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Summaries of all unreported family law cases

IN BRIEF

FEATURES

Court of Appeals bars paternity test

By Steve Lash
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A man who claims he impregnated his girlfriend while she was separated from her husband has no right to a paternity test, Maryland's top court has held.

William Corbett was seeking visitation rights with the child born to Amy Mulligan, who divorced Thomas Mulligan during her pregnancy but later remarried him.

The Court of Appeals said the timing of the Mulligans' divorce did not rebut the legal presumption that a woman's husband at the time of her child's conception is the father.

The top court reversed the Court of Special Appeals, which said last year that Corbett had a right to a paternity test because the girl, now 2, was "born out of wedlock."

That decision, which was stayed pending review by the Court of Appeals, took too narrow a view of the law, the top court said.

"Equating wedlock with matrimony, the Court [of Special Appeals] seems to have construed 'born out of wedlock' literally and thereby failed to recognize that the phrase, when applied to a child, is a euphemism for an illegitimate child or a bastard…," Judge Lawrence F. Rodowsky wrote for the majority. "Parents who divorce during the pregnancy of the wife do not, by the divorce alone, delegitimate their child."

Rather, the child is "presumptively legitimate, based on her having been

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COMITY

Maryland allows same-sex couple to divorce here

By Steve Lash
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Not even a successful petition drive could tear asunder the Maryland high court's decision requiring the state to recognize as valid the marriages of same-sex couples who lawfully wed in other states.

The Court of Appeals said recognition is required by the legal doctrine of comity — under which one state accepts the legal judgments of another — because same-sex marriage is neither "repugnant" to the state's public policy nor expressly prohibited by state law.

A Maryland state law permitting same-sex marriages is slated to go into effect Jan. 1. But that law, the Civil Marriage Protection Act, will be put before Maryland voters this fall, as opponents of the measure have secured the votes to put it on the ballot on Election Day.

In a footnote, the court said its decision will stand even if the law is defeated on Nov. 6, as that would merely leave the status quo in place.

Attorney Susan Sommer, senior counsel to Lambda Legal in New York, called that footnote vitally important.

"No matter what happens, these marriages get respect when entered out of state," said Sommer. "This opinion shows an independent path to having your marriage respected in Maryland."

Even so, she said, it "seems downright silly" to compel people to leave Maryland for the limited purpose of getting married.

State Sen. Jamin B. "Jamie" Raskin, chief sponsor of the Civil Marriage Protection Act, also called the decision's continued vitality "a crucial point." But

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Debtor over-counted her kids

By Pat Murphy
Dolan Media Newswires

A debtor could not count each of her children and step-children as full members of her "household" when calculating her disposable income under the Bankruptcy Abuse Prevention and Consumer Protection Act, the **4th U.S. Circuit Court of Appeals** has held.

Under the act, the calculation of a Chapter 13 debtor's projected disposable income takes into consideration the size of her "household." Congress did not define what constitutes a household in the Act.

In this case, the debtor's proposed Chapter 13 plan claimed a household of seven members, counting each person who resided in her home for any period of time within the prior six months. The debtor included herself, her current husband, her two children from a previous marriage, and her three step-children.

A creditor objected, contending that the debtor overstated the size of her household because the five children only lived in her home approximately half the time due to existing custody arrangements.

The bankruptcy judge in Raleigh, N.C., found that the debtor's "heads-on-beds" approach was an inappropriate measure of the size of her household. Instead, the judge adopted an "economic unit" approach which took into account how much time any part-time residents were members of the debtor's household. Accordingly, the judge determined that the size of the debtor's household was five, counting each child in fractional terms based on their time in residence.

In a 2-1 panel opinion, the 4th Circuit agreed that "Congress' intent will most often be best implemented through a definition of 'household' that is based on whether individuals operate as a single economic unit and are financially interdependent."

Accordingly, the court upheld the method to determine the debtor's household size in this case. The opinion, by Judge G. Stephen Agee, noted that it was the first U.S. appellate circuit to address the issue.

Judge Robert B. King joined Agee's opinion, but Judge J. Harvie Wilkinson III dissented.

"While there is much in the majority's thoughtful opinion with which I agree, I cannot approve the bankruptcy court's decision to break a debtor's children into fractions for purposes of Chapter 13's means test," Wilkinson wrote. "That approach contravenes statutory text, allows judges to unilaterally update the Bankruptcy Code, and subjects debtors to needlessly intrusive and litigious proceedings."

The case is *Johnson v. Zimmer*, US4th No. 11-2034, decided July 11, 2012.

Pat Murphy writes for Lawyers USA, a sister publication of The Daily Record.

Monthly Memo

• Casey Family Services, which provides therapeutic foster care services to about 400 children, is closing and laying off 280 employees. Baltimore-based Annie E. Casey Foundation announced the move on June 26, saying it will discontinue its direct services through New Haven-based Casey Family Services and shift to making grants to child welfare agencies. The foundation said the new strategy would advance stronger practices across the field.

The foundation will move the majority of children and their foster families to other providers by year's end and will remain open next year with a small staff. Employees affected by the closing will receive a generous severance, foundation spokesman Norris West said. Casey Family Services was created in 1976, and provides foster care services to children under state contracts in Maryland and five New England states.

• A Montgomery County lawyer who left his clients in the lurch has been disbarred by the Court of Appeals. The complaints against Ranji M. Garrett came from nine separate family-law clients. In one divorce case, Garrett was paid $800 but never served his client's spouse; the case was dismissed for want of prosecution. In another, a soldier on active duty in Iraq hired Garrett to represent him in a divorce. Garrett took a $2,500 fee but did not appear at a hearing. "Anything less than disbarment in this case would be a gross disservice to the public," the opinion says. The per curiam opinion from the Sept. 2010 term, published June 25, is available on the court's website.

• Save the date: The American Academy of Matrimonial Lawyers and the University of Baltimore School of Law are presenting "Family Law 101: Basics for the New Practitioner" on Sept. 21 and 28, at the law school. For more information, visit http://www.lerc-hearly.com/news_events/658-family-law-basics-new-practitioner.

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Paternity

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conceived during marriage," added Rodowsky, a retired judge sitting by special assignment.

Intact family

Corbett could have rebutted the presumption of legitimacy under the Estates and Trusts Article by showing that a paternity test is in the child's best interest, the high court ruled.

Corbett argued it would be in the girl's best interest to know for certain who her father is, both for bonding purposes and to know her future medical needs.

But the court agreed with Frederick County Circuit Court Judge Theresa M. Adams' conclusion in May 2010 that the test was not in the girl's best interest, as she was well-cared-for and in an intact family that provided stability.

The Mulligans, who reconciled in 2010 and remarried last July, have three children in addition to the girl, now 2. Amy Mulligan said the girl has formed a strong bond with Thomas Mulligan.

Her lawyer, Laura N. Venezia, of Conklyn & Associates in Frederick, said the case, with its unusual facts, will stand for the proposition that a child is "born in wedlock" if the mother was married at either the time of conception or birth.

University of Baltimore School of Law professor Jane C. Murphy said the decision follows the court's precedent instructing judges to rule based on the child's best interest and that a child conceived during marriage is legitimate.

"The underlying policy of legitimizing children and protecting intact marital families seems to be preserved here, and that's the underlying policy of the Estates and Trusts Article," said Murphy.

But Judge Mary Ellen Barbera, in dissent, said the statute was clear and that "born out of wedlock" refers to "the mother's marital status in relation to the child's biological father at the time of the child's birth."

Retired Judge Irma S. Raker, who also sat by special assignment, joined Barbera's dissent.

Keith N. Schiszik, Corbett's attorney, declined to comment on the decision. Schiszik is with Day & Schiszik in Frederick.

Both sides acknowledge Corbett was romantically involved with Amy Mulligan in spring 2009, prior to her divorce that September.

The girl was born Jan. 23, 2010.

Amy Mulligan swore during her divorce proceedings that she and her husband had lived separate and apart since April 4, 2008, satisfying the one-year voluntary separation requirement.

However, in opposing Corbett's request for a paternity test in circuit court, Thomas Mulligan testified that he and Amy had sex in April 2009, belying Amy's sworn testimony but raising the possibility that he is in fact the girl's biological father.

During the paternity-test hearing, Amy Mulligan was asked about the inconsistency and declined to answer, citing her Fifth Amendment privilege against self-incrimination.

WHAT THE COURT HELD

Case: *Amy Mulligan v. William Corbett,* CA No. 43, Sept. Term 2011. Reported. Opinion by Rodowsky, J. (retired, specially assigned). Dissent by Barbera, J. Argued Dec. 1, 2011. Filed May 23, 2012.

Issue: Did the judge err in rejecting the paternity-test request of a man who conceived a child with a woman who divorced her husband before giving birth?

Holding: No; the child is presumed to be the offspring of the husband and wife since they were married at time of conception, and a paternity test would not be in the child's best interest.

Counsel: Laura N. Venezia for Petitioner; Keith N. Schiszik for respondent.

RecordFax # 12-0523-22 (62 pages).

Same-sex

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he, like Sommer, said his favored result would be to permit same sex couples to have their nuptials — and the money that generates — in Maryland.

"Essentially, the proponents of a referendum are inviting Maryland to create a legal regime in which our citizens can get married in other states and have their marriages recognized in Maryland, but they cannot get married in Maryland," said Raskin, D-Montgomery. "That argument should be rejected by the hotels, bed and breakfasts, caterers, wedding planners and wedding bands in the state of Maryland. Why should we shoot ourselves in the foot and not recognize our own same-sex marriages?"

But Derek McCoy, who helped lead the petition drive, said in a statement that he was not discouraged by the May 18 decision.

"Today's decision by the Maryland Court of Appeals does not at all affect the commitment that Maryland voters have to protecting the definition of marriage as a union between one man and one woman," the statement said. "This is merely an example of how the courts and the legislature continue to be out of step with the clear will of the people."

Public policy question

While observers on both sides see the case as favoring same-sex marriage, the fundamental issue was whether a state court could grant a divorce to a lesbian couple who were legally married in California.

Prince George's County Circuit Judge A. Michael Chapdelaine had denied Viriginia Anne Cowan and Jessica Port's divorce petition in 2010, finding it "contrary to the public policy of Maryland."

The Court of Appeals, in its decision, sent the case back to the circuit court with instructions to grant the divorce.

Sommer and Leslie R. Stellman, of Pessin & Katz, represented Cowan before the Court of Appeals.

In contrast to Chapdelaine, Anne Arundel County Circuit Court Judge Ronald A. Silkworth and Baltimore County Circuit Court Judge Susan Souder have granted divorces to same-sex couples.

The Court of Appeals cited those decisions in explaining why it was necessary to render a binding decision.

"Maryland recognizes liberally foreign marriages, even those marriages that may be prohibited from being formed if conducted in this state," Judge Glenn T. Harrell Jr. wrote for the high court.

See SAME-SEX *page 5*

Looking at permanency through a new lens

Maryland is seeking to improve outcomes of young adults transitioning from foster care into adulthood. To further that effort, a conference titled "New Visions For Permanency: Looking at Permanency Through a New Lens" was held on June 21.

The conference, produced by Maryland Legal Aid and attended by more than 300 people, was an educational opportunity for judges, attorneys, and social work professionals to introduce new perspectives and solutions concerning transitioning foster youth. Funding was provided by Maryland judiciary's Foster Care Court Improvement Project.

