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# SUPPLEMENT
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## COURT OF SPECIAL APPEALS

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## COURT OF SPECIAL APPEALS

**Unreported opinions**

**Cite as 9 MFLM Supp. 3 (2012)**

**Divorce: marital settlement agreement: unambiguous contractual language**

# Mehrna Naini

# v.

# Siros Arefi

*No. 0818, September Term, 2011*

*Argued Before: Woodward, Wright, Hotten, JJ.*

*Opinion by Hotten, J.*

*Filed: July 10, 2012. Unreported.*

**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 married on September 13, 1996. The Circuit Court for Montgomery County granted an absolute divorce on December 16, 2009, incorporating a marital settlement agreement into the judgment. The agreement, among other things, stated that appellant would be responsible for the mortgage and equity line of credit associated with real property located at 9601 Newbridge Dr., Potomac, Maryland ("Marital Home"), and 6715 Tildenwood Dr., Rockville, Maryland ("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 for appropriate relief, 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 the Marital Home and the Rockville Property within sixty days or a trustee would be appointed to sell them. Appellant noted an appeal, and presents the following questions, which we quote:

1. Whether The Trial Court Was Legally Correct When It Determined As A Matter 0f Law That No Ambiguity Existed Regarding The Meaning Of The Parties Agreement When No Part Of The Agreement Defines Applicable Terms.
2. Whether The Trial Court Was Legally Correct When It Ordered A Forfeiture Of [Appellant's] Ownership In The Rockville [Property] And [Marital] Home Even Though There Was No Proof Of Injury.

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

For the reasons that follow, we affirm the judgment of the circuit court.

## BACKGROUND

Appellant and appellee were married on September 13, 1996. More than twelve years later, appellant filed a complaint for absolute divorce, requesting that a postnuptial agreement ("Postnuptial Agreement") be incorporated into the judgment. Appellant also filed a motion to enforce the Postnuptial Agreement. The agreement, in particular, outlined the division of marital property upon the filing of a complaint for divorce. Under the Postnuptial Agreement, appellee was required to transfer his interest in the Marital Home and the Rockville Property within thirty days of judgment being entered. Appellee was also required to transfer his interest in a commercial property located at 11300 Viers Mill Rd., Wheaton, Maryland, or provide appellant with $250,000, within thirty days of judgment being entered. Furthermore, appellee was supposed to deposit $780,000 into an escrow account within thirty days of a complaint being filed. The escrow account would be titled in appellant's name, and she would receive the money in the account once judgment was entered.

On May 27, 2009, appellee filed a counter-complaint, requesting, among other things, that the circuit court apportion ownership of the marital property, enjoin appellant from dissipating or encumbering marital property, and equitably divide the parties' pensions,

retirement benefits, deferred compensation plans, and profit sharing agreements. Approximately two weeks later, appellant filed an opposition to appellant's motion to enforce the Postnuptial Agreement. Appellee explained that the parties separated on December 6, 2006, and entered into a different agreement that stated: (1) appellant would retain ownership of the Marital Home and the Rockville Property, (2) appellee would give her $6,000 a month for three years beginning March 1, 2007, (3) appellee would be responsible for the second home equity line of credit on the Rockville Property, and (4) appellant would refinance the properties so appellee's name would be removed from the mortgages and equity lines of credit. Appellee made the payments and gave appellant the respective deeds of trust. Appellant, however, was unable to refinance the properties. Eventually, appellee signed quit claim deeds because, according to him, appellant indicated that she was unable to refinance the properties until she was the legal title holder. Shortly thereafter, appellant withdrew $160,000 from the parties' joint line of credit.

In appellee's opposition to enforce the Postnuptial Agreement, he argued that the agreement was unconscionable because it was oppressive and burdensome. Specifically, he argued that the Postnuptial Agreement shocked the conscience. Appellee then noted that appellant abused her confidential relationship with him to obtain his signature. Appellee explained that he signed the agreement because appellant suggested that their marriage would not continue unless he signed it. Moreover, noting that appellant was emotionally distraught, hysterical, medicated, and under the care of a professional, appellee indicated that he signed the Postnuptial Agreement to reassure her.

A judgment for absolute divorce was entered on December 16, 2009, incorporating the terms of a marital settlement agreement ("Agreement"). Pursuant to the Agreement, appellee was required to give appellant $6,000 a month in tax-free alimony from October 1, 2009 until February 28, 2010, and $5,000 a month in tax-free alimony from March 1, 2010 until December 31, 2011. All payments were to be made by the 10th day of each month. If two payments were late, the balance of the alimony would be accelerated and due immediately. Furthermore, the Agreement provided that appellant would be responsible for most of the financial obligations associated with the Marital Home and the Rockville Property. The Marital Home was encumbered by a mortgage and an equity line of credit, and the Rockville Property was encumbered by a mortgage, an equity line of credit, and an additional loan. The Agreement, in particular, stated that appellant would be accountable for the mortgage and equity line of credit on the properties. In the event of two successive late payments, the Agreement stated that the property associated with the late payment would be sold. Additionally, it provided that appellant would refinance the properties to ensure that appellee's name was removed from any outstanding lien.

Approximately one year later, appellee filed a motion for appropriate relief, arguing that appellant breached the Agreement. Appellee averred that a trustee should be appointed to sell the Marital Home and the Rockville Property because appellant made two consecutive late payments on each property. After receiving a summons, appellant, *pro se*, responded that her payments were timely. Appellant then noted that she would provide paperwork demonstrating that the payments were timely. Once appellant retained counsel, an amended response was submitted, positing that she had complied with the terms of the Agreement.

