police because she was left home unattended, that you were doing it because you had had a difficult day at work?
>
> A I didn't even go to work that day. I had a difficult day because — I missed work to go to an interview, driving in the heat, the stop lights not working properly that day —
>
> [BY THE COURT]: The what? What was the last thing you just said?
>
> A The stop lights, the traffic lights not working properly. So — and also, trying to get to my daughter Na'imah because the child care provider kept calling my phone, like, "Where you at, where you at?" So it was a lot of stress.
>
> Q So you walked in the door from a stressful day like that and you decided to put your hands around your daughter's throat and choke her?
>
> A No, it didn't even actually happen just like that. I was — in all of this, what I was going through, what I just told you, then I got a message on my phone saying that the police is at my house. So that added on to what was going on. And I actually — I think I talked to my niece and she said she was there already. And so I told her, okay, I would be there in a few. I had to go pick up Na'imah.
>
> Q So you were mad that the police where at your house, weren't you?
>
> A No, I was mad because I'm like, "Why is she home alone?" You know, "I told you to be here," and —
>
> [BY THE COURT]: You told who to be there?
>
> A Sherita Williams [Aaliyah S.'s niece]. And why is she home alone? Why is the police at my house? What, you know, what is wrong? Is she okay? You know?
>
> Q And it's your testimony that that's the only time that you ever left her alone in the home unattended?
>
> A Yes. I never left her home alone. I take that back. Because I misunderstood your question. I never left her home alone. I was already — she [w]as in school that day . . .

[ ] Sherita Williams, which is my niece, was supposed to be there to babysit her like she always do when she can, between her and my mother and my aunt. And I had no idea she was home alone. She was at school and I was doing what I was doing, you know? I usually be at work.

Q If you were angry at Sherita Williams for not being there to babysit as you originally intended, why would you walk in the door and put your hands around your daughter's neck?

A It didn't happen like I just walked in and grabbed her and put my hands around her neck.

Q Well, tell us what happened, then? How did that happen?

A Because we was talking. I said, "Let me talk to you."

[BY THE COURT]: To who?

A To Zahrah. So we went into the kitchen and I asked her what happened, you know, why is the police here, what's going on? "Are you okay?" And she just said, "Well, I was here by myself and no one was here." And I was like, "Well, how did the police get here?" And she said she thinks her teacher — her teacher was the one, because she had talked to her teacher or something — was the one who called the police there. So — and then I started talking to her and — I was yelling, to be honest. I was yelling.

[BY THE COURT]: Why were you yelling at her if she was there alone? Why were you yelling at your daughter?

A I was yelling at her because she was acting like she couldn't hear me, and I was like — okay. So I just yelled so she could hear what I was saying.

[BY THE COURT]: What do you mean she was acting like she couldn't hear you?

A I mean, because when I was trying to get her to answer the question, she just wouldn't look, you know, like she didn't hear me, that's what I mean.

[BY THE COURT]: So you were — let me make sure I get this. You were asking Zahrah why she called the police and she wouldn't answer you?

A Yes.

[BY THE COURT]: And then when she did answer, she said, "Maybe it was my teacher that called."?

A Yes.

[BY THE COURT]: So then you're yelling at her because you think she's not listening or can't hear you?

A I think she can't hear me.

[BY THE COURT]: And what was she actually doing that made you think that?

A She just wouldn't answer, and that's unlike Zahrah not to answer me.

[BY THE COURT]: Did it occur to you that she was scared that afternoon, with no one home?

A Yes, it did. Because I was scared for her.

[BY THE COURT]: So you're yelling at her?

A Yes, I was yelling at her. It's not intentionally — I was wrong for yelling at her.

[BY THE COURT]: It wasn't intentional that you were yelling at her?

A It was — it wasn't intentional, no.

[BY THE COURT]: Well, what was your intention?

A My intention was to see why the police was there and what was going on.

[BY THE COURT]: Did you ask the police why they were there? AYes, I did.

[BY THE COURT]: What did they tell you?

A They told me that they got a call that she was home alone and they came to check and someone from Child Welfare Services —

[BY THE COURT]: So why did it anger you that the police came to make sure your daughter was okay?

Why did that anger you? If she was there alone and your niece couldn't get there for some reason, why would it anger you that the police were there to make sure your little girl was okay?

A That did not anger me. What angered me was what went on before I got home. And then when I find out on my way . . . I talked to my niece, Sherita. She told me that the police were there. And I'm yelling at my niece and asking her, "Why are the police there? Where were you at?" You know? So when I got home, I talked to my daughter, you know? I pretty much — I was under a lot of stress, and I didn't use appropriate ways to control it.

Aaliyah S. denied calling Zahrah a "fucking bitch," threatening to kill her if she ever called the police again, or telling Na'imah to get a belt from the other room and hit her sister.

Aaliyah S. was asked about an incident in 2009, when Zahrah allegedly reported to a school counselor that she was being sexually abused by her brother Tyreek. Aaliyah S.'s response to that was to write a letter to the school, which stated, in part, "If I find out any person is trying to entice or befriend my daughter to get information out of her, legal action will be pursued against the school and staff member." Aaliyah S. readily admitted to writing that letter. There was no evidence in the record that Aaliyah S. got her daughter any help after she suffered that abuse, although there was testimony — denied by her at trial, without elaboration — that Aaliyah S. once walked in on Tyreek sexually abusing Zahrah, and responded by beating Zahrah.

Aaliyah S. was asked about her prior history with the Department, which included a 1998 finding of "indicated neglect" for leaving 2-year-old Tyreek home alone, and a 2006 finding of "indicated neglect" for leaving the girls alone under 10-year-old Tyreek's supervision. With respect to the 1998 incident, Aaliyah S. claimed that she was unaware, until 2006, that the result of that case had been "indicated neglect"; she testified that she initiated the 1998 investigation herself when she called the Department "because I was young and I wanted to do some things and I was stressed out." Aaliyah S. suggested that she "probably" told the Department she had left Tyreek alone "just to try to get services," but she denied that she ever actually left Tyreek alone. With respect to the 2006 finding of "indicated neglect," Aaliyah S. testified: "I never left Tyreek alone with the girls by himself, just said, 'Here, watch the girls,' and I'm going out the door. That never happened."'

Aaliyah S. testified that the Department provided her nine months of services after the 2006 investigation, including providing her with a math tutor and paying for her to have a root canal. The Department also paid for Tyreek to attend summer camp, and sent a social worker to personally drive him there after he overslept and missed the bus. But she complained that, in the current case, the Department did not offer her the opportunity for supervised visitation.

Aaliyah S. also testified that she does not agree with Dr. Himmelfarb's diagnosis of narcissistic personality disorder, and agreed that she informed Ms. Spenadel that it was not accurate. However, Aaliyah S. also claimed that she told Ms. Spenadel that she thought it was important that Ms. Spenadel read Dr. Himmelfarb's report, but that Ms. Spenadel "didn't want to read it." She testified that she believes she has made "adequate progress" in therapy, but acknowledges that she "still need[s] to work on some things." When asked how long she thought it would take for her to be "completely prepared" to have Na'imah back in her care, Aaliyah S. responded, "I don't know. I don't know."

**II. The juvenile court did not err or abuse its discretion in terminating Aaliyah S.'s parental rights**

As indicated above, an appellate court will affirm a judgment that terminates parental rights if the record shows that the juvenile court considered the statutory criteria, made factual determinations which were not clearly erroneous, properly applied the law, and did not commit an abuse of discretion in making its determination. *In re Adoption/Guardianship/CAD No. 94339058*, 120 Md. App. 88, 101 (1998). As this Court explained in *In re Abiagail C.*, 138 Md. App. 570 (2001):

> On review, our function . . . is not to determine whether, on the evidence, we might have reached a different conclusion. Rather, it is to decide only whether there was sufficient evidence — by a clear and convincing standard — to support the chancellor's determination that it would be in the best interest of [the child] to terminate the parental rights of the natural [parent]. In making this decision, we must assume the truth of all the evidence, and of all of the favorable inferences fairly deducible therefrom, tending to support the factual conclusion of the trial court.

*Id.* at 587 (citing *In re Adoption No. 09598*, 77 Md. App. 511(1989)).

The juvenile court, in this case, rendered an opinion that clearly considered each part and subpart of FL § 5-323. Its factual determinations were supported by the evidence and were not clearly erroneous. The juvenile court properly applied the law, keeping the best interests of Na'imah at the forefront of its analysis, and it did not abuse its discretion in terminating Aaliyah S.'s parental rights. There was sufficient evidence to support the court's conclusion, applying a clear and convincing standard, that Na'imah's best interests would be served by severing her connection with Aaliyah S.

With respect to Aaliyah S.'s specific complaints, noted above, they are all without merit. We will address each of the alleged errors.

> 1. "The juvenile court erred in its application of . . . § 5-323 in determining that it was in Na'imah' s best interests to terminate her mother's parental rights where such an action would irreparably server [*sic*] her relationship, not only with her mother who had been her sole care giver until November of 2009, but also with her extended family with whom she had continuous contact over the course of her life; and who were ready, willing, and able to care for her. Moreover, the act of terminating Na'imah's mother's parental rights severed Na'imah' s cultural and religious ties to the Muslim/Islamic community that her mother was part of and she was raised in."

Aaliyah S. is correct to point out that terminating one's parental rights does, indeed, irreparably sever the familial connection between parent and child, and by extension, between extended family and child. In this case, however, as we have explained, terminating Aaliyah S.'s parental rights was clearly in Na'imah's best interests. Aaliyah S. put forth no evidence of any extended family members who, in fact, "were ready, willing, and able" to care for Na'imah. To the contrary, Rashid and Laura S. were eliminated from consideration for failing to provide the Department with documentation it needed regarding their criminal histories. Aaliyah S.'s mother was disqualified early in the process because she has a negative history of her own with the Department. Aaliyah S. did not prove that there was anyone else among her extended family who was "ready, willing, and able" to care for Na'imah. To the contrary, the record reflects that Aaliyah told Ms. Korth, on November 3, 2009, "No, I'm not calling any relatives. You're not calling any of my relatives. Take them if you need to take them." Moreover, with respect to as Aaliyah S.'s assertion that terminating her parental rights cuts Na'imah off from the "Muslim/Islamic community," there was insufficient evidence presented to establish that the best interests of the child would be served only if Aaliyah S. remained in a position to serve as the tie to the Muslim/Islamic community.

> 2. "The juvenile court's application of the statutory factors to the facts in the instant case constituted an abuse of discretion given that the mother was unable to receive services during the majority of the time that Na'imah was in foster care. Specifically, subsections (1)(i)[,] (ii), and (iii) were lacking because the Department was unable to create service agreements that would assist the mother in reunifying until immediately prior to the hearing . . . the mother, through no fault of her own, was not provided with a therapist to help her understand how her actions harmed her daughters until the months immediately prior to the hearing."

Aaliyah S. argues that she, "through no fault of her own, was not provided with a therapist . . . until the months immediately prior to the hearing." This contention is never explained in Aaliyah S.'s brief. We observe, however, that Aaliyah S. was released from jail on March 6, 2010, and started therapy with Ms. Spenadel one year later, on March 8, 2012. Dr. Himmelfarb referred Aaliyah S. to a Muslim therapist following their appointment on August 10, 2010. Aaliyah S. testified that she lacked the funds, or the insurance, to meet with that therapist. However, her current therapy is paid for by Medicaid, and Aaliyah S. did not testify about any other efforts at seeking therapy before becoming a patient of Ms. Spenadel's. Aaliyah S. also never followed up on Ms. Pillay's September 2010 referral to the Family Services Agency, which, as Ms. Pillay testified, sets its fees on a sliding scale according to income, and could even waive the fee.

> 3. "Further, Ms. S was not able to see Na'imah between the fall of 2009 and the termination hearing, rendering it impossible to [*sic*] the court to evaluate whether services could repair their relationship. The court's error in failing to allow those services to be provided to Ms. S prior to termination was great because Ms. S was clearly willing to make an 'effort to adjust [her] circumstances, condition, or conduct to

> make it in the child's best interests for the child to be returned to [her] home."

This argument is presumably based on the fact that Aaliyah S. was under a no-contact order, and additionally was incarcerated for three and a half months of that time. In addition, there was actually no credible evidence in the record that Aaliyah S. was willing to "make an effort to adjust [her] circumstances, condition or conduct" to make it in Na'imah's best interests to be returned home. To the contrary, the evidence was that Aaliyah S. had been uncooperative in her dealings with the Department, and disruptive during the three brief supervised visits she did have. And she persisted in minimizing the abuse she inflicted upon her children even in the face of abundant evidence to the contrary, including her own guilty plea to second-degree child abuse.

> 4. "The record shows that Ms. S participated in every service that the Department offered to her. And even though she did not seem to appreciate the impact of her actions on Na'imah when the case was initiated, it is clear that she was willing to learn from her mistakes and conform her conduct to regain a relationship with her daughter. As a result, this was not a situation where continuing services would be futile."

Aaliyah S. did not abide by the Department's ground rules during visitation. She refused to sign a service agreement, and did not follow up on the Department's referral to the Family Services Agency. She refused to sign releases enabling the Department to talk to her chosen therapist. And it was not evident that Aaliyah S. was "willing to learn from her mistakes" when she denied ever abusing any of the children, at least not since late 2005, and termed her choking of Zahrah as 'just inappropriate behavior."

> 5. "Most importantly, the court failed in its consideration of subsection (4) and its mandate to consider (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."

There is an abundance of evidence in the record as to the court's consideration of Na'imah's "emotional ties with and feelings toward" the family members identified in FL § 5-323(d)(4)(i). Ms. Pillay testified that Na'imah has "indicated over and over again, to both me, her foster parent, [and] her therapist, that she wants to stay with her foster mother. At no time did she ask me about her mother. At no time did she indicate . . . that she wanted to return to her mother's care." Ms. Rao, Na'imah's therapist, confirmed in her testimony that Na'imah "is afraid of her mother." Ms. H. concuned, testifying that Na'imah never asks about Aaliyah S., but has mentioned being afraid of her, and has never brought up Kevin C. at all.

Ms. Pillay testified that, as it is now, Na'imah and Zahrah have regular contact and visitation, and in the event of termination of Aaliyah S.'s parental rights, "that will not change," due to the efforts of Ms. H. and Zahrah's father, Christopher McCallum.

> 6. "In determining Na'imah's best interests the juvenile court failed to consider the impact of severing not only Na'imah's relationship with her mother on her, but also the impact of severing Na'imah's relationship with her biological family that her mother links her to. By severing Ms. S.'s parental rights, Na'imah is forever excluded from a close and loving family including her aunt and uncle who made great efforts to care for her, maintaining her relationship with her grandmother and maternal aunt who she has known since birth, and most importantly her relationship with her sister Zarrah [*sic*-Zahrah], who is still living with a parental family member and has routine access to her mother's family."

As noted above, the evidence in the record contradicts each of the points Aaliyah S. asserts. Rather than demonstrating that Rashid and Laura S. had "made great efforts to care for her," there was evidence in the record that one or both of them violated the no-contact order during an overnight in September 2010. Both admitted to, but minimized, the incident during the February 2012 overnight visit when Na'imah was left unattended in a vehicle. Both of these incidents were upsetting to Na'imah, and required extra attention by her therapist, Ms. Rao, and her foster mother. In fact, the February 2012 incident led Ms. Rao to recommend that Rashid and Laura S. no longer have unsupervised overnight visitation with Na'imah.

In addition, the grandmother was eliminated as a placement resource due to her own history with the Department. It is not made plain who the "maternal aunt [ ] she has known since birth" is, but, if that person is Charlene Pace, then it is clearly not in Na'imah's best interest to see her. Charlene Pace is the person who took in Tyreek after he sexually assaulted both of his sisters.

Further, there was testimony that Na'imah's relationship with her sister Zahrah has not suffered during foster care and would not be damaged by the termina-

tion of Aaliyah S.'s parental rights.

In sum, the juvenile court in this case rendered an exhaustive, fact-intensive opinion, and we detect no error in those findings. Next, the court took those facts and analyzed them in light of Aaliyah S.'s interest in continuing the parent-child relationship, Na'imah's best interests, and FL § 5-323. We perceive no abuse of discretion in the court's determination that Na'imah's best interests would be served by terminating Aaliyah S.'s parental rights.

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

**NO TEXT**

Cite as 4 MFLM Supp. 31 (2012)

**CINA: mental injury: sufficiency of evidence**

# In Re: Matthew L. & Sophia L.

*No. 0882, September Term, 2012*

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

*Opinion by Matricciani, J.*

*Filed: January 12, 2012. Unreported.*

**Even without an expert evaluation of the children, the evidence of appellant's anger management issues was sufficient to support the court's finding that the children were exposed to a substantial risk of mental injury as a result of his behavior, and its resulting order that he leave the family home.**

*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 is an appeal by Brian L. ("Father") from the judgment of the Circuit Court for Montgomery County, sitting as a juvenile court, finding Matthew L. and Sophia L., his biological children, to be Children in Need of Assistance ("CINA"), placing Matthew and Sophia ("children") in the care and custody of Marta D., their mother ("Mother"), and ordering appellant to leave the family home. In his appeal, appellant presents the following arguments:

I. The trial court's CINA finding was clearly erroneous and its disposition order requiring Brian L. to leave the home was an abuse of discretion insofar as they were both based on a finding of substantial risk of mental injury which was not supported by the evidence.

II. The trial court erred in preventing Brian L. from cross-examining the Department's expert social worker concerning the results of Brian L.'s VA evaluation as they may have affected the basis for her opinion that the children were at risk.

For the reasons set forth below, we shall affirm.

### BACKGROUND

On May 9, 2012, the Montgomery County Department of Health & Human Services (Child Welfare Services) ("Department") filed a "Child in Need of Assistance Petition." The Petition alleged, *inter alia*, that the children had been neglected and that Sophia had been subjected to physical abuse. The Petition also alleged that the parents were unable or unwilling to give proper care and attention to the children and their needs. An emergency shelter care hearing was conducted on May 9 & 10, and on the latter day the juvenile court issued an "Order for Shelter Care" which, *inter alia*, directed that the children be placed in foster care under the jurisdiction of the Department. On June 6, 2012, the Department filed a "1st Amended" CINA Petition, which, *inter alia*, deleted the reference to physical abuse of Sophia and added that "Matthew has been verbally abused by his father."

An adjudication hearing was conducted on June 7, 2012. The juvenile court heard extensive testimony offered by the Department and Brian L., the father.

Officer Romand Schmuck serves with the Montgomery County Police Department. He was on patrol when he and his partner, Officer Mendez, received a call to provide standby assistance for representatives from Child Protective Services ("CPS"), who anticipated the removal of children from a home. Officer Schmuck reported to 7151 Mill Run Drive in Derwood and encountered appellant. They discussed the situation, while Officer Mendez spoke with representatives from CPS.

Officer Schmuck recalled that appellant was "pretty agitated," and that he "want[ed] them out of here." Appellant kept raising his voice, and after the CPS representatives produced a court order for removal of the children, the situation, according to Officer Schmuck, "got kind of crazy there." The officer elaborated:

> Well, his level of anger definitely escalated to the point where he was holding a motorcycle helmet and he threw the motorcycle helmet up against a, I don't know if it was a wall or what, but it, I heard it hit something.
>
> * * *
>
> I don't remember exactly what he threw it against. I know he threw it

> kind of to his right and I heard it strike something. I don't know if it was a brick wall or a railing. We were out in front of several houses, but I remember him taking the motorcycle helmet and just throwing it really hard to his right.

Appellant then started walking in the direction of the CPS representatives, who were in the process of taking the children. When he ignored Officer Schmuck's orders to come back, the officer felt compelled to "take [appellant] to the ground, just to subdue him" so that the CPS workers could safely get the children into their vehicle. Officer Schmuck was concerned that appellant might harm the CPS workers or himself, and he attempted to prevent appellant from doing anything that would cause harm and result in his arrest.

Officer Schmuck eventually allowed appellant to get up. While appellant remained agitated, he was no longer directing his anger at the CPS personnel. Following the departure of the CPS workers, the officers remained at the scene to allow appellant to calm down further.

Officer Schmuck testified on cross-examination that the mother, although upset, did not appear to be aggressive, and instead was attempting to "find out what was going on." He explained on cross-examination by appellant's counsel that he did not want a repeat of appellant's initial behavior, "[t]hrowing the motorcycle helmet, walking towards [the CPS workers] in a threatening manner . . . yelling and screaming, that kind of stuff."

Appellant's father, Brian L. Sr. ("Brian Sr."), is the children's grandfather. He acknowledged that he had not spoken with appellant in the eight months prior to the adjudication hearing. He recalled discussions with Mother in October 2010 about appellant's treatment of the children. Mother told him that "anytime Matthew did anything wrong, [appellant] would get in his face[,]" and that appellant would "yell at him and slap him and put him in the bed and dare anybody to go in there and do anything with him." She had complained that appellant's interactions with the children, when he was otherwise occupied with his friends or playing on the computer, were "to say good night and I love you[.]"

A few weeks before the hearing, and just after an [earlier emergency] hearing, appellant spoke briefly with Brian Sr. The latter testified that appellant told him that he no longer would speak with his mother, Annie L., because of her testimony against him. Appellant claimed that Annie had "lied in court about an incident" in which she claimed that appellant had threatened her. Brian Sr. then told appellant that he had been on the phone too, when appellant stated words to the effect that if Brian Sr. did not "shut [Annie] up, he would."[1]

Brian Sr. had been to appellant's and Marta's house about eight months prior to the hearing, and recalled that the house was "filthy." He noticed that "the floors were just littered" with dirty diapers, toys were scattered all over the back patio, and trash was all over the place. The bathroom was in such a state that Brian Sr. avoided touching anything in that room.

The children and their mother, Marta D., stayed with Brian Sr. in late September or early October, 2010. The children alone then visited Brian Sr. for four days in early November or late October 2010. He recalled that Matthew was scared of him at first, and it took nearly three days before Matthew would not hide behind his grandmother whenever Brian Sr. spoke to him. He explained that appellant permitted the children to stay with him and their grandmother because appellant intended to arrange to have the children taken from Marta. This arrangement broke down, and Brian Sr. returned the children to appellant's house.[2] He testified that, when he returned the children, Matthew was reluctant to get out of the car.

Brian Sr. had met Marta D. on about ten occasions. While he originally harbored some concerns about her, Brian Sr. became convinced that "she was a beautiful young lady who had a lot of potential." For a while they communicated, and she disclosed to Brian Sr. the manner of appellant's treatment of the children. After the Department became involved with the children, Brian Sr. said that his relationship with Marta had deteriorated, and was "questionable." Finally, after Brian Sr. met with Marta's father to inform him that others were also staying at the house, Brian Sr. and appellant's mother, Annie L., were no longer welcome to see the children.

Annie L., the children's paternal grandmother, had last seen the children eight months prior to the adjudication hearing. She recalled that her son, appellant, had called to inform her that he wanted to take the children's mother to court and obtain sole custody. Appellant asked whether Annie L. could watch the children "until things straightened out." The children stayed with them for four days at their house in Virginia. Annie L. testified that, approximately a "month or so" earlier, the children visited with Marta D., their mother. Marta's care for the children raised some concerns with Annie. For example, Marta did not bathe them, and Sophia developed "roseola or eczema." Eventually, the grandparents assisted Marta and helped improve her parenting skills. Annie recounted that Marta "comment[ed] on the fact that [appellant] did not interact with his kids unless he was reprimanding them, as well as she was afraid of [appellant's] temper." She told them that appellant "loses control." When asked about appellant's temper, Annie testified that they've "been having

anger management problems with [appellant] since he was about 10 years old." She recalled seeing that appellant had been "very harsh with reprimanding Matthew on several [two] occasions." Appellant became very aggressive and would grab the boy by the arm and "get in his face[.]"

Annie confirmed what Brian Sr. had said with respect to appellant's threat. After they informed Marta's father of concerns about the house, appellant called his mother and said that his parents "were no longer family[,] and that "[i]f you [the parents] don't shut up, I'm going to shut you up." He had said that over the speaker phone so that both Brian Sr. and Annie L. could hear this threat.

When asked about appellant's home, Annie L. acknowledged that it was "quite a bit messy." She then stated her concerns:

> [T]he kids were not being worked with. They were not being bathed. They were shying away from people. Matthew did not like men. He would flinch every time a man would, every time my husband [Brian Sr.] would come near him. And if he did something wrong and you went to go to correct him, he would scrouch down like you were going to hit him. And that was a concern and I would never hit him, but somebody had obviously been doing something that he was afraid of.

She voiced her concerns with Marta. She also mentioned her concerns to appellant, that the children were "dirty and unke[m]pt," when she spoke with him in October, 2010.

Appellant called Annie L., after the children left her house in October, to tell her that she "was no longer part of the family, that [she] could not see the grandchildren at all and to, if [she] didn't shut the f-blanking up, he would shut me up." He also told her that the children "were taken care of now [and that she didn't] have to worry about them."

On cross-examination, Annie L. also acknowledged that she had seen Marta on one occasion become angry with Sophia, so that Marta "threw [Sophia] in the car seat and said, 'I can't deal with this anymore.'"

Christine D., the children's maternal grandmother, testified about arriving at appellant and Marta's home in April, 2012. Christine and her son, Danylo, were "running errands" and offered to bring some gifts to the children. They were all outside when appellant arrived. Appellant, who had a prior bad experience with Danylo, was angry, and started to yell through the window of his car at them while he was parking his car. He cried out that "I've told you I didn't want him around here. You are not following my wishes." Appellant continued his tirade, directed mainly at Marta, for about five minutes. Matthew started to cry and run towards his mother, to be joined by Sophia. Christine admonished her son Danylo to get in the car. They then drove away. Appellant called the police, because he had earlier secured a restraining order against Danylo. Since that order had expired, no action was taken.

Christine testified that she was "upset" about the condition of the house. She explained that trash was "everywhere." On cross-examination, she thought that her relationship with Marta was not "contentious," and said that Marta confided in her for "some things." Marta had, for example, mentioned an occasion when appellant "was choking her." She thought that Marta may have disclosed other incidents of physical violence, for example when appellant pushed her.[3]

The Department called Marta D. as an adverse party. When asked to explain an incident wherein she told her father that appellant had thrown something that had hit Sophia, Marta explained that "[m]y dad misunderstands a lot of things[.]" She denied telling her father, Sergue D., that appellant had struck Sophia. When asked whether she had concerns about appellant's treatment of the children, Marta recalled an instance when appellant disciplined Matthew, putting his face about a foot away from the child's face and yelling. She recounted:

> [W]hen Matthew does something wrong, he will, there is a tendency where he will spank him on the butt or tap him on his hand or put him in a corner, but there's a tendency where he could control his tone of voice when he yells at his own son. When Matthew say, does something, like spills juice on the floor, he, instead of going up to him and saying, Matthew, pick that up . . . he would yell at him and my son would be frightened and he would come running to me for comfort.

Marta testified that Matthew runs toward her and hides when he has done something wrong "because he knows what [appellant] will do." Marta then testified:

> I think the kids will be safer if they come with me because I think [appellant] needs to take courses to learn how to control his tone. Like when he gets upset really fast, he needs to not get agitated to a point where practically the whole neighbors . . . but the point where he should just

> calm down and not yell to a point where, you know, you can't stop him, you know.

Marta recounted that appellant appears to get angry when dealing with her parents. She testified that she has had issues with her mother, and this prompts appellant's concern. When asked about her actions when appellant gets mad, Marta testified:

> I either take [the children] to the park or I take them to the mall. But even if Brian isn't mad, I still take them out because it's fresh air.

During the preceding year, Marta acknowledged taking the children out, when appellant becomes angry, "[a] couple times a week[.]" The testimony continued:

> [DEPARTMENT'S COUNSEL:] So a couple times a week, Brian gets as mad as anyone you've even seen —
>
> A Uh-huh.
>
> Q Right?
>
> A Yes.
>
> Q And you have to take the children out of the house?
>
> A Yes.
>
> * * *
>
> Q Why is it, what effect does Brian's anger have on the children?
>
> A They're scared.
>
> * * *
>
> Because every time Brian gets angry, I can see it in my kids' eyes and they run towards me. Any mom can see a kid terrified of someone that yells and they already know it.

Marta recalled another incident in which appellant slammed a door, breaking some glass. Marta did not see what actually broke, but believed that it was a cabinet door. Appellant was angry because Marta's father had arrived at the house and voiced concern that appellant had some house guests who were not permitted. After this incident, Marta and the children stayed at a hotel for two days.[4] She did so to permit appellant to "calm down, so he'd cool off[.]" On cross-examination by counsel for the children, Marta explained that she prepares the children when appellant gets really angry: "when he starts getting really agitated, that's when I get the kids ready quick and fast and then I leave." She explained her haste by noting that she knows "how angry he is and I know the kids are scared by the look of it, and I know, I don't want them to be in that kind of environment." She had previously testified at a shelter hearing that she had called the police on one occasion because appellant was "yelling and screaming and cussing. Marta recounted that it sometimes takes appellant a "whole day" to "cool off."

Marta testified that she is undergoing therapy, and that she hoped that appellant would also get some help:

> [MOTHER'S COUNSEL:] What are you willing to do to ensure the safety of your children?
>
> A Still continue seeing my therapist, still continue taking the Abused [Person's] Program and hoping that [appellant] will take some angry management classes for him to improve his anger issues. And any other courses that I need to be taking, I'm willing to take.

She acknowledged that appellant's anger hurts her chances of getting the children back from foster care.

On re-direct examination, she stated what, in her opinion, would be required for appellant:

> In order for Brian to prove to me that he can control his anger issues is take the classes and stay away from me and the kids for awhile until he can prove to me that he could control his anger and not be, not make the kids be scared of him. If that means that he has to leave the house and not communicate with us for how long it needs to be, then I'm willing to do that in order to protect my own kids. If that means not communicating with Brian L., then I'm willing to do that.

Sergue D. is Marta's father and the children's maternal grandfather. He owns the house where appellant and Marta live with the children. He rents the home to them for less than the mortgage in order to help appellant and Marta. He recalled one occasion when Sophia was taken to the hospital for stitches. Marta had later told him that appellant threw something at Marta, missed and hit the child. Sergue D. recounted experiencing appellant's anger on another occasion while appellant was entertaining friends at the house:[5]

> This was about a year ago. Marta and I and the kids went to New Jersey to visit my mother. On the way back, we called Brian and asked him that when we arrive, that he could help us unload the car. . . . I could hear on the phone that he was very upset about it.

He was screaming and so on.

* * *

So we arrived at the house. When we arrived at the house, Brian [ ] stormed out from the house, slammed the door, ran up to me screaming, then he run up to Marta like in a typical kind of military fashion, came up right to her face, screamed profanities, was extremely aggressive and hostile, basically for nothing.

* * *

And it continued. It didn't stop. It continued for awhile. He went back to the house. . . . I was becoming concerned because, you know, it's, it was extremely aggressive posturing on his part. So we were there. The kids were in the car. I asked Marta to sit in the car, okay?

The next thing I hear is this smashing inside the house.

Sergue said that it was impossible to communicate with appellant. He thought that the children were in danger, and told Marta that they were not going to stay there. He also called the police, whose presence prompted appellant to calm down somewhat. Segue denied "forcing" Marta to stay at the hotel.

He also recalled that Marta admitted to "a couple of occasions" when appellant was physically abusive. On one occasion, appellant warned Marta that because he had been a Marine he could snap her wrist.[6] On another occasion, Sergue asked to meet with appellant and Marta after the children had been taken into foster care. He suggested that the three meet at a local restaurant to try to discuss this matter. Appellant became agitated to the point where Sergue warned him to calm down or another restaurant patron might call the police. When Sergue suggested that they try to find a solution,

Brian's response was just hostility. He says he's not to blame for anything. He's not responsible. That if need be, he'll go to court and he'll continue until it's resolved the way he thinks it should be resolved. And then, basically I said, well, let's talk about it then. What should we do, you know? And he basically just went on and on and got up and left.

Sergue suggested that appellant seek help, and he offered to pay for this.

Cynthia King is a social worker with the Montgomery County Child Welfare Services. She is responsible for investigating reports of abuse and neglect. Ms. King is a licensed clinical social worker who has been trained to assess risk. Over appellant's objection, Ms. King was accepted by the juvenile court as an "expert, social worker who assesses risk as part of her job."

On May 6, 2012, Ms. King, accompanied by fellow social worker Emmett Woodard, went to the home shared by appellant, Marta and the children. They arrived unannounced, knocked on the door and Marta answered the door. After Ms. King and her colleague identified themselves, Marta became "very agitated and was swearing and saying that she didn't want anything to do with us." Marta then relented and allowed the social workers to see the children. Marta then telephoned appellant, ignoring Ms. King's request that they "talk for a few minutes first[.]"

Appellant would arrive about fifteen minutes later. In the meantime, Ms. King peered into the house and, from her vantage point at the doorway, she could tell that the house was "pretty dirty." There were dirty diapers on the floor. She described the floor as "dirty and sticky."

Concerned about appellant's reaction when he would finally arrive, Ms. King sat outside with Marta on the stoop. Fifteen minutes later, appellant drove up on a motor scooter. Ms. King testified that he started yelling at them while he was still a block away. Appellant was swearing and yelling "Get the fuck out of my yard[!]" Ms. King and her colleague left the yard, started toward their car. She attempted to hand appellant her business card, a tender he refused. Appellant continued to swear and "gestur[e]."

Ms. King had called for police assistance as soon as Marta called appellant. In the face of appellant's tirade, Ms. King and Mr. Woodard went to their automobile to await the officers. In view of the turn of events, Ms. King formed an opinion about the children's safety. Her testimony on this point is telling:

[DEPARTMENT COUNSEL:] [W]hen you originally rung the doorbell and Ms. D. had come down with the children, had you already arrived at an opinion to a reasonable degree of social work certainty as to whether or not these children were safe in the home?

A No.

Q And after you had this interchange with Mr. L., did you come to, did you arrive at an opinion to a reasonable degree of social work certainty as to whether or not the children would be safe if they remained in the home?

A Yes, I did.

> Q And when specifically did you arrive at an opinion? And then I'm going to ask you what the opinion was.
>
> A Probably as he approached on the motor scooter.
>
> Q And why was that? Why at that point did you arrive at the opinion?
>
> A He just, he was completely out of control. I've, in my thousand investigations . . . I mean I said at shelter he was in the top five out of control aggressive people I've dealt with. I mean, he might even be the top. He was just, I mean he just seemed to not be calming himself down at all and he'd had 15 minutes on the phone when she had called him and told him we were there, to kind of think of the strategy, and he didn't seem to have one, other than just be aggressive and threatening.[7]
>
> Q So what was your opinion at that point?
>
> A That he was aggressive and threatening and dangerous.

Ms. King based her opinion that the children were at risk on the facts that appellant had thrown an object that hit Sophia, and that Marta was intimidated by him. As to the latter observation, Ms. King "didn't feel that [Marta] could stand up to him."

The social workers then informed Marta and appellant that they had shelter care authorization and were going to remove the children. Appellant, who had been speaking with a police officer, threw down his helmet when he heard this. Ms. King then noticed "some movement," and then saw appellant on the ground with a police officer on top of him.

The children were taken to shelter care, pending a court appearance. At the time of the hearing, they remained in a foster home. Ms. King expressed the view that they should return to their mother, but not with their father. Ms. King opined that Marta needs assistance in protecting the children from their father. She explained that Marta has difficulty in standing up to him. In her view, Marta seems intimidated when appellant gets angry. She further explained: "I haven't seen any effective interchange between the two of them when he becomes agitated that there's anything she can do that helps that."[8] She was confident that, with assistance from the juvenile court and the Department, Marta could keep the children safe.

Ms. King was the Department's final witness. Appellant then put on a case, presenting Deborah Weltz as appellant's first witness. Ms. Weltz serves as a salesperson and works at two stores, including a jewelry store. Appellant has worked as a security officer, and she has observed him during situations in the retail environment where there is a high level of stress. Appellant was very helpful, in Ms. Weltz's opinion, and always made sure that she would be safe, especially at closing time. Appellant seemed to handle the stress of dealing with shoplifters. His demeanor was always polite, even when interacting with shoplifters and the like. Ms. Weltz also saw appellant and Marta together, and they appeared to her to be "emotionally together."

Appellant presented the positive accounts of a number of witnesses who attested to his professionalism and good behavior in the context of his work, or who had served with him or otherwise known him. Linda Gardner has worked with appellant at J. C. Penny's and is also acquainted with him from college. She is friends with both appellant and Marta. Ms. Gardner testified that appellant's home is "clean" and "kid-friendly." She has permitted her 19-year old daughter to visit there. She has observed the children, who showed no fear of either parent. Nor has appellant shown any aggression toward Marta, in Ms. Gardner's view. On the job as a security officer, appellant has been courteous and professional. Ms. Luz Lopez, a supervisor at the home department at J. C. Penny's, had similar praise for appellant and the manner in which he has conducted himself in his employment. She emphasized that he had never lost control, and never exhibited any "anger problem." D'Angelina Hammett, who works at Littman Jewelers at the Lakeforest Mall, had similar praise for appellant's professionalism, restraint and conduct. His use of force to apprehend shoplifters and the like was always appropriate. Tacara Gassaway has known appellant for two years. She has been to appellant's house, and testified that it was well-kept. She had seen no indication of problems when she saw appellant, the children or Marta. Further, in her view, appellant is the "most approachable" of members of the mall's security team. Jerry Wolnitzek has known appellant for 14 years, having served with appellant in the Marine Corps and, before that, known him through school. Mr. Wolnitzek testified that appellant's home is clean and well-kept. He opined that appellant is a "great father." He also observed no problems with the children and appellant. Mr. Wolnitzek is the children's godfather.

Appellant took the stand, and acknowledged that he and Marta have had disagreements, but characterized them as "nothing major," except for issues involving her family. Appellant explained that Marta's family "treat[s] her like a 5-year old." Appellant is also concerned about Marta's brother, Danylo, because of his substance abuse issues. He denied that there has been any violence in his relationship with Marta and

the children. He described how they resolve their arguments:

> If I'm, I know when I get angry it's to the point where I say I need a timeout and I, you know, I just, I either walk away or she'll take the kids out to the park or whatnot. But it's to the point where I just, I don't want to talk and I'll tell her I don't want to talk at this point. Let me calm down, we'll come back to it with a clear head and that's what mainly happens.

Appellant is enrolled in Montgomery College, pursuing a degree in criminal justice, and receives G.I. benefits. He has signed up for anger management and says that he has been counseled at the VA hospital.

Appellant denied ever being angry with his children. He explained that the injury to Sophia, who sustained a cut above her eye, was due to the children playing and her tripping and falling.[9] He also denied throwing any object that may have hit her.

Appellant explained his behavior when Christine D. brought Danylo to the house. Appellant felt threatened. He testified that he has always had issues with Marta's mother, who, he claims, shows no respect for her daughter. This has prompted a reaction on appellant's part. Appellant denied claims by the Department that the house was filthy. He denied striking the children, and described his discipline of Matthew as "pat[ting] him on the butt" or "put[ting] him in the corner" if he misbehaves. Appellant insisted that he would never raise his voice "to the point where it scares him or anything." He denied threatening his own mother.

Appellant was asked about a period when Marta and the children were staying with his mother. He denied that the children were "living" with his mother, but that the stay was temporary because he was fumigating the house. He denied the account that he had told his parents that he planned to leave Marta and get custody of the children.

Appellant testified that, on the day the social workers came to his house, Marta had called to inform him that her mother, Christine, had called Social Services. He replied to Marta that there was nothing that Social Services could do because the kids were not in any danger. He reiterated that Christine had been trying to "get [him] out of Marta's life" since the beginning of their relationship.

Appellant was asked about the incident that took place when Marta's parents and the children returned from a trip. He explained that a couple of co-workers had arrived to have pizza and watch television that Sunday evening. When he stepped outside, Marta's father, Sergue D., started yelling at him. Appellant immediately pulled the front door shut so that his friends would not hear the commotion, and dislodged a wreath that had been on the door. He tossed the wreath into the kitchen where it fell against a cabinet, breaking some glass. A police officer had been summoned by Sergue D., and appellant explained to the officer that the damage was inadvertent. Appellant denied Sergue D.'s claim that his guests ran out of the house when Sergue approached.

Appellant testified that, on the day the children were removed, he called the police because he felt "threatened by Social Services." He recalled that when he arrived at the house, he got off of his motor scooter, and told the Social Services workers to "[g]et the fuck off my lawn. If you want to speak to me, a lawyer is going to be present." Appellant said that the social worker "overreacted." When one of the social workers tried to put a business card "on the back of [appellant's] van," he told him to "get that shit off my van." Appellant was not willing to talk with the social workers. Appellant explained that, when he realized that the children would be removed, he broke down and the "helmet came flying out of [his] hand when I went up because I was in tears by this point." He was distraught, and "went down to the ground." A police officer caught him.

Although he felt very comfortable with the police, appellant did not have the same feelings with the social worker. Appellant felt that the social worker harbored a grudge against him. The supervised visits with the children have been, according to appellant, "very disturbing."

Appellant said that he had no trouble disciplining the children. If Matthew misbehaved, appellant would "try to teach him the right way" or put the child in the corner. Appellant "would never physically . . . harm [Sophia]."

Appellant acknowledged that his relationship with Marta could use some improvement. He is attending anger management and would participate in any additional programs such as family counseling. Appellant testified that he would prefer to avoid contact with Marta's mother. He said that his parents could see the children "as long as the nonsense stops."

On cross-examination, appellant disagreed with Marta's statement that she would have to leave the house a couple of times per week. He explained that he was not initially concerned about calls to Social Services because, in his view, Christine D.'s allegations were false.

Appellant disputed Ms. King's claim that, on the day the children were removed, he had started to yell at the social workers before he reached the house and that he could be heard from a block away. He explained that his scooter was loud and that he wore a face shield on his helmet. He explained that he felt

threatened by Social Services because they had been called by Marta's mother, Christine D., whom he considered to be a threat. He also felt threatened because he knew they were there to remove the children. He also claimed that the police officer, Officer Schmuck, did not take him to the ground, but rather fell to the ground with him. Appellant insisted that he was hysterical when he learned that the social workers were removing the children.

Appellant explained that he has not signed up for the Abused Persons Program because he is not an abuser. He believed that both he and Marta were "victim[sj in all this [.]"

The juvenile court made the following findings of fact:

> THE COURT: Okay. As to facts now, whether it has been sustained or not sustained, and of course I look at this through the lens of preponderance of the evidence. As to A-1, I find that the moving party has proved that on or about April 22, 2012, Sophia sustained, excuse me, a cut to her head while at her home. She was taken to the hospital and that required stitches. And both parents claim that the injury had been accidental.
>
> As to B-1, I find that the moving party has proved that the environment in the home is characterized by Mr. L.'s abusive behavior towards the mother and children. And I find that this is really, I guess, the heart of the matter here.
>
> There is a variety of testimony supporting this proposition and further [ ] factual averments in Paragraph 1, including the, when put together, the testimony of Brian's own parents, the expert testimony of the social worker at the time of the removal, the volatility observed by the police officer on the part of Mr. L., Brian L. when police were on the scene.
>
> Let me digress a minute in terms of credibility. That's always an issue in every type of hearing and trial and maybe now is the time to address it. I don't accept anybody's testimony 100 percent in large part because we're all human and there is at least lapses of memory, if not other biases and things that come into play when people testify.
>
> In this particular case I did not find Mr. L.'s testimony particularly credible. I find that it was pretty much just a piece of denial, almost in total as to any allegation of any type of wrongdoing coming from whatever source from the D.'s, his own parents, his significant other, the social worker, the police officer. He had pretty much an entirely different memory as to all of these things, none of which I found credible.
>
> As to the mother's credibility, the mother's credibility was greatly compromised in this case because of the prior inconsistent statements. I am mindful of the argument that she was willing to make certain concessions in terms of the, I guess the change in her viewpoint between the shelter hearing and now. But I, it was very hard to credit the actual recitation of what had happened in the past.
>
> It seems to me that her testimony today was designed to get the children out of foster care, which is certainly not an unreasonable position for anybody to take. And I'm certainly mindful as well of the evidentiary fact that what she said on a prior occasion does not come in against Mr. L., but it does come in against her in terms of her credibility.
>
> And in terms of the other witnesses, let us say I give a healthy discount to the credibility of [Marta's family]. because of some long — standing animosity. Actually on the face of it I didn't find their testimony particularly not credible or not believable, but I'll give a healthy discount for some animosity in the past between them and Mr. L.
>
> There are still so many variables here that don't make sense in terms of Mr. L.'s testimony because on one hand he says that he's fine with Ms. D. for the, you know, in large part, not totally and he's fine with the kids seeing him and he takes them out and he helps them babysit while he's studying and then in another part of his testimony he's, you know, an enemy like almost everybody else in this case. So I'm not quite certain what his real position is with Mr. D.

In terms of his own parents, they sounded very credible when they testified. And I could find nothing with anybody's testimony that compelled me to find otherwise, including Mr. L.'s testimony as to why his parents would be against him or why there would be so much drama. There was just no reason for, I guess, his perception or nor did it ever explain why they would be testifying as they did in terms of his aggressive attitude towards Matthew, which his father or his mother, or perhaps both have seen.

And the whole, I guess, estrangement back last fall, it's, I did not credit Mr. L. whatsoever that he hasn't allowed them to see his children because it was initiated by them. So there's just no accounting whatsoever for why — nothing credible that accounts for why his own parents would be saying these things.

As to his own people that he brought in and his people from work, I thought they were, sounded credible in terms of how they know him and how they value him as a professional. It just, I guess, carries some weight, but little weight in terms of how things are going within the family unit, which in this case have not been going well.

I will find — so the first, excuse me, the first sentence has been sustained as has the second, that Mr. L. often reacts and acts aggressive, with aggression, excuse me, hostile behavior, screams, yells, curses, physically aggressive towards family members and inanimate objects and fixtures. I don't know whether I can say physically aggressive. Well, I suppose you could say aggressive not in terms perhaps of a battery if we were talking in criminal terms, but just threatening and just getting in people's faces and right up to their noses in a combative way.

In terms of inanimate objects and fixtures, the whole ashtray event has not been proven as against him. But the wreath throwing, I don't know that's particularly dispositive of anything, but it at least has been sustained as to one inanimate object. Do I believe that he threw the wreath and it hit the cabinet in another room and that it just, you know, caused the glass to break? I don't believe that at all. I believe that it was out of whatever rage he was in at that time. And I do believe based on the totality of this testimony that that is his norm, at least with his immediate family, to react with rage.

Mother is afraid of the father, has never seen as much uncontrolled anger in a person. She was pretty clear about that, pretty credible about that, about his anger and that she has to vacate the home with the children on multiple occasions to enable the father to calm down.

The very powerful testimony that she gave, perhaps she didn't mean to, but she did, she said that these children are frightened of him and they're frightened of him every week, multiple times a week. She has to take them out or put them in their room she said at one point. And she can see it in their eyes and she knows it and sees it all the time and has them running to her and clinging to her on these occasions.

The next sentence is the father has been physically violent with the mother and children. I don't think that's been proven, has been physically violent with the mother and children. I mean we have all of the inconsistencies, but they go to the mother's credibility, but they don't prove the facts against the father. So I don't think that has been proven, actually the physical violence.

Has threatened the mother with physical violence. I keep pouring water in it and taking the glass away. I think as to threats of physical violence, that again was a matter of inconsistent testimony on the part of the mother. She may have told her father or she may have told others. That comes in against her, but it doesn't come in, it doesn't prove the fact against him in terms of physical, threats of physical violence on her.

The next sentence I will sustain the following. The mother, other family

members have called the police on account of the father's behavior. I've taken out on multiple occasions. He has been offered therapy, but has refused. I think that that has been sustained given the testimony of Mr. D. when they went to McDonalds and tried to have this resolution meeting. He's an ex — Marine who served in Iraq.

All right. Second paragraph, on March 6th I find, well, that's just a one sentence paragraph, that has been sustained as to the mom's demeanor when the social worker arrived. No. 3, I find that this was sustained as well, and that is the actions of Mr. L., again, in a rage screaming at the social worker charging her, the fact that she and the other social worker retreated to the car.

I find the testimony of the social worker credible. I didn't find it particularly embellished or otherwise showing signs of bias. It was also borne out by the testimony of the police officer when he got there. He wasn't there right away. But the police officer, too, testified about the father's volatility and screaming in such that he actually had to take him to the ground. That's a little bit, what's the word, outside the norm perhaps in these circumstances. Hopefully it's outside the norm. It's not an everyday occurrence.

But I didn't find the police officer at all trying to embellish, quite the opposite. I thought that his testimony evidenced some moderation and some sympathy for what the family was going through, including the father on this occasion. So I did credit his testimony as to just out of, how out of control Mr. L. was at that time. So that goes for No. 4 as well, Paragraph 4.

And as to 5, in terms of — it can be used against the mother in terms of her credibility because she did say these things and then she said otherwise. But there is this one instance when he threw the wreath if we're counting that as throwing objects in the past, but in terms of being used against the father, it's not, has not been proven. And then the last sentence about she claims that he stopped without going to therapy or treatment, that hasn't been sustained.

In terms of C — 1, I will sustain the following, that the home is sometimes very dirty, [ ] (trash, used diapers, utensils on the floor), but that's all, not that the children are oftentimes unclean, not the strong smell of urine and not used diapers everywhere.

There are things that I have said here in terms of facts that I have found credible and that I accept that are not written in here and I've already said them. They are part and parcel of the outline that is contained in this petition and they go to facts, as I've already stated, in terms of the mother's testimony about the children being habitually frightened and her having to take them out of the home and also the testimony of Mr. L.'s own parents as to his aggressive behavior with Matthew.

There's also the social worker's testimony, her expert testimony as to risk, her risk assessment. I did find her testimony credible that she did not go there with the express purpose to remove them, but I guess to check out the incident about the ashtray and then made her decision thereafter based on Mr. L.'s conduct and her assessment of the entire situation.

I also credit the testimony that Ms. D., the mother of the young children, is reliant on Mr. L. and perhaps intimidated by him. And interestingly enough, that comes from one of his witnesses. There's certainly a suggestion of it throughout this case. But I do credit that as well. It came from her testimony as well.

All right. That then is my analysis of the facts.

The juvenile court's disposition included the following:

THE COURT: Based on the entirely of these arguments, I'm going to order as follows in terms of placement. The children will, having been found to be children in need of assistance, will return to the care and custody of their

mother under an order of protective supervision. She will live with them either in the townhouse with her father present living in the home or if somehow that is not found to be a viable option for the family, then they are to find other quarters together somewhere, that is the mother, the children and the [grand]father.

The juvenile court also ordered psychological evaluations for both parents. Appellant was directed to participate in parenting education, and would have visitation, "minimum weekly," under Department supervision.

We shall set forth additional facts below as we address the issues raised on appeal.

**DISCUSSION**
**Standard of Review**

Where the juvenile court reaches a purely legal conclusion, it is subject to plenary review. *See In re Shirley B.*, 419 Md. 1, 18 (2012). We review the juvenile court's ultimate custody determinations for abuse of discretion. *In re Yve S.,* 373 Md. 551, 585-86 (2003) (quoting *Davis v. Davis*, 280 Md. 119, 125-26 (1977) (footnote omitted)). *See In re: Caya B.*, 153 Md. App. 63, 74-75 (2003). The adjudication of a CINA is to be made by a preponderance of the evidence. *In re Joseph G.*, 94 Md. App. 343, 347 (1993) (citing *In re Beverly B.*, 72 Md. App. 433, 440 (1987). We review the juvenile court's findings of fact for clear error. *In re Shirley B.*, 419 Md. at 18 (citations omitted); *In re Joseph G.*, 94 Md. App. at 346. When we review for clear error,

> we may not set aside a finding of fact unless we are left with the 'definite and firm conviction that a mistake has been committed,' . . . and that we will reverse 'most reluctantly and only when well persuaded.' . . . We must respect the evaluation of credibility made by the trial judge of the witnesses present before him. . . . What this comes down to in substance is that we must take a good, hard look at the record as a whole, and when all is said and done, given the unavoidable division of function between a trial and an appellate court, we should only reverse when fairly well persuaded."

*Orient Overseas Line v. Globemaster Baltimore, Inc.*, 33 Md. App. 372, 387 (1976) (quoting *M. W. Zack Metal Company v. S.S. Birmingham City*, 311 F. 2d 334, 337-338 (2d Cir. 1962)).

With these precepts in mind, we turn to the issues at hand.

