Maryland Family Law Monthly
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Summaries of all unreported family law cases

IN BRIEF

FEATURES

Edgewater woman's will was ambiguous

A battle between first cousins over their late grandmother's will is headed back to trial for a determination of how she intended to bequeath her Edgewater home and other possessions.

The Court of Special Appeals held that Joanne Click's last will and testament was ambiguous, reversing a grant of summary judgment in favor of Mrs. Click's three granddaughters — all sisters — who said the document clearly provided for the real property to be divided equally among them and their first cousin.

Their cousin, Bret Click, argued that the house should go to him. While the will was ambiguous, he said, Mrs. Click's intent was to give it to his father, Steven Click, who had lived with his mother for several years prior to her death.

Steven died on Dec. 10, 2009, just 71 days after his mother, so the bequest to him devolved to Bret, his sole heir, attorney Wayne T. Kosmerl argued.

Warren Walls, the personal representative of Mrs. Click's estate (and her only remaining sibling) filed a Petition for Instructions in the Orphan's Court for Anne Arundel County to resolve the dispute.

Anne Arundel County Circuit Court Judge Philip T. Caroom granted the three sisters' motion for summary judgment.

The Court of Special Appeals reversed.

In remanding the case, the Court of

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LEGISLATION

Freedom from DV as a fundamental human right

By Sean Gahagan, Sierra Mitchell, and Sarah Witri

The Baltimore City Council declared this Spring that freedom from domestic violence is a fundamental human right. Resolution 12-0034R, written by the University of Baltimore Family Law Clinic's Community Education team and sponsored by City Councilman Robert Curran, aims to shift Baltimore's thinking about domestic violence. In adopting this resolution, Baltimore is only the second city in the United States to join a growing chorus of voices around the world condemning domestic violence as a violation of fundamental human rights.

The average American does not expect to encounter human rights violations in their day-to-day life. But human rights violations are occurring every day in communities across the United States — in the form of domestic violence. According to the Centers for Disease Control, more than one in three women and more than one in four men in the United States will experience rape, physical violence, and/or stalking by an intimate partner at some point in their lives.

Jessica Lenahan was one of these women. On June 22, 1999, Jessica Lenahan's estranged husband, Simon Gonzales, violated the restraining order Ms. Lenahan had against him when he kidnapped his three daughters from their Castle Rock, Colorado home. Ms. Lenahan contacted the local police department and reported that she was worried for her daughters' safety. The police told Ms. Lenahan to wait and see if her husband would return the children, and to call back if he did not.

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Obama's statement may impact Md. referendum

By Justin Snow
Justin@MarylandReporter.com

With a referendum on Maryland's same-sex marriage law looming in November, President Barack Obama may have shaken the dynamic in the state this month as he openly endorsed same-sex marriage.

While the president's public stance on same-sex marriage may have implications for the 2012 presidential race, it might have a bigger impact on the referendum process playing out in Maryland.

Supporters say momentum is on their side

Supporters of same-sex marriage were elated by the news, coming hours after North Carolina voters approved a constitutional amendment banning same-sex marriage. Gov. Martin O'Malley and dozens of other lawmakers took to Twitter to applaud the president after ABC News interrupted broadcasts at 3 p.m. on May 9 to air Obama's announcement.

"Today, President Obama affirmed that for a people of many different faiths — a people who are committed to the principle of religious freedom — the way forward is always to be found through greater respect for the equal rights and human dignity of all," O'Malley said in a statement. "In Maryland, we agree."

Carrie Evans, the executive director of Equality Maryland who played an integral role in passage of same-sex marriage legislation earlier this year, said the president's evolution on the issue was similar to that experienced by legislators like Republican Dels. Wade Kach of Baltimore County and Bob Costa of Anne Arundel. They both voted in favor of same-sex marriage legislation in February.

"The drumbeat is there," said Evans. "Week after week there are prominent public officials coming out supporting marriage equality. It really helps voters realize this is the right thing to do for families."

Some gay rights advocates have expressed frustration at how long it took Obama to "evolve," particularly after he already said he supported same-sex marriage in a questionnaire filled out in 1996. But Evans said it was time to embrace Obama's statement rather than question his motives.

"People do things for all different reasons, as we saw in Annapolis this year," Evans stated. "Politics is like that."

Ramifications for Maryland

Same-sex marriage supporters point to Obama's endorsement as a major boost for their cause. Yet it is unclear how this new dynamic will play out when Marylanders go to the polls in November with both the

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Monthly Memo

• **For richer, for poorer:** A new study by Philip N. Cohen of the University of Maryland looks at state-by-state data to see what effect the 2007 recession and high foreclosure rates had on divorces. Among his findings: State unemployment rates showed no effect on the likelihood of divorce, while foreclosure rates had a positive association with those odds — but only for those with more than a high school education. Cohen's study, "Recession and Divorce in the United States: Economic Conditions and the Odds of Divorce, 2008-2010," is available online at http://papers.ccpr.ucla.edu/papers/PWP-MPRC-2012-008/PWP-MPRC-2012-008.pdf

• **Family law practitioner disbarred:** Mishandling two family law cases led to the disbarment of Edgewater solo Constance Ann Camus. Camus ignored a court order to enter her appearance in a custody dispute and never filed or responded to discovery requests, the Court of Appeals said. In the second matter, a divorce action, Camus withdrew funds from her client's trust fund without telling the client, failed to turn over files to the client's new lawyer and billed her more than $80,000 after the client complained to the Attorney Grievance Commission. Camus never produced time sheets to back up the bill. Camus told the court she was overburdened by her caseload and a thyroid illness.

• **The best interest of the puggle:** The ABA Journal's Law News Now, citing the New York Post, says a 34-year-old New York City man is ready to throw in the towel after spending his life savings of $60,000 on a custody fight for his dog. Craig Dershowitz says he considers Knuckles his son, but can't afford to litigate further. According to the ABA Journal, Sarah Brega claims Knuckles was a gift, but Dershowitz says Brega dognapped the puggle when she moved to California.

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Aging out of foster care: The importance of a seamless transition

By Meredith Esders, Esq.
Guest Column

Children growing up in foster care face an unfortunate paradox as they enter adulthood. In order to have a seamless and successful transition to adulthood, they must be even better prepared to support themselves than their peers growing up in their families' homes.

Yet, the very fact that they needed to be in foster care often makes that transition much more difficult. These youth have no back-up system—and any errors in judgment that they make can have a lasting impact.

A youth's commitment to the state's local Department of Social Services ends at the age of 21, an event called "aging out." Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 3-804(a). The department has no obligation to support the youth at that point, regardless of the youth's circumstances. And quite often, these foster youth have no reliable family support.

These youth leaving foster care must be fully prepared to manage all facets of their life— housing, employment, budgeting, medical care, etc.—without any older adult support to fall back on.

Foster youth need to be prepared, often beyond what their development allows. Researchers have found that adolescent brains finish developing at a later age than originally believed and continue to develop until age 25. David Dobbs, Beautiful Brains, National Geographic Magazine, Oct. 2011.

Thus, young adults in foster care age out before their adult brains have fully developed. And it is this latter development that helps adolescents and young adults engage in more complex thinking, such as balancing impulses, goals and rules.

Additionally, many children in foster care have experienced trauma that negatively affects their brain development. Research shows that abuse and neglect can actually alter brain development. Child Welfare Information Gateway, Understanding the Effects of Maltreatment on Brain Development (Nov. 2009) at http://www.childwelfare.gov/pubs/issue_briefs/brain_development/brain_development.pdf .

In adolescents, this can lead to increased impulsive behavior, risk-taking and difficulty with tasks that require higher-level thinking. As a result, these youth who are already prone to make some poor decisions as a normal part of their adolescence are even more likely to do so as a result of trauma.

> **Rather than warranting elimination of all support, lack of compliance is really a sign of needing extra support.**

Such mistakes can lead to the youth losing employment or failing to budget money, which can have dire consequences for a person who has no older adult from whom to seek help.

While still in foster care, these youth are often pinned with labels such as "lazy," "defiant" or "difficult" — and the child protection case shifts to a case about the teenager's bad behaviors. This is problematic not only because of the unfair labeling, but because it can become an excuse for not implementing services to prepare the youth for adulthood.

When a child is committed to the DSS, the department must make reasonable efforts to prepare that youth for independence. CJP § 3-816.1(b)(2)(ii). However, a youth's poor decisions can become an excuse for not offering assistance to the youth in the future.

For example, a youth's case worker might hand her an application for mental health services after she ages out of foster care and tell her to complete the application. If she does not complete the application, as adolescents are apt to do, often the worker allows the application to remain uncompleted.

This results in a loss of necessary services available for the youth. The DSS caseworker should instead work with the youth to complete the application while simultaneously counseling on the importance doing so.

Another example is when the court terminates a youth's commitment to the department prior to age of 21 due to what is often termed as the youth's "lack of compliance" with the department. For example, the youth may have stopped attending school or may have been unable to maintain employment as required to remain in the foster care system.

Rather than warranting elimination of all support, lack of compliance is really a sign of needing extra support. It should trigger a caseworker to provide immediate and intensive services, so that the youth does not miss educational opportunities or the chance to develop a small savings account.

Adults who were in foster care have disproportionately high rates of homelessness, unemployment, substance abuse and incarceration. Because the transition to adulthood is so difficult for so many foster youth, it is imperative they receive the necessary services to prepare for independence while they are in the custody of the DSS.

Meredith Esders is a staff attorney in the Child Advocacy Unit of Maryland Legal Aid in Baltimore.

Will

Continued from page 1

Special Appeals told the circuit court to decide based on extrinsic evidence whether Mrs. Click intended the Edgewater property to go to Steven upon her death.

The probate dispute centered on the clarity of two phrases from the will, which Mrs. Click, a non-lawyer, had prepared from a store-bought computer program.

The phrases were "… any interest in any such property not otherwise disposed of by this will," contained in the third paragraph, and "… surviving members in order of succession," housed in the fifth.

The granddaughters — Elizabeth Smith, Rebecca Maberry and Teresa Talley — contended the phrase in the third paragraph clearly meant that Mrs. Click intended for Steven to have the specified, or "such," personal property not mentioned in the will. The granddaughters, through their attorney Susan Mays, added that they are among the "surviving members" who are to share in the real property.

Their father, Frank E. Click Jr., had died before his mother and brother.

Bret, Steven's son, countered that the phrase "such property" was ambiguous but intended by Mrs. Click to refer to real rather than personal property. Bret added that "surviving members in order of succession" referred to his father, Steven, and him.

Steven Click's estate joined Bret's claim that the will was ambiguous and that Mrs. Click intended for the real property to go to him.

But Caroom in the fall of 2010 agreed with the granddaughters' position that the will was clear.

Caroom said he needed no legal authority to conclude that the "such property" referred to personal property, as "personal" was the antecedent to "such." The use of the plural "members" in the will meant that not only the father and son but the other survivors, the granddaughters, were to share in the real property, he added.

But the Court of Special Appeals found "latent" ambiguities where the circuit court found clarity.

"The issue is whether 'such' relates backward to the preceding clause concerning personal property or forward to the language 'property not otherwise disposed of by this will,'" Judge Shirley M. Watts wrote for the three-judge panel. "It is not possible to conclusively discern the meaning of the phrase by the plain language of the third paragraph or Joanne's intent as to its meaning from the four corners of the document."

The appellate court added that "surviving members" is also "susceptible to multiple meanings."

For example, the phrase could mean a bequest to Mrs. Click's surviving son, Steven, and his son, Bret, in that order; to all of Mrs. Click's surviving family members or to her family "by way of royal succession," the court stated.

"We conclude that the phrase 'surviving members in order of succession' is ambiguous on its face and that it is not possible to determine from the use of the phrase that Joanne intended *per stirpes* distribution of her property, which may or may not have included distribution of her real property, depending on the interpretation of the third paragraph of the will," Watts wrote.

Judges James R. Eyler and James P. Salmon joined Watts' opinion.

Neither Kosmerl nor Mays returned telephone messages seeking comment. Kosmerl is with Council, Baradel, Kosmerl & Nolan PA in Annapolis. Mays is a Glen Burnie solo practioner.

The full text of the opinion is printed in this month's supplement.

By Steve Lash

WHAT THE COURT HELD

Case: *Estate of Steven Click et al. v. Estate of Joanne Click et al.,* CSA No. 2430, Sept. Term 2010. Reported. Opinion by Watts, J. Argued March 7, 2012. Filed May 30, 2012.

Issue: Did the circuit court err in finding provisions of a will unambiguous with regard to the distribution of real property?

Holding: Yes; the phrases used, "such property" and "surviving members in order of succession," were "susceptible to multiple meansings."

Counsel: Wayne T. Kosmerl for appellants; Susan Mays for appellees.

RecordFax # 12-0330-00 (30 pages).

UNREPORTED CASES IN BRIEF

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

*Lori L. Andochick v. Keith A. Lee**

CHILD SUPPORT: ABOVE-GUIDELINES CASE: EXTRAPOLATION NOT REQUIRED

CSA No. 836, September Term, 2010. Unreported. Opinion by Meredith, J. Filed April 3, 2012. RecordFax #12-0403-01, 11 pages. Appeal from Frederick County, Tisdale, J. Result: Remanded without affirming or reversing.
Attorneys: Patrick Dragga for Andochick; Jerold Thrope and Sheila Sachs for Lee.

