MARYLAND Family Law Monthly
THE DAILY RECORD

SUPPLEMENT
August 2012

INDEX
COURT OF SPECIAL APPEALS

Reported opinion

Unreported opinions

(Continued on page 2)

INDEX (CONTINUED)

COURT OF SPECIAL APPEALS

Unreported opinions

Cite as 8 MFLM Supp. 3 (2012)

Custody: modification: admissibility of psychological report

Victoria Gillespie

v.

David Gillespie

No. 960 and 2153, September Term, 2011

Argued Before: Kehoe, Berger, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Berger, J.

Filed: June 29, 2012. Reported.

The extreme worsening of symptoms of a parent's pre-existing mental illness constituted a material change of circumstances that supported a modification of custody; and, in making that decision, the court was entitled to admit into evidence a psychological report that contained otherwise inadmissible hearsay in order to evaluate the opinion of an expert witness who had relied on the report.

This case arises from an Order of the Circuit Court for Frederick County modifying custody of the children of the parties. On August 24, 2009, Victoria Gillespie ("Mother") and David Gillespie ("Father") signed a voluntary separation and property settlement agreement, agreeing to joint physical and legal custody of their three minor children.[1] The separation agreement provided that the children were to alternate weeks between Mother and Father, spending fifty percent of their time with each parent. A hearing was held on September 11, 2009, and the parties were granted an absolute divorce on October 5, 2009, incorporating the terms of the separation agreement.

On June 9, 2010, Father filed a motion to modify custody. The custody modification trial took place on April 19, 20, and 22, 2011. The circuit court rendered its opinion from the bench at the conclusion of trial and subsequently issued a written order on May 5, 2011. The order modified the physical access of the children, granting significantly more access to Father than Mother. The court also modified legal custody granting Father tie-breaking authority in the event of an impasse. Mother filed motions to alter and amend and for a new trial, which the circuit court denied on June 13, 2011. This timely appeal followed.

Father filed an appeal from the circuit court's orders requiring him to pay outstanding fees owed to the court appointed evaluator, Rebecca L. Snyder, Psy.D ("Dr. Snyder"), and the children's best interest attorney, Richard M. Winters ("Winters").[2] This Court elected to treat Father's appeal as a cross-appeal.

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.

On appeal, Mother presents two issues for our review, which we have rephrased as follows:

I. Whether the circuit court erred in admitting the report of R. Allen Lish, Psy.D ("Lish Report").

II. Whether the circuit court erred in modifying custody of Mother and Father's three minor children.

Father presents one issue for our review, which we have rephrased as follows:

I. Whether the circuit court erred in ordering Father to pay the balance due to the best interest attorney and the court appointed evaluator.

For the reasons set forth below, we affirm the judgment of the Circuit Court for Frederick County modifying custody. Because we conclude that the circuit court erred in ordering Father to pay the balance due to the best interest attorney and the court appointed evaluator, we vacate that order and remand for the limited purpose of determining the fees for the best interest attorney and court appointed evaluator in accordance with the statute.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother were married on August 28, 1993. They have three minor children: a son, age eleven, a daughter, age nine, and a daughter, age seven. The parties entered into a Voluntary Separation and Property Settlement Agreement ("Agreement") on August 24, 2009. At that time, the parties and the three children resided together at the marital home. The Agreement specified that the parties would separate on September 13, 2009, and the parties separated on September 12 and 13, 2009. The Agreement provided for joint legal and physical custody with the children alternating between the parents on a weekly basis. The Agreement also provided a holiday schedule for the children.

Mother and Father were divorced on October 5,

2009, following a hearing before a Family Law Master on September 11, 2009. The Agreement was incorporated but not merged into the Judgment for Divorce, and the court granted the parties joint legal and shared physical custody. Following the divorce hearing, during the weekend of September 12, 2009, Mother moved out of the marital home and initially moved into the home of her sister, Lisa Adkins ("Adkins"). Mother intended to remain at Adkins' home until the construction of her new home was completed. The parties initially followed the alternate week schedule, but there were soon deviations from the schedule. At various times throughout the fall of 2009, Mother asked Father to keep the children additional nights or delay drop-off or pick-up for various reasons, including Mother's work obligations and because Mother did not want the children to be around Adkins' boyfriend.

The parties agreed to temporarily postpone the alternating weeks schedule in February 2010 because Adkins' boyfriend was planning to move in and Mother did not want to expose the children to him. From February through April 2010, the children lived predominantly with Father. The children did not stay overnight with Mother at Adkins' home, but Mother spent time with the children regularly during the week and on weekends. At the end of April 2010, the parties agreed that the girls would resume alternate weeks while their son would continue to reside primarily with Father. Mother believed that the alternate weeks would resume for all three children once she moved into her own house.

Since the divorce, there has been increasing volatility in the relationship between Mother and the parties' son. Both parties agree that the son has been increasingly disrespectful to Mother since the divorce. One evening in February 2010, at approximately 11:20 p.m., Mother telephoned Father and told him to "get [the son]'s ass out of [her] house" and said that the son needed to stay with his father until he could act respectfully toward her. Mother claimed that she believed the son was sleeping when she made this statement, but she since learned that the son had heard her comments. Father testified that the son was extremely upset by his mother's statement and that the son felt that his mother did not want him in her home. Mother testified that she and the son have had difficulty getting along at times but that she has made efforts to improve her relationship with the son.

On May 25, 2010, Mother moved out of Adkins' home and into her new home but the alternating weeks schedule did not resume. The girls spent the week of May 28, 2010 with Mother pursuant to the separation agreement but the son did not. Father filed a motion to modify custody on June 9, 2010. The following alternate week, the week of June 11, 2010, the girls again came to Mother's home but the parties' son did not. Mother complained about Father's refusal to allow her access to the son. She called and emailed Father to remind him of his breach of the Agreement. The following alternate week, the week of June 25, 2010, the girls again came to Mother's home but the son remained with Father. At this point, Mother again notified Father that he was in breach of the Agreement and she filed a petition for contempt and show cause on June 25, 2010.[3]

All three children stayed with Mother for the entire week of July 9, 2010, and Mother testified that everything went well during that stay. All three children also spent the entire week with Mother during the weeks of July 23, 2010 and August 6, 2010. The son did not go to Mother's home for the week of August 20, 2010 and instead spent the week with Father and Mary Ann Grenis ("Grenis"), Father's girlfriend.[4] The following alternate week, September 3, 2010, all three children spent the week with Mother and Mother testified that the week went well. Throughout the fall of 2010, the son often did not spend time with Mother pursuant to the Agreement.

At the custody modification trial, the parties testified regarding various other events that occurred during the period between the parties' separation and divorce in the fall of 2009 and the custody modification trial in April 2011. On May 26, 2010, an altercation occurred between Mother and Grenis. Grenis had known the family for several years prior to Father and Mother's divorce. After the divorce, Father and Grenis began dating. On May 26, 2010, at a youth baseball game at the Mount Airy Youth Athletic Association ("MAYAA") baseball fields, Mother and Grenis had an argument relating to the time Grenis spent with the children. Mother struck Grenis in the face, and law enforcement personnel were called to the scene. Mother was charged with criminal assault and she ultimately pleaded guilty to second degree criminal assault. Mother was placed on unsupervised probation until January 2012. One of the conditions of probation was that she stay away from Grenis, but Grenis testified that Mother gave her "the finger" in view of the children in April 2011. Additionally, Mother was banned from the MAYAA baseball fields for one year.

Father further testified that Mother treats the son differently than the daughters and that Mother has made comments to the daughters such as, "[l]ook at [the son]. That is what a bad boy does." Father testified that in June 2010, Mother allowed the daughters to go on a beach vacation but did not allow the son, saying that he "didn't deserve to go." Both parties have admitted to giving "the finger" to each other in front of the children, and Father testified that on one occasion, Mother said, "fuck off, jackass" to him in the presence

of the children. Father acknowledged that he did not put Mother's name or contact information on the YMCA after school program emergency contact card but instead left the section for "mother" blank.

There was also an incident on October 31, 2010. Father and Mother had a disagreement in front of the children regarding Younger Daughter's Halloween costume. Father testified that the son made a statement to which Mother replied, "You got a bad attitude. [sic] You can't stay here and you know, you just, you can just go back with your dad." Father testified that the son then got into his car and when they drove away, the son was in tears. The son's psychologist, Dr. Elise Abromson ("Dr. Abromson"), also testified that the son was very upset by this incident and that, after this event, the son no longer thought his relationship with his mother could be resolved.

Since Mother and Father's divorce, the parties' son has been in therapy with Dr. Abromson, a clinical psychologist. The son began seeing Dr. Abromson in October 2009 and Dr. Abromson continued to see him up to the point of the custody modification trial. Initially, the treatment goals were to help the son cope with his parents' divorce. Dr. Abromson testified that, at first, the son was extremely sad about the divorce. Despite the divorce, in the fall of 2009, Father and Mother got along exceptionally well and were willing to work together and do whatever it took for the betterment of the children. Dr. Abromson testified that the parties now have much more tense interactions and significant difficulty communicating. Dr. Abromson testified that she believes the nature of the parents' relationship and their ability to communicate changed between October 2009 and the time of the custody modification trial in April 2011. Dr. Abromson further testified that she did not believe Father and Mother were able to effectively co-parent and that they would benefit from a parenting coordinator.

Dr. Abromson also testified at length regarding the parties' son's progress between 2009 and 2011. Dr. Abromson testified that the son was extremely upset when he heard his mother say that Father should "get [the son]'s ass out" of her house in February 2010. The son still regularly brought up the February 2010 incident in his interactions with Dr. Abromson, and in Dr. Abromson's opinion, the incident was still not fully resolved. Dr. Abromson testified that from spring 2010 through at least March 2011, the parties' son became less sad but increasingly frustrated and angry, and he often talked about the tension between his parents increasing. Dr. Abromson testified that the son felt out of control and that he viewed the litigation as a battle between the parents and that the son had allied himself with his father. Dr. Abromson had recommended to Father and Mother that the son needed some space from Mother in order to work on improving his relationship with her.

Sometime around September 2010, Dr. Abromson recommended that the parties' son gradually increase the time he spent with his mother, beginning with one night visits and then adding additional nights as he became more comfortable. At one point, Dr. Abromson believed the increased time was possibly moving too fast, but Mother wanted her son with her "fifty-fifty" and believed the schedule was working. Dr. Abromson testified that things between Mother and the parties' son were progressing well for a while in early fall 2010, but after the Halloween incident, the son no longer believed that the relationship could be improved.

Between November 2010 and the custody modification trial in April 2011, the parties' son spent more time with Father, but he also spent time with Mother. Dr. Abromson reported that the son's stress level increased during this period. In mid-March 2011, during a session with Dr. Abromson, the parties' son was "incredibly frustrated" and she had "never seem him that angry before." Dr. Abromson testified that the son's frustration then "moved over into just crying hysterically and saying that he felt that nobody cared about him" and that the son exhibited "a general sense of, of hopelessness." Dr. Abromson testified that this was the first time she had seen the parties' son cry since his first session when he was talking about the divorce. The son expressed to Dr. Abromson at that session that he did not want to go to Mother's house any more. Dr. Abromson testified that when she told Mother about the session, Mother reported that the son was doing well and she had not seen any of the emotions Dr. Abromson had seen during the session. Dr. Abromson testified that the son seemed happier and less stressed during the time he was staying exclusively at Father's home, and there was significantly more conflict when the son was staying with Mother. Additionally, although Dr. Abromson originally treated only the parties' son, she later began to see the parties' older daughter as well. The older daughter indicated that she did not like that her mother and brother were fighting frequently.

In addition to his motion to modify custody, on June 9, 2010, Father filed a motion for mental health evaluation of Mother, or, in the alternative, for family mental health and custody evaluation. Mother did not respond to the motion. Father filed a supplement to the motion on September 1, 2010, to which Mother filed a response on September 17, 2010. In his motion, Father had alleged that Mother had previously been diagnosed with bipolar disorder. In her response, Mother stated: "[Mother] has not been diagnosed with bi-polar disorder. As such, [Mother] does not know how

[Father] arrived at such a contention."

Instead of ordering a mental health evaluation, the circuit court appointed Mr. Richard Winters ("Winters") to serve as the children's best interest attorney on October 5, 2010. Winters filed a motion for psychological evaluation on March 1, 2011, and on March 18, 2011, the circuit court appointed Dr. Rebecca Snyder, Psy.D, ("Dr. Snyder") to prepare a psychological evaluation of each of the parties in order to measure "each party's personality strengths and weaknesses." The court ordered that Dr. Snyder have access to "all records, public or private, that bear upon the physical or mental health of either of the parties." Dr. Snyder did not complete a custody evaluation and she did not make any recommendations regarding custody and fitness of the parents. Dr. Snyder's report was admitted into evidence and she also testified at the custody modification trial.

The custody modification trial occurred on April 19, 20, and 22, 2011. The court heard from several witnesses, including Father, Mother, Grenis, Dr. Abromson, and Dr. Snyder, among others. Shortly before Dr. Snyder began her testimony on April 20, it came to the court's attention that she had just received the Lish Report. The Lish Report was prepared by Dr. R. Allen Lish ("Lish") pursuant to a voluntary evaluation in April 2009 and was entirely independent of any litigation. In that report, Dr. Lish diagnosed Mother with bipolar disorder.[5] Although Dr. Snyder was entitled to have access to all records, she did not receive the Lish report until immediately before trial. Mother had claimed that her current psychiatrist, Lisa R. Halpern, M.D. ("Dr. Halpern"), had the report, but when Winters subpoenaed Dr. Halpern's records, the Lish Report was not included. Personnel from Dr. Halpern's office indicated that they believed that they had returned the report to Mother, but she asserted that she did not have the report.

Additionally, Father had noted the deposition of Dr. Lish, and Dr. Lish was personally served on June 21, 2010. Mother was provided with notice of the deposition and did not object. When counsel for Father arrived for Dr. Lish's deposition on August 13, 2010, Dr. Lish did not appear. Counsel for Father later learned that Dr. Lish had moved to North Carolina the day before the scheduled deposition and had taken all of his records with him. Counsel for Father asserted that he called Dr. Lish on multiple occasions but his calls were never returned. Dr. Snyder was ultimately able to locate Dr. Lish in North Carolina and received a copy of the report on the first day of trial. The court concluded that Dr. Snyder should have been provided with the Lish Report and that it was appropriate for her to review it. Dr. Snyder also had not previously been provided with notes from Dr. Halpern in which Dr. Halpern discussed the Lish Report. The court allowed Dr. Snyder to consider the notes from Dr. Halpern as well.

After Dr. Snyder reviewed the Lish Report and accompanying notes from Dr. Halpern, Winters moved to have the Lish Report and Halpern notes admitted into evidence. Mother objected to the admission of the Lish Report, arguing that the Lish Report was prejudicial and had not been produced until the day of trial. Counsel for Mother argued that although these documents formed a foundation for Dr. Snyder's opinions, so did various other medical records that were not being admitted into evidence. The court noted that the Lish Report and Halpern notes were the only records Dr. Snyder reviewed after completing her report. The court stated, "[A]fter [Dr. Snyder's] report was done she then reviewed other records including Dr. Lish and Dr. Halpern's. Now they were the only two that Mr. Winter [sic] moved." The court further stated that these documents differed from other documents that informed Dr. Snyder's opinion because "the report was done and these opinions [the Lish report and the Halpern notes] came in after her report was completed." Thereafter, the court admitted the Lish Report and the Halpern notes into evidence.

At trial, Dr. Snyder testified regarding the strengths and weaknesses of both parents. Dr. Snyder testified that both parents were very loving and emotionally invested in the wellbeing of their children. Dr. Snyder testified that, during the marriage, the parties made considerable efforts to seek treatment for Mother's mental illness. Dr. Snyder also noted Mother's "minimization and a disowning of the significance of her mental health issues." Further, Dr. Snyder testified that Mother "really does have a personality style of preferring to minimize and not take sufficient ownership of her own role in problems in the family with her children and that . . . leads to trust issues and other concerns. . . ." Dr. Snyder testified that Father had involved the parties' son in the litigation, and although some knowledge of the litigation was inevitable, she thought that Father "at times failed to shelter [the son] sufficiently from [the litigation] and he needs work on being able to, to do that going forward."

Dr. Snyder testified that Father was typically not the initiating contributor to conflict, and that Father had "diligently tried for months . . . to continue to try to maintain the fifty-fifty access arrangement" and made "efforts toward having [the son] function within the agreement that the parties had reached." Rather, [Mother] was "more of the provocateur in conflict." Regarding Mother's strengths, Dr. Snyder testified that she is creative, warmhearted, and spontaneous. Dr. Snyder noted, however, that the children, and particularly the son, have had difficulty with Mother's unpre-

dictability and mood swings. When asked whether she believed Mother suffered from bipolar disorder or some form of personality disorder, Dr. Snyder stated that she was unable to conclusively make a diagnosis and that her evaluation was limited by Mother's "reticence to be forthcoming" during Dr. Snyder's evaluation. Dr. Snyder explained:

> I found support for the hypothesis that a mood issue, depression, and anxiety do impact [Mother's] ability to function. However the scope of what I did was not, I, I didn't feel I had the basis to make a diagnosis.
>
> * * *
>
> Particularly with [Mother's] reticence to be forthcoming. I'm troubled that I wasn't yet able to get from Dr. Halpern's office sufficient records to have a diagnosis that, that Dr. Halpern is using to treat [Mother].
>
> * * *
>
> I still don't have everything, Your Honor. I believe there have been at least a half dozen phone calls from my office to Dr. Halpern's office. In a way if, if there is indeed a mood, an Axis I, a biological component to [Mother's] issues, that's actually relatively easy to get medication for, to pursue cognitive behavioral therapy. We have evidence that there can be quite a, a great deal of success and [Mother] does report and it's reflected in Dr. Halpern's records that antidepressant medications have been helpful for [Mother] over the years. So that's actually an encouraging thing . . . I found traits of personality issues but I would not, you know, Dr. Lish diagnoses narcissistic personality disorder. I would not.
>
> * * *
>
> I don't find the severity that Dr. Lish did of the issues. I think his description of many of the behaviors and concerns are, are similar and very accurately descriptive . . . . I didn't reach the same level of conclusion and in fact, Your Honor, the parties both reported to me even before I had Dr. Lish's report in hand, [Father] as well as [Mother] felt Dr. Lish, Lish's assessment was too, too severe in its conclusions.
>
> * * *
>
> . . . Dr. Halpern's review of Dr. Lish's report . . . [discussed] its inaccurate and irrelevant erroneous assumptions. That was Dr. Halpern's assessment of Dr. Lish's report.

Dr. Snyder summarized her impressions, noting that both parties agreed that their conflict had "greatly impacted their kids." She emphasized that the parties "don't see solutions the same" and although the parents have similar goals for their children, they have very different parenting styles. Dr. Snyder testified that Mother would benefit from treatment by a therapist who was in communication with the children's therapist, and both parents would benefit from a parenting coordinator. She also testified that avoiding parent-to-parent contact would be beneficial, given that conflicts often occurred when the children were transferred.

After three days of trial, the circuit court issued its ruling from the bench on April 22, 2011. The circuit court set forth, in significant detail, the witnesses who had testified, the evidence it had considered, and the court's findings of fact and conclusions. The court concluded that there was a material change in circumstances, stating:

> But why I believe there has been a change in circumstances is that some things have happened that indicate there's extreme deterioration of any mental condition that [Mother] suffers from. She's well-educated, she acted as a vice president, [of a bank]. Now who ever heard of the vice president of [a bank] slapping someone in the face at a baseball game? Just so out of character. What it indicates was essentially there was no control. I'm not even sure she really thinks she was wrong in doing that.

Having found a material change in circumstances, the court then stated it would consider the best interests of the children, noting the court "needs to take in the factors in determining the custody of the child to include but not be limited to the fitness of the parents, character and reputation of the parties, desire of the natural parents and agreements between them, potentiality in maintaining natural family relations, the preference of the child, material opportunities affecting the future life of the child, age, health, and sex of the child, residence of parents and opportunities for visitation, length of separation from the natural parents and prior voluntary abandonment and surrender." The court then discussed the factors and ultimately modified physical custody by placing the children in the primary care and custody of Father.[6] The court maintained joint legal custody but provided that, in the event of an

impasse between the parties, Father would serve as the tie-breaker. The court issued its comprehensive ruling from the bench and subsequently issued a written order on May 5, 2011. Mother filed a motion for new trial and motion to alter or amend on May 16, 2011, which was denied on June 13, 2011. Mother noted her appeal on June 30, 2011.

On May 2, 2011, Winters filed petitions for fees for Dr. Snyder and for himself. Each party filed a response, and the circuit court granted Winters' petition, ordering Father to pay all of Dr. Snyder's and Winters' outstanding fees. Specifically, the court ordered Father to pay Dr. Snyder's fees in the amount of $3,669 and Winters' fees in the amount of $23,237.50. Father filed motions to reconsider, alter, or amend both orders requiring him to pay fees to Dr. Snyder and Winters, respectively, which were denied. On August 24, 2011, Father noted an appeal from the circuit court's denial of his motions with respect to the fees of Dr. Snyder and Mr. Winters. This Court elected to treat Father's appeal as a cross appeal.

DISCUSSION

I.

We first consider whether the circuit court erred in admitting the Lish Report into evidence and relying upon it in reaching its conclusions. Mother contends that the "Lish Report was the only evidence presented mentioning bi-polar disorder" and that the circuit court's opinion, which referred to Mother's bipolar disorder "clearly demonstrates that the [circuit court] considered the Lish Report for the truth of the matter asserted." For the reasons set forth below, we disagree.

A. Standard of Review

We generally review rulings on the admissibility of evidence applying an abuse of discretion standard. Bernadyn v. State, 390 Md. 1, 7-8 (2005). Whether evidence is hearsay is an issue of law, and therefore we review a hearsay determination *de novo. Id*. The circuit court may, at its discretion, admit inadmissible evidence relied upon by an expert for the limited purpose of evaluating the validity or probative value of an expert's opinion. *Brown v. Daniel Realty Co.*, 180 Md. App. 102, 118 (2008). Therefore, we apply an abuse of discretion standard when reviewing a circuit court's consideration of otherwise inadmissible evidence as the basis of an expert's opinion.

B. The Lish Report

It is well established that experts may rely upon inadmissible evidence in formulating their opinions. Md. Rules 5-703, 5-705. Moreover, evidence "that might not otherwise be admissible may, under Rule 5-703(b), be properly admitted if it is relied upon by an expert or is necessary to illuminate testimony." *Brown, supra*, 180 Md. App. at 118. Rule 5-703(b) provides:

> If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert . . . may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

Md. Rule 5-703(b). Therefore, the circuit court was permitted to admit the Lish Report because Dr. Snyder considered it in reaching her opinions and conclusions, even though the Lish Report contained otherwise inadmissible hearsay. The court was permitted to consider the Lish Report for the purpose of evaluating the validity and probative value of Dr. Snyder's opinion.

Mother argues that, because the circuit court considered her prior diagnosis of bipolar disorder, the circuit court must have impermissibly considered the Lish Report as substantive evidence rather than for the mere purpose of evaluating the validity and probative value of Dr. Snyder's opinion. Mother maintains that the Lish Report was the only evidence presented mentioning bipolar disorder. This Court disagrees. There were several other sources discussing Mother's previous bipolar diagnosis and mental illness other than the Lish Report. Therefore, the court was well within its discretion to consider Mother's bipolar diagnosis. When there is an independent source for a fact in admissible evidence, the court is not precluded from considering that fact simply because it is also found in a piece of otherwise inadmissible evidence considered by an expert. *See Hutton v. State*, 339 Md. 480, 513 (1995). In *Hutton*, the Court of Appeals stated:

> If trustworthy, but inadmissible, facts or data are relied upon by an expert in forming an opinion, the jury is instructed that the underlying facts are not substantive evidence. Md. R. Evid. 5- 703(b). That, however, is not a concern in the instant case. The jury saw and heard the victim, so that the historical basis for the diagnois was in evidence through a witness who had personal knowledge.

Id.

As in *Hutton*, Mother's diagnosis was in evidence through a source other than the Lish Report. Indeed, Mother testified that she had been previously diagnosed with bipolar disorder. Therefore, the circuit court

was entitled to consider Mother's bipolar diagnosis as substantive evidence. Mother herself testified, in response to questions by her own attorney, that she had been diagnosed as being bipolar. The following exchange occurred:

> [COUNSEL]: Have you ever been diagnosed as being bipolar?
>
> [MOTHER]: It's an interesting term. In Dr. Lish's report which was early 2009.
>
> [COUNSEL]: Has you, have you —
>
> [MOTHER]: Yes, I believe it was in that report.
>
> [COUNSEL]: Okay. Do you have issues regarding mood swings?
>
> [MOTHER]: Yes, I can have mood swings.

Accordingly, the court could have reasonably concluded that Mother had been diagnosed with bipolar disorder based upon her own testimony.[7]

The records of Dr. Halpern, Mother's treating psychiatrist, were also admitted into evidence. Dr. Halpern's records included a written intake form on which Mother had reported that she suffered from anxiety, obsessive thinking, and high highs and low lows. This evidence indicated to the court that Mother's mental health was a concern that should he considered in a custody evaluation. Because there were other sources of evidence regarding Mother's bipolar diagnosis and mental health, there is no indication that the circuit court improperly considered the Lish Report as substantive evidence.

Moreover, the circuit court, in rendering its opinion, explicitly stated, "I don't really know whether [Mother] is bipolar or not." The circuit court discussed, at length, the deterioration of Mother's mental condition since the signing of the Agreement, and indicated that the deterioration of Mother's condition may or may not be related to a bipolar diagnosis. We, therefore, disagree with Mother's contention that "the sole basis of the decision to modify custody was based on the Lish Report." Rather, the circuit court considered many factors in determining that Mother's mental health had deteriorated.

We do not find merit in Mother's argument that the circuit court impermissibly considered the Lish Report as substantive evidence because the circuit court, in issuing its ruling, stated, "I have considered. . . the psychological evaluation by Dr. Lish. . . ." The circuit court was permitted to consider the Lish Report to evaluate the validity of Dr. Snyder's opinion, and there is no indication that the circuit court considered the Lish Report as substantive evidence. The circuit court also properly considered Mother's own testimony, in which she admitted to having been diagnosed with bipolar disorder. Accordingly, we hold that the circuit court did not err in admitting the Lish Report and considering it as the basis of Dr. Snyder's opinion.

Additionally, we find that, assuming *arguendo* the circuit court erred in admitting the Lish Report into evidence as substantive evidence, the error was harmless. "It has long been the policy in this state that [appellate courts] will not reverse a lower court judgment if the error is harmless." *Barksdale v. Wilkowsky*, 419 Md. 649, 657 (2011) (internal citation and quotation omitted). "The burden is on the complaining party to show prejudice as well as error." *Flores v. Bell*, 398 Md. 27, 33 (2007). A verdict will not be overturned unless the error was likely to have affected the verdict below; and "an error that does not affect the outcome of the case is harmless error." *Id.* The complaining party must demonstrate that the prejudice was "likely" or "substantial." *Barksdale, supra*, 419 Md. at 662. "[T]he general rule is that a complainant who has proven error must show more than that prejudice was *possible*; she must show that it was probable." *Id.* (emphasis in original).

Here, even if the court erroneously considered the Lish Report as substantive evidence, such error was harmless. It is well established that "an error in evidence is harmless if identical evidence is properly admitted." *Barksdale, supra*, 419 Md. at 663. In the instant case, Mother testified that she had been diagnosed with bipolar disorder, and her testimony regarding her bipolar diagnosis was properly admitted as substantive evidence. Accordingly, Mother is unable to carry her burden of demonstrating prejudice.

II.

We next consider whether the circuit court improperly found a material change in circumstances to justify a modification of the custody order. For the reasons set forth below, we conclude that the circuit court did not err in modifying custody.

Courts must engage in a two-step process when presented with a request to change custody. We have described the two-step analysis as follows:

> First, the circuit court must assess whether there has been a "material" change in circumstance. *See Wagner v. Wagner*, 109 Md. App. 1, 28 (1996). If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody. *See id.*; *Braun v. Headley*, 131 Md. App. 588, 610 (2000).

McMahon v. Piazze, 162 Md. App. 588, 594 (2005);

Therefore, we first consider whether the trial court erred in finding that a material change in circumstances occurred. Second, we consider whether the court abused its discretion in modifying custody.

A. Standard of Review

This court reviews child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described the three interrelated standards as follows:

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

Id. at 586. In our review, we give "due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses." *Id.* at 584. We recognize that "it is within the sound discretion of the [trial court] to award custody according to the exigencies of each case, and . . . a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the [trial court] because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Id.* at 585-86.

B. Material Change of Circumstances

A material change of circumstances is a change in circumstances that affects the welfare of the child. *McMahon, supra*, 162 Md. App. at 594. The Court of Appeals has explained that although courts must engage in a two-step process in evaluating a petition to modify custody, the two-steps are often interrelated. The Court explained:

> [I]n the more frequent case . . . there will be some evidence of changes which have occurred since the earlier [custody] determination was made. Deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. Thus, the question of "changed circumstances" may infrequently be a threshold question, but is more often involved in the "best interest" determination, where the question of stability is but a factor, albeit an important factor, to be considered.

McCready v. McCready, 323 Md. 476, 482 (1991). "In [the custody modification] context, the term 'material' relates to a change that may affect the welfare of a child." *Wagner*, 109 Md. App. at 28 (1996). "The burden is then on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008).

In the instant case, we find that there was sufficient evidence to support a finding that a material change of circumstances had occurred. Mother argues that her mental illness was an issue that had been present throughout the parties' marriage, and therefore, the mental illness did not constitute a material change of circumstances. The circuit court, however, did not find that Mother's mental illness itself was a material change; rather, the court determined that the worsening of her symptoms was a material change. The court stated that there had been "an extreme deterioration" in Mother's symptoms. We find that there was sufficient evidence for the circuit court's conclusion that Mother's mental health had severely deteriorated and that the deterioration of Mother's mental health adversely affected the children.

The court set forth the evidence it considered before rendering its opinion, stating:

> Now in my decision, ladies and gentlemen, I have considered the testimony of Amanda Franks, (unclear), Dr. Rebecca Snyder, Dr. Elise Abromson, the psychological evaluation by Dr. Lish, the treatment notes of Dr. Halpern; witnesses, Mary Anne Grenice (phonetic), Amanda Franks, Drew Tracy, Lisa Adkins. There were three stipulation witnesses, Luther Reynolds, Ron Romig, Lisa Lepore, and then Sergeant Pickert [sic] I believe was our last witness before [Mother] went on the stand.
>
> Now I have for the last three days had the opportunity of observing

> both the Plaintiff and the Defendant and I've had the opportunity of seeing them testify and incidentally the report that Dr. Snyder did I guess confirms my views that I noticed of both of them.

In reaching its conclusion, the circuit court considered various indicators that Mother's mental health had deteriorated, including her assault of Grenis at the youth baseball game, her apparent lack of control over her actions, and her tendency to minimize responsibility and difficulty in appreciating the effect of her actions on her family. The court also noted that Mother did not appreciate how hurtful her conduct was to the parties' son. The court emphasized Mother's "inability to see what her behavior has done to [her son], now it's not that it has done great damage. It's that it has caused him to be crushed." Accordingly, we hold that the circuit court did not err in finding that Mother's mental health deteriorated and that the deterioration was a material change of circumstances that adversely affected the children.

C. Custody Modification

Having found a material change in circumstances, the circuit court then considered the best interests of the children and modified custody. When making a custody determination, a trial court is required to evaluate each case on an individual basis in order to determine what is in the best interests of the child. *Wagner*, 109 Md. App. at 39 (citing *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503 (1992)). Factors the trial court may use in this determination include:

> [A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.

Id. (internal citations omitted). These factors make it clear that the best interest of the child is not a factor of its own. Instead, it is the goal that all other factors seek to reach. *Id*. In determining whether joint custody is appropriate, the capacity of the parties to communicate and reach shared decisions regarding the children's welfare is of paramount importance. *Taylor v. Taylor*, 306 Md. 290, 303 (1986).

In the instant case, the circuit court considered various factors in order to determine a custody arrangement that would be in the best interest of the children. The court explicitly stated that it was taking into account factors including but not limited to:

> the fitness of the parents, character and reputation of the parties, desire of the natural parents and agreements between them, potentiality in maintaining natural family relations, the preference of the child, material opportunities affecting the future life of the child, age, health, and sex of the child, residence of parents and opportunities for visitation, length of separation from the natural parents and prior voluntary abandonment and surrender.

The court maintained joint legal custody but granted Father tie-breaking authority.

Regarding legal custody, the court stated in its ruling:

> [I]n considering whether the custody arrangement should be changed, as to legal custody I've considered the capacity of the parents to communicate, reach shared decisions affecting the child's welfare, the willingness of the parents to share custody, sincerity of parents, I must say there's a differences [sic] in these people, but generally you essentially have the same values.
>
> * * *
>
> Given that I do feel that you should share responsibility for the major decisions that do affect the lives of your children, but on the other hand I am concerned about trivial matters that might result and might result in renewed litigation . . . . believe that in this case . . . a tie-breaker is appropriate, sort of a proactive provision to anticipate a post-divorce dispute.
>
> * * *
>
> [I]n this case . . . I think there should be a tie-breaker and that's going to be [F]ather. And, ah, it's going to be [F]ather because [F]ather has demonstrated an ability to be stable.

The court also modified the physical custody arrangement, stressing that it was doing so because of the increasing conflict between the parents and their inability to communicate effectively. The court stated:

> As to, I also believe there has to be a

> change in the physical custody because what is occurring now is the conflict is escalating. It's only gonna [sic] continue to escalate. It's not gonna [sic] get any better.

The court modified the physical custody arrangement, providing that the children would primarily reside with Father and would spend alternate weekends with Mother. On the weeks when Mother did not have the children over the weekend, the children would have an overnight visit with Mother on Thursday nights. The order also provided for a vacation and holiday rotation schedule. The court stressed that it was modifying the physical custody arrangement in order to create more stability for the children, stating, "[T]here has got to be some stability put back in this home and things are not gonna [sic] get better all of a sudden." The court stated that if Father at some point sought sole physical custody, he would have to seek a custody modification through the court, but if things improved and the parties wanted to move to a fifty-fifty shared custody arrangement, they could do so by agreement and not through the court.

We hold that the circuit court did not abuse its discretion in modifying the custody arrangement. After hearing significant evidence and considering the best interests of the children, the court reasonably concluded that the deterioration of Mother's mental health had an adverse affect on the children and that reducing the amount of time the children stayed at Mother's home would be in their best interests. We conclude that the circuit court's factual findings were not clearly erroneous, and the circuit court's ruling was founded upon sound legal principles. The circuit court's decision was not "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., supra*, 373 Md. at 583-84. Accordingly, we affirm the circuit court's modification of the custody arrangement.

III.

We now turn to whether the circuit court abused its discretion by requiring Father to pay the fees of Winters, the children's best interest attorney, and Dr. Snyder, the court appointed evaluator. Because the circuit court did not conduct the appropriate analysis of the parties' financial resources and financial needs, we vacate the circuit court's order granting fees and remand for further proceedings.

A. Standard of Review

We review the award of counsel fees under the abuse of discretion standard. *Meyr v. Meyr*, 195 Md. App. 524, 552 (2010). The circuit court's decision regarding the award of fees "will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994).

B. Attorney's Fees

Father contends that the circuit court failed to consider the parties financial resources and needs when it ordered him to pay Winters' and Snyder's fees. During the custody modification trial, the circuit court indicated that it would not address financial issues at that time, and that such matters would be reserved for a separate proceeding. Father was asked, on cross-examination by Mother's counsel, about his salary. Mother asserted that a party's financial condition was a factor to be considered in connection with the party's ability to care for the children. Father testified that he earned $127,000 per year. The circuit court expressly stated, "I thought we were gonna [sic] leave financial matters out of this." Moreover, when Father's counsel attempted to ask a question relevant to the issue of costs and attorney's fees, he was precluded from doing so, and the court stated, "I think there needs to be a separate, ah, separate hearing on those issues." The following colloquy occurred between the court and Father's counsel:

> THE COURT: How is this relevant?
>
> [COUNSEL]: Well, if she's asking for attorneys' fees I think it's appropriate to get into what —
>
> THE COURT: Well, we're not gonna [sic] litigate that matter today.
>
> [COUNSEL]: Okay. Well, I should not inquire of the witness about that issue? (Pause.) So should I refrain from financial issues as well?
>
> THE COURT: I think there needs to be a separate, ah, separate hearing on those issues.
>
> * * *
>
> THE COURT: I think we ought to separate it for a separate hearing as to all financial issues.

Accordingly, no inquiry was made into Mother's financial resources or needs, and no further inquiry was made regarding Father's finances.

After trial, Winters filed a petition for attorney's fees and petition for payment of fees of court appointed evaluator. Both parties filed responses to both petitions, and each party included significant documentation of his or her financial status. The court did not hold a hearing on the financial issues.[8] On June 13, 2011, the court ordered Father to pay the balance of Winters' attorney's fees in the amount of $23,237.50. On June 15, 2011, the court ordered Father to pay the

balance of Dr. Snyder's fees in the amount of $3,669.00. Father filed motions to reconsider, alter, or amend both orders, which the circuit court denied.

A court order requiring that a party involved in a custody dispute pay counsel fees to a best interest attorney is authorized by § 1-202 of the Family Law Article, which provides in pertinent part:

> (a) *In general*. — In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may:
>
> (1) (i) appoint a lawyer who shall serve as a child advocate attorney to represent the minor child and who may not represent any party to the action; or
>
> (ii) appoint a lawyer who shall serve as a best interest attorney to represent the minor child and who may not represent any party to the action; and
>
> (2) impose counsel fees against one or more parties to the action.

Md. Code (1984, 2006 Repl. Vol.), § 1-202 of the Family Law Article ("FL").[9] This section does not set forth specific factors a court should consider in awarding counsel fees for a best interest attorney. The Court of Appeals and this Court have, however, indicated "that the factors set forth in F.L. § 12-103(b), are relevant to the analysis." *Meyr, supra*, 195 Md. at 555 (citing *Taylor v. Mandel*, 402 Md. 109, 134 (2007) ("[W]henever a court assesses guardian ad litem fees under Section 1-202, the court should consider various factors, such as those articulated in Section 12-103(b) of the Family Law Article.")).

FL § 12-103(b) provides:

> II. Before a court may award costs and counsel fees under this section, the court shall consider:
>
> I. the financial status of each party;
>
> II. the needs of each party; and
>
> III. whether there was substantial justification for bringing, maintaining, or defending the proceeding.

FL § 12-103(b).

Here, although the circuit court was presented with significant information regarding the financial status of the parties, there is no indication that the court expressly considered any of the factors listed in FL § 12-103(b). The orders of the circuit court did not include any explanation of the basis for the court's decision, and there is nothing in the record to indicate that the court made any findings of fact to justify its order that Father pay the outstanding fees.

Mother contends that because Father did not request a hearing on the two fee-related motions pursuant to Maryland Rule 2-311, Father should not be permitted to argue the issues on appeal. We disagree. A hearing is not always required before a court determines the apportionment of fees, and we do not find that the circuit court was necessarily required to entertain a hearing in this case. The court is, however, required to state the basis for its determination. Here, each party provided significant documentation of his or her finances with their responses, and the court may have reasonably based its determination on that documentation. Because the court did not state the basis for its determination, however, we are unable to properly review the decision. *Ledvinka v. Ledvinka*, 154 Md. App. 420, 432-33 (2005) ("Based on the record, we conclude that the trial court failed to make findings of fact to justify the award of attorney's fees. Absent the court stating the basis for its determination, this Court cannot properly review the decision."); *Painter v. Painter*, 113 Md. App. 504, 529 (1997) ("In a case in which bills for legal services are challenged, [the trial court] ought to state the basis for [its] decision so it can be reviewed, if necessary, on appeal.") (internal quotation omitted). Accordingly, we remand for the limited purpose of determining the fees for the best interest attorney and court appointed evaluator in accordance with the statute.

JUDGMENT MODIFYING CUSTODY AFFIRMED. ORDER GRANTING FEES FOR BEST INTEREST ATTORNEY AND COURT APPOINTED EVALUATOR VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR FREDERICK COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLANT/CROSS-APPELLEE TO PAY THE COSTS.

FOONOTES

1."Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.*

"Joint legal custody means that both parents have an equal voice in making those decisions and neither parent's rights are superior to the other." *Taylor, supra*, 306 Md. at 296. "Joint physical custody is in reality 'shared' or 'divided'

custody. Shared physical custody may, but need not, be on a 50/50 basis." *Id.* at 296-97. "The parent not granted legal custody will, under ordinary circumstances, retain authority to make necessary day-to-day decisions concerning the child's welfare during the time the child is in that parent's physical custody. Thus, a parent exercising physical custody over a child . . . necessarily possesses the authority to control and discipline the child during the period of physical custody." *Id.* at 296 n.4.

