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SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Trial court hears frozen embryo case

By Kristi Tousignant
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A Prince George's County couple is locked in a heated custody battle — over children who do not yet exist.

Divorced in May, the couple is fighting over the rights to frozen embryos created through in vitro fertilization while the two were still married. Honorine Anong wants to keep the embryos since they represent her only chance of reproducing in the future. Her former husband, Godlove Mbah, wants the embryos destroyed or to bar Anong from using them.

"He's just taken everything away from me," Anong said. "He's taken my last hope, basically."

"We are talking about life, children," Mbah said in court. "If I meet them in the street, they will say, 'Daddy, Daddy, why did you abandon me?' I will know them very well. That is my blood."

The couple's dispute went to Judge John Paul Davey in August in Prince George's County Circuit Court. The judge will decide the custody arrangement for the couple's 3-year-old daughter as well as the future of the couple's embryos, which are being stored at Shady Grove Fertility in Washington.

After day-long testimony on Aug. 2, each side will give closing arguments on Aug. 20. Davey said in court he would have to decide, first, whether the embryos be considered marital property. If so, do they have value? And if they have value, how should it be divided?

See FROZEN *page 2*

CUSTODY

Psych report was properly admitted, appeals court says

A judge's determination that a mother's mental health had significantly worsened in the eight months since her divorce supported a modification of custody that reduced her access to the children and gave her ex-husband tie-breaking authority, the Court of Special Appeals held.

In making that determination, the trial court could use a psychological report that contained otherwise inadmissible hearsay in order to evaluate the testimony of an expert witness, the appellate panel said.

The reported opinion is a loss for Victoria Gillespie, who claimed the court relied on inadmissible evidence in modifying its custody award over her 11-year-old son and her two daughters, ages 9 and 7.

Not only was the psychological report admissible, the appeals court held; there was no evidence the judge had even relied on it, as the content Ms. Gillespie referred to was available in other testimony the court heard — including her own.

Specifically, Gillespie claimed the only evidence indicating she suffered from bipolar disorder appeared in a report by a psychiatrist, R. Allen Lish, who had moved out of state by the time of trial and was difficult to locate.

Lish evaluated Gillespie in April 2009, a few months before the couple separated. The report was not part of any litigation, the Court of Special Appeals noted.

Victoria Gillespie and David Gillespie were granted an absolute divorce in October 2009. After the divorce there was "increasing volatility" in her relationship with her son, who

See GILLESPIE *page 3*

Frozen

Continued from page 1

Out-of-state cases

There have been no reported cases like this in Maryland, and the law "is all state-specific," said Susan L. Crockin. Her legal consulting practice, The Crockin Law & Policy Group LLC in Newton, Mass., consults on embryo law and fertility preservation.

Courts elsewhere have grappled with the issue with mixed results.

"This is an issue that has come up in a number of states, and there has been no uniform solution to it," said Charles P. Kindregan, a professor at Suffolk University Law School in Boston and former chair of the American Bar Association's Family Law Section on Assisted Reproductive Technologies.

A 1993 case, *Davis v. Davis*, dealt with the rights of a divorced Tennessee couple. The former wife wanted to donate the frozen embryos to a couple who could not have children, while the husband wanted to destroy them.

The Tennessee Supreme Court found that the parties could decide what to do with the frozen embryos by contract. Since there was no contract in this case, however, the judge ruled that the husband had a constitutional right to decide not to have children.

Crockin said most courts do rule in favor of the husband, saying the constitutional right not to procreate trumps the right to procreate.

"It's sad and unfortunate for the person that can't use them, but that is the pretty clear line, the courts say," said Crockin, who is also an adjunct professor of law at the Georgetown University Law Center.

In April, however, the Superior Court of Pennsylvania ruled in favor of a woman who hopes to give birth with frozen embryos she and her former husband created. The woman can no longer conceive because of treatments for breast cancer. The court ruled she had a superior right to the embryos since she was no longer able to procreate.

That case will likely go before the state supreme court.

Personal history

In court on Aug. 2, Anong broke down on the witness stand as she made a similar argument on her own behalf.

"This is the only way I could produce children," Anong said. "Without the embryos, I could never ever have a child.'

Her attorney, Johnine N. Clark, a solo attorney in Lanham, said the embryos also should belong to Anong because that was the couple's agreement when they underwent in vitro treatments.

Clark produced a notarized consent order from the fertility clinic signed by both Mbah and Anong, which said the couple agreed to give Anong custody of the embryos in case of separation. Mbah said the conversation never occurred, he never signed the form and his signature on the document was forged by Anong.

"It's kind of disingenuous to say you didn't see the document and you didn't sign it,"

See FROZEN *page 4*

Monthly Memo

Cert granted

The Supreme Court has agreed to resolve a split in the circuits that can arise in international custody disputes in which a U.S. court has returned the child to the other country. The question is whether a child's exit from the U.S. renders the case moot, on principles of comity. Stephen Cullen and Kelly Powers, with Miles & Stockbridge in Baltimore, will be defending the decision of a federal judge in Alabama who returned Lynn Hales Chafin's daughter to her in Scotland. The 11th U.S. Circuit Court of Appeals dismissed Sgt. Jeffrey Lee Chafin's appeal as moot, and he filed for certiorari. Cullen and Powers supported the grant because the issue arises with some frequency in their work.

Do it now

The estate-planning patch Congress enacted in 2010 is set to expire on Jan. 1, leaving lawyers to wonder what comes next. Changes in law could affect the exemption, tax rate, and planning tools like gifts in trust and life insurance trusts. The message, according to our sister paper Lawyers USA: Whether or not your client is ready to act at this point, get the appraisals now. The closer we get to the end of the year, the busier the appraisers are likely to be.

Save the date

Save the date: The Maryland chapter of the American Academy of Matrimonial Lawyers will host its Chapter Symposium in Ellicott City on Nov. 12. And if you're just starting out, don't forget "Family Law 101: Basics for the new practitioner," a two-part program being presented by the AAML and the University of Baltimore School of Law on Sept. 21 and Sept. 28. For details, go to www.aaml.org/calendar-of-events.

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Gillespie

Continued from page 1

felt frustrated, hopeless and even "crushed" by her actions

Meanwhile, David Gillespie began dating an old friend. A fight broke out when the two women attended the same youth baseball game in late May 2010. Ms. Gillespie slapped the woman and later pleaded guilty to second degree assault.

On June 9, 2010, two weeks after the incident, Mr. Gillespie filed his motion to modify custody and requested a mental health evaluation for his ex-wife. The court instead appointed a best-interest attorney for the children, Mr. Richard M. Winters, but later appointed a mental health evaluator for both parties at Winters' request.

The mental health evaluator, Dr. Rebecca Snyder, was unable to get a copy of the Lish evaluation before finishing her own report, but received it at the outset of the hearing. Snyder disagreed with Lish's conclusion that Ms. Gillespie had a bipolar disorder, but noted "support for the hypothesis that a mood issue, depression, and anxiety do impact [Mother's] ability to function."

The court also heard from both parties and their son's treating psychologist before finding a material change in circumstances. The judge said: "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."

The court then limited Ms. Gillespie's physical access to the children and changed the terms of the legal custody arrangement to give Mr. Gillespie tie-breaking authority. Ms. Gillespie appealed.