**I.**

The present action began with a petition to declare appellant's children in need of assistance. Maryland Code (1974, 2006 Repl. Vol., 2010 Supp.), § 3-801 of the Courts and Judicial Proceedings Article ("CJ"), defines "Child in Need of Assistance" and "CINA":

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

"Abuse" includes "physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or is at substantial risk of being harmed by," among other possible individuals, a parent. CJ § 3-801(a). "Neglect" includes the "failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate . . . [t]hat the child has suffered mental injury or been placed at substantial risk of mental injury." CJ § 3-801(s). Section 3-801(r) of the Courts Article defines "mental injury" as "the observable, identifiable, and substantial impairment of a child's mental or psychological ability to function."

It has long been recognized that a parent has the fundamental right to rear his or her children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re: Adoption/Guardianship No. 6Z00004*5, 372 Md. 104, 115 (2002); *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 105 (1994). As pointed out by Judge Harrell for the Court of Appeals,

> [P]arents . . . are invested with the fundamental right of parents generally to direct and control the upbringing of their children; the pages of the United States and Maryland Reports corroborate this point. . . . This liberty interest provides the constitutional context

> which looms over any judicial rumination on the question of custody or visitation.
>
> As a natural incident of possessing this fundamental liberty interest, the [parents] are also entitled to the long-settled presumption that a parent's decision regarding the custody or visitation of his or her child with third parties is in the child's best interest. . . . Where parents claim the custody of a child, there is a *prima facie* presumption that the child's welfare will be best subserved in the care and custody of its parents rather than in the custody of others, and the burden is then cast upon the parties opposing them to show the contrary. . . . This presumption is premised on the notion that the affection of a parent for a child is as strong and potent as any that springs from human relations and leads to desire and efforts to care properly for and raise the child, which are greater than another would be likely to display.

*Koshko v. Naming*, 398 Md. 404, 422-24 (2007) (citations and internal quotation marks omitted).

"The parental right is not absolute, however." *In re Shirley B.*, 419 Md. at 21; *In re Najasha B.,* 409 Md. 20, 33-34 (2009) (stating "where abuse or neglect is evidenced, particularly in a CINA case, the court's role is necessarily more pro-active.") (citation omitted). If the court grants a petition to declare a child in need of assistance, then the court may commit the child to the custody of a parent on terms the court considers appropriate. CJ § 3-819(b)(1)(ii)(2)(A.). The court may also place a child under the protective supervision of the local department on terms the court considers appropriate, and it may order the child's parent, guardian, or custodian to participate in rehabilitative services that are in the best interest of the child and family. CJ § 3-819(c)(1)(i), (c)(1)(iii).

### A. Mental Injury

Appellant first contends that, "in the absence of any expert evaluation of the children," the juvenile court clearly erred in finding that the children were exposed to a substantial risk of mental injury as a result of appellant's behavior. He maintains that there is no evidence that identifies any mental injury in either child, or suggests the likelihood of mental injury as that condition is defined in the Courts Article. With respect to disposition, appellant asserts that because evidence of the likelihood of mental injury was lacking, the juvenile court's order depriving appellant of custody was not justified.

The children, through counsel, remind us that a child may be declared a CINA due to neglect "without actual harm," *see In re Andrew A.*, 149 Md. App. 412, 418 (2003), and point out that the record contains "ample evidence of observable and substantial impairment of Matthew's ability to function[.]" The children also cite *In re Dustin T.*, 93 Md. App. 726, 731 (1992), for the proposition that "a parent's past conduct is relevant to a consideration of his or her future conduct." The Department similarly responds that the juvenile court's determination is amply supported by the record, and that the Department carried its burden of proof by a preponderance of the evidence.

We agree that the record contains sufficient evidence to sustain the juvenile court's determinations that the children are CINA. The social worker, Ms. King, described appellant as "in the top five out of control aggressive people I've dealt with. I mean, he might even be the top." Appellant's mother, Annie L., recounted that the children would shy away from people, and that Matthew seemed particularly afraid of men. Appellant's anger was chronicled by others. For example, Marta testified that appellant "raises his voice to where he makes Matthew very afraid of him." We are not persuaded by appellant's argument that the lack of an expert opinion undermines the juvenile court's findings. We emphasized in *In re Nathaniel A.*, 160 Md. App. 581, 596 (2005), that "[t]he purpose of the act is to protect children — not to wait for their injury." The facts, as found by the juvenile court are more than sufficient to establish a "substantial risk of harm." There may not have been a discrete diagnosis, for example, of mental injury, but Ms. King, who was accepted as an expert social worker who assesses risk, provided testimony, credited by the juvenile court, that is sufficient to establish a "substantial risk of harm" such that the children would be deemed to be CINA. *See In re Nathaniel A.*, 160 Md. App. at 596 (citing *In re: Andrew A.*, 149 Md. App. at 419).

For these reasons, the record evidence does not establish that the court clearly erred when it found that the children are in need of assistance.

### B. Restrictions on Appellant

Appellant next contends that, assuming the juvenile court's CINA finding "could be sustained," there was no justification for the juvenile court's disposition requiring appellant to leave the home. We hold that the juvenile court did not abuse its discretion by ordering this disposition.

The Courts article does not *require* separation of a parent from child, but it is within the court's power to do so if the circumstances allow and require it. *See* CJ § 3-819(b)(1)(ii)(2.)(A.). As stated above, our standard of

review is whether the juvenile court abused its discretion in making this determination. We reiterate that the Court of Appeals has stated that where there has been a finding of CINA, "the court's role is necessarily more proactive" than in other custody determinations. *In re Najasha B.*, 409 Md. at 33-34. The "juvenile court, 'acting under the State's *parens patriae* authority, is in the unique position to marshal the applicable facts, assess the situation, and determine the correct means of fulfilling a child's best interests.'" *Id.* (citation omitted). As stated by the Court of Appeals on the issue of discretion,

> [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 re Yve S.*, 373 Md. at 583-84.

Here, we cannot say that the court has acted against the children's best interests by ordering appellant from the home. The crux of the CINA finding — and the court's intervention — was appellant's issues with anger and his denial thereof, both supported by ample record evidence. Moreover, there is testimony that Marta frequently acted to protect the children by temporarily removing them from the home when appellant was enraged. It appears from the record that appellant does not currently have that critical issue under control at this time, and he left the court with little choice but to protect the children from exposure to his angry outbursts while he attempts to resolve his anger management problems. We are therefore unable to conclude that the juvenile court abused its discretion by fashioning the remedy in this case.

**II.**

We come to appellant's argument that the juvenile court erred by limiting his cross-examination of Ms. King by not permitting counsel to cross-examine Ms. King with the contents of a Veteran's Administration Hospital "evaluation." We are not persuaded by appellant's argument.

This issue arose during the testimony of Ms. King, who opined that the children were at risk because appellant could not control his anger and because he intimidated Marta. Appellant's counsel sought to cross-examine Ms. King using an "evaluation" prepared by the VA Hospital:

> [APPELLANT'S COUNSEL:] And he's also taken the initiative to get an evaluation done?
>
> A Yes.
>
> Q And you've seen that evaluation?
>
> A Yes.
>
> Q And it shows that he doesn't have PTSD or anger management problems?
>
> [COUNSEL FOR THE DEPARTMENT:] Objection. That's not in evidence. That needs to be in evidence before those questions are asked.
>
> THE COURT: Sustained.
>
> [APPELLANT'S COUNSEL]: Your Honor, this is cross-examination of someone who the Department has successfully created as an expert.
>
> THE COURT: Yes. I sustained the objection.

As noted by the parties, the scope of a cross-examination of an expert is reviewed for abuse of discretion. *See Wrobleski v. de Lara*, 353 Md. 509, 515 (1999); *Pfeifer v. Phoenix Insurance Co.*, 189 Md. App. 675, 681 (2010). Appellant relies on Rule 5-703, which provides:

> **(a) In general.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
>
> **(b) Disclosure to jury.** If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
>
> **(c) Right to challenge expert.** This Rule does not limit the right of an opposing party to cross-examine an

> expert witness or to test the basis of the expert's opinion or inference.

Appellant's reliance on Rule 5-703 is misplaced, because the court's ruling was only that questioning could not continue *because the evaluation had not yet been admitted into evidence*. Thus, if appellant wished to continue his questioning, he was required to move the report into evidence, at which point he would have had to establish that the report was trustworthy, necessary to illuminate testimony, unprivileged, and reasonably relied upon by the expert. Appellant, however, did none of this, and instead merely insisted that his questioning should be allowed to continue because the witness was an expert.[10] The court therefore did not err in sustaining the objection to appellant's cross-examination, and appellant did not present (or preserve) the report's admissibility under Rule 5-703. Thus, the record reveals no abuse of discretion in the court's evidentiary rulings.y

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

1. On cross-examination by the Department's counsel, appellant denied saying this.

2. The house is actually owned by Marta's father, who has permitted Marta and appellant to reside there at a discounted rent. The owner had a rule prohibiting any pets or other occupants. Brian Sr. told Marta's father about seeing additional people at the house, and because of this incurred appellant's wrath. Appellant then told Brian Sr. that "he [appellant] was no longer part of our family, that [Brian Sr.] was no longer allowed to see the grandchildren and not to call him, not talk to him, he's done, he's over, period, end of story."

3. Christine also recalled receiving a telephone call from appellant in which the latter essentially accused Danylo of taking a bottle of Vodka. After she denied that Danylo would take appellant's Vodka, Christine ended the call. Appellant persisted, and called "several times later." Christine did not pick up the phone because it "was the middle of the night."

4. Marta later testified that on one occasion her father "forced" her to go to a hotel. She acknowledged that appellant has defended her when her parents had "put her down" or criticized her.

5. This was the instance where Sergue voiced concern that people were staying at the house who did not belong there.

6. On cross-examination by the Department's counsel, appellant denied saying this or threatening Marta. He insisted that he "would never put physical harm onto [his] kids or onto Marta."

7. On cross-examination by the children's attorney, Ms. King further explained:

> He — there seemed to be no calming him down. That was what struck me. People are never happy when Child Protective Services knocks at their door, and I've certainly been yelled at before, but usually if you give a person a minute or two and listen to them and then explain what the process is, there's, you know, they calm down and you can talk about it. And he was just never anywhere near that point.
>
> It was each time you try and say something to him, it was kind of met with kind of almost a lunge forward and waving his arms. It just never felt safe to get another, to get a sentence out. It, every sentence agitated him further, no matter what the sentence was about.

8. Ms. King had observed their interactions on "three or four [supervised] visits[.]"

9. On cross-examination, appellant explained that Marta's mother, Christine D., threatened to call Social Services because of Sophia's injury.

10. Appellant points out that the report was later admitted as evidence of appellant's fitness for custody, but that is irrelevant to its admissibility under Rule 5-703 as part of Ms. King's cross-examination.

Cite as 4 MFLM Supp. 45 (2012)

**Adoption/Guardianship: termination of parental rights: incarcerated parent**

# In Re: Adoption/Guardianship of Isis Y., Malik Y. and Asia Y.

*No. 0996, September Term, 2012*

*Argued Before: Wright, Matricciani, Rodowsky, Lawrence F. (Ret'd, Specially Assigned), JJ.*

*Opinion by Wright, J.*

*Filed: January 12, 2012. Unreported.*

**In terminating a father's parental rights, the court duly considered all statutorily required factors and articulated its conclusions on the record, including its finding that it would be an unacceptable risk to return the children to the care of their father, who killed their mother and is serving a life sentence.**

The appellant, Cleaven W., is the father of Isis Y., Malik Y., and Asia Y. Cleaven W. and Veronica W., the children's mother, were married and living together until approximately November 2008. At that time, Veronica W. took the children to live with her cousin, Carlin R., in an effort to escape from acts of domestic violence. Two weeks later, Cleaven W. fatally stabbed Veronica W. outside a Baltimore City Courthouse. In February 2012, Cleaven W. was convicted of first-degree murder and is currently serving a life sentence.

On November 20, 2008, the Baltimore City Department of Social Services ("Department") filed Child in Need of Assistance[1] ("CINA") petitions for each child in the Baltimore City Juvenile Court. The children were placed in shelter care[2] with their mother's cousin during the proceedings. The Circuit Court for Baltimore City found the children to be CINA on May 4, 2009, and it ordered that neither Cleaven W. nor the paternal grandmother were to have any contact with the children. On October 9, 2009, the Department filed a Petition for Guardianship with the Right to Consent to Adoption or Long-Term Care Short of Adoption, which sought to terminate Cleaven W.'s parental rights to the children. On April 29, 2010, the court ordered a permanency plan of adoption by a relative.[3] The court held a motions hearing on January 3, 2012, and held a termination of parental rights ("TPR") hearing on April 26, 2012, April 29, 2012, and May 17, 2012. On May 17, 2012, the court granted the petitions to terminate Cleaven W.'s parental rights and Cleaven W. timely appealed.

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

**Factual and Procedural Background**

On January 3, 2010, the court held a preliminary motions hearing to address Cleaven W.'s motion to strike his appointed counsel and the Department's motion for a protective order prohibiting Cleaven W. from sharing information in the court record with any third party, including his mother. Cleaven W. had filed two motions to strike his counsel, the first on November 22, 2010, and the second on December 1, 2010, in which he asserted that he was unsatisfied with his counsel's performance and that she had failed to provide him with a copy of court records upon request. The court cautioned Cleaven W. against proceeding *pro se* and warned him that his interests would be better represented by counsel. Before the court ruled on the motions, Cleaven W.'s attorney suggested that she could remain in an advisory capacity with Cleaven W. presenting his own case. Cleaven W. consented to this arrangement, and the court instructed Cleaven W.'s attorney to draft a limited representation agreement. The court then denied Cleaven W.'s motion to strike his counsel.

After addressing Cleaven W.'s motion to strike counsel, the court heard argument regarding the Department's motion for a protective order prohibiting Cleaven W. from sharing information in the court record with any third party, including his mother. The court granted the motion, determining that Cleaven W. was prohibited by statute from sharing information about the proceedings with anyone who was not a party to the case.

After the court granted the State's motion, Cleaven W. made an oral motion for an emergency psychiatric evaluation of Isis Y. Cleaven W. argued that the Department's therapist had diagnosed Isis Y. with post-traumatic stress disorder, but the therapist was not qualified to treat post-traumatic stress disorder. He further asserted that the therapist should be able to evaluate Isis Y.'s bond to her paternal grandmother. The court noted that Cleaven W. did not present evidence of imminent harm as required for an emergency evaluation. The court ordered that Isis Y. be made

available for a bonding evaluation regarding her bond to Carlin R. and the paternal grandmother with both Cleaven W.'s therapist and the children's therapist. The court limited the evaluation to Isis Y.

At a postponement hearing held on January 21, 2012, Cleaven W. requested that the court's order, permitting a bonding evaluation of Isis Y., include an evaluation of his other children. The court denied the motion. On January 24, 2012, Cleaven W. filed a Motion for Court Ordered Clarifications for "Bonding Evaluation" in which Cleaven W. again requested that all of his children be made available for a bonding evaluation by a therapist of his choosing. On February 1, 2012, the court issued a written order denying Cleaven W.'s motion. In its order, the court noted that Cleaven W. is permitted to move for an independent medical examination of the children, however, before the court can order such an evaluation, Cleaven W. "must demonstrate good cause for such an evaluation" and "must show that the proposed examination will not be harmful to the [children]." The court concluded that Cleaven W. failed to produce any evidence supporting either of the required showings, and, therefore, denied the motion. On March 14, 2012, Cleaven W. filed an amended motion to revise the court's order. On April 6, 2012, the court denied the aforementioned motion.

The TPR hearing began on April 26, 2012, with the Department calling Njeri Gaines, the children's therapist. Gaines testified that she had worked with the children since December 2008, meeting with them weekly for both individual and family therapy. Gaines also testified that both Isis Y. and Asia Y. had expressed a desire to stay with Carlin R. Gaines further stated that all of the children had expressed a desire not to live with their father. According to Gaines, Carlin R. provides "a stable, loving, caring environment where the children will be secure." Furthermore, Gaines stated that during her sessions with the children, all three had expressed a desire to be adopted.

Following Gaines's testimony, the Department called Mary Ann Joynes, the supervisor on the case since February 2009. Among other things, Joynes testified that Carlin R. was willing and able to adopt the children. The Department's last witness was Armando Kumara, the current case manager. Kumara testified that he meets with the children, both privately and in a group, on a regular basis. He further testified that during these meetings the children have expressed a desire to remain with Carlin R.

After the Department concluded its case, Cleaven W. called Carlin R. who testified regarding her care for the children. Following Carlin R.'s testimony, the hearing was continued until April 29, 2012. On the second day of the hearing, Cleaven W. attempted to call Cathy Fox, the first social worker assigned by the Department to work with the children; however, she was not present. Unable to question Fox, Cleaven W. proceeded with his other witnesses including several family members who testified regarding their bond with the children. At the end of the second day, the court continued the trial until May 17, 2012, to allow Cleaven W. to obtain the appearance of Njeri Gaines and Cathy Fox.

On May 17, 2012, Cleaven W. chose not to call Gaines, and Fox was not available to testify. Cleaven W. made an oral motion to continue the case so that Fox could testify, but the court denied the motion. Following closing arguments, the court ruled in favor of the Department terminating Cleaven W.'s parental rights as to each child. In issuing its ruling from the bench, the court placed its specific findings on the record.

**Questions Presented**

1. Did the trial court err by denying Mr. W.'s motion to strike counsel?
2. Did the trial court err by failing to present any discussion of the statutory factors enumerated in Md. Code Ann. Fam. Law Art. § 5-323?
3. Did the trial court fail to apply the Md. Code Ann. Fam. Law Art. § 5-323(d)(4) factors by 1) [ ] delegating the decision regarding whether the children would speak with the court to their attorney rather than making an independent decision and 2) declining to order a bonding study to evaluate the children's attachment to their paternal relatives?
4. Did the trial court err by denying the father's request for a continuance to present the testimony of a missing witness or alternatively to proffer her testimony?

**Discussion**

**I. The court did not err in denying Cleaven W.'s motion to strike his counsel and instead allowing Cleaven W. and his attorney to enter into a limited representation agreement.**

Cleaven W. argues that the trial court violated his due process rights when it denied his motion to strike his appointed counsel. To support his position, he cites *Snead v. State*, 286 Md. 122, 123 (1979), where the Court of Appeals noted that criminal defendants not only have the right to be represented by counsel at trial, but they also have the right to refuse the assistance of counsel and present their own defense. Cleaven W. urges us to expand the Court of Appeals's

holding in *Snead* to include the parents in a CINA proceeding. Additionally, Cleaven W. avers that the court improperly required that he proceed under a hybrid model of representation where he was neither represented by counsel nor representing himself *pro se*.

The State responds that Cleaven W. cannot challenge the court's order on appeal because he consented to the arrangement at trial. Specifically, the State asserts that Cleaven W. waived his right to appeal the court's denial of his motion to strike counsel when he agreed to the limited representation arrangement proposed by his attorney.

We need not address Cleaven W.'s constitutional argument or his contention that the representation model that resulted from the court's ruling was inappropriate because we agree with the State that Cleaven W. waived his right to appeal the issue when he consented to the court's order. "It is well-settled that a party in the trial court is not entitled to appeal from a judgment or order if that party consented to or acquiesced in that judgment or order." *In re Nicole B.*, 410 Md. 33, 64 (2009). When Cleaven W.'s appointed counsel proposed a limited representation model at the hearing on January 3, 2012, Cleaven W. not only did not object, but he agreed to the arrangement by stating "[t]hat's reasonable" in reference to his attorney's suggestion. Having consented to the court's order, Cleaven W. cannot now challenge it on appeal.

**II. The court considered all statutorily required factors and articulated its conclusions on the record.**

"When the State seeks to terminate parental rights without the consent of the parent, the standard is whether the termination of rights would be in the best interest of the child." *In re Abiagail C.*, 138 Md. App. 570, 586 (2001) (citations omitted). When making that determination, the court is required to consider the factors enumerated in Md. Code (1984, 2006 Repl. Vol.), § 5-323(d) of the Family Law Article ("FL") and make specific findings as to each factor. *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007). In 2007, the Court of Appeals explained the trial court's role in TPR cases as follows:

> The court's role in TPR cases is to give the most careful consideration to the relevant statutory factors, to make specific findings based on the evidence with respect to each of them, and, mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make a continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. If the court does that — articulates its conclusion as to the best interest of the child in that manner — the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.

*Id.* at 501 (emphasis and footnote omitted).

On appeal, "we must ascertain whether the court considered the statutory criteria, whether its factual determinations were clearly erroneous, whether the court properly applied the law, and whether it abused its discretion in making its determination." *In re Cross H.*, 200 Md. App. 142, 155 (2012). Here, Cleaven W. argues that the court failed to consider the factors enumerated in FL § 5-323(d), so we will focus our review on this contention. FL § 5-323(d) provides as follows:

> *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 efforts 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.

First, pursuant to FL § 5-323(d)(1), the court must consider the efforts on the part of the Department to facilitate a reunion between the parent and the child. However, FL § 5-323(e)(2) permits the court to waive the Department's obligation to provide reunification services where the court finds by clear and convincing evidence that one or more of the circumstances listed in subsections (d)(3)(iii), (iv), or (v) exists. Here, the court found by clear and convincing evidence that Cleaven W. committed a crime of violence against the children's mother. Therefore, the court correctly waived the Department's obligation to provide reunification services pursuant to its authority under FL § 5-323(e)(2).

Second, FL § 5-323(d)(2) requires that the court consider the parent's efforts to care for the child and to maintain a relationship with the child. The court stated that Cleaven W. was serving a life sentence for killing the children's mother, and that as a result of Cleaven W.'s incarceration, "there's just nothing that the father can provide through the father, such that he can take care of the children." In making this statement, the court concluded that Cleaven W. was unable to care for the children or maintain a relationship with them because of his incarceration.

Third, having found the existence of a crime of violence against the children's mother under FL § 5-323(d)(3)(iv), the court was required to make a specific finding "whether return of the [children] to a parent's custody poses an unacceptable risk to the child's future safety." FL § 5-323(f). The court concluded that "in all three cases this Court clearly finds that it would be an unacceptable risk to return the children to the care of a father who has killed the mother and is serving life in imprisonment [sic] in the Division of

Corrections."

Fourth, FL § 5-323(d)(4) requires that the court consider the child's emotional ties to the parent, siblings, and others who may significantly affect the child's interests as well as the child's adjustment to their new placement and the child's desire to maintain a relationship with the parent. In issuing its decision, the court noted that Gaines had testified that the children "don't want life with their father." Based on Gaines's testimony, the court found that "[a]ll three children desire . . . [to sever] their relationship with the father." The court further credited Gaines's testimony in finding that the children had a close bond with each other and had bonded with Carlin R. Further, the court found that Carlin R. was providing for the children's needs and taking good care of them. Ultimately, the court concluded:

> not only are the children making the adjustment to having lost their mother by a brutal death and having lost their father to incarceration for, as the father says, a term of life, the children have bonded with each other, bonded with [Carlin R.], made the adjustment to home, school, community, family and for the lack of a better term, new situation that they have found themselves in for the last 2+ years or so.
>
> It would be a travesty of justice not to grant the Department's petition in this case.

Because the court considered the statutory factors and articulated its conclusions, it did not abuse its discretion in terminating Cleaven W.'s parental rights.

**III. The court did not abuse its discretion when it refused to conduct an *in camera* interview of the children or to order a bonding study to assess the children's attachment to their paternal relatives.**

Cleaven W. argues that the court abused its discretion when it refused to conduct an *in camera* interview of the children and/or have the children independently evaluated regarding their bond with the paternal family. Cleaven W. avers that the court's refusal to permit him to present this evidence precluded the court from considering the children's emotional ties to others who may affect the children's best interests and the children's feelings about ending the parent-child relationship as required by FL § 5-323(d)(4). Further, Cleaven W. contends that the court improperly delegated judicial authority to children's counsel by permitting counsel to determine whether it was necessary to interview the children.

The State responds that the court considered the required factors in FL § 5-323(d)(4) and placed a statement of its findings on the record. The State further asserts that the court properly denied Cleaven W.'s requests for an *in camera* interview and a bonding study because the purpose of these procedures would have been to evaluate the children's bond with the paternal family, which is irrelevant in a TPR proceeding as all the court is concerned with is determining the fitness of the parent and not the children's ultimate placement.

We conclude that the court did not delegate its judicial authority when it refused to conduct an *in camera* interview of the children to determine whether they had a close bond with the paternal family. To support his argument, Cleaven W. relies on the Court of Appeals's decision in *In re Mark M.*, 365 Md. 687, 707 (2001), where the Court held that the trial court erred when it ordered that "visitation [with the mother] will not occur until [Mark M.'s] therapist recommends it." In reaching this conclusion, the Court noted that FL § 9-101 requires that the court make a determination that abuse or neglect is not likely to occur before granting custody or visitation where "the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding. . . ." *Id.* at 707-08. The Court further stated: "In cases where prior abuse is evidenced, the statutory mandate is that the court make this specific finding. The court cannot delegate this determination to a non-judicial agency or an independent party." *Id.* at 708 (emphasis omitted).

Here, unlike in *In re Mark M.*, the court did not grant an independent party the ability to make a decision requiring judicial authority. Rather, on February 10, 2012, the court issued a Protocol Order regarding procedures to be followed during the TPR proceedings. Section IV of that order states in pertient part: "[i]f Respondents' Counsel believes that an interview of the Respondents is appropriate in order to assist the trier of fact, the interview will be conducted in chambers, via closed circuit television, and the interview shall be broadcast to the courtroom's television." In denying Cleaven W.'s request for an *in camera* interview, the court explicitly referenced this order and upon determining that children's counsel did not recommend an *in camera* interview, the court ruled in accordance with the order. In following the terms of its prior order, the court did not delegate judicial authority to children's counsel. Nor did the Protocol Order constitute a delegation of judicial authority because the court did not grant children's counsel the authority to make a determination that has been reserved for the court as was the case in *In re Mark M.* Rather, the court made it clear that the primary factor it would consider in the exercise of its discretion was the recommendation of the children's counsel and then it exercised its judicial authority.

The court did not abuse its discretion when it

denied Cleaven W. the opportunity to have the children interviewed, or to have a bonding study conducted, because these procedures would only have produced evidence that was irrelevant to the TPR proceeding. As this Court stated in *In re Cross H.*, 200 Md. App. at 152, the appropriate focus of a TPR hearing is not to determine the potential suitability of placement with specific relatives; rather it is to determine the fitness of the parents to provide for and meet the needs of the children. Therefore, any testimony elicited by Cleaven W.'s requested proceedings regarding the children's bond with the paternal family would have been irrelevant to the court's determination in the TPR hearing. Pursuant to Maryland Rule 5-402, [4] this testimony was inadmissible.

**IV. The court did not abuse its discretion when it denied Cleaven W.'s second request for a continuance.**

Cleaven W.'s last argument on appeal is that the court abused its discretion when it refused to grant him a continuance to obtain the presence of Cathy Fox. He asserts that Fox's testimony was important to his case, and that he had made adequate efforts to obtain her appearance. The State responds that the court did not abuse its discretion because Cleaven W. did not present evidence that would require the court to grant a continuance.

"[T]he decision to grant a continuance lies within the sound discretion of the trial judge." *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006). To establish that the court abused its discretion by denying a request for a continuance, the party requesting the continuance must show: "first, that he had a reasonable expectation of securing the witness within a reasonable time; second, that the evidence was competent and material and that the case could not be fairly tried without the witness; and, third, that he made diligent efforts to obtain the witness." *Fontaine v. State*, 134 Md. App. 275, 298 (2000) (citation omitted).

Here, the court did not abuse its discretion when it refused to grant a continuance because Cleaven W. could not demonstrate that he had a reasonable expectation of obtaining Fox's appearance or that he had taken reasonable steps to obtain her appearance. Cleaven W. twice was unable to obtain Fox's appearance, yet he failed to show a reasonable expectation that he would be able to secure her appearance within a reasonable time. Cleaven W.'s prior efforts to obtain Fox's appearance consisted of two subpoenas sent to her office. At the hearing on May 17, 2012, Cleaven W. could not confirm that Fox was, in fact, served but only that a subpoena was issued. Moreover, the record does not indicate any effort by Cleaven W. to find an alternate address where Fox would be more likely to receive the subpoena. In view of Cleaven W.'s failure to meet his burden, the court did not abuse its discretion in denying his request for a continuance.

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

**FOOTNOTES**

1. A "CINA" is a child who requires court intervention because the child 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 (1973, 2006 Repl. Vol.), § 3-801(f) of the Courts & Judicial Proceedings Article ("CJP").

2. "'Shelter care' means a temporary placement of a child outside of the home at any time before disposition" as a CINA. CJP § 3-801(y).

3. Cleaven W. appealed this decision, which was affirmed by this court in *In re Isis Y., Malik Y., and Asia Y.*, No. 618, Sept. Term 2010 (Ct. Spec. App.) (Unreported opinion filed on February 10, 2012).

4. Md. Rule 5-402 provides as follows:

> Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible.

Cite as 4 MFLM Supp. 51 (2012)

**CINA: evidence of neglect: award of custody to other parent**

# In Re: Ethan B.

*No. 1260, September Term, 2012*

*Argued Before: Eyler, Deborah S., Meredith, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.*

*Opinion by Eyler, Deborah S., J.*

*Filed: February 8, 2012. Unreported.*

**The master's receipt of inadmissible hearsay did not affect the factual findings upon which the circuit court relied in determining that the child had been neglected by his mother, nor its discretionary decision to award custody to the child's father, who was able and willing to care for him.**

The Circuit Court for Worcester County, sitting as the Juvenile Court, issued an order sustaining allegations that Jill G. the appellant, neglected her son, Ethan B., and awarding custody of Ethan to his father, appellee Leland B.[1] The Worcester County Department of Social Services ("the Department") and Ethan also are appellees before this Court. Jill appeals from that order, posing two questions for our review:

I. Did the juvenile court err in concluding that the juvenile master's erroneous admission of hearsay testimony was harmless error?

II. Did the juvenile court err in concluding, by a preponderance of the evidence, that the allegations against Jill G. were sustained and in removing Ethan from her custody?

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

### FACTS AND PROCEEDINGS

Ethan, now age 5, was born on August 27, 2006, to Jill and Leland. Ethan's parents never were married. When Ethan was six months old, Jill married Ricky G. In July of 2010, Jill and Ricky had a daughter together, Haley. At all relevant times, Ethan lived with Jill, Ricky, and, after July 2010, Haley, in a house in Snow Hill, which they rented from Jill's parents. Jill stayed home with the children and Ricky worked several jobs, including a position at a chicken farm.[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.*

Leland lives in Indiana with his wife of more than two years, Heather B.; Heather's daughter Tiffany, age 11; and Leland and Heather's two children, William, age 8, and Brianna, age 5. Leland also has a daughter from a previous relationship, Makaila, who resides with her mother in Salisbury.

When Ethan was born, Leland lived on the Eastern Shore. He maintained sporadic contact with Ethan for the first six months of his life. In March of 2007, Jill moved to West Virginia with Ricky and Ethan. She did not tell Leland she was moving or provide him with a forwarding address. She also voluntarily dismissed an action seeking to establish child support. On a date unclear from the record, Leland moved to Indiana. He had no further contact with Ethan until the instant proceedings.

Ethan came to the attention of the Department in the spring and summer of 2010, when it received three separate referrals for neglect and/or abuse. First, in March of 2010, Ricky's mother contacted the Department and reported that Ricky had threatened to kill her and her male friend.[3] The Department took no action with respect to this referral because it did not involve allegations of abuse or neglect of Ethan or his sister.

On July 21, 2010, the Department received a second referral from Ethan's maternal grandmother, Deborah B. ("Mrs. B"). Mrs. B and her husband, Ralph B. ("Mr. B") also lived in Snow Hill. Mrs. B reported that on July 8, Jill had dropped Ethan off at her house with no explanation as to when she would return to pick him up. On July 13, Jill picked Ethan up, only to return him two hours later, again without explanation. On July 21, Mrs. B called Jill to ask when she planned to pick Ethan up. Jill replied by asking whether Ethan needed more clothing and did not express any plans to pick him up.

Mrs. B further reported that Ethan was "suffering from extreme night terrors, screaming and flailing his arms in terror while he was asleep." Finally, she reported that Ricky was verbally abusive to his family, had threatened Mrs. B's life, and that she feared retaliation if he learned that she had made the referral. Based on this referral, the Department initiated an investigation.

On August 16, 2010, while the first investigation was in progress, the Department received a third referral indicating that Ricky had threatened to harm Ethan. That same day, Kevin Schablein, a child protective services case worker for the Department, went to Jill and Ricky's home to interview Jill. He observed that Jill had a black eye. She offered a vague explanation as to how she had injured herself. Three days later, on August 19, Schablein spoke by telephone with William Yost, Ricky's former employer at the chicken farm. Mr. Yost reported that Ricky said to him "if he [(Ricky)] thought he could get away with it and not go to jail he would kill Ethan." That same day, Ethan was removed from the home.[4] He spent one night in the care of Mr. and Mrs. B before being placed in foster care.

On August 20, 2010, the Department filed a CINA petition alleging that Jill had neglected Ethan and was "unable and/or unwilling to give proper care and attention to him."

At some point, Leland, who had been notified by Jill of the CINA proceedings, contacted the Department to express his interest in being a custodial resource for Ethan.[5] The Department began working with Leland to determine his suitability as a custodian. Leland also provided the Department with contact information for his mother and sister, both of whom resided in Delaware. Finally, the Department considered placing Ethan with Mr. and Mrs. B, Jill's parents, but they were fearful of Ricky and expressed concern about caring for Ethan for that reason.[6]

On September 13, 2010, a shelter care hearing was held before a juvenile master. The master took testimony from Schablein, Jill, Ricky, Leland, and Heather and determined that Ethan should remain in foster care pending an adjudication of the allegations of the CINA petition.

On October 25, 2010, the adjudicatory hearing was held before the same master. At the outset of the hearing, the Department advised the master that it no longer considered Ethan to be a CINA because Leland was willing and able to care for him. Therefore, the Department intended to present evidence that Jill had neglected Ethan and evidence that Leland was a suitable custodian for Ethan.

The Department called as witnesses Schablein and Stacy Smith, the foster care caseworker assigned to Ethan's case. Schablein testified concerning the Department's investigation of the allegations against Jill. He explained that, since the shelter care hearing, the Department had received a fourth referral. The reporter said that Ethan had stated that, when he misbehaved, Jill sent him to sit outside in a doghouse for a "timeout." After receiving this report, Schablein interviewed Ethan at his foster home. Ethan repeated the allegation and confirmed that Jill enforced this form of punishment. Schablein testified that he had observed doghouses on Jill and Ricky's property. Schablein explained that the Department had concerns as to Jill's care of Ethan and also feared that Jill could not or would not protect Ethan from Ricky.

With respect to Leland, Schablein testified that Leland was willing and able to take custody of Ethan. The Indiana Department of Child Services had conducted a home visit and found Leland and Heather's home to be "appropriate." Ethan would have his own room and Heather was a stay-at-home mother who could care for him until he reached school age. Leland was employed as a warehouse worker at a local grocery store chain.

Schablein had observed two visits between Ethan and Leland. The first visit occurred soon after Ethan was removed from Jill's home. At that visit, Ethan was initially very "standoffish" and became physically ill. Over the course of an hour, however, Ethan warmed up and began engaging in play with Leland. At the end of the first visit, Ethan hugged Leland goodbye. The second visit occurred on September 13, 2010, immediately after the shelter care hearing. Heather and Leland's mother also were present for this visit. Again, Ethan was shy at first, but warmed up fairly quickly and was "talking and interacting" with all three relatives by the end of the visit.

Schablein also testified concerning the conditions at Jill and Ricky's home. During one visit, Schablein observed a rotting deer head near the front door of the home and a rotting dear carcass by the fence in the front yard. Both were covered in flies, maggots, and bugs. Both were in areas accessible to Ethan if he were playing outside.

Smith testified regarding her observations of Ethan's visits with Jill and Ricky and Leland. On August 25, 2010, Ethan was scheduled for his first visit with Jill and Ricky. When Ricky entered the visitation room and sat down next to Ethan, however, Ethan told Smith he was scared. Ethan was removed from the room and the visit did not go forward. The following day, Smith went to pick Ethan up from his daycare for another visit with Jill and Ricky and he refused to go with her. Smith discussed with Ethan the possibility of visiting only with Jill, but he still refused. On that day, his daycare presented Smith with a letter indicating that Ethan had displayed extreme anxiety that morning and had had difficulty separating from his foster parents.

Approximately a week later,[7] Ethan agreed to visits with Jill, but explicitly told Smith "not Ricky." When Smith asked Ethan why he didn't want to visit with Ricky, he got "very, very quiet and wouldn't answer."

Ethan continued to visit with Jill on a twice weekly basis from that point forward. According to Smith,

although the visits were "very appropriate," there was "just not a lot of interaction [between Jill and Ethan] . . . not a lot of talking[.]" In more recent visits, Jill had been "playing with [Ethan] more." Smith described Jill as "very quiet." When asked whether she would characterize Jill as "submissive," Smith replied, "Possibly, yes."

Smith also had observed a visit between Ethan and Leland. She described it as "very appropriate," noting that Leland let Ethan "initiate the level of contact." By the end of the two-hour visit, Ethan and Leland were "playing and acting goofy, there was a lot of laughter and they both hugged each other at the end of the visit."

In addition to the visit Smith had observed, Ethan had visited with Leland on three other occasions. Most recently, on the weekend prior to the hearing, Ethan had visited with Leland and Heather and had been permitted to spend the night with them in a local hotel. Finally, Ethan spoke to Leland and his family by telephone on an almost daily basis.

Leland testified on his own behalf at the hearing and also called as witnesses Heather and Mr. B. Leland testified concerning his employment and the steps he had taken to prepare his home for Ethan. He further testified that, if he were awarded custody of Ethan, he would facilitate supervised visits with Jill any time she wanted to come to Indiana and would make Ethan available for visits whenever he came to the Eastern Shore to visit his family. He also stated that Ethan's maternal grandparents could visit Ethan whenever they wanted.

With respect to his involvement in Ethan's life, Leland testified that he "briefly" supported Ethan financially before Jill dismissed her child support case. After Jill moved to West Virginia, Leland did not know Ethan's whereabouts. In the summer of 2009, Leland located a possible address for Ethan in West Virginia and drove to that location to try to find him. The house was empty, however. In November of 2009, Leland located Jill and Ricky's address in Snow Hill. In early 2010, Leland filed a petition for custody in the circuit court, which Jill opposed. Leland represented himself in that action, while Jill was represented by counsel. After an unsuccessful mediation, a custody trial was scheduled for August 4, 2010. Leland failed to appear for the custody trial and, by order dated August 17, 2010, Jill was awarded sole legal and physical custody of Ethan. Leland explained that he did not appear for the trial because he felt he would be unable to represent himself adequately and would not succeed.

Leland also testified that he experienced a period of depression five years prior, after he and Heather, then his girlfriend, broke up. He voluntarily sought out therapy, was prescribed a sleep aid for about a month and had not experienced any problems since that time.

Heather testified that she could care for Ethan in their home and that he could enroll in a nearby elementary school for kindergarten when he turned 5.

Mr. B testified that Ricky "just [doesn't] get along with people." He recounted that when Ricky would come to pick Ethan up from Mr. and Mrs. B's home, Ethan would cry. Over time, Ethan also began crying in anticipation of Jill coming to pick him up, acting "frightened to death." When Mr. B gave Ethan a hug goodbye, he could "feel [Ethan]'s little heart just pounding, he was scared to death to go home."

Jill testified on her own behalf and called as witnesses Ricky and Edward Pinto, the supervisor of 25 to 30 chicken farms, including the one run by Yost. Pinto testified about conflicts between Ricky and his former employer, Yost, over whether Yost was complying with safety regulations and/or committing fraud at the chicken farm.

Jill and Ricky generally denied all of the allegations against them. Each testified that they did not have many friends in the community and were generally "homebodies." With respect to the July 2010 neglect referral, both explained that they dropped Ethan off at Mr. and Mrs. B's house because Haley had just been born and they were overwhelmed with the demands of a newborn. Jill asserted that she called every day to check on Ethan and her parents told her he was fine, she could "leave him [there]."

Jill further denied ever having sent Ethan to sit in a doghouse for a time out. Jill also testified that during her visits with Ethan, he had twice told her that he wanted to see Ricky. On both of these occasions, Jill and Ethan were unsupervised, according to Jill, so Smith would not have overheard Ethan making these comments.

Ricky testified that he and Ethan were close. He took Ethan hunting because Ethan enjoyed it. Most of the time, they went rabbit hunting with dogs. Occasionally, Ricky took Ethan deer hunting with guns. Ethan never had handled a gun, however. Ricky disputed that deer carcasses ever would be left in the yard. His ordinary practice was to dispose of the carcasses in the woods near the home.

At the conclusion of all the evidence, the master briefly questioned Ethan's foster parents, who were present in the courtroom.[8] The foster mother explained that Ethan had adapted very well to their home and was a happy little boy. She also described recent incidents when Ethan had wet himself. The days that Ethan had accidents corresponded with visits with Jill. He did not have accidents on days that he visited with Leland or with Mr. and Mrs. B. She also stated that Ethan always referred to Ricky by his first name, never as "Dad."

In addition to the testimony, the master took judicial notice, without objection, of photographs introduced at the shelter care hearing depicting the condition of Jill and Ricky's home at the end of August of 2010. On August 27, 2010, after Jill and Ricky ceased paying rent, Mr. and Mrs. B evicted them from their house. The photographs were taken immediately following their eviction. The house was filled with belongings left behind, bags of trash, and there was dog feces on the carpet. The exterior of the property included several large doghouses.

After hearing argument, the master announced her ruling from the bench. She explained that, in order to sustain the allegations against Jill, she had to find that Ethan's "health and welfare [had] been harmed or placed at substantial risk of harm." She noted that this case was "not black and white" and that it came "down to credibility." This was so because the witnesses presented by the various parties testified in direct contradiction to one another concerning key facts. For example, the master noted that Jill and Leland disputed whether "[ ]he was really AWOL for a couple of years" or whether he was "simply being a passive uninvolved father."

The master credited Mr. B's testimony about Ethan's fearful reaction when Jill or Ricky came to pick him up. She also credited the testimony of the foster parents that Ethan referred to Ricky by his first name and that he had wetting accidents that correlated with his visits with Jill. She opined:

> Now, in and of themselves, a lot of these things taken alone maybe aren't determinative . . . but you start to take them together and any reasonable person is going to become concerned. This is a child who described himself immediately on August 25th as scared when Ricky [ ] walked in, that's pretty credible. . . . [S]aid to a social worker right there, he was removed. And by the way, the school let [the Department] know loud and clear the next day that [Ethan] was very anxious and very tense and was exhibiting stress. He told the Department [ ] he didn't want to see [Ricky], he told — according to the maternal grandfather he's also described that exact same presentation of Ethan when dealing with his stepfather.

The master also emphasized what she viewed as a major inconsistency in Jill's testimony. On the one hand, Jill dropped Ethan off at her parents' home shortly after Haley's birth and left him there for 12 days. She testified that Ethan spent considerable time with her parents and that, while this was a lengthier than usual stay, it wasn't particularly out of the ordinary. Yet, when the Department removed Ethan from Jill and Ricky's home, Jill made clear that she would rather Ethan be placed in foster care than go to her parents' home. The master opined that this "sure doesn't say much about putting the needs of Ethan first and foremost."

With respect to the condition of the house, the master emphasized that she took no issue with Ricky hunting or with Ethan being permitted to accompany him hunting. The issue, however, was the presence of a "deer carcass covered with bugs." Similarly, the master took notice of photographs taken of the house immediately after Jill and Ricky moved out which showed "dog feces on the carpet."

She considered the testimony that Jill and Ricky were socially isolated to be "not that big of a deal," but considered it as one factor in her analysis.

The master ultimately found that Ethan's "health and welfare ha[d] been at risk of harm" and, thus recommended that the allegations against Jill be sustained. She also found that Leland was an "able, willing parent" and recommended that, prior to the dismissal of the CINA petition, custody be awarded to him.

On October 29, 2010, Jill filed exceptions to the master's recommendations and requested a *de novo* hearing. She excepted to the admission of Schablein's testimony regarding Yost's hearsay statement that Ricky threatened to kill Ethan and to the master's ultimate recommendations that the allegations of neglect be sustained and that Leland be awarded custody of Ethan. On May 17, 2012, Jill withdrew her request for *de novo* review and agreed to proceed on the record without additional evidence.

On June 27, 2012, the juvenile court issued an opinion upholding the findings and recommendations of the juvenile master. As to Yost's hearsay statement, the court concluded that the master had erred in admitting the testimony, but that the error was harmless given that the master did not rely upon Yost's statement in sustaining the allegations in the petition.

With respect to the master's ultimate recommendations, the court opined that the decision rested largely on credibility findings and the "Master is in the best position to observe the witnesses and gauge their credibility." Thus, the fact that the master chose not to credit Jill and Ricky's testimony "must be afforded great weight." After exercising its "independent judgment of the record," the court concurred in the master's recommendations. The court found "[p]articularly compelling" the testimony about Ethan's behavior "as it relates to [Jill and Ricky]." The court noted the evidence that Ethan had night terrors; that he expressed his fear of Ricky to Smith; that he refused visits with

both Jill and Ricky initially after being placed in foster care; and that, even after visits with Jill resumed, he continued to refuse visits with Ricky. The court opined:

> The evidence is clear that Ethan has an aversion to and a fear of [Ricky]. The Court is concerned about this obvious aversion and fear and, more importantly, the underlying reason for this aversion and fear. Ms. Smith's decision to remove Ethan from [Ricky]'s presence and the daycare's observation of Ethan's nervous behavior following the visits is evidence of the child's fear. Mr. [B]'s similar testimony, and that of Ethan's foster mother, compounds the Court's concern about [Ricky] and the problems that probably will occur if he and Ethan were to live together under the same roof. Specifically, there was disturbing testimony from [Mr. B] concerning Ethan's behavior when confronted with the prospect of returning to his house with [Ricky and Jill]. Mr. [B] testified that he (Ethan) was "scared to death," "his heart was pounding," and "he didn't want to go home," when his mother arrived to take him home. This Court finds that there is legitimate concern of mental injury inflicted upon Ethan, and concurs with the Master that this is evidence of neglect and gives rise to a substantial risk of harm.

The court further found that Jill's decision to leave Ethan with her parents for twelve days "with no explanation, no contact, no indication when she might return and without a change of clothes, constitutes neglect." The court agreed with the master that Jill's conduct in this respect was inconsistent with her subsequent position that Ethan would be better off in foster care than with her parents. The court found "[t]his contradiction disturb[ing]," because it suggested that Jill's "spite and resentment towards her parents took priority over Ethan's best interests."

With respect to the condition of Jill and Ricky's home, the court noted the testimony that a rotting deer carcass and deer head were present on the property in an area accessible to Ethan. This evidence raised concerns about "the sanitation/health issues regarding the presence of maggots on the deer carcasses, the presence of germs, and the close proximity of the carcasses to the child's play area." Turning to photographs of the home after Jill and Ricky moved out, the court emphasized the presence inside the house of "bags full of trash, dog feces on the carpet and a generally unkempt and unsanitary home" and found that the outside of the home was "not properly maintained and did not provide a safe environment for [Ethan]." Based on this evidence, the court determined that Ethan's "living environment at [Jill]'s residence was unclean, unhealthy, and unsafe, and that ordinary standards of care were not maintained."

As to discipline of Ethan, the court found Ethan's report that Jill sent him outside to a doghouse for time outs to be credible, emphasizing that "[n]othing in the evidence undermine[d] the reliability of these statements."[9]

The court also found the lack of "social interaction" in Jill and Ricky's home to be concerning, opining that it is "not in Ethan's best interests to reside in a home environment devoid of social interaction and, where the adults choose to isolate themselves, and Ethan, from others."

Finally, the court found that there was evidence in the record supporting the Department's concerns about Ricky's temper and "volatility" and Jill's inability to protect Ethan from Ricky.

For all of these reasons, the circuit court sustained the allegations of neglect against Jill, opining:

> By way of example and without limitation, the manner in which the child was punished constitutes abuse. The exposure of the child to the rotting deer carcass and the inherent dangers associated therewith, constitutes neglect. The isolation of the child, coupled with his anxious and frightened behavior, is evidence of neglect and even a substantial risk of mental injury. The other evidence set forth above, when subjected to a totality of the circumstances analysis, adequately supports the Master's conclusion that the child's welfare has been placed at substantial risk of harm.

Turning to Leland's fitness to be Ethan's custodian, the court concurred with the master's determination. The court emphasized the testimony from Schablein and Smith regarding the visits between Leland and Ethan; the testimony from Schablein about the positive home study report from the Indiana Department of Child Services; Leland's actions in driving more than twenty hours round trip on numerous occasions to see Ethan during the CINA proceedings; and his testimony as to his desire to be Ethan's custodial parent. Finally, the court noted the testimony of the foster parents that Ethan did not have "accidents" on days he visited with his father.

Jill noted a timely appeal from the court's order.

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

**STANDARD OF REVIEW**

In reviewing the decision of the Juvenile Court, this Court simultaneously applies three different levels of review:

> 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 (2012) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

Thus, while we review the juvenile's court's factual findings with respect to the allegations against Jill for clear error, we review the court's ultimate determination that her conduct constituted neglect and justified removal of Ethan from her custody for abuse of discretion. In so doing, we must be mindful that reversal for abuse of discretion only is warranted when the decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Yve S.*, 373 Md. at 584 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295,313 (1997)).

**DISCUSSION**

**I.**

We begin by briefly disposing of Jill's contention that the juvenile master's erroneous admission of Yost's hearsay statement "warrants reversal." As discussed, *supra*, Ricky worked for Yost on a chicken farm, but had quit prior to the adjudicatory hearing. After the Department received the August 2010 referral that Ricky had made a threat against Ethan, Schablein interviewed Yost.[10] According to Schablein, Yost told him that Ricky said "if he [(Ricky)] thought he could get away with it and not go to jail he would kill Ethan" ("Yost Statement").

The Department subpoenaed Yost to testify at the adjudicatory hearing, but he did not appear. Schablein testified that the Department had learned from Yost's family members that Yost was hospitalized due to a severe illness and was not expected to live. Based on this testimony, the master found that Yost was unavailable and ultimately ruled the Yost Statement was admissible under Md. Rule 5-803, pertaining to exceptions to the hearsay rule when the declarant is unavailable. The master did not specify under which exception she was admitting the Yost statement.[11]

Jill attempted to cast doubt on Yost's credibility, offering testimony from Pinto that Ricky had approached him with complaints about Yost's practices in running the chicken farm. While Pinto testified that Ricky made the complaints directly to Yost and that Yost was unaware of the source of the complaints, Ricky testified that he complained openly in front of Yost.

As already mentioned, Jill excepted to the admission of the Yost Statement and the circuit court determined that the master erred in admitting it. The circuit court ruled, however, that the error was harmless because there was ample admissible evidence in the record supporting the master's recommendation and because the master herself did not rely on this evidence, characterizing it as "questionable."[12] Even if we were to agree with Jill that the master "relied" on the Yost Statement in reaching her ultimate determination that the allegations of the petition should be sustained, it is abundantly clear that the circuit court, in exercising its independent judgment, did not consider, much less rely upon, the Yost Statement. Accordingly, any error in admitting this evidence at the adjudicatory hearing was harmless.

**II.**

Jill argues that the evidence of neglect was "speculative at most, and inferences drawn by the Master concerning that evidence were tenuous." She contends the court erred by connecting Ethan's displays of anxiety and fear to any conduct by Jill or Ricky; that the court "inflated the significance of testimony about Ethan's interest in hunting and the presence of deer carcasses in the yard"; that the court inappropriately "passed judgment" on Jill and Ricky's relatively isolated lifestyle; and that the other factual findings were insufficient to support a finding of neglect. She also argues that, even if a finding of neglect was warranted, the court nonetheless erred in concluding that Ethan should be removed from her custody.

At a CINA adjudicatory hearing, the allegations in the petition must be proved by a preponderance of the evidence. Md. Code (2006 Repl. Vol., 2012 Supp.), § 3-817(c) of the Courts and Judicial Proceedings Article ("CJP"). Neglect is defined as

> the leaving of a child unattended or

> other failure to give proper care and attention to a child . . . under circumstances that indicate (1) [t]hat the child's health or welfare is harmed or placed at substantial risk of harm; or (2) [t]hat the child has suffered mental injury or been placed at substantial risk of mental injury.

CJP § 3-801(s). Pursuant to CJP section 3-819(e), when

> the allegations in [a CINA] petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a [CINA], but, before dismissing the case, the court may award custody to the other parent.