By Christopher Ziemski
Guest Column

The conference was developed in partnership with the Maryland Association of Resources for Families and Youth, the Maryland Dept. of Human Resources, the Maryland Court Appointed Special Advocate Assoc., and many other organizations.

DHR Secretary Ted Dallas kicked off the conference by highlighting DHR's efforts towards permanency. He hailed DHR's Place Matters program as "a tremendous initiative move toward permanence." He added that DHR had helped 3,200 children find permanency through adoption and guardianships statewide.

According to Dallas, one half of foster care youth in Maryland are older than age 14, and about one-fourth of them (25 to 27 percent) are over 17. These statistics, he said, reinforce the urgency for all stakeholders to work together to craft new strategies for transitioning these vulnerable youth into successful adulthood.

Following the secretary's remarks, a youth panel spoke from their own experiences in the system. They emphasized that the sudden end to services triggered by a 21st birthday creates numerous challenges not faced by their contemporaries who are not in the system.

The panelists made concrete recommendations for change. For example: Create a one-stop center for former foster youth who were still struggling with living independently. Such a center could offer on-site, short-term transitional housing to alleviate homelessness in this population, along with employment, health, mental health, and other services.

One of the conference's many different training sessions focused on how transitioning youth can prepare for independence. This panel included Master Richard Maslow from the Circuit Court of Allegany County, Charles County Circuit Judge Amy J. Bragunier, and two former foster youths.

Judge Bragunier noted that most individuals, on average, do not live on their own until they are 26. The lack of affordable and available housing, employment training opportunities, and employment were discussed as unmet needs for these young adults.

The discussion turned to the topic of the impact of a transitioning foster youth's criminal records on housing and employment. During that discussion, the youth panel noted the importance of providing former foster youth access to, and assistance with, expungement procedures.

Another session featured a panel discussion on engaging fathers in child welfare cases. Panelists included Mimi Laver, director of legal education at the American Bar Association's Center for Children and Families, Jessica Kendall of Child and Family Policy Associates, James Worthy from the Center for Urban Families, and Mark Matthews, founder of Clean Slate America.

The panel focused on the importance of taking extra steps to locate and engage fathers whose children are involved with the foster care system so that a child can have some connection to his or her paternal side of the family. Increased positive outcomes for youth with fathers involved in the foster care system were presented, including reduced rates of teen pregnancy and better scholastic performance.

On the legal issues track, two sessions addressed the meaning of the requirement that the local social service agency provide reasonable efforts to the families it serves.

Mitchell Y. Mirviss, the pro bono lead counsel for children in *L.J. v. Dallas*, gave a rousing presentation on the federal and state laws regarding findings of reasonable efforts from a child advocate's point of view.

Mirviss suggested reasonable-efforts requirements should be viewed as a "report card" on the efforts of the local Department of Social Services to create permanency and urged the audience to resist applying a "rubber stamp" to the reasonable efforts requirement. He also emphasized the court's broad judicial authority to remedy reasonable efforts problems.

Baltimore City Circuit Judge Robert B. Kershaw and Court of Special Appeals Judge Christopher B. Kehoe followed with presentations on the judicial perspectives on reasonable-efforts findings.

Judge Kershaw underscored the importance of all parties working together to help reunify families and craft solutions for foster youth. Judge Kehoe discussed the standards of review that the appellate court uses and how that interfaces with reasonable efforts cases.

In sum, the conference covered a wide variety of topics and the workshops provided a forum where professionals from a variety of related fields were able to discuss their new visions for permanency for older youth in foster care.

The passion for finding better solutions for foster youth that the various panels demonstrated impressed the attendees and opened up new perspectives into how to view the needs of foster youth transitioning into adulthood.

Christopher Ziemski is a staff attorney in the Child Advocacy Unit of Maryland Legal Aid in Baltimore.

Same-sex

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"Liberal recognition of out-of-state marriages promotes uniformity in the recognition of the marital status…," Harrell wrote. "Further, the recognition of foreign marriages instills stability in one of the most important of human relations."

Harrell also noted that the high court has provided "liberal recognition" of marriages valid in other states, such as Pennsylvania common-law marriages and a Rhode Island-approved marriage of an uncle and his niece.

The opinion also noted that the General Assembly has never barred same-sex marriage and has enacted laws supportive of same-sex couples short of marriage, granting them medical decision-making rights and exemptions from recordation, transfer and inheritance taxes.

The court also cited Attorney General Douglas F. Gansler's February 2010 advisory opinion that state agencies should recognize as married same-sex couples legally wed in other states. In that non-binding opinion, Gansler predicted that the Court of Appeals would find that comity should prevail.

"This pattern permits an inference, which we take, that the General Assembly intended the doctrine of comity regarding foreign same-sex marriages to remain the proper analysis to employ here," Harrell wrote. "A valid out-of-state same-sex marriage should be treated by Maryland courts as worthy of divorce, according to the applicable statutes, reported cases and court rules of this state."

Six states and the District of Columbia permit same-sex couples to lawfully wed. The states are Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont, the opinion noted.

WHAT THE COURT HELD

Case: *Port v. Cowan,* CA No. 69, Sept. Term 2011. Reported. Opinion by Harrell, J. Argued April 6, 2012. Filed May 18, 2012.

Issue: Must the circuit court grant a divorce to a same-sex couple validly married in another state and who otherwise meet the criteria for divorce under Maryland law?

Holding: Yes; Maryland must recognize the couple's lawful out-of-state marriage, and if appropriate grant a divorce, under the "comity" doctrine, as same-sex marriages are neither "repugnant" to the state's public policy nor expressly prohibited by state law.

Counsel: Shannon Minter for petitioner; Leslie R. Stellman and Susan Sommer for respondent.

RecordFax # 12-0518-20 (23 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.

*Jennifer Lynn Anthony-Call v. Brian Keith Richardson**

PATERNITY TESTING: AFFIDAVIT OF PARENTAGE: FINALITY

CSA No. 0985, September Term, 2011. Opinion by Wright, J. Unreported. Filed May 18, 2012. RecordFax #12-0518-09, 7 pages. Appeal from Caroline County. Affirmed.

The circuit court properly denied the mother's motion to order genetic testing to disestablish paternity of her child, where an affidavit of parentage had been signed more than 60 days earlier and the mother failed to challenge it on the statutory grounds of fraud, duress or a material mistake of fact.

"Appellant, Jennifer Anthony-Call, appeals from an order of the Circuit Court denying her motion for paternity testing. On November 17, 2010, Anthony-Call sought to disestablish the paternity of one of her children. An affidavit signed after the birth of the child established appellee, Brian Richardson, to be the father. On March 23, 2011, Anthony-Call moved for paternity testing, and the court denied her motion on June 14, 2011. This timely appeal followed.

In her brief, Anthony-Call presents nine questions, spanning over four pages. Anthony-Call provided legal argument to support her contentions regarding her requests for paternity testing and the trial judge's recusal. We will discuss those issues below. With regard to the remaining issues, Anthony-Call did not provide any argument, and therefore, we decline to address them. See Md. Rule 8-504(a)(6).

Facts

Anthony-Call and Richardson had a romantic relationship beginning in 1997 and ending in 2010. The relationship produced two children, Aiden, born in 2001, and Madeline, born in 2006. While Aiden is the biological child of Richardson, there was some uncertainty about Richardson's biological relation to Madeline. Richardson and Anthony-Call nevertheless signed an affidavit of parentage certifying that Richardson was Madeline's father; both parties signed with knowledge that Richardson may not be biologically related to the child. That affidavit has never been modified since its creation, and no other individual has been found to be Madeline's father. Anthony-Call's current husband initially claimed to be the father of Madeline in a previous hearing, but later withdrew that assertion. Richardson is named as the father on Madeline's birth certificate.

Discussion

I. The court did not err in determining that the affidavit signed by Richardson was legitimate and that Anthony-Call could not contest it.

The circuit court did not err in determining that the affidavit signed by Richardson could not be contested. Under §5-1038(a)(l) of the Family Law Article, "a declaration of paternity in an order is final." FL § 5- 1038(a)(2)(ii) further states that a declaration of paternity may not be modified or set aside even "if the individual named in the order acknowledged paternity knowing he was not the father."

Here, Richardson signed the affidavit of parentage even though he knew that he likely was not the father. Therefore, neither Anthony-Call nor Richardson could disestablish paternity of the child at issue pursuant to this provision of the statute.

Moreover, pursuant to FL § 5-l028(d)(1), "an executed affidavit of parentage constitutes a legal finding of paternity," and it can only be set aside if a signatory to the affidavit rescinds the affidavit in writing within 60 days after execution of the affidavit, if a court sets aside the affi-

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davit in a judicial proceeding relating to the child that occurs within 60 days of the execution of the affidavit, or if challenged more than 60 days after the execution of the affidavit, upon a court's finding of fraud, duress, or a material mistake of fact. In cases where a signatory challenges the affidavit more than 60 days after its execution, the party challenging the affidavit bears the burden of proving fraud, duress, or a material mistake of fact.

In this action brought by Anthony-Call, the 60-day period following the execution of the affidavit had passed. Anthony-Call's only recourse, therefore, was to show fraud, duress, or mistake of fact. Anthony-Call failed to challenge Richardson's affidavit on any of the three enumerated grounds, and therefore, it follows that the affidavit may not be rescinded.

II. The trial judge did not err when she refused to recuse herself from the trial.

Anthony-Call argues that the trial judge, the Honorable Karen Jensen, should have recused herself due to her "relationship" with individuals involved in previous hearings associated with the parties to this case. Specifically, Anthony-Call cites the trial judge's "close[] relationship" with Roger Layton, a police officer. The record reflects that Layton knew Judge Jensen through his previous employment at the courthouse. Roger Layton was never called to testify and, therefore, the issue of recusal as to Layton was never before Judge Jensen.

The issue of recusal, as to the individuals named by Anthony-Call, has not been preserved for our review because Anthony-Call never raised the issue below. Because Anthony-Call failed to raise the issue and file a timely motion, we need not address her contention.

For the foregoing reasons, we affirm the circuit court's judgment."
Slip op at various pages, citations and footnotes omitted.

*Tamika Rachelle Dixon et al. v. Willie Best**

NAME CHANGE: PARENTAL MUTUAL AGREEMENT AS TO NAME: EXTREME CIRCUMSTANCES

CSA No. 2929, September Term 2010. Opinion by Hotten, J. Unreported. RecordFax #12-0510-10, 18 pages. Appeal from Montgomery County. Affirmed.

The child's birth certificate established a mutual parental agreement that the child be given his father's last name, which could be overcome only by a showing of extreme circumstances necessitating a name change; the father's subsequent imprisonment for drug dealing did not meet that standard, since it did not constitute willful abandonment nor did it make the child's continued use of that surname shameful or disgraceful.

"Tamika Dixon gave birth to Gavin on January 11, 2005. The putative father was Willie Best. Dixon completed paperwork giving Gavin her last name, including on his Social Security form. Later, the parties filled out the birth certificate for Gavin, giving him Best's last name. Best was later found guilty of federal drug trafficking charges and remains incarcerated. Dixon filed a "Petition for Change of Name" for Gavin. Best filed an "Affidavit" in opposition. The circuit court denied Dixon's petition, and she timely appealed, presenting the following question:

Whether the Circuit Court committed error in denying Appellant's Petition for Change of Name, when it failed to find extreme circumstances despite the facts that the young child does not know his name was different than his mother's, the biological father had never been involved in the child's life in any appreciable way, the biological father is incarcerated for more than a decade on a federal drug trafficking charge, and the only document with the child's father's surname is his birth certificate?