The following May, Winters, the best-interest attorney, filed for fees for himself and Snyder. The court ordered Mr. Gillespie to pay Snyder's fee of $3,669, plus more than $23,000 on Winters' bill. Mr. Gillespie challenged that ruling.

The Court of Special Appeals consolidated the two actions, affirmed the modification and vacated the fee awards.

"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," Berger wrote. "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… .

"Accordingly," Berger concluded, "we remand for the limited purpose of determining the fees for the best interest attorney and court appointed evaluator in accordance with the statute."

GILLESPIE CASE IN BRIEF

*Victoria Gillespie v. David Gillespie**

CUSTODY: MODIFICATION: ADMISSIBILITY OF PSYCHOLOGICAL REPORT

CSA Nos. 0960 and 2153, Sept. Term 2011. Reported opinion by Berger, J. Filed June 29, 2012. RecordFax #12-0629-03, 36 pages. Appeal from Frederick County. Affirmed in part, vacated and remanded in part.

Custody: Modification: Admissibility of psychological report

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.

"The parties were granted an absolute divorce on October 5, 2009, incorporating the separation agreement.

On June 9, 2010, Father filed a motion to modify custody. The circuit court modified physical access of the children, granting significantly more access to Father. The court also modified legal custody granting Father tie-breaking authority. This appeal followed.

Father filed an appeal from orders requiring him to pay outstanding fees owed to the court appointed evaluator, Rebecca L. Snyder, and the children's best interest attorney, Richard M. Winters.

Mother presents two issues which we have rephrased:

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

II. Whether the circuit court erred in modifying custody.

Father presents one issue, which we have rephrased:

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

We affirm the judgment modifying custody. Because we conclude that the circuit court erred in ordering Father to pay the best interest attorney and the evaluator, we vacate that order and remand for the limited purpose of determining fees in accordance with the statute.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother were married August 28, 1993. They have three 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 on August 24, 2009. The Agreement provided for joint legal and physical custody with the children alternating between parents weekly.

Mother and Father were divorced on October 5, 2009. Since the divorce, there has been increasing volatility between Mother and son. At the custody modification trial, the parties testified regarding various events that occurred during the period between the parties' divorce and the custody modification trial in April 2011.

The circuit court appointed Mr. Richard Winters to serve as the children's best interest attorney and Dr. Rebecca Snyder to prepare a

See GILLESPIE CASE IN BRIEF *page 6*

Frozen

Continued from page 2

Clark said.

Mbah and Anong, both originally from Cameroon, were married in March 2007. After Anong failed to conceive naturally, a gynecologist found cysts on her ovaries and blood and fluid in her fallopian tubes, both of which prevented her from naturally conceiving.

Anong, now 35, had her fallopian tubes removed — something Mbah said he did not know.

"Today is the first time I am hearing the fallopian tubes have been removed," Mbah told the court.

Anong underwent in vitro fertilization treatment in July 2008, ultimately creating 11 embryos.

Two were implanted in her uterus, one of which resulted in the birth of the couple's daughter in February 2009. The rest were frozen and stored at the clinic.

The couple separated in December 2009 and divorced this May.

Since 2009, Anong, living in the home the couple formerly owned together in Upper Marlboro, has paid the embryo storage fee of $720 a year.

Mbah, now living in Greenbelt, filed for absolute divorce in April 2011. He filed an amended complaint in October 2011, identifying the embryos as property and asking the court for a property determination.

"I was shocked — shocked and angry," Anong said.

Mbah's attorney, Nataly C. Mendocilla, a solo attorney in Upper Marlboro, did not return repeated requests for comment on the case.

If Anong were to have a child from the embryos, Mbah said, he would feel personally responsible. The former couple attends the same church, and Mbah said he would not be able to explain to his daughter why he does not acknowledge her siblings.

He also said he would like to marry again and no woman would want to marry him if she knew his ex-wife was having children with his DNA.

"We live in a very close community," Mbah said in court. "There is no way I could avoid seeing these children. There's no way I could get up and say this is not my child legally or otherwise."

Change in circumstances

In court, Clark argued that the consent order signed by the couple before the in vitro procedure was binding.

"Our basic premise is there is a contract," Clark said. "Both parties signed it. And it's very clear about who gets the embryos."

Kindregan said contracts play a key role in frozen embryo cases. He said more and more states have been willing to enforce consent agreements in these cases.

"A growing number of states said, 'You consented. You should have read it. You should have realized you were giving up any right to control these embryos even though your sperm was used to produce them,'" Kindregan said. "There is just a conflict of law on this subject."

In Illinois, for example, the state will enforce contracts if they meet certain provisions without even going to court, Kindregan said.

Other states, however, have ruled that time and a change in circumstances can alter the contract's power in court, he said. In a Massachusetts case, *A.Z. v. B.Z.,* a judge declined to force parentage based on a contract, Kindregan said.

"The question really is even if such a consent was given at the time of the procedure, at the time they wanted to have children, is that still relevant?" Kindregan said. "Some states have said, 'No, it is no longer good because circumstances are changed.'"

Also, a parent cannot contract away a child's right to support; however, there have been no court decisions that have addressed how to deal with child support in a case like this.

"There could be an agreement to use the embryos and turn the ex-husband into a donor, but he would not have the legal responsibilities of a father," Crockin said. "There is no court that has said you can do that yet, either."

Clark said her client has no intention of seeking child support from Mbah in the future, a sentiment Anong repeated on the witness stand. Anong said she is not even sure she would implant the embryos.

Mbah, however, is not convinced.

"I've spent more than four years in court with her," Mbah testified. "Accepting this will just guarantee I will spend the rest of my life in court. Those are nine children. How will I be able to take care of nine children?"

Crockin said she thinks there will be fewer cases on frozen embryo custody in the future as the law becomes clearer on the issue. Kindregan, however, said he thought there would not be a lot of legislation on the subject, since it is a complicated political conflict that raises moral and religious questions.

"Legislators are not anxious to jump into this, frankly…," Kindregan said. "There is a lack of will to really deal with the problems, and they will fall back on the courts to deal with it on a case-by-case basis."

UNREPORTED CASES IN BRIEF

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

*Marion Blades v. Norman Blades, Jr.**

ALIMONY: EMERGENCY MOTION TO INCREASE: JURISDICTION

CSA No. 2452 Sept. Term 2010. Unreported. Opinion by Berger, J. Filed June 11, 2012. RecordFax #12-0611-00, 11 pages. Appeal from Anne Arundel County. Appeal as to alimony award moot; remanded for purposes of vacating order to seek employment.

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 denying Marion Blades' Emergency Motion to Increase

See UNREPORTED CASES IN BRIEF *page 6*

Aging out: Grim consequences vs. rays of hope

By Ronald Grove, Esq.
Guest Column

In the animal kingdom, most species protect their young and keep them protected until they are ready to leave the nest or create their own family groups. The young are trained how to survive and thrive in a tough — and sometimes cruel — world. They are taught life skills upon which they may rely when problems arise.

With this as a premise, the question must be asked, "Shouldn't children in foster care be treated at least as well?"

Most children enter foster care because abuse or neglect at home triggered the duty of the state to step in and protect them. The state becomes the parent. In that role, it must provide special measures of protection.

When the state fails in its responsibility to protect children wholly dependent on it by not providing for their developmental needs, there are grim consequences.