We conclude that the juvenile court did not err or abuse its discretion in sustaining the allegations of neglect against Jill and in determining that Ethan should be removed from her custody and placed with Leland. First, to the extent that Jill disputes any of the first level facts as found by the juvenile court, we perceive no clear error.[13] It was clear that the juvenile master found Jill and Ricky to be less than credible and the juvenile court properly deferred to these findings. *See, e.g., Wenger v. Wenger*, 42 Md. App. 596, 604 (1979) (emphasizing that a master acting as factfinder makes "subtle judgments based upon appearance, upon tone of voice, upon even non-verbal communication, etc. that are never available upon the pages of a transcript as perused").

Moreover, the juvenile court's ultimate determination that, at a minimum, the facts as found demonstrated that living with Jill and Ricky placed Ethan's "health or welfare . . . at substantial risk of harm . . . or placed [him at] substantial risk of mental injury" was amply supported by the evidence. The court found that Jill abandoned Ethan, then not even four years old, at the home of Mr. and Mrs. B for nearly two weeks "without a change of clothes." Moreover, the court rejected Jill's testimony that she maintained contact with her parents during that period of time. We agree with the court's assessment that this conduct on the part of Jill "constitutes neglect." Thus, on this basis alone, we would affirm the juvenile court's determination that the allegations of the petition were sustained.

In addition to this evidence, the court also found that Jill disciplined Ethan by sending him outside to sit in a doghouse; that the outside area where Ethan played was in a state of disrepair and contained a rotting deer carcass teeming with flies and maggots; and that the photographs of Jill's and Ricky's home following their eviction depicted unsanitary and unkempt conditions.[14] These findings also demonstrated that Jill failed to give Ethan "proper care and attention" and were supportive of the court's ultimate determination.

Finally, the court found that Ethan displayed "an aversion to and a fear of Ricky." Jill suggests that the evidence cannot support any causal connection between Ethan's anxiety and Ricky. We disagree. Mr. B testified that Ethan cried whenever Ricky came to pick him up from Mr. and Mrs. B's house and that, over time, he began crying when Jill came as well. Mr. B also testified that, on these occasions, Ethan's heart pounded so hard that Mr. B could feel it when he hugged Ethan goodbye. Most compelling, however, was that Smith testified that, on the occasion of Ethan's first scheduled visit with Jill and Ricky following his removal from the home, he openly expressed that he was scared when Ricky entered the room. Ethan refused to visit with Ricky for the remainder of the time he was in foster care. The juvenile court was permitted to conclude by a preponderance of the evidence that Ethan was extremely fearful of his stepfather and to infer from that finding that Ethan's mental health was placed at substantial risk of harm if he was returned to live with his mother and Ricky.

Finally, we reject Jill's suggestion that the juvenile court abused its discretion by concluding that its finding justified removing Ethan from her custody and placing Ethan with his father.[15] For the same reasons that the court's factual findings concerning Ethan's prior abandonment, Jill's disciplinary style, the physical condition of Jill's home, and Ethan's extreme fear of Ricky supported its discretionary decision to sustain the allegations of the petition, they supported its discretionary decision to remove Ethan from Jill's custody. This is especially true when, as here, Ethan's father was able and willing to care for him. For all of these reasons, we perceive no abuse of discretion and shall affirm the order of the circuit court.

**ORDER AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.**

**FOOTNOTES**

1. For ease of discussion, we shall refer to the parties by their first names.

2. Jill worked outside the home for some period of time before Haley was born. Her parents acted as Ethan's caregivers while she was at work.

3. At that time, Ricky's mother and father were involved in a contentious divorce.

4. Haley also was removed from the home. The disposition of her case is not before us in the instant appeal.

5. As we shall discuss, *infra*, Leland and Jill were in contact because Leland had initiated a custody case earlier that year.

6. The maternal grandparents later actively sought custody of Ethan and, based on letters in the court record, deny ever having made statements that they did not wish to be considered as a custodial resource.

7. Smith explained that Ethan became sick and no visits were scheduled until he had recovered from his illness.

8. Neither of Ethan's foster parents was placed under oath. No objection was raised below and Jill did not except to the master's accepting their testimony.

9. The court explained that there was nothing to suggest that Ethan was "speaking metaphorically," as Jill's counsel had suggested. There also was no evidence that Ethan made these statements after being asked about "playing in or around doghouses." Rather, in each instance, Ethan made the statement in direct response to a question about what happened to him when he was bad.

10. It is unclear from the record whether Yost made the referral.

11. Based on the questioning of Schablein, it was clear that counsel for the Department, Ethan, and Leland sought to lay a foundation for the admission of the Yost Statement under the business records exception.

12. We agree that the master did not rely on the Yost Statement. The only reference to it in the master's opinion was related to conflicts in the evidence. The master opined, "We have a difference of opinion between Mr. Yost's statements which [based on testimony at the shelter care hearing] appeared to be credible and are questionable now versus what Mr. P[i]nto said and then what [Ricky]'s testimony was about what actually went on in the chicken farm." The master did not reference the Yost Statement whatsoever with respect to her ultimate determination that the allegations against Jill should be sustained, nor did the master find as a fact that Ricky ever made a threat against Ethan's life. While the juvenile court in reviewing exceptions on the record accords deference to the first level factual findings of the master, here, there was no factual finding made with respect to whether the Yost Statement was credible.

13. For example, Jill points to the juvenile court's reference to the presence of "deer carcasses," arguing that Schablein testified only that one carcass was present on Jill and Ricky's property. Schablein testified, however, to the presence of a rotting deer head near the door of the property and a rotting deer carcass near the fence. Moreover, the court also referenced Schablein's testimony that neighbors had complained about the presence of multiple deer carcasses in the past.

14.The court expressly noted that it took into consideration the fact that these photographs were taken after an eviction and that Schablein found the home to be sanitary on a prior visit.

15. Jill does not challenge on appeal the finding that Leland was a fit custodian for Ethan.

Cite as 4 MFLM Supp. 59 (2012)

Custody: shared physical custody: relocation out of state

# Rebecca L. Ygnacio
# v.
# Julio M. Fernandes

*No. 1344, September Term, 2012*

*Argued Before: Eyler, James R., Meredith, Graeff, JJ.*

*Opinion by Graeff, J.*

*Filed: February 10, 2012. Unreported.*

*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 award of shared physical custody was vacated and remanded because the record failed to indicate why the circuit court found a 5-2-2-5 schedule reasonable, given the mother's imminent move from Maryland to California; however, the award of attorneys' fees to the father was justified by the mother's insistence on attempting to modify visitation through emergency motions.**

This case involves a custody dispute between Rebecca L. Ygnacio, appellant, and Julio M. Fernandes, appellee, involving their son, Quentin, who was born on October 2, 2009. Ms. Ygnacio appeals from three orders of the Circuit Court for Montgomery County: (1) a Custody Order, issued on August 10, 2012, granting joint legal and shared physical custody of Quentin, with a 5-2-2-5 access schedule; (2) an order denying Ms. Ygnacio's subsequent Emergency Motion for Interim Access; and (3) an order denying her motion for reconsideration of the emergency motion for access. The motions for access were denied on the ground that there was not an emergency, and the court ordered Ms. Ygnacio to pay attorney's fees to Mr. Fernandes.

On appeal, Ms. Ygnacio presents five questions for our review, which we have rephrased:

1. Did the trial court err in failing to uphold and enforce the court's pretrial orders and discovery orders?
2. Did the trial court violate Ms. Ygnacio's due process rights by failing to allow her to present testimony and evidence in support of her claims and defenses?
3. Did the trial court err in granting the parties joint legal custody and shared physical custody?
4. Did the trial court err in failing to award child support and attorney's fees?
5. Did the trial court err in denying Ms. Ygnacio's motions regarding an interim access order and in awarding attorney's fees?

For the reasons set forth below, we shall vacate the August 2012 custody order, but we shall affirm the judgments awarding attorney's fees in connection with the subsequent motions for interim access.

## FACTUAL AND PROCEDURAL HISTORY

On December 29, 2010, Mr. Fernandes filed an Emergency Complaint to Establish Custody. He asserted that Ms. Ygnacio was "threatening to leave the State of Maryland with the child of the parties and move to California." He stated that he was a "fit and proper person to have the physical and legal custody of Quentin," and that Ms. Ygnacio had "recently attempted suicide, has no permanent residence, is unemployed and has indicated she will permanently remove the minor child to California without the consent of his father." Mr. Fernandes requested sole legal and physical custody of Quentin, with Ms. Ygnacio to be awarded "reasonable supervised visitation" with the child. That day, the circuit court held a hearing and determined that the complaint was not an emergency. On January 6, 2012, however, the court entered an Order *Ne Exeat*, ordering that neither Ms. Ygnacio nor Mr. Fernandes "remove the minor child of the parties from the State of Maryland."

On January 10, 2012, Mr. Fernandes filed an Amended Complaint for Custody, Child Support, and Attorney's Fees. The amended complaint reiterated the claims in his emergency motion.

On January 11, 2012, Ms. Ygnacio filed a Motion to Alter or Amend Court's Order or, in the Alternative, Motion to Vacate and/or Set Aside Court's Order Entered January 6, 2012. She stated that she had plane tickets to California on January 16, 2012, a job interview in California scheduled for January 17, 2012,

and tentative arrangements for childcare and housing in California. Ms. Ygnacio asserted that she had been Quentin's primary caregiver since his birth, and that Mr. Fernandes had forced her from their home and removed all of the funds from the parties' joint account, canceled the parties' joint credit card, and refused to provide her with any funds.

Ms. Ygnacio raised concerns about the child's welfare, asserting that he had been injured while in Mr. Fernandes' care, that Mr. Fernandes had "failed to properly administer medications when the child had a bronchial infection and fluid in his ears," and that Mr. Fernandes "failed to bathe the child for approximately 3 days." She asserted that, on one occasion, Mr. Fernandes took Quentin to dinner and refused to return the minor child or disclose his whereabouts until the next day.

On January 18, 2012, Ms. Ygnacio filed a Motion to Strike Plaintiff's Amended Complaint for Custody, Child Support, and Attorney's Fees. She claimed that the pleading was "rife with hearsay, speculation, and conjecture and [was] completely inappropriate and improper."

On January 19, 2012, Ms. Ygnacio filed a Motion for Emergency Relief. She claimed that she and the minor child had "no funds, no support, and no residence." She asked the court to allow her to travel with the minor child to California or require Mr. Fernandes to pay for her and the child's housing.

On that same date, Ms. Ygnacio filed a counter-complaint for custody, child support, and attorneys' fees. She requested sole legal and physical custody, child support, and attorney's fees. She also filed a Motion for Preliminary Injunction for Funds Held with SunTrust Bank.

On January 20, 2012, the circuit court held a hearing on Ms. Ygnacio's motion for emergency relief. Ms. Ygnacio asserted that she had nowhere to live and was living in a hotel, but she did not have money to pay for the hotel. Her counsel stated that "her family flew out here to help and assist her with the baby, but they want her to come back" to California. They had a place for her to stay and would assist her with the care for the child if she returned to California. Counsel asserted that Ms. Ygnacio needed to go because she had "no resources, no money, nothing to keep her here in Maryland."

Mr. Fernandes' counsel stated that there was an incident where Ms. Ygnacio attempted suicide, and the relationship then ended. Mr. Fernandes told Ms. Ygnacio that he did not want her leaving for California, and she responded: "I don't care what you say." Mr. Fernandes then took possession of the child "[b]y deception" because he was afraid that she was "going to get on a plane to California the next day." Mr. Fernandes then filed an emergency motion and the court entered the *ne exeat* order prohibiting either party from leaving the State and ordered the parties to "go out there and work out a liberal access schedule." The parties then agreed to a 5/2/2/5 access schedule and $500 for support. Counsel claimed that Mr. Fernandes has been prepared to give Ms. Ygnacio a check but that Ms. Ygnacio had failed to show up at the agreed upon time and that "the reason she doesn't have funds is because she withheld the child and didn't bring him to the house." Counsel stated that under the shared custody guidelines he would pay $795 but that he was willing to pay $1,000.

The court then asked Mr. Fernandes' counsel: "Who does she have in the area to live with? Where is she supposed to live?", noting that "$1000 doesn't pay even a month's rent." The court stated that it was "not going to have an emergency custody hearing" that day, but it was attempting "to come up with a way that the child is safe, and that there's money to support the child, and that everyone has a place to live in the interim." The court established a nesting arrangement where "whoever has the child under the schedule [was] in the house with the child." It awarded $795 a month in child custody and retroactively included January.[1]

On January 31, 2012, the circuit court issued an Emergency Order for Access and Child Support, granting Ms. Ygnacio's Motion for Emergency Relief and ordering that the parties follow a temporary schedule until further court order. The court ordered that "the parties may travel with the minor child throughout the greater Washington D.C. metropolitan area, subject to further review," and that the parties shall nest with the minor child at Mr. Fernandes' residence, with each party having "full rights and privileges in the home during his or her designated time." The court ordered as a temporary schedule that Ms. Ygnacio have custody "each Monday from 9:00 a.m. until Wednesday at 9:00 a.m, and Mr. Fernandes have custody "each Wednesday from 9:00 a.m. until Friday at 9:00a.m.," with the parties having alternate weekends with Quentin. The court ordered Mr. Fernandes to pay to Ms. Ygnacio "$795.00 per month, as well as providing food and clothing for the minor child."

On February 16, 2012, Mr. Fernandes filed a Second Amended Complaint for Custody, requesting that "he be awarded custody of the minor child of the parties, *pendente lite* and permanently" and that "the Court determine an appropriate access schedule for the minor child." That same day, he filed a response to Ms. Ygnacio's motion to strike.

On February 17, 2012, the court denied Ms. Ygnacio's Motion to Alter or Amend Court's Order entered on January 20, 2012, her Motion for

Preliminary Injunction for Funds Held with SunTrust Bank, and her motion to strike.

On February 18, 2012, the court ordered that both parties participate in a parenting skills enhancement program. On March 10, 2012, Ms. Ygnacio filed a Motion for Drug Testing and Mental Health Evaluation of Mr. Fernandes.

The court subsequently issued a *Pendente Lite* Consent Order. That order vacated the Order *Ne Exeat* entered on January 6, 2012. It also stated:

> ORDERED, that the parties shall have the minor child, namely Quentin Michael Fernandes, born October 2, 2009, evaluated within thirty (30) days of the date of this Order either at Montgomery County Infants and Toddlers Program or a program recommended by the minor child's pediatrician; and it is further
>
> ORDERED, that [Ms. Ygnacio] shall continue her therapy and regular drug screens with Dr. Oeljten, and provide [Mr. Fernandes'] counsel with regular reports from Dr. Oeljten reflecting the status of her therapy and results of her drug screens; and it is further
>
> ORDERED, that [Mr. Fernandes] have regular drug screens through the Courthouse program or a program recommended by this treating psychologist, and he shall provide [Ms. Ygnacio's] counsel with regular reports reflecting the results of his drug screens. . . .

The order also set up a visitation schedule whereby Quentin would reside with Ms. Ygnacio every Monday and Tuesday, with Mr. Fernandes every Wednesday and Thursday, and he would reside with the parties on alternate weekends. It further ordered that Ms.Ygnacio have use and possession of Mr. Fernandes' residence *pendente lite*. The order stated that Ms. Ygnacio was permitted to travel with Quentin outside the Washington, D.C. area on her scheduled visitation days and that either party traveling with the minor child outside of the Washington, D.C. area shall inform the other party of such, and in the "event of air travel, the party traveling with the minor child shall provide the other party with the itinerary within twenty-four (24) hours of scheduling the travel." The order required Mr. Fernandes to continue to pay the bills for his residence, including the mortgage, telephone, and utilities. It also ordered Mr. Fernandes to pay $1,500 per month in *pendente lite* child support and *pendente lite* support for Ms. Ygnacio until further order of court. Mr. Fernandes was also ordered to pay $15,000 in counsel fees to Ms. Ygnacio's attorney's law firm. The order was entered on April 1, 2012.

On June 28, 2012, a three-day trial commenced on the issue of custody. Joelle Hall, a licensed social worker appointed by the court to do a custody evaluation, testified that she met with each of the parties. She found both parents to be fit and appropriate custodians for the child. She agreed that it was in the best interest of a young child to see both parents with some degree of regularity, as long as there were no health or safety concerns. She had no such concerns with the parents here. Both Ms. Ygnacio and Mr. Fernandes advised her that they had used marijuana and cocaine in the past, but they stated that they stopped in December 2010.

Ms. Hall visited the homes of the parties. Ms. Ygnacio was staying in Mr. Fernandes' house with their child, pending a court decision. Mr. Fernandes was staying with his parents, who Ms. Hall met. Ms. Hall testified that she visited each home for approximately one hour, and she opined that both homes were acceptable. Ms. Hall testified that Ms. Ygnacio's plan was to go to California and stay with her grandparents. Ms. Hall saw pictures of that home and found it to be an appropriate home.

Ms. Hall considered Ms. Ygnacio to be the primary parent. She did not base this on the number of hours Ms. Ygnacio spent with Quentin, nor on the current access schedule, but rather, this determination was based on information provided by people she interviewed during the evaluation.

Ms. Hall found that Quentin had bonded with and was attached to both of his parents. She agreed that attachment affects a child for his lifetime. She opined that if a child is removed from somebody with whom he is attached, it could be devastating to the child.

The parents had been sharing access to Quentin on a 5/2/2/5 access schedule since January 2012. She believed that such a schedule was not recommended for infants or toddlers because they "need to have one primary parent, but still see the other parent in short, but frequent, visits." She admitted, however, that she did not have the training a psychologist would have regarding "[s]cheduling for a 2-year-old." She also stated that she was not aware of any detrimental effect this schedule had on Quentin.

A friend of the parties told Ms. Hall that, before the separation, the parties worked well together. Ms. Ygnacio's therapist told Ms. Hall that "he had made a determination that there would be no detriment to Ms. Ygnacio to stay in Maryland," and that "she could certainly stay in Maryland." Ms. Hall testified that it generally is good for the child if the parents live in close proximity to each other, and she agreed that, here, it

was in "Quentin's best interest to maintain a relationship" with each party.

Ms. Hall did not have any concern regarding Ms. Ygnacio's mental health. Ms. Ygnacio's therapist, similarly, had no concerns regarding her mental health.

Ms. Hall testified that she had stated in her report that she "had a problem with Mr. Fernandes' veracity." For example, Mr. Fernandes told her that he received notice of medical appointments only 30 minutes in advance. Ms. Hall subsequently determined that was not true. She agreed that Mr. Fernandes would tell her "things that were not truthful in order to sway [her] opinion."

Quentin had been diagnosed with MRSA[2] on at least two occasions. According to his pediatrician, Quentin had a speech delay.

Ms. Hall had listened to a recording between the parties that was made on January 4, 2012, in which Mr. Fernandes "acknowledged that he had not fed the child; he had not given the child antibiotics," and "[h]e was cursing at [Ms. Ygnacio], told her she was crazy." Mr. Fernandes then said: "I can say whatever I want" and "I will fight your ass and you're not going to get any time with our son."[3] In that recorded conversation, Mr. Fernandes "demean[ed] and belittl[ed]" Ms. Ygnacio. When she spoke with Mr. Fernandes' therapist, the therapist advised that Mr. Fernandes "struggles with thinking before he acts, thinking before he speaks and he has situational depression."

Ms. Hall testified that Ms. Ygnacio had "a viable plan to go to California for care of the baby, a home, a job and she's already found a pediatrician there as well." She opined that Ms. Ygnacio "should continue to have primary physical custody," and that if Ms. Ygnacio were to remain in Maryland, Mr. Femandes have "short, frequent, visitation and access." If Ms. Ygnacio moved to California, Ms. Hall recommended that Mr. Fernandes have custody of Quentin "one week every other month" and "one week or 10 days in the summer." She stated that, regardless of location, Ms. Ygnacio should be the primary parent for Quentin.

With respect to legal custody, Ms. Hall recommended "sole legal custody to Ms. Ygnacio" because Mr. Fernandes was "negative, controlling, and he has poor communication." She reported that one of the physicians treating Quentin stated that the parents could not communicate.

Carlos Fernandes, Julio Fernandes' brother, testified that he owned Chase Builders, of which Julio Fernandes was the "vice president/president" and received a salary of $75,000, plus benefits. Julio Fernandes' name was on a bank account with their father. Carlos Fernandes also testified that Julio Fernandes owned his home on Shepherd Street, and he was having a hard time paying the mortgage. His father owned multiple rental properties.

Dr. Jamie Holstein, Quentin's treating pediatrician, testified that she had treated Quentin three times. On January 13, 2012, he was diagnosed with MRSA and strep throat. On February 28, 2012, he had an upper respiratory infection. On March 22, 2012, he had his 18-month check-up. At the check-up, Dr. Holstein, relying on an assessment form completed by Ms. Ygnacio, determined that Quentin had developmental delays. Based on the questionnaire filled out by Ms. Ygnacio, Quentin scored below normal for communication, gross motor skills, fine motor skills, problem solving, and personal/social skills. Dr. Holstein recommended that Quentin receive an Infant and Toddlers evaluation at Kennedy Krieger Institute.

Mr. Fernandes subsequently had a consultation with Dr. Holstein. Mr. Fernandes had no concerns about Quentin. Mr. Fernandes filled out an assessment, and according to his assessment, Quentin failed in only the communication area. Dr. Holstein was aware that Mr. Fernandes was speaking to Quentin in Portugese. Dr. Holstein testified that children in bilingual homes often fall below the cut-off for normal development in the area of communication. Given the discrepancies between the two reports, however, Dr. Holstein believed it was good to have an independent assessment.

On April 16, 2012, Kennedy Krieger performed an assessment, which indicated that Quentin had an expressive language delay. Kennedy Krieger recommended that Quentin start receiving speech therapy and have an audiological evaluation. Dr. Holstein testified that Mr. Fernandes appeared to be concerned about his child and his child's development.

Anthony Cusimano, a friend of the parties, testified that he worked with Mr. Fernandes approximately eight or nine years earlier, and his wife, Ann Marie Cusimano, worked with Ms. Ygnacio at a hotel in Maryland approximately ten years earlier. Mr. Cusimano stated that he introduced the parties, and that Ms. Cusimano and Ms. Ygnacio had a very close relationship. In 2004, Ms. Ygnacio worked for a company of Mr. Cusimano's in an administrative capacity. Ms. Ygnacio and Mr. Fernandes then broke up, and Ms. Ygnacio moved back to California. Approximately a year later, Ms. Ygnacio and Ms. Cusimano reconnected and rekindled their friendship. Ms. Ygnacio invited the Cusimanos and Mr. Fernandes on a trip to Costa Rica. At the end of the trip, Ms. Ygnacio was very upset because she was concerned that her relationship with Mr. Fernandes would end.

After returning to California, Ms. Ygnacio discovered she was pregnant. The Cusimanos went to California for three or four days to help Ms. Ygnacio pack her belongings to move to Maryland. Ms. Ygnacio

"wasn't completely excited about the idea of moving back here but she thought it would be the best thing in her interest and in [Quentin's] interest to come back" because she had security and support in Maryland with the Cusimanos, Mr. Fernandes, and Mr. Fernandes' family. Mr. Cusimano was not sure if Ms. Ygnacio was speaking with her family at the time he was in California helping her move, and they did not help her move. She moved in with Mr. Fernandes in March or April of 2009.

Mr. Cusimano testified that, during the initial part of her pregnancy, the parties "got along well." Ms. Ygnacio, however, wanted to go back to California, stating that "[s]he missed her family." Mr. Cusimano testified that Ms. Ygnacio's relationship with her family was "hot and cold." He stated that they would have arguments, stop speaking for a while, and then make up.

After Quentin was born, the parties argued often. Ms. Ygnacio would "pick on" Mr. Fernandes "incessantly." Mr. Cusimano never saw Mr. Fernandes act inappropriately when this was going on, but instead, he was "[c]alm, cool, collected." He never heard him threaten her, and he swore at her "[p]robably no more than she would swear at him, if they were in a little argument or a tiff or something even more severe." During the first six months of Quentin's life, Ms. Ygnacio never suggested to Mr. Cusimano that she was being abused by Mr. Fernandes, that he was threatening to throw her out, or that he was not supporting her financially.

In the summer of 2010, the relationship between the parties began "[g]oing steadily downhill." Ms. Ygnacio became "much more insistent about her desire to move back to California." She was "[c]hronically unhappy."

Mr. Cusimano testified that Mr. Fernandes was a "great dad" and did "[a]ll the things good dads do." Mr. Femandes' family welcomed Ms. Ygnacio "with open arms."

After the parties separated, Ms. Ygnacio stayed with Sara Owen, her dog walker, for two days. On December 30, 2010, Ms. Ygnacio came to stay with the Cusimanos. Ms. Ygnacio said that Mr. Fernandes threw her out. Mr. Cusimano testified that Mr. Fernandes "[w]ouldn't throw her out in the street."

In Mr. Cusimano's opinion, Ms. Ygnacio did not pay as much attention to Quentin as she could have while staying at the Cusimanos' home. He testified that "she was very busy on her computer, working on her potential case," and she spent hours "transcribing conversations where she had taped Mr. Fernandes," "[s]o she could make him look bad." Ms. Ygnacio told Mr. Cusimano that Mr. Fernandes "cut off a credit card," stating that "the last charge she made on that credit card was for a laptop that she gleefully showed me and was very proud to have charged to his credit card. Got a laugh out of it."

During the ten days that Ms. Ygnacio stayed with the Cusimanos, she relied on a lot of other people to watch Quentin; her requests for help were "a bit excessive." Ms. Ygnacio was extremely emotional and could not "hold a conversation about [Mr. Fernandes] for more than five minutes without starting to cry." When she moved out of their home, she did so without telling him or his wife, leaving a note that read: "Dear Ann and Tony, so sorry for the inconvenience. Love you both so much. Thanks for the hospitality. I can come back tomorrow to clean if you'd like. Love, Beck and Q." The day before she left, Mr. Cusimano asked her not to share her anger toward Mr. Fernandes "on a 24/7 basis. It would make us feel a little more comfortable." As a result, "[s]he was angry. She thought that we were taking his side." Although he told her he was trying to remain neutral, "she didn't like that fact. She wanted me and my wife to be on her side."

Mr. Cusimano testified that Mr. Fernandes is "an honest, believable, trustworthy person." He and his wife wrote a letter, dated January 11, 2012, addressed to "whom it may concern," stating that they thought Quentin "would be in better hands with [Mr. Fernandes]." He wrote the letter because he had concerns about Ms. Ygnacio's ability to care for Quentin and he was truly concerned about Quentin, due to Ms. Ygnacio's high emotions. He stated that he "didn't think she could reason properly. Case being leaving our home, moving into a hotel, when she had a perfectly safe place to stay." He expressed concern that she cried when she was holding Quentin and discussing the situation with Mr. Fernandes, stating: "I didn't think it was appropriate for him to see his mother crying nonstop." He further stated his concern that "she didn't give him the attention that she should have," specifying that Quentin spent most of the night with other people during a New Years Eve party.

Yanive Hadar, a friend of Mr. Fernandes, testified that Mr. Fernandes had been diagnosed with cancer, and he did not see Ms. Ygnacio "exhibit any help or care to [Mr. Fernandes] during the time that . . . he was sick." He saw Ms. Ygnacio smoke marijuana and use cocaine after Quentin's birth. In his opinion, both parties were loving parents.

Mr. Hadar testified to an incident on December 21, 2010. At approximately 9:30 p.m. or 10:00 p.m. that night, Mr. Hadar went to the parties' home to pick up Mr. Fernandes. As Mr. Hadar and Mr. Fernandes walked to Mr. Hadar's car, Ms. Yganció came running out the door and asked if Mr. Fernandes was really going to leave. Mr. Hadar and Mr. Fernandes drove away. They then stopped to get gas. Ms. Ygnacio called

Mr. Fernandes twice and hung up each time. They went back to the house and Mr. Fernandes went up to the bedroom. Mr. Hadar heard Mr. Fernandes repeatedly say: "Beck what are you doing." Mr. Hadar then went upstairs and saw Mr. Fernandes standing beside the bed shaking Ms. Ygnacio, who was lying in the bed. Mr. Hadar got Ms. Ygnacio to sit up and lean on the headboard. Her eyes were half-open and her speech was slurred. Mr. Hadar noticed that there was an open bottle of prescription drugs on the night table next to the bed. She repeatedly stated: "I just want it to be over. I want it all to be over." She said she had taken approximately ten Percocet pills and liquid cold medicine, in addition to drinking a bottle of wine. Ms. Ygnacio told Mr. Hadar that she had vomited. Mr. Hadar stayed with Ms. Ygancio for approximately 45 minutes. Eventually Ms. Ygancio went to sleep and Mr. Hadar sat with her to check on her breathing.

Ms. Ygnacio's counsel then played a part of a recording that Ms. Ygnacio made of a conversation between her and Mr. Fernandes, with Mr. Fernandes' consent. In the recording, Ms. Ygnacio talked about taking Quentin to California for Christmas. Mr. Fernandes said:

> Okay. So just leave with him. Like I told you, and if you do, I will switch the locks. You will not come back in this house unless you have a [f--king] van sitting out there. Do you understand?
>
> And trust me. I will get lawyers, and I will fight your ass and I will tell them how [f--king] nuts you are and whatever I have to tell them. If I can call your family, whatever it is. I will fight so that you do not have any, any time with our son. You understand?
>
> Because you know why? Do you know why that? Because you're such a [b--ch] that even if I allowed you [to] take our son and go to California, you would do whatever you can, [f--ked] up shit, just like you told me when you waved his arm at me and said, now say bye to your dad and you're going to eliminate me from his life? I don't doubt that [s--t.] You are so capable of that.

Mr. Fernandes testified that, on December 29, 2010, he and Ms. Ygnacio entered into an agreement as to access to Quentin. One stipulation in the agreement was that Ms. Ygnacio would have a psychological evaluation within 10 days of the agreement and would follow all treatment recommendations. He testified that, after the incident on December 21, 2010, described *supra*, he was concerned that Ms. Ygnacio was not emotionally stable. He also testified that, in late December 2010, Ms. Ygnacio was admitted to Suburban Hospital. Her blood tested positive for cocaine and marijuana. The next day, when she was released from Suburban Hospital, Ms. Ygnacio was "extremely angry," thinking that "because [he] had driven her to the hospital . . . that somehow [he] had had her committed." He asked her many times to go to counseling, but she agreed only if it was couples counseling. Ms. Ygnacio later saw a psychopharmacologist. The psychopharmacologist suggested that she increase the dose of her current medication and start regularly seeing a psychologist. She discontinued counseling. Mr. Fernandes testified that Ms. Ygnacio's mood got worse:

> Everything from the crying, the anger, the total negativity of how she viewed the world just basically got worse. She hated her life. She hated living in the house. She hated living in Maryland. She was unmotivated. She didn't want to be social. She wouldn't leave the house with my son to do a simple thing like go for a walk.

Ms. Ygnacio called him between 10 and 20 times while he was at work, stating: "I need you to come home. I can't deal with our son today. I need you to be with him." He testified that he always came home.

After Ms. Ygnacio left the Cusimanos' home, Mr. Fernandes was unable to locate his son for approximately two weeks. Pursuant to the parties' access agreement at the time, he should have had access to his son during those two weeks. He later found out they were staying in a hotel.

Mr. Fernandes paid child support pursuant to a court order that was dated on January 31, 2012. A subsequent *pendente lite* order modified the amount of child support to $1,500 a month and required Mr. Fernandes to pay $15,000 in attorney's fees, plus all the expenses of two mediation sessions, including paying for Ms. Ygnacio's counsel to be present at the second mediation session. The *pendente lite* order had a nesting provision that allowed Ms. Ygnacio to reside in Mr. Fernandes' home during her time with Quentin, and it required Ms. Ygnacio to continue receiving therapy.

Mr. Fernandes began therapy with Dr. Bleach in January 2012, to deal with the stress from the parties' relationship and his concerns for his son. Mr. Fernandes testified that he never told Ms. Ygnacio that she needed to leave by a certain date, but after she left, he changed the locks to the house.

Mr. Fernandes testified regarding Ms. Ygnacio's family in California. Her grandparents were in their 80s and would have a hard time keeping up with Quentin. If

they were watching him for a day, he would be "a little concerned." Ms. Ygnacio told Mr. Fernandes that she and her mother fought "very often," and her family would stop speaking to her "very often."

Mr. Fernandes testified to an incident that occurred between Ms. Ygnacio and her family when Quentin was approximately six or seven months old. Ms. Ygnacio was in California with Quentin visiting her family. Mr. Fernandes described a phone call he received from Ms. Ygnacio:

> She told me that she had to basically break into her sister's home to get her and her son's belongings, and that her sister wouldn't allow her to. And that she was going to probably have to go stay at a hotel because she has nowhere to stay, and she was upset with her family.
>
> And I then got a phone call from her sister stating that her sister said . . . she was also crying, "My sister broke into my house." Called her all sorts of names and so forth, and threatened to call Child Services on her.

As a result of the phone call, Mr. Fernandes flew to California to "have her and my son come back home safely."

There was another incident in November 2010, when Ms. Ygnacio and Quentin were in California visiting Ms. Ygnacio's family. A disagreement about the sleeping arrangements escalated into a large fight, and when Ms. Ygnacio returned to Maryland, she was not speaking with her mother or her sister.

Mr. Fernandes testified about Ms. Ygnacio's decision to move to Maryland with Quentin. The parties would discuss the issue on the phone and when Mr. Fernandes would travel to California to visit her and attend doctor's appointments when she was pregnant. He stated:

> At first, I just assumed that she was going to want to stay in California and want me to come to California. After learning what was going on with her and her family, and conferring with other parents and people with children, I realized that the most important thing, the most consistent thing I was hearing from everyone is [ ] having a support system and how important it is. So, I presented that to Rebecca, "What's, where do we have the best support system?" And she finally realized, and so did I, that the best support system was here. And we based that decision to move here on that.

Mr. Fernandes and Ms. Ygnacio had lived in Maryland since April 2009. Mr. Fernandes testified that Quentin was born in Maryland and had always lived in Maryland.[4] Mr. Fernandes wanted Quentin to remain in Maryland and be present in both his and Ms. Ygnacio's lives. He stated:

> I believe we have a better support system [in Maryland.] My son would have a better support system here for us. I feel like California, I'm afraid . . . I don't see how I can be present in his life as often as he would require a parent to be. Two, it concerns me what happens the next time she gets in a fight with her family; what kind of example does that set for our son? What kind of support system will Rebecca and our son have in California if something like that was, were to occur again?
>
> So, I have many — and as long as she's not getting the help I feel she needs, that's a concern of mine.

Mr. Fernandes believed that the parties could co-parent Quentin and that he would "work very hard to make that successful." He stated that there were times when they were able to co-parent, including when they both attended the evaluations at Kennedy Krieger Infants and Toddlers program, doctor's appointments, and speech therapy. He testified that they spoke almost every day about their son. He believed that the schedule they had at the time was working well because Quentin gets to see each party "equally and very often."

Ms. Ygnacio testified that she had been diagnosed with depression in December 2010. She had been prescribed Zoloft, Wellbutrin, Prozac, Klonopin, and Ambien. She was depressed "[b]ecause of the downfall of the relationship with Julio. The abusive behavior, the inconsistency, the fatigue, the lack of support that [she] was getting from him and his family."

She acknowledged that, at a deposition on May 19, 2012, she had been asked what she would do if the court determined that Quentin should stay in Maryland, and she responded that she would stay in Maryland as well. She testified, however, that at the time of trial, she could not "stay in Maryland. I have no job. I have no support system. I have no money. I have no home. I have been completely isolated from, from the Fernandes family and friends. I cannot provide for Qu[e]ntin."

Ms. Ygnacio testified that she had accepted employment at Tech Systems in California, and she had a start date of August 1, 2012. Mr. Fernandes'

counsel asked Ms. Ygnacio about similar job openings at Tech Systems' offices in the Washington D.C. area. Counsel then asked her: "So, it's your testimony that even if you could find a similar position with the same employer that paid potentially as much, if not more than what you're earning in California, you wouldn't consider it?" Ms. Ygnacio replied that she would not consider it. Counsel asked: "Now, if the Court determines that it's in Qu[e]ntin's best interest to remain here in Maryland, would you not accept a position for any job here in Maryland, or in the Maryland, Washington area?" Ms. Ygnacio responded that she "wouldn't be able to" because "I don't have a home, a support system, any finances. I've got a huge attorney's fee bill, and, and I have a job waiting for me."

She stated that her family came out to help when Mr. Fernandes was diagnosed with cancer. Mr. Fernandes' family, by contrast, did not come to visit Mr. Fernandes, and his parents went out of the county for several months. That time was difficult for Ms. Ygnacio, and she realized that she had a very supportive family. Ms. Ygnacio's family also traveled to Maryland when she was sick with MRSA because she could not touch her son. Her counsel introduced into evidence a timeline that documented time that her family has spent with Quentin in 2010.

Ms. Ygnacio told her doctor that she had used cocaine approximately 15 times in 2010. Any time she used illegal drugs, Mr. Fernandes provided the drugs. She stated that Mr. Fernandes used drugs on a daily basis.

Ms. Ygnacio testified that she has tried to communicate with Mr. Fernandes, sending him text messages, and keeping him "apprised of what's going on with [Quentin]." She also stated that she believed it was in her son's best interest that she and Mr. Fernandes get along, that she would do everything she could to minimize any conflict between herself and Mr. Fernandes, and that she thought it was "important for Qu[e]ntin to have a good relationship with both [her] and Mr. Fernandes."

During closing argument, Mr. Fernandes' counsel stated that it appeared that the only option the circuit court had for Quentin was that he either "stays in Maryland with Dad, or goes to California with Mom." She later framed the issue, however, as follows: "The issue before the Court is, what is appropriate access for this 2-year-old child in the event Ms. Ygnacio decides to go to California, or in the event that she does decide to stay here in Maryland."

During his closing argument, Ms. Ygnacio's counsel highlighted the custody evaluator's opinion that Mr. Femandes was abusive and deceptive. He introduced a calendar showing that the child had spent 131 nights outside the state of Maryland with his mother. He then referred to various "relocation factors."[5] He stated:

> "A relocation shall be deemed to occur when a child would reside more than an hour drive from the non-custodial parent."
>
> Clearly, California's more than an hour.
>
> "Number one, it shall be a rebuttable presumption that it's in the child's best interest to relocate with the parent who exercised more than 70 percent of the parenting time."
>
> And there's no question that she's done more than 70 percent of the parenting time.
>
> "Provided that the move is for a valid purpose and the location of the move is reasonable in light of that purpose."
>
> So, what you need to determine is for her accepting this job of $65,000 a year, living in California next to her sister is going to be running the Kinder Care, living with the grandma who is here in the courtroom, with her mom close by and her other sister who lives may be [sic] an hour away, there as a support system, who you've seen in all the photos, is that reasonable?
>
> * * *
>
> And then, number two, "A custodial parent shall be entitled to relocate with a child for any valid reason if:
>
> "The parents were never married and never resided for more than two continuous years as a family unit;
>
> "And the non-custodial parent has only occasional or sporadic contact with the child;
>
> "And three, the non-custodial parent has failed to substantially support the child."

He asked that Ms. Ygnacio be awarded sole physical and legal custody of Quentin as well as attorney's fees, and child support. He asked that "she be allowed to relocate to the state of California" and that Mr. Fernandes be given "liberal visitation in the state of California."

The circuit court concluded the hearing by stating: "Well, I'm going to, I have about 30 pages of notes and a lot of exhibits to look at, so I'm going to recess. Hopefully, I'll be able to decide this by the middle of next week and issue an opinion."

On August 10, 2012, the court issued a written Custody Order. The court found:

> This Court has considered all the factors under *Montgomery County v. Sanders* and *Taylor v. Taylor*, many of them being neutral towards both parties. The Court finds that the most compelling facts favor a finding of Joint Legal Custody and Shared Physical Custody. Both parents appear to be capable and fit to parent the child. They have a long history of communicating with one another regarding child issues. The child is attached to each of his parents and each of the parents is attached to the child. The child is not old enough to express a preference of one parent over the other. It would be devastating to the child if either parent were to be removed from his life.
>
> The child has special needs to deal with his delayed milestones in the area of receptive and expressive language for which he is receiving speech therapy. He is also bonded to [Mr. Fernandes'] extended family, his pediatrician, and his speech therapist, all of whom live in Maryland. The parties had previously analyzed and discussed their options and decided that Maryland was the best place to live and raise their child. Neither party has provided any compelling reason why this is not still the case.
>
> The parties have also reached a prior agreement to share physical custody under a 5-2-2-5 plan. This plan has worked well in the past, and would continue to work well if the parties and the child were to remain in Maryland. The Court finds that it is clearly in the best interest of the child that he remain in Maryland and be raised by both parents, and each parent should undertake to do so to the best of his or her ability.

The court then ordered that "the parties shall have Joint Legal Custody of the minor child, and the child is to remain living in the State of Maryland until further order of the Court," and "the parties shall have Shared Physical Custody of the minor child, and shall follow a 5-2-2-5 schedule." The order was entered on August 16, 2012.

On August 18, 2012, Ms. Ygnacio filed an Emergency Motion for Interim Access, stating that Mr. Fernandes had been "threatening and abusive" toward her. She stated that she had a use and possession order to reside in Mr. Fenandes' home, and on "August 11, 2012, police were called to the residence as [Mr. Fernandes] broke into the home and [Mr. Fernandes] was found removing substantial property from the residence, removed televisions, a dvd player and dvd's the minor child uses, looted through [Ms. Ygnacio's] personal effects, [and] stole personal items that belong to [her]." She also asserted that Mr. Fernandes "tampered with the air conditioning, disconnected the cable and internet access, and ordered the disconnection of the home telephone." She stated that a "Temporary Protective Order was entered" by the circuit court and that criminal charges were pending. She intended to vacate the home as she did not feel safe there, and she intended to relocate to the State of California.

Ms. Ygnacio also asked the court to reconsider its custody order, as it was "inapposite [to] the facts and evidence presented, as well as being completely inapposite of the Court Evaluator's Recommendations." She noted that the court "ordered shared physical custody, even though [she was] relocating to the State of California," rendering the court's 2/2/5/5 schedule "untenable and impractical." Ms. Ygnacio stated that her relocation had been delayed until August 29, 2012, and she requested the court to enter a temporary, interim access schedule pending her appeal of the court's order. She asserted that she had been Quentin's primary caregiver since birth, the Custody Evaluator had recommended that she maintain sole custody of the child, and that Mr. Fernandes had "refused to pay any substantive support" to her "after having removed all of the parties' assets from the joint account."

Mr. Fernandes filed a Motion to Strike, Opposition to Defendant's Emergency Motion for Interim Access and Request for Attorney's Fees. He stated that Ms. Ygnacio's motion made "improper, immaterial, impertinent, scandalous and patently false allegations about [Mr. Fernandes] and [Mr. Fernandes'] counsel. . . ." His motion also stated that Ms. Ygnacio's motion was the "fourth (4th) Motion filed by [Ms. Ygnacio] requesting an emergency hearing so [she] can relocate the minor child to California with the same facts, same argument, and same legal theory," and that the circuit court had denied all such prior requests.

On August 22, 2012, the circuit court held a hearing on Ms. Ygnacio's Emergency Motion for Interim Access. At the hearing, the court asked if this was an emergency, and it asked why Ms. Ygnacio had not filed a motion to modify visitation "or a motion to alter or amend, or all these other things that we give

the judges an opportunity to correct their errors if there's any." The court stated that Ms. Ygnacio was "creating the emergency by going to California."

Ms. Ygnacio's counsel argued that, on August 11, 2012, Mr. Fernandes came to the house and tampered with the air conditioning, cut off the utilities, and disconnected the home phone and internet access. Counsel stated that Mr. Fernandes was "constructively forcing her to go to California" as she has no job or family here. Ms. Ygnacio requested an access schedule that accommodated a move to California.

Mr. Fernandes' counsel argued that Ms. Ygnacio stated "at her deposition that she was going to stay in Maryland if the child stayed in Maryland. And at the trial she said no matter what she's going to California, and testified that her job started there on August 8th." Counsel stated that the trial court had decided in its custody order that the child should live in Maryland, and Ms. Ygnacio had not made a reasonable request for access. Counsel argued that there "was never a use and possession order" for the house, there was no *pendente lite* order, and further, if it was, "it was over when [the court] . . . signed the new order." Counsel asked for sanctions against Ms. Ygnacio's counsel, claiming that the motion was "totally unnecessary, totally inappropriate," and that he had "run into court, as he tends to do a lot to run up fees."

The court saw counsel in chambers. When the hearing resumed, the court found that the motion was not an emergency motion, but rather, "a request to modify the current access schedule based upon [Ms. Ygnacio's] plans to leave the [S]tate and take up her residence in California." It further stated that the matter "may be properly addressed in a number of ways, the quickest of which I believe is before [the judge] who heard this matter for several days and has a feel for what would be the appropriate access schedule for this under 2 year old child." The court explained that, even though the judge who heard the case was "in Juvenile," it was not true that he could not "hear a Family motion or a motion for reconsideration," noting that he had "been in Juvenile and I have heard Family cases and motions related to Family cases, and so that is just not the case." The court concluded: "What I am going to do is find that this is not an emergency. I will set it for an expedited scheduling conference, and it can be heard in due course if the defendant wants to proceed in this manner." It stated:

> It is clear to me that this was not an emergency that needed to be heard today, nor could the Court be reasonably informed enough on an emergency basis to make such an important decision respecting visitation of this very young child between California and Maryland.
>
> To that end, I understand that the plaintiff has incurred attorneys' fees in connection with the review and preparation and appearing today in order to deal with this motion that was filed on an emergency basis.
>
> I was provided for in the motion with statements of time and the like. I don't believe that the attorney in this case should be personally assessed the fees, although I have done so one time in my career between the master's office and the bench.
>
> But I do believe that there should be some contribution to the fees of plaintiff's counsel and therefore I will order that the defendant pay to the plaintiff as and for contribution to attorneys' fees the sum of $1,000.

In an order entered on August 24, 2012, the court denied Ms. Ygnacio's motion, ordered that the matter be scheduled for an expedited scheduling hearing within the next thirty days, and that Ms. Ygnacio pay Mr. Fernandes $1,000 for attorneys' fees.

On August 26, 2012, Ms. Ygnacio noted an appeal from the Custody Order entered on August 16, 2012.

On August 30, 2012, Ms. Ygnacio filed a Motion for Reconsideration of Emergency Motion for Interim Access Schedule. In her motion, she stated that the court's custody order included "a 2/2/5/5 custody schedule, even though it was undisputed by either party that [Ms. Ygnacio] was relocating to California in August 2012." She stated that it was "abundantly clear" that she was not leaving for California by choice, but rather, she was doing so only "after having suffered abuse by [Mr. Fernandes] who has berated [Ms. Ygnacio] repeatedly, calling her profane names including in the presence of the minor child, cut her off from all funds . . . and denying any access to credit cards." She requested that the court "issue an immediate access Order granting [her] an appropriate access schedule, pending the appeal."

On September 13, 2012, after Mr. Fernandes filed an opposition to the motion and Ms. Ygnacio filed a reply, the circuit court issued an order denying Ms. Ygnacio's motion because it was not an emergency and requiring Ms. Ygnacio to pay Mr. Fernandes $1,500 in attorneys' fees. It ordered that "Counsel shall contact the Assignment Office immediately to schedule an expedited scheduling hearing within the next thirty days as was ordered August 24, 2012." On September 26, 2012, Ms. Ygnacio noted another appeal from the Orders entered on August 24, 2012 and September 14, 2012.[6]

## MOTION TO DISMISS

Before addressing the claims raised by Ms. Ygnacio, we will address Mr. Fernandes' motion to dismiss the appeal. He contends that the appeal should be dismissed based on Ms. Ygnacio's "complete disregard of this Court's rules of procedure." In particular, Mr. Femandes asserts that Ms. Ygnacio's brief:

> a) fails to make any references whatsoever to the record extract in support of her assertions; b) includes substantial factual assertions that were not part of the evidentiary record at trial; c) exceeds the mandatory page limitation without securing approval of this court; and d) does not include either a table of contents or a table of citations of cases.

With respect to the failure to include references to the record extract that support the factual assertions, Mr. Fernandes states:

> It is highly inappropriate, unprofessional, and a heavy burden for Appellee, Appellee's counsel and the Court to have to sift through over One Thousand Five Hundred (1500) pages to determine whether or not statements and exhibits to which Appellant refers to throughout her brief are even in the record extract, because Appellant has failed to provide cites to the record extract.

We agree with Mr. Fernandes that Ms. Ygnacio's brief does not comply with the Maryland Rules. *See* Md. Rules 8-503(d) (except with permission of the Court, "a brief of the appellant and appellee shall not exceed 35 pages in the Court of Special Appeals"); 8-504(a)(1) (brief shall have a table of contents and a table of authorities); 8-504(a)(4) (statement of facts shall include reference to the pages of the record extract supporting the factual assertions). Pursuant to Rule 8-504(c), a failure to comply with the rules is ground for dismissal of the appeal.[7] The sanction of dismissal is rare, but it is utilized in appropriate cases. *See Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 203 (appellant's brief, which represented a "complete disregard of the rules of appellate practice" and was "so far removed from . . . acceptable appellate practice that [it was] an affront to the process," justified dismissal of the appeal), *cert. denied*, 406 Md. 746 (2008).

Appellant's brief contains multiple violations of the rules. We will not, however, dismiss the appeal. Given the importance of the issue involved, custody of a young child, and appellant's attempt to rectify the lack of citations in her reply brief, we will exercise our discretion to consider the appeal.[8]

## DISCUSSION

### I.

Ms. Ygnacio's first contention is that the trial court "erred in failing to uphold and enforce the trial court's pretrial orders, discovery orders, and rules of evidence." She contends that the court "waste[d] considerable trial time" by allowing Mr. Fernandes to "relitigate the trial court's previous discovery rulings." She asserts that, "[w]hile the trial court ultimately upheld its prior rulings, the court's failure to strictly enforce its orders," allowed Mr. Fernandes to use improperly the limited time allocated for trial. Ms. Ygnacio further argues that the court made "erroneous evidentiary rulings." She asserts that counsel "routinely posed hypothetical questions to witnesses," but she does not identify the witnesses involved or the questions asked.

Mr. Femandes argues that the "trial court did not fail to uphold and enforce its pretrial orders and discovery orders, nor did the trial court fail to follow the rules of evidence." He asserts that the trial court did not waste time, but rather, it "properly utilized a few moments to address the scope and applicability" of its prior orders. With respect to the claim of evidentiary error, Mr. Fernandes argues that Ms. Ygnacio "fails to provide any citation to the record where the alleged erroneous evidentiary rulings occurred" and fails to show any prejudice from these rulings.

Initially, we are not aware of, and Ms. Ygnacio has not cited, any case supporting the proposition that a court "wasting time" in trial compels reversal of a judgment. Ms. Ygnacio's failure to cite any legal authority in support of her claim is grounds to decline to address the argument. *See Conrad v. Gamble*, 183 Md. App. 539, 569 (2008) (declining to address issue because appellant's argument was "completely devoid of legal authority") (quotation omitted); *Marquis v. Marquis*, 175 Md. App. 734, 758 (2007) ("[I]t is not our function to seek out the law in support of a party's appellate contentions.") (quoting *Sodergren v. Johns Hopkins Univ. Applied Physics Lab.*, 138 Md. App. 686, 707 (2001)); *Anderson v. Litzenberg*, 115 Md. App. 549, 577-78 (1997) (refusing to address argument because appellants failed to cite any legal authority to support their contention of error).

With respect to the alleged evidentiary errors, as indicated, Ms. Ygnacio did not provide any citations to the record in support of her claim. As this Court has stated, "[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Rollins*, 181 Md. App. at 201. *Accord Von Lusch v. State*, 31 Md. App. 271, 282 (1976), *rev'd on other grounds*, 279 Md. 255 (1977). Accordingly, we decline to address the issues raised in this portion of her brief.[9]

## II.

Ms. Ygnacio argues next that "the trial court erred in failing to allow the appellant to present testimony and evidence in support of her claims and defenses and violated the appellant's due process rights." She asserts that, at the beginning of the trial, the court advised that it would hold six-hour trial days over the three days scheduled for trial, and that it would keep track of each counsel's time and divide the time equally between the parties. She then reiterates her claim that the court wasted time addressing issues already disposed of pretrial, and she contends that the court miscalculated the parties' trial time, allowing Mr. Fernandes' counsel to use 298.64 minutes and giving her counsel only 259.54 minutes. As a result, she argues, the court refused to allow her to "call any of her witnesses," several of which were "critical for the court's determination of the best interests of the minor child."

Mr. Fernandes contends that the "court did not conduct the trial improperly, nor were appellant's due process rights violated." He argues that the parties were "allotted an equal amount of time to try the case as they saw fit," and it was Ms. Ygnacio's decision to use "a great deal of her allotted time on the cross-examination of witnesses, pursuing lengthy lines of questioning that elicited testimony that was irrelevant to the issues, and on the admission of copious amounts of photographs and other exhibits that did little to aid the court in making its determination." He contends that Ms. Ygnacio "cannot now complain to this Court when it was her own flawed trial tactics — and not any error by the lower court — that prevented her from introducing all of the testimony and other evidence that she desired prior to the expiration of her trial time."

