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COURT OF SPECIAL APPEALS

Unreported opinions

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Divorce: comity: recognition of valid foreign same-sex marriage

Jessica Port
v.
Virginia Anne Cowan

No. 69, September Term, 2011

Argued Before: Bell, C.J., Harrell, Battaglia, Greene, Adkins, Barbera, Raker, Irma S., (Ret'd, Specially Assigned), JJ.

Opinion by Harrell, J.

Filed: May 18, 2012. Reported.

Under the common law doctrine of comity, a valid out-of-state marriage will be recognized in Maryland, for purposes of application of its domestic divorce laws, if it is not statutorily prohibited or "repugnant" to Maryland public policy. A review of Maryland statutes and executive branch policies demonstrates that recognizing valid foreign same-sex marriages is consistent with Maryland public policy.

Appellant, Jessica Port, and Appellee, Virginia Anne Cowan, married in California in 2008. Approximately two years later, Port and Cowan agreed mutually to separate. Port filed ultimately a divorce complaint, on the ground of voluntary separation, in the Circuit Court for Prince George's County (at the time, she was a resident of the County). Cowan answered the complaint in a "no contest" manner. The court denied the requested relief, explaining in its written order that the marriage was "not valid" and "contrary to the public policy of Maryland." Being aggrieved equally, the parties filed appeals timely, asking why an out-of-state, same-sex marriage, valid when and where performed, was not cognizable in Maryland for purposes of the application of its domestic divorce laws.

Puffing aside for present purposes whatever may turn out to be the view of the Maryland electorate regarding recognition of the performance in Maryland of domestic same-sex marriages, the treatment given such relationships by the Maryland Legislature (until recently) may be characterized as a case of multiple personality disorder.[1] Exhibit One in this lay diagnosis is the currently effective version of § 2-201 of the Family Law Article of the Maryland Code, defining marriage, for purposes of such ceremonies conducted in Maryland, as being only between a man and a woman.[2] *See Conaway v. Deane*, 401 Md. 219, 325, 932 A.2d 571, 635 (2007) (rejecting constitutional challenges to § 2-201). Exhibit Two is a long list of enactments protecting gay persons and same-sex couples from discrimination (by reason of their sexual orientation and relationships) in employment,[3] health care,[4] estate planning,[5] and other areas.[6]

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

These perceptually mixed legal messages bear directly on resolving the question presented in the present case because they are where we find most often the public policy of Maryland. In order for the parties' foreign same-sex marriage to be recognized in this State for purposes of the application of our domestic divorce laws, that marriage cannot be "repugnant" to Maryland public policy, as that term is understood under the common law doctrine of comity.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence is undisputed in the record of this case. Port and Cowan were wed in a civil ceremony in California on 10 October 2008.[7] At that time, California recognized domestic same-sex marriage.[8] That the parties' marriage was formed validly, in California is neither contested nor at issue on this record. Therefore, we assume, for purposes of this appeal, that the parties' marriage was, and is, valid in California.

Approximately eight months after marrying, the parties agreed to separate on or about 24 June 2009. After the requisite period of separation, Port filed in the Circuit Court for Prince George's County on 12 July 2010 a complaint for an absolute divorce. Cowan filed timely a "no contest" answer to Port's divorce complaint. The couple were not parents. There was no dispute identified or decision sought by the parties regarding marital property, alimony, or support submitted to the court.

The Circuit Court received testimony at a hearing on 15 October 2010 establishing and corroborating the divorce ground of mutual separation. In its 22 October 2010 dispositve order, the court concluded that Port met the residency requirements for divorce, had been separated voluntarily for more than one year, and had no hope or expectation of reconciliation. *See, e.g., Wallace v. Wallace,* 290 Md. 265, 275, 429 A.2d 232,

238 (1981) (stating that the three elements of voluntary separation are "(i) an express or implied agreement to separate, accompanied by a mutual intent not to resume the marriage relationship; (ii) voluntarily living separate and apart without cohabitation for twelve months prior to the filing of the bill of complaint; and (iii) that the separation is beyond any reasonable hope of reconciliation"); *Fletcher v. Fletcher*, 95 Md. App. 114, 123, 619 A.2d 561, 565 (1993) (explaining that jurisdiction over a divorce requires at least one of the parties to the marriage be domiciled in the State). Despite these conclusions, the Circuit Court denied Port's divorce request. The trial judge reasoned solely that the "same sex marriage in which the parties hereto participated is not valid pursuant to Maryland law. . . . [T]o recognize the alleged marriage would be contrary to the public policy of Maryland."

Port filed timely an appeal to the Court of Special Appeals. Cowan filed timely a cross-appeal. Despite being opposing parties technically, Port and Cowan agree that their California marriage should be recognized in Maryland for purposes of the application of Maryland's divorce laws, and a divorce granted. Prior to the intermediate appellate court deciding the appeal, we issued, on our initiative, a writ of certiorari. *Port v. Cowan*, 422 Md. 353, 30 A.3d 193 (2011).

II. QUESTION PRESENTED

Port and Cowan present in their respective appeals the same, single question for our consideration: "Must the Circuit Court grant a divorce to two people of the same sex who were validly married in another jurisdiction and who otherwise meet the criteria for divorce under Maryland law?" Because this question is purely a legal one, we review without deference the Circuit Court's conclusions. *See, e.g., Taylor v. Giant of Md., LLC*, 423 Md. 628, 651, 33 A.3d 445, 459 (2011) (citing *Rosemann v. Saisbuzy, Clements, Bekman, Marder & Adkins, LLC,* 412 Md. 308, 314, 987 A.2d 48, 52 (2010)).

The parties posit that an affirmative response by us to their question is compelled by proper application of the principles of the common law doctrine of comity. They argue alternatively that the Circuit Court's failure to recognize their marriage violated their equal protection and due process rights, contained within Article 24 of the Maryland Declaration of Rights. No one appeared before us, in writing or in person, to argue that we should affirm the Circuit Court's judgment.[9] Because we resolve this appeal on the non-constitutional ground of comity, we shall not reach the parties' equal protection and due process arguments. *Prof'l Staff Nurses Ass'n v. Dimensions Health Corp.*, 346 Md. 132, 138–39, 695 A.2d 158, 161 (1997) (quoting *State v. Lancaster*, 332 Md. 385, 404 n.13, 631 A.2d 453, 463 n.13 (1993)) (noting that the Court of Appeals will not reach a constitutional issue when a case may be decided on a non-constitutional ground).

III. DISCUSSION

As we noted at the outset, § 2-201 of the Family Law Article provides (now and at the time the Circuit Court decided this case) that "[o]nly a marriage between a man and a woman is valid in this State." Md. Code Ann., Fam. Law § 2-201 (LexisNexis 2006). In 2007, we concluded that this prohibition on domestic same-sex marriage did not violate Articles 24 and 46 of the Maryland Declaration of Rights. *Conaway*, 401 Md. at 325, 932 A.2d at 635. Thus, Maryland will recognize a marriage solemnized within its boundaries if it is between a man and a woman only.[10]

This appeal, however, does not require us to revisit *Conaway*, nor does the resolution of this case implicate the Civil Marriage Protection Act (CMPA), enacted by the General Assembly during its 2012 session. H.B. 438, 2012 Leg., 429th sess. (Md. 2012). Instead, we are asked whether a valid out-of-state, same-sex marriage maybe recognized in this State, for purposes of a domestic divorce action. Courts deciding whether a foreign marriage is valid in this State, for purposes of divorce or otherwise, employ the common law doctrine of comity, not principally our domestic marriage laws. *See, e.g., Henderson v. Henderson*, 199 Md. 449, 457–58,87 A.2d 403, 408 (1952); Fensterwald v. Burk, 129 Md. 131, 137–38, 93 A. 358, 369 (1916).[11]

We note that there appears to be a conflict among the Circuit Courts of this State regarding the issue before us. In addition to the present case, the Circuit Court for Baltimore City denied recognition to an apparently valid foreign same-sex marriage for purposes of applying Maryland's divorce laws. The Baltimore City case is pending before the Court of Special Appeals. *Brown v. Keller*, No. 24-D-10-001660DA (Cir. Ct. Balt. City, Md. 2011), *appeal filed*, No. 816, September Term, 2011 (Md. Ct. Spec. App. 2011). Conversely, the Circuit Courts for Anne Arundel and St. Mary's Counties granted divorces to same-sex couples, married validly outside-of-the-State. *Migues v. Johnson,* No. 02-C-10-155341DA (Cir. Ct. Anne Arundel Cnty., Md. 2011); *Cole v. Clover*, No. 18-C-10-000327 (Cir. Ct. St. Mary's Cnty., Md. 2010). The divergent treatment of foreign same-sex marriages by these Circuit Courts demonstrates the need for this Court to resolve the conflict.

A. The Doctrine of Comity

Under the doctrine of comity, long applied in our State, Maryland courts "will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and respect" *Wash. Suburban Sanitary Comm'n v. CAE-*

Link Corp., 330 Md. 115, 140, 622 A.2d 745, 757 (1993) (citing *Galloway v. Watts*, 395 F. Supp. 729, 731 (D. Md. 1975)). When considering a foreign marriage specifically, Maryland courts follow the choice-of-law rule of *lex loci celebrationis*,[12] applying the substantive law of the place where the contract of marriage was formed. J*ackson v. Jackson*, 82 Md. 17, 28, 33 A. 317, 318 (1895).

Generally, Maryland courts will honor foreign marriages as long as the marriage was valid in the state where performed. *Henderson*, 199 Md. at 458, 87 A.2d at 408; *Bannister v. Bannister*, 181 Md. 177, 180, 29 A.2d 287, 288 (1942); *accord* Restatement (Second) of Conflict of Laws § 283(1) (1971). There are two exceptions to this rule: the foreign marriage may not be "repugnant" to Maryland public policy and may not be prohibited expressly by the General Assembly. *See Henderson*, 199 Md. at 459, 87 A.2d at 409 ("[T]he State is not bound to give effect to marriage laws that are repugnant to its own laws and policy. Marriages that are tolerated in another state but are condemned by the State of Maryland as contrary to its public policy will not be held valid in this State."); *Fensterwald*, 129 Md. at 137–38, 98 A. at 360 (1916) (quoting *Jackson*, 82 Md. at 29–30, 33 A. at 318–19); *accord* Restatement (Second) of Conflict of Laws § 283(2).

Maryland recognizes liberally foreign marriages, even those marriages that may be prohibited from being formed if conducted in this State. Research by the parties, amici, and this Court failed to reveal a case, decided by this Court, voiding a valid out-of-state marriage that was prohibited from being formed in Maryland.[13] Liberal recognition of out-of-state marriages promotes "uniformity in the recognition of the marital status, so that persons legally married according to the laws of one state will not be held to be living in adultery in another State, and that children begotten in lawful wedlock in one State will not be held illegitimate in another." *Henderson*, 199 Md. at 458; 87 A.2d at 408 (citing, among other authorities, *Lando v. Lando*, 127 N.W. 1125 (Minn. 1910)). Further, the recognition of foreign marriages instills stability in "one of the most important of human relations." Eugene F. Scoles & Peter H. Hay, *Conflict of Laws* 429 (2d ed. 1991); *see also* William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* § 116(a), at 362 (2d ed. 1993).

The following cases illustrate the liberal recognition of valid foreign marriages in this State. Maryland law prohibits the formation of common law marriages within the State. *Mendelson v. Mendelson*, 75 Md. App. 486, 502, 541 A.2d 1331, 1339 (1988). Yet, Maryland courts will recognize out-of-state common law marriages, if valid where formed. *See, e.g., Henderson*, 199 Md. at 458–60; 87 A.2d at 408–09 (recognizing, for purposes of divorce, a common law marriage formed in the District of Columbia); *Whitehurst v. Whitehurst*, 156 Md. 610, 620, 145 A. 203, 207-08 (1929) (recognizing, for purposes of administering the deceased husband's estate, a common law marriage formed in New York). The Court of Special Appeals has gone so far as to infer that a couple's two-day sojourn in Pennsylvania, a common law marriage state, created a valid foreign marriage, where their relationship fulfilled otherwise the common law marriage requirements. *Blaw-Knox Constr. Equip. Co. v. Morris*, 88 Md. App. 655, 669–72, 596 A.2d 679, 685–87 (1991) (concluding that, for purposes of maintaining a wrongful death claim, there was sufficient evidence for the jury to consider whether a couple was married).

We recognized, for domestic law purposes, a Rhode Island marriage between an uncle and a niece. *Fensterwald*, 129 Md. at 137–38, 98 A. at 360. At that time in Maryland, an uncle-niece marriage was void and constituted further a misdemeanor, subject to a fine. Md. Code (1904), Art. 27 § 297, Art. 62 § 2. The couple traveled to Rhode Island expressly for the purpose of avoiding the Maryland prohibition (and possibly criminal prosecution). *Fensterwald*, 129 Md. at 134, 98 A. at 359. Despite these facts, we deemed the marriage so formed in Rhode Island to be valid in this State.

B. Applying *Lex Loci Celebrationis* to the Parties' Valid Foreign Same-Sex Marriage

Henderson, Fensterwald, and the other cases considered above demonstrate that Maryland courts will recognize liberally valid foreign marriages. *See also Frey v. Frey*, 298 Md. 552, 560, 471 A.2d 705, 709 (1984) ("[N]o state interest exists in preserving a marriage in which the relationship has broken down irretrievably."). The parties' California same-sex marriage is valid. Therefore, in order for their marriage to be valid for purposes of whether Maryland will adjudicate its dissolution, it must not run afoul of either exception to *lex loci celebrationis*: that is, it cannot be prohibited by statute or "repugnant" to the public policies of Maryland. For the following reasons, Port's and Cowan's entitlement, on this record, to a Maryland divorce from their California same-sex marriage is not prohibited, as a matter of law and on this record, by these exceptions.[14]

Regarding the statutory prohibition exception, Family Law Article § 2-201 does not forbid expressly valid-where-formed foreign same-sex marriages. The plain wording of § 2-201 provides that "[o]nly a marriage between a man and a woman is valid in this State." It does not preclude from recognition same-sex marriages solemnized validly in another jurisdiction, only those sought-to-be, or actually, performed in

Maryland. To preclude the former from being valid, the statute in question must express a clear mandate voiding such marriages and abrogating the common law. *Molesworth v. Brandon*, 341 Md. 621, 630, 672 A.2d 608, 613 (1996) ('"[A]bsent a statute expressing a clear mandate of public policy, there ordinarily is no violation of[it]." (quoting *Waston v. People's Ins. Co.*, 322 Md. 467, 478, 588 A.2d 760, 765 (1991))); *Azarian v. White*, 140 Md. App. 70, 95, 779 A.2d 1043, 1057 (2001) (citing *Robinson v. State*, 353 Md. 683, 693, 728 A.2d 698, 702–03 (1999)). Moreover, we note that same-sex marriages are not listed in Family Law Article § 2-202 as among those marriages considered void.

Other states intending to prevent recognition of valid foreign same-sex marriages have done so expressly and clearly, rather than by implication, subtlety, or indirection. For example, the Pennsylvania Code provides, "A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth." 23 Pa. Cons. Stat § 1704 (LexisNexis through 2011). The Virginia Code provides, "Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable." Va. Code Ann. § 20-45.2 (LexisNexis through 2011). The Missouri Statute provides, "A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted." Mo. Rev. Stat. § 451.022(4) (LexisNexis through 96th General Assembly).[15] The language of § 2-201, by comparison, fails to void for present purposes valid foreign same-sex marriages.

On at least eight occasions, the Maryland General Assembly failed to amend § 2-201 to preclude valid out-of-state same-sex marriages from being recognized in Maryland. For example, during the 2010 legislative session, House Bill 90 (cross-filed with Senate Bill 852) sought to add the following language to § 2-201: "A marriage between two individuals of the same sex that is validly entered into in another state or foreign country is not valid in this State." H.B. 90, 2010 Leg., 427th Sess. (Md. 2010) (died in a House committee). Similar amendments have failed to become law on at least seven other occasions, by our count See H.B. 693, 2005 Leg., 420th Sess. (Md. 2005) (died in a House committee); H.B. 728, 2004 Leg., 418th Sess. (Md. 2004) (died in a House committee); H.B. 531, 2001 Leg., 415th Sess. (Md. 2001) (died in a House committee); H.B. 1128, 1999 Leg., 413th Sess. (Md. 1999) (died in a House committee); S.B. 565, 1998 Leg., 412th Sess. (Md. 1998) (passed on third reading in the Senate, but died in a House committee with an unfavorable report); H.B. 398, 1997 Leg., 411th Sess. (Md. 1997) (died in a House committee); H.B. 1268, 1996 Leg., 410th Sess. (Md. 1996) (died in a House committee). This pattern permits an inference, which we take, that the General Assembly intended the doctrine of comity regarding same-sex marriages to remain the proper analysis to employ here. *See Potom Orthopaedic Assocs. v. Md. State Bd. of Physicians*, 417 Md. 622, 639–41, 12 94–95 (2011) (citations omitted).

We conclude also that the parties' same-sex marriage is not "repugnant" to "public policy," as that term is understood properly in applying the doctrine of modem times. Admittedly, "public policy" is an amorphous legal concept.[16] It however, that wherever found and identified, that public policy prohibits generall' that injures or tends to injure the public good. *Md.-Nat'l Capital Park & Planning v. Wash. Nat'l Arena*, 282 Md. 588, 605-06, 386 A.2d 1216, 1228 (1978) (quoting *v. Brownlow*, 4 H.L. Cas. 1, 196 (1853)). The primary sources of public policy (a typically we look to divine it) are the State's constitution, statutes, administrative reg and reported judicial opinions. *Adler v. Am. Standard Corp.,* 291 Md. 31, 45, 4321 472 (1981) (quoting *Md-Nat'l Capital Park & Planning Comm'n*, 282 Md. at 605–06, 386 A.2d at 1228). Although courts are not confirmed to these emanations of public policy in their search, secondary sources are perceived generally as less persuasive. *See Adler*, 291 Md. at 45, 432 A.2d at 472.

The bar in meeting the "repugnancy" standard is set intentionally very high, as demonstrated in *Fensterwald* and *Henderson*. In the former case, this Court recognized an uncle-niece marriage solemnized in Rhode Island, despite the fact that it would be void and a misdemeanor had it been attempted to be formed in Maryland. *Fensterwald*, 129 Md. at 139, 98 A. at 360. In the latter case, we ruminated, in dictum, that a valid interracial marriage solemnized in another jurisdiction would be deemed invalid in Maryland.[17] The dictum in *Henderson* has been discredited, *Conaway*, 401 Md. at 304 n.66, 932 A.2d at 622 n.66, and the anti-miscegenation statute repealed, 1967 Md. Laws 6. For present purposes, however, the dictum demonstrates how elevated a standard "repugnancy" is. At the time of *Henderson*, interracial marriage was condemned by statute ("an infamous crime") and carried a severe penalty—imprisonment for not less than eighteen months and not more than ten years. Md. Code (1935), Art. 27 § 365, *repealed by* 1967 Md. Laws 6. By comparison, a same-sex marriage performed in Maryland does not carry for the couple (or the celebrant) a serious criminal penalty. *See, e.g.,* Md. Code Ann., Fam. Law § 2-406(d)(2) (LexisNexis 2006) (providing that an individual who marries knowingly two people prohibited by Family Law Article § 2-202 is guilty of a misdemeanor, punishable by a fine). Thus,

based on the *Fensterwald-Henderson* line of cases, we cannot conclude logically that valid out-of-state same-sex marriages are "repugnant" to Maryland public policy.

With regard to the second exception to *lex loci celebrarionis,* recognizing valid foreign same-sex marriages is consistent actually with Maryland public policy. Prior to the Attorney General's opinion surmising that this Court would recognize foreign same-sex marriages (valid where entered), the General Assembly enacted several laws that protect and support same-sex couples, as alluded to earlier in this opinion. An array of statutes prohibit public or private discrimination based on sexual orientation in the areas of employment, public accommodations, leasing commercial property, and housing. Md. Code Ann., State Gov't §§ 20-304, 401, 501, 606, 705, 901 (LexisNexis 2009); *see also* Md. Code. Regs. 01.01.2007.16(A)(13) (2007) (gubernatorial executive order protecting State executive branch employees and applicants from sexual-orientation discrimination). Maryland's domestic partner statute extends to same-sex couples, who qualify as domestic partners, certain medical and decision-making rights as regards one another.[18] Md. Code. Ann., Health-Gen § 6-101 (LexisNexis 2009); *see also* Madeleine N. Foltz, Comment, *Needlessly Fighting an Uphill Battle: Extensive Estate Planning Complications Faced by Gay and Lesbian Individuals,* 40 U. Balt. L. Rev. 495, 523–24(2011). The General Assembly granted also recordation, transfer, and inheritance tax exemptions to same-sex couples who qualify as domestic partners. Md. Code Ann., Tax-Prop. §§ 12-101(e-2), -108(c)(1)(ix), (d)(1)(ii), 13-207(a)(2)–(3) (LexisNexis Supp. 2011); Md. Code Ann. Tax-Gen. § 7-203(1) (LexisNexis 2010). Finally, this Court rejected discrimination based on sexual orientation in the context of certain family law situations. In *Boswell v. Boswell,* we concluded that sexual orientation of a parent ordinarily is irrelevant in a visitation dispute (unless the court finds that the child would be impacted adversely in a demonstrable way because of the parent's conduct with his/her partner in front of the child). 352 Md. 204, 237–3 8, 721 A.2d 662, 678 (1998); *see also North v. North*, 102 Md. App. 1, 16–17, 648 A.2d 1025, 1032–33 (1994) (concluding that the trial court abused its discretion by denying overnight visitation to a father based on his sexual orientation).[19]

After the Attorney General published his opinion in 2010, the State of Maryland expressed a panoply of policies recognizing explicitly out-of-state same-sex marriages. See Marriage — Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May Be Recognized in Maryland, 95 Op. Att'y Gen. Md. 3 (2010); Press Release, Statement from Governor O'Malley on Attorney General's Same Sex Marriage Recognition Opinion (24 Feb. 2010) ("I expect all State agencies to work with the Attorney General's office to ensure"recognition of out-of-state same-sex marriages). The Department of Budget and Management changed its paid-leave and employee-benefit policies to include same-sex spouses of eligible State employees. *See Same Sex Domestic Partner and Same Sex Spouse FAQ's*, Md. Dept. of Budget and Mgmt., http://dbm.maryland.gov/benefits/Documents/SameSexDPSpouseFAQs.pdf (lasted visited 16 May 2012); *Important Benefit Update Concerning Same-Sex Spouses*, Md. Dept. of Budget and Mgmt., http://www.dbm.maryland.gov/benefits/Pages/BenefitUpdateConcerningSame.aspx (last visited 16 May 2012). The Board of Regents of the University System of Maryland, for purposes of tuition remission and other policies, redefined spouse to be "consistent with the advice given by the Office of the Attorney General." Clarification of the Definition of "Spouse" in BOR Policies, University System of Maryland Board of Regents (12 Sept. 2010), *available at* http://www.usmd.edu/BORPortal/Materials/2010/FB/20100917/6f.pdf. Finally, the Department of Health and Mental Hygiene changed its procedure so that a female same-sex spouse (who did not give birth) can be listed as a parent without having to obtain a court order. Letter from Geneva G. Sparks, State Registrar and Deputy Director, to Birth Registrar (10 February 2011), *available at* http://data.lambdalegal.org/in-court/downloads/exec_md_20110210_ss-spouse-instructions-to-facilities.pdf.

A number of other states with similar comity principles and relevant domestic marriage laws to those of Maryland have recognized foreign same-sex marriages for purposes of their domestic divorce laws. In *Christiansen v. Christiansen*, a same-sex couple, whose marriage was formed validly in Canada, appealed the denial of their divorce request by the courts of Wyoming. 253 P.3d 153, 154 (Wyo. 2011). Wyoming has a statute limiting marriage to a man and woman, but fails to proscribe by legislation recognition of valid foreign same-sex marriages. *See* Wyo. Stat. Arm. § 20-1-101 (LexisNexis through 2011 regular session). It also recognizes foreign marriages pursuant to *lex loci celebrationis* (although the principle is codified, rather than a creature of the common law) and will not validate a foreign marriage "contrary to the policy of [Wyoming] laws." *Christiansen*, 253 P.3d at 155–56 (citing Wyo. Stat. Ann. § 20-1-111 (LexisNexis through 2011 regular session)). The court, noting that the "policy exception is necessarily narrow, lest it swallow the rule," concluded that recognizing a valid foreign same-sex marriage for purposes of a domestic divorce proceeding "does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages [in Wyoming]." *Christiansen*, 253 P.3d at 156. New York, which prior to enacting a marriage-

equality law in 2011 had comity and marriage laws similar to Maryland and Wyoming, recognized foreign same-sex civil unions for purposes of divorce. *See Dickerson v. Thompson*, 897 N.Y.S.2d298, 299–301 (N.Y. App. Div. 2010) (no subsequent appeal). See also New Mexico Opinion Attorney General 11-01 (2011), *available* at 2011 WL 111234, concluding that "same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico."

Some states have elected not to recognize valid foreign same-sex marriages for purposes of domestic divorce proceedings. *See, e.g., In re J.B.,* 326 S.W.3d 654 (Tex. Ct. App. 2010); *Kern v. Taney,* 11 Pa. D. & C.5th 558 (Pa. C.P. Ct. 2010). Those states, unlike Maryland, expressed clear public policies against honoring foreign same-sex marriages. *In re J.B.*, 326 S.W.3d at 665 ("Section 6.204(b) [of the Texas Family Code] declares same-sex marriages void and against Texas public policy."); *Kern*, 11 Pa. D. & C.5th at 562 ("A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth." (quoting 23 Pa. Cons. Stat. § 1704)).[20]

IV. CONCLUSION

Under the principles of the doctrine of comity applied in our State, Maryland courts will withhold recognition of a valid foreign marriage only if that marriage is "repugnant" to State public policy. This threshold, a high bar, has not been met yet; e.g., no still viable decision by this Court has deemed a valid foreign marriage to be "repugnant," despite being void or punishable as a misdemeanor or more serious crime were it performed in Maryland. The present case will be treated no differently. A valid out-of-state same-sex marriage should be treated by Maryland courts as worthy of divorce, according to the applicable statutes, reported eases, and court rules of this State.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED; CASE REMANDED TO THAT COURT WETH DIRECTION TO GRANT A FINAL DIVORCE TO THE PARTIES. PARTIES TO BEAR EQUALLY THE COSTS IN THIS COURT.

FOOTNOTES

1. The essential feature of multiple personality disorder (also known as dissociative identity disorder) is the existence within a person of two or more distinct identities or personality states. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 484 (4th. ed. 1994). There are at least two fully developed personalities, each having unique memories and behavior patterns. *Id.*

2 The General Assembly enacted, during the 2012 session, the Civil Marriage Protection Act ("CMPA"), H.B. 438, 2012 Leg., 429th Sess. (Md. 2012). The Governor signed the bill into law on 1 March 2012. The law, when effective, will change § 2-201 [to become § 2-201(b)] to read "only a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State." The law provides a prospective effective date of 1 January 2013, or later if litigation is pending on 1 January 2013 arising from an anticipated petition referendum initiative to place the measure on the ballot before the Maryland electorate for the November 2012 general election. *See* 2012 Md. Laws 2, §§ 5, 7. Thus, if the petition initiative receives successfully the State Board of Elections' approval of the requisite number of signatures of eligible voters, but that approval spawns litigation that is not resolved finally by 1 January 2013, or the electorate rejects the law at the polls in November 2012 and litigation results from that action which is not resolved finally on or before 1 January 2013, the effective date of the CMPA (if it should become effective at all) may be later than 1 January 2013. At the time this opinion is filed, the petition initiative is ongoing. For reasons explained *infra*, whether the CMPA becomes effective is of no impact on the resolution of the present case. *See infra* note 11.

3. Md. Code Ann., State Gov't § 20-606 (LexisNexis 2009).

4. *See, e.g.,* Md. Code. Ann., Health-Gen. § 6-101 (LexisNexis 2009).

5. Md. Code Ann., Tax-Prop. §§ 12-l01(e-2), -108(c)(1)(ix), (d)(1)(ii), 13- 207(a)(2)–(3) (LexisNexis Supp. 2011).

6. *See infra* note 18 and accompanying text.

7. Presently, Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont solemnize same-sex marriages. D.C. Code § 46-401 (LexisNexis through 23 Dec. 2011); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Corn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); N.H. Rev. Stat Ann. § 457:1 (LexisNexis through chapter 9 of 2012 session); N.Y. Dom. Rel. Law § 10-a (LexisNexis through 2012 released chapters 1–8, 10–24, 50–55); Vt. Stat Ann. tit. 15, § 8 (LexisNexis through 2011 session). Several foreign countries solemnize same-sex marriage, including Canada. Civil Marriage Act S.C. 2005, c. 33 (Can.).

8. Approximately one month after the parties' marriage, the voters of California adopted Proposition 8, which enacted a state constitutional provision limiting the definition of marriage to a man and a woman. *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009). Proposition 8, however, did not affect the validity of same-sex marriages formed in California during the time when it was legal to do so. *Strauss*, 207 P.3d at 119. In any event, the federal Ninth Circuit Court of Appeals concluded subsequently that Proposition 8 violated the Fourteenth Amendment to the Constitution. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012). The mandate is stayed presently, however, pending the outcome of an en bane rehearing. *See* Fed. R. App. P. 41; 9th Cir. R. 41-1, -2.

9. No one moved to file an amicus brief arguing against Port's and Cowan's position. On the other hand, we received

amicus briefs in support of the parties' position from the American Civil Liberties Union of Maryland, the Deans and Faculty of the University of Baltimore School of Law, the Deans and Faculty of the University of Maryland Francis King Carey School of Law, Equality Maryland, Inc., Maryland Black Family Alliance, the National Black Justice Coalition, and Rainbow Families.

10. Subject, of course, prospectively to whether the CMPA becomes effective. *See supra* note 2..

11. Like the legislation considered in *Conaway v. Deane,* 401 Md. 219, 932 A.2d 571 (2007), the CMPA governs domestic same-sex marriages, not whether valid foreign same-sex marriages should be recognized in Maryland. According to its terms, it will become effective on 1 January 2013 (or thereafter, if at all, based on the outcome of related litigation that may be undertaken), as explained in footnote 2, *supra*. The CMPA authorizes domestic same-sex marriage by amending Family Law Article § 2-201. Whether the ongoing referendum petition "drive" to place this law on the November 2012 election ballot succeeds, and if so, whether the electorate rejects the CMPA, however, has no bearing on our consideration and resolution of the present case. If the electorate rejects the CMPA, § 2-201 will remain in its present formulation. As we shall explain *infra*, such a petition initiative, should it occur and succeed, does not evince that the recognition of valid-where-performed same-sex marriages, for the purposes application of domestic divorce laws, are "repugnant" to the public policy of this State. The result of that initiative has no bearing on the application of the principles of comity to the question before us in the present case.

12. Although we use the Latin phrase *lex loci celebrationis*, which means the law of the place of the ceremony, Maryland common law uses actually the alternative phrase *lex loci con tractus*, meaning the law of the place where a contract is executed (marriage is, after all, a contract). If Latin is to be used at all, it is more correct in the present context to use *celebrationis*. Black's Law Dictionary 995 (9th ed. 1990) ("[*Lex loci celebrationis* usually] governs when the validity of a marriage is at issue."); *see also* William M. Richman & William L. Reynolds, *Understanding Conflict of Law* § 116(a), at 362 (2d ed. 1993).

13. This Court has denied, however, recognition to a foreign divorce. *Aleem v. Aleem*, 404 Md. 404, 947 A.2d 489 (2008). The wife filed in Maryland for a limited divorce from her husband. *Aleem*, 404 Md. at 406, 947 A.2d at 490. The husband argued that his *talaq* divorce, obtained in and recognized by Pakistan, deprived Maryland courts of jurisdiction to hear the wife's marital property claims. *Id.* We declined to extend cornity to the *talaq* divorce because it was contrary to Maryland public policy regarding equitable distribution of marital property, in the absence of a valid agreement to the contrary. *Aleem*, 404 Md. at 425, 947 A.2d at 502.

14. In addition to the briefs of the parties and amici curiae, we are guided by the Maryland Attorney General's opinion, which concluded that foreign same-sex marriages are valid in Maryland. *See* Marriage—Whether Out-of-State Same-Sex Marriage That is Valid in the State of Celebration May Be Recognized in Maryland, 95 Op. Att'y Gen. Md. 3 (2010). Although certainly not binding on this Court, we consider for its persuasive value, if any, the Attorney General's opinion. *See, e.g., Dodds v. Shamer*, 339 Md. 540, 556-57, 663 A.2d 1318, 1326 (1995).

15. For additional examples, *see* Ala. Code § 30-1-19(e) (LexisNexis through 2012 regular session) ("The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued."); W. Va. Code Ann. § 48-2-603 (LexisNexis through 4th 2011 extraordinary session) (stating that foreign same-sex marriages "shall not be given effect").

16. In *Maryland-National Capital Park & Planning Commission v. National Arena*, Judge Levine wrote that "jurists to this day have been unable to truly fashion a workable definition of public policy." 282 Md. 588, 605, 386 A.2d 1216, 1228 (1978). He noted further that "conceptions of public policy tend to ebb and flow with the tides of public opinion, making it difficult for courts to apply the principle with any degree of certainty." *Md.-Nat'l Capital Park & Planning Comm'n*, 282 Md. at 606, 386 A.2d at 1228 (citing 1 W. Story, *A Treatise on the Law of Contracts* § 675 (5th ed. 1874)). For example, in 1895, this Court grounded its notion of public policy on "Christendom," deeming foreign marriages "contrary to the law of nature as generally recognized in Christian countries" to be invalid in this State. *Jackson v. Jackson*, 82 Md. 17, 29–30, 33 A. 317, 318–19 (1895). Although the ecclesiastical underpinning of *Jackson* may not be without some continuing efficacy, the modem conception of public policy is not so limited and includes an objective, secular component.

17. Despite *Henderson* and the above referenced dictum, the Board of Immigration Appeals concluded subsequently that Maryland would recognize an interracial marriage, solemnized validly in another state, despite being against the law and a criminal violation in Maryland at the time. *In re C*, 71. & N. Dec. 108, 110–11 (B.I.A. 1956). In that case, a Filipino man married a Caucasian woman in the District of Columbia to avoid purposefully Maryland's anti-miscegenation statute. *In re* C, 7 I. & N. Dec. at 109. The board noted that the Maryland statute did not "in express terms make void the marriage of persons domiciled in Maryland who attempt to evade this statutory provision by marriage in another state." *In re* C, 7 I. & N. Dec. at 110–11.

18. The Health-General Article (LexisNexis 2009) extends to qualifying domestic partners the following rights: visiting a domestic partner in a health facility or nursing home (§ 6-20 1 & § 19-344(k)(2)); sharing a nursing-facility room (§ 19-344(h)); accompanying a domestic partner in a medical-emergency transport (§ 6-202); surrogate decision-making authority when the other partner is incapacitated and has not granted power of authority to another (§ 5-605(a)(2)(ii)); authority to consent to a postmortem examination of a deceased partner (§ 5-501(b)(iii)); authority over the disposition of a deceased partner's remains (§ 5-509(c)(1)); and, access to burial permits related to a deceased partner (§ 4-215(e)(5)(iii)). Further, a surviving domestic partner is a "person of interest" as regards the deceased partner's burial site. Md. Code Ann., Real Prop. § 14-121(a)(4)(iii).

19. Although the issue has not been addressed in a holding by the Court, Judge Raker, in her concurring/dissenting opin-

ion in *Conaway*, expressed her view that Family Law Article § 5-3A-29 permits same-sex couples to adopt children. *Conaway*, 401 Md. at 334–36, 932 A.2d at 641–42 (2007) (Raker, J., concurring/dissenting).

20. The Supreme Court of Rhode Island opted also not to honor foreign same-sex marriages for purposes of domestic divorces. *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007). Although that state does not have a clear public policy against recognizing such marriages, *Chambers* is distinguishable from *In re J.B.,Kern*, and the present case. The issue in *Chambers* was whether the Rhode Island family court, a legislatively created court of limited jurisdiction and authority, had jurisdiction, under the prevailing statute, over parties seeking to annul their valid foreign same-sex marriage. 935 A.2d at 962–63. The statute provides that the Rhode Island family court could "hear and determine all petitions from the bond of marriage." R.I. Gen. Laws § 8-10-3 (LexisNexis through January 2011 session). The *Chambers* court resolved that the word "marriage" in the statute connoted opposite-sex marriage only. *Chambers*, 935 A.2d at 962–63.

Maryland Circuit Courts, by comparison, are courts of general jurisdiction with common law and equitable powers. Md. Code Ann., Cts. & Jud. Proc. § 1-501 (LexisNexis 2006). The Family Law Article grants jurisdiction to equity courts, i.e., the Circuit Courts, over "divorce," without using the term "marriage." Md. Code Ann., Fam. Law § 1-201 (a)(4) (LexisNexis 2006).

Cite as 7 MFLM Supp. 11 (2012)

Paternity: presumption of legitimacy: child conceived during marriage

Amy Mulligan

v.

William Corbett

No. 43, September Term, 2011

Argued Before: Bell, C.J., Harrell, Greene, Adkins, Barbera, Rodowsky, Lawrence F., (Ret'd, Specially Assigned) Raker, Irma S., (Ret'd, Specially Assigned), JJ.

Opinion by Rodowsky, J., Barbera and Raker, JJ., Dissent.

Filed: May 23, 2012. Reported.

The presumption of legitimacy under FL § 5-1027(c)(1) is based on the time of conception, not birth. Thus, the fact that the child was born after the mother's divorce did not establish the respondent's status as a putative father, entitled to a blood test under FL § 5-1002(c); rather, respondent must rebut the presumption of legitimacy by other evidence.

This case calls upon us to delve once again into the issue of genetic testing to determine paternity. In particular we are asked to determine whether a man who claims to be the father of a child conceived while the mother was married to another man, but born afier the mother and her husband divorced, has an unconditional right to genetic testing to determine whether he is the biological father. The question requires us to identify which of two statutory schemes dictates the outcome.

The Paternity Proceedings subtitle ("Paternity subtitle'), codified at Maryland Code (1999, 2006 Repl. Vol., 2010 Cum. Supp.), §§ 5-1001 through 5-1048 of the Family Law Article (FL), presumes that the mother's husband at the time of conception is the father of that child, *see* FL § 5-1027(c)(1). Section 5-1029(b) requires a court to order blood testing "to determine whether the alleged father can be excluded as being the father of the child."[1] *See Langston v. Riffe*, 359 Md. 396, 424, 754 A.2d 389, 404 (2000). Alternatively, Maryland Code (2001, 20 11 Repl. Vol.), § 1-206(a) of the Estates and Trusts Article (ET), presumes that a child born or conceived during the mother and her husband's marriage is the legitimate child of each spouse. A request for blood testing to rebut that presumption is analyzed as a motion pursuant to Maryland Rule 2-423 ("Mental or physical examination of persons") and invokes the trial court's discretion in deciding whether ordering such testing would be in the best interests of the child. *Turner v. Whisted*, 327 Md. 106, 113-14, 607 A.2d 935, 939 (1992). For the reasons that follow we hold that, under the facts of this case, the circuit court did not err or abuse its discretion by considering the best interests of the subject child when rejecting the requested blood testing.

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

I

In order to put into proper context the underlying facts and procedural history of this case, it is helpful first to review generally the two statutory schemes at issue. We begin with the Paternity subtitle of the Family Law Article.

Until 1963, the subject now addressed in the Paternity subtitle was covered under the heading of "Bastardy" or "Bastardy and Fornication." *Eagan v. Ayd*, 313 Md. 265, 268, 545 A.2d 55, 56 (1988). Those laws served "to prevent the county from having to bear the full cost of supporting an illegitimate child . . . [and] to punish fornication, and the laws were deemed criminal in nature." *Id*. at 269, 545 A.2d at 56. The criminal bastardy laws were in effect when, in 1941, the General Assembly enacted former Article 12, § 17 of the Code. *Id*. That section was added "to give the court the benefit of a relatively new scientific tool — the use of blood tests to *prove nonpaternity*." *Id*., 545 A.2d at 56-57 (emphasis added). The provision was "patently for the benefit of the defendant," *i.e*., a man alleged by the State to be the child's father. *Id*. at 270, 545 A.2d at 57. Under that provision, "[w]henever the defendant in bastardy proceedings denies that he is the father," then, "*upon petition of the defendant*, the court shall order that the complainant, her child and the defendant submit" to blood testing. *Id*. (quoting former Article 12, § 17 of the Maryland Code) (emphasis in original).