2. Father's motions to reconsider, alter, or amend were denied on July 25, 2011. On August 24, 2011, Father filed his notice of appeal of the orders requiring payment of best interest attorney's and court appointed evaluator's fees. Mother filed a motion to dismiss Father's appeal as untimely. Mother argues that judgment was not yet final at that time because the circuit court did not rule on her motion for attorney's fees until November 4, 2011, and therefore, Father was required to file a notice of appeal after the November 4, 2011 final disposition.

We are not persuaded by Mother's argument. Although a ruling of a circuit court is not appealable until it constitutes a final judgment, this rule does not apply to orders that are collateral to the proceeding: *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41(1989). Motions for the payment of fees are collateral to the merits. *Blake v. Blake*, 341 Md. 326, 338 (1996) ("[A] decision on the merits is a 'final decision' . . . whether or not there remains for adjudication a request for attorney's fees attributable to the case."). Father's motions to reconsider, alter, or amend the orders requiring him to pay best interest attorney's and court appointed evaluator's fees were denied on July 25, 2011, and his notice of appeal was filed on August 24, 2011. Accordingly, we find that Father's appeal was timely under Maryland Rule 8-202 and deny Mother's motion to dismiss.

3. The parties later agreed to consolidate the contempt hearing with the hearing on the merits of the custody modification petition.

4. In the transcript, Grenis' last name is incorrectly spelled "Grenice."

5. The Lish Report contradicted Mother's statement in her response to Father's motion for mental health evaluation, in which she had stated that she had never been diagnosed with bipolar disorder. Additionally, at trial, Mother testified that she had been diagnosed with bipolar disorder.

6. The order provided that the children would reside primarily with Father but would spend alternate weekends with Mother. On the weeks when Mother did not have the children over the weekend, the children would have an overnight visit with Mother on Thursday nights. The order also provided for a holiday rotation schedule.

7. Even if the Lish Report itself were not admissible, Mother was still able to testify independently that she had been diagnosed with bipolar disorder by Dr. Lish. Moreover, there was basis to question Mother on the issue regardless of whether the Lish report was admitted. Mother's bipolar diagnosis, as well as Mother's candor regarding her mental health, were issues in the case. Additionally, Mother had previously denied that she had been diagnosed with bipolar disorder in her response to Father's motion for mental health evaluation.

8. Notably, on November 4, 2011, the court held a separate hearing on Mother's request for a contribution toward her own attorney's fees. The court denied Mother's request for attorney's fees.

9. In their briefs, both parties incorrectly cite FL § 12-103 as the section governing the payment of best interest attorney's fees. Section 12-103 addresses attorney's fees of the parties in child custody cases but does not address best interest attorney's fees.

Cite as 8 MFLM Supp. 15 (2012)

Alimony: emergency motion to increase: jurisdiction

Marion Blades
v.
Norman Blades, Jr.

No. 2452, September Term, 2010

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

Opinion by Berger, J.

Filed: June 11, 2012. Unreported.

The circuit court lacked jurisdiction over appellant's emergency motion to increase indefinite alimony, since the underlying award of indefinite alimony was on appeal.

This case is an appeal from an order of the Circuit Court for Anne Arundel County denying Marion Blades' Emergency Motion to Increase Indefinite Alimony. Ms. Blades presents four issues for our review:[1]

I. Did the trial court err and abuse its discretion in awarding Marion, Appellant $0 (zero) a month in additional alimony?

II. Did the trial court err and abuse its discretion in not recognizing Marion, Appellant, was disabled and unable to work, stating her financial circumstances are due in large part to her failure to pursue employment and to look for a job two days a week until she becomes employed, if does not through no fault of her own gain employment, then she shall provide written proof of all effort to do so to the court at all future hearings on alimony?

III. Did the trial court err and abuse its discretion in not allowing Norman, Appellee, income into evidence?

IV. Did the trial court err and abuse its discretion in not making Norman, Appellee, produce Interrogatories and Discovery Documents?

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.

For the reasons set forth below, we conclude that the appeal of the alimony award is moot. We vacate for lack of jurisdiction the December 2010 order of the circuit court requiring Ms. Blades to seek competitive employment. Accordingly, we do not address the merits of Ms. Blades' arguments.

FACTUAL AND PROCEDURAL BACKGROUND

This is the third appeal to this Court by Ms. Blades relating to orders issued by the Circuit Court of Anne Arundel County regarding her alimony award. Ms. Blades and Norman C. Blades, Jr., were divorced on January 3, 2007. The circuit court awarded Ms. Blades indefinite alimony in the amount of $1,500 per month.[2] Ms. Blades appealed, and this Court, in an unreported opinion, vacated the award of indefinite alimony.[3] *Blades v. Blades*, No. 81, Sept. Term, 2007 (filed Nov. 18, 2008) ("*Blades I*"). We remanded the matter to the circuit court for further proceedings. *Id.*

On remand, the circuit court held another hearing, and on August 25, 2009, the circuit court issued an order granting Ms. Blades indefinite alimony in the amount of $2,400 per month.[4] In making its alimony calculation, the circuit court imputed income to Ms. Blades in the amount of $16,000 per year. Ms. Blades again appealed. This Court, in an unreported opinion, vacated the alimony award and remanded to the circuit court. *Blades v. Blades*, No. 1620, September Term, 2009 (filed Sept. 13, 2011) ("*Blades II*"). We determined that there was no evidence to support the imputation of $16,000 of income to Ms. Blades, and remanded for the purpose of determining the appropriate alimony award in light of testimony indicating the Ms. Blades was not capable of competitive employment.[5]

Between the time of the circuit court's August 2009 order and when this Court vacated that order on September 13, 2011, Ms. Blades filed a Request for Emergency Hearing on February 1, 2010 in the Circuit Court for Anne Arundel Country. The circuit court issued an order on March 10, 2010, requiring Ms. Blades to specifically detail the relief sought. On March

25, 2010, Ms. Blades filed an Amended Request for Emergency Hearing stating that she sought an increase in indefinite alimony.

A hearing was ultimately held on December 7, 2010, before Judge Paul G. Goetzke of the Circuit Court for Anne Arundel County.[6] At the hearing, Judge Goeztke indicated that he was concerned that the circuit court may not have jurisdiction given that an appeal was pending at that time before this Court. The circuit court stated:

> My concern with this case is that it — there's an appeal pending in the Court of Special Appeals. Is that right? . . . As a result of that this court is divested of jurisdiction. So, I can't rule on your motion. What we can do is wait for it to come down. As I understand it, the issue of alimony is pending in that court, isn't it?

Ms. Blades stated that a "Master Judge" had told her that she could go forward with the modification of alimony hearing "even though it was in special appeals." The following colloquy ensued:

> [THE COURT]: So, she determined there is jurisdiction in this court?
>
> [MS. BLADES]: Yes. Yes, Your Honor.
>
> [THE COURT]: All right. Well, it does seem that there were subsequent orders and while I'm not sure whether we have jurisdiction or not, I'm certainly willing to hear the evidence at this point and then do some more research and if you're entitled to an increase I'll give it to you, if not, I won't. Okay?
>
> [MS. BLADES]: Yes, Your Honor.

The hearing then continued.

During the hearing, Ms. Blades repeatedly tried to relitigate issues that had been raised and resolved by the circuit court's order on August 25, 2009, which was pending on appeal. The court repeatedly emphasized that it could only consider new, unanticipated expenses that had arisen since the August 2009 order, stating:

> I can't modify your alimony just because your bills accumulate. I need to have evidence of a change in your financial circumstances since last September . . . What we have to find is some unanticipated expense, some change in circumstances.
>
> * * *
>
> [D]on't go through your continuing monthly bills unless they bring any significant modifications in your — I'm sorry, changes in your circumstances since September or August, whatever the date of the last modification was.
>
> * * *
>
> I can't give you an alimony increase for every bill you incur. These just have to be modifications for new expenses since last year.
>
> * * *
>
> I think you have a fundamental misunderstanding about indefinite alimony. Indefinite alimony is an award to a dependent spouse based on an inability to meet her own needs. It's not an opportunity to come back each month to get a Judge to award you an additional amount of — an additional amount of money to pay the previous months (sic) bills. All right. So, what I can do is only give you some consideration for significant expenses that were not anticipated by Judge Harris when he entered his $2,400 award.

The circuit court issued its order on December 8, 2010, denying Ms. Blades' motion to increase indefinite alimony. The court found that "Ms. Blades failed to demonstrate that circumstances or justice require another increase with one possible exception." The possible exception involved Ms. Blades' increased health insurance premium. The circuit court, however, declined to rule on that matter because the August 2009 order was pending on appeal. The court stated in its order:

> In light of the fact that the August 25, 2009 order, which addressed the health insurance premium claim, is pending on appeal, we will not rule on this matter until the Court of Special Appeals mandate is issued and the case is returned to this Court.
>
> The issue of whether or not the new premium justifies another alimony increase may be brought to the Court's attention then.

The court denied Ms. Blades' motion without prejudice to Ms. Blades' right to pursue an alimony modification, after the pending appeal was concluded, based solely on any increase in her health insurance premiums after September 25, 2009. In addition to denying Ms. Blades' motion regarding an alimony modification, the court ordered:

> Ms. Blades' shall seek employment at the rate of not less than two jobs per

> week until she becomes employed, but if she does not, through no fault of her own, obtain employment, then she shall provide written proof of all efforts to do so to the Court at all future hearings on alimony.

Ms. Blades timely appealed the circuit court's denial of her emergency motion to increase indefinite alimony.[7]

DISCUSSION

We first address the threshold question of whether this case is moot. A case is moot when there is no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant. *Suter v. Stuckey*, 402 Md. 211, 219 (2007). Ms. Blades filed her emergency motion to increase indefinite alimony while the appeal in *Blades II* was pending before this Court. In *Blades II*, we held that the lower court erred in imputing income to Ms. Blades in the amount of $16,000 annually and, accordingly, vacated the circuit court's alimony award. That case is now before the circuit court on remand. Even if we were to agree with Ms. Blades on the merits, there is no possible relief that could be granted, given that the underlying alimony award has already been vacated and is currently before the circuit court remand. This appeal, as it pertains to the alimony award, is therefore moot.

Only in rare instances will the reviewing court address the merits of a moot case. The Court of Appeals has articulated those instances as follows:

> Under certain circumstances, however, this Court has found it appropriate to address the merits of a moot case. *Human Resources, v. Roth*, 398 Md. 137, 143, 919 A.2d 1217, 1221 (2007). If a case implicates a matter of important public policy and is likely to recur but evade review, this court may consider the merits of a moot case. *Coburn v. Coburn*, 342 Md. 244, 250, 674 A.2d 951, 954 (1996) ("This Court in rare instances, however, may address the merits of a moot case if we are convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct."); *Lloyd v. Supervisors of Elections*, 206 Md. 36, 43, 111 A.2d 379, 382 (1954) ("[I]f the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight.").

Suter, 402 Md. at 220. This case does not implicate an important matter of public policy, nor are any of the issues raised by Ms. Blades likely to recur but evade review. Rather, the issue of the proper calculation of Ms. Blades' indefinite alimony is already before the circuit court on remand. Accordingly, we find no reason to address the merits of Ms. Blades' arguments regarding the alimony award.

Although the merits of Ms. Blades' appeal relating to the alimony award are moot, we address *sua sponte* the issue of the circuit court's jurisdiction over Ms. Blades' emergency motion. "[I]ssues of primary jurisdiction . . . will be addressed by this Court *sua sponte* even though not raised by any party." *Tamara A. v. Montgomery County Dept. of HHS*, 407 Md. 180, 187 n.5 (2009) (quoting *Bd. of Ed. for Dorchester Co. v. Hubbard*, 305 Md. 774, 787 (1986)). Accordingly, we address the issue of whether the circuit court properly had jurisdiction over Ms. Blades' motion even though this issue was not raised by either party.

When a matter is on appeal, the circuit court is divested of jurisdiction over issues that affect the subject matter of that appeal. *In re Emileigh F.*, 355 Md. 198, 202-03 (1999). "After an appeal is filed, a trial court may not act to frustrate the actions of an appellate court. Post-appeal orders which affect the subject matter of the appeal are prohibited." *Id*. The circuit court may, however, continue to act with regards to matters "not relating to the subject matter of, or matters not affecting, the appellate proceeding." *Id*. at 203. In the instant case, Ms. Blades essentially was attempting to relitigate the issues surrounding her alimony award, which was at that time on appeal to this Court. Although the circuit court attempted to focus only on unanticipated expenses that had arisen since the August 2009 order, the circuit court, in its order, ultimately concluded that it would not rule on alimony modification while it was pending on appeal. We agree with the circuit court's conclusion on this issue because a modification of the alimony award would have affected the subject matter of the pending appeal. Accordingly, the circuit court was correct to decline to rule on the alimony modification because it

was divested of jurisdiction over the matter.

More problematic, however, is the circuit court's order requiring Ms. Blades to seek employment at the rate of not less than two jobs per week until she became employed. One of the issues on appeal in *Blades II* was whether the circuit court, in its August 2009 order, had properly imputed $16,000 of income to Ms. Blades. This Court ultimately concluded that the imputation of income was in error, given that the expert testimony established that Ms. Blades was not capable of obtaining competitive employment. Therefore, the circuit court's December 2010 order, requiring Ms. Blades to seek employment, is in direct conflict with the matter that was pending on appeal at the time of the December 2010 order. A circuit court may not take actions that affect the subject matter of an appeal. *Id*. at 202. We hold that the circuit court's order requiring Ms. Blades to seek employment at the rate of not less than two jobs per week was inconsistent with the pending appeal and, therefore, was prohibited. Accordingly, the circuit court shall vacate for lack of jurisdiction the order requiring Ms. Blades to seek employment at the rate of not less than two jobs per week.

For the reasons set forth above, we conclude that the appeal, as it pertains to the alimony award, is moot. However, we remand for the limited purpose of vacating for lack of jurisdiction the December 2010 order requiring Ms. Blades to seek employment.

APPEAL, AS IT PERTAINS TO THE ALIMONY AWARD, IS MOOT. CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR THE PURPOSE OF VACATING FOR LACK OF JURISDICTION THE DECEMBER 2010 ORDER REQUIRING MS. BLADES TO SEEK EMPLOYMENT. APPELLANT TO PAY COSTS.

FOOTNOTES

1. The questions presented have not been rephrased and are copied directly from Ms. Blades' brief.

2. The circuit court also provided for the division of marital property and the payment of attorney's fees.

3. This Court also vacated the marital property award and the award of attorney's fees.

4. The circuit court also awarded Ms. Blades a monetary award for her interest in a condominium and additional attorney's fees.

5. This Court also vacated the monetary award and the award of attorney's fees, which we determined must be reconsidered in light of the circuit court's analysis of the alimony award on remand. Ms. Blades also raised the issue of judicial bias by the circuit court, which we declined to address given the resolution of the appeal on other issues.

6. The prior proceedings in the Blades' divorce case had come before Judge Paul Harris of the Circuit Court for Anne Arundel County, but Judge Harris recused himself after Ms. Blades alleged judicial bias in her appeal in *Blades II*.

7. On March 27, 2012, Ms. Blades filed a motion to strike appellee's brief as untimely. We deny Ms. Blades' motion to strike because we conclude Mr. Blades' brief was timely filed. Ms. Blades' brief was filed on February 21, 2012. Pursuant to Maryland Rule 8-502, Mr. Blades' brief was due to be received by the court by March 22, 2012, thirty days after the filing of appellant's brief. Mr. Blades filed his brief on March 22, 2012, on the thirtieth day after the filing of appellant's brief.

Cite as 8 MFLM Supp. 19 (2012)

Divorce: marital award: disparity

Tim S. Meese
v.
Megan S. Meese

No. 499, September Term, 2011

Argued Before: Zarnoch, Hotten, Berger, JJ.

Opinion by Berger, J.

Filed: June 18, 2012. Unreported.

Although the monetary award to the husband was less than 10 percent of the value of the marital home, it was supported by the circuit court's extensive consideration of the factors in Family Law Art. § 8-205(b), including a finding that the husband had intentionally diminished his monetary contributions to the marriage by remaining unemployed or under-employed.

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 case arises from an Order of the Circuit Court for Montgomery County granting a monetary award to appellant Timothy Meese ("Husband") and denying Husband's request for attorney's fees. Husband filed a complaint seeking an absolute divorce from appellee Megan Meese ("Wife"). Husband and Wife consented to custody and division of all marital property other than the family home. This is the third time that this case is before this Court.[1] The second remand instructed the circuit court to solely consider the amount, if any, of a monetary award and attorney's fees. The Circuit Court for Montgomery held hearings over two days, after which it granted Husband a monetary award, and denied Husband's request for attorney's fees.

Husband filed a timely appeal and presents eight questions for our review,[2] which we have condensed and rephrased as two questions:

1. Whether the trial court abused its discretion in granting Husband a monetary award of $30,000.
2. Whether the trial court abused its discretion in denying Husband's request for attorney's fees.

For the reasons set forth below, we affirm the judgment of the Circuit Court for Montgomery County.

FACTS AND PROCEDURAL BACKGROUND

Husband and Wife were married on August 1, 1998. During their marriage, the parties had two children. Shortly after they were married, the parties moved into a home owned by Wife's father, Charles Miller ("Miller"). The home was located on Weller Road in Silver Spring, Maryland. Miller owned this home since the 1970s and it was the childhood home of Wife. Husband and Wife lived in the home rent free.

In 2000, Miller retired. Because he wanted to keep the home in his family and maintain a place to live for the rest of his life, Miller discussed selling the home to Husband and Wife. These discussions led the parties to request that a real estate attorney draft an agreement through which Husband and Wife would buy the home from Miller. This agreement included a provision that entitled Miller to live in the home, rent free, for the rest of his life. If the home was sold by Husband and Wife prior to Miller's death, Husband and Wife were required to provide substitute rent free housing for Miller until his death. Miller testified that he believed this arrangement guaranteed him a life estate in the home. Because Miller's mortgage contained a due-on-sale clause,[3] the transfer of the home was made solely in Wife's name.[4]

The consideration for the sale was Husband and Wife's assumption of the remaining mortgage on the home and the signing of a balloon note valued at $30,000 in favor of Miller. The balloon note did not bear interest and was to come due upon the first to occur of: 1) the sale of the home; 2) sixty days after Miller's death; or 3) November 29, 2015. The balloon note was guaranteed by Husband and Wife with the home as collateral. The balloon note and assumption of the outstanding mortgage were valued at approximately $150,000. This amount was approximately $30,000 less than the appraised value of the home at the time of the transfer. After the sale, all payments on the mortgage were made from a joint bank account in the names of both Husband and Wife.[5] Husband and Wife's paychecks were directly deposited into this account.

Before, during, and after the marriage Husband worked sporadically as an iron worker. Wife worked as a teacher's assistant and reservist in the U.S. Army. During the marriage, Wife was called into active duty and stationed over seas for approximately one year.[6]

While Wife was stationed over seas, she decided the marriage was not working and told husband she wanted a divorce. Husband initially told wife that he would move out of the home but later changed his mind. Husband also told Miller that Miller needed to look for a new place to live. Upon hearing this from husband, Miller realized that the initial sale from Miller to Husband and Wife did not provide him with a life estate in the home.

Thereafter, Miller and Wife decided that they needed to take action to ensure that Miller would be able to live in the home until his death. In order to accomplish this goal, Wife transferred title of the home to an irrevocable trust for no consideration. The beneficiary of the trust was Miller. Upon Miller's death, the trust would cease to exist and the property would revert to Wife in fee simple. Upon completion of the transfer to the irrevocable trust, the locks on the home were changed and Husband was not allowed to re-enter the home.

Subsequently, Husband filed a complaint for absolute divorce in the Circuit Court for Montgomery County. Prior to the divorce hearing, Husband and Wife agreed to joint custody of their children and to split all marital property 50/50, with the exception of the home. Wife contended that the home was not marital property even though it was acquired during the marriage because it was acquired by a gift from Miller to Wife. Husband argued that the agreement concerning the house was a sale not a gift, and therefore, the home was marital property.

After entertaining argument, the circuit court delivered an oral ruling in which it declined to determine whether the home was marital property. It also declined to make a monetary award or award attorney's fees to either party. Parts of this ruling seemed to suggest that the home was marital property while other parts seemed to say that it was not. Husband timely appealed the circuit court's ruling to this Court. In an unreported opinion ("*Meese I*"), we vacated the circuit court's order denying a monetary award and remanded for further proceedings. We, specifically, held that:

> From the record before us, although it is clear that the court declined to make a monetary award and denied attorney's fees, it is not clear what the court determined with regard to the disputed property, i.e., whether the property was marital property or not. At one point in its ruling, the court seems to classify the property as a gift, based on its finding that 'no consideration' was ever given by [Husband] and [Wife]. At another point, however, the court states quite inconsistently that it was going to consider the property marital property, and that the transaction 'looks . . . like a sale.'
>
> The evidence points toward the property being marital property. On its face, the purported purchase agreement obligates each party to do something. Moreover, it appears that the obligations, if any, under the agreement and balloon note still exist. There has been no determination as to whether and to what extent that agreement and balloon note are enforceable. Thus, we must remand to the circuit court for clarification of its findings, and for a determination of what impact, if any, that clarification has on the denial of the monetary award and attorney's fees to [Husband].

On remand, the Circuit Court for Montgomery County held hearings concerning the marital or non-marital character of the home. Despite our holding in *Meese I*, the circuit court determined that the home was not marital property. The circuit court concluded that the transaction was a gift from Miller to Wife, despite the obligation of both Husband and Wife regarding the property. Nonetheless, the circuit court awarded Husband a monetary award of $8,500.[7] Additionally, the circuit court again declined to award attorney's fees in favor of either party.

Husband again appealed to this Court. In this appeal, Husband argued that the property was marital, and that Wife intentionally dissipated the value of the home in order to prevent Husband from receiving a monetary award. Husband further argued that he was entitled to a monetary award in line with the 50/50 split that the parties agreed for all other marital property. In a second unreported opinion ("*Meese II*"), we again reversed the circuit court's decision and remanded for further proceedings. We held, in pertinent part:

> We conclude that the evidence before the circuit court could only support a rational finding that the Property was acquired by the parties during their marriage and, accordingly, is marital property. The purchase agreement signed between [Husband] and [Wife], on the one hand, and [Miller], on the other, was a contract for sale of the Property. Contrary to the trial court's finding, it was supported by consideration.

* * *

Having concluded that the Property is marital property, we now turn to the question whether [Wife]'s transfer of the Property to the Trust amounted to dissipation as a matter of law. We have no difficulty in concluding that, on the evidence adduced, one could reasonably find only that [Wife] dissipated the Property and therefore the Property must be treated as extant for purposes of valuing the marital estate.

* * *

In the instant case, there can be no dispute that [Wife]'s transfer of the Property to the Trust was accomplished after the parties' marriage was irretrievably broken.

* * *

Turning to the purpose of the transfer, there also can be no dispute that [Wife] intended, by making the transfer, to prevent [Husband] from realizing a share of the Property in the eventual divorce proceedings. . . . The terms of the Trust provide that upon [Miller's] death, the Property will vest in [Wife]. Accordingly, the Trust benefits her at the expense of [Husband], who retains no interest in the property.

Because the evidence adduced at trial only can support a reasonable conclusion that [Wife] intentionally dissipated marital property, the Property should have been deemed extant and included in the marital estate for purposes of equitable distribution, including the decision whether to grant [Husband] a monetary award. . . . The relevant valuation evidence was that presented at the time of the first trial, when the divorce was granted and equitable distribution of all the marital property (which should have included the Property) took place.

* * *

Because we are reversing the trial court's ruling that the Property is non-marital, we also must vacate the monetary award and the denial of attorneys' fees for re-evaluation in light of this opinion. . . . On remand, the circuit court shall make findings pursuant to [Family Law Article] section 8-205(b) with respect to [Husband]'s request for a monetary award and pursuant to [Family Law Article] section 7-107 with respect to his request for attorneys' fees.

On remand, the circuit court held two days of hearings. Thereafter, the circuit court held the case *sub curiae* while it formulated its final ruling. A little more than two months after the initial hearings, the circuit court held a third hearing at which it delivered an oral ruling. This ruling granted Husband a $30,000 monetary award and denied Husband's request for attorney's fees.

This timely appeal followed. We shall include additional facts, as necessary, in our discussion of the issues.

DISCUSSION

I.

A trial court's "decision whether to grant a monetary award is generally within the sound discretion of the trial court. Nevertheless, even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards." *Gallagher v. Gallagher*, 118 Md. App. 567, 576 (1997). The circuit court is afforded wide discretion in determining whether to grant a monetary award because the trial judge "has the opportunity to assess the demeanor of witnesses before the bench and weigh the various financial statements and other documents each party brings to court." *Long v. Long*, 129 Md. App. 554, 566 (2000). When we review such a decision "we assume the truth of all evidence tending to support the findings of the trial court, and simply inquire whether there is any evidence legally sufficient to support those findings." *Id.* at 566-67. Accordingly, we review a circuit court's decision to grant a monetary award under an abuse of discretion standard.

Before a court grants a monetary award, it must follow a three step process:

> (1) if an equitable adjustment over and above the distribution of the spouse's property in accordance with its title is an issue, the court shall determine which property is marital property; (2) the court shall then determine the value of all marital property; and finally, (3) the court may make a monetary award as an adjustment of the parties' equities and rights concerning marital property, whether or not alimony is awarded.

Hollander v. Hollander, 89 Md. App. 156, 162 (1991) (internal citations and quotations omitted). After com-

pleting this analysis, "[i]f an award is deemed appropriate, the court then must consider each of the [eleven] factors enumerated in section 8-205." *Id*. (citing *Harper v. Harper*, 294 Md. 54, 79 (1982)).

Husband maintains that the circuit court erred, not in its determination to grant him a monetary award but, in the amount of the monetary award. Husband contends that the circuit court considered irrelevant factors, allowed wife to present new evidence, and did not determine if the Property was encumbered by the $30,000 balloon note. Additionally, Husband proffers that because $30,000 is just under 10% of the value of the Property, the circuit court's monetary award is inequitable, and therefore, an abuse of discretion. Wife counters, that the circuit court clearly and accurately evaluated each of the eleven factors required under § 8-205(b) of the Family Law Article of the Maryland Code when arriving at the final monetary award. Wife further argues that the circuit court reviewed each factor in detail and explained whether the factor weighed in favor of Husband or Wife. Because of this diligent work and explanation, Wife argues that the circuit court's monetary award was correct as a matter of law.

Husband's contentions are misplaced. The circuit court not only took the time and effort to arrive at its decision, but it delivered an extensive and well thought out analysis of each of the factors required under Family Law Article § 8-205(b). The circuit court issued a comprehensive oral opinion that took over thirty-five pages to transcribe.

A. Family Law Article § 8-205(b) Factors

It is indisputable that the first two prongs of the monetary award analysis were completed. This Court, in *Meese II*, determined that the home was the only piece of marital property at issue. Additionally, as the circuit court stated, we established, in *Meese II*, that Husband and Wife had equity of $303,000 in the home. This figure is based on the valuation of the home minus the mortgage obligations at the time of the divorce. We, therefore, must determine whether the circuit court properly evaluated the eleven factors provided by § 8-205(b) of the Family Law Article of the Maryland Code.

Section 8-205(b) specifically, provides:

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

Md. Code (1984, 2006 Repl. Vol), § 8-205(b) of the Family Law Article ("FL").[8]

In its comprehensive oral opinion, the circuit court specifically discussed each of these eleven factors. It applied the facts and circumstances present in the instant case to determine whether a monetary award was proper. Concerning the first factor, the circuit court found that Wife was the overwhelming monetary and non-monetary provider for the family. In its evaluation of this factor the circuit court specifically found:

> As to monetary, [Husband] is an iron worker and union member, but

has ceased any active employment as of 2006, when he began work as a handyman and reseller/slash/auctioneer on eBay.

He claimed income for some years of employment as an ironworker but ostensibly claimed to have been totally unemployed for the period of 1990 through 199[9].

* * *

[Husband]'s monetary contributions were proven as follows:

[I]n 1989, for Social Security reporting purposes at least, $11,956 was earned.

From 1990 to 1999, zero.

In 2000, there was a claim by testimony of 40 to $45,000. . . .

In 2001, [Husband] claimed approximately 45 to $50,000.

And in 2002, approximately the same. . . .

* * *

In 2003, there was a claim of approximately $45,000 as well.

Defendant's 1 addresses 2004, where the claim, by testimony at least, is something in the range of $25,000. The actual documentation shows $2,384.

Defendant's 5 addresses 2005 income, this is the year of separation, and that shows $4,284. At that — and that is [sic] last time essentially of any substantial employment as an iron worker.

In 2006, there was testimony that he worked for a brief time, but then he became a carpenter /slash/ auctioneer.

Defendant's 6, which is the documentation of income, shows $3,725.

In 2007, the only documentation is [Husband]'s financial statement . . . and that claimed $2,500 a month, which would amount to $30,000 a year gross.

After divorce, [Husband] claimed that he continued his employment, and, in 2008, . . . the testimony was that his earnings were somewhere in the range of 15 to $17,000.

2009, . . . $4,560 of earnings.

[For 2010 t]here is $7,800 documented against the testimonial claim of 21 to $22,000.

Tax liens for 1991 and 1992 had been outstanding before the 1998 marriage . . . having reached at least $46,473 as of December 10, 2005.

* * *

The Court finds that [Husband] deliberately chose to be unemployed, particularly in the 1990 to 1999 time frame, for fear that the IRS would enforce liens and collect income tax on earned monies.

[A]fter the date of marriage, [Husband] intentionally diminished monetary contribution to the marriage by remaining unemployed or underemployed.

In 2004, while [Wife] was deployed to Iraq for the entire year, [Husband] initially was working as an iron worker and claimed to work 12-hour days. He had terminated this employment within a short time of [Wife]'s arrival in Iraq and did not return to work for that entire year-long tour.

[Husband] claimed that he stopped working because his children . . . needed a full time-parent.

[W]hile [Wife] was deployed, [Husband] had lunch with Theresa Douglas, [Wife]'s sister, and indicated that he was tired of going to work for back taxes since the IRS would take all of the money if he worked, and that he was quitting for that reason.

The Court finds that to be credible testimony by Ms. Douglas, also finds as a fact then that [Husband] stopped working out of this fear, which he mentioned in his trial testimony, that the IRS would garnish money for past taxes due arid not for any reason related to the care of his minor children, and that [Husband] did not take care of the children full-time during the deployment.

The Court finds as a fact that [Wife] did not agree that [Husband] stop working during her deployment.

* * *

From a financial point of view,

the Court finds that [Husband] intentionally diminished his financial contributions by failing to be employed as an ironworker, which was to his maximum earning potential, because he did not want the IRS to obtain payment for past amounts due.

Accordingly, such act was voluntary and intentional on his part, and any claim that he was unemployed as an ironworker due to market or other conditions for nine years is . . . totally incredible and ludicrous.

* * *

As to [Wife], she began working for Montgomery County Public Schools in 1998 and remained employed until September 2005 . . . earning approximately $27,000 annually.

She earned annually another $15,000 as an Army reservist.

* * *

She claims to have been earning a gross income of $4,000 every two weeks from the Army. She further claims that when deployed to Iraq, her pay was increased to 5,000 every, $5,000 every two weeks, totaling $120,000, which, because of service in a combat zone, was tax-free for that calendar year, 2004.

The parties agree that all of her military pay was directly deposited to a joint bank account of which she and [Husband] were owners.

* * *

[Wife] contended that when she returned home from her deployment, only $11,000 remained of monies earned from her deployment and that this was in the form of cash in a lockbox maintained by Husband.

He testified that he did so [sic] so that the IRS could not get it.

On her return, he gave [Wife] $2,000 and told her to, quote, "Have a good life," end quote.

Additionally, [Wife] established that [Husband] had not paid a [sic] $10,000 for daycare accrued during her absence.

* * *

[Wife] liquidated $5,000 from her premarital Janus retirement account and obtained representation from [sic] [Husband] to deal with the unpaid tax issue.

The Internal Revenue Service was at that time garnishing wages and at other times during the marriage.

* * *

[T]he source of funds for [mortgage] payment[s], the Court finds as a fact, were overwhelmingly supplied by earnings of [Wife] and not by [Husband].

* * *

[Wife] has been and is the overwhelming financial contributor in the marriage and the Court so finds, and [Husband] intentionally refused to work to capacity, thereby relying on [Wife] to support him and their children.

The circuit court next determined the level of non-monetary participation of both parties. The result was similar to that reached regarding the monetary contribution of the parties. The circuit court found that Wife was the overwhelming head of the family and that Husband participated little, if at all, in the lives of his children. The court described how Husband did not attend birthday parties, movies, doctors appointments, or their child's Individualized Education Program ("IEP").[9] The court specifically found:

The Court does not find [Husband]'s contention concerning parental caretaking to be credible and finds as a fact that [Husband] was never an equal caretaker to the children.

The care of the children was almost entirely the responsibility of [Wife].

* * *

The Court finds [Wife] to have been the overwhelming non-monetary contributor to the marriage.

Next, the circuit court evaluated the second § 8-205(b) factor, namely the value of the property interests of the parties. As we stated, *supra*, the only property at issue was the home because Husband and Wife agreed to evenly divide all other property. In its factual explanation, the circuit court described multiple valuations for the home. These valuations were completed at different times and by different persons. It then, correctly, explained that, in *Meese II*, we established the value of the home for monetary award cal-

culations was the value at the time of the initial divorce proceedings in 2007. At that time, the home was established to have a market value of $440,000 and was encumbered by a mortgage of $137,000. Accordingly, the net equity in, and value of, the home for purposes of this case was established to be $303,000.

The circuit court, thereafter, evaluated the economic circumstances of each party, i.e. the third § 8-205(b) factor. In this context, the court briefly rehashed Husband and Wife's monetary contributions because those contributions shed significant light onto both parties' economic circumstances. Additionally, the circuit court noted that Husband was not paying a debt he owed to his brother nor his credit card debts. The circuit court also explained that at the time of divorce, Husband had a net worth of negative $37,000 and did not work much, if at all, after that point. Therefore, the circuit court determined that Husband's net worth is currently lower than it was in 2007. Regarding Wife's economic circumstances, the circuit court explained how, after the divorce, she began making close to $100,000 per year. It, however, noted that Wife too had significant debt. Indeed, Wife had so much debt that she filed a Chapter 13 bankruptcy claim.

Accordingly, the circuit court found:

> [Husband] has, the Court finds as a fact, that [Husband] has remained voluntarily under-employed and does not pay his debts. [Wife] is more substantially employed but has incurred debilitating debt.

Thereafter, the circuit court examined the fourth § 8-205(b) factor, namely the circumstances leading to estrangement of the parties. Husband testified that Wife decided to end the marriage without cause and that he did nothing to provoke Wife's change of heart. Husband further contended that his alcohol abuse had nothing to do with the estrangement. The circuit court clearly disagreed. Husband also contended that Wife's adultery after returning from Iraq played a significant role in the estrangement and that he attempted to get counseling and keep the marriage together while Wife wanted nothing to do with counseling or keeping the marriage together. The circuit court also disagreed with these contentions. The court specifically found:

> As to estrangement . . . [Husband] had difficulty holding down a job or seeking employment, and he had alcohol issues; and . . . [Wife] had not been able to change him after the marriage.
>
> The Court specifically finds that the adultery did not cause the estrangement; that the marriage had been unhappy from its inception; and that [Husband] contributed to the estrangement by his lack of financial or other financial, or other marital responsibility whether toward [Wife] or toward the children.

Regarding the fifth factor, length of the marriage, the circuit court found that:

> [T]he marriage occurred, endured from August 1st, 1998, to May 29, 2007, a period of eight years and eight months.
>
> The separation took place on May 6th, 2005 . . . thus the parties lived together for approximately 6.5 years, less another year of absence due to Iraq deployment, for a total cohabitation of five years and five months.
>
> By any measure, whether the length of the legal marriage being eight years and eight months or the actual time of cohabitation being five years and five months, this, the Court finds this to be a short-term marriage under any method of computation.

Husband argues that this interpretation is incorrect. He contends that a marriage of eight years is of median length. The circuit court clearly explained the reasoning behind its calculation of the length of the marriage prior to concluding that it was short-term. As such, we do not find that this decision in any way constituted an abuse of discretion.

Next, the circuit court quickly addressed the sixth, seventh, ninth, and tenth factors. Because these factors are neutral, the circuit court determined that they have no impact on its analysis and its decision. In arriving at this decision, the circuit court noted that neither party is too old to work or take care of his or her self in the future (factor six); both parties are in good physical and mental condition (factor seven); neither party has contributed non-marital property to the acquisition of marital property (factor nine); and that there is no award of alimony in this ease (factor ten).

Thereafter, the circuit court discussed the eighth factor, i.e. how and when specific marital property or interest in that property was acquired. In this analysis, the circuit court found that the only marital property, the home, was acquired by both parties from Wife's father. While both parties acquired the home in a sale, the attorney who drafted the sale agreement explained that the sale was not an arms-length sale and that Miller intended to keep the home in his family. Additionally, the circuit court explained that the home was held in an irrevocable trust. It was purportedly

placed in the trust to remove the marital character of the home. Thereafter, the circuit court specifically found:

> The Court finds as a fact that the property was retitled to the trust from [Wife] after [Miller] was told three times while [Wife] was in Iraq by [Husband] that [Miller] needed to find a new place to live.
>
> [Miller]'s idea had been to keep the family in the residence and, when confronted with these statements, felt that he needed to do something to protect what he thought had been a life estate he had set up, and also to protect the property
>
> [Husband] claimed at the time the initial transfer was made into [Wife]'s sole name that he had no real interest in what was about to happen, about titling of the house, and he did not stay for the meeting.
>
> At that time, it — and [Husband] also admitted that he did not reveal his outstanding tax lien to anyone at the time these discussions were proceeding as to how to title the residence.

Accordingly, the circuit court concluded that the home was marital property but that the initial transfer was intended to directly benefit Wife while only indirectly benefitting husband during the marriage. Therefore, the circuit court found that this factor weighed in favor of awarding a monetary award to Husband, but the amount of the monetary award would be a lower percentage of the value of the home.

Finally, the circuit court evaluated the eleventh, catchall, factor. In its analysis of this factor, the circuit court again described Husband's issues with the Internal Revenue Service ("IRS"). The circuit court also reiterated how Husband did not tell anyone about these issues at the time of the transfer of the home. Additionally, the court focused on the fact that Husband denied any problems with the IRS when Wife confronted him about an IRS collection letter. It was not until two weeks after Wife confronted Husband about the IRS letter that Husband showed Wife five or six shoe boxes full of unopened letters from the IRS. Furthermore, the court made sure to point out that Husband was not paying his credit card or other debts, and that Wife's bankruptcy petition was justified because of her substantial debt. Moreover, the court explained how Husband and Wife lived in the home, rent free, from 1998 to 2000 and that Husband currently lives with his father, rent free. While the court's analysis of this factor did not add any additional information or facts, it clearly demonstrated the court's reasoning and deliberative thought process. It also demonstrated that the court determined that, based on the facts presented in the instant case, Husband was not entitled to a significant monetary award.

After completing its analysis of the final factor, the court determined that Husband was entitled to a monetary award due to the marital quality of the home and the equities of the case. The court, however, believed that the factors weighed heavily in favor of granting a minimal monetary award. Based on this analysis, the circuit court granted Husband a monetary award of $30,000. Because the circuit court explicitly analyzed each of the eleven factors in great detail, it did not abuse its discretion when it awarded Husband a monetary award of $30,000.

B. Inequitable Character of the Monetary Award

Husband further contends that even if the circuit court correctly evaluated the § 8-205(b) factors, the award is nonetheless an abuse of discretion because it is inequitable. In this context, Husband argues that because $30,000 is less than 10% of the total equity in the home, the monetary award is disproportional, and therefore, an abuse of discretion. He, thereafter, argues that "Maryland appellate courts have routinely vacated monetary awards where one spouse receives less than 20% of the marital property, because such a large disparity constitutes an abuse of discretion."

Husband is correct that the purpose of a monetary award is to achieve equity between the parties and that "[a]lthough an equal division of the marital property is not required, the division must nevertheless be fair and equitable." *Flanagan v. Flanagan*, 181 Md. App. 492, 527 (2000) (quoting *Long, supra*, 129 Md. App. at 577-78). He, however, fails to point out that in *Flanagan*, we specifically stated that decisions overturning monetary awards "are relatively infrequent, given the deferential nature of the discretionary standard of review." *Id.* Additionally, Husband misinterprets the holdings of *Flanagan, Long*, and *Ward v. Ward*, 52 Md. App. 336 (1982).

In each of these three cases, we reversed monetary awards equivalent to less than 20% of the total value of marital property. We, however, reached our results in these cases based on actions of the trial court and the specific facts in each case, not simply because the percentage of the monetary award was substantially lower for one party than the other. In *Ward*, we held "it is clear from the record that the chancellor gave no more than lip service to the nine factors."[10] *Ward, supra*, 52 Md. App. at 343. In *Flanagan*, we held "[i]n its Memorandum Opinion, the court did not explain the enormous percentage on the basis of appellant's conduct leading to the parties'

estrangement, or indeed on any particular basis." *supra*, 181 Md. App. at 526-27. While the circuit court here did not specifically state the precise calculations it used to arrive at the $30,000 monetary award, it clearly evaluated each of the eleven factors. Additionally, the circuit court explained, in significant detail, how these factors were relevant and which party they favored. Therefore, the holdings in *Ward* and *Flanagan* are inapplicable to the facts in this case.