Because it was not clear whether the circuit judge exercised his discretion in determining the amount of child support, the case was remanded for further consideration of that amount. Without affirming or reversing, the appellate court expressed its view that on remand, the circuit court is not required to extrapolate from the Child Support Guidelines in an above-guidelines case; nor is the circuit court obligated to precisely articulate an amount corresponding to the children's needs.

"Lori Andochick appeals from a judgment which ordered Keith A. Lee to pay child support of $6,707 per month in addition to tuition payments in proportion to Lee's income. In comments from the bench, the trial court suggested that it was required to extrapolate

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Human rights

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Over the next 10 hours, Ms. Lenahan called the police seven times and drove to the police station to submit an incident report. The Castle Rock police did not search for Gonzales.

At 3:20 a.m., Gonzales drove his pick-up truck to the Castle Rock police station and opened fire. The police returned fire, fatally shooting Gonzales. When the police searched Gonzales's truck, they found Ms. Lenahan's three daughters: all had been shot and killed. The murder of Ms. Lenahan's daughters was never investigated.

Unsatisfied with the U.S. court system, which provided her with no relief, Ms. Lenahan took her case to the Inter-American Commission on Human Rights (IACHR). On August 17, 2011, the IACHR found that the United States had failed in its duty to protect Jessica Lenahan and her children from domestic violence. The IACHR also held that the United States' failure to protect women from gender-based violence constitutes discrimination and denies women their right to equality.

The Lenahan decision teaches us that domestic violence is more than a private matter or a family concern — it is a denial of fundamental human rights recognized throughout the world.

Domestic violence is a serious issue facing thousands of people in Baltimore each year. According to the Maryland Administrative Office of the Courts, 4,265 Protective Order petitions were filed for protection from domestic violence in Baltimore City between July 1, 2009 and June 30, 2010.

Furthermore, the petitioner requesting protection from abuse was represented by an attorney in only 23 of 369 Baltimore City Eastside District Court domestic violence proceedings observed by University of Baltimore Family Law Clinic Court Watch Project between September 19, 2011 and October 14, 2011.

Widespread recognition that all human beings deserve protection from domestic violence, regardless of their economic status, is a crucial step towards highlighting and mitigating the ways that our current legal system falls short of this goal.

As Shawn Boehringer, Chief Counsel at Maryland Legal Aid Bureau, explains, "All Marylanders ought to have access to legal remedies that protect their basic human rights. The passage of Baltimore City Resolution #12-0034R elevates freedom from domestic violence to its appropriate place as a fundamental right everyone should enjoy."

The City of Baltimore took an important step toward addressing this problem by recognizing that domestic violence is a human rights concern. Resolution 12-0034R, adopted on March 19, will bolster efforts to educate and empower our community to help eradicate domestic violence.

Sean Gahagan, Sierra Mitchell, and Sarah Witri, then third-year law students, worked under the supervision of Professor Leigh Goodmark as the University of Baltimore Family Law Clinic Community Education Team. Goodmark is director of clinical education at the University of Baltimore School of Law.

Referendum

Continued from page 2

president and same-sex marriage likely on the same ballot.

Opponents of the Maryland law have collected about 30,000 of the more than 56,000 signatures they need to put same-sex marriage on the ballot. The Maryland Marriage Alliance reassured petitioners in a statement that Obama's change in stance does not affect their efforts.

Much as he did in 2008, Obama will likely drive higher black voter turnout in November. However, substantial portions of the black community in areas such as Prince George's County have long been religiously opposed to same-sex marriage.

Several polls have shown Marylanders fairly evenly divided on the issue. The question is whether higher black turnout will lead to same-sex marriage's defeat or if Obama's support will change minds on the issue in the months ahead.

According to Don Kettl, dean of the School of Public Policy at the University of Maryland, Obama's support could galvanize opponents of same-sex marriage. While it is highly unlikely black Democrats will vote Republican because of Obama's position, that does not mean they will vote for same-sex marriage in Maryland. Moreover, Democrats' rocky relationship with conservative Catholic voters will likely be "exacerbated" by Obama's shift, Kettl said.

Impact on young voters and the Democrats' future

Another key demographic will be young voters who supported Obama in droves in 2008. Younger voters have been less enthusiastic about Obama this election, citing concern over the state of the economy. With that lack of enthusiasm plaguing Mitt Romney as well, young voters could be poised to stay home on election day.

People under 40 tend to support same-sex marriage more than older generations. But Kettl believes Obama's support for same-sex marriage will not be a game changer so much as a larger wedge between the two parties.

"This could be part of a much broader trend that might really separate the two candidates on social and economic issues that younger voters care about and begin to convince younger voters that maybe they ought to show up and vote at the polls after all," Kettl said.

Obama's confirmed support for same-sex marriage will likely have political ramifications into the future as well. With 2016 presidential buzz already surrounding O'Malley and New York Gov. Andrew Cuomo, who have both successfully spearheaded same-sex marriage legislation, Kettl adds that this could be a "watershed moment" for the Democratic Party.

"It will be increasingly difficult for any major Democratic national figure to not back gay marriage," Kettl said. "In all likelihood, nothing will be the same after this."

from the child support guidelines in an above-guidelines case.

Because it is not clear to us whether the circuit court exercised its discretion, we will remand pursuant to Rule 8-604(d), without affirming or reversing, for further consideration of the child support amount. For guidance, we express the view that (1) extrapolation is not mandatory, and (2) the circuit court was not obligated to precisely articulate numerically the children's needs.

History

On January 22, 2007, the Circuit Court granted a judgment of absolute divorce. Lee appealed. In *Lee v. Andochick,* 182 Md. App. 268, *cert. denied,* 406 Md. *745* (2008), we vacated the child support award.

On remand, at the outset of the hearing, the circuit court made the following comments:

> THE COURT: One of the things that I will need to do is to at least extrapolate and look at the child support guidelines. *** One of my colleagues has received, ah, we're still sort of shaking our heads, but an unreported opinion which said it doesn't matter how far above the guidelines the figures work out to be, you still have to extrapolate and express them. So the lesson I take from that is we're likely to get a case back just on that basis alone because that's what happened in this other matter. So that's what I understand at least as a practical matter that the law requires of us, which is why I raise that issue. …

After the presentation of evidence, the circuit court issued an oral opinion:

> THE COURT: Now as to child support, we've got two people obviously with very high incomes. The courts have told us to follow what the legislature said in determining child support. The legislature says there is a rebuttable presumption that the guidelines are correct. *Only if it is in the best interest of the children… should there be a deviation, and only then if the Court can identify how a deviation would serve the best interest of the children. So I start with looking at what the guidelines provide…* I always think the issue is what's fair and when I don't have the theological, spiritual capacity to decide what's fair I think I should follow what the law tells me. And in this case I think following the guidelines is the correct way to do it. Following the statute is the correct way to do it. I'm going to do this. I'm going to assign to you, [Mr. Lee's counsel], the easy job perhaps of running the guidelines using the 261,000 and the 911,184, what you did use for Mr. Lee. Whatever that figure is, is, will give us, give the percentage, will lead to the guidelines amount and will be applied against the 58,000 in the school tuition.

DISCUSSION

The legislature enacted the child support guidelines to ensure that awards "reflect the actual costs of raising children,' …'improve the consistency, and therefore the equity, of child support awards,' and … 'improve the efficiency of court processes for adjudicating child support…" *Voishan v. Palma,* 327 Md. 318, 322(1992). FL § 12-204(d) states: "If the combined adjusted actual income exceeds the highest level specified in the schedule …, the court may use its discretion in setting the amount of child support."

Therefore, in above-guidelines cases, judges are expected to exercise discretion in determining child support. *Voishan, supra,* 327 Md. at 328. This discretion is not unfettered, and is tethered to the principle underlying the guidelines. *Malin v. Mininberg,* 153 Md. App. 358, 410 (2003)

In exercising discretion, it may be appropriate, but is not required, for the circuit court to arrive at the child support amount, in part, by extrapolating from the guidelines; "ultimately the decision is one of discretion, balancing the best interests and needs of the child with financial and other considerations of the parties." *Voishan, supra,* 327 Md. at 328-29. The legislature did not intend that "the schedule in §12-204(e) 'govern' a judge's discretion by dictating a cap or mechanical extrapolation." *Id.* at 331. Therefore, "extrapolation may act as a "guide," but there is no presumptive correctness of the extrapolated amount. *Collins v. Collins,* 144 Md. App. 395, 443 (2002).

In an above-guidelines case, the only applicable rebuttable presumption is "that the maximum support award under the schedule is the minimum which should be awarded in cases above the schedule." *Voishan, supra,* 327 Md. at 331-332(1992). Moreover, because the amount is a matter of judicial discretion, there is no "deviation" from the guidelines, and, therefore, no need to make the specific findings required in a guidelines case. *Collins, supra,* 144 Md. App. at 442-43.

Here, the circuit court arrived at the amount by first extrapolating from the guidelines. Such an approach would not constitute an abuse of discretion so long as the court employed the step of extrapolating with the understanding that it had discretion to arrive at a different amount based upon other considerations.

Because of the oral comments made by the court in this case — particularly the reference to the "unreported opinion which said it doesn't matter how far above the guidelines the figures work out to be, you still have to extrapolate and express them" — it is not clear to us what weight the court gave the guidelines, and whether the court followed the guidance in *Voishan.* Therefore, we remand for the circuit court to reconsider the award if necessary, and clarify on the record the manner in which it exercised its discretion in arriving at the child support amount.

> II. Andochick's second contention is that the circuit court: failed to determine the reasonable needs of in light of the parents' affluence; … failed to make a specific finding regarding the children's needs separately from [Andochick's] overall shortfall; and … "failed to determine each parent's proportionate share of the children's reasonable needs, as required under Maryland law in an above the guidelines case.

Andochick cites *Voishan, supra,* 327 Md. at 332, for the premise that: "In an above the guidelines case, a trial court is required to determine the reasonable needs of the children." But *Voishan* does not, in fact, espouse such a requirement. According to *Voishan,* the court "should examine the needs of the child in light of the parents' resources and determine the amount of support necessary to ensure that the child's standard of living does not suffer because of the parents' separation." There is no requirement that the court make a specific finding of the children's needs and then apportion those needs according to the parents' respective incomes. Therefore, there is no legal merit to Andochick's second contention." *Slip op. at various pages, citations and footnotes omitted.*

*Sally Brown v. Arthur Wayne Brown**

DIVORCE: SEPARATION AGREEMENT: DAMAGES FOR BREACH

CSA No. 606, September Term, 2010. Unreported. Opinion by Kehoe, J. Filed March 23, 2012. RecordFax #12-0323-01, 21 pages. Appeal

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UNREPORTED CASES IN BRIEF *Continued from page 6*

from Frederick County. Result: Affirmed in part, vacated in part.

Where a separation agreement provided that, in lieu of paying his ex-wife's attorneys' fees, the husband would pay her the first $20,500 of his net proceeds from the sale of the house, he was not obligated to pay that amount when there were no net proceeds from the sale; however, she is entitled to damages for his breach of the provision requiring him to make monthly mortgage and home loan payments.

"Sally Brown, appellant, initiated a contempt proceeding against her former husband. The trial court held appellee in contempt for various breaches and entered judgment in favor of appellant for monetary damages.

Appellant, dissatisfied with some aspects of the court's judgment, has appealed and raises the following issues, which we have reworded and consolidated:

I. Did the trial court err in failing to hold appellee liable for damages arising from his breach of the marital separation agreement pertaining to monthly mortgage and home equity/consolidation loan payments?

II. Did the trial court err in failing to hold the appellee liable to the appellant for his failure to provide health insurance for the minor children?

III. Did the trial court err in its analysis and treatment of the claim for attorney's fees in only awarding $2,500 in attorney's fees to appellant?

We will vacate the court's judgment in part and remand this case for it to reconsider the first and third issues.

I. Breach of Contract

Paragraph 6(b) of the [Separation] Agreement provides that appellee was to pay appellant the first $20,500 of his share of net proceeds of sale of the marital residence "in lieu of any claim for attorney's fees for issues addressed prior to January 24, 2007, and for any arrears due Wife for the *Pendente Lite* Order."

When the residence was sold, it was "under water" and there were no proceeds. Appellant argues that she has an independent right to recover the $20,500.

Second, appellant argues that the only reason there were no proceeds was because appellee failed to perform his obligation under the Agreement to make all mortgage payments between the Agreement and the sale.

The operative provision states that appellee agrees that the first $20,500 of his share of proceeds was "in lieu of," that is, in substitution for, her claims for attorney's fees and unpaid sums under the *pendente lite* agreement.

In addition, 6(b) specifies the source from which the payment is to be made. "It is quite generally held, in the absence of facts or circumstances showing the contrary, that a promise which is restricted to pay out of a particular fund does not create an absolute liability." *Hood v. Gordy Homes, Inc.*, 267 F.2d 882, 885 (4th Cit 1959).

Therefore, appellee's obligation to pay appellant $20,500 is contingent upon there being net proceeds. The Agreement did not create an independent obligation.

Second, 6(a) states that "[u]ntil the sale of the home, [appellee] shall make all payments on the mortgage and home equity loan/consolidation loan, and any other liens or encumbrances against the property… ." Paragraph 6(c) provides that appellee is also solely responsible to pay "any unpaid or outstanding interest on encumbrances at settlement."

The trial court concluded that the primary purpose of appellee's obligation was to assure that appellant could remain in the residence until it was sold, which occurred. Moreover, the court determined that "there's no provision in this contract for what happens if he doesn't pay."