DISCUSSION

Parents are generally allowed jointly to choose their child's surname, *Lassiter-Geers v. Reichenbach*, 303 Md. 88, 94-95 (1985). However, neither parent "has a superior right to determine the initial surname their child shall bear." *Id.*

In *Lassiter-Geers*, the Court of Appeals addressed a dispute regarding the initial surname of the child. The Court held that "when a father and mother fail to agree at birth and continue to disagree upon the surname to be given the child, the question is one to be determined upon the basis of the best interest of the child."

In *Schroeder v. Broadfoot*, 142 Md. App. 569 (2002), we noted that "unlike in a 'no initial surname' case, the standard applicable to a 'change of name' case is not merely what is in the child's best interests, but whether 'extreme circumstances' warrant the requested change."

In *Dorsey v. Tarpley*, 381 Md. 109 (2004), the Court of Appeals summarized as follows: "If… there was no parental mutual agreement to name the child "Dorsey" at birth, the [lower court] should be guided by the appropriate best interest of the child factors . … If the court determines, however, that an agreement existed at birth, the court, before granting a name change, must be satisfied that 'extreme circumstances' justify that decision."

Dixon agreed on appeal that this is a "change of name" case, maintaining that the circuit court erred by failing to recognize that extreme circumstances existed to necessitate the change.

Extreme circumstances justifying a name change may be shown by "any proof of misconduct by [a parent] which might make the continued use of the name by his children shameful or disgraceful" or evidence that a parent "willfully abandoned or surrendered the natural ties between himself and his children." *West*, 263 Md. at 300.

The Court in *West*, 263 Md. at 301, stated "[t]here are no hard and fast definitions as to the [type] of misconduct required; however, the offense must be of such great magnitude that the continued use of the name by the children would result in significant harm or disgrace to them." The Court of Appeals held that the father, who promptly paid child support, did not willfully abandon his children or sever natural ties with them. Although the father did not see his children frequently, the court discerned that the infrequent visits were attributable to the father working six days a week, living in a small house, and the mother moving with the children 300 miles away.

Additionally, we have noted that "the proponent of the [name] change bears the burden of demonstrating that the name change promotes the best interest of the child." *Lawrence*, 74 Md. App. at 477.

Best was charged and convicted of drug offenses. While these crimes may not reflect highly on his character, the circuit court noted that "the mere fact that [Best] is in jail, even though it's drug trafficking, doesn't make the parent's surname [shameful] or disgraceful." On appeal, Dixon posits that "being a convicted drug dealer is both shameful and disgraceful." However, there was competent evidence to support the circuit court's findings, so those findings cannot be held to be clearly erroneous. *Omayaka*, 417 Md. at 652-53.

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UNREPORTED CASES IN BRIEF *Continued from page 6*

With regard to willful abandonment, Dixon avers that Best "has failed to do anything to ensure any kind of relationship with Gavin," that Best denied paternity before the DNA test, that Best's contact with Gavin since he has been imprisoned is "sporadic, at best." Because Best has been incarcerated, he has been unable to make financial contributions to support Gavin and only calls approximately three times per year. Finally, Dixon concludes that Best's incarceration should be characterized as willful because he knowingly committed the criminal offenses for which he is imprisoned.

The circuit court noted that Dixon signed the birth certificate, agreeing to Gavin's last name being "Best," and that she, not Best, caused Gavin to have a different last name on his social security card and other records. Moreover, the court found Best had not willfully abandoned Gavin or surrendered his right to be involved in Gavin's life. The court relied on Dixon's testimony and Best's affidavit as evidence that Best sought to, and did, maintain a father-son relationship with Gavin. Although Best's expected release is not until 2019, the circuit court did not err in its determination that Dixon had not presented sufficient evidence of extreme circumstances through willful abandonment to necessitate a change of Gavin's last name on his birth certificate." *Slip op at various pages, citations and footnotes omitted.*

*In re: Adoption/Guardianship of Elizabeth G.E.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: PARENTAL UNFITNESS

CSA No. 1870, September Term, 2011. Opinion by Watts, J. Unreported. Filed May 16, 2012. RecordFax #12-0516-10, 31 pages. Appeal from Montgomery County. Affirmed.

The juvenile court did not err in terminating the parental rights of a woman who, due to drug addiction and mental illness, was unable to take care of herself or her child; while the child had expressed her desire not to be adopted and to have her whole family live in a hotel, she had also bonded with her caregiver for the past 18 months and was improving in that placement.

"This appeals involves the grant of the Department's Petition terminating the parental rights of Ashleigh G., appellant, and Paul E., the mother and father of Elizabeth G.E. Appellant raises two issues:

I. Did the circuit court err in terminating parental rights, rather than ordering custody and guardianship to a relative, where Elizabeth did not want to be adopted, and the evidence showed it would be in her best interest to maintain an ongoing relationship with her mother and other maternal relatives?

II. Did the circuit court err in denying the mother's request for an independent evaluation of Elizabeth?

We answer both questions in the negative.

DISCUSSION

I.

Appellant contends the circuit court erred in terminating her parental rights and permitting adoption by Aunt Lisa, rather than ordering custody and guardianship, under which she would have retained the right to maintain contact.

The Department responds that the circuit court properly exercised its discretion based on its finding that appellant was an unfit parent. The Department argues that appellant's "reliance on pain killers ... has rendered her incapable of performing the basic duties of a parent."

The Supreme Court and Maryland appellate courts have recognized that a parent has a fundamental constitutional right to raise his or her children. See, e.g., *In re: Samone H. & Marchay E.*, 385 Md. 282 (2005); *In re: Yve S.*, 373 Md. 551 (2003); *Troxel v. Granville*, 530 U.S. 57,66 (2000).

The presumption is rebutted "by a showing that the parent is either unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest." *Rashawn H.*, 402 Md. at 498. This showing must be established by clear and convincing evidence as set forth in F.L. § 5-323(b). *In re: Adoption/Guardianship Amber R. & Mark R.*, 417 Md. 701, 714 (2011); *Ta'Niya C.*

The circuit court carefully considered the relevant statutory factors, making specific findings based on the evidence.

With regard to services offered, the court observed that "preremoval services were not provided to [appellant], who was not a placement resource due to her history with drug use" and that appellant had been provided numerous services and had participated in: "parenting instruction … during supervised visitation, individual therapy, family therapy, supervised visitation at Ann G.'s home, pain management referrals and treatment, a psychological evaluation, a psychiatric evaluation, and twice weekly drug testing." The circuit court found appellant "is frequently late and often ill," "was slow to engage with the Department, but finally signed a service agreement" on September 18, 2010; had fulfilled some of the obligations imposed by the service agreement [but] had consistent trouble "with timeliness: for visits; for her psychological evaluation; for meetings with the social worker; and for court."

Appellant was unable to follow Dr. Rodriguez's, her pain management doctor's, recommended course of treatment. She has also been "unemployed and dependent on the support of Ann G. throughout the time Elizabeth has been in care."

The circuit court noted that appellant objected to the Petition, but was not seeking reunification; rather she "did not want to let Elizabeth move on to a permanent relationship with anyone else."

The circuit court explained that appellant's "sporadic attendance at the trial spoke volumes about her inability to put Elizabeth first."

As to contact with Elizabeth, the circuit court determined that contact was relatively consistent over the six months leading to trial, "In large measure because Ann G. supervised, and covered for [appellant] when she was late, sick, or unable to do anything but lie in bed during a visit."

The circuit court noted that appellant has a long history of mental and physical health issues, and had been diagnosed with mental disabilities and disorders, as well as addiction to pain killers. Appellant's psychologist, Dr. Zinna, "opined that [appellant's] mental health disorders …are a major impediment to [appellant's] ability to put Elizabeth first."

As to whether "additional services would be likely to bring about a lasting parental adjustment," the circuit court found "no evidence …that more time w[ould] make a difference" [and] that appellant herself "as much as acknowledged this when she withdrew her request for reunification in March 2011." The circuit court found Elizabeth is bonded with Aunt Lisa, her current caregiver, and "it would be contrary to Elizabeth's best interest to disturb this placement."

The circuit court found that appellant's "addiction issues have led to her neglect of Elizabeth[,]" as appellant "cannot take care of herself,

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much less Elizabeth."

With regard to Elizabeth's emotional ties and feelings, the court noted that Elizabeth is bonded to her parents, Aunt Lisa, Ann G., and her paternal grandparents. The court determined that although Elizabeth does not want to be adopted and would like her "whole family to live in a hotel," appellant cannot parent her. The circuit court found that Aunt Lisa can and has been able to parent Elizabeth and this "must carry the day."

As to Elizabeth's adjustment to the community and Aunt Lisa's house, the circuit court found her adjustment has been good, as Elizabeth is involved in numerous activities and has friends within several blocks. "She has been officially placed with Aunt Lisa since March 19, 2010, almost [eighteen] months to the date of trial." As to school, "Elizabeth has had an 'up and down' record" but is doing better.

As to Elizabeth's feelings, "Elizabeth has said clearly that she does not want to be adopted. [But], her attorney advocated for the termination of parental rights as being in the child's best interest." The circuit court agreed.

As to the likely impact on the child's well-being, the circuit court concluded that "[g]iven her strong ties to Aunt Lisa and the support system in place, the termination likely will not negatively impact Elizabeth's long term well-being."

We are satisfied the circuit court properly considered the applicable statutory criteria, that the findings as to parental unfitness are supported by clear and convincing evidence and that terminating the rights of appellant was in Elizabeth's best interest.

II.

Appellant contends the circuit court erred in denying, without explanation, her pretrial motion for an independent evaluation of Elizabeth.

To obtain a court-ordered independent evaluation of a child, a parent must demonstrate good cause for the examination and that the examination will not be harmful to the child. *In re: Mark M.*, 365 Md. 687 (2001).

The sole reason given by appellant was to "challenge the Department's expert's conclusions." Appellant failed to specify what, if any, clinical issues needed to be addressed or how the evaluation would assist the court. Appellant failed to state how a second evaluation might reveal any information beyond that produced by the evaluation by Dr. Meade.

In the motion for reconsideration, appellant sought an independent evaluation arguing that a change in circumstance had occurred since Elizabeth's evaluation by Meade — mainly, Appellant contended that Elizabeth's crying, threatening to run away, and refusal to go with Aunt Lisa on August 14 conflicted with Meade's conclusion that Aunt Lisa was meeting Elizabeth's "emotional needs."

Even if the alleged events occurred, Meade stated that "Elizabeth presents as a traumatized child who is highly anxious and has labile moods" and Elizabeth's behavior suggest that she "has learned that she can get what she wants by 'having a fussy fit' or by more indirect manipulation[.]" These observations undermine appellant's contentions.

Another factor: In the motion for reconsideration, appellant made a conclusory statement that "[t]here is no indication … an independent evaluation would be harmful." This statement in no way meets the burden of demonstrating that an independent evaluation would not harm Elizabeth. We conclude that the circuit court properly denied the motion." Slip op at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of India L.H.**

ADOPTION/GUARDIANSHIP: DEVELOPMENTALLY DISABLED INDIVIDUAL: GUARDIANSHIP REVIEW

CSA No. 2353, September Term, 2011. Opinion by Zarnoch, J. Unreported. Filed May 23, 2012. RecordFax #12-0523-09, 10 pages.