For instance, I met Tyia when she was 20 years old. She was going to "age-out" of care in 10 months. During our first meeting, I asked her what her plan was for aging out of care. She responded, "I will get a job and an apartment for me and my baby."

Then, I asked, "How will you go about getting a job and apartment?" She paused, looked at me blankly and responded, "I don't know."

This is a young woman who had been in the care of the Department of Social Services for more than 10 years. She had no idea how to seek employment and didn't know how to get an apartment.

Another foster youth, Barry, was 20 years old and sitting in jail awaiting trial on burglary charges. Barry had spent the majority of his life in the care of the DSS. Although he had dropped out of school, Barry was an intelligent and insightful young man.

He acknowledged that he often was angry and would push people away. Barry spoke of not having any family connections and wished he had been able to connect with his foster families.

"You know, I may be better off if I just in stay jail. I ain't got nowhere else to go," he said. Barry was eventually convicted and sentenced to five years in prison. However, instead of being angry, he was calm.

He had converted to Islam while in jail and found a teacher and mentor in his Imam. While I was encouraged he had found community connections, I was saddened that it took imprisonment for this young man to find a sense of peace.

In an effort to assist to these young people, the Maryland legislature has codified specific actions that must occur at every review hearing for children in care. Section 8-316.1 (b)(2) of the Md. Code Ann., Courts and Judicial Proceedings, provides in part, "In a review hearing...the court shall make a finding whether a local department made reasonable efforts to: . . . meet the needs of the child, including the child's health, education, safety, and preparation for independence."

Additionally, the Code of Maryland Regulations (COMAR) 07.02.10.09 identifies specific transitional services which youth committed to a local department of social services must receive. That includes educational, vocational, physical and mental healthcare; housing acquisition; and money management.

The juvenile court has proven uniquely able to engage multiple systems on behalf of older foster youth. It may require the involvement of agencies overseeing mental health or developmental disabilities programs to assist a youth in securing stable housing, employment, and on-going mental health treatment. The court's authority, along with its priority to advance a child's best interests, operates to overcome the weaknesses in service delivery within the DSS.

An example: Rashaad was a year away from aging out with no concrete plans, tenuous family relationships and few connections to any adults outside of the foster care process.

During a periodic review hearing, the court challenged the DSS and child's counsel to make every effort to ensure this young man is not set adrift upon aging out.

The young man's caseworker and attorney convened a meeting to discuss options for Rashaad.

It was determined that he should enroll in the Job Corps and, because Rashaad had previously been diagnosed with a mild developmental disability, he was connected with a program that would provide community support services and provide access to caring adults to assist in his maturation to adulthood.

A follow-up with Rashaad found him enrolled in a Job Corps program in West Virginia studying culinary services. He was connected with the Baltimore-based program People Encouraging People, a community-based program focused on helping individuals with disabilities thrive in the community.

Mahatma Ghandi said, "A nation's greatness is measured by how it treats its weakest members." Children in foster care have no voice in the political process with which to advocate for themselves.

It is, therefore, incumbent on all of us who wish to continue to make our nation great, to identify and publicize the needs of foster youth, and to force their "parent" — the state — to do the right thing.

Ronald Grove is a staff attorney in Maryland Legal Aid's Child Advocacy Unit in Baltimore.

GILLESPIE CASE IN BRIEF *Continued from page 3*

psychological evaluation to measure "each party's personality strengths and weaknesses." Although Snyder was entitled to access to all records, she did not receive the Lish report until immediately before trial.

After trial, the circuit court issued its ruling from the bench. The court set forth, in detail, the witnesses who had testified, the evidence it had considered, and the findings and conclusions. The court concluded:

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 [bank] vice president. 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, the court discussed the factors and modified physical custody by placing the children in the primary care and custody of Father. The court maintained joint legal custody but provided that, in the event of an impasse, Father would serve as tie-breaker. Mother noted her appeal.

Winters filed petitions for fees for Dr. Snyder and himself. Each party filed a response, and the circuit court granted Winters' petition, ordering Father to pay Snyder's fees of $3,669 and Winters' fees of $23,237.50. Father noted an appeal.

DISCUSSION

I.

Mother contends the 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."

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… 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).

Mother maintains that the Lish Report was the only evidence mentioning bipolar disorder. This Court disagrees. There were several other sources. Indeed, Mother testified that she had been previously diagnosed with bipolar disorder.

The circuit court was permitted to consider the Lish Report to evaluate the validity of Dr. Snyder's opinion, and there is no indication the court considered the Lish Report as substantive evidence. The court also properly considered Mother's own testimony, in which she admitted to having been diagnosed with bipolar disorder. The circuit court did not err in admitting the Lish Report and considering it as the basis of Dr. Snyder's opinion.

II.

Mother argues that her mental illness had been present throughout marriage, and therefore, did not constitute a material change of circumstances. The court, however, did not find that Mother's mental illness was a material change; rather, that the worsening of her symptoms was a material change.

The circuit court considered various indicators, including her assault of [father's girlfriend] 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 noted that Mother did not appreciate how hurtful her conduct was to the parties' son, "that it has caused him to be crushed." We hold that the circuit court did not err.

III.

After trial, Winters filed a petition for attorney's fees and for fees of court appointed evaluator. Both parties filed responses and included significant documentation of financial status. The court did not hold a hearing on the financial issues.

A hearing is not always required before the apportionment of fees, and we do not find that the 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, 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 (2005). We remand for the limited purpose of determining fees for the best interest attorney and court appointed evaluator in accordance with the statute." *Slip op. at various pages, citations and footnotes omitted.*

UNREPORTED CASES IN BRIEF *Continued from page 4*

Indefinite Alimony. 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.

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 of $1,500 per month. Ms. Blades appealed, and this Court, in an unreported opinion, vacated the award. *Blades v. Blades,* No. 81, Sept. Term, 2007 (filed Nov. 18, 2008) *("Blades I").* We remanded to the circuit court.

On remand, on August 25, 2009, the circuit court issued an order granting Ms. Blades indefinite alimony of $2,400 per month. In its calculation, the circuit court imputed income to Ms. Blades of $16,000 per year. Ms. Blades again appealed. This Court, in an unreported opinion, vacated the alimony award and remanded. *Blades v. Blades,* No. 1620, September Term, 2009 (filed Sept. 13, 2011) *(Blades II).* We determined

See UNREPORTED CASES IN BRIEF *page 7*

UNREPORTED CASES IN BRIEF *Continued from page 6*

there was no evidence to support the imputation of income.

Between the circuit court's order and when this Court vacated that order on Sept. 13, 2011, 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 held on December 7, 2010, before Judge Paul G. Goetzke. Judge Goeztke indicated that he was concerned that the circuit court may not have jurisdiction given that an appeal was pending at that time. 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 hearing continued. 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 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 money to pay the previous months 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 on appeal.

In addition to denying Ms. Blades' motion regarding alimony, 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 denial of her emergency motion to increase indefinite alimony.

DISCUSSION

We first address the threshold question of whether this case is moot. Ms. Blades filed her emergency motion to increase indefinite alimony while the appeal in *Blades II* was before this Court. In *Blades II,* we held that the lower court erred in imputing income to Ms. Blades. 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 before the circuit court. This appeal, as it pertains to the alimony award, is therefore moot.

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 alimony.