### A.
### Proceedings Below

Both parties advise that, at a pre-trial scheduling hearing, the case was set for a three-day custody merits trial, and that the trial judge subsequently advised that he was going to divide the time equally between the parties.[10] Throughout the trial, the court updated the parties as to the amount of time each had remaining. At the beginning of the second day, the court told counsel that they would have five and a half hours to spend that day and four and a half the next, allowing for a half-hour each for closing. The court told counsel: "So you each have five hours to spend on your direct, your cross, anything that's unrelated to the closing argument." At the end of the second day, the court advised counsel of the remaining time, 139 minutes for Mr. Fernandes, and 125 minutes for Ms. Ygnacio. Ms. Ygnacio's counsel asked: "I have less time than the Plaintiff?" The court responded: "Yes, you have 14 minutes less time than the plaintiff. . . . [b]ased upon the direct and the cross-examination that's occurred." Counsel responded: "Thank you, Your Honor."

At the beginning of the afternoon session of the third day of trial, the court advised the parties of the remaining time which was 65 minutes for one and 45 minutes for the other. Ms. Ygnacio's counsel asked if it would be possible to bifurcate the issue of attorney's fees and hold a hearing on that issue at a later time because he had an expert on attorney's fees and he did not think there would be enough time to discuss the issue. The court responded: "Well, whatever we're going to handle we got to handle before the close today, because I'm going to juvenile court, and then we're done with it, so." The court stated that it did not know its schedule when it moved to juvenile court, so it could not schedule anything, but it suggested that "[m]aybe someone else can handle that piece of it." The court instructed the parties: "Well, we have an hour and 10 minutes of time to go, so put in . . . what you think you need to put in . . . to finish the case."

At this point, Mr. Fernandes was still presenting his case. He called Ms. Ygnacio as a witness, and during Ms. Ygnacio's counsel's cross-examination of her, counsel was warned that he had "five more minutes of time." Counsel used that time to introduce into evidence numerous pictures of Ms. Ygnacio with her family to rebut Mr. Fernandes' claim that she had an "unsupportive family." This evidence included pictures of: (1) "Christmas"; (2) Ms. Ygnacio being "silly" with her brother and dogs; (3) the family skiing in Tahoe; (4) Ms. Ygnacio and her family in matching aprons; (5) her mom, aunt, and uncle dressed up like elves; (6) her uncle with the "two new dogs"; (7) a picture of her "grandparents and their children when they were young"; (8) and many more. The court then advised counsel that he had approximately 30 seconds remaining. After more testimony, the court admitted the employment agreement between Ms. Ygnacio and Tech Systems. Ms. Ygnacio's counsel then asked for "latitude" to ask two more questions because "we've spent considerable time on discovery . . . issues" each day with regard to this case, which has not been as a result of my client's conduct in this case. The court responded:

> Well, let me say this. We have wasted so much time in this case going over information that is redundant, irrelevant, completely immaterial to what we're talking about, arguing back and forth. This thing could have been done in a day and a half, and we're now at the end of the third day. You all said you were going to be done in a certain amount of time, I gave you a certain

amount of time, we're now at the end.

Mr. Fernandes' counsel was then allowed to use her remaining 14 minutes on redirect examination of Ms. Ygnacio. When the court told the parties that they were out of time, the redirect ended. Ms. Ygnacio's counsel asked to admit "business certifications" and explained that he could not have done so earlier because he "had 30 seconds left." Mr. Fernandes' counsel objected, stating: "I'm sorry, I think it's disrespectful to the Court to just, to just say, here's, it looks like about five inches of documents . . . and expect that the Court is somehow, at the end of the day . . . to review those and determine what the purpose of them are." The court stated: "Well, at this point, we've close[d] the evidence, so we're beyond the point for that. There's going to be no testimony about it, so I don't think it's going to be all that helpful."

The following then occurred:

> [MS. YGNACIO'S COUNSEL]: Your Honor, if I may, I would cut my closing argument short by 15 minutes if I can call two witnesses, or call, call my own client for two or three brief questions, and then call her mother, who I think is critical for the Court's determination, and I'll, I'll abbreviate my closing.
>
> [MR. FERNANDES' COUNSEL]: And I would strongly oppose that, Your Honor. I must say that I attempted to manage —
>
> THE COURT: Well, here's the problem with that. You've each been given equal amount of time. You've each used equal amount of time. You have a side that is preparing to do a half hour close, you're offering to give up time so that you can call witnesses which will require her to give up time so she can cross-examine the witnesses. So, we're at the end of the testimony, my question is, do you want 10 minutes to complete your, do something to put together a closing, or do you want to start now?

**B.**
**Limitation of Trial Time**

The Court of Appeals has repeatedly stated that "[t]rial judges have the widest discretion in the conduct of trials, and the exercise of that discretion should not be disturbed on appeal in the absence of clear abuse." *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 684 (2007) (quoting *Tierco Md., Inc. v. Williams*, 381 Md. 378, 426 (2004)). This discretion extends to a determination of "the number of days allotted for trial." *Id.*

An abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles." *King v. State*, 407 Md. 682, 697 (2009) (citation omitted). As the Court of Appeals has made clear,

> [A] ruling reviewed under the abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. 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.

*Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009) (citations and quotations omitted).

In *MIE Props*, 398 Md. at 684, the Court of Appeals held that the circuit court did not abuse its discretion when it denied a party's request for additional trial days. The Court stated:

> Following the pre-trial conference, at which time the trial was set for three days based on MIE's representation that it intended to call six fact witnesses and two expert witnesses, MIE did not petition the court prior to trial for additional days to accommodate more witnesses. Rather, MIE waited until the morning of the first day of trial to broach this subject. Thus, the Circuit Court did not abuse its discretion in denying MIE the opportunity to produce additional witnesses, which would have extended the length of the trial beyond the limit established at the pre-trial conference.

*Id. See also State v. Reina*, 218 S.W.3d 247, 255 (Tex. App. 2007) (trial court properly exercised its discretion on the fourth day of trial when it held the parties to an agreed upon time limit, even though the State was left with only six minutes for its closing argument).

As indicated, Ms. Ygnacio was allotted a certain amount of time to present her case, and the court updated counsel several times about the amount of time remaining. Ms. Ygnacio raised no objections to the time allotment until the afternoon of the third day of trial.[11] Under those conditions, the court did not abuse its discretion in denying Ms. Ygnacio extra time to produce witnesses.[12]

Ms. Ygnaeio cites *Lewis v. State*, 71 Md. App. 402, 411 (1987), in support of her position. That case, however, is inapposite. In *Lewis*, the trial judge *sua*

*sponte* imposed a one-hour limitation on cross-examination of the State's key witness, shortly after counsel began the cross-examination. *Id*. at 409. When counsel exceeded this hour, the court cut-off further examination, indicating that counsel's inquiry "was repetitive and circuitous." *Id*. This Court held that, "[i]n setting a prospective time limit to appellant's cross-examination, the court acted arbitrarily. When it imposed the limit, the court did not know where appellant's inquiry might lead or what unexplored, pertinent matters the witness might, if prompted, disclose." *Id*. at 410. This Court concluded that, "[w]hen a court terminates cross-examination without first informing itself of facts essential to its ruling, it abuses its discretion." *Id.* at 410-11.

This is not what happened in this case. Rather than arbitrarily imposing a time limit, *sua sponte*, the circuit court below followed the time set for trial, a time that generated no objection from the parties. The court discussed the time limits at the beginning of trial and frequently updated counsel as to the amount of time remaining. It was up to the parties to use their time as they saw fit. We find no abuse of discretion by the court in this regard.

**III.**

Ms. Ygnacio next contends that "the trial court erred in granting the parties joint legal custody and shared physical custody, contrary to the testimony, evidence and court evaluator's recommendation." She argues that she had been Quentin's primary parent, and the Court Evaluator recommended that she be granted sole legal custody and primary physical custody. Ms. Ygnacio asserts that "the trial court failed to rule based on circumstances presented and requests of the parties, and contrary to the best interests of the minor child."

Mr. Fernandes contends that "the trial court did not fail to consider the *status quo* and parties' respective history in caring for the minor child." He asserts that the "[s]tatus quo and continuity for the minor child were shown to be achieved in Maryland, where he was born, raised, goes to the doctor, and is surrounded by his extended paternal family members." Mr. Fernandes argues that the court was not obligated to follow the recommendations of the Custody Evaluator, noting that the court "cannot delegate legal and physical custody decision-making to a mental health professional."

We have explained the standard of review in a child custody case as follows:

> Appellate review of a trial court's decision in a child custody case is governed by Maryland Rule 8-131(c), which pertains to the review of actions tried without a jury. We review the case on both the law and the evidence[;] we will not set aside the judgment of the trial court unless it is clearly erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of the witnesses. In summary, when we scrutinize factual findings, we apply the clearly erroneous standard; when we review issues of law, we do so *de novo;* and, finally, we disturb the trial court's ultimate conclusion on the question of custody 'only if there has been a clear abuse of discretion.'

*Karen F. v. Christopher J.B.*, 163 Md. App. 250, 264 (2005) (citations omitted), *cert. denied*, 390 Md. 501 (2006).

A decision as to custody "generally lies within the sound discretion of the trial judge and is rarely disturbed on appeal." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 495 (2007). An "appellate court does not make its own determination as to a child's best interest; the trial court's decision governs, unless the factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion." *Gordon v. Gordon*, 174 Md. App. 583, 637-38 (2007). In reviewing a trial court's custody determination, "our standard of review is quite deferential." *Id.* at 638. We "may not set aside the trial court's judgment merely because we would have decided the case differently." *Id.*

The Court of Appeals has explained:

> Joint legal custody means that both parents have an equal voice in making [ ] decisions, and neither parent's rights are superior to the other.
>
> Physical custody, on the other hand, means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody. Joint physical custody is in reality "shared" or "divided" custody. Shared physical custody may, but need not, be on a 50/50 basis, and in fact most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights.

*Taylor v. Taylor*, 306 Md. 290, 296-97 (1986).

"Custody and visitation decisions in disputes between the parents are made based on what the court finds to be in the child's best interest." *Rashawn*

*H.*, 402 Md. at 495. *Accord Taylor*, 306 Md. at 303 (best interest of the child is the "paramount concern" in any child custody case); *Gordon*, 174 Md. App. at 636 (the child's best interest in custody and visitation decisions is of "transcendent importance"). This Court has set forth several factors that are relevant for the trial court to consider in deciding what is in the best interest of the child:

> The criteria for judicial determination [of child custody] includes, but is not limited to 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

*Gordon*, 174 Md. App. at 637 (citing *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 420 (1977)). Additionally, when determining whether to award joint custody, legal and physical, the court should consider the "capacity of the parents to communicate and to reach shared decisions affecting the child's welfare." *Taylor*, 306 Md. at 304.

Here, although the court evaluator opined that Ms. Ygnacio should have primary physical custody and sole legal custody of Quentin, the circuit court ordered that the parties have joint legal custody, with the child to remain living in Maryland, and that the parties have shared physical custody of the child, following a 5-2-2-5 schedule. The court explained its rationale as follows:

> This Court has considered all the factors under *Montgomery County v. Sanders and Taylor v. Taylor*, many of them being neutral towards both parties. The Court finds that the most compelling facts favor a finding of Joint Legal Custody and Shared Physical Custody. Both parents appear to be capable and fit to parent the child. They have a long history of communicating with one another regarding child issues. The child is attached to each of his parents and each of the parents is attached to the child. The child is not old enough to express a preference of one parent over the other. It would be devastating to the child if either parent were to be removed from his life.
>
> The child has special needs to deal with his delayed milestones in the area of receptive and expressive language for which he is receiving speech therapy. He is also bonded to [Mr. Fernandes'] extended family, his pediatrician, and his speech therapist, all of whom live in Maryland. The parties had previously analyzed and discussed their options and decided that Maryland was the best place to live and raise their child. Neither party has provided any compelling reason why this is not still the case.
>
> The parties have also reached a prior agreement to share physical custody under a 5-2-2-5 plan. This plan has worked well in the past, and would continue to work well if the parties and the child were to remain in Maryland. The Court finds that it is clearly in the best interest of the child that he remain in Maryland and be raised by both parents, and each parent should undertake to do so to the best of his or her ability.

We address first the trial court's order that the parties share physical custody of the child with a 5-2-2-5 schedule.[13] This order is puzzling given that it was clear throughout trial that Ms. Ygnacio was moving to California shortly after the trial. Ms. Ygnacio testified: "I cannot stay in Maryland. I have no job. I have no support system. I have no money. I have no home. I have been completely isolated from, from the Fernandes family and friends. I cannot provide for Qu[e]ntin." She stated that she had accepted employment at Tech Systems in California and had a start date of August 1, 2012. During closing argument, both counsel addressed the issue of custody with the premise that Ms. Ygnacio was moving to California.[14]

A finding of joint physical custody with a 5-2-2-5 schedule, with Ms. Ygnacio in California, does not appear to be workable given the distance between Maryland and California.[15] We did not find any evidence in the record to support a finding that this schedule was reasonable once Ms. Ygnacio moved to California, and the court did not explain the basis for its order in this regard. Accordingly, we vacate the August 10, 2012, custody order and remand for further proceedings to determine a custody order that is in the best interests of the child in light of Ms. Ygnacio's relocation to California.[16]

IV.

Ms. Ygnacio contends that "the trial court erred in failing to award child support for the minor child and counsel fees." She asserts that the "court's order is silent as to child support and attorneys' fees and, as such, the court failed to exercise any discretion."

Mr. Fernandes "concedes that this case should be remanded to the trial court for the very limited purpose of making a determination as to child support in accordance with the child support guidelines." He asserts, however, that "the court did not err in choosing not to award Attorney's Fees."

**A.**
**Child Support**

Our review of the record supports Ms. Ygnacio's assertion that the court erred in failing to address the issue of child support. The issue of child support clearly was before the trial court. Ms. Ygnacio requested child support in her counter-complaint that she filed on January 19, 2012. In closing argument, counsel discussed the child support guidelines. The court failed, however, to address the issue of child support in its order. On remand, the court should address the issue of child support.

**B.**
**Attorneys' Fees**

Section 12-103 of the Family Law Article states that a circuit court "may award to either party the costs and counsel fees that are just and proper" in a child custody dispute. Md. Code (2006 Repl. Vol., 2010 Supp.) § 12-103(a) of the Family Law Article ("F.L."). In making a determination regarding an award of costs and counsel fees, "the court shall consider: (1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." *Id.* at 12-103(b). In awarding counsel fees, a court may award only fees that are reasonable. *See Petrini v. Petrini*, 336 Md. 453, 467 (1994) ("When the case permits attorney's fees to be awarded, they must be reasonable, taking into account such factors as labor, skill, time, and benefit afforded to the client, as well as the financial resources and needs of each party.").

Here, although Ms. Ygnacio requested attorneys' fees in her pleadings, and counsel stated in closing argument that Ms. Ygnacio had incurred attorneys' fees of more than $135,000, counsel did not introduce any evidence regarding his fees or the reasonableness of his fees. There was a request, when counsel was running out of time, to bifurcate the issue of attorneys' fees and hear this issue at another time, but there was no ruling on this issue by the court and no discussion of fees in the court's order. On remand, the court should address the issue of fees, either on the record as it exists or after further hearing.

V.

In her final contention, Ms. Ygnacio asserts error in the court's orders of August 24, 2012 and September 14, 2012, which denied, respectively, her Emergency Motion for Interim Access and her motion to reconsider this dismissal, and ordered, respectively, that Ms. Ygnacio pay Mr. Fernandes attorneys' fees of$1,000 and $1,500. Ms. Ygnacio claims that these orders were erroneous because the court failed to: (1) properly consider the best interests of the minor child; (2) consider prior rulings; and (3) exercise the court's independent judgment and discretion. With respect to the award of attorney's fees, she asserts that the court failed to (1) consider the requisite factors set forth in F.L. § 12-103; (2) "follow the mandatory determinations for an award of fees"; (3) make any determination of the reasonableness of the fees; and (4) take evidence or testimony as to the parties' financial circumstances.

Mr. Fernandes asserts that the court's rulings were proper. He argues that there was "no material change in circumstance" between the issuance of the Custody Order, entered on August 16, 2012, and Ms. Ygnacio's Emergency Motion for Reconsideration for Interim Access Schedule, filed on August 18, 2012. As to the award of attorneys' fees, Mr. Fernandes argues that he requested attorneys' fees "based only on Appellant's violations of Maryland Rule 1-341 and Md. R. Prof. Conduct 1.1, 3.1, 3.2, 3.3(a), 4.4, 8.2(a) and 8.4(c)." Thus, he concludes, the requirements of the Family Law Article are inapplicable.

In the circuit court, Mr. Fernandes opposed Ms. Ygnacio's Emergency Motion for Interim Access on the ground that the motion was not an emergency, and he asked that counsel be sanctioned, or alternatively, that Ms. Ygnacio be required to pay legal fees because the filing of the pleading was "unnecessary and costly to the parties," and "without just cause." At a hearing on August 22, 2012, the court inquired regarding the emergency nature of the motion and asked why Ms. Ygnacio had not filed instead a motion to modify visitation "or a motion to alter or amend, or all these other things that we give the judges an opportunity to correct their errors if there's any." The court stated that Ms. Ygnacio was "creating the emergency by going to California."

The court found that the motion did not qualify as an emergency motion, but rather, it was "a request to modify the current access schedule based upon [Ms. Ygnacio's] plans to leave the [S]tate and take up her residence in California." It further stated that the matter "maybe properly addressed in a number of ways, the

quickest of which I believe is before [the judge] who heard this matter for several days and has a feel for what would be the appropriate access schedule for this under 2 year old child." The court dispelled any misconception that the parties may have had that the judge who heard the custody issue could not hear a motion for reconsideration because he was "in Juvenile," stating: "I will tell you that I have been in Juvenile and I have heard Family cases and motions related to Family cases, and so that is just not the case." The court concluded: "What I am going to do is find that this is not an emergency. I will set it for an expedited scheduling conference, and it can be heard in due course if the defendant wants to proceed in this manner." It stated:

> It is clear to me that this was not an emergency that needed to be heard today, nor could the Court be reasonably informed enough on an emergency basis to make such an important decision respecting visitation of this very young child between California and Maryland.
>
> To that end, I understand that the plaintiff has incurred attorneys' fees in connection with the review and preparation and appearing today in order to deal with this motion that was filed on an emergency basis.
>
> I was provided for in the motion with statements of time and the like. I don't believe that the attorney in this ease should be personally assessed the fees, although I have done so one time in my career between the master's office and the bench.
>
> But I do believe that there should be some contribution to the fees of plaintiff's counsel and therefore I will order that the defendant pay to the plaintiff as and for contribution to attorneys' fees the sum of $1,000.

The order entered on August 24, 2012, reflected this oral ruling, denying Ms. Ygnacio's motion, ordering that the matter be scheduled for an expedited scheduling hearing within the next thirty days, and ordering that Ms. Ygnacio pay Mr. Fernandes $1,000 for attorneys' fees.

On August 30, 2012, Ms. Ygnacio filed a Motion for Reconsideration of Emergency Motion for Interim Access Schedule. Mr. Fernandes' opposition to her motion stated that "there is no emergency" and that Ms. Ygnacio was "determined to file as many frivolous motions and other pleadings as possible," and that he "should not have to pay for these expenses." He asserted that the filing of the pleading was "unnecessary" and "without just cause."

The September 14, 2012, Order denied Ms. Ygnacio's Motion for Reconsideration of Emergency Motion for Interim Access Schedule as not being an emergency. It also ordered that counsel "contact the Assignment Office immediately to schedule an expedited scheduling hearing within the next thirty days as was ordered August 24, 2012," and it ordered Ms. Ygnacio to pay $1,500 in attorneys' fees to Mr. Fernandes.

Because we have vacated the custody order and access schedule and remanded for further proceedings on the issue of an appropriate access order, it is not necessary for us to address the rulings regarding an interim access schedule pending appeal. We will address, however, the order for attorneys' fees.

Maryland Rule 1-341 provides:

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

This Court has explained:

> [B]efore imposing sanctions in the form of costs and/or attorney's fees under Rule 1-341, the judge must make two separate findings that are subject to scrutiny under two related standards of appellate review. First, the judge must find that the proceeding was maintained or defended in bad faith and/or without substantial justification. This finding will be affirmed unless it is clearly erroneous or involves an erroneous application of law. Second, the judge must find that the bad faith and/or lack of substantial justification merits the assessment of costs and/or attorney's fees. This finding will be affirmed unless it was an abuse of discretion.

*Seney v. Seney*, 97 Md. App. 544, 549 (1993) (quoting *Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267-68 (1991)).

In both of his oppositions to Ms. Ygnacio's filings, Mr. Fernandes asserted that the filing of the pleading was "unnecessary" and "without just cause." In its

order addressing Ms. Ygnacio's Emergency Motion for Interim Access Schedule, the court stated that the motion "was not an emergency" and that Ms. Ygnacio should have filed a motion to modify visitation. Despite the admonition, Ms. Ygnacio filed a motion for reconsideration of the first order, based on the same arguments that had already been rejected. Under those circumstances, the award of attorneys' fees was not an abuse of discretion.

**MOTION TO DISMISS DENIED. AUGUST 2012 CUSTODY JUDGMENT VACATED. JUDGMENT AWARDING ATTORNEY'S FEES BASED ON MOTIONS FOR INTERIM ACCESS AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

1. On January 20, 2012, the court also entered an order denying Ms. Ygnacio's Motion to Alter or Amend Court's Order or, in the Alternative, Motion to Vacate and/or Set Aside Court's Order Entered January 6, 2012. On January 24, 2012, Ms. Ygnacio filed a Motion to Alter or Amend Court's Order Entered January 20, 2012.

2 Methicillin-resistant Staphylococcus aureus, a strain of *staphylococcus aureus* bacteria resistant to most antibiotics. Taber's Cyclopedic Medical Dictionary 1457, 2194 (21st ed. 2009).

3. This was Ms. Ygnacio's attorney's summary of the parties' recorded conversation, but Ms. Hall had been given a transcript of the recording and the CD, and she responded that the conversation, as summarized by counsel, influenced her decision on custody.

4. The birth certificate, however, indicates that Quentin was born at Sibley Hospital in Washington, D.C.

5. Counsel indicated that another judge of the court promulgated relocation factors, and the court allowed reference to them as an aid to the court.

6. Since this appeal was noted, there have been multiple motions filed. On November 23, 2012, Ms. Ygnacio filed, in this Court, an Emergency Motion to Stay Court's Orders and Motion for Immediate Access Schedule Pending Appeal. On November 30, 2012, this Court denied Ms. Ygnacio's motion, without prejudice to her right to seek that relief in the circuit court. On December 6, 2012, Mr. Fernandes filed, in the circuit court, an Emergency Motion for Modification of Custody Order and Petition for Constructive Civil Contempt, based on Ms. Ygnacio's failure to return Quentin after his Thanksgiving visit with her in California On December 8, 2012, after a hearing in which counsel for Ms. Ygnacio explained that she had not returned Quentin to Maryland due to Mr. Fernandes' neglect or improper medical care of Quentin, the circuit court granted the motion, in part, directing Ms. Ygnacio to return the parties' minor child to Mr. Fernandes by December 9, 2012, and providing that if she did not do so, the Maryland State Police or another law enforcement agency "shall use any and all necessary and reasonable force to return the child to his home address." On December 12, 2012, Ms. Ygnacio filed, in this Court, an Emergency Motion to Stay Court's Orders. On December 13, 2012, this Court granted the motion until Mr. Fernandes had an opportunity to respond to the motion and this Court had the opportunity to review the response. On December 22, 2012, after Mr. Fernandes filed a response and Ms. Ygnacio filed a reply, this Court granted Ms. Ygnacio's Emergency Motion to Stay Court's Orders, ordering that the December 8, 2012 order, as well as enforcement of the circuit court's Custody Order that the parties follow a "5-2-2-5" visitation schedule, was stayed. Mr. Fernandes subsequently filed a motion for reconsideration of the December 22, 2012 order, to which Ms. Ygnacio replied. On January 18, 2012, this Court denied the motion, without prejudice to the parties to seek an interim access schedule in the circuit court pending appeal. On January 20, 2012, Mr. Fernandes filed, in the circuit court, an Emergency Motion for Interim Access Schedule Pending Appeal, which was granted on January 23, 2012. A hearing has been set in the circuit court for February 17, 2012.

7. Rule 8-504(c) provides:

> **Effect of noncompliance**. For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with respect to the case, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed.

8. We do note, however, that although Ms. Ygnacio's reply brief cites to pages of the record extract to support her factual assertions, a review of those pages often does not support those assertions.

9. Moreover, in her original brief, Ms. Ygnacio failed to discuss how the court's alleged waste of time prejudiced her. *See Harris v. David S. Harris, P.A.*, 310 Md. 310, 319 (1987) (an appellant seeking reversal of a court's judgment must show both error and prejudice). Although Ms. Ygnacio did discuss prejudice in her reply brief, the prejudice raised involves the court's subsequent rulings limiting Ms. Ygnacio from presenting testimony. We will address this issue in section II of the opinion.

10 At argument, counsel for Mr. Fernandes stated that the parties agreed that three days was a sufficient allocation of time for the hearing. Ms. Ygnacio's counsel stated that he believed he asked for four days, but in any event, he did not object to the allocation of three days for trial.

11. On appeal Ms. Ygnacio lists six witnesses in addition to herself that she would have called had she been given more time to present evidence. At trial, however, counsel proffered only that he would call Ms. Ygnacio and her mother.

12. Ms. Ygnacio further alleges that she was given 40 fewer minutes than Mr. Fernandes, but we do not have an adequate record to address this claim. *See Fields v. State*, 172 Md. App. 496, 513 (an appellant has the burden to produce a record to rebut the general presumption that a trial court's actions are correct), *cert. denied*, 399 Md. 592 (2007). The transcripts in the record are not time stamped. Ms. Ygnacio included "CourtSmart Tag Reports" in support of her argument that she was given less time. The full report for the morning of June 29, 2012, however, is not included. From our review of the record, it appears that the circuit court painstakingly kept track of the time and found that the parties had equal time.

13. The 5-2-2-5 schedule refers to alternating days the child is to spend with each parent.

14. Mr. Fernandes' counsel stated that it appeared that the only option the circuit court had was that Quentin either "stays in Maryland with Dad, or goes to California with Mom."

15. The court evaluator testified that a 5-2-2-5 access schedule is not recommended for infants or toddlers because they "need to have one primary parent, but still see the other parent in short, but frequent, visits."

16. On remand, we suggest that the court hold a hearing to take additional evidence. Although we did not find an abuse of discretion in the trial court's limitation of Ms. Ygnacio's time to present evidence, the result of counsel's tactical choices regarding his use of time resulted in his having extremely little time to present Ms. Ygnacio's case. Further evidence on the issue on remand may be in the best interest of the child. Additionally, we suggest that the court reassess its order for joint legal custody. The Court of Appeals has stated that the ability of the parents to communicate "is clearly the most important factor in the determination of whether an award of joint legal custody is appropriate, and is relevant as well to a consideration of shared physical custody." *Taylor v. Taylor*, 306 Md. 290, 304 (1986). Indeed, "[r]arely, 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." *Id*. The circuit court granted joint legal custody based on the finding that the parties "have a long history of communicating with one another regarding child issues." Given the extensive litigation that has occurred since the August 2012 order, this issue should be revisited.

NO TEXT

Cite as 4 MFLM Supp. 79 (2012)

**Custody: modification: jurisdiction over out-of-state custody order**

# William Smith
# v.
# Sheila A. Wright, et vir

*No. 0623, September Term, 2011*

*Argued Before: Matricciani, Hotten, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.*

*Opinion by Hotten, J.*

*Filed: February 14. 2012. Unreported.*

**Where the child's father was awarded custody by a Virginia court but immediately gave the child to a Maryland couple, the Maryland court properly assumed jurisdiction to modify the order six years later, after the couple registered it in Maryland and the Virginia court deferred jurisdiction.**

*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 April 2, 2003, Kim Gaines ("Ms. Gaines") gave birth to Jahmear Dion Smith ("Jahmear"). Not long after the birth, the Juvenile and Domestic Relations District Court in Arlington, Virginia ("Arlington Juvenile Court"), awarded appellant, William Smith, custody of Jahmear. That same day, appellant gave Jahmear to appellees, Marvin and Sheila Wright, who were residents of Maryland, to raise as their own child. Several years later, appellees asked the Circuit Court for Dorchester County to modify the Arlington Juvenile Court's custody order. Throughout the proceeding, appellant asserted that the circuit court did not have jurisdiction. The circuit court disagreed, concluding that jurisdiction was proper because the Arlington Juvenile Court deferred jurisdiction to Maryland. On appeal, appellant argues that the circuit court did not have jurisdiction to modify custody, appellees were guilty of breach of contract, his right to a trial by jury was violated, and his rights to due process and equal protection were violated.[1] For the reasons that follow, we affirm the judgment of the circuit court.

### Background

On July 6, 2004, the Arlington Juvenile Court issued an order awarding appellant custody of Jahmear. Prior to the hearing, appellant and his wife contacted appellees to gauge their interest in caring for Jahmear. Appellees agreed to care for Jahmear and picked him up the day appellant was awarded custody. Not long after, appellees contacted appellant to obtain documentation that would confirm appellees were raising Jahmear. In response, appellant and his wife drafted an agreement that stated appellees would raise Jahmear in their home; appellees would be "given share[d] custody[;]" and custody would be surrendered if Jahmear was not raised under the proper standard of care. Thereafter, early in 2007, appellees learned that the agreement was insufficient documentation to register Jahmear for school. Appellees attempted to discuss the issue with appellant, but the conversation angered appellant. Appellant subsequently threatened to take Jahmear back if appellees challenged the Arlington Juvenile Court's custody order.

In August of 2010, appellant, who lived in Florida, returned to Maryland to get Jahmear. Appellant showed up at appellees' old residence and became angry when he was unable to locate them. Appellant then called the police. The police contacted Sheila at work, and Sheila and appellant spoke about the situation. Sheila invited appellant over to appellees' house to visit Jahmear, but appellant refused. Thereafter, on August 13, 2010, appellees received a letter requesting the termination of the custody arrangement. In the letter, appellant stated that appellees had not maintained the "standard requirements" of Jahmear's welfare, failed to maintain "legitimate" contact information, and prohibited Jahmear from developing a relationship with his mother, siblings, grandparents, and extended family.

On August 27, 2010, appellees filed a request to register a foreign custody determination, a motion to modify custody and visitation, and a motion for an emergency hearing.[2] On September 8, 2010, appellant filed a motion challenging jurisdiction. In his motion, appellant asserted that appellees could not register the initial custody determination because they were not parties to the action. Appellant also asserted that Virginia was the controlling jurisdiction. Separately, Ms. Gaines filed a motion, asserting Virginia was the controlling jurisdiction. Not long after, appellant, again, challenged jurisdiction, arguing that the circuit court

lacked authority over the custody determination. Appellant also filed a counter-complaint, alleging "fraud and bad faith" with regard to the custody agreement.[3] Appellant then submitted an additional motion challenging jurisdiction, wherein he proffered the same arguments noted above.

On December 17, 2010, the parties appeared before a master for a *pendente lite* hearing. Before addressing the merits of the pending issue, the master concluded that jurisdiction was not an issue because the initial custody determination was registered in the circuit court, and there was no pending proceeding in another state. The master then held that there had been material changes in the circumstances from the initial custody determination. The master also noted that appellant was given custody of Jahmear and immediately handed him over to appellees. Ultimately, the master recommended that appellees be awarded sole physical and legal custody while the case was pending. The master also recommended that Ms. Gaines be granted liberal visitation, and appellant be permitted supervised visitation.[4] The circuit court accepted the recommendations.

On December 22, 2010, appellant filed a motion to amend the *pendente lite* order. Appellant argued, among other things, that jurisdiction was not proper, appellees breached the custody agreement, "the express agreement of the parties overrides the law[,]" appellant's right to due process was violated, the circuit court violated appellant's right to equal protection, appellant was denied a fair trial, there was insufficient evidence to support the *pendente lite* order, the circuit court was "sidestep[ping]" existing law, and the circuit court was not impartial. The circuit court denied the motion.

Appellees thereafter propounded interrogatories and requested the production of documents. Appellant and Ms. Gaines failed to respond or produce the necessary documentation. Appellees thereafter filed motions to compel. Appellant objected on the grounds that the circuit court lacked jurisdiction. The circuit court granted the motions and held that appellant and Ms. Gaines could not support or oppose claims and defenses; appellant and Ms. Gaines would not be permitted to introduce evidence; pleadings would be stricken; and default judgment would be entered.

On April 27, 2011, the circuit court conducted a custody hearing. At the conclusion of testimony, the circuit court found that it had jurisdiction over the matter because the Arlington Juvenile Court had surrendered jurisdiction. The Chief Judge of the Arlington Juvenile Court informed the circuit court that he would make a notation in the record that the Arlington Juvenile Court no longer exercised jurisdiction over the case. The Chief Judge then acknowledged that "all contact involving [Jahmear was] in the State of Maryland." Once jurisdiction was addressed, the circuit court concluded that legal and physical custody should be awarded to appellees. The circuit court explained that Jahmear needs permanency in his life; appellees had a longstanding relationship with Jahmear; appellees had a strong reputation for caring for their family; Jahmear thrived with appellees, Jahmear expressed a desire to remain with appellees; appellees residence was appropriate for raising children; and Jahmear had known appellees for seven years.

**Jurisdiction**

In 1997, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). *Krebs v. Krebs*, 183 Md. App. 102, 104 (2008). The UCCJEA was promulgated to "provide stronger guidelines for determining which state has original jurisdiction, continuing jurisdiction, and modification jurisdiction over a child custody determination." *In Re: Kaela C., Gunner C. & Franklin C.*, 394 Md. 432, 455 (2006) (footnotes omitted). Maryland adopted the UCCJEA in 2004, *see* Chapter 502 of the Acts of 2004, and Virginia adopted it in 2001. *See Foster v. Foster*, 664 S.E. 2d 525, 526 n.1 (Va. Ct. App. 2008).

In Virginia, pursuant to VA Code Ann. § 20-146.12 (Lexis 2011), a court has jurisdiction to make an initial custody determination when:

> 1. Th[e] Commonwealth is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from th[e] Commonwealth but a parent or person acting as a parent continues to live in th[e] Commonwealth;
>
> 2. A court of another state does not have jurisdiction under subdivision 1, or a court of the home state of the child has declined to exercise jurisdiction on the ground that th[e] Commonwealth is the more appropriate forum under § 20-146.18 or § 20-146.19, and (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this Commonwealth other than mere physical presence and (ii) substantial evidence is available in this Commonwealth concerning the

> child's care, protection, training, and personal relationships;
>
> 3. All courts having jurisdiction under subdivision 1 or 2 have declined to exercise jurisdiction on the ground that a court of th{e] Commonwealth is the more appropriate forum to determine the custody of the child under § 20-146.18 or § 20-146.19; or
>
> 4. No court of any other state would have jurisdiction under the criteria specified in subdivision 1, 2, or 3

The Arlington Juvenile Court had jurisdiction over the initial custody determination because Ms. Gaines was a resident of Virginia, and Jahmear resided in Virginia for six months prior to the initial custody determination. Appellees accepted the original custody determination; but, because Jahmear was given to them immediately after the Arlington Juvenile Court determined custody, appellees asked a Maryland court to modify the original order.

A Maryland court cannot modify a custody determination made by an out-of-state court unless it had jurisdiction to make an initial determination and:

> (1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under § 9.5-202 of this subtitle or that a court of this State would be a more convenient forum under § 9.5-207 of this subtitle; or
>
> (2) a court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Md. Code (2006 Repl. Vol.), § 9.5-203 of the Family Law Article ("F.L.").

Pursuant to F.L. § 9.5-201, a Maryland court has jurisdiction to make an initial custody determination when:

> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:
>
> (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
>
> (4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

The Arlington Juvenile Court had jurisdiction over the initial custody determination because Jahmear resided in Virginia at the time of the proceedings. However, the Chief Judge of the Arlington Juvenile Court deferred jurisdiction to Maryland because Jahmear resided in Maryland with appellees since appellant was awarded custody. Once the Arlington Juvenile Court deferred jurisdiction, the circuit court could only exercise jurisdiction if the Arlington Juvenile Court concluded that forum was inconvenient, *see* F.L. § 9.5-207, or if it declined to exercise jurisdiction. *See id* at § 9.5-208. The record suggests that the Arlington Juvenile Court determined jurisdiction was appropriate in Maryland because the forum was inconvenient.

In Virginia, a court "that has jurisdiction . . . to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." VA Code Ann. § 20-146.18. Moreover, "[t]he issue . . . may be raised upon the motion of a party, the court's own motion, or request of another court." *Id*. In reviewing such a motion, a Virginia court must review the following factors:

> 1. Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> 2. The length of time the child has resided outside this Commonwealth;

> 3. The distance between the court in this Commonwealth and the court in the state that would assume jurisdiction;
>
> 4. The relative financial circumstances of the parties;
>
> 5. Any agreement of the parties as to which state should assume jurisdiction;
>
> 6. The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> 7. The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> 8. The familiarity of the court of each state with the facts and issues in the pending litigation.

*Id.* at § 20-146.18.

In Maryland, "[a] court . . . that has jurisdiction . . . to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." F.L. § 9.5-207(a)(1). Inconvenient forum can be raised by a motion by a party, a motion by the court, or through a request by another court. *Id.* at § 9.5-207(a)(2). In making this determination, a court must consider:

> (i) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (ii) the length of time the child has resided outside this State;
>
> (iii) the distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (iv) the relative financial circumstances of the parties;
>
> (v) any agreement of the parties as to which state should assume jurisdiction;
>
> (vi) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (vii) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (viii) the familiarity of the court of each state with the facts and issues in the pending litigation.

*Id.* § 9.5-207(b)(2).

The Arlington Juvenile Court concluded that Maryland was the appropriate forum because "all contact involving [Jahmear was] in the State of Maryland." We have no authority to review this decision. *See e.g. Krebs*, 183 Md. App. at 112-13 (an appellate court did not have authority to review an Arizona court's determination that jurisdiction was inconvenient in Arizona). However, because the factors for determining forum inconvenience are the same, we would have affirmed the holding if it were made by a Maryland court. In any event, because the Arlington Juvenile Court deferred jurisdiction, and subsequently found that the forum was more appropriate in Maryland, pursuant to F.L. § 9.5-203, we must conclude that the circuit court properly assumed jurisdiction over the case.

### Custody Agreement

Appellant argues that the parties' custody agreement is controlling. Specifically, appellant provides:

> **MAXIM — Consent makes law. A Legal Contract agreement of the consenting parties Constitutes law between the parties, Agreeing to be bound by it. THE express LEGAL agreement of the parties . . . overrides the law,.!?**

(Emphasis in original).

Appellant did not provide sufficient support for the argument, so we shall not address the issue. Md. Rule 8-504(a)(6); *see Beck v. Mangels*, 100 Md. App. 144, 149 (1994); *see also Davidson v. Seneca Crossing Section II Homeowner's Ass'n., Inc.*, 187 Md. App. 601, 646-47 (2009); *Baltimore Street Builders v. Stewart*, 186 Md. App. 684, 706-07 (2009); *McIntyre v. State*, 168 Md. App. 504, 528 (2006); *Kramer v. Mayor & City Council of Baltimore*, 124 Md. App. 616, 634 n.4 (1999); *Hoffman v. United Iron & Metal Co., Inc.*, 108 Md. App. 117, 135 n.9 (1996).

### Due Process

Appellant argues that his right to due process was violated. However, he neglects to explain how or why his right was violated. Other than a general reference to Article 24 of the Maryland Declaration of Rights, appellant also fails to provide sufficient authority for his argument. Accordingly, we elect not to address the issue. Md. Rule 8-504(a)(6); *see Beck*, 100 Md. App. at 149; *see also Davidson*, 187 Md. App. at 646-47; *Stewart*, 186 Md. App. at 706-07; *McIntyre*, 168 Md. App. at 528; *Kramer*, 124 Md. App. at 634 n.4; *Hoffman*, 108 Md. App. at 135 n.9.

### Equal Protection

Appellant next posits that the circuit court violated his right to equal protection. However, appellant, again, neglects to proffer supporting argument or legal authority. Therefore, we decline the invitation to address the issue. Md. Rule 8-504(a)(6); *see Beck*, 100 Md. App. at 149; *see also Davidson*, 187 Md. App. at 646-47; *Stewart*, 186 Md. App. at 706-07; *McIntyre*, 168 Md. App. at 528; *Kramer*, 124 Md. App. at 634 n.4; *Hoffman*, 108 Md. App. at 135 n.9.

### Trial By Jury

Relying on Article 23 of the Maryland Declaration of Rights, appellant asserts that the circuit court violated his right to a trial by a jury. Under Article 23, in civil proceedings, a trial by jury is permissible "where the amount in controversy exceeds the sum of $ 15,000. . . ." However, appellant neither established an amount in controversy that exceeded $15,000, nor did he advance sufficient support for his argument that he was entitled to a jury trial. Thus, because appellant failed to present sufficient supporting argument beyond the general reference to Article 23, we shall not address the issue. Md. Rule 8-504(a)(6); *see Beck*, 100 Md. App. at 149; *see also Davidson*, 187 Md. App. at 646-47; *Stewart*, 186 Md. App. at 706-07; *McIntyre*, 168 Md. App. at 528; *Kramer*, 124 Md. App. at 634 n.4; *Hoffman*, 108 Md. App. at 135 n.9.

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

**FOOTNOTES**

1. Appellant's questions presented are incomprehensible. The issues we gleaned were from an arduous review of appellant's brief.

2. Appellees also filed a motion to intervene because they were not parties to the original custody determination. In the motion, appellees argued that it was necessary to intervene because Jahmear had resided with them since the date of the original custody order, they had an interest in the pending situation, and they wanted to be granted sole legal custody. The circuit court granted the motion.

3. In the counter-complaint, appellant alleged that the writ of summons was fraudulent because jurisdiction was not proper.

4. During the *pendente lite* hearing, as the master was making her ruling, appellant argued that his right to due process was being denied because the master would not permit him to speak. The master noted that appellant's right to due process was not being violated because he had been provided an opportunity to be heard.

NO TEXT

**Cite as 4 MFLM Supp. 85 (2012)**

**Custody: modification: jurisdiction over out-of-state custody order**

# Anita L. Webb
# v.
# Daniel M. Salley

*No. 727, September Term, 2011*

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

*Opinion by Watts, J.*

*Filed: February 14, 21012. Unreported.*

**The Maryland court lost jurisdiction to modify a New York court's custody order when the mother and child returned to New York, where the mother was assigned by the Army, while the father was stationed in Virginia.**

This appeal is from an Order of the Circuit Court for Anne Arundel County granting Daniel M. Salley, appellee,[1] sole legal and physical custody of the parties' child, Laela, and modifying an Order of the Family Court of the State of New York, held in and for the County of Kings (the "New York Family Court"), which had given appellant, Anita L. Webb, permanent custody of the child. Appellant raises two issues, which we quote:

> I. Did the trial court have jurisdiction to hear and decide this case?
>
> II. Did the trial court abuse its discretion and commit clear error in denying Appellant's request for a continuance?

For the reasons set forth below, we answer the first question in the negative, and shall reverse. As a result of the reversal on Issue I, we need not address Issue II.

## FACTUAL AND PROCEDURAL BACKGROUND

On August 13, 2004, Laela was born to appellant and appellee. Appellant and appellee were never married and both are commissioned officers in the United States Army. On February 2, 2006, appellee filed a petition for custody of Laela in the New York Family Court. On October 30, 2006, the New York Family Court issued a Temporary Order of Visitation granting appellee visitation the first weekend of every month.

*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 28, 2007, the New York Family Court issued a second Temporary Order of Visitation which continued appellee's visitation until April 20, 2007. On April 20, 2007, appellant and appellee entered into a "So-Ordered Stipulation" ("Stipulation") in the New York Family Court. In the Stipulation, the parties agreed that appellant would have "permanent custody of [Laela], and full control and supervision of [her] care, guidance, maintenance and education[.]" The parties agreed that appellee would have visitation and access to information regarding Laela's health, schooling, and general well-being. The parties agreed to "consult with each other with respect to the education, religious training, health, welfare and other matters of similar importance affecting [Laela.]" As of April 20, 2007, appellant was stationed at Fort Hamilton, New York, and appellee was stationed in Fort Lee, Virginia.

On April 30, 2007, appellee was deployed to Iraq — a deployment that lasted for two years, ending May, 2009. At the conclusion of his deployment, appellee returned to Fort Lee, Virginia, and lived in Petersburg, Virginia. During appellee's deployment, appellant was assigned to a duty station at Walter Reed Hospital, District of Columbia. Appellant relocated from New York to Maryland with her four other children and Laela.

On July 1, 2009, appellee filed a Request for Registration of a Foreign Child Custody Determination for the Stipulation, as well as a Petition for Enforcement of a Foreign Child Custody Determination, in the Circuit Court for Anne Arundel County[2] seeking enforcement of the Stipulation in Maryland. On July 6, 2009, the circuit court held a hearing on the Request for Registration and Petition for Enforcement. At the hearing, the parties reached an agreement. On August 13, 2009, based on the agreement of the parties, the circuit court issued an Order, which provided as follows:

> **ORDERED**, that the Court finds as a fact that the home state of the minor child, Laela Moniquie Salley born on August 13, 2004, has been. established to be the State of Maryland since January, 2008; and it

is further agreed upon by the Parties; and

**ORDERED**, that the April 20, 2007 Custody Order and Stipulation from the Family Court of the State of New York for the County of Kings is hereby Registered and Recognized in the State of Maryland; and it is further agreed upon by the Parties, and

**ORDERED**, that the April 20, 2007 Custody Order and Stipulation from the Family Court of the State of New York for the County of Kings is to be Enforced in the State of Maryland[.]

On September 25, 2009, appellee filed a Petition for Contempt and a Petition to Modify Custody and Child Support with the Circuit Court for Anne Arundel County alleging that appellant failed to: (1) follow the provisions of the Custody Order and Stipulation dated April 20, 2007, (2) provide adequate medical care for Laela, and (3) that appellant had relocated to Maryland from New York, constituting a substantial change in the parties' circumstances. On October 31, 2009, appellec served appellant with the Petition for Contempt and the Petition to Modify Custody, via a process server, at 6619 Mapes Road, Fort Meade, Maryland 20755.

On November 19, 2009, appellant filed answers to both petitions. Over the next eleven months, appellant and appellee conducted discovery, and attended a court-ordered Mediation of Custody and Visitation Issues. On October 5, 2010, the circuit court scheduled a hearing for January 25, 2011.

On January 10, 2011, in a letter submitted via facsimile to the circuit court, appellant requested that the hearing scheduled for January 25, 2011, be postponed "in order [for appellant] to find legal representation" and "the case if possible [to] be returned to the State of New York[.]" On January 20, 2011, the circuit court issued an Order denying appellant's request for a continuance. In the Order, the circuit court stated "with regard to [appellant's] request to have the case 'returned' to the State of New York, [appellant] shall file a more appropriate motion if she wishes for this Court to relinquish jurisdiction." On January 24, 2011, appellant's new counsel entered his appearance.

On January 25, 2011, the circuit court held a hearing on the Petition to Modify Custody and Child Support. At the hearing, counsel for appellee asserted that the Circuit Court for Anne Arundel County had subject matter jurisdiction over the motion, and appellant agreed. Appellant, however, gave her home address as being in Cornwall, New York. On February 14, 2011, the circuit court issued an Order awarding appellee sole legal and physical custody of Laela, and appellant visitation. The Order provided:

> The above captioned case having come before this Honorable Court on January 25, 2010 on [appellee]'s Motion for a Modification of Custody, Visitation and Support with both parents agreeing to treat Maryland as child's "home state" currently for UFSA/UCCJEA & the court finding that custody should be reversed between parents in child's best interest, it is on this 7" day of February, 2011, hereby ORDERED as follows:
>
> * * *
>
> [Appellee] shall have sole legal and physical custody of [Laela], and full control and supervision of the care, guidance, maintenance and education of [Laela].
>
> [Appellant] shall have the rights of visitation with [Laela] set forth in the Schedule of [Appellant's] Visitation herein below.

On February 24, 2011, appellant filed a Motion for New Trial or to Alter or Amend a Judgment or Revise. In the motion, appellant advised that in May, 2010, she was reassigned to West Point, New York and had moved, with Laela, to Cornwall, New York. On April 14, 2011, the circuit court denied the motion. On May 13, 2011, appellant noted an appeal.

**DISCUSSION**

Appellant contends that the Circuit Court for Anne Arundel County lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") to hear and decide the case.[3] Appellant argues that the circuit court erred in finding that Maryland was the home state of Laela, and compounded this error by modifying the child custody order on February 14, 2011. Appellant argues that the New York Family Court retained jurisdiction over the matter because "there was a New York custody order, . . . appellant and [Laela] were residing in New York at the time of trial, [ ]and . . . [a]ppellee was, at that time, living in Virginia." Appellant maintains that "it seems unquestionable that [she] and the minor child Laela were residing in New York State when this action was commenced." Appellant concedes that her attorney consented to the Circuit Court for Anne Arundel County having jurisdiction over the matter. Appellant contends, however, that subject matter jurisdiction cannot be conferred upon the circuit court by consent

or inaction of the parties. Appellant maintains that "the issue of subject matter jurisdiction can be raised and decided in this [ ] Court[.]" We agree.

**Consent to Jurisdiction**

Maryland Rule 8-131(a) provides: "The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322,[4] over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court." In Lane v. State, 348 Md. 272, 278 (1997), the Court of Appeals interpreted Md. Rule 8-131(a) as granting an appellate court the ability to review a challenge to subject matter jurisdiction that was not raised before the trial court. The Court stated:

> Ordinarily, we would not address an issue not raised in or expressly decided by the trial court. It has long been the law, however, which is now articulated in Maryland Rule 8-131(a), that a challenge to the trial court's subject matter jurisdiction may be raised on appeal even if not raised in or decided by the trial court. This exception to the general rule of preservation is based on the premise that a judgment entered on a matter over which the court had no subject matter jurisdiction is a nullity and, when the jurisdictional deficiency comes to light in either an appeal or a collateral attack on the judgment, ought to be declared so.

Lane, 348 Md. at 278 (citations omitted).

In Russell v. Russell, 50 Md. App. 185, 187 (1981), we held that "[t]he parties could not confer jurisdiction by consent where the jurisdiction did not exist under the appropriate law; this deficiency may be raised at any time." See also Rypma v. Stehr, 68 Md. App. 242, 247, n. 1(1986) ("Parties cannot confer subject-matter jurisdiction on a court. The question presented here, whether a Maryland court has jurisdiction over custody related matters, is one of subject-matter jurisdiction. This has always been so, both before the Maryland Uniform Child Custody Jurisdiction Act and after its enactment. A question of subject-matter jurisdiction can be raised at any time, including on appeal." (Citations omitted)). Thus the issue of a circuit court's subject matter jurisdiction may be raised in an appellate court despite the party's consent to jurisdiction before the circuit court. "Whether a court has fundamental jurisdiction, i.e., the power, to decide a matter, must be determined by looking to 'the applicable constitutional and statutory pronouncements,' because fundamental jurisdiction involves the power, or authority, of a court to render a valid final judgment." Maryland Bd. of Nursing v. Nechay, 347 Md. 396, 405 (1997) (internal citations omitted).

In this case, consistent with our holding in Russell, we conclude that appellant's consent to the circuit court's jurisdiction at the January 25, 2011, hearing did not confer jurisdiction on the court, as jurisdiction must be determined based on the applicable laws and the facts of the case. Accordingly, we shall review the circuit court's exercise of subject matter jurisdiction.

**Jurisdiction**

In determining whether the circuit court properly exercised jurisdiction, the decision of the circuit court is reviewed for an abuse of discretion. Harris v. Melnick, 314 Md. 539, 557 (1989); Gestl v. Frederick, 133 Md. App. 216, 229 (2000) ("We will not disturb a trial court's decision whether or not to exercise jurisdiction unless the trial court abuses its discretion."). In Olson v. Olson, 64 Md. App. 154, 159 (1985) in holding that the trial court erred in concluding that the court lacked subject-matter jurisdiction, we stated that "a judge is 'presumed to know the law and is presumed to have performed his duties properly." (Citations omitted). See also In re John F., 169 Md. App. 171, 180 (2006) (In a Child in Need of Assistance case, we discussed a previous case, In re Nahif A., 123 Md. App. 193 (1998), in which we explained that "a prima facie presumption of jurisdiction arises from the exercise of it. It is presumed that jurisdiction over the subject matter and parties has been rightfully acquired and exercised.").