We disagree. 6(c) requires appellee to pay "any unpaid or outstanding interest on encumbrances at settlement." By settlement, appellant would no longer have a right to possession. The specific requirement that appellee is nonetheless obligated to pay outstanding interest indicates the parties contemplated the economic consequences of appellee's failure to perform. We hold that appellant has a right to recover monetary damages for appellee's breach of ¶¶ 6(a) and 6(c).

Appellant asserts alternative measures of damages. She first points to the fact that the primary lender instituted foreclosure proceedings and the home equity lender was threatening to do the same. Appellant argues that, as a result, the parties were forced to sell for $465,000. She contends that, had appellee made timely mortgage payments, the parties would have been in a position to hold out for a better offer.

The problem with this argument is an evidentiary one. There is no evidence in the record as to what the price would have been but for the pending foreclosure: $475,000? $515,000? $550,000? The trial court rejected this approach as "impermissibly speculative." In light of the evidence, we do not see how the court could have reached any other conclusion.

Appellant's second theory as to the measure of damages is on firmer ground. It focuses on the effect that appellee's breach had on the amount that would otherwise have been available based on the actual contract sales price. The damages can be determined with reasonable certainty based upon the settlement sheet and the payoff documentation.

By the time the parties' home was sold, they were required to pay $473,416.73 to satisfy the existing mortgages and other settlement expenses.

The pay-off notice from Chase indicates that the principal balance was $392,875, with $19,152 in unpaid interest, $1,827 in escrow advances and $30 in "unpaid fees." Had appellee timely performed his obligations, the amount due at closing would have been reduced significantly.

The settlement sheet indicates that the parties paid BB&T $31,350 to satisfy the home equity loan. If appellee had made the monthly payments, the amount to satisfy that loan would have been reduced as well.

On remand, the trial court should conduct a hearing to decide how much the proceeds would have been if appellee had performed his obligations. The parties would have divided those proceeds equally except that appellant would have received the first $20,500 of appellee's share. The trial court should enter judgment in appellant's behalf accordingly.

II. Health Insurance

Appellant asserts that, under the Agreement, appellee agreed to pay for the minor children's health insurance. She states that appellee then quit his job and made no effort to enroll the children in another health insurance plan. As a result, appellant contends, she had to provide health insurance for the children and should be reimbursed

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for her expenses.

The trial court found that appellee was fired from the job which provided health insurance benefits and that there was "no provision whatsoever in this agreement that required him to provide COBRA… . The Court also hearkens back to Family Law §11-102. The Court only has the authority to order health insurance when that parent can obtain health insurance coverage through an employer or any form of group health insurance coverage at a reasonable cost."

The trial court's findings of fact were not clearly erroneous and we agree with its interpretation of the legal effect of the Agreement.

III. Attorneys' Fees

Appellant argues that the trial court was clearly erroneous in awarding her $2,500 in attorneys' fees.

The abbreviated nature of the court's analysis makes review by this Court very difficult, especially as appellant asserts multiple grounds for recovery. We will vacate this portion and remand for the trial court to reconsider its award and more fully explain its reasons under FL §11-110, 12-103 and Paragraph 12 of the Agreement, a fee-shifting provision. *Weichert,* 190 Md. App., may provide a useful analytical approach on remand." *Slip op. at various pages, citations and footnotes omitted.*

*Kenneth Collins v. State of Maryland**

CHILD SUPPORT: CONTEMPT: PERSONAL JURISDICTION

CSA No. 2860, September Term, 2010. Unreported. Opinion by Eyler, D.S., J. Filed March 28, 2012. RecordFax #12-0328-09, 15 pages. Appeal from Baltimore City, Ausby, J. Result: Vacated.

Following the Court of Appeals' 2010 decision in *Flanagan v. DHR,* the circuit court lacked personal jurisdiction over a civil contempt defendant who was not properly served because the sheriff's department in his home county of record did not receive the summons and documents in time to effect service.

"Kenneth R. Collins was found in civil contempt for non-payment of child support, on an agreed statement of facts. The court postponed disposition. Collins noted this appeal. The appellee is the Baltimore City Office of Child Support Enforcement, on behalf of Beth Donaldson.

Collins raises one question for review, which we have shortened: Did the circuit court err in denying his motion to dismiss the contempt proceeding for lack of personal jurisdiction?

We shall vacate the contempt order.

FACTS AND PROCEEDINGS

Collins is the father of Julia Donaldson, who was born on August 8, 2001. He and Julia's mother, Beth Donaldson, never were married. On September 8, 2003, in a paternity action brought in the Circuit Court for Baltimore City, Collins and Beth Donaldson entered into a "Consent Judgment Determining Paternity" in which Collins acknowledged paternity and was ordered, *inter alia,* to pay $473 per month in child support through the OCSE.

On December 23, 2008, the OCSE filed a complaint and request for show cause order of contempt. On December 30, 2008, the court issued the show cause order and a summons for a hearing on March 4, 2009. The complaint, show cause order, and summons were to be served by January 19, 2009.

Because Collins's given address was in Harford County, the documents were sent to the Sheriffs Office in that county for service. They were not received until January 15, 2009, however. The Sheriff's Office attempted to serve Collins without success. On January 20, 2009, the Harford County Sheriffs Office returned the documents to the Circuit Court with an attached post-it note stating, "Returning due to not receiving in time for service deadline."

On March 4, 2009, the master held the scheduled hearing. Donaldson and the OCSE were present, Collins was not. The master directed that an arrest warrant "shall be issued."

More than a year went by. On July 12, 2010, the same master reviewed the file. A "Paternity Contempt Warrant" was issued the next day. On November 6, 2010, the warrant was served at Penhall Road, Baltimore. On November 12, 2010, Collins appeared with counsel for bail review.

Counsel represented that the address at which Collins currently was living was his mother's house, and that he was staying there because she was ill. He previously had lived at the [Carroll County] address for about eight years.

The presiding judge at the bail review hearing issued an incarceration show cause order and summons, which was served on Collins in court. Counsel for the OCSE also served Collins's counsel with the contempt petition. The court ruled that Collins would be released on his own recognizance.

On December 14, 2010, Collins filed a motion to dismiss the contempt petition on the grounds of insufficiency of service, lack of personal jurisdiction, and violation of his due process rights.

The OCSE filed an opposition. The OCSE complained that Collins had "unclean hands," because he had not notified it of his change in address, as the Consent Judgment required. The OCSE further argued that, pursuant to FL 5-1041, the paternity contempt warrant properly was issued on July 13, 2010, and service of the warrant was properly effected upon Collins on November 6 and 12, 2010.

On January 6, 2011, the motion to dismiss was denied without a hearing. The January 24, 2011 contempt hearing went forward as scheduled. Counsel for Collins renewed the motion to dismiss, arguing in particular that the court lacked personal jurisdiction. The court again denied the motion.

Defense counsel proffered that Collins would be willing to proceed on an agreed statement of facts, subject to the objection being noted and preserved.

After hearing the agreed statement, the court held Collins in contempt. It postponed disposition. The appellant noted a timely appeal.

DISCUSSION

Collins contends the circuit court erred for two, alternative, reasons in denying his motion to dismiss the contempt petition. He first argues that the court erred in denying his motion without a hearing as it was a dispositive motion and both he and the OCSE had requested a hearing.

Alternatively, Collins argues that the court erred in denying his motion to dismiss because the court had not obtained personal jurisdiction over him.

Relying on *Flanagan v. Dep't of Human Res.,* 412 Md. 616 (2010), Collins argues that, because he had not been served, the war-

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rant for his arrest was improperly issued and could not serve as a proper basis to obtain personal jurisdiction over him.

Because we conclude that the circuit court did not obtain personal jurisdiction over Collins, and therefore should have granted his motion to dismiss on that basis, we do not address whether the court erred by not holding a hearing on the motion, as it is unnecessary to do so.

We agree with Collins that the recent analysis by the Court of Appeals in *Flanagan*, 412 Md. 616, is dispositive of the case at bar. The Court of Appeals noted that, under FL 5-104, "a warrant shall issue only if the defendant (1) fails to appear after proper service of the show cause order or (2) cannot be served with the show cause order." *Flanagan* at 630. As Flanagan was never properly served with the show cause order, he could not be said to have failed to appear. Because there were no attempts made to serve Flanagan at any of his other known addresses, or to seek the court's permission for alternative service or for a declaration that he was evading service, the Court determined that service was not "impossible." The Court remanded the case with instructions to dismiss the contempt petition with prejudice.

In the case at bar, Collins was not served before the March 4, 2009 hearing. It cannot be said that Collins "fail[ed] to appear in response to a show cause order served on [him]." It is undisputed that the OCSE did not request the court to authorize service by alternative means pursuant to Rule 2-121(c) or to declare that Collins had evaded service pursuant to Rule 2-121(b). [Footnote 5: If the OCSE believed that Collins had "unclean hands" due to his failure to report his change of address, as it argued in opposition to Collins's motion to dismiss, it should have offered proof, pursuant to Rule 2-121(b), that Collins had "acted to evade service" and requested an order for alternative service. As the OCSE did not do so, it cannot now argue that Collins could not be served.]

Without any such request, it cannot be said that Collins could not be served, as required by FL 5-1041(c)(l)(ii). Accordingly, there was no legal basis for the July 13, 2010 issuance of the paternity contempt warrant authorizing Collins's arrest. Although there is some dispute as to whether Collins was first served when the arrest warrant was executed, or at the bail hearing, neither service was sufficient, as both were accomplished while Collins was in custody due to the improperly-issued arrest warrant. Service of the improperly-issued arrest warrant could not furnish the basis for the court to acquire personal jurisdiction over Collins necessary to hold him in contempt. *Flanagan,* 412 Md. at 629-30.

As Collins acknowledges in his reply brief, should his child support obligations continue to stand in arrears, the OCSE is free to file a new contempt petition, properly effect service of process, and obtain appropriate relief." *Slip op. at various pages, citations and footnotes omitted.*

*Jacqueline S. Donohue v. Michael H. Donohue**

CUSTODY: MODIFICATION: CHANGED CIRCUMSTANCES

CSA No. 0409, September Term, 2011. Unreported. Opinion by Wright, J. Filed March 20, 2012. RecordFax #12-0320-06, 20 pages.

Appeal from Wicomico County. Affirmed.

The circuit court did not err in finding that there had been a material change in circumstances, warranting modification of custody, where both parties agreed the current arrangement was not working, where disagreements about who had custody of the child at a given time had twice led to police being called, and the mother had announced her intention to move to another state.

"Mother and Father had one child, Mariana, born July 4, 2002. On December 13, 2004, Father filed a complaint for limited divorce. A consent order awarded sole legal custody to Mother and shared physical custody to both parents on an alternating weekly basis according to Father's work schedule. Father was a pilot for a private airline, seven days on and then seven days off.

On December 7, 2007, the court modified the consent order. The modified order granted Father sole legal custody, but continued joint physical custody.

In January 2008, Mother and Father obtained an absolute divorce. On June 18, 2010, Mother sought sole legal and physical custody. In her petition, Mother argued that Father made the custody arrangement "impossible to implement" because of Father's constant schedule changes and his unilateral decision to remove "the child's grandmother, and a close personal friend from the school pick-up list." Father filed a counter-petition for modification of custody in which he requested continued sole legal as well as sole physical custody of Mariana.

The circuit court held a hearing on both petitions. At the hearing, Father testified that he had removed Mariana's grandmother from the school pick-up list at the request of the principal, and he removed Mother's friend because of her history of substance abuse. Father further testified that his schedule had become less consistent after he began flying a new plane, but he understood the custody order as permitting him to alter the custody schedule to fit his work schedule. Additionally, Father testified about two incidents when the parties argued over who had custody of Mariana at the time, and the police came to settle the dispute. Furthermore, Father stated that Mother refuses to take Mariana to her extracurricular activities.

Mother testified that Father's removal of Mariana's grandmother and Mother's friend from the school pick-up list made it more difficult for her to obtain employment. She testified that she planned to move to Virginia to live with her fiancé, that she no longer communicates with Father and that Father's schedule changes frequently, which results in her having less time with Mariana than under the consent order.

Discussion

I. Material change in circumstances.

When deciding whether modification of custody is warranted, the circuit court first determines if a material change in circumstances exists. *Wagner v. Wagner,* 109 Md. App. 1, 28 (1996). Mother argues that "there were no changed circumstances since the initial decree."

In finding a material change of circumstances, the circuit court noted Mother and Father were in agreement that the existing custody arrangement was not working. The court found the parents were having more difficulty implementing the joint custody arrangement as a result

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of changes to Father's work schedule. The court found Mother felt the existing arrangement made it more difficult to start a new relationship and find full time employment. Additionally, the court concluded that Father felt confined by his work schedule, and, since the last modification to custody (December 2007), remarried on August 11, 2010.

Additionally, Mother's own testimony of the problems resulting from changing Mariana's school, her inability to communicate with Father, and Father's sporadic work schedule established sufficient basis to find a material change in circumstances. We find no basis for concluding the court abused its discretion.

II. Separate counsel for the child

Mother asserts the trial court recognized that counsel should have been appointed for Mariana, but did not exercise its discretion because it believed a prior judge's decision was binding.

F.L. Section 1-202 authorizes courts to appoint counsel for a minor child in custody, visitation, or support proceedings. However, as stated in *Garg v. Garg,* 393 Md. 225, 238 (2006), "the statute merely authorizes a court to appoint counsel …; it does not mandate such an appointment."