Although the merits relating to the alimony award are moot, we address *sua sponte* the issue of whether the circuit court had jurisdiction over Ms. Blades' motion even though [jurisdiction] 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). 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 her alimony award, which was on appeal. Ultimately, the circuit court was correct to decline to rule on the alimony modification because it was divested of jurisdiction over the matter.

More problematic is the order requiring Ms. Blades to seek employment. 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 was in error. Therefore, the order to seek employment is in direct conflict with the matter on appeal and was prohibited.

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

*Daniel J. Boehler v. Cheryl Boehler**

DIVORCE: MOTION TO MODIFY FINAL JUDGMENT: DUE DILIGENCE

CSA No. 0530, Sept. Term 2011. Unreported. Opinion by Davis, Arrie W. (retired, specially assigned). Filed June 21, 2012. RecordFax #12-0621-07, 12 pages. Appeal from Howard County, McCrone, J. Affirmed.

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.

"Daniel J. Boehler appeals from the denial of his Motion to Modify Judgment of Absolute Divorce. Appellant filed his Motion to modify more than ten days after entry of the final

See UNREPORTED CASES IN BRIEF *page 8*

UNREPORTED CASES IN BRIEF *Continued from page 7*

judgment. 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?

FACTS AND LEGAL PROCEEDINGS

Appellant and Cheryl Boehler were married August 9, 1997, in Cozumel, Mexico. The parties separated on April 1, 2007, when appellant moved out of Maryland. In January 2009, appellee filed a Complaint for Divorce. Because appellant was on active military duty, the parties agreed to stay the proceedings. 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, the request for continuance was denied and the case referred for a trial on the merits.

The circuit court granted a Judgment of Absolute Divorce. Significantly, appellant did not appeal; 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 on April 25, 2011.

ANALYSIS

Appellant contends 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 storm in the immediate vicinity of his Ohio home was of an unexpected and unusual character that made any travel unreasonably dangerous. Appellant cites *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.

Despite the limited issue raised in the Motion to Modify, appellant 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 relegated to challenging the court's decision declining to modify the judgment.

The Court of Appeals, in *Neustadter v. Holy Cross Hospital of Silver Spring, Inc.,* 418 Md. 231 (2011), thoroughly explicated the law on abuse of discretion: "Generally, an appellate court will not disturb a ruling on a motion to continue 'unless [discretion is] arbitrarily or prejudicially exercised." *Id.* at 241. Of particular relevance, 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… ." *Neustadter,* at 242-43.

Based upon the record in this case, nothing suggests the trial court's decision was arbitrary or prejudicial. Appellant failed to cooperate during the entire divorce proceeding. He failed to file a timely Answer, to submit or assist in the completion of financial statements regarding 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 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 "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 until late in the evening prior to trial was voluntary. The impending inclement weather was widely publicized and appellant's attachments to his Motion indicate that, at worst, the snowstorm did not begin until the afternoon of February 21. Given the hazardous six-hour drive in late February across mountain roads during rapidly changing weather conditions, appellant's delay 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 in light of appellant's dilatory behavior. 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." *Slip op at various pages, citations and footnotes omitted.*

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

CUSTODY AND VISITATION: INTENTIONAL INTERFERENCE WITH VISITATION RIGHTS: ISSUE PRECLUSION

CSA No. 2859, Sept. Term, 2010. Unreported. Opinion by Thieme, Raymond G., Jr. (retired, specially assigned). Filed June 25, 2012. RecordFax #12-0625-07, 22 pages. Appeal

See UNREPORTED CASES IN BRIEF *page 9*

UNREPORTED CASES IN BRIEF *Continued from page 8*

from Montgomery County. Affirmed.

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 Mona Yasmin Essam Nasser ("Mother") were married in Egypt. They had a son, Nadim, born in 1995, and a daughter, Malak, born in 2001. By 2006, Mother and Father were divorced. 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, traveling to Maryland to stay with her mother, co-appellee, Monika Fingas ("Grandmother"). Mother did not inform Father that she was leaving Egypt.

On August 31, 2009, after discovering that Mother was living in Maryland with Grandmother, Father filed a complaint in 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 Montgomery County in which he alleged that Mother and Grandmother intentionally interfered with his right to visitation with Malak. The circuit court granted Grandmother's motion for judgment. The jury returned a verdict in favor of Mother concluding that Father did not have a right to visitation with Malak between summer 2008 and August 31, 2009. Father filed this appeal.

Father presents two questions, which we rephrase:

1) Did the circuit court err in declining to give preclusive effect to determinations made by the judge in a prior case?

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?

Discussion

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

I. Issue Preclusion

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. Father relies on a number of statements made by the court. In particular, the circuit court concluded that the *ne exeat* order "constitutes a child custody determination" within 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."

Before addressing issue preclusion, we conclude that the only claim asserted with sufficient specificity was Father's contention that Mother interfered with Father's right to visitation between summer 2008 and August 31, 2009.

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.

The UCCJEA provides for recognition and enforcement of out-of-state custody determinations in FL § 9.5-303(a). 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.

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. Therefore, the court in the tort case correctly refused to rule that Father's right to visitation with Malak was conclusively established through issue preclusion.

Furthermore, the circuit court did not rule that Father had a right to visitation during the relevant period in the temporary child custody order issued April 28, 2010 or the enforcement order. The temporary custody order addressed issues that arose during the proceedings, but the court made no finding as to whether Father had visitation rights between summer 2008 and August 31, 2009. 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.

II. Evidentiary Issues

Father argues that the circuit court erred when it excluded certain items Father sought to introduce to prove he had a right to visitation that Mother and Grandmother interfered with.

See UNREPORTED CASES IN BRIEF *page 10*

UNREPORTED CASES IN BRIEF *Continued from page 9*

A. Relevancy

Father sought to introduce the Egyptian visitation order issued on March 28, 2006. 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."

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

As to Mother's testimony, her statement makes it more probable that Father had such rights, and therefore is relevant. However, Mother's statement is not probative of such rights existing during the relevant period. Because of the risk that the jury could misunderstand Mother's statement as an admission, 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…" The court in the tort case ruled Mother's statement inadmissible because it constituted a legal conclusion. Father argues that Mother's statement was a relevant admission.

"The 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. 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.

Additionally, during the examination of Dr. Zitner, Father's counsel asked 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." Maryland Rule 5-702 gives the trial court broad discretion in ruling on the admissibility of expert testimony. Father's question requires a legal determination. As Zitner was an expert in psychology not a legal expert, the court did not abuse its discretion in concluding that 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 had Grandmother's name at the bottom but not her signature. The court ruled that the letter had not been properly authenticated.

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.

Pursuant to Rule 5-901, to properly authenticate the letter, 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. As Father failed to establish this basic factual predicate, the letter was inadmissible. Even if the letter was properly authenticated, the circuit court also ruled that the letter was not relevant, and Father does not challenge that ruling on appeal.

For the foregoing reasons, we affirm the rulings of the circuit court." *Slip op at various pages, citations and footnotes omitted.*

*Mariel Fiat v. Philippe Auffret**

CUSTODY: MODIFICATION: RELOCATION OF CUSTODIAL PARENT

CSA No. 1222, Sept. Term 2011. Unreported. Opinion by Meredith, J. Filed June 26, 2012. RecordFax #12-0626-04, 19 pages. Appeal from Montgomery County. Affirmed.