Our decision in *Long* is more on point for the premise argued by Husband. In that case, we reversed a monetary award despite "the chancellor's thorough treatment of the statutory factors, both in the original and clarification opinions." *Long, supra*, 129 Md. App. at 577. Nonetheless, *Long* is inapplicable to the instant case. In *Long*, we determined that the monetary award was inequitable because "Husband was the source of the marital fault. [The Chancellor] noted Wife's mental health problems, her present unemployment and lack of job training, and her non-monetary contribution to the marriage. Yet [the Chancellor] awarded less than 20 percent of the marital assets to Wife, who held title to under one percent of those assets." *Id.* Therefore, in *Long* we determined that the monetary award was inconsistent with the facts and the detailed analysis of the statutory factors. In the instant case, however, we find that the circuit court's monetary award followed the court's thorough and well reasoned analysis as to each of the eleven factors. Therefore, the holdings in *Long, Ward*, and *Flanagan* are inapplicable to the facts of the instant case. Accordingly, the circuit court did not abuse its discretion when it granted Husband a monetary award of $30,000.

II.

Husband, further, contends that he was entitled to an award of attorney's fees in this case. His contention is based on the fact that we previously reversed two decisions in favor of Wife in this case. Specifically, Husband proffers that because we held "[t]he evidence points toward the property being marital property" (in *Meese I)* and "the evidence before the circuit court could only support a rational finding that the Property was acquired by the parties during their marriage and, accordingly, is marital property" (in *Meese II*), that Wife was not justified in arguing that the home was not marital property. Therefore, Husband contends that Wife's arguments were without any merit, and he is therefore entitled to attorney's fees. Wife counters that simply because we disagreed with the circuit court's decision twice does not mean her argument was frivolous. Additionally, wife argues that the circuit court in this case correctly applied the facts to the relevant law and came to the correct conclusion concerning the appropriateness of the circuit court denying Husband's claim for attorney's fees.

A court is authorized to award attorney's fees in a divorce case by § 7-107(b). When a court is deciding whether to award attorney's fees in a divorce case it must consider:

> (1) the financial resources and financial needs of both parties; and
>
> (2) whether there was substantial justification for prosecuting or defending the proceeding.

FL § 7-107(c). It is well settled that "[t]he standard of review for the award of counsel fees and costs in a domestic case is that of whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002) (internal citations omitted).

In the instant case, the circuit court explicitly evaluated the two considerations required by § 7-107(c) before denying Husband's request for attorney's fees. The circuit court specifically found:

> As to substantial justification, it's clear that a substantial issue existed, so much so that on two occasions before review by the Court of Special Appeals the trial court found the residence to be non-marital in nature, either having occurred as a gift by, from Charles Miller to his daughter or having been transmitted to preserve a life estate in the property.
>
> Each party was substantially justified in litigating the issue as to the nature of the property being marital or non-marital.
>
> As to financial resources and financial needs, plaintiff has voluntarily established his diminished level of income without prohibition from any source except his own fear of the Internal Revenue Service collecting monies rightly due for past taxes.
>
> [Husband] testified that he already used a couple of thousand dollars from his wife's military earnings from Iraq kept in his lockbox toward his attorney's fees.
>
> * * *
>
> In 2007, [Husband's] claim was for $22,182.
>
> The claim in 2011 is for $51,000, including costs.
>
> In 2007, [Wife]'s fees and costs were $18,413 . . . which are essentially comparable to the 2007 expenditures that were incurred by [Husband].

* * *

> [Wife] has been forced to resort to bankruptcy. She was clearly the major financial support and is still the major financial support for her children, one of whom has special needs.
>
> Substantial earnings resulted from her combat tour in Iraq, which [Husband] used largely for his own purposes.
>
> Accordingly, concerning justification and financial resources, and considering the status of the case and its appeals and the necessarily [sic] for these legal proceedings, the Court declines to award attorney's fees.

The circuit court was, therefore, legally correct when it determined that neither party was entitled to attorney's fees in this case. It correctly applied the facts to the law in a well reasoned opinion.

For the reasons stated above, we affirm the decision of the Circuit Court for Montgomery County.

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

FOOTNOTES:

1. A complete description of the procedural history will be provided in the facts and procedural background sections of this opinion.

2 The questions, as posed by Husband, are:

1. Did the trial court abuse its discretion in issuing a $30,000 monetary award to Appellant Tim Meese?
2. Did the trial court consider irrelevant factors in issuing its monetary award?
3. Did the trial court err in allowing Appellee to present new evidence of what occurred during the parties' marriage?
4. Did the trial court err by failing to determine whether or not the family home was still encumbered by a $30,000 Second Deed of Trust?
5. Did the trial court abuse its discretion by denying Tim Meese's request for attorney's fees?
6. Is Tim Meese entitled to attorney's fees as a matter of law, because Appellee Megan Meese had contended without substantial justification that the family home was non-marital property?
7. Did the trial court err in not determining Appellant's current income?
8. Did the trial court abuse its discretion by denying Appellant's request that it receive his 2010 1099 tax form as newly discovered evidence?

3. This is a clause that allows a mortgage holder to immediately accelerate and collect all amounts due on a mortgage when the associated property is sold.

4. Under the Garn-St. Germain Depository Institutions Act of 1982, due-on-sale clauses may not be invoked when the sale of a property is from a parent to a child. Pub. L. No. 97-320.

5. Wife contends that Miller made approximately twenty monthly mortgage payments. No evidence was presented, however, that Miller made any mortgage payments other than Wife and Miller's testimony.

6. Specific details of Husband and Wife's income and work history will be provided in the discussion section, *infra*.

7. This award was equal to the present value of the portion of the balloon note for which Husband was responsible. The balloon note was valued at $30,000. Husband and Wife co-signed the note. Therefore, the circuit court determined that Husband would have owed $15,000 on the note when it came due. It then determined that, at the time of divorce, this $15,000 had a present value of $8,500.

8. Unless otherwise indicated, all statutory references are made to relevant sections and subsections of the Family Law Article of the Annotated Code of Maryland.

9. One of the parties' two children is developmentally disabled. This child has been enrolled in an IEP since he was old enough to attend school.

10. *Ward* was decided under Md. Code (1973, 1980 Repl. Vol.) § 3-6A-01 et seq. of the Courts and Judicial Proceedings Article, which was repealed and replaced by FL §§ 8-201 to 8-214.

Cite as 8 MFLM Supp. 29 (2012)

Divorce: marital award: recalculation on remand

Albert Marsico
v.
Rose Isbell

No. 0598, September Term, 2011

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

Opinion by Wright, J.

Filed: June 18, 2012. Unreported.

When the extent of marital property has changed due to an appellate decision, it is within the discretion of the trial court to alter its monetary award on remand in light of a change in parties' circumstances. In the instant case, the trial court did not abuse its discretion.

This case arises from a judgment issued by the Circuit Court for Montgomery County on August 6, 2008, granting appellee, Rose Marsico, an absolute divorce from appellant, Albert Marsico. The court included a monetary award to appellee of $69,792.00. Appellant appealed the monetary award, and this Court held that the trial court had erred in its valuation of a piece of marital property, Rose Tree Crossing, LLC ("RTC"). This Court remanded the case to the circuit court for a revaluation of RTC and a revision of the Monetary Award Worksheet. *Marsico v. Marsico*, No. 2602, Sept. Term, 2008 (Feb. 23, 2010) ("*Marsico I*"). On remand, the circuit court, on November 5, 2010, granted appellee a monetary award of $19,241.50. Appellant timely appealed, presenting the following question:

> Did the trial court commit clear error by relying on a worksheet completed in the course of the original 2008 trial to determine, in 2010, the value of the marital award under Md. Code, Family Law 8-205?[1]

For the reasons set forth below, we affirm the judgment of the Circuit Court.

Facts and Procedural History

Appellee sued appellant for absolute divorce and sought, among other relief, division or sale of marital property and a monetary award. Appellant counter-sued for annulment or absolute divorce, including the same prayers for relief. After a trial on the merits, the court granted absolute divorce to appellee and a monetary award of $69,792.00.[2]

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

We adopt the factual background as stated in *Marsico I*:

> Appellant, Albert Marsico, describes himself as a part-time real estate broker and resides in Etchison, Maryland. Appellee, Rose Marsico, holds a doctorate in French literature and has held several teaching positions, including a professorship at the University of Lyon, where she resided when the parties began an internet courtship in the Spring of 2001. After physically meeting and, soon thereafter, consummating their relationship, the parties began a so-called "whirlwind romance." Within the month, appellee and her son left France to live with appellant in Maryland. The parties were married on December 13, 2001.
>
> The parties' relationship quickly soured as appellee began to make semi-frequent trips to France, under various pretenses. In February of 2003, appellee moved into a condominium in Bethesda, Maryland, ostensibly to be closer to her work. The condominium soon became her primary residence, and she saw her husband only on vacations, holidays, and "dates.". . . [O]nly eighteen months after their wedding, appellee proposed that they divorce.
>
> * * *
>
> Despite their deteriorating personal relationship, in February of 2003, the parties invested in a Florida real estate holding company, Rose Tree Crossing, LLC ("RTC"). Appellant obtained an eventual 23.84% interest

in RTC and appellee 16.56%, while the remaining 59.6% belonged to a third investor. Appellant was the managing member and operated from Maryland using on-site property managers.

In 2006, RTC refinanced the property in order to convert it into condominiums, at which point the real estate was estimated to be worth $4.6 million by Cuervo Appraisal Services ("Cuervo"). In 2007 and 2008, RTC experienced severe problems and required capital infusions. Appellant loaned a total of $637,000.00 to RTC and deferred $25,000.00 of his management fees. Shortly after the circuit court entered its judgment in this case, RTC was foreclosed upon.

The value of RTC was a primary issue at the divorce trial. . . . Appellee obtained [an] appraisal from Urban Economics ("Urban"), who valued the property at $3.65 million as of February 27, 2008. Appellee's expert, Joseph Estabrook, CPA ("Estabrook"), did not use this apprisal in his valuation because RTC's current financial reports were not made available to him by the time his expert witness' report was due under the court's scheduling order. Lacking this information, Estabrook used the Cuervo apprisal performed for RTC's refinancing in April 2006, and was only able to value the parties' interests in RTC as of December 31, 2006. Appellant attempted to rebut this evidence with an updated appraisal from Cuervo, which valued the real estate at $3 million as of August 5, 2008.

The court took judicial notice of the deteriorating Florida real estate market but ultimately relied upon the December 31, 2006, Estabrook valuation to find that the marital portion of appellant's interest in RTC was worth $115,500.00, while appellee's was worth $14,400.00. The court further held, with regard to RTC, that "it would be inequitable to permit [appellee] to benefit from the management fees and loan repayments that may ultimately be recovered by [appellant] when she did little during the marriage to make the project solvent, and nothing after the parties split up." Thus, the court "factored out" appellant's loans to and deferred management fees from RTC when deciding the monetary award.

> . . . Sometime in 2005 or 2006, appellant lent his daughter $30,000.00 to open a law practice in Florida. Appellant initially testified that his daughter had repaid $7,000.00 but later stated that she had repaid $21,000.00. The chancellor found that there was no satisfactory evidence of the latter repayment and that appellant had either forgiven $23,000.00 in debt ($30,000.00 less $7,000.00 repaid) or was still entitled to it, so that in either case it should be considered marital property.
>
> Having tallied the parties' marital assets and carefully considered the relevant factors in its opinion, the circuit court evenly divided the parties' marital property (save appellant's loans and deferred management fees) and awarded appellee $69,792.00.

Slip. op. at 2-5.

In *Marsico I*, appellant argued that the court erred in relying upon a "stale" valuation to make its monetary award. *Id.* at 5-6. We held that there is no magic point at which evidence of value becomes "stale," and the "expiration date" will depend on the asset class and its volatility. *Id.* at 6. Additionally, we stated that the chancellor should consider the fact that a declining market value may advantage one party over the other. *Id.* Nonetheless, equity required that "reasonable efforts be made to ensure that valuations of marital property approximate the date of judgment of divorce which includes a monetary award." *Id.* (citation omitted). We explained:

> [E]vidence confirmed the common knowledge that Florida's real estate market deteriorated rapidly between 2006, when the Estabrook valuation was performed, and 2008, when the divorce was finalized. . . . Thus, the lower court erred when it relied upon a corporate valuation that predated its judgment by approximately two years.[3]

Id. at 7 (footnote in original).

On remand, the circuit court heard evidence that the real estate held in the name of RTC was its only asset. Appellant testified that on November 5, 2008,

the note holder, Colonial Bank, held a mortgage of $3.2 million against a $2.7 million fair market value of the property. Upon foreclosure in late 2008, the property sold for $1.87 million, which was insufficient to satisfy the mortgage. Based on this evidence, the circuit court found that the value of RTC on the date of divorce was zero. The court then revised the Monetary Award Worksheet it had prepared on November 5, 2008 to reflect the revaluation of RTC. As a result, appellee's marital property share was decreased by $14,400.00. Appellant's marital property share was decreased by $115,000 based on the revaluation of RTC, plus related management fees of $25,000.00 and loans of $637,000.00, which were no longer recoupable due to foreclosure.

Appellant testified on the subject of his financial condition as of November 2010. On the original joint statement of marital and non-marital property, filed pursuant to Md. Rule 9-207,[4] appellant had a life insurance policy with a cash value of $10,000.00. However, during the trial, appellant testified that he had liquidated the policy. Appellant also testified that the 2000 BMW he owned during the last trial was inoperable due to engine failure. He purchased a 2002 BMW that had a value of $6,000 or $7,000 but he was not sure. He believed that he had "looked it up in a Kelley Book, or something like that." There was no additional testimony concerning the loan to the appellant's daughter.

Based upon this testimony, the circuit court concluded that appellant's expenses exceeded his income by roughly $3,500.00 per month, and his assets appeared to have diminished since the original trial. The court also noted that appellant had allowed his broker's license to lapse, despite evidence that appellant could continue working.

After considering the factors set out in Md. Code (1984, 2006 Repl. Vol.), § 8-205 of the Family Law Article ("FL") and determining the value of RTC, the circuit court valued appellee's marital property at $31,010.00 and appellant's marital property at $69,493.00. The court then awarded appellee one-half of the difference between these marital property values ($69,493.00 minus $31,010.000 = $38,483.00/2), or $19,241.50. The order was entered on April 22, 2011, and appellant noted this appeal.

Discussion

Appellant attacks the trial court's valuation of the joint marital property and its determination of the marital award. Specifically, appellant argues that the trial court was required to make a fresh valuation of all joint marital property, consistent with FL § 8-205, and although counsel argued as much at trial and the court agreed, noting that it "considered all the 8-205 factors anew," appellant contends that the record belies that assertion. Instead, appellant asserts that the court did not properly consider the factors in light of the evidence presented at the remand hearing. Specifically, appellant contends that the trial court erred by using the October 2008 values for three marital assets: a life insurance policy, a 2002 BMW sedan, and a loan to appellant's daughter. According to appellant, the trial court was required to make a new valuation of each of the marital assets on the Marital Valuation Statement based on the evidence presented at the November 2010 remand hearing. We disagree.

Marital property valuation is a question of fact that we review for abuse of discretion. *See e.g., Alston v. Alston*, 331 Md. 496, 504 (1993) ("The decision whether to grant a monetary award is generally within the sound discretion of the trial court.") (Citations omitted); *Flanagan v. Flanagan*, 181 Md. App. 492, 521 (2008) ("[T]he ultimate decision regarding whether to grant a monetary award, and the amount of such an award, is subject to review for abuse of discretion.") (Citations omitted); *Innerbichler v. Innerbichler*, 132 Md. App. 207, 230 (2000) ("[W]e may not substitute our judgment for that of the factfinder, even if we might have reached a different result."); *see also* Md. Rule 8-131(c) (the appellate court "will not set aside the judgment of the trial court on the evidence unless clearly erroneous.").

"The law is settled that, in a proceeding for absolute divorce, the value of marital property must be decided as of the date on which divorce is actually entered." *Doser v. Doser*, 106 Md. App. 329, 348 (1995) (citations omitted). Here, the order granting the divorce was entered on August 6, 2008. Appellant's request that the court determine the value of appellant's assets in 2010 and adjust the monetary award accordingly is contrary to the established rule. Therefore, we conclude that the circuit court did not abuse its discretion when it refused to rely on the 2010 values of certain assets held by appellant when reevaluating its monetary award.

As to the determination of the marital award, appellant contends that, upon remand, the trial court was required to redetermine its prior monetary award in light of the parties' economic circumstances. Appellant avers that the trial court committed reversible error by failing to properly consider evidence presented at the 2010 remand hearing, in particular appellant's testimony concerning a decrease in value, from 2008 to 2010, of the three aforementioned marital properties. Specifically, appellant argues that, according to this Court's decision in *Fuge v. Fuge*, 146 Md. App. 142 (2002), the trial court committed reversible error by not recalculating all of the marital assets in light of present values. In support of his argument, appellant cites two cases where this Court found that a

trial court's monetary award was inequitable: *Flanagan v. Flanagan*, 181 Md. App. 492 (2008), where the trial court abused its discretion by granting wife a marital award that was almost 90% of the value of marital property, and *Ward v. Ward*, 52 Md. App. 336 (1982), where the trial court's monetary award was held to be erroneous because it exceeded the total value of marital property. Neither case furthers appellant's argument.

A trial court must valuate the marital property at the time divorce is granted. As we stated in *Fuge*:

> When the extent of the marital property has changed due to an appellate decision, the trial court should rethink whether its original method of allocation is still "equitable" in light of the new circumstances. Further, the court must carefully consider whether there have been any other changes in circumstance since its original award that may have caused the equities to shift, justifying a different allocation of the marital property.

Fuge, 146 Md. App. at 177. This language clearly states that, upon remand, a trial court may reconsider its award if justice so requires. In other words, it is within the discretion of the trial court whether or not to alter its monetary award in light of a change in circumstances of the parties.

In the instant case, the trial court properly reconsidered the parties' economic circumstances upon remand and assessed a monetary award that was consistent with a reasonable interpretation of the evidence and the controlling law. More importantly, the trial court specifically cited the evidence as to the RTC property — the 2008 Marital Property Statement — from which it was deriving its final monetary judgment. *See Flanagan*, 181 Md. App. at 527 (trial court's error was compounded by its failure to indicate the source of its valuations). With regard to the insurance policy and the 2000 BMW automobile, the fact that those items no longer had their 2008 value because, in the interim, appellant either converted the value to cash or traded the vehicle in for another vehicle, is irrelevant.

There was nothing "inequitable" in light of the purported new circumstances. The trial court took a fresh look at the parties' circumstances and insured that an "equitable" award was made. *Fuge*, 146 Md. App. at 177.

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

FOOTNOTES

1. That section states:

Marital property — Award.

(a) *Grant of award*. — (1) Subject to the provision of subsection (b) of this section, after the court determines which property is marital property, and the value of the marital property, the court may transfer ownership of an interest in property described in paragraph (2) of this subsection, grant a monetary award, or both, as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded.

(2) The court may transfer ownership of an interest in:

(i) a pension, retirement, profit sharing, or deferred compensation plan, from one party to either or both parties;

(ii) subject to the consent of any lienholders, family use personal property, from one or both parties to either or both parties; and

(iii) subject to the terms of any lien, real property jointly owned by the parties and used as the principal residence of the parties when they lived together, by:

1. ordering the transfer of ownership of the real property or any interest of one of the parties in the real property to the other party if the party to whom the real property is transferred obtains the release of the other party from any lien against the real property;

2. authorizing one party to purchase the interest of the other party in the real property, in accordance with the terms and conditions ordered by the court; or

3. both.

(b) *Factors in determining amount and method of payment or terms of transfer*. — The Court shall determine the amount and the method of payment of a monetary award, or the terms of the transfer of the interest in property described in subsection (a)(2) of this section, or both, after considering each of the following factors:

(1) the contributions, monetary and nonmonetary, of each party to the wellbeing of the family;

(2) the value of all property interests of each party;

(3) *the economic circumstances of each party at the time the award is to be made;*

(4) the circumstances that contributed to the estrangement of the parties;

(5) the duration of the marriage;

(6) the age of each party;

(7) the physical and mental condition of each party;

(8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;

(9) the contribution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;

(10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and

(11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

(c) *Award reduced to judgment*. — The court may reduce to a judgment any monetary award made under this section, to the extent that any part of the award is due and owing.

Md. Code (1984, 2006 Repl. Vol.), § 8-205 of the Family Law Article (emphasis added).

2. The divorce proceedings were tried in the circuit court from July 28 to 30, 2008, and August 5 to 6, 2008. At the conclusion of trial, the chancellor found that appellee "sought [appellant's] companionship to — among other more legitimate reasons — obtain her green card." This, the court held, was not clear and convincing evidence of fraud sufficient to grant an annulment, and instead granted appellee an absolute divorce based upon a two-year separation.

3. We note that the record contained more recent appraisals performed by Urban and Cuervo, but these would not establish the value of RTC as a business.

4. Maryland Rule 9-207 provides in part:

(a) When required. When a monetary award or other relief pursuant to Code, Family Law Article, § 8-205 is an issue, the parties shall file a joint statement listing all property owned by one or both of them.

NO TEXT

Cite as 8 MFLM Supp. 35 (2012)

Divorce: motion to modify final judgment: due diligence

Daniel J. Boehler
v.
Cheryl Boehler

No. 530, September Term, 2011

Argued Before: Wright, Graeff, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Davis, J.

Filed: June 21, 2012. Unreported.

Appellant did not exercise due diligence in preparing for trial when he failed to arrange to travel from Ohio to Maryland over a weekend, before the arrival of an anticipated snowstorm; thus, the trial court did not abuse its discretion in denying his motion to modify the final judgment of absolute divorce that was entered in his absence.

Appellant, Daniel J. Boehler, appeals from the denial by the Circuit Court for Howard County (McCrone, J.) of his Motion to Modify Judgment of Absolute Divorce, entered on April 25, 2011. On this appeal, he initially submitted four questions for our review).[1] On September 29, 2011, however, this Court issued the following Order:

ORDER

> Final judgment (Judgment of Absolute Divorce) was entered in this matter on March 7, 2011. Appellant filed his Motion to Modify the Judgment of Absolute Divorce on April 5, 2011, which is more than ten days after entry of the final judgment. The order denying the Motion to Modify was entered on April 25, 2011. Appellant's Notice of Appeal was filed on May 18, 2011. A motion to modify a final judgment filed more than ten days after entry of the judgment does not toll the time in which to note an appeal from the final judgment. Md. Rule 2-535; Md. Rule 8-202; *see also Furda v. State of Maryland*, 193 Md. App. 371, 377 n.1 (2010). Accordingly, it is this 29th day of September, 2011 by the Court of Special Appeals, on its own motion,
>
> ORDERED that within thirty days of the date of this order the Appellant show cause in writing why the issues on appeal should not be limited to whether the circuit court abused its discretion in denying the Motion to Modify the Judgment of Absolute Divorce.
>
> /S/

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.

Appellant, having failed to show cause why the issues on this appeal should not be limited, we shall consider only the following question:

> Did the circuit court abuse its discretion in denying appellant's Motion to Modify Judgment of Absolute Divorce?

For the reasons that follow, we answer the question in the negative and affirm the judgment of the circuit court.

FACTS AND LEGAL PROCEEDINGS

Appellant and appellee, Cheryl Boehler, were married August 9, 1997, in Cozumel, Mexico. One child, Ashley A. Boehler, was born on January 25, 1999. The parties separated on April 1, 2007, when appellant moved out of the State of Maryland. In January, 2009, appellee filed a Complaint for Divorce in the Circuit Court for Howard County, Maryland. Because appellant was on active military duty in March, 2009, the parties agreed to stay the proceedings. After appellant was no longer on active duty, the case was placed on the active court docket and appellant's Answer to the complaint was due to be filed by April 5, 2010. Counsel initially filed a motion to withdraw his appearance in April 2010, because appellant indicated he did not wish to take further action in the case, even though it was moving forward in court.

An Order of Default was entered on May 13, 2010, when appellant failed to file an Answer, but, by consent of the parties, the Order was vacated after appellant filed an Answer on June 16, 2010, and coun-

sel filed a line withdrawing the motion to withdraw on June 7, 2010. Because of appellant's lack of cooperation throughout the case, on February 9, 2011, his counsel again requested that he be permitted to withdraw his appearance. This request was granted by the court on February 22, 2011.

Appellee propounded discovery and the court issued a full scheduling order, but appellant failed to submit the required financial statement or assist in completion of the joint statement of marital and non-marital property as requested. Appellant also failed to bring any of the necessary documents when he appeared for a court-ordered settlement conference on November 22, 2010. When the parties were unable to reach an agreement at the settlement conference, the case was scheduled for trial on Tuesday, February 22, 2011.

On the scheduled trial date, when appellant did not appear, his counsel requested a continuance because appellant was in Ohio, unable to travel due to a snowstorm the prior evening. After a hearing off the record, the request for continuance was denied by the administrative judge and the case referred for a trial on the merits.

Preliminarily, the court ruled upon counsel's motion to withdraw his appearance because of appellant's failure to remain in contact with him regarding the case, sometimes failing to respond to correspondence and telephone calls for months, and also failing to pay legal fees. The court granted counsel's motion to withdraw.

Appellee and a witness on her behalf then testified and several exhibits were introduced into evidence. After the presentation of evidence, the circuit court granted a Judgment of Absolute Divorce, dated February 28, 2011, and entered March 7, 2011. Significantly, appellant did not appeal the Judgment of Absolute Divorce; rather, on April 5, 2011, he filed a Motion to Modify the Judgment of Absolute Divorce. The circuit court, upon consideration of appellant's motion and the subsequent responses, entered an Order denying appellant's Motion to Modify on April 25, 2011.

LEGAL ANALYSIS

Appellant contends that the trial court abused its discretion when it denied his Motion to Modify because he "submitted sufficient allegations and/or evidence to establish that his non attendance at the trial was not voluntary. Specifically, a snow and ice store in the immediate vicinity of his Ohio home was of an unexpected and unusual character that made any travel unreasonably dangerous." Moreover, he asserts that the trial court should have granted the motion because of judicial sensitivity to family law disputes that have a significant impact on the parties. Additionally, appellant contends that his Motion to Modify, pursuant to Maryland Rule 2-535, was the appropriate procedure for raising the fact that his absence at trial was not voluntary.

Appellee counters that the trial court did not abuse its discretion when it denied appellant's Motion to Modify. Specifically, appellee maintains that appellant's decision to delay traveling from Ohio to Maryland in the face of a foreseeable snowstorm over President's Day weekend was a failure of due diligence in preparing for trial. In addition, appellee asserts that appellant failed to file a motion pursuant to Maryland Rule 2-534, which would have stayed the appeal period.

For the reasons that follow, we agree with appellee. Because appellant failed to exercise due diligence in preparing for trial by not arranging to travel to Maryland before the snowstorm began, the trial court's denial of his motion was not an abuse of its discretion. We explain.

I

Appellant seeks to expand our review beyond the parameters of our mandate that the issues on appeal should be limited to whether the circuit court abused its discretion in denying the Motion to Modify. He initially contends that, pursuant to common law and the due process provisions of the federal and State Constitutions, he had a right, as a party to a civil case, to be present and participate in his trial. He next assigns error to the trial court's summary denial of his Motion to Modify "without making any findings regarding the credible and specific allegations set forth in his Motion," which he maintains is a denial of his right emanating from "common law and due process provisions of the federal and State Constitutions to be present and participate in the trial of his case." Finally, he posits that, "just as the exercise of religion should elicit judicial sensitivity[,] so should family law disputes that may have profound consequences for the parties."

In arguing that his Motion to Modify was the appropriate procedure for noting that his absence at trial was not voluntary, appellant cites the decision of the Court of Appeals in *Pinkney v. State*, 350 Md. 201 (1998), wherein the Court held that the trial court had conducted an inadequate inquiry into the defendant's failure to appear and therefore did not have a sufficient basis to conclude his absence was the product of voluntary choice. Specifically, appellant cites to the following passage from the Court's opinion in *Pinkney*:

> [W]e conclude that the trial court has an obligation at a subsequent court proceeding to allow a criminal defendant the opportunity to explain the cir-

> cumstances surrounding an absence at trial. To be sure, a modicum of uncertainty will often accompany a trial court's finding that a defendant has waived this right because the trial court will usually be required to find a negative: that an absent defendant is not involuntarily absent. Thus, when the defendant appears before the court at a later time, the judge must allow a defendant the opportunity to establish that the prior absence at trial was other than voluntary. If the defendant, through a motion for new trial or other appropriate objection, takes issue with the finding of waiver and presents evidence which, if known to the court initially, would have precluded a finding of waiver, then the trial judge must vacate any adverse verdict and grant the defendant a new trial.

Id. at 217-18.

Appellee counters that the circuit court did not abuse its discretion when it denied appellant's Motion to Modify because, she asserts, this case came before the circuit court for trial on the merits on February 22, 2011, having been scheduled more than three months earlier. Appellant was not present on that date, although appellee, appellee's counsel and appellant's counsel were all in attendance. Preliminarily, appellant's counsel requested a continuance; however, the administrative judge denied the continuance after conducting a hearing. Thereafter, the case proceeded to trial, during which testimony and documentary evidence were presented to the court. As a result of that proceeding, appellee was granted an absolute divorce and attendant relief, pursuant to a judgment dated February 28, 2011 and entered March 7, 2011.

Appellee points out that appellant did not file a Motion to Alter or Amend pursuant to Maryland Rule 2-534, which would have stayed the time for filing an appeal. On April 5, 2011, twenty-eight days after the entry of the Judgment, appellant filed a Motion to Modify, asking the court to reconsider the denial of his continuance request. The Motion to Modify, avers appellee, was in actuality, a request to reconsider as demonstrated by appellant's citation, in support of the motion, to Md. Rule 2-535.

After consideration of appellant's Motion and various related pleadings, the Motion to Modify was denied pursuant to an Order entered April 25, 2011 and this appeal is from that Order. Despite the limited issue raised in the Motion to Modify, appellant, in his brief, focuses on issues adjudicated by the Judgment of Absolute Divorce. None of those issues are the subject of this appeal and, therefore, are not before this Court. Because appellant decided not to appeal the Judgment of Absolute Divorce, he is precluded from appealing the Judgment, and is relegated to challenging the court's decision declining to modify the judgment.

Appellant failed to show cause, pursuant to the September 29, 2011 Court Order, *supra*, that the issues on appeal should not be limited solely to whether the trial court abused its discretion in denying the Motion to Modify. Accordingly, we will not address whether the trial court was required to hold a hearing, pursuant to the Motion to Modify, to determine whether appellant's absence was voluntary.

II

The Court of Appeals, in *Neustadter v. Holy Cross Hospital of Silver Spring, Inc.*, 418 Md. 231 (2011), thoroughly explicated the law on the abuse of discretion issue. In that case, the Court stated: "Generally, an appellate court will not disturb a ruling on a motion to continue 'unless [discretion is] arbitrarily or prejudicially exercised.'" *Id.* at 241 (quoting *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 28 (1974) (finding no abuse of discretion in denying a motion where there was an "eleventh hour" request to continue a twenty-six month trial). However, the Court noted that, "[i]n exercising discretion, the trial court must apply the correct legal standard in rendering its decision," 418 Md. at 242, explaining that a failure to consider the proper legal standard in utilizing its discretion constitutes an abuse of discretion. *Id*. at 242. Additionally, the abuse of discretion standard of review is premised on the idea that matters within the discretion of the trial court are "much better decided by the trial court judges than by appellate courts." *Id*. (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 436 (2007) (citations omitted)).

In the instant case, we conclude that the circuit court's denial of appellant's Motion to Modify was not an abuse of discretion. We note that, in light of the deference given to the trial court's ruling on a motion to continue, we will not reverse a trial court's ruling unless the discretion is "arbitrarily or prejudicially exercised." *Dart Drug Corp.*, 272 Md. at 28. Additionally, we will only reverse a trial court's ruling on a motion when the court has resolved the issue on "unreasonable or untenable" grounds. *Neustadter*, 418 Md. at 241. Abuse of discretion occurs when a trial court "exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Id*. (quoting *Jenkins v. State*, 375 Md. 284, 295 (2003)). Of particular relevance to the instant case, 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 the absence

of unforeseen circumstances to cause surprise that could not have been reasonably mitigated, where untimely requests were made, where procedural rules were ignored, where attorneys failed to adequately prepare for trial, where a witness was missing, and where a litigant's chosen counsel was absent but alternative counsel was available." *Neustadter*, 418 Md. at 242-43. In contrast, this Court has reversed the "denial of a motion to continue when a wife sought more time to obtain counsel in a contentious and complex divorce proceeding, *Reasner v. Reasner*, 62 Md. App. 643, 650 (1985), and when a mother could not attend a custody hearing because the child whose welfare was at issue was ill, *In re McNeil*, 21 Md. App. 484, 499-500 (1974)." *Id*. at 243 (parallel citations omitted).

Based upon the record in this case, nothing suggests that the trial court's decision to deny the Motion to Modify was arbitrary or prejudicial. Appellant failed to cooperate during the entire divorce proceeding. He failed to file a timely Answer to appellee's Complaint, to submit or assist in the completion of financial statements regarding marital and non-marital property and to bring requested documents to the settlement conference. His overall lack of cooperation resulted in his counsel's request to withdraw his appearance, which the trial court granted. In addition, appellant did not appeal the Judgment of Absolute Divorce, but instead filed the Motion to Modify, together with a memorandum supporting the motion which argued that his "non-appearance was caused by exceptional circumstances that warranted a continuance."

Appellant is a federal employee and the day of the hearing was the Tuesday after the three-day President's Day weekend. According to his affidavit, his plans had been to drive his 2002 GMC Envoy overnight from Medina, Ohio to Ellicott City to attend the hearing. The 358-mile drive, under normal conditions, would take six hours. He was familiar with the mountainous route, which goes through Ohio, Pennsylvania and across the Allegheny Mountains, over roads that are steep and windy. In appellant's opinion, these roads "could be very treacherous [and] hazardous in conditions with ice and snow," and appellant acknowledges that the weather over this weekend "was unpredictable due to temperature changes that were occurring."

Appellant had ninety-two days of advance notice of the hearing date; consequently, there was no element of surprise. His decision to delay coming to Maryland from Ohio until late in the evening prior to trial was voluntary on his part. The impending inclement weather was widely publicized and appellant's attachments to his Motion to Modify indicate that, at worst, the snowstorm that he claims prevented his attendance at trial did not begin until the afternoon of February 21, 2011. Given the hazardous six-hour drive in late February across mountain roads during rapidly changing weather conditions, appellant's delay of his decision regarding his mode of travel until the last minute constitutes an obvious failure of due diligence, especially because the holiday weekend afforded him three extra days to travel. Instead, appellant asserts that he had no other option but to make the six-hour drive in the middle of the night, arriving at court on the morning of trial.

The trial court's decision to deny appellant's Motion to Modify was a reasonable one and within its sound discretion, especially when viewed in light of appellant's dilatory behavior in the instant case. Because appellant could have made arrangements to leave Ohio earlier, he cannot argue that his failure to appear was due to unforeseen circumstances. Accordingly, we affirm the trial court's denial of the Motion to Modify.

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

FOOTNOTE

1. The questions raised by appellant were as follows:

> 1. Was Appellant's Motion to Modify Judgment of Absolute Divorce ("Motion to Modify") pursuant to Rule 2-535 an appropriate procedural mechanism for raising issues of fact relating to the non voluntary nature of his failure to appear at the merits hearing?
>
> 2. Under the facts of this case, did Appellant have the right that emanates from the common law and from the due process provisions of the Federal and State Constitutions to be present and participate in the trial of his case?
>
> 3. Was the trial court's denial of Appellant's Motion To Modify without making any findings regarding the credible and specific allegations set forth in his Motion To Modify, affidavit and accompanying papers a denial of his right that emanates from the common law and from the due process provisions of the Federal and State Constitutions to be present and participate in the trial of his case?
>
> 4. Was it an abuse of discretion for the trial court to summarily deny Appellant's Motion to Modify without making any findings regarding the credible and specific allegations set forth in his Motion To Modify, affidavit and accompanying papers?

Cite as 8 MFLM Supp. 39 (2012)

Divorce: visitation: modification

Michael A. McNeil

v.

Sarah P. McNeil

Nos. 1098 & 1991, September Term, 2011

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

Opinion by Watts, J.

Filed: June 22, 2012. Unreported.

The circuit court did not err in its handling of appellant's third through 13th petitions for contempt against appellee, nor did it abuse its discretion in ordering appellant to pay the costs of visitation and counseling with his son, or in holding a hearing before modifying visitation; however, it did abuse its discretion in reducing the frequency of supervised visitation, without explanation and without a request for such reduction by any party.

This consolidated appeal stems from orders of the Circuit Court for Howard County relating to divorce and custody proceedings between appellant, Michael A. McNeil, and appellee, Sarah P. McNeil.[1] Appellant, *pro se*, raises six issues, which we consolidate into four and rephrase:[2]

I. Whether the circuit court abused its discretion in ordering appellant to pay half of the Best Interest Attorney's fees for work that was related to seven of appellant's third through ninth petitions for contempt against appellee?

II. Whether the circuit court:

A. Abused its discretion in not holding hearings in a timely manner on appellant's tenth through thirteenth petitions for contempt or Motion to Modify Custody?

B. Erred in not signing "show cause orders" in response to appellant's tenth through thirteenth petitions for contempt?

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.

III. Whether the circuit court abused its discretion in denying the Emergency Motion to Resume Normal Visitation and in amending appellant's visitation with his son and daughter in the Order Temporarily Adjusting Supervised Visitation?

IV. Whether the circuit court abused its discretion in ordering appellant to pay the costs of visitation and counseling with his son?

We answer questions I, II, and IV in the negative. We answer question III in the affirmative as to the circuit court's amendment of appellant's visitation with his daughter, but otherwise answer question III in the negative. We shall, therefore, affirm, in part, and reverse, in part, the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from divorce and custody proceedings, the history of which is long and contentious. Appellant and appellee are the divorced parents of two minor children, Adam and Tevia. On December 27, 2010, the Circuit Court for Howard County entered a Judgment of Absolute Divorce, awarding appellee sole legal and physical custody of Adam and Tevia and granting appellant unsupervised, non-overnight visitation.

Prior to the circuit court's issuance of the Judgment of Absolute Divorce, appellant filed six petitions for contempt against appellee, who responded to each of the petitions. At the time of entry of the Judgment of Absolute Divorce, the circuit court had denied the first two petitions. Subsequent to entry of the Judgment of Absolute Divorce, appellant filed three more petitions for contempt. Appellee filed responses to two of the three additional petitions. On January 26, 2011, appellee filed a Petition to Modify Visitation and for Attorney's Fees. On January 28, 2011, appellant filed a Motion to Change Custody. On February 10, 2011, appellee filed a second Petition for Attorneys' Fees and Costs and for Advance Attorneys' Fees and Costs, seeking compensation for work that had been

performed by her attorney between September 7, 2010, the conclusion of the divorce trial, and February 6, 2011.

On February 14, 2011, the circuit court held a hearing to adjudicate the seven pending petitions for contempt and Motion to Change Custody, which were filed by appellant, and the Petition to Modify Visitation and motions for attorneys' fees, filed by appellee. At the hearing, the circuit court heard testimony about two incidents—one in which Adam assaulted appellant with a knife during an argument,[3] and one in which appellant spanked Tevia with a wooden spoon. Ruling orally from the bench, the circuit court denied appellant's seven petitions for contempt and Motion to Change Custody, and granted appellee's Petition to Modify Visitation, limiting appellant to supervised visitation with the children. The circuit court stated as follows:

> I also now find that [appellant is] not fit to have unsupervised visitation with the children until [appellant] somehow find[s] it in [his] control, [his] decision-making, to participate, you know, in family counseling, you know, et cetera.
>
> Again, understanding the expense of shifting counselors and, you know, where [appellant and appellee] are, you know, [their] financial situations, I am — what I am going to do here is alter the visitation schedule and apparently, fortunately, I'm told, you know, we have a supervised visitation center here through the Howard County Circuit Court.
>
> . . . [A]t this point, until [appellant] participate[s] in family counseling and we get some feedback from the counselors, you know, that [appellant is] attempting to deal with these children, there needs to be, in my judgment, you know, a third party involved to prevent any knife-pulling incidents, you know, to prevent further psychological and emotional damage that has been done to these children as a result of this on-going litigation, you know, et cetera.
>
> So until that occurs, [appellant] will not be getting unsupervised visitation and the only visitation [appellant is] going to get, until I get some feedback from the counselors that it is appropriate as to both of these children, will be the supervised visitation[.]