Nothing in the circuit court's statement at the modification hearing leads us to conclude the court believed it was bound by the prior denial of Father's motion requesting counsel for Mariana, or that the court believed appointment of counsel was necessary to decide the motions before it. Moreover, there was nothing before the court requesting that it appoint counsel for Mariana. All prior requests had been ruled upon. The court could not have abused its discretion.

III. Interviewing Mariana

Mother argues that the circuit court erred by granting Father's motion without interviewing Mariana to determine Mariana's preferences regarding custody.

When determining if modification of custody is in the best interest of the child, there are at least ten factors the court should consider. *See Montgomery County Dep't of Soc. Servs. v. Sanders,* 38 Md. App. 406 (1977). One factor is the preference of the child.

During the hearing, neither parent requested that the court interview the child. The court did not indicate it believed interviewing the child was necessary. Despite Mother's bare assertion, there are no requirements that circuit courts interview every child in a custody dispute. We are unable to discern anything approaching an abuse of discretion.

IV. The decision does not deprive Mother of the right to raise her child.

Mother asserts that, under the modified arrangement, Father's new wife effectively replaces Mother as Mariana's maternal caretaker because Father's work requires that he be away from home for significant periods. Mother contends the court should have viewed the custody dispute as being between a parent and a third party, and given preference to Mother as Mariana's biological parent.

Mother's argument fails for two reasons. First, Father's new wife was not a party to the dispute; therefore, the court correctly viewed the custody issue as being between two parents. Second, when deciding custody, the best interests of the child take precedence over either parent's interest. *See In re: Adoption/Guardianship No. 10941,* 335 Md. 99, 113 (1994). As discussed, the court did not abuse its discretion in finding the child's interests were best served by granting sole physical and legal custody to Father.

Sanders, 38 Md. App. at 420, laid out a number of factors that circuit courts should generally consider when deciding what is in the child's best interests. Here, the court discussed each factor. The court determined that Father was in a better position to provide a stable home life, had initiated the relationship with Mariana's therapist, and was better able to meet Mariana's material needs. The court did not find the other factors dispositive. Nothing in the court's analysis would lead us to conclude it abused its discretion in granting custody to Father." *Slip op. at various pages, citations and footnotes omitted.*

*Barnerico Gilmore v. Samantha Wadkins**

CHILD SUPPORT: CONTEMPT: ABUSE OF DISCRETION

CSA No. 2650, September Term, 2010. Unreported. Opinion by Zarnoch, J. Filed April 3, 2012. RecordFax #12-0403-05, 8 pages. Appeal from Prince George's County, Pearson, J. Result: Affirmed in part, reversed in part.

The finding of contempt amounted to an abuse of discretion in that it was not supported by the evidence; rather, it was directly contradicted by the trial court's earlier, explicit finding that appellant was making a good-faith effort to make payments.

"Barnerico Gilmore was held in contempt because of his failure to pay child support to the mother of his two minor children, Samantha Wadkins. Gilmore was also ordered to pay $13,476 in arrears. Gilmore presents the following questions for our review:

1. Did the Circuit Court commit reversible error when it found appellant in contempt for failure to pay child support in an order after having rendered an opinion on the record that appellant was not in contempt for the same conduct?

2. Did the Circuit Court abuse its discretion by not giving fair consideration to documentary evidence presented by appellant and verified by appellee which disputed appellee's previously admitted evidence?

We reverse in part and affirm in part.

FACTS AND LEGAL PROCEEDINGS

Gilmore and Wadkins are the parents of twin girls, born December 18, 2007. The parties never married. Wadkins filed her initial complaint for child support on June 11, 2008. Following several hearings, the court issued *a pendente lite* order requiring Gilmore to pay $1,941.00 per month in child support.

Another hearing was held on June 16, 2010, where Wadkins presented evidence of checks she had paid to her child care provider. The court ordered Gilmore to increase his support payments to $2,390 per month to cover the increased child care costs.

Gilmore filed a motion to alter or amend the judgment. Before the motion was ruled upon, Wadkins filed a motion to modify child support and a petition for contempt against Gilmore.

The court held a hearing on December 10, 2010, and found Gilmore's child support arrears to be $13,476. Gilmore was ordered to pay $885 per month in child support and an additional $200 per month towards the arrears.

At the close of the hearing, the court appeared to conclude that Gilmore was not in contempt. The judge explained:

It's clear that you have made good-faith efforts in the past to try

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and provide for these children, and I want to see that continue… I simply don't see a basis on the contempt issue at this point for — I think he's been making a good-faith effort.

Despite this finding, the judge inexplicably issued an order on December 16, 2010, finding Gilmore in contempt. This order was docketed March 2, 2010.

This appeal follows.

DISCUSSION

I. Contempt Finding

Gilmore argues that the court's findings at December 10, 2010 hearing are in conflict with the December 16, 2010 order. He further claims that because he is an attorney, a finding of contempt is particularly injurious to him, especially as he seeks employment in order to meet his child support obligations.

We will reverse a finding of civil contempt only "upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous." *County Com'rs for Carroll County v. Forty West Builders, Inc.,* 178 Md. App. 328, 394 (2008).

The Court of Appeals has explained: "Civil contempt proceedings are …remedial and coercive in nature. They are intended not to punish for past misconduct inflicted against the court but to force present or future compliance with the court's order." *Bryant v. Howard County Dep't of Soc. Servs.,* 387 Md. 30, 46 (2005).

A finding of contempt in a support case is, however, improper if the defendant can establish that he or she "never had the ability to pay more than was actually paid and that he/she made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make additional payments." *Id.* at 48, Md. Rule 15-207(e)(3).

Given the record before us, we must find that the trial judge's finding of contempt amounted to an abuse of discretion, because there was no evidence to support this finding. The only findings the trial court made were explicit in that Gilmore was making a good-faith effort to make payments, which directly contradicts the later contempt finding. We recognize that a trial judge has discretion to change his or her oral ruling before a written order is issued. *Billman v. Maryland Deposit Ins. Fund Corp.,* 312 Md. 128, 132 (1988). However, when the written order is issued, it must be supported by the evidence, which is not the case here.

II. Rebuttal Evidence

Gilmore's second contention is that at the December 10, 2010 hearing, the trial court erred in accepting Wadkins' "rebuttal evidence" concerning child care costs.

We fail to see an abuse of discretion here. The parties disputed the amount paid to the child care provider. It was up to the circuit court to assess the credibility of the witnesses as well as the conflicting documentary evidence. The trial court correctly noted that Gilmore should have called the day care provider as a witness to refute Wadkins' claims, but he failed to do so." *Slip op. at various pages, citations and footnotes omitted.*

*Steven Darryl Green v. Cheryl Keen Green**

DIVORCE: MONETARY AWARD:
CALCULATION OF MARITAL INTEREST

CSA No. 2504, September Term, 2009, and No. 0987, September Term, 2010. Unreported. Opinion by Salmon, J., retired, spec. assigned. Filed March 26, 2012. RecordFax #12-0326-02, 56 pages. Appeal from Kent County, Price, J. and Bowman, J. Result: Affirmed in part, vacated in part and remanded.

While most of appellant's 19 claims of error were unavailing, the trial court did err in (1) failing to allow appellant to claim a $6,000 statutory exemption from garnishment, (2) foreclosing his arguments on modification of child support and (3) computing the monetary award without properly determining how much of the parties' home was nonmarital property; and, since the recalculation of the monetary award may affect the award of temporary alimony and attorneys' fees, those awards are also vacated.

"On November 30, 2009, the Court entered an amended judgment of absolute divorce that ended the Greens' marriage. Steven eventually filed five notices of appeal to this Court. Those filings have resulted in two separate cases, which we have consolidated.

The marital award to Cheryl

Steven argues the only competent evidence as to value of the marital home was his testimony that it was worth $195,000 and therefore Judge Price erred when he valued it at $210,000. One week before the merits hearing, Steven filed a "statement of marital property" in which he listed the home being worth $230,000. At trial, he gave no plausible explanation for this dramatic change. Under the circumstances, Judge Price clearly did not err.

Appellant also contends Judge Price erred in calculating the marital and non-marital value of the home. Judge Price determined that $43,000 (i.e., all the equity) constituted marital property. Steven argues, citing *Grant v. Zich,* 300 Md. 256 (1984) and *Heger v. Heger,* 184 Md. App. 83 (2009), that this was incorrect. We agree. The Court of Appeals said in *Grant v. Zich, "*Property is nonmarital in the ratio that the nonmarital investment bears to the total nonmarital and marital investment in the property. To the extent that property is nonmarital, its value is not subject to equitable distribution." Using the formula, Steven's non-marital interest in the marital home is 2.5% of $210,000 or $5,250. The marital value of the property is $37,750.

Also, the court overvalued the marital property in Steven's name alone by $4,000, the value of the home furnishings.

Cheryl points out that Judge Price made an error [concerning 8 lots of land] that was prejudicial to her that offsets somewhat the errors just discussed. We know of no authority that would allow us to make the offset when, as here, Cheryl did not file a cross-appeal.

Upon remand it will be the responsibility of the court to consider all the factors in FL 8-205. It may take into consideration Judge Price's error in regard to the eight lots as well as the home furnishings.

Because we have vacated the monetary award, we must also vacate the award of attorneys fees and the award of temporary alimony. Upon remand, if the monetary award is not significantly increased or decreased, we see no reason why the very modest award of temporary alimony should not be reinstated.

Petition to Modify Child Support and Alimony

On February 19, 2010, Steven filed a petition to modify child support and to terminate temporary alimony, and to terminate the use and possession order. Prior to the petition, Cheryl, in an effort to

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collect the $95,515 monetary award, had the court issue a writ of garnishment against Steven's business accounts. As a result of the garnishment, approximately $14,000 was seized.

Because Judge Price had retired, the motion to modify child support and other matters were heard by Judge Bowman. Judge Bowman ruled, in essence, that even if Steven's income had deteriorated as a result of Cheryl's enforcement, that decrease could not amount to a change in circumstance, because it was merely re-arguing what Judge Price had already considered.

We disagree. With a monetary award and with no *supersedeas* bond posted, Cheryl had several options. She could have forced a sheriff's sale; executed against personal property in Steven's possession; bought the lots in Steven's name at a sheriff's sale; or garnished Steven's bank accounts.

At the time Judge Price ruled, there was no way to predict whether Cheryl would seize Steven's bank accounts and what, if anything, Steven owed suppliers. Thus, the effect on Steven's business was clearly not something Judge Price had considered. The matters in Steven's petition should be considered on their merits upon remand.

The Use and Possession Order

At the April 22, 2010 hearing, Judge Bowman considered Steven's contention that the use and possession order should be terminated because, after the judgment of absolute divorce was entered, Cheryl's boyfriend commenced to reside in the former marital home. Whether Cheryl had a boyfriend living in the marital home had nothing to do with the use and possession order.

The Garnishment

After Cheryl filed the garnishment action, Steven filed a motion in which he claimed the statutory exemption from garnishment. Under the plain language of CJP section 11-504(b)(5), Steven was entitled to a $6,000 exemption from the garnishment because Cheryl was attempting to execute on a "judgment."

Contempt For Failure to Pay Child Support

On July 8, 2010, Cheryl filed a petition for contempt alleging a child support arrearage of $14,653.93 (12 months without payment). Steven filed an answer.

The hearing was set for Monday, August 30, 2010, before Judge Bowman. On [Friday] August 27, 2010, Steven's counsel filed a motion to recuse Judge Bowman from hearing the contempt case. That motion was denied on August 30, 2010. On the same date, Judge Bowman found Steven in contempt for failure to pay child support.

Appellant raises five questions concerning Judge Bowman's August 30, 2010 rulings:

1. Timeliness of the Motion to Recuse

When the recusal motion was considered by Judge Bowman, Cheryl's lawyer pointed out (accurately) that Steven's counsel had waited until Friday, August 27, 2010, at 2:30 p.m. to file the motion.

The court and Steven's counsel engaged in the following colloquy:

THE COURT: … I think that's a back door way of getting a continuance, quite frankly ... it's not timely filed.

MS. DAVIS: Well, then, if you do not consider it timely filed, Judge, then I…strongly suggest you take a recess and read the *Surratt [v. Prince George's Co.*, 320 Md. 439 (1990)] case.

Ultimately Judge Bowman ruled that the subject case was far different from *Surratt.*

Steven alleges that under the principles set forth in *Surratt,* the recusal motion was "timely filed because it alleged personal misconduct by the trial judge — directed toward Defendant's attorney."

The short answer to this allegation is that the Surratt case does not hold (or in any way suggest) that if personal misconduct is alleged, a motion to recuse need not be filed within a reasonable time of when the personal misconduct first became known to the movant. In fact, *Surratt* stands for the opposite.

Judge Bowman's ruling that appellant's recusal motion was not timely filed was supported by strong and unrebutted evidence. Steven's written motion to recuse states that when Judge Bowman last made a *sua sponte* ruling, which was June 12, 2010, appellant's counsel (purportedly) realized that the trial judge harbored personal bias against either counsel or the appellant. The motion to hold appellant in contempt was served on July 20, 2010, more than a month before the recusal motion was filed. And, according to what was said in the recusal motion, appellant's counsel learned of no new facts that would support a recusal motion after June 12, 2010.

In *Surratt* counsel gave a reasonable explanation as to why she waited so long to file the motion. Steven's counsel gave no reasonable explanation as to why she waited until the last working day prior to the contempt hearing.

