THE DAILY RECORD Maryland Family Law Monthly

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SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Court questions Baltimore 'rule'

Court of Appeals seeks information on access restrictions

The state's highest court has questioned "a local, unwritten policy or 'rule'" in Baltimore City Circuit Court, which bars attorneys from taking the custody investigator's report out of the Family Division Clerk's Office or even copying out significant portions of it.

Stephen J. Cullen, who challenged the rule on behalf of Millicent Sumpter, called the rule "daft — and as well as daft, it's not right that there's one rule for city and one for everyone else," he said.

In other jurisdictions, Cullen noted, "they give [the report] to you and tell you not to share it, and if you were to do so the court would deal with you as if you disobeyed any other court order."

The policy also makes it impossible to have the investigator's report analyzed, he noted.

"No expert worth his or her salt is going to give an opinion without seeing the report," he said.

The Court of Appeals seemed sympathetic — up to a point.

"If, as represented by Mother's counsel, the policy or rule is applied uniformly and vigorously to custody proceedings in the Circuit Court for Baltimore City (as it was in this case), we may have reservations about its viability," Judge Glenn T. Harrell wrote

See SUMPTER *page 4*

UCCJEA

Custody dispute to stay in Va., top court holds

A Maryland father who participated in an interstate conference call between judges regarding jurisdiction in a custody dispute waived his right to object to the timing of the call, the state's highest court has held.

The decision affirms the transfer of the custody case to Virginia, even though the conference call was held 10 days before Joseph D. Miller's answer to Amanda Lee Mathias' motion was due.

Miller "asserts that his time to respond to the appellee's motion to alter or amend was cut short by the Circuit Court's phone conference and subsequent ruling. The appellant is correct…," Chief Judge Robert M. Bell wrote for the unanimous Court of Appeals. "Nevertheless, he is not entitled to relief on this ground."

Miller cooperated in setting up the conference call and did not object to it until 10 days after the court ruled against him, Bell noted. By that point, the time for filing an answer also had passed.

While the circuit court erred in ruling before the time for an answer had passed, "an error that is not shown to be prejudicial does not warrant reversal," the court said.

The opinion cites the Court of Special Appeals' opinion in *Johnson v. Rowehouses, Inc.*, 120 Md. App. 579, 707 A.2d 933 (1998), for the proposition that "where the merits of the dispositive issue are litigated without objection with regard to response time, there is no prejudicial error."

The decision resolves a dispute that began more than four years ago, when Mathias sought to modify a custody agreement she and Miller had reached in July 2006.

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CINA

State can keep foster child's survivor benefits

The state can keep a foster child's Social Security survivor's benefits to pay for money it spent on his care, a Maryland appeals court has held.

The Court of Special Appeals overturned a decision by a juvenile court judge, which ordered the Baltimore City Department of Social Services to hold the benefits of about $32,000 in trust for the teen.

The Department of Social Services received Ryan W.'s Social Security Old-Age, Survivors and Disability Insurance benefits for three and a half years after his parents' deaths. It used them to offset the money it spent on his foster care services, which the state estimated at more than $220,000 for the same period.

The lower court had ruled in June 2011 that the state violated Ryan's constitutional rights by accepting the benefits and not informing Ryan of their use. It also declared invalid two sections of the Code of Maryland Regulations that authorized the department's actions.

The Court of Special Appeals, however, found the offsets were allowed by law. It also ruled that the Juvenile Court did not have authority to declare a state regulation void and its order to create a trust is barred by sovereign immunity.

"I am disappointed with the opinion," Ramesh Kasarabada, an attorney at Maryland Legal Aid who represented Ryan, said in a statement. "My client and I will be weighing our options."

The Office of the Maryland Attorney General, which represented the Department of Social Services, declined to comment.

Elissa Garr, executive director of First Star Inc., a Washington-based nonprofit that advocates for children who have been abused or neglected, said the money in cases like Ryan's should be saved for children to use after they transition out of state care. The money could be used to pay for college or an apartment, Garr said.

"The state would take care of them whether they are entitled to monetary benefits or not," Garr said. "Consider the fact that the state, when children do age out, does not provide the kinds of preparation and financial help these kids need to make it in the world, generally speaking. It would help if they had some sort of trust fund where money was put aside for them."

Daniel L. Hatcher, an associate professor of law at the University of Baltimore School of Law, represented a former foster child in a similar case against the Baltimore County Department of Social Services. The Court of Special Appeals also ruled in favor of the state in *Myers v. Baltimore County Department of Social Services*, an unreported opinion issued Aug. 29.

"Foster children are among the most vulnerable citizens in our society and also are most in need of assistance and services," Hatcher said. "The Social Security benefits

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Monthly Memo

Play-area release no help to retailers

Parents cannot sign away their children's right to recover for injuries they might sustain in a store's play area, the Court of Special Appeals has held. The reported opinion revives a couple's $5 million lawsuit over the brain injury their 5-year-old son allegedly sustained at the BJ's Wholesale Club in Owings Mills in 2006.

"[A] parent may not legally bind his or her minor child to a pre-injury release of tort liability in favor of a commercial enterprise," Chief Judge Peter B. Krauser wrote for the court.

BJ's attorney, Christopher R. Dunn, said he will seek review by the Court of Appeals and may also seek legislation on the topic.

The case is *Rosen, et al. v. BJ's Wholesale Club Inc.*, CSA No. 2861, Sept. Term 2009; RecordFax #12-0830-00 (26 pages).

Gearing up for marriage fight

Gay rights activists, religious leaders and politicians are gearing up for two months of campaigning on the Maryland referendum to strike down same-sex marriage legislation that passed in March, the Capital News Service reports.

Maryland voters were in a dead heat in a January 2012 poll by Arnold-based Gonzales Research & Marketing Strategies, with 49 percent supporting the legislation, 47 percent opposing and a 3-percentage point margin of error.

The Maryland Marriage Alliance, a nonpartisan interfaith coalition dedicated to preserving the traditional definition of marriage has an office in Annapolis and will open others throughout the state to facilitate volunteer training, workers and phone banks.

The close race and potential implications nationwide have donors pouring millions of dollars into the state.

The Human Rights Campaign, the nation's largest gay-rights lobby, recently spent another $250,000 in Maryland, raising the organization's total spent on the state's battle over same-sex marriage to more than $1.6 million.

Miller

Continued from page 1

When they signed the agreement, Mathias was about to move to Virginia with her new husband. However, she agreed that Maryland would have continuing jurisdiction over child custody issues and that neither parent would be deemed to have primary physical custody, regardless of the amount of time the child spent in each home.

In May 2008, however, Mathias filed a motion to asking the Montgomery County Circuit Court to relinquish jurisdiction. She also filed a motion to modify custody in Fairfax County, Va.

Mathias acknowledged that Montgomery County had continuing jurisdiction, but argued that it should relinquish jurisdiction to Virginia as a more convenient forum.

Miller opposed both motions.

In Montgomery County, the court denied Mathias' motion without a hearing on July 15, 2008.

In Fairfax County, Va., however, the court denied Miller's motion to dismiss without prejudice and stayed the custody proceedings. That court also ordered Mathias to set up a conference call with the judge assigned to the case in Montgomery County, pursuant to the Uniform Child Custody Jurisdiction & Enforcement Act.

On August 1, 2008, Mathias filed a motion to alter or amend the earlier ruling, including with her motion a copy of the Fairfax County judge's order mandating a teleconference.

With the aid of counsel, the teleconference was set up for Aug. 6, 2008. Judge Gayle B. Carr of the Juvenile and Domestic Court of Virginia phoned Montgomery County Circuit Judge Ann Harrington. The two judges conferred and heard from counsel for both sides.

Mathias' lawyers argued that Montgomery County was an inconvenient forum because the teachers, doctors, therapists and coaches she planned to call were all in Virginia, and some were professional experts who would have to be compensated for their travel time.

Miller responded that he would have professional witnesses in Maryland, too, but he would not specify who they were. He also suggested that the Virginia experts could be deposed by videotape and could testify by telephone.

However, Miller's main argument was that that an inconvenient-forum analysis did not apply because Maryland had continuing, exclusive jurisdiction, and the grounds for terminating that jurisdiction had not been met.

Harrington disagreed, saying that both jurisdictions were "almost equally poised" to handle the case, "and what puts me over the top" in deciding to relinquish custody was that Mathias had lined up professional witnesses who were "more concrete" than those Miller had proposed.

Miller appealed, raising three main arguments in addition to the timing of the conference call: the lack of a hearing on the merits of Mathias' motion to alter or amend the July 15 ruling; whether the "inconvenient forum" provisions Family Law § 9.5-207 apply to a child custody case in which the court has acquired "continuing, exclusive jurisdiction"; and, if so, whether the court abused its discretion in relinquishing jurisdiction.

The Court of Appeals took the case on its own motion before action in the Court of Special Appeals in December 2008. It heard argument on June 5, 2009, and affirmed on Aug. 27, 2012.

No hearing required

First, no hearing was necessary on Mathias' motion to alter or amend, the top court held. Under Md. Rule 2-311, a hearing is mandatory for motions filed under Md. Rule 2-534. That includes motions to alter or amend that are filed within 10 days of a ruling.

However, Mathias' motion to alter or amend was filed outside that 10-day window, making it an "other motion" under Md. Rule 2-535. A party who wants a hearing on a 2-535 motion must request it, and Miller did not do so, the Court of Appeals said.

Second, the court found no inconsistency with the notion of allowing Maryland to relinquish jurisdiction regardless of whether there were grounds for terminating jurisdiction.

"Indeed, a statute that defines when a court's jurisdiction will be terminated is not at all inconsistent with one which permits a court with jurisdiction, upon consideration of enumerated factors, to decline to exercise that jurisdiction," Bell wrote. "After all, in order to be able to decline to exercise jurisdiction, the court must have jurisdiction in the first place.

And, finally, the court declined to second-guess Harrington on the merits of her ruling.

"The decision whether to relinquish the court's jurisdiction in favor of a more convenient one is one addressed to the sound discretion of the court," Bell wrote.

Harrington's ruling was grounded in the inconvenient forum arguments raised by counsel and reflected an understanding and appreciation of the relevant statutory factors, the court concluded.

"Judge Harrington, consequently, had a basis for her conclusion and her rationale was certainly not unreasonable. Her decision was not "beyond the fringe" of what this Court deems acceptable," Bell wrote. "We discern no abuse of discretion."

Editor's note: This case is available on the court's website and will be reprinted in full in the October supplement.

WHAT THE COURT HELD

Case: *Joseph D. Miller v. Amanda Lee Mathias, CA No. 146, September Term 2008.* Opinion by Bell, C.J. Argued June 5, 2009; decided Aug. 27, 2012. Reported.

Issue: Did a Maryland court properly relinquish jurisdiction to Virginia, under the UCCJEA, where (1) the parties agreed that Maryland would have continuing and exclusive jurisdiction; (2) no hearing was held on the appellee's motion to alter or amend the Maryland court's earlier ruling, retaining jurisdiction; and (3) the Maryland judge ruled on the motion to alter or amend before the time for appellant's answer to the motion had elapsed?

Holding: Yes; affirmed. (1) The fact that Maryland had jurisdiction did not prevent the court from relinquishing that jurisdiction based on the convenience of the forum. (2) Since appellee's motion to alter or amend was filed more than 10 days after the initial ruling, it was an "other motion" under Rule 5-235, and a hearing was not mandatory. (3) While it was error to rule on the motion before the time to answer had elapsed, appellant had participated in litigating the merits without objection with regard to response time; thus, under *Johnson v. Rowehouses, Inc.,* 120 Md. App. 579 (1998), the error was not prejudicial.

Counsel: Jonathan S. Shurberg, Silver Spring, for appellant; Daniel L. Owel, Paradiso, Taub, Sinay & Owel P.C., Bethesda, for appellee.

RecordFax #12-0827-20 (38 pages)

Sumpter

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for the court.

Based on the transcript of the Sumpter hearing in circuit court, in which the judge had the sole copy of the report and shared it with the attorneys for each side, Harrell described the scene as "reminiscent of the Greek mythological story of three Cyclopes with one eye between them that had to be passed around as needed or desired."