On February 16, 2011, the Best Interest Attorney filed a Motion for Attorney Fees seeking compensation for services that had been performed between September 13, 2010, and February 14, 2011. In response to the motion, appellee requested that appellant be ordered to pay all of the Best Interest Attorney's fees. Appellant opposed the motion, disputing the Best Interest Attorney's itemized bill and arguing that (1) he was financially unable to pay, and (2) he could not be required to pay for work that had been performed in response to the petitions for contempt because the circuit court found the petitions for contempt were not frivolous.

On March 2, 2011, consistent with the oral ruling of February 14, 2011, the circuit court issued an order directing that appellant have twelve weeks of supervised visits with the children at the Howard County Visitation Center.

On April 29, 2011, the circuit court issued an order denying appellee's Petition for Attorneys' Fees, filed on February 10, 2011, and granting the Best Interest Attorney's Motion for Attorney Fees. The circuit court ordered appellant and appellee each to pay fifty percent of the Best Interest Attorney's fees. In an accompanying Memorandum in Support of Order Regarding Attorneys' Fees, issued on the same day, the circuit court explained the ruling on attorneys' fees, and the rulings of February 14, 2011, regarding visitation and the contempt petitions.

> As to supervised visitation, the circuit court stated:
>
> [T]he incidents precipitating [appellee]'s and [appellant]'s filings involved alleged assaultive behavior between [appellant] and the minor children and [appellee]'s withholding of visitation of the parties' minor children, due there to but contrary to prior Orders of this Court. As a result, [appellee] refused [appellant] visitation because she believed it to be in the best interest of the parties' minor children.
>
> * * *
>
> On review of the record of the last hearing this Court confirms it does not condone Adam's behavior in pulling a knife on his father but finds that [appellant] greatly contributed to the initiation and escalation of the behavior by Adam, whom the investigating officers took for a psychiatric evaluation at the time. The Court confirms that considering Adam's age

> and physical and mental frailties and the volatile family environment inflamed by [appellant]'s long time insensitive and persistent inflammatory conduct toward the entire family, [appellant] did not act appropriately. Tevia, on the other hand, was hit with a wooden spoon numerous times in a row for refusing to eat meat, which resulted in a complaint with Child Protective Services that was eventually deemed unfounded. This Court, while generally condoning **appropriate** corpor[ ]al punishment confirms herein that the extent to which Tevia was hit with an inanimate hard object, to have been inappropriate on [appellant]'s part.
>
> The actions of both parties surrounding the above resulted in litigation and the subsequent modification of the initial visitation award in the Judgment of Absolute Divorce, amending the unsupervised, non-overnight visitation awarded to [appellant] to supervised visitation at the Howard County Supervised Visitation Center . . . [T]he Court based its decision on what it ultimately determines was in the best interests of the children within the context of this case, the legal reality that [appellee] had primary and sole legal and physical custody of the children at the time in question, the environment created by the parties, and the upheaval that the family has suffered that is primarily due to [appellant]'s actions, *i.e.* [appellant]'s constructive desertion and the children living in a relative's basement with their mother for an extended period of time.

(Emphasis in original). As to the denial of the petitions for contempt, the circuit court stated:

> This court confirms its findings that [appellee], while technically disobeying this Court's Orders, did not willfully or substantively do so. Additionally, rather than only withhold visitation, [appellee] had other avenues to act in the best interest of the child, *i.e.*, file an emergency motion for modification of visitation.

As to the denial of appellee's request for attorneys' fees for proceedings that occurred after the divorce trial, the circuit court stated:

> [Appellant] had a substantial justification to prosecute and defend the subject present proceedings, [appellee's] technical violations of prior Court Orders, *etc.* and, as such, [appellee] too had substantial justification to prosecute and defend this action. . . .
>
> [Appellant], while filing numerous Petitions for Contempt, had a substantial justification for filing the same because he was denied visitation with his children, contrary to court Order which had not been modified or challenged by filing a petition timely.[ ] The Court notes that, although [appellee] was not found in contempt of this Court, [appellant] had the right to challenge [appellee]'s actions. Given the context of the actions within the scope of this case, [appellee] was not found to be in willful contempt of this Court's Orders. [Appellee] had other avenues to act in the best interest of the children, *i.e.*, file an emergency motion for modification of visitation; regardless of what she could have done, her actions contributed to the litigation. Thus, the petitions, as with all of [appellant]'s filings after the September 2010 hearing, are found to have substantial justification in fact and law. Additionally, the Court notes that [appellee]'s Pe[t]ition to Modify Visitation was also justified; however, as noted above, [appellant] was justified in his defense. Therefore, the Court finds there to be no frivolous claims or claims to be without substantial justification. In so finding, [appellee] is not entitled to attorney's fees.

This Court has previously found that through "this entire process, [appellant] has burdened the court system by filing countless, unsubstantiated, and burdensome motions and has prematurely appealed this case, despite there being no final judgment. All of these examples have caused [appellee] to unduly alter her preparation for and her counsel's efforts during this litigation." In the present situation, however, [appellee] was not caused to alter her preparation; rather she was a part of the cause for the litigation. Thus, this Court finds that each party was a cause to the litigation and that [appellant]'s filings were substantially justified and made with good cause, as such, [appellee] is

not entitled to the fees requested.

As to the basis for granting the request of the Best Interest Attorney for fees incurred between September of 2010 and February of 2011, the circuit court stated:

> This Court accepts th[e amount requested by the Best Interest Attorney] as being necessary to protect the separate interests of each child in this highly conflicted case. The issues raised in [ ] many of the motions and petitions to which the fees are attributable dealt with the well being of the parties' two minor children, [the Best Interest Attorney]'s clients, and, as such, [the Best Interest Attorney]'s involvement was instrumental to ensure their interests were properly and zealously represented and protected.
>
> Nevertheless, this Court finds these fees to be fair and reasonable[.] . . . Making the considerations as to the parties' financial resources and substantial justification for such litigation and the reasoning behind the involving of a Best Interest Attorney, but considering all of the financial obligations imposed on both parties, particularly, [appellant] for fee contributions thus far, this Court Orders that the parties pay this fee using a 50/50 division, as to this matter.

On August 4, 2011, appellant noted an appeal of the April 29, 2011, order of the circuit court as to the Best Interest Attorney's fees.

On May 9, 2011, appellant filed four documents: (1) a Motion to Modify/Reconsider the circuit court's order of April 29, 2011, (2) a Memorandum in Support of Motion to Modify/Reconsider, (3) a Motion to Modify Custody, and (4) a tenth petition for contempt. In the Motion to Modify/Reconsider and memorandum, appellant contended that the circuit court abused its discretion in ordering appellant to pay fifty percent of the Best Interest Attorney's fees. In the Motion to Modify Custody, appellant argued that he should be granted full legal and physical custody of the children based on appellee's multiple violations of previous court orders. In the petition for contempt, appellant asserted that appellee had violated several provisions of the Judgment of Absolute Divorce as to the sharing of information with and regarding the parties' minor children.

Appellee and the Best Interest Attorney filed responses to the motions and the tenth petition for contempt. On May 20, 2011, appellant filed an eleventh petition for contempt, alleging again that appellee had violated the provisions of the Judgment of Absolute Divorce as to the sharing of information about the parties' minor children. Appellee and the Best Interest Attorney filed responses to the eleventh petition for contempt.

On June 1, 2011, the circuit court ordered that a hearing on the Motion to Modify Custody and the tenth and eleventh petitions for contempt be scheduled for June 27, 2011. On June 2, 2011, appellant filed a twelfth petition for contempt, alleging that appellee had violated provisions of the court's order regarding visitation by not bringing the children to a scheduled meeting at the Howard County Visitation Center. Appellee and the Best Interest Attorney filed responses to the twelfth petition for contempt.

On June 10, 2011, appellee filed a Motion Requesting Postponement of Motions Hearing, on the ground that her attorney was scheduled to be in court in another county on June 27, 2011. On June 14, 2011, appellant filed an opposition to the motion. On June 15, 2011, the circuit court granted the motion to postpone the hearing, but directed that the hearing be held as soon as practicable.[4] On June 20, 2011 the circuit court ordered that appellant's Motion to Modify/Reconsider be heard on August 26, 2011, along with the petitions for contempt, which had been already scheduled for hearing on that date.[5] On June 22, 2011, appellee filed a Motion Requesting Postponement of Motions Hearing from the rescheduled date of August 26, 2011, advising that her attorney was scheduled to be in court in another county until August 31, 2011. Appellant did not oppose the motion. On July 12, 2011, the circuit court granted the motion to postpone the hearing.

On July 26, 2011, appellant filed an Emergency Motion to Resume Normal Visitation Per Judgment of Divorce, on the ground that Sunday, July 31, 2011, would be the last of his twelve supervised visits with his children. Appellant requested that "visitation be normalized between the children and their father [ ] as ordered in the Judgment of Absolute Divorce," thus allowing appellant unsupervised, non-overnight visits.

On August 2, 2011, appellee and the Best Interest Attorney filed oppositions to the emergency motion. On August 16, 2011, the circuit court denied the motion to resume visitation on an emergency basis, and scheduled the motion to resume visitation for hearing on August 31, 2011, along with other pending motions. On August 23, 2011, appellant filed a thirteenth petition for contempt alleging that appellee violated provisions in the Judgment of Absolute Divorce as to sharing of information about the parties' minor children. Appellee and the Best Interest Attorney

answered the thirteenth petition for contempt. On August 30, 2011, the motions hearing scheduled for August 31, 2011, was administratively postponed. On August 31, 2011, appellant noted an appeal of the order denying the Emergency Motion to Resume Normal Visitation Per Judgment of Divorce and of "all orders whereas [the circuit] court has willfully conspired with [appellee] and the Best Interest Attorney to not hear a custody hearing and contempt hearings for a period of over six months[.]"[6]

On October 26, 2011, the circuit court held a status hearing and an emergency hearing on the issue of supervised visitation. During the status hearing, discussing the scheduling of hearings on the contempt petitions and motions regarding visitation, the circuit court stated, as follows:

> At any rate, the — I just point out that the — I believe [appellant] filed the Emergency Motion on July twenty-sixth, about the supervised visitation. It was really at that point, you know, I had learned, you know, I was conscious, I'll put it that way, that there was a limited duration, but that has been true of anybody who as been a litigant here. You get twelve visits, it is a finite resource because of money and supervision, et cetera. But about the same time that [appellant] filed that, and I understood his twelve had run out and you know, he wanted visitation. I was also informed that the funding for the visitation center was being cut, and that ceased to exist as of September the first.
>
> At any rate, then we get to August . . . [w]here we were set to do these contempts and to pick up the aspects of all of this.
>
> Where [appellee's attorney], I think, late that afternoon I [was] informed that [appellee's attorney] had contacted the Administrative Judge and [appellant], as happens very often here, when lawyers are tied up in jury trials, I believe, in other jurisdictions that are what I was told, at any rate. That he couldn't be here because he had a carry over.
>
> As a basic proposition jury trials take preceden[ce] over other matters. So, I was told that that was administratively postponed because he couldn't get over here, and he was tied up in a carryover jury trial, at least that is what I was informed, I, under the circumstances. So then, this — the contempt aspects, and I think my motion to hear all the pending motions was moved now until I think it is December [twelfth.]
>
> * * *
>
> You know, it was again, I then set this status hearing aspect in mainly because I, you know, understanding the supervision, supervised visitation center had ceased, [appellant]'s supervision, his twelve authorized visits had run out anyway. And, feeling some obligation to address that, because it has never been this Court's intention, nor has it been this Court's decisions to stop [appellant] from having some type of visitation under the circumstances. As I think a review of the orders dealing with his visitation would lead one reasonable person to conclude. At any rate, so I wanted to get that aspect on the record in terms of the timing aspects that have been involved here.

At the status hearing, all parties agreed that appellant's tenth, eleventh, twelfth, and thirteenth petitions for contempt, as well as the Motion to Modify Custody, would be heard on December 12, 2011.

As scheduled, the circuit court conducted the hearing on supervised visitation, and after testimony from the parties, the court stated:

> You know, in terms of Tevia I would be willing . . . to reorder supervised visitation at the [Carroll County Visitation Center] . . . basically under the same terms and provisions that we had at the Howard County center in the interim here.
>
> You know, in terms of Adam, and I will pick up on this again, . . . having given [appellant] the right to participate in family counseling, and understanding as I understand the kids have been, continue to be in counseling. I haven't heard any pick up on attempts, initiation, et cetera, for [appellant] to do that. Now, I think Adam is a different, you know, is a different category, given his behavior that has been either proffered to me or I have heard about at least up through the last contempt hearing. That I see proffered in the pleadings,

you know, that et cetera.

* * *

The teenager, those kind of physical problems, emotional problems, whatever is going on between [appellant and Adam], before this Court became aware of it and what has happened since, psychologists, two that have at least proffered to say there either shouldn't be contact until there is certain types of counseling et cetera. You know, et cetera, I say to you that my read is, is that there needs to be a graduated approach dealing with counselors to try to reinitiate [appellant's] relationship with [his] son. And since I have continuing jurisdiction in looking out for [Adam's] best interest, I am amenable to doing that. I haven't been, as I said, [appellant] ha[s]n't picked up apparently on, you know, I think the [Best Interest Attorney] has been pretty reasonable and liberal in terms of not totally limiting [appellant's] access and so forth, and I will hear from him today too.

Following the circuit court's remarks, appellee's attorney advised the circuit court that appellee had offered to "do a Consent Order, so that [appellant could] go to another supervised visitation center and meet with the children on that date, on days and times in accordance with [the] interpretation of [the court's] order that the visitation would continue to be supervised." Appellant stated that he rejected this offer because he believed that it would render him unable to appeal visitation orders in the future. The circuit court clarified that a consent order would not affect appellant's ability to pursue an appeal. The following exchange then occurred:

THE COURT [TO APPELLANT]: . . . [W]hy don't you avail yourself of what counsel and myself are willing to do here, and either work through the present counselors or perhaps the National Family Resiliency Center, which does tons of these cases, okay.

[APPELLANT]: Actually, Your Honor, I have no problem with that, I have absolutely no problem working with them, I am here to get all I can get.

The court directed from the bench that appellee "draft a Consent Order, no[ ] prejudice to" appellant, allowing appellant visitation with Tevia at a visitation center in an adjacent county, and counseling with Adam through the National Family Resiliency Center.

On November 4, 2011, the circuit court signed a "Consent Order" directing that supervised visitation between appellant and Tevia occur every other week at the Carroll County Visitation Center, and that appellant would attend counseling through the National Family Resiliency Center for the purpose of reunification with Adam, with costs to be paid by appellant. Appellant did not sign the "Consent Order" prior to its submission to the circuit court. On November 7, 2011, appellant filed an Opposition to the Best Interest Attorney's Proposed "Consent Order" and Motion for Temporary Injunctive Relief. Appellee and the Best Interest Attorney filed answers to the motion. On November 15, 2011, the "Consent Order" was entered as the order of the court.

On November 17, 2011, appellant noted an appeal of the November 15, 2011, visitation order, *i.e.* the "Consent Order."[7] On November 18, 2011, the circuit court issued an Order Denying Temporary Injunctive Relief and Clarifying Previous Order Temporarily Adjusting [Appellant]'s Supervised Visitation, confirming the "Consent Order" issued on November 4, 2011, and entered on November 15, 2011, as the order of the court.[8]

DISCUSSION

I.

Appellant contends that the circuit court abused its discretion in ordering him to pay half of the Best Interest Attorney's fees for work related to appellant's third through ninth petitions for contempt. Appellant argues that there was no reason for the Best Interest Attorney to be involved in the contempt proceedings, and, as such, the circuit court should have denied the Best Interest Attorney's Motion for Attorney Fees.

The Best Interest Attorney contends as to each of appellant's issues that appellant's brief failed to satisfy the requirements of Maryland Rule 8-504, in that it lacked: a statement of the standard of review; citations to relevant portions of the record; and legal authority in support of appellant's arguments.[9]

"The award of counsel fees is reviewed under the abuse of discretion standard. A [trial] court's decision in this regard will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." Meyr v. Meyr, 195 Md. App. 524, 552 (2010) (citations and internal quotation marks omitted).

Maryland Code Ann., Family Law Art. ("F.L.") § 1-202 controls the appointment of counsel to minors in custody proceedings and the award of fees to such counsel, providing, in pertinent part, as follows:

(a) In general. — In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may:

. . .

(ii) **appoint a lawyer who shall serve as a best interest attorney to represent the minor child** and who may not represent any party to the action; and

(2) **impose counsel fees against one or more parties to the action**.

(Emphasis added). Although a trial court is not required to make any specific findings prior to awarding attorneys' fees to the Best Interest Attorney pursuant to F.L. § 1-202, the Court of Appeals has held that the factors delineated for the award of attorneys' fees to moving parties in custody proceedings in F.L. § 12-103(b) should be considered prior to a court ordering fees under F.L. § 1-202. Meyr, 195 Md. App. at 555-56 (citing Taylor v. Mandel, 402 Md. 109, 134 (2007) ("[W]henever a court assesses guardian ad litem fees under Section 1-202, the court should consider various factors, such as those articulated in Section 12-103 (b) of the Family Law Article.")). F.L. § 12-103(b) provides:

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

(1) the financial status of each party;

(2) the needs of each party; and

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

In this case, upon review of the record, we discern no abuse of discretion by the circuit court in ordering that appellant pay half of the Best Interest Attorney's fees that were assessed between September 2010 and February 2011. In the April 29, 2011, order, the circuit court found the Best Interest Attorney's involvement in contempt proceedings to be "instrumental to ensure [the children's] interests were properly and zealously represented and protected[,]" and found the bills to be reasonable. The circuit court determined appellanthad contributed to the litigation by escalating conflicts with his children during unsupervised visits.[10] The circuit court noted that appellee contributed to the litigation by withholding visitation after the incidents. In the Judgment of Absolute Divorce and Supplemental Memorandum, entered on December 27, 2010, the circuit court made extensive findings as to: (1) each party's interest in the marital property, and (2) the independent financial status of each party, including current and potential income. Accordingly, prior to awarding attorneys' fees to the Best Interest Attorney, the circuit court had information regarding financial status and needs of each party, consistent with the requirements of F.L. § 12-103(b). Upon consideration of the "parties' financial resources and [the] substantial justification for such litigation and the reasoning behind the involv[ement] of a Best Interest Attorney," the circuit court ordered that appellant pay half of the Best Interest Attorney's fees. On this record, we perceive no abuse of discretion by the circuit court.

II.

A.

Appellant contends that the circuit court abused its discretion in postponing the hearing scheduled on his tenth through thirteenth petitions for contempt and Motion to Modify Custody. Appellant argues that the circuit court must hear child access matters "on an expedited basis and has a limited number of days to hear the matter[s] and to rule upon" them. Appellant maintains that Maryland Rule 8-207, allowing for expedited appeals of child access matters before this Court, is indicative of a public policy in Maryland to hear child access cases in an expedited manner.

> [A]lthough there is no requirement in civil cases . . . that a [trial court] find expressly "good cause" before granting a motion to postpone [ ], a trial court's decision to grant or deny a motion to postpone or continue [ ] is within the sound discretion of the trial court, and, accordingly, the decision is subject to a great degree of deference on appellate review. Although the abuse of discretion standard does not leave [trial courts] with "unfettered discretionary interpretation," appellate review of this type of judicial determination is highly deferential and gives judges a substantial degree of discretion in granting such motions.

Neustadter v. Holy Cross Hosp. of Silver Spring, Inc., 418 Md. 231, 267 (2011) (internal citation and footnote omitted).

In this case, we are satisfied that the circuit court did not abuse its discretion in its handling of appellant's petitions for contempt and Motion to Modify Custody. The circuit court scheduled a hearing on the tenth and eleventh petitions for contempt on June 27, 2011, less than two months after the filing of the tenth petition on May 9, 2011. The twelfth and thirteenth petitions were added to the scheduled hearing date as they arose. The record reflects that the hearing dates of June 27, 2011, and August 26, 2011, were postponed due to scheduling conflicts on the part of appellee's attorney.[11] After each occasion, the circuit court directed that the hearing should be rescheduled as soon as possible.

There is no statute requiring a trial court to hear motions relating to child access within a specified time frame. Although Maryland Rule 8-207 provides for expedited appeals of certain child custody issues, this rule applies to appellate courts, not trial courts. In this case, the record demonstrates that the circuit court did not abuse its discretion in handling the scheduling of hearings on appellant's contempt petitions or Motion to Modify Custody.

B.

Appellant contends that the circuit court erred in not issuing "Show Cause" orders in response to his tenth through thirteenth petitions for contempt. Appellant argues that the petitions for contempt could not be adjudicated until the circuit court signed "Show Cause" orders for each alleged contempt.

In Fisher v. McCrary Crescent City, LLC, 186 Md. App. 86, 117-19 (2009), cert. denied, 131 S. Ct. 637 (2010), we discussed issuance of a show cause order in constructive civil contempt proceedings, governed by Maryland Rule 15-206, as follows:

> The show cause order must include three elements. First, if incarceration is sought, the court must provide a notice in the form set forth in Rule 15-206(c)(2)(C). Second, the order must establish a date by which the alleged contemnor must answer the petition. [Md. R.] 15-206(c)(2)(A). The date may not be less than 10 days after service of the order, unless good cause exists. Third, the order must establish a time and place at which the alleged contemnor must appear in person for a prehearing conference, a hearing, or both. [Md. R.] 15-206(c)(2)(B). If the [trial] court schedules a hearing, the order also must state whether the hearing is before a master or a judge. . . . [I]f the [trial] court schedules a hearing, the hearing date must allow the alleged contemnor a reasonable amount of time to prepare a defense. [Md. R.] 15-206(c)(2). The amount of time may not be less than 20 days afler the prehearing conference. . . .

(Footnotes and some citations omitted).

In this case, we perceive no error by the circuit court in its handling of the petitions for contempt. Because appellant alleged constructive civil contempt, Maryland Rule 15-206 applies. The record reflects that the circuit court scheduled each petition for contempt for hearing pursuant to Maryland Rule 15-206. On May 9, 2011, and May 20, 2011, respectively, appellant filed his tenth and eleventh petitions for contempt. On June 1, 2011, the circuit court scheduled a hearing on the petitions for June 27, 2011. The June 1, 2011, order contained a clause ordering that any subsequent related matters arising before the June 27, 2011, hearing also be set in for hearing on that date.[12] On June 2, 2011, appellant filed the twelfth petition for contempt, which was included for hearing on June 27, 2011, under the June 1, 2011, order. The June 27, 2011, hearing was postponed for various reasons until December 12, 2011. On August 23, 2011, appellant filed a thirteenth petition for contempt, which was included in the upcomihg hearing under the June 1, 2011, order.[13]

The record reflects that appellee promptly responded to each petition as follows: appellee filed a response to the May 9, 2011, tenth petition for contempt on May 19, 2011, ten days after the filing of the petition; appellee filed a response to the May 20, 2011, eleventh petition on June 10, 2011, twenty-one days after the filing of the petition; appellee filed a response to the June 2, 2011, twelfth petition for contempt on June 10, 2011, eight days after the filing of the petition; and appellee responded to the August 23, 2011, thirteenth petition for contempt on August 26, 2011, three days after the filing of the petition.

The record demonstrates that the circuit court complied with the requirements of Maryland Rule 15-206, in each instance, by promptly scheduling a hearing to adjudicate each petition for contempt. That the orders were not titled "Show Cause" orders is of no consequence. Maryland Rule 15-206 provides that the court must enter an order **generally** called a show cause order. In responding to appellant's numerous petitions for contempt, the circuit court committed no error warranting reversal.

III.

Appellant contends that the circuit court abused its discretion in denying the emergency motion to resume visitation as ordered in the Judgment of Absolute Divorce, and in entering the "Consent Order." Appellant argues that, because appellee caused the delay in hearing the emergency motion, the motion should have been granted while the question of visitation was pending. Appellant asserts that, as there were no reported conflicts with his children during his supervised visits, the circuit court should have granted him unsupervised visitation. Appellant contends that the circuit court abused its discretion by reducing visitation from once a week to once every other week and ordering visitation with only his daughter, not his son.

In Davis v. Davis, 280 Md. 119, 125-26, cert. denied, 434 U.S. 939 (1977), the Court of Appeals explained the standard of review on issues of child custody, stating:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Maryland Rule 8-131(c)[14]] 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 [trial 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 discrction.

(Footnote omitted).

"The guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child." Shunk v. Walker, 87 Md. App. 389, 396 (1991). "A change of custody resolution is most oflen 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." Wagner v. Wagner, 109 Md. App. 1, 28, cert. denied, 343 Md. 334 (1996). Because a finding of material change in circumstance requires a factual inquiry, such findings "will only be disturbed if they are plainly arbitrary or clearly erroneous." Shunk, 87 Md. App. at 398.

In Boswellv. Boswell, 352 Md. 204, 219-20 (1998), the Court of Appeals explained that the child's best interest is the primary factor in visitation disputes, stating:

> **In Maryland, the State's interest in disputes over visitation . . . is to protect the "best interests of the child" who is the subject matter of the controversy.**
>
> . . .
>
> [W]hile a parent has a fundamental right to raise his or her own child . . . the best interests of the child may take precedence over the parent's liberty interest in the course of a custody, visitation, or adoption dispute. . . . The best interests standard does not ignore the interests of the parents and their importance to the child. We recognize that in almost all cases, it is in the best interests of the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent.

(Citation omitted) (emphasis and alteration added).

In this case, in the Emergency Motion to Resume Normal Visitation, appellant sought unsupervised rather than supervised visitation. This constituted a request for a change in the existing visitation order—requiring a material change of circumstance and consideration of the best interest of the children. Wagner, 109 Md. App. at 28. On February 14, 2011, the circuit court had ordered supervised visitation as a result of the incidents in which Adam had brandished a knife and appellant had spanked Tevia with a wooden spoon. The circuit court did not determine, based solely on the contested pleadings of the parties, whether or not a material change in circumstance had occurred warranting modification of the visitation order. Rather, the circuit court denied the emergency motion and scheduled the matter for a hearing. We are not persuaded that the circuit court abused its discretion by denying the Emergency Motion to Resume Normal Visitation and holding a hearing to consider the issues of a material change in circumstance and the children's best interest.

At the hearing, on October 26, 2011, the circuit court addressed modifying the visitation order. The court found, based on the recommendations of two psychologists, that it was, at that time, in Adam's best interest not to have contact with his father except during counseling. The child's best interest supercedes the parent's interest in visitation. Boswell, 352 Md. at 220. For all the reasons discussed above, we perceive no abuse of discretion in the circuit court's ordering that visitation between appellant and Adam consist of counseling at the National Family Resiliency Center.

As to appellant's visitation with Tevia, before the circuit court, neither party raised the issue of reducing the frequency of visitation. Under the existing visitation order of the circuit court, appellant was "entitled to twelve (12) weeks of supervised visitation with . . . Tevia McNeil" at the Howard County Visitation Center. These visits were conducted **weekly**. The "Consent Order," which the court adopted, provides that appellant "shall be entitled to supervised visitation with Tevia McNeil. The supervised visitation shall be held at the following facility: Carroll County Visitation Center[,]" but the order inexplicably directs that visitation is to occur once **every other week**, reducing the frequency of the weekly visitation. No explanation is given in the order for the change. As such, we conclude that the circuit court abused its discretion in reducing appellant's supervised visitation with Tevia from weekly to once

every other week, but see no other abuse of discretion in the court's handling of the matter.

IV.

Appellant contends that the circuit court abused its discretion in ordering him to pay the cost of counseling for him and Adam at the National Family Resiliency Center. Appellant argues that the circuit court made no inquiry into the nature of the cost of the counseling, or appellant's ability to pay the cost.

Absent any legal authority for the argument or further information as to the manner in which the circuit court abused its discretion, on this point, we agree with the Best Interest Attorney that appellant has failed to provide any support for the contention. In the December 27, 2010, Judgment of Absolute Divorce and Supplemental Memorandum, the circuit court examined the independent financial status of each party. As such, the circuit court was fully aware of appellant's financial status when ordering that he pay the cost of the counseling for him and his son. The record in this case demonstrates that: (1) the counseling at the National Family Resiliency Center is for the benefit of appellant and Adam, not the family as a whole, (2) Adam is in separate, individual counseling, (3) counseling at the National Family Resiliency Center is not pursuant to any medical diagnosis, and (4) the recommendation for counseling was precipitated by the incident that occurred between appellant and Adam during the unsupervised visitation that was subsequently tenninated by the circuit court. Under the circumstances, we conclude that it would have been illogical, and indeed, an abuse of discretion, for the circuit court to have, in any manner, held appellee responsible for the costs of counseling for appellant and his son)5

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED IN PART AND REVERSED IN PART AS STATED IN THE OPINION. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellee did not file a brief with this court. V. Peter Markuski, Jr., the Best Interest Attorney appointed by the circuit court to represent theparties' minor children, Adam Ruari McNeil and Tevia Anne McNeil, filed a brief styled as appellee's brief.

2. Appellant phrased his questions as follows:

I. Did the trial court abuse its discretion by continuing to not to hear the Appellant's Petitions for Contempt and Petition to Modify Custody in a Timely Manner?

II. Did the trial court error by not signing "Show Cause Order" for contempt?

III. Did the trial court abuse its discretion when it denied the Appellant's Emergency Motion To Resume Normal Visitation?

IV. Did the trial court abuse its discretion when it ordered supervised visitation to occur every other week between only the Appellant and his daughter?

V. Did the trial court abuse its discretion when it ordered that the Appellant pay for all the costs of visitation and for counseling without even knowing those costs?

VI. Did the trial court abuse its discretion when it ordered that the Appellant pay for half of the Best Interest Attorney's bill for his participations in the Appellee's contempt hearings whereas the Appellee was denied attorney fees for herself since the Appellant had substantial justification for filing his petitions for contempt?

3. In a memorandum issued on April 29, 2011, the circuit court described this incident as follows: "Adam's altercation with [appellant] involved Adam pulling a knife on [appellant] after being asked to lower the volume of his headphones and [appellant removing him] from the vehicle[. T]he confrontation was initiated after [appellant] pulled off the road and stopped the car behind a warehouse."

4. Although no separate order was issued, both the circuit court's "Document Tracking Sheet" for this case and a handwritten note in the margin of the Motion Requesting Postponement of Motions Hearing reflect that the motion was granted and the court's direction that the hearing be rescheduled as soon as practicable. -

5. It is unclear from the record when the motions hearing was scheduled for August 26, 2011. The date, however, is not disputed by the parties.

6. The appeal noted on August 4, 2011, and the appeal noted on August 31, 2011, are before this Court in Case Number 1098.

7. The appeal that was filed November 17, 2011, is before this Court as Case Number 1991. On February 1, 2012, appellant filed a Motion to Consolidate Appeals. On March 8, 2012, this Court granted the motion, consolidating cases 1098 and 1991.

8. The circuit court noted that the previously titled Consent Order was "[c]onfirmed as the Order the Court promulgated from the bench on October 26, 2011 but not ultimately as a 'Consent Order[,]" as appellant had never signed it.

9. Although the Best interest Attorney is correct that appellant's brief does not comport with the requirements of Maryland Rule 8-504(a), we shall nohetheless address the merits of the issues raised.

10. Appellant's contention that he should not be required to pay attorneys' fees because the circuit court found a substantial justification for his contempt filings stems from a misreading of F.L. § 12-103(c), which provides: "Upon a finding

by the court that there was an absence of substantial justification [by] a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees." Although F.L. § 12-103(c) requires a trial court to grant attorneys' fees where there is no substantial justification for the other party pursuing the proceeding, F.L. § 12-103(c) does not require the denial of attorneys' fees where substantial justification for the proceeding is found.

11. At the October 26, 2011, emergency hearing, the parties discussed litigating the outstanding motions. Appellant assented to the petitions for contempt being scheduled for hearing on December 12, 2011.

12. At the hearing on October 26, 2011, the parties discussed the general assumption held by the circuit court and the parties, including appellant, that all pending petitions for contempt were scheduled be heard at the upcoming hearing. The circuit court ordered from the bench that the scheduling notice be reissued to reflect specifically that the twelfth and thirteenth petitions would be included in the December 12, 2011, hearing.

13. At the time appellant filed the thirteenth petition for contempt on August 23, 2011, the contempt hearing was scheduled for August 31, 2011; less than ten days later. As a result, the thirteenth petition was not ripe to be heard on the scheduled date. Md. Rule 15-206(c). When the hearing was rescheduled to December 12, 2011, however, the petition became ripe for inclusion under the June 1, 2011, order.

14. Davis relies on the clearly erroneous standard of Maryland Rules 886 and 1086, which have since been recodified as Maryland Rule 8-131(c). See In re: Yve S. 373 Md. 551, 584 n.11 (2003).

15. Even if payment for counseling at the National Family Resiliency Center were properly considered child support, it would have been an abuse of the circuit court's discretion to order appellee to pay the costs of that counseling, as no motion to modify child support was filed pursuant to F.L. § 12-104.

NO TEXT

Cite as 8 MFLM Supp. 51 (2012)

Adoption/guardianship: termination of parental rights: mandatory considerations

In Re: Adoption/Guardianship of Hilliard S.

No. 2270, September Term, 2011

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

Opinion by Kehoe, J.

Filed: June 22, 2012. Unreported.

In assessing a petition for termination of parental rights, the circuit court did not err by considering the child's bond with his potential adoptive parents or his mother's present and long-term inability to be a fit parent; to the contrary, those considerations are mandatory under Family Law Art. § 5-323(d).

We begin our analysis of Tikira S.'s appeal of a judgment of the Circuit Court for Prince George's County terminating her parental rights in her son, Hilliard S., by adopting as our own a statement made by counsel during her closing argument at trial:

> [A]fter the testimony and evidence that you've heard about all that has happened in her short 24 years of life on this earth, to deny human empathy and sympathy to [Ms. S.] is to deny your own humanity. But, again, we are not convened here [to make] displays or gestures of sympathy to the parent. We are to examine . . . what is in the best interests for a child . . .

Ms. S. presents the following questions:

I. Did the juvenile court err in weighing Hilliard's[1] prospects for adoption in considering whether to terminate Ms. S's parental rights?

II. Did the juvenile court err in focusing on whether Ms. S. should have custody of Hilliard, rather than whether it would be in Hilliard's best interest to have an ongoing legal relationship with his mother, in considering whether to terminate Ms. S's parental rights?

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.

We affirm the juvenile court's judgment.

BACKGROUND

Ms. S's parental rights to Hilliard were terminated by the Circuit Court for Prince George's County, sitting as a juvenile court, after a two day hearing on May 17 and 18, 2011. The following has been taken from the testimony and exhibits admitted as evidence in that proceeding.

The Prince George's County Department of Social Services (the "Department") became involved in the life of Hilliard S. and his mother, Tikira S. on January 29, 2009. Hilliard, born on September 6, 2008, was four months old at the time. The Department had received a referral from Hilliard's maternal grandmother, who reported that Ms. S. was going to harm herself and Hilliard. The Department responded to Ms. S.'s home and was concerned because of Ms. S.'s alleged PCP use. The Department removed Hilliard from Ms. S.'s care and placed him in shelter care[2]. The juvenile court subsequently declared Hilliard to be a Child in Need of Assistance (CINA) and committed to the Department for foster care placement. The identity of Hilliard's father is unknown. Putative fathers identified by Ms. S. were ruled out by DNA testing. The Department explored the possibility of placing Hilliard with family members, but none were willing or qualified to be placement resources. Hilliard has been in the foster care of James and Deborah L. since January of 2009.

As relevant background, we note that Ms. S. herself had experienced an especially troubled childhood. She was also a product of the foster care system, having been removed from her mother's care as a child. When she was a child, she was in an automobile accident and suffered from blunt force trauma which left her in a coma for about one-and-a-half years. When she regained consciousness, she had to relearn how to walk and talk and regain functions. Due to her own mother's neglect, Ms. S. did not receive the rehabilitative services necessary to maximize her ability to recover from traumatic brain injury (TBI). Exacerbating Ms. S.'s traumatic injury was a lack of familial support

or nurturing, as her childhood was marked by a pattern of abuse, neglect, abandonment, trauma, substance abuse, crime, prostitution, drug selling, sexual abuse, domestic violence and at least 14 psychiatric hospitalizations.

Psychiatrist Dr. Willlie Hamlin evaluated Ms. S. in 2008. At the termination of parental rights proceeding, Dr. Hamlin testified that, according to his 2008 evaluation, his diagnostic impressions of Ms. S. were that "there is a question of schizophrenia, there is a formal ongoing thought disorder, there is certainly chronic post traumatic stress disorder, there is agitated depression, there is chronic substance addiction and there's certainly evidence of some mood disorders, such as bipolar." Dr. Hamlin evaluated Ms. S. again in 2010 and concluded that his diagnostic impressions from 2008 to 2010 "had not changed significantly at all." According to Dr. Hamlin, Ms. S.'s "history of depression, post traumatic stress, the bipolar disorder, the impulsivity, the anger issues, all kind of go together in terms of what she's attempting to medicate of all the traumas of her life. Unfortunately, they combine in a way that cause her to be dysfunctional in her relationships, in her judgment frequently, and in her parenting." According to Dr. Hamlin's 2010 written evaluation, Ms. S. "functions on the developmental level of a traumatized six to seven year old child." When, as part of the hearing, Dr, Hamlin was asked what services could be put in place to get Ms. S. to a level where she could be a fit parent and pose no threat to her child, Dr. Hamlin responded that

> I think her intention is there. I think her ability, cognitively, mentally, emotionally, psychologically, would make it a risk for many, many years to come for her ever to have sole responsibility for parenting a child. I think that child's safety and growth and development would be at serious risk for many years to come with or without medication.

Dr. Hamlin further testified that

> [m]ost treatment for half of the trauma that she's been through would be almost a lifetime of treatment and supports that should be ongoing weekly for years and years to be able to function and take care of herself and make good decisions that are not destructive and damaging to herself, let alone the stress of parenting a young child, which can quickly cause her to decompensate and regress back into more serious pathology.

Such treatment would include "staying on medications, frequent psychiatric treatment, monthly therapy, weekly group support for grief, for domestic violence, sometimes inpatient, sometimes outpatient, depending . . . ." However, "[t]here is no known cure for some of the mental disorders that [Ms. S.] has in terms of thought disorder, in terms of the mood disorder, of bipolar, or other things. There are known treatments. There's no known cure." Dr. Hamlin recommended that, before any attempt is made to return Hilliard to Ms. S., Ms. S. should first spend a "bare minimum" of a year and a half in a treatment center, during which time she would abstain from drugs and comply with therapeutic interventions, to be followed by "at least a year and a half that her and any child in her custody would be in a treatment center where they could be monitored daily for the safety of the child and for her continued treatment and abstinence."

Dr. James Lewis, a Ph.D. in neuro-psychology, evaluated Ms. S. in December of 2008 and again in 2010 to "test what kinds of preexisting brain damage that she had from childhood . . . [and] assess how the use of alcohol and substances had increased her brain impairment over time . . . assess her amenability to treatment and certain types of treatment planning programs." From these evaluations, Dr. Lewis determined that, as a result of the automobile accident, Ms. S. had suffered a traumatic brain injury which caused structural damage to her brain and placed a ceiling on her recovery of function. With rehabilitative therapy, Ms. S.'s ability to recover function would have been significant, but she would never function as well as if she had never had the brain injury. Ms. S., however, did not receive such therapy and, instead, suffered continued severe traumatic stress as a result of physical, sexual and emotional abuse, and neglect. According to Dr. Lewis, these brain injuries were further compounded by Ms. S.'s abuse of multiple substances, of which PCP was the most toxic.

At both of his evaluations Dr. Lewis recommended that, for a minimum of 18 to 24 months, Ms. S. abstain from any drugs or alcohol, and participate in drug counseling, psychotherapy, medication management, and a 12-step narcotics anonymous program. At the end of that time period, Dr. Lewis would reassess Ms. S. to see if she was in a condition appropriate for unsupervised visitation with Hilliard. Dr. Lewis informed Ms. S. that, if she followed all of the above steps, her case may be appropriate for open adoption. At the hearing, Dr. Lewis was asked whether, after Ms. S. completed 24 months of following the above advice, how long would she need before she could regain custody of her son. Dr. Lewis responded, "[i]t's impossible to say."

Dr. Lewis testified that Ms. S. did not heed his advice in 2008, but that in 2010 she seemed to hear

what he was saying about getting substance abuse and mental health treatment. Ms. S. conveyed that she understood the reasons for the recommendations about complying with her treatment. She gave the impression that she had an understanding of the course of treatment she needed to follow.

Dr. Lewis observed Hilliard with Ms. S. and the prospective adoptive parents. Dr. Lewis testified that Hilliard was not attached to her the way he was to the foster parents and became agitated after a short time and wanted to be with his foster parents. Dr. Lewis testified that the foster parents were Hilliard's "psychological mother and father"[3] and that Hilliard "would be damaged psychologically if suddenly removed from that setting."