At the April 15, 2011 hearing, appellant opposed the appointment of a trustee, asserting that the Agreement was ambiguous. Appellant, in particular, averred that the Agreement failed to provide a date in which the mortgages were due. Appellant then indicated that the parties merely agreed that the mortgages would be paid within thirty days to ensure that there would be no adverse effect on appellee's credit Appellant next posited that the due date of the alimony suggested that there was ambiguity in the 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, and that appellant made the December 2009 payment on December 30, 2009, and the January 2010 payment on February 8, 2010. Appellee next 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, 2009, and the January 2010 payment in February of 2010. Thereafter, appellee testified that the mortgage on the Rockville Property was due on the 1st of the month, with a fifteen day grace period, and that appellant made the December 2009 payment on December 31, 2009, and the January 2010 payment on January 28, 2010. In conjunction with appellee's testimony, the circuit court accepted certified documents from Bank of America that confirmed the respective due dates and payments.[1]

On April 27, 2011, 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, "not 30 days later or 60 days later for purposes of when [the issue] would be reported to a credit bureau." Appellant was then ordered to refinance the properties within sixty days or a trustee would be appointed to sell them.

**STANDARD OF REVIEW**

Issues tried without ajury are reviewed based on the law and the evidence of the case. Md. Rule 8-131(c) ("When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence."). A judgment on the facts will not be disturbed unless a court's findings are clearly erroneous. *Goff v. State*, 387 Md. 327, 338 (2005). Conversely, conclusions of law are not afforded the deferential treatment of factual findings. *Nesbit v. Gov't Employees Ins. Co.,* 382 Md. 65, 72 (2004). Instead, when a court interprets Maryland statutes or case law, we review whether its conclusions were legally correct under a *de novo* standard of review. *Walter v. Gunter*, 367 Md. 386, 392 (2002) (citation omitted).

**DISCUSSION**

**I.**

Appellant argues that the circuit court erred in concluding that the terms of the Agreement were unambiguous. First, appellant asserts that the word "late" renders the Agreement ambiguous. Appellant, in particular, notes 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, appellant questions: "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" when used in conjunction with the phrase "two (2) consecutive monthly payments" is ambiguous. At bottom, appellant argues that it is impossible to determine whether she violated the Agreement without knowing what the parties meant by these words.[2]

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) (citing *Paine Webber, Inc. v. East,* 363 Md. 408, 413-14 (2001)). "The interpretation of a contract, including the determination of whether a contract is ambiguous, is a question of law,' which we review *de novo*." *Ocean Petroluem, Co., Inc. v. Yanek*, 416 Md. 74, 86 (2010) (quoting *Clancy v. King*, 405 Md. 541, 556-57 (2008)).

In Maryland, we adhere to "the objective law of contract interpretation and construction." *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 496 (2005) (citing *Taylor v. NationsBank, N.A.*, 365 Md. 166, 178-179 (2001); *Wells v. Chevy Chase Bank, F.S.B.*, 363 Md. 232, 251 (2001); *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254, 266 (1996)). If the language of the contract is unambiguous, "we give effect to that language as written without concern for the subjective intent of the parties at the time of formation." *Ocean Petroluem*, 416 Md. at 86 (citing *Cochran v. Norkunas*, 398 Md. 1, 16 (2007)). To make this determination, ourreview is "confined to 'the four corners of the agreement,' and we 'ascribe to the contract's language its 'customary, ordinary, and accepted meaning." *Baltimore County v. AECOM Serv.'s*, 200 Md. App. 380, 401 (2011) (quoting *Ocean Petroleum*, 416 Md. at 86 (citing *Cochran*, 398 Md. at 17; *Fister v. Allstate Lfe Ins. Co.*, 366 Md. 201, 210 (2001)).

"Rather than acquiescing to the parties' subjective intent, we consider the contract from the perspective of a reasonable person standing in the parties' shoes at the time of the contract's formation." *Ocean Petroleum,* 416 Md. at 86 (citing *Cochran*, 398 Md. at 17). "A contract is ambiguous if, 'when read by a reasonably prudent person, it is susceptible of more than one meaning." *United Servs. Auto. Ass'n v. Riley*, 393 Md. 55, 80 (2006) (quoting *Calomiris v. Woods*, 353 Md. 425, 436 (1999)). This determination "requires an examination of "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution" *Id.* (quoting *Calomiris*, 353 Md. at 436 (quoting *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388 (1985))).

In the case *sub judice*, the following section of the Agreement is alleged to be ambiguous:

**e. <u>Mortgage Payments for [Marital Home] and Rockville [Property]</u>**

1. Except as otherwise provided herein, [appellant] shall be 100% responsible for monthly payment associated with the [Marital Home] and Rockville [Property]. [Appellant] shall make monthly payments timely and when due, time being of the essence. [Appellant] further agrees to indemnify and hold [appellee] harmless for debts (including taxes and insurance premiums) attributed to the [Marital Home] and Rockville [Property]
2. In the event that [appellant] is late in making two (2) consecu-

> tive monthly payments for the [Marital Home] or Rockville [Property], the property or properties to which she is late shall be immediately sold. . . .

A cursory review of this section indicates that a reasonable person would not ascribe multiple meanings to the use of the word "late" when used in conjunction with the phrase "making two (2) consecutive monthly payments. . . ." "Late" is defined as "coming or remaining after the due, usual, or proper time." Merriam-Webster's Collegiate Dictionary 702 (11th Ed. 2005). When the word is used in the context of a monthly financial obligation, a reasonable person would conclude that it means a payment made beyond a due date. Moreover, when the obligation is a mortgage, we presume that a reasonable person would know that a payment is due upon the date determined by the financial institution. Even assuming a reasonable person does not have intricate knowledge of the mortgage industry, we believe that he or she would know that loans have due dates. Notwithstanding, the Agreement *clearly* stated that appellant was required to "make monthly payments timely and *when due*. . . ." (Emphasis added).