However, five of the judges were "apprehensive…to make a conclusive determination" on the record as it stands, without knowing more about the rule and giving the Office of the Attorney General a chance to weigh in on it.

Neither Millicent's former husband nor the best-interest attorney for their two daughters opposed the certiorari petition or filed briefs in the Court of Appeals, the majority said.

The opinion remands the case to the circuit court for further proceedings, without affirming or reversing.

Judge Sally D. Adkins, joined by Chief Judge Robert M. Bell, dissented, saying the record was sufficient to show the circuit court had such a rule and applied it to deny counsel equal access to the report in Sumpter's case.

Millicent Sumpter had sent the girls to Baltimore to live with their father, from whom she was separated, after a series of traumatic events in Georgia and Florida. But when Sean Sumpter filed for divorce, she sought joint legal and physical custody.

Cullen and his co-counsel, Kelly A. Powers, took her case pro bono.

Prior to trial, Baltimore City Circuit Judge Lawrence Fletcher-Hill asked the court's Adoption and Custody Unit to prepare a report on the custody and visitation matters at issue.

Unfortunately, the ACU filed the report a full month after its due date, with little more than a week to go before trial.

Cullen and Powers were notified on a Friday that the report was available for review in the Family Division. That Monday, exactly one week before trial, they went to the courthouse to read the report.

It turned out to be 19 pages of text, plus 17 exhibits that added an extra 143 pages. Cullen and Powers spent about 90 minutes reading and taking notes before leaving at 4:00.

They did not return that week and did not request a continuance. Instead, at trial, Cullen made a motion in limine to keep the judge from considering the report.

The judge denied the motion but allowed counsel to see the report during the trial.

Ultimately, the court granted Sean Sumpter an absolute divorce as well as sole legal and physical custody of the two girls.

On appeal, Millicent Sumpter argued that the no-copy policy violated her due process rights.

The Court of Special Appeals rejected the argument in an unreported opinion last November. However, it warned that the policy "could, under certain circumstances, be unfair to a litigant and deny that litigant Due Process of law."

Cullen filed for certiorari, which the Court of Appeals granted.

Now, "we want to get it back to the Court of Appeals as soon a possible …," Cullen said. "Hopefully, by the end of the year."

WHAT THE COURT HELD

Case: *Millicent Sumpter v. Sean Sumpter,* CA No. 120, September Term 2011. Argued May 12, 2012. Decided Aug. 21, 2012. Opinion by Harrell, J. Dissent by Adkins, J.

Issue: Was the petitioner denied her due process rights by a rule or policy of the Baltimore City Circuit Court, which restricts access to the custody investigation report to attorneys who may view it in the courthouse during regular business hours but may not copy or remove the report?

Holding: Remanded without affirming or reversing in order to develop the record.

Counsel: Stephen J. Cullen and Kelly Powers, Miles & Stockbridge, for petitioner; no appearance by respondent or best-interest attorney for the children.

RecordFax #12-0821-24 (29 pages)

Ryan

Continued from page 2

are their assets."

Hatcher said he and his client will petition for the decision to be reviewed by Maryland's highest court, the Court of Appeals. In a similar case in 2008, the North Carolina Supreme Court ruled in favor of the foster child, saying the state did not have the right to divert the funds to reimburse itself for the child's care.

"Why would a foster care agency work against the best interests of children and why would our state condone that practice?" Hatcher said.

While Hatcher said he understood many foster care agencies are low on funding, especially during the economic downturn, foster children should not be obligated to pay for their care.

"There is not a law that says children have to pay for foster care," Hatcher said. "That makes no sense because they are not the ones who put themselves there in the first place. … The answer is not to take money from the very children they are supposed to be helping."

Notice to guardian

Ryan, now 19, entered foster care in June 2002 at the age of 9. His parents were drug addicts and both died a few years later. Since then, Ryan has bounced around between foster families and group homes.

In 2009, the Department of Social Services asked to be the representative payee of Ryan's OASDI benefits and began receiving $771 per month in benefits — collecting $31,693 total.

Ryan filed a motion to control conduct in April 2011. Ryan said he had not known that the department was receiving benefits on his behalf. Ryan told the court that he would have invested the money and wanted to go to college to be a park ranger.

Baltimore City Circuit Judge Stephen Sfekas, sitting as a juvenile court judge, held a hearing in May 2011 and ultimately ruled in Ryan's favor.

The Court of Special Appeals reversed. Under the Social Security Act, a child under the age of 18 cannot directly receive OASDI benefits and has to receive them through a representative payee. Federal law allows a local social services department to act as payee.

The court also said Ryan was not deprived of due process because the only

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The doctrine of 'parens patriae'

When are the best interests of a child best served by staying in foster care?

By Gary S. Herwig, Esq.
Guest Column

Parens patriae is Latin for "parent of the nation." In child welfare law, it refers to the public policy interest of a juvenile court to act as a "parent" to an abused or neglected child and to make decisions based on what is in that child's best interests.

A driving principle of child welfare law among many social workers, attorneys, masters and judges alike who practice in juvenile court is that a juvenile court's primary obligation is to move children out of foster care as quickly as possible so that permanency may be achieved.

This may not be in every child's best interests. Sometimes, a child may best be served by remaining in foster care, committed to the local Department of Social Services.

Maryland Rule 11-115(d) states, in relevant part:

> In cases in which a child is committed to a local department of social services for placement outside the child's home, the court, within 18 months after the original placement and periodically thereafter at intervals not greater than 18 months, shall conduct a review hearing to determine whether and under what circumstances the child's commitment to the local department of social services should continue. Considerations pertinent to the determination include whether the child should (1) be returned home, (2) be continued in foster care for a specified period, (3) be placed for adoption, or (4) because of the child's special needs or circumstances, be continued in foster care on a permanent or long-term basis.

What exactly constitutes sufficient justification to continue a child's commitment to the local Department of Social Services when a juvenile court's primary obligation is to move children out of foster care as quickly as possible so that permanency may be achieved?

A child, John, had been removed from the care of his parents shortly following his birth and placed in the care and custody of his maternal grandmother. He subsequently was determined by the juvenile court to be a Child In Need of Assistance and committed to the local Department of Social Services for relative placement.

He remained committed to the local department for the duration of his life — well beyond the 18 months contemplated by the statutes and regulations — and review hearings were convened annually in compliance with Maryland Rule 11-115(d).

At one such review hearing that took place proximate to John's 20th birthday, the parents appeared and were present in juvenile court. At that time, John's parents submitted that they were ready, willing, and able to provide appropriate care for John. They said that the circumstances that gave rise to John's being removed from his their care had been sufficiently alleviated.

John disagreed. He knew that he needed support services from the department to exit care and to launch into adult life successfully. Unfortunately, the court rescinded John's commitment to the local Department of Social Services and terminated its jurisdiction.

From the perspective of the parents, the rescission of John's commitment to the local Department of Social Services was appropriate.

John, however, disagreed with the outcome because the court had essentially overtaken the role of parenting John for 18 years, without holding the parents accountable for their failings. In addition, the court failed to consider John's perspective that he had "special needs or circumstances" that made remaining in care in his best interests.

If the juvenile court had continued his commitment, John would have received services intended to prepare him to age-out of the foster-care system and transition him into adult life.

These services are not insignificant. They would have included financial assistance with college, assistance in locating and financing affordable housing suitable for his continued residence after his 21st birthday, and training and/or assistance directed toward helping him to obtain suitable employment.

> **"John was 'cut loose' by the juvenile court with no safety net and without the training and skills necessary to make the transition into adulthood.**

It is precisely this balance between the juvenile court's obligation to move children out of foster care to achieve permanency as quickly as possible and the *parens patriae* duty of the court to act in a child's best interests that social workers, attorneys, masters, and judges who practice in juvenile court struggle with each day.

In this instance, John, after spending his entire life in foster care, was "cut loose" by the juvenile court with no safety net and without the training and the skills necessary to make the transition into adulthood.

In this case, John's best interests would have been better served by allowing him to remain in foster care.

Gary S. Herwig is a staff attorney in the Child Advocacy Unit of Maryland Legal Aid in Baltimore.

Ryan

Continued from page 4

notice required under federal law was to Ryan's legal guardian — in this case, the Department of Social Services.

The court ruled that the Juvenile Court had no jurisdiction to declare state regulations void and that the Juvenile Court's order to create a trust is barred by sovereign immunity.

"It follows that no equitable remedy was necessary because there was no wrong to be corrected," Judge Deborah S. Eyler wrote for the appellate court.

— Kristi Tousignant

WHAT THE COURT HELD

Case: *In re: Ryan W.,* CSA No. 1503, September Term 2011. Argued May 4, 2012. Decided Sept. 5, 2012. Opinion by Eyler, D., J.

Issue: Can the state use a foster child's Old-Age, Survivors, and Disability Insurance benefits to pay towards the child's care?

Holding: Yes, reversed. Under the Social Security Act, a child can receive OASDI benefits only through a representative payee. Federal law allows a local social services department to act as payee. Notice was properly given to the DSS as Ryan's legal guardian. Furthermore, the juvenile court lacked authority to invalidate COMAR regulations providing for the offset.

Counsel: Julia Doyle Bernhardt, Office of the Attorney General, for appellant; Ramesh Kasarabada, Maryland Legal Aid, for appellee.

RecordFax #12-0905-00 (69 pages)

UNREPORTED CASES IN BRIEF

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

*Thomas F. Bernikowicz v. James H. Porter, Jr., Spec. Admin. Estate of Bernikowicz et al.**

CSA No. 0040, September Term, 2009. Unreported. Opinion by Woodward, J. Filed July 25, 2012. RecordFax #12-0725-08, 56 pages. Appeal from Somerset County. Affirmed.

ESTATES AND TRUSTS: PROBATE: PRESUMPTION OF TESTAMENTARY CAPACITY

Evidence that the decedent suffered from Alzheimer's disease months after the execution of his last will and testament was insufficient to overcome the presumption of testamentary capacity; nor did the appellant establish other grounds to reverse the circuit court's determination that the will was valid.

"Thomas Bernikowicz challenges the judgment that the last will and testament of appellant's father, Veto Bernikowicz ("Veto") was valid.

On January 22, 2007, Curtis Farrow, Veto's personal representative, filed a petition and the court admitted to probate Veto's Last Will and Testament executed on January 15, 2002 ("2002 Will"). Beneficiaries Barbara Dubray, Dennis Degulis, Paul Degulis and Michael Degulis also appeal.

Appellant filed a petition to caveat probate, arguing Veto lacked testamentary capacity. The orphans' court ordered Veto's 2002 Will be accepted. The circuit court affirmed.

Appellant presents questions we have rephrased:

1. Did the circuit court err in denying appellant's request for jury trial?

2. Did the circuit court err in finding the presumption of testamentary capacity had not been rebutted?

3. Did the circuit court err in striking appellant's amended petition to caveat?

4. Was the circuit court clearly erroneous in not finding Veto's sister, Helen, and niece, Barbara, exerted undue influence over Veto?

5. Did the circuit court err in striking appellant's motion to issue a rule to show cause to the personal representative why he should not be removed?

6. Did the circuit court err or abuse its discretion in its evidentiary rulings?

DISCUSSION:

DEMAND FOR JURY TRIAL

There is no common law right to jury trial in caveat proceedings. CJ §12-502(a)(1)(iii) provides "[t]he de novo appeal shall be treated as if it were a new proceeding and as if there had never been a prior hearing or judgment by the orphans' court." Nowhere is there a mention of a jury trial right. In the absence of express language, we hold there is no statutory right to a jury trial in a *de novo* appeal from a judgment of the orphans' court.

PRESUMPTION OF TESTAMENTARY CAPACITY

In its oral ruling, the court provided in great detail the relevant background and evidence. The court addressed the testimony of Judge Hayman who prepared the 1998 Will and testified Veto was "legally competent to execute a will"; testimony of Dr. Adam Rosenblatt, appellant's expert, who opined that "Veto was not legally competent" in 1998 or 2002; Veto's medical records; observations of lay witnesses; and observations of Veto's medical professionals.