As part of Hilliard's CINA case, Ms. S. entered into four service agreements with the Department. The first was on March 10, 2009. Ms. S. was asked to have substance abuse treatment, address her mental health and medication management, submit to a psychological evaluation and, in later agreements, to submit to random urinalysis and participate in a 12-step program. Accordingly, Ms. S. had weekly visitation with. Hilliard, and enrolled in mental health care and substance abuse treatment. Unfortunately, Ms. S. relapsed into drug use in December of 2009. Between April of 2010 and March of 2011 Ms. S. submitted to a monthly urinalysis as a required condition of probation resulting from a criminal case she was involved in. According to the urinalysis results, Ms. S. maintained her sobriety during this period, which ended March of 2011. There was no evidence before the juvenile court regarding the results of any additional drug testing between the end of her probation, in March of 2011, and the termination of parental rights hearing on May 17, 2011.

The Department called Ms. S. to testify. She testified that she has been under the care of Dr. Swanson at the Washington Hospital Center since May, 2010, and that she sees him once per month for her medication management, to wit Seroquel. She testified that she was presently on a waiting list for mental health therapy. She is in a 12-step program and has had a sponsor since 2008. She was studying to obtain her cosmetology license through a correspondence school. The last time she submitted to urinalysis was on April 28, 2011.[4] She lives in a two-bedroom duplex which she pays for with the money she receives for disability insurance. She has contributed to Hilliard's care by giving him gifts of clothes and toys during his stay in foster care. Ms. S. has had regular visits with Hilliard.

After the two-day termination of parental rights hearing, the juvenile court filed an opinion terminating Ms. S.'s rights to Hilliard. In so doing, the juvenile court explained its findings using the factors mandated by Family Law Article §5-323(d). The findings relevant to the issues on appeal, were as follows:

- Ms. S.'s contact with the child has been somewhat consistent. . . . The inconsistency can be attributed to Ms. S.'s relapses in treatment. Currently Ms. S. is seeing Dr. Swanson at the Washington Hospital Center to get medication for management of her psychological problems. She is on the waiting list to obtain mental health therapy but is not in any drug counseling program.
- Ms. S. suffers from co-occurring disorders of schizophrenia and bipolar disorder. She has a history of phencyclidine, marijuana, and ecstacy addiction with repeated substance abuse relapses; history of violent assaultive and bizarre behavior; history of suicidal ideations; chronic Post-Traumatic Stress Disorder symptoms; fourteen psychiatric hospitalizations; auditory and visual hallucinations and; childhood blunt force trauma with prolonged unconsciousness, and resultant Traumatic Brain Symptoms.
- Dr. Willie Hamlin testified that although Ms. S. has made some progress it would be dangerous for her to have unsupervised contact with Hilliard. Morever he does not recommend her having custody due to her lifestyle, associations, and her prior neglect and abandonment of her children to seek drugs.
- It is unlikely that additional services would be likely to bring about a lasting parental adjustment so that Hilliard could be returned to Ms. S. within an ascertainable time not to exceed 18 months from the date of placement. According to Dr. Hamlin, Ms. S.'s past history is not promising that she will abide by treatment directives. She went to one rehabilitation program five times without success and also had referrals to two other rehabilitation programs. Moreover, the stress of parenting a young child may make her regress. Her abilities both cognitively and emotionally need many years of treatment along with medication before she could be a fit parent. Dr. James Lewis, a neuropsychologist testified that Ms. S. is not even at step one in her treatment progression. To obtain step one in treatment, Ms. S. will need to have completed the following for 18 months: rehabilitation at an inpatient treatment facility, consistently remain on medication, and participate in ongoing mental health psychiatry drug counseling, urinalysis, and a 12 step program.
- While there is no evidence that Ms. S. has abused or neglected the child or a minor, has

been convicted of a crime of violence against their child, or has involuntarily lost parental rights to a sibling of Hilliard, the circuit court finds that, as a result of Ms. S.'s serious drug issues and chronic mental health disorder, the return of Hilliard to Ms. S.'s custody poses an unacceptable risk to Hilliard's future safety.

- Although Hilliard recognizes Ms. S., he does not exhibit the same emotional tie or bond that he displays towards his foster parents. Ms. S.'s support network is severely lacking and she admits to no interaction with her family.
- Currently, Hilliard is adjusting extremely well to his foster home. The foster parents have siblings in the area who have children who interact with Hilliard on a consistent basis. They have placed him in day care and hope to enroll him in private school when he becomes of school age. He attends Sunday school, loves art and music, and participates in Gymboree.
- While Hilliard is unable to express his feelings about the possible severance of a relationship with Ms. S., Dr. Lewis testified that the foster parents are his "psychological parents."
- The likely impact on Hilliard's well being of terminating Ms. S.'s parental rights would be that Hilliard would become available for adoption by his foster parents. The standard for the circuit court is not who loves this child, but what is in his best interest. To take a chance that Ms. S. will stay off drugs, stay consistent with her medication, and begin and continue with mental health treatment is at best a possibility in the distant future. Ms. S. has had a difficult life, but to allow Hilliard to be returned to her would subject him to the same difficult life. The foster parents provide Hilliard with a stable, safe, living and healthy home in which to grow up. It would not be in Hilliard's best interest to take away this opportunity.

After considering these and all the other factors enumerated in §5-323(d), the court concluded by "clear and convincing evidence that the facts demonstrate an unfitness of Ms. S. to remain in a parental relationship with Hilliard by virtue of her chronic and severe mental illness and drug abuse and cause it to be in the best interest of Hilliard to terminate Ms. S.'s parental rights over him."[5]

DISCUSSION

Legal Framework

A parent's right to raise their children free from undue and unwarranted interference on the part of the State is a fundamental constitutional right. *See In re Adoption/Guardianshz of Rashawn Kevon H.* and *Tyrese H.*, 402 Md. 477, 495 (2007); *In re Samone H.*, 385 Md. 282, 299-301 (2005); and *In re Yve S.,* 373 Md. 551, 565-68 (2003). However, parental rights are not absolute. *In re Yve S.*, 373 Md. at 568-71. The State may act to protect the best interests of the child in contravention of the parents' fundamental rights if the parents are unable or unwilling to provide proper care for the child. *Id.* at 568-570. The State's authority extends to terminating parental rights when necessary to protect the best interest of the child. *Rashawn H.*, 402 Md. at 496 (Even in termination cases, "where the fundamental right of parents to raise their children stands in the starkest contrast to the State's effort to protect those children from unacceptable neglect or abuse, the best interest of the child remains the ultimate governing standard.")

In *Rashawn H.*, the Court identified three "critical elements" in the balance between parental rights and a child's best interest:

> First and foremost, is the implicit substantive presumption that the interest of the child is best served by maintaining the parental relationship, a presumption that may be rebutted only 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. . . .
>
> * * *
>
> To justify a TPR judgment, therefore, the focus must be on the continued parental relationship, not custody. The facts must demonstrate an unfitness to have a continued parental relationship with the child, or exceptional circumstances that would make a continued parental relationship detrimental to the best interest of the child. . . .
>
> The second element that serves to protect the parental relationship is that, in a TPR case, the kind of unfitness or exceptional circumstances necessary to rebut the substantive presumption must be established by clear and convincing evidence, not by the mere preponderance standard that applies in custody cases. . . .
>
> Third, and of critical significance, the Legislature has carefully circumscribed the near-boundless discretion that courts have in ordinary custody cases to determine what is in

> the child's best interest. It has set forth criteria to guide and limit the court in determining the child's best interest — the factors formerly enumerated in FL § 5-313(c) and (d) and now stated in FL § 5-323.

Id. at 498-499.[6] Thus, the starting point for a termination of parental rights analysis is statutory, and the statute in question is now codified as MD. CODE ANN., FAM. LAW § 5-323(d) (1984, 2006 Repl. Vol.).[7]

Standard of Review

In reviewing an order terminating parental rights, we employ three related standards:

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

In re Adoption/Guardianship of Ta'niya C., 417 Md. at 100 (quoting *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 297 (2005)).

I. Hilliard's Prospects for Adoption

Ms. S. argues that the juvenile court erred when it weighed Hilliard's prospects for adoption in considering whether to terminate Ms. S's parental rights. Specifically, she contends that the "court essentially decided that parental rights should be terminated so that Hilliard would not lose the chance to be adopted by his foster parents." In support of her argument, Ms. S. points to the following comments of the court: "[t]he likely impact on Hilliard's well being of terminating Ms. S.'s parental rights would be that Hilliard would become available for adoption by his [foster parents]" and that "[t]he [foster parents] provide Hilliard with a stable, safe, loving and healthy home in which to grow up. It would not be in Hilliard's best interest to take away this opportunity."

Ms. S. relies on *In re Adoption/Guardianship of Victor A.*, 386 Md 288 (2005), for the proposition that such comments, which she argues give weight to the effect that terminating parental rights would have on Hilliard's prospect of being adopted by his foster parents, are in error. According to Ms. S., *In re Victor* holds that the consideration of any potential adoptive resource must be separate and independent from the termination of parental rights hearing. She further quotes the Court in *In re Victor* as holding that "the facts should first be considered as if the State were taking the child from the parent for some indefinite placement and upon that determination open the question of the suitability of the proposed adoption and its relationship to the child's welfare." *Id.* at 317.

The State counters that the court did not improperly weigh Hilliard's prospects for adoption in deciding to terminate Ms. S.'s parental rights. The State contends that, while no single factor outweighs all the others, the juvenile court is required to consider 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;" "the child's adjustment to: community, home, placement, and school;" "the child's feelings about severance of the parent-child relationship;" and "the likely impact of terminating parental rights on the child's well-being." § 5-323(d)(4). Here, the State argues, the juvenile court was not only correct to consider whether terminating Ms. S.'s parental rights would afford Hilliard permanency with the foster parents to whom he is attached (in a home to which he has positively adjusted), the court was *required* to take such factors into account. According to the State, encompassed in such mandated considerations is an examination of Hilliard's potential adoptive placement and assessment of whether that placement would meet his needs.

We agree with the State, and conclude that the court did not err. In arguing error, Ms. S. relies on *In re Adoption/Guardianship of Victor A*. This decision interpreted and applied FL §5-313 (1984, 1999 Repl. Vol.), the applicable statute at the time. Since 2005, however, the pertinent Family Law statute was amended and recodified as FL §5-323 (1984, 2006 Repl. Vol.). *See* 2005 Md. Laws at 2624-25.

Here, the juvenile court made the above statements while addressing the four mandatory factors listed under §5-323(d)(4). These factors are as follows: (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. FL §5-323(d)(4). A review of the statute relied upon in *In re Adoption/Guardianship of Victor A.*, FL §5-313, reveals that two of the mandatory factors listed in §5-323(d)(4), namely, the child's feelings about severance of the parent-child relationship

and the likely impact of terminating parental rights on the child's well-being, were hot included in the former FL §5-313, and, therefore, were not considered by the Court in *In re Adoption/Guardianship of Victor A*. We also note that the current statute requires the juvenile court to consider the child's adjustment to his *placement*, home, school, and community, where previously the former FL §5-313 only required consideration of the child's adjustment to home, school, and community. The changes in the pertinent family law statute have therefore rendered the analysis under *In re Adoption/Guardianship of Victor A*. inapplicable to the present case. *In addition,* in *In re Adoption/Guardianship of Amber R. and Mark R.*, 417 Md. 701, 719 (2011), Judge Adkins, writing for the Court of Appeals, discussed FL §5-323(d)(4)(iv) — the likely impact of terminating parental rights on the child's well being — in a similar fashion to the juvenile court in this case.

However, even assuming error, such error was harmless. The harmless error analysis applies to cases involving the termination of parental rights. *In re Adoption/Guardianship of Ta'niya C.*, 417 Md. at 100 (citing *In re Adoption/Guardianship of Victor A.*, 386 Md. at 297). As the State argues, the juvenile court analyzed the facts appropriately before it, using the required factors under Family Law Article §5-323(d), and ultimately determined that there was "clear and convincing evidence that the facts demonstrate an unfitness of [Ms. S.] to remain in a parental relationship with her child by virtue of her chronic and severe mental illness and drug abuse" and that it is "in the best interest of the child" to terminate Ms. S.'s parental rights. The record overwhelmingly supports this conclusion. Accordingly, the juvenile court's statements regarding how the termination of parental rights might affect the child's likelihood of adoption, if in error, was harmless.

II. Ms. S.'s Present Ability to Have Custody of Hilliard

Ms. S. contends that the court erred in terminating her parental rights to Hilliard because the court "focused solely on [her] ability to presently have custody of Hill[i]ard, rather than whether it was in Hill[i]ard's best interest to have a continued legal relationship with her." While Ms. S. concedes that she is not in a position to immediately take custody of Hilliard, she argues that "the evidence did not support the conclusion that [her] deficiencies warranted the permanent severance of her legal relationship with Hill[i]ard."

The State counters that there was clear and convincing evidence before the juvenile court that Ms. S. should not remain in a parental relationship with Hilliard, and that it was in Hilliard's best interest to terminate Ms. S.'s parental rights. Therefore, while the juvenile court may have considered Ms. S.'s ability to have custody of Hilliard, the State argues, the juvenile court based its decision to terminate Ms. S.'s parental rights on her unfitness as a parent.

We agree with the State. We first note that, while the juvenile court addressed Ms. S.'s inability to have custody of Hilliard, the court hardly focused solely on Ms. S.'s ability to presently have custody of Hilliard. In fact, as set forth in Part I of this opinion, the juvenile court ultimately based its termination of parental rights on Ms. S.'s "unfitness . . . to remain in a parental relationship with her child by virtue of her chronic and severe mental illness and drug abuse." As we explain below, the juvenile court did not abuse its discretion in making this determination.

There was clear and convincing evidence — from two expert witnesses — that Ms. S. would not be in an appropriate condition for even unsupervised visitation for at least 18 to 24 months. The court was not clearly erroneous in crediting the testimony of these experts. The court's consideration of their testimony in this context was appropriate because the court is required to consider (emphasis added):

> (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;

FL § 5-323(d)(2)(iii & iv).

As the Court of Appeals stated in *In re Yve S.*,

> 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. Thus, Title 5 of the Family Law Article seeks to prevent the need for removal of a child from its home, to return a child to its home when possible, and where returning home is not possible,

to place the child in another permanent placement that has legal status.

373 Md. at 576 (internal quotations removed).

At the time of the termination hearing, Hilliard had been in foster care for two years and three months. According to the testimony of Doctors Hamlin and Lewis, if Ms. S. adhered to every treatment and rehabilitation recommendation for 18 months, she might be ready for unsupervised visitation. There is no realistic possibility that she will be able to act as Hilliard's custodian in the foreseeable future. The court did not en in terminating Ms. S.'s parental rights.

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

FOOTNOTES

1. The child's name is spelled "Hilliard" in the transcript and most documents in the record, but spelled "Hillard" in this Court's briefing notice. For consistency and clarity, we will refer to him as "Hilliard."

3. Dr. Lewis explained that:

> [a] psychological parent is one the child knows. This is in their mind. This is the person who wakes me up, changes my diaper, who feeds me, who takes care of me, who nurtures me, who gives me baths, who does things for me, who loves me. That's a psychological parent. A biological parent is simply you're related by blood.

4. Ms. S. submitted to a urinalysis on April 28, 2011, two to three weeks before the Termination of Parental Rights hearing on May 17, 2011. However, because Ms. S.'s probationary period ended before the State would receive the results of the urinalysis, the Department did not receive the test results. Accordingly, the evidence submitted to the court regarding Ms. S.'s sobriety was that she was sober at least until March, 2011, the date of the last urinalysis for which the State received results.

5. A notice of the petition for guardianship was published in the newspaper, and because no one objected orally or in writing, Hilliard's father was deemed to have consented by operation of law. (App. 1).

6. *In re Adoption/Guardianship of Ta'niya C.*, 417 Md. 90 (2010), the Court of Appeals clarified certain aspects of its opinion in *Rashawn*, reaffirming that the paramount focus of the court in a Termination of Parental Rights proceeding is the best interest of the child. *Id.* at 104 ("the child's best interest infuses every element of a courts analysis in TPR cases. . . .")

7. **§ 5-323. Grant of guardianship** — Nonconsensual.

(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 I 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 fights on the child's well-being.

Cite as 8 MFLM Supp. 59 (2012)

Custody and visitation: intentional interference with visitation rights: issue preclusion

Moustafa El Masry
v.
Mona Yasmin Essam Nasser, et al.

No. 2859, September Term, 2010

*Argued Before: *Eyler, James R., Meredith, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.*

Opinion by Thieme, J.

Filed: June 25, 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.*

The registration and enforcement of a ne exeat order pursuant to the UCCJEA had no preclusive effect on a father's separate tort action against his ex-wife and mother-in-law for intentional interference with visitation rights, since the court in the registration and enforcement action did not decide that the father had visitation rights, nor was it required to do so.

In 1993, appellant, Moustafa El Masry ("Father"), and appellee, Mona Yasmin Essam Nasser ("Mother") were married in Egypt. During their marriage, they had two children: a son, Nadim, born in 1995, and a daughter, Malak, born in 2001. Between 2002 and 2006, Mother and Father divorced and re-married several times.[1] By 2006, Mother and Father were divorced and living separately. At that time, Malak lived with Mother, and Nadim lived with Father.

On March 28, 2006, Father obtained an order from an Egyptian court granting him weekly visitation with Malak (the "visitation order"). On December 12, 2006, Father further obtained a *ne exeat* order, which prohibited Mother from removing Malak from Egypt. Despite the *ne exeat* order, Mother left Egypt with Malak in March 2008. Mother took Malak to Dubai and Munich before traveling to Maryland to stay with her mother, co-appellee, Monika Fingas ("Grandmother"). Mother did not inform Father that she was leaving Egypt or where she was going.

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 August 31, 2009, after discovering that Mother was living in Maryland with Grandmother, Father filed a complaint in the Circuit Court for Montgomery County seeking registration and enforcement of the visitation order and the *ne exeat* order. On March 17, 2010, the circuit court confirmed the *ne exeat* order. On May 21, 2010, the court ordered that Malak return to Egypt with Father and dismissed Father's action as to the visitation order concluding that the court lacked subject matter jurisdiction over it.

On September 28, 2009, Father filed a second complaint in the Circuit Court for Montgomery County in which he alleged that Mother and Grandmother intentionally interfered with his right to visitation with Malak by "unilaterally relocating Malak in the summer of 2008." The case proceeded to trial, and at the end of Father's case, the circuit court granted Grandmother's motion for judgment in her favor. At the end of the trial, the jury returned a verdict in favor of Mother concluding that Father did not have a right to visitation with Malak between the summer of 2008 and August 31, 2009. On February 4, 2011, the circuit court entered judgment in Mother's favor, consistent with the jury's verdict, and on February 10, 2011, Father timely filed this appeal.

Questions Presented

Father presents two questions[2] for our review, which we have rephrased as follows:

> 1) Did the circuit court err in declining to give preclusive effect to certain determinations made by the judge in a prior case between Mother and Father?
>
> 2) Did the circuit court err when it excluded certain documents offered by Father to prove that Mother and Grandmother interfered with his right to visitation with Malak?

For the reasons stated below, we affirm the circuit court's rulings regarding the applicability of issue preclusion and the admissibility of evidence.

Facts

I. The Registration and Enforcement Case

Father's complaint in the registration and enforcement case was filed pursuant to the Maryland Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"). *See* Md. Code (1984, 2006 Repl. Vol.) §§ 9.5-101— 9.5-318 of the Family Law Article ("FL"). In his complaint, Father sought registration and enforcement of both the visitation order and the *ne exeat* order. On September 10, 2009, Mother filed a timely contest to Father's complaint. She also filed a complaint to register a decision issued by an Egyptian appellate court on August 8, 2008, which vacated the visitation order. On March 11, 2010, the circuit court held a hearing on Father's request to register the *ne exeat* order, and on March 17, 2010, the circuit court confirmed the *ne exeat* order.

From May 3, 2010 to May 6, 2010, the circuit court held a hearing on Father's request to enforce the the *ne exeat* order. At the end of the hearing, the court issued an oral ruling from the bench, which was incorporated into a written judgment filed on May 21, 2010. The court's statement from the bench included a discussion of the history between Mother and Father and the court's assessment of Mother's credibility. Specifically, the court determined that Mother had a history of preventing Father from visiting Malak and that Mother's testimony was not credible. The court further noted that Mother interfered with the efforts to reunify Malak with Father. Ultimately, the circuit court concluded as follows:

> As a result of all of the evidence that I have considered and arguments of counsel, I will order that pursuant to Section 9.5-301, et. seq. of the Family Law Article, that the December 12, 2006, Egyptian order of *ne exeat* shall be enforced and that further, Moustafa El Masry shall return the minor child, Malak El Masry, born October 31, 2001, to the Arab Republic of Egypt without undue delay and as soon as may be possible and practicable.

After announcing its ruling, the circuit court stated:

> Once again, I want to thank counsel for the manner in which this case was tried. It is my anticipation that once in Egypt, that is, once Malak is in Egypt, that the plaintiff will take whatever actions are necessary to immediately put this matter before the court in Egypt. And then the Court in Egypt can decide the custody and visitation issues.

In the written order that followed, the circuit court ruled that the *ne exeat* order was enforceable, that Father was to return Malak to Egypt, and that Mother was not to have unsupervised contact with Malak until Malak had been returned to Egypt.

II. The Tort Case

While the registration and enforcement case was pending, Father filed a second complaint in the Circuit Court for Montgomery County alleging that Mother and Grandmother had intentionally interfered with Father's right to visitation with Malak between the summer of 2008 and August 31, 2009. The case proceeded to trial, which was scheduled to begin on January 24, 2011. On January 21, 2011, Father filed a motion requesting that the circuit court apply the doctrine of issue preclusion to establish that the circuit court's findings in the registration and enforcement case were binding on the parties in the tort case. On January 24, 2011, Mother and Grandmother both filed motions in limine requesting that the circuit court exclude any testimony or evidence from the registration and enforcement case regarding the best interests of the child or any allegations of harm to the child because such evidence would be irrelevant to the issues before the court in the tort case.

The circuit court heard argument from all parties and concluded that issue preclusion did not apply as against either Mother or Grandmother. Specifically, the court decided that the pertinent statements made by the judge in the registration and enforcement case were dicta, and in any event, issue preclusion was not available against Grandmother because she was not a party to the prior adjudication. The court further granted both Mother's and Grandmother's motions in limine prohibiting the introduction of statements from the registration and enforcement case pertaining to Malak's treatment and interests. At the end of Father's case, both Mother and Grandmother moved for judgment in their favor. The court ruled that Father had failed to present any evidence to support its case against Grandmother, and therefore, it granted her motion for judgment. However, the court denied Mother's motion. At the end of the trial, the jury concluded that Father was also unable to prove that he had a right to visitation with Malak between the summer of 2008 and August 31, 2009. Thus, on February 4, 2011, the circuit court entered judgment in favor of Mother.

Discussion

Since 2008, Maryland has recognized a cause of action in tort for interference with parent-child relations. *Khalfa v. Shannon*, 404 Md. 107, 127 (2008). To establish a claim for interference with parent-child relations, the plaintiff must prove (i) that the defendant intentionally and knowingly interfered with the plain-

tiff's right to visitation or custody, (ii) that the plaintiff was entitled to visitation or custody at the time, and (iii) that the interference with visitation or custody was major and substantial. *Id.* at 127. Here, Mother challenged Father's claim on the grounds that Father did not have a right to visitation with Malak during the relevant period. Father initially sought to establish the existence of such rights through the doctrine of issue preclusion. When the court ruled that issue preclusion did not allow Father to introduce the relevant statements from the registration and enforcement case, Father sought to prove the existence of his right to visitation with Malak through a variety of documents and statements all of which the court ruled were inadmissible. The circuit court's decisions as to the application of issue preclusion and the admission of evidence form the basis of this appeal.

I. Issue Preclusion

First, Father argues that the circuit court erred when it refused to apply the doctrine of issue preclusion to conclusively establish, in the tort case, the factual and legal determinations made by the court in the registration and enforcement case. Specifically, Father asserts that the court in the registration and enforcement case ruled that Father had a right to visitation with Malak and that Mother interfered with that right. To support this contention, Father relies on a number of statements made by the court in the March 17, 2010 order confirming the Egyptian *ne exeat* order, the temporary child custody order issued on April 28, 2010, the court's oral ruling on enforcement of the *ne exeat* order pronounced on May 6, 2010, and the written order enforcing the *ne exeat* order on May 21, 2010. In particular, Father states that, in its order confirming the *ne exeat* order, the circuit court concluded that the *ne exeat* order "constitutes a child custody determination" within the meaning of FL § 9.5-101. Father further relies on the court's statement at the enforcement hearing that "there is a long history in this case now of mother trying to impede the father's visitation with Malak and bringing her back to Egypt would in fact give him the opportunity to enforce those rights that he was previously ordered by the court in Egypt."

Mother responds that Father's complaint only asserts a claim for interference with his right to visitation with Malak between the summer of 2008 and August 31, 2009. Thus, Mother contends that Father must prove the existence of his visitation rights during the relevant period to succeed on his claim for interference with parent-child relations. Mother further argues that the circuit court correctly refused to apply the doctrine of issue preclusion to establish that Father had visitation rights during the relevant period and that Mother interfered with those rights because the court in the registration and enforcement case neyer ruled that Father had a right to visitation with Malak, and even if it did, such a determination was not essential to the court's ruling in the registration and enforcement case, and therefore was not entitled to preclusive effect.

Before addressing Father's argument regarding the application of the doctrine of issue preclusion, we first conclude that Mother correctly states the scope of Father's claim when she contends that Father's complaint only asserts a claim for interference with Father's right to visitation with Malak between the summer of 2008 and August 31, 2009. As the Court of Appeals stated in *Scott v. Jenkins*, 345 Md. 21, 27-28 (1997):

> [P]leading plays four distinct roles in our system of jurisprudence. It (1) provides notice to the parties as to the nature of the claim or defense; (2) states the facts upon which the claim or defense allegedly exists; (3) defines the boundaries of litigation; and (4) provides for the speedy resolution of frivolous claims and defenses.

(Citation omitted). "Of these four, notice is paramount." *Id.* (Citations omitted). As the Court of Special Appeals concluded in *Fischer v. Longest*, 99 Md. App. 368, 380 (1994), the requirement of Maryland Rule 2-303(b) that pleadings contain "such statements of fact as may be necessary to show the pleader's entitlement to relief" expresses the established rule "that the subject matter of a claim must be stated with such reasonable accuracy as will show what is at issue between the parties, so that, among other things, the defendant may be apprised of the nature of the complaint he is required to answer and defend," (Citation omitted). Thus, where a complaint fails to state the basis for a claim such that the defendant has notice of the allegations that he or she is required to defend against, the circuit court does not have the authority to issue a ruling as to that claim. *See Early v. Early*, 338 Md. 639, 658 (1995) ("The court has no authority, discretionary or otherwise, to rule upon a question not raised as an issue by the pleadings, and of which the parties therefore had neither notice nor an opportunity to be heard.")

Here, Father specifically asserts that Mother's decision to leave Egypt with Malak during the summer of 2008 interfered with Father's right to visitation with Malak. Father does not assert that he has a right to custody of Malak or that Mother interfered with Father's visitation rights prior to the summer of 2008. Thus, the only claim asserted with sufficient specificity to provide Mother with notice was Father's contention that Mother interfered with Father's right to visitation

with Malak between the summer of 2008 and August 31, 2009.

Father's argument that the circuit court erred when it refused to apply the doctrine of issue preclusion in the tort case presents a question of law. When reviewing a trial court's rulings on issues of law, we scek to determine whether the trial court's conclusions are legally correct under a de novo standard of review. *See Schisler v. State*, 394 Md. 519, 535 (2006) ("where an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a de novo standard of review") (citing *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 383 (2006); *Gray v. State*, 388 Md. 366, 374-75 (2005); *Nesbit v. GEICO*, 382 Md. 65, 72 (2004); *Walter v. Gunter*, 367 Md. 386, 392 (2002)). Therefore, we review the circuit court's decision not to apply the doctrine of issue preclusion for legal error.

The circuit court correctly ruled that the doctrine of issue preclusion was inapplicable in the tort case because the registration and enforcement court never found that Father had a right to visitation with Malak. The doctrine of issue preclusion, also known as collateral estoppel, provides "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). *Accord Gibson v. State*, 328 Md. 687, 693 (1992) ("The collateral estoppel doctrine operates to a preclusive end, so that when an issue of ultimate fact has been determined once by a valid and final judgment, that issue cannot be litigated again between the same parties in a future action."); *John Crane, Inc. v. Puller*, 169 Md. App. 1, 26 (2006) ("when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). *See also Welsh v. Gerber Prods., Inc.*, 315 Md. 510, 516 (1989); *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 490 (1987). However, where an issue of fact was not decided by the court in a prior adjudication, the parties are not prohibited from raising the issue in a subsequent litigation.

Here, the issues before the court in the registration and enforcement case were whether to confirm the Egyptian *ne exeat* order, and once it confirmed the order, whether and how to enforce the order. The UCCJEA provides for the recognition and enforcement of out-of-state custody determinations in FL § 9.5-303(a), which states:

> *In general*. A court of this State shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this title or the determination was made under factual circumstances meeting the jurisdictional standards of this title and the determination has not been modified in accordance with this title.

Thus, pursuant to the UCCJEA, in order to confirm and enforce the *ne exeat* order, the court in the registration and enforcement case was required to decide: 1) that the *ne exeat* order constituted a child custody determination as defined by the statute, 2) that the Egyptian court that issued the order had the jurisdiction to do so, and 3) that the order had not been modified since it was entered. The registration and enforcement court made the required findings in its order confirming the *ne exeat* order on March 17, 2010.

When making the above findings, the circuit court did not decide that Father had a right to visitation with Malak nor was it required to do so. In concluding that the second and third factors were satisfied, the court was not required to consider whether Father had visitation rights at all. Only the first factor, whether the *ne exeat* order constituted a child custody determination, presented an opportunity for the court to rule on whether Father had a right to visitation with Malak. Pursuant to FL § 9.5-101(d)(1), a child custody determination is "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." Thus, the circuit court could find that the *ne exeat* order was a child custody determination if it concluded that it granted Father a right to custody of Malak or a right to visitation with Malak. However, in concluding that the *ne exeat* order was a child custody determination, the circuit court did not state the basis for its decision. Without knowing the basis for the court's ruling, we cannot infer that the court found that Father had a right to visitation. Therefore, the court in the tort case correctly refused to rule that Father's right to visitation with Malak was conclusively established through the doctrine of issue preclusion.

Furthermore, the circuit court did not rule that Father had a right to visitation with Malak during the relevant period in either the temporary child custody order issued on April 28, 2010 or the enforcement order. The temporary child custody order addressed visitation and custody issues that arose during the proceedings, but the court made no finding as to whether Father had visitation rights between the summer of 2008 and August 31, 2009 in that order. Additionally, at the enforcement hearing, the only issue before the court was whether to enforce the *ne exeat* order and if

so, how the order should be enforced. Any discussion outside the scope of those issues was dicta and therefore, did not constitute a ruling of the court. Specifically, when announcing its ruling, the court stated that "there is a long history in this case now of the mother trying to impede the father's visitation with Malak and bringing her back to Egypt would in fact give him the opportunity to enforce those visitation rights that he was previously ordered by the court in Egypt." That statement was outside the scope of the issues before the court, and was not entitled to preclusive effect under the doctrine of issue preclusion.

We also hold that the circuit court correctly refused to apply the doctrine of issue preclusion to establish that Father had a right to visitation with Malak as against Grandmother because Grandmother was not a party to the registration and enforcement case. The third-prong of the test for applying the doctrine of issue preclusion requires that the party against whom the plea was asserted must have been a party or in privity with a party in the prior adjudication. Only Mother and Father were parties in the registration and enforcement case. Grandmother played no role in that adjudication. Therefore, she did not have a fair opportunity to litigate the issues before the court in the registration and enforcement case, so the court's rulings in that case are not conclusive as against Grandmother.

II. Evidentiary Issues

Second, Father argues that the circuit court erred when it excluded certain items of evidence that Father sought to introduce to prove that he had a right to visitation with Malak and that Mother and Grandmother interfered with that right. Specifically, Father sought to admit the following evidence, which the circuit court ruled was inadmissible: the Egyptian visitation order, a portion of Mother's Answer in the registration and enforcement case, a portion of Mother's testimony in the registration and enforcement case, and a letter to the FBI purportedly written by Grandmother. Additionally, Father sought to elicit testimony from Dr. Zitner, the psychologist who provided assistance with the reunification efforts between Father and Malak, regarding whether she had observed Mother interfere with Father's visitation rights, but the court sustained Mother's objection to the question.

Mother responds that the circuit court did not abuse its discretion when it ruled that the above evidence was inadmissible. Specifically, Mother asserts that the Egyptian visitation order, the portion of Mother's Answer in the registration and enforcement case, and the portion of Mother's testimony from the registration and enforcement case are inadmissible because they are not relevant to the proceedings in the tort case. Meanwhile, Grandmother asserts two arguments in support of her contention that the circuit court properly excluded the letter to the FBI. First, she argues that the letter was never authenticated, and therefore was inadmissible. Second, she contends that the letter was not relevant to the issues before the court in the tort case. Additionally, Grandmother argues that even if the court erred in excluding the letter to the FBI, such error was harmless. For the reasons that follow, we conclude that the circuit court did not err in excluding any of the challenged evidence.

A. Relevancy

During the trial in the tort case, Father sought to introduce an Egyptian visitation order issued on March 28, 2006. The court excluded the visitation order on the grounds that it had been annulled by the decision of an Egyptian appellate court on August 8, 2008. In reaching this conclusion, the court stated with reference to the visitation order:

> It was clearly reversed. It has an opinion here. The appellate court opinion is quite eloquent as written and it didn't have anything to do with the merits.
>
> * * *
>
> The second, the court gives two reasons for the reversal. But, the second reason is annulling the judgment of the court in the first instance and halting to implement the judgment until final judgment is issued in the appeal and obliging the appeal against to pay the lawyers [sic] fees for the two court decrees. [Father] was ordered to pay the fees for [Mother] having filed it and the court having to take up the issue.

Father argues that the court erred when it excluded the visitation order, whereas Mother asserts that the visitation order was irrelevant, and therefore the court properly ruled that it was inadmissible.

In addition, Father sought to introduce a portion of Mother's testimony from the registration and enforcement case. There, Mother testified that "[w]e had, he had an order of supervised visitations to come and visit with Malak at the Youth (unintelligible) Club." However, the court ruled that Mother's testimony from the registration and enforcement case was inadmissible because it did not provide a time frame for Father's right to visitation with Malak. As with the visitation order, Father argues that Mother's testimony from the registration and enforcement case was admissible and the court erred in excluding it, whereas Mother argues that the testimony was irrelevant because it did not tend to make it more or less probable that Father had a right to visitation during the relevant period.

Maryland Rule 5-401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594 (2011), the Court of Appeals explained the standards by which we review the admission or exclusion of evidence, stating:

> It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded "is committed to the considerable and sound discretion of the trial court," and that the "abuse of discretion" standard of review is applicable to "the trial court's determination of relevancy." *See e.g. Merzbacher v. State*, 346 Md. 391, 404-05, 697 A.2d 432, 439 (1997). Maryland Rule 5-402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence. . . . [T]he "de novo" standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not "of consequence to the determination of the action." *Parker v. State*, 408 Md. 428, 437, 970 A.2d 320, 325 (2009), (citations omitted)(quoting *J.L. Matthews, Inc. v. Md. Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92, 792 A.2d 288, 300 (2002)).

Id. at 6 19-20 (footnote omitted). In *State v. Simms*, 420 Md. 705 (2011), the Court of Appeals further stated:

> we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403. *See Thomas v. State*, 372 Md. 342, 350, 812 A.2d 1050 (2002) (Thomas I) ("The fundamental test in assessing admissibility is relevance."). During the first consideration, we test for legal error, while the second consideration requires review of the trial judge's discretionary weighing and is thus tested for abuse of that discretion.

Id. at 725. (Citation omitted). *See also Parker v. State*, 408 Md 428 (2009). Here, we conclude that the visitation order was irrelevant because it had been annulled by the Egyptian appellate court's decision on August 8, 2008. We further conclude that Mother's testimony from the registration and enforcement case was relevant, but the circuit court did not abuse its discretion in determining that its probative value was substantially outweighed by the danger of unfair prejudice.

With respect to the visitation order, the circuit court found that the Egyptian appellate court decision issued on August 8, 2008 annulled the March 28, 2006 visitation order. As a result, the visitation order no longer made the existence of Father's visitation rights more or less probable. Therefore, the visitation order was irrelevant, and the court was required to exclude it. *See Ruffin Hotel Corp. of Md., Inc.*, 418 Md. at 620.

As to Mother's testimony regarding the existence of Father's right to visitation, her statement makes it more probable that Father had such rights, and therefore is relevant in the tort case. However, the issue in the tort case was not whether Father had a right to visitation, but whether he had such a right between the summer of 2008 and August 31, 2009. Because Mother's statement in the registration and enforcement case did not include any indication of when Father had a right to visitation, it is not probative of such rights existing during the relevant period. Therefore, introducing Mother's statement, although probative of Father having visitation rights, presented a substantial risk that the jury would assign greater weight to the statement than it merited. Because of the risk that the jury could misunderstand Mother's statement as an admission that Father had a right to visitation during the relevant period, we conclude that the court did not abuse its discretion in excluding it.

B. Expert Testimony

Father also sought to introduce a portion of Mother's Answer from the registration and enforcement case, in which she stated "[t]hat the Order attached to the complaint as Exhibit 'A' provides for the Plaintiff to have visitation with the child, Malak, once a week for three hours, said visitation to take place Friday evenings at the 6 October Sporting Club in Cairo, Egypt." However, the court in the tort case ruled that Mother's statement was inadmissible because it constituted a legal conclusion. Father argues that Mother's statement was a relevant admission and therefore was admissible, whereas Mother asserts that the court properly excluded the statement because Mother was not qualified to provide testimony regarding legal conclusions.

As the Court of Appeals noted in *Merzbacher v. State*, 346 Md. 391, 404 (1997), "[t]he admission of evidence is committed to the considerable and sound discretion of the trial court." (Citations omitted). *See also Goren v. United States Fire Ins. Co.*, 113 Md. App. 674, 685 (1997) ("The admissibility of a lay opinion is

vested in the sound discretion of the trial court."). Therefore, we review the court's decision to exclude Mother's statement in her Answer from the registration and enforcement case for abuse of discretion. Because we conclude that the court's decision to exclude Mother's statement as an unqualified legal opinion was well within the appropriate bounds of its discretion, we affirm.

Maryland Rule 5-701 provides as follows:

> 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.

Thus, "[t]he rule in Maryland is that 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." *Goren*, 113 Md. App. at 685 (quoting *King v. State*, 36 Md. App. 124 (1977)). Just as Mother would not be permitted to make legal conclusions in her testimony as a lay witness, Father should not be permitted to use Mother's legal conclusions against her. Therefore, we conclude that the circuit court did not abuse its discretion in excluding Mother's statement in her Answer from the prior adjudication.

Additionally, during the examination of Dr. Zitner, Father's counsel asked Dr. Zitner "did you observe any conduct or hear anything from [Mother] during this time that you believe interfered with [Father's] right to see his child The court sustained Mother's objection to the question ruling that the question called for a legal conclusion, and therefore was not appropriate.

Maryland Rule 5-702 gives the trial court broad discretion in ruling on the admissibility of expert testimony. *See Bentley v. Carroll*, 355 Md. 312, 339 (1999). In *McCoy v. Hatmaker*, 135 Md. App. 693, 722 (2000), we held that the circuit court did not abuse its discretion when it found that a witness who was qualified as an expert regarding the standard of care for emergency medical technicians, "lacked the knowledge, skill, experience, and training to testify as to conclusions of law." Moreover, in *Burdette v. Rockville Crane Rental Inc.*, 130 Md. App. 193, 210 (2000), we upheld a circuit court's refusal to allow the defendant's expert witnesses to give their opinion as to the cause of an accident where the questions asked required that the experts make legal conclusions. Here, Father's question requires that Dr. Zitner conclude that Father had a right to visitation, which is a legal determination. As Dr. Zitner was an expert in psychology not a legal expert, the court did not abuse its discretion in concluding that Dr. Zitner was unqualified to testify as to legal conclusions.

C. Authentication

Finally, Father sought to introduce a letter to the FBI purportedly written by Grandmother. The letter discussed a murder threat made in a phone call from Egypt. It contained allegations that Father threatened to send people to kill Mother. The letter had Grandmother's name at the bottom but not her signature. When Father attempted to introduce the letter, the court ruled that the letter was inadmissible because it had not been properly authenticated and was irrelevant.

On appeal, Father argues that Grandmother's counsel authenticated the letter when he admitted that Grandmother wrote a letter to the FBI in his opening statement. Specifically, Grandmother's counsel stated:

> Now much has been made by counsel of a letter that was written. What you're going to hear, and you've heard some of this already, what the evidence is going to establish in this case is that [Grandmother] believed that [Father] was threatening the life of her daughter and her granddaughter and she believed that because of threats that had been made to [Mother] and to the life of [Mother] and to the life of the child.
>
> That, as you'll come to find out, is why she wrote a letter to the FBI. That's the only reason she wrote a letter to the FBI and you won't hear anybody in this courtroom testify anything to the contrary. You won't hear anybody in this courtroom testify that she wrote that letter for any other reason.
>
> And, lastly, what you won't hear is you won't hear anybody testify that the letter she wrote to the FBI caused any problem for [Father] in attempting to come to the United States. Counsel suggested to you that the letter was written for the sole purpose, the sole purpose of preventing [Father] from getting a visa to come to the United States. You won't hear any evidence about that and you won't hear any testimony about that. What you will hear is [Grandmother] explain to you why she wrote the letter.