Where a guardianship review prior to a disabled individual's 21st birthday established that she was receiving all the services she requested and progressing better than expected, her complaint that she was denied an opportunity for fair judicial oversight of the planning and efforts on her behalf amounts to a generalized interest in ensuring the Department's compliance with law, which is insufficient to permit judicial review.

"India L. H. brings this appeal after the Circuit Court entered an order denying her exceptions to a 'reasonable efforts' finding of a juvenile master after a hearing on guardianship review. India presents the following questions:

1. Did the Juvenile Court commit a clear error of law when, prior to her twenty-first birthday, it (a) failed to make any reasonable efforts determination in India's guardianship review matter and (b) failed to make any determination as to whether additional services were required, in light of her disabilities?

2. Did the Juvenile Court commit a clear error of law when it dismissed India's exceptions on the grounds of mootness and standing and deprived her of judicial review?

Appellee, the Baltimore City Department of Social Services has moved to dismiss this appeal on the grounds of non-appealability, lack of injury to India and mootness.

For reasons set forth below, we affirm the circuit court's denial of India's exceptions and do not reach the Department's motion to dismiss.

FACTS AND LEGAL PROCEEDINGS

India, a developmentally disabled individual, was born on December 6, 1990 and has been under the guardianship of the Department since June 28, 2000. Each year thereafter, the juvenile court has conducted a guardianship review to determine, *inter alia,* whether India's placement was in her best interests, whether her permanency plan was appropriate, and whether the Department had made reasonable efforts to meet her needs.

On July 27, 2010, the juvenile master conducted a guardianship review hearing and found that the Department had made reasonable efforts for India. The next review hearing was scheduled for May 4, 2011.

Before the May 4, 2011 guardianship review, India's counsel and the Department were unable to reach an agreement concerning India's needs. A contested review hearing was scheduled for July 27, 2011. At that review, the juvenile master made proposed findings, including recommendations that the Department be ordered to perform a number of tasks for India. At that time, the master did not rule on whether the Department had made reasonable efforts on her behalf. The juvenile judge approved and adopted the master's findings and recommended agency directives on August 4, 2011.

At a subsequent review hearing held on September 21, 2011, the master made a proposed factual finding that the Department had made reasonable efforts and completed the tasks recommended at the July 27, 2011 contested review hearing. The master made her proposed

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findings *nunc pro tunc* to July 27, 2011. India filed exceptions.

An exceptions hearing was held on November 10, 2011. At that hearing, the judge found that "[India] seems to have had a lot of her issues addressed in that she has now been accepted into the DDA program and to my delight, shock and surprise … they actually [provided] money for her and that they have staffed her in an appropriate level. That doesn't happen very often but that is good to hear. And that some of the issues that she had in terms of furniture and money and the like have been successfully addressed.

Additionally, the judge found that at the time of the hearing, there was no remedy the court could provide India:

> [I]f there were to be a finding that reasonable efforts had not been made. . .[i]t seems clear there would be no material impact on [India] other than the fact that [India] feels that she has been done a disservice or an injustice and she really feels strongly [that] DSS should have … a negative finding as to reasonable efforts made. … [N]othing this Court can do will change [India's] position for good or ill in this case.

Accordingly, the judge dismissed India's exceptions on the grounds of mootness and standing. In addition, the order found that India "turned 21 years of age on December 6, 2011 and is doing well. She is receiving services from the DDA." On December 5, 2011, India noted a timely appeal, one day shy of her twenty-first birthday, the date she "aged out" of the Department's care.

DISCUSSION

As the circuit court made clear, there was nothing that could be done for India at the November 10, 2011 exceptions hearing, even if the court made a finding the Department had failed to make reasonable efforts.7 Nor could she suffer collateral consequences from a failure to make an express finding of reasonable efforts. India was already receiving all of the services she requested, and the judge made a finding that she was progressing better than expected. Furthermore, the Department had previously been ordered to perform certain tasks for India, which the master and the juvenile court found they had successfully completed. These are findings which would be inconsistent with the Department's failure to make reasonable efforts.8 We also note that India is no longer under the care of the Department, but the Developmental Disabilities Administration (DDA), a separate government agency.

All we are left with is India's claim that the juvenile court's order "denied [her] the opportunity to receive fair judicial oversight over the local department's planning and efforts on her behalf." Such a request, when the party, India, is suffering no harm, is merely a "generalized interest" in ensuring the Department's compliance with the law, which is not sufficient to permit judicial review. *See Kendall v. Howard County,* ___Md. App. ___ (April 11, 2012), Slip Opin. at 12." *Slip op at various pages, citations and footnotes omitted.*

*In re: Alecia J.**

CUSTODY: BEST INTEREST OF THE CHILD: SANDERS FACTORS

CSA No. 2156, September Term, 2011. Opinion by Moylan, J., retired, specially assigned. Unreported. Filed May 16, 2012. RecordFax #12-0516-11, 8 pages. Appeal from Baltimore City. Affirmed.

The trial judge meticulously analyzed the Sanders factors in awarding sole legal and primary physical custody of a 2-year-old child to her father, with whom she had lived for the past year after being adjudicated a CINA based on neglect by her mother.

"On November 17, 2011, in the Circuit Court for Baltimore City, Judge George L. Russell, III, overruled objections to the findings and recommendation of Master Richard D. Lawlor. Judge Russell affirmed the master's custody recommendation and awarded sole legal and primary physical custody of then two-year-old Alecia J. to the child's father, Cameron R. The appellant, Joy J., who is Alecia's mother, has taken this appeal and raises the single contention that Judge Russell abused his discretion in awarding custody to the father.

Discussion

In custody cases, the trial court employs the child's best interests standard to determine to whom custody should be granted. See. e.g. *Griffin v. Crane*, 351 Md. 133, 144-45, 716 A.2d 1029 (1998); *Montgomery County Dept. of Social Services v. Sanders*, 38 Md. App. 406, 414, 381 A.2d 1154 (1977). In *Sanders*, this court enumerated several non-exhaustive factors which a trial court may consider in making its best interests determination:

1. The fitness of the parents;
2. Character and reputation of the parties;
3. Desire of the natural parents and agreements between the parties;
4. Potentiality of maintaining natural family relations;
5. Preference of the child;
6. Material opportunities affecting the future life of the child;
7. Age, health, and sex of the child;
8. Residences of parents and opportunity for visitation;
9. Length of separation from the natural parents; and
10. Prior voluntary abandonment or surrender.

In affirming the master's recommendation with respect to custody, Judge Russell engaged in a meticulously thorough analysis of all pertinent factors:

> Certainly as far as the fitness of the person seeking custody, I have not made a determination that either parent is unfit.
>
> First, with regard to [the] mother in this case, her housing situation is somewhat tenuous. Her financial situation is uncertain. And although those are certainly not the deciding factors, when weighed against dad, who does have a stable house and a stable income, it weighs heavily in favor of the father.
>
> The adaptability of the perspective custodian to the task: father living with his folks at this point in time certainly does not have as many minors or young children to care for as the mother does. And her family will continue to grow.
>
> The age, sex, and health of the child: The child is very young. The sex of the child is, as far as this court is concerned, is not a factor weighing heavily in the court's decision. And the child certainly appears to be healthy.
>
> Physically, spiritually, and morally, I fault neither parent. I think the child would be in good hands with either parent.
>
> The environment and surroundings in which the child will be reared: As I indicated before, mother's housing situation is extremely cramped. And on top of that, [it] is tenuous. Also mother is not working. She is relying entirely on government assistance as well as individual donations that are unsecured, by family and friends. As a result, her ability to be able to care for these children

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is going to be extremely strained.

The influences likely to be exerted on the child: I don't feel that this is a heavy factor in this particular case. However, I will note that this particular factor, in the case of father has three adults looking after one child, whereas in mom's home, there is one adult looking after five children.

So as far as the influences are concerned, it weighs in favor of the father. Certainly I don't question the desire of mom to have the child in this case. And I think that her sincerity in seeking custody is deep. At the same time, I don't, although there was testimony indicating possible other motives for seeking custody, I do believe that father does have a genuine interest in raising his daughter.

Certainly, there is a great potential for maintaining natural family relations. Both mother and father live in the city. There have been frequent visits with the stepchildren.

Material opportunities affecting the future life of the child: there is no question that Alecia's future opportunities are brighter at this standpoint with father. The reality is that he can provide more to her than mom can at this point in time.

The residence of the parents: Father lives with his parents in a home. Mother is renting and potentially is going to be moving out of that home. So it's transitory housing.

There is a great opportunity for visitation. And it seems to have worked out. Despite a court order for alternating weekends, the stepsiblings have had the opportunity to visit with their stepsister weekly.

As far as the length of separation, certainly dad has had his daughter now for most of her conscious life. And by conscious, I mean the consciousness of an infant is different than the consciousness of a one or two year old. And since she has matured, I think that the separation as an infant is different than the separation as a little girl."

There was nothing clearly erroneous about any of Judge Russell's findings of fact. His ultimate decision, which we hereby affirm, was not an abuse of discretion." *Slip op at various pages, citations and footnotes omitted.*

*In Re: Chelsea O. et al.**

CINA: CHANGE IN PERMANENCY PLAN: BEST INTEREST OF THE CHILDREN

CSA No. 2063, September Term 2011. Opinion by Graeff, J. Unreported. RecordFax #12-0509-09, 22 pages. Appeal from Montgomery County. Affirmed.

Given the evidence of appellants' neglect and maltreatment of their children, the children's attachment to their current caregivers, and appellants' abandonment of reunification efforts, all of which led the juvenile court to conclude that the danger of continued state care was outweighed by the danger of further emotional harm from appellants' actions, the court properly exercised its discretion in changing the permanency plan from reunification to adoption even though there was no guarantee that the foster parents would adopt the children.

"Reginald O. and Rose C. appeal from an order changing the permanency plan for their five children, Chelsea, Savanna, Shianne, Katelyn, and Kyle, from family reunification to adoption by non-relatives. Appellants present one issue for our review: Did the trial court err in changing the permanency plan for all five children to adoption?

We affirm the judgment of the circuit court.

DISCUSSION

Appellants contend the circuit court erred in changing the permanency plan from reunification to adoption. Specifically, they assert that "the Department failed to show that the three older girls...would benefit from having parental rights terminated, as the evidence clearly showed that they needed permanency, but did not show that their foster parents would provide that permanency or that the Department was looking for pre-adoptive homes."

With respect to the younger children, appellants assert that "the Department failed to show any compelling reason to change the plan," and that they are "loving parents who formed a bond with their children that was only broken when poverty forced them to move to a location where they could no longer participate in visits." Appellants further note that the circuit court "failed to consider the impact of terminating the parents' rights, if the children were not adopted by their foster parents, which is a likely outcome."

The Department contends that the circuit court properly exercised its discretion. It asserts that the evidence "demonstrated that the parents' maltreatment of the children, including neglect, sexual abuse, and physical abuse, had caused the three oldest children serious emotional and psychological harm," and that this Court should not presume that reunification is the optimal outcome in this ease because, as the circuit court aptly described, the relationship the children have with their parents is "troubled." It argues that the court "appropriately concluded that Katelyn and Kyle have no bond with their biological parents," and that it "appropriately considered the children's attachment to their current caregivers," the harm that the children would experience if removed from their current placements, and "that all of the children need to know who their caregivers will be." It asserts that "the potential harm of foster care 'is outweighed by the danger of [the children] . . . being subjected to further emotional devastation as the result of reunification attempts abandoned by their parents."