The court concluded: "It is presumed Veto was sane … when he executed his will. The caveator has the burden of proving otherwise. Neither the opinions of Doctor Rosenblatt nor the other evidence in this case convinces me otherwise."

Although evidence tending to prove competency may span "the entire period of acquaintance of a witness," the caveator must demonstrate the testator lacked testamentary capacity *at the time the will was executed* to rebut the presumption of sanity. *Webster v. Larmore,* 268 Md. 153 (1973).

Appellant points to evidence that Veto suffered mental incapacity before and after signing the 2002 Will, on December 7, 2001 [and in April 2002, when] Veto was admitted into Manokin Nursing Home with a diagnosis of paranoid delusions, agitation, and dementia. Veto's doctor at Manokin, Dr. Gregorio Belosso, testified Veto had "regular dementia probably Alzheimer's type" when he was admitted and could not understand or sign any paper work. Dr. Belosso, however, explained any assessment made prior to April 2002 was "speculation."

The above evidence is insufficient to overcome the presumption of testamentary capacity, because, according to *Webster,* evidence of forgetfulness, delusions, lapse of memory, peculiarities, or oddities standing alone is not enough. 268 Md. at 165. Morever, such evidence does not relate directly to the date Veto signed his 2002 Will.

The only evidence regarding January 15, 2002, when Veto executed his

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UNREPORTED CASES IN BRIEF *Continued from page 6*

Will, was testimony of Will witnesses Janet Bedsworth and Jacqueline Bowen Hill, and a locksmith, Paul Ward.

Bedsworth did not remember Veto but, based on her normal procedure, believed Veto understood he was signing a will and was capable and competent, because she would not have witnessed it otherwise. Similarly, Hill did not recall much of the signing, but it was not "normal practice" for them to witness a will if the testator "wasn't just right." Ward came to Veto's residence on January 15 to change three locks. Ward stated "[Veto] seemed perfectly normal. The only thing I found unusual … he thought the neighbor was watching what he was doing."

The court did not err in finding appellant had not overcome the presumption of sanity.

Appellant argues that, because evidence exists of "incapacitating enfeeblement," the burden shifted to appellees to prove Veto signed the Will in a lucid moment.

Doyle v. Rody, 180 Md. 471 (1942), requires incapacitating enfeeblement *prior to* and after the signing of the will. Having not shown incapacitating enfeeblement prior to the signing, appellant did not establish the burden of proof should be shifted.

AMENDED PETITION

Appellant['s] amended petition to caveat consisted of four counts. Counts III [Fraud] and IV [in the alternative to Fraud, Construction of Ambiguity in Will, Containing Latent Ambiguity, Presumption Against Disinheritance] were wholly new.

ET §5-207 requires a petition to caveat be filed "prior to the expiration of six months following the first appointment of a personal representative under a will." Beyond six months, the circuit court does not have jurisdiction because the orphans' court did not have jurisdiction. Appellant filed his amended petition 21 months after Farrow was appointed personal representative.

UNDUE INFLUENCE

Appellant argues the circuit court erred in not finding Helen and Barbara Dubray exerted undue influence over Veto. Because appellant failed to raise his claim at trial, the court did not err in failing to rule.

STRIKING THE PERSONAL REPRESENTATIVE

On December 12, 2007, appellant filed a petition to remove the personal representative.

Maryland Rule 6-452(a) permits the court, the register, or an interested person to initiate the removal of a personal representative. ET § 1-101(i) defines "interested person."

Appellant contends he was not eliminated as an interested person, because the register did not give notice under ET §5-403. ET §1-101(i) requires notice pursuant to either ET §5-403 *or* §2-210. In the instant case, the register properly gave notice under §2-210.

EVIDENTIARY RULINGS

Motion in Limine. Appellant argued the 1998 Will could not be introduced into a probate proceeding regarding the 2002 Will, because Veto's testamentary capacity in 1998 was in dispute. We agree. The error, however, was harmless. The court did not rely on similarities between the 1998 and 2002 Will. Instead, the court focused on the presumption Veto was sane in 2002 and appellant did not overcome that presumption.

Examination of Judge Hayman. Appellant argues "[t]he court erred by injecting itself into the cross-exam of Judge Hayman" by asking a leading question. We disagree. The Maryland Rules allow the court itself to interrogate any witness. Rule 5-614(b).

Redirect. Although appellees asked appellant on cross-examination about Veto's visits with appellant's family, this did not open the door to appellant testifying about Veto's alleged mistaken belief that certain deceased family members were still alive on redirect.

Cross-Examination. Appellant argues the court committed reversible error by "allowing cross examination of Dr. Rosenblatt based on facts not in evidence and which did not get into evidence." Even assuming the court erred, such error was harmless. At the end of trial, the court provided an extensive recitation of facts and its rationale. Nowhere did the court indicate it relied upon Rosenblatt's testimony.

Witness Bonnie Stone. Appellant called Stone, administrator of Manokin. Relying on Rule 5-611(c), appellant argues "[t]he court committed reversible error by not permitting …Stone to be examined as an adverse witness." According to appellant, Stone was a hostile witness identified with an adverse party, because she was Farrow's friend, used him as her accountant, and "did not care if the power was signed thirty days or one day before involuntary commitment to the nursing home."

The record, however, does not reveal Stone was hostile to appellant during her testimony. Appellant also makes no showing of hostility, bias, or reluctance by Stone in his brief before this Court. Maryland's "adverse witness" statute is found in CJ § 9-113. Stone does not fall under any of the categories. Appellant cites no authority for the proposition that a client of an adverse party accountant falls within the meaning of the witness identified with the adverse party.

Testimony of Susan Metzger Fountaine. At trial, Farrow's attorney called Fountaine, a director of social services at Manokin. Farrow's counsel asked: "In regards to [Veto's] mental state and capacity were there times in your evaluation of him was he lucid and competent to answer your questions and to engage in the types of conduct you requested and the testing?"

Although ordinarily, leading questions should not be allowed on direct examination, it is in the trial court's discretion to allow leading questions when "necessary to develop the witness's testimony." Md. Rule 5-611(c). Although the question appears leading, counsel was essentially asking Fountaine to summarize her previously stated opinions. The trial court did not abuse its discretion in allowing the subject question." *Slip op. at various pages, citations and footnotes omitted.*

*Dept. of Human Resources, Queen Anne's County OCSE Ex Rel. Mary Rebecca Poteat v. Daniel Dominic Rosendale**

CSA No. 1404, September Term, 2010. Unreported. Opinion by Krauser, C.J. Filed Aug. 1, 2012. RecordFax #12-0801-03, 14 pages. Appeal from Circuit Court for Queen Anne's County. Reversed and remanded.

CHILD SUPPORT: GENETIC TESTING: DEPARTMENT'S MOTION TO COMPEL

Once a divorced man enrolled a judgment disestablishing paternity of a child born to his ex-wife during their marriage, the provisions governing paternity proceedings for children born out of wedlock apply to that child; thus, a later circuit court was required, under FL §5-1029, to grant the DHR's motion to compel genetic testing of another man to determine if he is the child's biological father.

"Christian Goodwin was born in 1997, while Mary Poteat was still married to Mark Goodwin. Three years later, Poteat and Goodwin divorced, and eight years after that, Poteat filed a motion, in Circuit Court for Frederick County, demanding child support. The court granted [Goodwin's] petition to disestablish paternity. A final judgment was entered declaring that Mark

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Goodwin is not the father of Christian Goodwin.

During this same period, Poteat moved to North Carolina. The day after the notice of recorded judgment was docketed in Maryland, Poteat sent a "Child Support Enforcement Transmittal" under the UIFSA to the Maryland Child Support Enforcement Administration, requesting proceedings to establish Rosendale as Christian's biological father. The Department filed the transmittal in the Circuit Court for Queen Anne's County.

When Rosendale requested dismissal of that petition, the Department moved to compel Rosendale to submit to genetic testing. The Queen Anne's County circuit court denied the Department's request and granted his motion to dismiss. In so holding, it stated that the "various inconsistencies" in Poteat's affidavit made it "impossible … to determine whether the action is well-pled." The court advised that it would "not consider an order for paternity testing until [Rosendale] has been given a reasonable opportunity to reopen" the Frederick County judgment, denying that motion "without prejudice." The Department noted this appeal.

Discussion

The Department claims the lower court erred in dismissing the UIFSA petition because the petition was sufficient to apprise Rosendale that he was alleged to be Christian Goodwin's father. It further erred, the Department claims, in denying the motion to compel Rosendale to submit to genetic testing.

Maryland Rule 2-303(b) states that a "pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense." It was clear that the "petition, with affidavit, alleges that … Rosendale is Christian's father, and states the facts necessary to support that allegation."

As for inconsistencies, the first — Poteat's conflicting statements as to whether a "man was married to the natural mother, and the child's birth occurred within a year of the end of the marriage" — is merely technical. It is clear from the face of the petition and affidavit that Christian's birth date is July 17, 1997, and that Poteat was divorced from Goodwin in December 2000. Those facts are not in dispute. This discrepancy is not material.

The second inconsistency — naming Rosendale as both the natural father and as "another man" with whom Poteat had sexual intercourse during the time Christian was conceived — appears to be simply the product of misreading "natural father" to be a reference to "legal father." Poteat's allegation was legally sufficient to withstand a motion to dismiss, since her testimony, if believed by the fact-finder, was more than sufficient to establish Rosendale's paternity. *Kimble v. Keefer,* 11 Md. App. 48, 50 (1971).

Turning to genetic testing, it is clear, based upon the lower court's memorandum opinion, that the Queen Anne's County circuit court harbored doubts that the Frederick County decision disestablishing Mark Goodwin's paternity complied with *Kamp v. Department of Human Services,* 410 Md. 645 (2009). Those doubts were unwarranted.

In *Kamp,* the Court of Appeals held that, where a child is born in a marriage and the marital father subsequently moves for genetic testing in an attempt to rebut the presumption that he is the biological father, a court must first determine whether good cause exists for that testing and that such testing is in the child's best interest, before ordering its performance.

Although the Queen Anne's County circuit court correctly observed that the issues raised before the Frederick County circuit court could not be re-litigated before it, it then, inexplicably, invited Rosendale to challenge the Frederick County judgment and refused to consider genetic testing "until [Rosendale] has been given a reasonable opportunity to reopen the judgment in Frederick County." But he has no reason to challenge that ruling. Moreover, the Frederick County judgment was recorded in 2009, and, under Maryland Rule 2-535(b), may be reopened only for "fraud, mistake, or irregularity." Even if we were to assume that the Frederick County circuit court misapplied *Kamp* and abused its discretion, such a legal error does not provide a sufficient basis for reopening the enrolled judgment. In sum, Rosendale has neither an incentive nor a legal basis to seek to reopen the Frederick County judgment.

The Department further contends that, under Family Law §5-1029, the circuit court lacked discretion to deny the genetic testing requested. Rosendale maintains that the applicable statute is Estates and Trusts §l-208.

We next consider whether the Department's motion for genetic testing is governed by Family Law § 5-1029, which would require the circuit court to grant the Department's motion, or by Estates and Trusts § 1-208 and Maryland Rule 2-423, which would require the circuit court to conduct a best interest analysis but retain discretion as to whether to grant the motion.

Several cases have addressed the same question, but none presents the peculiar factual circumstances of the case before us. Those cases have all held that § 5-1029 does not apply where the child at issue was born or conceived during a marriage, but that holding in each case was at least, in part, based on the statutory presumption that the marital father is the biological father. *See, e.g., Mulligan v. Corbett,* ___ Md. ___, No. 43, September Term, 2011 (filed May 23, 2012), slip op. at 35; *Kamp,* 410 Md. at 665; *Evans v. Wilson,* 382 Md. 614, 628 (2004); *Ashley v. Mattingly,* 176 Md. App. 38, 62 (2007); *Stubby, 154* Md. App. at 682-88.