Father relies on the Court of Appeals's decision in *McLhinney v. Lansdell Corp. of Md.*, 254 Md. 7 (1969),

to argue that the admission by Grandmother's counsel that Grandmother wrote a letter to the FBI removed the issue from controversy thereby relieving Father of the obligation to authenticate the letter. Grandmother responds that Father did not properly authenticate the letter, and, even if he did, the letter was irrelevant. Grandmother further argues that, even if the letter was relevant, the court's error in excluding it was harmless because Father never presented any evidence that Grandmother sent the letter, that the FBI received the letter, or that the letter had the effect that Father claims it had.

Pursuant to Maryland Rule 5-901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, to properly authenticate the letter to the FBI, Father was required to provide some evidence that the letter he sought to introduce was the letter that Grandmother wrote and sent to the FBI. At most, the statements made by Grandmother's counsel at the beginning of the trial establish that Grandmother wrote a letter to the FBI. However, these statements do not establish that the specific letter that Father tried to enter into evidence was the letter that Grandmother wrote to the FBI. Father presented no evidence that the letter he sought to introduce was the letter written by Grandmother. As Father failed to establish this basic factual predicate, the letter was inadmissible, and the circuit court properly excluded it.

Furthermore, even if the letter to the FBI was properly authenticated, the circuit court also ruled that the letter was not relevant, and Father does not challenge that ruling on appeal. We note that Father offered the letter to the FBI to establish that Grandmother intentionally interfered with Father's right to visitation, but Father presented no evidence that the FBI received the letter or that the letter had any adverse impact on Father's ability to obtain a visa to come to the United States. Without any evidence that the letter had the effect that Father claimed, the letter was irrelevant, and the circuit court properly excluded it on that ground as well.

For the foregoing reasons, we affirm the rulings of the circuit court.

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

FOOTNOTES

1. According to Mother's testimony, Mother and Father were married and divorced twice. According to the court's ruling in the registration and enforcement case, Mother and Father were married and divorced three times. This discrepancy in the record is not pertinent to the issues before this Court.

2. Father presented the following issues:

> I. Whether the trial court improperly declined to honor the conclusivity of various relevant court determinations rendered in prior related circuit court case No. 80538-FL, which had established core elements of plaintiff's right to prevail in the instant case.
>
> II. Whether the trial court's systematic exclusion of admissible evidence offered by plaintiff inappropriately usurped the jury's function.

Cite as 8 MFLM Supp. 67 (2012)

Custody: modification: relocation of custodial parent

Mariel Fiat

v.

Philippe Auffret

No. 1222, September Term, 2011

Argued Before: Meredith, Woodward, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Meredith, J.

Filed: June 26, 2012. Unreported.

In granting the father's motion to modify custody based on the mother's impending move to Jamaica, the trial court properly focused on the best interests of the children, and was not required to put any special emphasis on keeping the children with their primary custodial parent in an effort to maintain stability.

Mariel Fiat ("Mother"), appellant, has appealed from an order of the Circuit Court for Montgomery County which granted a motion to modify custody filed by Philippe Auffret ("Father"), appellee. The appeal presents the following question for our review, which we have conflated from the two questions presented in Mother's brief:[1]

> 1. Did the trial court err in granting Father's motion to modify custody?

We answer that question in the negative, and affirm the trial court's order.

FACTS AND PROCEDURAL HISTORY

The parties never married, but engaged in a long-term, if sporadic, romantic relationship in various locales around the world. Both Mother and Father are highly educated and work in international development. Father has been employed by the World Bank since 1991, and has lived in Vietnam, Bolivia, and the Dominican Republic, among other countries. Since approximately 2003, Father has resided in Silver Spring, with periodic overseas travel as a component of his job. Mother is currently employed by the Inter-American Development Bank and is posted in Kingston, Jamaica. The employment offer which lead to Mother's current job precipitated the instant litigation.

Mother and Father met in late 2000 when both were living and working in the Dominican Republic.

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.

Mother became pregnant with the parties' son, and left the Dominican Republic for Massachusetts, where their son was born on October 17, 2001. Father was not present for their son's birth, and did not meet his son until Mother took the 8-month-old to the Dominican Republic to visit Father in July 2002. Father left the Dominican Republic for his next posting in Vietnam in October 2002. Mother and son visited Father in Vietnam over the 2002-2003 Christmas and New Year's holidays, and returned to Vietnam in April 2003. She then lived with Father for a few months. While in Vietnam, the parties learned that Mother was pregnant. Mother and their son moved to Massachusetts, where Mother's family resided; Father left his Vietnam posting and moved to Silver Spring. The parties' daughter was born on January 9, 2004, in Massachusetts. Father was not present for his daughter's birth, and did not meet her until December, 2006, when she was nearly three years old. Father did not see the parties' son during this time frame either.

In December 2006, Father's visit to the Dominican Republic to see the children marked the beginning of a new chapter in the relationship between Father and the children, which was encouraged by Mother. The testimony at trial revealed visits by Father with the children every six months (December 2006, June 2007, Christmas 2007). In June 2008, Father flew to the Dominican Republic, picked the children up, and flew with them to France so that they could meet Father's family in Brittany. In August 2008, Mother moved with the children from the Dominican Republic to Maryland, a decision that made Father "extremely, extremely happy."

Since late 2003, Father has been romantically involved with Katie Bannon, with whom he lives in Silver Spring. Father and Ms. Bannon are the parents of two children, a boy born May 4, 2005, and a girl born April 25, 2007. The Fiat-Auffret children and the children of Father and Ms. Bannon attend school together, have been involved in each others' lives since August 2008, and consider each other siblings. Father has been a constant presence in the parties' children's lives since August 2008 as well, and, at trial, termed his lack of contact with them prior to December 2006 as his "biggest regret."

On August 4, 2010, Mother and Father entered into a custody and parenting agreement that provided Mother with sole physical custody, with the parties sharing joint legal custody. Father enjoyed visitation with the children every other weekend, Tuesday evenings from 5 p.m. until 8 p.m., alternating holidays, and three weeks in the summer. Paragraph 45 of the custody agreement stipulated that the children's passports would be kept in the court registry, and only released upon written consent of both parties. In addition, the custody agreement recognized Father's "right of first refusal" to watch the children in the event Mother was out of town. Further, the agreement provided that, if either party planned to move more than twenty miles from his or her current residence, that party was required to provide the other with ninety days' notice. Mother's notice pursuant to that provision gave rise to the instant litigation.

Mother testified that, after three years of unemployment and exhaustive job-search efforts, she was offered a position with the Inter-American Development Bank in Kingston, Jamaica. The position was squarely within her field of expertise and paid more than twice as much as the highest salary she had earned previously, in addition to providing handsome fringe benefits. On April 1, 2011, Mother formally notified Father that she intended to move with the children to Jamaica as of July 11, 2011.

On April 11, 2011, Father filed a motion to modify custody and to enjoin Mother from removing the children from Maryland. On April 20, 2011, Mother filed a motion to modify visitation and for an order releasing the children's passports from the court registry. Both parties filed answers to the other's motion, and trial was set, on an expedited basis, for July 5-7, 2011.

At the conclusion of trial, the court rendered an oral opinion granting Father's motion to modify custody. The court found that the children's best interests would be served by remaining in Silver Spring with Father, and not by moving to Jamaica with Mother. To that end, the court awarded Father sole legal and physical custody, with reasonable visitation by Mother.

STANDARD OF REVIEW

Changes in child custody are guided by the court's paramount concern of acting in the best interests of the child. As the Court of Appeals noted in *Taylor v. Taylor*, 306 Md. 290, 303 (1986):

> [I]n any child custody case, the paramount concern is the best interest of the child. As Judge Orth pointed out for the Court in *Ross v. Hoffman*, 280 Md. 172, 175 n.1 (1977), we have variously characterized this standard as being "of transcendent importance" and the "sole question." The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.

An appellate court reviewing a trial court's decision on child custody is limited to determining whether the trial court's factual findings were clearly erroneous, and whether the court abused its discretion. "This Court may not set aside the factual findings of the chancellor unless they are clearly erroneous, and absent a clear showing of abuse of discretion, the decision of a trial judge in a custody case will not be reversed." *Montgomery County Dep't of Social Services v. Sanders*, 38 Md. App. 406, 419 (1978) (internal citations omitted). Deference is owed by a reviewing court to the ability of the trial court to view the witnesses and assess credibility. *Id.* at 418-19.

Neither parent in this custody contest alleged that the other was unfit. Rather, Father alleged that Mother's proposed move would interrupt his relationship with the children, their relationship with his children by Ms. Bannon, and their lives in this community. Father asserted that Mother's relocation to Jamaica constituted a change in circumstances sufficient to warrant a modification of sole physical custody from Mother to Father.

As this Court stated in another case involving parental relocation, *Braun v. Headley*, 131 Md. App. 588, 597 (2000):

> When a trial court finds that the moving party has satisfied the burden and established a justification for a change in custody, those findings must be accorded great deference on appeal, and will only be disturbed if they are plainly arbitrary or clearly erroneous.

Change in circumstances sufficient to warrant a change in custody can be found, depending on the circumstances of the individual case, when a parent seeks to relocate. *See, e.g., Domingues v. Johnson*, 323 Md. 486 (1991); *Goldmeier v. Lepselter*, 89 Md. App. 301 (1991).

DISCUSSION

In her appeal, Mother advances several contentions. First, she complains that the court did not properly apply the *Sanders* factors or certain "relocation guidelines" promulgated by the American Association of Matrimonial Lawyers. This Court in *Sanders* recognized that none of the factors recited in that opinion had dispositive qualities, and that a court should look at the "totality of the situation in the alternative environments and avoid focusing on any single factor[.]" 38 Md. App. at 420-21. It also noted:

> The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication. The fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future. At the bottom line, what is in the child's best interest equals the fact finder's best guess.
>
> What critics of the "judicial prognostication" overlook is that the court examines numerous factors and weighs the advantages and disadvantages of the alternative environments. The court's prediction is founded upon far more complex methods than reading tea leaves. The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health, and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Id. at 420. *Accord Best v. Best*, 93 Md. App. 644, 655-56 (1992). ("While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation or the length of the separation.").

In this case, the trial court made plain that it was focusing on the best interest standard, stating:

> The Court's decision has to be focused on, and the thrust of the Court's decision needs to be decided by, what is, in fact, in the best interest of these children.
>
> In deciding this case, the Court has listened very closely to all of the testimony, both fact witnesses, all of the expert witnesses that were called for a host of different reasons. I have reviewed all of the relevant case law that has been cited, that has been provided and that the Court has researched on its own, relative to custody issues and specifically to relocation laws. And the Court in its decision, I will tell you and I will reiterate it through the decision is that the Court has looked at the various factors that the Court is required to consider in assisting the Court in making the decision.

The court in this case further indicated that it considered the *Sanders* factors in reaching its decision here. The court specifically mentioned factors 1, 4, 5, 6, 8, 9, and 10, and we infer from the court's comments that the court did not overlook factors 2, 3, and 7. The court in this case reviewed at length

> the factors that should be considered. There's different sources regarding various factors in terms of, and let me go through some from different categories, fitness of parties, potentiality of maintaining natural family relations, preferences of the child. . . . Material opportunities affecting the future of the child, residences of the parents and opportunities for visitation or geographic proximity of parental homes, length of a child's separation from a parent, prior voluntary abandonment or surrender, relationship between the child and each parent, potential disruption of the child's social and school life, demands of parental employment, sincerity of the parent's request.
>
> Factors which are listed as simply guidelines as well for the Court to consider in assisting the trier of fact in making what is otherwise a very difficult decision from the American Academy of Matrimonial Lawyers. The nature, quality and extent of involvement and duration of the child's relationship with the person proposing to relocate and with the non relocating person, siblings and other significant persons in the child's life, the age, developmental stage, needs of the child and the likely impact that relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child. The feasibility of preserving the relationship between the non relocating person and the child through suitable

arrangements considering the logistics and financial circumstances of the parties; the child's preference taking into consideration the age and maturity of the child; whether there is an established pattern of conduct of the person seeking the relocation either to promote or thwart the relationship of the child and the non relocating person; whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to financial or emotional benefit or education opportunity; the reasons of each person for seeking or opposing the relocation; and any other factor affecting the best interest of the child.

The Court is taken [sic] and has taken all of those factors that are relevant and germane to the Court's decision into consideration in its decision today.

After reciting the various factors it had considered, the court again emphasized the objective of seeking to act in the best interest of the couple's children. As the court stated in its oral opinion:

> This is [ ] not about Mariel Fiat or Philippe Auffret. Please understand that in rendering the Court's decision today, I am not making any comment about the fitness of being one better fit than the other. You strike me . . . as very nice, sincere, genuine, talented, concerned individuals and loving parents. But, I do not make the decision through the prism of your position. I make the decision because you have given me the unenviable position of having to make that decision of what is in the best interest of your children, sadly. You have asked a stranger to make a decision what is in the best interest of your children as opposed to being able to sit down as mature adults and hammer out a decision, not as what is in your best interest from the career perspective.

The court then discussed the Father's concern about the children relocating to Kingston, Jamaica. The court was careful to note that it was not criticizing Jamaica, but had ultimately concluded that the evidence persuaded it that having the children remain in their present community was more likely to be in their best interest than uprooting them for a move to a new locale:

> Let me talk a little bit about Jamaica and all of the information that was referenced about Jamaica and Kingston and it's an unsafe environment and unsafe community. Please, no comment that I make is made in any way, shape, or form to denigrate or criticize Jamaica. I have not been there, but I understand it's a lovely country in parts. But, part of the decision is you have an environment in a nice secluded area of Silver Spring with a school in Chevy Chase, the French School, versus an environment in Jamaica where you have a walled community with bars and safe rooms, with concern about getting the children from here to there. Who is going to take them; how are they going to get there. Which is a better environment for children to be raised in?
>
> * * *
>
> It is a completely different environment. Is that dispositive of the Court's decision in this case, absolutely not. It's a factor. It's a factor that the Court considers. It's not that Jamaica is not safe. I think when you weigh the two considerations, they are presently in a safer environment.

A main thrust of Mother's argument, both in the circuit court and in this Court, focused on Father's lack of involvement with the children during the early years of their lives. But the circuit court, again, was careful to articulate that the focus of its decision was on the current and future best interests of the children. The court explained its reasoning as follows:

> Clearly from the testimony that I have heard, at least for a pattern of over the course of the past three years, [Father] has done exactly what Ms. Fiat wanted him to do, and that was become a very involved, caring father for these two young children and the two other children that have been referenced. They're not the subject of today's litigation, but a father who is concerned about his kids, actively involved with them, concerned about education, concerned about sports, concerned about the arts, concerned about his culture, not

to the exclusion of anybody else's culture. It kind of reminds me of the book that was written by S.E. Hinton back in 1971 called That Was Then and This Is Now. Perhaps Mr. Auffret could have been a better father in the early years. From the testimony it seems certainly he could have been.

But that's not the lens through which this Court needs to make its decision today. Its decision, I think, I need to focus on what has been the situation more recently. It's a factor to consider who has had primary custody; who has been involved the most over the years. But, it's also a factor that the Court needs to consider, what is the current environment that these children are currently in in assisting the Court in making its decisions.

The relationship of the children with each parent seems to be very close. I'm certain there's love back and forth. I was very moved. One listens very intently when you hear the question asked of either of the parties, what is your view regarding the other as in this particular [case] it was asked of Mr. Auffret, what is your view of Ms. Fiat as a mother. . . . And the response was she's a wonderful mother. That speaks volumes to me. His only criticism, his only criticism that I heard was that his feeling that Ms. Fiat's preference would be that although she's finally achieved what she wanted to achieve, and that is [Father's] involvement, she now wishes less involvement.

A factor also for the Court to consider, and this [ ] was very significant . . . is the potential disruption of a child's social and school life. They are 7 and 9 years old. When you have children . . . that are younger, there's obviously an initial bond that's formed. But children at a year, 18 months, you pick them up, they go, off they go and they adjust, they adapt. They don't have the same type of social environment that children have as they get older. When you are 7 and 9, they have a pattern. They have a personal life. They have friends. They have siblings. They have schoolmates. They have interests. They have art. They have music. They have soccer. They have perhaps ice skating and many, many other things. Does that mean that that's not available to them in Jamaica? No, but what it means is that social morase [sic], that social activity, that social environment has already been established for them. **To pick them up from what I perceive from the evidence to be a very, for both parents, a very beautiful loving environment here in Montgomery County, to take them from that and to put them in an environment involving walls and bars and a safe house and a school yet to be determined with no relationships whatsoever, to me, is not in the best interest of these children, quite candidly, not even close.**

(Emphasis added.)

In our view, the trial court examined numerous factors and weighed the asserted benefits and detriments of both Jamaica and Silver Spring, but always focused on the best interests of the minor children. We will not substitute our view of the evidence for that of the trial court.

Mother also asserts in her brief that the American Academy of Matrimonial Lawyers' guidelines and "other states" "have also placed an emphasis on keeping a child with the primary custodial parent in an effort to maintain that stability in a relocation case." Nevertheless, courts in Maryland are not required to give decisive weight to this factor.

In *Domingues v. Johnson*, 323 Md. 486 (1991), the Court of Appeals addressed the proposed out-of-state relocation of a remarried mother who shared joint custody of two children with her ex-husband. The mother sought to modify the existing visitation schedule of the father, because her new husband's job was transferring him to Texas, and the mother planned to join him there with the parties' children. At the initial stage of the modification proceeding, a master of the Circuit Court for Montgomery County recommended that primary custody be granted to father. The circuit court heard arguments of counsel, but ultimately overruled the mother's exceptions and signed an order adopting the master's recommendations. The mother appealed to this Court, which reversed, holding that the trial court erred by focusing on the best interests of the child when it should have determined whether there was a change in circumstances affecting the welfare of the children. This Court further held that,

because the record before the trial court did not show "a demonstrable adverse affect" on the children, the trial court should have granted sole custody to the mother and cleared the way for the move to Texas.

The Court of Appeals granted the father's petition for *certiorari*, and reversed for procedural reasons involving the degree of scrutiny the trial court should have applied to the master's recommendations. However, the Court of Appeals expressly stated that it did not agree with mother's contention that the trial court was wrong to consider the best interest of the children, and further pointed out that this Court was wrong in its conclusion that no change in circumstances had been proved because no deleterious effect on the children had been proved. The Court of Appeals held that this Court had taken an "unduly restrictive" view of the concept of changed circumstances. "It is sufficient if the chancellor finds that changes have occurred which, when considered with all other relevant circumstances, require that a change in custody be made to accommodate the future best interest of the children." 323 Md. at 499. The Court of Appeals expressly disapproved a statement this Court had made in *Jordan v. Jordan*, 50 Md. App. 437, 447 (1982), in which we had quoted with approval from a New York case which had held that relocation by a custodial parent, "cannot of itself . . . constitute the basis for a modification of custody." To the contrary, the Maryland Court of Appeals said in *Domingues*, 323 Md. at 500: "[C]hanges brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody. The result depends on the circumstances of each case." The *Domingues* Court went on to state:

> The relocation of a parent having joint or primary physical custody may present serious questions concerning modification of a custody order, and the approach of the courts of the several states to this problem has not been uniform. In some states the courts jealously protect the right of travel, and place a heavy burden upon the parent who would challenge the relocation. In other states, the burden is placed upon the parent contemplating relocation to show that it would be in the best interest of the child. The legislatures of some states have enacted "anti-removal" statutes.
>
> The view that a court takes toward relocation may reflect an underlying philosophy of whether the interest of the child is best served by the certainty and stability of a primary caretaker, or by ensuring significant day-to-day contact with both parents. Certainly, the relationship that exists between the parents and the child before relocation is of critical importance. If one parent has become the primary caretaker, and the other parent has become an occasional or infrequent visitor, evidencing little interest in day-to-day contact with the child, the adverse effects of a move by the custodial parent will be diminished. On the other hand, where both parents are interested, and are actively involved with the life of the child on a continuing basis, a move of any substantial distance may upset a very desirable environment, and may not be in the best interest of the child. Professor Raines suggests that "in light of current psychological research, moving children away from one parent, after a successful joint custody arrangement has been instituted, is rarely in a child's best interest." . . .
>
> * * *
>
> In the present case, there was evidence that the father had a very close relationship and strong bonds with the children. Although the father did not have equal physical custody, he did have, and regularly exercised, extensive rights of visitation. As a result, the children spent substantial periods of time with each parent. The close relatives of the children, maternal and paternal, with whom the children had enjoyed close contact, reside in this area. . . .
>
> The issue of stability cuts both ways in this case. Continued custody in the mother, the primary caretaker in fact, certainly offers an important form of stability in the children's lives. However, permitting the children to remain in an area where they have always lived, where they may continue their association with their friends, and where they may maintain frequent contact with their extended family, also provides a form of stability. These are but some of the factors that the chancellor must consider.

Id. at 501-02 (citations omitted).

Maryland law is clear that,

> where the custodial parent seeks to relocate, the focus of the trial judge's analysis has shifted, from a narrow "specific harm" analysis, to a more sweeping "best interests of the child" inquiry. Stability, in the form of continuing primary physical custody in the same parent, is now only a factor, albeit a substantial factor.

Goldmeier v. Lepselter, 89 Md. App. 301, 309 (1991). *Cf. McCready v. McCready*, 323 Md. 476, 482 (1991) ("in the 'best interest' determination, . . . stability is but [one] factor . . . to be considered"). The basic facts in *Goldmeier* were similar to those in *Domingues*: a divorce, joint legal custody of two children, with primary physical custody by the mother, remarriage by the mother, and a proposed relocation to Texas as a result of mother's new husband's job. The father sought a change in custody and sought to enjoin the mother from moving with the parties' sons. Because the trial court in that case relied upon this Court's opinion in *Johnson v. Domingues*, 82 Md. App. 128 (1990), which was later overturned by the Court of Appeals's opinion in *Domingues v. Johnson, supra*, the case had to be remanded. In our opinion ordering the remand, this Court expressed this view regarding the mobility of modern society:

> The legal question presented to us by the parties in this appeal is whether the divorced spouse, who seeks to relocate the children, has the burden of proof to demonstrate that the move is in the best interests of the children. That is not, however, the question we need to address. The real question is, under all the circumstances, what is in the best interests of the children? Our answer, in short is: the burden is on the trial judge to weigh the relocation and all its ramifications, together with all the other information he or she can garner, to decide this very difficult question.
>
> There is, however, a larger social question presented by the facts in this case. How can such a relocation be accomplished without pain to the children and both parents? Our answer is, it cannot. This answer is the same regardless of whether the children relocate with the primary custodial parent or there is a change in custody. A superficial answer to this larger question might be, "maintain the status quo, don't relocate," but the social and economic reality is that people must and do move.

89 Md. App. at 302. We emphasized that, on remand, each parent "bears the burden of persuading the trial judge that he or she is best suited to serve as the primary custodian. The trial judge's role is not so much to ferret out specific harm, but **to evaluate the child's best interests.**" *Id.* at 308 (emphasis added).

Mother also asserts that the trial court's decision infringes on her constitutional right to travel. We do not agree with that assertion, but, in any event, our cases have made clear that even constitutional rights, such as the right to travel, must yield to the best interests of the children. In *Braun v. Headley*, 131 Md. App. 588 (2000), this Court recognized that "the best interests of the child must override all other competing interests, including the parent's interest in retaining custody, if a relocation would be adverse to the child." *Id. at* 602. In *Braun*, a custodial mother complained that a trial court's change of custody to the father infringed on mother's constitutional right to relocate to Arizona with the minor child. This Court specifically held in *Braun* that the relocation standards established in *Domingues* do not violate the right to travel:

> After review of the Supreme Court decisions in *Saenz* [*v. Roe*, 526 U.S. 489 (1999)] and *Shapiro* [*v. Thompson*, 394 U.S. 618 (1969), *overruled in part, Edelman v. Jordan,* 415 U.S. 651 (1974)], the out of state cases addressing this issue, as well as commentary on the issue, we conclude that the standard set forth in *Domingues* for deciding custody disputes involving a parental relocation does not interfere with a custodial parent's right to travel. The Supreme Court has given no indication that the constitutional right to travel should be paramount over the state's interest in preserving the best interests of the children. Indeed, the state's duty to protect the interests of minor children has been recognized by the Supreme Court as "duty of the highest order." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

131 Md. App. at 607 (footnote omitted).

Finally, Mother contends that the court abused its discretion and otherwise "fail[ed" to properly apply sound legal principles" in its decision to award sole legal custody to Father. According to Mother, the court failed to discuss any of the factors mentioned in *Taylor v. Taylor*, 306 Md. 290 (1985).

In the circuit court, Mother advocated for sole legal custody in her verified motion to modify visitation and legal custody, asserting that it was "not in the children's best interests that joint legal custody remains in effect." At trial, although she did claim to be "willing to continue to work with" Father if the court maintained joint legal custody, Mother also testified to incidents where she and Father could not agree on various issues regarding the children. For example, Mother testified that she "hope[d]" she and Father would be able to cooperate on the children's religious upbringing, but testified to a disagreement about catechism classes that eventually "became an impasse." The "impasse" pertained to their daughter's attendance at classes in preparation for her First Communion; Mother testified that Father "refused to understand" the necessity of these classes, "it was a disaster," and "it has been a problem." Mother was asked, "other than the impasse you have on the school decision, are you willing to continue the joint legal custody in all other respects?" and replied, "yes."

Mother testified that she and Father communicate primarily through e-mails, but that, if there is an emergency, she will call him. She admitted on cross-examination that she had not discussed potential schools for the children in Jamaica with Father, that she has called Father names (adding, "he called me names, I called him names"), and that she has e-mailed Ms. Bannon to get the children together when Father has been away on assignment, because she "actually do[es] not wish to see their father's face."

It is noteworthy, in our assessment, that the Court in *Taylor* regarded the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare as

> clearly the most important factor in the determination of whether an award of joint legal custody is appropriate, and is relevant as well to a consideration of shared physical custody. Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.

Id. at 304. In our view, Mother's testimony regarding the parties' conflict over religion issues would be sufficient to support the trial court's decision to award Father sole legal custody. The parties clashed over their daughter's attendance at catechism classes in a way that eventually became a "disaster," and all Mother could say about the future was that she hoped she and Father would be able to agree on this issue.

In *Maness v. Sawyer*, 180 Md. App. 295, 318 (2008), Judge Moylan observed that the parent who was objecting in that case to the circuit court's failure to award joint custody had "cite[d] no reported case that has ever held that a chancellor's decision not to grant joint custody was an abuse of discretion and we know of none."

The trial court's task in this case was to weigh the competing proposed living situations for the Fiat-Auffret children and determine which would be more likely to serve the children's best interests. As the court in this case aptly noted, the case was not about what the parents wanted — it was about what was best for the children. In arriving at the decision that custody should be granted to Father, the court properly kept its focus on the children, and, in our view, neither erred nor abused its discretion.

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

FOOTNOTE

1. The questions presented in Mother's brief are as follows:

> 1. Mother had been the primary parent for the children's entire lives and, after three years of unemployment, obtained an exceptional career opportunity in her field and geographic region of expertise, which would have enhanced both the Mother['s] and children's lives, and her relocating with the children would have permitted the Father to maintain his relationship and be involved in the children's lives. It is in the best interest [of] the children to relocate with their Mother to Jamaica. The trial court did not properly apply the legal principles applicable to child custody relocation in determining the best interest [of the children] and in modifying the custody to grant Father sole physical custody. Did the trial court err in its determination of the children's best interests and abuse its discretion by transferring sole physical custody from Mother to Father and precluding the children from relocating to Jamaica with Mother?
>
> 2. The trial court neither articulated its reasons for modifying legal custody nor applied the legal principles of *Taylor v. Taylor*, 306 Md. 290 (1985) in determining whether continuation of joint legal custody is in the children's best interest. Did the trial court err or abuse its discretion in terminating joint legal custody and awarding Father sole legal custody?

Cite as 8 MFLM Supp. 75 (2012)

Divorce: transfer of interest in real property: statutory factors

Lisa G. Stafford
v.
Timothy L. Stafford

No. 1947, September Term, 2011

Argued Before: Zarnoch, Matricciani, Eyler, James R. (Ret'd, Specially Assigned), JJ.

Opinion by Zarnoch, J.

Filed: June 26, 2012. Unreported.

The circuit court's order to one spouse to transfer her rights, title and interest in the marital home were based on the relevant statutory factors for transferring an ownership interest in marital property, rather than those governing use and possession of the family home.

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

STATEMENT OF THE CASE

Appellant, Lisa Stafford ("Lisa"), appeals an October 2011 Judgment of Absolute Divorce of the Circuit Court for Charles County requiring her to transfer her rights, title, and interests in the marital home held as tenants by the entirety with appellee, Timothy Stafford ("Timothy"). Lisa also challenges the court's award of joint legal and shared physical custody of the parties' two minor children. For the reasons set forth below, we affirm the circuit court's rulings.

FACTS AND LEGAL PROCEEDINGS

Timothy and Lisa Stafford were married on September 24, 1994 in Beltsville. Two children were born of the marriage, and Timothy also adopted Lisa's child from a prior relationship.

In 2004, Timothy and Lisa moved to Hillmeade Court in Charles County (the "marital home"). The title to the property was jointly held, but Timothy was the only borrower identified on the mortgage. After learning that Lisa was having an adulterous affair, Timothy filed a Complaint for Absolute Divorce in the circuit court in September 2010, seeking, *inter alia*, sole legal and physical custody of the parties' two minor children and transfer of full title and ownership of the marital home. Lisa filed an answer and counter-complaint, seeking substantially the same relief, but requesting exclusive use and possession of the marital home.

On November 17, 2010, the circuit court entered a consent order for *pendente lite* relief that gave both parties joint legal custody of the their minor children according to a detailed schedule and exclusive use and possession of the marital home on an alternating basis to coincide with each party's physical custody of the children.

Trial on the merits began on April 8, 2011 and continued on August 18-19, 2011, at which evidence was presented concerning the grounds for divorce as well as the parties' parental fitness, financial situations, potential living arrangements post-divorce, and monetary and non-monetary contributions to the marriage. Specifically, the court learned that both parties worked for the government; Timothy earned $120,000.00 from the FBI; Lisa made $70,000.00 from the Postal Service; the mortgage on the home was greater than its value; Timothy was solely responsible for paying the mortgage; Lisa initially paid for "small accessories, like the cable bill . . . food [bill] . . . stuff like that[;]" and that, even though Timothy recognized that the value of the home was less than what he owed, he still requested that the court transfer title to him. Timothy testified that he and Lisa shared responsibilities for taking care of their children and corroborating witnesses indicated that both Timothy and Lisa were fit parents, who had good relationships with their sons.

During closing argument, Timothy's attorney urged the court to grant Timothy primary custody during the school year as well as title to the marital home, and discussed the following factors: parental wishes, wishes of the children, interactions and interrelationships with family members, the parent/child relationships, relationships with siblings, gender of the children, living situations of the parties, the parties' religiousness, history of domestic violence between the parties, history of alcohol or drug abuse, economic situations of the parties, medical records, court records and personal judgments, fitness of the parties, the parties' work schedules and ability to provide supervision, and the children's ability to stay in their home and community. With respect to the marital home, counsel discussed the grounds for divorce, the parties' monetary and non-monetary contributions, the value of their

property interests, their ages, economic circumstances and physical and mental conditions.

Specifically, counsel stated:

> [W]ith respect to custody of the children, the Court has to take into consideration . . . the best interest test . . . Both . . . parties . . . love and want to have custody of their children . . . [Timothy] has a great relationship with his children, and so does [Lisa]. They both do things for their children . . . participate in the schools . . . participate in their extracurricular activities . . . [Lisa] has an alternative living situation [and can live with her father] . . . [Timothy] . . . has had to live with different people in order to accommodate the current order, and at the same time be available for his children on . . . nights when [Lisa] is at work.
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> . . .
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> Moreover . . . the [marital home] is titled in both [parties'] names. However, the mortgage is in [Tim's] name. He has made all of the payments on it. If he were required to vacate that home and allow [Lisa] to stay in there, we clearly have no assurance she is going to make any payments on it. . . .

The court subsequently granted an absolute divorce on the grounds of adultery. After consideration of the factors recited by Timothy's attorney, the court awarded both parties joint legal and physical custody of the minor children, reasoning that the testimony reflected that both parents were fit and proper, and that the "parties have been sharing custody. They've shared the child rearing duties. Although I do recognize that [Lisa] has done most of the cooking, . . . shopping, . . . laundry, . . . and . . . homework, the parties . . . have shared the raising of the children[,] . . . [have] both participated in school activities[,] . . . [and have] both participated in doctor[']s and dental appointments." With respect to the division of the marital property, specifically the marital home, the court concluded that the home had no current value, that the mortgage was in Timothy's name only, and that transferring title to Timothy would give the children the ability to stay in their school districts.

Accordingly, the court awarded both parties joint legal and shared physical custody according to a specific schedule,[1] ordered Timothy to pay child support, and ordered Lisa to transfer the deed to the home within ten days. The court's factual findings and rulings were reflected in a Judgment of Absolute Divorce; which was entered on October 5, 2011, prompting this appeal.

QUESTIONS PRESENTED

Lisa presents the following questions for our review:

> 1. Did the trial court abuse its discretion in ordering [her] to transfer all of her right, title and interest in the marital home without application of the statutory factors?
> 2. Did the trial court err in not articulating some consideration of the best interests of the child factors in awarding primary residential custody . . . that would allow for appellate review of the trial court's discretion?

We answer these questions in the negative and affirm the decision of the circuit court.

DISCUSSION

I. Award of Full Title and Ownership of Marital Home

Lisa argues that the circuit court's order that she transfer to Timothy her rights, title and interest in the marital home must be reversed because the court considered the factors set forth in Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("Fam. Law") § 8-208, governing use and possession of the family home, rather than those set forth in Fam Law § 8-205(b), which concerns the transfer of an ownership interest. In our review of the record, Lisa did not contest nor independently raise the issue of transfer of the marital home at trial. Thus, in our view, the issue has been waived. *See* Md. Rule 8-131(a). Even if not waived, we would still find ample support in the record that the circuit court considered the relevant factors before it ordered Lisa to transfer title and ownership of the marital home.

Prior to making a monetary award or ordering transfer of ownership of real property, trial courts are required to consider the factors set forth in Fam Law § 8-205(b). *Gordon v. Gordon*, 174 Md. App. 583, 624 (2007). "While consideration of the factors is mandatory, the trial court need not go through a detailed check list of the statutory factors, specifically referring to each. . . ." *Doser v. Doser*, 106 Md. App. 329, 351 (1995) (internal citations omitted). The factors include:

> (1) the contributions, monetary and nonmonetary, of each party to the

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

Fam. Law § 8-205(b).

Here, the record demonstrates that the circuit court considered these factors. During the course of trial, the court took note of the parties' employment, financial status, and capability to contribute pecuniarily to the well-being of the family. Also, the court examined the shared custody guidelines worksheets outlining the parties' employment and finances. Additionally, before the court was a Md. Rule 9-207 joint statement of marital and nonmarital property, cataloging the parties respective property interests, as well as their financial statements, bank statements, mortgage statements, credit card applications, and Lisa's W-2. The court was made aware of the parties' incomes and analyzed the parties' Thrift Savings Plan accounts and balances when determining the amount of child support to be paid by Timothy. Also, the court heard testimony regarding the acquisition of the marital home, that Timothy was the only party on the mortgage, Lisa had never made nor knew how to make a payment, and that the home was "upside down," increasing the potential for a deficiency judgment if sold. Finally, the court found that Lisa's conduct was the cause of the divorce between the parties. Therefore, we conclude that the court considered the relevant factors prior to transferring ownership of the marital home.

II. Award of Joint Legal and Shared Physical Custody

A. Standard of Review

Lisa also contends that the custody order should be reversed and remanded for further consideration because the court did not give "some indication of consideration of the best interests of the child factors in awarding custody . . . that would allow for appellate review of the decision." Orders concerning visitation or custody "are generally within the sound discretion of the trial court, not to be disturbed unless there is a clear abuse of discretion." *Barrett v. Ayres*, 186 Md. App. 1, 10 (2009). "There is an abuse of discretion where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles." *In re Adoption/Guardianship No. 3598*, 347 Md. 295,312 (1997) (internal citations omitted).

B. Best Interest Factors

The appropriate "best interest factors" a court must consider when making its custody determination are discussed at length in *Taylor v. Taylor*, 306 Md. 290, 304-311 (1986) and *Montgomery County v. Sanders*, 38 Md. App. 406, 420 (1978). These factors include:

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender [of the children].

Id.

When awarding joint custody, the court must also consider the age and number of children; the ability of the parents to communicate and reach shared decisions; the parents' willingness to share custody and their relationship with the child; the parents' employment demands and financial status; the effect on the child's social and school life; the proximity of each home; the impact on state or federal assistance; the benefit to the parents; and any other relevant factor.[2] *See Taylor*, 306 Md. at 304-11.

In examining all of these factors, a court should "generally not weigh any one to the exclusion of all others" and "should examine the totality of the situation . . . avoid[ing] focus[ ] on any single factor." *Sanders*,

38 Md. App. at 420-21. Importantly, "a trial judge's failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion." *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2007).

C. Analysis

Here, although the circuit judge did not explicitly list her factual findings in support of each of the above stated factors,[3] the record contains ample support for the court's ruling and demonstrates the trial judge's consideration of the children's best interests. For example, the court heard testimony that both parents were gainfully employed and actively participated in the lives of the children. The parties themselves and corroborating witnesses testified that both parents were fit and proper, and the court made the same explicit factual finding. As to the parents' wishes, the court pointed out that Lisa had acquiesced to joint custody.

Further, upon consideration of the parents' post-divorce residences and opportunities for visitation, the court found that Lisa had the ability to stay with her father, which would accommodate the children, but that Timothy would have to "live with different people in order to accommodate" Lisa's request. Also, the court commented on the parents' ability to communicate and reach shared decisions, finding that the parties were "endeavoring to reach joint decisions affecting the welfare of their children, and putting aside their differences."

Additionally relevant to the best interest factors is the court's finding that Lisa's conduct caused the marital break-up. The court also stated that it considered the children's ages, that they were doing well, and were relatively well adjusted. Moreover, the court undertook consideration of the parties' work schedules and suggested how their schedules would be conducive to caring for the children during the day. The court also explicitly reviewed the parties' shared custody guidelines worksheet which undertook calculations based upon the parties' respective incomes and financial statuses.

Finally and most importantly, the court awarded Timothy full title to the marital home so that the children could stay with him, "afford[ing] [them] the ability to stay in their school districts . . . ," and minimizing the potential disruption to their school and social life. In addition, we note that in the November 17, 2010 Consent Order for *pendente lite* relief, the parties agreed to joint legal and shared physical custody of the children. Although this order was later superceded by the October 5, 2011 Judgment of Absolute Divorce, the parties' custody arrangement was not disturbed. Because the October 5, 2011 order did not create a consequential shift of obligations or responsibilities, but merely preserved the status quo for Lisa, we also find it difficult to reverse and remand on this basis.

In sum, the record clearly supports the conclusions of the circuit judge who considered the relevant "best interest" factors in granting both parties joint legal and physical custody. Finding no abuse of discretion, we affirm.

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

FOOTNOTES

1. For example, the court found:

> The parties have testified as to their work schedules. And, [Timothy]'s current work schedule is such that he is available to put the children on the bus; get them off to work.
>
> And, [Lisa]'s schedule is conducive to her being able to get the children after school.

2. Our recitation of these factors combines the *Sanders* factors, which are taken into consideration in any custody determination, and the *Taylor* factors, which arise primarily in situations granting joint legal and shared physical custody. Several factors overlap, and in such instances, are only listed once.

3. Some of those factors were simply not relevant in this case.

Cite as 8 MFLM Supp. 79 (2012)

Custody: temporary custody: best interest standard

Melissa L. Howell
v.
Brenda S. Kelley

No. 1971, September Term, 2011

Argued Before: Eyler, Deborah S., Woodward, Rodowsky, Lawrence F. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 26, 2012. Unreported.

Given the emergent nature of the temporary custody proceedings, the circuit court did not abuse its discretion in making a preliminary determination that the children should be returned to the custody of a third party, under the terms authorized by their mother in unrevoked guardianship papers, until the allegations of abuse against the mother could be more fully investigated.

The Circuit Court for Baltimore County entered an order granting Brenda Kelley, the appellee, temporary custody of the minor children of Melissa Howell, the appellant. Brenda Kelley is a family friend. On appeal, Howell presents two questions for review, which we have rephrased:

I. Did the circuit court err in denying the motion to dismiss for lack of jurisdiction?

II. Did the circuit court err in awarding temporary custody of the minor children to Kelley?

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

FACTS AND PROCEEDINGS

Howell is the mother of two children, Michael, age 13, and Fonda, age 8. The children have different fathers. Michael's father is deceased. Fonda's father's whereabouts are unknown. Prior to the summer of 2011, Michael and Fonda lived with their mother in Jacksonville, Florida.