The law underwent major change in 1963, when the General Assembly repealed the Bastardy and Fornication Arlicle (former Article 12) "for the purpose of 'entirely revising the laws of this State concerning bastardy and fornication and paternity proceedings; vesting in the several equity courts of this State jurisdiction to hear and determine all such paternity pro-

ceedings; [and] providing generally for such jurisdiction and the procedure for its exercise. . . .'" *Id.* at 271, 545 A.2d at 57 (quoting 1963 Md. Laws, ch. 722) (alteration in original). Pursuant to this revision, "criminal 'Bastardy' became civil 'Paternity."[2] *Id.*

The goals of the 1963 enaciments were reflected in the report (hereafter "Commission Report") of the Commission to Study Problems of Illegitimacy among the Recipients of Public Welfare Monies in the Program for Aid to Dependent Childien (hereafter "Commission"). *Id.* at 272, 545 A.2d at 58. The Commission "concerned itself with bettering the plight of the illegitimate child," and its "recommendations were made 'with the hope that if adopted, illegitimacy will be curtailed and amelioration of the effects of illegitimacy on children and the community at large will result.'" *Id.* (quoting the Commission Report at 22). The legislative declaration to the enactment, codified in former Article 16, § 66A, announced the State's "duty to ameliorate the deprived social and economic status of children born out of wedlock." The declaration expressed three specific purposes for the legislation: (1) promoting the general welfare and best interests of children born out of wedlock; (2) imposing the obligations of parenthood on both parents; and (3) simplifying procedures. The legislative policy expressed in the current Paternity subtitle, nearly identical to the original declaration, is found in FL § 5-1002. The current section provides, in pertinent part:

> "(a) *In general* — The General Assembly finds that:
>
> "(1) this State has a duty to improve the deprived social and economic status of children born out of wedlock; and
>
> "(2) the policies and procedures in this subtitle are socially necessary and desirable.
>
> "(b) *Purpose*. — The purpose of this subtitle is:
>
> "(1) to promote the general welfare and best interests of children born out of wedlock by securing for them, as nearly as practicable, the same rights to support, care, and education as children born in wedlock;
>
> "(2) to impose on the mothers and fathers of children born out of wedlock the basic obligations and responsibilities of parenthood; and
>
> "(3) to simplify the procedures for determining paternity, custody, guardianship, and responsibility for the support of children born out of wedlock."

In 1976, the General Assembly again amended the "Paternity Proceedings" subtitle of Article 16 to "enhance effective recovery of child support payments" and "creat[e] . . . the Division of Child Support Enforcement." *Eagan*, 313 Md. at 272, 545 A.2d at 58. In 1982, the Paternity subtitle was further amended, in apparent response to technological advancements in blood testing. *See* Ch. 784 of the Acts of 1982. Previously, the putative father, by motion, could require the court to order, or the court, on its own motion, could order blood tests to determine exclusion from paternity. The 1982 amendment changed "putative father" to "a party to the proceedings." Further, the results were admissible in evidence, not only if they excluded the alleged father, but also if they reflected at least a 97.3% probability of the alleged father's paternity. *Id.* A subsequent amendment in 1984 "eliminate[d] the court's discretion to reject a qualifying blood test." *Id.*

In 1984, the Paternity subtitle of Article 16 "was transferred to the Family Law Article . . . without substantive change," *Id.* at 274 n.5, 545 A.2d at 58 n.5, and codified at subtitle 10 ("Paternity Proceedings") of Title 5 ("Children"). Subsequent amendments pertinent to the issue presented in this case were enacted in 1995 and 1997.

The 1995 amendment was the General Assembly's response to a decision from this Court holding that a paternity judgment could only be set aside on the basis of "fraud, mistake, . . . irregularity,' or clerical error." *Evans v. Wilson*, 382 Md. 614, 630, 856 A.2d 679, 688-89 (2004) (quoting *Tandra S. v. Tyrone W.*, 336 Md. 303, 315, 648 A.2d 439, 445 (1994)). The amendment "provide[d] an alternative way for an adjudged father to challenge a judgment of paternity," by "permit[ting] a paternity judgment to be set aside at any time if blood or genetic testing establishes that the named father is not the biological father of the child." *Id.* at 630-31, 856 A.2d at 689. *See* FL § 5-1038.

The 1997 amendment, in turn, was the General Assembly's response to the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the 'Federal Act')," which, "in an attempt to combat the increase in 'out-of wedlock pregnancies,' conditioned the receipt of continued federal assistance on certain federal standards.' *Evans*, 382 Md. at 634 n.6, 856 A.2d at 691 n.6 (citing *Stubbs v. Colandrea*, 154 Md. App. 673, 684, 686, 841 A.2d 361, 367-68 (2004)). The Federal Act required genetic testing in "certain contested cases" and required that states afford "[p]utative fathers . . . a reasonable opportunity to initiate a paternity action" to establish paternity. *Id.* (citing *Stubbs*, 154 Md. App. at 687, 841 A.2d at 369). Maryland responded by adding subsection (c) to § 5-1002 of the Paternity subtitle of the Family Law Article. Section 5-

1002(c) states: "Nothing in this subtitle may be construed to limit the right ofaputative fatherto file a complaint to establish his paternity of a child."

The current Paternity subtitle outlines the procedures "through which the state can establish paternity, and thus hold alleged fathers responsible for parental duties, such as child support. It is also the statute that allows alleged fathers to deny paternity." *In re Roberto d.B.*, 399 Md. 267, 275, 923 A.2d 115, 120 (2007). Generally, a complaint must be initiated before the child's eighteenth birthday, FL § 5-1006, arid must be accompanied by the consent of the State's Attorney. FL § 5-1010(e). "At the trial, the burden is on the complainant to establish by a preponderance of the evidence that the alleged father is the father of the child." FL § 5-1027(a).

The Paternity subtitle creates a "rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception." FL § 5-1027(c)(1). Upon motion of any party to the complaint, "the court shall order the mother, child, and alleged father to submit to blood or genetic tests" to determine whether the alleged father can be excluded as being the father of the child. FL § 5-1029(a) and (b).[3] If the laboratory report, however, establishes a statistical probability of the alleged father's paternity of at least 99.0%, it may be received into evidence and constitutes a rebuttable presumption of his paternity. FL § 5-1029(f)(4). Then, "[i]f the court finds that the alleged father is the father, the court shall pass an order" so declaring and providing for support. FL § 5-1032(a). The trial court may also "include a provision, directed to any party, regarding: (1) custody of the child; (2) visitation privileges with the child; (3) giving bond; or (4) any other matter that is related to the general welfare and best interests of the child." FL § 5-1035(a).

The Estates and Trusts Article provides independent authority by which the court may make a paternity determination. The express purpose of the Estates and Trusts Article is "to simplify the administration of estates, to reduce the expenses of administration, to clarify the law governing estates of decedents, and to eliminate any provisions of prior law which are archaic." ET § 1-105(a). That same section further provides: "This article shall be liberally construed and applied to promote its underlying purpose." Giving the statute the required liberal construction, we years ago held that the Estates and Trusts Article "is not limited in its scope and application to matters of inheritance only." *Thomas v. Solis*, 263 Md. 536, 542, 283 A.2d 777, 780 (1971) (citing *Dawson v. Eversberg*, 257 Md. 308, 262 A.2d 729 (1970), and *Holloway v. Safe Deposit & Trust Co.*, 151 Md. 321, 134 A. 497 (1926)).

Pertinent here, we have interpreted ET §§ 1-206(a) and 1-208 as providing the framework through which the court, in equity, may adjudicate paternity. *Thomas*, 263 Md. at 544, 283 A.2d at 781. Section 1-206(a) provides that "[a] child born or conceived during a marriage is presumed to be the legitimate child of both spouses." "A child born to parents who have not participated in a marriage ceremony with each other," ET § 1-208(a), is considered the child of the mother. FT § 1-208(b) delineates four methods by which to establish the father-child relationship recognized by law: (1) ajudicial determination under the "statutes relating to paternity proceedings"; (2) if the father acknowledges himself as the father, in writing; (3) if the father has "openly and notoriously recognized the child to be his child"; or (4) if the father "has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father."

We have held that, where a self-proclaimed biological father sued a mother and her estsanged husband, seeking visitation with a child born, but not conceived, during the marriage of the mother and her husband, the complainant, as a party, may request blood testing to rebut the presumptions established by ET § 1-206(a). *Turner*, 327 Md. at 113, 607 A.2d at 938-39. Establishing paternity under the Estates and Trusts Article, as an alternative to the Paternity subtitle is "more appropriate[ ]" and "less traumatic." *Id.* Such a request is to be analyzed as a motion for mental or physical examination under the command of Rule 2-423. *Id.* That Rule requires a showing of "good cause" before the court will order an examination. *Id.* at 114, 607 A.2d at 939. We interpreted the "good cause" standard, in the context of paternity proceedings pursuant to the Estates and Trusts Article, to require a judicial determination of "competing interests," including if blood testing is in the best interests of the child. *Id.* at 116, 607 A.2d at 940.

There is an interrelationship between the Estates and Trusts Article and the Paternity subtitle. FL § 5-1005(a), entitled "Legitimation proceedings," provides that "[a]n equity court may determine the legitimacy of a child pursuant to § 1-208 of the Estates and Trusts Article." FL § 5-1005 "does not limit paternity proceedings under [the Paternity] subtitle except after the legitimation of a child under this section. "FL § 5-1005(b). The Estates and Trusts Article also includes a reciprocal reference to the Paternity subtitle, as ET § 1-208(b) specifies, as one method of legitimation, that "a child born out of wedlock shall be considered the child of his father . . . if the father '[h]as been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings." *Taxiera v. Malkus*, 320 Md. 471, 478-79, 578 A 2d 761, 764 (1990) (quoting ET § 1-208(b)(1)) (alteration in original).

It is with this background in mind that we turn to

the case before us.

II

Petitioner, Amy Mulligan, is the mother of Gracelyn Mulligan, born January 23, 2010. Respondent, William Corbett, strongly suspecting that he is the father of Gracelyn, initiated the case by filing in the Circuit Court for Frederick County a Complaint for Paternity, Child Support and Visitation Schedule. The present appeal stems from the circuit court's order denying Respondent's request for paternity testing and ordering that Petitioner's former husband, Thomas Mulligan (hereafter Mr. Mulligan), who is not a party to this case, "is the legal father" of Gracelyn. The underlying facts, essentially undisputed, were developed at a hearing on Respondent's request for testing.

Petitioner and Mr. Mulligan were married on March 26, 1999. Three children were born during their marriage, none of whom is Gracelyn. Difficulties arose several years into the marriage, and Petitioner and Mr. Mulligan agreed to separate. They participated in mediation and ultimately reached an agreement providing for, *inter alia*, their separation and the custody and support of their children. The agreement, dated April 20, 2009, recognized that the couple "mutually and voluntarily agreed to cease living together and have in fact lived separate and apart without cohabitation since [April 4, 2008]." Despite these representations, Mr. Mulligan testified at the hearing that he and Petitioner resided together in the family home with their three children during March and April 2009 and had sexual relations during those months. Nevertheless, Petitioner ultimately filed a complaint for divorce on May 6, 2009, in which she affirmed under penalty of perjury that she and Mr. Mulligan had been separated since April 4, 2008.

In late March 2009, Petitioner and Respondent, who had known one another from their youth, reacquainted, started dating, and developed a sexual relationship. According to Respondent, the couple "met as frequently as [their] schedules would allow," they had discussed their mutual desire, and were attempting to conceive a child. The following month (April), the couple made concerted efforts to time their relations with Petitioner's menstrual cycle. About a month after that meeting, Petitioner, who, by then had moved out of the family home and into her own apartment, in formed Respondent that she was pregnant.

In August 2009, Petitioner moved with her three children to live with Respondent in Pennsylvania. Petitioner and Respondent's joint living arrangement was short-lived. About one month after Petitioner's move, Respondent demanded that she and her children vacate the home. Petitioner and her children moved out during the first half of September 2009, and, sometime during the same month, returned to live with Mr. Mulligan. On September 25, 2009, after Petitioner had testified before a hearing examiner that she and Mr. Mulligan had lived separate and apart, without sexual relations, since April 4, 2008, the circuit court signed a Judgment of Absolute Divorce incorporating the couple's separation agreement.[4]

Gracelyn was born on January 23, 2010. Mr. Mulligan testified that, at his urging, Petitioner contacted Respondent to inform him of the birth, because "[Respondent] has a right." Petitioner called Respondent on the evening of Gracelyn's birth, and he visited her and the baby the following day. During the visit, Petitioner asked Respondent to sign the affidavit of parentage[5] for Gracelyn's birth certificate. When Petitioner denied Respondent's request "to have paternity tests done," Respondent refused to sign because, he later testified, he was upset that he "wasn't being treated as the father" and "needed to be 100 percent sure" that he was the father. After a further angry exchange, Respondent left the hospital, and, according to Petitioner, "that was the last that we heard from him or saw him or had any contact with him." Soon thereafter, Mr. Mulligan informed Petitioner that he "would love to be the baby's father. The baby needs insurance. Baby needs to be taken care of and put my name down." Mr. Mulligan did not testify explicitly that he signed the affidavit of parentage and no such affidavit was entered into evidence.[6] Since September 2009, when Petitioner returned to the family home, Mr. Mulligan has taken on the role of Gracelyn's father.

In a letter dated February 3, 2010, Respondent, through counsel, informed Petitioner that he wished to have "legally recognized" that he is Gracelyn's biological father and to "attain some of the rights, privileges and obligations of parenthood." Respondent therefore desired "genetic DNA testing be undertaken to demonstrate . . . Gracelyn's lineage." The letter explained that, "[a]ssuming the child to be [Respondent's], I would then like to enter into negotiations to establish a regular access schedule for my client with his daughter, and to similarly, establish appropriate child support under the Maryland Child Support Guidelines." Petitioner did not respond to Respondent's entreaties.

On February 25, 2010, Respondent filed a Complaint for Paternity, Child Support and Visitation Schedule in the Circuit Court for Frederick County. Respondent's Complaint does not cite either the Estates and Trusts Article or the Paternity subtitle as the basis of his paternity action, but the complaint was marked as "approved for filing" by an Assistant State's Attorney, presumably to comply with the Paternity subtitle's requirement that the State's Attorney consent to proceedings under that subtitle. *See* FL § 5-1010(e). Respondent alleged that it was in Gracelyn's best

interests "to know for certain who her father is." He further alleged that "it would be in the best interests of the child to allow her to develop a relationship with her actual father, the Plaintiff." Respondent requested that the circuit court determine "whether or not DNA testing should be [o]rdered," "establish a visitation schedule," and "determine the appropriate amount of child support to be paid, commencing at the time that the visitation schedule begins."

Petitioner responded with a Motion to Dismiss for Failure to State a Claim. As grounds for the motion, Petitioner asserted that Gracelyn was "the legal child of Thomas Mulligan" and "no showing of good cause of sufficient persuasive force to overcome the statutory presumption [of legitimacy in ET § 1-206(a)] ha[d] been made and thus [the circuit court] should not require a blood test to determine 'paternity' of a child living with her legal father in a stable home environment." Respondent, in opposing dismissal, highlighted, among other points, that Gracelyn was conceived well after the Mulligans separated and last had sexual relations (as Petitioner had attested in her divorce action), and the child was born after their divorce. Consequently, the Family Law Article's Paternity subtitle, applicable "*to resolve disputes regarding paternity of children who are born out-of-wedlock*" (*i e.*, FL § 5-1002) is the appropriate statutory scheme by which to determine Gracelyn's paternity.

The circuit court denied Petitioner's Motion to Dismiss and set for a hearing the issue of whether to order blood testing. At the time of the hearing on May 13, 2010, Gracelyn was almost four months old. Petitioner, Respondent, Mr. Mulligan, and Petitioner's father testified. The testimony included all that we have summarized. In addition, Mr. Mulligan testified that he was Gracelyn's legal father, though he acknowledged he might not be so biologically. He testified farther that he had undergone a vasectomy in 2005 and that there had been no "other pregnancies since [his] vasectomy." On cross-examination, Petitioner agreed that "the odds were pretty good this man [Respondent] was the father of [her] daughter." She further testified that Mr. Mulligan "is the legal father of the child."

The circuit court announced its ruling on the record, concluding that the Estates and Trusts Article, not the Paternity subtitle, was the appropriate statute by which to determine Gracelyn's paternity. The court, evidently relying on two cases from this Court, *Kamp v. Department of Human Servs.*, 410 Md. 645, 980 A.2d 448 (2009), and *Monroe v. Monroe*, 329 Md. 758, 621 A.2d 898 (1993), reasoned that the Paternity subtitle only applied when paternity was, in the court's words, "void," and, in this matter, paternity was not void because Mr. Mulligan was Gracelyn's presumed father under the Estates and Trusts Article. The court, applying the best interest standard employed in *Monroe* and *Kamp*, concluded that it was not in Gracelyn's best interests to order blood testing. The trial court found, *inter alia*: "[T]his child has been in an intact family, has been in a family that this Court is satisfied provides her with stability"; and Gracelyn was "well cared for, well loved, well nourished . . . not just . . . in a physical sense but in . . . an emotional sense." The court noted, among other things, that Petitioner's relationship with Respondent "was very limited"; and Respondent had forced Petitioner out of the home they had shared in the early fall of 2009, when she was pregnant. The circuit court thereafter entered a written order dated May 26, 2010, denying Respondent's request for paternity testing and ordering 'that Thomas Mulligan is the legal father of the minor child, Gracelyn Mulligan."

Respondent timely appealed to the Court of Special Appeals presenting three issues, only part of the first of which — whether Respondent was entitled to blood testing to determine paternity — the court decided.[7] *Corbett v. Mulligan*, 198 Md. App. 38, 41, 16 A.3d 233, 234 (2011). The court correctly recognized at the outset that Maryland appellate cases "have addressed the choice of statutory provisions on several occasions, primarily in the context of a child born during a marriage." *Id.* at 54, 16 A.3d at 242. The intermediate court further recognized that the legislature specifically provided for a "putative father" to initiate an action under the Paternity subtitle, pursuant to FL § 5-1002(c). The court understood the meaning of "putative father" to be "the alleged biological father of a child born out of wedlock." *Id.* at 56, 16 A.3d at 243 (quoting *Stubbs*, 154 Md.App. at 688, 841 A.2d at 367). The Court of Special Appeals concluded that, "because Gracelyn was born out of wedlock, the Family Law Article was the proper statutory provision to address [Respondent's] request for genetic testing to determine Gracelyn's paternity." *Id.* at 60, 16 A.3d at 245. Accordingly, the Court of Special Appeals reversed the judgment of the circuit court and remanded the matter to that court for further proceedings. *Id.*

We granted certiorari, 420 Md. 463, 23 A.3d 895 (2011), to consider the following question: "Should the paternity of a child conceived during a marriage but born after divorce be determined under the Estates and Trusts Article or the Family Law Article?"

III

In analyzing the competing statutory schemes at issue, we do not write on a clean slate. *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935, decided in 1992, though not the first case on the subject of paternity,[8] has been the touchstone since then for many of the decisions of this Court and the Court of Special Appeals in the years that followed. We review it at some length.

The petitioner Turner was involved in a sexual relationship with an unmarried woman. *Id.* at 109, 607 A.2d at 936. The woman, Kelly Whisted, became pregnant. *Id.* She married another man, Mr. Whisted, and gave birth to the child five months into the marriage. *Id.* Six months after the birth, Mr. and Mrs. Whisted separated, and Mrs. Whisted renewed her relationship with Turner. *Id.*, 607 A.2d at 937. When that relationship ended eighteen months later, Turner, alleging that he was the biological father of the child, sued for visitation and sought a court-ordered blood test to establish his paternity. *Id.* at 110, 607 A.2d at 937. The circuit court denied the motion and granted summary judgment for the Whisteds. *Id.* The Court of Special Appeals agreed with the denial of the motion for blood testing, *Id.* at 110-11, 607 A.2d at 937, though we held that, on remand, the circuit court was required to consider the child's best interests before ruling on the motion for blood testing. *Id.* at 116-17, 607 A.2d at 940.

We noted preliminarily that Turner had not referenced the Paternity subtitle in his Complaint for Visitation or in his Motion for Blood Test; instead he invoked the equity court's jurisdiction under the Estates and Trusts Article to determine paternity because the State's Attorney had declined to consent to his action under the Paternity subtile, as required by FL § 5-1010(e). *Id.* at 111, 607 A.2d at 937. We acknowledged that both the Estates and Trusts Article and the Family Law Article provide a course of action by which to establish paternity, as indicated by the "reciprocal references in the two articles." *Id.* at 112, 607 A.2d at 938. And we concluded that Turner "quite properly" invoked the Estates and Trusts Article because he had alleged that the child whose paternity was at issue "was a child 'born to parents who had not participated in amarriage ceremony with each other.'" *Id.* (quoting ET § 1-208). We then held that, when a child is presumed legitimate and "two men each acknowledge paternity of the same child," then "an action to establish paternity is more appropriately brought under the Estates & Trusts Article" because that statutory scheme "presents the 'more satisfactory' and 'less traumatic' means of establishing paternity" when a child is born during a marriage. *Id.* at 113, 607 A.2d at 938 (quoting *Thomas*, 263 Md. at 544, 283 A.2d at 781; *Dawson*, 257 Md. at 314, 262 A.2d at 732). Finally, we recognized that a motion for blood testing under the Estates and Trusts Article was to be analyzed as a request for physical examination under Maryland Rule 2-423. *Id.*, 607 A.2d at 939. We concluded that the existence of the presumption of legitimacy under the Estates and Trusts Article was not an absolute bar to Turner's claim and, therefore, the circuit court, on remand, was to consider the child's best interests before deciding whether to order blood testing. *Id.* at 117, 607 A.2d at 940.

One year later, in *Monroe v. Monroe*, 329 Md. 758, 621 A.2d 898 (1993), we applied the reasoning of *Turner* to hold that a mother, who was unmarried throughout the period from conception to birth, was not entitled to *disestablish* paternity of her child whom we described as "born out of wedlock." *Id.* at 760, 621 A.2d at 899.[9] Preliminarily, we recognized that the matter did not arise as a paternity establishment case, but rather "in the context of a child custody dispute between the mother of a child born out of wedlock and the man who has, both before and after their marriage, acknowledged that child as his own and maintained a fatherly relationship with her." *Id.* at 766, 621 A.2d at 902. We also noted that Ms. Monroe "quite candidly acknowledge[d] that, if successful, she [would] seek no support from the biological father, nor [would] she attempt to foster a relationship between him and the child." *Id.* We reasoned that neither the Estates and Trusts Article nor the Paternity subtitle was "directly implicated" in the case because "establishing paternity is not a necessary factor to be considered when addressing the issue of custody." *Id.* at 767, 621 A.2d at 902. We nevertheless looked to the policies undergirding those two statutory schemes because they were "relevant to the determination whether good cause for ordering the blood tests has been shown," as Ms. Monroe's motion for blood testing evidently was analyzed as a request pursuant to Maryland Rule 2-423. *Id.*

We then recognized that both Articles "are aimed at the legitimation of children born out of wedlock,' *Id.* at 767, 621 A.2d at 902, and noted further that "[t]he purpose of legitimation statutes is well served, and, in fact, furthered when, without court proceedings, a child born out of wedlock is legitimated." *Id.* at 768, 621 A.2d at 902. We reasoned that "[i]t matters not whether [legitimation] was accomplished pursuant to [ET] § 1-208(b)(2), (3), and (4) or pursuant to [FL] § 5-1029" because, "where the party against whom the paternity decree is sought . . . admits paternity, no further judicial proceedings to establish that fact are required." *Id.*, 621 A.2d at 902-03 (citations omitted). We recognized that Mr. Monroe had acted as the child's father and provided for her since her birth. *Id.* at 769-70, 621 A.2d at 903-04. We reasoned that "[t]he best interest of a child born out of wedlock but subsequently treated as if it were the legitimate issue of the man who married its mother is not necessarily served by establishing that that man is not the biological father, without a concomitant establishment of paternity in someone else." *Id.* at 771, 621 A.2d at 904. Therefore, we concluded that the trial court erred in not considering whether the blood testing would be in the child's best interests, given the mother's motivations. *Id.* at 773, 621 A.2d at 905.

One year after we decided *Monroe*, we considered another custody case, *Sider v. Sider*, 334 Md. 512, 516, 639 A.2d 1076, 1078 (1994), in which the mother, Ms. Sider, and the biological father (not Mr. Sider) jointly petitioned to establish paternity. Ms. Sider simultaneously and independently sought custody — in the context of the divorce proceedings Mr. Sider initiated — of the child born during the Siders' marriage, less than two years before the divorce action. *Id.* at 515-17, 639 A .2d at 1077-78. Ms. Sider and the biological father had confirmed the child's paternity through consensual, extrajudicial genetic testing. *Id.* at 516, 639 A.2d at 1078. The circuit court consolidated the two matters and, after that court ruled that paternity was evidently not at issue given the extrajudicial paternity test, Ms. Sider withdrew her motion for court-ordered blood testing. *Id.* at 517, 639 A.2d at 1079. The circuit court ultimately "ordered that [Mr. Sider] be 'recognized as the natural father of [the child]' and denied the Petition for Paternity filed by [Ms. Sider] and [the biological father]." *Id.* at 520, 639 A.2d at 1080.

Based on our then-recent decision in *Monroe*, we noted that, although generally we need not establish paternity before awarding custody, the scenario presented was "unique" and required such a determination. *Id.* at 525-26, 639 A.2d at 1083. We further noted that, because "[t]he underlying facts in this case conclusively establish that [the alleged biological father] is [the child's] biological father . . . it appears that no further proceedings with regard to paternity were necessary. *Id.* at 526, 639 A.2d at 1083 (footnote omitted). We then turned to the question of "whether the trial court had the authority to deny the paternity petition jointly filed by [the child's] biological mother, and [the child's] biological father, when there was no marital integrity to protect." *Id*. In deciding that question, we relied on *Turner* for the proposition that "a trial court must consider the best interests of a child before granting a putative father's request for a blood test" and held that the trial court should have considered the child's best interests before deciding the paternity petition, *Id.* at 527, 639 A.2d at 1083, even though the parties did not dispute the biological paternity of the child. We ultimately concluded that, had the circuit court conducted the required best interest analysis, it would have granted the petition because of the various interests involved, including the child's best interest, the biological father's interest, and the lack of family integrity to protect. *Id.* at 528-29, 639 A.2d at 1084.

The cases we have discussed so far preceded the General Assembly's amendments to the Paternity subtitle in 1995 and 1997, which we discussed earlier, and our 2000 decision in *Langston v. Riffe, supra*, about which we say more later. We analyzed those subsequent occurrences in *Evans*, 382 Md. 614, 856 A.2d 679.

Evans "claimed to be the biological father of [the child], who was conceived and born while [the mother] was married to another man." *Id.* at 617, 856 A.2d at 681. Evans sought mandatory blood testing under the Paternity subtitle. *Id.* at 621, 856 A.2d at 683. The other man was "the only man [the child had] known as a father. She call[ed] him 'Daddy,' and he participate[d] in many of the routine tasks involved in parenting, such as caring for [the child] when she [was] sick and helping pay for her daycare, food, and clothes." *Id.* at 620, 856 A.2d at 683.

Evans claimed that the legal landscape had changed in the years since we decided *Turner*. *Id.* at 629, 856 A.2d at 688. We agreed that the landscape indeed had changed, but the changes, though significant, "do not apply to individuals in his position." *Id.* We said: "It is true that since the *Turner* decision, the General Assembly and this Court have changed the legal landscape of 'Paternity Proceedings' governed by the Family Law Article." *Id.* at 630, 856 A.2d at 688. We noted that the 1995 amendment to FL § 5-1038 served "to provide an alternative way for an adjudged father to challenge ajudgment of paternity," by "permit[ting] a paternity judgment to be set aside at any time if blood or genetic testing establishes that the named father is not the biological father of the child." *Id.* at 630-31, 856 A.2d at 689.

We noted too that our later decision in *Langston* held that the 1995 amendment applied retroactively to permit "men who had been declared fathers by the court before that date[,] . . . pursuant to Section 5-1029, to reopen paternity proceedings for blood or genetic testing." *Id.* at 631, 856 A.2d at 689 (citing *Langston*, 359 Md. at 437, 754 A.2d at 411). Furthermore, "blood or genetic testing under [FL] Section 5-1029 did not depend on any analysis of 'the best interests of the child' because, when an individual challenges a declaration of paternity in which he is named the father and then moves for a blood or genetic test, the trial court *must* grant the request." *Id.* at 632, 856 A.2d at 689-90 (citing Langston, 359 Md. at 435, 754 A.2d at 410) (emphasis in original). We considered as well that,

> "[i]n 1997, the General Assembly . . . amended the 'Paternity Proceedings' subtitle of the Family Law Article, adding Section 5-1002(c), which states: 'Nothing in this subtitle may be construed to limit the right of a putative father to file a complaint to establish his paternity of a child.' The Legislature added this language to Section 5-1002 for the purpose of 'clarifying that a putative father may file a paternity action.' 1997 Maryland

Laws, ch. 609. . . .

> "The coalescence of *Langston* and the 1995 and 1997 amendments to the 'Paternity Proceedings' of the Family Law Article brings into question whether our holding in *Turner* has been invalidated so that the mandatory blood or genetic testing of Section 5-1029 is now available to challenge the paternity of a child born during an intact marriage."

Id. at 632-33, 856 A.2d at 690 (citation omitted).

We concluded, however, that these "expanded rights" of "putative fathers' . . . to challenge paternity declarations . . . do not apply to individuals in [Evans's] position," *i.e.*, individuals who are not "putative fathers." *Id.* at 629, 856 A.2d at 688. We turned to the Court of Special Appeals' opinion in *Stubbs*, 154 Md. App. 673, 841 A.2d 361, which had been issued only months earlier. Stubbs sought a blood test to prove that he was the biological father of a child conceived and born during the marriage of the mother and her husband. The intermediate court explained:

> "Although 'putative father' is not a defined term in the Paternity Act, the quoted term has a settled legal meaning. Black's Law Dictionary defines 'putative father' to mean '[t]he alleged biological father of a child born out of wedlock.'
>
> "That the dictionary meaning of 'putative father' was intended by the General Assembly when using that term in [Section 5-1002(c)] is confirmed by construing subsection (c) compatibly with the balance of [Section 5-1002] to which subsection (c) was added."

Evans, 382 Md. at 633, 856 A.2d at 690-91 (quoting *Stubbs*, 154 Md. App. at 683-84, 841 A.2d at 367) (alterations in original; citation omitted). *Stubbs* concluded that the child "is not an illegitimate child, and Mr. Stubbs is not a putative father." 154 Md. App. at 688, 841 A.2d at 369. In *Evans*, we also noted that *Stubbs* relied on the express purpose of the current Family Law statute "to 'promote the general welfam and best intexests of children born out of wedlock." *Evans*, 382 Md. at 633-34, 856 A.2d at 691 (quoting *Stubbs*, 154 Md. App. at 684, 841 A.2d at 367 (citing FL § 5-1002(b)). Further, the court in *Stubbs* had "extensively reviewed the legislative history of Section 5-1002(c), focusing specifically on the federal legislation that precipitated its enactment." *Id.* at 634, 856 A.2d at 691. The Court of Special Appeals had concluded:

> "'Nothing in the text of [Section 5-1002(c)], or in its Maryland or federal legislative histories, indicates that the General Assembly intended to alter the *Turner v. Whisted* test for determining whether a blood test should be ordered under the circumstances presented here, or that the Federal Government intended to require, under the circumstances presented here, a mandatory blood test similar to that provided by [Section 5-1029].'"

Id. at 635, 856 A.2d at 691-92 (quoting *Stubbs*, 154 Md. App. at 688, 841 A.2d at 369-70) (alterations in original).

We agreed in *Evans* with the reasoning of *Stubbs* and applied it to the facts before us in Evans to hold that "the effect of Section 5-1002(c) does not reach the situation before us, where *Evans* seeks to establish patemity of a child born during a marriage." 382 Md. at 635, 856 A.2d at 692. We concluded, therefore,that "*Turner* . . . remains the controlling precedent for cases such as this, where two men (one the husband of the mother and the other a stranger to the marriage) acknowledge the paternity of a child born during a marriage." *Id.* at 636, 856 A.2d at 692.

Kamp v. Department of Human Servs., 410 Md. 645, 980 A.2d 448 (2009), was an action brought by the Administration to increase support from Kamp for a child who was conceived and born during the marriage of the mother and Kamp. The mother and Kamp divorced over seven years after the child was born. A blood test, ordered by the circuit court, excluded Kamp from paternity, and the circuit court terminated his support obligations. Applying the *Turner v. Whined*, 327 Md. 106, 607 A.2d 935, line of cases, this Court held that the circuit court had abused its discretion in ordering DNA testing, and that, even though the "cat is now out of the bag," the DNA test results "shall not be considered until doing so is determined to be in the child's best interests." *Kamp*, 410 Md. at 657, 980 A.2d at 464.'° In reviewing the Maryland law, this Court pointed out "[w]hen the child is 'born out of wedlock,' see [FL] § 5-1002(b), the applicable provisions are those found" in the paternity statute. *Id.* at 656, 980 A.2d at 454-55 (footnote omitted).

Ashley v. Mattingly, 176 Md. App. 38,932 A.2d 757 (2007), is similar. In that case, the child was born when the mother and her husband had been married for eight months. The couple divorced, and the former husband subsequently sought and obtained blood testing in order to terminate his support obligations. That testing excluded him from paternity. Because the Court of Special Appeals could not "say that [the child] was

necessarily conceived during the marriage," *Id.* at 55, 932 A.2d at 767, it applied the presumption in ET § 1-206(a), which is based, alternatively, on birth during marriage. Accordingly, the court applied the *Evans*, *Turner*, and *Stubbs* line of cases and held that the circuit court erred in failing to recognize that it had discretion, under a best interests of the child standard, to deny blood testing.

There is considerable daylight between the issue presented in the instant matter and that in *Langston v. Riffe*, 359 Md. 396, 754 A.2d 389 (2000). There, this Court said, "We hold that the provisions of FL § 5-1029 are mandatory once a party to any paternity proceeding moves for a blood or genetic test." *Id.* at 435, 754 A.2d at 410. *Langston* held that FL § 5-1038 not only permitted an enrolled judgment of paternity to be set aside based on a blood test that excluded the putative father, but that the provisions of that section were retroactive. *Langston* involved three cases in each of which the mother and the father were unmarried at the time of conception and of birth of the child involved. The *Langston* cases did not involve two men, each of whom claimed to be the biological father of the child. They involved mothers who asserted that the putative father was the biological father, and they involved putative fathers whose purpose in initiating the action was to set aside a support order.

In sum, none of the Maryland appellate cases have involved a claim of paternity by a man who was never the husband of the mother, a child who was conceived during the marriage of the mother and her former husband, birth of the child after their divorce, and an assertion by the mother and her former husband of the best inteiest of the child in opposition to blood testing requested by the paternity claimant. In resolving this issue here, we are mindful that the language used in the discussions in the cases reviewed above were written in a particular factual context and not necessarily to be extrapolated to other contexts.

IV

In the instant matter, the heart of the rationale by the Court of Special Appeals is:

> "The present case is distinguishable from the above cases because here, the child was not born during a marriage. Gracelyn was conceived when Mr. and Mrs. Mulligan were married, albeit separated, but she was born after they were divorced."

Corbett, 198 Md. App. at 58-59, 16 A.3d at 244. Further, that court said:

> "The General Assembly, however, has provided that a 'putative father' of a child born out of wedlock has the right to bring a paternity action under the Family Law Article."

Id. at 59, 16 A.3d at 245. The court then concluded that "because Gracelyn was born out of wedlock, the Family Law Article was the proper statutory provision to address Mr. Corbett's request for genetic testing to determine Gracelyn's paternity." *Id.* at 60, 16 A. 3d at 245. This holding is predicated solely on the fact that Gracelyn's mother was divorced from her husband at the time the child was born.

Equating wedlock with matrimony, the court 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. Ballentine's Law Dictionary (3d ed. 1969) defines "born out of wedlock" to mean "[b]orn to an unmarried female; born to a married female but begotten during the continuance of the marriage status by one other than her husband."

In *J.A.S. v. Bushelman*, 342 S.W.3d 850 (Ky. 2011), the court explained the term as follows:

> "Historically, the phrase 'child born out of wedlock' is not a term of art, and seems to have come into common usage as a more acceptable modem substitute for 'bastard,' which over the years acquired the baggage of unrelated connotations. 'Child born out of wedlock,' like the word 'bastard,' has been used interchangeably with the term 'illegitimate child.' As shown below in Part V of this opinion, all three terms have been used historically to refer to a child whose biological parents were not married to each other, as well as a child whose mother was unmarried."

Id. at 856 n.5. *And see Lathan v. Edwards*, 121 F.2d 183, 185 (5th Cir. 1941) ("In common parlance, illegitimate child, 'natural child' and 'bastard' are inteichangeable terms connoting a child born out of wedlock."); *Sweet v. Hamilothoris*, 84 Cal. App. 775, 285 P. 652, 655 (1927) ("A child born out of wedlock is an illegitimate child").

Lewis v. Schneider, 890 P.2d 148 (Cob. App. 1994), involved the interpretation of a descent and distribution statute which provided that "*a person born out of wedlock* is a child of the mother." *Id.* at 149 (emphasis in original). After concluding that no Colorado cases had construed the terminology, the court said:

> "Other jurisdictions have interpreted the phrase to refer both to a child born to an unmarried woman and also to one born to a married woman but

having a father other than the mother's husband. *Estey v. Mawdsley*, 3 Conn. Cir. Ct. 491, 217 A.2d 493 (Conn. Cir. Ct. 1966); *Wilkins v. Georgia Department of Human Resources*, 255 Ga. 230, 337 S.E.2d 20 (Ga. 1985); *Johnson v. Studley-Preston*, 119 Idaho 1055, 812 P.2d 1216 (Idaho 1991); *Pursley v. Hisch*, 119 Ind. App. 232, 85 N.E.2d 270 (Ind. App. 1949); *Smith v. Robbins*, 91 Mich. App. 284, 283 N.W.2d 725 (Mich. Ct. App. 1979); *Martin v. Lane*, 57 Misc. 2d 24, 291 N.Y.S.2d 135 (N.Y. Fam. Ct. 1968), *rev'd sub nom. on other grounds*, *Mannain v. Lay*, 33 A.D.2d 1024, 308 N.Y.S.2d 248 'N.Y. App. Div. 1968), *aff'd*, 27 N.Y.2d 690, 262 N.E.2d 216, 314 N.Y.S.2d 9 (N.Y. 1970); *In re Legitimation of Locklear by Jones*, 334 S.E.2d 46 (N.C. 1985); *State v. Coliton*, 73 N.D. 582, 17 N.W.2d 546 (RD. 1945)."

Id. at 149-50.

The Court of Special Appeals cited no authority, and we know of none, for the proposition that a child conceived during a marriage but born after a divorce is a child born out of wedlock. Parents who divorce during the pregnancy of the wife do not, by the divorce alone, delegitimate their child. An English work, W. Hooper, *The Law of Illegitimacy* (1911) (Hooper), states that "if the efficient act of sexual intercourse falls within the marriage bond, legitimacy is presumed whether that bond continues or ceased as of the date of birth." Hooper at 154.

Judge Roszel Thomsen's opinion in *Metzger v. S. S. Kirsten Torm*, 245 F. Supp. 227 (D. Md. 1965), bears on the divorce aspect of the problem before us. That was an admiralty case in which the court concluded that the libelant, the widow of a deceased stevedore, had proved that her husband's death was caused by unseaworthiness. The libelant had married the stevedore in July 1958. From April 1949 until August 1956, she had been married to one Poling. That marriage ended in divorce. Libelant's son, Roland, was born while she was married to Poling and another son, Haffy, was conceived while she was married to Poling, but born after the divorce. The libelant claimed that both children were the children of the stevedore. Judge Thomsen held that the children must be considered the children of Poling and that they were not entitled to any recovery for the death of the stevedore. Citing case law, Judge Thomsen held that "[u]nder Maryland law nonaccess by the then husband must be shown by other evidence than the testimony of the wife; her testimony on that point is not admissible." *Id.* at 233. Thus, divorce of the libelant from Poling did not mean, in and of itself, that Harry, the child whom the libelant was carrying at the time of her divorce from Poling, was born out of wedlock.

V

The respondent in this case, William Corbett contends that he is the putative father of a child born out of wedlock, Gracelyn. The determination that he seeks, in the terminology of Hooper at 152, is "adulterine" bastardy. Hooper's work on illegitimacy proposes the following as Rule I:

> "A bastard is a person: —
>
> "(a) Who is the child of an unmarried woman, a woman unmarried at the date of conception and birth of the child, and during the intervening period;
>
> "(b) Who though conceived or born in wedlock has been proved by judicial process not to be the child of the husband."

Where the child is born to a mother who is unmarried at conception and birth and during the intervening period, there is no presumption of legitimacy. In cases of that type, prior to 1997, the Administration or the mother could require blood testing as a sword, to prove the paternity of the putative father, and the putative father could require bloodtesting as a shield "to determine whether [he] can be excluded as being the father of the child." FL § 5-1029(b). *Langston*, 359 Md. 396, 754 A.2d 389, was concerned with children born to mothers who had never married during any relevant period, and consequently presented no presumption of legitimacy. Thus, we said, in that context, that there was no best interests analysis before ordering blood tests. When FL § 5-1002(c) was added in 1997, it furnished a "putative father" with a sword, namely, to require blood testing under FL § 5-1029(b) in order "to establish his paternity of a child" that was born out of wedlock. *Evans* makes clear that sword use of FL § 5-1029(b) does not extend to a self-proclaimed biological father of a child born in wedlock.