Counsel for the children agrees with the Department.

We discussed the law governing permanency plans in some depth in *Shirley B.,* 191 Md. App. 678, 706-08, *aff'd,* 419 Md. 1 (2011). The permanency plan is part of a statutory framework for helping children at risk. In a permanency plan proceeding, the "best interests of the child" are the primary consideration, and the court must consider the factors in § 5-525(0(1) of the Family Law Article. The court is required to review the child's permanency plan periodically until commitment is rescinded. C.J.P. § 3-823(h)(1)(iii).

The Court of Appeals has explained that, although reunification with the parent or parents is presumed to be the optimal result for children, that presumption can be rebutted "if there are weighty circumstances indicating that reunification with the parent is not in the child's best interest." *In re Adoption/Guardianship of Cadence B.,* 417 Md. 146, 157 (2010).

Here, the circuit court's oral findings and its written ruling establish that it properly considered all of the factors required in changing the permanency plan. Given the evidence of the parents' neglect and maltreatment of their children, the children's attachment to their current caregivers, and appellants' abandonment of continued work with

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the children, which experts testified was very detrimental to the children, the court properly exercised its discretion in changing the permanency plan from reunification to adoption.

That there was no guarantee that the foster parents would adopt the children does not change this result. The circuit court properly found that, even if the children end up in state care, "the danger of continued State care is outweighed by the danger of [the children] being subjected to further emotional devastation as the result of reunification attempts abandoned by their parents." The circuit court did not abuse its discretion in finding that the permanency plan should be changed to adoption by non-relatives." *Slip op at various pages, citations and footnotes omitted.*

*In Re: Ryan O.**

CINA: REQUEST FOR CONTINUANCE: LACK OF SURPRISE, DILIGENCE AND MITIGATION

CSA No. 2062 September Term, 2011. Opinion by Wright, J. Unreported. Filed May 9, 2012. RecordFax #12-0509-08, 22 pages. Appeal from Montgomery County. Affirmed.

The trial court did not abuse its discretion by denying a continuance in a CINA case, where appellants failed to establish that the state's decision to present information from CINA cases involving the child's siblings was an unforeseeable surprise or that they had prepared or acted diligently to mitigate the effects of such a surprise.

"Reginald O. and Rose C. are the parents of Ryan O., who is the subject of this proceeding. On November 30, 2011, the juvenile court found Ryan to be a Child in Need of Assistance and committed him to the Montgomery County Department of Health and Human Services for placement in foster care.

Appellants present the following questions, which we have rephrased and renumbered.

I. Did the court abuse its discretion in denying appellants' request for a continuance?

II. Did the court err in admitting documents containing hearsay statements?

III. Did the court abuse its discretion in admitting expert testimony through a lay witness?

IV. Did the court abuse its discretion in finding Ryan to be a CINA?

We answer the first three questions in the negative, decline to address the fourth, and affirm the order of the juvenile court.

DISCUSSION

I.

Appellants argue that because their counsel were not served with, or able to conduct, proper discovery and Ms. C.'s counsel was not involved in the cases related to Ryan's siblings, upon which the Department's case was heavily reliant, their counsel faced an unforeseeable factual scenario against which they could not have reasonably been expected to defend. Appellants contend the court's denial of their respective counsel's motions for continuance was an abuse of discretion and reversal is required. See *Touzeau v. Deffinbough*, 394 Md. 654 (2006) (citing *Platik v. Summers*, 205 Md. 598 (1954); *Thanos v. Mitchell*, 220 Md. 389 (1959)).

In *Neustadter v. Holy Cross Hosp of Silver Spring, Inc.*, 418 Md. 231 (2011), the Court of Appeals held that "the decision to grant a continuance [or postponement] lies within the sound discretion of the trial judge" and that "Absent an abuse of that discretion we historically have not disturbed the decision to deny a motion for continuance [or postponement]."

The Court of Appeals has consistently affirmed denials of motions to continue when litigants have failed to exercise due diligence in preparing for trial, in absence of unforeseen circumstances to cause surprise that could not have been reasonably mitigated. *Neustadter,* 418 Md. at 242.

Here, both counsel knew, in advance of the scheduling order for the adjudicatory hearing, that they would be representing their respective clients. Appellants chose to be consistently absent from the proceedings, and to not avail themselves of contact with counsel until immediately before the hearing. As to the "surprise" of having to defend against the information contained in the CINA cases of Ryan's siblings, Mr. O., specifically, had been represented by the same counsel in those matters. Further, the information was present in the contentions of the original CINA petition in this case and thus served to put both appellants' counsel on notice of the Department's intent to offer evidence relevant to those matters. Moreover, neither counsel opted to request a continuance until the day of the hearing.

Under these circumstances, we are not persuaded that appellants were surprised by any "unforeseen" events or that they prepared or acted diligently to mitigate the effects of any such "surprises." See *Touzeau*, 394 Md. at 669-70. Rather than a continuance, the court afforded appellants the opportunity to review any evidence offered at the first day of the hearing and renew any objections at the hearing's second day, forty-two days later. The juvenile court properly exercised its discretion. See *Greenstein v. Meister*, 279 Md. 275, 294 (1977).

II.

Appellants contend the Department's exhibit numbers 2-5 contained inadmissible hearsay. The exhibits in question were court orders from Ryan's siblings' permanency planning hearings and had the corresponding Department reports attached. The court took judicial notice of the evidence in question. In matters involving parents who have been parties in previous CINA proceedings, with the same or other children, this Court has held taking judicial notice of the prior hearings was not inappropriate. *In re Nathaniel A.,* 160 Md. App. 581, 598 (2005). Here, as in *Nathaniel A.,* appellants were parties to the prior proceedings at issue; they were given the opportunity to defend themselves through cross-examination in those cases and the one at bar; they were represented by counsel in all referenced matters; the exhibits in question documented judicial proceedings, findings, and orders of the same juvenile court; and the documents were moved into evidence and made part of the record. The exhibits in question did not include any evidence which was not already a part of the court's official record of the CINA proceedings involving Ryan's siblings. Therefore, it was proper for the court to take judicial notice of the exhibits and admit them into evidence.

III.

Appellants contend the court abused its discretion when it admitted Ms. Williams' testimony regarding the pill crusher, because she had not been admitted or disclosed as an expert, and her lay opinion testimony relied upon "specialized knowledge, skill, experience, training or education" in the field of illegal drug use and paraphernalia. *See Ragland v. State*, 385 Md. 706, 721, 725 (2005).

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We agree. Nevertheless, we conclude that any error in admitting this testimony was harmless. Appellants' drug use could also have been inferred from the contents of their motel room as well as the withdrawal symptoms Ryan displayed at birth. Drug use was likewise confirmed by the results of drug tests administered to each appellant the day Ryan was located. Hence, Ms. Williams' testimony was merely cumulative to the other, properly considered, evidence.

IV.

Finally, appellants brief does not contain any substantive argument directed at the CINA adjudication and, therefore, we need not address the issue. Md. Rule 8-504(a)(6)." *Slip op at various pages, citations and footnotes omitted.*

*In Re: Trevonte B.**

CINA: MODIFICATION OF PERMANENCY PLAN: CONCURRENT PLAN OF GUARDIANSHIP WITH A RELATIVE

CSA No. 1957, September Term, 2011. Opinion by Kehoe, J. Unreported. Filed May June 1, 2012. RecordFax #12-0601-04, 12 pages. Appeal from Prince George's County. Affirmed.

After maintaining a sole permanency plan of parental reunification for more than two years with uncertain progress, the juvenile court did not abuse its discretion in concluding that the child's best interest would be served by adding a concurrent permanency plan of custody and guardianship with a relative.

"Trevonte B. and his mother, Sherrell B., appeal an order changing Trevonte's original Child In Need of Assistance permanency plan from parental reunification to a concurrent plan of parental reunification and custody and guardianship with a relative. Appellants assert that the juvenile court abused its discretion in entering the order. The Prince George's County Department of Social Services (the "Department") maintains that the court acted within its discretion in light of Sherrell B.'s halting and uncertain progress towards responsible parenthood.

We affirm the court's decision.

DISCUSSION

An order in a CINA case amending a reunification permanency plan is reviewed under an "abuse of discretion" standard. *In re: Yve S.,* 373 Md. 551, 583 (2003); *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 312-13 (1997).

In CINA cases, a juvenile court is required by law to "hold a permanency planning hearing to determine the permanency plan for a child[.]" Cts. & Jud. Proc. Code Ann.(C.J.) § 3-823 (b)(1). The permanency plan must thereafter be reviewed every six months until rescinded. CJ § 3-823 (h)(l)(i). In considering a proposed change to the permanency plan, the court is required to consider whether the change is in the child's best interests. CJ § 3-823 (h)(2)(vi); *In re: Yves* 8., 373 Md. at 581.

The juvenile court properly based its decision to change the permanency plan based upon Trevonte's best interests. The court articulated its consideration of his best interest in finding that it was "not fair to Trevonte" to maintain reunification as the sole plan, after working for over two-and-one-half years with Sherrell to achieve this goal. The court, who was familiar with this child's case from working with it in the past, was concerned that Trevonte remain in the best environment for him. Continued placement with his grandmother, who took special care to ensure that he receive appropriate medical and dental care, attend therapy sessions, take his prescribed medicines and assist him in obtaining the best available education, provided him with the only stable arrangement he experienced since he was first adjudicated a CINA in 2009.

It is important to note that this was not a decision to terminate the parental rights of Sherrell, but rather, to make the reunification plan a concurrent one. The order provided that visitation between Sherrell and her son "shall be liberal and unsupervised," as arranged by the family, as long as she remains abstinent and refrains from any corporal punishment. Reunification is not removed as a goal. Rather, the juvenile court encouraged Sherrell to take the necessary steps, such as finding a steady place to live which would be suitable for Trevonte, a job that provided a source of income, and to attend her therapy sessions when they were scheduled.

Trevonte's brief argues that the court's decision was based solely on the length of time the child has been in care. We read the record differently. While the court appropriately considered Trevonte's time in foster care as a factor, it also considered Trevonte's safety, the length of time he resided with his grandmother, the continuing inability to safely return him to his mother's permanent care, and the potential harm he would suffer by remaining in State custody for an additional indefinite amount of time.

Time-limited reunification services are designed to facilitate reunification within the first 15 months of the child's out-of-home placement. COMAR 07.02.11 .03(B)(61)(a). Regardless of the goal of the permanency plan, services are time- limited because the goal is to achieve permanent placement within 24 months of the initial placement. *See* C.J. § 3-823(h)(3); Fam. Law § 5-525(c)(1); *In re: James G.*, 178 Md. App. 543, 589-90 (2008)

In contrast to *In re James* G., the case before us provides a history of both neglect and abuse. On two prior occasions, Trevonte was forced to be removed from the care of his mother on an emergency basis after the court ordered his return to her care. Based on the record before us, the best interests of Trevonte justify the court's decision to maintain him in the home of his grandmother, who will have guardianship and custody, while retaining reunification as an achievable goal for Sherrell.