The trial court did not err in holding the recusal motion was not timely.

2. Not Assigning the Recusal Motion to Another Judge.

The rule in Maryland, and elsewhere, is that ordinarily the question of recusal is to be decided, in the first instance, by the judge whose recusal is sought. *Surratt,* 320 Md. App.464-65.

Despite the usual Maryland rule, however, we believe there are some circumstances in which the judge whose impartiality is questioned should not himself or herself decide the merits of a recusal request. That is a statutory requirement in the federal system.

We hold that when the asserted basis for recusal is personal conduct of the trial judge that generates serious issues about his or her personal misconduct, then the trial judge must permit another judge to decide the motion for recusal.

In the case *sub judice*, at the time the trial judge ruled on the recusal motion, appellant had made *no allegation of personal misconduct on Judge Bowman's part.* Appellant simply pointed to legal rulings made by the judge with which appellant's counsel did not agree. Even if we were to assume, purely for sake of argument, that all the rulings with which appellant's counsel did not agree, were legally incorrect, personal misconduct would not have been proven.

Because appellant did not allege personal misconduct against Judge Bowman, the judge did not err in not acquiescing in what Steven's counsel wanted him to do, which was: continue the case and bring in a judge from another county to consider the motion.

3. Refusal to Admit Tax Returns for 2008.

During the contempt hearing, appellant's counsel apparently wanted to introduce the 2008 tax returns to show that Judge Price was wrong when he calculated the child support guidelines based on the belief that Steven earned $7,500 per month. As already demonstrated, Judge Price established Steven's monthly income based on a concession by Steven's counsel. But even if Judge Price erred, the

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way to attack Judge Price's ruling was on appeal — not collateral attack at a contempt hearing.

4. Exclusion of Defendant's Exhibit Two.

At the [contempt] hearing, Steven proffered, as defendant's exhibit two, a "calculation of adjusted actual income" for 2006, 2007, 2008 and 2009. Cheryl's counsel objected [citing] Md. Rule 5-1006. Judge Bowman sustained the objection on the grounds that the original or duplicates from which the summary was compiled had not been produced for inspection prior to trial. The record clearly supports that ruling.

5. Sufficiency of the Evidence

Because the evidence showed that Steven had not paid child support, Steven, pursuant to Rule 15-207(e)(3), had the burden of proving that he never had the ability to pay more than the amount actually paid *and* that he made reasonable efforts to lawfully obtain the funds necessary to make support payments.

Steven testified in his own behalf and called two witnesses. They were Ronald Jayne, a CPA, and Donna Herr, the bookkeeper for his company. At the time of the hearing, Steven and Donna Herr lived together in Chestertown. Herr, an independent contractor, is paid $20,000 per year by Steven's company.

Judge Bowman found that Steven had not met his burden of proving that he did not have the ability to pay more child support than what was paid. Judge Bowman acknowledged that the CPA was a credible witness. Judge Bowman criticized the fact that appellant had not brought with him any bank records. Instead, appellant brought in his bookkeeper whose credibility was questionable, in the Judge's view, "because of her involvement" with Steven. The trial court also found there had been no good faith effort on Steven's part to sell equipment that he could have sold.

Taking the evidence, as we must, in the light most favorable to Cheryl, Judge Bowman did not err when he found that Steven had not met his burden." *Slip op. at various pages, citations and footnotes omitted.*

*Thomas Harris v. Alicia Boglin**

CHILD SUPPORT: CONTEMPT: EVIDENCE OF NONPAYMENT

CSA No. 2641, September Term, 2010. Unreported. Opinion by Hotten, J. Filed March 28, 2012. RecordFax #12-0328-06, 11 pages. Appeal from Baltimore City, Lawrence P. Fletcher-Hill, J. Affirmed.

While the circuit court erred in allowing the complainant to testify as to the amount of arrears without evidence to establish that she had personal knowledge of the amount, the court had sufficient evidence, based on the defendant's own testimony as to the amounts he had paid, to find him in contempt for failure to pay child support.

"On August 4, 2008, Peyton Harris was born to appellant Thomas Harris, and appellee, Alicia Boglin. Approximately a year later, appellee filed a complaint for custody. The court awarded appellee legal custody and ordered appellant to pay $694 a month in child support. Not long after, appellee petitioned the court to find appellant in contempt for failure to pay child support. At the contempt hearing, using a printout from the Maryland Child Support Enforcement Administration, appellee testified that the amount of arrears was $6,241.80. Appellant objected, arguing that the document was hearsay and unauthenticated. The circuit court sustained the objection. Appellee was then asked to provide the amount of arrears based on personal knowledge. Over appellant's objection, appellee provided the same number.

Appellant noted an appeal, arguing that the circuit court erred in permitting appellee to testify about the amount of arrears "based on an unauthenticated printout." We affirm the judgment of the circuit court.

Appellant argues that appellee was "pretending to testify to the contents of the document on the basis of her personal knowledge rather than from having just read it off the inadmissible document in front of her."

We do not believe appellee was "pretending" to have personal knowledge about the amount of arrears. However, the record is devoid of evidence that demonstrates she actually had knowledge. Appellee did not testify that she maintained a ledger detailing the amount of child support received, nor did she testify that she calculated the amount of arrears. This is significant because "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Md. Rule 5-602. Consequently, we must conclude that appellee's testimony regarding the amount of arrears, which was proffered immediately following the court's ruling on the admission of the CSEA printout, was inadmissible. However, the circuit court did not err in finding appellant was in contempt. We explain.

"An appellate court may reverse a finding of civil contempt only upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous." *Gertz v. Md. Dept. of the Environment,* 199 Md. App. 413, 424-25 (2011) (internal citations and quotations omitted). The circuit court found appellant to be in contempt because he willfully failed to make complete child support payments. We believe the court's finding is supported by the record. At the contempt hearing, appellant admitted, and appellee confirmed, that he never made a full payment of child support. Moreover, the disparity between appellant's earnings and the amount of child support paid, suggest that appellant could have provided more in child support.

As a result of the contempt determination, the circuit court was required to issue an order articulating the amount of arrears. *See* Md. Rule 15-207(e)(4). In its order, the court stated that the amount was $6241.20. Unfortunately, when the circuit court assessed the amount of arrears, we are unsure whether it used appellee's inadmissible testimony, or whether it calculated the amount based on other evidence. Nevertheless, there was sufficient evidence in the record to support the court's determination.

At the contempt hearing, appellant testified that he was ordered to pay $694 a month in child support, effective January 15, 2010. Appellant then noted that he made the following payments: (1) $300 on January 27, 2010, (2) $149.61 on February 25, 2010, (3) $218.18 on March 12, 2010, (4) $224.41 on March *25,* 2010, (5) $200 on September 24, 2010, and (6) $300 on October 28, 2010. As of November 17, 2010, the date of the contempt hearing, appellant

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should have paid $7,634 (i.e. eleven child support payments). The record indicates that appellant paid $1392.20. When we subtract $1,392.20 from $7,634, the balance is $6,241.80. Thus, we believe the circuit court's arrears assessment was supported by the record." *Slip op. at various pages, citations and footnotes omitted.*

*In re Brianna O.**

CINA: EXCEPTIONS TO MASTER'S REPORT: PREMATURE FILING

CSA No. 1234, September Term, 2011. Unreported. Opinion by Eyler, D.S., J. Filed April 5, 2012. RecordFax #12-0405-10, 29 pages. Appeal from Baltimore City. Affirmed.

Exceptions that were filed one day after the master announced her proposed decision from the bench, but before the master issued her report, were untimely, and did not entitle the mother to a *de novo* exceptions hearing six weeks after the circuit court had entered its order adopting the report, transferring custody of the child to her aunt and uncle, and rescinding the order of commitment.

"Jennifer B. appeals from an order of the juvenile court, denying her motion for reconsideration of the court's final judgment. The final judgment had dismissed as untimely Jennifer B.'s exceptions to the report and recommendations of a master in a CINA case concerning Jennifer B.'s child, Brianna O., and adopted the report and recommendations. The prior final judgment also declared that the juvenile court no longer had jurisdiction over Brianna O.

The appellees are the Baltimore City Department of Social Services; Brianna's father, Shaun O.; and Brianna.

Jennifer B. presents two questions for our review, which we have rephrased:

I. Was she entitled to a *de novo* exceptions hearing?

II. Does she have a viable claim for ineffective assistance of counsel?

We answer both questions in the negative.

I. Prematurely Filed Exceptions

Because there was no appeal from the April 1, 2011 Order adopting the Master's Report and terminating jurisdiction, the only contention Jennifer B. can advance in this Court is whether the juvenile court abused its discretion by refusing to vacate its Order and schedule a *de novo* exceptions hearing. Any direct challenge Jennifer B. may have made to the Order was lost when the order was not appealed.

CJP section 3-807(c) governs exceptions "in accordance with the Maryland Rules." Maryland Rule 11-111 relates to proceedings before a juvenile master.

In *In re Danielle B.,* 78 Md. App. 41(1989), this Court held, under the predecessor to Rule 11-111, that exceptions filed one day prior to the issuance of a master's written report and recommendation were premature and that the juvenile court's order striking the exceptions was "technically correct." Jennifer B.'s exceptions were filed fifteen days before the Master's Report was issued. As such, there can be no question that her exceptions were untimely.

Jennifer B. argues that, under *Danielle B.,* the juvenile court nonetheless was obligated to hold a *de novo* exceptions hearing. Jennifer B. asserts that, as in *Danielle B.,* at the June 22, 2011 hearing, the juvenile court improperly "focused solely on the procedural posture of the case[ ] without any regard for the appropriateness of the master's factual findings or appropriateness of [the master's ultimate recommendation]."

Given the marked differences in the procedural posture in this case and *Danielle B.*, we disagree that the juvenile court erred. In *Danielle B.,* the juvenile court had before it timely on-the-record exceptions filed by the Department and was aware that the children had filed untimely exceptions as well. Notwithstanding the extreme facts presented, the court conducted a cursory review of the master's recommendation that the CINA petitions be dismissed, apparently concluding it had no choice but to defer to the master's credibility findings. Finally, the children noted a timely appeal from the order of the juvenile court.

Here, in contrast, there were no timely-filed exceptions. The April 1, 2011 Order was a final and appealable judgment concluding the CINA case. *See Rohrbeck v. Rohrbeck,* 318 Md. 28, 41(1989). Having failed to note an appeal, Jennifer B. cannot now directly challenge on appeal the propriety of the juvenile court's decision to adopt the Master's Report.

The only issue arguably before the juvenile court on June 22, 2011 was Jennifer B.'s oral motion to vacate the April 1, 2011 Order pursuant to Rule 11-116.

The court denied the motion, concluding that it only retained revisory power under Rule 11-116 "while the CINA case remain[ed] pending and the court ha[d] jurisdiction." Because the court had entered a final judgment terminating jurisdiction, more than thirty days had passed, and no appeal had been taken, the court concluded that it lacked the power to reopen the case. The juvenile court also opined that the master had found that Brianna was "in the custody of an aunt and uncle who were providing good care" and that it was in her best interest to remain in their care pending further custody proceedings, if necessary, in North Carolina.

We perceive no abuse of discretion.

II. Ineffective Assistance of Counsel

Jennifer B. argues, in reliance upon *In re Adoption/Guardianship of Chaden M.,* 422 Md. 498 (2011), that her attorney rendered ineffective assistance of counsel. The appellees respond that *Chaden M.* involved termination of parental rights proceedings and there are no Maryland appellate cases recognizing a claim to ineffective assistance in CINA proceedings.

The instant case is distinguishable from *Chaden M.* in ways that make it particularly unsuited for appellate decision of an ineffective assistance claim. First, the record is not clear as to why the exceptions were filed prematurely. Any resolution of this issue would require further proceedings in the juvenile court. Second, were we to remand, Maryland would continue to exercise jurisdiction even though all the parties live out of state and the factual circumstances that would give rise to jurisdiction in this State do not exist. And, unlike a finally adjudicated TPR case, in a CINA case, custody disputes are subject to further adjudication; here, however, any further adjudication should be in a state having jurisdiction.

Finally, in the instant ease, Jennifer B. was present and represented by counsel at all times. In *Chaden M.,* the mother's failure to timely object to the guardianship petition deprived her of the right to par-

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ticipate in any proceeding challenging the termination of her parental rights.

Accordingly, this is not a proper case in which to entertain Jennifer B.'s ineffective assistance of counsel claim." *Slip op. at various pages, citations and footnotes omitted.*

*In re Jasmine S. and Dominique S.**

CINA: MODIFICATION OF PERMANENCY PLAN: ADOPTION BY NONRELATIVE

CSA No. 3043, September Term, 2010. Unreported. Opinion by Kehoe, J. Filed March 19, 2012. RecordFax #12-0319-02, 26 pages. Appeal from Prince George's County. Affirmed.

A change in the child's permanency plan from reunification to guardianship by a nonrelative was an appropriate exercise of the court's discretion, where the evidence showed that the child was thriving in her foster treatment home, while reunification with her mother was likely to subject the child to needless medical tests and procedures.

"Cargyle S. (Ms. S.) is the biological mother of Jasmine S. and Dominique S. Each child was declared a CINA. Ms. S. appeals from permanency plan orders concerning each child. The juvenile court changed Jasmine's permanency plan from reunification to guardianship by a non-relative. With regard to Jasmine, we affirm the court's permanency plan order. As for Dominique, the order that Ms. S. appealed is now moot; therefore, we will not reach the merits of that portion of the appeal.