Where a third party to a marriage relationship seeks to use blood testing as a sword in order to prove his paternity of a child conceived during the maniage of the mother and her husband, it cannot be said, because of the presumption of legitimacy based on the time of conception, that the child was born out of wedlock, unless and until the presumption of legitimacy is overcome. Merely claiming to be the father of a child born out of wedlock, where the child was conceived during a marriage, does not overcome the presumption. In order to overcome the presumption, there must

be proof presented within the framework of the rules set forth in FL § 5-1027(c)(2), (3), and (4) which read as follows:

> "(2) The presumption set forth in this subsection may be rebutted by the testimony of a person other than the mother or her husband.
>
> "(3) If the court determines that the presumption set forth in this subsection has been rebutted by testimony of a person other than the mother or her husband, it is not necessary to establish nonaccess of the husband to rebut the presumption set forth in this subsection.
>
> "(4) If the court determines that the presumption set forth in this subsection has been rebutted by testimony of a person other than the mother or her husband, both the mother and her husband are competent to testify as to the nonaccess of the husband at the time of conception."

If a self-proclaimed father seeks blood testing in order to delegitimate a presumptively legitimate child, he must first show that blood testing is in the best interests of the child under the *Tucker-Evans* line of cases reviewed above. Unless and until the presumption of legitimacy is rebutted, a self-proclaimed father's application for a blood test relates to a legitimate child, *i.e.*, one born in wedlock, and the paramour is not a putative father under FL § 5-1002(c). So long as the presumption of legitimacy stands, the request for a blood test under the circumstances here is to be analyzed under the *Tucker-Evans* rule. Consequently, the best interests analysis was required in *Evans* and *Stubbs* because the children there involved were presumptively legitimate, having been both conceived and born during marriage. Here, Gracelyn likewise is presumptively legitimate, based on her having been conceived during marriage.

Obviously, the best interests of the child issue must be raised, in order to have it decided, when a paramour seeks to prove his paternity of a presumptively legitimate child by requesting blood tests. *Cf. Toft v. Nevada ex rel. Pimentel*, 108 Md. App. 206, 671 A.2d 99 (1996) (mother of child conceived during marriage, while mother and husband living apart, brought paternity action against paramour for child support and obtained confirmatory blood testing, without express best interests analysis).

Conclusion

For all the foregoing reasons, we hold that the circuit court did not err in performing a best interests of the child analysis when ruling on the Respondent's request for blood testing of a child conceived during marriage, where the mother and the presumptive father raised the best interests of the child issue. Accordingly, we shall vacate the judgment of the Court of Special Appeals and remand to that court for consideration of the other issues raised by the Respondent.

JUDGMENT OF THE COURT OF SPECIAL APPEALS VACATED AND CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY RESPONDENT.

Dissenting Opinion by Barbera, J., which Raker, J., joins.

I dissent. I have a quarrel with certain of the reasoning of the Majority, as well as its ultimate conclusion that a child conceived during marriage, though born after her mother has divorced, was not "born out of wedlock," and, therefore, the child's self-alleged biological father may not invoke the mandatory blood testing provisions of the Patemity Proceedings subtitle (Paternity subtitle), codified at Maryland Code (1999, 2006 Repl. Vol. & 2010 Supp.), § 5-1001 through § 5-1048 of the Family Law Article (FL)[1].

For reasons I explain, I agree with the Majority that the definition of a child "born out of wedlock" includes a child born to a mother who, although married, is not married to the child's biological father. But I disagree with the Majority that the term "born out of wedlock," as it is employed in the Paternity subtitle, is merely a euphemism for the term "illegitimate," as it is defined in Maryland Code (2001, 2011 Repl. Vol.), § 1-208 of the Estates and Trusts Article (ET), to refer to a child who was neither conceived nor born during marriage.[2] Further, I reject the Majority's requirement that a "putative father," that is, a man who alleges he is the biological father of a child born out of wedlock, must first demonstrate that the child was *in fact* born out of wedlock, by rebutting the presumption that the mother's former husband is the child's father, before that alleged biological father may proceed to establish his paternity of the child by invoking the mandatory blood testing procedures of the Paternity subtitle.

I.

Before the General Assembly amended the Paternity subtitle in 1997, it was generally understood that an alleged biological father could invoke only the provisions of the Estates and Trusts Article to establish paternity. *See Thomas v. Solis*, 263 Md. 536, 543-44, 283 A.2d 777, 781 (1971) (holding that the biological father of children conceived and born outside of mar-

riage, and, therefore, illegitimate, could establish his legal relationship as their father pursuant to the Estates and Trusts Article);__ Md.__,__, __ A.3d __, __ (2012) (slip op. at 18, n.8). During that same pre-1997 period, we decided *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935 (1992). In *Turner*, the self-alleged biological father of a child born, though not conceived, during the mother's marriage to another man filed to establish paternity under the Estates and Trusts Article and then sought court-ordered blood testing.[3] *Id.* at 109-10, 607 A.2d at 936-37. This Court concluded that "the Estates & Trusts Article provides an alternate avenue by which one could seek blood tests for the purpose of establishing paternity," and we held that, when a child is presumed legitimate and "two men each acknowledge paternity of the same child," then "an action to establish paternity is more appropriately brought under the Estates and Trusts Article." *Id.* at 113,607 A.2d at 938. We reasoned that the statutory scheme set forth in that Article "presents the 'more satisfactory' and 'less tramatic' means of establishing paternity" when two men acknowledge paternity of a child (who was born during a marriage). *Id.*, 607 A.2d at 938 (quoting *Thomas*, 263 Md. at 544, 283 A.2d at 781; *Dawson v. Eversberg*, 257 Md. 308, 314, 262 A.2d 729, 732 (1970)). We then explained that, in order for Turner to establish his paternity, he would need to rebut the presumption that the mother's husband at the time of the child's birth was the child's father and a motion for blood testing (evidently to obtain evidence to rebut that presumption) would be "analyzed as a request for physical examination under Maryland Rule 2-423, and the court had discretion to giant or deny the blood tests." *Id.* at 938-39, 607 A.2d at 113 (footnote omitted). We further explained that a motion pursuant to Rule 2-423 would necessitate a showing of "good cause," which would require consideration of the various interests involved, including the alleged biological father's relationship with the child and the best interests of the child. *Id.* at 114-16, 607 A.2d at 939-40.

The year 1997 brought changes that precipitated a line of cases leading to the present one. In that year, the General Assembly enacted subsection (c) to § 5-1002 of the Paternity subtitle. That subsection provides: "Nothing in this subtitle may be construed to limit the right of a putative father to file a complaint to establish his paternity of a child." We considered in *Evans v. Wilson*, 382 Md. 614, 856 A.2d 679 (2004), the effect of that legislative change on our holding in *Turner*. We recognized, as the Majority notes, __Md. at__, __ A.3d at __ (slip op. at 24), that the enactment of § 5-1002(c) had "changed the legal landscape." The specific question presented in that case caused us to determine the intended meaning of the term "putative father," as the legislature had provided no definition. As the Majority notes, __ Md. at__, __ A.3d at __ (slip op. at 26-27), we adopted in *Evans* the definition of "putative father" embraced by the Court of Special Appeals in *Stubbs v. Colandrea*, 154 Md. App. 673, 841 A.2d 361 (2004). Judge Rodowsky, writing for the intermediate appellate court in *Stubbs*, explained:

> Although "putative father" is not a defined term in the Paternity Act, the quoted term has a settled legal meaning. Black's Law Dictionary defines "putative father" to mean "[t]he *alleged* biological father of a child born out of wedlock."
>
> That the dictionary meaning of "putative father" was intended by the General Assembly when using that term in FL § 5-1002(c) is confirmed by construing subsection (c) compatibly with the balance of FL § 5-1002 to which subsection (c) was added.

154 Md. App. at 683-84, 841 A.2d at 367 (emphasis added) (alteration in original) (citation omitted). We concluded in *Evans* that, because the child at issue was "born during a marriage," not out of wedlock, *Evans* was not a "putative father" and, therefore, not entitled to mandatory blood testing under the Paternity subtitle. 382 Md. at 635, 856 A.2d at 692. That conclusion necessarily flowed from the *Evans* Court's premise (albeit unarticulated by the *Evans* majority) that the phrase "born out of wedlock," in the adopted definition of "putative father" quoted above, does not include a child who is born to a woman while she is married to a man other than the child's biological father. A man in that scenario, like *Evans* himself, would have to show good cause before blood testing would be ordered, pursuant to this Court's earlier decision in *Turner*.

Judge Raker penned a vigorous dissent to the *Evans* majority's decision. Among other criticisms, Judge Raker understood the majority's analysis and holding of that case, as do I, as improperly narrowing the category of men who could be "putative fathers" by excluding the self-alleged biological father of a child born to a woman who was married to another man. *See Evans*, 382 Md. at 649-50, 856 A.2d at 700-01 (Raker, J. dissenting) ("The majority and the *Stubbs* court simply assume that 'out of wedlock' has only one meaning—a child born to an unwed mother. Courts around the country have considered the meaning of this language and have interpreted the phrase to mean either a child born to an unmarried mother or a child born to a married woman but fathered by a man other than the mother's husband.").

The definition of "out of wedlock" (as well as "putative father") supported by Judge Raker in her dis-

sent in *Evans* seems to be the definition the Majority endorses today. The Majority quotes the definition of a child "born out of wedlock" to include a child "born to a married female but begotten during the continuance of the marriage status by one other than her husband." __Md. at__,__A.3d at __ (slip op. at 30) (quoting Ballentine's Law Dictionary (3d ed. 1969)). *See also* __ Md. at__, __ A.3d at __ (slip op. at 31), What the Majority has done by adopting that definition of "born out of wedlock" negates, without saying so explicitly, the more narrow definition of the term that follows necessarily from the holding in *Evans*, *i.e*. a definition excluding children born to a married mother, though begotten by a man other than the mother's husband. To the extent that today's decision rejects the more narrow definition of "putative father" employed in *Evans*, I agree with the Majority. I would prefer, however, that the Majority have made that explicit.

II.

Although I agree with the Majority's endorsement of the definition of "out of wedlock" that includes children born to women married to men other than the children's biological fathers, I disagree with the Majority's definition of "born out of wedlock" as synonymous with the term "illegitimate." Consequently, according to the Majority, a child, such as Gracelyn, who was born to a divorced mother, though one who was married at the time of conception, is not "born out of wedlock" for purposes of the Paternity subtitle. The Majority's premise of synonymity between the terms is false and has led the Majority to a legal conclusion that undermines the express legislative policy of the Paternity subtitle.

The Majority correctly recognizes that Maryland law affords a choice between two statutory schemes to establish paternity, the Paternity subtitle and the Estates & Trusts Article. __ Md. at__,__A.3d at __ (slip op. at 1). The Paternity subtitle, as expressed in its purpose clause, serves to determine the paternity of children "born out of wedlock," and to provide for their support and custody. *See* § 5-1002.[4] The subtitle also grants standing to putative fathers (as both the Majority and I define that term to mean the alleged biological fathers of children born out of wedlock, *see supra*) to initiate complaints for blood testing. § 5-1002(c). Yet, notably, neither the Paternity subtitle nor the Estates and Trusts Article defines "out of wedlock" or "born out of wedlock," much less does either statute equate those phrases with the word "illegitimate." Moreover, none of our prior cases, nor those of the Court of Special Appeals, have specifically considered whether the term "born out of wedlock" is synonymous with the term "illegitimate," as the Majority opines it is.[5]

I do not disagree that some other jurisdictions have employed the phrase "born out of wedlock" synonymously with the term "illegitimate." Nor do I disagree that other jurisdictions have statutes that specifically define a "child born out of wedlock" as an "illegitimate child," or provide a definition that follows this State's definition of "illegitimate." This interpretation, however, is certainly not universal. *See, e.g.*, D.C. Code § 16-907(a) (stating that "'legitimate' or 'legitimated' means that the parent-child relationship exists for all rights, privileges, duties, and obligations under the laws of the District of Columbia"); D.C. Code § 16-907(b)(stating that "[t]he term 'born out of wedlock' solely describes the circumstances that a child has been born to parents who, at the time of its birth, were not married to each other"). *Cf. R.N. v.J.M.*, 61 S.W.3d 149, 211 (Ark. 2001) (recognizing that, although a child is presumed legitimate because he/she was either conceived or born to a married mother, a "putative father" has standing to litigate the issue of paternity). I therefore disagree with the Majority's position that the term "born out of wedlock," as related to the term "putative father," and when construed in the context of the provisions of this State's Paternity subtitle, *necessarily* is synonymous with "illegitimate," as that term is defined in the Estates and Trusts Article.

I believe, instead, that under Maryland law the terms are distinct: "born out of wedlock" describes the mother's marital status in relation to the child's biological father at the time of the child's birth, and "legitimacy" describes the legal status of the parent-child relationship. These distinct definitions, in my opinion, derive from the plain language of the Paternity subtitle.

The "primary goal" of statutory construction "is always to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision." *Moore v. State*, 424 Md. 118, 127, 34 A.3d 513, 518 (2011) (quoting *Ray v. State*, 410 Md. 384, 404, 978 A.2d 736, 747 (2009)). Statutory interpretation begins with "the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Id.*, 34 A.3d at 518 (quoting *Ray*, 410 Md. at 404, 978 A.2d at 748). "The plain language of a provision is not interpreted in isolation. Rather, we analyze the statutory scheme as a whole and attempt to harmonize provisions dealing with the same subject so that each may be given effect." *Proctor v. Washington Metro. Area Transit Auth.*, 412 Md. 691, 714, 990 A.2d 1048, 1061 (2010) (quoting *Bowen v. City of Annapolis*, 402 Md. 587, 614, 937 A.2d 242, 258 (2007)).

Section 5-1027(c)(1) of the Paternity subtitle recognizes that "[t]here is a rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception."[6] The

inclusion of this presumption in the Paternity subtitle evidences the legislature's intent that the procedures of that subtitle would be available in situations in which children have "presumed" fathers. For this reason, I cannot support expanding the definition of "born" also to mean "conceived." Only if the term "born out of wedlock" is afforded its plain language definition, that is, "born (not also born and/or conceived) outside of marriage," does the Paternity subtitle's presumption of legitimacy when the mother was married at the time of conception retain effect. If the term "born out of wed lock" is synonymous with "illegitimate," as the Majority concludes it is, then there would never be a matter arising under the Paternity subtitle to which the presumption in § 5-1027(c)(1) would apply. This is so because the Paternity subtitle is the statutory scheme for determining paternity of a child who is "born out of wedlock." Yet, as the Majority has decided, a child "born out of wedlock" is "illegitimate" and, therefore, has no presumed father. The Majority's analysis renders nugatory § 5-1027(c), which our rules of statutory construction do not tolerate.

A proper construction of the Paternity subtitle retains the presumption of legitimacy for a child conceived during the mother's marriage. Moreover, the statutory presumption of legitimacy for a child conceived during marriage is recognized in the Estates and Trusts Article, and it is not rendered nugatory or one bit undermined by the interpretation of the Paternity subtitle that I support. For example, a child conceived during marriage, but born after her presumed father has died, would benefit from the presumption of legitimacy under the Estates and Trusts Article for inheritance purposes.

In short, faithful adherence to the pertinent rules of construction requiring, here, application of the plain language of both the Estates and Trusts Article and the Paternity subtitle and the harmonious construction of each yields, for me, but one conclusion: The Paternity subtitle, at the time its provisions were originally enacted in 1963 through the adoption of the current versions, see __ Md. at __, __ A.3d at __(slip op. at 2-7), was and is intended to apply to decide contested paternity cases for children whose biological parents were not married at the time of the child's birth.

III.

Just as I reject the Majority's conclusion that "born out of wedlock" is synonymous with "illegitimate," I cannot subscribe to the Majority's reading into the law a requirement of a *preliminary determination* by the court that a self-alleged "putative father" is indeed a "putative father," by having rebutted the presumption of legitimacy, before he may invoke the provisions of the Paternity subtitle and obtain mandatory blood testing upon request. __ Md. at__, __ A.3d at __(slip op. at 34-35.) The Majority does not direct us to the statutory source of such a procedural requirement, and I could find none. In fact, the Paternity subtitle negates such a requirement.

To repeat, § 5-1002(c) provides: "Nothing in this subtitle may be construed to limit the right of a putative father to file a complaint to establish his paternity of a child." That subsection expressly prohibits any interpretation of the Paternity subtitle that would limit a putative father's right to maintain an action under the subtitle and, fairly read, precludes imputation of a requirement that a self-alleged putative father first rebut the presumption of legitimacy before maintaining an action to establish paternity. The Majority, though, requires a self-alleged biological father to prove, first, that the child's presumed father is not, in fact, the child's biological father (to establish his own status as a "putative father," by proving that the child was "born out of wedlock"). Only then, according to the Majority, would the putative father have access to mandatory, court-ordered blood testing that would serve as the best evidence to rebut the presumption, see *Toft v. Nevada*, 108 Md. App. 206, 226, 671 A.2d 99, 109 (1996), and ultimately establish his paternity of the child.[7] That reasoning is circular and evades what, by its plain language, is dictated by the Paternity subtitle.

Moreover, the Majority's reasoning conflates the requirement of rebutting the presumption of legitimacy, which any alleged father must to do to establish paternity of a child who has a presumed father pursuant to either the Paternity subtitle or the Estates and Trusts Article, with the burden of demonstrating good cause, pursuant to Maryland Rule 2-423, to obtain discretionary blood testing when proceeding under the Estates and Trusts Article. I am unaware of any case explicitly holding that establishing good cause to obtain blood results evidence, which includes consideration of the child's best interests, is equivalent to overcoming the evidentiary hurdle of rebutting a presumption of biological fatherhood.

The Majority chides the Court of Special Appeals's decision in the present case because it would "delegitimate" children born after divorce. __ Md. at__, __ A.3d at __ (slip op. at 32). The Majority states that "[p]arents who divorce during the pregnancy of the wife do not, by the divorce alone, delegitimate their child." __ Md. at__, __ A.3d at __ (slip op. at 32). I disagree with the Majority's conclusion that the intermediate appellate court's decision would have that effect. Further, I disagree with the analysis of the Majority that leads to its flawed assessment of the intermediate appellate court's conclusion.

The presumption of legitimacy holds for a child who is conceived during marriage under both the Estates and Trusts Article, *see* ET § 1-206(a)[8], and the

Paternity subtitle, *see* § 5-1027(c)(1)[9]. That presumption remains *until rebutted*. Nothing in the Court of Special Appeals's decision implies that a divorce would rebut that presumption, by operation of law, particularly without an alleged biological father to fill the void. Nor does a self-alleged biological father's mere *filing of a complaint to establish his paternity* of a child operate automatically to rebut that presumption. Rather, the filing of a complaint pursuant to § 5-1002(c) solely affords the self-alleged biological father of a child born out of wedlock, that is, a child born outside of his or her biological parents' marriage, the opportunity to litigate the matter and rebut that presumption with the reliability and accuracy of genetic testing, if requested or ordered.

The Majority's requirement that a self-alleged putative father first prove he is a putative father yields the exact consequence the Majority purportedly seeks to avoid. The Majority, in effect, requires a court to delegitimate a child as a precursor to the self-alleged putative father's proceeding pursuant to the Paternity subtitle to establish ultimately his own paternity of the child. Proper construction of the statutory scheme, as I have outlined it, is one that would maintain the presumption of legitimacy unless and until the putative father could rebut the presumption, likely with the benefit of reliable genetic evidence.

IV.

Finally, I believethat the Majority's opinion today requires the courts to ignore, to the derogation of the provisions of the Paternity subtitle, readily available, reliable evidence that would prove the biological fact upon which the marital presumptions of legitimacy are based.[10] As Judge Eldridge opined in his dissenting opinion in *Turner*,

> In order for § 1-208(b) of the Estates and Trusts Article [the legitimation provision] to have a logical application, there cannot be a dispute as to whether the "parents" were married at the time of conception or birth. The provisions of the Estates and Trusts Article, because they were not designed to resolve an adversarial dispute between two men claiming paternity, require an assumption as to who is the natural father before a determination can be made concerning which section of the statute applies[,] [the presumption of legitimacy under § 1-206(a) or the legitimation procedure under § 1-208].
>
> Because the Estates and Trusts Article *presumes knowledge of the identity of the natural* [i.e., biological] *father before its legitimation procedures become meaningful*, I cannot agree that the legitimation piovisions of the Estates and Trusts Article are better suited to resolve a dispute between two men each claiming to be the natural father. It seems to me that the paternity provisions ofthe Family Law Article were better designed to resolve disputes over the identity of the natural father.

327 Md. at 121, 607 A.2d at 942 (Eldridge, J., dissenting) (emphasis added): As Judge Eldridge noted, the marital presumptions of the Estates and Trusts Article are premised on the underlying assumption that a woman's husband is her child's biological father. Those legitimacy presumptions still serve the important purpose of efficiently recognizing the father-child relationship in a number of situations, such as in the case of a married couple where the husband is the biological father and no other man alleges paternity. When a self-alleged biological father steps forward, however, to challenge those presumptions and establish his paternity of a child, the courts should not preclude his access to reliable evidence in the form of mandatory genetic testing. Such testing is available upon request under the Paternity subtitle to determine the truth of the fact underlying the marital presumptions, that is, the *biological relationship* between father and child.

I also take issue with the Majority's analysis because, effectively, it requires the Circuit Court judge first to reach the ultimate conclusion it deems most appropriate in order to receive, or preclude, evidence to support that pre-determined result. If a Circuit Court judge believes it is not in the best interest of the child for an alleged biological father to be determined to be the father, then, under the Majority's analysis, that judge will not order that genetic evidence proving that fact be obtained. Judge Eldridge provided a logical rejection of the *Turner* analysis in his dissenting opinion in that case, which Judge Raker cited, in part, in her dissent in *Evans*, see 382 Md. at 645, 856 A.2d at 698:

> The majority has simply changed the law in a particular class of cases. The motivation for this departure apparently is the desire to avoid a result which the majority perceives as an evil, to be rectified by judicial fiat, namely the declaration that a man, other than a married woman's husband, is the father of her child. Because the determination of the identity of the natural father of this

> child could lead to the natural father having some rights with respect to that child, and because such rights may impinge upon the "integrity of familial relationships already formed," the majority has reconstructed the principles which govern the resolution of disputes. Normally a dispute is resolved after the relevant facts are ascertained and the pertinent law is applied. Under the majority's construction, in this limited class of cases, sometimes the most relevant facts will not be ascertained in order to prevent an unsatisfactory resolution of the dispute. The father may bring an action to determine paternity but, in some cases, may not have access to the most germane evidence available to resolve this dispute, namely the results of the blood tests.
>
> Nevertheless, according to the majority, if the man can prove that it is in the best interests of the child for him to be declared the father, blood tests will be provided. The majority has formulated a procedum whereby the trial court must determine the ultimate result, in order to discover whether that result is satisfactory, before it can ascertain the facts. If the court decides that it likes the predicted ultimate result, then the fact finding process continues. If the court decides that it does not like the predicted ultimate result the process ends.
>
> I cannot subscribe to the proposition that relevant, ascertainable evidence should be excluded because it may lead to a result which the court does not like. The trial court's conjecture over whether the result will be satisfactory should not determine whether facts relevant to that result are concealed. I simply cannot agree with the majority's view that the government (through its courts) is entitled to determine in a particular case that one will be better off by the perpetuation of a falsity and the suppression of relevant, unprivileged facts.

327 Md. at 123-24, 607 A.2d at 943-44 (Eldridge, J., dissenting) (footnote omitted). I agree with Judge Eldridge's dissenting analysis and believe it applies, even more so, at present day given that self-alleged biological fathers now have a right under the Paternity subtitle to file a complaint to establish paternity and invoke the subtitle's mandatory blood testing provision.

V.

Turning to the facts of the matter *sub judice*, as gleaned from the evidence presented to the Circuit Court I cannot support *any* analysis that would preclude Respondent from confirming and establishing legally his biological paternity of Gracelyn. Substantial, and essentially undisputed, evidence was presented to the trial court to support the alleged fact that Mr. Mulligan is not Gracelyn's biological father, and that Respondent indeed is. The failure to permit Respondent to confirm that fact with reliable genetic testing implicitly condones the Mulligans' decision for Mr. Mulligan to assume the role of Gracelyn's biological father, without actually believing he is and without regard to this State's adoption laws. At no time has Mr. Mulligan believed or maintained he is Gracelyn's biological father. Despite this, Petitioner and Mr. Mulligan evidently signed an "affidavit of parentage" with knowledge that Respondent could be, and likely is, Gracelyn's biological father.[11]

I recognize the Circuit Court found that Respondent acted aggressively and in a controlling manner with Petitioner and her children and that he provided virtually no support, save one month of housing, for Petitioner during her pregnancy. Still, those findings do not negate Respondent's status as Gracelyn's putative father. Those findings are relevant, instead, for purposes of analyzing Gracelyn's best interests when determining access schedules, provided Respondent is determined to be her biological father pursuant to the Paternity subtitle procedures he has invoked.

In addition to the Circuit Court's findings, evidence presented demonstrated that Petitioner believed Respondent to be Gracelyn's biological father and anticipated that he would sign the affidavit of parentage to establish that as legal fact when Gracelyn was born. When Respondent sought first to confirm his paternity through genetic testing at the hospital the day after Gracelyn was born, Petitioner denied his request, Respondent became upset, and Petitioner threatened to call security.[12] In response, Respondent left the premises and sought legal counsel. Respondent's counsel initiated contact with Petitioner to resolve these issues within two weeks after Gracelyn's birth and, approximately three weeks thereafter, filed a complaint to establish Respondent's paternity. Mr. Mulligan testified that he assumed the responsibility of serving as Gracelyn's father after Respondent left the hospital without signing the affidavit. While this action is commendable, it is not the

proper course to establish a legal parent-child relationship when there is another man all parties believe to be the biological father.

In *Sider v. Sider*, 334 Md. 512, 639 A.2d 1076 (1994), discussed by the Majority, __ Md. at__, __ A.3d at __ (slip op. at 22-24), this Court noted that, after the mother and putative father obtained extrajudicial blood testing confirming the putative father's status as the child's biological father, *Id.* at 516, 639 A.2d at 1078, "it appears that no further proceedings with regard to paternity were necessary" because "[t]he underlying facts in this case conclusively establish that [the alleged biological father] is [the child's] biological father" *Id.* at 526, 639 A.2d at 1083 (footnote omitted). We found erroneous the Circuit Court's decision to deny the paternity petition and declare the presumed father the "natural" (i.e., biological) father because "[a] court's attempt to declare a third party to be the 'natural parent' of a child in a custody dispute is in effect a judicial adoption, which is not sanctioned in Maryland. Furthermore, the circuit court's decision had the effect of terminating [the biological father's] parental relationship with [the child] which generally can only be accomplished through a decree of adoption." *Id.* at 529, 639 A.2d at 1084-85 (footnote and citation omitted).

Certainly the evidence presented in *Sider* was greater than the evidence presented in the matter *sub judice*. That was only possible, however, because the mother and biological father had agreed to undergo blood testing. I believe *Sider* is analogous, nevertheless, because the essential consensus by both Petitioner and Respondent, as well as Mr. Mulligan, is that Respondent *is* the biological father of Gracelyn. Indeed, Petitioner's position has been, not that Mr. Mulligan is Gracelyn's biological father, but rather that he is her "legal" father, and essentially, therefore, Respondent has no standing. The evidence presented to the Circuit Court, principally that Mr. Mulligan had a vasectomy before Gracelyn was conceived and Petitioner and Respondent engaged in sexual relationswith the intent to conceive a child at the time Gracelyn was conceived, sufficiently supports the conclusion that Respondent, at the very least, is Gracelyn's putative father. Respondent is entitled, therefore, to maintain an action to establish his paternity through genetic testing under the Paternity subtitle.

VI.

I would affirm the decision of the Court of Special Appeals remanding the matter to the Circuit Court to order blood testing pursuant to the Paternity subtitle of the Family Law Article because I believe Respondent is a "putative father." As the Majority seems to require a preliminary determination that Respondent is indeed a putative father in order to obtain blood testing, then I believe the proper recourse would be to remand the matter specifically for the determination of whether Respondent has rebutted the presumption, albeit without the availability of reliable court-ordered genetic testing. Yet, even under the Majority's analysis, I believe that Respondent already has presented sufficient evidence to rebut the presumption that Mr. Mulligan is Gracelyn's father, and therefore has established himself as a "putative father" entitled to blood testing under the Paternity subtitle.

Judge Raker has authorized me to state that she joins the views expressed here.

FOOTNOTES TO DISSENT

1. Unless otherwise indicated, all statutory references refer to the Family Law Article (FL) of the Maryland Code (1999, 2006 Repl. Vol. & 2010 Supp.).

2. I use the terms "legitimate" and "illegitimate" throughout my dissenting opinion solely because they are the terms employed by this State's statutes. I emphasize, however, that, although these terms retain legal significance, "all children are legitimate." *Evans v. Wilson*, 382 Md. 614, 646 n.4, 856 A.2d 679, 698 n.4 (2004) (Raker, J. dissenting). *See also* Cynthia Callahan & Thomas C. Ries, *Fader's Maryland Family Law*, § 9-2 n. 18 (5th ed. 2011) ("One wonders why the legislature does not re-title [Maryland Code (2001, 2011 Repl. Vol.), § 1-208 of the Estates and Trusts Article (ET)] as 'children of unmarried parents.'").

3. As the Majority notes, Turner was precluded from proceeding under the Paternity subtitle. __Md.__, __, A.3d__, __(2012) (slip op. at 19).

4. The legislative policy of the Paternity subtitle is expressed in FL § 5-1002:

(a) *In general.* — The General Assembly finds that:

(1) this State has a duty to improve the deprived social and economic status of children born out of wedlock; and

(2) the policies and procedures in this subtitle are socially necessary and desirable.

(b) *Purpose.* — The purpose of this subtitle is:

(1) to promote the general welfare and best interests of children born out of wedlock by securing for them, as nearly as practicable, the same rights to support, care, and education as children born in wedlock;

(2) to impose on the mothers and fathers of children born out of wedlock the basic obligations and responsibility of parenthood; and

(3) to simplify the procedures for determining paternity, custody, guardianship, and responsibility for the support of children born out of wedlock.

5. The circumstances of previous cases in which we, as well as the Court of Special Appeals, have discussed the issue of the two statutory schemes either concerned children who were born (and sometimes also conceived) while their moth-

ers were married, *see Kamp v. Dep't of Human Servs.*, 410 Md. 645, 980 A.2d 448 (2009); *Evans*, 382 Md. 614, 856 A.2d 679; *Sider v. Sider*, 334 Md. 512, 639 A.2d 1076 (1994); *Turner v. Whisted*, 327 Md. 106, 607 A.2d 935 (1992); *Ashley v. Mattingly*, 176 Md. App. 38, 932 A.2d 757 (2007); *Stubbs v. Colandrea*, 154 Md. App. 673,841 A.2d 361 (2004), or children who were neither conceived nor born to married mothers, see *Langston v. Riffe*, 359 Md. 396, 754 A.2d 389 (2000); *Monroe v. Monroe*, 329 Md. 758,621 A.2d 898(1993); *Taxiera v. Malkus*, 320 Md. 471, 578 A.2d 761 (1990); *Thomas v. Solis*, 263 Md. 536, 283 A.2d 777 (1971). Only in *Toft v. Nevada*, 108 Md. App. 206, 210-11, 671 A.2d 99, 101 (1996), did the Court of Special Appeals consider the circumstances of a child who was conceived by a married mother who had divorced by the time of the child's birth, *Id.* at 214 n.5, 671 A.2d at 103 n.5, where the mother sought to establish paternity in a man other than her former husband, *Id.* at 212, 671 A.2d at 102. In that case, the Circuit Court had proceeded under the Paternity subtitle and the issues presented to the Court of Special Appeals concerned the admissibility of the court-ordered blood testing, pursuant to the Paternity subtitle. *Id.* at 212-16, 671 A.2d at 102-04. The issues before the *Toft* court did not pertain to whether the Paternity subtitle was the appropriate statutory scheme by which to establish paternity, where the child's mother was married at the time of conception and the child, therefore, had a presumptive father, though the mother had divorced by the time of the child's birth.

6. Section 5-1027(c) further provides:

> (2) The presumption set forth in this subsection may be rebutted by the testimony of a person other than the mother or her husband.
>
> (3) If the court determines that the presumption set forth in this subsection has been rebutted by testimony of a person other than the mother or her husband, it is not necessary to establish nonaccess of the husband to rebut the presumption set forth in this subsection.
>
> (4) If the court determines that the presumption set forth in this subsection has been rebutted by testimony of a person other than the mother or her husband, both the mother and her husband are competent to testif' as to the nonaccess of the husband at the time of conception.

The current version is an iteration of former Article 16, § 66F(b), enacted pursuant to the 1963 revisions discussed by the Majority. __ Md. at__, __ A.3d at __ (slip op. at 3-4). The former section provided:

> When any bill or petition filed under this subtitle shall allege, or the court shall determine after the commencement of proceedings thereunder, that the child's mother was married at the time of the child's conception; the presumption that the child is the legitimate child of her husband may be rebutted by the testimony of persons other than the mother and her husband that, at the time the child was conceived, the mother was in fact living separate and apart from her husband. . . . After the court shall have determined that the child's mother and her husband were not living together as man and wife when the child was conceived, both the mother and her husband shall be competent to testify as to the nonaccess of the husband when the child was conceived.

Additionally, § 66G, entitled "Blood tests," provided that, "upon motion of the defendant alleged to be the putative father, or upon [the court's] own motion," the court "shall order the mother and the child, as well as the defendant to submit to such blood tests as maybe deemed necessary to determine whether or not the defendant can be excluded as being the father of the child."

7. The Majority holds, in part, that, "[i]n order to overcome the presumption [of legitimacy of a child conceived during marriage], there must be proof presented within the framework of the rules set forth in FL § 5-1027(c)(2), (3), and (4)." __ Md. at__, __ A.3d at __(slip op. at 34). *See Toft*, 108 Md. App. at 224, 671 A.2d at 108 ("[T]he rules of evidence controlling the proof of paternity ought to be the same" whether proceeding in an equitable action pursuant to the Estates and Trusts Article or pursuant to the Paternity subtitle.) (quoting *Turner*, 327 Md. at 113, 607 A.2d at 938). 1 would hold that properly admitted blood testing results maybe used, as well, to rebut the presumption of legitimacy found in § 5-1027(c)(1). *See Toft*, 108 Md. App. at 226, 671 A.2d at 109 ("[W]e conclude that the paternity statutes favor the use of blood test evidence, and would likely favor their use for rebutting the legitimacy presumption. Otherwise, the legislature would have created the potential for dueling rebuttable presumptions of paternity in two different men, with no 'trumping' mechanism. We do not believe that the legislature intended such an incongruous result."). Indeed, that is why I reject, as inconsistent with the scheme of the Paternity subtitle, the Majority's requirement that the presumption must first be rebutted.

8. ET § 1-206(a) provides in pertinent part: "A child born or conceived during a marriage is presumed to be the legitimate child of both spouses."

9. Section 5-1027(c)(1) of the Paternity subtitle provides that "[t]here is a rebuttable presumption that the child is the legitimate child of the man to whom itsmother was married at the time of conception."

10. I would embrace the reasoning expressed by the Supreme Court of Connecticut in rejecting that state's recognition of an irrebuttable presumption of legitimacy. That court explained, in *Weidenbacher v. Duclos*, 661 A.2d 988, 997-98 (1995):

> The reasons for which the irrebuttable quality of this presumption originally sprang into existence do not justify its application today. Primarily, two factors motivated its adoption. First, the harsh treatment of illegitimate children motivated the state to avoid attaching illegitimate status to children. Second, the lack of a scientifically reliable method of determining paternity was a logical reason for presuming the husband's paternity. Today, however, society has come to recognize that discrimination against illegitimate children is not justified. The social stigma of being branded illegitimate, if indeed it remains at all, no longer carries the same sting that it once did. The United States Supreme Court, moreover, has held that illegitimate children cannot be denied equal protection of the law. *Trimble v. Gordon*,

> 430 U.S. 762, 776 (1977) (holding unconstitutional intestacy statute that permitted child born out of wedlock to inherit only from his or her mother). *Furthermore, modern scientfic tests can determine, with nearly perfect accuracy, who is the true biological father of a child. The original reasons which justified the adoption of the rule are no longer valid*.

(quotation marks and citations omitted) (emphasis added). I believe the Majority's analysis effectively treats the presumption under the Estates and Trusts Article as irrebuttable by requiring a third party to a marriage to first rebut the presumption before he can obtain reliable evidence to rebut the presumption.

11. The import of an "affidavit of parentage" is delineated in FL § 5-1028. That section provides

(a) *In general* — An unmarried father and mother shall be provided an opportunity to execute an affidavit of parentage in the manner provided under § 4-208 of the Health-General Article.

* * *

(c) *Requirements for completion*. —(1) The completed affidavit of parentage form shall contain:

(i) in ten point boldface type a statement that the affidavit is a legal document and constitutes a legal finding of paternity;

(ii) the full name and the place and date of birth of the child;

(iii) the full name of the attesting father of the child;

(iv) the full name of the attesting mother of the child;

(v) the signatures of the father and the mother of the child attesting, under penalty of peijury, that the information provided on the affidavit is true and correct;

(vi) a statement by the mother consenting to the assertion of paternity and acknowledging that her cosignatory is the only possible father;

(vii) a statement by thefat her that he is the natural-father of the child; and

(viii) the Social Security numbers provided by each of the parents.

* * *

(d) Execution constitutes legal finding of paternity. — (1) An executed affidavit of parentage constitutes a legal finding of paternity, subject to the right of any signatory to rescind the affidavit:

(i) in writing within 60 days after execution of the affidavit; or

(ii) in a judicial proceeding relating to the child:

1. in which the signatory is a party; and

2. that occurs before the expiration of the 60-day period.

(2)(i) After the expiration of the 60-day period, an executed affidavit of parentage m' be challenged in court only on the basis of fraud, duress, or material mistake of fact.

(ii) The burden of proof shall be on the challenger to show fraud, duress, or material mistake of fact.

(iii) The legal responsibilities of any signatory arising from the affidavit, including child support obligations, may not be suspended during the challenge, except for good cause shown.

(Emphasis added).

12. The record reflects that, at some point before Gracelyn was born, Petitioner filed harassment charges against Respondent. Though the specifics of the allegations are not included, Petitioner explained, "He harassed me a lot and said things, very hurtful things about me and my family. And, um, to the point where I filed harassment charges against him." The charges ultimately were placed on the stet docket, evidently because Petitioner was concerned that, presumably, any conviction would impact negatively Respondent's employment as a recreation specialist with the Federal Bureau of Prisons. Evidently, as a consequence of these charges, some form of protection order was entered against Respondent for Petitioner's benefit.

FOOTNOTES

1. We shall use the terms "blood testing," "genetic testing," and "paternity testing" interchangeably.

2. The 1963 legislative overhaul nevertheless "carried forward many of the substantive provisions of old Article 12" and left intact the State's Attorney's investigative and enforcement authority. *Eagan v. Ayd*, 313 Md. 265, 271, 545 A.2d 55, 57 (1988).

3. FL § 5-1029, "Blood or genetic tests," provides:

"(a) *Requests and orders or tests*. — (1) The [Child Support Enforcement] Administration may request the mother, child, and alleged father to submit to blood or genetic tests.

"(2) If the mother, child, or alleged father fails to comply with the request of the Administration, the Administration may apply to the circuit court for an order that directs the individual to submit to the tests.

"(b) *In general*. — On the motion of the Administration, a party to the proceeding, or on its own motion, the court shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child."

4. When Petitioner was questioned during the May 2010 hearing in the instant matter about the inconsistency between her sworn testimony during the divorce proceedings that she had been separated uninterruptedly since April 2008 and the assertion that Mr. Mulligan might be Gracelyn's biological father, Petitioner exercised her Fifth Amendment rights.

5. The import of an "affidavit of parentage" is delineated in FL § 5-1028. That section provides:

"(a) *In general*. An unmarried father and mother shall be provided an opportunity to execute an affidavit of parentage in the manner provided under § 4-208 of the Health-General Article.

* * *

"(c) *Requirements for completion*. —(1) The completed affidavit of parentage form shall contain:

"(i) in ten point boldface type a statement that the affidavit is a legal document and constitutes a legal finding of paternity;

"(ii) the full name and place and date of birth of the child;

"(iii) the full name of the attesting father of the child;

"(iv) the full name of the attesting mother of the child;

"(v) the signatures of the father and the mother of the child attesting, under penalty of perjury, that the information provided on the affidavit is true and correct;

"(vi) a statement by the mother consenting to the assertion of paternity and acknowledging that her cosignatory is the only possible father;

"(vii) a statement by the father that he is the natural father of the child; and

"(viii) the Social Security numbers provided by each of the parents.

* * *

"(d) *Execution constitutes legal finding of paternity*. — (1) An executed affidavit ofparentage constitutes a legal finding of paternity, subject to the right of any signatory to rescind the affidavit:

"(i) in writing within 60 days after execution of the affidavit; or

"(ii) in a judicial proceeding relating to the child:

"1. in which the signatory is a party; and

"2. that occurs before the expiration of the 60-day period."

6. Gracelyn's birth certificate also was not entered into evidence. Petitioner, however, included a copy of the birth certificate in her reply brief The certificate indicates that Gracelyn's father is "Thomas Gerard Mulligan, Jr." Respondent has not moved to strike the birth certificate, as not properly part of the record on appeal, which indeed it is not. *See Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 500 n.l, 16 A.3d 159, 161 n.1 (2011); *see also* Md. Rule 8-413. We shall not consider the birth certificate, or, for that matter, the affidavit of Mr. Mulligan, appended to Petitioner's brief, that he and Petitioner remarried on July 21, 2011.