Md. Code Ann., Family Law Article ("FL") § 9.5-201(a)(l) and (2), provides as follows:

> (a) Grounds for jurisdiction. — Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State has jurisdiction to make an initial child custody determination only if:
>
> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate

forum under § 9.5-207 or § 9.5-208 of this subtitle, and:

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

(ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[. ]

As defined by the Maryland UCCJEA, the "home state" of a child is "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child custody proceeding[.]" FL § 9.5-101(h)(1).

FL § 9.5-306, provides as follows:

(a) Granting relief. — A court of this State may grant any relief normally available under the law of this State to enforce a registered child custody determination made by a court of another state.

(b) Modification. — A court of this State shall recognize and enforce, but may not modify, except in accordance with Subtitle 2 of this title,[5] a registered child custody determination of a court of another state.

When modifying an out-of-state custody determination, FL § 9.5-203(2) requires:

Except as otherwise provided in § 9.5-204 of this subtitled,[6] a court of this State may not modify a child custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under § 9.5-201(a)(1) or (2) of this subtitle and . . . a court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

In Blount v. Boston, 351 Md. 360, 363 (1998), the Court of Appeals addressed whether a long-time member of the Maryland General Assembly, who was a candidate for re-election, had abandoned his domicile in Baltimore City. In determining whether the candidate met the "residency" requirement, the Court explained that "the words 'reside' or 'resident' in a constitutional provision or statute delineating rights, duties, obligations, privileges, etc., . . . mean[s] 'domicile' unless a contrary intent [is] shown." Id. at 365. The Court stated that the "concept of domicile is somewhat elusive," however, the "controlling factor in determining a person's domicile is his intent. One's domicile, generally, is that place where he intends it to be." Id. at 367-68 (citations and internal quotation marks omitted). The Court stated that:

A person's statements of his or her intent as to domicile are admissible and should be considered. Nevertheless, as the cases repeatedly point out, "that intent may. . . be more satisfactorily shown by the acts of the individual, rather than by his words." Intent is best shown by objective factors.

The two most significant objective factors evidencing a person's intent regarding domicile are where the person lives and where he or she votes or is registered to vote.

Id. at 368 (internal citations omitted).

In this case, the circuit court abused its discretion in exercising jurisdiction over the modification proceedings as the record reflects that appellant and Laela returned to live in New York in May, 2010. Pursuant to FL § 9.5-203(2), the circuit court may modify an out of state custody determination only when: (1) the jurisdiction requirements of FL § 9.5-201, regarding the child's home state, are met, **and** (2) "the child, the child's parents, and any person acting as a parent do not presently reside in the other state [where the original custody determination was made]." (Emphasis added).

As previously stated, FL § 9.5-201(a)(1) provides that:

(1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

FL § 9.5-101(f) provides "[c]ommencement means the filing of the first pleading in a proceeding." A review of the record reflects that the commencement of the modification proceedings occurred on September 25, 2009, when appellee filed a Petition to Modify Custody. On September 25, 2009, appellant and Laela were living in Maryland. According to

appellant in her Motion for New Trial or to Alter or Amend Judgment or Revise: “In May 2010 [appellant] was reassigned to West Point, NY and moved her family to Cornwall, NY. The home state of the parties’ daughter became New York as of November 2011.” As such, the circuit court properly determined that Laela’s home state was Maryland at the commencement of the modification proceeding — in September, 2009.

Satisfying the second criteria of FL § 9.5-203 (2) — requiring that Laela, appellant, and appellee “presently reside” outside of New York—is, however, problematic. FL § 9.5-203(2) requires, that “a court of this State or a court of the other state determine[ ] that the child, the child’s parents, and any person acting as a parent do not presently reside in the state [where the original custody determination was made].” In the February 14, 2011, Order, the circuit court specifically acknowledged that appellant “presently reside[d]” in New York, the State where the original custody determination was made, when discussing the visitation schedule, stating:

> [Appellant] shall make her best effort at all times to return the Child on time, with the understanding that, **notwithstanding [appellant’s] residence in another State**, a pattern of lateness in her pick up and/or drop off of the Child-absent the occurrence of a demonstrable emergency-shall be grounds for modification of the visitation agreement set forth herein.
>
> * * *
>
> Both [appellee] and [appellant] are currently enlisted in the United States Army: [appellee] is presently stationed at Fort Lee in Virginia; **[appellant] is presently stationed in New York.**
>
> * * *
>
> The Effective date of this Order shall be February 1, 2011 as to custody, visitation, and child support. On February 1, 2011, [appellee] shall travel to **[appellant’s] military base in New York** and pick up the minor child.

(Emphasis added).

In Blount, 351 Md. at 368, the Court of Appeals stated that determining a person’s domicile is based on evaluating the intent of the person to remain in that State. Intent is best shown by objective factors; the two most significant objective factors being “where the person lives and where he or she votes or is registered to vote.” Id. at 368-69. At the time of the modification hearing, appellant and Laela had been living in New York since May, 2010, when appellant was reassigned by the military. According to appellant, as expressed in her Motion for New Trial or to Alter or Amend a Judgment or Revise, she votes in New York. The record is devoid of any information indicating appellant intended to return to Maryland, or that appellant’s assignment outside of New York was anything but temporary. Appellant had previously lived in New York in 2007, and returned to New York in May 2010, nine months prior to the modification hearing. Absent reassignment by the military, there is no indication that appellant intends to live anywhere other than New York.

For the reasons set forth above, we conclude that the requirements of FL § 9.5-203(2) were not satisfied and, as such, the circuit court abused its discretion in modifying the out-of- state custody determination.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED AND REMANDED TO THE CIRCUIT COURT WITH INSTRUCTIONS TO DISMISS THE ACTION. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.**

**FOOTNOTES**

1. Appellee did not file a brief.

2. In the Petition for Enforcement of Foreign Child Custody Determination, appellee indicated that as of July 1, 2009, appellant lived at 4244 Doyle Court, Fort Meade, Maryland 20755.

3. The Uniform Child Custody Jurisdiction Enforcement Act was adopted as Title 9.5 of the Family Law Article of the Annotated Code of Maryland.

4. Maryland Rule 2-322 provides in pertinent part:

> (a) Mandatory. The following defenses shall be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process. If not so made and the answer is filed, these defenses are waived.
>
> (b) Permissive. The following defenses may be made by motion to dismiss filed before the answer, if an answer is required: (1) lack of jurisdiction over the subject matter, (2) failure to state a claim upon which relief can be granted, (3) failure to join a party under Rule 2-211, (4) discharge in bankruptcy, and (5) governmental immunity. If not so made, these defenses and objections may be made in the answer, or in any other appropriate manner after answer is filed.

5. “Subtitle 2 of this title” refers to the “Jurisdiction” subtitle of

the Maryland UCCJEA which includes sections 9.5-201 and 9.5-203.

6. FL § 9.5-204 allows for "temporary emergency jurisdiction" in Maryland "if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."

**Cite as 4 MFLM Supp. 91 (2012)**


**Adoption/Guardianship: termination of parental rights: CINA considerations distinguished**

# In Re: Juliana B.

*No. 1598, September Term, 2011*

*Argued Before: Zarnoch, Hotten, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.*

*Opinion by Hotten, J.*

*Filed: February 21, 2012. Unreported.*

**In deciding whether to terminate the parental rights of a father serving a long-term prison sentence, the court was not required to revisit the decisions in an earlier CINA case regarding potential relative placements for the child.**

This appeal arises out of the Circuit Court for Washington County, sitting as a juvenile court, ordering the termination of the parental rights of Louis G. to Juliana B. Juliana, who was two years old at the time of the court's order, had been placed in foster care by the Washington County Department of Social Services ("the Department") within days of her birth on October 8, 2009. She has remained in the same foster home since her original placement. On November 12, 2009, the circuit court determined that Juliana was a child in need of assistance ("CINA") and committed her to the Department for continued foster care placement.

On April 1, 2011, the Department filed a petition for guardianship with right to consent to adoption or long-term care short of adoption of Juliana. Tamara B., Juliana's mother, consented to the court's grant of guardianship to the Department on the condition that Juliana be adopted by the foster parents who have taken care of her essentially since her birth. Louis G., Juliana's father, who has been incarcerated during the entirety of Juliana's life, objected to the Department's guardianship petition. The court held a hearing on July 21, 2011, after which it granted the Department's petition. Mr. G. timely appealed, presenting the following issues, which we quote:

> 1. Did the circuit court err in denying appellant's motion to stay and proceeding with a termination of parental rights hearing when the parent's appeal of the CINA order changing the permanency plan from reunification to adoption is still pending in this Court?

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

> 2. Did the circuit court err in refusing to consider placement of Juliana with Appellant's aunt, Maria B., before terminating appellant's parental rights?
>
> 3. Did the circuit court err in terminating appellant's parental rights to Juliana?

For the reasons that follow, we affirm the judgment of the circuit court.

### BACKGROUND

Tamara B. was incarcerated in the Washington County Detention Center while pregnant with Juliana B. Prior to giving birth to Juliana, Ms. B. contacted a representative of the Department and expressed a desire that her expected child be adopted immediately after birth. Ms. B., while still incarcerated, gave birth to Juliana on October 8, 2009 at the Washington County Hospital. On October 9, 2009, Alison Lillis, a Child Protective Services worker for the Department, met with Ms. B. at the hospital to discuss arrangements for Juliana. Ms. B. provided Ms. Lillis with the names of two potential fathers, one of whom was Mr. G, and indicated that she wished for Juliana to be placed in a foster home for adoption. Mr. G was identified as Juliana's natural father before the adjudication and disposition of her CINA hearing on November 12, 2009. The court found Juliana to be a CINA and committed her to the Department for continued foster care placement.

Mr. G. was incarcerated at the time of Juliana's birth and remains incarcerated, with a mandatory release date of 2029.[1] He has never met Juliana because the Department and the juvenile court determined that transporting her to a maximum security prison in another county to visit Mr. G. was not in her best interest.

Ms. B. has been released from incarceration, but continues to assert that Juliana should be adopted by her foster parents. Ms. B. has maintained contact with the foster parents for information on Juliana's health and welfare, but has decided that it would be too emo-

tionally painful to visit Juliana. Ms. B. has attended all of Juliana's CINA hearings and the guardianship hearing. From the beginning of the guardianship process, Ms. B. has indicated that she consents to termination of her parental rights on the condition that Juliana be adopted by the foster parents. She also informed the court that she entered into an agreement with the foster parents for post-adoption contact with Juliana.

At the guardianship/termination of parental rights ("TPR") hearing, Dr. Carlton Munson testified for the Department as an expert in clinical social work. On December 8, 2010, Dr. Munson completed an attachment assessment for Juliana and her foster parents. He concluded that Juliana had developed a positive and secure attachment with the foster parents. He stated that removing Juliana from her foster parents' care would "cause a major, major disruption in her life" because she had been with them her entire life. He opined that termination of Mr. G.'s parental rights was in Juliana's best interest, given the need to maintain permanency and not disrupt Juliana's positive development.

Becky Rice, a member of the Department's Foster Care Unit, testified for the Department. She was the foster care worker for Juliana for Juliana's entire life. She reiterated that Ms. B. had been in favor of adoption since Juliana's birth. Ms. Rice advised that the Department had not made efforts to provide drug treatment counseling, parenting classes, or other services to Mr. G. because he was incarcerated and was unavailable as a placement option. She stated that Mr. G. did offer five family members as potential placements for Juliana, including his aunt, Maria B.[2] Mr. G. did not dispute, however, that he lied to Ms. Rice about Maria B.'s fitness, originally stating that she had gang affiliations and would be a bad placement for Juliana. Mr. G. maintained this position for several months, later admitting to Ms. Rice that he lied and asserting that Maria B. would be a suitable placement.

Ms. Rice visited Maria B. to explore whether she could be a possible placement option. At the time, Maria B. was fifty-six years old, smoked tobacco, had suffered a heart attack, and was diabetic. She was unemployed, with her primary source of income being social security disability payments. Ms. Rice stated that Maria B. was licensed as a foster care placement for troubled adolescent girls, but also had difficulty walking. Ms. Rice and the Department concluded that, based on Maria B.'s age, smoking habit, heart attack, diabetes, and difficulty walking, she was not a viable placement option for an infant child. Ms. Rice also testified that Maria B. advised that if she obtained custody of Juliana, she would place Juliana with her sister, Mr. G.'s birth mother. In his proffer, Mr. G. stated that Maria B., if she testified, would deny stating that she would give someone else custody of Juliana.

In its order, the circuit court found Ms. Rice's testimony to be credible, adopted the Department's recommendation, and also noted that it was concerned about placing a very young child in a home with emotionally troubled adolescent girls. The court also stated that its consideration of Maria B. as a placement resource was not statutorily required, but was part of its evaluation that the Department was reasonable in not placing Juliana with Maria B. The court recognized that Juliana "will be running and playing in the immediate future," so "[s]ome modest amount of physical fitness is required and the Department acted reasonably . . . in ruling [Maria B.] out based on purely physical reasons."

As additional placement options, Mr. G. offered his adoptive parents, who are also his biological grandparents. They were seventy-one and eighty-five years of age, with the elder suffering from dementia. The Department determined that they were too old to be viable placement options for an infant, ruling them out as placement options in the CINA case.

Mr. G. also offered three of his relatives who lived in New York as possible placement options for Juliana. The Department wrote letters to each of Mr. G.'s New York relatives, including in the letters information about possibly adopting Juliana and a form they could fill out and return if they desired to be considered as a placement option. One relative responded by leaving a voicemail in Spanish for the caseworker. The Department, through a Spanish speaking person, returned the telephone call. Mr. G.'s relative did not answer, so the Department left a message in which it provided information regarding Juliana and asked the relative to call back. However, the Department received no further contact from any of Mr. G.'s New York relatives, written or verbal. The Department did not receive any forms from Mr. G.'s New York relatives, and they did not attend the hearing.

Ms. B., Juliana's mother, testified at the TPR hearing, stating that she consented to the termination of her parental rights. She advised the court that she wanted Juliana to be adopted "from day one." Ms. B. also wanted Juliana to be adopted by her foster parents to maintain a sense of continuity. Ms. B. stated that Mr. G.'s family had known that she was pregnant, but that they did not help her during her pregnancy or seek to be involved in Juliana's life. Because Mr. G. was dealing with criminal charges during the pregnancy and Ms. B. perceived that Mr. G. was receiving threats, she decided to give Juliana her own last name and later to give Juliana up for adoption. Though she was incarcerated when she gave birth to Juliana, Ms. B. has since been released and has given birth to a son, who is in her care. Ms. B. testified that she did not

think Maria B. was fit to have custody of Juliana.

In a written order dated August 9, 2011, the circuit court considered the evidence, applied the statutorily mandated considerations, and, found that there was clear and convincing evidence that it was in Juliana's best interest to terminate the parental rights of Ms. B. and Mr. G, granting the Department guardianship of Juliana with the right to consent to adoption or long term care short of adoption.

**DISCUSSION**

**I. Denial of Mr. G.'s Request to Stay or Continue the Guardianship Trial Pending Resolution of Appeal of CINA Case**

Before the hearing on the petition to terminate Mr. G.'s parental rights, he sought to stay the proceedings until after this Court resolved his appeal of the circuit court's decision in the CINA case, changing the permanency plan from reunification to adoption.[3] The circuit court denied Mr. G.'s request, stating

> this termination of parental rights is an independent action from any underlying child in need of assistance petition. They are cases that have been going on before. It's another case file. It's another matter altogether. So . . . for that reason, . . . motion to stay is . . . denied and again it is my understanding the statutory scheme and judicial gloss provided by the Court of Appeals that these cases are mandated to proceed in a timely fashion and not be held up by appeals of something like the permanency plan or whatever. This case, of course, depending on how it goes, could be appealed by any party that feels aggrieved at the end of it as well. So that's not a reason I think to stay this matter. So the motion [is] respectfully denied[.]

Mr. G. contends that the circuit court erred in proceeding with the TPR hearing while his appeal of the CINA case was pending before this Court. We recently addressed the same issue in *In re: Adoption/Guardianship of Cross H.*, 200 Md. App. 142, cert. granted 422 Md. 352 (2011).[4] In that case, we held as follows:

> [T]here is no prohibition against the initiation of TPR proceedings during the pendency of a CINA appeal. . . . [W]hile related, the actions are independent of one another. CINA proceedings are governed by CJP 3-801, *et*[ ] *seq*. [,] and TPR proceedings are governed by FL 5-313 *et seq.* Therefore, despite the fact that appellants' claim of error here was mooted by the action of the Court of Appeals, we are unpersuaded that the pendency of the CINA appeal was a bar to the TPR case proceeding in the circuit court.

*Id.* at 151.

Accordingly, regardless of the outcome of the CINA appeal in this Court, the circuit court did not err in proceeding with the TPR case.

**II. Consideration of Placing Juliana with Mr. G.'s Aunt, Maria B.**

Mr. G. next contends that the circuit court erred in not considering placing Juliana with Maria B., Mr. G.'s aunt. In the its written order, the court ruled:

> Initially, the Court finds that the alleged failure of the Department to place the child with a relative of Mr. G. is not a consideration under the statutory criteria of Md. Family Code Ann. Section 5-323. All of the provisions of that section seem to require the Court to ensure at a TPR hearing that the Department has provided services to, and honored agreements with, the *parents* of the Respondent. In this case, placement with either parent is not an option. In the alternative, the Court shall address Mr. G.'s concerns in respect for his constitutionally protected parental rights.

(Emphasis in original).

Mr. G. asks us to revisit the CINA case in his appeal of the TPR case. However, in Mr. G.'s appeal of the CINA case, we already determined that the Department and the juvenile court committed no error by not placing Juliana with Mr. G.'s aunt, Maria B.[5]

In particular, the Department had investigated Maria B. as a potential placement option for Juliana, finding that she was a fifty-six year old smoker who had suffered a heart attack in 2004 and had poorly controlled diabetes. She was receiving disability income benefits due to her heart conditions, had difficulty walking, and was licensed to provide foster care to emotionally disturbed teens. The Department was concerned that Maria B. would have difficulty caring for a toddler and that the emotionally unstable teens could place Juliana at risk of harm. Maria B.'s income was derived from disability benefits and foster care payments, so she stated that she would use foster care payments to care for Juliana. Lastly, she may have indicated that she would eventually place Juliana with Mr. G.'s mother, who was currently unavailable due to

incarceration and has a long history of incarceration and involvement with drugs and drug cartels. The Department concluded that based on the results of Ms. Rice's investigation, Maria B. was not an appropriate placement for Juliana. In the CINA case, the lower court agreed, and we upheld that decision. In the TPR case currently before us, we will not revisit the court's decision to not place Juliana with Mr. G.'s aunt, Maria B.

**III. Circuit Court's Termination of Mr. G.'s Parental Rights**

Mr. G. argues that the circuit court erred in terminating his parental rights as to Juliana. He has recognized that he is not able to care for Juliana due to his incarceration. However, he identified several relatives who he believes would be able to care for Juliana. As mentioned above, we will not revisit the decisions in the CINA case regarding potential placements for Juliana.

Md. Code (2006), § 5-323(b) of the Family Law Article ("F.L.") provides that a juvenile court may 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. F.L. 5-323(d) sets forth the factors the court must consider in its best interest determination, giving "primary consideration" to the CINA's "health and safety." Finally, the court must make specific factual findings for each relevant statutory factor and determine whether those findings demonstrate parental unfitness or exceptional circumstances "that would make a continuation of the parental relationship detrimental to the best interests of the child[.]" F.L. § 5-323(b); *see also In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007). We review a lower court's factual findings under a clearly erroneous standard, any errors of law under a *de novo* standard, and the ultimate conclusion under an abuse of discretion standard. *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010).

The circuit court found, by clear and convincing evidence, that Mr. G. was unfit to remain in the parental relationship with Juliana pursuant to F.L. § 5-323(d). For this determination, the court pointed to Mr. G.'s incarceration, which is to continue for another fifteen years, in a maximum security prison for several violent felonies.[6] Mr. G.'s incarceration makes him clearly incapable of caring for Juliana. *In re Adoption/Guardianship of Rashawn H.*, 402 Md. at 499-500 ("What the statute appropriately looks to is whether the parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare."); *In re Adoption/Guardianship No. J970013*, 128 Md. App. 242, 252 (1999) (A parent's incarceration may "be a critical factor in permitting the termination of parental rights, because the incarcerated parent cannot provide for the long-term care of the child."); F.L. § 5-323(d)(2)(iv) (requiring a juvenile court to consider "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").

Mr. G. recognizes that he is clearly unable to care for Juliana, but reiterates his contentions that the Department should have more thoroughly investigated Maria B. as a placement resource. However, F.L. § 5-323 governs guardianship proceedings and does not require the juvenile court to consider a parent's relatives. As mentioned, the Department and the circuit court did address whether Maria B. was an appropriate placement for Juliana, concluding in the CINA case that she was not. As we stated in *In re: Adoption/Guardianship of Cross H.*, 200 Md. App. at 152, "the appropriate focus of the TPR hearing [is] not the potential suitability of [a relative] as a placement for [the CINA] — as this was an issue properly addressed in the CINA case — but rather the fitness of [the] parents."[7]

Mr. G. relies on *In re Adoption/Guardianship Nos. CAA92-10852 and CAA92-10853*, 103 Md. App. 1 (1994). In that case, we held that the lower court erred by terminating an incarcerated father's parental rights when the local department of social services failed to offer any of its services to the father and failed to make any effort to find suitable placement with the father's relative who has expressed interest in custody. *Id.* at 23. The local department of social services exhibited little if any reunification efforts, and this court reversed the lower court's decision to terminate the father's parental rights. *Id.* at 28. Here, however, the Department did investigate Maria B., in addition to other several other relatives of Mr. G., and it had significant concerns about her ability to care for Juliana. We cannot hold that the circuit court's decision to adopt the Department's concerns, which were well-founded in light of its investigation into Mr. G.'s recommended relatives, was error.

A parent has "a constitutionally protected fundamental right to raise his or her children." *In re: Samone H.*, 385 Md. 282, 299 (2005). In light of this right, the Legislature has codified the specific factors a court must consider in a TPR case in F.L. § 5-323(d), and the circuit court addressed the factors in its written order. Mr. G. states that because most of the factors in F.L. § 5-323(d) are inapplicable based on his incarceration, the Department's failure to consider Maria B. as

a placement resource was error. Mr. G. misconstrues the facts presented before the court, however, because the Department did thoroughly investigate whether Maria B. could serve as a suitable placement for Juliana. It determined that she could not. The circuit court agreed, as did this Court in Mr. G.'s appeal of the CINA appeal.

Finally, Mr. G. alleges that the court's decision to terminate his parental rights was inconsistent the CINA statute's "goal of conserving and strengthening family ties." This position ignores that the circuit court's decision maintained continuity for Juliana, who had been living with the foster parents her entire life. The foster parents and Ms. B. had also agreed to an "open adoption," which is "an adoption in which it is the explicit intent of all parties to the adoption that the child maintain contact, including the possibility of visitation, with the birth parents or other birth relatives." *In re Adoption/Guardianship of Cadence B.*, 417 Md. 146, 154 n.9 (2010). Therefore, even though the court terminated Mr. G.'s parental rights, the opportunity for eventual contact with Juliana remains a possibility if Mr. G. is able to work with Juliana's foster parents and Ms. B. Of course, whether to permit any contact between Mr. G. and Juliana would be the sole decision of Juliana's adoptive foster parents.

Based on the above, we conclude that the circuit court did not err in its fact-finding, nor did it commit legal errors. Mr. G. does not challenge that the court's findings were sufficient to support the court's conclusion that termination of Mr. G.'s parental rights was in Juliana's best interest. Though Mr. G. alleges that the Department and the court did not consider his aunt, Maria B., as a placement resource, the record indicates otherwise. As such, we hold that the court did not abuse its discretion in terminating Mr. G.'s parental rights.

**ORDER OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**

**FOOTNOTES**

1. Mr. G. was convicted of armed robbery and intimidation of a witness under an *Alford* plea. He is eligible for parole in 2025. Mr. G. has appealed his conviction, with argument scheduled before this Court in March 2012.

2. Maria B. was available to testify, but the court declined to hear from her. Mr. G. proffered, however, that she would testify that she desired to have placement of Juliana and that she would be a fit custodial placement.

3. Mr. G. filed his brief in the case of *In re Juliana B.*, September Term 2011, No. 638 on August 31, 2011.

4. The Court of Appeals heard oral argument on the appeal of *In re:Adoption/Guardianship of Cross H.* on January 9, 2012 to address the question "may the circuit court proceed with a termination of parental rights hearing when the parents' appeal of the CINA order changing the permanency plan from reunification to non-relative adoption is still pending in the [Court of Special Appeals]?"

5. *In re Juliana B.*, Court of Special Appeals, September Term 2011, No. 638 (filed December 21, 2011).

6. Mr. G. was also on probation in New York when arrested, convicted, and sentenced in Maryland.

7. Although the Court of Appeals has granted *certiorari* in *Cross H.*, the Court did not grant *certiorari* on the issue of placement with a relative, only addressing whether it was error to hold the TPR hearing while the CINA case was pending on appeal.

NO TEXT

Cite as 4 MFLM Supp. 97 (2012)

**Child support: departure from guidelines: voluntary impoverishment**

# William M. Thompson v. Katrina Thompson

*No. 2916, September Term, 2010*

*Argued Before: Matricciani, Hotten, Theime, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.*

*Opinion by Matricciani, J.*

*Filed: February 21, 2012. Unreported.*

**While the trial court's finding of voluntary impoverishment was not clearly erroneous, the court erred in failing to determine an amount of income to impute to the father before calculating the child support award, and in ordering him to pay an amount below the Child Support Guidelines without explaining why the departure was warranted.**

On August 25, 2009 appellee, Katrina M. Thompson, filed a complaint for divorce from appellant, William M. Thompson, in the Circuit Court for Prince George's County. On November 4, 2010 the circuit court entered an order granting the divorce, awarding Ms. Thompson legal and physical custody of the two minor children, granting Mr. Thompson visitation rights, and setting Mr. Thompson's child support obligation at $300 per month. Mr. Thompson noted a timely appeal to this Court on November 15, 2010.

## QUESTIONS PRESENTED

Mr. Thompson does not raise any clear legal issues for our review.[1] Having reviewed the circuit court's order, however, we surmise that Mr. Thompson is complaining about those parts of it that are adverse to him: the custody award, his visitation rights, and the child support calculation. For the reasons that follow, we shall affirm the judgment of the circuit court as to the child custody and visitation issues. We shall vacate the judgment as to the child support calculation and remand the case for the circuit court to make the factual findings required under the Maryland Code (1984, 2006 Repl. Vol.), §§ 12-201 through 12-204 of the Family Law Article ("FL").

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

## FACTUAL AND PROCEDURAL HISTORY

The parties married on June 27, 1996. They have two children, both of whom are minors. Mr. Thompson also has an adult daughter from a previous marriage. The Thompsons separated in January of 2009, and the divorce proceedings began later that year. Because both parties proceeded *pro se*, there were a number of procedural irregularities in their fillings in the circuit court and briefs to this Court.[2] Our review of the record reveals the following relevant facts.

Ms. Thompson filed a complaint for limited divorce on August 25, 2009. The complaint requested joint custody and reasonable child support. Ms. Thompson later amended the complaint to one for absolute divorce requesting sole physical and legal custody of the two minor children, and child support. The case was scheduled for an uncontested divorce hearing on July 7, 2010, despite there being indications that the parties would contest the custody issue. Realizing this, the Master set the case for an October 12, 2010 trial.

At the Master's request, Family Support Services filed a report to aid in resolving the custody and visitation issues. This report incorporated an evaluation by a court-appointed psychologist and a criminal record investigation of both parties conducted by the Sheriffs Department. The report recommended that Ms. Thompson be awarded sole custody of both children, and that Mr. Thompson be allowed two one-hour supervised visitations per month.

The circuit court held a hearing on the complaint for absolute divorce on October 12, 2010. Mr. Thompson did not offer testimony challenging the divorce, child custody, or child support payments. Nor did Ms. Thompson present any evidence of Mr. Thompson's income. Mr. Thompson stated that he was self-employed, but was not earning any income as an artist or a contractor. He stated that he was denied unemployment benefits, and that he "applied for Social Service and food stamps and [was] denied that." Mr. Thompson testified that his only source of income since January of 2009 was gifts from his family and friends. He testified further that, after separating from this first wife, he made child support payments of $150

per month until his daughter turned eighteen.

The circuit court made a ruling from the bench granting the absolute divorce and awarding full legal and physical custody of the children to Ms. Thompson. The circuit court allowed Mr. Thompson one hour supervised visits every other Saturday, in accordance with the recommendations in the report. Regarding child support, the circuit court found that:

> The defendant, William Thompson, has voluntarily impoverished in that based upon his education level, his work history, and the apparent lack of attempts to obtain employment, this Court finds he really could be earning more income than what he is earning or at least be making more adequate steps towards attempting to earn more income.
>
> However, there are so many gaps in the evidence here. The Court cannot really, absolutely, make a valid and appropriate determination as to what a realistic amount of child support should be.
>
> Based upon the evidence presented that, at some point in time Mr. Thompson was obligated to pay $150 a month for his other child[, t]he Court will impose an amount of $300 a month child support for both Wesley and Keshon combined, so it would be $150 a piece.

The circuit court then explained its calculation of child support to the parties as follows:

> Now, Mr. Thompson, Ms. Thompson, if either of you take strong exception to any aspect that I have just ruled on with — especially, with respect to the child support, because there really is a formulated approach that we're supposed to take in terms of child support and we have a mathematical formula we just plug those numbers into a computer, it spits out what the guidelines and the amount of child support should be. It's very straightforward. The problem is is that the data that we're supposed to put in for this is very sketchy, in this case. I didn't even get clear evidence as to what your monthly income is Mrs. Thompson. And, I, certainly, didn't get clear evidence as to what Mr. Thompson's income is. I know for a fact that $300 is well below the guidelines in this case for people of your position and status in life with two kids. But, until I have something of more substance, I couldn't, in good conscious [*sic*], rule anymore than that.
>
> Now, it very well maybe that there is some evidence out there that would persuade me that $300 is too much, and that you can't even afford to pay that Mr. Thompson. My point is if any — either one of you come up with substantive evidence as to what the guidelines should be and whether or not they should be increased or lowered, based upon my ruling today, I'll be more than happy to entertain a motion to modify child support. But, until I get that information, this is the best we can do. I don't have that — I don't have much to go on. So, if you come up with something, don't hesitate to file that motion and then we'll address whatever issues.

Neither party filed a motion to modify the circuit court's order as to child support. On November 2, 2010 the circuit court entered an order summarizing its ruling from the bench. Mr. Thompson appealed to this Court on November 15, 2010.

## DISCUSSION

Mr. Thompson does not appeal the divorce; he protests only the child custody, visitation, and child support issues. Mr. Thompson feels that "he was denied his rights and due process in the courts," and alleges judicial misconduct by the circuit court. Our review of the record reveals that the circuit court was patient and accommodating in light of Mr. Thompson's lack of representation. His arguments to the contrary do not warrant any further discussion. Mr. Thompson's brief lacks any cognizable claim of error by the circuit court, citations to the record, or citations to supporting legal authority. Still, Mr. Thompson is entitled to an appeal to this Court as of right. As such, we shall review the circuit court's order for any errors.

### *Standard of Review*

Trial courts aim to resolve custody disputes based on a determination of "what is in the child's best interests." *Montgomery Co. v. Sanders*, 38 Md. App. 406, 419 (1977). There are "three distinct aspects of review in child custody disputes." *In re Yve S.*, 373 Md. 551, 586 (2003). Under Maryland Rule 8-131(c), we will not disturb the circuit court's factual findings unless they are clearly erroneous. *Id*. If the circuit court erred as a matter of law, however, "further proceedings

in the trial court will ordinarily be required unless the error is determined to be harmless." *Id.* If the circuit court's "ultimate conclusion" is correct as a matter of law and "based upon factual findings that are not clearly erroneous," we must affirm the judgment unless there has been a "clear abuse of discretion." *Id.* Likewise, child support orders are within the sound discretion of the trial court, and will not be disturbed absent legal error or abuse of discretion. *Knott v. Knott*, 146 Md. App. 232, 246 (2002).

I. Custody and Visitation Determinations

The circuit court's order awarded sole legal and physical custody of both minor children to Ms. Thompson. Ms. Thompson has had sole physical custody of both children since her separation from Mr. Thompson in January of 2009. She testified that Mr. Thompson has not participated in the children's lives since the separation, and has not had any contact with them since September of 2009. Mr. Thompson did not present any evidence that Ms. Thompson does not care for the children properly. Further, Family Support Services's report supports the circuit court's custody award. The record confirms that it is in the best interest of the children that Ms. Thompson be awarded sole custody. *See generally Sanders*, 38 Md. App. at 407. Accordingly, the circuit court did not err in awarding sole legal and physical custody of both children to Ms. Thompson.

Regarding visitation privileges, Family Support Services recommended that Mr. Thompson be awarded two one-hour supervised visitations per month. Mr. Thompson did not contest this recommendation. He offered no evidence that caused the circuit court to question the recommendation. It was proper for the circuit court to consider the report in determining which custody arrangement is in the best interests of the Thompsons' minor children. *See Shanbarker v. Dalton*, 251 Md. 252, 259 (1968) (stating that after reviewing "investigations and reports of qualified social agencies," the circuit court is in "a better position to determine what is in the best interests of the child."). Moreover, Mr. Thompson has not had any contact with his children since September of 2009. The circuit court acted appropriately here to protect the minor children. Mr. Thompson does not allege specifically, nor can we find any evidence in the record, that the circuit court erred in determining Mr. Thompson's visitation privileges.

II. Child Support Calculation

A. Voluntary Impoverishment

The circuit court based its child support calculation, in part, on its determination that Mr. Thompson had voluntarily impoverished himself. "A person shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate means." *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1992). "Whether the voluntary impoverishment is for the purpose of avoiding child support or because the parent simply has chosen a frugal lifestyle for another reason, doesn't affect that parent's obligation to the child." *Id.* at 326. "In a case involving a claim for voluntary impoverishment, a trial court must find voluntary impoverishment in order to impute income to that parent for purposes of calculating child support." *Durkee v. Durkee*, 144 Md. App. 161, 183 (2002).

In *John O. v. Jane O.*, 90 Md. App. 406 (1992), we set forth the factors that a trial court should consider when determining whether a parent is voluntarily impoverished:

1. his or her current physical condition;
2. his or her respective level of education;
3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;
4. the relationship of the parties prior to the divorce proceedings;
5. his or her efforts to find and retain employment;
6. his or her efforts to secure retraining if that is needed;
7. whether he or she has ever withheld support;
8. his or her past work history;
9. the area in which the parties live and the status of the job market there; and
10. any other considerations presented by either party.

*Id.* at 422. Once the trial court determines that a parent is voluntarily impoverished, it "must then determine the amount of potential income to attribute to that parent in order to calculate the support dictated by the guidelines." *Goldberger*, 96 Md. App. at 327. We enumerated the factors that a circuit court should consider when imputing potential income to a voluntarily impoverished parent in *Goldgberger*:

1. age
2. mental and physical condition
3. assets
4. educational background, special training or skills
5. prior earnings

> 6. efforts to find and retain employment
>
> 7. the status of the job market in the area where the parent lives
>
> 8. actual income from any source
>
> 9. any other factor bearing on the parent's ability to obtain funds for child support.

*Id*. at 328; *see also* FL § 12-201(j).

At the October 12, 2010 hearing, the circuit court discussed the reasons for its findings that Mr. Thompson was voluntarily impoverished. The court stated, "based upon his education level, his work history, and the apparent lack of attempts to obtain employment, this Court finds he really could be earning more income than what he is earning or at least be making more adequate steps towards attempting to earn more income." *See supra* page 4. That statement touched on three of the ten *John O*. factors for voluntary impoverishment. *See Stull v. Stull*, 144 Md. App. 237, 246 (2002) (explaining that a trial court need not "articulate on the record its consideration of each and every factor when reaching its determination.").[3] Accordingly, the circuit court's finding that Mr. Thompson was voluntarily impoverished was not clearly erroneous.

In light of our discussion in Part II(B), however, we must remand this case to the circuit court for further findings.[4] On remand, the circuit court must determine what income should be imputed to Mr. Thompson using the *Goldberger* factors. 96 Md. App. at 327. After calculating Mr. Thompson's potential income, the circuit court should then apply that calculation to our discussion below.

B. Award Calculation

Child support orders must be set using the child support guidelines provided in FL §§ 12-201 through 21-204. The Court of Appeals outlined the workings of the statutory regime in *Drummond v. State*, 350 Md. 502 (1998):

> In calculating a child support award, a court first must determine the adjusted actual income of each parent, as defined in section 12-201. It then adds the adjusted actual income of both parents to arrive at the combined adjusted actual income. A court next determines the basic child support award in accordance with the schedule of basic child support obligations in [FL § 12-204(e)]. The basic support obligation derived from the schedule in section 12-204(e) then is divided between the parents in proportion to their adjusted actual incomes. Certain child care expenses and extraordinary medical expenses incurred on behalf of a child must be added to the basic child support obligation.

*Id*. at 512 (quotation and citations omitted).

"When a court calculates a parent's financial obligations under the child support guidelines, the central factual issue is the 'actual adjusted income' of each party. The court must consider the actual income of a parent, if the parent is employed to full capacity . . . or the potential income of a parent, if the parent is voluntarily impoverished." *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994) (citations omitted). Here, the circuit court did not make any findings as to Ms. Thompson's actual adjusted income or Mr. Thompson's potential income. The failure to make these findings was an error of law that can only be cured by further proceedings in the circuit court. *Yve S*., 373 Md. at 586. On remand, the circuit court must make the required findings, and then apply those figures to the guidelines to determine the basic child support obligation under FL § 12-204.

"There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines . . . is the correct amount of child support to be awarded." FL § 12-202(a)(2)(i). Once it has made the required calculations, however, the trial court has discretion to determine that "the application of the guidelines would be unjust or inappropriate in a particular case." *Id*. § 12-202(a)(2)(iii). If the trial court makes such a determination, it "shall make a written or specific finding on the record stating the reasons for departing from the guidelines." *Id.* § 12-202(a)(2)(v)(1). The finding must state:

> A. the amount of child support that would have been required under the guidelines;
>
> B. how the order varies from the guidelines;
>
> C. how the finding serves the best interests of the child; and
>
> D. in cases in which items of value are conveyed instead of a portion of the support presumed under the guidelines, the estimated value of the items conveyed.

*Id*. § 12-202(a)(2)(v)(2); *see In re Joshua W*., 94 Md. App. 486, 501 (1993) ("If a trial court fails to make these specific findings its order must be vacated."). Here, the circuit court departed from the guidelines when it ordered Mr. Thompson to pay Ms. Thompson $300 per month in child support. In so ordering, the circuit court did not make the requisite findings in accordance with FL § 12-202(a)(2)(iv).[5] Even if the circuit court decided properly to depart from the guidelines, it failed to follow the necessary procedures to do

so. *Burdick v. Brooks*, 160 Md. App. 519 (2004). Accordingly, the support order must be vacated. *Tannehill v. Tannehill*, 88 Md. App. 4, 15-16 (1991).

## CONCLUSION

Based on the limited available evidence, the circuit court made a best interest determination regarding child custody, Mr. Thompson's visitation privileges, and his child support obligation. We find no legal errors or clearly erroneous factual findings as to the child support and visitation portions of the order. The circuit court erred, however, in failing to calculate the amount of child support due under the guidelines. Thus, we must vacate the order and remand the case for the necessary calculation to be made. If the circuit court concludes that the calculated support under the guidelines is unjust or inappropriate, the court must make further findings in accordance with the statute.

**JUDGMENT VACATED AS TO CHILD SUPPORT. JUDGMENT OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE BORNE EQUALLY.**

**FOOTNOTES**

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

> 1. Did the Circuit Court abuse its discretion by not considering the material evidence and facts submitted by the Pro Se?
>
> 2. Did the Circuit Court by use of intimidation and Appellee (perjury) commit violations against Appellant?
>
> 3. Did the Courts and Appellee in their response of information filed by appellant disregard credible evidence?

2. Ms. Thompson was represented by counsel at the July 7 and October 12, 2010 hearings.

3. Mr. Thompson claimed that a January 2009 accident prevented him from working, but offered no corroborating evidence that he was physically or mentally unable to work. The record reflects that it was reasonable to infer that this claim was without merit, and that Mr. Thompson was physically and mentally fit to work. On remand, the circuit court should make a specific finding as to whether Mr. Thompson is unable to work due to a disability. *See* FL § 12-204(b)(2)(i).

4. We recognize that the trial judge invited a further hearing on the child support award in the hopes of obtaining useful evidence of the parties' respective incomes. But even without such evidence, the trial court must impute income to a voluntarily impoverished parent and render a child support calculation using the guidelines. FL § 12-204.

5. On remand, the circuit court has no obligation to make the fourth finding, concerning the estimated value of items conveyed, because that finding is inapplicable to this case. *Joshua W.*, 94 Md. App. at 501.

NO TEXT

Cite as 4 MFLM Supp. 103 (2012)

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

**Divorce: monetary award: equitable distribution**

# Timothy W. Davis
# v.
# Sharon Davis

*No. 2178, September Term, 2010*

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

*Opinion by Eyler, Deborah S., J.*

*Filed: February 22, 2012. Unreported.*

**The trial court's decision to award the husband less than 50 percent of the marital property was not an abuse of discretion, because the wife was the primary monetary and nonmonetary contributor to the marriage and the marriage was of brief duration.**

Timothy W. Davis, the appellant ("Davis"), and Sharon L. Davis, now Sharon L. Stewart, the appellee ("Stewart"),[1] were divorced in the Circuit Court for Howard County on September 3, 2010. The court denied Davis's request for alimony but granted him a monetary award of $15,880.34. Davis challenges the amount of that award and presents one issue for review, which we have reworded:

> Did the court abuse its discretion in granting Davis a monetary award that was "well below 50%" of the value of the marital assets?

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

## FACTS AND PROCEEDINGS

Davis and Stewart were married on February 21, 2004. Stewart had two children from a prior marriage.[2] No children were born of the parties' marriage. The parties first separated on June 20, 2008. They attempted to reconcile from September 2008 to February 2009, but that failed and they again separated.

On October 19, 2009, Stewart filed a complaint for absolute divorce in the Circuit Court for Howard County, alleging cruelty and excessively vicious conduct. Davis filed an answer on November 18, 2009, and a countercomplaint for limited divorce on December 18, 2009, alleging a voluntary separation dating from February 22, 2009, and requesting alimony and a monetary award. Stewart filed an answer to the countercomplaint on January 21, 2010. On April 16, 2010, the case proceeded to trial. The court granted Davis's oral motion for judgment at the conclusion of Stewart's case, finding no grounds for divorce.

On April 26, 2010, Stewart filed a second complaint for absolute divorce, alleging a voluntary separation dating from March 15, 2009. Davis filed an answer on May 14, 2010.

On August 19, 2010, the case was tried before a different judge. Christine McPartland, Stewart's neighbor, testified as a corroborating witness and confirmed that Stewart and Davis had lived separate and apart, without cohabitation, since March 2009.

Stewart testified on her own behalf. She said that the marriage first became strained in 2005 when, after being laid off from a job as an engineer, in which he was earning $100,000 a year, Davis started law school. For a year, he attended law school part time and continued to work part time as an engineer. He then stopped working and attended law school full time. Davis did not help with household chores and did not contribute financially to the marriage. Stewart paid all household expenses from her own income. She purchased the family home with money that she had had prior to the marriage and titled the home in her name as sole owner.

In July 2005, Stewart exercised $26,000 in stock options from a former employer. These options were hers prior to the marriage. Davis demanded that Stewart give him $13,000 (*i.e.*, half of the stock options) or he would leave the marriage. Stewart gave him the money.

After an argument in May 2006, Davis grabbed Stewart and pinned her to the ground. On June 15, 2006, Stewart called the police when Davis became upset, broke a chair, and threw objects through the walls of their house. One evening, when Stewart and Davis went out in Baltimore, Davis pushed Stewart in front of oncoming traffic and pulled her back at the last minute. In April 2008, Davis threatened to kill Stewart's son. On May 16, 2008, Davis assaulted Stewart's son and only stopped when Stewart pulled Davis away by his hair.

In his final year of law school, Davis was offered

a lucrative position as a patent attorney, with an annual salary of $95,000; he rejected it, because he was concerned about working long hours. When Davis finished law school in 2007, Stewart paid over $4,000 for his bar review classes.

Davis, representing himself, testified in narrative form. He explained that he rejected the job as a patent attorney because he wanted to practice criminal and immigration law. After being admitted to the Maryland bar in December 2007, he opened a solo practice in criminal and immigration law. He estimated the net income from his law practice in 2009 to be $24,000. He testified that he performed home repairs during the marriage, including installing a ceiling fan, replacing a lamppost, painting a ceiling, and unclogging toilets. He acknowledged on cross-examination that he had asked Stewart to take out a home equity loan to pay off his student loans. She refused, however.

The court granted Stewart an absolute divorce on the grounds of mutual and voluntary separation, which was confirmed in a written judgment entered on September 3, 2010. The court reserved on the issues of alimony and equitable distribution of property. On September 14, 2010, the court filed a memorandum opinion and order setting forth its findings of fact, denying Davis's request for alimony, and granting Davis a monetary award of $15,880.34.

On September 24, 2010, Davis filed a motion to alter or amend the judgment, which the court denied on November 9, 2010. Davis then noted this timely appeal.

We shall include additional facts as pertinent to our discussion.

## DISCUSSION

Davis contends the court abused its discretion in the amount of the monetary award it granted him. He argues that the court miscalculated the amount of marital assets titled in the name of each spouse, asserting that the court incorrectly attributed $10,127.93 to him and erred because it should have attributed an additional $13,817.74 to Stewart. He maintains that the court improperly weighed the statutory factors used in deciding equitable distribution, suggesting the court "improperly applied a gender-specific modality to [his] non-economic contributions [to the marriage]," and that the court was incorrect in finding that he alone was responsible for the estrangement of the parties. He asserts the court abused its discretion by granting him a monetary award that resulted in his receiving "well below 50%" of the marital assets.

Stewart responds that the court's calculation of the marital property titled to each spouse accurately reflects the $13,000 she paid to Davis during the marriage that was half of the $26,000 in stock options she exercised in July 2005. Stewart maintains the court did not abuse its discretion in weighing the statutory factors, and did not abuse its discretion in determining the amount of a monetary award for Davis that would equitably adjust the marital property.

Courts follow a three-step process in equitably adjusting assets of spouses upon divorce. *Alston v. Alston*, 331 Md. 496, 498-500 (1993). After determining which property is marital, and its value, the court may transfer ownership of interests in certain property, grant a monetary award, or both, "as an adjustment of the equities and rights of the parties concerning marital property." Md. Code (1984, 2006 Repl. Vol.), § 8-205(a) of the Family Law Article ("FL"). If the court decides to grant a monetary award or transfer ownership of property, the court must consider the following factors in determining the amount and method of payment of the monetary award or the terms of a transfer of ownership:

> (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). The distribution of marital property in

Maryland is done on an equitable — not an equal — basis, and courts have discretion to determine which spouse should receive what amount of the marital property based on the facts of each individual case analyzed in light of the statutory factors. *Alston*, 331 Md. at 508-09.

We will not disturb a finding that a particular asset is marital or non-marital property unless that finding is clearly erroneous. *Gordon v. Gordon*, 174 Md. App. 583, 625-26 (2007). We review a court's decisions whether to grant a monetary award and the amount of such award for abuse of discretion, meaning that "we may not substitute our judgment for that of the fact finder, even if we might have reached a different result." *Innerbichler v. Innerbichier*, 132 Md. App. 207, 230, *cert. denied*, 361 Md. 232 (2000).

The parties admitted into evidence as a joint exhibit a written stipulation showing which property they agreed was marital, which property they agreed was non-marital, and which property was in dispute. In its memorandum opinion, the court closely followed the stipulation, although it omitted a savings account in which there was $2,747, titled in Davis's name, which Davis acknowledges was marital property. The court found that the total value of the marital property was $70,926.25, of which $56,029.32 was titled in Stewart's name and $14,896.93 was titled in Davis's name. (There was no marital property jointly titled.) Thus, $41,132.39 more marital property was titled in Stewart's name than in Davis's name.

The court found that the family home, which was titled to Stewart as sole owner, was non-marital property because the money paid for the home was traceable to Stewart's non-marital funds and the remaining debt owed on the house far outweighed any marital contribution made to it. The court apportioned certain stock and a 401(k) plan owned by Stewart as partly marital and partly non-marital, by subtracting its current value from its value on the date of the marriage.

As Stewart points out in her brief, the court also found that Stewart had given Davis half of the $26,000 realized when she exercised stock options in July 2005. This finding was supported by Stewart's testimony, McPartland's testimony, and canceled checks from Stewart to Davis dated October 26, 2005, and January 26, 2006, totaling $13,000, that were admitted into evidence. The court took this into account in calculating the marital property attributable to each spouse. This explains the bulk of the "error" Davis alleges, and any further discrepancy in the court's calculation and attribution of marital property is *de minimis*.

The court addressed all the factors enumerated in FL section 8-205 in deciding how to equitably distribute the marital property. It found as follows: 1) Davis's monetary and non-monetary contributions to the marriage were minimal, as he kept his earnings for his own use, and Stewart paid all the family expenses and some of Davis's law school expenses, and Davis did not help around the house; 2) Stewart had title to marital property worth $56,029.32, Davis had title to marital property worth $14,896.93, and Davis had approximately $44,000 in non-marital investment assets; 3) Davis had a monthly income/expense deficit of $556, whereas Stewart had a monthly income/expense deficit of $1,272; 4) the parties became estranged because Davis was verbally and physically abusive toward Stewart and he failed or refused to assist with household chores or contribute financially toward the marriage; 5) the marriage was "relatively brief," lasting approximately 5 years; 6) Stewart was 51 years old and Davis was 46 years old at the time of the divorce proceedings; 7) both parties were in good physical and mental condition, aside from Davis's mild dyslexia; 8) with the exception of a few bank accounts in Davis's name with balances totaling approximately $4,769, Stewart had earned all of the marital property; 9) Davis did not contribute to the purchase of the family home, which was held by Stewart as sole owner; 10) the court had denied Davis's request for alimony (which is not in dispute), finding that Stewart was unable to pay alimony and Davis had the ability to become self-supporting; 11) no evidence of any other factors was presented.

Based upon these findings, the court determined that it would be equitable to distribute the marital property by granting Davis a monetary award. It concluded that the amount of the award should be less than 50% of the difference in marital property titled in each party's name, that is, would not be such as to equally divide the marital property, because "[Stewart] was the primary monetary and non-monetary contributor to the marriage and the marriage was of such brief duration." The court granted Davis a monetary award of $15,880.34, to be transferred from one-half of the marital portions of two of Stewart's 401(k) accounts. The amount of the monetary award would result in the marital assets being distributed 43.39% to Davis and 56.61% to Stewart.

Obviously, given Davis's argument that the monetary award should have been higher, that is, an amount that would equally divide the marital assets, there is no argument by him that the court abused its discretion by granting a monetary award. We find no abuse of discretion in the court's decision to grant Davis a monetary award in the amount it did. There is nothing in the record to support Davis's argument that the monetary award to him would have been higher if the court had not applied outmoded gender stereotypes in considering his contributions to the marriage. Neither the transcript of the divorce hearing nor the court's memorandum opinion suggests in any way that

the court was improperly considering Davis's gender in assessing the factors in FL section 8-205. The testimony was clear that Davis did not contribute monetarily to the marriage even though he could have and that, generally, he did not contribute non-monetarily to the marriage. The court was free to consider occasional and singular tasks, such as replacing a ceiling fan, fixing a lamppost, painting ceilings, unclogging toilets, and sometimes mowing the lawn not to be significant household chores and not to amount to a "significant" non-monetary contribution to the marriage. The facts, not Davis's gender and not social stereotypes, supported the findings that underlay the court's decision about how much of the marital assets should be distributed to each party.

The court also did not abuse its discretion in finding that Davis was responsible for the estrangement of the parties. As the trier of fact, it was the province of the court to assess the demeanor and credibility of the witnesses and resolve conflicting evidence. *See* Md. Rule 8-131(c) (in an action tried without a jury, appellate courts "give due regard to the opportunity of the trial court to judge the credibility of the witnesses"). There was ample support in the record for the court's conclusion that Davis was responsible for the estrangement of the parties because of his "verbally and physically abusive" treatment of Stewart and his "failure or refusal to assist with household chores or contribute financially to the marriage."