Here, the legal presumption that Goodwin is Christian's father was conclusively rebutted when the Frederick County circuit court enrolled the judgment disestablishing paternity. The case is distinguishable because of that enrolled judgment, the effect of which is to legally recognize Christian as "an illegitimate child." *See Mulligan,* slip op. at 30. Under the circumstances, the provisions of the Family Law Article, Title 5, Subtitle 10 should apply. The circuit court was required, under Family Law §5-1029, to grant the Department's motion for genetic testing to establish paternity." *Slip op. at various pages, citations and footnotes omitted.*

*Siata Diarraassouba v. Alhanif Abdur-Rashid**

CSA No. 2073, September Term, 2011. Unreported. Opinion by Hotten, J. Filed July 26, 2012. RecordFax #12-0726-13, 23 pages. Appeal from Montgomery County. Affirmed.

CUSTODY AND VISITATION: MODIFICATION: DELEGATION TO NON-JUDICIAL ENTITY

In ordering that overnight visitation could resume once the best interest attorney was satisfied that the appellant had obtained housing that included a separate bedroom for the child, the circuit court was not delegating its discretion to a non-judicial entity; rather, it was merely using the best interest attorney to document a future fact.

"Siata Diarrassouba (appellant) and Aihanif Abdur-Rashid (appellee) married on November 7, 2004. On July 2, 2005, Sabriya was born. In September 2008, the parties were granted an absolute divorce. Prior to that, the parties entered into a consent custody and visitation order on July 10, 2008.

After a two-day hearing in September 2011, the circuit court modified the visitation schedule. Notably, the court prohibited [appellant] from having overnight visitation until she established that she had obtained housing that included a separate bedroom for Sabriya. Appellant assert[ed] that the circuit court improperly delegated authority to a non-judicial entity. We affirm the judgment of the circuit court.

DISCUSSION

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I. Appellant argues that the circuit court abused its discretion in precluding overnight visitation. In particular, appellant contends that there was insufficient evidence to ascertain whether her apartment was suitable for overnight visitation. At bottom, relying on *Shanbarker v. Dalton,* 251 Md. 252 (1968), and *Jester v. Jester,* 246 Md. 162 (1967), *superseded by statute on other grounds, Rhoad v. Rhoad,* 273 Md. 459 *(1975),* appellant avers that the case should have been continued so the best interest attorney could have generated a report regarding her housing situation.

Appellee responds that appellant never requested a continuance, that it was not within the court's "purview" to conduct a "spontaneous" and independent investigation [and] that additional evidence was unnecessary because terminating overnight visitation was not predicated on the dimensions of appellant's new apartment. Lastly, appellee contends that the decision was supported by recommendations from the best interest attorney, evidence that appellant had other adults sleeping in the presence of Sabriya, and evidence that appellant's living conditions were not suitable for a child. *Shanbarker*, 251 Md. at 259; *Jester*, 246 Md. at 170-71.

The case sub judice is distinguishable because the order that appointed the best interest attorney precluded her from testifying or providing a written report to the court. Moreover, additional information regarding appellant's apartment was unnecessary.

Before the hearing, appellant resided in a basement apartment that was condemned. Appellant and Sabriya slept in the same bed. On occasion, there were overnight visitors that slept within close proximity to Sabriya. Appellant stated that things would be different in her new apartment; Sabriya would sleep in the bedroom and she would sleep in the living room. Notwithstanding, because of appellant's previous living situation, the circuit court concluded that overnight visitation would cease until appellant obtained housing that included a separate bedroom for Sabriya. We believe that the history of the case supports the court's determination. Moreover, there was sufficient evidence to conclude that Sabriya did not have a separate bedroom at appellant's new apartment. We do not believe more evidence was necessary for the circuit court to conclude that appellant's residence was insufficient for overnight visitation.

II. Appellant posits that the circuit court failed to exercise discretion because it "gave away its jurisdiction and power" when it permitted the best interest attorney to decide whether or not she would have overnight visitation.

"[A] trial court may not delegate judicial authority to determine the visitation rights of parents to a non-judicial agency or person." *In re: Mark M.*, 365 Md. 687, 704 (2001) (citing In re: *Justin D.,* 357 Md. 431 (2000)); see also *Meyr v. Meyr*, 195 Md. App. 524 (2010); *Shapiro v. Shapiro*, 54 Md. App. 477 (1983). A determination as to whether a circuit court improperly delegated authority to a non-judicial entity is an issue of law that must be reviewed de novo. *In re Mark M.,* 365 Md. at 704-05; *Van Schaik v. Van Schaik*, 200 Md. App. 126 (2011); *Meyr,* 195 Md. App. at 546; *In re: Caya B.,* 153 Md. App. 63 (2003).

Shapiro was one of the first cases that addressed the issue. Specifically, we explained that "[i]t is entirely permissible for the chancellor to base his award of custody or his determination as to visitation on the opinions of experts, but the ultimate decision must be that of the chancellor, not the expert."

In *Meyr*, recognizing that the lower court expressly stated that the best interest attorney's authority was subject to supervision and modification, and that the primary issues concerning custody were resolved, we concluded that the delegation of authority was "a matter ancillary to custody and visitation."

In *Van Schaik*, against the backdrop of *Meyr*, we reviewed whether the lower court was permitted to delegate authority to the best interest attorney to resolve disputes concerning the children. Initially, we noted that the lower court did not restrict the best interest attorney's "decision-making authority to 'ancillary' matters." We opined that the lower court did not indicate that the best interest attorney's actions were subject to the court's review or modification. Accordingly, we concluded that the lower court erred because it improperly delegated authority to a non-judicial entity.

When the circuit court modified custody in the case *sub judice*, it concluded that overnight visitation would resume once appellant established that she had obtained housing that had an additional bedroom for Sabriya.

A review of the modification order suggests that the best interest attorney was not extended discretion with regard to a custody determination. Rather, she was merely asked to ascertain whether appellant's residence had a separate bedroom for Sabriya. No discretion was necessary for this determination. Either appellant's living situation had a separate bedroom for Sabriya or not. Admittedly, the determination may not have been as ancillary as the coordination of therapy in *Meyr*, but it had no bearing on the custody determination. To the contrary, and in contrast to *Van Schaik*, the best interest attorney was merely being used to document a future fact. Accordingly, we do not believe that the circuit court failed to exercise discretion when it concluded that overnight visitation would resume once the best interest attorney was satisfied that appellant had obtained housing that included a separate bedroom for Sabriya." *Slip op. at various pages, citations and footnotes omitted.*

*John Doe v. Prince George's County Department of Social Services**

CSA No. 1678, September Term, 2010. Unreported. Opinion by Graeff, J. Filed Aug. 1, 2012. RecordFax #12-0801-02, 21 pages.

ADMINISTRATIVE LAW: CHILD NEGLECT: EVIDENCE OF RISK OF HARM

Although the father made a bad choice in secretly sharing his prescription medicine with his son, the evidence presented by the Department of Social Services was insufficient to establish that his actions placed the child at substantial risk of being harmed.

"This case involves alleged child neglect/abuse. The Prince George's County Department of Social Services, appellee, received a report that Mr. John Doe, appellant, had been giving his son, J.T., medication without a prescription. The medication was Adderall, an amphetamine.

The Department concluded an investigation with a finding of "unsubstantiated child abuse." Doe sought review at the OAH and a contested hearing was held before an Administrative Law Judge. The ALJ modified the finding from "unsubstantiated child abuse" to "indicated child neglect." Doe filed a Petition for Judicial Review in the Circuit Court for Prince George's County, which affirmed in part, reversed in part, and remanded to the OAH for a de novo hearing. Both Doe and the Department appealed.

BACKGROUND

On December 4, 2008, the Department received a report that Doe was giving his medication to J.T., his then-ten-year-old son, after J.T. was diagnosed with attention deficit hyperactivity disorder ("ADHD"). Doe gave J.T. Adderall that had been prescribed for Doe, mixing the Adderall in his son's applesauce.

Ms. Isabelle Max-Johnson, the social worker who investigated the incident, testified that J.T. told her Doe had "been giving [J.T.] his own medication, and that [J.T.'s] mother was opposed to . . . [J.T.] taking the medication."

Doe testified that he began administering some of his own Adderall to

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J.T. from late August 2007 until the end of March or the beginning of April 2008. Doe testified that he administered the Adderall in secret, and without informing either J.T., J.T.'s mother, the pediatrician, or the school. While he was administering the Adderall to J.T., Doe checked with J.T.'s teachers to determine if there were any side effects or if the medication was working.

Prior to spring break in 2008, Doe finally approached J.T.'s pediatrician and asked her to write a prescription for ADHD medication for J.T. She wrote a prescription for five milligrams of Adderall. Eventually, at the request of J.T.'s mother, the pediatrician switched the prescription to Focalin.

Doe gave J.T. Adderall because he did not want J.T. to "lose confidence in himself or motivation. And that's what was happening. He was shutting down in school."

Doe eventually told his wife that he had been secretly administering Adderall to J.T. in March 2008.

DISCUSSION

I. Abuse

Doe contends that "the local department failed to meet its burden of proof on the single issue before OAR: whether the finding of unsubstantiated child abuse was correct." Because there was no finding adverse to Doe regarding child abuse, there is no appealable issue in this regard. Adm'r, Motor Vehicle Admin. v. Vogt, 267 Md. 660, 664 (1973).

II. Neglect

Doe presents several reasons why, in his opinion, the decision of the ALJ of indicated child neglect should be reversed.

A. Due Process. Doe's due process argument is not preserved for appellate review.

B. Burden of Proof

Doe contends that, even if the ALJ could have considered the issue of neglect despite a lack of notice, "there was no evidence in the record of a substantial risk of harm to J.T. and the local department failed to meet its burden of proof that Appellant is responsible for indicated child neglect." He further asserts that, "even if one could somehow guess that administering Adderall under these circumstances posed a risk of harm, there was no finding of fact or evidence in the record explaining that the degree of risk of harm rose to such a high level that there was a 'substantial risk of harm," constituting neglect.

The General Assembly has defined "neglect" [at] § 5-701(s) of the Family Law Article. Similarly, COMAR provides:

(1) Neglect— Other than Mental Injury. Except as provided in § A(2) of this regulation, a finding of indicated child neglect is appropriate when there is credible evidence, which has not been satisfactorily refuted, that the following four elements are present:

(a) A current or prior failure to provide proper care and attention;

(b) The alleged victim was a child at the time of the failure to provide proper care and attention;

(c) The failure to provide proper care and attention was by the child's parent or caretaker; and

(d) The nature, extent, or cause of the failure to provide proper care and attention indicate that the child's health or welfare was harmed or was at substantial risk of harm.

COMAR 07.02.07J3A.

Here, the parties agree that only the fourth factor, whether J.T. was at a substantial risk of harm, is at issue. In determining whether the ALJ properly found that Doe's actions created a substantial risk of harm to J.T., we apply the substantial evidence standard.

We agree with Doe that there was not substantial evidence to support the ALJ's finding that there was a substantial risk of harm to J.T. Although it may be that the Department could have elicited such evidence, we agree with Doe that the evidence that the Department "did put on, through the testimony of its sole witness, Ms. Max-Johnson, was woefully inadequate." Ms. Max-Johnson, who had no medical or pharmacological training, and who was not aware of the dosage of the Adderall pills given to J.T., acknowledged in her report that "there is insufficient evidence the father's poor judgment to give his son his own medication had placed the child at substantial risk of being harmed." Thus, notwithstanding that Doe made a bad choice in secretly giving his son Adderall that was not prescribed for him, the Department did not present substantial evidence that his actions in doing so placed J.T. at substantial risk of being harmed. For that reason, we affirm the circuit court's judgment reversing the ALJ's finding of indicated child neglect, albeit for different reasons.

We remand the case with instructions to remand to the OAH for further proceedings consistent with this opinion." *Slip op. at various pages, citations and footnotes omitted.*

*In Re: Adoption/Guardianship of Jayden G.**

CSA No. 2299, September Term, 2011. Unreported. Opinion by Meredith, J. Filed Aug. 7, 2012. RecordFax #12-0807-03, 18 pages. Appeal from Montgomery County. Affirmed.

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: CONCURRENT APPEAL OF CHANGE IN PERMANENCY PLAN

The juvenile court's unchallenged finding of parental unfitness, alone, is enough to justify termination of parental rights; and, unless the Court of Appeals ultimately decides otherwise in *In re: Cross H.* (argued Jan. 9, 2012), the pendency of an appeal in a CINA proceeding does not bar the initiation of a termination of parental rights case.