7. The three issues Respondent presented to the Court of Special Appeals were: (1)(A) Whether a child conceived during marriage but born after separation was born "out of wedlock" and therefore entitled to blood testing to determine paternity; (B) if testing was not mandatory, whether the trial court erred under the best interests test by not ordering blood testing; (2) whether the trial court erred by considering the affidavit of paternity when it was not introduced into evidence and when it established that the Mulligans had committed perjury; and (3) whether the trial court's denial of Respondents request for blood testing denied his due process rights to establish parenthood. *Corbett v. Mulligan*, 198 Md. App. 38, 41, 16 A.3d 233, 234 (2011). All that is before us is the first of those questions.

8. We allude here to *Thomas v. Solis*, 263 Md. 536, 283 A.2d 777 (1971). At the time we decided that case in 1971, the paternity law did not include the provision it now does, in FL § 5-1002(c), granting putative fathers the right to establish paternity. As we discussed in Part 1, the thrust of the paternity statute at the time of *Thomas* was to grant mothers of children born out of wedlock and the Child Support Enforcement Administration the right to establish the paternity of putative fathers for purposes of securing child support. Indeed, we evidently were unsure when we decided *Thomas* whether the paternity statute authorized a putative father to attempt to establish his paternity. We wrote: "We do not find it necessary, in the case at bar, to broaden the application of [former] Article 16, [the then-Paternity statute] . . . *were it of legal accomplishment*, so as to provide within its framework a provision for a father to obtain a filiation declaration." *Id.* at 543-44, 283 A.2d at 781 (emphasis added). We held "that a reasonable construction of Article 93, Sec. 1-208 [now, ET § 1-208] achieves that purpose and we think with a more satisfactory and 'less traumatic' effect than a proceeding under Article 16, Sec. 66, *were one available thereunder*." *Id.* at 544, 283 A.2d at 781 (emphasis added).

9. In *Monroe*, 329 Md. 758, 621 A.2d 898 (1993), the mother, Ms. Monroe, conceived the child after she had been dating Mr. Monroe for a short period of time. *Id.* at 760, 621 A.2d at 899. Mr. Monroe was present when the child was born and had his name placed on the birth certificate, and the Monroes lived together, with the baby, for the next two-and-a-half years before they married. *Id.* at 760-61, 621 A.2d at 899.

When the Monroes ultimately parted, within the separation and custody proceedings, Ms. Monroe sought blood testing to prove that Mr. Monroe was not the child's biological father. *Id.* at 762, 621 A.2d at 900. The circuit court granted the request and the results excluded Mr. Monroe as the father. *Id.* The circuit court then admitted those results into evidence, found that neither party was unfit, "found 'as a matter of law,' that exceptional circumstances did not exist," and ordered that Ms. Monroe be granted temporary custody of the child. *Id.* at 762-63, 621 A.2d at 900.

10. *Alternatively*, this Court held that the divorced husband was equitably estopped from denying paternity. *Kamp*, 410 Md. at 672-78, 980 A.2d at 464-68.

Cite as 7 MFLM Supp. 31 (2012)

CINA: request for continuance: lack of surprise, diligence and mitigating actions

In Re: Ryan O.

No. 2062, September Term, 2011

Argued Before: Eyler, Deborah S., Wright, Sharer, J. Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Wright, J.

Filed: May 9, 2012. Unreported.

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.

Appellants, Reginald O. ("Mr. O.") and Rose C. ("Ms. C."), are the parents of Ryan O. ("Ryan"), the child who is the subject of this proceeding. On November 30, 2011, the Circuit Court for Montgomery County, sitting as the juvenile court, found Ryan to be a Child in Need of Assistance ("CINA")[1] and committed him to the Montgomery County Department of Health and Human Services ("the Department") for placement in foster care. This appeal followed.

Appellants present the following questions, which we have rephrased and renumbered for clarity.[2]

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 shall affirm the order of the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

Ryan is the youngest of appellants' six children, the other five of whom were adjudicated as CINA on April 22, 2010, and currently reside in foster care. On May 5, 2011, shortly before Ryan's birth, Ms. C. participated in a visit with her children. During that visit, Kenyetta Taylor, a social worker for Montgomery County Child Welfare Services, asked Ms. C. if she was pregnant, and Ms. C. responded "no." On June 17, 2011, Ryan was born at Frederick Memorial Hospital at which time he displayed signs of withdrawal, from an unidentified substance, necessitating his being kept in the Special Care Nursery on a morphine drip until he was ultimately released to his parents on June 27, 2011.

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

I. The Department's Efforts to Locate Ryan

On July 27, 2011, Michelle Goodrich, a family services worker for the Washington County Department of Social Services, visited a residence in Keedysville, Maryland, which appellants had listed as their home, to determine if a newly born infant was there. While at the residence, Ms. Goodrich observed car seats, toys, a bassinet, diapers, baby pajamas, and other items related to infant care. Before leaving, Ms. Goodrich left her contact information with Ms. C.'s father, who was present in the home, and instructed him to have appellants call her should they appear. On July 29, 2011, Ms. C. contacted Ms. Goodrich and stated that she had given birth to Ryan. Ms. C. also stated that she had chosen to deliver Ryan outside of Montgomery County because she was concerned that the Department would take Ryan away from her. Ms. Goodrich was also made aware that Ms. C. had provided new contact information, including an address in Frederick County. Therefore, Ms. Goodrich issued a referral to the Frederick County Department of Social Services with the instruction to conduct a home visit at Ms. C.'s new Thurmont address.

In the days immediately after Ms. Goodrich's conversation with Ms. C., several attempts were made to contact appellants and to locate Ryan, but those efforts were unsuccessful.[3] On August 3, 2011, the Department filed a CINA petition in which it contended that Ryan had been neglected and that appellants were either unable or unwilling to care for him. The petition also referenced allegations of abuse and neglect which were related to the CINA cases of Ryan's siblings. The following day, the court issued a

Writ of Attachment for Ryan. The court also issued an Order to Show Cause in which it found that appellants had "sufficient notice that the Department and the [c]ourt are trying to contact them and that these proceedings have commenced." Further, the court found that appellants were "purposefully alluding [sic] the Department and its efforts to place [Ryan] in shelter care." The order also directed appellants and Ryan to be present at a hearing the following day. On August 5, 2011, the court issued a "Shelter Care Order" which stated that, once Ryan was located, he was to be placed in the custody of the Department in order to allow for his placement in foster care. The order also directed that all parties were to return to court for an adjudicatory hearing on August 31, 2011. On August 1 8, 2011, a Writ of Attachment was issued for appellants for failure to appear before the court in accordance with the show cause order.

Deputy Sheriff Cynthia DeFriece of the Warrants/Fugitive Division of the Montgomery County Sheriff's Office was involved in the search for appellants and Ryan and testified that she tried calling several cellphone numbers believed to be associated with appellants but was unable to reach them. On August 19, 2011, Deputy DeFriece contacted Sprint, whom she believed to be Mr. O.'s cellphone service provider, and asked the company to "ping"[4] what she believed to be Mr. O.'s phone in order to approximate the phone's location. That same day, acting on the information she received from Sprint, Deputy DeFriece, accompanied by additional personnel from her department, members of the Frederick City Police, and a social worker from the Frederick County Department of Social Services, responded to Beckley's Motel. In Room 12, Deputy DeFriece found appellants, Mr. O.'s mother and father, and Ryan. Ryan was handed over to the social worker who was waiting outside. The following items were found inside the room: premade alcoholic shots, a pill crusher and short straw, plastic baggies some of which had corners ripped off, a bottle of Lidocaine, Karo syrup, a bottle of Anbesol next to a syringe without a needle attached, a bottle of Similac formula, packaging for a vibrator, and a prescription bottle of Zyprexa (not prescribed to any of the room's inhabitants). Appellants were arrested and taken to a lockup facility in Montgomery County.

That same day, the court issued an "Order Controlling Conduct" requiring appellants to undergo a drug and alcohol test as a condition of their release, refrain from contact with any of their children, submit to bi-weekly drug and alcohol tests, and keep the Department apprised of their address and contact information. The results of their drug tests from that day showed Mr. O.'s urine tested positive for opiates and Ms. C.'s urine tested positive for methadone. The court also issued a Scheduling Order confirming an adjudicatory hearing, with regard to the CINA petition, to be held August 31, 2011.

On August 30, 2011, the State filed a "First Amended CINA Petition" in which it noted appellants' history of child neglect, their evasion of the Department's efforts to contact them, the circumstances of the recovery of Ryan from their custody, and appellants' positive drug tests.

II. Adjudicatory Hearing

On August 31, 2011, the adjudicatory hearing commenced with Mr. O. present and Ms. C. not present. Before the Department called their first witness, counsel for Ms. C. moved for a continuance.[5] Ms. C.'s counsel stated that she had only just made contact with her client the day before and had not been engaged with the cases involving Ryan's siblings and explained:

> It's my understanding the Department is relying heavily on the facts relating to the siblings in order to have the Court entertain a CINA on [Ryan's] case. And with that said, I believe that [Ms. C.] needs to have counsel that is privy to all that information within the first amended petition. And I still need to do additional discovery, interview additional witnesses, and basically ascertain additional information in order to proceed.

Denying counsel's request, the court stated that appellants' counsel would not be required to present their case on the first day of the hearing and would only have to hear the Department's witnesses. Counsel for both Ms. C. and Mr. O. objected to the court's decision to proceed in this manner, citing earlier arguments as to discovery, and a need for further preparation in order to perform proper cross-examination.

Counsel for Ms. C. next objected to the Department's offering of exhibit numbers 1-5, the certified court records relating to the CINA proceedings of Ryan's five siblings, on the grounds that she had not had an opportunity to look at the records and wanted to ensure that they did not contain the Department's own reports. Mr. O.'s counsel joined in the objection and further objected on the ground that the Department's reports contained inadmissible hearsay.[6] The court admitted the records but also expressed that it would consider any arguments as to redaction after counsel for Mr. O. and Ms. C. had time to review the evidence. The Department requested that the court take judicial notice of a summary, from its amended petition, detailing the facts of the CINA cases involving Ryan's siblings. The court declined to take judicial

notice of that summary but stated: "I think the [c]ourt can take judicial notice of what's happened in the other [children's] files."

After the Department examined its first witness, counsel for Mr. O. asked the court to allow her to reserve her cross-examination, on the ground that, because the Department had gone beyond the scope of its petition in its examination and had not served her with appropriate discovery, she could not perform an effective cross-examination.[7] The court overruled the objection.[8] At the close of the first day of the hearing, the court scheduled the proceeding to resume on October 12, 2011, and ordered that appellants only be permitted to have, at maximum, weekly supervised visitation with Ryan, conditioned upon producing randomly administered drug tests with negative results.

On October 12, 2011, the adjudicatory hearing resumed with both appellants failing to appear. With counsel for appellants present, the Department called Christen Williams, and the following colloquy occurred:

> [COUNSEL FOR THE DEPARTMENT]: What else was found that, that was the impetus for you opening your investigation?
>
> [MS. WILLIAMS]: The straw and the pill crusher and the ripped baggies, the corners of the baggies.
>
> [COUNSEL FOR THE DEPARTMENT]: With regard to the pill crusher, can't there be an innocent explanation for having a pill crusher?
>
> [MS. WILLIAMS]: Well, there could be, but typically pills are orally ingested and not crushed and snorted for any legal use.
>
> [COUNSEL FOR MS. C.]: Your Honor, I'm going to be objecting to her line of questioning. She hasn't been qualified as an expert in that area.
>
> [THE COURT]: Overruled.
>
> [COUNSEL FOR THE DEPARTMENT]: What, what, if anything led you to believe that anything would be, would be snorted as opposed to ingested?
>
> [MS. WILLIAMS]: Because the straw was right next to the pill crusher.

Additionally, counsel for Mr. O., taking advantage of the court's offer to allow argument against evidence admitted at the first day of the hearing, objected to the admission of exhibit numbers 1-5 on the ground that they contained "the Department's original allegations, which were not sustained and . . . [were] more prejudicial than probative." The court explained its rationale for admitting the Department's exhibits:

> This is the [c]ourt's record. I mean, that's what's been certified. . . . this isn't a secret to anyone in the room. . . . there's a difference between the initial petition being reviewed as established, which it's not, but I think it's part of the record, it's part of how we started. And the comparison between it and the first amended petition is a useful exercise in what actually was the basis for the children's determination as CINA rather than not.
>
> So I'm not inclined to remove anything from what's been submitted as the [c]ourt's record. I don't think that it's prejudicial any more than it is — that it was in the [c]ourt's record to start with . . . to consider . . . in this adjudication . . . the history of the other children.
>
> * * *
>
> So . . . I'm not going to strike . . . or remove the original petition, understanding that that isn't what the [c]ourt relied on in making the determination that it did about the older children.
>
> * * *
>
> . . . I am regularly asked to strike things from a report that have not been established or are just not relevant or are inappropriatcly stated or a whole host of things. None of that was the ease in any of these reports, and if that was what needed — that was what someone wanted it to do, especially given that in fact this is the practice in the county, this is how we have concluded that it best serves everyone so that it's clear what the basis is for what the [c]ourt does, so if there was an issue, it needed to be raised before it became part of the [c]ourt's record[.]
>
> * * *
>
> [The court orders] ended up attached to the reports because that's the practice here, and . . . in the past, both [counsel for Mr. O. and Ms. C.] of you, said you would like certain provisions stricken from those reports. There's no secret that then they get attached to the court orders, again, as a basis for the findings the [c]ourt makes. They are in fact evidence. They are in

> fact reviewed as evidence, and you have regularly had the opportunity to say you don't like particular wording or whatever it was, and if it needed to be stricken, it was then, not now. I can't go back and relitigate what happened in the older five children's cases.
>
> * * *
>
> . . . So, I'll admit the Exhibits 1 through 5 in their entirety.

At the conclusion of the hearing, the court issued an "Order Granting Limited Guardianship" to the Department. On November 30, 2011, the court issued an Amended Adjudication and Disposition Order, declaring Ryan to be a CINA, conditioning appellants' visitation with Ryan upon their participation in random weekly drug screening and production of tests with negative results, and determining the permanency plan for Ryan to be reunification.[9]

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 were faced with an unforeseeable factual scenario against which they could not have reasonably been expected to defend. Appellants contend that, because the court's denial of their respective counsel's motions for continuance prejudiced their ability to defend against the Department's case and to prepare their own, such denial was an abuse of discretion and reversal is required. *See Touzeau v. Deffinbough*, 394 Md. 654, 669-70 (2006) (holding that an abuse of discretion has been found in the failure to grant a continuance when counsel was taken by surprise by an unforeseen event at trial, despite diligent preparation or efforts to mitigate effects of surprise) (citing *Plank v. Summers,* 205 Md. 598, 604-05 (1954); *Thanos v. Mitchell,* 220 Md. 389, 392-93 (1959)).

In *Neustadter v. Holy Cross Hosp of Silver Spring, Inc.*, 418 Md. 231 (2011), the Court of Appeals stated the standard of review of a court's decision to deny a continuance:

> Pursuant to Maryland Rule 2-508 "[o]n a motion of any party . . . the court *may* continue a trial or other proceeding as justice may require." Because the Rule invokes the precatory word "may," we have held that "the decision to grant a continuance [or postponement] lies within the sound discretion of the trial judge" and that "[a]bsent an abuse of that discretion we historically have not disturbed the decision to deny a motion for continuance [or postponement]."

Id. at 274 (emphasis in original) (quoting *Touzeau*, 394 Md. at 669). Maryland Rule 2-508 provides in pertinent part:

> **Rule 2-508. Continuance**
>
> (a) **Generally**. On motion of any party or on its own initiative, the court may continue a trial or other proceeding as justice may require.
>
> (b) **Discovery not completed.** When an action has been assigned a trial date, the trial shall not be continued on the ground that discovery has not yet been completed, except for good cause shown.

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 (citation omitted).

Here, both counsel knew, in advance of the scheduling order for the adjudicatory hearing, that they would be representing their respective clients in this action. Appellants chose to be consistently absent from the proceedings of this case, and to not avail themselves 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 other matters and the one *sub judice*. 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 for appellants opted to request a continuance until the day of the adjudicatory hearing.

Under these circumstances, we are not persuaded that appellants were surprised by any "unforeseen" events at trial or that they prepared or acted diligently to mitigate the effects of any such "surprises." *See Touzeau,* 394 Md. at 669-70 (citing *Plank*, 205 Md. at 604-05; *Thanos*, 220 Md. at 392-93). Rather than grant a continuance, the court afforded appellants the opportunity to review any evidence offered at the first day of the hearing and renew any objections to the same at the hearing's second day, forty-two days later.[10] We conclude that the juvenile court properly exercised its discretion in denying appellants' motion to continue and in affording them the best opportunity,

given the circumstances, to make and defend their case. *See Greenstein v. Meister*, 279 Md. 275, 294 (1977) ("The resolution of the problem may not have been wholly to [appellants'] liking, but it hardly bespeaks an abuse of discretion.").

II.

Appellants contend that the court erred in admitting Department's exhibit numbers 2-5[11] because, even assuming *arguendo* that the documents were properly served in discovery, the exhibits contained inadmissible hearsay. The exhibits in question were court orders from Ryan's siblings' permanency planning hearings and had the corresponding Department reports attached. Appellants assert that the Department reports contained hearsay statements which may have been admissible at permanency planning hearings, where rules of evidence are relaxed, but would not be admissible at a CINA adjudication where the rules of evidence apply. Appellants maintain that the exhibits spoke to the ultimate issue of their ability to parent their children, and where evidence with respect to the reasons for Ryan's siblings entering foster care was not introduced by other means, the admission of this evidence was highly prejudicial, not harmless or cumulative, and warrants a reversal of the court's judgment.

"We review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard." *Bernadyn v. State*, 390 Md. 1, 7 (2005) (citation omitted). A determination as to the admissibility of hearsay evidence is different because a court has no discretion to admit hearsay evidence unless it falls within a recognized exception to the hearsay rule or is permitted by an applicable constitutional provision or statute. *Id.*; Md. Rule 5-802. "Whether evidence is hearsay is an issue of law reviewed *de novo*." *Bernadyn*, 390 Md. at 7.

In the case at bar, the court took judicial notice of the evidence in question. We have explained judicial notice as follows:

> The doctrine of judicial notice substitutes for formal proof of a fact "when formal proof is clearly unnecessary to enhance the accuracy of the fact-finding process." *Smith v. Hearst Corp.*, 48 Md. App. 135, 136, 426b A.2d 1 (1981). A court may judicially note facts that readily can be determined by examination of a source whose accuracy cannot be reasonably questioned. Md. Rule 5-201(b). Included among the categories of things of which judicial notice may be taken are "facts relating to the . . . records of the court." *Smith*, 48 Md. App. at 136 n.1. *Lerner v. Lerner Corp.*, 132 Md. App. 32, 40 (2000).

Specifically, 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 by the hearing judge was not inappropriate. The [parent] was a party to the prior hearings; she had the opportunity to defend herself through cross-examination; she was represented by counsel at those hearings; the facts relied upon were identical to the facts in the prior litigation; neither party demonstrated that circumstances had changed for the better since the prior hearings; the prior transcripts pertained to judicial findings deciding the allegations by the same [juvenile] court; the transcripts were identified, moved into evidence, and made a part of the record; and the circuit court independently analyzed the evidence before it and made its own conclusion.

In re Nathaniel A., 160 Md. App. 581, 598 (2005).

Here, as in *In re 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 containing the documents at issue and to admit them into evidence. *See Id.* (holding that the trial court may take judicial notice of the contents of court records, pleadings, and exhibits from related CINA proceedings when the interested party is a parent who was represented by counsel).

III.

Appellants contend that 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) (holding that lay witnesses may testify regarding their direct perceptions of

events but are prohibited from testifying as to opinions or inferences based upon "specialized knowledge, skill, experience, training or education"). Appellants claim that the Department's case was based upon the condition of their motel room as well as allegations of their drug use, and without this evidence, there was insufficient grounds to determine that Ryan would be harmed in their care. Therefore, appellants assert that the admission of Ms. Williams' testimony was not harmless error and thus warrants a reversal of the court's judgment.

It is within the sound discretion of the court to admit lay opinion testimony, and its decision to admit such evidence will not be overturned unless an abuse of discretion is shown. *Thomas v. State*, 183 Md. App. 152, 174 (2008) (citing *Robinson v. State*, 348 Md. 104, 118-19 (1997)), *aff'd on other grounds*, 413 Md. 247 (2010).

The provisions pertinent to this issue are Maryland Rules 5-701 and 5-702, which cover testimony by lay witnesses and by experts, respectively. They provide:

> **Rule 5-701. Opinion testimony by lay witnesses.**
>
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.
>
> **Rule 5-702. Testimony by experts.**
>
> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

The Court of Appeals adopted a "narrow approach" to the interplay between these two rules in *Ragland*, 385 Md. at 720, 725, explaining:

> The rationale underlying this narrow approach is that lay witnesses may testify regarding their direct perceptions of events but that opinions or inferences that rely on scientific, technical, or specialized knowledge must be excluded unless the witness is qualified as an expert.
>
> * * *
>
> Accordingly, we will follow the approach as reflected in the 2000 amendment to Fed. R. Evid. 701 and hold that Md. Rules 5-701 and 5-702 prohibit the admission as "lay opinion" of testimony based upon specialized knowledge, skill, experience, training or education.

Here, we agree with appellants that the portion of Ms. Williams's testimony related to the pill crusher constituted inadmissible "lay opinion." *See Bey v. State*, 140 Md. App 607, 623 (2001) ("[A] lay witness is not qualified to express an opinion about matters which are either within the scope of common knowledge and experience of the jury or which are peculiarly within the specialized knowledge of experts.") (citing *Rosenberg v. State*, 129 Md. App. 221, 254 (1999)). Only lay opinions that are "rationally based on the perceptions of the witness and helpful to the trier of fact" are admissible. *Wyatt v. Johnson*, 103 Md. App. 250, 268 (1995) (citations omitted); Md. Rule 5-701.

Despite Ms. Williams not being qualified as an expert in drug use or paraphernalia, she gave opinion testimony related to the pill crusher which could have only been based upon "specialized knowledge, skill, experience, training or education." *Ragland*, 385 Md. at 725. Where her statements essentially branded the pill crusher as an instrument with exclusively illegal uses and also presumed that appellants were using it to crush and snort drugs, we conclude that her opinions could not have been simply and rationally based on direct perceptions. Ms. Williams did not observe appellants engaging in any drug use and it does not seem rational to affirmatively condemn a device as having only nefarious utility when it is a commonly available consumer product. Accordingly, we hold that the court abused its discretion when it admitted Ms. Williams' lay opinion testimony regarding the pill crusher.

Nevertheless, we conclude that any error made by the court in admitting this testimony was harmless. This Court has explained harmless error in the context of a CINA action as follows:

> CINA cases are civil proceedings. *See In re Emileigh F.*, 353 Md. 30, 724 A.2d 639 (1999); *see also In re John P.*, 311 Md. 700, 707, 537 A.2d 263 (1988). It is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error *and*

> prejudice to the appealing party. *Muthukumarana v. Montgomery County*, 370 Md. 447, 477 n.20, 805 A.2d 372 (2002) (quoting *Benik v. Hatcher*, 358 Md. 507, 537, 750 A.2d 10 (2000)). In that context, prejudice means that it is likely that the outcome of the case was negatively affected by the court's error. *State Roads Com. v. Kuenne*, 240 Md. 232, 235, 213 A.2d 567 (1965); *McQuay v. Schertle*, 126 Md. App. 556, 587, 730 A.2d 714 (1999) (citing *Harris v. David S. Harris, P.A.*, 310 Md. 310, 319, 529 A.2d 356 (1980)).

In re Ashley E., 158 Md. App. 144, 164-65 (2004), *aff'd* 387 Md. 260 (2005).

In the instant case, the portion of testimony at issue was used to establish drug use by appellants. To that extent, they were not prejudiced by the improper admission of the statements related to the pill crusher. 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 positive results of drug tests administered to each appellant the day Ryan was located. Hence, any error by the court in admitting Ms. Williams' testimony was harmless and merely cumulative to the other, properly considered, evidence. Therefore, we decline to disturb the ruling of the juvenile court. *See In re Vanessa C.*, 104 Md. App. 452, 460 (1995) (holding that where the trial court made an "exhaustive summation" of the evidence considered and there was no indication that the judge relied upon a single erroneously admitted document in adjudicating a child as a CINA, the error was harmless).

IV.

Finally, the appellants ask "did the lower court err by finding Ryan was a CINA?" The record reflects that appellants made note of the court's ultimate decision only at the close of the second day of the hearing when Ms. C.'s counsel offered:

> And in looking at the care that Ryan was receiving in the parents' care . . . they did things that were expected of them: they followed up with the health care; they took the child to the pediatrician. Even when Ryan was found – the Court has an exhibit a picture of Ryan was taken. He looked appropriate; he looked healthy. There was no reason for him to be hospitalized at that time. So, on that day it doesn't appear that the parents were inappropriate and he wasn't receiving proper care.
>
> I would submit to the Court that this case does not rise to the level of neglect at an adjudication stage. . . .
>
> So, looking at Ryan's case specifically, I'd ask the Court not to find him CINA and I would argue that the Department has not proved neglect.[12]

These references notwithstanding, appellants' brief does not contain any substantive argument directed at the juvenile court's CINA adjudication and, therefore, we need not address the issue. Md. Rule 8-504(a)(6) (requiring that a brief "shall . . . include . . . [a]rgument in support of a party's position"). "An appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief." *Oak Crest Village, Inc. v. Murphy,* 379 Md. 229, 241 (2004). *See also Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) ("we decline to address [appellant's inadequately briefed argument] on appeal"); (accord *Federal Land Bank of Baltimore, Inc. v. Esham*, 43 Md. App. 446, 457-58 (1979) ("In prior cases where a party initially raised an issue but then failed to provide supporting argument, this Court has declined to consider the merits of the question so presented but not argued."). Appellants are confined on appeal only to those issues which were properly raised and argued in their brief. Accordingly, we decline to address the juvenile court's ultimate decision in adjudicating Ryan to be a CINA and affirm its other rulings.

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

FOOTNOTES

1. A "Child in Need of Assistance" is a "child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian, are unable or unwilling to give proper care and attention to the child and the child's needs." *In re Adoption/Guardianship of Chaden M.,* 422 Md. 498, 501 n.1 (2011) (citation omitted).

2. Appellants' questions presented *verbatim* are:

> I. Did the trial court err by denying the parents' request for a continuance and by admitting documents containing hearsay statements?
>
> II. Did the trial court err by admitting expert testimony through a lay witness?
>
> III. Did the lower court err by finding that Ryan was a CINA?

3. On August 1, 2011, Christen Williams, a social worker with the Frederick County Department of Social Services, attempted a home visit of the residence Ms. C. noted in Thurmont, Maryland, but did not encounter appellants or Ryan, nor did she observe any infant related items. Later that same day, Ms. Williams attempted to locate appellants or Ryan at the home of Mr. O.'s brother in Keymar, Maryland, but did not find them there. On August 2 and 6, 2011, Ms. Goodrich returned to the Keedysville, Maryland address in search of appellants or Ryan but no one was home on either occasion. On August 4, 2011, Ms. Williams went to another Frederick County address but did not find either appellants or Ryan present. On August 15, 2011, Ms. Williams went to an address in Mt. Airy, Maryland, where it was reported Mr. O. received his Social Security disability checks but no one was home when she visited. Also on August 15, 2011, Ms. Williams went to Beckley's Motel in Frederick, Maryland, but reported that she did not find either appellants or Ryan at the establishment.

4. *See Stone v. State,* 178 Md. App. 428, 448-49 (2008) (discussing use of "ping" information in context of Fourth Amendment challenge). *See also Wilder v. State,* 191 Md. App. 319, 347-48 nn.10-11 (discussing cellphone tracking), *cert. denied*, 415 Md. 43 (2010). *See generally,* ARTICLE, *Triggering a Closer Review: Direct Acquisition of Cell Site Location Tracking Information and the Argument for Consistency Across Statutory Regimes,* 45 COLUM. J.L. & SOC. PROBS. 139, 144-46 (2011) (explaining how the practice of "pinging" is used to track the location of cellphones).

5. Counsel for Mr. O. joined in the motion, stating that she had been away until just prior to the hearing and named a number of witnesses she would need to call in order to properly represent her client.

6. Counsel for Mr. O. stated that, although she represented Mr. O. in the cases involving Ryan's siblings, she had received a "very small packet of discovery that did not contain those documents," and that where her files on the siblings' cases were extensive it would be unfair to require her to recreate the Department's exhibits.

7. Counsel for Ms. C. made the same objection, seeking the court's permission to reserve her cross-examination: "[u]ntil I'm able to further explore these issues with my client, especially since the Department went beyond the scope of their petition in the direct examination."

8. The court also overruled the objection made by counsel for Ms. C.

9. Appellants were also ordered to complete psychological evaluations and participate in: smoking cessation classes, parenting classes, Infants and Toddlers services, and Ryan's medical treatment; all under the direction of the Department. The court dated its order *nunc pro tunc* to October 12, 2011.

10. The appellants did not make a request to recall the witness who testified on the first day for additional cross-examination.

11. In their brief, appellants concede that exhibit number 1, the Adjudication and Disposition report for Ryan's siblings, should not have been objected to at the adjudicatory hearing as it had been generated at a previous hearing which was subject to the rules of evidence.

12. Mr. O.'s counsel joined in this argument.

Cite as 7 MFLM Supp. 39 (2012)

CINA: change in permanency plan: best interest of the children

In Re: Chelsea O., Savanna O., Shianne O., Katelyn O. and Kyle O.

No. 2063, September Term, 2011

*Argued Before: *Eyler, James R., Graeff, Alpert, Paul E. (Ret'd, Specially Assigned), JJ.*

Opinion by Graeff, J.

Filed: May 9, 2012. Unreported.

***Eyler, James R., J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

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.

Appellants, Reginald O. and Rose C., appeal from an order issued by the Circuit Court for Montgomery County 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, which we quote:
>
> Did the trial court err in changing the permanency plan for all five children to adoption?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. O. and Ms. C. are the biological parents of Chelsea (DOB: January 25, 2005), Savanna (DOB: August 2, 2006), Shianne (DOB: March 10, 2008), Katelyn (DOB: February 14, 2009), and Kyle (DOB: March 7, 2010). On April 22, 2010, the circuit court found that the children were children-in-need-of-assistance ("CINA").[1]

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

The children first came to the attention of the Montgomery County Department of Health and Human Services, Child Welfare Services, (the "Department") in January 2010. The Department opened a neglect investigation regarding Chelsea, Savanna, Shianne, and Katelyn.[2] Department officials were concerned that appellants were not properly supervising the children, engaged in substance abuse, and were not providing stable housing for the children. Chelsea, Savanna, Shianne, and Katelyn had been living in a one-bedroom apartment with Ms. C., Mr. O., and Mr. O's elderly grandmother.

In late January 2010, the Department visited Mr. O. and Ms. C. to investigate. Mr. O. and Ms. C. subsequently signed a safety plan, agreeing to provide information regarding the children's medical care, address the inadequacy of housing, and refrain from drug use. Mr. O. agreed to a drug test. Ms. C. denied any drug abuse by herself and Mr. O.

On February 1, 2010, the Department met again with appellants. The entire family was living in a motel room. The Department inquired regarding what medical services the children had received, and Ms. C. subsequently provided written verification that she had an appointment in December 2009 for an ultrasound reading.

The Department contacted the clinic that Ms. C. identified as the children's medical provider. A physician at the clinic advised that Katelyn had not been seen in the clinic since June 2009. Clinic records indicated that: Shianne's last visit was in April 2009, and she was not up-to-date on her immunizations; Savanna and Chelsea had never been seen at the clinic, and their records indicated that they had received only some of their immunizations. The Department also contacted Ms. C.'s treating physician, who advised that Ms. C. had not been to their office since February 2009. The physician's office had no record of her current pregnancy. Ms. C. later explained to the Department that she had received prenatal care at

Montgomery General Hospital.

In February 2010, appellants signed a second safety plan, agreeing to schedule medical appointments for the children and Ms. C. immediately. The Department offered to help appellants obtain immediate medical care for the children, including providing transportation. Appellants then left for North Carolina the next day. They stated that they wanted to avoid severe weather and a disputed hotel bill that froze their funds.

On February 16, 2010, the Department contacted Mr. O., who advised that he and his family had moved to North Carolina and were residing with Ms. C.'s stepmother. He reported that the children were well, and he indicated that they would be seen by a local physician on February 18, 2010. On February 19, 2010, the Department contacted the local physician's office, and the staff advised that the children were not patients at that clinic. On March 17, 2010, the Department closed its investigation of the family, making a finding of "indicated" neglect against appellants.[3]

The Department learned that, while the O. family was in North Carolina, appellants did not receive medical assistance, food stamps, or temporary cash assistance. The family did not establish a stable home for themselves in North Carolina.

On April 6, 2010, the Department learned that appellants had returned to Maryland with their five children.[4] Ms. C. and Chelsea, Savanna, and Katelyn were living with Mr. O.'s elderly grandmother, in her one-bedroom apartment. The Department also learned that Mr. O. was living with Shianne and Kyle in Mr. O.'s mother's house.[5] The children had not received any additional immunizations.

The Department removed the children that day and, two days later, it obtained an order authorizing the Department to keep them in emergency shelter care. The Department was concerned that appellants had failed to obtain a stable residence, provide a safe home environment, or provide routine medical services for the children.

On April 22, 2010, all of the children were found to be CINA. The juvenile court ordered Ms. C. and Mr. O. to cooperate with the Department, complete substance abuse evaluations, and for Ms. C. to follow the recommendations of her treating physician. The children were placed in foster care.

In July 2010, the Department opened a sex abuse investigation after the foster parents disclosed that Chelsea and Savanna had been discussing their exposure to sexual conduct. Deborah Hinton, a therapist, reported that Chelsea and Savanna displayed "sexualized behaviors," and they used sexually explicit language. Chelsea discussed how, because of her separation from her biological parents, she no longer had to worry about being "humped." Chelsea disclosed to her foster mother that she had been sexually abused, and Shianne told a pediatric nurse that she had been abused. Chelsea also stated that Katelyn had been "humped" by Mr. O., that her father and grandfather forced her to engage in sexually inappropriate acts with another girl to obtain money, and that her 'job" was to "kiss and bump" and "fuck my penis."

On August 4, 2010, parental visits for Chelsea, Savanna, and Shianne were temporarily suspended, pending the outcome of the investigation. In October 2010, the Department concluded its investigation, making findings of indicated child sexual abuse against both of appellants. The children have remained in foster care.

On February 4, 2011, the court held a permanency planning review hearing. The court found that the Department bad failed to provide appropriate services to appellants to facilitate reunification, and it ordered that the permanency plan remain reunification with appellants. The court ordered that appellants and Chelsea, Shianne, and Savanna participate in "therapeutic reunification visitation," appointing Dr. Gail Thornburgh to conduct the visitation. The court ordered that appellants' visitation with Katelyn and Kyle be expanded to include supervised visits, with an allowance that visits become unsupervised at the Department's Visitation House by April 2011.

On April 5, 2011, the court held a status hearing to determine if visitation and reunification for Chelsea, Savanna, and Shianne should proceed. The court ordered that therapeutic reunification visitation between Chelsea and her parents continue, and that Chelsea and appellants participate in psychiatric and psychological evaluations.

On June 9, 2011, the court held an emergency hearing, in which it ordered that Chelsea and Savanna be removed from their current foster home and placed in respite foster care. On June 15, 2011, the court ordered that Chelsea and Savanna participate in psychiatric and psychological evaluations.

On September 15, 2011, and October 13, 2011, the court held permanency plan review hearings for all five children. Several experts testified.

Dr. Thornburgh, an expert in the field of psychology, testified that the children had "experienced a good deal of loss and a good deal of change in their lives." Appellants had missed multiple scheduled visitations, which was negatively affecting their children. Dr. Thornburgh recommended against supervised visitation because it was no longer in the children's best interests to continue having failed meetings with their parents. The children's feelings of abandonment and loss were so significant that continued failed visitation attempts with appellants would permanently under-

mine their ability to trust adults, impacting their ability to develop feelings of being safe and comfortable in their environment.

Dr. Joyanna Silberg, a licensed psychologist who specializes in trauma and maltreatment, diagnosed Chelsea with developmental trauma disorder, reactive attachment disorder, post traumatic stress disorder, borderline intellectual functioning, and a history of maltreatment. She determined that Chelsea was "impaired in every aspect of development." Chelsea's concept of relationships was that they were "fraught with trauma, disruption, and abuse." She had dissociative tendencies, which are often the result of extreme maltreatment and abuse. Chelsea needed "some sense of stability of where her future lies," and it was "critical for her development and healthy attachment" for her to participate in therapy with her foster parents. Dr. Silberg recommended against reunification with appellants, stating that Chelsea needed emotional stability and appellants' absences were preventing her from achieving that stability.

Dr. Todd Christiansen, an expert in adult psychiatry, child psychiatry, and forensic psychiatry, testified regarding his treatment of Chelsea. He diagnosed Chelsea with possible post-traumatic stress disorder, noting that she had anxiety, issues with attachment, and a history of abuse, suggesting reactive attachment disorder. Chelsea's mental health problems presented long-term issues. Chelsea never discussed her biological parents, but rather she viewed her foster parents as her family. Dr. Christensen stated that reunification with Chelsea's parents would exacerbate her anxiety and psychiatric issues.

Dr. Paul Berman, a licensed psychologist, testified that he was engaged to perform psychological evaluations of appellants, but he was not able to perform those evaluations because they did not show up for any of their four appointments. Appellants claimed that they did not attend because they did not have transportation. Dr. Berman offered to meet in another location, but he requested that appellants come to his office for the first evaluation because he did not want to invest time traveling to an appointment that appellants would not attend.

Michael Arthur Bogrov, an expert in child psychiatry, testified regarding his evaluation of Chelsea and his review of her medical records. He testified that Chelsea "was a child with difficulty with both her impulse control and anxiety and mood problems." These issues seemed to be a result of reactive attachment disorder, which he described as "a problem where particularly young children have difficulty in their relationships with others, either too close or difficulty forming attachments, and [Chelsea] demonstrated that both in her behavior and her play." Chelsea became "too comfortable too quickly" in trying to develop a relationship with Mr. Bogrov. Chelsea's adult caregivers needed to "be able to understand her needs, able to provide very clear and structured setting for her, [and] participate in her treatment." Chelsea needed individual therapy and continued medication.

Ms. Hinton, admitted as an expert in licensed clinical professional counseling, testified regarding her provision of therapeutic services to Chelsea, Savanna, and Shianne. She testified that the children "display a great deal of anxiety in their attachment."

Julia Churchill, a social worker for the Montgomery County Infants and Toddlers Program, testified regarding her experience with Katelyn. Katelyn displayed atypical social-emotional development. Katelyn's behavior with her biological parents was different from when she was with her foster parents. Specifically, Katelyn "did not use her words as often with the biological family as she [did] in the home with the foster family, which can indicate a regression." Katelyn's behavior suggested that she had bonded with her foster family, and she was comfortable asking them for help.

Christina Brown, the coordinator of the Visitation House program with the Department, testified that appellants missed or canceled multiple appointments to visit with their children when they were at Visitation House. She testified that the typical policy was to cancel parental visits after four "no-shows," but she made an exception for appellants because they did not live in Montgomery County, and she was aware of some family "turmoil."

Maureen Kennedy, a clinical social worker and the supervisor of the Sexual Abuse Treatment Unit for Child Welfare at the Montgomery County Department of Health and Human Services, testified regarding her recommended permanency plan of adoption by non-relatives for the O. children.[6] With respect to each child, she discussed each factor of the statutory factors[7] of health and safety, emotional ties, emotional attachment to the caregivers and parents, length of time with the current caregiver, potential harm, and potential harm in state custody, and concluded that the effort toward reunification was and would be unsuccessful.

With respect to Kyle, she was concerned that appellants' smoking was exacerbating his asthma. Kyle's primary attachment was with his foster parents, and he had spent 18 months in foster care. With respect to Katelyn, her attachment issues arising out of her unstable relationship with her parents had an impact on her development, and appellants' failure to participate in court-ordered parenting classes or, over time, to provide a stable home exacerbated those problems. She also had been in foster care for 18

months, and would refer to her foster parents as "mom" or "mommy." Both children had been with their foster parents for so long that disrupting their relationship with the foster parents "would be tantamount to separating . . . biological children from their biological families." Ms. Kennedy testified that, if the children were removed from foster care, it would cause serious trauma.

Shianne exhibited "tantruming behaviors," which Ms. Kennedy believed appellants were incapable of managing. Shianne seemed "quite attached" to her foster parents and exhibited "clinging behavior." She was secure with her foster parents because of the length of time she had been with them, and she made a lot of progress with her foster parents. Although Shianne did have an attachment to appellants, and she recognized them as "mommy" and "daddy," Ms. Kennedy testified that Shianne would regress if she lost the stability created by her relationship with her foster parents.

With respect to Chelsea and Savanna, their behaviors presented serious concerns for their safety and the manageability of those behaviors by appellants. Although Chelsea and Savanna loved their parents and wanted to be with them, they had "a lot of conflict" Savanna exhibited clinging behaviors to her foster parents. Chelsea "just lit up" when her foster mother came to see her, and she was very attached to her. Chelsea and Savanna suffered from poor self-esteem. Chelsea regressed significantly and become very disorganized in her thinking due to the anxiety associated with losing her foster parents. Savanna similarly was overwhelmed by anxiety and the insecurity of losing her foster parents. Visitation with appellants was "destabilizing."