"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 that 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, we hold that the circuit court did not err in concluding that the terms of the Agreement were unambiguous.

**II.**

Appellant asserts that the circuit court failed to consider parol evidence when considering whether the Agreement was ambiguous. However, we note that "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, 261-62 (1985) (citing *Truck Ins. Exchange v. Marks Rentals, Inc.*, 288 Md. 428, 433 (1980); *The Equitable Trust Co. v. Imbesi*, 287 Md. 249, 271-72 (1980); *Glass v. Doctors Hosp., Inc.*, 213 Md. 44, 57-58 (1957); *Markoff v. Kreiner*, 180 Md. 150, 155 (1941)). Indeed, "[o]nly when the language of the contract is ambiguous will we look to extraneous sources for the contract's meaning." *Ubom v. Suntrust Bank*, 198 Md. App. 278, 286 (2011) (quoting *Brendsel v. Winchester Constr. Co.*, 392 Md. 601, 624 (2006)). Thus, because there was no evidence of fraud, mistake, or duress, and we recognized that the Agreement was not ambiguous, parol evidence was unnecessary.

**III.**

In *Prince George's County v. Local Govt. Ins. Trust*, 388 Md. 162, 186 (2005) (quoting Restatement (Second) of Contracts § 229 (1981)), the Court of Appeals recognized that there is an exception to strictly interpreting contracts to avoid disproportionate forfeiture:[3] "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."

We expounded on the issue in *B & P Etners. v. Overland Equipment Co.*, 133 Md. App. 583, 610 (2000) (quoting Restatement (Second) of Contracts § 229 cmt. b (1981)):

> *Disproportionate forfeiture*. The rule stated in [Restatement (Second) of Contracts § 229 ] is, of necessity, a flexible one, and its application is within the sound discretion of the court. Here . . . "forfeiture" is used to refer to the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially, as by preparation or performance on the expectation of that exchange. . . . The extent of the forfeiture in any particular case will depend on the extent of that denial of compensation. In determining whether the forfeiture is "disproportionate," a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which that protection will be lost if the non-occurrence of the condition is excused to the extent required to prevent forfeiture. The character of the agreement may . . . affect the rigor with which the requirement is applied.

Appellant argues that ordering her to refinance the Marital Home and the Rockville Property within sixty days or a trustee would be appointed, was a disproportionate forfeiture of the Agreement because injury was never established. Appellant, in essence, contends that the circuit court neglected to consider the disproportionate nature of the remedy. Appellee counters that the protections against a disproportion-

ate forfeiture were not applicable to the case *sub judice*. Specifically, he suggests that appellant is attempting to undermine a remedy that was articulated in the Agreement.

In *Dreisonstok v. Dworman Building Corp.*, 264 Md. 50, 53 (1971), Mollie Shepard ("Ms. Shepard") leased property to Roger Euster ("Mr. Euster") for a period of twenty years. The lease presumed that: (1) commercial zoning would be obtained, (2) existing improvements would be demolished, and (3) the tenant would produce a commercial building that cost at least $40,000. *Id.* Additionally, it contemplated that the tenant would maintain hazard and public liability insurance, adhere to government orders associated with the property, and pay rent and taxes when due. *Id.* at 53-54. Approximately nine years later, Mr. Euster assigned his leasehold interest to a financial institution to borrow money. *Id.* at 54. When Mr. Euster defaulted on the loan, his leasehold interest was sold to Peoples National Bank of Maryland, which in turn, sold it to Dworman Development Company ("Dworman"). *Id.*

Over that period of time, Ms. Shepard died and half her interest in the property passed to Louise Dreisonstok ("Ms. Dreisonstok") individually, and the other half passed to her as the trustee of Ms. Shepard's will. *Id.* After Dworman purchased the leasehold interest, Ms. Dreisonstok's attorney notified the company that Mr. Buster continually failed to comply with the covenants of the lease; namely making timely rent and tax payments. *Id.* Although Dworman insisted things would be different with them, it made late tax payments for the next two years. *Id.* at 55. Eventually, the property was advertised for sale because of delinquent tax payments. *Id.* at 56. Ms. Dreisonstok paid the taxes and subsequently notified Dworman that the lease was terminated. *Id.* Ms. Dreisonstok thereafter instituted ejectment proceedings. *Id.* That same day, Dworman provided her with a check, which was deposited into the court's registry, that accounted for the taxes and outstanding interest. *Id.*

At trial, Lester J. Dworman, the president and controlling stockholder of Dworman, explained that developers never paid taxes on time. *Id.* at 57. Additionally, there was evidence that suggested Dworman failed to comply with orders from Montgomery County that required the removal of trash and the maintenance of weeds. *Id.* At the conclusion of the trial, a jury returned a verdict in favor of Ms. Dreisonstok. *Id.* at 52. The lower court, however, granted Dworman equitable relief because forfeiture of the leasehold was valued at $561,000, whereas the failure to pay taxes was $11,667.69. *Id.* at 52-53. Specifically, the court ordered Dworman to pay arrears associated with rent, costs of the ejectment case, and maintain a security deposit that would account for rent and taxes more than thirty days due. *Id.* at 53.