"Jennifer S. (Mother) appeals from the determination that her parental rights in her son, Jayden G., should be terminated. Mother also challenges the trial court's decision to proceed with the termination of parental rights adjudication while Mother's appeal of a change in Jayden's permanency plan ("the CINA case") was pending before this Court.

We affirm the judgment of the circuit court.

HISTORY

Jayden G. was born on September 26, 2007, the third of Mother's four children. Justin G., the father of the youngest three, has not noted an appeal of the termination of parental rights. Jayden no longer opposes the lower court's decision.

A. The CINA case

The family first came to the attention of the Montgomery County Department of Health and Human Services in 2008 as a result of a domestic violence complaint by Mother against Justin G. Jayden was adjudicated a child in need of assistance on February 18, 2009

Periodic review hearings followed. Mother's compliance with the court's various orders was inconsistent. Matters were complicated when, on October 12, 2010, Mother and Justin G. — who had been ordered not to visit with the children at the same time — absconded with the children. Both parents were convicted of abduction of a child relative pursuant to FL §9-305.

Jayden's permanency plan continued to be reunification until May 19, 2011, at which time the court ordered that Jayden's permanency plan be changed to adoption by a non-relative. That was appealed. In an unreported opinion filed January 19, this Court vacated the order and remanded to the circuit court for further proceedings, to include a new hearing. *In re: Jayden*

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G., No. 1291, Sept. Term, 2011.

B. The TPR Case

On June 24, 2011, the Department filed its petition to terminate parental rights. Trial occurred November 14-18. On December 21, the court granted the petition. In a 30-page document, the court found that both parents are unfit, and that exceptional circumstances exist which justify the termination of Mother's and Justin G.'s parental rights. The findings were detailed and tailored to the statutory factors, and prefaced by the following:

For the reasons set forth herein, the Court finds by clear and convincing evidence that both parents are unfit and that exceptional circumstances exist making continuation of the parental relationship detrimental to the best interest of the child. To wit, the parents cannot provide a safe and stable home for their son; and the many significant needs that each parent has presented since …2008 remain at issue. The most pressing areas of concern have been: mental health issues; lack of sustained employment; lack of stable housing; a history of assaultive and volatile behavior, particularly on Justin G.'s part; [and] substance abuse problems. The parents have been unable to maintain a consistent commitment to addressing these issues.

DISCUSSION

I. The propriety of proceeding with the TPR while the CINA case was on appeal

Mother argues that *In re Emileigh F.,* 355 Md. 198 (1999), required the circuit court to stay the TPR proceedings while the CINA case was on appeal to this Court. But Mother omits any mention of *In re: Cross H.,* 200 Md. App. 142. *In re: Cross H.* is directly on point. "[T]here is no prohibition against the initiation of TPR proceedings during the pendency of a CINA appeal." *Id.* at 151. Although further review of *In re: Cross H.* is currently in progress in the Court of Appeals, and oral argument took place on January 9, at this juncture, our opinion controls this case.

Finally, we note that one reason given by Mother for objecting to the timing of the TPR proceeding is that the sequence of events prevented the CINA court from being able to "properly address the suitability of the paternal grandmother as a resource for Jayden." That objection mixes apples and oranges. The question in the TPR case focused on the fitness of the parents. Whether Jayden's grandmother can play a role in his placement going forward is not yet adjudicated, and it is not before us at this time.

II. The propriety of terminating Mother's parental rights

Mother's second, third, and fourth questions all challenge, on differing grounds, the order terminating her parental rights. Mother does not attack the finding that she is unfit. Mother's contentions focus on the findings with respect to the exceptional circumstances justifying termination of parental rights. But the finding of unfitness, alone, is enough to justify termination of parental rights. FL §5-323(b). *See also In re: Amber R. and Mark R.,* 417 Md. 701, 718 n. 13 (2011). Accordingly, because Mother has not attacked the court's finding of unfitness, which itself justifies termination, we affirm on that basis without reaching Mother's other contentions." *Slip op. at various pages, citations and footnotes omitted.*

*In re: Elijah G.**

CSA No. 2300, September Term, 2011. Unreported. Opinion by Graeff, J. Filed July 17, 2012. RecordFax #12-0717-00, 17 pages. Appeal from Montgomery County. Affirmed.

CINA: SIBLING NEGLECT: PROTECTIVE SUPERVISION

While the juvenile court's decision to leave an infant in his mother's care indicates that it credited her with making progress since prior CINA declarations involving his three older siblings, the other evidence — specifically, the earlier findings of sibling neglect and current findings of unresolved domestic violence issues, untreated mental health issues and unstable housing — supported the order of protective supervision.

"Elijah G. is the son of Jennifer S. and Justin G. The juvenile court adjudicated two-month-old Elijah to be a CINA. In its disposition order, the court placed Elijah under the Department's jurisdiction but permitted him to remain in Ms. S's care and custody, subject to an order of protective supervision.

Ms. S. appeals, contending that the court erred in finding Elijah to be a CINA.

BACKGROUND

Elijah was born on September 28, 2011. The Department placed Elijah in shelter care because of his parents' history of neglecting Elijah's siblings, Victoria and Jayden G., and Ms. S's history of neglecting Elijah's half-sibling, Daeshawn E.

Beginning in May 2008, the Department and police received multiple reports of domestic violence between Mr. G. and Ms. S., leading to neglect investigations.

On January 30, 2009, the Montgomery County Crisis Center assisted Ms. S. in moving to a shelter. The next morning, with no shoes and no coat, she jumped out the window and ran, leaving the children behind. Police located Ms. S. in the woods, described her as delusional and transported her to the hospital for placement in the psychiatric unit.

In February 2009, all three children were adjudicated CINA. Daeshawn and Victoria were placed with Mr. G's mother. Jayden was placed in foster care.

On October 12, 2010, during a supervised visit, Ms. S. and Mr. G. absconded with all three children. Ms. S. and Mr. G. were convicted of child abduction.

In light of this history, two Department social workers went to the hospital on the day Elijah was born to evaluate whether the newborn would be at risk if discharged in Ms. S's care and custody. Heather Conversano discussed with Ms. S. the Department's concerns.

Concerned that Ms. S's living arrangements were both temporary and unverified, and given the family history of neglect, Conversano filed a petition alleging Elijah was a CINA. The juvenile court initially ordered shelter care, but on October 4, 2011, rescinded that order and allowed Elijah to leave the hospital with Ms. S. under an order of protective supervision that required the Department to make prearranged home visits and provide services, pending consideration of the CINA petition.

Conversano met with Ms. S. weekly through November 3. Between November 15 and November 21, Conversano was unable to reach Ms. S. Ms. S. eventually scheduled an appointment on November 23, which she did not attend. Ms. S. still refused to agree to continuing services. That same day, the Department filed an amended CINA petition in preparation for the CINA hearing scheduled to begin on November 28.

The juvenile court found Elijah is a CINA: "The parents continue to present a significant risk of exposing the Child to domestic violence; the Mother failed to obtain stable housing; and the parents have failed to make progress in working with the Department. The Mother's mental health issues remain unresolved."

The court ordered that Elijah may remain with his Mother under the protective supervision of the Department, subject to conditions. Ms. S. noted this timely appeal.

DISCUSSION

Ms. S. acknowledges that a CINA declaration may be premised upon an

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anticipatory finding and that there have been cases in which a neglect or abuse of one child provided a factual basis for a determination that such a risk exists for another child. Ms. S. contends, however, that her case is distinguishable based on the progress that she made after her older children were removed from her care, as well as "the fact that she had been successfully parenting Elijah for two months" prior to the CINA hearing. In support, Ms. S. itemizes the following as evidence of her improved circumstances:

He was up to date on his medical appointments, was being clothed, fed and housed properly, and was developing exactly on target. Second, the uncontroverted testimony was that during visits with the siblings, Ms. S. was appropriate with them … . Third, in the siblings' cases, Ms. S. complied with mental health treatment and other services to such an extent that the Department in September of 2010 agreed to a permanency plan of reunification with her, and agreed to unsupervised visits… . It was the abduction of the children that resulted in a change in terms of visitation and permanency plan. … . Fourth, Ms. S. had been in the care of a therapist, missed sessions during the last stage of her pregnancy, and then arranged to resume therapy again… . The therapist testified that he never saw any indication of manic episodes, and diagnosed her bi-polar disorder as being in partial remission. Fifth, Ms. S. was cordial and cooperative with the social worker who investigated the report on Elijah in the hospital… Sixth, Ms. S. had participated in the Abused Person's Program for almost one year, even though she did not complete it… . There had not been a domestic violence incident between Ms. S. and Mr. G. in one year.

The Department counters that "evidence of the parents' neglect of three older children, unresolved domestic violence issues, untreated mental health issues, and unstable housing supported the juvenile court's conclusion that infant Elijah was a child in need of assistance." We agree.

Despite the many services the Department offered, Ms. S had not succeeded in achieving reunification with Elijah's siblings. Nevertheless, the court did not treat Ms. S's prior neglect of Elijah's siblings as dispositive, but only as one of several factors to be considered. Other factors included the risk of domestic violence, which the court found was still present at the time of the CINA hearing. Moreover, Ms. S. and Mr. G. repeatedly violated court orders that they should not be together in front of the children in order to avoid exposing them to conflict and domestic violence.

Another factor was Ms. S's unstable behavior and [failure] to address consistently the mental health problems. She had not been taking her prescribed medication, in violation of the conditions of her probation and court orders in the CINA proceedings for Elijah's siblings.

As in *Nathaniel A.,* the juvenile court properly considered the evidence of domestic violence and mental health concerns that had not been fully resolved.

Furthermore, other circumstances that had changed for the worse over the preceding year. Ms. S's abduction of Daeshawn, Victoria, and Jayden, approximately one year before Elijah's birth, was a "watershed event" with important negative consequences. The abduction also marked a significant deterioration in the relationship between Ms. S. and the Department [that] continued after Elijah's birth.

On this record, the juvenile court did not abuse its discretion. The court correctly recognized that Ms. S's neglect of Daeshawn, Victoria, and Jayden was relevant, but not dispositive, in making an independent evaluation of whether Elijah was at substantial risk of neglect. Although the court's decision to leave Elijah in Ms. S's care indicates that it credited her with making progress, the evidence supports the decision that Elijah is in need of the monitoring and services provided by the Department under the order of protective supervision." *Slip op. at various pages, citations and footnotes omitted.*

*In re: Jania S.**

CSA No. 2461, September Term, 2011. Unreported. Opinion by Eyler, J.R., J. Filed July 17, 2012. RecordFax #12-0717-01, 15 pages. Appeal from Frederick County; judgment neither affirmed nor reversed; case remanded for further proceedings.

CINA: SIBLING ABUSE AND NEGLECT: INDEPENDENT ASSESSMENT OF POTENTIAL HARM

In a CINA case involving a three-month-old girl, the trial court erred in finding it was bound by its determination, in a permanency planning review of her 3-year-old brother's CINA case, that there was no likelihood of further neglect or abuse of the boy during unsupervised visits with his parents; rather, under FL §9-101, the court was required to make an independent finding that there was no likelihood of abuse or neglect of the infant before returning her to her parents' custody.

"Jania S., a child, and the Frederick Counter Department of Social Services (the "Department"), appellants, appeal from the dismissal of a CINA petition, filed to protect Jania from her parents, Kevin S. and Erica M., appellees. Appellants contend the circuit court erred in not making the required independent assessment of the potential risk of harm to Jania. We agree.

Background

Jania was born on September 24, 2011. On September 25, 2011, the Department placed Jania in shelter care with her aunt, Linda, based on prior proceedings involving Jania's sibling, Aaron, born November 15, 2008.

On March 12, 2009, Aaron was diagnosed with multiple serious injuries, including fractures and hemorrhages, consistent with more than one episode of abusive trauma. Appellees stated that they did not know how the injuries occurred. On April 16, 2009, the court found Aaron to be a CINA. Aaron was placed in the physical care of Linda.