With respect to all of the children, Ms. Kennedy testified that the uncertainty of not knowing where they were going to be or having a stable environment was greater than the harm associated with remaining in state custody for an extended period of time. Appellants had tested positive for drugs, and bottles of various unprescribed medications were found in appellants' motel room, along with a pill crusher. Appellants had missed visitation or scheduled meetings with the children. They had "disappeared," which prevented the Department from continuing any attempts to reunify them with their children.

At the end of the hearing, the circuit court did not issue a ruling, but made the following findings:

> Okay, it's really too late at this point for me to put a ruling on the record. I am, however, going to make a few observations. This has been an extremely difficult case for me and I think in general. It's unusual for there to be this many children at the same time. I mean, it's not that it never happens, but it is unusual.
>
> There was a long period of time when, frankly, the difficulty with engaging the parents in services and providing the parents services was problematic, and I asked today specifically about that eight months when the children didn't see their parents because I was interested in knowing what the effect of that was on the children, but I was the only person who asked, nobody else did, and that tells me something about the other part of this; which is that whatever the effect was of those eight months, what has become clear over the last four months is that these parents don't understand, partly because they haven't engaged in services, but they don't understand the effect that their actions have on their children.
>
> I can imagine what it is that drove the parents to — and I'm going to use this word, not as a statutory word, but as what I think it was — to abandon the older five because of the baby, because they didn't want the Department to get a hold of Ryan[8] and then did the only thing that would have absolutely guaranteed that the Department would get a hold of Ryan, which was [to go underground].
>
> They were able to move around, not just [to] one county, but at least two, at will, when what they needed to do was escape the Department. And while I have some sympathy for their fear, that became the reality that they created. They needed actually to just stand still. I said to them the day that they were picked up on the warrant that they'd essentially made it impossible for me to do anything but what I did that day. There's no other way to look at it. They, by their actions, said, "The older five, we're not going to see, help, parent, because we're trying to hold on to this baby." It was a terrible decision to make, but it speaks volumes about where things are.
>
> I absolutely agree that Dr. Thornburgh was an advocate for these parents and these kids with

their parents, but I think she made it clear in her testimony, which I did look back at, that at this point, the damage that's been done by the in-and-out, the back-and-forth is a really hard thing to cure, a really hard thing to deal with.

This isn't a termination of parental rights proceeding. This is a change in permanency plan hearing. And for so long as the CINA case is open, there is always a way back, but I am very worried about the message that was delivered by the parents today; which is that they couldn't get here, they weren't going to get here and, after we'd made efforts this afternoon at the 11th hour to try to contact them without success, then it becomes the responsibility of the court system to reopen the testimony so that these parents can call in. Call in on a hearing that's trying to determine what's going to happen to their five eldest children, the eldest of whom is not yet 7.[9]

But having said all that — I've said this before too, and it's not lost on me — there have been some rather significant problems in this case with how services were provided. That, however, in some ways, has been eclipsed by the choices the parents made this summer.

On October 28, 2011, the court issued its ruling, changing the children's permanency plan from reunification with their parents to adoption by a non-relative. The court detailed its findings regarding the factors enumerated in Family Law Article § 5-525 as follows:

a. Health and safety of the children if returned to parents.

The Court heard testimony from Maureen Kennedy, a Department social worker. While Ms. Kennedy focused on the dangers of parents who smoke for a child or children who have respiratory issues (Kyle in particular) the Court is more persuaded by the mental health damage that has been caused by the parents' disappearance from the Children's lives since June 17, 2011, focusing on mental health and safety. The parents have established that they cannot put the welfare of the Children ahead of their own desires.

b. Attachment and emotional ties to parents.

Kyle was very young when he went into care — only a few months old. His connection to his parents is the least strong of the Children. Kaitlin knows who her mom and dad are. However, she is not bonded to them; she has exhibited anxiety when she has visited the parents, e.g.[,] enuresis. Shianne recognizes and is connected to the parents, as are Savanna and Chelsea. The elder two girls have very troubled reactions to their parents, and lots of conflict.

The Court was persuaded by the testimony of Dr. Christensen, who testified about Chelsea's treatment at Psychiatric Institute of Washington (PIW) during the late summer of 2011, but whose comments the Court finds applicable to all five children. Chelsea, but also Kyle, Katelyn, Shianne and Savanna, need clarity in who they will live with and who they can count on. They need to know who they can trust.

c. Children's emotional ties to the caregivers.

Kaitlin and Kyle are very attached and bonded to their foster parents. Baby Ryan is also placed there. Shianne is very attached to her foster parents. Savanna is currently at PIW, in an acute hospitalization very like the one Chelsea had earlier in the year. But she is also connected to the foster parents, and they have been there for her, and continue to be. As for Chelsea, Dr. Christiansen said the hospital staff never heard her mention the biological parents, and the foster parents were at the hospital regularly to support Chelsea's treatment. The people she can count on are her foster parents.

d. Length of time with the caregivers.

Katelyn and Kyle have been with the foster parents since summer, 2010. Chelsea, Savanna and Shianne have been with their foster parents since about the same time, with intervening long term respite care placements for both Chelsea and Savanna on at least

two occasions, each girl's stay at PIW, and Chelsea's current residential placement.

e. Emotional, developmental and educational harm in moving the Children.

In 2011, until July, significant effort was devoted to giving the parents and the Children the tools to reunify. The parents abandoned the effort. The Court found two statements in testimony very persuasive. The first was made by Dr. Bogrov, who did a psychiatric evaluation of Chelsea (Petitioner's Ex. 8). Referring to Chelsea, he said she is "anxious about the outcome of her current placement." The other was Dr. Christiansen's letter regarding Chelsea (Petitioner's Ex. 7): "Chelsea needs to have a clear idea of who her family will be."

These statements apply to all the Children. They all need to know. The Court will not further delay the decision. The Children have been in care for nearly 18 months. The Court finds that there will be substantial harm if any of them is moved from his or her current placement.

f. Danger of [S]tate care.

It is real; but it is also reality that appellants have abandoned the children. The younger two children, Katelyn and Kyle, and to some degree Shianne, don't have an understanding of the concept of "[S]tate care." Chelsea and Savanna's need for stability is urgent; they are aware that they are in limbo, although they cannot articulate it in that way. For all of the Children, the danger of continued [S]tate care is outweighed by the danger of their being subjected to further emotional devastation as the result of reunification attempts abandoned by their parents.

The Court detailed the extensive efforts the Department made to achieve the current permanency plan of reunification. It then ordered that the children "shall remain Children In Need of Assistance (CINA), shall be placed under the jurisdiction of the Juvenile Court and committed to the Montgomery County Department of Health and Human Services/Child Welfare Services (the Department), for continued placement in foster care with their respective present foster parents." It further ordered that visitation between appellants and the children be suspended "until the parents present themselves to the Department, and a reasonable plan is made for them to consistently appear for visits, which shall be supervised, minimum monthly, under the direction of the Department." It ordered

> that the permanency plan for the Children is Adoption by a Non-Relative, which may include the filing of a Petition for Termination of Parental Rights if the parents have not made significant progress to remedy the circumstances that caused the need for removal as specified in this Court Order and are unwilling or unable to give the Children proper care and attention within a reasonable period of time. . . .

STANDARD OF REVIEW

On review of a circuit court's decision regarding a chance of a permanency plan, this Court employs three related standards

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

In re Shirley B., 419 Md. 1, 18 (2011).

DISCUSSION

Appellants contend that the circuit court erred in changing the children's permanency plan from reunification to adoption. Specifically, they assert that "the Department failed to show that the three older girls . . . would benefit from having their parents' 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 that there was any

compelling reason to change the plan," and they note 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 in changing the permanency plan for all five children from reunification to adoption. 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 case 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 piacements, 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 that the court, in changing the permanency plan for the children, "appropriately and carefully considered each of the statutory factors" and correctly determined that changing the permanency plan from reunification to adoption by non-relatives was in the best interests of all of the children. In support, counsel points to "the disappearance of [appellants] from the lives of their children, the history of neglect, the relationship of the younger three children with their foster parents, and the alarming behaviors of the older two children." With respect to the prospect of the children's adoption, counsel for the children argues that the court properly assessed that the danger of state care by non-adoption was not as great as the danger of the additional "emotional devastation" due to appellants' continued abandonment of the children.

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:

> The General Assembly has set forth the requisite procedures for children deemed to be at risk. When a child is declared a CINA and removed from the home, the court must "hold a permanency planning hearing to determine the permanency plan for [the] child. . . ." [Md. Code (2006) § 3-823(b)(1) of the Courts and Judicial Proceedings Article ("C.J.P.").] "'The permanency plan is an integral part of the statutory scheme designed to expedite the movement of Maryland's children from foster care to a permanent living, and hopefully, family arrangement."' *In re Joseph N.*, 407 Md. 278, 285, (2009) (quoting *In re Damon M.*, 362 Md. 429, 436 (2001)). *Accord In re Ashley E.*, 387 Md. 260, 287 (2005). It not only "'provides the goal toward which the parties and the court are committed to work,"' it determines the "'[s]ervices to be provided by the local social service department and commitments that must be made by appellants and children. . . ."' *In re Joseph N.,* 407 Md. at 285 (quoting *In re Damon M.*, 362 Md. at 436).

Id. at 706-08.

In a permanency plan proceeding, the "best interests of the child" are the primary consideration, and the court must consider the following factors in determining what is in the best interests of the child:

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

Md. Code (2011 Supp.) § 5-525(f)(1) of the Family Law Article ("F.L.").

The court is required to review the child's permanency plan periodically until commitment is rescinded.

C.J.P. § 3-823(h)(1)(iii). At each hearing, the court shall:

> (i) Determine the continuing necessity for and appropriateness of the commitment;
>
> (ii) Determine and document in its order whether reasonable efforts have been made to finalize the permanency plan that is in effect;
>
> (iii) Dctermine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment;
>
> (iv) Project a reasonable date by which a child in placement may be returned home, placed in a preadoptive home, or placed under a legal guardianship;
>
> (v) Evaluate the safety of the child and take necessary measures to protect the child; and
>
> (vi) Change the permanency plan if a change in the permanency plan would be in the child's best interest.[10]

C.J.P. § 3-823(h)(2).

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). "In other words, the child's best interest remains the 'transcendent standard in adoption, third-party custody cases, and TPR proceedings." *Id.* (citation omitted).

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 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 [S]tate 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.

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

FOOTNOTES

1. The statutory definition of a CINA is "a child who requires court intervention because: (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs" Md. Code (2011 Supp.) § 3-801(f) of the Courts and Judicial Proceedings Article.

2. At the time, Ms. C. was pregnant with Kyle.

3. On February 19, 2010, the Department produced verbal and written reports to child welfare authorities in North Carolina.

4. Kyle was born on March 7, 2010, in North Carolina.

5. Mr. O.'s mother had a history with child welfare services.

6. She did not recommend adoption by relatives because the available relatives were not appropriate possibilities. Some were absent, and others had histories of substance abuse.

7. Maryland Code (2011 Supp.) § 5-525(f) of the Family Law Article provides:

> (f) *Development of a permanency plan. —* (1) In developing a permanency plan for a child in an out-of-home placement, the local department shall give primary consideration to the best interests of the child, including consideration of both in-State and out-of-state placements. The local department shall consider the following factors in determining the permanency plan that is in the best interests of the child:
>
> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current earegiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;
>
> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

8. Ryan, the sixth and youngest of Ms. C and Mr. O's children, is not a party to this CINA proceeding.

9. The court's subsequent order confirmed what happened:

> [T]he parents were present on September 15, 2011. They were not present on October 13, 2011, although they were represented by counsel. At the request of each parent's counsel, the Court attempted several times on the afternoon of October 13 to reach both Mother and Father by telephone so they could provide testimony. There was no answer. After testimony had concluded, at about 5:30 p.m. on October 13, the Court was asked to allow Mother to testify by telephone. The Court denied the request. The parents have also failed to participate in Court[-]ordered psychological evaluations and have missed months of scheduled visits with the Children.

10. These last three clauses of this statutory subsection were omitted by the Court in its recitation of the law.

NO TEXT

Cite as 7 MFLM Supp. 49 (2012)

Child support: modification: limits to retroactivity

David H. Kennedy
v.
Susan Q. Kennedy

No. 29, September Term, 2011

Argued Before: Woodward, Watts, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Salmon, J.

Filed: May 10, 2012. Unreported.

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.

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

The 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.

For the reasons set forth below, we shall hold that the circuit court did not err.

I.

David Kennedy, appellant, and Susan Kennedy, appellee, are the parents of two children whose names and date of birth are: Carolyn Kennedy, born March 14, 1996 and Kate L. Kennedy, born March 14, 2000. The Kennedys were divorced by the Circuit Court for Prince George's County on May 1, 2007. The judgment of absolute divorce awarded physical custody of the two children 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" (hereafter, the "motion to modify"). Mrs. Kennedy alleged that since the date that her ex-husband's child support obligation was originally set, Mr. Kennedy's financial circumstances had materially changed for the better and that this change merited an increase in child support.

On December 8, 2009, which was six days after the motion to modify was filed, Mr. Kennedy filed an emergency motion to modify custody and visitation (hereafter, the "emergency motion"). He alleged in the emergency motion that "last week" Carolyn was admitted "into [a] hospital because of [her] suicidal ideation." Mr. Kennedy further alleged that Carolyn's psychiatrist, Dr. Nathan Osborne, recommended that she reside with her father. Mr. Kennedy did not say in his motion exactly when Carolyn moved in with him, but it was apparently sometime during the week immediately prior to his filing of the emergency motion.

On the same date that the emergency motion was filed, the Circuit Court for Prince George's County held a hearing to decide that motion. After the hearing, the court ordered that Mr. Kennedy have physical custody of Carolyn. The order transferring custody was signed on December 8, 2009.

About two and one-half weeks later, on December 23, 2009, Mr. Kennedy filed an answer to his ex-wife's motion to modify child support. In his answer, Mr. Kennedy asked that the motion to modify be denied. He did not, however, ask that his child support obligation be modified.

Meanwhile, commencing on December 15, 2009, Mr. Kennedy began paying Mrs. Kennedy $200 per month in child support rather than the $1,000 per month that had been previously ordered. About eleven months later, 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 that he had been ordered to pay.

Mr. Kennedy, on February 1, 2011, filed an answer to the contempt motion which he asked that he not be held in contempt. On the same date, he also filed a counterclaim for modification of child support. In that counterclaim he stated that "since December 14,

2009, Carolyn had resided with him." He further alleged that his child support obligations "should be determined retroactively to December 2, 2009," which was the date Mrs. Kennedy had filed her motion to modify child support.

On February 8, 2011, a hearing was held concerning Mrs. Kennedy's motion to hold Mr. Kennedy in contempt for failure to pay child support as ordered. About one-hour before the contempt hearing commenced, Mrs. Kennedy filed a line dismissing her motion to modify child support.

At the February 8th hearing, Mrs. Kennedy's counsel advised the judge that the motion to modify child support that had been filed on December 2, 2009, had been dismissed. The motions judge, after hearing this news, commented that this makes the previously filed motion to modify child support "moot."

During the contempt hearing, Mr. Kennedy admitted that he had paid his wife only $200 per month since December 15, 2009. He also admitted that this was $800 per month less than the amount that he had been ordered to pay. His excuse for reducing the amount of his payment was that since December 14, 2009, he had physical custody of Carolyn. At the end of the February 8, 2011 hearing, the motions judge reserved on the matter and set the case in for further hearing on February 17, 2011.

At the February 17 hearing, the motions judge ruled as follows:

> [The] Court . . . recognizes that the Defendant did have some expenses during 2010 associated with Carolyn's mental and physical health. There was certainly some documentation to support it but certainly not all of the expenses were corroborated by any documentation presented by the Defendant.
>
> There is, also, no dispute that the Defendant has paid $200 a month from December 2009 to the present. That there is no court order reducing the amount of child support. There is no motion filed before February 1st of 2011 on behalf of the Defendant requesting that the child support be reduced. So there is a total period of time of 14 months where there was a difference in the amount ordered and the amount paid and that difference is $800 per month times 14 months which comes to $11,200.
>
> Now, the Court is mindful of the arguments presented by Counsel regarding responses to motions suggesting that the mere response generated or, yeah, generated a request by Defendant to have child support reduced and the Court doesn't find any merit in that argument. The case law is pretty clear that the amount ordered is to be paid unless and until the Court orders otherwise unless the entire amount was done by agreement of the parties without the Court being involved. But this has to do with child support and not other financial obligations.
>
> 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 Court does find that the Defendant wilfully withheld the amount, didn't even, really never requested the Court to even reduce the amount of child support until there was a date set for a hearing on, on Plaintiff's motion for contempt for failing to pay child support.
>
> So the Court does find that the Defendant is in contempt and does find that the amount of $11,200 is the arrearage.
>
> Now, in sort of more in fairness, I guess, in consideration of some of the expenses that the Defendant did incur as it relates to Carolyn, the Court is going to subtract $3,000 from that amount. Actually, $3,000 is what he paid but the Court is going to subtract $1,500 from that amount under the theory that both parties are obligated to . . . [pay] those expenses. And so the balance is $9,700 and the Court is going to enter a judgment in that amount in favor of the Plaintiff and against the Defendant and requests for attorney's fees from both sides are denied.

The motions judge next announced that she was going to set Mr. Kennedy's counterclaim in for a hearing at a later date. On February 23, 2011, the court entered judgment against Mr. Kennedy and in favor of Mrs. Kennedy in the amount of $9,700.

Mrs. Kennedy, on February 24, 2011 filed an opposition to Mr. Kennedy's counterclaim.

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

to this court from the court's order holding him in contempt and entering a money judgment against him in the amount of $9,700.

On April 6, 2011, a hearing concerning Mr. Kennedy's counterclaim for modification of child support was heard. At the conclusion of the hearing the motions judge ordered that Mr. Kennedy's child support obligation be reduced to $278 per month, effective May 1, 2011. On May 23, 2011 the court signed an amended ordered in which it reduced the judgment entered on February 23, 2011 from $9,700 to $8,334.

II.

Maryland Code, Family Law Article (2006 replacement volume) 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 the case of *O'Brien v. O'Brien*, we had occasion to interpret Section 12-104(b) of the Family Law Article. William O'Brien and his wife, Gabriele, were the parents of three children, Molly, Colleen, and Fiona. Id. at 500-501. Colleen was eight years older than her younger sister Fiona. After the parent's divorced, the circuit court granted a motion to modify child support filed by Gabriele and increased William O'Brien's child support obligation, for Fiona, to $514 per month. In 1996, when Fiona was 14, her mother died. Colleen then gained physical custody of Fiona and thereafter became the only adult that gave Fiona support. Id. at 502. After the death of Gabriele, William O'Brien never made any further child support payments. Id. at 501.

On March 29, 1999, Colleen filed a petition for custody of Fiona, for a modification of child support and for other relief. The matter was heard before a Master for Domestic Relations in Montgomery County. The Master concluded that William's court ordered child support obligation for Fiona continued after Gabriele's death. Accordingly, the Master determined that William was in arrears for child support for Fiona for the period between May 1996 through June 1999 when Fiona turned 18. Id. at 502.

William filed exceptions to the Master's report and recommendations. Id. at 503. The circuit court overruled the master's recommendations after concluding that under all the circumstances a judgment for arrearages was not warranted. This court reversed the judgment of the circuit court. Id. at 509. In *O'Brien*, the Honorable Deborah Eyler, speaking for this court, stated:

> We note once again that the law is clear that William's duty to abide by the court's order of support did not terminate upon Gabriele's death. William had no right to unilaterally stop paying child support, and unless and until he filed and was granted a motion for modification of the support order, based on a material change in circumstances, see FL § 12-104(a), he was bound to make the payments at the times and in the amounts specified by the existing court order. The notice filed by the CSED had no effect whatsoever on this court-ordered obligation.
>
> A circuit court may not retroactively modify a child support award for a time period prior to the filing of a motion for modification. FL § 12-104(b). Because William never moved for modification of his child support obligation for Fiona, the court could not modify his obligation.

Id.

The principles in the *O'Brien* case 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. Therefore, if one looks at the counterclaim alone, Mr. Kennedy's position is without merit.

Mr. Kennedy appears to concede that the counterclaim for modification was not an appropriate vehicle to modify his child support obligations any further back than February 1, 2011. Instead, he maintains that as of the dates of the contempt hearings [February 8 and February 17, 2011], 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 last mentioned date. He contends that based on Mrs. Kennedy's motion the court was allowed to modify child support retroactive to December 2, 2009. He cites two unreported cases from Ohio as his sole legal support for that contention. Those Ohio cases stand for the proposition that when one party files a motion to modify child support upward and the other party merely files an answer opposing any increase, the court can nevertheless reduce child support and make the reduction retroactive to the date

the first motion to modify was filed. We need not decide whether the views expressed in the unreported opinions comport with Maryland law because those cases are plainly inapposite.

In the subject case, unlike the situation in the Ohio cases, the motion to modify child support filed by plaintiff was withdrawn by the time the child support arrearage came on for hearing before the circuit court. As the motions judge commented, the withdrawal of the motion made the issues presented by Mrs. Kennedy's motion "moot."

Mr. Kennedy agrees that Mrs. Kennedy's motion to modify was withdrawn before the February 8, 2011 contempt hearing. He argues, however, that the motion was not appropriately withdrawn. According to Mr. Kennedy, the line dismissing Ms. Kennedy's motion could only be filed with leave of court and Mrs. Kennedy withdrew her motion without leave of court. In support of that contention, appellant places sole reliance on Maryland Rule 2-506, which reads, in material part, as follows:

> **Rule 2-506. Voluntary dismissal.**
>
> (a) **By notice of dismissal or stipulation.** Except as otherwise provided in these rules or by statute, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer or (2) by filing a stipulation of dismissal signed by all parties to the claim being dismissed.
>
> (b) **By order of court.** Except as provided in section (a) of this Rule, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss the claim only by order of court and upon such terms and conditions as the court deems proper. If a counterclaim has been filed before the filing of a plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court.
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> * * *

The difficulty with appellant's argument is that the rule he cites 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. As the Court of Appeals said recently, quoting *Brown vs. Daniel Realty Co.*, 409 Md. 565, 585 (2009), "[w]hen interpreting the Maryland Rules, 'if the language of the rule is clear and unambiguous, it will be applied thusly in a common sense manner.'" *McClain v. State*, No. 17, Sept. Term, 2010, slip op at 18 (filed March 21, 2012). Importantly, there is no rule or statute in Maryland that requires that a party who files a motion must obtain leave of court before dismissing or withdrawing that motion.

Under the Maryland Rules, the word "pleading" is defined as "a complaint, a counterclaim, a cross-claim, a third-party complaint, an answer, and answer to a counter-complaint, cross-claim, or third party complaint, a reply to an answer, or a charging document as used in Title 4 [governing criminal actions]."' See Maryland Rule 1-202(t). See also Maryland Rule 2-302 ("There shall be a complaint and an answer. There may be a counterclaim, a cross-claim, and a third-party complaint. There shall be an answer to any counterclaim, cross-claim or third-party complaint. No other pleadings shall be allowed except that the court may order a reply to an answer. . . ."). The form of pleadings are governed by Maryland Rule 2-3 03.

As can be seen, under the Maryland Rules, motions are clearly not "pleadings." Motions are governed by Maryland Rule 2-311. Maryland Rule 2-311(a) provides that "an application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing and shall set forth the relief or order sought." Motions, unlike pleadings, must be supported by statements of grounds and authorities (see Maryland Rule 2-311(c)) and by affidavits, whenever the motion is based on facts not contained in the record (see Maryland Rule 2-311(d))."

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 that 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. For the foregoing reason, 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.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Cite as 7 MFLM Supp. 53 (2012)

Name change: parental mutual agreement as to name: extreme circumstances

Tamika Rachelle Dixon, *et al.*

v.

Willie Best

No. 2929, September Term, 2010

Argued Before: Graeff, Kehoe, Hotten, JJ.

Opinion by Hotten, J.

Filed: May 10, 2012. Unreported.

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.

Appellant, Tamika Dixon, gave birth to Gavin on January 11, 2005. The putative father was appellee, Willie Best. Ms. 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 Mr. Best's last name. Mr. Best was later found guilty of federal drug trafficking charges and remains incarcerated. In the Circuit Court for Montgomery County, Ms. Dixon filed a "Petition for Change of Name" for Gavin to "bring his birth certificate into agreement with his Social Security card." Mr. Best filed an "Affidavit" in opposition to the name change. The circuit court denied Ms. Dixon's petition, and she timely appealed,[1] 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?

For the following reasons, we affirm the decision of the circuit court.

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

FACTUAL BACKGROUND

Ms. Dixon gave birth to a baby boy on January 11, 2005 in Washington, D.C. Hospital employees presented Ms. Dixon with paperwork, including a social security form. Ms. Dixon completed the paperwork, naming the baby boy Gavin Anthony Dixon. However, she alleged that she did not fill out paperwork to obtain a birth certificate because the child's paternity had yet to be determined. Mr. Best was later identified as Gavin's natural father through DNA testing. Ms. Dixon and Mr. Best subsequently completed the birth certificate paperwork. Ms. Dixon contended that Mr. Best filled out the forms, naming the baby boy Gavin Anthony Best. She averred that despite her disagreement with Mr. Best giving Gavin his surname, she signed the birth certificate.

On October 5, 2010, Ms. Dixon filed a "Petition for Change of Name" in the circuit court on Gavin's behalf. Gavin was five years old at the time. In that petition, and now on appeal, Ms. Dixon alleged the following facts.

Ms. Dixon stated that she was Gavin's primary caregiver from his birth to the present. She described Mr. Best's involvement as "an occasional babysitter, caring for the child a couple of times a month for a couple of hours until she could pick him up, if she asked him to." Other than his birth certificate, all of Gavin's records and documents bear the surname "Dixon." Such documents include Gavin's social security card, his daycare records, school records, medical records, and insurance records. Ms. Dixon summarized that Gavin's last name is Dixon in every way, other than on his birth certificate.

When Gavin was about two years old, Mr. Best was arrested and convicted on federal drug trafficking charges. Ms. Dixon believed that he had "been on the run from the police" for six months prior to his arrest as well, during which time he had no contact with Gavin. Mr. Best is currently incarcerated in United States Penitentiary — Hazelton in Bruceton Mills, Preston County, West Virginia, with an expected release date of March 27, 2019.

Mr. Best filed an "Affidavit," in which he maintained that he was incarcerated, that he was Gavin's biological father, that he contested the name change, and that he "was there when [his] son took his first breathe [sic] of life and up until [his] incarceration has invariably been involved in nearly every aspect of his life." He stated that it was for "personal/undisclosed reasons" that he and Ms. Dixon decided to have a DNA test determine paternity after Gavin's birth. Moreover, he claimed that he and Ms. Dixon "willingly went hand in hand" to fill out Gavin's birth certificate, where he "proudly layed [sic] claim and gave [Gavin] his rightful name." He reiterated his contention that he had been involved in Gavin's life. Finally, Mr. Best stated that the "mistake and error" Ms. Dixon made in listing Gavin's last name as Dixon on important paperwork was wrong and requested that Gavin's surname be changed to Best "so that [there] will not be any mistakes or problems for him in the future."

On January 28, 2011, the circuit court held a hearing to address appellant's petition. Ms. Dixon testified to the above facts, including that Mr. Best was married to another woman when Ms. Dixon gave birth to Gavin, and that Mr. Best denied being Gavin's natural father until the DNA test results confirmed it. Ms. Dixon did use Mr. Best's surname to take advantage of a daycare program through Mr. Best's job for a short time before he was arrested. She maintained, however, that she was actually caring for Gavin his entire life.

In response to questioning by the circuit court, Ms. Dixon reiterated that Mr. Best put his surname on Gavin's birth certificate when he filled out the form. She averred that she "didn't necessarily agree," but that she signed the form giving Gavin the last name Best. She explained that Mr. Best has called sporadically from prison, often going "four or five months" between calls. She also detailed her efforts to change Gavin's last name on his birth certificate prior to Mr. Best's incarceration. She said that she never wanted Gavin's last name to be Best, even though she signed the birth certificate. She stated she advised Mr. Best of her intention to change the birth certificate, but he would not agree.

Appellant's counsel argued that Gavin thought his last name was Dixon, and that all of his records indicate the same as well, with his birth certificate being the lone exception. Counsel suggested that it would be traumatic to Gavin for Ms. Dixon to explain the name discrepancy. Additionally, counsel pointed out that Mr. Best's involvement has been lackluster throughout Gavin's life, and even more so during his incarceration.

The circuit court ruled as follows:

> All right, under the case that you cited,[2] you're right. I mean, there are two factors to consider when determining the existence of extreme circumstances and whether or not there was any evidence of misconduct by a parent that would make the child's continued use of the parent's surname shameful [or] disgraceful. The mere fact that [Mr. Best] is in jail, even though it's drug trafficking, doesn't make the parent's surname [shameful] or disgraceful. [Mr. Dixon] signed the birth certificate with the name Best. She voluntarily did that. There was no dispute about that. So she has [to] prove that there are extreme circumstances. And her conduct in getting a social security card with the wrong name, putting him in school, even with the birth certificate, but saying his name was something else — that's her conduct. That's not the father's conduct.
>
> And the father hasn't willfully abandoned his child or surrendered his child, as indicated by the testimony and by the affidavit filed by the father. He was involved with the child's life. She considers it to be a babysitter. He considers it to be more than that.
>
> And so, therefore, the mother hasn't shown extreme circumstances that would warrant changing this child's name at this point. So the petition is denied.

STANDARD OF REVIEW

Ms. Dixon alleges that the circuit court's denial of her petition to change Gavin's name was clearly erroneous. Under such a standard, and in accordance with Maryland Rule 8-131(c),[3] "'[i]f there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Omayaka v. Omayaka*, 417 Md. 643, 652-53 (2011) (quoting *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002)). The Court of Appeals has recently elaborated on the clearly erroneous standard:

> [W]e give due regard to the trial court's role as fact-finder and will not set aside factual findings unless they are clearly erroneous. The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to

> support the trial court's determination, it is not clearly erroneous and cannot be disturbed. Questions of law, however, require our non-deferential review. When the trial court's decision involves an interpretation and application of Maryland statutory and case law, [an appellate court] must determine whether the lower court's conclusions are legally correct Where a ease involves both issues of fact and questions of law, [an appellate court] will apply the appropriate standard to each issue.

Clickner v. Magothy River Ass'n, 424 Md. 253, 266-67 (2012) (internal quotations and citations omitted).

DISCUSSION

Preliminarily, we note that "Maryland follows the common law of names, that in the absence of a statute to the contrary, a person may take and use any name he [or she] wants, so long as his [or her] purpose is not fraudulent and the use of the name does not interfere with the rights of others." *Schroeder v. Broadfoot*, 142 Md. App. 569, 576 (2002) (citing *Stuart v. Bd. of Supervisors*, 266 Md. 440, 446 (1972); *Romans v. State*, 178 Md. 588, 597 (1940)). In *Hall v. Hall*, 30 Md. App. 214, 219 (1976), we explained:

> The common law recognized that an individual could change the given name, surname, or both, by which the community knew him [or her] merely by assuming a new one, with the restriction that the change could not be effected for fraudulent purposes or to interfere with the rights of others. The common law sprang and was gradually developed out of the groundwork of custom. It was the ancient custom for a son to adopt a surname at will, regardless of that borne by his father, and the practice extended to the given name also.

(Citations and footnotes omitted). Moreover, parents are generally allowed jointly to choose their child's surname, "just as they determine what shall be a child's given name." *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 v. Reichenbach*, 303 Md. 88 (1985), the Court of Appeals addressed what standard governs when a court is asked to resolve a dispute between a mother and father regarding the initial surname of their child. There, the parents were married and both used the surname "Reichcnbach." *Id*. at 90. The parents separated shortly before realizing that the wife was pregnant. *Id.* After the child was born, the mother gave the child the surname "Lassiter," her maiden name. *Id.* The father had no input in the decision because he was not consulted and did not learn that the child did not have his surname for seven months. *Id.* at 90-91. When the child was approximately one year old, the parents divorced, and the mother resumed the use of the name "Lassiter." *Id.* at 91. The father raised the issue of the child's last name during the divorce proceedings, and by the time the issue came for a hearing, the mother had remarried and used the last name "Lassiter-Geers," a hyphenation of her maiden name and her new husband's surname. *Id.* The lower court ruled that it was in the child's best interest to have the father's surname because the mother's maiden name was not being used by either parent. *Id*. As a result, if the child used "Lassiter," people might erroneously think that he was born out of wedlock, potentially "lend[ingj itself to the child being put in an embarrassing position," obviously not in her best interests. *Id*. at 96.

The Court of Appeals upheld the lower court's decision and best interest consideration, discerning no abuse of discretion. *Id*. at 95. The Court found that the lower court properly considered the child's interests and determined that avoiding an awkward situation of having the child have to explain her "legitimacy" was in her best interest. *Id*. at 96. In sum, 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." *Id*. at 90.

In *Schroeder v. Broadfoot*, 142 Md. App. 569 (2002), we had the opportunity to address parental disputes as to a child's surname after the child had already been named. In that case, the natural parents, Ms. Schroeder and Mr. Broadfoot, were not married, and their relationship had become unstable well before the child, Robert, was born. *Id*. at 571. The mother gave the child her surname "Schroeder."[4] *Id*. "Schroeder" was the surname of Ms. Schroeder's ex-husband, which she chose to keep after the divorce. *Id*. at 572. The parties each filed complaints against the other regarding paternity, custody, and child support. *Id*. at 571. The parties resolved their disputes out of court, except for Robert's last name. *Id*. at 571-72. At the hearing, where Robert was two-and-a-half years old, Ms. Schroeder conveyed that she had three other children from a prior marriage, each of whom had "Schroeder" as his or her last name after their natural father. *Id*. at 572-73. She also described how Robert recognized Mr. Broadfoot as his father, and knew that Mr. Broadfoot was different from the other children's father, Mr. Schroeder. *Id*. at 573. The parties further

outlined their disputes and disagreement regarding Robert's last name. *Id*. at 574-75. After holding the matter *sub curia*, the lower court issued a memorandum order, directing that Robert's surname be "changed" from "Schroeder" to "Broadfoot." *Id*. at 575. The court stated that it thought the decision was in Robert's best interest. *Id.* The lower court also noted that because Robert knew Mr. Broadfoot was his father, and the two had bonded in a father-son relationship, "it is likely that Robert will be confused as he gets older as to why he bears the surname of someone who is not his father." *Id*.

On appeal, Ms. Schroeder challenged the ruling as an abuse of the lower court's discretion and unsupported by the facts. *Id*. at 575-76. 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." *Id*. at 581. We reiterated that "[in 'change of name' cases, the Court of Appeals and this Court have emphasized that, in determining whether extreme circumstances exist, the two most important factors are misconduct by the parent that could make the child's continued use of that parent's surname 'shameful or disgraceful,' and the abandonment by the parent that implies a surrender of his or her natural ties to the child." *Id*. at 581-82 (citing *West v. Wright*, 263 Md. 297, 300 (1971); *Lawrence v. Lawrence*, 74 Md. App. 472 (1988)).

While we agreed with Ms. Schroeder that the lower court properly recognized that its decision was controlled by the best interest of the child standard and that the lower court's discretion was broad, we held that the reasons the court gave for its decision constituted an abuse of discretion. *Id*. at 582. First, the court's statement that it was likely that Robert would be confused as he gets older as to why he bears the surname of someone who was not his father was flawed because the evidence showed, and the parties agreed, that Robert was not confused regarding the identity of his father. *Id*. at 582-83. Second, we held that the court abused its discretion by "running afoul of the common law rule on names in assessing Robert's best interests" by ignoring that Robert shares his surname with his mother, Ms. Schroeder, not merely her ex-husband. *Id*. at 583-84. Therefore, we vacated the lower court's ruling as the court had made findings of fact not in the record and its ruling was based on a misapplication of the law. *Id*. at 586. After summarizing the relevant facts for the lower court to consider on remand, we "conclude[d] that in resolving 'no initial surname' disputes between unmarried parties, just as in resolving those disputes between parents who are or were married, either at conception or at the time of birth, a pure best interests standard applies." *Id*. at 587.

In *Dorsey v. Tarpley*, 381 Md. 109 (2004), the Court of Appeals again addressed a parents request to change a child's name. In that ease, the parties disputed whether there was an agreement regarding the child's surname at his birth. *Id.* at 112. The court reiterated the case law differentiating between "no initial name" and "name change" cases, but ultimately, the Court vacated the lower court's decision and remanded for the lower court to conduct fact-finding regarding whether the parties had an agreement concerning the child's surname. *Id.* at 118. The Court summarized the lower court's course as follows:

> If, based on the evidence, it is found that 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.

Id.

It is apparent that the circuit court considered this case to be a "change of name" case, rather than a "no initial name" case, and we agree based on both Ms. Dixon and Mr. Best signing the birth certificate. Though there was some discrepancy regarding whether Mr. Best was present at Gavin's birth, it is clear that both parties signed the birth certificate, listing Gavin's last name as "Best." Ms. Dixon did not present evidence that she was forced or threatened into signing the birth certificate. Ms. 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 name change. Therefore, although a best interest standard would apply if the circuit court found that there was no parental agreement as to Gavin's last name, there must be extreme circumstances, in addition to it being in Gavin's best interest, for a court to grant the change of name in this case.

As discussed above, 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 [or her] children shameful or disgraccful[ ]" or evidence that a parent "willfully abandoned or surrendered the natural ties between himself [or herself] and his [or her] children[.]" *West*, 263 Md. at 300 (citing *Application of Keach*, 274 N.Y.S.2d 938, 940 (1966)). The Court of Appeals has recognized, and adopted, that "some courts have also taken into account other factors such as the age of the children involved and in one case even went into an

elaborate discussion of whether a name per se was embarrassing." *Id*. (citing *Worms v. Worms*, 60 Cal. Rptr. 88 (Cal. Ct. App. 1967)). Still, "[t]he most prevalent basis for allowing a change of name is where there is proof of serious misconduct by [a parent] which adversely affects the best interests of his [or her] children." *Id.* at 301 (citing *W. v. H.*, 246 A.2d 501, 501-02 (N.J. 1968) (New Jersey court allowed name change where father, who had previously impregnated his oldest daughter, was imprisoned for engaging in sexual intercourse with his eleven year old daughter); *Application of Yessner*, 304 N.Y.S.2d 901, 903 (N.Y. App. Div. 1969) (New York court allowed name change where father was convicted of manslaughter for choking child's maternal grandfather to death); *Application of Fein*, 274 N.Y.S.2d 547, 554 (KY. App. Div. 1966) (New York court allowed name change because father was serving life sentence in prison for second degree murder that "aroused wide notoriety, of the sensational type, because of the unusual features of the ease[,]" attracting "most distasteful kind of publicity[]" and bringing "shame, disgrace and distress to his family[ ]")). 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."

In *West*, 263 Md. at 301-02, 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 parties' children 300 miles away. *Id*. The Court stated, "[t]he fact that under these circumstances he arrange[d] to spend but a few days with his children each year does not show a lack of diligence on his part; rather it is the sad but true result of the practical limitations with which he is faced." *Id*. at 301-02. The father's seeking to spend some time with the children showed his desire "to maintain ties with them[,]" and it was clear that he had not abandoned the children. *Id*. at 302. As such, the Court held that there was "no evidence to indicate that [the father] ha[d] done or failed to do anything justifying the allowance of a change of name by the court." *Id*. The mother contemplated that the children's continued use of their father's surname would result in the possibility that she would have to explain to others the difference between her resumed maiden surname and the children's surname. *Id*. However, the Court believed that any potential embarrassment to the children's custodial parent was "clearly outweighed by the desirability of maintaining some bond" between the noncustodial parent and his or her children. *Id*. at 302-03. 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 (citations omitted).

In the case *sub judice*, Mr. Best was charged and convicted of drug offenses, for which he received a substantial sentence. While these crimes may not reflect highly on his character, the circuit court noted that "[t]he mere fact that [Mr. Best] is in jail, even though it's drug trafficking, doesn't make the parent's surname [shameful] or disgraceful." On appeal, Ms. Dixon posits that "being a convicted drug dealer is both shameful and disgraceful." She argues that, perhaps if Mr. Best had been convicted of simple possession of a controlled dangerous substance, "it could be excused as an addiction to be treated." Instead, she maintains that "trafficking of drugs . . . contributes to the destruction of our families, communities and society in general." She also notes that she has never been convicted of a criminal offense, so it would be better for Gavin to have her surname. However, we cannot hold that the circuit court clearly erred by finding that Ms. Dixon failed to present sufficient evidence that Mr. Best's surname was shameful or disgraceful. Unlike the cases cited in *West*, 263 Md. at 300, where the noncustodial fathers had committed particularly heinous and notorious crimes, we will not disturb the circuit court's decision that Ms. Dixon did not present "proof of serious misconduct by [Mr. Best] which adversely affects the best interests of [Gavin]." *See West*, 263 Md. at 300 (citing *W. v. H.*, 246 A.2d at 501-02; *Application of Yessner*, 304 N.Y.S.2d at 903; *Application of Fein*, 274 N.Y.S.2d at 554). We cannot hold that the circuit court clearly erred in its rejection of the proposition that Mr. Best's drug conviction is of "such great magnitude that the continued use of the name [Best] by [Gavin] would result in significant harm or disgrace to [him]." *West*, 263 Md. at 301. 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.