As noted, in Maryland, the division of marital property is equitable, not equal. *See Alston*, 331 Md. at 508-09. "[A] trial judge must weigh the relevant factors in light of the legislative purpose, and then use his or her sound discretion to arrive at an award that is equitable and in accordance with the statute." *Id.* at 509. We are satisfied that the court did just that in this case.

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

**FOOTNOTES**

1. The court authorized Stewart to resume the use of her maiden name (Stewart) as part of the judgment of absolute divorce in this case.

2. Both Stewart's children were adults at the time of the divorce proceedings.

Cite as 4 MFLM Supp. 107 (2012)

**Custody: sole legal custody: significant disagreement on child's activities**

# Kurt Linnemann
# v.
# Alison Sheaffer f/k/a Alison Linnemann

*No. 268, September Term, 2011*

*Argued Before: Eyler, James R., Meredith, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.*

*Opinion by Eyler, James R., J.*

*Filed: February 23, 2012. Unreported.*

**The trial court did not abuse its discretion in awarding sole legal custody to one parent after determining that, while both parents supported pro-life demonstrations, they could not agree on whether it was appropriate for their 8-year-old son to participate in them.**

Kurt Linnemann, appellant, appeals from an order entered by the Circuit Court for Harford County, awarding sole legal custody of the parties' minor child, to Alison Sheaffer, appellee. We shall affirm the judgment.

### Background

The parties were married on January 27, 2001. Their child, Logan, was born on December 5, 2002. The parties separated on or about June 16, 2004. At the end of 2004, the parties, after consultation with the Office of Family Court Services, entered into a parenting agreement. In that agreement, the parties agreed that they would have joint legal custody and shared physical custody of Logan. On February 3, 2005, the court entered a consent order incorporating the parenting agreement.

On January 26, 2005, the parties entered into a marital settlement agreement. In that agreement, the parties affirmed the then existing joint legal custody and shared physical custody arrangement. On November 28, 2005, the court granted an absolute divorce and incorporated, without merging, the marital settlement agreement.

On December 16, 2009, appellee filed a "complaint to modify residency, to modify child support and for other appropriate relief." Appellee requested a

*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.*

change in the physical custody arrangement and an increase in the amount of child support. On July 1, 2010, after consultation with the Office of Family Court Services, the parties entered into another parenting plan. At that point in time, the parties disagreed as to the extent to which Logan should be involved in appellant's pro-life activities. The parties were unable to resolve that dispute, and consequently, the order adopting the parenting plan contained the following provision.

> ORDERED, that neither parent will involve their minor child, Logan Joseph Linneman, born December 5, 2002, in any activities relating to advocacy on issues concerning pro-life or abortion, *pendente lite*, and without prejudice to the rights of either party to fully litigate this dispute.

On February 22, 2011, the court held a hearing on the merits of the custody dispute. The parties agreed that the only issue before the court was the issue of legal custody.

Because the summary of the testimony in appellant's brief is not seriously contested by appellee, except in a few instances, we shall reproduce that summary, deleting extract references and footnotes.

> Alison testified that she and Kurt "worked out most" of their issues with [the Office of Family Court Services] through their second Parenting Agreement. Alison went on to describe the issue of whether Logan could be involved in any of Kurt's pro-life activism as their "dead heat problem" and that "it was where we came that we could not make a resolution." Like Kurt, Alison has strong feelings against abortion. She does not see their differing opinions as to Logan's involvement in pro-life activities as a religious or political issue. She describes herself and Kurt as Christians who believe that Christ is their savior. She admires the fact that

Kurt, through his activism, goes out to work for what he believes in. Alison acknowledges that Kurt has been very involved in the pro-life movement for "quite some time" including prior to the marriage. She testified that she has contributed to his cause. She has contacted abortion mills, places where abortions occur, for Kurt. Alison would find out when abortions would be taking place and advise Kurt of same so that he could be there.

Kurt's involvement in pro-life activism commenced in the 1980s when he was a member of a committee that founded the Seacoast Crisis Pregnancy Center in New Hampshire. Kurt works with Birthright in Bel Air, Maryland. Resources and information are provided to women choosing to have their babies. Counseling is also available for women who have abortions, should they need or request such services.

Kurt is the director of the Center for Bio-Ethical Reform of Maryland (hereafter "CBR"). There are three components to his work with CBR. The first component is being present at "abortion mills," where unborn babies are actually terminated, in an effort to reach out to women who are upon the threshold of getting an abortion. It involves an effort "to offer women alternatives to abortion" and to "stand up for the life of the unborn." The second component involves educating people about human development and abortion. The third component is awareness of "the reality of what happens to children through abortion." Kurt participates in about 146 individual pro-life activities a year.

By contrast, Logan has been involved in a total of eight (8) hours of pro-life activities over two and one-half years i.e. from January 1, 2008 through the July 7, 2010 Order proscribing pro-life activities. These eight hours are comprised of six events that Logan attended with his father. The child's first involvement with his father's pro-life activism was January 2008, when he attended the annual March for Life rally for three hours with his father in Washington, D.C. Approximately 200,000 people attended the event. They are like-minded people of father gathered "for the single purpose of the unborn and moms." Logan wanted to carry a small text sign; he enjoyed marching and was delighted to be there. Logan spent three hours at the Washington D.C. rally. Alison testified that Kurt told her about taking Logan to this pro-life rally.

Logan was also with his father at four separate Face the Truth Tour events on the side of the road. Alison believes that there are 15 to 20 people at these roadside events. Each of these events was one hour. Unlike the annual March for Life, there is no marching at the Face the Truth Tours. They are peaceful events attended by other families and children there. After the one-hour Face the Truth Tour end, the participating families typically have a picnic or a barbecue. Logan spent a total of four hours at four separate events on the road with his father from January 2008 through July 2010. Logan enjoys the Face the Truth Tours and asks his father if he can go on them. Even though Kurt believes that Logan attending an occasional Face the Truth Tour is appropriate, Kurt has not taken his son to any Face the Truth Tours regardless of the child's requests because the July 7, 2010 Order proscribes such activity.

Finally, Logan was at a pro-life news conference with his father. Kurt was asked to speak at this news conference and Logan wanted to go. The conference was in Baltimore and lasted about one hour. Kurt does not bring Logan to any event where there are two different sides; he has only brought Logan to events attended by like-minded people.

Although she had no exact information as to the nature and frequency of Logan's attendance at the six pro-life events previously mentioned, Alison is against Logan attending any such events. She has zero tolerance for Logan participating in any pro-life events citing that even "one time is too

much for me." She does not want him at any rallies or gatherings regardless of the subject matter as people's passion for the views they hold can be dangerous.

Alison testified that Logan is too young to be exposed to "this kind of stuff" and that he shouldn't be seeing graphic images associated with pro-life rallies. She does not believe that "this is appropriate information or content" for Logan. Nevertheless, Logan has watched Alfred Hitchcock's Psycho with his mother. Hitchcock's film has frightening images, cutting and a woman is killed in the shower. At his mother's home, Logan plays the video game, Modern Warfare II. The game is rated for people 17 years of age and older. It is an interactive video game in which Logan is engaged in a course of brutal warfare in which he actively shoots and "kills" other people. When asked if she thought that this was age appropriate for Logan to be involved in, Alison replied, "I don't know what to tell you. I haven't thought about it, so I'm not going to answer you."

Kaylin Linnemann, Kurt's daughter by a prior marriage, is 22 years of age. When she was a child, her father afforded her the option of being involved in his life ministries. When Kaylin was young, Kurt's primary expression of his faith was through weekly Bible study in his home and neighborhood outreach. Around the time of first or second grade, Kaylin, was part of his door-to-door evangelism in inner city areas of Baltimore, which Kaylin described as "rough" neighborhoods. Soul winning involved going to people in their homes, inviting them to church and ministering to their physical and spiritual needs. She and her sister also participated with Kurt in a miming ministry used by the church to tell people about Jesus Christ.

In addition to his faith-based activities, Kaylin describes Kurt as being a "regular dad" who took her to marching band, figure skating, and softball. He also coached her sports and would drive to her band competitions. Most recently, Kurt drove up to New York City to spend a few hours with her to support her at the end of her bike ride from Indianapolis to New York. Kaylin participated in the interstate bike ride to raise funds and awareness about human trafficking.

Kaylin attends Crossroads Bible College. Her passion is human trafficking, and she intends to be a counselor to victims of human trafficking. Human trafficking "is the moving of men or women across state or country lines for the purpose of selling them." It can involve selling human beings for labor or sex. Like her father, she is an activist. She is involved in action based anti-trafficking groups. She was on the planning committee to establish a bike ride to raise money for a shelter in the Phillippines for victims of human trafficking. She works to promote awareness about human trafficking. In addition to attending college, she works part-time as a nanny. Kaylin also works at "an after school program in inner city Indianapolis."

When asked about the values she learned from her father, she replied as follows:

> I've learned to be passionate about life. I've learned that Christianity is being active in your faith, and not sitting in church. And its really abut involving people in your life that — and I've learned that activism is not something that you do, but it's who you are. It's standing up for those who can't speak for themselves. And it's something that you share. It's part of who you are. And I've really seen that in my dad's life, and it's impacted me in like amazing ways. And he's shown me what it mean to fall down and mess up and get back up.

As with Kaylin, Kurt is a very involved parent for Logan. As a sales representative for Thermo Fisher

Scientific, Kurt works from home and sets his own schedule. He gets Logan off to school in the morning and picks him up between 3:30 to 4:00. Kurt asks about and reviews the homework. He attends parent teacher conferences, and the majority of these conferences are attended by Alison and Kurt together. He cooks and makes the meals for Logan. In addition to homework, they play sports, matchbox cars, etc. They go sledding, camping and swimming. Kurt also participated in Logan's Boy Scout program. Logan does extremely well in school and has many friends.

Kurt is a devout Christian who attends St. Joseph's Catholic Church. During high school, he was "born again" and entered into a personal relationship with Jesus. While living in Pennsylvania, he was assistant pastor at a nondenominational church. He helped during worship services and he also went into low-income housing areas to invite people to church and to "minister to their needs both physically and spiritually." He continued Bible study and neighborhood outreach in Maryland.

Being present at abortion mills is part of what Kurt does as the director of CBR. Alison has provided Kurt with information as to when abortions would be taking place at these "mills" so he can be present to provide information on alternatives to abortion. Kurt has never brought Logan to abortion mills because Kurt knows that they can be "highly contested areas." As to this type of activity, Kurt unequivocally stated, "[i]t's a highly contested environment I don't think it's appropriate for him to be there, and so I do not take him there." If Logan were to be part of such a contested activity, it would "certainly be years and years down the road."

Although Kurt does not involve Logan in activism related to abortion mills, Kurt does think it is acceptable for Logan to attend the annual March for Life rally in Washington D.C. and the occasional Fact the Truth Tour. Logan went with his father to one March for Life rally in D.C. in January 2008 — almost two years before Alison filed her current complaint. Kaylin Linnemann has also attended the annual event in D.C. It is a "well organized, peaceful march." There are "tons of families from kids in strollers to teenagers going with their youth groups there, to families, to churches, schools, colleges. People come from all over the country to this march." It is a "peaceful, prayerful" event.

As to graphic images, Logan has been exposed to two static pictures of babies who have been aborted. He does not ever hold the pictures. The two pictures Logan has seen are the same pictures that were in the home when Kurt and Alison were living together as man and wife. The pictures are kept in Kurt's van, and are not new to Logan. As Logan's father, Kurt believes that the interactive nature of watching Psycho and playing Modern Warfare II are far more damaging than the two static pictures of aborted fetuses that the child has seen and which Kurt has had for many years.

While Kurt does wear a bullet proof vest on occasion, he does so only at abortion mills and never considers bringing Logan there. As to Face the Truth Tours, Kurt has spent hundreds of hours at them and personal safety for him and other families attending has never been an issue. Kurt believes that Logan's participation does not pose a danger to the child and encourages Christian values such as speaking up for those who can't defend themselves and helping people in need. The parties worked out a Parenting Plan in July 1, 2010 and Logan's participation in pro-life activism is the only issue they cannot agree on.

Appellee directs us to appellant's testimony, referenced in the court's opinion, that he was arrested in the past and may be arrested in the future in connection with his activities. He expressed the view that it would be a good for Logan to see his father arrested for a just cause.

At the conclusion of evidence, the court delivered the following oral opinion.

It's important to recognize what the issue is in this case. And the issue is in this case, and the only issue in this case, is whether these parents are able to reach shared decisions concerning the health, welfare, education, and religious training of their son. And it's obvious they cannot. They can on some issues, but there is one issue that they cannot. And I'm not going to sit here and try to micromanage the extent of that by passing an order as to what is and is not permissible. My decision here is based on *Taylor v. Taylor*, and I have to determine whether or not these parents can agree and reach shared decisions on fundamental issues. And if they can't, then joint custody is not appropriate, and that is what *Taylor v. Taylor* says. And it's obvious that in this case with respect to this fundamental, important issue, so important it puts joint custody at issue, that they cannot reach a shared decision.

But this is not, it's not a dispute between pro-life and the right to abortion. Both parents are on the same page. What is at issue here is whether it's appropriate for an eight-year-old to be exposed to this type of activity, rallies involving right-to-life, roadside demonstrations, situations in which the father is arrested. And while the father may think it is valuable for his son and appropriate for his son to see his father arrested, there is another inference which may be drawn from that situation that the son may conclude that the father has no respect for the rule of law. That is another possible inference that may be attributed to that kind of behavior.

I find in this case, that the parents are unable to communicate on this issue, and that it's a fundamental issue to the child's welfare, and that joint custody is no longer appropriate in this instance. I have no other, other than passing remarks, any other evidence upon which to base this on, other than the primary issue that has been put before this court.

And I agree with the mother that anti-abortion rallies and anti-abortion demonstrations at the side of the road are not age appropriate for an eight-year-old. First of all, there is a potential for violence. There is a safety issue. These are passionate issues on both sides, and it only takes once, one overly zealous negative influence to cause harm to the child in this case. And Mr. Linnemann recognizes this. He may think that he knows when it's very dangerous and not very dangerous. But he does wear a bullet proof vest on some occasions, and there is not much of a difference between a roadside demonstration and a demonstration at an abortion clinic.

So you can't gauge and determine what is absolutely safe and what is not absolutely safe. There are gray areas in between. Having been the subject of threats on many occasions in my line of work, I understand the difference between the two.

This is an adult subject matter. It's not appropriate subject matter for an eight-old-year. If we took society in general and we took a collective sampling of parents, I can't not help believe that it would be overwhelmingly a decision that anti-abortion material and anti-abortion participation in various rallies and demonstrations are not appropriate for an eight-old-child. It concerns graphic material. And I just can't agree that this is appropriate that an eight-old-year should be exposed to this type of material. As to the arrest, I've already expressed my view in that.

I think I have a choice here. Somebody has to be put in charge. You agree on everything else but this one issue that shouldn't even be that much of a change, and still agree on other educational issues, on other health issues, on other medical issues. You don't agree on this, and I'm going to grant the motion to terminate joint custody in this case and award sole custody to Ms. Linnemann.

And you gave me one issue to determine, and I determined that issue and I made my decision based on that one issue alone. That concludes this matter.

### Standard of Review

The standard of appellate review in child custody cases is both limited and deferential. McCarty v. McCarty, 147 Md. App. 268, 272 (2002). Of importance, an appellate court does not make its own determination as to a child's best interest, and the scope of appellate review is limited to whether the trial court abused its discretion or whether its factual findings were clearly erroneous. Best v. Best, 93 Md. App. 644, 655 (1992) (*citing* Montgomery County v. Sanders, 38 Md. App. 406, 419 (1977) (other citations omitted))). A finding is not clearly erroneous if it is supported by "competent and material evidence in the record." Lemley v. Lemley, 109 Md. App. 620, 628 (1996). The trial court's "findings of fact are to be given great weight since [it] has the parties before [it] and has 'the best opportunity to observe their temper, temperament and demeanor, and so decide what would be for the child's best interest. . . .'" Best, 93 Md. App. at 655 (*citing* Sanders, 38 Md. App. at 419) (other citations omitted)).

While physical custody determines where a child will live; "[l]egal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." Taylor v. Taylor, 306 Md. 290, 296 (1986). In any child custody case, the determination as to custody must be made upon careful examination of the facts on a case by case basis, Bienenfeld v. Bennett-White, 91 Md. App. 488, 503, *cert. denied*, 327 Md. 625 (1992), and "the paramount concern is the best interest of the child." Taylor, 306 Md. at 303. Other factors that courts consider in determining custody include: (1) the fitness, character and reputation of each parent and their adaptability to the task of legal custodian; (2) the relationship established between the child and each parent; (3) the preference of the child; (4) the age, sex, and health of the child; (5) the residences of the parents, the environment and surroundings in which the child will be reared, the opportunity for visitation, and the influences likely to be exerted on the child; (6) potential disruption to the child's social and school life; (7) the demands of the parents' employment; (8) the age and number of children; (9) the desire of parents, any agreements between them, and the sincerity of their request; (10) the potentiality of maintaining normal family relations; (11) the financial status of the parents; and (12) any other circumstances that reasonably relate to the issue. Id. at 303- 10; Wagner v. Wagner, 109 Md. App. 1, 39, *cert. denied*, 343 Md. 334 (1996); Sanders, 38 Md. App. at 420.

Furthermore, in making a determination as to whether a joint custody award is appropriate, the court will consider (1) the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (2) willingness of the parents to share custody; (3) fitness of the parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of the child's social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parent's request; (11) financial status of the parents; (12) impact on state and federal assistance; (13) benefit to parents; and, (14) other factors that reasonably relate to the issue. *See* Taylor, 306 Md. 290.

### Discussion

Appellant presents three questions in his brief, but in essence, he contends that the court abused its discretion.[1] Appellant argues (1) the court focused on the pro-life issue and did not consider the "multiple factors developed in Taylor"; (2) the court failed to consider a less restrictive alternative, explaining that it could have kept joint custody in place while prohibiting Logan's involvement in appellant's "pro-life activism"; and (3) the court's "proscription against Logan being involved in pro-life activism is an unwarranted infringement upon Kurt's right to parent his son that does not serve Logan's best interests."

The court expressly stated that it was guided by the Taylor factors, and absent some indication to the contrary, we assume that the court knows and applies the law. Medley v. State, 386 Md. 3, 7 (2005). Here, there is no indication to the contrary. The court found there was a significant disagreement between the parties, not as to their position on religion or pro-life, but rather on the type of activity to which Logan should safely be exposed at his relatively young age. The court determined that, because of a significant difference in views, joint legal custody would not work. The court further determined that it was not going to attempt to micromanage on a day to day basis what activities were age appropriate, left it to the parties to determine that, and awarded legal custody to one parent because they could not agree. We perceive no abuse of discretion.

With respect to appellant's remaining arguments, which appear to be inconsistent with each other, the court did not prohibit Logan from participating in all pro-life or abortion advocacy activities, as had been true under the *pendente lite* order. The court awarded to one parent the general right to make those decisions that are attendant with legal custody. That result is typical when fit parents cannot agree on major issues. With respect to which parent, the court awarded custody to that parent that it found was acting in the best interest of the child.

Appellant cites cases for the proposition that the track record of the parties involved in a custody dispute, including any prior agreement as to custody, is very relevant and also for the proposition that a court may award joint legal custody while including specific requirements. *E. g.*, Touzeau v. Deffinbaugh, 394 Md. 654 (2006); Levitsky v. Levitsky, 231 Md. 388 (1963); Barton v. Hirschberg, 137 Md. App. 1 (2001). The cases do not stand for the proposition, however, that the circuit court had to award joint legal custody as a matter of law. Trial courts have wide discretion in these matters, and if a court correctly applies the law and is not clearly erroneous in its findings of first level facts, it enjoys a wide discretion as to disposition. We perceive no abuse of discretion.

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTE**

1. In appellant's words:

> I. Did the court abuse its discretion in modifying the longstanding joint legal custody arrangement based on the minor child's limited involvement in pro-life activities with his father?
>
> II. Did the court err as a matter of law, in failing to consider outcomes less restrictive for the particular circumstances of this case other than terminating joint legal custody?
>
> III. Is the proscription against Logan being involved in pro-life activism an unwarranted infringement upon Kurt's right to parent his son that does not serve Logan's best interests?

NO TEXT

Cite as 4 MFLM Supp. 115 (2012)

**CINA: abuse by sibling: order of protective supervision**

# In Re: Alexandra W.

*No. 1000, September Term, 2011*

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

*Opinion by Kehoe, J.*

*Filed: February 28, 2012. Unreported.*

**The determination that a 10-year-old girl was a Child in Need of Assistance was supported by findings that the girl had been physically abused by her 17-year-old sister and that her mother, while otherwise skilled and attentive as a parent, had been unable to stop it; the child was returned to her mother's custody with an Order of Protective Supervision under which the sisters were not permitted to be alone together.**

Appellant Amy W. is the biological mother of Alexandra W., who was born on 2/1/2000. Alexandra's biological father is Jerome J. On November 1, 2010, the Baltimore City Department of Social Services ("the Department") filed a child in need of assistance ("CINA") petition in the Circuit Court for Baltimore City with respect to Alexandra, who had been living with her mother and 17 year-old sister. After conducting a number of hearings, Master Patricia Brown recommended that Alexandra be found CINA ("child in need of assistance"), but that she be returned from foster care to her mother's custody. On March 31, 2011, Hon. Robert Kershaw, sitting as the juvenile court, adopted the master's recommendations. Ms. W. filed exceptions to the court's CINA ruling, which were denied after hearings on June 10, 2011, and June 27, 2011. In her timely appeal to this Court, Ms. W. raises the following questions, which we quote:

1. Did the court err in finding Alexandra to be a child in need of assistance?
2. Did the master err in admitting and relying upon out-of-court statements by the child at the adjudicatory hearing, and did trial counsel's failure to preserve the issue for appellate review deny Appellant her right to effective assistance of counsel?

For the reasons set forth below, we conclude that (1) the court did not err in finding Alexandra to be a CINA; (2) the challenge of the master's evidentiary rulings has not been preserved for appeal; and (3) appellant was not denied effective assistance of counsel. We affirm the circuit court's decision.

*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

This case began on October 27, 2010, when Kylie Barns-Evans of the Department received a call from Alexandra W.'s school, the Holabird Academy, regarding "an initial allegation of physical abuse." Ms. Barns-Evans contacted the police and went to the school to speak with the child and members of the staff. She found Alexandra "to be dressed in a neat, clean, school uniform; and she appeared to be in good physical condition."

Ms. Barns-Evans, over objection, testified as to Alex's statements during her interview,[1] which began with her explaining that she was "here to see if you're okay," and asking Alex to tell her what was going on. According to Ms. Barns-Evans:

> [Alex] stated: "My sister Amy me. She doesn't want me to live at home." She stated that her sister told her that she doesn't love her and she wants her to go and live in a foster home. She stated that Amy slapped her in the whole face. And, I'm quoting her.... She stated that Amy pinched her on the thumb![2]

According to the document from which Ms. Barns-Evans was reading, Alex stated that her sister Amy had "called her a 'B' and told her she would kill her if she went to sleep. She stated she was afraid to go to sleep because of things her sister said to her," but was not afraid to go home that day. "She stated that her mother knows that Amy is hitting her and she tells her to stop; but Amy keeps hitting her. She stated that Amy always hits her when her mother leaves them at home when she goes out."

After the interview with Alex, Ms. Barns-Evans went to the W. home. There was no answer, so she left a business card. Ms. W. promptly called her in response, and an interview was arranged for the morn-

ing of October 29, 2010.

Ms. Barns-Evans testified that her interview with Ms. W. was "a pretty cordial conversation," in which she learned that Ms. W. had previously been married, and was raising her children by herself. When asked about the allegations of physical abuse, the mother said that sometimes the girls do fight, "and that Amy hits Alexandra and Alexandra hits Amy, because that's what sisters do and sisters fight." She acknowledged leaving the girls together when she went out and stated that Alex was 10 and Amy was 17 years old. When asked about her own mental health problems, Ms. W. told her that she had been born with some complications causing "what's called organic brain syndrome."[3] Ms. W. provided her with the name of the mental health treatment program that both she and her daughters already were attending.

During this interview, Ms. Barns-Evans and Ms. W. developed a safety plan to address the allegation that Alex was being "hit and beat up" by her older sister, despite the lack of any bruises or other marks on the child. Ms. Barns-Evans testified:

> I did a safety plan stating that there would be no physical abuse between the siblings. I also stated that mother could not leave one child to be supervised by the other — Alexandra to be supervised by her sister — when she went out on appointments, and things like that.
>
> And, [Ms. W.] signed it, I signed it, and that's what we put in place before we got the second phone call. And, that plan would have been sufficient, based on the allegations that I had at that time.

However, before their conversation was concluded, Ms. Barns-Evans received a cell phone call from her supervisor regarding a new report from Alex's school regarding physical abuse.

Ms. Barns-Evans testified that she proceeded to the Holabird Academy, where a police officer was waiting for her in his patrol car. After interviewing two staff members, they got Alex from her classroom so that Ms. Barns-Evans and the officer could interview her in a separate room.

After the officer asked Alex to lift the polo shirt sleeves on her right upper arm, it was revealed that there was a full mouth bite mark on her arm. Over objection, Ms. Barns-Evans testified that when asked what happened, Alex said that her sister, Amy, bit her, but that she did not know when it happened. Alex was crying, was visibly upset, and "just kept saying over and over: 'I don't want to go home."' Ms. Barns-Evans testified:

> [A]t that point, we tried to calm her down. And, I had to explain to her, well, if you don't go home, this is what is going to happen; and I went through the process of telling her that, if you don't want to go home and you don't feel safe there, then we're not going to have you return there.
>
> And, I — I specifically said: Do you understand the things I'm saying? And, I said; You will have to go stay with other people. I said: That's called foster care.
>
> And, I went through the whole foster care process and explained that to her and also asked her was she afraid? And, she said: I don't want to go home.

When Ms. Barns-Evans called Ms. W. to let her know what was going on, she was very upset and made several comments about her own ability to care for her daughter.

Ms. Barns-Evans and the officer agreed that the bite mark was not serious enough to take Alex to the hospital or to seek any medical attention. However, Ms. Barn-Evans did conclude that because of the bite mark and based on the child's statements, Alex should be removed from the family home pursuant to an emergency shelter plan. The initial safety plan developed with Ms. W. was abandoned, and Alex was immediately placed into foster care.

On November 1, 2010, the Department filed a CINA petition with request for shelter care, which alleged the following:

> 1. Ms. W. "fails to maintain a safe, stable, nurturing and protective living environment" for Alexandra, who reports feeling unsafe at home "due to physical abuse by her 17 year old sister," and Ms. W. "fails to protect" Alexandra "from the abuse."
> 2. On October 29, 2010, Alexandra reported to school officials that her sister bit her, and "was observed to have a bite mark on her right shoulder." Alexandra "disclosed that her sister hits, beats, slaps, and bites her," and reported "that her mother knows about the abuse but does nothing to stop it."
> 3. School officials have reported that the child is cognitively limited. She is in the fifth grade and some-

times wears a soiled pamper to school.

4. Ms. W. "appears to be cognitively limited," and "has been diagnosed with depression and Organic Brain Syndrome."
5. Ms. W. "is aware of the abuse and allows the 17 year old to use corporal punishment" on her sister.
6. Alexandra's father, whose location is unknown, has "failed to take the steps necessary" to protect Alexandra from "the physically abusive situation."
7. Based on the emergency nature of the circumstances, it was necessary for the Department to place Alexandra in foster care.

Ms. W. contested the placement of her daughter into foster care, but after a hearing on November 1, 2010, the "Court determined that continued residence in the home is contrary to the welfare of the child and it is not now possible to return the child to the home because of the following reasons: Father's identity not determined;[4] allegation of abuse by sister, which mother has not been able to prevent."

Ms. W. filed a request for immediate review. She maintained that she had not abused or neglected the respondent, denied all allegations of "abuse" by the sister, and stated that she was in the process of addressing the conflict between the siblings through therapy. In addition, the situation was not an emergency, the respondent was not in "serious imminent danger," and the Department failed to make reasonable efforts to prevent or eliminate the need for removal of the child from her mother as required by Md. Code, Courts & Judicial Proceedings, Section 3-815. After a hearing on November 12, 2010, the court ordered Alexandra to remain in shelter care.

The Department's investigation indicated that Alexandra, her sister and her mother were living in an apartment with almost no furniture and that the two siblings were sleeping on the floor on deflated air mattresses. Once Alexandra was removed from the family home, the Department shifted its attention from immediate safety issues to Ms. W.'s basic needs as a caretaker in order to properly raise her daughter, such as new furniture and linens. The master ordered the Department was to expedite the process of obtaining beds and linens for the family and refer Ms. W. to an organization which provided family counseling and medication management.

An adjudicatory hearing was held on December 16, 2010. Ms. W. testified that her two daughters loved each other very much, but sometimes did fight. "Alexandra hits on Amy and Amy hits on Alex. It's back and forth. It's not just one person." Ms. W. explained that the bite mark was the result of an incident between the girls that took place months earlier, when Alex hit and bit Amy, and then Amy did the same to Alex. However, the bite mark remained on Alexandra's pale skin. She would tell them not to fight, and took action when necessary. According to Ms. W.:

> I've been telling them to stop fighting. I've been taking stuff away from them when they get in arguments. I've been talking to them, sitting them down, talking to them about it, about them not fighting. I don't let Amy hit . . . her sister. I don't stand there and let her hit her. I don't stand there and do that.

Ms. W. never hit her children, and would do all that she could to make them understand that, as sisters who are going to need each other as they grow older, they should not fight.

Ms. W. had been attending Peace of Mind Counseling for her own therapy since 2006, where she also took her daughters on a regular basis for both individual and family counseling. Alexandra had difficulty controlling her temper, and would bite and throw tantrums when she did not get her way. The psychiatrist had prescribed Alexandra with three medications, which Ms. W. provided for her daughter. Ms. W. had been taking Alexandra to the dentist since she had teeth in her mouth, and to the Kennedy Krieger Institute for speech and other problems beginning when she was two years old.

Ms. W. testified that Alexandra was diagnosed with low muscle tone at birth, which results in a difficulty maintaining bladder control. Having her wear pull-ups to school was not a new issue, but the result of this pre-existing medical condition. After Alexandra was placed in foster care, Ms. W. took her to an appointment with a urologist at Johns Hopkins who recommended she be taken to the bathroom every two hours to train herself.

The parties stipulated that Alexandra was "cognitively limited." At a later hearing it was revealed that, in 2008, she had been hospitalized for severe aggression and a reportedly high Depakote[5] level. Although Ms. W. had been following the prescriptions given by the doctor for Alexandra, considerable attention was given to the possibility that the amount of Depakote prescribed by the psychiatrist was still too much for someone of her size. Alexandra also received Concerta[6] and Risperdal.[7]

The court ordered Alexandra to remain in foster care until her mother obtained adequate furniture, but Alexandra was permitted to visit over the Thanksgiving and Christmas holidays. The unsupervised home visits

went smoothly. On the other hand, life was somewhat less smooth for Alexandra in her foster home. She would act out on an almost daily basis, becoming verbally and physically aggressive. Alexandra wanted to return home to Ms. W., a fact that she made known on a daily basis since entering foster care.

Anne Marie Miskela Jarmin, employed with the Arc of Baltimore, was the treatment foster care worker assigned to Alexandra's case. She was accepted as an expert witness in treatment foster care, which is care for special needs children. Ms. Jarmin testified that, since entering foster care, Alexandra was often having "meltdowns" in the morning when it was time to go to school, slamming doors and screaming "get out of my room — don't touch me!" at the foster mother. The foster mother would often contact Ms. W., who would then talk to Alexandra. On one "typical morning" on November 15, 2010, Alex was having a meltdown, screaming "I hate you. I hate school," then ran into the street, threatening to run away until a police officer was flagged down. When she refused to listen to the police, they took her to the emergency room.

Ms. Jarmin testified that Ms. W. had "a good base of parenting skills," and recommended that Alexandra be returned home. She witnessed Ms. W. attend all of the scheduled appointments and meetings for Alexandra, and would take the lead in parenting her daughter. According to Ms. Jarmin:

> She, kind of, redirects her if she is doing something wrong. If she is on the other side of the room, she calls her back. She's constantly keeping watch of her; like, if we're in a large waiting room area, where she is, what she's doing.
>
> If it's time to go, it's: Alexandra, get your coat. Get your bag. Let's go. It's time to go. She's constantly reminding her to mind [her foster mother] at home, to listen, to go to school.

Ms. Jarmin opined that Ms. W. could use support to build upon the skills she already had because Alexandra's behaviors were "not going to go away magically." Ms. W. had a "pretty good base knowledge" and understanding of her daughter's behaviors and how to handle them. Home was the best place for her to be while the family worked on behavior issues and issues between the sisters.

On January 20, 2011, the court found Alexandra to be a CINA, based on the following facts to be "SUSTAINED AS WRITTEN in the petition:

> 1. The respondent's mother fails to maintain a safe, stable, nurturing and protective living environment for the respondent, [who] reports that she does not feel safe at home due to physical abuse by her 17 year old sister who resides in her home. The respondent's mother fails to protect the respondent from the abuse.
>
> 5. The respondent's mother is aware of the abuse and allows the 17 year old to use corporal punishment on the respondent.
>
> 7. The respondent has been placed in BCDSS Foster Care, under an Emergency Authorization of Shelter Care.

The following facts were SUSTAINED AS MODIFIED:

> 2. On or about October 29, 2010, the respondent reported to school officials that her sister bit her. The respondent was observed to have a bite mark on her right shoulder. The respondent disclosed that her sister hits, slaps, and bites her. The respondent reported that her mother knows about the abuse but does nothing to stop it.
>
> 3. The respondent is cognitively limited. The respondent attends the 5th grade and she wears a pul-up [sic] to school.
>
> 4. The respondent's mother has been diagnosed with Organic Brain Syndrome.
>
> 6. The respondent's father is NOT Darren W. The father may be Jerome J."

On January 25, 2011, Ms. Jarmin testified that Alexandra did not want to be in foster care, whereas she was in a good state of mind when seen with her mother. Ms. W. had proposed a safety plan in which Alex would remain with her whenever she was not in school, and that Alex would not be left alone with her older sister. To accomplish this, Alex's appointments would all be made after school and her own appointments would be made while Alex was in school. Ms. Jarmin testified that she had authority to assist Ms. W. in completing a plan of action for 90 days following reunification, to do things such as assist her in developing new treatment facilities for Alexandra.

Danielle Wagner, Special Educator for the Pride program, which is a self-contained classroom for children with emotional difficulties, testified for Ms. W. Although the school previously had diagnosed Alexandra differently, it currently considered her to be emotionally disabled.

According to Ms. Wagner, in addition to homework, each night she would send home a point sheet that the child's parents were to read, sign, and then return with the child the following day. When home with Ms. W., "Alexandra was one of three students who always turned in their signed point sheets with mom's signature." Alexandra also did quite a bit of homework, which Ms. W. would also sign. Ms. Wagner explained that given Alexandra's emotional difficulties, she understood that all homework was not being done.

After she entered foster care, Alexandra's homework completion decreased by an average one assignment per week. As for math homework, it went from an average 50 percent with Ms. W. to 30 percent completion in foster care. One point sheet was entered into evidence showing that on November 8, 2010, Alexandra had a "breakdown crying and screaming that she wanted her mother and marbles." At the time of the hearing on January 25, 2011, Ms. Wagner testified that "we've seen the same crying that she doesn't want to do something and she refuses and then she will break down and start crying and then will scream she wants her mom." Ms. Wagner testified that Ms. W. participated in meetings when asked, answered the phone when called, and if Alexandra were to go into a crisis, Ms. W. would be available and willing to talk to both the teacher and her daughter.

The final witness was Tina Allen, a Family Preservation Worker with the Department, whose job was to work with children that have been abused or neglected, "trying to keep the families together and preserve the family." She testified that the Department recommended keeping Alexandra in foster care until all services were put in place for the mother, and that Ms. W. attend specific therapy for both individual and family members, keeping all scheduled appointments. Over objection, Ms. Allen testified that she spoke with Ms. W.'s therapist on November 25, 2011, who revealed that Ms. W. was being treated for bipolar disorder.

At the close of testimony on January 25, 2011, the master offered the following opinion:

> [E]verything happens for a good reason. And, the good reason is that Ms. W. needed help; but she didn't — either didn't realize it or didn't know where to get it. Either way, she will now get the help. And, she'll get it because I am going to find this child to be in need of the Court's assistance. And, I'm planning on, two weeks from today, putting into place an OPS [Order for Protective Supervision].

She set forth a detailed plan of family services for Ms. W., and then ruled that Alexandra would not be permitted to go home until "all the supports" were in place. The court ordered Alexandra to remain in foster care.

On January 27, 2011, a genetic test report was filed with the court confirming that Jerome J. was Alexandra's biological father. On February 9, 2011, following a hearing, Alexandra was returned to her mother's care, under an order controlling conduct ("OCC"). Ms. W. was excited, and two days later, she took Alexandra to a court-ordered psychiatric evaluation.

A hearing took place on February 24, 2011, at which time the court granted the Department's requested order for protective supervision, which required Ms. W. to provide proof of attendance of all appointments and compliance with the OCC conditions in the former order.

On March 29, 2011, Ms. W. filed a notice of exception which challenged "the proposed findings, conclusions, and recommendations in the adjudication and disposition of this matter. . . ." On March 31, 2011, the court issued an order, signed by Master Brown and Judge Kershaw, recited various facts, mostly concerning social services issues and the family's history of health treatment. The order then stated: "Based on the foregoing findings, the court determines that it is in the best interest of Alexandra and her mother that she be found to be a Child in Need of Assistance and placed in mother's custody under an Order of Protective Supervision, with very specific conditions as set forth in this order." The court found that "in accordance with Rule 11-114 and Courts & Judicial Proceedings Code Annotated, Section 3-817 that the allegations in the CINA petition have been proved by a preponderance of the evidence and that the facts were sustained at a prior adjudicatory hearing."

On June 10, 2011, a hearing was held before Judge Kershaw on Ms. W.'s notice of exception to the ruling that Alexandra was a CINA. The court stated that "for the [CINA] finding to be appropriate, it needs to be, (a) based on findings of fact" on the record. "And if we were proceeding solely on the issue of a single incident of teeth marks and complaints of Alexandra at age ten against her sister at age seventeen, that's one case." On the other hand, if the CINA finding was made based on Alexandra's special needs and "the abilities and success of parents on the other hand to appropriately address those special needs," that would be a different basis for determining CINA.

The court noted that "there is no question that mother and father would benefit from assistance in dealing and managing their child. [But] the issue of this case appears to present as to whether or not" a CINA ruling was necessary to receive services from the Department. Stated the court:

> I'll have to say on my first reading of all of this, on the issue of abuse and neglect, her single bite mark and the complaints of a ten year old that her sister's inappropriately discipliner [sic] on the other hand. And on the other hand it is only one bite mark and there's no report of injuries at school where she is attending. She's in fifth grade. You know those issues haven't been raised elsewhere or corroborated elsewhere. Looking at that by itself and you've got the special needs issue, I would be surprised to be persuaded this tipped the balance in favor of a [CINA] finding.

However, the judge opined that it was more complicated when considering the diagnoses of both mother and daughter, and the mother's well intentioned ability to provide appropriate medical and mental health treatment for Alexandra.

During the hearing, counsel for Alexandra stated that she did not object if the court were to find that child was not CINA, but asked the court to keep the case open under an order of protective supervision.

Before ruling, the court stated that there was "a natural misunderstanding and stigma associated with the term 'child in need of assistance.' It's natural to conclude that if there's a finding of a child in need of assistance it necessarily means that mother or father or both have in an extreme and awful way, abused, neglected or otherwise failed to provide for their child." However, this was not such a case. "The issue is whether on certain issues, given Alexandra's special needs, the child in particular and the family as support for the child would benefit from the assistance of the department."

On June 27, 2011, the court held a review hearing on Ms. W.'s exception to the court's finding that Alexandra was a CINA. The court first stated that "the court gives deference to the [master's] findings of fact." Then:

> With regard to the legal conclusion that based on the facts, Alexandra was at the time of the disposition, in February of 2011, appropriately found to be a child in need of assistance as a consequence of the sustained facts. The court believes that there is sufficient evidence in this record to have reached that finding.
>
> I want to make it clear, I want to make it very clear that . . . as I read the record, the [CINA] finding is in no way, shape or form a criticism of Ms. W. as a mother.
>
> I think Ms. W. as a mother and I think Master P. Brown believed this, has done an admirable job on many fronts with regard to her child's education needs, with regard to her child's mental health needs. It is certainly not, in the court's view, a criticism of Ms. W. that Peace of Mind did not effectively prescribe or manage [Depakote] and other medications for Alexandra.
>
> Nor is it given the number of appointments, the nature of the special needs, the nature of other dynamics in the family and special needs, is it even a serious criticism of mother that the therapeutic appointments and counseling for Alexandra was at times irregular or missed or perhaps not as frequent as it might have been. In the real world and with the pressures of so many things at one time, all of that is very understandable.
>
> However, with respect to the [CINA] finding, the issue is whether by a preponderance of the evidence the court should appropriately conclude that its [sic] in the child's best interest to have the benefit of the assistance of the Department of the Social Services in dealing with certain issues. One of them being that everyone agrees given the age, given the size disparity, given the nature of the relationship, that Alexandra and her sister Amy ought not to be left alone together.
>
> That's not a criticism of anybody, it's simply the case. And that had occurred and it occurred with sufficient frequency that there was (a) objective evidence of physical abuse by Amy on Alexandra; and (b) a sufficient repetition of those behaviors that at the time . . . Alexandra very clearly expressed her fear of being alone with Amy and desired not to be any more.
>
> And it is that aspect of this case and this record, which in the court's view supports the [CINA] finding.

This appeal followed.

## DISCUSSION

### 1. The court's finding that Alexandra is a CINA

Appellant argues that "the court erred in finding Alexandra to be a child in need of assistance." The

Department contends that, because the court "relied on admissible evidence that Alexandra's older sister had abused her with such frequency that Alexandra was now afraid to return home" and that Ms. W. needed assistance from the Department to help Alexandra deal with emotional and behavioral issues, the court did not err. The child's brief argues that the "court did not abuse its discretion or commit any clear error of law," and that the "ultimate conclusion of the court, that Alexandra is a CINA, was founded upon sound legal principles, and based upon factual findings that are not clearly erroneous." Father Jerome J. argues that, based on the evidence, "the court's determination that Alexandra was at a substantial risk of harm in the home of Ms. W. and therefore a CINA was supported by ample evidence and not erroneous."

Based on our review of the record, we conclude that the court did not err in finding Alexandra to be a child in need of assistance.

Maryland law defines a "child in need of assistance" as:

> 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."

Md. Code Ann. Cts. & Jud. Proc. ("CJ") § 3-801(f) (2001, 2006 Repl. Vol., 2010 Supp.).

As explained by this Court in *In re Michael W.*, 89 Md. App. 612, 618 (1991), CINA proceedings are bifurcated into adjudicatory and disposition hearings. Adjudicatory hearings are conducted to determine if the factual allegations in the petition are true. CJ § 3-801(c). If the allegations are sustained, the court conducts a disposition hearing to determine whether the child needs the court's assistance and, if so, the nature of the assistance. CJ § 3-801(m).

The allegations in a CINA petition must be proven by a preponderance of the evidence. CJP § 3-817(c); *In re Nathaniel A.*, 160 Md. App. 581, 595, *cert. denied*, 386 Md. 181 (2005). The juvenile court in this case was persuaded that Alexandra should be declared a CINA. We apply three different levels of review to the juvenile court's decision:

> 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). Our review of the record leads us to conclude that, although the case is a close one, the court's factual findings supporting its decision were not clearly erroneous.

The court's decision regarding Alexandra was based primarily upon two findings: (1) Alexandra had been physically abused by her seventeen year-old sister, and (2) Ms. W. knew about the abuse but could not stop it.

"Abuse" is defined by CJ § 3-801(b) as "(1) Sexual abuse of a child, whether a physical injury is sustained or not; or (2) Physical or mental injury of a child under circumstances that indicate that the child's health or welfare is at substantial risk of being harmed by: (i) A parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child; or (ii) A household or family member."

The evidence of abuse was Ms. Barns-Evans's testimony about two conversations she had with Alexandra at her school on October 27 and 29, 2010. Ms. Barns-Evans testified that Alexandra told her that her older sister hit her, slapped her face, pinched her thumb, bit her on the arm, said she did not love her, said she wanted her to go live in a foster home, and would kill her if she fell asleep. Although there was no injury that required medical attention, Alexandra was crying, and repeatedly said, "I don't want to go home."

According to Ms. Barns-Evans, the mother told her that the girls hit each other, because sisters do fight, and asked a hypothetical question — "what am I supposed to do?"

During the hearing, Ms. W. testified: "Alexandra hits on Amy and Amy hits on Alex. It's back and forth. It's not just one person." She explained that the bite mark was the result of such an incident several weeks before the Department was called, but which had remained on Alexandra's arm.

This was sufficient evidence for the circuit court to find that the interaction between Alexandra and her sister was of the type that places a child's health or welfare at substantial risk of being harmed; therefore, there was sufficient evidence of "abuse" as contemplated by CJ § 3-801(b).

Likewise, there was sufficient evidence to show that Ms. W. was unable to give proper care and attention to Alexandra and her needs. There is no doubt that Ms. W. cares deeply about providing a healthy environment for her children, but the evidence suggests that she remains unable to protect Alexandra from harm on her own. The court made the following findings concerning the initial reported incident of abuse:

> On or about October 29, 2010, the respondent reported to school officials that her sister bit her. The respondent was observed to have a bite mark on her right shoulder. The respondent disclosed that her sister hits, slaps, and bites her. The respondent reported that her mother knows about the abuse but does nothing to stop it.

Indeed, Ms. Barns-Evans testified that "Amy slapped [Alexandra] in her whole face" when their "mother was gone somewhere." She further testified that "[Alexandra] stated that her mother knows that Amy is hitting her and she tells her to stop; but Amy keeps hitting her. She stated that Amy always hits her when her mother leaves them at home when she goes out." Ms. Barns-Evans also testified that Ms. W. stated: "What am I supposed to do? I can't stop them from fighting. That's what sisters do." The evidence also showed that Ms. W.'s apartment was almost entirely bereft of furniture.[8]

Moreover, while Ms. Barns-Evans was conducting her interview with Ms. W., she received a phone call regarding a second report of abuse toward Alexandra. The report indicated that Alexandra had received a bite mark. Ms. Barns-Evans stated that Ms. W. confirmed "that the school had called earlier that morning to tell her that Alexandra didn't want to take off her coat and became hysterical and started crying. And [the school] had wanted [Ms. W.] to come to the school; but [Ms. W.] told them that . . . she couldn't come to the school and that was their job to deal with whatever was going on."

Ms. W. testified that, at times, she leaves her two daughters at home by themselves and Amy watches Alexandra. Ms. W. admitted that "[t]hey fight" but that "Alexandra hits on Amy and Amy hits on Alex. It's back and forth. It's not just one person."

Based on this evidence, the court sustained Master Brown's findings that:

> The respondent's mother fails to maintain a safe, stable, nurturing and protective living environment for the respondent. The respondent reports that she does not feel safe at home due to physical abuse by her 17 year old sister who resides in her home. The respondent's mother fails to protect the respondent from the abuse.

Ultimately, the court found that "given the age, given the size disparity, [and] given the nature of the relationship . . . Alexandra and her sister Amy ought not to be left alone together." Thus, the court concluded that the "(a) objective evidence of physical abuse by Amy on Alexandra; and (b) [the] sufficient repetition of those behaviors" supported a CINA finding. This conclusion was supported by sufficient evidence and was not clearly erroneous.[9]

As a final argument relating to this issue, appellant asserts that "[t]he court incorrectly stated the standard to be applied at CINA hearings" and that this is "reversible error in and of itself." We do not agree.

The court found that Alexandra had been abused and that Ms. W. was unable to give proper care and attention to Alexandra. This satisfied the two requirements embodied in CJ § 3-801(f), namely factual findings that "(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."

With regard to the first requirement, the trial court relied upon "objective evidence of physical abuse by Amy on Alexandra" (a bite mark observed by Ms. Barns-Evans) along with Ms. W.'s admissions about the girls fighting. This was enough evidence of abuse or neglect. With regard to the second requirement, the court found that Ms. W. was unable to prevent Alexandra from abuse by inferring that Alexandra's fear of her sister was the result of "repetitive" abuse. Moreover, although Ms. W stated that she was only aware of a biting incident that had occurred "several months" before the social worker viewed the full-mouth bite marks on Alexandra, this means that there were either multiple biting incidents or that the original bite had been so severe that the mark remained several months later. In either case, the finding of "repetitive abuse" was based on competent evidence and supported the court's conclusion that Ms. W. was unable to provide Alexandra with proper care. The court's CINA finding was not clearly erroneous.

### II. Ineffective Assistance of Counsel

Ms. W.'s other argument is that the master made several erroneous evidentiary rulings and that trial counsel's failure to preserve the objections to these rulings constituted ineffective assistance of counsel. Specifically, Ms. W. argues that counsel failed to preserve her objections to the master's admission of Ms. Barns-Evans' testimony relating Alexandra's out-of-court statements that her sister had bitten her, slapped her, called her a "B" and "told [Alexandra] she would

kill her if she went to sleep." The master permitted Ms. Barns-Evans to testify to these statements on the basis that they were excited utterances and admissible under Md. Rule 5-803(b)(2). Additionally, Ms. W. contends that the master erred when he refused to permit Ms. W.'s counsel to examine a document that Ms. Barns-Evans was using to refresh her memory while testifying, as permitted by Rule 5-612. Ms. W. states that the ineffective assistance occurred when, in filing exceptions, counsel failed to note these alleged evidentiary errors. As a result, these alleged errors are not preserved for appellate review. *See in Re Tryek S.*, 351 Md. 698, 707 (1998).

Ms. W. states in her brief that:

> there was no conceivable trial strategy that could explain counsel's failure to preserve the hearsay and Rule 5-612 issues for appellate review. Alexandra's statements, as read by Ms. Barns-Evans from her report, were at the heart of the Department's case in the adjudicatory hearing. Without them, the Department could not sustain its burden of proving the allegations in the petition. . . .

Ms. W. urges us to reverse the judgment declaring Alexandra to be a CINA or, "should this Court deem the record to be insufficient to rule on [her] claim of ineffective assistance of counsel, it should order a remand so that testimony can be taken on the issue."

Ms. W. acknowledges that Maryland's appellate courts have yet to grant appellate relief for ineffective assistance of counsel in the context of CINA proceedings. She urges us to extend our ruling in *In re Adoption/Guardianship of Chaden M.*, 189 Md. App. 411 (2009), *aff'd*, 422 Md. 498 (2011) — which recognized a right to an ineffective assistance of counsel claim for disabled parents participating in *guardianship* proceedings — to parents involved in *CINA* proceedings. Finally, she suggests that *Strickland v. Washington,* 466 U.S. 668, 687 (1984), provides the appropriate analysis for us to decide the ineffective assistance issue. In that case, the Supreme Court stated:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

For the purpose of our analysis, we will take as correct three of Ms. W.'s premises: (1) a claim of ineffective assistance of counsel is cognizable in a CINA case; (2) such a claim can be addressed on direct appeal and (3) *Strickland* provides the appropriate analysis in such a case. We will also assume that trial counsel's performance was deficient. Conceding all of this arguendo and taking no position on the merits of the argument, Ms. W. has nonetheless failed to satisfy the second component of the *Strickland* test, namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *In re Chaden M.*, 189 Md. App. at 434 (quoting *Strickland*, 466 U.S. at 694).

As stated *supra*, there was sufficient evidence — even if we excluded the testimony that Ms. W. claims was wrongly admitted — to support a CINA finding. A full-mouth human bite mark was observed on Alexandra's arm. Ms. W. testified that Amy had bitten and struck Alexandra. Amy is significantly older than her sister. Ms. W. admitted that she left Alexandra alone with Amy fully aware that Amy hit Alexandra. Even if trial counsel had preserved the hearsay issue for the consideration of the juvenile court, in light of the evidence in the record, we think it very unlikely that the court would have dismissed the CINA petition.

The second evidentiary ruling that Ms. W. points to is insignificant. It is true that counsel had a right to examine the notes to which Ms. Barns-Evans referred to during cross-examination. Rule 5-612 permits this "for the limited purpose of impeaching the witness as to whether the item in fact refreshes the witness's recollection." However, Ms. Barns-Evans' credibility was not challenged during the proceedings before the master; indeed, trial counsel did not even raise the issue in her closing argument. In light of this, it is difficult to understand what purpose would have been served by raising the issue to the juvenile court.