On appeal, the Court of Appeals recognized that a landlord's right to forfeiture is a security against a tenant disregarding its covenant to pay taxes. *Id.* at 58 (citation omitted). Indeed, "equitable relief is ordinarily granted upon the payment of the principal sum with interest and costs that have accrued, these payments being regarded as compensation for nonpayment when the obligation was due[.]" *Id.* at 58-59 (citing *Lombardo v. Clifford Bros. Co.*, 139 Md. 32, 36 (1921); *Wylie v. Kirby*, 115 Md. 282, 286 (1911); *Carpenter v. Wilson*, 100 Md. 13, 22 (1904); 1 Tiffany, Real Property § 215 (3d ed. 1939)). Notwithstanding, the Court recognized that it was unsettled whether equitable relief against forfeiture was prohibited when breach was a result of gross negligence or willful conduct. *Id.* at 59. Thereafter, noting that relief would not be granted with regard to a covenant to pay rent when a tenant violated the principles of fair dealing, the Court held that "[t]here is no reason why the same rule is not applicable by analogy to the breach of a covenant to pay taxes when due." *Id.* The Court then discussed the fair dealing rule:

> The fair dealing rule was well stated in *Darvirris v. Boston Safe Deposit & Trust Co.*, 235 Mass. 76, 78, 126 N. E. 382 (1920):
>
> > The failure to pay rent when due was not once or twice, but was so settled a habit as to be rightly described as a general course of conduct. The circumstances of continued delay were annoying in nature and were accompanied by the frequent drawing of cheeks when there were no funds to meet them. This is not an instance of temporary financial embarrassment or fleeting willfulness of purpose. Much less is it the result of accident or mistake. When measured by the term of the lease, it has become a custom. The state of being behindhand appears to have been not only willful but contumacious. There is, however, no finding of bad faith.
> >
> > It is a familiar maxim in equity that he who seeks equity must do equity. The plaintiff has made an express contract in writing for the payment of rent at specified times, with provision, in ease of failure, for entry by the landlord.

> He asks equity to relieve him from the consequences stipulated in his agreement to follow from failure to perform that obligation. While in the ordinary case of delayed payment of rent that will be done, equity will not interfere in his behalf where, as in the case at bar, the plaintiff has violated fundamental principles of fair dealing.

*Id.* at 59-60.

Relying on the notion that "a court on equitable grounds has the right to restrain the forfeiture of a lease in a case where the loss caused by the forfeiture would be wholly disproportionate to the injury caused by the breach . . . ," Dworman argued that the forfeiture would be inequitable because the value of the leasehold exceeded $500,000. *Id.* at 60 (quoting *Streeter v. Middlemas*, 240 Md. 169, 173 (1965)). The Court of Appeals disagreed, holding that equitable relief should have been denied because Dworman's failure to comply with the leasehold was "calculated, deliberate, willful, persistent, and violated the fundamental principles of fair dealing . . . ," and that the property would have been sold if Ms. Dreisonstok did not intervene. *Id.* at 60-61.

In the case *sub judice*, the Agreement stated that appellant was required make timely payments on the mortgage and equity line of credit associated with the Marital Home and the Rockville Property. The Agreement, in particular, provided that two consecutive late payments on either property would trigger a sale of the affected property. Additionally, it stated that appellant was required to refinance the Marital Home and the Rockville Property. Each of these were integral aspects of the Agreement. At the time of the hearing, appellant made several late payments on both the mortgage or equity line of credit associated with the Marital Home and the Rockville Property. Additionally, she was unable to refinance the properties. As a result of two consecutive late payments on the mortgage for the Marital Home and the Rockville Property, appellee requested that the circuit court appoint a trustee to sell both properties. Appellant was subsequently ordered to refinance the properties within sixty days or a trustee would be appointed. We believe that the sixty day refinancing provision indicates that the forfeiture was not disproportionate.

The Agreement stated that a trustee would be appointed to sell the properties once appellant made two consecutive late payments. However, the court provided appellant with sixty days to refinance them before that would occur. 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. Nonetheless, assuming appellant was unable to refinance the Marital Home and the Rockville Property, appointing a trustee to sell the properties was not a disproportionate forfeiture of the Agreement. *Dreisonstok*, 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. Accordingly, because making timely payments was a fundamental aspect of the Agreement, the circuit court was correct in declining to excuse appellant's breach under the equitable principles of disproportionate forfeiture.

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

**FOOTNOTES**

1. Appellee also asserted that appellant made untimely payments toward the mortgage on the Marital Home in March of 2010, May of 2010, and October of 2010, and that she made untimely payments on the equity line of credit on the Marital Home in March of 2010 and August of 2010.

2. Md. Rule 8-131(a) provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ." However, a court "may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." *Id.* Appellant never argued that the phrase "two (2) consecutive monthly payments" was ambiguous. Nonetheless, we elect to review the issue because the phrase is within the section of the Agreement that is purportedly ambiguous.

3. "Disproportionate forfeiture" is a term of art that represents an equitable principle. In our opinion, a definition of these words would assist in understanding that principle. "Disproportionate" is defined as "being out of proportion." Merriam-Webster's Collegiate Dictionary 362 (11th ed. 2005). Black's Dictionary defines "forfeiture" as: (1) "divestiture of property without compensation," (2) "loss of a right, privilege, or property because of obligation, or neglect of duty[,]" or (3) [s]omething (esp. money or property) lost or confiscated by this process; a penalty." Black's Law Dictionary 722 (9th Ed. 2009).

**Cite as 9 MFLM Supp. 9 (2012)**

**Child support: paternity testing: best interest of the child**

# David M. Pattawi

# v.

# Tynnetta Pattawi

*No. 0555, September Term, 2010*

*Argued Before: Eyler, Deborah S., Watts, Salmon, James P. (Ret'd, Specially Assigned), JJ.*

*Opinion by Salmon, J.*

*Filed: July 11, 2012. Unreported.*

**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.**

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

David Pattawi and Tynnetta Pattawi were married in 1996, separated approximately ten years later in July 2006, and were divorced by the Circuit Court for Baltimore County on April 19, 2011. Mr. and Mrs. Pattawi are the parents of Dasia Pattawi, who was born about two months before the parties married. During the marriage two children were born. Their names are Dayon Pattawi ("Dayon") (born December 2, 1997) and Davia Pattawi ("Davia") (born January 2, 2005).