With regard to willful abandonment, Ms. Dixon avers that Mr. Best "has failed to do anything to ensure any kind of relationship with Gavin." She reiterates that Mr. Best initially denied paternity before the DNA test identified him as Gavin's father. She contends that Mr. Best was "barely involved" in Gavin's life before he became a "fugitive for approximately six months before being apprehended, during which time he had absolutely no contact with [her] or Gavin." Furthermore, she maintains that Mr. Best's contact with Gavin since he has been imprisoned is "sporadic, at best." She argues that though Mr. Best stated in his "Affidavit" that he had significant contact with Gavin, "he has never done anything of any significance to

support his son, other than allow registration at a day-care program under his name." Ms. Dixon stated that because Mr. Best has been incarcerated for a majority of Gavin's life, he has been unable to make financial contributions to support Gavin and only calls approximately three times per year. Finally, Ms. Dixon concludes that Mr. Best's incarceration should be characterized as willful because he knowingly committed the criminal offenses for which he is now imprisoned.[5]

The circuit court noted that Ms. Dixon signed the birth certificate, agreeing to Gavin's last name being "Best," and that she, not Mr. Best, caused Gavin to have a different last name on his social security card and other records. Moreover, the court found that Mr. Best had not willfully abandoned Gavin or surrendered his right to be involved in Gavin's life. The court relied on Ms. Dixon's testimony and Mr. Best's affidavit as evidence that Mr. Best sought to, and did, maintain a father-son relationship with Gavin. Although Mr. Best's expected release from incarceration is not until 2019, the circuit court did not err in its determination that Ms. 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. Just as we will not disturb the court's determination that Mr. Best's crimes were not "of such great magnitude" to result in "significant harm or disgrace" to Gavin, we do not conclude that the court erred in finding that Ms. Dixon failed to present sufficient evidence that Mr. Best willfully abandoned Gavin when there was evidence that Mr. Best maintained a father-son relationship with Gavin. Therefore, we affirm the court's decision that Ms. Dixon failed to present "extreme circumstances" to necessitate a name change.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

FOOTNOTES

1. On March 19, 2012, Mr. Best filed a motion in this Court, requesting that this matter be submitted on brief, rather than continue for oral argument on April 3, 2012, in light of his incarceration and the fact that he was proceeding *pro se*. We did not rule on the motion before the scheduled argument date, and in light of our decision to affirm the circuit court's decision, as discussed *infra*, we discern that the issues presented in Mr. Best's motion are moot.

2. During oral argument in support of Ms. Dixon's petition, her counsel cited *Dorsey v. Tarpley*, 381 Md. 109 (2004), which reiterated the appropriate standards a court applies when reviewing a petition for name change for a child. If the parents never agreed on a name, the petition is classified as a "no initial name" case, and a pure best interest standard applies. *Id.* at 117 (citing *Lassiter-Geers v. Reichenbach*, 303 Md. 88, 94-95 (1985)). If, however, the child was given an initial surname at birth, the petition is classified as a "change of name" case, and the petitioning party must present evidence that the change "'is in the best interests of the child before [the court] determin[es] if a name change is warranted.'" *Id.* at 115 (quoting *West v. Wright*, 263 Md. 297, 299 (1971)). Moreover, "[o]ther than in the case of adoption proceedings, there is a presumption against granting such a change except under 'extreme circumstances.'" *Id.*

3. Maryland Rule 8-131(c) states:

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

4. For an in-depth discussion of the history of surnames, *see Schroeder*, 142 Md. App. at 575-80.

5. Ms. Dixon also points out that contrary to Mr. Best's position that he was very upset regarding the possibility of Gavin's name change, the record is void of Mr. Best making an effort to arrange transportation to the hearing in the circuit court. She urges us to consider this fact, but we note that such transportation was likely unavailable and, thus, this fact is irrelevant to our analysis.

Cite as 7 MFLM Supp. 59 (2012)

Adoption/guardianship: termination of parental rights: parental unfitness

In Re: Adoption/Guardianship of Elizabeth G. E.

No. 1870, September Term, 2011

Argued Before: Kehoe, Watts, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Watts, J.

Filed: May 16, 2012. Unreported.

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 of 18 months and was improving in that placement.

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

This appeals involves the Circuit Court for Montgomery County's[1] grant of Montgomery County Department of Health and Human Services's (the "Department's"), appellee's, Petition (the "Petition") terminating the parental rights of Ashleigh G., appellant, and Paul E., the mother and father of Elizabeth G.E.,[2] and appointing the Department as the guardian of Elizabeth with the right to consent to adoption or to long-term care short of adoption. Appellant noted an appeal raising two issues, which we quote:

> 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?

For the reasons set forth below, we answer both questions in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Paul E., not a party to the appeal, are the unmarried parents of Elizabeth, who was born on October 3, 2003. On April 19, 2011, the Department filed a Petition—in which it stated that termination of appellant's and Paul E.'s parental rights was in Elizabeth's best interest—seeking that the Department be granted guardianship of Elizabeth with the right to consent to adoption or another permanent living arrangement. In the Petition, the Department stated that, since birth, the care and custody of Elizabeth has been as follows: from her birth on October 3, 2003, to September 12, 2008, Elizabeth resided in the care and custody of her parents and/or relatives. From September 12, 2008, to December, 2009, Elizabeth was in the sole custody of her father, Paul E.[3] During that time, Elizabeth and her father resided with Elizabeth's paternal aunt, Lisa S. ("Aunt Lisa"). From December, 2009, to March 2, 2010, Elizabeth remained in the care and custody of her father and they resided with the father's girlfriend, Sylvia A. From March 2, 2010, to March 22, 2010, Elizabeth resided with Aunt Lisa. From March 22, 2010, to April 1, 2010, Elizabeth was placed in the care and custody of the Department for placement with Aunt Lisa. On April 1, 2010, Elizabeth was adjudicated a Child in Need of Assistance ("CINA") by the Circuit Court for Montgomery County, and Aunt Lisa became her relative caregiver.[4] From April 1, 2010, to the present, Elizabeth has been under the jurisdiction of the Circuit Court for Montgomery County, committed to the Department and placed in the care of Aunt Lisa, with whom she remains.

On June 3, 2011, appellant filed an objection to the Petition.[5] On June 16, 2011, through counsel,[6] Elizabeth filed a Notice of Consent to the Petition for Guardianship.

On July 25, 2011, appellant filed a Motion for Independent Evaluation of Child, seeking an independent psychological evaluation of Elizabeth.[7] On August 9, 2010, the Department filed a response to appellant's Motion for an Independent Evaluation of Elizabeth, objecting to the motion. On August 15, 2011, Elizabeth, through counsel, filed a response, adopting the position of the Department. On August 15, 2011, the circuit court denied the Motion for Independent Evaluation.[8]

On August 29, 2011, appellant filed a Motion for Reconsideration of Motion for Independent Evaluation of Child, stating that "since the denial of the request for independent evaluation there has been a change in circumstances."[9] On September 2, 2010, the Department filed a Response. On September 7, 2011, the circuit court denied the motion for reconsideration.[10]

From September 26, 2011, through September 28, 2011, the circuit court held a hearing on the Petition. During the hearing, Deborah Hinton, a licensed clinical professional counselor, testified on behalf of the Department about Elizabeth's counseling sessions, treatment, and condition. Hinton testified that at the time Elizabeth had been living with Aunt Lisa, she experienced stability and developed a routine, and that adoption would make very little difference in her day-to-day habits. Hinton indicated that she thought "it [was] important for Elizabeth to maintain contact with both her parents." At the hearing, a report from Linda S. Meade, Ph.D., a licensed psychologist, was admitted as Petitioner's Exhibit No. 3, providing in pertinent part, as follows:

> Mental Health History. Elizabeth has been in treatment with Deborah Hinton, a licensed counselor, since June 2010. Her counselor describes her as a fragile child and has diagnosed her with Reactive Attachment Disorder and Post-Traumatic Stress Disorder.
>
> According to her therapist, Elizabeth has trouble with boundaries, cannot tolerate negative feedback, and "becomes petulant when denied what she wants," She has told her therapist that her life is "bad." Emotionally labile, she has periods of excessive excitation during therapy sessions followed by "a collapse into sulks or tears." Sometimes she gets into "fights" with imaginary siblings while talking to her therapist. Considerable anger is expressed to her counselor about her parents' neglectful treatment of her.
>
> * * *
>
> **CONCLUSIONS**
>
> Having been neglected and exposed to family violence, Elizabeth presents as a traumatized child who is highly anxious and has labile moods. There are elements of a reactive attachment disorder as well, in that there are indications of indiscriminate sociability and excessive familiarity with relative strangers.
>
> Elizabeth's exaggerated displays of emotion and unsatisfactory conduct may be in reaction to past trauma, generalized affective instability, or they may serve a manipulative function. Whether Elizabeth's elevated activity level, inconsistent attention span, and other executive functions deficiencies are manifestations of attention deficit disorder in isolation, or a function of her marked anxiety, or correlates of the agitation seen in untreated mood disorders, is not clear at this time.
>
> Patterns suggestive of an oppositional defiant disorder are emerging. It is suspected that Elizabeth has learned that she can get what she wants by "having a fussy fit" or by more indirect manipulation. . . . Her second line of attack is agitated expressions of distress that continue until someone figures out what has to be done to calm her down. Her rapid recovery once she gets what she wants suggests that her displays of despair are more manipulative ploys as opposed to sincere expressions of distress.
>
> [Aunt Lisa] appears to have made a good start towards disciplining [Elizabeth] appropriately. It is possible with residential stability and effective discipline, Elizabeth will no longer resort to exaggerated and unproductive flouting of authority and manipulative strategies to obtain control of her environment following what has undoubtedly been a bewildering series of early life experiences.

On October 13, 2011, the circuit court issued a "Final Order" granting the Department's Petition, terminating appellant's and Paul E.'s parental rights and appointing the Department as the guardian of Elizabeth with the right to consent to adoption or to long-term care short of adoption. The circuit court provided the basis for the Order in a document titled "Findings of Fact and Conclusions of Law," stating in pertinent part, as follows:

> **II. Findings of Fact**
>
> * * *
>
> D. [Appellant] has been unable to gather herself and get the help she

needs to manage the chronic pain from which she suffers, and to address her addiction to pain medication. To a large extent, [appellant] is enabled by Ann G[.] ([Elizabeth's] maternal grandmother). Ann G[.] desperately does not want to lose contact with Elizabeth. [Appellant] has attended biweekly visits fairly regularly with Elizabeth over the past six months. Ann G[.] has supervised the visits. [Appellant] is often late, or ill. [Appellant's] lateness and illness distresses Elizabeth; it haunts her days and nights. Transitions to and from the visits had become increasingly fraught with emotion as the [Termination of Parental Rights ("TPR")] trial drew near. Although [appellant] attended the TPR trial, she was late every day, by hours. [Appellant] is unable to have unsupervised visits with Elizabeth.

* * *

K. [F.L.] §5-323(d) provides that when a Court considers a request for granting guardianship (TPR) over the objections of a parent,

[A] juvenile court shall give primary considerations to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests . . .

* * *

1. All services offered to the parent before the child's placement, whether offered by local department, another agency, or a professional ([F.L.] §5-323(d)(1)(i)).

Efforts were made to provide services to Father, who failed to cooperate. Pre-removal services were not provided to [appellant], who was not a placement resource due to her history with drug use and that the fathers of each of her children had been awarded custody in family law matters in the Circuit Court for Montgomery County.

2. The extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent ([F.L.] §5-323(d)(1)(ii)).

* * *

[Appellant] has been provided numerous services. She participated, *inter alia*, in parenting instruction and assistance during supervised visitation at Visitation House, individual therapy, family therapy with Ann G[.] and Elizabeth, supervised visitation at Ann G[.]'s home, pain management referrals and treatment, a psychological evaluation, a psychiatric evaluation, and twice weekly drug testing. As noted elsewhere, [appellant] is frequently late and often ill. She has not faced the necessity to confront her pain with treatment; her pain management physician, Dr. [David] Rodriguez, testified that he had repeatedly told [appellant] that the pain would not improve unless she followed a treatment regimen, which would require she take fewer medications. [Appellant] was not able to do so.

3. The extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any ([F.L.] §5-323(d)(1)(iii)).

[Appellant] was slow to engage with the Department, but finally signed a service agreement with the Department on September 18, 2010.

Pursuant to the service agreement, [appellant] was to provide written documentation of: employment, financial information, and housing; provide information concerning relative resources; participate in supervised visitation at Visitation House; participate in drug screening prior to each visit; participate in a psychological evaluation; participate in family therapy with Elizabeth and Ann G[.]; follow all treatment recommendations of Dr. Rodriguez, her pain management physician; sign releases for all treatment providers; call Elizabeth daily before bedtime; and stay in contact with the Department.

[Appellant] fulfilled some of these obligations pursuant to the service agreement. However, she had consistent trouble with timeliness: for visits, even when the Court loosened the Department's requirements; for her psychological evaluation; for meetings with the social worker; and for court. She was also unable to follow Dr. Rodriguez'[s] recommended course of treatment, which was that she substantially reduce the pain medication she was on and follow the injection protocol he was recommending. She was also unemployed and dependent on the support of Ann G[.] throughout the time Elizabeth has been in care.

The service agreement required the Department to maintain the child in the kinship home; arrange for regular visits between Elizabeth and [appellant]; monitor the child's progress in the kinship care home; refer [appellant] for services as necessary; and meet with [appellant] to plan, assess progress and facilitate the same. The Department performed all of its obligations.

4. The results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including [i- iv, below] ([F.L.] §5-323(d)(1)(2))

At the time of the TPR [trial], [appellant] was advocating not for reunification with her but for Custody and Guardianship to Aunt Lisa or Ann G[.] In other words, [appellant] was not seeking reunification, but did not want to let Elizabeth move on to a permanent relationship with anyone else.

[Appellant's] sporadic attendance at trial spoke volumes about her inability to put Elizabeth first. Her rejection of Dr. Rodriguez'[s] treatment plan in favor of a life under the influence of pain killers also evidenced an inability to prioritize her daughter's needs. Her unemployment, partially the result of her pain medication dependence, is an example of her inability to appreciate the consequences of her choices. [Appellant] failed to adjust her circumstances and conduct.

a. The extent to which the parent has maintained regular contact with:

1. the child.

Contact between [appellant] and Elizabeth had been relatively consistent over the six months leading to trial. In large measure that was because Ann G[.] supervised, and covered for [appellant] when she was late, or sick, or unable to do anything but lie in bed during a visit. Prior to six months ago, [appellant's] attendance was less regular, and the Department was a less enabling monitor of the visits.

2. the local department to which the child is committed.

[Appellant's] contact with the Department is detailed in paragraph II(D) and (I) and K(3), above. Her failure to take responsibility for pain management, self support, or involvement in Elizabeth's life and needs makes it impossible for her to parent Elizabeth. Although the Department's involvement was not the first notice [appellant] had of her need to change her ways, she could not, or would not, heed the warning.

3. if feasible, the child's caregiver.

. . . [Appellant's] relationship with Aunt Lisa is contentious. She sees Aunt Lisa as a rival, an obstacle. While contact between Aunt Lisa and [appellant] occurred occasionally, it was more usually Ann G [.] who managed the relationship and who had the contact with Aunt Lisa. Again, [appellant] abdicated her role.

b. The parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so.

Given [appellant's] unemployment, she was and is financially unable to contribute to Elizabeth's support. As noted above, [appellant] has done little to correct this situation. No evidence was presented at trial as to her ability to provide for Elizabeth.

c. The existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time.

[Appellant] has a long history of mental and physical health issues, and has been diagnosed with mental disabilities and disorders, as well as addiction to pain killers, by Dr. Zinna[11] and Dr. Rodriguez, respectively. Dr. Rodriguez testified that [appellant] has degenerative disc disease and arthritis, physical dependence on pain killers, and that she can never hope to deal with the underlying pain unless she engages in treatment, which she has thus far refused to do. Dr. Zinna diagnosed [appellant] with major depression and narcissistic and antisocial personality features.

Dr. Zinna opined that [appellant's] mental health disorders [a]ffect cognition, energy, the ability to follow through, interpersonal skills, distortion of situations, and that the narcissistic personality features are a major impediment to [appellant's] being able to put Elizabeth first. [Appellant's] behavior with regard to Elizabeth and her needs bears that out.

d. Whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period.

As noted above in 4(c), [appellant] has been diagnosed with extensive mental and medical disabilities and disorders. Additionally, the Court cannot ignore the history of [appellant's] track record with Elizabeth. Significantly, before Elizabeth was removed to kinship care, [appellant] was by court order a visitor in her child's life. Drug addiction played a major role in this outcome in the family court. [ ] Dr. Rodriguez and Dr. Zinna both said it is possible, albeit difficult, for a person with [appellant's] conditions to parent. However, [appellant] has not taken the steps necessary to reach that point. As the situation in which [appellant] finds herself appears to have existed as early as 2008, there is no evidence on which to base a conclusion that more time will make a difference. [Appellant] herself as much as acknowledged this when she withdrew her request for reunification in March 2011.

Meanwhile, Elizabeth has been in kinship care with Aunt Lisa for more than 18 months, which in some ways pales in comparison to Aunt Lisa's role as the steady guide for all of Elizabeth's life. Elizabeth is bonded with Aunt Lisa. The Court specifically finds that it would be contrary to Elizabeth's best interest to disturb this placement.

5. Whether ([F.L.] §5-323(d)(3)):

a. The parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect.

As noted above, [appellant's] addiction issues have lead to her neglect [of] Elizabeth. [Appellant] cannot take care of herself, much less Elizabeth. [Appellant's] history with her son, Alexander, who is in the custody of his father, and Elizabeth, whose custody [appellant] also lost (to Father), is one of neglect of her parental responsibilities. At adjudication, the Court specifically found that both parents had neglected Elizabeth)[12]

* * *

6. ([F.L.] §5-323(d)(4))

a. The child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly.

This factor is the hardest to reconcile in this case. Elizabeth is bonded to her parents, and to Aunt Lisa and to Ann G[.], and to her paternal grandparents. As noted above, Elizabeth's solution was for the whole family to live in a hotel, so she could see them whenever she wanted to. She does not want to be adopted. Her recognition of the looming loss of [appellant] and that side of the family is perceptive beyond her years, and heart wrenching. The Court is further faced with the unhappy reality that the maternal and paternal sides of the family do not work well together. In the end, [appellant] cannot parent Elizabeth. Aunt Lisa can do so; she has done so. The latter must carry the day.

b. The child's adjustment to:

1. community;

Elizabeth's adjustment to the community at Aunt Lisa's house has been good. She is involved in dancing, karate, religious education, charity walks for Special Olympics kayaking (which Aunt Lisa coaches) and has friends within several blocks. Aunt Lisa also ensures that Elizabeth gets to her weekly therapy appointments.

2. home;

It was clear from the testimony that Aunt Lisa's home is the only stable home Elizabeth has known, and she has lived there on and off since she was two. She has been officially placed with Aunt Lisa since March 19, 2010, almost 18 months to the date of trial.

3. placement;

Elizabeth is doing well in her aunt's home. Aunt Lisa described a system of task and reward cards that she uses to encourage Elizabeth to do her chores and cooperate at home. There have been incidents of difficult behavior but Aunt Lisa has managed those, and asked for help when she needed it.

4. school.

Elizabeth has had an "up and down" school performance record. Kindergarten was good, first grade (2010-11) was a struggle; and up to the date of trial (not far into the 2011-12 school year) Elizabeth was doing better in second grade. She has friends at school, and the school knows her. Aunt Lisa assists at school with the yearbook and attends Elizabeth's Parent-Teacher conferences.

c. The child's feelings about severance of the parent-child relationship.

As noted above, Elizabeth has said clearly that she does not want to be adopted. However, her attorney advocated for the termination of parental rights as being in the child's best interest. The Court agrees with that position.

d. The likely impact of terminating parental rights on the child's well-being.

The Court is convinced that termination of parental rights is the best course for Elizabeth. There will be little change in Elizabeth's day to day activities as a result of a termination of the parents' parental rights. It is of course impossible to predict what the repercussions will be, although the Court expects a period of intense emotional reaction from Elizabeth. Given her strong ties to Aunt Lisa and the support system in place, the termination of the parents' parental rights likely will not negatively impact Elizabeth's long term well-being.[13]

* * *

III. Conclusions of Law

* * *

E. [Appellant's] life as a parent has been difficult. She has been the defendant in two family law custody cases, one for each child, both of which resulted in the child's father being the primary custodian and [appellant] being restricted to supervised visits. Ann G[.] has support[ed] her daughter, but has enabled [appellant's] self-absorbed helplessness. [Appellant's] untreated pain issues — and her reliance of pain killers, on which she is now dependent — have rendered her incapable of performing the basic duties of a parent.

Apparently recognizing this, she gave up the notion of reunification with her daughter, waiving further reunification services from the Department. Hoping to keep Elizabeth as her child but have others do the job, she advocated for the perpetual limbo of Custody and Guardianship as Elizabeth's lot in life. This approach highlights [appellant's] narcissism, and underscores the mandate to get Elizabeth to a permanent, forever placement.

Elizabeth needs, and is entitled to, her childhood in an environment of safety — physical, and more crucially, emotional. Compounding this inescapable conclusions is [appellant's] inability, or unwillingness, to face reality and accept responsibility for her actions and their consequences.

(Footnotes omitted) (some alterations in original).

On October 31, 2011, appellant noted an appeal.

DISCUSSION

I.

Appellant contends that the circuit court erred in terminating her parental rights and permitting Elizabeth's adoption by Aunt Lisa, as this "would cut off contact" between Elizabeth and appellant. Appellant argues that the evidence demonstrated that maintaining an ongoing relationship with her mother and other maternal relatives was in Elizabeth's best interest. Appellant asserts that the circuit court erred in terminating parental rights rather than ordering custody and guardianship, under which she would have retained the right to maintain contact.[14]

The Department responds that the circuit court properly exercised its discretion in terminating appellant's parental rights based on its finding by clear and convincing evidence that appellant was an unfit parent. The Department argues that the termination of appellant's parental rights was in Elizabeth's best interest, as she was in need of a safe physical and emotional environment and appellant's "reliance on pain killers . . . ha[s] rendered her incapable of performing the basic duties of a parent."

The Court of Appeals recently set forth the stan-

dards guiding our review of an order of the juvenile court terminating parental rights:

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

In re: Adoption/Guardianship of Ta'Niya C., 417 Md. 90, 100 (2010) (some alterations in original) (citations omitted).

The United States 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, 299 (2005); In re: Yve S., 373 Md. 551, 566-67 (2003). A parent's fundamental right encompasses the "right . . . to make decisions concerning the care, custody, and control of [his or her] children." Troxel v. Granville, 530 U.S. 57, 66 (2000) (citations omitted). This right is not absolute—it must be balanced against the State's interest in protecting a child's best interest. Yve S., 373 Md. at 568-69.

"When the State seeks to terminate parental rights without the consent of the parent(s), the standard is whether the termination of rights would be in the best interests of the child." In re: Adoption/Guardianshi[ ]p of Cross H., 200 Md. App. 142, 152, cert. granted, In re: Adoption of Cross H., 422 Md. 352 (2011) (citation omitted). Following the best interest standard is a rebuttable presumption that it is in the best interest of a child to maintain the parent's rights. See, e.g., In re: Rashawn H. & Tyrese H., 402 Md. 477, 495 (2007) ("We have created [the] harmony [between a parent's fundamental right and the best interest standard] by recognizing a substantive presumption . . . that it is in the best interest of children to remain in the care and custody of their parents."), abrogated in part as noted in concurring opinion, Ta'Niya C., 417 Md. at 118 (2010); Yve S., 373 Md. at 571 ("The best interests of the child standard embraces a strong presumption that the child's best interests are served by maintaining parental rights." (Citations omitted)).

The presumption in favor of the natural parent is rebutted, and parental rights will be terminated, "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), which provides:

> If, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with a child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objeetion.[15]

F.L. § 5-323(d) sets forth the "criteria for determining the kinds of exceptional circumstances that would suffice to rebut the presumption favoring a continued parental relationship and justify termination of that relationship." Rashawn H., 402 Md. at 499. In completing this analysis, the trial court "must faithfully examine" and make findings of fact as to each statutory factor. In re: Adoption/Guardianship Amber R. & Mark R., 417 Md. 701, 714 (2011). F.L. § 5-323(d) reads as follows:

> (d) Considerations. — Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1)(i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social

services agreement, if any;

(2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:

(i) the extent to which the parent has maintained regular contact with:

1. the child;

2. the local department to which the child is committed; and

3. if feasible, the child's caregiver;

(ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;

(iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and

(iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interests to extend the time for a specified period;

(3) whether:

(i) the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect;

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

(iv) the parent has been convicted, in any state or any court of the United States, of:

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

2. aiding or abetting, conspiring, or soliciting to commit a crime described in item 1 of this item; and

(v) the parent has involuntarily lost parental rights to a sibling of the child; and

(4) (i) the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

(iii) the child's feelings about severance of the parent-child relationship; and

(iv) the likely impact of terminating parental rights on the child's well-being.

The Court of Appeals summarized the process involved in a termination of parental rights case as follows:

> The court's role in [termination of parental rights] cases is to give the most careful consideration to the relevant statutory factors, to make specific findings based on the evidence with respect to each of them, and, mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an

> unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make a continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. If the court does that—articulates its conclusion as to the best interest of the child in that manner—the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.

Rashawn H., 402 Md. at 501 (emphasis and footnote omitted). In a more recent opinion, the Court of Appeals explained that this summary should be the "touchstone for courts" in termination of parental rights proceedings. Ta'Niya C., 417 Md. at 111.

Applying the principles set forth above, we conclude that the circuit court properly exercised its discretion in terminating appellant's parental rights. In the Findings of Fact and Conclusions of Law, the circuit court carefully considered the relevant statutory factors, making specific findings based on the evidence with respect to each consideration.

With regard to services offered to the parents, the court observed that "[p]re-removal services were not provided to [appellant], who was not a placement resource due to her history with drug use" and that, as a result of that history, Paul E. had been awarded custody. The circuit court found that appellant had been provided numerous services and that she had participated in: "parenting instruction . . . during supervised visitation at Visitation House, individual therapy, family therapy with Ann G[.] and Elizabeth, 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 that appellant "is frequently late [to visits and therapy] and often ill." The circuit court observed that appellant "was slow to engage with the Department, but finally signed a service agreement" on September 18, 2010. The circuit court noted that appellant had fulfilled some of the obligations imposed by the service agreement. She had consistent trouble, however, "with timeliness: for visits, even when the Court loosened the Department's requirements; for her psychological evaluation; for meetings with the social worker; and for [scheduled] court [dates]." Appellant was unable to follow Dr. Rodriguez's, her pain management doctor's, recommended course of treatment, which was that she substantially reduce the pain medication she was on and follow a recommended injection protocol. She has also been "unemployed and dependent on the support of Ann G[.] throughout the time Elizabeth has been in care."

As to appellant's efforts to adjust her circumstances, condition, or conduct to make it in Elizabeth's best interest to be returned to the parent's home, 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."[16] The circuit court explained that appellant's "sporadic attendance at the trial spoke volumes about her inability to put Elizabeth first." The circuit court found that appellant's rejection of the proposed pain management treatment plan "in favor of a life under the influence of pain killers also evidenced an inability to prioritize her daughter's needs."

As to appellant's contact with Elizabeth, the circuit court determined that the contact was relatively consistent over the six months leading to trial, stating "[i]n large measure that was because Ann G[.] supervised, and covered for [appellant] when she was late, or sick, or unable to do anything but lie in bed during a visit." The circuit court found that, prior to six months before trial, appellant's attendance was less regular.

As to her ability to contribute to the financial support of Elizabeth, the circuit court noted that appellant is unemployed and unable to contribute financially to Elizabeth's support, and that appellant has done little to correct this situation.

With regard to the existence of a "parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs[,]" 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 an addiction to pain killers. Appellant's psychologist, Dr. Zinna, "opined that [appellant's] mental health disorders [a]ffect cognition, energy, the ability to follow through, interpersonal skills, distortion of situations, and that the narcissistic personality features are a major impediment to [appellant's] ability to put Elizabeth first." The circuit court noted that "[appellant's] behavior with regard to Elizabeth and her needs bears that out."

As to whether "additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent[,]" the circuit court found that, based on appellant's extensive mental and medical disabilities and disorders, as well as appellant's track record with Elizabeth, "there [wa]s no evidence on which to base a conclusion that more time w[ould] make a difference." The circuit court noted that appellant herself "as much as acknowledged this when she withdrew her request for reunification in March 2011." The circuit court found that Elizabeth is bonded with Aunt Lisa, her current caregiver, and "it would be

contrary to Elizabeth's best interest to disturb this placement."

Concerning whether appellant has abused or neglected Elizabeth, the circuit court found that appellant's "addiction issues have led to her neglect of Elizabeth[,]" as appellant "cannot take care of herself, much less Elizabeth." The circuit court noted that appellant lost custody of her son to her son's father.

With regard to Elizabeth's emotional ties and feelings, the circuit court noted that Elizabeth is bonded to her parents, Aunt Lisa, Ann G., and her paternal grandparents. The circuit 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 that her adjustment has been good, as Elizabeth is involved in numerous activities and has friends within several blocks. The circuit court found that "Aunt Lisa's home is the only stable home Elizabeth has known, and she has lived there on and off since she was two. She has been officially placed with Aunt Lisa since March 19, 2010, almost [eighteen] months to the date of trial." Aunt Lisa ensures that Elizabeth gets to her weekly therapy appointments. As for Elizabeth's adjustment to the placement in Aunt Lisa's home, the circuit court noted that "[t]here have been incidents of difficult behavior but Aunt Lisa has managed those, and asked for help when she needed it." As to school, the circuit court found that "Elizabeth has had an 'up and down' school performance record[,]" but is currently doing better.

As to Elizabeth's feelings about severance of the parent-child relationship, the circuit court noted that "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 with this position.

As to the likely impact of terminating parental rights on the child's well-being, the circuit court found that "termination of parental rights is the best course for Elizabeth[,]" noting that "there will be little change in Elizabeth's day-to-day activities as a result of a termination of the parent's parental rights." The circuit court concluded that "[g]iven her strong ties to Aunt Lisa and the support system in place, the termination of the parent's parental rights likely will not negatively impact Elizabeth's long term well-being."

Based on the evidence in the record, we are satisfied that the circuit court properly considered the applicable statutory criteria, and that the court's factual findings are amply supported by the evidence. In sum, we conclude that the circuit court's findings as to appellant's parental unfitness with regard to Elizabeth are supported by clear and convincing evidence and that terminating the rights of appellant was in Elizabeth's best interest.

II.

Appellant contends that the circuit court erred in denying, without explanation, her pretrial motion for an independent evaluation of Elizabeth. Appellant argues that she was deprived of the right to fully prepare a defense by the circuit court's denial of her motion for an independent evaluation of Elizabeth "in a contested termination of parental rights hearing[.]" Appellant argues that Elizabeth's emotional attachment to her parents and the effect on the child's mental health of terminating parental rights were dispositive issues in the case. Appellant asserts that by denying the motion for independent evaluation, no expert testimony was offered as to "quality of the bond between the mother and Elizabeth and the effect of the cutting off of that bond."

The Department responds that the circuit court properly denied appellant's motion for an independent evaluation of Elizabeth because the child had recently undergone a court-ordered evaluation, and appellant failed to demonstrate good cause as to why an independent evaluation would assist the court and not be harmful to Elizabeth.[17]

"We review a juvenile court's denial of a request for a psychological examination to determine whether . . . the court abused its discretion." In re Adoption/Guardianship of Mark M., 147 Md. App. 99, 111, cert. denied, 372 Md. 430 (2002) (citation omitted). The denial of a motion for reconsideration is reviewed for an abuse of discretion. Wilson-X v. Dep't of Human Res. ex rel. Yasmin, 403 Md. 667, 676, cert. denied, 555 U.S. 849 (2008).

To obtain a court-ordered independent evaluation of a child, a parent must demonstrate good cause for the proposed examination and that the examination will not be harmful to the child. In In re: Mark M., 365 Md. 687, 717-18 (2001), a CINA proceeding, the Court of Appeals stated:

> We also hold that when making a motion to compel a physical or mental examination of a child pursuant to Section 3-818 of the Courts and Judicial Proceedings Article, the party making the motion must demonstrate good cause for such an examination. The examination should be reasonably calculated to assist the trier of fact in rendering its decision.
>
> The party also must show that the proposed examination will not be harmful to the child.

(Citation omitted).

"The Court's holding regarding independent psychological examinations in CINA proceedings is equally applicable to TPR proceedings." Mark M., 147 Md. App. at 109. "A parent against whom a petition for termination of parental rights has been filed may move for an independent examination, and must then demonstrate that there is good cause for the proposed examination and that the examination will not be harmful to the child." Id. (citation omitted). See also Samone H., 385 Md. at 306-07 ("When a party moves for an independent evaluation, that party 'must demonstrate good cause for such an examination,' show that 'the examination should be reasonably calculated to assist the trier of fact in rendering its decision,' and must demonstrate that the 'proposed examination will not be harmful to the child." (Citation omitted)).

Returning to the case at hand, we conclude that the circuit court properly exercised its discretion in denying appellant's motion for an independent evaluation of Elizabeth. In the motion, the sole reason given by appellant as to the need for an independent evaluation was to "challenge the Department's expert's conclusions." Appellant bore the burden of demonstrating that the independent evaluation would "be reasonably calculated to assist the trier of fact in rendering its decision." Mark M., 365 Md. at 717. In the motion, appellant failed to specify what, if any, clinical issues needed to be addressed by the independent evaluator or how the evaluation would assist the court. As noted above, Elizabeth participated in a psychological evaluation by Dr. Meade from March 5, 2011, to March 12, 2011. In her motion, appellant failed to state how a second evaluation might reveal any information beyond that produced by the evaluation conducted 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 Dr. Meade—mainly, Elizabeth's alleged behavior on August 14, 2011. Appellant contended that Elizabeth's behavior of crying, threatening to run away, and refusal to go with Aunt Lisa on August 14, 2011, conflicted with Dr. Meade's conclusion that Aunt Lisa was meeting Elizabeth's "emotional needs." Appellant argued the behavior demonstrated a strong bond between appellant and Elizabeth. As such, appellant asserted that an independent evaluation was needed to examine the bond between appellant and Elizabeth.

Appellant's attempt to cast the August 14, 2011, incident as good cause for the court to permit an independent evaluation is unpersuasive. Even if the alleged events occurred—in the response to the motion for reconsideration, the Department disputed that the events happened—a number of circumstances undermine the conclusion that the behavior is demonstrative of a bond with appellant. According to Dr. Meade's report, Hinton had already diagnosed Elizabeth with "Reactive Attachment Disorder and Post-Traumatic Stress Disorder." According to Dr. Meade, who discussed Hinton's report as part of Elizabeth's mental health history, Elizabeth "has trouble with boundaries, cannot tolerate negative feedback, and 'becomes petulant when denied what she wants." In her report, Dr. 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.

Appellant's argument that Elizabeth's actions on August 14, 2011, demonstrate a bond between appellant and Elizabeth, which has not been explored, is not substantiated by the testimony of the experts in the case. The record demonstrates that at the hearing of September 26, 2011, through September 28, 2011, the circuit court considered evidence regarding appellant's relationship with Elizabeth. At the hearing, as to Elizabeth's relationship with her mother, Dr. Meade testified:

> I think that if the mother could be a constructive resource for the child, it would be beneficial to continue the relationship.
>
> * * *
>
> Based on what I, what I knew up, as of six months ago, the mother was not a constructive resource for the child. The other thing that, one of Elizabeth's problems is general difficulty trusting, and I don't know if she trusts her mother, or whether seeing her mother would be source of greater anxiety for her.

Hinton testified that in her opinion it was important for Elizabeth to maintain contact with both of her parents. Appellant noted in her brief before this Court that, according to Hinton, "[i]f Elizabeth were no longer able to have visits with her mother and maternal grandmother, it would have a significant and negative impact on Elizabeth." Upon reviewing the record, we perceive no basis on which to find that appellant has demonstrated good cause for an independent evaluation as Elizabeth's relationship with appellant was explored and addressed at the hearing.

Another factor demonstrating that the circuit court properly exercised its discretion in denying the motion for an independent evaluation is that appellant completely failed to address whether the independent evaluation would be harmful to Elizabeth. In the initial

motion filed July 25, 2011, appellant failed to offer any basis or support for the conclusion that an independent evaluation would not harm Elizabeth.[18] In the motion for reconsideration, appellant merely made a conclusory statement that "[t]here is no indication from the history of this case that an[ ] independent evaluation would be harmful to the child." This statement in no way meets the burden of demonstrating that an independent evaluation would not harm Elizabeth. Accordingly, we conclude that the circuit court properly denied the motion for an independent evaluation and motion for reconsideration.[19]

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

FOOTNOTES

1. The Circuit Court for Montgomery County was sitting as a juvenile court during the proceedings in this case.

2. By letter dated March 13, 2012, counsel for the minor child Elizabeth joined in the brief filed by the Department.

3. According to the Child in Need of Assistance ("CINA") Petition filed on March 19, 2010, Paul E. has had sole legal and physical custody of Elizabeth since September 12, 2008, pursuant to Family Court case 66841FL. "[The] docket entries in the case, [reflect that appellant] was ordered to undergo drug and alcohol testing in June 2008. [Appellant] had supervised visitation with Elizabeth at Family Trauma Services until June 2009 when the service was terminated for non-compliance in June 2009. Currently [appellant] visits with Elizabeth twice a month supervised by Elizabeth's maternal grandmother, Anne [ ] G[.]." During the course of the custody case, Paul E. was ordered to participate in drug and alcohol testing as well.

4. Until March 2011, Elizabeth's initial CINA permanency plan was reunification. On March 17, 2011, the circuit court changed Elizabeth's permanency plan from a sole plan of reunification, to concurrent plans of custody and guardianship with a relative, and adoption with a relative. Neither appellant nor Paul E. noted an appeal of the change in permanency plan.

5. Paul E. did not object to the Department's Petition and was deemed by operation of law to have consented to the termination of his parental rights to Elizabeth. See Md. Code Ann., Family Law Art. ("F.L.") § 5-323(g) ("If a parent has consented to guardianship in accordance with § 5-320(a)(1)(iii)1 of this subtitle, the loss of parental rights shall be considered voluntary.").

6. 0n April 20, 2011, the circuit court appointed Lazarus and Burt, Esq. as Elizabeth's counsel.

7. Appellant sought an independent evaluation by Dr. Charles David Missar, Ph.D., trained in Clinical Psychology, who would obtain history from all parties, and conduct clinical interview(s) of the child and appropriate psychological tests as deemed necessary.

8. Other than stating that the Order was upon consideration of the motion and the responses thereto, the circuit court stated no reasons for the denial.

9. Appellant alleged that during a visit between Elizabeth and her maternal family members on August 14, 2011, Elizabeth stated that she did not want to be adopted and threatened to run away, stating "I cannot take it there anymore." According to appellant, Elizabeth refused to enter the caretaker's car and was hyperventilating, crying, screaming, running away from the car, and begging appellant not to return her to the caretaker. Due to this incident, appellant asked the circuit court to reconsider the denial of her motion for independent evaluation, arguing that the evaluation would "allow [appellant] to have full and fair hearing to establish the emotional ties between the child and her mother and the likely impact on the child's future well-being if the parent-child relationship is terminated."

10. Other than stating that the Order was upon consideration of the motion and the responses thereto, the circuit court stated no reasons for the denial.

11. Kel1y A. Zinna, Psy is a forensic psychologist.

12. The court found that there was no evidence presented as to the actions described in F.L. § 5-323(d)(3)(ii) through (v), *infra*.

13. As to F.L. § 5-323(e)-(f), the circuit court found that those sections were not at issue in the case. As to F.L. § 5-323(g), the circuit court found that Paul E. had failed to respond to the Petition and as to him, termination was voluntary.

14. Appellant points out that by terminating her parental rights, "she no longer had any rights to Elizabeth, including the right to visit or have any contact," which appellant maintains is not in Elizabeth's best interest.

15. This higher burden of proof is required by the Due Process Clause of the Fourteenth Amendment. Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

16. In In re Adoption/Guardianship No. 10941, 335 Md. 99, 106 (1994), although discussing permanency plans, the Court of Appeals stated: "The overriding theme of both the federal and state legislation **is that a child should have permanency in his or her life**. The valid premise is that it is in a child's best interest to be **placed in a permanent home** and to spend as little time as possible in foster care." (Emphasis added). According to appellant, the "goal of 'permanency' is to avoid foster care drift, not to pursue adoption at all cost." Because Elizabeth "was not languishing in foster care[,]" appellant contends that adoption was not appropriate as "under the current arrangement [living with Aunt Lisa with visits to appellant and Ann G.], [Elizabeth] was able to continue having a relationship with her mother and other maternal relatives." As the circuit court noted, however, it is in Elizabeth's best interest to terminate appellant's parental rights and for Elizabeth to have a "permanent, forever placement[,]" despite appellant's hope "to keep Elizabeth as her child [while] hav[ing] others do the job[.]"

17. The Department contends that appellant has failed to preserve the issue for appellate review by failing to object to the circuit court's denial of her request for an independent

evaluation at the beginning of trial or when Dr. Meade testified. Appellant, however, filed a motion for independent evaluation, and after it was denied, subsequently filed a motion for reconsideration. Before this Court, appellant takes issue with these denials and, as such, we will address the merits of the issue.