DISCUSSION

I. Changing Jasmine's permanency plan to custody and guardianship by a non-relative

In CINA cases where a child has 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," CJP §3-823(b). Thereafter, the court must review the child's permanency plan "at least every 6 months until commitment is rescinded." CJP § 3- 823(h)(1)(iii).

The juvenile court's ruling that Jasmine should be placed in the custody and guardianship of the L. family was an appropriate exercise of discretion. The court listened to five days of testimony and considered each of the factors enumerated in FL § 5-525(f)(1) in reaching its conclusion. We will briefly discuss the court's most salient findings with regard to these factors.

(i) the child's ability to be safe and healthy in the home of the child's parent

The court found that placing Jasmine in the home of Ms. S. "is contrary to her welfare … because the child is at risk of continuing harm from unnecessary and duplicate invasive testing, medical treatment and intermittent home catheterization in the parents' custody." This finding was based on testimony from Ms. Lally and Ms. Wise-Davis, who each worked with Ms. S. extensively for over three years.

(ii) the child's attachment and emotional ties to the child's natural parents and siblings

The court noted that, in its discussions with Jasmine, "there was no response at all or remarks at all regarding the mother. None." Jasmine emphasized that she wanted to be adopted, and although she expressed that living with her dad may be okay, she did not say the same thing about her mom.

(iii) the child's emotional attachment to the current caregiver and caregiver's family

Jasmine expressed that she wanted to be adopted because, although she feels safe with her dad, she feels "a little more safe with [Mr. and Ms. L.]" because "I've been with them for so long." She also answered affirmatively when Judge Dawson asked her if she liked her friends in her neighborhood and at her current school.

(iv) length of time the child has resided with the current caregiver

At the time of the permanency plan review hearing, Jasmine had been living with Mr. and Ms. L. for three years and four months.

(v) potential emotional, developmental, and educational harm to the child if moved from the current placement

The court found that "Ms. S. does not demonstrate any empathy towards her children or take responsibility for their educational neglect or child abuse. She continues to deny that she harmed her children in any way." When Jasmine entered foster care, her foster parents and the school system provided her with a significant amount of academic support. By October 2010, Jasmine's grades were average to above average.

(vi) potential harm to the child by remaining in State custody for an excessive period.

The court, in its oral decision, remarked that Jasmine has been in State custody for forty-one months and that "every time she's talking to me she wants some permanency." By granting custody and guardianship to the L. family, Jasmine is provided with a semblance of permanency.

In sum, the record makes clear that, while in Ms. S.'s care, Jasmine was exposed to physical abuse and neglect, and Ms. S does not present any evidence that such conduct would be unlikely to continue. See FL § 9-101(b). Moreover, Ms. S.'s inability to make progress toward changing her behavior has left Jasmine languishing in foster care for forty-one months. We see no abuse of discretion in the decision to change Jasmine's permanency plan from reunification to custody and guardianship with the L. family.

Ms. S. attempts to rebut this conclusion in a variety of ways.

First, Ms. S. cites FL §5-323 and contends that the court erred in terminating her parental rights. This issue is not before us. The issue before us is the juvenile court's decision to change Jasmine's permanency plan.

Ms. S. next contends that there was no evidence to show she is an unfit parent. Again, this is an argument that should be made in a challenge to a decision to terminate Ms. S.'s parental rights. Issues of parental fitness underlay CINA determinations but the specific issue before the juvenile court was not whether Ms. S. was a fit parent but whether further abuse or neglect is likely if Jasmine is returned to her mother's care. *See* FL 9-101(b). The court did not err in finding that Ms. S. did not meet her burden of showing that further abuse was unlikely.

Ms. S. also asserts that the court did not sufficiently consider placement in a relative's home under CJP § 3-823(e)(I)(i). Ms. S. argues that Jasmine should be placed with her mother, Ann H. The

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Department and the court considered alternative placement resources, including Ms. S.'s mother, when the children were first brought into care. Ms. S.'s mother lives in Georgia and the Department informed Ms. S. "that the Department will not recommend an out of state placement at this time as the children need to be closely monitored and it would impede reunification efforts." More importantly, Mr. S., who was working toward reunification, opposed placement with Ms. S.'s mother.

The juvenile court acted within its discretion in choosing guardianship by a non- relative as the best option for Jasmine.

II. The Appeal of the Modification to Dominique's Plan Is Moot

Ms. S.'s appeal regarding Dominique's permanency plan is moot because a subsequent permanency plan has already been adopted, appealed, and affirmed by a panel of our Court. *See In re Dominique* S., Slip Op., No. 974, Sept. Term, 2011 (filed November 28, 2011)."

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

*In Re: Yumary N.**

JUVENILE LAW: COMPULSORY EDUCATION: ELEMENTS OF OFFENSE

CSA No. 1174, September Term, 2010. Unreported. Opinion by Davis, Arrie, J., retired, spec. assigned. Filed March 8, 2012. RecordFax #12-0308-05, 9 pages. Appeal from Prince George's County. Result: Affirmed.

Under the state's compulsory education law, which requires school attendance for children under the age of 16 "unless the child is otherwise receiving regular, thorough instruction during the school year," the exception provides an affirmative defense to the offense charged; the burden does not fall to the state to prove that the exception does not apply.

"Yumary N. appeals from a finding of involved by the Juvenile Court, in that she failed to send her child to school. On June 16, 2010, the court sentenced her to ten days in jail but, on June 17, 2010, ordered that she be released. This timely appeal followed.

BACKGROUND

Appellant's son, Nicholas J., whose date of birth is November 29, 1997, was enrolled in the Robert Gray Elementary School in the school year that began on August 24, 2009. According to the testimony of Lucille Tompkins-Davis, a pupil personnel worker for the Prince George's County Public Schools, Nicholas had been absent from school eighty-three days during that school year. Thirty-five or thirty-six of the days that Nicholas had been absent were unexcused. On November 9, 2009, Tompkins-Davis and another worker met with appellant regarding her son's failure to attend school regularly. Tompkins-Davis testified that appellant told her that Nicholas was not attending school because he "had been ill for some of the reasons and some of them she wasn't quite sure of." On other occasions, she explained, Nicolas had missed the bus. According to Tompkins-Davis, appellant acknowledged that she understood the importance of daily attendance at school and stated that she "would try to make sure that he did attend school."

On November 12, 2009, Tompkins-Davis mailed a notice of an interagency meeting to appellant, but she failed to attend. In March, 2010, the State filed a petition in the Circuit Court charging appellant with failing to send Nicholas to school in violation of Educ. § 7-301.

From the court's finding that appellant was involved, she filed this appeal.

LEGAL ANALYSIS

Appellant's principal contention on this appeal is that the evidence was insufficient to sustain the court's finding because the State failed to prove that Nicholas was not otherwise receiving instruction during the period in question. Educ. § 7-301(a)(1) provides:

(a) Who must attend. — (1) Except as otherwise provided in this section, each child who resides in this State and is 5 years old or older and under 16 shall attend a public school regularly during the entire school year *unless the child is otherwise receiving regular, thorough instruction during the school year in the studies usually taught in the public schools to children of the same age.* (Emphasis added).

Appellant asserts that the State must prove that the person failed to see that the child "receives instruction," *id.* § 7-301(c) & (e)(2), i.e., that the child was not "otherwise receiving regular, thorough instruction during the school year in the studies usually taught in the public schools to children of the same age," *id.* § 7-301(a)(1).

As the State points out, however, Yumary N. never advised Tompkins-Davis and her co-worker that Nicholas was otherwise receiving regular, thorough instruction in conformance with §7-301(a)(1). Nor did she offer alternative regular, thorough instruction as the reason for Nicolas's absences during her testimony or at any other time during the proceedings.

Appellant cites *Mackall v. State,* 283 Md. 100 (1978) for the proposition that the burden is on the State to prove beyond a reasonable doubt that the offense charged is not within an exception when a penal act contains an exception so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission or other ingredients which constitute the offense.

Appellant neglects to cite the exception to the rule in *Mackall* and *Howes [v. State,* 141 Md. 532 (1922)*]*. That exception, discussed in *Mackall,* is articulated in *Spurner v. State,* 229 Md. 110 (1962), wherein the Court of Appeals held:

> The second contention that the State had the burden of proving that the defendant was not within the exceptions, like the first contention, also lacks substance. *For when the facts are peculiarly within the knowledge of the defendant, as they were here, the burden is on him to prove that he comes within one or more of the exceptions. Howes v. State, supra.*

Id. at 112 (emphasis added).

In the case at hand, Tompkins-Davis testified that she made contact with Yumary N. on November 9, 2009, concerning Nicholas J.'s lack of regular attendance. Tompkins-Davis stated that Yumary N. told her that her son was not attending school because Nicholas had been ill, he had on occasion missed the school bus and, as to other reasons, "she wasn't quite sure of." Yumary N., according to Tompkins-Davis, stated that "she would try to make sure that [Nicholas] did attend school." Despite her assurances that she would ensure that her son's attendance improved, it did not. Significantly, appellant specifically offered reasons that were unacceptable as to

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Nicholas J.'s lack of attendance.

Moreover, neither the State's Attorney, the pupil-personnel workers for the Prince George's County Public Schools nor the juvenile court had any way to discover that Nicholas was otherwise receiving regular, thorough instruction during the school year in the studies usually taught in the public schools to children of the same age. And, as noted, appellant never so advised the authorities. The juvenile court properly relied on the evidence before it in rendering its decision. That evidence, provided by appellant, negated any finding that Nicholas was otherwise receiving instruction. The facts regarding the basis for and the reasons why Nicholas failed to attend school eighty-three days during the August, 2009 session, thirty-six of which were unexcused, were peculiarly within the knowledge of the defendant. It is therefore an affirmative defense that must have been first raised by her and, thus, the burden was on Yumary N. to prove that she came within the exception. *See Spurner, supra.*" *Slip op. at various pages, citations and footnotes omitted.*

*Qwentra O. McCallister v. Willie G. McCallister**

CHILD SUPPORT: CONTEMPT: ABILITY TO PAY

CSA No. 1292, September Term, 2010. Unreported. Opinion by Davis, Arrie, J., retired, spec. assigned. Filed March 7, 2012. RecordFax #12-0307-01, 16 pages. Appeal from Charles County, Nalley, J. Affirmed.

Despite appellant's testimony that she and appellee had engaged in intercourse before appellee filed for divorce in 2008, the testimony and both sides' pleadings were more than sufficient to sustain the grant of an absolute divorce in 2010 on the basis of voluntary separation lasting more than 12 months, with no reasonable expectation of reconciliation.

"Qwentra McCallister appeals from the judgment granting an absolute divorce from appellee, Willie McCallister, and ordering that the marital home located at White Plains, Maryland be transferred to appellee to effectuate the meaning and intent of the Consent Order, dated December 11, 2008. Appellant, *pro se,* files this appeal, raising issues which we consolidate and rephrase:

1. Whether the trial court's award of a Judgment of Absolute Divorce to appellee from appellant was an abuse of discretion.

2. Whether the trial court's denial of appellant's request for an award of alimony constituted an abuse of discretion.

We decide both issues adversely to appellant, the first issue because the evidence supports the court's award of a Judgment of Absolute Divorce to appellee and the second issue because we are unable to discern from the record that the issue was tried and decided in the circuit court.

We pause, at the outset, to note that we are bound by Maryland Rule 8-131 to decide, ordinarily, only issues that plainly appear by the record to have been raised in and decided by the trial court. Although we are mindful that appellant is proceeding *pro se* in this appeal, as appellee's counsel observes, "Appellant's Statement of the Case is, in some respects, unnecessarily argumentative" and appellee's response "has been made more difficult by the Appellant's failure to make even one reference to the record extract (or transcript, at the very least) in violation of Rule 8-504(a)(4)."

We will not consider any of the issues based on facts outside of the record or not substantiated by citation to the record or for which appellant has failed to cite legal authority.

DISCUSSION

I

Appellant argues that appellee's "Complaint for Divorce" and "Consent Order" are void because "Plaintiff had sex with Defendant prior to filing for divorce in 2008" and asserts, "Defendant was divorced against her will." Both contentions challenge statutory prerequisites for the grant of a divorce a *vinculo matrimonii* based on voluntary separation [under] F.L. §7-103.

During the hearing before the court, appellant stated:

Are you aware that I'm not in agreement with you of a separation for voluntary separation for the year of 2010, the year of 2009, or the year 2008. I'm not in agreement … are you aware that I'm not in agreement with him for a voluntary separation.

Appellee's counsel, however, reminded the court, "she's plead it differently" (referring to appellant's Counter-Complaint, wherein she had asserted a contrary position and indicated that the parties had separated on July 1st, 2008). The court also noted that "we have the two Complaints that are here, each of which alleges that there was a voluntary separation in the middle of 2008. And, the specific allegation in the Counter-Complaint that is still before this court has not been withdrawn, has not been dismissed." Finally, the court asked appellant, "You want to stay married to him?" Her response was "No, I need time to get a lawyer." The aforementioned testimony, which tracked the parties' pleadings, is more than sufficient to sustain the court's finding that the parties' voluntary separation had lasted substantially more than twelve months and that there was no reasonable expectation of reconciliation.

Appellant, citing myriad alleged irregularities, also contends the Consent Order was entered against her will. The issue of whether appellant's agreement to sign the Consent Order was voluntary was never raised before the trial court nor was the question of whether trial counsel provided effective legal representation. Consequently, these issues are not before us.