Appellants also take issue with what they characterize as the juvenile court's "speculative and baseless fears that Ms. B. would fail to continue to improve her circumstances" and its "flippant" disregard of [Trevonte's] desire to be reunited with his mother. Neither of these criticisms are warranted. As we have explained, the history of the case showed a pattern of improvement by Sherrell followed by backsliding. The court acknowledged that Trevonte wanted reunification but that, as a seven year old, his wishes were not controlling. These were proper considerations for the court in its decision making process.

Finally, Trevonte asserts that "reunification [with Sherrell] and custody and guardianship to Yvette B. are … directly contradictory and that such a plan is inconsistent with the Court of Appeals' reasoning in *In re Karl H.*, 394 Md. 402,431(2006). He misreads the analysis. The permanency plan at issue in this appeal does not call for the filing of a petition for termination of parental rights. Therefore, it is not the sort of "Janus-type order" disapproved in *Karl H."* *Slip op at various pages, citations and footnotes omitted.*

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*Yiannes Kacoyianni v. Susan Luongo**

CUSTODY: MODIFICATION: PROOF OF MATERIAL CHANGE IN CIRCUMSTANCES

CSA No. 0392, September Term, 2011. Opinion by Kehoe, J.
Unreported. Filed May 18, 2012. RecordFax #12-0518-07, 14 pages.
Appeal from Anne Arundel County. Affirmed.

"In determining whether there had been a material change in circumstances warranting a modification of custody, the trial court was not required to view the evidence in the light most favorable to the father, who had requested modification; rather, because the court ruled after hearing evidence from both parties, it quite properly based its decision upon the weight, and not merely the sufficiency, of the evidence, and its findings of facts were not clearly erroneous.

This case is an appeal by Yiannes Kacoyianni ("Father") of a judgment of the Circuit Court for Anne Arundel County denying his complaint to modify the custody of his two minor children. Susan Luongo ("Mother") is the appellee. Father presents two issues:

I. Whether the trial court committed legal error in granting the motion to dismiss by applying the wrong legal standard for granting the dismissal and based its dismissal upon clearly erroneous findings of fact and an incorrect application of the law?

II. Whether by granting the motion to dismiss the trial court deprived [him] of his right pursuant to the Due Process Clause of the 14th Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights, to make closing argument in a case involving the custody of his children?

DISCUSSION

A. Did the trial court err in concluding that Father failed to demonstrate a material change in the children's circumstances?

Father argues that the trial court erred because it based its decision on the wrong legal standard and made clearly erroneous findings of fact. We do not agree. Because the trial court ruled after hearing evidence from both parties, it quite properly based its decision upon the weight, and not merely the sufficiency, of the evidence. Moreover, even if the trial court had, in fact, granted Mother's motion for judgment, the court would not have erred in making credibility-based determinations of the facts.

Turning to Father's second argument, we conclude that the trial court's findings of facts were not clearly erroneous.

Mother's "motion for judgment" at the close of the evidence was, in effect, final argument limited to whether Father had demonstrated a material change in circumstances. That Mother termed this argument a "motion for judgment" is irrelevant. The trial court was correct in deciding the case on the weight, not the legal sufficiency, of the evidence.

The trial court's conclusion that Father failed to prove a material change in his children' s circumstances is dispositive because proof of material change is necessary before a court can modify custody arrangements.

At trial and in his brief, Father focuses on Mother's behavior as the most significant material change in circumstances. He states that Mother's "refusal to allow [Father] any meaningful participation in the children's school and extra-curricular activities are punitive and contrary to the children's best interests." He points to nineteen different incidents, which he contends are "undisputed facts," to prove his point. They can be summarized, broadly speaking, as: (1) Mother's refusal to allow Father "any meaningful participation in the children's school and extra-curricular activities,"; (2) delays in Mother's communication, or her failure to communicate altogether, with Father regarding medical care for the children; (3) that Mother's male friend has supplanted Father as a father figure in children's life.

The difficulty with Father's arguments is that Mother contested some of these assertions and provided explanations for her actions to show that they were in the best interests of the children. The trial court was entitled to find Mother to be a more credible witness and to place greater weight on her evidence. As the party seeking a change in custody, Father had the burden of persuasion and we cannot say the trial court was clearly erroneous because it was not persuaded by Father's evidence. *See Starke v. Starke,* 134 Md. App. 663, 680-81 (2000).

Father's next argument as to the material change in circumstances pertains to changes in the children's lives which are incidental to growing up, i.e. the children have, or are beginning to, enter school, and become more involved in religious activities. The problem with this argument is that these changes are natural ones that occur as every child matures and they do not, in and of themselves, constitute a material change. *See Levitt v. Levitt, 79* Md. App. 394, 397 (1989) ("[R]ecognizing the importance of the child's need for continuity[,] if a child is doing well in the custodial environment, the custody will not ordinarily be changed."). Here, the trial court explicitly concluded that:

The children are, certainly, growing older and the [custody] order has been changed to accommodate the change in school schedules … . I heard a fair amount of evidence that the children are wonderful, that they are doing incredibly well… So, therefore I find that there is not a material change in circumstances as to the issues of custody and visitation.

We cannot say that the trial court's conclusions were the result of any clearly erroneous finding of fact by the trial court or the failure of the trial court to take into account an uncontested fact.

B. Did the trial court deprive Father of his due process rights in not providing him with an opportunity to present a closing argument?

Father argues that the court deprived him of his due process rights under the 14th Amendment of the Constitution and Article 24 of the Maryland Declaration of Rights, by entering judgment in favor of Mother in a child custody case before he was permitted to give a closing argument.

Father maintains that his right to present such a closing argument is fundamental. *In re Emileigh F.,* 353 Md. 30, 41(1999). While the case before us is not a CINA proceeding, it is similar to *Emileigh F.* in that the custody of the parties' children is at issue. However, *Emileigh F.* is distinguishable because the trial court in the present case permitted the parties to address the issue raised in Mother's mistitled "motion to dismiss," namely, whether Father had demonstrated material change in circumstances. As we have explained, until material change is shown, there is no reason for a court to consider the children's best interests. The trial court did not abuse its discretion in limiting the parties' arguments to the dispositive issue of whether there had been a material change in circumstances. *See Emileigh F.* at 40

In conclusion, our review of the record leaves us satisfied that the trial court carefully considered the parties' contentions and correctly applied the law to the conflicting evidence before it."

Slip op at various pages, citations and footnotes omitted.

See UNREPORTED CASES IN BRIEF *page 14*

UNREPORTED CASES IN BRIEF *Continued from page 13*

*David H. Kennedy v. Susan Q. Kennedy**

CHILD SUPPORT: MODIFICATION: LIMITS TO RETROACTIVITY

CSA No. 0029, September Term 2011. Opinion by Salmon, J., retired, specially assigned. Unreported. Filed May 10, 2012. RecordFax #12-0510-11, 11 pages. Appeal from Prince George's County. Affirmed.

Even though the circumstances likely would have warranted a modification of child support more than a year earlier, the court's authority to make support retroactive was limited by the date appellant filed his motion for modification; nor did the court have the authority to go back further based on an earlier motion by appellant's ex-wife, which she had withdrawn before the court ruled on appellant's motion.

"The issue presented in this case, as phrased by the appellant, David H. Kennedy, is: Whether the circuit court erred in concluding that it did not have the authority to modify Appellant's child support obligation retroactive to the date when Appellee filed a Motion to Modify Child Support when the physical custody of the parties' daughter was transferred to Appellant prior to the filing of Appellee's motion.

I.

David Kennedy, appellant, and Susan Kennedy, appellee, are the parents of two children: Carolyn, born March 1996 and Kate, born March 2000. The Kennedys divorced on May 1, 2007. The judgment of absolute divorce awarded physical custody to Mrs. Kennedy and required Mr. Kennedy to pay $1,000 per month in child support.

On December 2, 2009, Mrs. Kennedy filed a "motion to modify child support and other relief' (the "motion to modify").

On December 8, 2009, Mr. Kennedy filed an emergency motion to modify custody and visitation (the "emergency motion"). He alleged that Carolyn's psychiatrist, Dr. Nathan Osborne, recommended she reside with her father. On the same date, the Circuit Court ordered that Mr. Kennedy have physical custody of Carolyn. The order was signed on December 8, 2009.

On November 17, 2010, Mrs. Kennedy filed a "motion for contempt and other relief" in which she alleged that since December 2009, Mr. Kennedy had been paying her only $200 per month in child support rather than $1,000 per month ordered. Mr. Kennedy filed an answer.

On February 8, 2011, about one hour before the contempt hearing commenced, Mrs. Kennedy filed a line dismissing her motion to modify child support. Mrs. Kennedy's counsel advised the judge.

During the contempt hearing, Mr. Kennedy admitted he had paid his wife only $200 per month since December 15, 2009. His excuse was that since December 14, he had physical custody of Carolyn. The motions judge ruled: "The case law is pretty clear that the amount ordered is to be paid unless and until the Court orders otherwise … Now, the Court does understand that during that time period, while child support, perhaps, would have been reduced based on the situation, since there was no request made to have it reduced, the Court has to go by what was ordered and the ...Defendant willfully withheld the amount. So the Court does find that the Defendant is in contempt… ."

Mr. Kennedy, on March 7, 2011, filed an appeal.

On April 6, 2011, Mr. Kennedy's counterclaim for modification of child support was heard. The judge ordered Mr. Kennedy's child support obligation reduced to $278 per month, effective May 1, 2011.

II.

Family Law Section 12-104 reads as follows:

§ 12-104. Modification of child support award.

(a) Prerequisites. - The court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstances.

(b) Retroactivity of modification. — The court may not retroactively modify a child support award prior to the date of the filing of the motion for modification.

In *O'Brien v. O'Brien*, we had occasion to interpret §12-104(b). The principles in *O'Brien* make it clear that Mr. Kennedy's counterclaim for modification provided the court with no authority to change the amount of child support due any further back than February 1, 2011 – the date the counterclaim was filed. And, as already noted, when the circuit court decided the issue of contempt it calculated the amount of arrearages only up until February 1, 2011.

Mr. Kennedy appears to concede that the counterclaim for modification was not an appropriate vehicle to modify his support obligations any further back than February 1, 2011. Instead, he maintains that as of the dates of the contempt hearings, the circuit court still had the right to reduce child support back to December 2, 2009 based on Mrs. Kennedy's motion to modify child support, which was filed on that date. He cites two unreported cases from Ohio as his sole legal support. Those cases are plainly inapposite. In the subject case, unlike the Ohio cases, the motion to modify child support was withdrawn by the time the arrearage came on for hearing. As the motions judge commented, the withdrawal made the issues presented "moot."

Mr. Kennedy agrees that Mrs. Kennedy's motion to modify was withdrawn before the February 8, 2011 hearing. He argues, however, that the line dismissing Ms. Kennedy's motion could only be filed with leave of court. In support, appellant places sole reliance on Maryland Rule 2-506, Voluntary dismissal.

The difficulty with appellant's argument is that the rule only controls the circumstance under which a complaint, counterclaim, cross-claim, or third-party claim may be dismissed. It does not govern the question of when a motion can be dismissed by a movant. No rule or statute in Maryland requires that a party who files a motion must obtain leave of court before dismissing or withdrawing that motion.