On August 11, 2011, the court changed the permanency plan for Aaron to reunification with a concurrent plan of custody and guardianship to a relative. The court found that "there is no further likelihood of abuse or neglect by the mother and/or father," ordered that Aaron shall continue as a CINA, and placed various conditions on appellees. The court also ordered unsupervised visitation with Aaron at least one time per week, for a maximum of two hours.

On December 21, 2011, the court held an adjudicatory hearing in Jania's case. The court took judicial notice of the contents of Aaron's CINA file. There is no need to go into detail because legal sufficiency of the evidence to sustain a finding is not before us.

At the conclusion of the evidence, the court stated, in part:

> I simply cannot find that there is a substantial risk of harm to this child which would constitute neglect based on the evidence that I've heard regarding her brother Aaron's case. Therefore, pursuant to CJ 3-819, ah, since the court has not found the child to be a child in need of assistance I dismiss the petition.

Discussion

Appellants contend that the court erred in applying the doctrine of collateral estoppel and not making an independent finding, including a finding under §9-101(b) of the Family Law Article. Second, appellants contend that the court sustained most of the factual allegations in Jania's petition which established the risk of harm. Nevertheless, because the court failed to address the pertinent issue, the court failed to recognize that the risk of harm had not diminished because the parents' circumstances had not materially changed. In

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addition, according to appellants, the court failed to recognize that the burden of proof was on the parents to show a sufficient change in circumstances.

Appellees do not seriously dispute that the court erred in relying on collateral estoppel, at least with respect to Jania, but argue that the error was non-prejudicial because the court made an independent assessment of the evidence.

We agree that the court erred in relying on collateral estoppel. The issue in Aaron's case was not identical to the issue before the court in this case. The August 11, 2011 ruling in Aaron's case was pursuant to a permanency planning review hearing. The court did not return Aaron to his parents' home. In fact the court declared that Aaron continue as a CINA and added a concurrent plan of custody and guardianship to a relative to a plan of reunification. The court's finding of no likelihood of further abuse or neglect of Aaron was not based on returning Aaron to the parents' home but was on permitting unsupervised visitation. Moreover, Aaron was almost three years old and presumably more capable of communicating any problems than was Jania, who was three months old. Additionally, assuming that the interlocutory order in Aaron's case might suffice as a "final judgment" for collateral estoppel purposes, Jania was not a party in Aaron's case and had no opportunity to be heard.

Thus, the question is whether we can affirm the decision despite the error. While it is arguable that the court made an independent assessment of the evidence, we are not convinced that it did so. In addition, the court failed to make a specific finding pursuant to FL 9-101(b).

On the facts of this case, FL §9-101 applied, and the court was required to find that there was no likelihood of abuse or neglect of Jania before placing her in the custody of her parents. See *In Re Billy W.*, 387 Md. 405, 450-51(2004). When there is a proven history of abuse or neglect, the burden of proof is on the parents to show that the past abuse or neglect will not be repeated. *In Re Shirley B.*, 419 Md. 1, 22 (2010); *In Re Yve S.*, 373 Md. at 587. The three year old Aaron was not returned to the parents' home. The three month old Jania should not have been returned without a finding of no likelihood of abuse or neglect and a finding of changed circumstances. The court did not make that finding. Instead, the court stated that its finding in Aaron's case, in the context of visitation only, was binding on it.

Pursuant to Maryland Rule 8-604(d), we shall remand the case without affirming or reversing with directions to hold an adjudicatory hearing on the CINA petition and make a determination.

On remand, the court, in its discretion, may hear additional evidence. At the conclusion of the hearing, conducted consistent with this opinion, the court shall determine whether it reaches the same result or a different result. The parties will have a right to appeal that decision." *Slip op. at various pages, citations and footnotes omitted.*

*Stephen Love v. Alonda Love**

CSA No. 1520, September Term, 2009. Unreported. Opinion by Meredith, J. Filed Aug. 8, 2012. RecordFax #12-0808-08, 12 pages. Appeal from Montgomery County. Affirmed.

DOMESTIC PROTECTIVE ORDERS: FINAL ORDER: SUFFICIENCY OF EVIDENCE

The purpose of the final protective order hearing is to determine whether a final protective order should be issued, not solely to prove that a single act of abuse occurred. In determining whether to issue a protective order, the judge should consider not only evidence of the most recent incident of abuse, but prior incidents which may tend to show a pattern of abuse, since one act of abuse may not warrant the same remedy as a pattern of abuse between the parties.

"Stephen Love appeals the entry of a final protective order against him. Appellant was married to Alonda Love, appellee, in 1998 and divorced in 2005. One child was born, and he was ten years old at the time of the events in question. According to appellee's testimony, she had been granted sole custody of the child and had moved with him to Georgia. In December 2008, circumstances compelled her to return to the D.C. metro area. Appellee testified that, because she was initially unable to find a place for herself and the child to stay, appellant offered his apartment in Beltsville on a temporary basis. Appellee and the child moved in around December 2008. On or about March 21, 2009, appellant notified appellee she had thirty days to quit the premises.

Appellee testified that she and the minor child moved out on April 20, 2009, but returned the next evening to get some items they had left; that, while she was there, appellant came home, and when he saw her there ironing some of their son's clothes, threatened her.

Appellant denied threatening appellee that night.

Appellee also testified about the events of the night of April 24, 2009. Appellee again requested that she be allowed to come back to the apartment to get a few of her things, to which appellant responded, "If you come into my apartment I'll put a cap in your ass," a threat appellee testified she took "very seriously." The next day, appellee went to court and filed for a protective order "because I'm afraid he's going to kill me. And I still am."

Appellant denied threatening appellee at any time on April 24. Upon questioning by his attorney, appellant did admit to having previously hit appellee, "to try and get her attention … like the black and white movies you see. I don't know. I can't explain it, but I tried to just give her a slap on the cheek. I wasn't trying to hurt her. But apparently it did, so. You know, I think that was about 1999."

Both parties testified that there had been two prior protective orders entered against appellant as a result of abusive conduct toward appellee; it is unclear when the first proceeding occurred, but the second was in December 2004.

At the conclusion of the hearing, the court explained its reason for granting the protective order:

> If a person is in fear because they've already been injured by someone in the past and conduct emerges by that individual which causes those fearful feelings to come forward again, as what happened between these two, then the law says it's not inappropriate to issue a protective order.
>
> …
>
> I find that the evidence is clear and convincing that she was fearful. She was fearful because on one previous occasion she had been injured.

DISCUSSION

Although appellant suggests that the trial court failed to make any finding of abuse that would support the issuance of a protective order, we disagree. Family Law Article §4-501 (b)(1) defines "abuse" — as that term is used in the Subtitle providing for domestic violence protective orders — to include "any act that places a person eligible for relief in fear of imminent serious bodily harm," as well as "any… assault in any degree." A former spouse qualifies as "a person eligible for relief." FL § 4-501(l)(l). Under FL § 4-506(c)(1)(ii), a judge may grant a protective order "if the judge finds by clear and convincing evidence that the alleged abuse has occurred."

In *Coburn v. Coburn*, 342 Md. 244, 258-59 (1996), the Court of Appeals expressly held that evidence of past abuse is an appropriate and relevant factor

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for the court to consider in support of a request for protective order:

One act of abuse may not warrant the same remedy as if there is a pattern of abuse between the parties. Different remedies are required when there has been an isolated act of abuse that is unlikely to recur, as compared to an egregious act of abuse preceded by a pattern of abuse. The more abuse that occurred in the past, the higher the likelihood that future acts of abuse will occur and thus, the need for greater protective measures. Thus, the statute appropriately gives discretion to the trial judge to choose from a wide variety of available remedies in order to determine what is appropriate and necessary according to the particular facts of that case. *See § 4-506(d).* Evidence of prior incidents of abuse is therefore highly relevant both in assessing whether or not to issue a protective order and in determining what type of remedies are appropriate under the circumstances. *See Providing Legal Protection for Battered Women,* 21 HOFSTRA L. REV. at 901.

Here, the trial court heard testimony from appellee that she was scared of appellant not only because of his actions in April 2009, but also because of his violence toward her in the past. The fact that courts had previously entered two prior protective orders was conceded by appellant, even though he had contested the second protective order and continued to dispute that court's finding that he had threatened to kill appellee.

It was not clearly erroneous for the court to find appellee was in fact fearful in 2008, and that appellant's conduct constituted abuse within the definition of FL §4-501(b)(1). Appellee testified that appellant placed his hand on his weapon and said "I know how to kill you and get away with it." She testified that his conduct made her "afraid he's going to kill me." Such evidence was legally sufficient to support the issuance of the protective order pursuant to FL § 4-506(c)(1)(ii)." *Slip op. at various pages, citations and footnotes omitted.*

*Mehrna Naini v. Siros Arefi**

CSA No. 0818, September Term, 2011. Unreported. Opinion by Hotten, J. Filed July 10, 2012. RecordFax #12-0710-10, 18 pages. Appeal from Montgomery County. Affirmed.

DIVORCE: MARITAL SETTLEMENT AGREEMENT: UNAMBIGUOUS CONTRACTUAL LANGUAGE

Where the Marital Settlement Agreement provided that two consecutive late payments would trigger the sale of the encumbered property, the term "late" was unambiguous as a matter of law; in the context of a monthly financial obligation, a reasonable person would conclude that "late" means a payment made beyond the due date and, when the obligation is a mortgage, a reasonable person presumably would know that the due date determined by the financial institution.

Mehrnaz Naini (appellant) and Siros Arefi (appellee) were granted an absolute divorce on December 16, 2009, incorporating a marital settlement agreement into the judgment. The agreement stated that appellant would be responsible for the mortgage and equity line of credit associated with real property located at Potomac, Maryland ("Marital Home"), and Tildenwood Dr., Rockville ("Rockville Property"). Most notably, it provided that two consecutive late payments would trigger the sale of the affected property.

On January 13, 2011, appellee filed a motion requesting that the circuit court appoint a trustee to sell the Marital Home and the Rockville Property. Appellant opposed, arguing that the terms of the agreement were ambiguous. Specifically, appellant asserted that the word "late" was ambiguous. The court disagreed and ordered appellant to refinance within sixty days or a trustee would be appointed to sell them. We affirm.

BACKGROUND

Appellant posited that the due date of the alimony suggested that there was ambiguity in the [Marital Settlement] Agreement. Specifically, she argued that the Agreement did not contemplate mortgage payments being paid by the 1st of the month because alimony was not required to be paid until the 10th. Appellant, in fact, noted that alimony was supposed to be paid by the 10th because the parties normally paid the mortgage on the 16th of the month. Alternatively, appellant argued that appointing a trustee was a disproportionate remedy.

Appellee testified that the mortgage on the Marital Home was due on the 1st of the month, with a fifteen day grace period, that appellant made the December 2009 payment on December 30 and the January 2010 payment on February 8. Appellee testified that the line of equity on the Marital Home was due on the 5th of the month, with a ten day grace period, and that appellant made the December 2009 payment on December 30, and the January 2010 payment in February. Appellee testified that the mortgage on the Rockville Property was due on the 1st, with a fifteen day grace period, and that appellant made the December 2009 payment on December 31, and the January 2010 payment on January 28. Certified documents from Bank of America confirmed the respective due dates and payments.

The circuit court concluded that the Agreement was unambiguous. Most notably, the court articulated that a payment was considered late when made beyond the due date established by a financial institution. Appellant was ordered to refinance the properties within sixty days or a trustee would be appointed to sell them.

DISCUSSION

I. Appellant argues that it is unclear whether a payment made after the due date, but within the grace period, would be considered "late." Second, appellant contends that there is ambiguity with regard to the phrase "two (2) consecutive monthly payments." Specifically, "Does this phrase mean that one payment has to be more than two months late? Does it mean that each monthly payment has to be late in two consecutive months?" Lastly, appellant posits that the word "late" in conjunction with the phrase "two (2) consecutive monthly payments" is ambiguous. Appellant argues that it is impossible to determine whether she violated the Agreement without knowing what the parties meant by these words.