II

Appellant contends, "The Circuit Court failed to use Maryland Laws for divorce including Family Law 11-106."

Family Law Article §11-106 sets forth the factors that the court must consider in awarding alimony. Nowhere in her brief does appellant cite to any assertion of a claim for alimony in the record or any consideration of the issue in the record by the trial court.

Rather than present an argument to support her claim for alimony, appellant challenges the court's alleged failure "to let Plaintiff show evidence and did not use the Maryland Law of Divorce," and the court's decision "which requested financing of the home/trustee." The decision to which appellant refers is apparently a provision in the Consent Order requiring appellant, on a successful refinancing of the mortgage by appellee, to sign over her interest in the former marital home to appellee. Appellant, who signed and initialed the December 1, 2008 Consent Order, agreed, *inter alia,* to a formula by which appellee would "buy-out" her interest in the home. Appellant's

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objection to the requirement is subsumed in the agreement. Appellant cites to no record evidence that she raised the issue that the signing of the Consent Order was under duress or that the issue was decided by the trial court.

Appellant also raises an issue regarding personal property, asserting, "The USAA claim per vehicle Toyota Rav4 was never marital property [and] Vehicle purchase prior to marriage in which Plaintiff clearly knows." Appellant has failed to provide any citations to her record extract or to the record wherein disposition of the vehicle was made by the court. Because this issue, like the plethora of other issues raised in this appeal, were neither tried nor decided by the trial court, we decline to grant appellate review. Maryland Rule 8-131."

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

*Angela McFalls-Ring v. Thomas Blake Neimiller**

CHILD SUPPORT: MODIFICATION: GUIDELINE AMENDMENTS OF 2010

CSA No. 2108, September Term 2010. Unreported. Opinion by Meredith, J. Filed March 28, 2012. 12-0328-04, 25 pages. Appeal from Baltimore County. Result: Reversed

The circuit court committed legal error by not applying the 2010 amendments to the Child Support Guidelines which took effect on Oct. 1, 2010, the day the order was signed, and instead treating this as an above-guidelines case based on the previous guidelines.

"Angela McFalls-Ring appeals from an order which modified the amount of child support that Thomas Neimiller is obligated to pay. McFalls-Ring presents four questions. We answer questions one, two and three in the negative. With respect to question four, we conclude that the circuit court committed legal error by not applying the 2010 amendments to the child support guidelines for support awarded on or after October 1, 2010.

I. MOTION TO STRIKE

McFalls-Ring contends it was legal error for the circuit court to deny the motion to strike Neimiller's complaint for modification of child support. Because McFalls-Ring has not demonstrated any prejudice, she has not met her threshhold burden as an appellant, and we will not consider the issue.

II. UNITARY CHILD SUPPORT AGREEMENT

McFalls-Ring contends that the circuit court failed to exercise its discretion by omitting a discussion of whether the two children reaching the age of majority could be considered a material change for purposes of modification. It is implicit from the court's calculations — applying Neimiller's reduced income to the extrapolated guidelines for only the two minor children — that the court concluded that either, or both, the decrease in income and achievement of the age of majority sufficed as a material change in circumstances.

III. DEDUCTION FOR EXISTING CHILD SUPPORT OBLIGATION

McFalls-Ring contends that, because the "Trupia children did not pre-exist the four children at issue here; nor did the Consent order [entered April 7, 2010] for their support pre-exist the 6/2/06 Judgment providing for the support of children at issue here," the amount Neimiller pays pursuant to the Trupia consent order should not be deducted from Neimiller's adjusted actual income.

When analyzing the existence of a pre-existing obligation under FL §12-201(c)(1), we look for an outstanding child support order for a specific sum. Here, the obligation under the April 7, 2010, Trupia order pre-existed the October 1, 2010, McFalls-Ring order. Therefore, the circuit court did not err in adjusting Neimiller's income by subtracting out the obligation to the Trupia children.

IV. CHILD SUPPORT GUIDELINES

McFalls-Ring contends that the circuit court erred in refusing to apply the guidelines that became effective on the date the court signed the order. We review this legal issue *de novo. Walter v. Gunter,* 367 Md. 386, 391 (2002).

i. Is the Statute Being Applied Retroactively?

In *John Deere Constr. & Forestry Co. v. Reliable Tractor, Inc.,* 406 Md. 139 (2008), the Court of Appeals adopted the analysis regarding retroactivity set forth in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994). In *Muskin v. SDAT,* 422 Md. 544, (2011), the Court of Appeals again applied the *Landgraf* factors.

Looking to the first of the three *Landgraf* factors, we conclude that the period between the statute's enactment on May 4, 2010, and its effective date of October 1, 2010, satisfied the requirement of fair notice. With respect to the issues of reasonable reliance and settled expectations, this Court has stated: "Parents enjoy no prospective guarantees of their future child support obligation." *Bornemann [v. Bornemann,* 175 Md. App. 716, 729 (2007).] Parents cannot claim to have settled expectations regarding child support amounts; nor can parents reasonably rely on the amount not changing.

ii. Is the Statute Remedial and/or Procedural?

Although there exists a presumption generally against retroactive application of a statute, statutes that are remedial or procedural fall under an exception to that presumption. *Doe [v. Roe],* 419 Md. at 702. "If a statute is remedial, there is a presumption that it applies to cases pending at the time of its enactment." *Rawlings v. Rawlings,* 362 Md. *535,* 560 n. 20 (2001).

Langston broadly defined remedial as follows: "Generally, remedial statutes are those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries. … Under Maryland law, statutes are remedial in nature if they are designed to correct existing law, to redress existing grievances and to introduce regulations conducive to the public good." 359 Md. at 408-09.

The legislature enacted the original child support guidelines in 1989 to achieve three goals: "(1) to 'remedy a shortfall in the level of awards' that do not reflect the actual costs of raising children, (2) to 'improve the consistency, and therefore, the equity of child support awards,' and (3) 'to improve the efficiency of court processes for adjudicating child support." *Barton v. Hirshberg,* 137 Md. App. 1, 16 (2001) (quoting *Voishan v. Palma,* 327 Md. 318, 322 (1992)).

The revisions extend the application of the guidelines from incomes of $10,000 a month to $15,000 a month. 2010 Md. Laws 1778-1800. The revised Fiscal and Policy Note accompanying Senate Bill 252 and House Bill 500, upon which the revisions were based, under the "Background" section states:

Since the adoption of the guidelines 21 years ago, it has become

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more common for combined monthly incomes to exceed $10,000 and for more cases to fall outside of the guidelines. The advisory committee recommended increasing the combined monthly income ceiling to $30,000. This change is intended to allow the courts to set a specific amount *and eliminate* discretionary, potentially unequal treatment of families whose income *exceeds the current schedule.*

(Emphasis added.)

These revisions are aimed at updating the existing law, and furthering public good by reducing potentially unequal treatment of child support cases. Therefore, we conclude that the statute amending the guidelines is remedial. The statute is presumed to apply to pending cases on the date that it becomes effective — here, October 1, 2010. *Doe, supra,* 419 Md. at 707-08.

iii. Vested Rights in the Context of a Remedial Statute

Even a remedial statute may not be applied retroactively if it impairs vested rights. *Rawlings, supra,* 362 Md. at 561. Until recently, under Maryland's jurisprudence, the analysis of whether there exist vested rights was almost redundant once a determination was made that a statute is remedial. *Langston, supra, 359* Md. at 423 (quoting 2 NORMAN J. SINGER, SUTHERLAND'S STATUTORY CONSTRUCTJON, *supra,* § 41.16, at 429 n. 12).

Prince George's County v. Longtin, 419 Md. 450 (2011), calls into question the previous approach. In *Longtin,* the Court of Appeals held that applying a statutory damages cap to injuries that occurred prior to the effective date of the act deprived the injured party of a "vested right" to damages, despite the fact that no damages had yet been awarded.

In the present case, because there is no temporally discrete factual scenario relating to child support, and the obligation for support is continuing and subject to modification, no vested rights are impacted by the application of the 2010 amendments to child support orders entered on or after October 1, 2010, and applicable to obligations on and after that date.

In the final analysis, we conclude that either approach leads to the same conclusion: for any child support award not effective prior to October 1, 2010, the circuit court was required to apply the 2010 amendments. Because the combined adjusted actual income of the parties in this case was less than $15,000, the [amended] guidelines would have provided a presumptively correct amount for child support. The amount required by the 2010 revision is greater than the amount the court determined by extrapolating from the previous guidelines. We reverse and remand this case with instructions that the circuit court apply the 2010 amendments to the guidelines for any child support amount from October 1, 2010, onward.

Because, on remand, this case will be a guidelines case, we do not need to address whether there was any error in the court using the SALSI-CALC software to extrapolate from the guidelines." *Slip op. at various pages, citations and footnotes omitted.*

*Percy Lee Sanders, Jr. v. DHR, Calvert County Bureau of Support Enforcement Ex Rel. Jamie Lynn Sanders**

CHILD SUPPORT: CONTEMPT: ABILITY TO PAY

CSA No. No. 2386, September Term, 2010.Unreported. Opinion by Sharer, J. Filed March 20, 2012. RecordFax #12-0320-03, 7 pages. Appeal from Calvert County, Lombardi, J. Affirmed.

Appellant's testimony about other bills he paid during a six-month period directly contradicted his claim that he was unable to make any payments whatsoever toward his court-ordered child support obligations during that time.

"Percy Lee Sanders, Jr., was found to be in contempt of court for failing to pay court-ordered child support. In his appeal, Sanders asserts that the circuit court erred in finding him in contempt, based upon his meager earnings. We find no error and shall affirm.

HISTORY

The genesis of this appeal is the divorce of appellant and Jamie Sanders. On February *5,* 2007, Sanders entered into a consent order in that case, agreeing to pay $650 per month for the support of his two minor children.

On June 17, 2010, the Department filed a petition to cite Sanders for contempt based on his delinquency in the payment of support. At the time of the hearing, the total amount due was $5,200. Sanders had not made a payment in more than six months.

Sanders, a 59-year-old with a Bachelor of Science degree in economics, testified that he was a licensed mortgage originator and licensed general contractor, and that he had earned just $3,000 in the preceding six months. At the time of the hearing he was employed at two commission-based jobs, and "looking for additional work," but because the "economy took a terrible turn for the worse," it had become very difficult for him to continue paying child support, although he was seeking "other sources of income to try to be able to pay."

The court found that although Sanders had sufficient income to allow him to make mortgage payments, auto loan payments, and meet household living expenses, "not a dime has been paid toward the child support."

The court sentenced appellant to 179 days incarceration, subject to a purge provision of $2,600. The Department did not object to work release, which the court granted. The purge amount was paid the following week.

DISCUSSION

Sanders argues that the court erred in finding him in contempt, and in finding that "he had failed to meet his burden, under Md. Rule 15-207(e)(3)(A), to show that he 'never had the ability to pay more than the amount actually paid' and 'made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment." Sanders emphasizes that, although he had billed approximately $20,000 for work performed in 2010, he only received payment for "two to $3,000 of that money." The Department responds that the "lower court correctly found Sanders in contempt of court when his testimony established that he worked two jobs, supported his adult daughter, and made mortgage payments, yet failed to make a single payment for six months toward his court-ordered child support obligation."

In reviewing the trial court's decision, this Court will not reject findings of fact unless they are clearly erroneous. Md. Rule 8-131(c).

Because it was undisputed that Sanders failed to pay any child support for a period of six months, the Department met its burden of

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showing "that … the alleged contemnor failed to make the court-ordered payments." *Jones v. State,* 351 Md. 264, 273 (1998).

Rule 15-207(e)(3) provides for when a finding of contempt may not be made:

The court may not make a finding of contempt if the alleged contemnor proves by a preponderance of the evidence that (A) from the date of the support order through the date of the contempt hearing the alleged contemnor (i) never had the ability to pay more than the amount actually paid and (ii) made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment, or (B) enforcement by contempt is barred by limitations … .

In interpreting this rule, the Court of Appeals has said: "Obviously, the court is not required to believe everything (or anything) any witness says, especially when it is unsupported by other evidence, but the court may not ignore credible and uncontroverted evidence of a defendant's impecunious circumstances … . A defendant claiming poverty may be questioned regarding that claim, and other evidence, together with reasonable inferences from other evidence, may be considered, both for its own value and as affecting the defendant's credibility." *Arrington v. Human Resources,* 402 Md. 79, 102 (2007).

Sanders argues that the evidence supported his position that, although he was doing everything he could to obtain the funds, he never had the ability to pay more than the amount he actually paid because he had only received $3,000 in income from February through September, 2010. The court rejected those arguments based on his testimony that he had made five monthly mortgage payments of $1,167 each, as well as payments for his automobile and household living expenses for himself and his adult daughter, during that same period. Because these expenses paid by Sanders clearly exceeded $3,000, the evidence directly contradicted his claim of the inability to pay more than he did toward the court-ordered child support. *See Arrington,* 402 Md. at 102.

We find no error in the court's finding of contempt for failing to make *any* payments whatsoever toward his support obligations during the time in question." *Slip op. at various pages, citations and footnotes omitted.*

*David Schwinger v. Juliann Koch F/K/A Juliann Schwinger**

DIVORCE: SEPARATION AGREEMENT: ENFORCEMENT

CSA No. 0182, September Term, 2011. Unreported. Opinion by Zarnoch, J. Filed March 23, 2012. RecordFax #12-0323-11, 22 pages. Appeal from Montgomery County, Greenberg, J. Affirmed.