18. In a response to the motion, counsel for Elizabeth asked that the circuit court deny the motion because Elizabeth "is an emotionally fragile child, [who] experiences extensive anxiety when dealing with any child welfare issues."

19. Appellant's reliance on Mark M., 147 Md. App. 99—a case in which this Court reversed the trial court's denial of a mother's motion for independent evaluation—is misplaced. In Mark M., there was a complete lack of expert testimony regarding whether the child's fear of his mother was based in reality, which was the mother's main purpose in seeking an independent evaluation. Id. at 103. Rather, in this case, appellant contends that an independent evaluation is necessary to further explore the bond between appellant and Elizabeth, even though Elizabeth had already participated in one such evaluation, and Elizabeth's bond with appellant was explored and addressed.

NO TEXT

Cite as 7 MFLM Supp. 73 (2012)

Custody: best interest of the child: Sanders factors

In Re: Alecia J.

No. 2156, September Term, 2011

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

Opinion by Moylan, J.

Filed: May 16, 2012. Unreported.

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.

Factual Background

Alecia is the child of Joy and Cameron. She was born in November of 2009. Until March 22, 2010, Alecia resided for the first four months of her life with Joy and three of Joy's other children, all of whom are Alecia's half-siblings,[1] at Joy's three-bedroom apartment. At that time, Alecia's older half-brother, Elijah, accidentally locked himself in a car on a warm day. The police found him, freed him, and accompanied him back to Joy's apartment. Joy, who was asleep when the police arrived, was not even aware that Elijah was not at home. The apartment was in an uninhabitable condition: there was mold all over the walls, there were soiled diapers and other trash strewn throughout the premises, and there was a broken window.

Following that incident, the Baltimore City Department of Social Services sent a social worker, Tracy Cook-Thomas, to Joy's residence. Two of the older children were determined to have ringworm. Joy was subsequently diagnosed with depression and an unspecified personality disorder. The Department filed a Petition with Request for Shelter Care for all four children then living with Joy. The Petition averred that the children were children in need of assistance ("CINA"). They were placed with their maternal aunt. At that time, Cameron R. was identified as Alecia's father. Cameron is a security guard who works nights. He lives with his parents. He usually has two to three days off per week, on a rotating basis.

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

An adjudicatory CINA hearing was held on June 28, 2010 before Judge Teaette S. Price. Cameron was present and testified that he wanted custody of Alecia. Following a DNA test confinning his paternity, he also began having weekly visits with Alecia while she remained in her aunt's care. At the June 28 hearing, all four children were determined to be CINA and were placed with the Department for placement. Alecia was placed with Cameron in November of 2010. Under that arrangement, Joy was permitted to have at least one overnight visitation per week. Alecia's maternal aunt continued to have co-guardianship with Cameron over Alecia until December 1, 2010, when Cameron was granted full guardianship.

Joy contested Cameron's custody award, as well as the custody decisions regarding the three other CINAs who had been removed from her home. A hearing was held before Master Lawlor in August of 2011. At that hearing, Joy contended that Cameron wanted the custody of Alecia solely to avoid having to pay child support. She argued that Cameron's parents were the actual primary caretakers of Alecia.

At the hearing, it was also developed that Alecia has resided with Cameron since this time. She sleeps in a crib in his room. She is in full-time daycare, but Cameron spends time with her on his days off from work. His parents, Alecia's grandparents, help take care of Alecia at night when Cameron is at work. Cameron also arranges and accompanies Alecia to her medical appointments. Ms. Cook-Thomas testified that she is in regular communication with Cameron regarding Alecia's case.

In January of 2011, Joy was evaluated by the Medical Services Division of the Circuit Court for Baltimore City. She denied any responsibility for the neglect of her children. She was found to have a depressive disorder and an antisocial personality dis-

order. Even though Joy had attended parenting classes, her evaluator concluded that the lessons had not "translated into her reality." The evaluation also concluded that Joy's judgment was impaired. With the return of her other three children, her apartment became unkempt once again. Joy was unemployed. She had applied for a four-bedroom apartment, but it was unclear if she would be granted one. Joy was also pregnant with a sixth child, with an expected due date in February of 2012. Joy relies mainly on food stamps and the monthly charity of relatives to feed her family. She admitted that this is often not enough to provide for her family's needs.

The master recommended that the three older children return to Joy's care under protective supervision. He also recommended that Alecia remain with Cameron and that Cameron be granted sole legal and primary physical custody. Joy filed an exception to the master's recommendation. A de novo trial was held on November 2, 2011. Judge Russell affirmed the master's recommendation. He awarded primary physical and sole legal custody of Alecia to Cameron, granting Joy visitation on at least every other weekend and for two additional weeks in the summer. Joy appealed that order to this Court.

Discussion

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

In re Adoption of Cadence B., 417 Md. 146, 155, 9 A.3d 14 (2010) (citing In re Yve S., 373 Md. 551, 586, 819 A.2d 1030 (2003)). 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 masters 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 surround-

ings 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 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.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

FOOTNOTE

1. The other children were: Maiya, Elijah, and Kaitlin. All the children had different fathers. One other daughter, Keenyana, resided with her father.

NO TEXT

Cite as 7 MFLM Supp. 77 (2012)

Custody: modification: proof of material change in circumstances

Yiannes Kacoyianni
v.
Susan Luongo

No. 392, September Term, 2011

Argued Before: Kehoe, Watts, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: May 18, 2012. Unreported.

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?

We will affirm the judgment of the trial court.

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BACKGROUND

The parties, who were never married, are the biological parents of two children,

Neophetos Andreas,[1] born January 17, 2002, and Mia, born April 25, 2003. After Mia's birth, the parties' relationship deteriorated and, in 2005, Mother filed an action in the Circuit Court for Anne Arundel County to establish paternity and to obtain custody and child support. The parties reached an agreement on issues of custody, visitation, and child support, which was reduced to writing in a consent order signed by them and approved by the circuit court on March 3, 2006. At the time the consent order was filed, Andreas was four and Mia was almost three years old. Pursuant to the consent order, the parties share joint legal custody but Mother has the authority to make final decisions when, after discussion, the parties cannot agree on an issue. Father was awarded a detailed visitation schedule that provided for visits on various weekends, weekdays, and holidays. Some of this visitation was scheduled to take place during what would have been the school day, had the children been old enough to attend school at the time of the consent order.

The consent order did not resolve the parties' differences. On October 25, 2007, Father filed a "Petition for Contempt" alleging that Mother had made decisions regarding Mia's education and Father's visitation and access to the children decisions without informing Father of her decisions or discussing them with Father beforehand. Father also argued that Mother's decisions and actions were in violation of the consent order. Mother opposed this petition. After a hearing on the matter, the circuit court entered an order on February 26, 2008, finding Mother in contempt for violating Father's Wednesday access by unilaterally limiting his access with Mia to 4:00 p.m. through 6:30 p.m., and "deliberately obstructing" his full participation in Andreas's educational activities. The court ordered Mother to make the parties' children available for visitation at specific times, and refrain from obstructing Father's full participation in the children's educational activities.

Mother appealed the circuit court's order and, in

an unreported opinion filed on September 30, 2008, a panel of this Court affirmed the circuit court's contempt finding against Mother with respect to the visitation start time for Mia, but vacated the court's contempt finding against Mother with respect to her deliberate obstruction of Father's participation in Andreas's educational activities. See *Luongo v. Kacoyianni*, No. 109, September Term 2008, slip op. at 14, 18 (filed September 30, 2008). The panel also took this opportunity to warn Mother that if she "engages in a pattern of unreasonable abuse of that authority, her conduct could be found to constitute a material change of circumstances that could support a change from joint legal custody, or a change in which parent has final decision-making authority if joint legal custody is continued." *Luongo*, slip op. at 18 n. 2.

On December 11, 2009, Father filed a request to modify the child custody arrangement, contending that

> a change in circumstances which materially affects the welfare of the children exists in that, *inter alia*, both children are attending a hill day of school which makes the current access schedule impractical to continue, [Mother] fails to abide by the joint legal custody order, and [Mother] is abusing her authority as final decision-maker regarding legal custody decisions.

Father also argued that Mother's "behavior is inimical to the best interests of the children." At the time this complaint was filed, Andreas was almost eight years old and Mia was six years old.

The trial court held a two-day trial beginning on December 8, 2010. Before opening arguments, Mother moved to dismiss Father's petition, arguing that Father failed to state a claim upon which relief could be granted. The trial court denied Mother's motion. At the end of Father's case, Mother moved to dismiss Father's petition or, in the alternative, enter judgment in favor of Mother, on the basis that Father had failed to prove that there had been a material change in circumstances, or that a material change in circumstances had affected the children's welfare. Both parties presented arguments on their respective positions. Although the trial court concluded that it was a "close call, as to whether or not there's evidence to show that there has been a material chance in circumstances[,]" it denied Mother's motion.

At the close of all the evidence, Mother renewed her motion for judgment. After hearing argument from both parties on the issue of material change of circumstances, the trial court entered judgment in favor of Mother, concluding that there was no material change in circumstances and that there was "no credible evidence to suggest that it is in the children's best interest for the court to find that there is a material change in circumstances."

Father filed a "Motion to Vacate Dismissal, Motion to Alter or Amend a Judgment, and/or for Reconsideration of Dismissal, Motion for New Trial and Request for Hearing," which the trial court denied. Father filed a timely appeal from the trial court's dismissal of his request to modify custody. We will add additional facts in the analysis as necessary.

DISCUSSION

Standard of Review

There are three aspects of appellate review of custody and visitation decisions. *In re Shirley B.*, 419 Md. 1, 18-19 (2011); *Ross v. Hoffman*, 280 Md. 172, 185-86 (1977). The first pertains to the factual findings made by the circuit court; the second is concerned with the circuit court's interpretation of legal principles and the third focuses upon the circuit court's ultimate conclusion as to custody or visitation. *Shirley B., supra.*

Findings of the circuit court will not be set aside on the evidence unless clearly erroneous and we must give due regard to the circuit court's ability to judge the credibility of witnesses. Maryland Rule 8-131(c). Moreover, "'[t]he trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence.'" *Murphy v. 24th Street Cadillac Corp.*, 353 Md. 480, 497 (1999) (quoting *Ryan v. Thurston*, 276 Md. 390, 392 (1975)).

Claims of legal error by the circuit court as to matters of law are reviewed on a *de novo* basis and further proceedings in the circuit court will ordinarily be required unless we conclude that the error is harmless. *Shirley B.*, 419 Md. at 18. Finally, whether to modify custody is a matter in the circuit court's discretion. We will reverse such a decision only when it is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *In re Yve S.*, 373 Md. 551, 586 (2003) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)). We turn to Father's contentions.

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.

Father asserts that the trial court used the wrong legal standard because, "[in deciding a Motion for Judgment, the trial judge is required to consider the legal sufficiency of the evidence and all logical and reasonable inferences deducible therefrom in a light

most favorable to the party having the burden of proof," and that, "[for purposes of a Motion for Judgment, the Court is to rule only upon the sufficiency of the evidence, and not in its role as the trier of fact." Father insists that the trial court here erred when it acted as a trier of fact and ruled on the weight of the evidence, instead of its sufficiency. Father also disputes the trial court's findings of fact and its conclusion that there was no material change in circumstances, arguing that there is "undisputed evidence" that there has been a change in circumstances which materially affects the welfare of the children.

Father's arguments are not persuasive. We do not agree with Father's first contention that, in resolving this case, the trial court was required to view the evidence in the light most favorable to him. There are two reasons for this. First, the trial court did not grant Mother's motion for judgment at the close of Father's case; the court denied it. 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. We will explain our reasoning below.

Father asserts that this case was resolved on a motion for judgment and, therefore, the court was required to view all evidence in a light most favorable to him. This is incorrect. The evidentiary standard to be applied in motions for judgment in non-jury trials is set forth in Rule 2-519(b), which reads in pertinent part (emphasis added):

> When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, **as the trier of fact, to determine the facts** and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence.

Thus, when Mother moved for judgment at the end of Father's case on the basis that Father failed to demonstrate a material change in circumstances, the trial court, as the trier of fact, was free to make credibility assessments and factual determinations. Had the trial court decided the case at that time, it would not have been required to view the evidence in the light most favorable to Father.[2] However, the trial court exercised its discretion to "decline to render judgment until the close of all the evidence."

Maryland Rule 2-519 does not provide for a "motion for judgment" at the close of all the evidence in a court trial. Therefore, 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 because '"the substance rather than the form is the controlling consideration.'" *In Re Deontay J.*, 408 Md. 152, 160 (2009) (quoting *Lapp v. Stanton*, 116 Md. 197, 199 (1911)); *see also Corapcioglu v. Roosevelt*, 170 Md. App. 572, 590 (2006). 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. This requirement serves two purposes. As this Court has explained:

> The "material change" standard ensures that principles of *res judicata* are not violated by requiring that such a showing must be made any time a party to a custody or visitation order wishes to make a contested change, even if it is to an arguably minor term. The requirement is intended to preserve stability for the child and to prevent relitigation of the same issues.

McMahon v. Piazze, 162 Md. App. 588, 596 (2005) (citing *Domingues v. Johnson*, 323 Md. 486, 498 (1991)).

Therefore, (citation deleted, emphasis added):

> A change of custody resolution is most often a chronological two-step process. **First, unless a material change of circumstances is found to exist, the court's inquiry ceases.** In this context, the term "material" relates to a change that may affect the welfare of a child. . . . **If** a material change of circumstance is found to exist, **then** the court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding. Certainly, the very factors that indicate that a material change in circumstances has occurred may also be extremely relevant at the second phase of the inquiry — that is, in reference to the best interest of the child.
>
> * * * *
>
> If, however, in respect to the previously known circumstances the evidence of change is not strong enough, i.e.,

> either no change or the change itself does not relate to the child's welfare, there can be no further consideration of the best interest of the child because, **unless there is a material change, there can be no consideration given to a modification of custody.**

Wagner v. Wagner, 109 Md. App. 1, 28-29 (1996); see also Cynthia Callahan & Thomas C. Ries, FADER'S MARYLAND FAMILY LAW, § 5.10(c-g), at 5-46 (5th ed. 2011) ("The key is to remember that **first** there must be material change; then, and only then, can there be modification.") (emphasis in original).

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, during her presentation of evidence, Mother contested some of these assertions and provided explanations for her actions to show that they were in the best interests of the children. For example, Father testified that Mother does not inform him of the children's medical information in a timely manner and that she usually only informs him of their medical conditions when Father is required to provide some care, such as administering a dose of medicine, during his time with them. During her testimony, Mother countered that she consistently provides Father with information regarding the children's medical care via email; Mother presented some representative emails as evidence at trial. The trial court observed much the same back and forth between the parties on Father's other contentions.

After weighing this evidence, the trial court stated, "I am not persuaded that there has been, in fact, a material change in the circumstances since the order was entered in 2006 . . . I heard no credible evidence to suggest that it is ii the children's best interest for the court to find that there is material change in circumstances." 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) ("Mere non-persuasion, . . . requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.").

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.[3]

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 United States 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. According to Father, that the trial court denied him the opportunity to give a closing argument, on the basis that he would make the same arguments at closing as he did in the motion for judgment, shows that the court "misunderstood the difference between the purpose of closing argument and argument limited to the sufficiency of the evidence." As Father explains,

> [h]ad the court allowed closing argument, [he] would have had the opportunity to explain to the court why and how the evidence supported his claim

> for a modification of the custody order. He would have had the opportunity to explain the law to the Court, apply the law to the factual circumstances in this case, and focus the court's attention to logical inferences the court should draw based upon the evidence presented

Father maintains that his right to present such a closing argument is fundamental.

In support of his argument, Father cites *In re Emileigh F.*, 353 Md. 30, 41(1999). In that case, the trial court in a CINA ("Child in Need of Assistance") proceeding refused to allow closing arguments because of the lateness of the hour. The Court of Appeals held that, in CINA proceedings, litigants normally have the right to present closing argument and the trial court's failure to allow closing argument was an abuse of discretion. The Court's holding was based upon Maryland's common law. *Id*. 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 ("'The extent of the argument may depend on the complexity of the legal issues, whether evidence has been received, whether there is a conflict in the evidence, and other factors. The trial judge, of necessity, must have great latitude in controlling the duration and limiting the scope of these arguments.'") (quoting *State v. Brown*, 324 Md. 532, 446 (1991)).

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.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED.
APPELLANT TO PAY COSTS.

FOOTNOTES

1. Neophetos Andreas goes by the name Andreas.

2. Appellant's reliance on *Hooton v. Kenneth Mumaw P. & H. Co.*, 271 Md. 565 571-72 (1974) is misplaced. In *Hooton*, the Court, applying former Rule 535, held that a circuit court should consider the evidence in the light most favorable to the plaintiff in entertaining a motion to dismiss at the close of a plaintiff's case in a non-jury trial. This holding has been abrogated by Maryland Rule 2-519(b).

3. Father also argues that, under the law of the case doctrine, the trial court was estopped from making "findings of fact and conclusions of law contrary to those earlier made by this Court in the 2008 appeal." Father appears to rely on the following excerpt from this Court's opinion as support for his contention that, because Mother abused her authority, this Court cannot find that there has not been a material change in circumstances.

> [T]he trial judge now has clarified for the parties that the issue of parents' volunteering in the children's schools is one of legal custody; therefore it is to be decided by both parents, with the Mother having tie-breaking authority. If, however, Mother engages in a pattern of unreasonable abuse of that authority, her **conduct** could be found to constitute a material change of circumstances that **could** support a change from joint legal custody, or a change in which parent has final decision-making authority if joint legal custody is continued.

Luongo, slip op. at 18 n. 2 (emphasis added).

> The law of the case doctrine does not apply to this case, because nothing in the above excerpt, or elsewhere in the panel's opinion, states that Mother's abuse of authority **constituted** a material change in circumstances; merely that it **could** be grounds for revisiting custody. *See Kearney v Berger*, 416 Md. 628, 641(2010) ("Once this Court has ruled upon a question properly presented on an appeal, . . . such a ruling becomes the law of the case and is binding on the litigants and [courts] alike. . . .") (internal quotation marks and citations omitted; bracketed material added by the *Kearney* Court). Whether Mother's contumacious behavior constituted a material change in the children's circumstances was not an issue before the panel.

NO TEXT

Cite as 7 MFLM Supp. 83 (2012)

Paternity testing: affidavit of parentage: finality

Jennifer Lynn Anthony-Call

v.

Brian Keith Richardson

No. 0985, September Term, 2011

Argued Before: Eyler, Deborah S., Wright, Sharer, J. Frederick (Ret'd, Specially Assigned), JJ.

Opinion by Wright, J.

Filed: May 18, 2012. Unreported.

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 for Caroline County 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.

Questions Presented

In her brief, Anthony-Call presents nine questions, spanning over four pages. We have truncated those questions as follows:

1. Did the trial judge commit error in dismissing the Appellants [sic] repeated requests for Genetic Paternity Testing under Maryland's Family Law Article § 5-1029(b)?
2. Did the trial judge commit error by placing significant importance on an Affidavit of Paternity. . .?
3. Did the trial judge commit error in extending an already established custody and visitation arrangement, which was ordered by the Circuit Court for Queen Anne's County in a protective order. . .?
4. Did the trial Judge commit error when attempting to use the best interest of the child scenario . . .?
5. Did the trial Judge commit error by appointing an attorney for the minor child that failed to make a good faith effort to interview the children, but accepted a memorandum by the attorney. . . .?
6. Did the Trial Judge commit error by not recusing herself when she was notified In a Motion to Transfer Venue where the Appellant disclosed a personal friend and co-worker of the judge[?]
7. Did the trial Judge commit error by denying a Motion to Transfer Venue, when she was made aware the Defendant's Protective Order was issued in the County in which she and the children resided. . .?
8. Did the trial Judge commit error when it failed to use the child support guidelines to establish support for the minor child Aidan Andrew Richardson? . . .
9. . . . Did the Court err when it conducted a hearing on the issue of genetic testing . . .?

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

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.[1] *See* Md. Rule 8-504(a)(6) ("A brief shall include . . . [a]rgument in support of the party's position on each issue"). *See also Klauenberg v. State*, 355 Md. 528, 552 (1999) ("arguments not presented in a brief or not presented with particularity will

not be considered on appeal") (citation omitted); *Rollins v. Capital Plaza Assocs.*, L.P., 181 Md. App. 188, 201 (2008) (finding a violation of Md. Rule 8-504(a)(5) where appellant failed to provide "any legal authority for her contentions") (citation omitted); *Beck v. Mangels*, 100 Md. App. 144, 149 (1994) (refusing to address questions presented where appellant did not "offer any substantial argument supporting his position"); *Fed. Land Bank of Balt., Inc. v. Esham*, 43 Md. App. 446, 457-58 (1979) ("In prior cases where a party initially raised an issue but then failed to provide supporting argument, this Court has declined to consider the merits of the question so presented but not argued.") (Citations omitted).

Facts

Anthony-Call and Richardson were never married, but had a romantic relationship beginning in 1997 and ending in 2010. The relationship produced two children. The older child, Aiden, was born in 2001, and the younger child, Madeline, was 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 the document 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 he 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 Md. Code (1984, 2006 Repl. Vol.), § 5-1038(a)(1) of the Family Law Article ("FL"), "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 affidavit 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. The child subject to the affidavit was born in 2006, and Anthony-Call did not commence this action until November 1, 2010. 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.[2]

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.[3]

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. We have previously stated that a party must raise the issue of a trial judge's recusal at the trial level. *Scott v. State*, 110 Md. App. 464, 486 (1996) ("Because of the importance of allowing a trial judge to rule on the issue of his recusal, a party should raise that issue in the lower court proceedings, unless very extenuating circumstances exist."); *Traverso v. State*, 83 Md. App. 389, 394 (1990) (stating that "no issue concerning recusal has been preserved for our review" where the appellant "never asked the trial judge to recuse himself') (citations omitted). A party must not only raise the issue of recusal at the trial level, but must also "file a timely motion in order to initiate the recusal procedure. *Miller v. Kirkpatrick*, 377 Md. 335, 358 (2003). A timely motion ordinarily is not one that represents 'the possible withholding of a recusal motion as a weapon to use only in the event of some unfavorable ruling."' *Id*. (quoting *Surratt v. Prince*

George's County, 320 Md. 439, 468-69 (1990)). The motion should be filed "as soon as the basis for it becomes known and relevant." *Id*. at 358 (quoting *Surratt*, 320 Md. at 469).[4] 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.

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

FOOTNOTES

1. We hereby deny Richardson's Motion to Strike Appellant's Corrected Brief and Record Extract filed on January 3, 2012.

2. If another individual came forward claiming to be the father of the child, a blood paternity test would be warranted. Under FL § 5-1029(b), a court may order a blood or genetic test to determine whether the alleged father may be excluded as the biological father. In this case, Anthony-Call's husband initially came forward but later withdrew his claim.

3. Roger Layton was never called to testify and, therefore, the issue of recusal as to Layton was never before Judge Jensen.

4. The motion to disqualify must be made as early as possible because the timeliness requirement is necessary to prevent the waste of judicial resources, and it ensures that the movant does not hedge its bets against the eventual outcome. *See United States v. Yonkers Rd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991) (citations omitted).

NO TEXT

Cite as 7 MFLM Supp. 87 (2012)

Custody: school choice: parent's availability

William Trout, II
v.
Jennifer Rouse

No. 1795, September Term, 2011

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

Opinion by Sharer, J.

Filed: May 23, 2012. Unreported.

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 to the Circuit Court for Anne Arundel County in this case was a determination as to which parent should make the decision about choice of school for the parties' son. The court having granted that authority to appellee, Jennifer Rouse, appellant, William Trout II, filed this timely appeal, raising the following question, which we have recast,[1] for our review:

> 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 and LEGAL PROCEEDINGS

Logan Trout, the son of appellant and appellee, was born on January 28, 2007. The parties did not marry. Custody of Logan was governed by a consent agreement between the parties filed on July 28, 2008. The parties agreed to an equally divided physical custody arrangement, 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, it became apparent that the distance between appellant's home and appellee's home would necessitate a revision of the physical custody arrangement. 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.

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Appellant filed a Motion for Modification of Child Custody, Child Support, and Other Relief, which was timely opposed by appellee. In response, appellee filed a Motion for Modification of Child Custody, Child Support, and Other Relief, to which appellant timely responded.

At a hearing on the above motions, the parties submitted a stipulation of facts. In effect, there were no facts in dispute, and appellant raises no issue that the court was clearly erroneous in any factual determination.[2] Each of the parties testified as to what Logan's typical day would be like if he were to attend school near their home.

The court received evidence of the Maryland School Assessment test results for the public school in each of the parties' home districts, but did not rely on this information in making its decision. 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, the court highlighted the appellee's availability both before and after school as weighing in her favor. The court also noted that if Logan lived with appellant during the school term, he would have to spend time after school at appellant's mother's residence before appellant could pick him up. The court concluded that that was not an ideal situation for Logan.

Ultimately, 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 that the trial court erred, arguing 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):

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of *Rules 886* and *1086* applies. If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

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) ("Where the decision or order is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."). 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) (defining abuse of discretion for the purposes of appellate review).

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 by remaining unemployed is not persuasive. Appellee's duty toprovide 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.

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

FOOTNOTES

1. In his brief, appellant asks:

Did the trial court err by awarding the Appellee the right to make the child's school choice, and thus decide residential custody?

2. The court also heard testimony relating to income and child support. Appellant is employed as a serviceman for alarm systems. He pays child support as ordered, based on the child support guidelines. Appellee, who lives with her mother, is unemployed and intends to remain so, at least in the short term. Appellee's mother helps support her.

Cite as 7 MFLM Supp. 89 (2012)

Child support: below guidelines award: voluntary support of stepchildren

Wicomico County Bureau of Support Enforcement Ex Rel. Christy Hales

v.

Errond B. Truitt, Jr.

No. 2310, September Term, 2010

Argued Before: Woodward, Berger, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Raker, J.

Filed: May 23, 2012. Unreported.

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.

In this child support enforcement case, the Wicomico County Bureau of Support Enforcement (the "Bureau") appeals the judgment of the Circuit Court for Wicomico County, which ordered appellee Errond B. Truitt, Jr. to pay monthly child support for his two biological children at an amount lower than that prescribed by the Maryland Child Support Guidelines. *See* Md. Code (1984, 2006 Repl. Vol.), § 12-101 *et seq.* of the Family Law Article.[1] In departing from the Guidelines, the court took into account appellee's expenditures for the support of his four stepchildren, who live with him. The Bureau presents the following issue for our review:

> "Did the circuit court clearly err when it deviated from the Guidelines amount based on Mr. Truitt's voluntary support of stepchildren to whom he owes no legal obligation of support?"

We shall hold that the 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.

I.

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

On August 13, 2010, the Bureau filed a complaint in the Circuit Court for Wicomico County against appellee on behalf of Christy Hales, seeking child support for Errond. On September 25, 2010, a second child was born to the couple, Payten Elizabeth Hales. At the subsequent hearing on child support for Errond, the Bureau filed a separate complaint to obtain child support for Payten. Without objection from appellee, the circuit court accepted the newly-filed complaint and consolidated both cases.

Appellee is employed as a residential advisor in the Department of Juvenile Services and, as reflected on the "Child Support Guidelines Worksheet" that the Bureau entered into evidence, earns a monthly wage of $2775.31. Based upon appellee's income, his status as the non-custodial parent, and the children's normal healthcare expenses, the Bureau sought total monthly child support in the amount of $679.52, $339.76 for each child.

When the court asked appellee if he had any response to this request, 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 when he married the girl's mother, the Department of Social Services halved the stepdaughter's monthly disability benefits. Thus, in appellant's words, "it rested on me, on my shoulders to take care of her." Additionally, one of his stepsons has Crohn's disease and his wife has lupus, which prevents her from working. Appellee acknowledged that these were not his biological children, but said that he "provide[s] for them financially in the home."

The circuit court discussed the conundrum with counsel representing the Bureau in the following colloquy:

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

THE COURT: It doesn't make any difference how he's got these other financial obligations. If Social Services took away the assistance that they had for these children because he got married, then he doesn't get that money then dumped on him. Is that figured out in the worksheet?

COUNSEL: Well, the guidelines don't really allow for that, Your Honor.

I think that's where this request for a deviation kind of comes into play here, because the guidelines worksheet doesn't allow for that. We have to assess his income, her income and —

THE COURT: And you're not allowed to take out—I don't see anything—you're not allowed—you've got cash, medical support, but this only applies to child support cases brought under Title IV, Department D of the Social Security Act.

There is nothing down here in either party's column for extraordinary medical expenses. It would seem to me that under the guidelines, if he had extraordinary medical expenses within the household, that they would be put down there.

COUNSEL: For those two children. Not his household. For those two children who he is legally obligated to provide for. He has no legal obligation to provide for those two children that he's talking to you about, but he does for his two children that he has had with Ms. Hales here. They are his legal biological children.

So, our point is they should not suffer because he has decided that he would like to care for the children of his now current wife.

THE COURT: So, these children over here shouldn't suffer because we can make these children over here suffer.

COUNSEL: It's not the matter of that, Your Honor. It's he has a legal obligation to these children. He doesn't have a legal obligation under the law to provide support to those children, to the two that he's talking about here.

The big elephant in the room is what is those children's mother doing?

[APPELLEE]: She has lupus, sir.

THE COURT: He said, she has lupus. She's her cousin, first wife's cousin.

COUNSEL: What about their biological father?"

Appellee never answered that last question, and the circuit court did not pursue an answer. Rather, the court inquired whether Ms. Hales had any medical problems approximating those of appellee's wife and said "[i]t is impossible for this Court to make these things right between all of the parties."

The circuit court ordered appellee to pay a total monthly child support payment of $400 to cover both Errond and Payten effective August 13, 2010, 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."

This timely appeal followed.

II.

Before this Court, the Bureau argues that the circuit court erred by "impermissibly deviat[ing] from the presumptive guidelines amount based solely on the fact that [appellee] was voluntarily supporting four children other than his own two biological children." The Bureau further maintains that the court failed to explain adequately how its downward departure served the best interests of Errond and Payten, as required by statute.

Although, as a general matter, a child support order is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion, where the order involves interpretation or 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).

A court's order to a parent to pay child support "derives from the obligation of the parent to the child, not from one parent to another." *Rand v. Rand*, 40 Md. App. 550, 554 (1978). The Maryland General Assembly enacted the Child Support Guidelines in 1989 to comply with federal law and to make child support awards (1) more reflective of the actual costs of raising children; (2) more consistent, and hence more equitable, among recipients; and (3) simpler and more efficient for purposes of adjudication. *See In re Katherine C.*, 390 Md. 554, 565 (2006). Use of the Guidelines is usually mandatory: "in any proceeding to establish or modify child support, whether pendente lite or permanent, the court *shall* use the child support guidelines set forth in this subtitle." § 12-202(a)(1) (emphasis added); *see also Gladis v. Gladisova*, 382 Md. 654, 663 (2004)

(noting that "[a]s originally adopted in 1989, the Guidelines were merely advisory" but that "[i]n 1990, however, the General Assembly amended the Guidelines, making them mandatory" (internal citation omitted)). Section 12-202(a)(2)(i) provides further that "there is a rebuttable presumption that the amount of child support which would result from the application of the child support guidelines. . . is the correct amount of child support to be awarded." *See also Shrivastava v. Mates*, 93 Md. App. 320, 327-28 (1992) ("The guidelines require a trial court to presume, unless rebutted, that the amount of child support dictated by the guidelines is correct."). 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 of the Guidelines would be unjust or inappropriate:

> "1. the terms of any existing separation or property settlement agreement or court order, including any provisions for payment of mortgages or marital debts, payment of college education expenses, the terms of any use and possession order or right to occupy the family home under an agreement, any direct payments made for the benefit of the children required by agreement or order, or any other financial considerations set out in an existing separation or property settlement agreement or court order; and
>
> 2. 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."

§ 12-202(a)(2)(iii). 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)(iv) ("The presumption may not be rebutted 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.").

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, the court must explain how "the downward departure is in the best interests of the child receiving the child support." *Beck v. Beck*, 165 Md. App. 445, 451 (2005).

In the present case, 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) (noting that "[w]ithout paternity, there is no legal duty; without a legal duty, there can be no financial obligation"); *Knill v. Knill*, 306 Md. 527, 531 (1986) (reiterating that "[t]he duty of child support extends to the natural parents of an illegitimate child, but not to a stepparent," and that "a long line of Maryland cases places the responsibility of child support squarely upon the shoulders of the natural parents." (citations omitted)); *Bledsoe v. Bledsoe*, 294 Md. 183, 192 (1982) (stating that there is no legal duty to support a stepchild, and holding that the statute authorizing an order for the use, after divorce, of the family home did not apply to a wife whose two children were by a prior marriage); *Brown v. Brown*, 287 Md. 273, 283 (1980) (asserting "that the legal duty to support does not ordinarily encompass a stepchild is beyond doubt"). Appellee's determination to contribute to the medical care of his stepchildren is laudable, but though he may deem it a moral obligation based upon his marriage to the children's mother, it is not a legal obligation. Appellee does have a legal obligation, however, to his two biological children Errond and Payten. That obligation may not be offset by appellee's decision to support his stepchildren.

This follows from § 12-202(a)(2)(iv). Even were the children residing with appellee biological or adopted children to whom he did owe a duty of financial support, rather than stepchildren, the circuit court would not have been permitted to depart downward from the Guidelines. According to § 12-202(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). *See Beck*, 165 Md. App. at 452-53.

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." *See id.* at 368. 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 neces-

sary)." Judge Ellen Hollander dissented in part, taking issue with the majority's reasoning and finding the benefit to his half-siblings to be "an inadequate explanation as to how the downward departure from the guidelines serve[d] Justin's best interests." *Id.* at 376 (Hollander, J., concurring in part and dissenting in part). The General Assembly enacted § 12-202(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 justified as being in his best interests simply because doing so will benefit another child to whom a common parent owes a duty of support. We held as follows:

> "If the court's sole basis for reducing the support owed for the marital children under the guidelines is that it would be in the best interests of the marital children for their father to have more money available to spend on their half-sibling, that is an insufficient justification to satisfy the requirement of . . . § 12-202(a)(2)(v)(2)(C)."

165 Md. App. at 457.

Thus, in the instant case, even if appellee were legally required to support his stepchildren, the circuit court could not have reduced the Guidelines amount of child support that appellee was obliged to pay for Errond and Payten. Absent such a legal obligation to his 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.

Based upon this disposition, we need not address the Bureau's argument that the court committed reversible error by failing to explain sufficiently its downward departure. To avoid any disruption in support payments, we will leave the circuit court's November 23, 2010, order in effect, pending the court's modification of that order in accordance with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED AND CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. CHILD SUPPORT PROVISIONS TO REMAIN IN EFFECT IN ACCORDANCE WITH THE CIRCUIT COURT'S ORDER OF NOVEMBER 23, 2010, PENDING FURTHER ORDER OF THAT COURT. COSTS TO BE PAID BY APPELLEE.

Cite as 7 MFLM Supp. 93 (2012)

Adoption/guardianship: developmentally disabled individual: guardianship review

In Re: Adoption/Guardianship of India L.H.

No. 2353 September Term, 2011

Argued Before: Meredith, Zarnoch, Hotten, JJ.

Opinion by Zarnoch, J.

Filed: May 23, 2012. Unreported.

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.

Appellant, India L. H. brings this appeal after the Circuit Court for Baltimore City entered an order denying her exceptions to a "reasonable efforts" finding of a juvenile master after a hearing on guardianship review.[1] India presents the following questions for our review:

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 ("the Department") 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.

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

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, which including recommendations that the Department be ordered to perform a number of tasks for India.[2] 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 juvenile 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. Additionally, the juvenile master made her proposed findings *nunc pro tunc* to July 27, 2011. India filed exceptions.[3]

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[4] 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 to citing mootness and standing, the court's order, echoing the judge's oral findings, 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

A. Review of Juvenile Court Determinations

Three standards of review are applicable to the juvenile court's determination in a case such as this:

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

In re Shirley B., 419 Md. 1, 18 (2011) (internal citations omitted).

Reversal is only appropriate when "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* at 19 (internal citations omitted). Here, India has conceded she is not challenging the circuit court's factual findings.

B. Mootness Principles

The circuit court rejected India's exceptions, at least in part, on mootness grounds,[5] and now, the Department seeks a dismissal of this appeal, in part on the basis of mootness, thus raising a challenge to this Court's jurisdiction. However, for purposes of appellate review, the question of whether we have jurisdiction to affirm or reverse a lower court's finding of mootness differs from the issue of whether post-judgment "intervening" mootness requires dismissal of an appeal. Aside from noting that India had turned 21, the Department does not make the latter type of mootness argument. Rather, it focuses primarily on prejudgment factors.

If we were to agree with the circuit court that this case was moot, relevant authorities appear to indicate that the appropriate response is to affirm the lower court, rather than dismiss the appeal. *See e.g., Johansen v. U.S.*, 506 F. 3d 65 (1st Cir. 2007); *Poulson v. Wooster City Planning Comm.*, 2005 Ohio 2976; and *State of Tennessee v. Jordan*, 296 S.W. 3d 530 (Tenn. App. 2008). Thus, it would seem that granting the Department's motion to dismiss this appeal as moot based on pre-judgment facts rather than intervening events would not be appropriate.

In any event, because the issue of mootness is a question of law, we review a lower court's finding of mootness *de novo*. *See, e.g., Troiano v. Supervisor of Elections*, 382 F. 3d. 1276, 1282 (11th Cir. 2004); *Poulson, supra*; and *Johansen*, 296 S.W. 3d at 534. When a case is moot, absent extraordinary circumstances,[6] a court dismisses the action "without a decision on the merits" because the court "does not give advisory opinions." *Dep't of Human Res., Child Care Admin. v. Roth*, 398 Md. 137, 143 (2007). "A case is moot when there is no longer any existing controversy between the parties at the time that the case is before the court, or when the court can no longer fashion an effective remedy. . . .Where, however, it seems apparent that a party may suffer collateral consequences from a trial court's judgment, the case is not moot" and is therefore subject to review. *In re Kaela C.*, 394 Md. 432, 452-453 (2006) (Internal citations omitted).

C. The Correctness of the Circuit Court Decision

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.[9]

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.[10]

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

FOOTNOTES

1. Section 3-816.1(b) of the Courts and Judicial Proceedings (CJP) Article of the Md. Code (1973, 2006 Repl. Vol.) provides:

> (1)In a hearing conducted in accordance with § 3-815, § 3-817, § 3-819, or § 3-823 of this subtitle, the court shall make a finding whether the local department made reasonable efforts to prevent placement of the child into the local department's custody.
>
> (2) In a review hearing conducted in accordance with § 3-823 of this subtitle or § 5-326 of the Family Law Article, the court shall make a finding whether a local department made reasonable efforts to:
>
> (i) Finalize the permanency plan in effect for the child; and
>
> (ii) Meet the needs of the child, including the child's health, education, safety, and preparation for independence.
>
> (3) In a hearing conducted in accordance with § 3-815, § 3-817, or § 3-819 of this subtitle, before determining whether a child with a developmental disability or a mental illness is a child in need of assistance, the court shall make a finding whether the local department made reasonable efforts to prevent placement of the child into the local department's custody by determining whether the local department could have placed the child in accordance with a voluntary placement agreement under § 5-525(b)(1)(i) or (iii) of the Family Law Article.
>
> (4) The court shall require a local department to provide evidence of its efforts before the court makes a finding required under this subsection.
>
> (5) The court's finding under this subsection shall assess the efforts made since the last adjudication of reasonable efforts and may not rely on findings from prior hearings.

Subsection (f) goes on to state:

> If the court finds that reasonable efforts for a child were not made in accordance with subsection (b) of this section or finds that reasonable efforts were made but that one of the conditions described in subsection (e) of this section exists, the court promptly shall send its written findings to:
>
> (1) The director of the local department;
>
> (2) The Social Services Administration;
>
> (3) The State Citizens Review Board for Children established under § 5-535 of the Family Law Article;
>
> (4) If applicable, the local citizens review panel established under § 5-539.2 of the Family Law Article; and
>
> (5) Any individual or agency identified by a local department or the court as responsible for monitoring the care and services provided to children in the legal custody or guardianship of the local department on a systemic basis.

2. These tasks included: obtaining updated medical examinations, helping India's sister to obtain furniture and clothing vouchers for her and assisting with the completion of documents to obtain various government benefits, such as Supplemental Security Income (SSI).

3. On February 17, 2012, after this appeal had been noted and India had turned 21, the juvenile court approved the master's September 21, 2011 order. India has noted a separate appeal of this order.

4. DDA refers to the Developmental Disabilities Administration, a branch of Maryland's Department of Health & Mental Hygiene that provides services to individuals with developmental disabilities.

5. Because the court made an express factual finding concerning India's progress and the Department's responsiveness to prior judicial directives, it is possible to read its order as addressing the merits in addition to making a mootness determination. *Cf Potomac Abatement v. Sanchez*, 424 Md. 701, 728 (2012), where the Court of Appeals affirmed a decision of this Court at the same time it dismissed the appeal as moot.

6. We "may decide a moot question where there is an imperative and manifest urgency to establish a rule of future conduct in matters of important public concern, which may frequently recur, and which, because of inherent time constraints, may not be able to be afforded complete appellate

review." *Attorney Gen. v. Anne Arundel County School Bus Contractors Assoc.,* 286 Md. 324, 328 (1979). There is no evidence this very narrow exception applies in India's case.