Kelley is a longtime friend of the Howell family. She lives in the Middle River area of Baltimore County with her domestic partner of eight years, Kristine Clarke. Kelley has a daughter from a prior relationship, Rebecca, who lives with her and Clarke half of the time.[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.

In June of 2011, Howell arranged for Kelley to come to Florida to pick up Michael and Fonda and take them to Maryland to live with her (Kelley). The reason for this move was disputed below, but, according to Kelley, Howell told her that she (Howell) was being evicted from her home and needed a place for her children to stay temporarily. The children began living with Kelley in Maryland on June 6, 2011. A few days later, Kelley received in the mail from Howell signed and notarized papers authorizing Kelley to act as the temporary guardian of her children for a one-year period from June 8, 2011, to June 7, 2012; the children's birth certificates; and the children's social security cards. Pursuant to the temporary guardianship documents, Kelley was authorized to "travel locally or abroad" with the children; to make day-to-day decisions on their behalf to administer first aid treatment; and to authorize medical treatment if Howell could not be reached to personally do so.

Within weeks after the children moved in with Kelley, Michael told her that Howell had physically abused him and that he had reported the abuse to a school nurse and a guidance counselor at his school in Florida. According to Michael, he had told school personnel that Howell had "physically beat him" and had "whipped him with a belt on several occasions." School personnel then interviewed Fonda and she, too, said that her mother was physically abusing her. Michael also told Kelley that Howell had neglected him and Fonda by failing to provide them with basic necessities.

Kelley contacted the Baltimore County Department of Social Services ("BCDSS") and the Florida Department of Children and Families ("FDCF") and reported these allegations. Charlotte Childers of the FDCF informed Kelley that the FDCF had received a report of abuse from Michael and Fonda's school and, in response, had commenced a child abuse and neglect investigation against Howell. The FDCF had closed its investigation, however, after it was informed that Howell had moved the children out of Florida to live with their maternal grandmother in Mississippi. (In fact, the children never had been moved to

Mississippi.)

On or about June 24, 2011, Childers contacted the BCDSS and requested that it conduct a home study of Kelley's residence. On July 15, 2011, Lisa Parker, a licensed graduate social worker with BCDSS, came to Kelley's house. She interviewed Kelley, Clarke, Michael, and Fonda. She concluded that Kelley was a fit custodian for the children. She observed that the children appeared "comfortable in the residence" and that both children "verbalized their comfort with Ms. Kelley and their desire to remain in her care."

Kelley advised Parker that both children had anxiety about the possibility that Howell would return and take them back to Florida. Michael's anxiety manifested itself in a nervous habit of picking at his chin. Parker observed "substantial scabbing" on Michael's chin. She advised Kelley that Michael would be able to receive mental health counseling at his school. She also advised Kelley that Kelley could enroll Michael and Fonda in school using the temporary guardianship authorization documents.

On July 26, 2011, Parker forwarded a copy of her home study report to Childers.

On July 29, 2011, Kelley applied to enroll Michael and Fonda at the local public schools.

In the weeks after Michael and Fonda moved in with her, Kelley applied to the Social Security Administration ("SSA") to be appointed the representative payee for Michael's Social Security survivor benefits.[2] Prior to that time, Howell was acting as Michael's representative payee and was receiving his monthly benefit checks in Florida. On July 22, 2011, the SSA approved Kelley's application. On August 3, 2011, she received the first monthly benefit check on Michael's behalf, in the amount of $963.

Three days later, on August 6, 2011, Howell arrived unannounced at Kelley's house and said she was taking the children.[3] When Howell showed up, Rebecca was there with the children. Officers from the Baltimore County Police Department also were on the scene as Howell had contacted them and advised that she was afraid there might be an incident when she came to get her children. Kelley arrived home shortly thereafter. Kelley protested the removal of the children, but the police declined to intervene.

On August 11, 2011, five days after the children were removed from her residence, Kelley filed in the circuit court a Complaint for Immediate Child Custody and an Ex Parte Motion for Immediate Custody. In addition to the above-stated facts, Kelley alleged in her complaint that, to the best of her knowledge, there were no other pending custody proceedings in Maryland or any other state; that it was in the best interests of Michael and Fonda for her to be awarded custody on a temporary and permanent basis; and that Michael and Fonda would be "susceptible to grave danger" and it would be detrimental to their health, education, and well-being to remain in Howell's custody.

In her *ex parte* motion, Kelley further alleged that Howell had sent the children to Maryland to avoid the reach of the FDCF's investigation;[4] and that Howell had come to take the children for "the sole reason of reclaiming Michael's Social Security survivorship payments." Kelley argued that Howell likely would remove the children from Maryland if the court did not intervene.

That same day, the court signed an order granting the *ex parte* motion and awarding Kelley "immediate temporary custody of Michael . . . and Fonda . . . in accordance with the [temporary guardianship] authorizations signed by Ms. Howell until such time as a decision on custody is made following a full hearing."

By letter dated August 15, 2011, Kelley, through counsel, submitted a proposed, amended order to the court. The letter explained that, according to the Baltimore County Sheriff's Office, the temporary custody order only could be served on Howell by a sheriff if the order expressly so provided. That same day, the court signed an amended order including a provision that "the Baltimore County Sheriff's Office shall serve this Order upon [ ] Howell . . . and enforce the terms of this Order, in particular, returning Michael . . . and Fonda . . . to [ ] Kelley. . . ."

On August 18, 2011, before the amended order was served upon Howell, she moved through counsel to vacate it. She denied committing any physical abuse against her children; asserted that she moved the children to Maryland to stay with Kelley because of her (Howell's) involvement as a prosecution witness in a murder trial in Florida; and stated that she had come to Maryland to retrieve her children as soon as it was practicable to do so. Howell acknowledged that in May 2011 the FDCF had initiated a child abuse and neglect investigation of her, but asserted that she was "under the impression" that the investigation had been closed. She further alleged that the FDCF investigation had revealed "findings of physical injury" but had not found that she had caused the injuries.

That same day, the court signed an order vacating the amended order and setting the case in for a thirty-minute hearing on August 24, 2011. This order apparently was entered on the court's own initiative, not in response to Howell's motion to vacate.

On August 22, 2011, Howell filed an answer and a motion to dismiss the complaint for lack of jurisdiction ("motion to dismiss"). She asserted that, pursuant to the Maryland Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), codified at Md. Code (2006 Repl. Vol.), section 9.5-201 *et seq*. Of the

Family Law Article ("FL"), Maryland was not the "home state" of the children, nor had Maryland otherwise acquired emergency jurisdiction under the circumstances.

On August 24, 2011, the court held a brief hearing on Kelley's motion for immediate, temporary custody. Howell's counsel advised the court of his motion to dismiss. The judge stated that, because the motion to dismiss had been filed just two days prior, it was not in the record before her. She asked counsel to explain the basis for the motion. Counsel responded that until June of 2011 the children both were residents of the State of Florida. The court interjected that Howell had consented to Kelley's taking "custody" of the children in Maryland. Counsel for Howell then stated that the temporary guardianship authorizations were not formal court orders and, in any event, at some point in August, Howell had revoked the authorizations. The discussion then turned to other matters without the court ruling on the motion to dismiss.

In response to questioning from the court, Howell represented that she and her children were staying with one of her cousins, Angie Gue, at a house also located in the Middle River area.

Kelley called Parker as her first witness. The court accepted Parker as an expert in the field of social work. She testified about the home study of Kelley's house. She explained that the house was suitable and that neither Kelley nor Clarke had any history of involvement with child protective services authorities in Maryland.

During a brief pause in the proceedings, counsel conferred and agreed to proffer to the court the testimony of the remaining witnesses and then to argue the motion. Counsel for Kelley proffered that Parker would have further opined that Michael and Fonda should be placed with Kelley "at least temporarily" to maintain their stability. He further proffered that Kelley would have testified consistent with the factual assertions in her motion for immediate custody. With respect to the circumstances under which Kelley became the children's guardian, she would have testified that she thought at first that she would be caring for Michael and Fonda on a very temporary basis, but after she returned to Maryland with the children and received in the mail the temporary guardianship papers and identification records for the children, she realized that Howell anticipated a long-term arrangement. Kelley further would have testified (consistent with the facts set forth above) that Michael told her that he had been physically abused by Howell and that Fonda also was a victim of physical abuse by Howell. Kelley further would have testified that, immediately after she was appointed as Michael's representative payee for his Social Security benefits, Howell arrived unannounced to retrieve the children; and that, upon arriving, Howell told Kelley, "this is about my money, this is about the check, you took the money from me."

Counsel for Kelley further proffered that Rebecca would have testified that Howell "appeared unannounced and forcibly" entered Kelley's house to remove the children. She also would have testified that Kelley was fit to act as custodian of the children.

Kelley's counsel attempted to proffer certain evidence he would have introduced regarding an exchange over Facebook bctween Rebecca and Gue; the court sustained Howell's objection to that evidence.

Howell's counsel proffered that Howell would have.testified that she had been the sole caretaker for her children for their entire lives and that it was her intent to continue in that role. Howell further would have testified that she only had sent the children to stay with Kelley for the summer because of her involvement as a prosecution witness in a murder trial. After she was deposed in the murder trial, she came to Maryland to get the children and "move on to Mississippi where she could be with her mother." She gave Kelley notice of her intention to do so.

Howell would have testified that she never abused her children. She had cooperated with the FDCF during its investigation of the allegations against her and "was under the impression that the Florida protective service investigation was closed." Howell's counsel introduced into evidence a letter from the FDCF to Howell dated July 29, 2011 (after the FDCF had been in contact with Kelley and Parker). The letter stated that the investigation involving Howell's children "ha[d] been completed." It went on to state:

> At the conclusion of the investigation, we determined that there were verified findings of physical injury. During the investigation you agreed to participate in Steps Prevention Program, and later declined services, and moved your children out of state without the knowledge of the Department. Your counselor was Teslyn Hill. . . .

The letter further discussed the Steps Prevention Program, which was designed to "help prevent further reports to the Florida Abuse Hotline." It closed by thanking Howell for her cooperation with the "investigation process." The letter was signed by Richard Stephens Reid, a Child Protective Investigations Supervisor with the FDCF.[5]

Howell also would, have testified that she had intended upon retrieving her children to leave Maryland with them. She went to BCDSS and spoke to Parker's supervisor, one Maureen Kelly, to make certain that there was not an outstanding BCDSS investi-

gation. Kelly told her that BCDSS did not have an active case and that Howell was "free to . . . leave" with her children. Thereafter, Howell learned of the ex parte order awarding temporary custody to Kelley. At that time, she sought legal assistance.

Howell's counsel represented to the court that Howell was willing to remain in Maryland with the children pending a further hearing and that she would be willing to cooperate with a BCDSS investigation. Howell's counsel further proffered that, if the court was unwilling to allow Howell to retain custody of her children, the children could be placed with Howell's cousin Gue; and that Gue would have testified that she was willing and able to take care of the children on a temporary basis.

Given that Howell's counsel had proffered that Gue would be a suitable temporary custodian for the children, the court permitted Kelley's counsel to proffer the previously excluded evidence regarding the Facebook conversation between Rebecca and Gue. Kelley's counsel proffered that Gue told Rebecca over Facebook that the allegations that Howell had disciplined her children with a belt "didn't seem so bad to [her]" and that she (Gue) "correct[ed her] kids the same way sometimes when they need[ed] it but never ever to hurt."

Kelley's counsel also introduced into evidence an undated letter from Howell to the children written while they were staying with Kelley. It contradicted her proffered testimony that she had planned to move with the children to Mississippi. In the letter, Howell asked the children whether they wanted her to move the family to Maryland permanently.

At the conclusion of the proffered testimony and after hearing argument, the court announced its ruling from the bench. The court emphasized the "extraordinary" nature of the proceedings and that the matter had been assigned to it "on an emergent basis" without the benefit of a full custody hearing.

The court sated that its decision was "guided by what [it] believe[d] to be the best interests of the children." The court recounted the parties' positions as to why the children had come to Maryland, but declined to make a finding as to Howell's motivation given that the custody case was at a preliminary stage.

With respect to the FDCF abuse investigation, the court noted that the letter moved into evidence by Howell "appear[ed] . . . to be a form letter" in many respects, but that it also included information particular to Howell's case, including the statement that there were 'verified findings of physical injury." The court noted that the letter did not specify whether the injuries were to Michael or Fonda (or both children). The court found, based on the letter, that there was "no further action that Florida could take" given that Howell had moved the children out of the state. The court credited the testimony of Parker, however, that FDCF was "at least concerned enough" about the well-being of Michael and Fonda to contact BCDSS about the allegations of abuse.

The court noted that Howell chose to place her children in the care of Kelley and that she chose Kelley despite having relatives in Maryland, such as Gue.

The court declined to make a finding as to why Howell came to retrieve the children when she did, but, as noted earlier, found by a preponderance of the evidence that Howell's arrival was unannounced. The court opined that it was not in Michael's and Fonda's best interest to be removed from Kelley' s care without any warning or preparation. The court also found that BCDSS had approved Kelley's home, but had not visited Gue's home.[6]

The court determined that it would be in Michael's and Fonda's best interest to be placed in the temporary custody of Kelley. It emphasized that that decision would "maintain the status quo that these parties agreed to in June" until such time as a full custody hearing could be held. It emphasized that this was only a temporary custody determination. The court ordered that Howell would have visitation with the children every weekend from Friday evening until Monday morning.

The court's oral ruling was reduced to a written order on August 29, 2011, and was entered on August 30, 2011 ("Temporary Custody Order"). The Temporary Custody Order permitted the parties to alter the visitation schedule by agreement and directed that Howell have "reasonable telephone contact" with the children. It further provided that Howell could not leave the State of Maryland with the children without Kelley's consent. Finally, it stated that the order would remain in effect "until a full hearing is held on the claims contained in [the custody complaint]."

By letter dated September 1, 2011, counsel for Kelley submitted to the court a proposed order denying Howell's motion to dismiss. The attached letter advised that the motion had been "denied . . . from the Bench" during the August 24, 2011 hearing. By letter dated September 6, 2011, counsel for Howell challenged that assertion, stating that it was his position that the motion had not yet been decided and requesting that the court schedule a hearing on it.

On September 7, 2011, the court signed an order denying Howell's motion to dismiss. The order was not entered until September 18, 2011.

On September 8, 2011, within ten days of the entry of the Temporary Custody Order, Howell moved for reconsideration of that order. She challenged the court's jurisdiction and argued that the court could not grant custody to Kelley without a finding that Howell

was unfit to care for the children or that there were exceptional circumstances justifying an award of custody to a third party. She asked the court to vacate the Temporary Custody Order and return the children to her.

On October 24, 2011, the court denied the motion for reconsideration. Pursuant to Md. Code (2006 Repl. Vol.), section 12-303(3)(x) of the Courts and Judicial Proceedings Article ("CJP"),[7] Howell noted this timely interlocutory appeal. For reasons that the record does not reveal, the parties have not requested a hearing on the final custody complaint and no such hearing has been held. (The pendency of this appeal would not prevent a decision on the final custody complaint.)

DISCUSSION

I.

Jurisdiction under the UCCJEA

Howell contends the circuit court lacked jurisdiction to enter the Temporary Custody Order because, when Kelley filed the custody action, Florida, not Maryland, was the children's home state. She further contends that there was no evidence to support the exercise of emergency temporary jurisdiction under the UCCJEA. Kelley responds that Maryland had jurisdiction in this case because there was no other state with jurisdiction and, in the alternative, the court had emergency temporary jurisdiction.

"Whenever a child custody case in Maryland involves another state or another country, the Maryland [UCCJEA] is implicated." *Toland v. Futagi*, 425 Md. 365, 370 (2012). As the Court of Appeals has explained, the UCCJEA was drafted by the National Conference of Commissioners on Uniform State Laws in response to the growing problem of conflicting custody decrees being entered by courts in different states and countries. *Id.* at 371. "The concern was that movement of a child from state to state, by parents or family members seeking a more favorable custody decree in another jurisdiction, created an instability that inhibited the child's ability to develop personal attachments or a sense of belonging in a community." *Id.*

In the instant case, the Temporary Custody Order was the first and only custody order issued by any court with respect to the children. Accordingly, we are not concerned with conflicting custody decrees, but with whether Maryland could exercise jurisdiction to make an initial custody determination. *See* FL § 9.5-101(i) & (d) (Defining "Initial determination" to mean "the first child custody determination concerning a particular child" and defining "Child custody determination" to include a temporary custody order).

FL section 9.5-201, entitled "When court has jurisdiction," provides:

(a) *Grounds for jurisdiction.* — Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State has jurisdiction to make an initial child custody determination only if:

(1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exereise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:

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

(ii) substantial evidence is available in this State

concerning the child's care, protection, training,

and personal relationships;

(3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or

(4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

(b) *Exclusive jurisdictional basis.* — Subsection (a) of this section is the

> exclusive jurisdictional basis for making a child custody determination by a court of this State.
>
> (c) *Effect of physical presence*. — Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

(Bolded emphasis added.)

Section 9.5-201(a) creates four, prioritized jurisdictional bases for an initial custody determination: 1) home state jurisdiction; 2) significant connection jurisdiction, 3) more appropriate forum jurisdiction or 4) "vacuum jurisdiction." *Toland, supra*, at 375-76 & n.8 (discussing the catch-all "vacuum jurisdiction" provision "that enables jurisdiction as a matter of last resort because no other state exercises jurisdiction as the child's home state, as the 'more appropriate forum' based on significant connections to the child and family, or had declined to exercise jurisdiction."). We therefore must first determine what, if any, state was the home state for Michael and Fonda. As relevant here, a child's "home state" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child custody proceeding." FL § 9.5-101 (h)(1).

The evidence before the trial court was that Michael and Fonda had lived in Florida with Howell for almost their entire lives. Beginning June 6, 2011, however, Howell sent the children to live in Maryland with Kelley. The children had lived in Maryland for nine weeks prior to the initiation of the instant custody case. As these facts make plain, the children had not lived in any state for "at least 6 consecutive months" "immediately before the commencement of [the] child custody proceeding." *Id.*

The UCCJEA allows a "temporary absence" from a state to be included within the "6 consecutive month[ ]" period, however, for purposes of determining a child's home state. *Id.* Thus, we must determine whether the children's departure from Florida nine weeks prior to the initiation of the custody case qualifies as a "temporary absence." We conclude quite easily that it does not.

"Temporary" means "lasting for a limited time," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, I286 (11th ed. 2003), or, in other words, not permanent. Thus, as courts in other states interpreting the UCCJEA have held, a "temporary absence" from a state necessarily includes an intent to return to that state. *See In re Brilliant*, 86 S.W.3d 680 (Tex. App. 2002) (when parents of a minor child moved from Massachusetts to Texas with the intent to stay there permanently, the mother's return to Massachusetts with the minor child a little over a month later did not transform her absence from that state into a "temporary absence" for purposes of the UCCJEA); *Hammond v. Hammond*, 708 S.E.2d 74, 84-85 (N.C. Ct. App. 2011) (temporariness of absence under the UCCJEA determined based upon totality of the circumstances, including the intent of the absent party); *In re Payne*, 899 P.2d 1318 (Wash. Ct. App. 1995) (when the father left Virginia with the intent to live permanently in Washington with his wife and children, his absence from Virginia for three months was not a "temporary absence").

At the August 24, 2011 hearing, Howell's counsel proffered to the court that it was Howell's intention that the children spend the summer with Kelley. Significantly, he also proffered that Howell would have testified that she was planning to come to Maryland, retrieve the children, and "move on to Mississippi where she could be with her mother."[8] Thus, the undisputed evidence is that Howell had no intention of returning to Florida with the children.[9] This evidence establishes that the children were not "temporarily absent" from Florida, but had moved out of that state with no plans to return. Whether Maryland was a temporary stop before moving on to Mississippi or, as other evidence introduced at the hearing suggested, their new permanent home, their absence from Florida cannot be viewed as "temporary."

The fact that Howell had moved from Florida with no intention to return also makes the second prong of subsection 9.5-201(a)(1) — permitting home state jurisdiction if a state was "the home state of the child *within 6 months before the commencement of the proceeding*," and "a parent or person acting as a parent continue[d] to live [there]" — inapplicable under the facts of this case.

Having concluded that Florida does not qualify as Michael and Fonda's "home state" for purposes of the UCCJEA, we must consider the other grounds for the exercise of jurisdiction under FL section 9.5-201(a). Subsection 9.5-201(a)(2) permits a court to exercise jurisdiction when, as relevant here, there is no home state *and*:

> (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships . . . .

Howell contends that there was no evidence before the court demonstrating that Michael, Fonda, or Howell

had a "significant connection" to Maryland and that there plainly is not "evidence [ ] available in [Maryland]" concerning the children. Kelley largely concedes that Maryland lacked "significant connection" jurisdiction with the children and Howell. We agree that while there may have been evidence before the trial court demonstrating a significant connection between the children and Maryland, there was not evidence supporting such a finding as to Howell, who had arrived in Maryland just days prior to the commencement of the custody case and represented to the court that she had not been to Maryland in more than twenty years.

Because Howell maintains that Florida has "home state" jurisdiction, she does not argue that Florida has "significant connection" jurisdiction. Given, as already discussed, that Howell had moved out of Florida with no intent to return, we also would conclude that she and the children lacked a significant ongoing connection to that state. The UCCJEA was not designed and it would not be practical to vest initial jurisdiction in a state that the parent and child have left with no intention to return.

The catch-all provision at subsection 9.5-201(a)(4) governs when "no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection." As already discussed, we conclude that neither Maryland nor Florida would qualify as the "home state" of the children pursuant to (a)(1) and neither state would have "significant connection" jurisdiction under (a)(2). Subsection 9.5-201(a)(3) has no applicability in this case as no court of any other state has declined to exercise jurisdiction. Accordingly, because no other state would have jurisdiction under the other criteria, we conclude that, under the circumstances, Maryland had "vacuum jurisdiction." As the circuit court had jurisdiction under the UCCJEA, it properly denied Howell's motion to dismiss.

II.

Authority to Award Temporary Custody to Kelley

We now turn to the propriety of the Temporary Custody Order entered by the circuit court. Howell contends that, before the court could remove Michael and Fonda from her custody and place them in the custody of Kelley, it first had to find either that she was unfit or that there were exceptional circumstances justifying third party custody. Kelley responds that the circuit court did not abuse its discretion in awarding temporary custody to Kelley where, as here, the evidence of past physical abuse of the children by Howell supported findings of unfitness and exceptional circumstances for an award of third party custody.

In *McDermott v. Dougherty*, 385 Md. 320 (2005), the Court of Appeals explained in detail the standard for the subset of third-party custody cases in which a private third party seeks custody of a child over the will of a natural parent.[10] It opined that, under those circumstances, "it is necessary first to prove that the parent is unfit or that there are extraordinary circumstances posing serious detriment to the child, before the court may apply a 'best interest' standard." *Id.* at 374-75. The non-exclusive list of factors to be considered by the court in determining whether "exceptional circumstances" exist are

> the length of time the child has been away from the biological parent; the age of the child when care was assumed by the third party; the possible emotional effect on the child of a change of custody; the period of time which elapsed before the parent sought to reclaim the child; the nature and strength of the ties between the child and the third party custodian; the intensity and genuineness of the parent's desire to have the child, [and] 7) the stability and certainty as to the child's future in the custody of the parent.

Ross v. Hoffman, 280 Md. 172, 191 (1977). The Court of Appeals has since clarified that the best interest of the child standard remains the ultimate determinative factor in any child custody dispute, but that a child's interests are presumed to be best served by being in the custody of his or her natural parents, absent evidence rebutting that presumption. *See In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 104-10 (2010).

FL section 9-101 also is relevant to our analysis. It provides that, "[i]n any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party." FL § 9-101(a). The court must deny custody or visitation to that party unless it "specifically finds that there is no likelihood of further child abuse or neglect by the party[.]" FL § 9-101(b).

As the circuit court judge emphasized, this was an "extraordinary proceeding" that came before the court "on an emergent basis" without the benefit of a full custody hearing. It was set in for a thirty-minute hearing. In light of the time constraints, after presenting some minimal live testimony from Parker, counsel for the parties agreed to present the court with proffers of the testimony of the remaining witnesses. Based upon these proffers and other evidence, including the letter from the FDCF stating that its investigation into

allegations of abuse by Howell revealed "verified findings of physical injury" to at least one of the minor children, and the allegations of physical abuse by Howell of Michael and Fonda, as put before the court by the proffer of Kelley's testimony, the court expressed serious "concern[ ]" for the well-being of the children if they remained in the custody of Howell.[11] The temporal proximity of the May 2011 FDCF investigation and the children's departure from Florida at the beginning of June lent credence to Kelley's contention that the children were sent to live with her in order to thwart any further child protective services' involvement.

This case also was unusual in that Howell herself placed the children in Kelley's care and authorized her to act as their guardian for a one-year period. While she claimed to have revoked that authorization and advised Kelley that she was coming to retrieve her children, the trial court explicitly found that she arrived unannounced to forcibly remove the children. There was no evidence of a revocation of the guardianship documents. The trial court found that it was not in the best interests of Michael and Fonda to be removed from Kelley's home in that manner and that Howell's decision to do so created additional concerns about the children's well-being.

While this case arose as a private, third-party complaint for custody, the court clearly was under the impression that the BCDSS was going to become involved. The BCDSS had conducted a home-study and Parker testified at the hearing. Moreover, the court expected that the Temporary Custody Order would be in effect for a very short time before a full hearing could be held to assess the merits of the petition for third party custody by application of the *McDermott* test. In fact, as we have noted, the case since has languished for reasons unclear from the record. As of the date of this opinion, Howell has filed a counter-complaint for custody and the case is set in for a scheduling conference in August. The docket entries do not reflect the exchange of any discovery. There also is no indication that BCDSS has intervened in the matter, notwithstanding the children's allegations of physical abuse by Howell and the history of a social services investigation in Florida that had resulted in a finding of physical injuries to the children.

In light of the allegations by the children that their mother had physically abused them, the Florida child abuse investigation, and the extreme circumstances under which the children were removed from Kelley's home, the court could have found that it was more likely than not that Michael and Fonda had been abused by Howell in the past. *See* FL § 9-101(a); *Volodarksy v. Tarachanskaya*, 397 Md. 291, 304 (2007) (holding that "reasonable grounds to believe" abuse has occurred is equivalent to the preponderance of the evidence standard). Given the emergent nature of the proceedings, it was not possible for the court to determine whether abuse was likely to occur in the future. We perceive no abuse of discretion by the court in making a preliminary determination, in keeping with FL section 9-101, that the children should be returned to the custody of Kelley temporarily, under the terms authorized by Howell in the unrevoked guardianship papers, until the allegations of abuse could be more fully investigated. For all of these reasons, we shall affirm the Temporary Custody Order and the order denying the motion for reconsideration of that order. [12]

ORDERS AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

FOOTNOTES

1. Rebecca's age is not reflected in the record, but it is apparent that she is older than Michael and Fonda.

2. As a minor, Michael was entitled to benefits because his father was deceased and had earned sufficient work credits during his lifetime. *See* 42 U.S.C. § 402(d).

3. Howell maintained that she had made prior arrangements with Kelley and had revoked the temporary guardianship authorization. As we shall discuss, the circuit court found that Howell had arrived unannounced.

4. In support of this contention, Kelley alleged that Howell had asked Kelley to home school the children in Maryland. Kelley suspected that this was because she did not want the FDCF to be able to determine the children's current location.

5. Howell's counsel proffered to the court that Stephens-Reid was Childers's supervisor at FDCF.

6. The court commented that Gue's home was "not acceptable to the Department of Social Services because there have been prior interaction[s] between Ms. Angie Gue and [BCDSS] regarding children living in that home." We are not able to find in the record the basis for that finding.

7. CJP section 12-303(3)(x) permits an interlocutory appeal from an order "[d]epriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order."

8. This proffered testimony also was consistent with the information Howell had purportedly provided to the FDCF when she advised them that her children had left the state to live with her mother in Mississippi.

9. Howell's brief on appeal confirms this fact, stating the Howell had considered moving to Maryland, but "ultimately decided to move to Mississippi." Howell also asserted in her motion to vacate filed in the circuit court that it had "always been [her[intent[ion] to leave Florida with the children."

10. The *McDermott* Court distinguished "pure third-party custody cases" from custody disputes between fit natural parents, where each party has "equal constitutional rights" and from the large class of cases where a state is the party petitioning for custody in the "exercise of their generally recog-

nized power to protect the child." 385 Md. at 35456. In this latter class of cases, the Court noted that the best interest standard is applied "after a [preliminary] finding that it is necessary to protect the child who is being exposed to harm by the parental unit." *Id.* at 355. In many ways, this case is more akin to an emergency shelter care hearing falling into the latter class of cases.

11. It would have been preferable for there to have been live testimony from, at the very least, Howell and Kelley, prior to a ruling in this case. It is not surprising that the trial judge declined to resolve central disputes of fact — including Howell's motivation for sending the children to Maryland in the first place — given that she was unable to make demeanor-based credibility findings.

12. In her reply brief, Howell moves to strike portions of Kelley's brief that she asserts "contain statements of purported fact that were not admitted into evidence before the trial court and therefore are not properly before this Court." The challenged statements of fact are largely derived from the allegations in Kelley's motion for immediate temporary custody. As discussed, during the August 24, 2011 hearing, Kelley's counsel made a proffer to the court that Kelley would have testified consistently with the factual assertions in her motion. Therefore, the allegations set forth in the motion were in evidence before the trial court and we shall deny the motion to strike on that basis.

Howell also moves to strike a document in the appendix to Kelley's brief showing a Facebook conversation between Rebecca and Gue. As explained, Kelley's counsel was permitted to proffer to the court a small excerpt of that conversation. The document in the appendix was not introduced into evidence before the trial court, however, and includes a lengthy discussion between the two women. We shall deny the motion but note that we did not consider this document in deciding the instant appeal.

NO TEXT

Cite as 8 MFLM Supp. 89 (2012)

Custody: sole legal custody: access and visitation schedule

Christopher C. J. Ling
v.
Suzanne E. A. Ling

No. 558, September Term, 2011

Argued Before: Meredith, Woodward, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: July 3, 2012. Unreported.

The award of sole legal custody to the child's mother was supported by the court's finding that she was a fit parent while the father was not; nor did the court err or abuse its discretion in determining the father's access schedule, in delegating "tie breaking" authority to appellee over when appellant can exercise summer visitation, or in awarding attorney's fees to appellee.

On April 22, 2011, following a three-day trial on a complaint for divorce, custody, and other relief filed by appellant, Christopher C. J. Ling, and on a counterclaim for similar relief filed by appellee, Suzanne E. A. Ling, the Circuit Court for Montgomery County awarded (1) sole legal and physical custody of the parties' minor son, Alexander, to appellee, (2) visitation to appellant on alternating weekends, every Wednesday afternoon, and two non-consecutive weeks during the summer, and (3) attorney's fees to appellee totaling $70,685.39. Following appellant's appeal of the court's April 22, 2011 order, appellee filed a motion for award of appellate attorney's fees, which the court granted, awarding appellee $25,000 on August 5, 2011.

On a consolidated appeal of the circuit court's April 22, 2011 and August 5, 2011 orders, appellant presents five issues for review by this Court, which we have consolidated into four questions:[1]

1. Did the trial court err or abuse its discretion in awarding appellee sole legal custody?
2. Did the trial court err or abuse its discretion in its determination of the access schedule granted to appellant?
3. Did the trial court err as a matter of law in delegating judicial authority to appellee to determine when appellant can exercise summer visitation?
4. Did the trial court err or abuse its discretion in awarding trial and appellate attorney's fees to appellee?

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.

For the reasons set forth herein, we shall answer each question in the negative and therefore affirm the judgment of the circuit court.

BACKGROUND

The parties were married on July 3, 2006. They resided in the marital home at 8504 Pierce Point Court, Potomac, Maryland. On February 19, 2008, the parties' only child, Alexander, was born. In December 2008, Alexander underwent corrective surgery for a cleft palate. Alexander also suffers from severe gastroesophageal reflux disease and has undergone speech and physical therapy.

Appellant is a senior vice president of Booz Allen Hamilton, where he has been employed for almost 20 years. Appellant is responsible for managing three accounts focused on military intelligence. Appellee has a bachelors degree in management, but has not worked outside of the marital home since November 2006.

On August 20, 2009, the parties separated. Appellee and Alexander remained in the marital home, and appellant moved to Bethesda. In a letter dated February 1, 2010, appellant's counsel informed appellee's counsel that appellant sought to terminate their marriage and invoke the terms of their premarital agreement. On February 19, 2010, appellee moved from the marital home, with Alexander, to her parents' home in Stephens City, Virginia, approximately 80 miles from the parties' former marital home.

On July 19, 2010, appellant filed a Complaint for Limited Divorce, Custody, and Other Relief in the circuit court, seeking joint physical and legal custody of Alexander. On September 2, 2010, appellant filed an Amended Complaint for Absolute Divorce, Custody, Access and Other Relief (the "amended complaint"), seeking physical and legal custody of Alexander if

appellee failed to return to Montgomery County, and, alternatively, seeking shared physical and joint legal custody if appellee returned to Montgomery County.

On October 4, 2010, appellee filed her answer to appellant's amended complaint. On November 8, 2010, appcllee filed a Counterclaim for Absolute Divorce, Custody, and Other Relief, seeking, among other things, *pendente lite* and permanent custody of Alexander. On November 18, 2010, the parties executed a Voluntary Separation and Property Settlement Agreement, which resolved the parties' property and financial issues. By order dated November 30, 2010, the circuit court granted appellant access to Alexander *pendente lite* on every other weekend from Thursday at 5:30 p.m. until Sunday at 5:30 p.m., beginning December 30, 2010.

The parties proceeded to a three-day merits trial, from March 21, 2011 to March 23, 2011, on their unresolved custody issues. In an oral opinion rendered on April 11, 2011, the trial court reviewed each of the factors for determining an award of custody as set forth in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1978), as well as the additional factors specifically related to the appropriateness of an award of joint custody, as identified in *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986). The trial court found:

> The fitness of father and mother. I find they're both physically and mentally fit. [Appellee] does take medication for anxiety, but nothing that would trouble this Court on a custody situation.
>
> Adaptability of the parents to perform their custodial tasks. I'll get to that in a minute.
>
> Age of the parties. [Appellant] is 45, [appellee] is 37. I find there is no advantage for either parent there.
>
> The age and health of the child and mental — mentally and physically. Alexander is 3. His motor skills seem fine. He needs speech therapy weekly. No mental problems. [Appellee] schedules these sessions . . . and accompanies the child to these appointments.
>
> The surroundings in which the child will be reared. If he stays with [appellee], he'll continue to live with her . . . and the child's maternal grandparents, in Stephenville, at the grandparent's home.
>
> [Alexander is] currently attending Winchester Academy.
>
> [Appellee] wants to move out and acquire her own home. She's partial to Leesburg and the Ashburn area and averse to relocating in Maryland.
>
> If the child were to live with [appellant], he would live in Potomac, Maryland, with [appellant]'s lady friend, Robin Sands, and [appellant]'s friend, Jonathan Krinn.
>
> The child could easily attend very fine public and private schools in Montgomery County.
>
> The influence likely to be exerted on the child by both parents. I find [appellee] really wants the child to have a strong and healthy relationship with [appellant] and would promote it. I think [appellant] recognizes the importance that [appellee] plays in the child's life.
>
> Character and reputation of the parents. I find that [appellee] has outstanding character and a very fine reputation. [Appellant] has a reputation as a playboy and has earned it with his documented liaisons with his girlfriends and trips to various massage parlors.
>
> [Appellant] is the epitome of an unfaithful husband. His character has been severely sullied by his flagrant adulterous conduct.
>
> [Appellant's] character was further besmirched by his prioritizing message — massage parlors, gratification over time with other partners, and he did that by jeopardizing time with his wife and son.
>
> The plethora of retrieved phone records, the captured e-mails to and from Justine Berfield (phonetic sp.) and the admissions of sex with Robin Sands and Ms. Cafferty left no doubt that [appellant] was a classic cheat.
>
> The desire of the plaintiff to involve the other parent in the child's life. [Appellee] will do her best to involve [appellant] in the child's life and always has. [Appellant] will abide by the Court's custody and visitation schedule, the Court finds, but I don't think he'll go above and beyond that to involve [appellee] unless he has a conflict and it helps him out.

Existing agreement between the parties. [Appellant] agreed to [appellee] sending the child to Winchester Academy and promised to pay the tuition, which he has.

Since the parties have separated, [appellant]'s visitation has evolved into a schedule where [appellant] drives . . . to Leesburg and meets the child, who has been driven there by [appellee], every other Thursday at about 5:30.

[Appellant] takes the child home to Potomac, takes off Fridays, Saturday, and Sunday, and returns the child to [appellee] in Leesburg on Sunday.

The potentiality of maintaining natural family relationships with the child. I find the potential is good.

The preference of the child. He's 3 and he hasn't reached the age of reason.

The material opportunities affecting the future life of the child. [Appellant] works for Booz Allen Hamilton and manages three main accounts. He earns over a million dollars a year. The material opportunities for the child are almost limitless.

[Appellee] has an undergraduate degree in business and would like to get a master's in speech pathology. [Appellee] is enrolled in a graduate program and is taking classes online.

The child will clearly do considerably better materialistically with [appellant]; however, if [appellant] isn't awarded custody, he'll be obligated to pay significant child support, as he's paying now, and alimony, and I have no doubt that the child will do quite well.

The residence of the parents and the opportunities for visitation — and I say [Alexander will] do quite well if he remains with [appellee].

The parties live 80 miles apart, which makes the back and forth inconvenient for the parties. They both have residences that can easily accommodate the child.

The length of separation from the child from either natural parent. The child has always lived with [appellee]. The child has had continuous contact with [appellant]. There has not been any appreciable separation of the child from [appellant].

Prior voluntarily abandonment or surrender. None.

The parents' ability to communicate. Poor.

The parents' willingness to share custody and be flexible with visitation. [Appellant] is willing to share custody, but [appellee] isn't. Both are willing to be flexible with visitation.

Sincerity of the parents' request. I found [appellee] to be very sincere in all her requests and concerns for the child.

I question [appellant]'s sincerity.

The relationship of the child with each parent. [Appellee] has a quintessential relationship with Alexander as a mom. [Appellant] has a very good relationship with his son and has had very constant and consistent contact and visitation with the child during the last year.

[Appellee] has tagged [appellant] to be a, somewhat of a Johnny-come-lately to the profession of real fatherhood and there are substantial bases for [appellee]'s accusations and concerns.

Disruption of the child's schooling and social life. The child has relatively no social life now and could be properly schooled either with [appellant] or [appellee]; however, if [appellee] remains in Stephensville or moves to Leesburg, joint custody would be counter-indicated.

The job demands for each parent. [Appellee] right now is, lives, stays at home and is taking courses online. I don't know what the — when she goes to graduate school, I suspect she'll actually have to go to a location.

[Appellant] works [on] a regular basis, a demanding job, and travels quite frequently, but he does work in the Virginia area, I think Reston to be exact, but he has meetings in other places in Virginia.

> The number of children that each parent might have [is] . . . [u]npredictable.
>
> The proximity of — [the parties are] both young enough that they could have more children or they may decide not to . . .
>
> The proximity of the parents' homes. The evidence is pretty clear they're about 80 miles [apart].
>
> The financial situation of each parent. I've already addressed that.
>
> The impact of state and federal assistance. It's not applicable.
>
> And benefits to both parents. I don't even know how to answer that, so I'm not.

Inconsideration of the aforementioned findings, the circuit court ruled that "[i]t would not be in [Alexander]'s best interest for his parents to have joint custody." Regarding appellant, the court stated, in relevant part:

> [Appellee] doesn't trust [appellant], for very good reasons. He cheated on her throughout the marriage and his wedding vows were nothing but empty words.
>
> What's changed, the birth of [Alexander]? No. He was living like a single man during [the pregnancy] and after the birth of his son.
>
> His commitment to being a father was woefully lacking when the parties lived together[.] How do I know? [Appellee]'s testimony, who I found to be very credible, and some simple math. There's only 24 hours in a day. He has to sleep from about six to eight hours, attend to his personal needs in the morning, he works hard, travels a fair amount, which entails a fair amount of time, and he had regular and consistent trips to massage parlors, telephone calls, e-mails, and scores of calls to girlfriends, after-work dinners and drinks — so many at one restaurant that he got so friendly with the chef that he allowed him to move in.
>
> That doesn't leave much time, does it, for [appellee] and [appellant's] son?
>
> [Appellee] has every reason to be suspicious of [appellant]'s intentions. There's no evidence that he's cut back time at work or any of his extracurricular activities.
>
> * * *
>
> I share [appellee]'s doubts as to whether or not [appellant]'s enthusiasm will wane after [appellant] gets custody.
>
> * * *
>
> How can [appellee] trust [appellant] or believe him when they discuss the status of the child when the child is with [appellant]? [Appellant] wouldn't treat her as an equal partner parenting any more than he did in his marriage.
>
> [Appellant's] respect for [appellee], he doesn't respect her. The napkin in the back pocket is a very small example[2] His affairs throughout the marriage is a rather large one.