Each provision in the Separation Agreement constitutes an independently enforceable transaction, so the doctrine of res judicata does not bar successive petitions for contempt based on different breaches of the agreement.

"David Schwinger appeals several rulings made in favor of his former wife, Juliann Koch.

FACTUAL AND PROCEDURAL BACKGROUND

Schwinger and Koch were divorced on May 23, 2005. The Judgment incorporated but did not merge the parties' August 30, 2004 Voluntary Separation and Property Settlement Agreement. The Agreement imposed upon Schwinger a number of obligations, including monthly alimony payments, child support payments, and the payment of two $25,000 monetary awards in September 2008 and 2009. The Agreement provided further:

It is the intention of the parties that each promise, covenant and provision of this Agreement be deemed independent…Each and every obligation…set forth in any provision of this Agreement shall be enforceable by contempt proceedings …or by any other legal or equitable action …

On August 6, 2009, Koch filed a Petition for Contempt and Other Relief seeking enforcement of the Agreement as to child support and alimony and asking the court to hold Schwinger in contempt of the Judgment of Absolute Divorce.

Schwinger answered and demanded a jury trial. He indicated that he had been terminated from his partner position at his former law firm, and that Koch had agreed to reduce his alimony payments and suspend child support payments on June 7, 2009. Schwinger asserted that he had "actively pursued employment with other law firms" to no avail, and had made several attempts with Koch's attorney to "discuss the outstanding issues," but received no response.

Schwinger was held in contempt and ordered to pay $69,240.65 in alimony and child support arrearages. Full payment was made on January 15, 2010, after Schwinger allegedly borrowed on his home equity line and against a real estate investment.

On June 1, 2010, and on June 17, 2010, Koch sent Schwinger Notifications of Breach which stated additional defaults. On June 24, 2010, Koch filed a Complaint for Enforcement of Voluntary Separation and Property Settlement Agreement and Judgment of Absolute Divorce, grounded in Schwinger's purported repeated failures to make payments.

Schwinger moved to dismiss, arguing that the matters "could have been raised" by Koch at the December 10, 2009 hearing, and were now barred by *res judicata.* The court denied the motion to dismiss.

On February 14, 2011, the court heard both the Petition and Complaint. The hearing ultimately concluded on February 15. The court took the matters under advisement, issuing a memorandum opinion and order on March 10. The court held Schwinger in constructive civil contempt by virtue of his non-payment of alimony; determined the amount of alimony arrearage to be $65,901.00; entered a judgment in the amount $196,378.84;6 and, ordered that, if the alimony arrearage was not paid by March 17, 2011, a body attachment would be issued so that Schwinger could be "apprehended and jailed."

Schwinger noted a timely appeal. We affirm the rulings.

DISCUSSION

Res Judicata

Schwinger contends that the circuit court erred in ruling that res judicata did not apply to Koch's Complaint for Enforcement. Koch points out that although all her claims arose from a single contract, each provision in the Agreement constitutes an independently enforceable transaction. The circuit court so held, and we agree.

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Under the doctrine of res judicata, a claim is barred if the following three elements are satisfied:

(1) [The] parties in the present litigation are the same or in privity with the parties to the earlier dispute;

(2) [the] claim presented in the current action is identical to the one determined in the prior adjudication; and

(3) [there] was a final judgment on the merits.

In the instant matter, there is no dispute as to the first and third elements. Accordingly, we review the circuit court's ruling as to the second element.

To determine whether two causes of action are the same for the purposes of *res judicata,* the Court of Appeals had adopted the "transaction test," codified in §24 of the Restatement (Second) of Judgments (1982). *See also Kent County Bd. of Education v. Bilbrough,* 309 Md. 487, 499 (1987).

Schwinger cites *Gonsalves v. Bingel,* 194 Md. App. 695 (2010), but we find it inapposite. Unlike that case, we are confronted with a single contract containing multiple provisions and obligations. The August 6, 2009 Petition for Contempt sought judgment as to alimony and child support for the months of June and July 2009. In contrast, the June 24, 2010 Complaint for Enforcement involved breaches that took place over the course of several months and years.

Comment d to the Restatement provides a more apt analogy and an example where *res judicata* would not apply because the wrongs alleged do not constitute a single transaction.

Here, Schwinger's obligations primarily relate to each other in that they are set forth in the same Agreement. But the Agreement specifically notes that each provision is "independent," and that "each and every obligation" may be enforced by legal equitable action. Thus, although obligations arose under the same Agreement, there is no indication that the parties should have expected that all claims related to the Agreement would be brought in a single suit. The second element of the *res judicata* analysis remains unsatisfied.

Motion to Strike Jury Demand

Schwinger contends that the Complaint presented mixed issues of law and equity, which entitle him to a jury trial. It is well-settled in Maryland that a party in a civil contempt action is not entitled to a jury trial. *Bryant v. Howard County Dep't of Soc. Servs.,* 387 Md. 30 (2005). In addition, there is no right to a jury trial when a party seeks to enforce a settlement agreement by specific performance — an equitable action. *See Calabi v. GEICO,* 353 Md. 549 (1999).

Request for Continuance

Schwinger argues that the February, 2011 hearing was improper because the trial court abused its discretion in deciding to proceed without him.

Md. Rule 2-508 allows the court to "continue a trial or other proceeding as justice may require." Here, once it became clear that the matter would not be resolved in one day and that Schwinger would be unavailable to testify, the court considered Schwinger's experience with the court system, stating: "The matter was set today. [Schwinger] is an attorney. He knew or should have known that the possibility existed … that we might be here tomorrow or maybe the day after." Nevertheless, the court allowed Schwinger to testify out of turn and present his case before departing on his trip. We hold that the trial court did not abuse its discretion, as it did not routinely proceed in Schwinger's absence, but instead afforded him an opportunity to testify first.

In a civil contempt case such as this, a defendant is "entitled to receive notice of the alleged violation, if incarceration is sought, the right to be represented by counsel and appointed counsel if indigent, and an opportunity to be heard on the merits of the charge of contempt." *Jones v. State,* 351 Md. 264,273-74(1998). These procedures were clearly satisfied.

Schwinger's present ability to pay

Schwinger contends that the trial court erred when it found that he had the present ability to pay the remainder of his alimony arrearages — i.e., the purge amount of $65,901. Because Schwinger purged the contempt and was never incarcerated, the argument is moot. Even if the issue were not moot, we would not find in Schwinger's favor.

Schwinger admitted that he had a net worth of more than $400,000. This testimony supports the trial court's finding that Schwinger had the present ability to comply with the purge provision, even if it required him to sell investments at an undesirable amount.

Contrary to Schwinger's assertion, this case presents a factually different scenario from *Young v. Fauth,* 158 Md. App. 105 (2004). Schwinger was never incarcerated. In addition, the purge provision, which provided Schwinger seven days to pay $65,901, did not obligate him to obtain funds from a specific source." *Slip op. at various pages, citations and footnotes omitted.*

*Judithann Wankerl v. Tony Scott Wankerl**

DIVORCE: CUSTODY AND SUPPORT: MONETARY AWARD

CSA No. 422, September Term, 2011. Unreported. Opinion by Berger, J. Filed April 3, 2012. RecordFax #12-0403-08, 29 pages. Appeal from Howard County. Result: Affirmed in part, reversed in part.

Lack of communication and the presence of mutual abuse between divorcing parents were just two factors to be considered in determining physical and legal custody of the parties' children, and not dispositive; nor was the court required to make findings to support a deviation from the Child Support Guidelines in what was clearly an above-guidelines case. However, a limited remand is required to recalculate the amount of the wife's *Crawford* credits in setting the amount of the marital award.

"This case arises from an Order granting joint physical and legal custody of the marital child and awarding child support and a monetary award to appellee Tony Wankerl ("Husband"). We affirm the judgment. We remand for the limited purpose of recalculating Wife's *Crawford* credits when arriving at the amount of the monetary award.

BACKGROUND

Husband and Wife met in 1996 while they were employed at Fort Meade. Husband was a military employee while Wife was a civilian. Wife was married to another man at the time. The parties were married on June 1, 1999.

At the time of the marriage, Wife had two daughters from her

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previous marriage. Wife gave birth to the marital child ("Son"). A few years after the marriage, Wife decided to open her own company, Celerity Technical Services Inc. Wife hired Husband as a salaried employee. Husband made as much as $175,000 per year for his work with Celerity.

The marriage became more and more strained. Wife testified to no less than seven occasions on which Husband physically abused her, including pushing and choking her. Husband countered that there were many occasions on which Wife physically abused Husband, including hitting him with shoes.

Husband filed for divorce on February 4, 2009. The special master awarded pendente lite custody and child support to Wife.

Thereafter, the Circuit Court held hearings on the merits. The court granted joint physical and legal custody of Son and awarded Husband child support of $433 per month and a monetary award of $470,000. Wife filed an appeal.

DISCUSSION

I.

Wife contends the unrefuted evidence of abuse should have resulted in sole custody to [her]. Second, Wife maintains that sole custody should have been awarded to her because of the difficulty in communication between Husband and Wife. These contentions, however, address only two of the many factors that the circuit court reviewed in arriving at its decision. Moreover, neither factor is dispositive.

Section 9-101.1 of the Family Law Article provides that a court must take abuse of those other than the child into account when determining custody. Specifically, Wife cites *In re Adoption No. 12612*, 353 Md. 209 (1999) (hereinafter *In re Cornilous*).

In *In re Cornilous*, the Court of Appeals held that §9-101.1 was enacted because the legislature believed that violence directed at other family members "will eventually be directed against [the child] as well." Therefore, courts must "give due consideration to such violence in determining what is in a child's best interest." *Id.* at 237.

It is unrefuted that Husband and Wife were both verbally abusive to each other. There also was evidence presented that Husband and Wife were both physically abusive toward each other. The circuit court came to the conclusion that the abuse was due to a failing marital relationship. The court concluded that since the abuse had persisted over time while never extending to Son, the abuse was not likely to extend to Son.

Wife's second contention is based on *Taylor [v. Taylor*, 306 Md. 290 (1986)]. In *Taylor*, the Court of Appeals specifically held that the most important factor in determining whether to award joint custody is "the capacity of the parents to communicate and to reach decisions affecting the child's welfare." Husband and Wife clearly demonstrated difficulties in reaching decisions. Nevertheless, the parties dispute to what extent these difficulties were attributable to Wife and to Husband. Moreover, the Court of Appeals cited twelve specific factors and one additional factor which gives a circuit court the ability to take any other factors into consideration that it deems necessary when awarding joint custody.

Because the circuit court carefully evaluated the *Taylor* factors and explained why the factors militated in one direction or another, it was not an abuse of discretion to award joint physical and legal custody.

II.

Wife maintains that the court was required to make findings of fact concerning the amount of child support required under the guidelines, how the order varies from the guidelines, and how the findings serve the best interests of the child. § 12-202(a)(2)(v).

This contention is misplaced. Section 12-202(a)(2)(v) only applies when a court deviates from the guidelines. There are no guidelines for the income levels presented in this proceeding. The court was simply required to use its discretion in granting an award consistent with the goals and objectives of the guidelines.

III.

A. *Crawford* Credits

Wife contends the circuit court erred in its calculation of *Crawford* credits. *Crawford* credits derive from "the general law of contribution between co-tenants of jointly owned property [which] applies when married parties, owning property jointly, separate. A married, but separated, co-tenant is, in the absence of an ouster (or its equivalent) of the nonpaying spouse, entitled to contribution for those expenses the paying spouse has paid." *Flanagan v. Flanagan*, 181 Md. App. 492, 539 (2008). Typically, when one co-tenant pays the costs of the jointly owned property, he or she is entitled to contribution from the other party. *Id.* at 540.

Wife maintains the calculation was incorrect because Husband was afforded a credit for the full $1,192 he was ordered to pay after the *pendente lite* hearing. Wife contends this payment was for child support and not the mortgage.

Because the evidence is clear that the $1,192 payments were, at least partially, for child support, the circuit court abused its discretion by awarding the full $1,192 to husband when calculating Wife's *Crawford* credits.

While *Crawford* credits are discretionary, the circuit court should have analyzed the *pendente lite* order to determine what portion of the $1,192 was for child support. After completing this analysis, the court is free to use its sound discretion in awarding the *Crawford* credits it deems appropriate.

B. Valuation of Celerity

There was no dispute between the parties that at least a portion of Celerity was marital property. Wife contends that at least some portion was due to Wife's personal goodwill, and therefore, not marital property.

"In order for goodwill to be marital property, it must be an asset having a separate value from the reputation of the practitioner." *Prahinski v. Prahinski,* 321 Md. 227, 239 (1990). Therefore, goodwill that is personal to a practitioner is not generally considered marital property.

Wife's expert determined that Celerity was valued at $1,300,000 with all but $130,000 attributed to Wife's personal goodwill. Husband's expert determined Celerity was valued at $940,000 with $150,000 attributable to Wife's personal goodwill.

The circuit court agreed with the value of Celerity determined by Husband's expert. It, however, came to the conclusion that "the goodwill described by the parties at trial is the kind of goodwill capable of sale" and, therefore, marital property. *Hollander,* 89 Md. App. at 164-69. The circuit court was not clearly erroneous." *Slip op. at various pages, citations and footnotes omitted.*

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CASE INDEX

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