III. Conclusion

Under the Family Law Article, a request to increase or decrease child support must be made by filing a motion. See Family Law Article, Section 12-104. Prior to the hearing, appellee, without violating any rule, appropriately withdrew her motion to modify. Therefore, at the time the court ruled on Mrs. Kennedy's motion to have appellant held in contempt, there was no pending motion that would have allowed the court to retroactively alter child support obligations any further back than February 1, 2011. We hold that the motions judge did not err when she ruled that she did not have the authority to modify appellant's child support obligation retroactive to December 2, 2009." *Slip op at various pages, citations and footnotes omitted.*

*David A. Rothwell v. Andrea C. Straw**

DIVORCE: SEPARATION AGREEMENT: MOTION TO VACATE

CSA No. 1652, September Term, 2011. Opinion by Wright, J.

See UNREPORTED CASES IN BRIEF *page 15*

UNREPORTED CASES IN BRIEF *Continued from page 16*

Unreported. Filed June 7, 2012. RecordFax #12-0607-04, 7 pages. Appeal from Dorchester County. Affirmed.

The circuit court did not err in denying a motion to vacate a consent order that was consistent with the terms of a Marital Separation Agreement and properly filed, where appellant's argument that he did not actually consent to the Agreement was not supported by any evidence in the record.

"David Rothwell appeals from an order dismissing his motion to vacate a consent order. The consent order adopted the terms of a marital separation agreement between Rothwell and Andrea Straw, which was introduced into the record at a merits hearing on August 3, 2011. We affirm the court's decision.

Facts

Rothwell and Straw were married and had one child, Nicholas. Straw filed for limited divorce. Rothwell filed a counter-complaint for absolute divorce. On March 14, 2011, the court filed a *pendente lite* order, temporarily resolving disputed issues of child support, custody, and visitation pending a merits hearing.

On August 3, 2011, the merits hearing was held before a Master. In attendance were: 1) Sharon Jennings, Straw's attorney; 2) Straw; 3) Charles Jannace, Rothwell's attorney; 4) Rothwell; and 5) Barbara Trader, the minor child's best interest attorney.

At the outset, Jannace informed the Master that the parties were close to an agreement. The Master delayed the hearing, stating "it's 10 after, I'll give it until 10:30 and this is absolute." The parties reached an agreement during this interval. The negotiations are not a part of the record.

After the Master read the Agreement into the record, the following transpired:

[MR. JANNACE]: Okay. With the understanding that there was a lot of negotiation right up to the last second … is this your agreement with Ms. Straw?

[MR. ROTHWELL]: I accept it.

* * *

[MR. JANNACE]: At this time do you believe that, for this period of time only, that this agreement is in the best interest of your son?

[MR. ROTH WELL]: I do not.

MASTER KETTERMAN: You do not. Okay. But you've agreed to this.

MR. ROTHWELL: But I've accepted it.

MASTER KETTERMAN: … let's not play with words, we need to know because if something is wrong I need to know it now … So is this your agreement or not?

[MR. JANNACE]: You intend to be bound by this agreement, correct?

[MR. ROTHWELL]: Yes.

MASTER KETTERMAN: Do you want this agreement to be incorporated into a court order?

MR. ROTHWELL: Yes.

* * *

MASTER KETTERMAN: You do not have to agree to anything. If you don't we're going … to have a hearing all day today and probably tomorrow and the next day and the next day. I can do that, that's what I'm here for. But it's been represented to me that there's an agreement, that's why we have everyone placed under oath and we ask them questions on the record just to make sure that everybody has the same understanding before we leave.

* * *

So Mr. Rothwell, there are two choices on this, is this your agreement or is this not your agreement?

MR. ROTHWELL: Yes.

* * *

MASTER KETTERMAN:...I won't call it an agreement until you tell me it is, is there anything [Ms. Jennings or Ms. Trader] have stated that you do not agree to?

MR. ROTHWELL: No.

MASTER KETTERMAN: Do you have any questions about this agreement or where things go from here?

MR. ROTHWELL: No.

MASTER KETTERMAN: Did you have any last minute questions for Mr. Jannace?

MR. ROTHWELL: No.

MASTER KETTERMAN: You understand that once I make this recommendation then the Judge signs the court order as I stated all the terms of this agreement?

MR. ROTHWELL: I do.

On August 26, 2011, the court filed the consent order that matched the Agreement.

On September 2, 2011, Rothwell filed a motion to vacate the consent order "for reasons of Coercion, Collusion, and failure to represent or negotiate in the best interest of the defendant and the minor child." The court dismissed Rothwell's motion. This timely appeal followed.

Discussion

Pursuant to Maryland Rule 2-6 12, "The court may enter a judgment at any time by consent of the parties." A party may appeal "from a court's decision to grant or refuse to vacate a 'consent judgment' where it was contended below that the 'consent judgment' was not, in fact, a consent judgment because the consent was coerced, the judgment exceeded the scope of consent, or for other reasons there was never any valid consent." *Chernick,* 327 Md. at 477 n.1 (citing *Long v. Runyeon,* 285 Md. 425, 429-30 (1979); *Mercantile Trust Co. v. Schloss,* 163 Md. 18, 24-25 (1933)).3

Rothwell argues that his consent to the Agreement was coerced. Nothing in the record contradicts the conclusion that Rothwell voluntarily consented to the terms of the Agreement. Rothwell was informed that he did not have to consent to the Agreement. The Master also indicated that the court would be willing to proceed to trial if Rothwell did not consent. On more than one occasion, Rothwell assured the Master there was nothing within the Agreement to which he did not consent and proceeded to affirmatively state his consent. Rothwell also stated he had no questions as to the ramifications of his consent.

In sum, Rothwell's argument that he did not actually consent to the Agreement is not supported by evidence in the record. The consent order was consistent with the Agreement and properly filed. As there is nothing in the record to contradict that the consent order at issue on appeal is a properly entered consent decree, we affirm the judgment dismissing his motion to vacate the consent order." *Slip op at various pages, citations and footnotes omitted.*

*William Trout II v. Jennifer Rouse**

CUSTODY: SCHOOL CHOICE: PARENT'S AVAILABILITY

See UNREPORTED CASES IN BRIEF *page 16*

UNREPORTED CASES IN BRIEF *Continued from page 15*

CSA No. 1795, September Term, 2011. Opinion by Sharer, J. (Retired, Specially Assigned). Unreported. Filed May 23, 2012. RecordFax #12-0523-08, 6 pages. Appeal from Anne Arundel County. Affirmed.

The circuit court did not abuse its discretion in granting the child's mother authority to decide where he should go to school, based in large part on the fact that she was able to be home when he left and returned from school; while the underlying reason for her availability was that she was unemployed, her duty to support her son was reflected in the support guidelines and was not a detrimental factor in the custody determination.

"The ultimate issue presented in this case was a determination as to which parent should make the decision about choice of school for the parties' son. The court granted that authority to Jennifer Rouse. William Trout II filed this appeal, raising the following question, which we have recast:

Did the trial court err in granting appellee the right to make the child's school choice?

Finding neither error of law nor abuse of discretion, we affirm the judgment of the circuit court.

FACTS

Logan Trout, the son of appellant and appellee, was born on January 28, 2007. The parties did not marry. Custody was governed by a consent agreement filed July 28, 2008. The parties agreed to equally divided physical custody, which presented no problems until Logan approached school age. Appellant lives in Essex, Baltimore County and appellee lives in Pasadena, Anne Arundel County.

As Logan neared school age, the parties basically agreed that Logan would have to spend Monday through Friday of each school week with the parent residing closest to his school. They disagreed, however, on who would choose the school.

Appellant filed a Motion for Modification of Child Custody, Child Support, and Other Relief. Appellee filed a Motion for Modification of Child Custody, Child Support, and Other Relief.

At a hearing on the above motions, in effect, there were no facts in dispute, and appellant raises no issue that the court was clearly erroneous in any factual determination. Appellant prefers Logan to attend Our Lady of Mount Carmel Catholic School, while appellee does not approve of Logan attending a religious school.

The sole question for the court to decide was which parent should choose where Logan would attend school. After careful consideration of factors that would impact on Logan's best interests relating to his education, the court granted the school choice authority to appellee. While the court discussed several factors, u1timately, the court concluded that appellee's ability to be at home when Logan left for school and when he returned at the end of the school day was the "biggest factor' in its decision.

DISCUSSION

Appellant contends specifically that the court should not have based its decision on appellee's greater availability because she is intentionally unemployed. Appellant contends further that the court did not consider all relevant evidence to determine the best interests of the child.

Appellee counters that child custody determinations are to be guided by the best interests of the child, not by punitive considerations as to the parents, and that the court's judgment is supported by the record.

Our standard of review in child custody matters is succinctly stated in Davis v. Davis, 280 Md. 119, 125-126 (1977). Appellant does not assert legal error; rather, his argument centers on his contention that the court abused its discretion in the ultimate decision. Therefore, the first two prongs of Davis do not require our analysis, and our focus will be on the court's ruling that appellee should have the school choice for Logan.

Abuse of discretion is judgment that is "manifestly unreasonable," or exercised "on untenable grounds, or for untenable reasons." Stabb v. State, 423 Md. 454, 465 (2011). There is abuse of discretion where no reasonable person would have taken the view adopted by the trial court. North v. North, 102 Md. App. 1, 13 (1994).

We find no abuse of discretion. The court carefully considered the competing interests of the parties, in terms of Logan's best interests. The court enunciated several factors in announcing its decision, each related to Logan's best interests. Among these was appellee's availability both before and after school.

Appellant asserts that appellee's choice to be a "stay at home" mother is a negative and is in derogation of her "responsibility" to be employed to aid in providing material benefits for Logan. We cannot find appellee's reasons to be unemployed as a detriment. Appellant's argument that appellee is somehow shirking her duty to support Logan financially is not persuasive. Appellee's duty to provide support to Logan is calculated into the child support guidelines based upon the imputation of potential earnings, to which appellee agreed. This satisfies her duty of financial support. See Middleton v. Middleton, 329 Md. 627, 631-33 (1993) (outlining the common law duty of each parent to support their child).

We are satisfied that the court gave adequate consideration to the evidence and to the factors that relate to Logan's best interests, particularly concerning his education and his access to family during the school year and on each school day. We find no abuse of discretion, and shall affirm." *Slip op at various pages, citations and footnotes omitted.*

*Lorena M. Walton v. David P. Walton**

DIVORCE: MARITAL SETTLEMENT AGREEMENT: COMPETENCE AND UNCONSCIONABILITY

CSA No. 134, September Term, 2011. Opinion by Graeff, J. Unreported. Filed May 24, 2012. RecordFax #12-0524-03, 22 pages. Appeal from Cecil County. Affirmed.

Appellant failed to overcome the presumption that her Marital Settlement Agreement was valid where (1) despite suffering from bipolar disorder, she failed to show that she was incompetent when the agreement was signed; (2) the MSA's terms could have resulted from a fair and reasonable tradeoff of benefits and obligations; (3) the evidence supported the finding that there was no confidential relationship between the parties; and (4) she produced no evidence of threats or coercion that would support a finding that she signed the agreement under duress.

"This appeal arises from an order declining to set aside a Marital Settlement Agreement between Lorena and David Walton. We shall affirm the judgment.

A. Incompetence

Ms. Walton contends the settlement agreement is unenforceable

See UNREPORTED CASES IN BRIEF *page 17*

UNREPORTED CASES IN BRIEF *Continued from page 16*

because, when she signed, she was incompetent due to a "long-term untreated bipolar disorder."