Even assuming *arguendo* that the right to effective assistance of counsel exists in this case, and assuming further that a the claim would be cognizable on direct appeal, Ms. W. "must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). Ms. W. has not come close to meeting that burden in this case.

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

**FOOTNOTES**

1. Counsel for the DSS responded to the hearsay objection by claiming "it wouldn't be offered for the truth and matter asserted," but for the actions Ms. Barnes took and her state of mind." The objection was overruled based on the excited utterance exception to the hearsay rule.

2. Because Ms. Barns-Evans was reading directly from a form, counsel for Ms. W. objected and requested that she be provided a copy of the document for use during cross-examination. The master overruled the objection.

3. Organic brain syndrome is "a general term used to describe decreased mental function due to a medical disease, other than a psychiatric illness." U.S. National Library of Medicine. http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002374/.

4. Ms. W. was not certain whether the father was her ex-husband or Jerome J.

5. Depakote, or valproic acid, is used to treat certain types of seizures, mania (episodes of frenzied, abnormally excited mood) in people with bipolar disorder, and to prevent migraine headaches. U.S. National Library of Medicine. http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000677/

6. Concerta, or methylphenidate, is used as part of a treatment program to control symptoms of attention deficit/hyperactivity disorder (ADHD). U.S. National Library of Medicine. http ://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000606/

7. Risperdal, or Risperidone, is used to treat the symptoms of schizophrenia, mania in people with bipolar disorder, and behavior problems such as aggression, self-injury, and sudden mood changes. U.S. National Library of Medicine. http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000944/

8. The apartment had only one chair, no tables and, as mentioned, the children were sleeping on deflated air mattresses.

9. To be sure, during the June 10, 2011, hearing, the juvenile court expressed skepticism that there was sufficient evidence to "tip the balance in favor of a CINA finding." The judge stated that Ms. W. "has done an admirable job" with regard to the education and mental health needs of her child, and said to Ms. W.: "I have read this record from beginning to end and you have done an exemplary job on many fronts." However, the court was bound by the fact that Ms. W. was unable to prevent the abuse inflicted on Alexandra by her sister Amy. The court stated that it was in the best interests of Alexandra that "Alexandra and her sister [not be] left alone together," and the court concluded that Ms. W. was unable to accomplish this alone.

Cite as 4 MFLM Supp. 125 (2012)

**CINA: custody and guardianship awarded to relative: sufficiency of services to father**

# In Re: Ashlee E.

*No. 1089, September Term, 2011*

*Argued Before: Matricciani, Hotten, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.*

*Opinion by Matricciani, J.*

*Filed: February 28, 2012. Unreported.*

**The circuit court properly closed the CINA case and awarded custody and guardianship to the child's grandparents, where, despite tailored services and a year's participation in a course specifically designed for parents with cognitive limitations, the child's father had not sufficiently demonstrated initiative in performing basic child-care tasks, much less an ability to complete such tasks without supervision.**

Ashlee E., appellee, is the minor daughter of Amber E. (Mrs. E.) and appellant, Andrew E. (Mr. E.). On December 10, 2009, and at the age of two months, Ashlee was adjudged a child in need of assistance (CINA) and removed from their custody and care, placed into the temporary physical custody and limited guardianship of Mrs. E.'s mother and step-father, Sherri and Andrew M.

On June 18, 2010, the Circuit Court for Baltimore County, sitting as a juvenile court, established a permanency plan of reunification. Based on recommendations by the Baltimore County Department of Social Services (the Department), appellee, and court-appointed counsel for Ashlee, the juvenile court changed the permanency plan to concurrent plans of reunification, custody, and guardianship with Sherri and Andrew M.

At a hearing held June 8 and 9, 2011, the Department and counsel for Ashlee renewed their contentions that Mr. and Mrs. E. would not be able to care for Ashlee independently in the foreseeable future. In an order entered June 9, 2011, the court granted the Department's request to close the CINA case, awarding physical custody and guardianship of Ashlee to Sherri and Andrew M. The court granted Mr. and Mrs. E. liberal supervised visitation. Mr. E. noted this appeal, raising three issues that we reorder and rephrase as follows:

*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.*

> I. Did the juvenile court err in finding that the Department made reasonable efforts toward reunifying Ashlee with Mr. E.?
>
> II. Did the juvenile court abuse its discretion in closing the CINA case and awarding custody and guardianship of Ashlee to Sherri and Andrew M.?
>
> III. Did the juvenile court err by permitting a lay witness to offer expert testimony?

For the reasons set forth below, we conclude that the juvenile court did not err in finding that the Department made reasonable efforts to reunify father and child, that the court did not abuse its discretion in awarding custody and guardianship to the maternal grandparents, and that Mr. E. did not preserve his objection to the lay witness testimony.

## FACTS AND LEGAL PROCEEDINGS

### CINA Declaration

On July 15, 2009, Ashlee was born to Mr. and Mrs. E. On August 6, 2009, the Department received a report that Mr. and Mrs. E. were not meeting their daughter's needs. The Department investigated and attempted to assist Mr. and Mrs. E., then removed two-month-old Ashlee from her parents' custody and placed her with Sherri and Andrew M. Following that relocation, Mr. and Mrs. E. moved into the M.'s residence as well, so they "could receive the support they needed."

On September 17, 2009, the Department filed a CINA petition alleging that Mr. and Mrs. E. were "unable to care for their infant Ashlee due to their developmental delays and [Mother's] mental health status." In support of the CINA petition, the Department submitted a report dated September 15, 2009.

This report provided the following background on Ashlee's family:

> Mrs. E. suffered stroke like symptoms at birth leaving her with muscle weakness, deafness in her right ear, and legal blindness in her left eye. She has developmental

> delays including a learning disability. Mrs. E. has a long history of depression. She started having symptoms at 5 years old, but was diagnosed when she was 8. Mrs. E. was also diagnosed with childhood schizophrenia after several significant incidents, one being when she placed a cat in the microwave and turned it on. Mrs. E. has been hospitalized 3 times (1998, 1999, & 2000) for mental health concerns. All three hospitalizations were due to Mrs. E. exhibiting self-injurious behavior or threatening suicide.
>
> Mr. E. has a host of medical concerns including [Waardenburg] Syndrome, Spina Bifida, and a bleeding ulcer. He has short term memory loss and a learning disability. [Waardenburg] Syndrome . . . is a disease in which the patient has difficulty with swallowing or speaking or both owing to one or more patches of dead tissue caused by interrupted blood supply to parts of the brain. Mr. E. informed that he was in chronic pain due to his Spina Bifida; however through pain medications and a new mattress he has been feeling better.
>
> Mr. and Mrs. E. met several years ago and got married a year ago. Mrs. E. informed that they got married because she was pregnant. It has been reported that Mrs. E. got pregnant purposely so that Mr. E. would marry her. Mrs. E. informed that initially she was excited about having a baby; however after she gave birth she began to have second thoughts. Mr. & Mrs. E. were living with Mr. E.'s family prior to their move in with [Sherri M.] Both Mr. and Mrs. E. report that they were victims of emotional and mental abuse while in that house. They were afraid to leave because they did not want to upset Mr. E.'s parents and they were scared that they would try to take Ashlee from them.

In addition, the Department described the circumstances that led to the removal of Ashlee from Mr. and Mrs. E.'s custody.

> This agency received a call regarding neglect of Ashlee. . . . Mrs. E. is developmentally delayed and has a history of depression, self-injurious behaviors and hospitalizations. The referral noted that Mrs. E. has Post-Partum Depression and she was not taking her prescribed medication. Mrs. E. admitted to being angry and frustrated in dealing with Ashlee. She admitted that she handles Ashlee roughly and jams the pacifier into her mouth. Mrs. E. has poor judgment in how to deal with a newborn. She takes her medication and falls asleep with Ashlee in the bed. She admitted to feeling hopeless and suicidal. Mr. E. is better with Ashlee, however, he too is developmentally delayed and does not seem to remember what to do (how much formula to use, the last feeding, how long Ashlee has slept etc). As there were several concerns, Mr. and Mrs. E. moved in with Mrs. E.'s parents (Sherri and Andrew [M.]) in Baltimore County where they could receive the support they needed.

The Department further reported that, after Ashlee's move to Mrs. E.'s family home, Sherri and Andrew M. supervised Mr. and Mrs. E.'s daily interactions with Ashlee. Nevertheless,

> Mrs. E. informed that she continues to feel overwhelmed with caring for Ashlee. She does not feel bonded with Ashlee and feels that Ashlee does not want a relationship with her. Due to Mrs. E.'s developmental delays and mental health status, she attributes feelings and characteristics to Ashlee that Ashlee is not able to express at her age. . . . Mrs. E. seems to be very frustrated with caring for Ashlee and sometimes defers the care of Ashlee to her parents or Andrew. Mrs. E. has begun seeing a therapist and is stabilized on her medication. She still has episodes where she hurts herself. For instance several days prior to this writing she was upset with Mr. E. and started punching a tree. Mrs. E. reports that she would rather hurt herself because then she is not hurting anyone else.
>
> Mr. E. reports having a good relationship with Ashlee. He said that he talks to her, feeds her and changes her diapers. He stated that his biggest challenge is knowing what to do when Ashlee cries as he has not yet figured

> out how to differentiate her cries. Although Mr. E. has been better at caring for Ashlee, he too is developmentally delayed and needs assistance with taking care of her. He admits that sometimes he allows his video games to take precedence over caring for Ashlee.

Based on these circumstances, the Department recommended that Ashlee be declared a CINA, that temporary physical custody and limited guardianship of Ashlee be awarded to Sherri and Andrew M., and that Mr. and Mrs. E. "attend Parenting Skills classes until such time that [they are] successfully discharged." After a December 10, 2009 hearing, the juvenile master concurred with the Department's recommendations. The master prepared an order proposing that the juvenile court:

1. sustain the allegations in the CINA petition;
2. declare Ashlee a CINA who would not be returned to her parents' care because they "are developmentally delayed and mother has mental health issues which render them unable to provide appropriate care for the infant"; find that reasonable efforts to prevent removal consisted of "continuing services from the Family Preservation and Foster Care Units of Baltimore County D.S.S., including referrals for parenting classes, monitoring, and supervision";
3. award "[t]emporary physical custody and limited guardianship to maternal grandparents, Sherri and Andrew [M.];
4. grant liberal visitation for Mr. and Mrs. E., with all "contact . . . be supervised by a responsible adult at all times";
5. order Mr. and Mrs. E. to participate in parenting classes through Kennedy Krieger Institute's PACT (Parents and Children Together) program, which is designed for parents with cognitive disabilities;
6. order Mrs. E. to continue her mental health treatment, including taking any prescribed medications; and
7. order the Department to "assist both parents in applying [for] DDA [Developmental Disabilities Administration] benefits."

Neither Mr. nor Mrs. E. filed exceptions to the recommended order. On December 18, 2009, the juvenile court approved the order as proposed.

Over the ensuing 18 months, the permanency plan for Ashlee changed from reunification with Mr. and Mrs. E., to an award of custody and guardianship to the maternal grandparents. The Department's efforts to reunify Ashlee with her parents, as well as the circumstances leading to the custody and guardianship award, are set forth in reports to the juvenile court. Because the reasonableness of those efforts is challenged in this appeal, we shall review in detail the reports and related court proceedings.

**Proceedings of May and June, 2010**

On May 3, 2010, the Department social worker assigned to Ashlee's case, Patricia Simms, submitted a report to the juvenile court in anticipation of the first permanency planning review hearing. Although the Department initially requested rescission of the order of protective supervision and "that custody and guardianship of the child remain with . . . Sherri and Andrew [M.]," it quickly filed an addendum dated May 11, 2010, revising its recommendation to ask that the order of protective supervision "be continued" while "custody and guardianship . . . remain with . . . Sherri and Andrew [M.]"

The May 2010 report reviewed Ashlee's case history, noting that in September 2009 when the Department began its intervention, the Department had arranged not only for Ashlee to move to Sherri and Andrew M.'s Baltimore County residence, but for Mr. and Mrs. E. to do so as well. The Department's initial investigation had revealed that Mr. E.'s mother, Christina R., and father did not "provide appropriate guidance" or information on Ashlee's care and that their home was "chaotic, cluttered, and unclean."

By February 2010, however, Mr. E. had "moved out of the [M.'s] home due to conflict with his wife" and returned to live with his family in Anne Arundel County. Although Mrs. E. had "gone back and forth between staying with her parents and staying with her husband and his family[,]" by May 2010, she was "staying with her father and stepmother," Robbie and Renae M., who live within walking distance of Mr. E.'s family in Anne Arundel County.

The May 2010 report advised that Ashlee remained

> in the care of . . . Sherri and Andrew [M.]. Ashlee is developing very well, and the [M.'s] are ensuring that she receives appropriate care and supervision. She has a close bond with Mr. and Mrs. [M]. who are very protective

> of her and fully understand the need to provide close supervision of the parents' visits with her.

The Department further reported that, between November 2009 and April 2010, Mrs. E.'s unstable mental health had resulted in three psychiatric hospitalizations as well as an incident that put Ashlee's physical safety at risk. The Department explained that Mrs. E.

> periodically has had suicidal feelings and has been cutting herself. Her mother [Sherri M.] called Baltimore County Crisis Response on 3/8/10 because Ms. E. was talking about suicide. A counselor went to the home and talked to Ms. E. and determined that it was not necessary to take her to the hospital because she was not at imminent risk of suicide at that time. Her most recent hospitalization occurred as a result of the following incident: Ms. E. was home with her stepfather, Andrew M. and Ashlee. The family was in the kitchen making dinner. As Mr. M. was about to put something on the stove, Ms. E. opened the oven door. The oven was on, and it burned Mr. M.'s leg. He was holding Ashlee at the time. Mr. M. told her that she should have waited until he was away from the stove before she opened the oven door because she burned him and could have hurt Ashlee. Ms. E. became very angry and started yelling at Mr. M. She hit him while he was still holding Ashlee, and he went into the other room to call the police. When he turned around, Ms. E. was waving a large kitchen knife in front of her. She cut herself on the arm before the police came. She was taken to Franklin Square Hospital Center and released a few hours later. Ms. E. later informed her psychiatrist that she had not been taking two of her three prescribed medications. After this incident, Mr. and Mrs. M. were concerned about Ashlee's safety with her mother living in the home. Therefore, Ms. E. is currently staying with her father and stepmother, Robbie and Renae M.

In March 2010, Child Protective Services also investigated "numerous sexual comments that Mr. E. made about his daughter," including remarks about her "G-spot" while changing her diaper and descriptions of certain movements by Ashlee as "humping." He also stated that "when the boys start coming to see [Ashlee] when she is older, he will give out condoms at the door." The Department's family support worker, Effie Brooks, also advised that Mr. E. said "that he does not know what to say to Ashlee and can only think of sexual things." He later claimed that "he was just joking" and that "he now realizes that making sexual statements about a child is inappropriate." The investigation "ruled out" sexual abuse, but "[g]iven Mr. E.'s history of inappropriate sexual comments and poor judgment in caring for Ashlee, the agency informed Mr. and Mrs. M. that they must ensure that Mr. E.'s contact with Ashlee is very closely supervised."

After Mr. and Mrs. E. moved out of Sherri and Andrew M.'s Dundalk home, supervised visits between Ashlee and her parents took place either at the M. residence or at the Anne Arundel home of Robbie and Renae M., Mrs. E.'s father and step-mother, who often had Ashlee for weekend overnight visits. According to the Department, even though Mr. and Mrs. E. "had a lot of time with Ashlee when they lived in the [M.] home with her" and were continuing their visits since they moved away,

> the parent-child bond is lacking. The parents often ignore Ashlee and instead pay attention to a laptop or a video game. For example, the Family Preservation Team has seen Ashlee pull up on her mother's legs and try to get her attention, but Ms. E. ignored her and continued to use her laptop. Family members report that the parents mostly ignore Ashlee and only occasionally pay attention to her. Dr. Stephen Lescht is the therapist who continues to see Ms. E. and has also seen Mr. E. on many occasions. Dr. Lescht believes that neither parent is able to provide safe and competent care of Ashlee due to Ms. E.'s unstable mental health and both parents' developmental disabilities.

After the December 2009 CINA adjudication and disposition, the Department aided Mr. and Mrs. E. in obtaining various public services. First, they were referred to Kennedy Krieger's PACT parenting program. After moving up the waiting list, they started the program on April 29, 2010. Second, the Department referred both parents to the DDA and the Division of Rehabilitation Services (DORS). Third, the DDA advised Mrs. E. that it would perform "an intellectual assessment" to determine what services might be available to her, and DORS offered her a life skills

class that would meet five days per week beginning in June. Fourth, the DDA sent a letter to Mr. E. requesting that he contact them to schedule an appointment to discuss their services, placed him in their highest priority category due to the severity of his disabilities, and referred him to a service provider for an exploratory career assessment. Although Mr. E. was told that he had to schedule this assessment "by 3/31/10 or his case would be closed," and Ms. Simms and the M.'s "encouraged him to do so," Mr. E. did not contact DDA or the service provider. Fifth, as a result of applications filed with the assistance of Sherri M. and the Department, Mr. E. obtained health insurance. Sixth, the Department helped Mr. E. gather medical information that he used in an appeal from being denied federal Supplemental Security Income benefits.

After a June 18, 2010 review hearing, the master recommended that Ashlee's permanency plan be reunification with her parents, with continued protective supervision by the Department, limited guardianship and temporary physical custody by Sherri and Andrew M., liberal supervised visitation for Mr. and Mrs. E., and parental participation in the PACT program. In addition, the master recommended adding, as a new requirement, that Mr. and Mrs. E. must "demonstrate the ability to use appropriate parenting techniques with Ashlee." The master further found that the Department's reunification efforts were "reasonable because [p]lacement is appropriate and meets ongoing needs." The master did not recommend any additional referrals or actions. Neither parent filed exceptions, and the juvenile court again adopted the master's recommendations.

**Proceedings of October, 2010, and January, 2011**

On October 25, 2010, Ms. Simms submitted another report on behalf of the Department, in support of its request that the order of protective supervision "be rescinded and that custody and guardianship of the child remain with" Sherri and Andrew M. In reviewing the circumstances necessitating intervention, the Department advised that it

> remains concerned about the risk to Ashlee in her father's care due to her age and Mr. E.'s history of inappropriate sexual comments and poor judgment in caring for Ashlee. For example, he once held Ashlee's bottle in her mouth while she was on the floor in her infant seat and he was sleeping on the couch. Also, he has a history of not knowing how to provide Ashlee's basic care, such as when/how much to feed her, change her diaper, etc. He has not demonstrated that he has learned how to care for Ashlee. Mr. E. has difficulty understanding appropriate boundaries regarding information that is personal or inappropriate for children. Such difficulty is common in people who have cognitive limitations. Due to these concerns, the agency informed Mr. and Mrs. M. that they must ensure that Mr. E.'s contact with Ashlee is very closely monitored.
>
> According to Mr. E.'s records from Hannah More School in 2006 to 2007, he was diagnosed with Pervasive Developmental Disorder, Anxiety Disorder, and Learning Disorder. The medical diagnoses were Waardenburg Syndrome and Motor Tic Disorder. It was also noted that he had a history of depression, but he had not been prescribed psychotropic medication. The records noted a history of story-telling and making inappropriate sexual statements. Evaluators noted that he might have been developing signs of a thought disorder.

The Department reported that Ashlee remained with Sherri and Andrew M., who continued to provide appropriate care and supervision over parental visits. Since the previous Department report, Mrs. E. had moved in with Mr. E. and his family. Her unstable mental health persisted, requiring another hospitalization in August 2010.

> In 8/10, Ms. E. was hospitalized at Harbor Hospital after taking an overdose of her bipolar medication and trying to run in front of a moving car. Ms. E. told the Family Preservation team and her mother that she had not been taking her prescribed medication at the time. She was at Mr. E.'s family's house, and his sister and brother stopped her from running in front of the car. Ms. E. stated to the Family Preservation team that Mr. E. thought the incident was funny. She said that she called a crisis hotline and was taken to the hospital. While Ms. E. was in Harbor Hospital, her parents were trying to reach her by phone. Whenever they called for Ms. E., Mr. E.'s family told them that she was out and did not tell them that she was in the hospital. Ms. E. said that Mr. E.'s mother and grandmother took her prescription medication from her and decided that they would give it to her

when they thought she needed it rather than having her take it as prescribed. On 10/31/10, Ms. B. went into a rage against her mother and stepfather after being without her medication for three days. Ms. E. also admits to periodically drinking alcohol, which interferes with her psychotropic medication and has a negative impact on her mood.

The Department reported that Mrs. E. opposed bringing Ashlee into the home where she was living with Mr. E. and his family:

> Ms. E. told the Family Preservation team that she does not want Ashlee to live in the home with Mr. E.'s family. She said that she does not want Ashlee to hear the frequent cursing and hurtful comments from his family. Also, she said that Mr. E.'s brother and his friends sometimes smoke in the house when his mother and grandmother are not home. Ashlee is highly allergic to cigarette smoke, so her pediatrician determined that Ashlee cannot be exposed to cigarette smoke. Ms. E. also expressed concern that Mr. E.'s 15-year-old cousin, Brett, lives in the house and reportedly has an alcohol problem. The adults in Mr. E.'s family reportedly allow Brett and Mr. E.'s teenage sister to drink alcohol. Ms. E. said that Mr. E.'s family told her and her husband not to tell DSS or her family about anything that happens that might make Mr. and Mrs. E. look bad in court. They were told, "What happens in this house stays in this house." Despite these concerns and the fact that Ms. E. frequently becomes highly upset by Mr. E.'s family, she chooses to live in their home so that she can be with her husband. Ms. E.'s mother and stepfather would allow her to live in their home, where she could be with Ashlee.

According to the Department, even though Sherri and Andrew M. offered opportunities for liberal visitation, including overnights, both parents' visits decreased after they moved to Anne Arundel County:

> [S]ince Mr. and Mrs. E. moved out of the M. home, the parents usually only see Ashlee during the PACT sessions. Ms. E. has seen Ashlee more frequently than Mr. E. has. The M.'s informed the parents that they are welcome to visit Ashlee as often as they like, and they can even spend the night sometimes. Mr. E. told Ms. M. that he does not want to spend the night because he likes to sleep in his underwear and cannot do so in the open area where he would have to sleep. Family members report that the parents still often ignore Ashlee and only occasionally pay attention to her.

The Department then reviewed Mr. and Mrs. E.'s participation in the PACT program, raising concerns that the presence of Christina R., who accompanied them, interfered with the parents' progress:

> Kennedy Krieger's PACT program is the only one in Maryland that is designed for parents with cognitive limitations. The PACT program can work with the family until Ashlee is three years old. Bridget McCusker from the Kennedy Krieger is doing a parenting program with the parents weekly at the M.'s home. In addition, the parents and Ashlee attend weekly group sessions with other parents and their children at the PACT office. Mr. E.'s mother, Christina [R.], attends the group sessions to supervise Mr. and Mr. E. with Ashlee. During the parenting sessions, Ms. [R.] often answers questions and interacts with Ashlee rather than allowing the parents to do so. Ms. [R.] also gave Ashlee macaroni and cheese at PACT on 9/27/10 despite the fact that Ms. McCusker told her that Ashlee is lactose intolerant and cannot have anything made with milk. Ms. [R.] reportedly said, "It's all right if I give it to her." Ms. McCusker reports that Mr. and Mrs. E. are interacting with Ashlee during the sessions more than they were when she began working with them. However, Ms. McCusker believes that the parents are not able to care for Ashlee without assistance. Ms. McCusker said that Ms. E. shows empathy for Ashlee if she gets hurt, but Mr. E. does not show any reaction. However, Ms. E. does not consistently show empathy for Ashlee. For example, in 8/10, Mr. and Mrs. E. went to her father's house to get some money for Ms. E. Both parents ignored Ashlee while they were there, even

> when Ashlee hit her face on Ms. E.'s knee and started to cry.

The Department also reported, "There are no services offered by DDA that suit Mr. or Mrs. E.'s current needs. However, their applications remain on file so that, if their situations change in the future, they are eligible to receive DDA services." The report noted that although the DORS life skills program had been offered to Mrs. E., "she moved to Anne Arundel County and had her case transferred there before she could begin the class." Mr. E's DORS case was closed because he did not contact Alliance as instructed.

At a January 14, 2011, permanency plan review hearing, counsel for Ashlee joined the Department in recommending that the permanency plan be changed from reunifying Ashlee with Mr. and Mrs. E. to awarding her custody and guardianship to Sherri and Andrew M. The juvenile court ordered concurrent permanency plans of reunification and placement with a relative for custody and guardianship, and the court continued the custody, guardianship, and supervised visitation orders previously in effect. In addition, the court ordered the parents to "continue in [the] PACT program — no independent supervision of their interactions with the child during the PACT sessions, as that interferes with the program's ability to assess [illegible] ability [and] the program provides adequate supervision."

**Proceedings of May and June, 2011**

On May 25, 2011, the Department submitted another report to the juvenile court, again requesting that the order of supervision be rescinded and that custody and guardianship be awarded to Sherri and Andrew M. Since the January 2011 permanency plan hearing, Ashlee had remained with Sherri and Andrew M. She was "developing at a level beyond that expected of her age (22 months)," in that she could read all the letters of the alphabet (both in and out of order), she knew her colors and shapes, she could count to at least 12, and she could speak in 2- and 3-word sentences."

Mr. and Mrs. E.'s marriage, however, had become troubled. In April 2011, Mr. E. reportedly told his wife that he was in love with another woman and wanted a divorce. Although the couple soon reconciled, the Department reported that Mrs. E. "often becomes severely depressed in response to problems in her relationship with her husband." According to Christina R., Mr. E. was taking prescribed medication for Tourette Syndrome and still suffered from anxiety but was "not in mental health treatment."

The department referred Mr. and Mrs. E. to a housing program in Anne Arundel County, but "the waiting list [was] very long, and Ms. McNabb [was] not aware of a program that could house the couple together." Through DORS, Mr. E. was referred to a job training program in March of 2011 and expected to finish landscaping training in July of that year. Mrs. E. had been contacted by the Anne Arundel County DORS program but was still "waiting to begin services." Both parents continued to participate in PACT sessions, supervised by Ms. McCusker at Sherri and Andrew M.'s home twice a month, and at weekly group sessions held at the PACT office. The Department reported that Ms. McCusker continued to believe "that the parents are not able to care for Ashlee without assistance."

This assessment was consistent with the observations made by the Family Preservation team and Mrs. E's family members, who

> have observed that Mr. and Mrs. E. are able to interact with Ashlee appropriately for brief periods of time. However, neither parent has demonstrated the ability to provide for all of Ashlee's needs for a longer period of time, such as a whole day. The parents have been given many opportunities to spend more entire days of supervised time with Ashlee at relative's homes, and they have been allowed shorter visits at appropriate locations in the community. Mr. and Mrs. M. volunteer at [W.] Park on Monday and Wednesday evenings from 6:00 to 8:00. The M.'s invited Mr. and Mrs. E. and Mr. E.'s family to visit with Ashlee at the park during those times. The park has a playground, refreshments, etc., so it would be an ideal place for family members to spend time with Ashlee. However, the parents and Mr. E.'s family have not visited Ashlee at the park as suggested. Ms. E. has visited Ashlee more frequently than Mr. E. has, but they do not take every opportunity to visit with Ashlee.

The Department also expressed concern that

> Mr. and Mrs. E. and his family continue to demonstrate poor judgment. For example, on 3/5/11, Mr. and Mrs. E. and members of Mr. E.'s family went to Henryton State Hospital, which has been abandoned for years. They entered the building and climbed on the roof of the dilapidated hospital. The building is not safe due to asbestos, broken glass, and general lack of repair. It is illegal to trespass

on the property.

Although Mrs. E. had been given opportunities to demonstrate the financial responsibility necessary to live independently, she failed to do so. After the January 2011 hearing, Sherri M. began giving Mrs. E. "the full amount of her SSI check at once to see if she is able to budget her money throughout the month." Mrs. E. spent "the whole check early in the month."

At a June 8 and 9 contested case hearing, the Department presented testimony and proffers from several witnesses. First, Patricia Simms, the Department's assigned social worker who prepared the reports submitted to the juvenile court and was admitted as an expert in licensed clinical social work. Second, Effie Brooks, the Department's family support worker who worked on parenting skills with Mr. and Mrs. E. twice a month at the home of Sherri and Andrew M., since September 2009 through May 2011. Third, Sherri M., Mrs. E.'s mother, who had court-ordered custody of Ashlee since she was two months old. Fourth, Robbie M., Mrs. E.'s father, who had Ashlee for overnight visits every weekend. And fifth, Bridget McCusker, the PACT program coordinator who, since April 29, 2010, had been working with the parents twice a month at Sherri and Andrew M.'s home, and at weekly group sessions held at the PACT office, and was qualified as an expert in teaching parenting skills to parents with disabilities.

The testimony of these witnesses was consistent with the Department reports detailed above. All agreed that, although Mr. and Mrs. E. had improved their parenting skills, they still had not demonstrated that they were capable of providing safe care for Ashlee independently. The witnesses testified uniformly that Mr. and Mrs. E. did not take advantage of opportunities to care for Ashlee for an extended period or outside the home settings provided by both sets of maternal grandparents and that, even during home visits, both parents — but especially Mr. E. — failed to give Ashlee appropriate attention. According to Ms. Brooks, during her visits over the prior six months, she had not seen Mr. B. "really interact . . . that often" with his daughter. When Ashlee ran to him, he would simply pat her on the head. When she brought him a book, he "might read one page and that's it." Since the January 2011 hearing, she had not seen Mr. E. change Ashlee's diaper, feed her, or put her down for a nap. In Ms. Brooks's view, Mr. E. was "a little confused as to what she wants or what needs to be done."

Sherri M. confirmed that Mr. E. would pick Ashlee up and sit her on his lap, but there was no further interaction. He never fed her or otherwise volunteered to do anything to take care of her. Sherri M. also recounted that, despite repeated warnings that Ashlee is highly allergic to cigarette smoke, Ashlee had been exposed to cigarette smoke during recent visits with Mr. and Mrs. E. and Mr. E.'s family members. In addition, she had concerns that Mr. and Mrs. E. "don't realize [their] strength when they're playing with" Ashlee, so that recently Ashlee had a "bad rug burn on her back" after "roughhousing" with her parents at Robbie M.'s house.

The proffered testimony of Robbie M. was that, although he and his wife lived within walking distance of Mr. and Mrs. E. and had an open door policy for them to visit during Ashlee's weekend overnight visits, Mrs. E. came to visit only on occasion and Mr. E. did so rarely. When Mr. E. did visit, he did not "pay a lot of attention to" Ashlee. In May, when Robbie M. met up with Mr. and Ms. E. in the parking lot of the PACT office, Mr. E. ignored Ashlee and Mrs. E. allowed her to dart into the parking lot.

All of the professional witnesses — Ms. Simms, Ms. Brooks, and Ms. McCusker — testified that neither Mr. E. nor Mrs. E. was capable of caring for Ashlee safely without aid. In Simms's expert opinion, an additional six months would not change the need for supervision. She and Ms. Brooks believed that, due to their cognitive limitations and Mrs. E.'s persistent mental health problems, Ashlee's parents would not ever be able independently to provide safe and healthy care for her. Although Ms. McCusker did not express an opinion on that question, she recommended that the parents be given regular opportunities to visit Ashlee outside of her home, that they be permitted to assume more responsibility for Ashlee's care during visits, and that, based on what she had observed, it was safe for Ashlee to have unsupervised visits with her parents at the PACT center where "there are other people in the environment." She testified that, since beginning the PACT program fourteen months earlier, both parents had greatly increased their ability to interact with Ashlee and were attentive to her, although they occasionally required prompting to do certain things. In Ms. McCusker's view, without an opportunity for unsupervised parenting, she could not determine what additional assistance Mr. and Mrs. E. needed or whether they were likely to be able to take on the responsibility of parenting Ashlee independently.

The proffered testimony of Christina R., Mr. E.'s mother, was that when she observed Mr. and Mrs. E. with Ashlee at the PACT center and during visits at Robbie M.'s house, both parents were appropriate and attentive to Ashlee. Since the cigarette smoke complaints, she had quit smoking. She expressed concern about seeing Ashlee because of tension between Mr. and Mrs. E.'s family members.

Mr. E. testified that he saw Ashlee as often as he could, given his weekday job training schedule and that Sherri and Andrew M. were busy when he was

free on weekends. Moreover, Mr. E. felt like he was being stalked when he did visit, with Sherri M. or Renae M. jumping in any time he tried to do something for Ashlee and telling him he was doing it wrong. At the PACT office, however, he had made Ashlee meals, fed her, and regularly changed her diaper. Mr. and Ms. E. both wanted Ashlee back, but Mr. E. did not mind the supervised visitation as long as there is no interference by Sherri M. and Renae M. If the court extended the order of protective supervision another six months, Mr. E. would have completed job training, and he hoped to find employment and housing, although he had never lived on his own. In addition, Mr. E. felt that more structured times for visitation would be helpful.

The Department and court-appointed counsel for Ashlee argued that despite reasonable efforts toward reunification, including providing all available services to assist them in parenting, Mr. and Ms. E. lacked the capacity to care independently for Ashlee, now or in the foreseeable future, due to both parents' developmental delays and Mrs. E.'s unstable mental health. At the conclusion of the hearing, the juvenile court agreed, finding that, although "the parents . . . have made a good presentation here today, are making some progress in this matter, . . . they have been in the PACT program for more than one year and still are not consistently providing for or . . . attending to young Ashlee at the present time." For that reason, "a guardianship and custody would be in young Ashlee's best interest at the present time." The court rescinded the order of protective supervision, awarded custody and guardianship to Sherri and Andrew M., ordered liberal supervised visitation for Mr. and Mrs. E., referred the case to mediation of visitation, and reserved jurisdiction only as to visitation. Mr. E. noted this timely appeal.

## DISCUSSION

### Review of Order Changing Permanency Plan for a CINA

We review a juvenile court's decision to change a permanency plan for a child in need of assistance for abuse of discretion. *In re Shirley B.*, 419 Md. 1, 18-19 (2011). The Court of Appeals recently set forth the statutory and precedential standards governing such cases, as follows:

> [W]e must be mindful that questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. In 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.
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> * * *
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> In CINA cases where a child ha[s] been removed from the family home, a juvenile court is required to periodically conduct a permanency planning hearing to determine the permanency plan for a child. Thereafter, the court must review the child's permanency plan at least every 6 months until commitment is rescinded. . . . 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 determine 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.
>
> 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.

The statute, however, must be interpreted and applied in light of the constitutional rights of parents. This is because we have recognized 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. . . . [W]hen the fundamental rights of parents are involved, we have not discarded the best interest of the child standard, but rather have harmonized it with that fundamental right.

We have created that harmony by recognizing a substantive presumption — a presumption of law and fact — that it is in the best interest of children to remain in the care and custody of their parents. The parental right is not absolute, however. The presumption that protects it may be rebutted upon a showing either that the parent is "unfit" or that "exceptional circumstances" exist which would make continued custody with the parent detrimental to the best interest of the child.

Thus, this court has often recognized that, absent compelling circumstances to the contrary, the plan should be to work towards reunification as it is presumed that it is in the best interest of the children to remain in the care and custody of their biological parent. Nevertheless, that course must be consistent with the best interests of the child. In other words, where the fundamental right of parents to raise their children stands in the starkest contrast to the State's effort to protect those children from unacceptable neglect or abuse, the best interest of the child remains the ultimate governing standard.

Additionally, where . . . there is a proven history of abuse or neglect, the proper issue before the hearing judge is whether there was sufficient evidence that further abuse or neglect is unlikely. The burden of proof rests upon the parent to show that the past neglect or abuse will not be repeated.

*Id.* at 19-22 (internal citations, quotation marks, and alterations omitted).

**I. Reasonable Efforts Toward Reunification**

At the conclusion of the June 2011 hearing, the juvenile court expressly found that "the Department has made . . . more than reasonable efforts at reunification," but there had not "been sufficient progress at the present time[,]" given that both parents "have been in the PACT program for more than one year and still are not consistently providing for or . . . attending to young Ashlee[.]" Mr. E. argues that the Department's efforts were not reasonable because available life skills services were not offered to him and "there were coherent recommendations made by Ms. McCusker for the parents to follow through on before she could assess whether the parents would be able to take on the responsibilities of parenting Ashlee."

In support of his contentions, Mr. E. lodges the following specific complaints. First, although the Department provided in-home services twice a month by family preservation worker Effie Brooks, "Ms. Brooks testified that she last worked with the parents on their parenting skills during March and April." Second, Mrs. E. "was having difficulty budgeting her money to last an entire month[, and] Ms. Brooks testified that part of her job consisted of working with a family on budgeting and finances, yet she had not worked with the parents on a budget because they did not live in Baltimore County." Third, Bridget McCusker, recommended "that the parent be provided with the opportunity to take a more active role in Ashlee's life[, but] Ms. Brooks never offered to assist Mr. E. with changing Ashlee's diaper or in making a meal for Ashlee," and the Department "never offered the parents unsupervised visitation with Ashlee despite Ms. McCusker's recommendation that it would be beneficial to the parents to have the unsupervised time with Ashlee and that it would be safe for Ashlee." In Mr. E.'s view, given "the considerable progress" that he and Mrs. E. made as a result of the services they did receive and the availability of additional services that they had not yet received, the Department failed to "provide adequate available services to the parents[.]"

In cases where the objective is to "finalize the permanency plan in effect for" a CINA, the Department's obligation to make reasonable efforts is satisfied when the Department offers services reasonably calculated to meet the specific needs of the family. *In re Adoption/Guardianship Nos. J9610436 and J97110311*, 368 Md. 666, 700-01 (2002) (hereafter cited as "*Case 36*"). We review a juvenile court's finding that the Department made reasonable efforts toward a permanency plan of reunification for clear error. *Shirley B.*, 419 Md. at 18.

Here, Mr. E. does not dispute what efforts were made by the Department, but instead argues that such efforts did not satisfy the reasonableness standard. The recent decision and rationale in *In re Shirley B.* is instructive because the Court of Appeals thoroughly reviewed the "reasonable reunification efforts' requirement as it applies to a parent with cognitive limitations.

The four children in *Shirley B.* were declared formally in need of assistance and removed from the care of their mother, Ms. E., because their "home [was] chaotic with domestic violence, lack of sexual boundaries and drug use by several people who are there most of the time[.]" *Id.* at 9. Ms. E.'s cognitive functioning was "in the mildly retarded range" and she "relie[d] 'heavily upon her feelings in arriving at conclusions and making decision about any given situation because she ha[d] difficulty in carefully thinking through possible solutions.'" *Id.* at 8. Her cognitive limitations had contributed not only to the children's chaotic home environment, but also to her failure to respond to family preservation efforts provided by the Prince George's County Department of Social Services before the children were removed. *Id.* at 5-6. "Perhaps due to her cognitive limitations, Ms. E. was largely unresponsive to the Department's assistance and she allowed vital benefits to lapse[,] . . . . permitted unauthorized adults to move into her home and exposed the Children to drug use and sexual activity." *Id.* at 5.

For nearly two years following the CINA declaration, the Department "crafted services for Ms. E. and Mr. T. [the children's father] aimed at reunification," including referring Mr. T. to substance abuse treatment for his crack addiction and to domestic violence counseling, and referring Ms. E. to "an intervention program for victims of domestic violence." *Id.* at 9. But neither parent followed through on those referrals. *Id.* at 9-10. Although the Department social worker "believed that Ms. E.'s primary barrier to reunification was her cognitive limitations," a juvenile master cited "the parents' lack of progress" as grounds for changing the permanency plans from reunification with Ms. E. to adoption. *Id.* at 10.

The juvenile court agreed that it was not in the children's best interests to return to their mother and that the Department had thus far "made reasonable efforts towards achieving reunification." *Id.* at 10-11. But the court also found it "significant that none of the evaluations . . . or the reports absolutely stated that the mother would not be able to parent." *Id.* Concluding that "Ms. E. 'needs specialized parenting classes that are only available through the [DDA] . . . in light of her diagnosis and the special needs of each child[,]'" the court declined to change the permanency plans in order to give "the mother . . . a chance" to obtain such specialized education. *Id.* at 11.

Six months later, at the next permanency planning hearing, the Department's case worker testified that Ms. E. had not been able to receive vocational training through DORS because there was no funding for those services. *Id.* at 12-13. Ms. E. had also been referred to "the Arc of Prince George's County, an organization that offers a support group for parents who have developmental disabilities[.]" *Id.* at 13. Nevertheless, during supervised visits, Ms. E. had a difficult time focusing on the activity that had been arranged for her to complete with her children, and she repeatedly hit one of the children and denied him food. *Id.* at 14. Although the Department social worker instructed her "on how to handle her children in a stressful situation, . . . Ms. E. still continued to strike" the child. *Id.*

"[B]ased on the lack of progress since the" prior hearing, the juvenile court changed the permanency plan from reunification to adoption. *Id.* at 15. "The court found that it was not in the Children's best interests to be reunited with Ms. E. because she had not received the necessary educational training and she did not reside in a home that would accommodate the Children." *Id.* Although the court "recognized that Ms. E. had cooperated with the Department, . . . it still did not believe that the Children could be safe in her care." *Id.* The juvenile court found that the Department made reasonable efforts to reunify the Children with Ms. E., which included, *inter alia*, assisting her to apply for educational services through DORS, attempting to secure alternate funding for such services, and assisting Ms. E. to obtain medical services and coverage. *Id.* at 16-17.

The Court of Appeals affirmed the order changing the permanency plan. *Id.* at 34-35. Reviewing "the problematic history of the 'reasonable efforts mandate,'" which has its genesis in federal legislation, the Court recognized that "[e]ven though 'reasonable efforts' must be determined on a case-by-case basis," there are established "guideposts" governing such determinations. *Id.* at 25. Pertinent to the appeal now before us are two principles: that, by itself, a parent's "mental or emotional disability" cannot justify the removal of a child from her parent's care, *Id.*, and that

in determining whether the Department has made reasonable efforts to reunify parent and child,

> **[t]he court is required to consider** the timeliness, nature, and extent of the services offered by [the Department] or other support agencies . . . and **whether additional services would be likely to bring about a sufficient and lasting parental adjustment that would allow the child to be returned to the parent**. Implicit in that requirement is that a reasonable level of those services, designed to address both the root causes and the effect of the problem, must be offered[.]

Yet, . . . there are limits to what the Department is required to do:

> **The State is not obliged** to find employment for the parent, to find and pay for permanent and suitable housing for the family, to bring the parent out of poverty, or **to cure or ameliorate any disability that prevents the parent from being able to care for the child. It must provide reasonable assistance in helping the parent to achieve those goals, but its duty to protect the health and safety of the children is not lessened and cannot be cast aside if the parent, despite that assistance, remains unable or unwilling to provide appropriate care**.

*Id.* at 26 (quoting *Rashawn*, 402 Md. at 500-01) (emphasis added)).

Applying these principles for a unanimous Court, Judge Adkins observed that in Ms. B.'s case, "perhaps more so than any of our previous CINA cases, the record demonstrates that economic considerations have shaped the boundaries of the Department's reasonable efforts." *Id.* The Court itemized the "extensive list" of specialized services that the Department offered, secured, or attempted to secure for Ms. B. *Id.* at 29-30. It contrasted these with the meager reunification efforts made in *Case 36*, 368 Md. at 682, 700, where the Department provided no specialized services to a father with cognitive limitations, despite the fact that such "'services [were readily] available' and the father had proven to be willing and eager to work toward reunification." *Shirley B.*, 419 Md. at 27-28, 29-30.

Ultimately, the *Shirley B.* Court

> agree[d] with the juvenile court that the Department's efforts were diligent and made in good faith. As the [Court of Special Appeals] observed, the Department. . . .
>
> > referred Ms. B. to parenting classes with the Family Tree. It arranged, and paid for, individual mental health therapy at Community Counseling and Mentoring, with therapist Debbie Austin, to address Ms. B.'s mental health needs and parenting skills. The Department then sought more specific services for Ms. B. due to her cognitive limitations, including referring Ms. B. to DORS, Melwood, and DDA, and helping Ms. B. complete an application for services. When Ms. B. was placed on a waiting list for DDA because adequate funding was not available, the Department attempted, albeit without success, to locate an alternative source of funds through the Community Connections Agency. It provided Ms. v. with information about ARC, which offered a support group for parents with developmental disabilities. Additionally, the Department paid for an individual neuropsychological evaluation for Ms. B. It cannot be said here . . . that the Department did not seek specialized services to assist Ms. B.
>
> We do not see how the Department could have acted any differently to attempt to address Ms. B.'s needs. . . . Thus, we agree . . . that the Department made reasonable efforts to reunify Ms. B. with her children, and we hold that the juvenile court's finding was not clearly erroneous.

*Id.* at 31-33 (quoting *In re Shirley B.*, 191 Md. App. 678, 715-16 (2010), *aff'd*, 419 Md. 1 (2011)).

Applying these lessons to Mr. B.'s appeal, we agree with the Department and counsel for Ashlee that

the juvenile court did not err in finding that the Department made reasonable efforts to reunify Ashlee with Mr. E., by providing services that directly addressed the parenting, life skills, and resource deficiencies that have prevented him from being able to care for Ashlee safely and independently. The specialized parenting education that the Department secured for Mr. and Mrs. E. compares favorably to the parenting programs cited by the *Shirley B.* Court as reasonable reunification efforts in that case. Whereas the Department's referrals in *Shirley B.* were enough to satisfy the reasonable efforts standard even though the mother never actually received any specialized parenting education, in this case, the Department's efforts actually resulted in the parents participating in programs that were specifically designed to address challenges faced by parents with cognitive limitations.

Immediately after Ashlee was placed in the care of Sherri and Andrew M. in September 2009, and until May 2011, the Department sent Effie Brooks, an experienced family preservation worker, to provide Mr. and Mrs. E. in-home parenting and life skills education twice a month. Ms. Brooks worked with both parents on their parenting skills, helping them interact with Ashlee, in an effort to address the CINA findings that they were unable to care for her safely due to their developmental delays and Mrs. E.'s mental health problems. The Department also referred Mr. and Mrs. E. to Kennedy Krieger Institute's "Parents and Children Together" program, which for more than a year provided hands-on training and education specially designed for parents with developmental disabilities. This was the only program available to cognitively impaired parents of children under the age of three. After making their way off the waiting list, Mr. and Mrs. E. started the program on April 29, 2010, and they were still receiving services fourteen months later, at the time of the June 2011 permanency planning hearing. The PACT program consisted of weekly group sessions lasting four hours, conducted at the PACT office, as well as twice-monthly in-home sessions. All of these sessions were conducted by the PACT program coordinator, Bridget McCusker, a specialist in teaching parenting skills to cognitively impaired persons.

Moreover, as in *Shirley B.*, the Department made reasonable efforts to assist Mr. E. in obtaining other services and resources that could help improve his ability to meet Ashlee's needs. As detailed in the Department's series of reports to the juvenile court, these services included assistance in obtaining vocational evaluation and training, medical insurance, dental services, and housing. The Department referred Mr. E. to DORS, which evaluated him, placed him in its highest priority tier for services, and then provided a job training program for landscaping work.[1] The Department also referred both parents to DDA, which evaluated them and advised that there are currently no DDA services for which either qualify. The Department referred Mr. E. for housing assistance. Although no assistance was available at that time, Mr. E. was put on a waiting list, albeit an unfortunately long one. There were no known programs that would allow Mr. and Mrs. E. to live together. Finally, the Department helped Mr. E. to apply for and obtain health insurance and dental services.

Based on this record, the juvenile court did not commit clear error in finding that Department satisfied its obligation to provide reasonable reunification efforts. The Department provided specialized parenting education to Mr. and Mrs. E., in order to address the impact of their cognitive limitations on their ability to provide a healthy and safe home for Ashlee. The two parenting skills programs offered to Mr. and Mrs. E. were specially designed for parents with developmental disabilities, each was offered regularly over an extended period of time, and the training was presented in both group and individualized in-home settings. Moreover, the Department provided the additional tailored services listed above in an effort to assist Mr. and Mrs. E. to ameliorate other factors that affect their ability to care independently for Ashlee safely at home, including Mr. E.'s lack of vocational skills and income, Mrs. E.'s mental health instability, and their lack of financial management, medical, and housing resources.

We are not persuaded that the Department's reunification efforts were unreasonable based on the specific service deficiencies cited by Mr. E. in his brief. Although Mr. E. complains that Ms. Brooks did not assist him "with changing Ashlee's diaper or in making a meal for Ashlee[,]" the record shows that he was provided such training and that he performed such tasks in the PACT program, so that the juvenile court could reasonably infer that his failure to undertake these tasks in the presence of Ms. Brooks or family members demonstrates persistent lack of ability or interest, rather than lack of assistance from the Department. With respect to Mr. E.'s complaint that Ms. Brooks failed to assist him to access public transportation, Ms. Brooks explained that she did not do so because Mr. E. lives in Anne Arundel County and she is not familiar with that bus system. In any event, Mr. E. admitted that he had learned to use public transportation without her assistance. And while the Department may not have provided Mrs. E. with a budget, that does not appear to have been a major influence on the court's decision and does not render the Department's efforts generally unreasonable.

Nor do we agree with Mr. E. that the juvenile court erred by refusing to extend the permanency plan so that the Department could implement Ms.

McCusker's recommendations that the parents have more "opportunity to take a more active role in Ashlee's life" and that it would be safe for them to have unsupervised visits with Ashlee. As we read Ms. McCusker's testimony, she did not recommend such unsupervised visits, but rather advised that the supervision be less intrusive into the parent-child interaction. Moreover, the court was entitled to conclude that the Department was not required to implement these recommendations, based on the evidence that Mr. E. had not taken advantage of the numerous opportunities he had been afforded to care for Ashlee during supervised visits that had been taking place regularly since September 2009.

The record shows that, after he moved out of the residence where Ashlee was living in February 2010, Mr. E. saw his daughter on the days of the PACT program sessions, but he failed to take advantage of additional visitation opportunities offered by Sherri and Andrew M. in their home and in the community. Although Ashlee also had overnight visits with Robbie and Renae M., who lived within three blocks of Mr. E., he rarely accompanied Mrs. E. when she came to visit Ashlee.

The Department reports prepared by Ms. Simms, as well as the testimony of Ms. Brooks, Sherri M., and Robert M., indicated that, after living in the same household with Ashlee for six months, receiving 19 months of tailored in-home parenting assistance from the Department's service worker, and completing more than a year of PACT training, Mr. E. still had not sufficiently demonstrated an interest or initiative outside the PACT center in performing basic tasks such as feeding Ashlee and changing her diaper, much less an ability to complete such tasks without supervision. Moreover, these observers reported that, even though Mr. E.'s interactions with Ashlee were somewhat improved as a result of these parenting services, Mr. E. remained confused by his daughter's needs, limited in his responses to her, and at risk of making sexualized comments about her, so that it was still necessary for someone to be present during visits to tell him what to do and to prevent inappropriate interaction. According to Ms. Simms, who was qualified to offer her expert opinion regarding a child's risk assessment and permanency planning, neither Mr. nor Mrs. E. would ever be able to care independently for Ashlee. On this record, the juvenile court did not err in concluding that the Department was not obligated to provide unsupervised visitation or additional opportunities for Mr. E. to increase his involvement in Ashlee's life.

**II. Award of Custody and Guardianship**

"Piggybacking" on his "reasonable efforts" argument, Mr. E. contends that the juvenile court "erred by changing Ashlee's permanency plan to custody and guardianship because both parents were making progress in their parenting classes, the director of the parenting class had further recommendations for the parents, and there was still time remaining before the CINA case had to be closed." In his view, the court "abused its discretion when it declined to maintain Ashlee's permanency plan as reunification with the parents to provide them with the opportunity to complete the recommendations of" Ms. McCusker.

Although the permanency planning statute requires the juvenile court to favor reunification over placement with a relative for custody and guardianship,[2] "what the statute appropriately looks to is whether the parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare. [The court's] primary consideration must be given to 'the safety and health of the child.'" *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 402 Md. 477, 499-500 (2007) (citation omitted). *See* Md. Code (1984, 2006 Repl. Vol. 2011 Supp.), § 5-525(e)(2) of the Family Law Article ("FL"). When a parent, despite reasonable reunification assistance from the Department, remains unable or unwilling to provide appropriate care, the juvenile court is obligated to protect the child's health and safety, *Shirley B.*, 419 Md. at 26; *Rashawn*, 402 Md. at 500-01, and that is what occurred in this case. As we have explained, the Department made reasonable efforts to reunify Ashlee with Mr. E., but Mr. E. failed to demonstrate that "additional services would be likely to bring about a sufficient and lasting parental adjustment that would allow the child to be returned to the parent." *Rashawn*, 402 Md. at 500. For the reasons set forth in Part I of this opinion, the juvenile court was not obligated to implement Ms. McCusker's recommendations before changing Ashlee's permanency plan and awarding custody and guardianship with a relative, and we conclude from the record evidence that the court did not abuse its discretion in doing so.