On December 17, 2008, Mrs. Pattawi filed a complaint for absolute divorce or in the alternative a limited divorce, in the Circuit Court for Baltimore County. While the divorce action was pending, Mr. Pattawi developed a suspicion that he was not the father of Dayon or Davia. Accordingly, he filed a motion asking the court to order a DNA[1] test of himself, his wife, and the minor children pursuant to Maryland Code (2006 Replacement Volume), Family Law Article ("FL") section 5-1029. Mrs. Pattawi filed a timely answer to the motion, in which she objected to the paternity testing on the grounds that such testing would not be in the best interest of the minor children.

A hearing was held on April 28, 2010, to determine whether Mr. Pattawi's request for blood tests was in the best interest of the children. The motions judge, the Honorable Robert Dugan, signed an order denying paternity testing, which was filed on April 29, 2010. On the same date as the hearing on the DNA test issue, 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 then directed counsel for Mrs. Pattawi to prepare an appropriate order encompassing the court's various rulings. Unfortunately, however, Mrs. Pattawi's attorney delayed for several months before presenting an order.

In the meantime, Mr. Pattawi, by counsel, filed a notice of appeal on May 24, 2010. The appeal notice stated that Mr. Pattawi was appealing the denial of his motion for paternity testing.

About eleven months later, on April 19, 2011, Judge Dugan signed a Judgment of Absolute Divorce in this case. That judgment, provided in part:

**ADJUDGED, ORDERED** and **DECREED** that the Plaintiff Tynnetta Spedden-Pattawi (hereinafter "Wife") is hereby absolutely divorced from Defendant David M. Pattawi (hereinafter "Husband"); and it is further,

**ORDERED** that Wife shall have sole legal and sole physical custody of the minor children of the parties, namely Dasia Pattawi, born November 30, 1995, Dayon Pattawi, born December 2, 1997 and Davia Pattawi, born January 2, 2005; and it is further,

**ORDERED** that Husband shall have the right to visit with the minor children at all reasonable times; and it is further,

**ORDERED** that Husband shall be generally charged with the support of the minor children and there are no arrearages owed. . . .

The Judgment of Absolute Divorce was docketed on April 29, 2011, exactly one year after the order denying DNA testing was filed. After April 29, 2011, no new notice of appeal was filed.

In this appeal, Mr. Pattawi raises one question: Did the trial court err in denying appellant's request for DNA testing to determine paternity of two of the minor children?

Before addressing that question, we shall discuss whether the appeal was timely.

## I.
## Timeliness

Maryland Rule 2-602 reads as follows:

> (a) **Generally**. Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
>
> (1) is not a final judgment;
>
> (2) does not terminate the action as to any of the claims or any of the parties; and
>
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.
>
> (b) **When allowed**. If the court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment;
>
> (1) as to one or more but fewer than all of the claims or parties; or
>
> (2) pursuant to Rule 2-501(f)(3), for some but less than all of the amount requested in a claim seeking money relief only.

In the case at hand, the order filed on April 29, 2010, plainly did not constitute a final judgment. The order filed on April 29, 2011 does, however, constitute a final judgment.

Maryland Code, Courts and Judicial Proceedings Article (2006 Replacement Volume) Section 12-301, with some exceptions, only allows a party to appeal from a final judgment. *See Waters v. Whiting*, 113 Md. App. 464, 470 (1997). The requirement that an appeal must be from a final judgment is jurisdictional. *Popham v. State Farm Mutual Insurance Company*, 333 Md.136, 142 (1994).

Maryland Rule 8-202(a), requires that an appeal must be filed within thirty days of the final judgment. Premature appeals must be dismissed if a second notice of appeal is not filed within thirty days after the final judgment is entered, if no saving provision in the Maryland Rules is applicable. *Makovic v. Sherwin-Williams Co.*, 311 Md. 278, 282-83 (1997).

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 just quoted saves appellant's appeal. Judge Dugan made an oral ruling on April 28, 2010, disposing of all issues in the case. He then asked both counsel whether there were any other outstanding issues to be resolved. Both counsel said there were none. With that assurance, the trial judge next asked appellee's trial counsel to prepare an order.

Based on the dictates of Md. Rule 8-602(d), we shall treat the appeal filed by Mr. Pattawi on May 24, 2010, as if it were filed on April 29, 2011 — immediately after the judgment of absolute divorce was docketed. *See Burrell v. Burrell*, 194 Md. App. 137, 154- 55 (2010), which is directly on point. We therefore hold that the appeal was timely.

## II.
## Evidence Presented at the April 28, 2010 Motions Rearing.

At the motions hearing, only two witnesses testified. They were the appellant, David Pattawi, and Dianne Mack, who is the appellee's mother.

Appellant and appellee were married on January 25, 1996. About two years after their marriage, Dayon Pattawi was born. A little over seven years after Dayon's birth, on January 2, 2005, Davia Pattawi was born. The parties lived together, continuously, until July of 2006. They did not, however, form the intent to end their marriage until November of 2008. While the parties co-habited, Mr. Pattawi had a caring, loving relationship with Dayon and Davia. After the parties separated in the summer of 2006, Mrs. Pattawi, for the most part, had custody of the three children. But, during the period between February and November, 2008, the children resided with Mr. Pattawi. While the children lived with him post-separation, Mr. Pattawi monitored the children's education, provided them with shelter, and looked out for their well-being.

Dasia, Dayon, and Davia went back to live with their mother in November of 2008. At that time, Dayon was eleven years old and Davia was almost four.