Ordinarily, "the law presumes every [person] to be capable of making a valid deed or contract." *Williams v. Moran*, 248 Md. 279 (1967). When a party attacks the validity of a contract under fraud, duress, coercion, mistake, undue influence, or incompetence, normally that party bears the burden of proof. *Cannon v. Cannon*, 384 Md. 537, 554 (2005).

That Ms. Walton was experiencing mental distress did not render her incompetent to sign the Agreement. In the area of testator competence, the Court of Appeals has explained that, "in the absence of proof of prior permanent insanity, it must be shown that the testator was of unsound mind at the time the will was executed in order to overcome the presumption of sanity." *Arbogast v. MacMillan*, 221 Md. 516, 523 (1960).

Here, the circuit court found no evidence that Ms. Walton was permanently incompetent. Ms. Walton "maintained employment, controlled her own checking account, paid her own car payments, and entered into a contract to purchase real property in the Philippines. This behavior is not indicative of a state of permanent incompetence."

Further, Ms. Walton failed to meet her burden to convince the court that she was incompetent at the time she signed the Agreement. As this Court has stated, "it is nearly impossible for a verdict to be clearly erroneous or an abuse of discretion or legally in error when it is based not on a fact finder's being persuaded of something but only on the fact finder's being unpersuaded." *Byers v. State*, 184 Md. App. 499 (2009). The circuit court's failure to be persuaded that Ms. Walton was incompetent when she signed the Agreement was not clearly erroneous.

B. Unconscionability

Ms. Walton next contends the terms were "so one-sided ... that the Agreement should be set aside as unconscionable." She asserts that Mr. Walton "earned more than five times" what she did in 2009, yet she waived all alimony, and "the division of assets was completely unfair and inequitable." She also states the Agreement leaves her "no rights to her children but mere limited visitation," despite that she was "the children's primary caregiver for most of their lives." She asserts "there was no negotiation in the creation" of the Agreement.

Mr. Walton contends the Ms. Walton "was provided with half the equity in the marital home, a 2007 Nissan Versa, and household furnishings." He asserts it was reasonable for him to be given sole legal and physical custody of the children because Ms. Walton "was preparing to leave indefinitely to the Philippines." He contends, contrary to Ms. Walton, that the parties did negotiate the terms of the Agreement.

Ms. Walton cites to three cases: *Williams* at 332; *Cronin v. Hebditch*, 195 Md. 607 (1950); and *Eaton v. Eaton*, 34 Md. App. 157 (1976). In each of these cases, separation agreements were found inequitable where one spouse received less than 2% of the total assets.

Here, the terms were not similarly egregious. Ms. Walton received a $40,000 payout, which was approximately half of the equity in the marital home. Ms. Walton also received various items of personal marital property. Although Ms. Walton waived her right to alimony, Mr. Walton obtained sole legal and physical custody of the couple's minor children, and Ms. Walton is not obligated to pay child support. Although Ms. Walton waived her right to Mr. Walton's retirement funds, the court was persuaded by the testimony that this was in light of the parties' agreement to use the retirement funds for the children's college education.

The court concluded that the terms of the Agreement did not "shock the conscience," and there was "no reason to think that such terms could not result from a fair and reasonable negotiation wherein the parties understood the respective benefits received as well as the obligations imposed by executing the agreement." The finding was not error.

C. Confidential Relationship

A confidential relationship has been described as one "where one party has dominion over the other person, and the relationship is such that the person with greater influence is expected to act in the best interest of the other person." *Brass Metal Prods. v. E-J Enters.*, 189 Md. App. 310 (2009). Maryland does not presume the existence of a confidential relationship between husband and wife. *Lasater v. Guttmann*, 194 Md. App. 431 (2010), *cert. denied*, 417 Md. 502 (2011); *Bell v. Bell*, 38 Md. App. 10 (1977).

In *Bell*, this Court affirmed the finding that no confidential relationship existed because the wife had negotiated several changes in the agreement and because "there was a lack of trust and confidence in the other party necessary to the establishment of a confidential relationship."

Similarly, Ms. Walton asked for a separation agreement because she distrusted her husband. Although Mr. Walton was a college graduate and had greater business experience, Ms. Walton was not "wholly dependent" on him. The court noted that she "was savvy enough to make her car payments, manage her own checking account and purchase a parcel of real property in the Philippines." The court also noted that Ms. Walton testified that she "routinely berated" Mr. Walton for having "no balls," finding "it would be extraordinarily odd for a wife who claims to be as dominated as she was to freely direct such emasculating invective at the purportedly dominant party." The court's finding was not clearly erroneous.

D. Duress

Ms. Walton's final contention is that the Agreement was "obtained by duress, undue influence, and/or fraud" as a result of her untreated bipolar disorder and Mr. Walton's statement that the Agreement was only temporary.

The Court of Appeals has held that the test for duress is "essentially composed of two elements: '(1) a wrongful act or threat by the opposite party to the transaction ... and (2) a state of mind in which the complaining party was overwhelmed by fear and precluded from using free will or judgment." *Cheek v. United Healthcare of the Mid- Atl.* 378 Md. 139, 164 (2003). Ms. Walton cites *Eckstein v Eckstein*, 38 Md. App. 506 (1978). In *Eckstein*, this Court concluded: "With no funds, no lawyer, no clothes, no transportation, and no viable alternative, it is not surprising that the wife capitulated and signed the agreement. We cannot accept that action, under all the circumstances, as one taken by her of her own free will." *Id.* at 518-19.

Here, by contrast, the circuit court found Ms. Walton "produced no evidence of threats or coercion" by Mr. Walton to force her to sign the Agreement. The court rejected her testimony that Mr. Walton told her that the agreement was "only temporary" as not credible. The circuit court's finding that the Agreement was not the result of duress or undue influence was not clearly erroneous." *Slip op at various pages, citations and footnotes omitted.*

See UNREPORTED CASES IN BRIEF *page 18*

UNREPORTED CASES IN BRIEF *Continued from page 17*

*Wicomico County BSE Ex Rel. Christy Hales v. Errond B. Truitt, Jr.**

CHILD SUPPORT: BELOW-GUIDELINES AWARD: VOLUNTARY SUPPORT OF STEPCHILDREN

Opinion by Raker, J., retired, specially assigned. Unreported. Filed May 23, 2012. RecordFax #12-0523-04, 11 pages.

CSA No. 2310, September Term, 2010. Appeal from Wicomico County. Reversed.

The circuit court erred as a matter of law in considering appellee's voluntary support of his stepchildren when it ordered him to pay child support for his biological children at below-Guidelines rates.

"The Wicomico County Bureau of Support Enforcement appeals the judgment of the Circuit Court, which ordered Errond B. Truitt Jr. to pay monthly child support for his two biological children at an amount lower than prescribed by the Maryland Child Support Guidelines, §12-101 *et seq.* of the Family Law Article. In departing from the Guidelines, the court took into account appellee's expenditures for the support of his four stepchildren, who live with him. We shall hold that the court erred as a matter of law.

Appellee and Christy Hales were in a long-term relationship and had a son, Errond B. Truitt III (Errond), born in December 2007. The couple split up in April 2010. Three months later, appellee married Hales' cousin and began living with her and her four children.

On September 25, 2010, a second child was born to [Appellee and Christy Hales], Payten Elizabeth Hales.

Based upon appellee's income, his status as the non-custodial parent, and the children's normal healthcare expenses, the Bureau sought total monthly support in the amount of $679.52 ($339.76 for each child).

Appellee informed the court that the amount would be difficult to pay because of the health problems of his wife and stepchildren. According to appellant, one of stepchildren was born without a cerebellum, and based upon the income appellee brought into the household, the Department of Social Services halved the stepdaughter's monthly disability benefits. His wife has lupus, which prevents her from working.

The circuit court ordered appellee to pay monthly child support of $400 to cover both Errond and Payten, and to provide both children with health insurance. "That," the court said, "leaves you a couple of hundred dollars a month for the medicals on the other ones."

Although, as a general matter, a child support order is within the sound discretion of the trial court, where the order involves application of Maryland statutory and case law, we must determine whether the lower court's conclusions are correct as a matter of law. The applicable standard of review in such a case is *de novo*. See *Walter v. Gunter,* 367 Md. 386, 391-92 (2002).

The General Assembly enacted the Guidelines in 1989. Use of the Guidelines is usually mandatory. A party may rebut this presumption "by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." §12-202(a)(2)(ii). The Guidelines list factors that a court may consider when determining whether a specific application would be unjust or inappropriate. The presence in a parent's home of "other children to whom that parent owes a duty of support," however, is not sufficient by itself to rebut the presumption. See § 12-202(a)(2)(v).

In any event, should the court find that applying the Guidelines in a specific case is unjust or inappropriate and decide to depart therefrom, the court must "make a written finding or specific finding on the record stating the reasons for departing from the guidelines," stating explicitly "how the finding serves the best interests of the child" See §12-202(a)(2)(v) — that is, in the best interests of the child receiving the child support. *Beck v. Beck*, 165 Md. App. 445 (2005).

We agree with the Bureau that the circuit court erred as a matter of law when it departed downward from the Guidelines based upon appellee's support of his stepchildren. Absent adoption, a stepparent in Maryland does not owe a duty of financial support to a stepchild. See, e.g., *Walter v. Gunter*, 367 Md. 386, 396 (2002); *Knill v. Knill*, 306 Md. 527, 531 (1986); *Bledsoe v. Bledsoe*, 294 Md. 183, 192 (1982); *Brown v. Brown*, 287 Md. 273, 283 (1980).

Appellee's determination to contribute to the medical care of his stepchildren is laudable, but though he may deem it a moral obligation, it is not a legal obligation. Appellee does have a legal obligation to his two biological children, Errond and Payten. That obligation may not be offset by appellee's decision to support his stepchildren.

Even were the children residing with appellee [his] biological or adopted children, rather than stepchildren, the circuit court would not have been permitted to depart downward from the Guidelines. According to §l2-202(a)(2)(iv), a court's support order cannot vary from the Guidelines amount "solely on the basis of evidence of the presence in the household of either parent of other children to whom that parent owes a duty of support and the expenses for whom that parent is directly contributing."

The General Assembly added this provision in 2000 in response to *Dunlap v. Fiorenza*, 128 Md. App. 357 (1999). In *Dunlap*, we held that the trial judge did not abuse his discretion in ordering the father to pay monthly child support at a lower rate than that prescribed by the Guidelines based upon the fact that the father remarried and had two additional children, one of whom had "serious medical problems." We opined that "it would be in the best interests of Justin [the child receiving support] that his half-siblings not have to do without (any more than necessary)." Judge Ellen Hollander dissented. The General Assembly enacted § l2-202(a)(2)(iv) to reflect Judge Hollander's views. In *Beck v. Beck,* we affirmed subsequently that a Guidelines departure with respect to one child is not in his best interests simply because doing so will benefit another child to whom a common parent owes a duty of support.

Thus, even if appellee were legally required to support his stepchildren, the circuit court could not have reduced the Guidelines amount that appellee was obliged to pay for Errond and Payten. Absent a legal obligation to stepchildren, the court erred *a fortiori* in departing downward from the Guidelines in this case. Because there was no finding that a downward departure from the statutory amount of child support was in the best interests of Errond or Payten, and in light of our holding in *Beck*, the circuit court shall revise its order and award child support for appellee's biological children in accordance with the Child Support Guidelines." *Slip op at various pages, citations and footnotes omitted.*

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CASE INDEX

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