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) has appealed from an order which granted a motion to modify custody filed by Philippe Auffret (Father). We affirm the trial court's order.

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

Mother became pregnant and left the Dominican Republic for Massachusetts, where their son was born on October 17, 2001. The parties' daughter was born on January 9, 2004, in Massachusetts. Father did not meet her until December 2006.

December 2006 marked the beginning of a new chapter in the relationship between Father and the children, which was encouraged by Mother. 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.

See UNREPORTED CASES IN BRIEF *page 11*

UNREPORTED CASES IN BRIEF *Continued from page 10*

Bannon attend school together, have been involved in each others' lives since August 2008, and consider each other siblings. Father, at trial, termed his lack of contact with [the parties' children] prior to December 2006 his "biggest regret."

On August 4, 2010, Mother and Father entered into a custody and parenting agreement that provided Mother with sole physical custody, sharing joint legal custody. The agreement stipulated that the children's passports would be kept in the court registry [and] that, if either party planned to move more than twenty miles, 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. Mother formally notified Father that she intended to move with the children to Jamaica as of July 11, 2011.

Father filed a motion to modify custody and to enjoin Mother from removing the children from Maryland. Trial was set on an expedited basis.

The court found that the children's best interests would be served by remaining in Silver Spring with Father. 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. *Taylor v. Taylor*, 306 Md. 290 (1986).

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. *Montgomery County Dep't of Social Services v. Sanders*, 38 Md. App. 406, 419 (1978).

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.

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

DISCUSSION

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.

Sanders recognized that none of the factors 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.

In this case, the trial court made plain that it was focusing on the best interest standard. The court further indicated that it considered the Sanders factors in reaching its decision. 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.

The court discussed 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:

"[P]art 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. …

"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. … 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. …To pick them up from what I perceive from the evidence to be 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."

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 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.

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).

See UNREPORTED CASES IN BRIEF *page 12*

Mother also asserts that the trial court's decision infringes on her constitutional right to travel. We do not agree, 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. *Braun v. Headley*, 131 Md. App. 588 (2000).

The trial court's task was to weigh the competing proposed living situations and determine which would be more likely to serve the children's best interests. The court properly kept its focus on the children, and, in our view, neither erred nor abused its discretion." *Slip op at various pages, citations and footnotes omitted.*

*Melissa L. Howell v. Brenda S. Kelley**

CUSTODY: TEMPORARY CUSTODY: BEST INTEREST STANDARD

CSA No 1971, Sept. Term 2011. Unreported. Opinion by Eyler, D., J. Filed June 26, 2012. RecordFax #12-0626-06, 26 pages. Appeal from Baltimore County. Affirmed.

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 entered an order granting Brenda Kelley, appellee, temporary custody of the minor children of Melissa Howell, appellant. Howell presents two questions 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?

We affirm the order of the circuit court.

FACTS AND PROCEEDINGS

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

Kelley is a longtime friend of the Howell family. She lives in Middle River with her domestic partner of eight years, Kristine Clarke.

In June 2011, Howell arranged for Kelley to pick up Michael and Fonda and take them to Maryland to live with Kelley. The reason was disputed below, but, according to Kelley, Howell told her she was being evicted. Kelley received signed and notarized papers authorizing Kelley to act as the temporary guardian of her children for one year.

Within weeks after the children moved in, Michael told [Kelley] that Howell had physically abused him. Kelley contacted the Baltimore County DSS and the Florida Department of Children and Families. Charlotte Childers of the FDCF informed Kelley that the FDCF had received a report of abuse. The FDCF had closed its investigation after it was informed that Howell had moved the children to Mississippi. (In fact, the children never had been moved to Mississippi.)

Kelley applied to the Social Security Administration to be appointed representative payee for Michael's Social Security survivor benefits. On August 3, 2011, she received the first monthly check on Michael's behalf, $963.

Three days later, Howell arrived unannounced at Kelley's house and said she was taking the children. Officers from the police department also were on the scene as Howell had contacted them. Kelley protested the removal, but the police declined to intervene.

Five days after the children were removed, Kelley filed a Complaint for Immediate Child Custody and an Ex Parte Motion for Immediate Custody. That same day, the court signed an order awarding Kelley immediate temporary custody "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." The court set the case in for a thirty-minute hearing on August 24.

Howell filed an answer and a motion to dismiss for lack of jurisdiction pursuant to the Maryland Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), §9.5-201 *et seq.* of the Family Law Article.

On August 24, the court held a brief hearing. Howell represented that she and her children were staying with one of her cousins, Angie Gue, in Middle River. During a pause in the proceedings, counsel conferred and agreed to proffer the testimony of the remaining witnesses and then to argue the motion.

After hearing argument, 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 determined it would be in Michael's and Fonda's best interest to be placed in the temporary custody of Kelley. It emphasized that that would "maintain the status quo that these parties agreed to in June" until a full custody hearing could be held.

Howell noted this interlocutory appeal.

DISCUSSION

I. Jurisdiction under the UCCJEA

Howell contends the circuit court lacked jurisdiction because Florida, not Maryland, was the children's home state. She further contends there was no evidence to support the exercise of emergency temporary jurisdiction under the UCCJEA.

The Temporary Custody Order was the first and only custody order issued by any court with respect to the children. FL § 9.5-201(a) creates four prioritized jurisdictional bases for an initial custody determination: 1) home state jurisdiction; 2) significant connection jurisdiction, 3) more appropri-

See UNREPORTED CASES IN BRIEF *page 13*

UNREPORTED CASES IN BRIEF *Continued from page 12*

ate forum jurisdiction or 4) "vacuum jurisdiction." *Toland*, *supra*, at 375-76 & n.8.

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).

Michael and Fonda had lived in Florida with Howell almost their entire lives. The children had lived in Maryland for nine weeks prior to the initiation of the custody case. The children had not lived in any state for "at least 6 consecutive months" "immediately before the commencement of [the] child custody proceeding."

The UCCJEA allows a "temporary absence" from a state within the "6 consecutive month" period. As courts in other states interpreting the UCCJEA have held, a "temporary absence" necessarily includes an intent to return to that state.

At the August 24 hearing, Howell's counsel 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." Thus, the undisputed evidence establishes that the children had moved out of [Florida] with no plans to return.

Having concluded that Florida does not qualify as Michael and Fonda's "home state," we must consider other grounds for jurisdiction. Subsection 9.5-20l(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…

Given that Howell had moved out of Florida with no intent to return, we 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.

Subsection 9.5-201(a)(3) has no applicability 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 Temporary Custody Order. Howell contends that, before the court could remove Michael and Fonda 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 evidence of past physical abuse of the children by Howell supported findings of unfitness and exceptional circumstances for an award of third party custody.

FL §9-101 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." § 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[.]"§ 9-101(b).

In light of the allegations by the children, the Florida investigation, and the extreme circumstances under which the children were removed from Kelley's home, the court could have found it more likely than not that Michael and Fonda had been abused by Howell in the past. See *Volodarsky v. Tarachanskaya*, 397 Md. 291, 304 (2007). 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 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." *Slip op. at various pages, citations and footnotes omitted.*

*In re: Adoption/Guardianship of Hilliard S.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: MANDATORY CONSIDERATIONS

CSA No. 2270, Sept. Term, 2011. Unreported. Opinion by Kehoe, J. Filed June 25, 2012. RecordFax #12-0625-00, 21 pages. Appeal from Prince George's County. Affirmed.