It was established at the hearing, that Mr. Pattawi was arrested by federal authorities in March of 2008 for a crime or crimes. The evidence did not reveal the nature of the crime(s). Appellant pled guilty to a federal charge in 2009 and agreed to pay the victim of his crime restitution in the amount of $400,000.00. Also,

according to Mr. Pattawi's testimony, he anticipated that in the near future he would receive a sentence of two years by a Federal judge.

Mrs. Pattawi filed for divorce on September 17, 2008. In her complaint, she alleged that three children were born of the marriage, namely, Dasia, Dayon, and Davia. Mr. Pattawi filed an answer to the complaint in which he admitted that the three children were all born during the marriage. He also admitted that he was employed and was capable of contributing to the support of the "minor children."

Between November, 2008 and November, 2009, Mr. Pattawi continued to play an active role in the lives of Dayon and Davia.

In April of 2009, Mr. Pattawi had DNA swabs taken from both his mouth and the mouth of Davia. The DNA swabs were sent to a private laboratory. According to a report produced by the DNA laboratory, and admitted into evidence, the DNA test showed that Mr. Pattawi was not Davia's biological father.

On October 5, 2009, Mr. Pattawi agreed to the terms of a *pendente lite* consent order that required him to pay a total of $550.00 per month in child support for the three children.

Mr. Pattawi, using a DNA home test kit, performed a DNA test on Dayon on November 7, 2009. The results of that test were not admitted into evidence.

Mr. Pattawi testified that in November of 2009 he came to believe that he was not the biological father of either Dayon or Davia. Since that date he has not attended any of their sports events in which the two minor children have participated. In fact, the last time he has seen either child was on November 7, 2009, the date he used a home testing device to determine whether he was Dayon's father.

Mr. Pattawi explained to Judge Dugan why DNA tests were performed on his children. In this regard, he stated that he had obtained records from "Easy Pass" and learned that during the marriage Mrs. Pattawi had been traveling on the Pennsylvania turnpike three to five times a month. By use of some additional data stored in the navigation system of a car used by his wife, he was able to determine that his spouse had been going with some frequency to Ohio. From other sources he learned that when she visited Ohio she sometimes would only stay one day. Eventually, Mr. Pattawi confronted Mrs. Pattawi with the results of his investigation. She admitted that she had had an affair during the marriage with one Carlos Miguel Casiano. From the records that Mr. Pattawi was able to obtain, his wife was involved in a relationship with Mr. Casiano from 2005 until 2009. He produced no evidence, however, that showed when the affair started.

Mr. Pattawi testified that when his wife would take trips to Ohio, she would sometimes take Davia with her. Mr. Pattawi also said that his investigation showed that his wife visited Mr. Casiano in Ohio while the latter was in jail. He also noted that Davia's middle name was Miguel, which led him to believe that Carlos Miguel Casiano was the father of Davia.

During the course of his testimony, Mr. Pattawi was asked by Judge Dugan whether it was true that one of the reasons he was asking for the court to order genetic testing was because he did not think that he should have to pay child support for children that were not biologically his. Mr. Pattawi answered that question in the affirmative.

Mr. Pattawi also testified that he believed it was important for the children's sake, that DNA testing be performed. When asked why he so believed, Mr. Pattawi gave the following answer:

> "Well, I would — as myself I would always want to know who my real father was. Medical reasons, you know, if something were to happen to them or anything, like if they needed a blood transfusion, medical history. Financial reasons, considering that I am going to be incarcerated for the next two years, financially I am not going to be able to provide for them. I think it is beneficial to establish a relationship with your father, with your real father. You know, just in general I would want to know who my father is as an individual.

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 also loved Davia.

In regard to his testimony on direct that he thought that it was important that children know their biological father for medical reasons, Mrs. Pattawi's counsel brought out the fact that both of the children were in good health and neither suffered from any disease. Moreover, Mr. Pattawi admitted that he did not know of any "genetic issues" that would necessitate medical treatment for the children.

Mrs. Pattawi did not testify at the hearing, but her mother, Dianne Mack, did. Mrs. Mack said that her daughter had another son, from a prior relationship, named Michael Smith (hereinafter "Michael"). Michael was, at the time of the hearing, eighteen years old and had lived with his mother and Mr. Pattawi almost his entire life. Although Mr. Pattawi was not his biological father, he treated Michael like a son i.e. "took care of him, bought him clothes" and took Michael places along with the other three children. When Michael

broke his collar bone at age 16, Mr. Pattawi allowed Michael to stay in his home, although by that time Mr. Pattawi and his wife were separated.

In the opinion of Mrs. Mack, Mr. Pattawi had been "an average father" and had regularly participated in activities with Dayon and Davia. For example, Mr. Pattawi took Dayon and Davia to Disney World, in Florida, every other year.