With the exception of Ms. McCusker's testimony, all of the evidence presented to the court at the June 2011 permanency planning hearing supported termination of the order of protective supervision and an award of custody and guardianship to Sherri and Andrew M. Since the January 2011 hearing, Mr. and Mrs. E.'s relationship had become troubled, Mrs. E.'s mental health again destabilized, Mr. and Mrs. E. had not taken advantage of proffered opportunities to visit with Ashlee, Mrs. E. had been unable to manage her money, and during visits outside the PACT center Mr. E. remained inattentive to Ashlee and uninvolved in her care. In Ms. Simms' expert opinion, given the parents' cognitive limitations, the modest progress in their parenting skills, Mrs. E.'s mental health instability, Mr. E.'s inability to perform basic child care, their lack of independent housing, and their inability to earn or

manage money, neither Mr. E. nor Mrs. E. would ever be able to care independently for Ashlee. Ms. Simms did not believe that six more months of reunification services would change her conclusion. And although Ms. McCusker testified that she would like to see how the parents handled an unsupervised visit with Ashlee, she conceded that there should be "other people in the environment" whose "presence is known" to Mr. and Ms. E. Moreover, Ms. McCusker did not have a recommendation as to whether Mr. and Mrs. E. would ever be able to regain custody of Ashlee.

In addition to considering this evidence, the court was entitled to factor into its decision the fact that Ashlee, at age 22 months, had been in the care and custody of Sherri and Andrew M. since she was two months old. *See* CJP § 3-823(e)(2). The court also properly considered that extending the permanency plan for another six months was not likely to result in Mr. and Mrs. E. becoming able to care for Ashlee safely in an independent living arrangement, and to do so would run afoul of the statutory requirement that "[e]very reasonable effort shall be made to effectuate a permanent placement for the child within 24 months after the date of initial placement." CJP § 3-823(h)(3). Moreover, the court was also aware that an award of custody and guardianship to Sherri and Andrew M. would not terminate Mr. and Mrs. E.'s parental rights, preclude visitation, affect their eligibility to continue in the PACT program through Ashlee's third birthday, or foreclose the possibility of modification of the terms of the custody and visitation order in the event that Mr. or Mrs. E. were to become capable of safely caring for Ashlee. *See In re Caya B.*, 153 Md. App. 63, 78 (2003) ("[T]he court may issue a decree of guardianship to the relative and may then close the case. Parental rights are not terminated in such a situation: the parents are free at any time to petition . . . for a change in custody, guardianship, or visitation."). In these circumstances, the juvenile court did not abuse its discretion in awarding custody and guardianship to Sherri and Andrew M.

**III. Lay Witness Testimony**

Mr. E.'s final assignment of error challenges the following testimony by Effie Brooks, the Department's family support worker, regarding Mr. and Mrs. E.'s need for supervision during their visits with Ashlee.

> [Counsel for the Department]: Have you ever observed Amber [E.] independently care for Ashlee without assistance?
>
> Ms. Brooks: Not without assistance, no.
>
> Q: Do you believe she's capable of it?
>
> A: I think she needs somebody around to tell her what need, what she need to do next.
>
> Q: What about Andrew [E.]?
>
> A: Yes, he would definitely need someone.
>
> [Counsel for Mr. E.]: I am going to object to these opinions, Your Honor. The witness is certainly not qualified to express opinions on this topic.
>
> The Court: Most respectfully overruled.

Mr. E. contends that the juvenile court erred in permitting Ms. Brooks, a lay witness, to give expert testimony. In his view, the challenged testimony "was an expert opinion as to the ability of the parents to care for Ashlee without assistance[,]" which is a matter "beyond the realm of common experience" so that Ms. Brooks lacked the "specialized knowledge, skill, experience, training or education" necessary to render such an opinion. The Department argues that Mr. E. failed to preserve his objection to this testimony, and we agree. Under Rule 4-323(a), an objection to the admission of evidence is waived unless it is "made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." And under Rule 5-103(a)(1), error may not be predicated upon a ruling that admits evidence unless a timely objection or motion to strike appears of record. As Professor McLain has described the contemporaneous objection rule,

> the admissibility of evidence admitted without objection cannot be reviewed on appeal. Failure to object amounts to waiver, and absent plain error, precludes appellate review of the issue. . . .
>
> If opposing counsel's question . . . calls for an inadmissible answer, counsel must object immediately. Counsel cannot wait to see whether the answer is favorable before deciding whether to object. For example, if the prosecutor in a criminal case asks the investigating police officer whether the officer thinks the defendant is guilty, defense counsel must object at this point. If counsel waits to hear the answer, hoping that the police officer may say "no," but the officer says "yes," and counsel then objects, the objection may be overruled properly, simply because it is untimely. . . .
>
> If, on the other hand, the question is unobjectionable, but the answer includes inadmissible testimony that

> was unforeseeable from the question, counsel should move to strike the answer. The motion should be made before the next question is posed.

5 L. McLain, *Maryland Evidence* § 103:3 (2d ed. 2001) (footnotes omitted). Here, Mr. E. did not object until after Ms. Brooks had answered two questions calling for her opinion about the parents' ability to care for Ashlee without assistance, and he did not move to strike the challenged testimony or otherwise request a limiting instruction. As the transcript shows, Mr. E.'s objection was "too little, too late."

Additionally, in light of Ms. Brooks's observations of Mr. and Mrs. E.'s interactions with Ashlee since September 2009, the trial court could have admitted her testimony as a lay opinion rationally based on her perceptions and helpful to the court as trier of fact. *See* Md. Rule 5-701 ("If the witness is not testifying as an expert, the witness's testimony in the form of an opinion or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."). And had there been any error in admitting this evidence, it accorded with testimony from Ms. Simms and Ms. McCusker and therefore caused no substantial prejudice to Mr. E.

**ORDERS AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

1. Mrs. E. was also referred to Baltimore County's DORS program, which evaluated her and offered a five day per week life skills training program. Mrs. E. moved to Anne Arundel County without participating in that program, however.

2. *See* Md. Code (1974, 2006 Repl. Vol., 2011 Supp.), § 3-823(c) of the Courts and Judicial Proceedings ("CJP") Article.

Cite as 4 MFLM Supp. 141 (2012)

**Divorce: custody and child support: voluntary impoverishment**

# Amanda L. Gregg
# v.
# Bryan D. Gregg

*No. 2128, September Term, 2010*

*Argued Before: Meredith, Matricciani, Hotten, JJ.*

*Opinion by Meredith, J.*

*Filed: February 28, 2012. Unreported.*

**The award of shared physical custody, with alternating weeks, was based on appropriate factors and not a desire to punish the mother for involving her paramour in the children's lives; nor did the court err in finding the mother had voluntarily impoverished herself by working part time while living for free with her paramour.**

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

Amanda Gregg (hereinafter "Mother" or "appellant") and Bryan Gregg (hereinafter "Father" or "appellee") were divorced on October 14, 2010, by the entry of an order of the Circuit Court for Anne Arundel County. Mother appeals the trial court's award of joint physical custody, the finding of voluntary impoverishment on her part, and the failure to make the award of child support retroactive to the date of the filing of her complaint.

## QUESTION PRESENTED

Mother presents for our review the following questions, which we quote:

I. Did the trial court err in awarding the appellant and the appellee joint physical custody on a "50-50" basis, providing visitation "50% of the time"?

II. Did the trial court err in finding the appellant voluntarily impoverished herself for the purposes of a child support calculation?

III. Did the trial court err in declining to award the appellant child support from the date the appellant filed her complaint for limited divorce, custody and other relief?

We perceive neither error nor an abuse of discretion in any of the trial court's findings or decisions, and shall affirm.

## FACTS AND PROCEDURAL HISTORY

Mother and Father were married on August 25, 2001, and resided in Pasadena, Maryland, in a home Father purchased just prior to the marriage. On December 15, 2001, their first child, a daughter, was born, followed, on February 23, 2004 by a son, and on August 1, 2007, by a daughter. Father testified that, following the son's birth, he believed Mother experienced some post-partum depression, and the two began to drift apart. After Father began to hear rumors that Mother was involved with another man, he confronted Mother about his suspicions at the end of 2008. Mother reacted defensively. Around the same time, Father found evidence of Mother's relationship with James Evans on Mother's Facebook page. Father began to sleep in another bedroom at the marital home. In late May 2009, while Father was attending a family event in Florida, Mother moved out of the marital home, taking the children and some of the furnishings with her. Mother and the parties' children moved in with James Evans the following weekend, where they have continued to reside.

There is no dispute by Mother that there were sufficient grounds for the court to have awarded Father an absolute divorce based on Mother's adultery. Nor is there any objection to joint legal custody. This appeal focuses on the physical custody determination.

At the time of trial, the children were residing with Mother and her paramour. Father — who lived in the former marital home a mile or a mile-and-a-half away — testified that he had overnight visitation with the children on Tuesdays and Thursdays from 5 p.m. until 8 a.m. the following morning, and from 8:30 or 9 a.m. Saturdays until 11 a.m. or noon on Sundays. At the trial herein, Father was seeking to have physical custody of the children half the time.

Trial occurred on May 26 and 27, 2010. The court held the matter sub curia, and issued its written opinion on October 1, 2010. Pertinent to this appeal, the court ordered:

> The parties shall share custody 50-50

> and provide visitation 50% of the time. The parties shall alternate visitation on weekends starting Friday night through Sunday evening as well as alternate weeks of visitation, one week with mother, one week with father. The parties shall evenly divide holidays and vacations from school, whether they decide to alternate them or divide the time is at the discretion of the parties[;] if unable to reach an agreement after good faith efforts to reach a resolution the parties may petition the court to set a schedule.

The court also found Mother to have voluntarily impoverished herself, and declined to make the award to Mother of child support date back to the filing of her complaint for limited divorce, which was June 16, 2009. Mother appeals both determinations.

## STANDARD OF REVIEW

As to the custody determination, our standard of review was described 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.

With respect to child-custody determinations, the best interest of the child is the paramount consideration. "The best interest of the child is . . . not considered as one of many factors, but as the objective to which virtually all other factors speak." *Taylor v. Taylor*, 306 Md. 290, 303 (1986). We apply a deferential standard of review to child custody rulings:

> The ultimate conclusion as to the custody of a child is within the sound discretion of the chancellor. That conclusion is neither bound by the strictures of the clearly erroneous rule, that rule applying only to factual findings of the chancellor in reaching the conclusion, nor is it a matter of the best judgment of the reviewing court. It is not enough that the appellate court find that the chancellor was merely mistaken in order to set aside the custody award. Rather, the appellate court must determine that the judicial discretion the chancellor exercised was clearly abused.

*Ross v. Hoffman*, 280 Md. 172, 186 (1977).

Our review of questions 2 and 3 is governed by Maryland Rule 8-131(c):

> 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.

## DISCUSSION

### 1. The custody order

Mother acknowledges that the court "considered the custody and visitation factors . . . in *Montgomery County Dep't. of Social Services v. Sanders*, 38 Md. App. 406 (1978), as well as the criteria for joint legal and physical custody set forth in *Taylor v. Taylor*, 306 Md. 290 (1986)," but asserts that, nonetheless, "the structure of the joint physical custody and visitation was based on erroneous conclusions of fact and constituted an abuse of discretion."

Aside from the parties themselves, there were twelve witnesses at trial. Every witness testified that Mother and Father are good parents, and each is a fit and proper person to have custody, and the court specifically found that to be the case. Mother contends, nevertheless, that the court, in making its custody order, sought to "punish" her "based on the erroneous finding [that Mother] was eliminating [Father] as the Children's father in favor of Mr. Evans," Mother's paramour. Examination of the record reveals that the court made no such finding. But the court observed:

> There was no testimony to indicate that [Mother] has attempted to shield the children from her involvement with Mr. Evans. In fact, she has openly and expressly involved Mr. Evans as a sur-

> rogate father, essentially. She testified and Mr. Evans testified that they operate as a "family unit." This includes Mr. Evans taking care of one or two of the children when [Mother] goes somewhere or has to do something with one of the other children. There was testimony that on a number of these occasions, they do not invite [Father] to be either the caretaker or participate in these family outings. Whether omitting [Father] indicates an intention to eliminate [Father] as a father figure or reduce [Father's] involvement in the lives of his children or he is omitted without that intention for the convenience of [Mother], it has the same effect. [Father] is not being as deeply involved as the father of the children and Mr. Evans is being involved as a substitute father for the children. This reflects poorly on [Mother's] character.

There was testimony to support the trial court's impression that Father was being excluded from field trips and opportunities to be with his children in favor of Mother's new boyfriend. However, this observation was clearly not the basis for the court's custody award.

The evidence adduced at trial reflected that both parents are active, involved, and interested in their children's well-being. Mother has always participated in the children's routines and activities, and Father, who works full-time, has been more involved since the parties' separation. Mother and Father agree that both of them are good parents and fit custodians. They live a mile to a mile-and-a-half away from each other. The children's schooling would not be disrupted by the court's change in the custody schedule. Mother and Father can, and do, commendably, communicate productively with regard to the best interests of their children. Mother testified that the children were doing well in school, and enjoy spending time with Father. She did not think the children were being hurt by the schedule in place at the time of the merits trial; Mother merely wanted the children to live with her and Mr. Evans, and for Father to accept a reduced visitation schedule of one night a week and every other weekend. She testified that she agreed "one hundred percent" that it is important for the children to spend time with Father.

Mother testified that she could not say "with one hundred percent affirmity [*sic*] that the long term effects of them being flipped-flopped back and forth every other day would not have an affect [*sic*]." The court's custody order, which provides for the children to spend a week at a time with each parent, eliminates that concern. Mother has failed to persuade us that the court abused its discretion in fashioning the custody order.

**2. Mother's voluntary impoverishment**

Mother was not ordered to pay child support. Mother's complaint is that the voluntary impoverishment finding led the trial court to impute an income to her of $32,500, which had the effect of reducing the amount of child support Father was ordered to pay. Mother contends that the court's finding that she was voluntarily impoverished was in error. We will not disturb the trial court's factual findings in this regard unless they are clearly erroneous, and will not disturb rulings based on those findings absent an abuse of discretion. *Stull v. Stull*, 144 Md. App. 237, 246 (2002). Mother, in her brief, does not point to a particular factual finding that she contends the trial court erred in making; rather, Mother argues that the finding of voluntary impoverishment itself was in error. As noted above, such a finding is reviewed for an abuse of discretion.

The trial court's finding of voluntary impoverishment was set forth in its memorandum opinion as follows:

> In terms of earning capacity, there was very little information introduced into evidence for Amanda Gregg. The testimony shows that she is earning $7.82 per hour and that she is working between 10-20 hours per week at the Gymboree [r]etail store as a sales associate. She started working there in September 2009. She is only earning approximately $150-$200 every two weeks. Formerly, she was working as a dispatcher for the Anne Arundel County Police and the Anne Arundel County Fire Department earning between $40,000 to $45,000 per year. She left this work to try and start a daycare business from her home. The tax returns that were submitted into evidence show that she only earned approximately $20,000 gross from this endeavor. For awhile she worked as a dispatcher for an ambulance company earning approximately $15.00 per hour. She has applied for over 30 jobs with the federal government for positions for which she believes she is qualified and those positions pay between $30,000-$35,000 per year. In addition, Amanda Gregg receives $606 per month in food stamps and receives

> medical assistance. Amanda Gregg has benefitted from the generosity of Mr. Evans. Mr. Evans, according to the testimony, pays for all household expenses and some food expenses. He provides a place for Mrs. Gregg and the children to live, all household associated costs and the car for Amanda Gregg to drive. This permits Amanda Gregg to have flexibility to spend more time with the children and to basically be an "at home" mom.
>
> * * *
>
> The Court finds that Amanda Gregg has voluntarily impoverished herself by electing to work part time when she has the capability to work full time. There are no physical or mental disabilities that she has to stop her from working full time. As a result, the Court will consider her income level to be at $32,500 a year.

As noted, Mother does not assert that any of these factual findings are without support in the evidence. Mother also does not assert that the income figure imputed to her is incorrect. These are sufficient factual findings for the court to have made a finding of voluntary impoverishment under the circumstances of this case, and we find no abuse of discretion in that determination.

In *Goldberger v. Goldberger*, 96 Md. App. 313 (1993), this Court dealt with a divorce and child-custody case involving a husband who had chosen to be a full-time student, had never been employed, and who never intended to become employed, lest it interfere with his studies. He was nevertheless the father of six children who were entitled to support. In discussing a court's considerations in determining whether someone is voluntarily impoverished, this Court observed:

> A parent who chooses a life of poverty before having children and makes a deliberate choice not to alter that status after having children is also "voluntarily impoverished." Whether the voluntary impoverishment is for the purpose of avoiding child support or because the parent simply has chosen a frugal lifestyle for another reason, doesn't affect that parent's obligation to the child. Although the parent can choose to live in poverty, that parent cannot obligate the child to go without the necessities of life. A parent who brings a child into this world must support that child, if he has or reasonably could obtain, the means to do so. *Carroll County v. Edelmann*, 320 Md. 150 (1990). The law requires that parent to alter his or her previously chosen lifestyle if necessary to enable the parent to meet his or her support obligation.
>
> Accordingly, we now hold that, for purposes of the child support guidelines, a parent shall be considered "voluntarily impoverished" whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources. To determine whether a parent has freely been made poor or deprived of resources the trial court should look to the factors enunciated in *John O. v. Jane O.*, 90 Md. App. 406, 422 (1992):
>
> 1. his or her current physical condition;
> 2. his or her respective level of education;
> 3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;
> 4. the relationship of the parties prior to the divorce proceedings;
> 5. his or her efforts to find and retain employment;
> 6. his or her efforts to secure retraining if that is needed;
> 7. whether he or she has ever withheld support;
> 8. his or her past work history;
> 9. the area in which the parties live and the status of the job market there;
> 10. any other considerations presented by either party.

*Goldberger, id.* at 326-27.

Mother argues that she applied for numerous jobs, but was only offered part-time employment at her current retail job, where she makes $7.82 an hour and works 10-20 hours per week. But the court had before it other evidence to support its voluntary impoverishment finding.

Mother was 27 years old and in good health at the time of the merits hearing. She is a high school graduate. At the time of the merits hearing, she testi-

fied that she was registered for, but had not yet started, a nursing program at Anne Arundel Community College that will take her three and one-half years to complete. It was Mother's expressed intention to continue to work part-time at Gymboree.

The court also had before it evidence that, from 2002-2007, Mother was employed as a dispatcher with both the Anne Arundel County Police Department and the county Fire Department, making between $35,000 and $45,000 a year, plus benefits. Mother testified that she quit that job because she did not like it. Mother also briefly had a home daycare business she operated out of the marital home, but she closed it after she determined she was leaving the marriage. Even that endeavor paid more than her current part-time retail job.

Mother also emphasizes the fact that she applied for "43 full time entry level government jobs." But she also testified at the merits hearing: "I haven't applied for one of those jobs in a while since, you know, I'm getting on the career path for school."

Finally, the court had before it testimony from both Mother and her paramour regarding the fact that Mr. Evans pays all the household expenses. Mr. Evans provides Mother with a vehicle to drive. He has paid debts on her behalf. Mother testified that she could never afford to live on her current salary without the benefit of Mr. Evans' largesse. Mother also testified that she considers herself "very fortunate that I'm able to stay working part time and I'm able to take care of my children."

There is no reason that has been articulated to this Court to indicate why Mother cannot work a full-time job; in fact, Mother agreed that if Mr. Evans was out of the picture, she would have to get a full-time job. Mother "has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." *Goldberger, supra*, 96 Md. App. at 327. We are not persuaded that the trial court's finding of voluntary impoverishment was an abuse of discretion.

**3. The court did not abuse its discretion in declining to backdate the award of child support**

As Mother recognizes, pursuant to Md. Code (1999, 2006 Repl. Vol.), Family Law Article ("FL"), § 12-101(a)(3), the court was permitted, but not required, to award her child support retroactive to June 16, 2009, the date of Mother's first pleading requesting that relief. This was a matter solely within the court's discretion. While Mother complains generally that the court should have done so in light of the fact that Father had not paid her child support following the separation, her argument ignores the evidence in the record that supported the decision the court did make in this case.

That evidence included the fact that Father had continued to pay all of the bills relative to the marital home after Mother moved to James Evans' house with the parties' children. Father was also left to deal with the parties' joint marital debt, which included over $25,000 in credit card debt alone. He had to take loans from family members to attempt to deal with the joint debt, and eventually had to file for bankruptcy protection. Father also has always contributed toward the children's expenses, such as sports, clothing, and registration fees. Mother, meanwhile, had moved on to a new relationship in which her bills were paid and she was at liberty to work on a part-time basis. Under the circumstances, it was not an abuse of discretion for the court not to make the award of child support retroactive to June 16, 2009.

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

NO TEXT

Cite as 4 MFLM Supp. 147 (2012)

**Custody: modification: multiple relocations as change in circumstances**

# Natalie Beverungen
# v.
# Matthew Beverungen

*No. 840, September Term, 2011*

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

*Opinion by Graeff, J.*

*Filed: March 1, 2012. Unreported.*

**The circuit court did not abuse its discretion in modifying custody to give a father tie-breaking authority on school enrollment for his 7-year-old son, given relocations by the boy's mother that resulted in him attending five different schools and daycare settings in four years.**

*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 involves a custody dispute between two parents, Natalie Beverungen, appellant, and Matthew Beverungen, appellee, regarding their son, Matthew. On June 2, 2011, the Circuit Court for Howard County entered an Amended Order for Modification of Custody, ordering shared physical custody of Matthew and joint legal custody "on all issues except for [Matthew's] school enrollment," for which Mr. Beverungen would "have the right to make decisions . . . if the parties are unable to [r]each an agreement after bona fide efforts to do so." Ms. Beverungen filed a Motion for Reconsideration of the custody order, which the circuit court denied on July 5, 2011.

On appeal, Ms. Beverungen presents the following questions for our review, which we have re-phrased and re-ordered as follows:

1. Did the circuit court err in striking Ms. Beverungen's exceptions to the Master's recommendations?
2. Did the circuit court abuse its discretion and/or err in not stating the reasons for its decision?
3. Did the circuit court abuse its discretion and/or err in finding that Ms. Beverungen's relocations were "material" changes in circumstances requiring a change in custody to accommodate Matthew's future best interests?

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

## FACTUAL AND PROCEDURAL BACKGROUND

On March 22, 2007, the circuit court entered a Judgment of Absolute Divorce, granting Mr. and Ms. Beverungen joint legal custody of their son, Matthew, born November 15, 2003. The court awarded the parties shared physical custody, with Ms. Beverungen given "primary physical and residential custody," and Mr. Beverungen awarded liberal visitation rights. This arrangement constituted shared physical custody of Matthew. Mr. Beverungen was ordered to pay Ms. Beverungen $566 per month in child support, $1,250 per month in rehabilitative alimony, $50,000 in attorney's fees, and $120,000 as a monetary award. The court also ordered Mr. Beverungen to pay 75.1% of work-related daycare costs.

On February 27, 2008, Mr. Beverungen filed a petition to modify custody, alleging that Ms. Beverungen "has not shown any significant progress at creating long-term stability for [Matthew's] home environment, residing in a rented apartment and refusing to inform [Mr. Beverungen] of where she is working or what kind of work she is engaged in." He voluntarily dismissed his petition on April 18, 2008.

On August 5, 2008, he filed a motion to modify, alleging that Ms. Beverungen had "failed to maintain steady employment and failed to maintain a steady residence," to Matthew's detriment. Mr. Beverungen also filed a Motion for Ex Parte Emergency Order that same day, after Ms. Beverungen informed him that she was moving to Annapolis and removing Matthew from the Howard County School District. He alleged that the relocation was not in the best interests of the minor child and seriously interfered with his access and custodial rights. The court denied the Motion for Ex Parte Emergency Order on August 6, 2008.

On August 18, 2008, Mr. Beverungen filed another motion to modify custody. The circuit court dismissed his outstanding motions on February 18, 2009.

On September 9, 2010, Mr. Beverungen filed

another motion to modify the custody order. He alleged that Ms. Beverungen was "very unstable, living in numerous residences in both Howard County and Anne Arundel County." Specifically, he alleged that, since entry of the Judgment, Ms. Beverungen had moved Matthew multiple times:

> a. [In] August of 2008, the Defendant moved suddenly from 5011 Walking Stick Road, Apt. N, Ellicott City, MD 21043, to 111 Stone Point Drive, Apt. 350, Annapolis, MD 21401. She switched the child's school from the Young School in Columbia, MD, to Calvary Center School in Annapolis.
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> b. In June of 2009, [she] moved the child from Calvary Center School in Annapolis to Annapolis Child Development Center.
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> c. In August of 2009, [she] abruptly moved to 8145-Q Cyprus Cedar Lane, Ellicott City, MD 21043. She enrolled the child in Worthington Elementary School.
>
> d. In April of 2010, she again abruptly moved to 5010 Walking Stick Road, Apt. N., Ellicott City, MD 21043.
>
> e. In August of 2010, [she] enrolled the child in Rolling Knolls Elementary School in Annapolis. School files show her address to be 130 Lubrano Drive, Apt. 312, Annapolis, MD 21401.

In the motion, Mr. Beverungen alleged that he was in a stable environment, living at "10339 Waverly Woods Drive, Ellicott City, MD 21042, the parties' marital home, since 1996." He requested that the court adjust Matthew's access schedule to 51% for him and 49% for Ms. Beverungen, permitting Mr. Beverungen to enroll Matthew in his neighborhood school. He also requested that the court modify the joint legal custody order, granting him "tie breaking authority" when the parties could not agree.

A hearing was held before a master on April 5, 2011. During the hearing, Ms. Beverungen testified that she was living at the family home until the end of July 2007, when she moved to 5011 Walking Stick Road in Ellicott City. Matthew continued to attend the Young School in Kings Contrivance. Ms. Beverungen worked as a travel agent, then switched companies. In August 2008, she moved with Matthew to 111 Stone Point in Annapolis and started a new job. Matthew attended a new school, the Calvary Day Care program in Annapolis. She lost her job in December 2008, and she started her own travel business in Annapolis, which failed. She was unemployed and declared bankruptcy in 2009. In the summer of 2009, she moved to Cyprus Cedar Lane in Ellicott City, a 55-plus community. She placed Matthew in a new school, Worthington Elementary School in Ellicott City. In January 2010, she started working for a medical software company. In April 2010, she moved to live with her brother on Walking Stick Road. In September 2010, she moved to Lubrano Drive, in Annapolis, and she enrolled Matthew at Rolling Knolls Elementary School in Annapolis. She then took a job selling cruises.

At the conclusion of the hearing, the master found that Matthew had not had stability with his mother. The master recommended that the parties be granted shared physical custody, with a visitation schedule giving each party equal time with Matthew, and that the parties continue to have joint legal custody "on all issues except for school enrollment," for which Mr. Beverungen would have the right "to make decisions on school enrollment issues if the parties are unable to reach an agreement after bonafide efforts." With respect to child support, it appears that the parties had not calculated specific figures for the court, and the court requested additional written argument on the issue of child support.

The master handed out written copies of the Master's Report and Recommendations ("Report") at the end of the hearing. In the written Report, she explained that she

> has some concerns about the amount of priority Matthew's needs have been given in the decisions regarding moves. The move from the marital home was due to the end of the use and possession, not due to Mother's judgment. The first move to Annapolis was to be closer to a good job, and coincided with a change in Matthew's daycare that came about due to the parties' inability to agree on whether he would continue at the Young school. This was also a reasonable decision, although it took Matthew a greater distance from his father. The moves after the initial move to Annapolis are somewhat more troubling. In the summer of 2009 Mother moved back to Ellicott City, to a 55 Plus community. This is no place for a child. It is hard to conceive how Matthew's needs were considered in moving to a community that does not welcome children. No play grounds or

playmates would be available for Matthew in this community. Also, because it was a 55 Plus community, the family had to move from there during the school year. Finally, the move to Annapolis in September 2010 was not necessary, and did not take into account the loss to Matthew of not having proximity to his father or continuity with his school mates. Mother explains that she was working from home, and that she couldn't afford Ellicott City. However, there are other areas closer than Annapolis that may have afforded Matthew greater proximity to his father, and the ability to participate in school, sports and activities that are close enough to both parents to have full participation. This was not taken into account. Failing to consider Matthew's interest in having both parents participate in his activities evidences a failure to put Matthew's interest first.

As indicated, the master recommended that the parties have shared physical, and joint legal, custody of Matthew, with Mr. Beverungen having the right to make school-related decisions if the parties could not come to an agreement.

At the end of the Report was the following notice provision:

**TAKE NOTICE:** An exception to this recommendation must be filed pursuant to Maryland Rule 9-208(f) in writing with the Clerk of the Court within 10 days of the receipt of this report. This is your only notice of proposed recommendations. The party taking exceptions is required to cause a transcript to be prepared in accordance with Maryland Rule 9-208(g).

Neither party filed exceptions within ten days. On April 20, 2011, the master issued a Supplemental Report and Recommendations ("Supplemental Report"), addressing child support. The master recommended that Mr. Beverungen pay child support in the amount of $910. The Supplemental Report also provided notice that any exceptions must be filed within ten days of receipt. On April 25, 2011, Mr. Beverungen filed exceptions to the Supplemental Report.

On April 21, 2011, the circuit court issued an Order for Modification of Custody and Child Support. The court's order adopted the master's recommendations regarding custody and child support.

On May 3, 2011, Mr. Beverungen filed a Motion to Alter or Amend the April 21, 2011, order, arguing that it was entered before the expiration of the deadline for filing exceptions to the Supplemental Report. On May 5, 2011, Ms. Beverungen filed her response to Mr. Beverungen's exceptions and, although it was 30 days after the original Report was filed, she filed her own cross-exceptions to the master's original recommendations regarding custody. In her cross-exceptions, Ms. Beverungen asserted that the master erred in granting the Motion for Modification of Custody because there had been no "sufficiently adverse impact on the welfare of the parties' minor child." She noted that the master found that Matthew was doing very well, and he was an "exceptional student," who is smart, well-behaved, and had friends. She argued that the factual findings did not warrant a modification in custody.

On May 10, 2011, Mr. Beverungen filed a Motion to Strike the Cross-Exceptions, arguing that the "deadline for filing exceptions to the [Custody] report expired on April 18, 2011, and neither party filed exceptions to the report." The court granted the Motion to Strike the Cross-Exceptions on May 26, 2011.

On the same day, May 26, 2011, the court issued an Amended Order for Modification of Custody, which vacated the April 21 order for modification of custody and modified the March 2007 order by adopting the master's recommendations for physical and legal custody as outlined in the Report. Ms. Beverungen filed a Motion for Reconsideration, which the circuit court denied on July 5, 2011. She filed a timely notice of appeal.

## DISCUSSION

### I.

Ms. Beverungen contends that the circuit court erred in striking her exceptions as being untimely filed. She asserts that the master gave partial recommendations on April 5, 2011, and completed her recommendations on April 20, 2011, and therefore, Ms. Beverungen's May 5, 2005, cross-exceptions were timely filed.

Mr. Beverungen contends that the circuit court properly granted his Motion to Strike. He asserts that, pursuant to Maryland Rule 9-208(e)(1), the master's recommendations regarding modification of custody were due within ten days of the April 5 hearing, but neither party filed timely exceptions. He asserts that, after the master issued the Supplemental Report addressing modification of child support, the parties had ten days to file exceptions to the new matters contained in the report, *i.e.*, child support. He contends that Ms. Beverungen's exceptions, which were "not to the new matters contained in the Supplemental Report but to the Report filed by the Master 30 days before. . . . were

clearly untimely and properly stricken by the court."

Maryland Rule 9-208 addresses findings and recommendations by a master and the procedure for filing exceptions. It provides, in pertinent part, as follows:

> (e) **Findings and recommendations.** (1) Generally. Except as otherwise provided in section (d) of this Rule, the master shall prepare written recommendations, which shall include a brief statement of the master's findings and shall be accompanied by a proposed order. The master shall notify each party of the recommendations, either on the record at the conclusion of the hearing or by written notice served pursuant to Rule 1-32 1. . . . Promptly after notifying the parties, the master shall file the recommendations and proposed order with the court.
>
> (2) Supplementary report. The master may issue a supplementary report and recommendations on the master's own initiative before the court enters an order or judgment. A party may file exceptions to new matters contained in the supplementary report and recommendations in accordance with section (f) of this Rule.
>
> (f) **Exceptions**. Within ten days after recommendations are placed on the record or served pursuant to section (e) of this Rule, a party may file exceptions with the clerk. Within that period or within ten days after service of the first exceptions, whichever is later, any other party may file exceptions. Exceptions shall be in writing and shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

"[T]he time to file exceptions runs from the date of notice to the parties as to the master's recommendations...." *Green v. Green*, 188 Md. App. 661, 672 (2009).

Here, Ms. Beverungen did not file timely exceptions to the Report regarding custody. The master issued her Report and placed her recommendations on the record on April 5, 2011, at the end of the hearing. Under Rule 9-208(f), Ms. Beverungen had ten days — until April 15, 2011 — to file exceptions to the master's Report. Ms. Beverungen did not file her exceptions until May 5, 2011.

To be sure, the master issued a Supplemental Report addressing child support on April 20, 2011.[1] Ms. Beverungen's cross-exceptions, following her response to Mr. Beverungen's exceptions on the issue of child support, raised issues only as to the master's findings regarding custody of Matthew, not child support. Accordingly, the circuit court did not err in granting Mr. Beverungen's Motion to Strike the cross-exceptions as untimely.

**II.**

Ms. Beverungen next contends that the circuit court abused its discretion in not stating the reasons for its decision "as mandated by Rule 2-522(a)." She contends that she was "deprived of due process because the modification order does not provide her with proper notice and an opportunity to be heard as to the points of error she must argue on appeal."

Mr. Beverungen responds that Rule 2-522(a) applies only to cases involving a contested court trial. He asserts that, "[i]n this action, no contested court trial occurred" before the circuit court. Therefore, Rule 2-522(a) is inapplicable.

Maryland Rule 2-522(a) provides:

> In a contested court trial, the judge, before or at the time judgment is entered, shall prepare and file or dictate into the record a brief statement of the reasons for the decision and the basis of determining any damages.

In *Lemley v. Lemley*, 102 Md. App. 266, 278 (1994), the Court of Appeals stated that this rule applies to cases where a litigant files exceptions to the report and recommendations of a master. In that situation, pursuant to Rule 2-522(a), the court must "state for the record how each challenge was resolved." *Id. Accord Kirchner v. Caughey*, 326 Md. 567, 571-72 (1992) (applying Rule 2-522(a) to court's resolution of challenges to master's recommendations); *Domingues v. Johnson*, 323 Md. 486, 496 (1991) ("The chancellor must carefully consider the mother's allegations that certain findings of fact are clearly erroneous, and decide each question. The chancellor should, in an oral or written opinion, state how he resolved those challenges.").

Here, however, as indicated, Ms. Beverungen did not file timely exceptions to the master's recommendations regarding custody. In this situation, where "exceptions are not timely filed, the court may direct the entry of the order or judgment as recommended by the master." Maryland Rule 9-208(h)(1)(B). *Accord Green*, 188 Md. App. at 674.

With respect to her due process claim, Ms. Beverungen cites no legal authority supporting her argument. Under these circumstances, we decline to address the issue. *See Anderson v. Litzenberg*, 115

Md. App. 549, 577-78 (1997) (refusing to address argument because appellants failed to cite any legal authority to support their contention of error).

**III.**

Ms. Beverungen's final contention is that the circuit court abused its discretion and/or erred in ordering a change in custody. She asserts that only the last two relocations were at issue, and they did not constitute a "material change" in circumstances requiring a change in custody to accommodate Matthew's best interest because: "A) Mother had permission of the court to relocate, B) Father is relitigating the same issues previously ruled against him, and C) there is no nexus between the alleged form of the instability and the terms of the amended order rendered by the Chancellor."

Mr. Beverungen argues that the circuit court's adoption of the master's recommendation, "that the parties share custody with approximately equal overnights and that Father have tie-breaking authority over school enrollment," did not constitute an abuse of discretion. With respect to Ms. Beverungen's claim that she had permission of the court to relocate, Mr. Beverungen asserts that "[t]he fact that the [initial] Judgment provides that a move outside the state will constitute a change in circumstances does not mean that a move, or moves, within the state cannot constitute a change in circumstances. Nothing in the Judgment gives Mother 'permission' to relocate." Mr. Beverungen acknowledges that he previously sought a modification of custody based on prior moves by Ms. Beverungen, but he argues that did not "prevent him from seeking a modification based on subsequent moves." He asserts that Ms. Beverungen "continued moving and the court eventually found that [she] is unstable." Finally, with respect to the argument that the ruling did not cure the instability, Mr. Beverungen argues that it was Ms. Beverungen's "frequent moves that resulted in the child attending five different schools and daycares over four years. The cure is to have the child go to school from the Father's stable residence, so that the child continues in the same school and same school system year after year."

On the merits, he asserts that, because Ms. Beverungen did not file timely exceptions, the findings of the Master "cannot be reviewed" on appeal. *Green*, 188 Md. App. at 674. He argues that the master's recommendations "adopted by the court in the Amended Order, are reasonably calculated to address the child's instability."

As this Court explained in *Green*, if there were no exceptions timely filed to a master's factual findings, then the master's factual findings adopted by the circuit court may not be reviewed. *Green*, 188 Md. App. at 674. Nevertheless, a litigant may challenge "the master's legal analysis and recommendations and the propriety of the circuit court's actions in adopting that recommendation." *Id.* We review these adopted recommendations for an abuse of discretion. *Domingues*, 323 Md. at 492 n.2 ("A chancellor's decision founded upon sound legal principles and based upon factual findings that are not clearly erroneous will not be disturbed in the absence of a showing of a clear abuse of discretion."). "An abuse of discretion occurs 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Brass Metal Prods. v. E-J Enters.*, 189 Md. App. 310, 364 (2009) (quoting *King v. State*, 407 Md. 682, 697 (2009)).

Here, the circuit court did not abuse its discretion. As indicated, the master made findings, to which no timely exception was presented, that there were concerns regarding Matthew's stability since the divorce. The master found that Matthew's multiple residential moves and school changes were "clearly not in [his] best interest" and subjected him "to the risk of further instability."[2]

The master made the following findings and recommendations:

> During Matthew's 7 years he has had more residential moves and changes in school or daycare than many children have throughout their childhood. It is clearly not in Matthew's best interest to be subjected to the risk of further instability. The least dramatic way to accomplish this outcome is to make the smallest possible change which will afford Matthew the greatest amount of stability: Granting Father's requested change in the access schedule, and giving Father tie breaking authority over educational enrollment only.

The circuit court's adoption of the master's recommendation did not constitute an abuse of discretion. *See Domingues*, 323 Md. at 498 (the question of stability is an important factor to be considered in determining the "best interest" of the child). It was a reasonable remedy to the instability arising out of Ms. Beverungen's multiple relocations and school changes for Matthew and comports with Matthew's best interests. Accordingly, the circuit court did not abuse its discretion in modifying Matthew's custody.

**JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. APPELLANT TO PAYCOSTS.**

**FOOTNOTES**

1. The initial Report and Recommendations left open the issue of child support, providing that "[i]n the event that the parties are unable to come to an agreement on the appropriate child support under the Maryland Guidelines, a hearing can be set upon request of either counsel without initiating a new case." The master requested additional briefing on what "child support should be with child support guidelines attached."

2. This finding was not inconsistent with the statement in the initial divorce order that a move from the State shall constitute a change of circumstances for the purpose of a request for modification of custodial access. This order did not address, implicitly or explicitly, the effect of relocating the child within the State on multiple occasions.

Cite as 4 MFLM Supp. 153 (2012)

**Divorce: rehabilitative alimony: comparative monthly deficits**

# James Titchenell v. Beverly Titchenell

*No. 1870, September Term, 2010*

*Argued Before: Woodward, Zarnoch, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.*

*Opinion by Woodward, J.*

*Filed: March 6, 2012. Unreported.*

**The trial court did not abuse its discretion in ordering rehabilitative alimony in an amount that, combined with child support and mortgage obligations, left appellant without sufficient means to support himself, since his monthly deficit after making those payments will be significantly less than the one that appellee and the parties' minor child will experience after receiving them.**

Following a hearing on a complaint for absolute divorce filed by appellee, Beverly Titchenell, against appellant, James Titchenell, the Circuit Court for Allegany County on September 24, 2010, entered a judgment of absolute divorce and ordered, among other things, that appellant pay rehabilitative alimony to appellee in the amount of $1,100.00 per month for four years. Appellant presents one question for our review, which we have rephrased: Did the trial court abuse its discretion in awarding rehabilitative alimony of $1,100.00 per month to appellee?[1]

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

## BACKGROUND

The parties were married on October 7, 1984. The parties have two children, Travis, who is emancipated, and Trevor, who was born on April 10, 1994. Appellant is employed by the Western Maryland Region Medical Center in a security position. Appellee, formerly a school bus driver for the Allegany County Board of Education, is now unemployed following an injury that she sustained while driving a bus. The bus accident left her with an elbow injury that prohibits her from lifting anything heavier than ten pounds. Appellee held a variety of employment positions both during and before her employment as a school bus driver, including certified nursing assistant, cashier, McDonald's floor supervisor, and home cleaner for the elderly. On February 12, 2010, appellant left the parties' marital home and began residing with his girlfriend.

*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 2, 2010, appellee filed a complaint for absolute divorce and a motion for hearing on custody, alimony, use and possession, and child support in the Circuit Court for Allegany County.[2] On March 23, 2010, the circuit court granted appellee's motion and ordered a hearing on *pendente lite* issues to be held before the family law master.

On May 21, 2010, a hearing was held on the *pendente lite* issues of child custody, alimony, use and possession, and child support. On June 1, 2010, the family law master rendered his findings and recommendations to the circuit court:

1. Order that [appellant] shall pay child support to [appellee] in the amount of $329.85 per month for the months of March, April, May and June, 2010, totaling $1319.40.
2. Enter a judgment in the amount of $1,319.40 against [appellant] in favor of [appellee] for unpaid child support.
3. Order that [appellant] shall pay pendente lite alimony to [appellee] in the amount of $613.31 per month for the months of March, April, May and June, 2010, totaling $2,453.24.
4. Enter a judgment in the amount of $2,453.24 against [appellant] in favor of [appellee] for unpaid alimony.
5. Order that, beginning on July, 1, 2010, and on the first day of each month thereafter, [appellant] shall pay child support to [appellee] in the amount of $276.13 per month.
6. **Order that, beginning on July, 1, 2010, and on the first day of**

**each month thereafter, [appellant] shall pay pendente lite alimony to [appellee] in the amount of $1,155.15 per month.**

7. Order, pursuant to [Maryland Code (1984, 2006 Repl. Vol.), § 8-208(c) of the Family Law Article ("F.L.")], that [appellant] pay the mortgage, insurance and taxes related to the [marital home] as they become due and owing, currently in the amount of $803 .05 per month.
8. When presented, sign the consent order of the parties concerning custody, visitation, and use and possession.

(Emphasis added).

On June 11, 2010, appellee filed exceptions to the family law master's report. On September 7, 2010, the circuit court affirmed the family law master's recommendations and entered an order in accordance therewith.

On September 13, 2010, the circuit court held a hearing on appellee's complaint for absolute divorce. At the conclusion of the hearing, the court, in an oral opinion, reviewed each of the required factors for alimony set forth in F.L. § 11-106(b), and found, in relevant part, that (1) appellee "can be wholly self-supporting" but "it is not going to be easy"; (2) appellee planned to gain employment and pursue a worker's compensation "disability award for her permanent partial injury" and that "it is difficult to find suitable employment with no academic credential, other than twelfth grade"; (3) "the standard of living of the parties established during their marriage is a powerful factor in this case in favor of the party seeking alimony, [appellee]," because when appellant, as the "bread winner" left appellee, unemployed in a difficult economic climate, "both parties['] standard of living suffers"; (4) the marriage lasted twenty-six years; (5) both parties contributed, by both monetary and nonmonetary means, during the marriage; (6) appellant committed adultery, which is "an unforgivable marital offense and weighs heavily in the determination of alimony, in favor of [appellee]"; (7) appellee is forty-five years old and appellant is forty-eight years old; (8) there was no evidence of physical or mental conditions with regard to appellant, but appellee has mental health issues, including depression and anxiety, and physical issues, including foot and elbow problems, which limit her employment prospects and weigh heavily in her favor with regards to alimony; (9) appellant will struggle to meet his own needs while paying alimony and the maintenance of the marital home; (10) "there is no agreement between the parties on the issue of alimony"; and (11) (i) the parties have no assets that the court took into account, (ii) there is no monetary award in this case, (iii) the "only financial obligation is the joint indebtedness on the marital home," and (iv) the only retirement benefits of the parties are Social Security and assets appellant will receive in retirement from the Western Maryland Health System, which the parties will split in a "number of years down the road."[3]

Taking all of the above findings into consideration, the trial court ruled:

> Putting all that together I am going to award alimony for a period of time. This is obviously related to, before I put a dollar amount on this, this is also related to the award of possession and use of the family home. You know, I would, my inclination, I am really torn as to whether to award you use and possession here, because I think that [appellee] would be better off if they just sold this home and got out, but I am going to award it until the sixteen-year-old becomes eighteen, and at that point, well this is the, I am going to award under the authority, the discretion the Court has under § 8-208, that both parties split the mortgage payment, fifty-fifty. It kind of gives [appellee] an incentive to really look for another place to live because I think that is a lot of money to pay for this house with probably, it is nice to let a sixteen-year-old grow up in the house that he is accustomed to, but it is not absolutely necessary, but [ ], you know, if you want to stay there until he is eighteen, that's fine, but you are going to have to pay half the mortgage. Now, I am going to take that into account going back to the alimony, the fact that the mortgage is going to be split fifty-fifty [,] [ ] which is as I understand approximately a $400.00 obligation from each party. [ ] [T]he Court is going to award alimony of $1,100 a month for four years. That gives [appellee] the opportunity to get retrained, to get a college degree, do whatever she wants during that period of time, and if there is, assuming you get some income before then, I am sure we will get a petition to revisit the alimony, taking into account whatever your future employment is.

In a Judgment of Divorce dated September 23, 2010, and entered September 24, 2010, the circuit court awarded appellee an absolute divorce from appellant and ordered, among other things, that appellant pay appellee rehabilitative alimony of $1,100.00 per month for four years from September 1, 2010, and that appellee shall have exclusive use and possession of the martial home until the minor child of the parties reaches the age of 18, with appellant being responsible for fifty percent of the mortgage obligation. The court also referred matters relating to child support to the child support master for determination and ordered that the existing *pendente lite* order "shall continue in full force and effect with respect to child support" until a hearing before the child support master is held.

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

**DISCUSSION**

Appellant contends that the trial court abused its discretion in setting alimony at an amount that, when combined with his child support and mortgage obligations, leaves him "without the means to support himself." Appellant claims that his financial obligations, including the court's alimony award, amount to $1,930.58 per month and that his pre-tax income is $2,382.20 per month. Appellant contends that he cannot be expected to support himself in any capacity, and that this result is "disheartening or oppressive."

Appellee counters that "[i]t is clear that the trial court carefully considered the required factors including the expenses of the parties in reaching its decision." Appellee admits that "[t]here is no question but that the alimony award has a significant impact on [appellant]," but contends that, "even with the payments ordered by the court[,] [appellee] and the minor child have a significantly greater monthly deficit than does [appellant]." As a result, according to appellee, "[t]he trial court was forced to try to equitably deal with the financial circumstances of both parties."

"In determining whether an award of alimony is appropriate the trial court must consider 'all of the factors necessary for a fair and equitable award' set forth in [F.L. 11-106(b)]." *Simonds v. Simonds*, 165 Md. App. 591, 604 (2005). "These factors are non-exclusive, and although the court is not required to use a formal checklist, the court must demonstrate consideration of all necessary factors." *Id*. at 605 (citation and quotation omitted). The required factors of F.L. § 11-106(b) are:

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (6) the circumstances that contributed to the estrangement of the parties;
>
> (7) the age of each party;
>
> (8) the physical and mental condition of each party;
>
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
>
> (10) any agreement between the parties;
>
> (11) the financial needs and financial resources of each party, including:
>
> (i) all income and assets, including property that does not produce income;
>
> (ii) any award made under §§ 8-205 and 8-208 of this article;
>
> (iii) the nature and amount of the financial obligations of each party; and
>
> (iv) the right of each party to receive retirement benefits; and
>
> (12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health - General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

"[I]n reviewing an award of alimony, we defer[ ] to the findings and judgments of a trial court," but "we may disturb an award of alimony if we conclude that in making that award the trial court abused its discretion or rendered a judgment that is clearly wrong." *Brewer v. Brewer*, 156 Md. App. 77, 98 (2004) (citation and quotation omitted).

Appellant does not contend that the trial court erred in failing to consider the required factors under F.L. § 11-106(b), nor does he challenge any of the court's factual findings thereunder. Instead, appellant

claims an abuse of discretion in the amount of the alimony award, because, according to appellant, such amount leaves it impossible to support himself. Appellee counters that, although both parties will suffer a monthly financial deficit, appellee will suffer an even greater deficit than appellant. We agree with appellee's analysis of the parties' respective financial conditions resulting from the court's alimony award.

Appellant's pay stub, which he admitted was an accurate reflection of his income, revealed that his gross earnings for 8 months were $22,711.82, which equates to $2,838.97 per month. Appellant's year to date taxes, according to the pay stub, were $4,852.36, which equates to $606.55 per month. The reduction for taxes leaves appellant with $2,232.42 per month. After accounting for the monthly alimony payment ($1,100.00) and child support payment ($276.13),[4] appellant has a monthly net income of $856.29.

Appellant claimed total expenses of $2,145.21 per month on his financial statement, but, as appellee notes, appellant admitted in his testimony at the hearing that he is not currently paying for the heat, water, or cell phone use that were claimed as monthly expenses. Excluding those costs from the calculation of his expenses reduces his monthly expenses by $400.00. Appellant also admitted that his claimed expense of $100.00 for gifts was an annual, not monthly, expense, so his monthly gift expense is reduced by $92.00. Appellant further conceded that he no longer pays $82.00 for cemetery lots, so his monthly expenses are reduced by an additional $82.00. Appellant's claimed life insurance expense of $14.74 is part of a supplemental voluntary plan, so it can be removed from the calculation of his monthly expenses. Finally, appellant claims a mortgage payment of $804.00 per month, but the circuit court's order reduces his monthly expense for the mortgage by half, so there is a reduction of that expense of $402.00. When appellant's monthly expenses are recalculated, taking into account reductions for heat, water, and cell phone use ($400.00), gifts ($92.00), cemetery plots ($82.00), life insurance ($14.74), and the mortgage ($402.00), appellant's monthly expenses are reduced to $1,154.47. When this amount is compared with appellant's monthly net income of $856.29, appellant has a monthly deficit of $298.18.

On the other hand, appellee's monthly expenses, $2,427.40, were not challenged at trial. Because appellee's expenses included the entire monthly mortgage payment and the court's order divided the mortgage payment evenly between the parties, there is a $402.00 per month reduction in her expenses, leaving her expenses at $2,025.40 per month. When the monthly alimony payment of $1,100.00 from appellant is included, appellee is left with a deficit of $925.40 per month. Therefore, with the alimony award of $1,100.00, appellee's monthly deficit remains more than that of appellant; indeed, three times more. Accordingly, we hold that there was no abuse of discretion in awarding appellee $1,100.00 per month rehabilitative alimony for four years.

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

**FOOTNOTES**

1. Appellant does not challenge the four-year time period of the rehabilitative alimony.

2. Appellee also filed a motion to shorten time, which was granted by the circuit court on March 4, 2010.

3. The court found that the twelfth factor of F.L. § 11-106(b), "whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health - General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur" was not relevant to this case.

4. In the Judgment of Divorce, the trial court ordered that the *pendente lite* amount for child support ($276.13 per month) continue until a new amount is determined after a hearing before the child support master. The record reflects that a hearing was held before the child support master on November 12, 2011, and the master recommended an increase in the monthly child support to $392.00, based on appellant's monthly actual income of $3,589.00. The record, however, does not indicate that the circuit court ever entered an order directing appellant to pay the increased amount. In his brief to this Court, appellant asserts that his current child support obligation is $199.00 every two weeks, or $431.16 per month. Neither the record reference stated in appellant's brief nor the record itself supports the amount of $431.16 per month for child support.

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