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 terminating her parental rights in her son, Hilliard, 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

See UNREPORTED CASES IN BRIEF *page 14*

UNREPORTED CASES IN BRIEF *Continued from page 13*

best interests for a child …'

Ms. S. presents the following questions:

I. Did the juvenile court err in weighing Hilliard's 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?

We affirm the juvenile court's judgment.

BACKGROUND

Ms. S's parental rights to Hilliard were terminated after a two day hearing. The following has been taken from the evidence in that proceeding.

The Prince George's County Department of Social Services became involved in the life of Hilliard S. and his mother, Tikira S. on January 29, 2009. Hilliard was four months old. The Department had received a referral from Hilliard's maternal grandmother. The Department responded and removed Hilliard from Ms. S.'s care. The juvenile court declared Hilliard to be a CINA. Hilliard has been in the foster care of James and Deborah L. since January 2009.

Ms. S. herself had an especially troubled childhood. 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. 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.

As part of Hilliard's CINA case, Ms. S. entered into four service agreements with the Department. She is in a 12-step program and was studying to obtain her cosmetology license. She has contributed to Hilliard's care by giving him clothes and toys during his stay in foster care. Ms. S. has had regular visits with Hilliard.

After the hearing, the juvenile court filed an opinion terminating Ms. S.'s rights to Hilliard.

DISCUSSION

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." Ms. S. points to the following comments of the court: "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]" 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 are in error. The State counters that 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.

We agree with the State.

In re Adoption/Guardianship of Victor A. 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.).

The four mandatory factors listed under §5-323(d)(4) are: (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.

A review of the statute relied upon in *Victor A.*, FL §5-313, reveals that two of factors 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 not included in §5-313, and, therefore, were not considered in *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 the former §5-313 only required consideration of the child's adjustment to home, school, and community. The changes in the statute have therefore rendered the analysis under *Victor A.* inapplicable to the present case.

Even assuming error, the juvenile court analyzed the facts appropriately before it, using the required factors under §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, if error, [were] harmless.

II. Present Ability to Have Custody

Ms. S. contends that the court "focused solely on [her] ability to presently have custody of Hilliard, rather than whether it was in Hilliard'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 Hilliard."

We first note that the juvenile court hardly focused solely on Ms. S.'s ability to presently have custody. 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 is required to consider "whether addi-

See UNREPORTED CASES IN BRIEF *page 15*

tional 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." 373 Md. at 576.

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 err in terminating Ms. S.'s parental rights." *Slip op. at various pages, citations and footnotes omitted.*

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

CUSTODY: SOLE LEGAL CUSTODY: ACCESS AND VISITATION SCHEDULE

CSA No. 0558, Sept. Term 2011. Unreported. Opinion by Woodward, J. Filed: July 3, 2012. RecordFax #12-0703-00, 42 pages. Appeal from Montgomery County. Affirmed.

"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 attorneys fees to appellee.

Following trial on a complaint for divorce, custody and other relief filed by appellant, Christopher C. J. Ling, and a counterclaim by Suzanne E. A. Ling, the Circuit Court awarded (1) sole legal and physical custody of the parties' son, Alexander, to appellee, (2) visitation to appellant, and (3) attorney's fees to appellee totaling $70,685. Following appellant's appeal of the April 22, 2011 order, appellee filed a motion for 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 and August 5, 2011 orders, appellant presents issues which we have consolidated:

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?

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?

We affirm the judgment of the circuit court.

BACKGROUND

The parties were married July 3, 2006. They resided in Potomac. 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 for almost 20 years. Appellee has a bachelors degree in management, but has not worked outside the home since November 2006.

On August 20, 2009, the parties separated. Appellee moved with Alexander to her parents' home in Stephens City, Virginia. Appellant filed a Complaint for Absolute Divorce, Custody, Access and Other Relief. Appellee filed a counterclaim. A Voluntary Separation and Property Settlement Agreement resolved the property and financial issues.

The parties proceeded to a three-day merits trial. In an oral opinion on April 11, 2011, the trial court reviewed each of the factors in *Montgomery County DSS v. Sanders,* 38 Md. App. 406 (1978), as well as factors specifically related to joint custody in *Taylor v. Taylor,* 306 Md. 290 (1986).

The trial court concluded that appellee "is a fit and proper person to have custody and that [appellant) isn't."

The circuit court awarded, *inter alia,* (1) sole legal and physical custody of Alexander to appellee, (2) visitation to appellant; and (8) attorney's fees to appellee of $70,685.39.

Appellant filed a timely appeal. The court held a hearing and awarded appellee $25,000 as a contribution toward costs and attorney's fees in connection with the appeal. Appellant filed a timely appeal of the court's August 5, 2011 order.

We granted appellant's Motion for Consolidation of Appeals.

DISCUSSION

A. Legal Custody

Appellant contends the trial court erred in awarding sole legal custody to appellee. Appellant claims "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)]."

Contrary to appellant's contention, the record indicates that appellee never sought joint legal custody, but rather sought the authority to make all final decisions, whether that be sole legal custody or joint legal custody with "tie-breaking authority." Appellant was aware that appellee would be seeking tie-breaking authority, and opposed such award.

Even if the parties had agreed that joint legal custody

See UNREPORTED CASES IN BRIEF *page 16*

UNREPORTED CASES IN BRIEF *Continued from page 15*

would be best, the court remains obligated to craft the custody arrangement that serves the best interest of the child. *Taylor,* 306 Md. at 303.

Appellant asserts there was "no evidence" the parties could not make joint decisions regarding Alexander's welfare. The record reflects that the parties were unable to agree in several areas [including Alexander's school]; on the importance of Alexander's dietary restrictions; on 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.

The court found 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.

We perceive no abuse of discretion.

B. Access

1. Dr. Thornburgh's Recommendations

At trial, appellee testified about problems with Alexander's behavior before and after his Thursday-to-Sunday visits with appellant. Appellee believed that shorter, more frequent visits 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." Thornburgh could not ethically offer an opinion as to what schedule would be in Alexander's best interest, because she did not evaluate Alexander. Thornburgh explained that her opinion, although not specifically tailored to Alexander, was useful in understanding and resolving regressive behavior in young children.

Appellant contends the trial court erred by adopting recommendations made by Dr. Thornburgh when she "expressly and repeatedly admitted that such recommendations did not — and ethically could not — apply to Alexander."

Appellant's challenge is not preserved for our review, because counsel for appellant explicitly offered no objection. Even if preserved, we perceive no error or abuse of discretion in the court's use of Thornburgh's testimony to form its own opinion on what visitation schedule would be in Alexander's best interest.

2. Access Schedule Limitations

Appellant contends the visitation schedule does not afford appellant the "reasonable maximum opportunity to develop a close relationship" with Alexander, because of limitations on appellant's access to Alexander.

The new access schedule affords appellant *more waking hour* time with Alexander than he had under the *pendente lite* schedule. In light of the court's concerns about Alexander's regressive behavior and the increased waking-hour access, we conclude the circuit court did not abuse its discretion.

Appellant next complains that the access schedule provides minimal "major" holiday and summer access. Even if the argument was preserved, the arrangement equitably shares Alexander's time between the parties.