**III**
**The Motions Judge's Opinion.**

Judge Robert Dugan, delivered the following 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. I reach that conclusion for several reasons.
>
> First of all, I think Mr. Pattawi does have a loving, caring relationship with these children. It is true he says he is going to have nothing to do with them in the future. I think you have to consider that against the backdrop that he is going to be for some period of time, and unfortunately for him and I think unfortunately for the children as well, serving a sentence of incarceration. Then there is going to come a time when he is released. I think there is a strong possibility based on what I have observed about him and based on what I have particularly heard about their past relationship that he had with these children that he is not only not going (sic) to be responsible financially, but be there emotionally for the children. Having observed Mr. Pattawi's demeanor on the stand, I don't think it is going to be as easy for him as he says just to terminate this relationship. I think part of the lack of contact with the children may well be Mrs. Pattawi's fault at this time in keeping the children from him. When he learns and becomes aware he is the father, he is entitled to visit with the children at some future time. He may even step up and be a custodial parent. He certainly did that in the past when the necessity was there between February and November, 2008. I think the children are best served by him remaining in the role as father. Not only for support purposes, but for emotional purposes.
>
> Mr. Casiano, I know nothing about him really. I don't know his health. I don't know his employment history. I don't know if he is even working now. I am measuring a known provider to the family, Mr. Pattawi, against an unknown entity.
>
> The medical issues, I really understand that. However, I don't think in a situation where any of these children are hospitalized, even though Mr. Pattawi is officially recognized as a father, that either of these children wouldn't be aware or couldn't provide to the medical providers who the biological father is for purposes of treatment and DNA.
>
> It is true Ms. Scherer [appellant's trial counsel] pointed out this issue was raised in the divorce, but it was not raised at the settlement conference. I don't think it was really raised in the *pendente lite* order either. I think it really is a self-serving attempt at this point by Mr. Pattawi to eliminate the financial obligation because he sees himself, and he is, obviously in a difficult situation because he is facing incarceration and also an order of restitution. I can understand why he feels financially overwhelmed and I think that may be affecting his judgment and it is really an attempt to cover up his real feelings for these children. I think that does exist. I think in the future he is going to step forward and be an emotional supporter and play the role of father for these children.
>
> For all of these reasons, the Court is going to deny the motion for the paternity test.

**IV.**
**The Merits.**

Very recently, in the case of *Mulligan v. Corbett*, No. 43, Md. Court of Appeals, September Term, 2011 (filed May 23, 2012), the Court had the opportunity to extensively review the current law governing whether, and under what circumstances, a trial Court should order DNA testing when the paternity of children is at issue. In *Mulligan*, Judge Lawrence Rodowsky, speak-

ing for the Court of Appeals, said:

> The Paternity Proceedings subtitle ("Paternity subtitle"), codified at Maryland Code (1999, 2006 Repl. Vol., 2010 Cum. Supp.), §§ 5-1001 through 5-1048 of the Family Law Article (FL), presumes that the mother's husband, at the time of conception, is the father of that child. *See* FL § 5-1027(c)(1). Section 5-1029(b) requires a court to order blood testing "to determine whether the alleged father can be excluded as being the father of the child." *See Langston v. Riffe*, 359 Md. 396, 424, 754 A.2d 389, 404 (2000). Alternatively, Maryland Code (2001, 2011 Repl. Vol.) § 1-206(a) of the Estates and Trusts Article (ET), presumes that a child born or conceived during the mother and her husband's marriage is the legitimate child of each spouse. A request for blood testing to rebut that presumption is analyzed as a motion pursuant to Maryland Rule 2-423 ("Mental or physical examination of persons") and invokes the trial court's discretion in deciding whether ordering such testing would be in the best interest of the child. *Turner v. Whisted*, 327 Md. 106, 113-114, 607 A.2d 935, 939 (1992).

Slip op. at 1. (Footnote omitted.)

In the case *sub judice*, Mr. Pattawi asks the court for genetic testing in his motion based on the provisions set forth in Md. Code (1999, 2006 Repl. Vol., 2010 Cum. Supp.) § 5-1029(b) of the Family Law Article which provides, in relevant part, "on the motion of . . . a party to the proceedings . . . the court shall order the mother, child, and alleged father to submit to blood or genetic testing to determine whether the alleged father can be excluded as being the father of the child." If FL § 5-1029(b) is applicable, a court must order blood testing; the court has no discretion in the matter even if testing would not be in the child's best interest. *Langston v. Riffe*, 359 Md. 396, 429 (2000).

The Paternity Act, which is set forth in the Family Law Article, and requires mandatory DNA testing, applies only when a request for blood testing concerns a child born out of wedlock. *Evans v. Wilson*, 382 Md. 614, 635 (2000). The term "born out of wedlock" means a child who is neither conceived nor born during the marriage of the mother. *See Mulligan*, slip op. at 35. Here, Davia and Dayon were indisputably conceived and born during the marriage between the parties. Therefore, neither were born out of wedlock. Thus, § 5-1029(b) of the Family Law Article that was relied upon by Mr. Pattawi in his motion for blood testing, is inapplicable.

The policy reasons why the Family Law Article provisions concerning DNA paternity testing do not apply when a child is conceived or born during a marriage was explained in *Evans, supra*, 382 Md. at 635, as follows:

> [C]onsidering the "best interests" standard represents the best policy for evaluating when a child born during a marriage can be ordered to undergo paternity testing. If the mandatory blood or genetic testing under Section 5-1029 could be invoked every time an individual seeks to establish paternity of a child born during a marriage, the consequences to intact families could be devastating. Without regard to the child's best interests, courts would be forced to order genetic tests of every child whose paternity is merely questioned. This would be in the case even if the child is well cared for and could assert that 'he or she does not want his or her life to be disturbed. We do not believe that, in enacting the "Paternity Proceedings" of the Family Law Article, the legislature intended such an effect.

In a situation like the one here presented where both children were born during the marriage of the mother, the issue of whether blood tests should be ordered by the court is governed by provisions of MD Code (2001, 2011 Repl. Vol.) Estates and Trusts Article ("ET"), Section 1-206(a). *See Kamp v. Dept. of Human Resources*, 410 Md. 645, 666 (2009). As the Court of Appeals said in *Kamp*:

> Maryland Code (1974, 2001 Repl. Vol.) § 1-206(a) of the Estates and Trusts Article teaches, concerning the legitimacy of a child, that "a child born at any time after his parents have participated in a marriage ceremony with each other, even if the marriage is invalid, is presumed to be the legitimate child of both parents."

*Id*. (footnote omitted).