The court also found that appellant was not sincere in his request for custody:

> The Court doesn't find that [appellant] is sincere in his request for custody. And if he is sincere, then I don't think he fully understands what custody entails.
>
> [Appellant]'s filing at the eve of the six-month deadline [for Maryland to retain jurisdiction over Alexander] I don't find was coincidental. I think he filed because Maryland would lose jurisdiction on custody and he figured, as a good businessman, that Virginia would be less likely to send [Alexander and appellee] back to Maryland, and I understand [that Virginia courts] can't send [appellee] back, but [appellant] knows full well [appellee is] not going to leave [Alexander] and stay in Virginia if [Alexander] had to come back [to Maryland].

The court found that appellee

> is an outstanding mother and parent, and she always has been. [Appellee] was and is the primary caregiver. She was and is the primary parent in seeing that the child receives the proper medical attention, education, nurturing, love, and time commitment.

The court concluded that appellee "is a fit and proper person to have custody and that [appellant) isn't," and

therefore "[i] is in [Alexander]'s best interests that [appellee] have custody."

In a written order dated April 22, 2011 and entered on May 5, 2011, the circuit court awarded, *inter alia*, (1) sole legal and physical custody of Alexander to appellee, (2) visitation to appellant "on alternate weekends from Friday after school ends, or at 12:00 noon if school is not in session, until Sunday at 5:00 p.m.," and on "every Wednesday from the time school ends until 5:00 p.m. the same day," (3) two non-consecutive weeks in the summer to appellant and directed that the parties agree upon which two weeks appellant shall have by April 15 each year, and, if the parties failed to reach an agreement by April 15, appellee shall select the two weeks for appellant's visitation, (4) visitation to appellant for Thanksgiving in all even-numbered years, from Wednesday night until Sunday at 5:00 p.m., (5) visitation to appellant "in odd-numbered years commencing with 2011, from December 24th after school or if school is not in session, at 12:00 noon until 2:00 p.m. on Christmas Day," and "[d]uring Christmas break in such odd-numbered years, [appellant] shall also have Alexander for another period of three overnights, to include [appellant]'s regular weekend visitation," (6) visitation to appellant from Christmas day at 2:00 p.m. until December 28 at 5:00 p.m. in even-numbered years beginning with 2012, (7) visitation on Father's Day to appellant and on Mother's Day to appellee, and (8) attorney's fees to appellee in the total amount of $70,685.39.

On May 18, 2011, appellant filed a timely appeal of the circuit court's April 22, 2011 order. On May 20, 2011, appellee filed a Motion for Award of Appellate Attorney's Fees and Costs, seeking "an amount not less than $25,000." On June 3, 2011, appellant filed an opposition to appellee's Motion for Award of Appellate Attorney's Fees and Costs, to which appellee replied on June 9, 2011. On August 5, 2011, the court held a hearing on appellee's motion and by order of the same date awarded appellee "$25,000.00 as a contribution toward the costs and attorney's fees of [appellee] in connection with [appellant]'s appeal of this Court's Order entered May 5, 2011." On August 29, 2011, appellant filed a timely appeal of the court's August 5, 2011 order.

On September 14, 2011, we granted appellant's Consent Motion for Consolidation of Appeals, consolidating appellant's May 18, 2011 and August 29, 2011 appeals. Additional facts will be set forth below as necessary to resolve the questions presented.

DISCUSSION

A.
Legal Custody

Appellant contends that the trial court erred in awarding sole legal custody to appellee when the parties "both advised the court in their respective opening statements that joint legal custody was appropriate." Appellant claims that "the parties were in agreement that this would be a joint legal custody case, with the only issue being whether the court would grant tie-breaking authority in accordance with [*Shenk v. Shenk*, 159 Md. App. 548 (2004)]." Appellant also contends that "there was no evidence that [the parties] could not make joint decisions regarding Alexander's welfare" and "[b]ased upon its findings of infidelity, the trial court made the impermissible stretch that because [appellant] cheated on his wedding vows, he and [appellee] could not make joint decisions regarding Alexander's welfare."

Appellee counters that appellee's position was not that the parties share joint legal custody, but rather that appellee have "tie-breaking authority" or sole legal custody. Appellee notes that appellant's counsel admitted that joint legal custody with tie-breaking authority is "essentially the same as awarding sole [legal] custody." Appellee also claims that the record "reflected many instances of disagreement and disrespect by [appellant] towards [appellee]," which supported the trial court's award of sole legal custody to appellee. Appellee argues that appellant's infidelities constituted further evidence of appellant's "disrespectful behavior" toward appellee that "made it impossible for the two to make shared decisions regarding Alexander."

"[I]n any child custody case, the paramount concern is the best interest of the child," *Taylor*, 306 Md. at 303. "The best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak." *Id*.

When determining whether an award of joint legal custody is appropriate, the Court of Appeals in *Taylor* made clear that the capacity of the parents to communicate and reach shared decisions affecting the child's welfare is the "most important factor":

> **Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child,** and then only when it is possible to make a finding of a strong potential for such conduct in the future.

Id. at 304 (emphasis added).

The Court quoted a law review article[3] wherein

> the author listed the characteristics of co-parental relationships found to be important in a study of successful joint custody arrangements:

> **Foremost was the sense of respect for one another as parents**, despite the disappointment in each other as marriage partners. Each appreciated the value of the other to the child, and was sensitive to the possible loss of a parent-child relationship. . . . They accepted the premise that they were equally significant to and capable of caring for the children. **This meant not only the genuine valuing of the other as a parent in raising the child** but, equally as important, it enhanced the parents' own self-confidence.

Id. at 306 (emphasis added).

Contrary to appellant's contention, the record indicates that appellee never sought joint legal custody as an arrangement in which the parties would share their authority and reach all decisions together, but rather sought a custody arrangement in which she had the authority to make all final decisions, whether that be sole legal custody or joint legal custody with appellee having "tie-breaking authority." In her counterclaim for absolute divorce, appellee sought "custody of Alexander, both *pendente lite* and permanently, with reasonable rights of visitation reserved to [appellant]." During his opening statement, counsel for appellee stated:

> With regard to legal custody, we don't care whether the Court calls it joint custody, but [counsel for appellant] did hit the nail on the head when we said there needs to be some ability if there's an impasse to break the impasse. . . .
>
> * * *
>
> So we have no problem at the end of the case, if the Court says we're going to give these parties joint legal custody. **But we do ask that the Court then establish a mechanism where if [appellee] makes a good faith effort to reach a resolution with [appellanti, and there's no resolution, that she does have the ability to make whatever material decisions are necessary for Alexander's welfare.**

(Emphasis added).

Appellant thus was aware that appellee would be seeking tie-breaking authority, and opposed such award, stating:

> As we know, tie-breaking authority sounds good and it's certainly noble in its thoughts, but I think as a practical matter, when one party knows that they essentially hold two votes to the other, they know at the end of the day they're going to make the decision . . . I don't think it gets you where it gets you.

Appellant's counsel then told the trial court that joint legal custody with tie-breaking authority is "essentially the same as awarding sole custody."[4]

Even if, however, the parties had agreed that joint legal custody would be the best arrangement for Alexander, the circuit court remains obligated to craft the custody arrangement that serves the best interest of the child. *Taylor*, 306 Md. at 303. Here, the court, in a thorough and well-reasoned oral opinion, made factual findings as to each of the applicable *Sanders* and *Taylor* factors and then considered those findings in determining what arrangement would be in Alexander's best interest. Appellant does not challenge any of the court's factual findings. Instead, appellant claims error in the court's analysis that led to its award of sole legal custody to appellee.

The court reasoned, in relevant part:

> [Appellee] doesn't trust [appellant], for very good reasons. He cheated on her throughout the marriage and his wedding vows were nothing but empty words.
>
> * * *
>
> How can [appellee] trust [appellant] or believe him when they discuss the status of the child when the child is with [appellant]? [Appellant] wouldn't treat her as an equal partner parenting any more than he did in his marriage.
>
> [Appellant's] respect for [appellee], he doesn't respect her. The napkin in the back pocket is a very small example. His affairs throughout the marriage is a rather large one.
>
> I think he recognizes that [appellee] is a good mom, but more in the same vein as you would recognize a businessman as a good negotiator, manager, or market analyst. He doesn't truly appreciate the unique role a mother plays in the development of her child, that is, she's not just a caretaker.

The trial court further determined that appellee, if

she were granted sole legal custody, would respect appellant and include appellant in Alexander's life:

> I share [appellee's] doubts as to whether or not [appellant]'s enthusiasm will wane after he gets custody.
>
> I found [appelleel's comment with that respect, with that issue a very telling, and very sincere, and very helpful to the Court, because I in no way found that [appellee] was trying to keep [appellant] from seeing the child. In fact, [appellee] was welcoming and encouraging a more dominant role [for appellant].
>
> Normally what the Court sees when the parties circle the wagons on custody is an attack to the other side that, "I don't want him this much there in my child's life. He's doing this, he's doing that."
>
> She says, "This is fine, but let's wait and see when the dust settles," which would indicate to the Court that she would do everything down the road to make sure Alexander has a good, healthy relationship with [appellant].
>
> * * *
>
> I find that [appellee] is an outstanding mother and parent, and she always has been. She was and is the primary caregiver. She was and is the primary parent in seeing that the child receives the proper medical attention, education, nurturing, love, and time commitment.

Appellant asserts that there was "no evidence" that the parties could not make joint decisions regarding Alexander's welfare. The record belies this assertion.

At trial, counsel for *appellant* read the following excerpt from appellee's deposition into the record:

> QUESTION: Notwithstanding your marital differences with [appellant], do you think the two of you would have the ability to work together to share the decisions on your son's best interest?
>
> [APPELLEE]: No.
>
> QUESTION: Why not?
>
> [APPELLEE]: [Appellant] likes to be in control.

The record further reflects that parties were unable to agree in several areas critical to Alexander's life. The parties disagreed about whether Alexander should attend Winchester Academy or the National Child Research Center. The parties also were unable to agree on the importance of Alexander's dietary restrictions. Appellee testified that appellant did not know how to maintain Alexander's diet and ignored her pleas not to give him dairy products such as ice cream. The parties disagreed on issues related to medical treatment for Alexander, including who should perform Alexander's ear tube procedure, the necessity for medical treatment when Alexander had hives and the croup, and when appellant should give Alexander allergy medication.

Appellant also contends that, "[b]ased upon its findings of infidelity, the trial court made the impermissible stretch that because [appellant] cheated on his wedding vows, he and [appellee] could not make joint decisions regarding Alexander's welfare." The court found, however, that appellant's "documented liaisons with his girlfriends and trips to massage parlors" strongly suggested that appellant would not respect appellee were the two to share legal custody. As a result, the court found that appellant's record of infidelity did not support granting joint legal custody.

Ultimately, the court concluded that "[appellee] is a fit and proper person to have custody and that [appellant] isn't. It is in the [Alexander]'s best interests that [appellee] have custody." In reaching this conclusion, we perceive no abuse of discretion.

B.
The Access Schedule
1.
Dr. Thornburgh's Recommendations

In the parties' *pendente lite* access schedule, appellant had extended overnight access with Alexander on alternating weeks from Thursday at 5:30 p.m. to Sunday at 5:30 p.m. At trial, appellee testified about problems with Alexander's behavior before and after his Thursday-to-Sunday visits with appellant:

> On . . . Thursdays, that day sometimes [Alexander], he will not take a nap. He's . . . very upset when I pull out the bag and start packing it and I ask him about which toys he'd like to take. Either that or he gets really withdrawn and reserved.
>
> Sunday, when he comes back, he's very upset, he doesn't want to eat dinner. Several occasions he's come back either soaked in his urine or the diaper has not been changed and, or soaked through his pants. So, he's not too happy about that.

Appellee further testified that, when Alexander

would come back after three days with appellant, "then Monday he doesn't want to go to school or he wants me to go to school with him." Appellee also observed other behaviors of concern to her after Alexander's return from visitation: "[t]he hitting, the smacking; the next day, refusal to put on his clothes, refusal to put on his coat to go to school." Appellee suspected that Alexander's "regression" was the result of his extended overnight visits with appellant, and believed that shorter, more frequent visits, starting with one overnight every week, would be in Alexander's best interest.

Appellee called Dr. Gail Thornburgh as an "expert in the fields of child psychology and child development with an emphasis on young children." Prior to the trial, Dr. Thornburgh met with appellee approximately seven times, but did not meet with appellant or conduct a psychological evaluation of Alexander. Counsel for appellee asked Dr. Thornburgh why young children exhibit aggressive behavior when separated from their primary parent, to which Dr. Thornburgh responded:

> Well, usually it's because they are wanting to go back to a period of time when the child feels safe and cared for. And usually it means going back to more when the child is a baby. And so they might become clingy; they might become aggressive; they might become, the only way they can show they're unhappy is by their behavior. And because their issues are issues of abandonment and loss, many times it is shown with the parent that is the primary parent.

Although Dr. Thornburgh was aware of the problematic behavior exhibited by Alexander before and after extended visits with appellant, Dr. Thornburgh could not ethically offer an opinion as to what access schedule would be in Alexander's best interest, because she did not evaluate Alexander. Dr. Thornburgh explained that her opinion, although not specifically tailored to Alexander, was useful in understanding and resolving regressive behavior in young children:

> [WITNESS]: [My opinion] can only have a value as related to what is hypothetical for a 3-year-old child with a primary parent who is exhibiting regression and that was the question that I was asked.
>
> And the answer that I gave was that, if I were seeing a 3-year-old child who was exhibiting regression, what I would do is I would first call for a mental health person to do an evaluation of the family. And secondly, when I see regression, for me it's a stop, drop and roll. I would say —
>
> THE COURT: Like a fire drill.
>
> [WITNESS]: Exactly. There's a problem. Take a look at it and address it. And possibly, possibly what might be happening is that the time period that the child is away might be too long.
>
> And that would have to be looked at appropriately in that situation. And in a typical 3-year-old . . . parenting plans for 3-year-old children, typically it starts with an overnight.
>
> And then increases as the child does well and it also would have dinner nights, so that the child sees the parent frequently. Children have object permanence at 3, but in order to build a bond, it works well for a parent to see the child during the week, to have a dinner night or even two dinner nights, so that the child builds the bond with the other parent and works toward a really good and solid, healthy relationship.

The trial court asked if appellant's counsel had any objection to that testimony, and counsel declined to object. The court then reiterated that "we understand that [Dr. Thornburgh's opinion is] not tailor made for [ ] Alexander."

In addressing the issue of visitation in its oral opinion, the court stated, in pertinent part:

> Visitation. The Court was impressed by [Dr.] Thornburgh's concerns and [appellee]'s concerns about the length of time Alexander is with [appellant]. It's not a question of being with [appellant]; it's a question of being that long away from [appellee]. That's the key. And he's a little guy and the reaction he's getting, I think, is consistent with the testimony. It would be hard to basically stabilize when he comes back with [appellee].
>
> [Appellee] is the safe haven and that's where you see the acting out. I think over time, as he gets older and sees [appellant] more frequently, this will subside.
>
> So what I'm going to do is [ ] find that their rational[e], Dr. Thornburgh and [appellee]'s rational[e], to be compelling, so I'm going to award visitation or grant visitation to [appellant]

> every other weekend, from Friday after school, which is now midday and eventually it will be around 3:00, until Sunday at 5:00 p.m.
>
> * * *
>
> Ok. I'll also award visitation every Wednesday after school until 5:00 p.m. . . .
>
> This will. . . give [appellant] a consistent every-week visitation with his son. It will also not require [appellant) to take off his full day on Friday, which I'm sure is somewhat of an inconvenience to his job, but it will still allow that constant seeing him every week, and then every other week he'll still have a nice weekend, which is still sufficient time for [appellant] to do a lot of nice things with his son, because he'll have Friday night, he'll have Saturday, he'll have Saturday night, and Sunday.

Appellant first contends that the trial court erred by adopting visitation recommendations made by Dr. Thornburgh when she "expressly and repeatedly admitted that such recommendations did not — and ethically could not — apply to Alexander." Appellant claims that "the trial court erred by concluding that it was 'impressed by Dr. Thornburgh's concerns,' finding her rational[e] 'compelling,' and expressly designing Alexander's time based on Dr. Thornburg's [sic] testimony, when Dr. Thornburg [sic] herself said that such testimony did not apply to Alexander. . . and could have no value without seeing the child and doing a mental health evaluation."

Appellee counters that Dr. Thornburgh "rendered an opinion that a hypothetical three-year-old child experiencing regression, with a primary parent, should have shorter periods of visitation, starting with an overnight," and that appellant's counsel "was queried by the court and expressly acknowledged that this testimony was not objectionable." Appellee also claims that the court did not adopt Dr. Thornburgh's recommendations, because her testimony "pertained to a 'hypothetical' child" and "Dr. Thornburgh never testified regarding the propriety of any specific schedule for any three-year-old child, and offered no recommendations that could have been 'adopted.'"

At the onset, we conclude that appellant's challenge to to the circuit court's reliance on Dr. Thornburgh's opinion is not preserved for our review, because counsel for appellant explicitly offered no objection to Dr. Thornburgh's opinion as to a "hypothetical . . . 3-year-old child with a primary parent who is exhibiting regression." When the court asked if appellant's counsel had any problem with Dr. Thornburgh's opinion, counsel replied, "I wouldn't object to that testimony. I would disagree with it, but wouldn't object." Maryland Rule 4-323 states that "[am objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *See Abeokuto v. State*, 391 Md. 289, 326-28 (2006) (finding that the appellant's failure to object to testimony precluded review of his challenge to the testimony's admissibility). Appellant's counsel explicitly did not object to the admission of Dr. Thornburgh's opinion. Accordingly, appellant's failure to object to Dr. Thornburgh's testimony precludes our review of this contention.[5]

Even if appellant's issue was preserved, the record is clear that the circuit court understood that Dr. Thornburgh's testimony was not based on her analysis of Alexander's specific situation, but rather reflected her opinion on a hypothetical child exhibiting similar behavior to that of Alexander. Dr. Thornburgh explained that, when a child of Alexander's age reacts negatively following extended time with the non-primary parent, such behavior may be a sign that the child is away from the primary parent for too long. The court accepted the testimony of appellee and others that Alexander was acting out following the extended weekend visits with appellant. Dr. Thornburgh's testimony thus served as an explanation for Alexander's regressive behavior after visiting with appellant. The court then used Dr. Thornburgh's opinion as a basis for adjusting appellant's visitation with Alexander, by reducing the length of appellant's overnight visits while increasing the frequency of appellant's visits.

Although the circuit court found the rationales' of appellee and Dr. Thornburgh to be "compelling," the court did not, in fact, adopt their recommendations as claimed by appellant. Appellee wanted appellant's overnight access to start at one night every week, and Dr. Thornburgh suggested that, with a hypothetical three-year-old, she would also recommend starting with one overnight per week. The court instead awarded appellant two consecutive overnights every other week. We also note that Dr. Thornburgh did not offer any specific visitation schedule, nor did she even recommend that the court reduce appellant's extended weekend visitation.

In sum, the trial court used Dr. Thornburgh's insights into a hypothetical three-year-old exhibiting regression, coupled with the evidence of Alexander's regressive behavior after extended visits with appellant, to determine that Alexander would benefit from having shorter, but more frequent, periods of access with appellant. We perceive no error or abuse of discretion in the trial court's use of Dr. Thornburgh's testi-

mony to form its own opinion on what visitation schedule would be in Alexander's best interest.

2.
Access Schedule Limitations

Appellant contends that the visitation schedule does not afford appellant the "reasonable maximum opportunity to develop a close relationship" with Alexander, because of the limitations on appellant's access to Alexander. First, appellant claims that the schedule provides "limited overnight visits," with "no provision for extended holiday weekends, even for those Monday holidays that are appended to [appellant]'s regular access schedule." Second, appellant argues that the schedule provides minimal "major" holiday and summer access. Finally, appellant argues that "[t]he trial court erred in establishing an access schedule for [appellant] that requires him to take a full day off of work every Wednesday and every other Friday."[6] We see no merit in any of appellant's contentions.

Overnight and Extended Weekend Access

Under the *pendente lite* access schedule, appellant had visitation with Alexander every other weekend beginning on Thursday at 5:30 p.m. and continuing until Sunday at 5:30 p.m. Following the circuit court's April 22, 2011 order, appellant's overnight access was reduced to every other weekend beginning on Friday after school through Sunday at 5:00 p.m.

Appellant complains about the limitation of his overnight access and "extended holiday weekends [access], even for those Monday holidays that are appended to [appellant]'s regular access schedule." Appellee responds that the trial court crafted the access schedule in Alexander's best interest based on appellant's work schedule and limited time available to spend with Alexander. According to appellee, the access schedule "afford[ed] him more frequent access [to Alexander] than he has ever had, including when there were no court proceedings."

As previously discussed, the court limited appellant's overnight access, because, following extended overnight access, Alexander was displaying regression and acting out when he returned to appellee's care. According to Dr. Thornburgh, regressive behavior by a three-year-old after an extended visit can be ameliorated by shorter, but more frequent, visits with the non-primary parent. Consequently, the evidence supported the trial court's reduction of appellant's weekend visitation from three overnights to two, as well as the court's denial of Sunday overnights on holiday weekends.

With regard to appellant's request for a "reasonable maximum opportunity to develop a close relationship" with Alexander, we note that the circuit court's new access schedule affords appellant *more waking hour* time with Alexander than he previously had under the *pendente lite* schedule. Under the *pendente lite* access schedule, appellant had visitation with Alexander on every other weekend beginning on Thursday at 5:30 p.m. and continuing until Sunday at 5:30 p.m. Under the court's new schedule, appellant loses one night with Alexander every other week, but, in its place, gains access to Alexander every Wednesday from the end of school to 5:00 p.m. Therefore, in light of the court's concerns about Alexander's regressive behavior and the increased waking hour access provided by the new schedule, we conclude that the circuit court did not abuse its discretion in reducing appellant's overnight or extended weekend access to Alexander.

"Major" Holiday and Summer Access

Appellant next complains that the access schedule provides minimal "major" holiday and summer access. Appellee responds that the circuit court "did not disregard or trivialize the issue of holiday visitation" and that, when the issue was raised before the court, the court awarded appellant access to Alexander (1) for the entire Thanksgiving break in alternating years, (2) from Christmas eve until Christmas day and for an additional three-day weekend during odd-numbered years, and (3) from December 25 until December 28 in even-numbered years.

As appellee notes, the parties did not broach the subject of holiday access until after the court decided the weekly and summer access schedules. The trial transcript indicates that the circuit court's formulation of the holiday schedule was not the product of resolving a dispute between the parties, but rather was the culmination of the parties coming together to reach a reasonable and equitable resolution. Counsel for the parties offered suggestions, counter suggestions were made, and the court ordered those arrangements that were acceptable to the parties.

Because appellant failed to object to the "major" holiday access schedule at trial, appellant has waived his opportunity to challenge that determination before this Court. Md. Rule 8-131(a). Even if the argument was preserved, the court's arrangement equitably shares Alexander's time between the parties, both by splitting "major" holiday time and alternating days of access in even and odd-numbered years. We perceive no abuse of discretion.

As to summer access, as previously discussed, the circuit court found that, because of Alexander's reaction to extended time away from appellee, it was in Alexander's best interest to limit appellant's summer access to two non-consecutive weeks. We thus see no

abuse of discretion by the court in its award of two non-consecutive weeks of summer access to appellant.

Wednesday Access

The circuit court awarded appellant access to Alexander every Wednesday from the time school ends, or at 12:00 p.m. on non-school days, until 5:00 p.m. Appellant claims that "[t]he trial court erred in establishing an access schedule for [appellant] that requires him to take a full day off of work every Wednesday and every other Friday."

Appellee counters that the circuit court did not err in awarding appellant access to Alexander on Wednesdays, because appellant claimed to have the "extraordinary" ability to rearrange his schedule and the court intended the schedule to be more convenient for appellant while still affording him the opportunity to see Alexander every week.

Appellant's claim of inconvenience caused by the award of access every Wednesday afternoon is undermined by his own statements and those of his counsel. At trial, appellant's counsel insisted that appellant had the "extraordinary" ability to rearrange his work schedule for Alexander. Appellant also testified to his ability to take time off from work for a variety of occasions. Appellant further testified, on direct examination, to his belief that his schedule afforded him the ability to fully co-parent Alexander:

> [COUNSEL FOR APPELLANT]: Generally can you tell us ideally, forget this Court, but ideally . . . [w]hat do you see as the the optimal parenting relationship for your son?
>
> [APPELLANT]: **I believe ideally it would be a co-parenting situation where two people who really love Alexander are heavily involved in all of his activities in school, socially, extracurricularly and that can work together to make the best decisions for him.**
>
> [COUNSEL FOR APPELLANT]: And do you think that you and [appellee] are capable of doing that assuming, forget what the Court does —
>
> [APPELLANT]: Yes.
>
> [COUNSEL FOR APPELLANT]: — but do you think the two of you are capable of doing that?
>
> [APPELLANT]: Yes.
>
> [COUNSEL FOR APPELLANT]: **Do you think your work schedule affords you the capability to have that sort of lifestyle or parenting arrangement with your son?**
>
> [APPELLANT]: **Yes**.

(Emphasis added).

Furthermore, the circuit court made clear that it intended the Wednesday access to be *more convenient* to appellant:

> This [access schedule] will . . . give [appellant] a consistent every-week visitation with his son. It will also not require [appellant] to take off his full day on Friday, which I'm sure is somewhat of an inconvenience to his job, but it will still allow that constant seeing him every week, and then every other week he'll still have a nice weekend. . . .

We also note that appellant's claim that his Wednesday visitation would require him to take every Wednesday off from work is less credible because of appellee's post-trial move to Ashburn, Virginia, which is closer to appellant's office in McLean than was the parties' original meeting location in Leesburg. We see no abuse of discretion on the part of the court in awarding appellant access to Alexander every Wednesday afternoon.

C.
Selection of Dates for Summer Access

The circuit court granted appellant two non-consecutive weeks of visitation in the summer, ordering that the parties jointly agree upon which two weeks appellant would have by April 15 of each year, and, if the parties failed to reach an agreement by April 15, appellee would select the two weeks. Appellant contends that, in doing so, the trial court "improperly delegated judicial authority to [appellee] regarding [appellant]'s summer vacation visitation." Appellant claims that appellee "can use her control over the little time [appellant] has with his son as leverage in any other matter in dispute between them," and "[d]elegation of judicial authority to one of the parties in a contested custody/visitation case is rife with problems and is contrary to Maryland law." We disagree.

The circuit court's order that the parties jointly agree upon the dates of summer access, with appellee possessing the authority to decide the dates if they cannot reach an agreement, is not a delegation of judicial authority. Rather, the award is analogous to the "tie-breaker" authority recognized in *Shenk*.

In *Shenk*, the lower court awarded the parties joint legal custody with the wife having final tie-breaking decision-making authority in the event of a future dispute. *Shenk*, 159 Md. App. at 549. We affirmed the court's award:

> The Court here adopted "a tie-breaker" as another proactive provision to anticipate a post-divorce dispute. It is this "tie-breaker" that the husband urges us to find prohibited under the language in [*Taylor v. Taylor*, 306 Md. 290 (1986),] that he believes precludes any variation designed to suit the needs of particular parents or children. We disagree. His interpretation is not mandated by *Taylor*, in which the Court expressly acknowledged the existence of "multiple forms" of joint custody and also stated that "formula or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made."
>
> It is clear that the trial court felt that the parties should share responsibility for the major decisions affecting the lives of their children. It is equally clear that the court was concerned that disagreements about trivial matters might result in renewed litigation. Under *Taylor*, the court was empowered to "continue the joint custody that has existed in the past." The court did just that, adding only an exhortation that both sides must be given the opportunity to present their views. The court made it clear to the parties that any failure to discuss issues involving the children would be a violation of its orders and emphasized that the mother was not to act without consulting the father.
>
> The accommodation fashioned by the trial court does not transform the arrangement into something other than joint custody. Instead, it illustrates how the "multiple forms" of joint custody can be tailored into solutions for each unique family, in keeping with the "broad and inherent["] power of an equity court to deal fully and completely with matters of child custody. The law should never be the prisoner of ideas.

Id. at 560 (citations omitted).

In the same way, the circuit court in the instant case gave appellee "tie-breaker" authority if the parties were unable to reach an agreement as to which two weeks appellant would have for his summer visitation with Alexander. This "tie-breaker" authority is not an impermissible delegation of judicial authority, but rather one of the many forms of a custody arrangement designed to reduce post-divorce legal disputes.

Furthermore, the "tie-breaker" authority given to appellee regarding the dates of summer access is fundamentally different from the improperly delegated authority contemplated in the cases cited by appellant in his brief, *In re Mark M.*, 365 Md. 687 (2001), and *Shapiro v. Shapiro*, 54 Md. App. 477 (1983). In *In re Mark M.*, the Court of Appeals held that the district court erred by improperly delegating its authority to determine visitation when it ordered that the petitioner be denied visitation until the state-appointed therapist recommended otherwise. 365 Md. at 692, 709-10. *In Shapiro*, we held that the trial court improperly delegated its authority to determine visitation rights when it ordered a doctor to decide whether the father would have visitation with his child and the terms of such visitation. 54 Md. App. at 479, 484-85. In both cases, the trial court delegated the authority to decide *whether someone would be awarded visitation*. In the instant case, the circuit court ordered two non-consecutive weeks of summer visitation and delegated to the parties the question of which two weeks would be chosen. In other words, the court did not delegate *whether there would be visitation*, or *even how much visitation*, but merely when the visitation would occur. This critical distinction separates an impermissible delegation of judicial authority from allowing the parties to decide *when* the *court-awarded visitation* would take place.

Appellant claims that appellee "can use her control over the little time [appellant] has with his son as leverage in any other matter in dispute between them." We again disagree. There is no evidence in the record to indicate that appellee has any predilection for using her "tie-breaker" authority to gain leverage over appellant or to limit his access to Alexander. To the contrary, the circuit court found that appellee encouraged a strong relationship between appellant and Alexander:

> I fully believe that [appellee] wants [appellant] to be involved as a dad and I'm not at all worried or — I don't have [any] reservations that this child is not going to be able to do a lot of nice things with [appellant].

The circuit court also expressed its belief that the parties "will be extremely flexible with [appelleej calling the shots with respect to all visitation schedules no

matter how rigid or how detailed."

Without any factual basis, we cannot assume that appellee intends to exercise her "tiebreaker" authority in bad faith. The circuit court believed that appellee wanted appellant to be involved in Alexander's life, and we will not second-guess the circuit court's assessment of the demeanor and credibility of appellee. *See Petrini v. Petrini*, 336 Md. 453, 470 (1994). In addition, the court's order that the parties "shall jointly agree upon the summer weeks during which [appellant] shall have Alexander by April 15th" indicates that the parties *must attempt* to come to a *joint agreement* before appellee may exercise her tiebreaker authority. Appellee's failure to attempt to come to a joint agreement would be a violation of the circuit court's order from which appellant could seek relief. *See, e.g., Shenk*, 159 Md. App. at 556, 560 (explaining that the trial court's order requiring the parties to "thoroughly discuss[ ]" matters related to the children and granting the wife tie-breaker authority only "[i]f the parties are unable to reach an agreement" meant that "any failure to discuss issues involving the children would be a violation of [the court's] orders"). Accordingly, the circuit court did not err or abuse its discretion in giving appellee "tie-breaker" authority in the event that the parties failed to reach an agreement as to when the two non-consecutive weeks of summer visitation for appellant would take place.

D.
Attorney's Fees

At the conclusion of the three-day trial, the circuit court discussed its findings as to attorney's fees:

> The Court has considered the financial status of each party. I looked at . . . [appellant]'s income, which is a little bit on the sizable side, over a million dollars a year. [Appellee], right now, basically has no income.
>
> I looked at the prenuptial agreement and what [appellee] is going to get, and she's certainly not going to be able to retire and never work again, so I've considered that.
>
> I've also considered the needs of each party — [appellee]'s situation, trying to go to school, living with her parents, trying to get her own place.
>
> And I understand that these, the prenuptial agreement things are timed. There's not going to be a tremendous amount of money coming out of that house.
>
> All of those things, the Court considered.
>
> And, third, the Court considered whether there was substantial justification for bringing or defending the proceedings.
>
> There certainly was substantial justification for defending it.
>
> I can see why [appellant] brought it, but I've already addressed that and I don't find that there was a tremendous amount of justification for seeking custody.
>
> I also will find that, so the Court analyzed all of those factors and I find that, I'll order that [appellant] pay [appellee]'s attorney's fees to [counsel for appellee] in the amount of $45,006.42 through March 20th, 2011, plus all reasonable fees, attorney's fees, from March 21st on, which includes the three-day trial, today, and the cost of preparing this Court's proposed order, and that those fees be paid within 14 days after I sign the order.

In its April 22, 2011 order, the circuit court awarded attorney's fees to appellee in the amount of $70,685.39.

At the conclusion of the August 5, 2011 hearing on appellee's Motion for Award of Appellate Attorney's Fees and Costs, the circuit court stated, in pertinent part:

> [T]he Court . . . will adopt whatever I said at the time of the final decision that I made with respect to attorney's fees at the time [of trial]. There's been really nothing to change that situation that's been brought to the Court's attention.
>
> With respect to the stream of income that the parties had, there's clearly, it's not even a close case. **[Appellant] is an extremely successful businessman. . . . And of course . . . he grossed [$] 1,742,000. So he's extremely capable. There were no other major debts brought to the Court's attention.**
>
> Obviously now he has a beautiful home which he's remained in . . . Potomac. And that's all been settled with respect to the prenuptial agreement that's been abided by.
>
> **The Court will also recall the fact that [appellee] did not have the**

trappings or the earmarks of anyone that was in fact extremely well off. I would have to find that she went to live with her mom and dad, even though she could have just [bought] a million dollar home with cash if she had it. In other words, I found that she was living with her parents because her financial situation pretty much required it. And that there was no indication throughout the trial, nor is there now that she's independently wealthy. By comparison, it's not even close. It's not an NFL situation with the players where you're talking millions and millions on both sides. I used that simply by analogy.

I can't make a decision for the purposes of the benefit of the plaintiff. I can't say [appellee] can't afford the attorney fees. And if that were the only test, I think it might fail. But the Court has to look at the financial status of each party. [The statute] doesn't say if one can afford then he or she pays his attorney's fees.

The financial status of [appellant] is outstanding. He's extremely successful. A lot of money. A lot of holdings. And a relatively young man. And absolutely no indication that this income won't continue.

The financial status of [appellee] indicates to the Court that she's not going to be in the bread lines, but she has, she's not in a tremendous financial position. She has, she was going to school to obtain a degree in an area that would allow her to deal with her son's needs. And going to school, she's paying for a daycare provider and a lot of other things. I did not find that her financial situation was terrific.

There again, by comparison, there's no comparison. It's night and day. It's 180 degrees different. The Court finds that [appellant] is in a much better financial situation to pay for attorney's fees. So the status of [appellant] far surpasses the financial status of [appellee]. It's not even a close call.

There are many doubts that the Court has that [appellee] is in great financial status despite what [appellant] says. There again, she's not in the bread lines. But I think by comparison it's not even a close case. That [appellantj's position, financial status is much . . . better than [appellee]'s.

And the same with the needs of the parties. There are no needs presented to the Court throughout the trial that there's any financial needs from [appellant]. [Appellee], on the other hand, does have a lot of needs and it was brought out in the testimony and in the argument.

That leads me to . . . the third factor, whether there's substantial justification for bringing, maintaining, or defending the proceeding. Well, [appellant] has custody of her son and was awarded [that] by the Court. There's absolutely no way she can just sit back and not defend this appeal. She didn't bring this appeal. [Appellant] did. . . .

* * *

I think the $25,000[ ] she's already paid close to [$5,000] on this appeal. I think another [$20,000] based on what's been paid already, based on the nature of appeals, based on the briefs that have to be done, based on the competence of both sides, and neither side is going to lay down. I think another [$20,000] is a reasonable round figure.

(Emphasis added). On August 5, 2011, the court awarded appellee $25,000 in appellate attorney's fees.

Appellant contends that the circuit court should vacate the attorney's fees award, because appellee "failed to satisfy the statutory requirements by failing to prove her financial status; that she lacked financial resources or had a financial need for [appellant] to pay her attorney[']s fees." Appellant claims that, although the court noted the difference in the parties' income, that difference "is only one aspect of their financial status" and the court should not have awarded attorney's fees "amidst this vacuum of evidence."[7]

Appellee counters that the record reflected that appellee was a full-time parent and student with no earned income, that appellant's annual earned income exceeded $1.7 million, that the property settlement to be paid to appellee was a mere 3% of appellant's net

worth, and that the circuit court found that appellant was "less than fully justified" in pursuing the instant custody action, and accordingly, the court did not err in its award of attorney's fees.

A court's decision to award attorney's fees generally is reviewed under an abuse of discretion standard. *Van Schaik v. Van Schaik*, 200 Md. App. 126, 139 (2011) ("A circuit court's decision in this regard will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong."). Maryland Code (1984, 2006 Rept. Vol.), § 12-103(b) of the Family Law Article ("F.L.") sets forth the factors a court must consider in awarding attorney's fees:

> (b) *Required considerations.* — Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

In the case *sub judice*, the circuit court, in awarding both trial and appellate attorney's fees, considered all of the required factors under F.L. § 12-103(b) and thoroughly explained its findings as to the financial status and needs of the parties, as well as to the justification for the litigation. The court repeatedly made clear that appellant's financial status was substantially stronger than that of appellee. Appellant earned over $1.7 million with "no other major debts," while appellee had no earned income, lived with her parents, and was a full-time student. The court said that "by comparison, there's no comparison. . . . It's not even a close call." The court also found that appellee was living with her parents, "because her financial situation pretty much required it," and that there was no indication that appellee was independently wealthy. Regarding the needs of the parties, the court stated that no financial needs of appellant were presented to the court at the trial and that appellee "does have a lot of financial needs and it was brought out in the testimony and in the argument" Finally, the court found that appellant lacked substantial justification for the suit, because "[appellant]'s filing at the eve of the six-month deadline [for Maryland to retain jurisdiction over Alexander]" was not "coincidental," and appellee had substantial justification for her defense, both at trial and on appeal.

We conclude that the circuit court's factual findings were supported by the evidence and that those findings were sufficient to satisfy the required considerations under F.L. § 12-103(b). Accordingly, the court did not abuse its discretion in awarding trial and appellate attorney's fees to appellee.

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

FOOTNOTES

1. Appellant, in his brief, presented the following issues:

> 1. Whether the trial court erred in awarding [appellee] sole legal custody when both parties requested joint legal custody in their respective opening statements at trial.
> 2. Whether the trial court erred as a matter of law by adopting visitation recommendations made by an expert witness when that expert expressly and repeatedly admitted that such recommendations did not — and ethically could not — apply to the parties' son.
> 3. Whether the trial court erred by restricting [appellant]'s time [with] his son in violation of the legal presumption of liberal visitation and creating improper obstacles for Alexander's time with [appellant].
> 4. Whether the trial court erred as a matter of law in delegating judicial authority to [appellee] to determine when [appellant] can exercise summer visitation.
> 5. Whether the trial court erred as a matter of law in providing [appellee] with an award of attorneys' fees when she failed to present any evidence as to her financial status and needs.

2. At a party where appellant had been drinking, appellant set on fire a napkin that was in the back pocket of appellee's pants.

3. Susan Steinman, Joint Custody: *What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications*, 16 U.C. Davis L. Rev. 739, 745-46 (1983).

4. It logically follows that appellant was also incorrect when he claimed in his brief that he did not have the opportunity to put on evidence to contradict appellee's request for sole legal custody, because he did not know that she was seeking sole legal custody. The record clearly shows that appellant was on notice that appellee was seeking sole legal custody, or tie-breaking authority, and had full opportunity to present his case accordingly.

5. Because appellant also contends that the circuit court *used* Dr. Thornburgh's testimony improperly, appellant was required to object to the court's *use* of the testimony, as opposed to its admissibility. He did not do so.

6. Appellant also contends that the circuit court erred in considering the presence of appellant's girlfriend "in [appellant]'s

home" when crafting the parties' visitation schedule, because the court failed to "make any requisite findings as to any harm suffered by Alexander" as a result of the girlfriend's presence pursuant to the Court of Appeals' holding in *Boswell v. Boswell*, 352 Md. 204 (1998). In *Boswell*, the Court of Appeals affirmed our decision to vacate an access schedule provision that precluded visitation of the children with their father in the presence of the father's male partner. *Id*. at 209, 211-13. In the instant case, the trial court did not deny or limit appellant's access to Alexander when appellant's girlfriend was present in his home. In other words, there were *no restrictions* on appellant's access to Alexander based on whether his girlfriend was in his home. Accordingly, the holding of *Boswell* is inapplicable to the case *sub judice*.

7. Appellant does not challenge the reasonableness of the amount of the attorney's fees awarded to appellee.

INDEX