A settlement agreement incorporated into a judgment for absolute divorce is subject to the rules of contract interpretation. *Janusz v. Gilliam*, 404 Md. 524, 534 (2008). In Maryland, we adhere to "the objective law of contract interpretation and construction." *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 496 (2005).

"Late" is defined as "coming or remaining after the due, usual, or proper time." Merriam-Webster's Collegiate Dictionary 702 (11th Ed. 2005). In the context of a monthly financial obligation, a reasonable person would conclude that it means a payment made beyond a due date. We presume that a reasonable person would know that a [mortgage] payment is due upon the date determined by the financial institution.

"Consecutive" is defined as "following after the other in order…" Id. at 265. When the word is placed between "two" and "monthly payments," we believe a reasonable person would know that the time period was successive months. Therefore, when the word "late" is combined with the phrase "making two (2) consecutive monthly payments," we presume that a reasonable person in appellant's situation would have known that making back-to-back payments after a financial institution's deadline was not permissible. Accordingly, the terms of the Agreement were unambiguous.

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II. Appellant asserts that the circuit court failed to consider parol evidence when considering whether the Agreement was ambiguous. However, "when contractual language is clear and unambiguous, and in the absence of fraud, duress, or mistake, parol evidence is not admissible to show the intention of the parties or to vary, alter, or contradict the terms of that contract." *General Motors Acceptance Corp. v. Daniels,* 303 Md. 254 (1985). "Only when the language of the contract is ambiguous will we look to extraneous sources for the contract's meaning." *Ubom v. SuntrustBank,* 198 Md. App. 278 (2011). Thus, because there was no evidence of fraud, mistake, or duress, and the Agreement was not ambiguous, parol evidence was unnecessary.

III. There is an exception to strictly interpreting contracts to avoid disproportionate forfeiture. We expounded on the issue in *B & P Enters. v. Overland Equipment Co.,* 133 Md. App. 583, 610 (2000) (quoting Restatement (Second) of Contracts § 229 cmt. b (1981)).

Appellant argues that ordering her to refinance within sixty days or a trustee would be appointed, was a disproportionate forfeiture because injury was never established.

We believe that the sixty day refinancing provision indicates that the forfeiture was not disproportionate. If appellant had refinanced the properties within sixty days, she would have retained her interest in them, thereby ensuring that she did not forfeit anything under the Agreement. Assuming appellant was unable to refinance, appointing a trustee to sell the properties was not a disproportionate forfeiture. *Dreisonstok* [*v. Dworman Building Corp.*, 264 Md. 50 (1971)] in fact, suggests that appellant's continuous failure to make timely payments violated the fundamental principles of fair play, and, thus, should preclude her from the protective umbrella of disproportionate forfeiture. Indeed, consistently making late payments within a year constitutes a pattern suggesting a violation of the principles of fair dealing." *Slip op. at various pages, citations and footnotes omitted.*

*David P. Olslund v. Mary E. Olslund**

CSA Nos. 1175 and 3035, September Term, 2010. Unreported. Opinion by Matricciani. J. Filed Aug. 1, 2012. RecordFax #12-0801-01, 11 pages. Appeal from Anne Arundel County. North and Wolff, JJ. Affirmed.

DIVORCE: CONTRIBUTION AWARDS: LACK OF OUSTER

Given the evidence that appellant left the marital home of his own accord, the trial court did not err in rejecting his claims that he should be relieved of contributing toward the mortgage, property taxes and other expenses on the basis of ouster; nor was he entitled to a credit for the fair rental value of the property occupied by his ex-wife, as she was a tenant in common.

"David and Mary Olslund separated in 2007. The Circuit Court granted an absolute divorce on July 27, 2009. Mr. Olslund filed a motion to modify custody and support on October 26, 2009. Ms. Olslund responded with a motion for summary judgment. Ms. Olslund's motion was granted on June 24, 2010. On June 28, 2010, Ms. Olslund filed a complaint for contribution, seeking half of all expenses related to the maintenance of their marital home. Her request was granted on January 7, 2011. Mr. Olslund brings a consolidated appeal.

Mr. Olslund presents questions we have rephrased:

I. Did the trial court err when it granted appellee's motion for summary judgment on appellant's motion for change of custody and support?

II. Did the trial court err in entering contribution awards for appellee?

HISTORY

On April 1, 1989, the parties were married. In June 2007, the marriage deteriorated. Mr. Olslund left the marital home and did not return there to live. He did, however, continue to use the home as his law office.

On July 2009, after a trial lasting several days, the court granted an absolute divorce on the ground of a two year separation. Ms. Olslund retained use and possession of the home and sole legal and physical custody of Kyle, and $441 per month in child support. The court assigned Ms. Olslund responsibility for the mortgage, property tax, homeowner's insurance, and all repairs under $250, but reserved her right to file a claim for contribution for these expenses later.

Throughout the proceedings, Kyle expressed a desire to live with Mr. Olslund. The court, finding the father related to his son more like a friend than a parent, discounted Kyle's desires. However, Kyle turned eighteen on September 2, 2009 and decided to move in with his father. Mr. Olslund filed a motion for modification of custody and support. The court granted Ms. Olslund summary judgment on the ground that Kyle was emancipated at the time of the hearing and, therefore, the court lacked jurisdiction. Mr. Olslund filed a timely appeal.

On June 28, 2010, Ms. Olslund filed a complaint for contribution toward mortgage payments, property taxes, insurance, homeowners' association dues, and repair and maintenance costs. After a hearing, the court awarded Ms. Olslund entered judgment against Mr. Olslund in the amount of $32,859. Mr. Olslund filed a timely appeal and moved for consolidation of the two appeals.

DISCUSSION

I. Appellant contends the circuit court erred when it granted summary judgment, arguing emancipation is a "factual determination." *Holly v. Maryland Auto. Ins. Fund, 29* Md. App. 498, *506* (1975). While this may be true of *minor children,* as an eighteen-year-old, Kyle was an adult as defined by statute. The court lost subject matter jurisdiction on custody simply because Kyle was no longer a child, not for any reason related to emancipation.

[Under] Art. 1 § 24(a)(2), because Kyle was enrolled in high school and was not yet nineteen, he was entitled to child support until graduation. However, appellant needed to show a substantial, material change in circumstances that warranted the modification. *Pettino v. Pettino,* 147 Md. App. 280, 306 (2002). Appellant offers Kyle's presence in the household as the material change but failed to set forth any material changes *relevant to child support,* such as increased expenses due to Kyle's presence. The circuit court correctly granted appellee's motion for summary judgment.

II. Mr. Olslund contends the court erred in awarding $32,589 in contribution. First, Mr. Olslund argues he was ousted from the property in July 2007, and therefore does not owe contribution. Alternatively, Mr. Olslund claims that he should be awarded a credit for the "fair rental value" of the property, to be subtracted from the total he would owe.

An ouster is a "notorious and unequivocal act" whereby "one cotenant deprives another of the right to common and equal possession and enjoyment of the property." *Young v. Young,* 37 Md. App. 211, 221 (1977) (citing *Israel v. Israel,* 30 Md. 120 (1869) and *Van Bibber v. Frazier,* 17 Md. 436 (1861)). A court's order of use and possession does not establish ouster. *Keys v. Keys,* 93 Md. App. 677, 689 (1992). Therefore, ouster would have had to occur separately from the use and possession order.

The circumstances here fully support the finding that there was no ouster. Though Mr. Olslund stopped living in the Severn house permanently in July 2007, he left largely of his own accord and returned frequently to work from the house during the day. There was no "notorious and unequivocal act" by Ms. Olslund.

Nor do we see error in the circuit court's ruling on a fair rental value

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credit. Appellant cites no legal authority to support his claim to monthly rent from appellee. To the contrary, Maryland law states that "one tenant in common cannot be held liable to his cotenants for use and occupation of the common property, unless there has been an ouster of his or her cotentants." *Colburn v. Colburn,* 265 Md. 468, 472 (1972) (quoting *Hogan v. McMahon,* 115 Md. 195,199 (1911)). As we have concluded, there was no ouster in this case. Appellant's argument on this matter is out of line with Maryland law and it fails accordingly." *Slip op. at various pages, citations and footnotes omitted.*

*David M. Pattawi v. Tynnetta Pattawi**

CSA No. 0555, September Term, 2010. Unreported. Opinion by Salmon, J., retired, spec. assigned. Filed July 11, 2012. RecordFax #12-0711-02, 18 pages. Appeal from Baltimore County. Affirmed.

CHILD SUPPORT: PATERNITY TESTING: BEST INTEREST OF THE CHILD

In a divorce action, the desire to avoid paying child support for two children born during the marriage did not constitute "good cause" for ordering paternity testing; while it might be in the best interest of the presumed father, it was not in the best interest of the children, especially since the presumed father had not shown that someone else could be made to pay support.

"David Pattawi and Tynnetta Pattawi were married in 1996, separated approximately ten years later, and were divorced on April 19, 2011. Mr. and Mrs. Pattawi are the parents of Dasia, Dayon and Davia.

While the divorce action was pending, Mr. Pattawi developed a suspicion that he was not the father of Dayon or Davia. He filed a motion asking the court to order a DNA test pursuant to Family Law section 5-1029.

A hearing was held on April 28, 2010. The Honorable Robert Dugan signed an order denying paternity testing, filed on April 29, 2010. On the same date as the hearing on the DNA test, Judge Dugan held a hearing on all other matters pertaining to the complaint for absolute divorce. At the conclusion of the hearing, the trial judge announced his decision concerning all pending issues. He directed counsel for Mrs. Pattawi to prepare an appropriate order. Unfortunately, Mrs. Pattawi's attorney delayed for several months before presenting an order. In the meantime, Mr. Pattawi filed notice on May 24, 2010, appealing the denial of paternity testing.

About eleven months later, Judge Dugan signed a Judgment of Absolute Divorce, docketed April 29, 2011. No new notice of appeal was filed.

Md. Rule 8-602(d) provides: "Judgment entered after notice filed. A notice of appeal filed after the announcement … by the trial court of a ruling, decision, order, or judgment but before entry of the ruling, decision, order, or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket." The rule saves appellant's appeal. *Burrell v. Burrell,* 194 Md. App. 137, 154-55 (2010).

Testimony

At the motions hearing, it was established that Mr. Pattawi was arrested by federal authorities in March 2008. Appellant pled guilty in 2009 and agreed to pay restitution of $400,000. Mr. Pattawi anticipated a sentence of two years.

Mrs. Pattawi filed for divorce on September 17, 2008. On October 5, 2009, Mr. Pattawi agreed to the terms of a *pendente lite* order to pay a total of $550 per month in child support for the three children.

Mr. Pattawi, using a home test kit, performed a DNA test on Dayon on November 7, 2009. Mr. Pattawi testified that the last time he has seen either child was on November 7, 2009.

Mr. Pattawi explained to Judge Dugan that Mrs. Pattawi admitted she had an affair with Carlos Miguel Casiano. Mr. Pattawi produced no evidence, however, that showed when the affair started.

On cross-examination, it was established that Dayon calls Mr. Pattawi "daddy" and that appellant had developed a very close relationship with Dayon. Mr. Pattawi admitted that he loved Dayon and Davia.

Judge Dugan delivered the oral opinion: "There is good cause under all the circumstances to do a paternity test, but in my judgment, it is not in the best interests of the children. * * * For all of these reasons, the Court is going to deny the motion for the paternity test."

Merits

In *Mulligan v. Corbett* (filed May 23, 2012), the Court [of Appeals] had the opportunity to extensively review the law governing DNA testing when the paternity is at issue.

Mr. Pattawi asks for genetic testing based on §5-1029(b) of the Family Law Article. If FL 5-1029(b) is applicable, a court must order blood testing, even if testing would not be in the child's best interest. Langston v. Riffe, 359 Md. 396 (2000).

Where children were born during the marriage, the issue is governed by Estates and Trusts Article Section 1-206(a). *See Kamp v. Dept. of Human Resources,* 410 Md. 645 (2009). A trial judge can order genetic testing only upon a showing of good cause sufficiently persuasive to overcome the statutory presumption that children born of the marriage are the children of the husband and wife. *Evans,* 382 Md. at 628, 636-638.