7 "Reasonable efforts" is an amorphous, factually dependant concept, which makes fashioning a remedy very difficult in the case of a violation. The Supreme Court, in analyzing a federal law with language requiring "reasonable efforts" on the part of state child welfare departments held, "[t]he term 'reasonable efforts' in this context is at least as plausibly read to impose only a rather generalized duty on the State." *Suter v. Artist M.*, 503 U.S. 347, 363 (1992). This led the Court to reject a right of private action to enforce the law because of the "broad limits" encompassed by the terms "reasonable efforts." *Id.* at 360.

8. Given this record and the findings of the master and the juvenile court, if we were to remand this case, the circuit court would undoubtedly again reject the exceptions, just as the court already has done in its post-appeal order of February 17, 2012. *See* n. 3, *supra*.

9. The parties are divided over whether the jurisdiction of the juvenile court automatically terminates when the child reaches 21 years old. Md. Code (1984, 2006 Repl. Vol.), Family Law Art. § 5-328 (a) provides, "[i]f a local department is a child's guardian under this subtitle, a juvenile court . . . may continue jurisdiction until the child attains 21 years of age." In our view, it is not necessary to resolve this question. If the statute does not provide continuing jurisdiction beyond the child's 21st birthday, this would bolster the Department's argument that India's appeal is now moot.

10. We are not unmindful of CJP §3-816.1(f), which requires a juvenile court to report to various oversight entities a finding that reasonable efforts "for a child" were not made by the Department. In light of the record in this ease, especially the findings of the master and juvenile court, this statutory requirement would not be triggered.

Cite as 7 MFLM Supp. 97 (2012)

Divorce: marital settlement agreement: competence and unconscionability

Lorena M. Walton

v.

David P. Walton

No. 134, September Term, 2011

Argued Before: Mereidth, Graeff, Hotten, JJ.

Opinion by Graeff, J.

Filed: May 24, 2012. Unreported.

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 of the Circuit Court for Cecil County declining to set aside a Marital Settlement Agreement between Lorena Walton, appellant, and David Walton, appellee. On appeal, Ms. Walton raises the following issue, which we have rephrased slightly:

> Did the trial court err in failing to set aside the parties' Marital Settlement Agreement on the grounds of incompetence, unconscionability, the existence of a confidential relationship, duress, undue influence, and/or fraud?
>
> For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on September 24, 1998. They have two children.

In August 2009, the parties executed a Marital Settlement Agreement (the "Agreement"). The Agreement provided that Mr. Walton would have "sole physical and legal custody" of the parties' children, and Ms. Walton would "have the right to reasonable visitation." It provided that neither party would receive alimony, and "there shall be no direct child support payments from either party to the other." Mr. Walton would pay Ms. Walton $40,000 for her interest in the marital home, Ms. Walton retained possession of a 2007 Nissan Versa, and Mr. Walton retained possession of a 2000 Toyota Tundra and a travel trailer. The parties waived their rights in each other's retirement assets.

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

On February 4, 2010, Ms. Walton filed a complaint to set aside the Agreement. She asserted that she had a "medical history of significant mental health issues," and a few days prior to the execution of the Agreement, she was "hospitalized after an attempted suicide." She contended that Mr. Walton told her that the Agreement was temporary, and he "pressured" her to sign the Agreement, "despite having knowledge of [her] mental state at that time." The complaint stated that Ms. Walton was not competent "to negotiate and execute" the Agreement on August 12, 2009, "as a result of her significant mental health issues and stress from surgery and a car accident just prior to the execution of the Agreement." She alleged that she was "unrepresented by counsel," she "was not able to fully comprehend the Marital Settlement Agreement," the Agreement was unconscionable, and the parties were in a confidential relationship.

On March 10, 2010, Mr. Walton filed a response to Ms. Walton's complaint. He asserted that the terms of the Agreement were not unconscionable, and Ms. Walton "freely and voluntarily" entered into the Agreement. He contended that Ms. Walton "failed to meet her burden of proof to show that the parties were in a Confidential Relationship."

On February 14, 2011, the circuit court held a hearing on Ms. Walton's complaint. Dr. John Mulvey, an expert in family practice and general medicine, testified that Mr. Walton and Ms. Walton were his patients. He had been treating Ms. Walton for bipolar disorder in 2009, but he was having difficulty treating her because she was not taking her medication. On August 8, 2009, Ms. Walton was admitted to Union Hospital after having taken "half a bottle of her husband's Serax."[1] Ms. Walton told the hospital staff that "she had not slept in

about a week and just wanted to sleep." She was admitted to the hospital and treated for Serax poisoning. The next day, a psychiatrist "saw her, felt that she had significant bipolar disorder, recommended Abilify to her, recommended a more prolonged hospital stay to work on the bipolar disorder, which the patient refused." Ms. Walton agreed to take Abilify and was discharged.

On August 17, 2009, Ms. Walton saw Dr. Mulvey and told him that she had not taken any medications or had any follow-up. She subsequently saw Dr. Mulvey in December and reported that she had started taking medication in October and she was doing better.

Dr. Mulvey gave his opinion of Ms. Walton's competence at the time she signed the Agreement. He stated that it was well documented that, at the time she signed the Agreement, she was not on any medications and had just attempted suicide.[2] He testified: "Her bipolar disorder, among other things, caused her to have significant paranoid ideations, specifically regarding her husband and her family." He opined that "she was probably not competent to sign [the Agreement] because the agreement specifically dealt with the separation between her and her husband," noting: "This is a woman who was very paranoid about her husband and I think would have done anything to get separated from him because of the disease." He stated that "her ability to look at this marital separation agreement was probably compromised" because of her delusions. Although "[s]he was competent outside that delusional system to made decisions, like I don't want to stay in the hospital, I want to go to the Philippines," he stated: "I don't know about signing this agreement."

Dr. Mulvey testified that Mr. Walton was aware of and disturbed by his wife's disorder, and he was concerned that she was paranoid, particularly about him and his family. Mr. Walton knew that she was not taking her medication, and he wanted to get her help. Mr. Walton told hospital staff about Ms. Walton's delusions when she was admitted to the hospital. He reported that his mother gave Ms. Walton a Bible as a gift, and Ms. Walton thought that her "mother-in-law was sending instructions through the Bible and trying to control her."

Dr. Mulvey explained his belief that Ms. Walton was not competent when she signed the Agreement:

> She had just had a suicide attempt. She was — it was recommended that medications be started; medications had not been started yet. The medications were specifically to treat a condition that was leading to delusions of paranoid thinking regarding her husband, regarding the person who was asking her to sign an agreement. Those delusions were not controlled at the time she signed an agreement that specifically released her from any connection to the husband that she had delusions about.

He testified that signing the Agreement was "a convenient way to rescue herself from her husband and get to the Philippines and get away from him."[3]

During cross-examination, Dr. Mulvey testified that he was not present when Ms. Walton signed the Agreement, and he did not see or talk to Ms. Walton on August 12, 2009. Therefore, he could state only that she "probably" was not competent at the time. He explained: "I have adequate knowledge to use the word probably. I couldn't go beyond the word probably because I did not see her that date. The timeline would suggest that her competency was certainly questionable."

Mr. Walton testified that he met Ms. Walton in South Korea while he was working at a United States military installation. The parties began living together in March or April 1998, were married September 24, 1998, and their first child was born November 26, 1998. They moved to the United States in 2000. Ms. Walton was unemployed from the time the parties were married until 2006. She was primarily responsible for raising the parties' children. Mr. Walton worked for Northrop Grumman Corporation. His income in 2009 was $87,153.48. Ms. Walton began working in 2006; her income in 2008 was $31,953.36, and in 2009, it was $l6,322.30.[4]

The parties signed the Agreement on August 12, 2009. At the time, they owned a house that was jointly titled and appraised at $250,000, with a mortgage balance of $160,000. Ms. Walton received $40,000 as compensation for her interest in the marital home. Mr. Walton had a 401K, the value of which was $57,000. In August 2009, Mr. Walton owned a 2000 Toyota Tundra truck, which was valued at approximately $4,000. Ms. Walton owned a 2007 Nissan Versa, which Ms. Walton wrecked in an accident the day before she signed the agreement. The Nissan Versa later was determined to be totaled by the insurance company. The insurance company paid the parties $12,386. Ms. Walton was in the Philippines when the check was issued. When she returned from the Philippines, Mr. Walton gave her $8,600 and an additional $3,500 in January.[5]

The Agreement stated that Ms. Walton would "have the right to reasonable visitation with the children." It did not, however, give a specific schedule, and the parties had not agreed on one. Mr. Walton testified that Ms. Walton first received the Agreement on July 24, 2009, and Ms. Walton participated in negotiating the terms of the agreement. He stated that the parties

agreed that he would withdraw from his 401K to pay for college for the children.

Mr. Walton testified about Ms. Walton's delusions, including her thoughts that he was being unfaithful. Ms. Walton did not want to have contact with Mr. Walton's family. Ms. Walton claimed that her hair was falling out because of shampoo from her mother-in-law. She would throw away things that Mr. Walton brought back from his mother's house because she thought they were tainted.

The days prior to signing the Agreement were eventful. On August 4, 2009, Ms. Walton had a tubal ligation. On August 7, 2009, she quit her job to move to the Philippines. On August 8, 2009, she was hospitalized following the overdose. On August 10, 2009, Mr. Walton called a neighbor, who was a police officer, to come to their house because she was throwing his things out of the window. On August 11, 2009, Ms. Walton caused a car accident that totaled the car.[6] On August 12, 2009, the parties signed the Agreement. After she signed the Agreement, Ms. Walton discovered that her rental car had been towed.

During cross-examination, Mr. Walton testified that he suspected that Ms. Walton had been unfaithful with a man named Bill. He explained that a man, who Ms. Walton claimed was just a friend, left inappropriate voice messages on her phone. In June 2009, Ms. Walton told him to get a separation agreement because she wanted to move in with Bill.

Patricia Spillane, a Human Resource Manager at Shorehaven, Inc., testified that her company hired Ms. Walton in 2006. As part of the hiring process, Ms. Walton passed a reading test without the assistance of an interpreter. Ms. Walton was rehired in September 2009, and she passed the test again. On December 1, 2009, Ms. Walton was terminated because she was found asleep at work.

Ms. Walton testified via an interpreter. She stated that Mr. Walton controlled the family's finances, and she quit her job because Mr. Walton did not want her to work. She believed that Mr. Walton was having an affair. Ms. Walton testified that Mr. Walton indicated he would like another child and that he could have his vasectomy reversed. In response, she had a tubal ligation because of the deteriorating state of their marriage. She testified that she took her husband's pills on August 8, 2009, because she "just wanted to sleep for awhile and rest" She explained that they were fighting all the time, and because she was angry and wanted him to leave the house, she threw his clothes outside. On cross-examination, Ms. Walton admitted telling Mr. Walton that he did not "have balls" and was a "momma's boy." She stated that when the parties would have a problem, Mr. Walton "would go around to his mother or his family, and he would not discuss it with me."

Ms. Walton testified that she saw the Agreement for the first time on August 12, 2009, and that she signed it because she was confused and did not have money. Mr. Walton told her the Agreement was only temporary, and she was "welcome to come back to the house."

She testified that she went to the Philippines to be treated by a healer. She was afraid to get treatment in the United States because Mr. Walton and his family told her that she needed to go to a psychiatric hospital. She saw a healer three times while she was in the Philippines. She also bought a house when she was in the Philippines.

Ms. Walton was not on medication for her bipolar disorder when she signed the Agreement. She testified that when she signed the Agreement she could not focus or understand anything. She was unaware of Mr. Walton's 401K or the amount of his income.

On March 1, 2011, the court issued a written opinion. The court found that Mr. Walton was "the more credible witness." It stated:

> In the present matter no evidence was presented showing that [Ms. Walton] was mentally incompetent as a result of her bi-polar at the time that the [Agreement] was executed. Nor does the evidence adduced lend itself to the interpretation that the nature of [Ms. Walton's] disorder was such as to render her permanently incompetent. Rather, the evidence shows [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.
>
> Plaintiff's medical expert testified that the nature of [Ms. Walton's] bipolar disorder is one of periodic paranoid delusions. Like the chronic alcoholic testator in *Hess v. Frazier*, the nature of [Ms. Walton's] condition is that it comes and goes. She has good days and bad days. Absent evidence showing that [Ms. Walton] was in the grip of a delusion that would render her incapable of understanding the terms of the [Agreement] at the time that she executed the agreement, this Court will not set aside the [Agreement] on the grounds of [Ms.

> Walton's] incompetence. No evidence having been adduced sufficient to convince the court by a preponderance of the evidence that such was the case, the court finds that [Ms. Walton] was mentally competent to enter into the [Agreement] at the time that the agreement was executed.

The court found that the terms of the Agreement were not unconscionable. The court stated:

> [Ms. Walton] received a $40,000 payout, that being the approximate value of her share of the equity the couple had built in the marital home. In order to make that payout, [Mr. Walton] had to borrow the money against the home-equity line-of-credit. [Ms. Walton] also received various items of personal marital property . . . . [Ms. Walton] waived her right to alimony. [Mr. Walton] received sole legal and physical custody of the couple's minor children with no child support obligation accruing to [Ms. Walton]. [Ms. Walton] waived her right to [Mr. Walton's] pension/retirement funds, with testimony at trial that this waiver was made in light of the parties' agreement to use the pension/retirement funds for the minor children's college education.
>
> These terms, on their face, do not shock the conscience of the court. The court finds 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 court also found that "no confidential relationship existed between the parties," finding that Ms. Walton sought a separation because she distrusted her husband. The court stated that "her testimony showed her fervent belief that [Mr. Walton] was working in direct contravention of her welfare." It explained:

> Certainly, [Mr. Walton] is a college graduate with greater earning capacity than [Ms. Walton], has greater business experience as a result of his employment and does not suffer from bi-polar disorder. It does not immediately follow, however, that [Ms. Walton] was wholly dependent on [Mr. Walton]. [Ms. Walton] held down her own job. She was savvy enough to make her car payments, manage her own checking account and purchase a parcel of real property in the Philippines. And, while [Ms. Walton] alleges that her difficulty with English made her dependent on [Mr. Walton], the court finds that the evidence of [Ms. Walton's] satisfactorily passing an English competency exam as a condition of employment and her enrollment as a student at Cecil College contradict this allegation.
>
> [Ms. Walton] presented a view of the marriage wherein she was so dominated by [Mr. Walton] that it amounted to subjugation. However, [Ms. Walton] testified that she routinely berated [Mr. Walton] for having "no balls" and for being able to stand up to people at work but being too weak to stand up to his own mother. The court finds that it would be extraordinarily odd for a wife who claims to be as dominated as she was by [Mr. Walton] to freely direct such emasculating invective at the purportedly dominant party.

Finally, the court found that Ms. Walton was not under duress when she signed the Agreement, stating that she "produced no evidence of threats or coercion" by Mr. Walton to force her to sign the Agreement. The court found her testimony, that Mr. Walton told her that the agreement was "only temporary," not credible.

The circuit court found that the Agreement was "legally valid, binding, and enforceable." Accordingly, it denied Ms. Walton's motion to set it aside.

DISCUSSION

Ms. Walton challenges the parties' Agreement on many fronts. First, she contends that she "suffered from a long-term untreated bipolar disorder that rendered her incompetent to comprehend and execute the parties' Marital Settlement Agreement on August 12, 2009." Second, she argues that the terms of the Agreement were "so one-sided in favor of [Mr. Walton] that the Agreement should be set aside as unconscionable." Third, she asserts that she signed the Agreement "because of the confidential relationship that existed between the parties." Finally, she contends that the Agreement "was obtained by duress, undue influence, and/or fraud as a result of [Ms. Walton's] untreated bipolar disorder, her belief in the need to get away from [Mr. Walton], her belief in the need to go [to] the Philippines for treatment, and [Mr. Walton's] state-

ment to [her] that the Agreement was only temporary."

Mr. Walton disagrees. He contends that the circuit court's decision that the Agreement "should not be set aside on grounds of incompetence, unconscionability, a confidential relationship, duress, undue influence or fraud should be affirmed."

Separation agreements generally are "'favored by the courts as a peaceful means of terminating marital strife and discord so long as they are not contrary to public policy."' *Gordon v. Gordon*, 342 Md. 294, 300-01 (1996) (quoting 5 WILLISTON ON CONTRACTS § 11:7 at 396-99 (4th ed. 1993)). *See also* Md. Code (2011 Supp.) § 8-101(a) of the Family Law Article ("A husband and wife may make a valid and enforceable deed or agreement that relates to alimony, support, property rights, or personal rights."). A separation agreement is a contract and "is subject to the same general rules governing other contracts." *Rauch v. McCall*, 134 Md. App. 624, 637 (2000), *cert. denied*, 362 Md. 625 (2001).

"[S]eparation agreements not disclosing on their face any injustice and inequity are presumptively valid and the burden to prove that their execution was caused by coercion, fraud or mistake is upon the party making the allegation." *Jackson v. Jackson*, 14 Md. App. 263, 269 (1972) (emphasis omitted). An appellate court may set aside a trial court's decision that a settlement agreement is enforceable only if the trial court was clearly erroneous. *Blum v. Blum*, 59 Md. App. 584, 597 (1984). *Accord* Md. Rule 8-131(c) ("When an action has been tried without a jury, the appellate court . . . will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.").

A.
Incompetence

Ms. Walton first contends that the settlement agreement is unenforceable because, when she signed the agreement, she was incompetent due to a "long-term untreated bipolar disorder." She asserts that "the chain of events leading up to the date of the execution of the Marital Settlement Agreement clearly evidence that [she] was under a lot of stress on and around August 12, 2009, causing significant manifestations of disorientation and paranoia."

Mr. Walton contends that the circuit court properly found that Ms. Walton was not incompetent to execute the agreement. He asserts that Ms. Walton failed to prove that she was mentally incapable on the date the Agreement was executed. Although acknowledging that "the facts show that the days surrounding execution of the Agreement were abnormal," he asserts that "these events can be explained quite reasonably."[7]

The Court of Appeals has explained:

> Ordinarily, "the law presumes every [person] to be capable of making a valid deed or contract." *Williams v. Moran*, 248 Md. 279, 285, 236 A.2d 274, 278 (1967) (quoting *Williams v Robinson*, 183 Md. 117, 121, 36 A.2d 547, 549 (1944)). When a party attacks the validity of a contract as invalid 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).

In determining competence, a court looks to whether the person "is of sound and disposing mind and capable of executing a valid deed or contract. It is not required that he possess the qualities of sound and disposing mind in the highest degree." *Marmaduke v. Dyer*, 208 Md. 525, 535 (1956). "Occasional incidents of unusual conduct are not enough to prove mental incapacity at the time the paper is signed." *Id*.

That Ms. Walton was experiencing mental distress at the time of the separation 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 that there was no evidence that Ms. Walton was permanently incompetent. It explained that 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."

The court found further that Ms. Walton failed to meet her burden to convince the court that she was incompetent at the time she signed the Agreement. To be sure, the court acknowledged that Ms. Walton had "good days and bad days."[8] Nevertheless, it concluded: "Absent evidence showing that [Ms. Walton] was in the grip of a delusion that would render her incapable of understanding the terms of the [Agreement] at the time that she executed the agreement, this Court will not set aside the [Agreement] on the grounds of [Ms. Walton's] incompetence."

Ms. Walton had the burden to prove that she was incompetent at the time she signed the contract, and she failed to persuade the circuit court in this regard As this Court has stated: "[I]t 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, 531(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 that the terms of the Agreement were "so one-sided in favor of [Mr. Walton] that the Agreement should be set aside as unconscionable." In support, she asserts that Mr. Walton "earned more than fives times" what she did in 2009, yet she waived all alimony, and "the division of assets between the parties was completely unfair and inequitable." She also states that the Agreement leaves her "no rights to her children but mere limited visitation as determined by" Mr. Walton, noting that it "granted sole legal and physical custody of the children to [Mr. Walton]," despite that she was "the children's primary caregiver for [ ] most of their lives." She asserts that "there was no negotiation in the creation of the parties" Agreement.

Mr. Walton contends that the Agreement was not unconscionable because Ms. Walton "was provided with half of the equity in the marital home, a 2007 Nissan Versa, and household furnishings." He further asserts that 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.

Maryland courts can "void a separation agreement when its terms are so unjust and unfair as to be unconscionable." *Williams*, 306 Md. 332, 342 (1986). The Court of Appeals has explained that "a basic aspect of unconscionability is that it must 'shock the conscience' of the court when it considers the terms and results at the time the contract is entered." Cannon, 384 Md. at 580. "Although the question of whether a contract is unconscionable is a question of law and subject to *de novo* review, the factual findings of the trial court that inform its judgment are subject to the clearly erroneous standard." *Doyle v. Fin. Am., LLC*, 173 Md. App. 370, 391 (2007).

Ms. Walton cites to three cases in support of her argument that the Agreement was unconscionable: *Williams*, 306 Md. at 332; *Cronin v. Hebditch*, 195 Md. 607 (1950); and *Eaton v. Eaton*, 34 Md. App. 157 (1976). In each of these three cases, however, separation agreements were found to be inequitable where one spouse received less than 2% of the parties' total assets. *See Williams*, 306 Md. at 334 (wife was to receive property valued at approximately $ 131,000, the husband retained property valued at about $ 1,100); *Cronin*, 195 Md. at 612, 615, 620 (wife released her rights in property worth more than $700,000 for $10,000); *Eaton*, 34 Md. App. at 160-61 (wife relinquished her claim to $250,000 worth of property for $4,300).

Here, by contrast, the terms of the Agreement were not similarly egregious. The circuit court found that Ms. Walton received a $40,000 payout, which was approximately half of the equity the couple had built 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 under the Agreement. Although Ms. Walton waived her right to Mr. Walton's retirement funds, the court was persuaded by the testimony that this waiver was made in light of the parties' agreement to use the pension/retirement funds for the minor children's college education.

The court ultimately concluded that the terms of the Agreement did not "shock the conscience of the court," 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 court's finding in this regard was not error.

C.
Confidential Relationship

Ms. Walton's next contention is that she signed the Agreement "because of the confidential relationship that existed between the parties." In support of this argument, she asserts that Mr. Walton controlled her throughout the marriage.

Mr. Walton contends that a confidential relationship did not exist between the parties. He asserts that Ms. Walton is "intelligent, maintained employment, attended college courses, [and] maintained a personal bank account and car loan."

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, 356 (2009). Maryland law does not presume the existence of a confidential relationship in transactions between husband and wife. *Lasater v. Guttmann*, 194 Md. App. 431, 457 (2010), *cert. denied*, 417 Md. 502 (2011); *Bell v. Bell*, 38 Md. App. 10, 13-14 (1977).

The existence of a confidential relationship is a question of fact. *Cannon*, 384 Md. at 571. "Among the

various factors to be considered in determining whether a confidential relationship exists are the age, mental condition, education, business experience, state of health, and degree of dependence of the spouse in question." *Bell*, 38 Md. App. at 14.

In *Bell*, this Court considered a relationship where the wife was born in Europe, left school at fifteen years old, was employed as a beautician, and had "relatively little experience or expertise in business matters." *Id*. The husband, conversely, was an experienced businessman with a real estate license and a college degree. *Id*. Despite this disparity, this Court affirmed the circuit court's 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." *Id*.

Similarly, here, the court noted that Ms. Walton asked for a separation agreement because she distrusted her husband. The court stated that "her testimony showed her fervent belief that [Mr. Walton] was working in direct contravention of her welfare." It further stated that, 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 that "it would be extraordinarily odd for a wife who claims to be as dominated as she was by [Mr. Walton] to freely direct such emasculating invective at the purportedly dominant party." The court's finding that no confidential relationship existed 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. Mr. Walton asserts that the circuit court properly found that the Agreement was not executed under duress, undue influence, or fraud.

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-Alt., Inc.*, 378 Md. 139, 164(2003) (quoting *Food Fair Stores, Inc. v. Joy*, 283 Md. 205, 217 (1978)). A finding of duress is subject to a clearly erroneous standard. *Bell*, 38 Md. App. at 18.

In support of her claim, Ms. Walton cites *Eckstein v Eckstein*, 38 Md. App. 506 (1978). In *Eckstein*, this Court found duress where a wife left the marital home in the parties' jointly owned van "with only the clothes on her back. She had no funds and the husband promptly closed the couple's joint bank account." *Id.* at 508. "The husband refused the wife's request to visit or communicate with her children and refused to give her her clothing. He told her that she could see her children and take her clothes only if she signed a separation agreement." *Id*. at 508-09. 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 that 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.

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

FOOTNOTES

1. Dr. Mulvey testified that Serax is a sedative, similar to Valium.

2. When asked on cross-examination about the suicide attempt, he testified: "I said she had an overdose. Actually when I asked her about — and I did use that term, you're correct. When I asked her in my office visit, office note, the next time I saw her, do you want to end your life. She was very noncommittal about that." He explained that when asked whether it was a suicide attempt, "she didn't say no. She also didn't say yes. She hedged and really wouldn't give me an answer." When she was admitted to the hospital, she told the hospital staff that she "just wanted to sleep."

3. Dr. Mulvey additionally discussed characteristics of a person who is "manic," explaining that such a person has "very great difficulty with proper judgment." He never testified, however, that Ms. Walton was manic at the time she signed the Agreement.

4. Ms. Walton testified that she worked "a lot of overtime" in 2008.

5. He testified that he initially "used $3,500 to pay for the credit card bill that she ran up in June." He subsequently paid her $3,500 because he was concerned about her, stating that

she told him she was out of money and had been fired.

6. Mr. Walton testified that Ms. Walton has had four major accidents since 2006.

7. Mr. Walton notes that Ms. Walton testified that she took her husband 'pills because she wanted to "rest" and that she was not attempting suicide. With respect to the tubal ligation, she testified that she obtained the surgery because she was concerned that her husband would have his vasectomy reversed. Also, Mr. Walton testified that he suspected that she was having an affair. As to the car accident the day before she signed the Agreement, there was testimony that she previously had been in four major car accidents. With respect to Ms. Walton's assertion that she could not find her car after signing the agreement, Mr. Walton notes that the trial court found that she could not find it because it had been towed, not because of a "blackout."

8. Distress accompanying marital separation does not render a person incompetent. *See Goza v. Goza*, 470 So. 2d 1262, 1264 (Ala. Civ. App. 1985) ("Mere emotional instability or depression is insufficient" to "overcome a presumption ofsanity."); *DiPietro v. DiPietro*, 460 N.E.2d 657, 664 (Ohio Ct. App. 1983) ("A state of depression is not equivalent to mental incompetency."); *Drewry v. Drewry*, 383 S.E.2d 12, 16 (Va. CL App. 1989) ("Severe mental depression does not of itself render a person legally incompetent. If such were the case few separation agreements would be beyond challenge.").

Cite as 7 MFLM Supp. 105 (2012)

CINA: modification of permanency plan: concurrent plan of guardianship with a relative

In Re: Trevonte B.

No. 1957, September Term, 2011

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

Opinion by Kehoe, J.

Filed: June 1, 2012. Unreported.

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.,[1] appeal an order of the Circuit Court for Prince George's County, entered after a review hearing, changing Trevonte's original Child In Need of Assistance ("CINA") permanency plan from one calling for 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.

Our review of the briefs and the record disclosed neither error nor abuse of discretion on the juvenile court's part. We will affirm the court's decision.

FACTUAL BACKGROUND

Trevonte B., born January 7, 2004, was initially determined to be a Child in Need of Assistance ("CINA") on April 21, 2009, and was placed in the care and custody of his mother, Sherrell B[2], subject to an order of protective supervision ("OPS"). The Department's involvement began upon receiving a referral from the Charles County Department of Human Resources, based on a report of neglect resulting from a police raid of their home while Trevonte was present and Sherrell was arrested for drugs. Trevonte was determined to be a CINA pursuant to Md. Code Ann. Cts. & Jud. Proc. § 3-819 based on the fact that his mother beat him with a belt almost daily, and on or about February 16, 2009, the belt buckle hit him in the mouth, causing his lip to bleed. If family members tried to stop Sherrell from beating her son, she would assault them, and one time attacked her sister with a knife. When a third party beat Trevonte while visiting, despite her knowledge of the beating, Sherrell failed to stop the abuse.

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The court initially determined that it was not contrary to Trevonte's welfare to remain with his mother. At that time they were residing with Yvette B., the child's maternal grandmother, and Sherrell indicated her willingness to enter drug treatment and to comply with the Department's recommendations. On April 29, 2009, the court ordered the permanency plan to be one of reunification, cautioning that the plan could be changed to another permanency plan if the parent failed to make significant progress to remedy the circumstances or was "unable to give the child proper care and attention within a reasonable period of time."

On June 2, 2009, the court approved the Department's decision to remove Trevonte from his mother's care, after the child walked a half-mile to school by himself, crossing two major roads to do so The court ordered Trevonte to be placed in the temporary care and custody of the Department, subject to visitation with his mother. The Department was ordered to provide and make referrals for several services, including individual and family therapy, a psychological evaluation for mother, substance abuse treatment, housing assistance, and parenting skills classes.

On October 6, 2009, the court issued an initial permanency planning hearing order. The court found that Sherrell was making progress toward reunification, which the court reaffirmed in orders entered on February 18, 2010, and July 15, 2010. Between the October and February hearing dates, Trevonte was returned to his grandmother Yvette's house. Over these months, Sherrell successfully participated in several court-ordered services, continued visitation with Trevonte, and was able to obtain a one-bedroom apartment. The Department recommended that he be placed back in her care and custody on June 28, 2010, which was approved by the court on July 15, 2010.

On July 17, 2010, less than a month after the child was returned to her custody, Sherrell was involved in a domestic altercation at her residence for which she was arrested and incarcerated until August 5, 2010. Sherrell was convicted of second degree assault and sentenced to supervised probation. On the night of the altercation, with Sherrell's approval, Trevonte's grandmother, Yvette, came to pick up the child. Yvette, who also serves as a Prince George's County foster parent, sought financial assistance in order to maintain Trevonte in her home. The Department filed a motion authorizing removal and new placement, which was granted by the court on July 26, 2010. On August 17, 2010, the court found that returning Trevonte to his mother's care would be contrary to his welfare for several reasons, including the assault and her lack of housing. The court found that "[p]hysical placement with the grandmother remains appropriate until placement with the mother is made." The Department was ordered to continue to work toward reunification by providing services and making referrals for both Sherrell and Trevonte.

Thereafter, Sherrell returned to live at her mother's home, but the dynamic between them was not good, and they clashed on parenting styles for Trevonte. Outbursts by Sherrell were reported regarding Trevonte, who witnessed them, and at one point she became so enraged that the police were called to intervene. The foster care manager assigned to Trevonte stated that he was "torn between wanting to be with his mother and wanting the structure and security that his grandmother's home provides for him." The Department continued to provide her with housing and employment resources to assist her with working toward the goal of reunification.

After a permanency plan review hearing on December 13, 2010, the master found that the Department's efforts were reasonable because they "focused on ensuring that Trevonte's educational, medical, therapeutic, and daily needs were met and that the mother was offered services and support needed to help effectuate reunification." In his grandmother's care, Trevonte continued to do well and was "in the least restrictive and most appropriate placement possible." Although Sherrell had made some progress by working with the Department and by visiting Trevonte, the master also found that she was "demonstrating behaviors similar to those that brought [the child] into care," so there was ongoing concern regarding her ability to provide a stable setting for him. All parties agreed that reunification should continue to be the recommended permanency plan.

Yvette, who ensured that Trevonte continued individual therapy and medical treatment for behavior disorders, moved to a new residence in February 2011, which was reported to be a positive change for Trevonte. Sherrell's visits were not consistently scheduled, but random and unscheduled. If she failed to visit when he hoped, his disappointment would lead to behavior problems. His therapist reported that he expressed a great desire to be with his mother, but enjoyed living with his grandmother.

A permanency planning review hearing before a master took place on May 3, 2011. Sherrell was staying with her mother, at that time, so she was also with Trevonte. She had obtained employment at a restaurant, working evenings and getting home late at night. The income was not sufficient to qualify her for an apartment of her own, although the Department was assisting her with obtaining one. Sherrell's substance abuse screening was completed, reporting no drugs, but Sherrell had difficulty attending scheduled counseling sessions, only attending one of three. The master concluded that the permanency plan should be changed to a concurrent one of custody and guardianship with a relative and reunification.

Based on exceptions filed by Sherrell, the court held a *de novo* permanency planning review hearing on July 28, 2011. The Department's recommended permanency plan for Trevonte was a concurrent plan of reunification with his mother and custody and guardianship with his maternal grandmother. Counsel for Sherrell expressed that she did not "have a problem with her mother continuing to care for him[, but] just feels that she has made sufficient progress on the plan of reunification" so that it should remain the exclusive plan.

At the time of the hearing, Sherrell had recently moved into a room in Clinton, Maryland, but the Department had been unable to assess its suitability for Trevonte. She apparently was no longer working in the restaurant, but was working privately as a hair stylist. Counsel for the Department, in support of the argument that the change in permanency plan was proper, stated that "[a]s we are looking for the best interest of Trevonte, that is the most appropriate plan." While making some progress as to substance abuse, she had not made the desired progress in therapy, having often missed appointments, and the Department had not received certification that she had completed anger management.

During the permanency review hearing, the court stated:

> [I]t is clear that this case has been open for two-and-one-half years which is way too long for us to still be playing with reunification as the sole permanency plan. The law and timeliness standards just do not allow us to keep

> it [in] that limbo state for this length of time.
>
> * * * *
>
> For two-and-one-half years the Department has been working with [Sherrell] to try to achieve reunification. They have attempted twice, and it's failed twice. To leave Trevonte in limbo any longer is just unfair.

The trial judge expressed her preference to "change the permanency plan immediately" to a sole plan of custody and guardianship to Yvette, "which would entitle her as guardian to let Trevonte live with his mother whenever [Yvette] thought it was appropriate without having to come back to court." However, the trial judge offered the following choice to Sherrell and Trevonte: "either it's a concurrent planning or it's my new plan, and we eliminate reunification all together."

> [COURT]: So, now. Would you prefer to sustain the findings and the proposed order of the Master? Or, do you want me to do it de novo and issue my own ruling?
>
> [Trevonte Atty]: From Trevonte's position, since he wanted a sole plan of reunification, he would be content with maintaining a concurrent plan when faced with those two options, and allowing reunification to remain.
>
> [COURT]: Mr. Wardlaw . . . I'm assuming you would prefer that reunification remain as one of the permanency plans, rather than eliminate it?
>
> [Sherrell Atty]: Absolutely, Your Honor.
>
> [COURT]: All right, then, I'm going to affirm the findings of the Master and it will continue as a concurrent plan, and I'll remand this to the Master for the hearing, as scheduled in October. All right?
>
> [Trevonte Atty]: Thank you, Your Honor.
>
> [Department. Atty]: Thank you.

The court issued a written order implementing this decision on October 3, 2011.

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[.]" Md. 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)(1)(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 S.*, 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.

Pursuant to Md. Code Ann., Fam. Law § 5-525 (f)(1), the best interests of the child shall be given primary consideration in determining a permanency plan for a child. Factors to be considered include:

> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;
>
> (v) the potential emotional, developmental, and educational harm to the

> child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

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, whether it is reunification, relative placement, adoption, or any other 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) (Where the Department failed to provide parent with reasonable efforts toward reunification, the lower court erred by changing child's permanency plan from reunification to relative placement). 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 his 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 child, 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 Court's analysis. In *Karl H.*, the juvenile court ordered that the permanency plan be modified from reunification with parents to a concurrent plan of adoption and reunification. *Id.* at 409. In the same order, the juvenile court directed the Department to file a petition for termination of parental rights within thirty days of the date of the order modifying the permanency plan. *Id*. In explaining why such an approach was inappropriate, the Court stated (emphasis added):

> The problem with concurrent permanency plans that are diametrically inconsistent is that they give DSS (and the parents) no real guidance and can lead to arbitrary decision-making on the part of DSS. If the court approves a permanency plan that calls for reunification or family placement, that should be the paramount goal. It should not share the spotlight with a completely inconsistent court-approved goal of terminating parental rights, *especially when the inconsistent plan calls for a TPR petition to be filed before the next scheduled court review of the permanency plan.* The objective of contingency planning can be achieved without a Janus-type order.

Id. at 422.

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.*

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

FOOTNOTES

1. Trevonte's father, Dedrick K., never attended any of his son's juvenile court proceedings.

2. To avoid confusion, given that both mother and grandmother are "Ms. B.," first names shall be used herein.

Cite as 7 MFLM Supp. 109 (2012)

Divorce: separation agreement: motion to vacate

David A. Rothwell
v.
Andrea C. Straw

No. 1652, September Term, 2011

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

Opinion by Wright, J.

Filed: June 7, 2012. Unreported.

The circuit court did not err in denying a motion to vacate a consent order that was consistent with the terms of a 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.

Appellant, David Rothwell, appeals from an order of the Circuit Court for Dorchester County, issued on September 16, 2011, dismissing his motion to vacate a consent order. The consent order at issue, filed on August 26, 2011, adopted the terms of a marital separation agreement ("Agreement") between the two parties, Rothwell and appellee, Andrea Straw, which was introduced into the record at a merits hearing on August 3, 2011. On appeal, Rothwell asks us to determine whether the court erred in dismissing his motion to vacate the consent order.[1] For the reasons that follow, we affirm the court's decision.[2]

Facts

Rothwell and Straw were married on October 3, 2003, and had one child, Nicholas. On January 18, 2011, Straw filed a complaint for limited divorce, and on February 8, 2011, 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, having "narrowed it down to two issues." The Master delayed the start of the hearing, stating "it's 10 after, I'll give it until 10:30 and this is absolute . . . 10:30 we are either calling a witness or doing opening[.]" 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 with respect to all aspects of this agreement, 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: Well, an agreement is an agreement, not [sic] I can accept that something horrible is happening to me but we're here for an agreement. So 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

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we're going to start calling witnesses, 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.

* * *

MASTER KETTERMAN: And then I had a no afterwards. 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 that [Ms. Jennings or Ms. Trader] have stated that you do not agree to?

MR. ROTHWELL: No.

MASTER KETTERMAN: Okay. Do you have any questions about this agreement or where things will 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.

After the merits hearing, Jannace prepared the consent order in accordance with the Agreement's terms. On August 24, 2011, the Master held a status hearing. Two versions of the consent order were submitted to the parties. Straw approved the order that matched the terms of the Agreement. Rothwell did not approve either order. On August 26, 2011, upon the Master's report and recommendation, 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 [c]oercion, [c]ollusion, and failure to represent or negotiate in the best interest of the defendant and the minor child." The court dismissed Rothwell's motion on September 16, 2011. This timely appeal followed.

Discussion

Pursuant to Maryland Rule 2-612, "[t]he court may enter a judgment at any time by consent of the parties." Prior cases have made clear that generally no appeal lies from a consent judgment. *Globe Am. Cas. Co. v. Chung*, 322 Md. 713, 716-17 (1991); *Chernick v. Chernick*, 327 Md. 470, 477 n.1 (1992); *Barnes v. Barnes*, 181 Md. App. 390, 411 (2008). A party, however, 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]

While 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 ensured the Master that there was nothing within the Agreement to which he did not consent and proceeded to affirmatively state his consent. Rothwell also stated that 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. Further, the consent order was consistent with the terms of the Agreement and was 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 of the circuit court dismissing his motion to vacate the consent order.

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

FOONOTES

1. In his brief, Rothwell, who has filed his appeal pro se, presented the following issues:

> 1) Testimony on the events of January 20, 2011 was inadmissible as it was resultant [sic] of an illegally executed Emergency

> Psychological Evaluation.
>
> 2) The Circuit Court erred when it denied the Appellant[']s Motion to Vacate a Consent Order of its own creation that the Appellant did not sign and did not agree to.

2. The appellee has filed a motion to strike documents, transcripts, pleadings, and miscellaneous correspondence that are not part of the record extract as defined in Maryland Rule 8-413. The motion is granted.

3. In *Barnes*, 181 Md. App. at 418, we observed that Maryland follows the "English practice" of dismissing an appeal from a consent order where the consent order is found to be properly entered. The *Barnes* Court noted that Maryland does recognize an exception to this rule:

> "The rule is otherwise if there was no actual consent. If there was no actual consent because the judgment was coerced, exceeded the scope of consent, or was not within the jurisdiction of the court, or for any reason consent was not effective, an appeal will be entertained."

Id. at 411 (quoting *Sister v. Stuckey*, 402 Md. 211, 224 n.10 (2007)) (emphasis omitted). This exception, however, is narrow in its scope: "Unless the record contains . . evidence [supporting appellant's contention] (which is most unlikely in any case) we may not go beyond it for additional facts." *Id*. at 419 (quoting *Casson v. Joyce*, 28 Md. App. 634, 638 (1975)) (emphasis omitted). Where the record does not indicate an absence of actual consent, Maryland dismisses all appeals from consent orders, pursuant to the aforementioned "English practice," because of the following considerations:

> "The English practice followed in Maryland seems more straightforward, founded on better reason and less drastic. If coupled with the requirement . . . that the attack be made below . . . it would seem preferable to hold there is no appeal rather than permitting appeal without considering the merits. This remedy permits judicial review of the [appellant's contention] when that question is raised propitiously below."

Id. at 4 19-20 (quoting *Casson*, 28 Md. App. at 638-39).

NO TEXT

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