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 the trial court erred in establishing a schedule that requires him to take a full day off work every Wednesday and every other Friday.

Appellant's claim of inconvenience is undermined by his own statements and those of his counsel. At trial, counsel insisted that appellant had "extraordinary" ability to rearrange his work schedule for Alexander. Appellant also testified to his ability to take time off from work. We see no abuse of discretion.

C. Summer Access

The circuit court granted appellant two non-consecutive weeks of visitation in the summer, ordering that the parties agree upon which two weeks by April 15 each year; if the parties failed to agree, appellee would select the two weeks. Appellant contends the trial court "improperly delegated judicial authority."

The award is analogous to the "tie-breaker" authority recognized in *Shenk.* This 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 is fundamentally different from the improperly delegated authority in the cases cited by appellant, *In re Mark M.,* 365 Md. 687 (2001), and *Shapiro v. Shapiro,* 54 Md. App. 477 (1983). The court did not delegate *whether there would be visitation,* or even *how much visitation,* but merely *when* visitation would occur.

D. Attorney's Fees

Appellant contends 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 attorneys fees."

FL § 12-103(b) sets forth the factors a court must consider. The court considered all the factors and thoroughly explained its findings as to the financial status and needs of the parties, as well as the justification for the litigation. 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, not even a close call."

Regarding needs, the court stated that no financial needs of appellant were presented at 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 appellant lacked substantial justification for the suit, because "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.

See UNREPORTED CASES IN BRIEF *page 17*

UNREPORTED CASES IN BRIEF *Continued from page 16*

The factual findings were supported by the evidence and sufficient to satisfy the required considerations under §12-103(b)." *Slip op. at various pages, citations and footnotes omitted.*

*Albert Marsico v. Rose Isbell**

DIVORCE: MARITAL AWARD: RECALCULATION ON REMAND

CSA No. 0598, Sept. Term, 2011. Unreported opinion by Wright, J. Filed June 18, 2012. RecordFax No. 12-0618-01, 12 pages. Appeal from Montgomery County. Affirmed.

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 on August 6, 2008, granting Rose Marsico an absolute divorce from appellant, Albert Marsico. The court included a monetary award to appellee of $69,792. 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 for 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 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?

History

As stated in *Marsico I,* the parties were married on December 13, 2001. In February 2003, the parties invested in a Florida real estate holding company, Rose Tree Crossing LLC (RTC). The value of RTC was a primary issue at the divorce trial. The court took judicial notice of the deteriorating Florida real estate market but ultimately relied upon the December 31, 2006, valuation.

In *Marsico I,* 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. 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." Thus, the lower court erred when it relied upon a corporate valuation that predated its judgment by approximately two years.

On remand, the circuit court heard evidence that the real estate held in the name of RTC was its only asset. 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 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.

After considering the factors set out in §8-205 of the Family Law Article and determining the value of RTC, the circuit court valued appellee's marital property at $31,010 and appellant's marital property at $69,493. The court awarded appellee one-half the difference, or $19,241.50, on April 22, 2011, and appellant noted this appeal.

Discussion

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.

"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). 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, the circuit court did not abuse its discretion when it refused to rely on the 2010 values of certain assets when reevaluating its monetary award.

As to the marital award, appellant contends 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, according to *Fuge v. Fuge,* 146 Md. App. 142 (2002).

Appellant cites *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 monetary award exceeded the total value of marital property. Neither case furthers appellant's argument.

A trial court must value 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

See UNREPORTED CASES IN BRIEF *page 18*

the equities to shift, justifying a different allocation of the marital property."

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 consistent with the evidence and 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 BMW, 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. 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." *Slip op. at various pages, citations and footnotes omitted.*

*Michael A. McNeil v. Sarah P. McNeil**

DIVORCE: VISITATION: MODIFICATION

CSA consolidated cases Nos. 1098 & 1991, September Term, 2011. Unreported. Opinion by Watts, J. filed June 22, 2012. RecordFax #12-0625-01, 29 pages. Appeal from Howard County. Affirmed in part, reversed in part.

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.

"Appellant Michael A. McNeil, pro se, raises issues which we consolidate and rephrase:

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 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?

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

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

We answer question III in the affirmative as to the amendment of appellant's visitation with his daughter, but otherwise answer in the negative.

BACKGROUND

This appeal arises from divorce and custody proceedings, the history of which is long and contentious. Appellant and appellee are the parents of two minor children, Adam and Tevia. On December 27, 2010, the Circuit Court entered a Judgment of Absolute Divorce.

On February 14, 2011, the circuit court held a hearing to adjudicate seven pending petitions for contempt and Motion to Change Custody, filed by appellant, and the Petition to Modify Visitation and motions for attorneys' fees filed by appellee. Ruling orally from the bench, the court denied appellant's petitions and motion and granted appellee's Petition to Modify Visitation, limiting appellant to supervised visitation with the children.

On February 16, 2011, the Best Interest Attorney filed a Motion for Attorney Fees for services performed between September 13, 2010, and February 14, 2011. The circuit court ordered appellant and appellee each to pay fifty percent of the BIA fees.

DISCUSSION

I.

Appellant contends the circuit court abused its discretion in ordering him to pay half the Best Interest Attorney's fees. Appellant argues 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 Motion for 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.

Family Law §1-202 controls the appointment of counsel to minors in custody proceedings and the award of fees to such counsel. Although a trial court is not required to make any specific findings prior to awarding attorneys' fees to the Best Interest Attorney, the Court of Appeals has held that the factors delineated for attorneys' fees in custody proceedings in § 12-103(b) should be considered. *Meyr*, 195 Md. App. at 555-56 (citing *Taylor v. Mandel*, 402 Md. 109, 134 (2007).

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

See UNREPORTED CASES IN BRIEF *page 19*

UNREPORTED CASES IN BRIEF *Continued from page 18*

properly and zealously represented and protected" and found the bills reasonable. The circuit court determined appellant had contributed to the litigation by escalating conflicts with his children during unsupervised visits. The circuit court noted that appellee contributed to the litigation by withholding visitation after the incidents. 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).

II.

Appellant contends the circuit court abused its discretion in postponing the hearing 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 that Maryland Rule 8-207, allowing for expedited appeals of child access matters before this Court, is indicative of a public policy.

We are satisfied that the circuit court did not abuse its discretion in its handling of appellant's petitions and motion. The record reflects that hearing dates were postponed due to scheduling conflicts on the part of appellee's attorney. 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 Rule 8-207 provides for expedited appeals of certain custody issues, this rule applies to appellate courts, not trial courts.

Appellant contends the circuit court erred in not issuing "Show Cause" orders in response to his tenth through thirteenth petitions for contempt. Because appellant alleged constructive civil contempt, Maryland Rule 15-206 applies. The record demonstrates that the circuit court complied with 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.

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 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.

"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). 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 the Emergency Motion to Resume Normal Visitation, appellant sought unsupervised 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. The circuit court denied the emergency motion and scheduled the matter for a hearing. The circuit 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 supersedes the parent's interest in visitation. *Boswell*, 352 Md. at 220. We perceive no abuse of discretion in the circuit court's ordering that visitation between appellant and Adam consist of counseling.