Mr. Pattawi puts great stress on the fact that Judge Dugan did say that appellant "had shown good cause … to do a paternity test." Read in context, however, it is clear those words simply convey that appellant had good reason to question whether he was the father. But Judge Dugan made it clear that appellant had not shown it was in the best interest of the children to have paternity testing performed.

In analyzing "good cause," *Kamp* reiterated the factors in *Turner v. Whisted,* 327 Md. 101 (1992). In the case at hand, unlike *Turner,* there was no "putative father." Although Mr. Pattawi voiced his suspicion that Davia's father may have been Casiano, he presented no proof that at the time that either Dayon or Davia were conceived, Mrs. Pattawi was having sex with Casiano. Mr. Pattawi never asked that blood tests of Casiano be taken. Although Mr. Pattawi asserts that the children should know who their "real" father was, that goal would not have been accomplished if Dugan had ordered DNA testing.

Mr. Pattawi stresses: 1) he "is not part of a stable home environment for these children;" 2) he is incarcerated; 3) he "has had no contact with these children since November 2009;" and 4) there "is no ongoing family unit." These points are, in a sense, legitimate. But, as Dugan found, a major reason there had not been any contact was not because he had ceased loving them, but that he had instead engaged in a "self-serving attempt…to eliminate the financial obligations because …he is …in a difficult situation" due to his obligation to make restitution and the fact he is facing incarceration. There was substantial evidence to support that finding.

Boiled down to its essence, the evidence supports the conclusion that the main reason Mr. Pattawi wanted DNA testing was because he did not want to pay child support. Such a reason does not constitute "good cause" for ordering paternity testing when provisions of the Estates and Trusts Article govern. *See Kamp,* 410 Md. at 664. Avoiding child support payments may well be in the best interest of a presumed father, but it is usually not in the best interest of the child, especially where the presumed father has not shown someone else can be made to pay child support.

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Absent a clear abuse of discretion, an appellate court will not disturb a trial court's assessment of the best interests of a child. Here no such abuse was shown." *Slip op. at various pages, citations and footnotes omitted.*

*Starsha Sewell v. John Howard, Sr.**

CSA No. 2236, September Term, 2011. Unreported. Opinion by Zarnoch, J. Filed Aug. 3, 2012. RecordFax #12-0803-02, 12 pages. Appeal from Prince George's County. Affirmed in part, vacated in part and remanded for further proceedings.

CUSTODY AND VISITATION: MODIFICATION: NOTICE

The circuit court erred in modifying custody *pendente lite* as a sanction for contempt when the mother had been given no notice that custody was at issue, and the order was, technically, vacated on appeal; as a practical matter, though, the Court of Special Appeals left the order in place on remand to "prevent the children from being shuffled back and forth between the parents before this issue can be sorted out by the circuit court."

"This case involves two appeals in one record of orders: one finding appellant Starsha Sewell in contempt of court for violating a visitation order; the other, a contempt sanction conferring *pendente lite* custody and unsupervised visitation of the children on their father, John Howard.

Sewell and Howard are the parents of John, born December 23, 2006; and Sean, born June 19, 2008. Howard is also the adoptive father of Donte, a boy approximately the same age as John. In November 2010, the Prince George's County Department of Social Services began an investigation into allegations by Sewell that Howard and Donte were sexually abusing/molesting Sean and John. The investigation was closed two months later after the Department concluded there were no safety concerns.

On May 26, 2011, Sewell filed a petition to modify custody and visitation. Dispositive motions were heard on August 5, 2011.The court awarded Howard visitation and ordered Howard to place the children in counseling.

On November 21, 2011, the court found Sewell in contempt, and ordered Sewell to provide Howard with "make-up time" with the children.

Sewell apparently continued to refuse to comply, and failed to appear at the February 7, 2012 hearing. On February 8, the court awarded Howard *pendente lite* custody, ordered Sewell's *pendente lite* access be limited to telephone, and suspended Howard's child support obligations. Sewell noted an appeal.

QUESTIONS PRESENTED

1. Did the circuit court commit reversible error when it ruled on Howard's petition for contempt when the witnesses Sewell subpoenaed to court failed to appear and the Department's sexual abuse investigation was under appeal?

2. Did the circuit court commit reversible error in modifying the custody arrangement on February 8, 2012 when Sewell received no notice that this issue was to be considered by the court?

We affirm the contempt finding, but vacate the custody modification sanction, and remand to the circuit court.

DISCUSSION

A. Contempt

At the November 15 hearing, Sewell admitted she had not complied with the visitation schedule outlined in the August 8, 2011 order because she was concerned about the safety of her children. Yet her own witnesses testified that there was no evidence of sexual assault. The court also had before it a complete record, including a report from the Department, which ruled out any safety concerns. On this evidence, we are hard-pressed to find error in the ruling.

B. The February 8, 2012 Order

Sewell argues that the February 8 *pendente lite* custody modification/contempt sanction must be reversed because she did not have adequate notice of the hearing.

We have previously concluded that a circuit court erred in temporarily changing custody when a parent was not properly notified that the court planned to make a custody determination. *Burdick v. Brooks,* 160 Md. App. 519 (2004). We noted that because the court's reason for modifying custody was the mother's alleged noncompliance with a court order, the goal on remand should be to "determine what custody arrangement is in the best interest of the minor children, and not to punish a disobedient parent." *Id.* at 528. We believe *Burdick* governs this case.

Although the court indicated it was not ruling on custody, it ordered a change of custody *pendente lite* without adequate notice to Sewell. The judge admitted that the clerk had never sent a hearing notice informing Sewell that custody was at issue, and the affidavit of service and testimony at the contempt proceeding indicated Sewell was only personally served with the contempt petition and show cause order, neither of which indicated the court might consider custody. Finally, as in *Burdick,* the court's stated reason for modifying custody was because Howard moved for sanctions, including "further relief that the Court deems appropriate." Although sanctions are punitive in nature, a court must make a custody arrangement that promotes the best interests of the children, not to punish a disobedient parent.

Because there was no notice the court was contemplating a custody decision and because there is no evidence the best interests of the children were considered, the circuit court erred in ordering a *pendente lite* change in custody and child support.

It is understandable the judge could lose patience with Sewell's repeated efforts to frustrate visitation, after he warned her this could lead to a change in custody — all aggravated by her failure to appear at the February 7 hearing. Nevertheless, "[w]hen the custody of children is the question … the best interest of the children is the paramount fact. Rights of father and mother sink in insignificance before that." *Kartman v. Kartman,* 163 Md. 19, 22 (1932).

Thus, while we affirm the finding of contempt, we disapprove the *pendente lite* custody change imposed as a contempt sanction.

While we technically vacate the latter order, as a practical matter, we leave it in place to prevent the children from being shuffled back and forth between the parents before this issue can be sorted out by the court. As we have done in other cases, *see e.g., B.G. v. M.R.,* 165 Md. App. 532 (2005), and *Simonds v. Simonds,* 165 Md. App. 591 (2005), we direct that the custody and support order remain in force and effect as *a pendente lite* order pending action by the circuit court." *Slip op. at various pages, citations and footnotes omitted.*

*Heather Thomeczek, F/K/A Heather Wooldridge v. Christopher Coquia**

CSA No. 1212, September Term, 2011. Unreported. Opinion by Eyler, James R., J. Filed July 17, 2012. RecordFax #12-0717-02, 24 pages. Appeal from

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Carroll County. Affirmed.

CUSTODY: MODIFICATION: EVIDENCE

In ruling on a motion to modify custody after a hearing on the merits, the judge was not bound by the findings or recommendations of the master but properly exercised its own independent judgment; nor was it an abuse of discretion to rely on a custody evaluation report that was admitted without objection by the appellant, or to admit into evidence Facebook postings that appellant explicitly or implicitly admitted making.

"Heather Thomeczek f/k/a Heather Wooldridge appeals from an order awarding sole legal and physical custody of Ryan George Coquia to Christopher Coquia, appellee. Appellant contends solely that the court's determination was an abuse of discretion and/or error in that the court did not give "due deference to the Master, utiliz[ed] a biased custody report, and [took] into account improperly authenticated Facebook entries…." Perceiving no abuse of discretion or error, we shall affirm.

Background

Ryan was born December 13, 2005. In August 2006, the parties separated following an allegation of domestic violence by appellant against appellee. In July 2007, the parties reached a consent agreement, giving the parties joint legal custody, with primary physical custody to appellant and overnight visitation to appellee.

On October 21, 2010, appellee filed for modification of custody after learning that appellant intended to move to Illinois with Ryan. An emergency modification hearing was held before a master. On November 24, 2010, the master issued a report and recommendation, and on February 7, 2011, a memorandum opinion was issued.

On May 12, 2011, a modification of custody hearing was begun in the circuit court. At the start of the hearing, the court heard arguments regarding the admissibility of certain postings from appellant's Facebook page. Appellant argued that pursuant to *Griffin v. State*, 419 Md. 343 (2011), the Facebook entries she did not admit to making were not properly authenticated; thus, inadmissible.

The court ruled:

[T]he pages that have been admitted by [appellant] in this case, as well as the one that is argued was a private conversation, because that is a form of an admission against interest, would be admissible. However, the other pages and entries the Master admitted, I believe, under *Griffin* would not be admissible. *Griffin*, as I read it, requires not only a showing of ownership of the account, but also that the actual statements were made by the person alleged to have made them.

Following the admissibility ruling, the hearing commenced. On July 8, 2011, the court issued a memorandum opinion and order grant[ing] sole legal and physical custody of Ryan to Father. This appeal followed.

Discussion

Appellant contends the court made its custody determination "without giving due deference to the master, utilizing a biased custody report, and taking into account improperly authenticated Facebook entries …." We disagree.

Maryland Rule 8-131 (c) provides:

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

In the case before us, the court explicitly recognized each factor it needed to consider. The court went through each factor in detail, seriatim. After a 2-day trial, the court expressly found more credible appellee and his version of events, concluding that appellant's "mercurial temper and penchant for not telling the truth would negatively affect Ryan." The court also concluded that appellant "does not promote the importance of [appellee's] relationship with Ryan."

The court's findings are clearly supported by the record, including its credibility determination. The court carefully considered all relevant factors when applying the evidence to the law. In making a custody determination, the court "will generally not weigh any one factor to the exclusion of all others." *Sanders*, 38 Md. App. at 421. Rather, it "should examine the totality of the situation in the alternative environments and avoid focusing on any single factor…." Id. This is precisely what the court did. We shall not disturb the court's determination and perceive no abuse of discretion.

Turning to appellant's specific contentions, as best we can discern them, appellant contends the trial court "failed to give any deference" to the master's finding that it was in Ryan's best interests to remain with appellant. This case does not involve review of a master's report and recommendations by the trial court at an exceptions hearing, as do the cases cited by appellant. This is an appeal from the decision of the trial court after a hearing on the merits. The trial court was not bound by the findings or recommendations of the master at the expedited hearing. With regard to an ultimate custody determination, a trial court must exercise its own independent judgment, which the court did.

Appellant next contends the court's "reliance" on Ms. Doyle's "biased" custody evaluation report "smacks of an abuse of discretion." Appellant did not object to admission of the report at trial. The 26-page report includes interviews with various witnesses as well as both parties and their parents. Doyle was present at trial and subject to cross-examination. Doyle indicated she spent approximately 60 hours investigating and preparing her report. As appellant had moved to Illinois, however, it was difficult for Doyle to visit her there. When Doyle offered to visit appellant during a planned trip to the Midwest, appellant refused. There is no evidence to suggest Doyle was anything but impartial in her investigation or recommendations.

Finally, appellant claims the court abused its discretion in allowing into evidence various Facebook entries. Appellant asserts that pursuant to *Griffin*, the Facebook entries were not properly authenticated; thus, inadmissible.

Our review of the record reveals that the court only admitted Facebook entries appellant admitted making, explicitly or implicitly. There is no evidence the court relied on unauthenticated Facebook postings in determining that appellant "has made Facebook entries which reveal her to be depressed and untruthful." The entries that were admitted support such a finding. We perceive no abuse of discretion."

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

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

CASE INDEX

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