As to Tevia, neither party raised the issue of reducing the frequency of visitation. Under the existing order, appellant was "entitled to twelve (12) weeks of supervised visitation with Tevia" at the Visitation Center. These were conducted weekly. The "Consent Order" inexplicably directs that visitation is to occur every other week. We conclude that the circuit court abused its discretion in reducing appellant's supervised visitation with Tevia, but see no other abuse of discretion in the court's handling of the matter.

IV.

Appellant contends 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. 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." *Slip op. at various pages, citations and footnotes omitted.*

*Tim S. Meese v. Megan S. Meese**

DIVORCE: MARITAL AWARD: DISPARITY

CSA No. 0499, Sept. Term 2011. Unreported. Opinion by Berger, J. Filed June 18, 2012. RecordFax #12-0618-06, 28 pages. Appeal from Montgomery County. Affirmed.

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-

See UNREPORTED CASES IN BRIEF *page 20*

UNREPORTED CASES IN BRIEF *Continued from page 19*

employed.

"This case arises from an Order granting a monetary award to appellant Timothy Meese ("Husband") and denying Husband's request for attorney's fees. This is the third time that this case is before this Court. The second remand instructed the circuit court to solely consider the amount, if any, of a monetary award and attorney's 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.

DISCUSSION

I.

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.

Husband's contentions are misplaced. The circuit delivered an extensive and well thought out analysis of each of the factors required under [F.L.] § 8-205(b).

Concerning the first factor, the circuit court found that Wife was the overwhelming monetary and non-monetary provider for the family. The circuit court specifically found: "[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/ /auctioneer on eBay…." The circuit court next determined the level of non-monetary participation of both parties. The result was similar. 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.

Next, the circuit court evaluated the second § 8-205(b) factor, the value of the property interests of the parties. As we stated, the only property at issue was the home. The circuit court correctly explained that, in *Meese II,* we established the value of the home for monetary award calculations was the value at the time of the initial divorce proceedings in 2007. Accordingly, the net equity in, and value of, the home for purposes of this case was established to be $303,000.

The court evaluated the economic circumstances of each party, the third §8-205(b) factor. The court found "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.

The court examined the fourth § 8-205(b) factor, circumstances leading to estrangement. Husband testified that Wife decided to end the marriage without cause and that he did nothing to provoke Wife's change of heart. The court specifically found Husband "had difficulty holding down a job or seeking employment, and he had alcohol issues … . that [Wife's] 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 marital responsibility."

Regarding the fifth factor, length of the marriage, the circuit court found that the marriage endured eight years and eight months, for a total cohabitation of five years and five months, "a short-term marriage under any method of computation." Husband argues that a marriage of eight years is of median length. We do not find this decision in any way constituted an abuse of discretion.

The sixth, seventh, ninth, and tenth factors are neutral, the circuit court determined.

The circuit court discussed the eighth factor, i.e. how and when specific marital property or interest in that property was acquired. The court found that the only marital property, the home, was acquired by both parties from Wife's father [Miller]. 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. Therefore, the circuit court found this factor weighed in favor of awarding a monetary award to Husband, but the amount would be a lower percentage of the value of the home.

Finally, the circuit court evaluated the eleventh, catchall, factor. The circuit court again described Husband's issues with the IRS, how Husband did not tell anyone about these issues at the time of the transfer of the home [and] denied any problems with the IRS when Wife confronted him. 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. 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, it clearly demonstrated the court's reasoning and deliberative thought process.

After completing its analysis, the court determined that Husband was entitled to a minimal 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.

B. Inequitable Character of the Monetary Award

Husband contends that even if the circuit court correctly evaluated the §8-205(b) factors, the award is an abuse of discretion because it is less than 10% of the total equity in the home.

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).

See UNREPORTED CASES IN BRIEF *page 21*

UNREPORTED CASES IN BRIEF *Continued from page 20*

Husband misinterprets the holdings of *Flanagan, Long,* and *Ward v. Ward,* 52 Md. App. 336 (1982). In each of these cases, we reversed monetary awards equivalent to less than 20% of the total value of marital property. We, however, reached our results based on actions of the trial court and specific facts in each case, not simply because the percentage of the award was substantially lower for one party.

Long is more on point for Husband. In that case, we reversed a monetary award despite "the chancellor's thorough treatment of the statutory factors." 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." In the instant case, however, the monetary award followed the circuit court's thorough and well reasoned analysis as to each of the eleven factors. Therefore, *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 contends that he was entitled to attorney's fees based on the fact that we previously reversed two decisions in favor of Wife. 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 each party was substantially justified in litigating the issue as to the nature of the property being marital or non-marital, but [considering] 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." *Slip op. at various pages, citations and footnotes omitted.*

*Lisa G. Stafford v. Timothy L. Stafford**

DIVORCE: TRANSFER OF INTEREST IN REAL PROPERTY: STATUTORY FACTORS

CSA No. 1947, Sept. Term 2011. Unreported. Opinion by Zarnoch, J. Filed June 26, 2012. RecordFax #12-0626-05,11 pages. Appeal from Charles County. Affirmed.

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.

"Lisa Stafford appeals an October 2011 Judgment of Absolute Divorce requiring her to transfer her rights, title, and interests in the marital home held as tenants by the entirety with appellee, Timothy Stafford. Lisa also challenges the court's award of joint legal and shared physical custody of the parties' two minor children. We affirm the 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 Charles County (the "marital home"). The title to the property was jointly held, but Timothy was the only borrower on the mortgage. After learning that Lisa was having an affair, Timothy filed for Absolute Divorce in September 2010, seeking, *inter alia,* sole legal and physical custody of the parties' two minor children and 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.

The court awarded joint legal and shared physical custody according to a specific schedule, ordered Timothy to pay child support, and ordered Lisa to transfer the deed to the home. The court's findings and rulings were reflected in a Judgment of Absolute Divorce entered on October 5, 2011, prompting this appeal.

DISCUSSION

I. Title and Ownership of Marital Home

Lisa argues that the court considered the factors in Family Law Article §8-208, governing use and possession of the family home, rather than those in §8-205(b), which concerns the transfer of an ownership interest. Lisa did not contest nor independently raise the issue 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 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).

Here, the record demonstrates that the circuit court considered these factors. During the 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 work-

See UNREPORTED CASES IN BRIEF *page 22*

UNREPORTED CASES IN BRIEF *Continued from page 21*

sheets outlining the parties' employment and finances. Additionally, before the court was a 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.

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.

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

Lisa also contends that the custody order should be reversed and remanded because the court did not give "some indication of consideration of the best interests of the child factors … 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).

The appropriate "best interest factors" 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). 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).

Here, although the circuit judge did not explicitly list her factual findings in support of each of the factors, the record contains ample support for the 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 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 is the finding that Lisa's conduct caused the break-up. The court also stated that it considered the children's ages and that they were relatively well adjusted. The court undertook consideration of the parties' work schedules. The court also explicitly reviewed the parties' shared custody guidelines worksheet calculations based upon the parties' respective incomes and financial statuses.

Most importantly, the court awarded Timothy full title to the marital home so the children could stay with him, minimizing potential disruption to their school and social life. In addition, the parties' custody arrangement was not disturbed. Because the order preserved the status quo for Lisa, we 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 joint legal and physical custody. Finding no abuse of discretion, we affirm." *Slip op. at various pages, citations and footnotes omitted.*

TOPIC INDEX

** Indicates full text reprint in current supplement; boldface indicates published opinion*

CASE INDEX

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