When a paternity test concerning a child born of a marriage is requested, 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 at the beginning of his oral opinion that appellant "had shown good cause . . . . to do a paternity test." Read in Context, however, it is clear that those words were used simply to convey the thought that appellant had good reason to question whether he was the father of the children. But in the context of Maryland law involving cases decided under section 1-206(a), the phrase "good cause" means good cause to find that it would be in the best interest of the children to order DNA testing. When his opinion is read in its entirety, Judge Dugan made it clear that appellant had not shown that it was in the best interest of the children to have paternity testing performed.

In analyzing whether "good cause" had been shown, the Court of Appeals in *Kamp* reiterated the factors mentioned in *Turner v. Whisted*, 327 Md. 101, 116-17 (1992), stating,

> consideration of the stability of the child's current home environment, whether there is an ongoing family unit, and the child's physical, mental, and emotional needs. An important consideration is the child's past relationship with the putative father . . . . Finally, other factors might even include the child's ability to ascertain genetic information for the purpose of medical treatment and genealogical history.

In the case at hand, unlike the situation in *Turner*, there was no "putative father." A putative father is "the alleged biological father of a child born out of wedlock." *Stubbs v. Colandra*, 154 Md.App. 673, 683 (2004) quoting Black's Law Dictionary at 623 (7th ed. 1999). Nevertheless, Mr. Pattawi's past relationship with the children is an important factor. Here, it was undisputed that appellant had for a long period, treated the children as his own and the children treated him as their father.

Although Mr. Pattawi, in his testimony, voiced his suspicion that Davia's father may have been Carlos Miguel Casiano, he presented no proof that at the time that either Dayon or Davia were conceived, that Mrs. Pattawi was having sex with Mr. Casiano. Moreover, in his Motion for Paternity Testing, Mr. Pattawi never asked that blood tests of Mr. Casiano be taken. Therefore, although Mr. Pattawi asserts that one of the reasons he wanted the children's DNA test performed was because he thought that the children should know who their "real" father was, that goal would not have been accomplished even if Judge Dugan had ordered the DNA testing that was asked for by Mr. Pattawi.[2]

Mr. Pattawi contends in this appeal that Judge Dugan abused his discretion by failing to order blood testing. Appellant stresses that: 1) he "is not part of a stable home environment for these children;" 2) he is incarcerated[3] 3) he "has had no contact with these children since November of 2009;" and 4) there "is no ongoing family unit." All of these points are, in a sense, legitimate ones. But, as Judge Dugan found, a major reason that there had not been any contact between the children and appellant was not because he had ceased loving them, but that he had instead engaged in a "self-serving attempt . . . to eliminate the financial obligations [of child support] because . . . he is . . . in a difficult situation" due to his obligation to make restitution and due to the fact that he is facing incarceration. There was substantial evidence to support that finding. And, given that finding, Judge Dugan reasonably believed that once appellant's attempt to avoid paying child support was rejected, appellant was "going to step forward and be an emotional supporter and play the role of [a] father for these children."

In their briefs, both the appellant and appellee rely on *Kamp v. Dept. of Human Resources, supra*, to support their positions. Kamp involved an action brought by the Department of Human Resources to increase support from Darren Kamp [Mr. Kamp] for a child (Julie) who was conceived and born during the marriage of the mother and Mr. Kamp. 410 Md. at 648. Mr. Kamp and the mother divorced approximately seven years after Julie was born. *Id.* at 651. A blood test, ordered by the circuit court, excluded Mr. Kamp from paternity and the circuit court terminated Mr. Kamp's support obligation for Julie. *Id*. at 654. The Kamp court held that the Circuit Court had abused its discretion in ordering DNA testing, and that even though the DNA evidence was presently known, the DNA test results should not "be considered until doing so was determined to be in the child's best interest." *Id*. at 657. In *Kamp*, the court said:

> "In [the] present case, the man who is the presumed father of a child, who also has acknowledged the children as his own not simply during the marriage but for over six years after the parties divorce, is the one seeking to rebut the presumption that he is the father and, therefore, to renounce, to rescind, his acknowledgment of paternity. On these facts, the case for conditioning the ordering of a blood test on a finding of good cause, tied to the determination by the best interest of a child, is, at least as, if not more, compelling than it was in *Turner [v. Whisted*, 327 Md. 101, (1992)] and *Evans [v. Wilson, supra*]. That is the position this court took in *Monroe [v. Monroe*, 329 Md. 758 (1993)], a case

> with which the case *sub judice* shares similarities. It certainly appears to be the position taken by the Court of Special Appeals in this case. *See Kamp*, 180 Md. App. at 198. . . . that position is likewise evident in the intermediate appellate court's decision in *Ashley v. Mattingly*, 176 Md. App 38, 62 . . . (2007).

*Id.*

In many ways, this case has similarities with *Kamp*. Even after the parties separated, Mr. Pattawi willingly took on the responsibility of having exclusive custody of the minor children for a period. And, for most of the children's lives, he has held himself out to the children and the public as the father of Dayon and Davia. As in *Kamp*, nothing in the record suggested that blood testing would be in the children's best interest.

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 for the two children. Such a reason does not constitute "good cause" for ordering paternity testing when, as here, provisions of the Estates and Trusts Article govern. *See Kamp*, 410 Md. at 664. In this case, as in almost any other, avoiding child support payments may well be in the best interest of a presumed father, but it is, quite obviously, usually not in the best interest of the child, especially in cases like the one *sub judice* where the presumed father has not shown that someone else can be made to pay child support. As Judge Dugan pointed out, the children could be harmed if he ordered DNA testing and if the tests showed that appellant was not the father. There was evidence supporting that finding. For instance, the evidence showed that as of the date of the April 28, 2010 hearing, appellant had been making child support payments pursuant to an October 5, 2009 order of court, to which he had consented. Notably, the agreement to pay child support was made about six months after a DNA lab had informed appellant that he was not Davia's biological father.

In the subject case, there was no real proof, in contrast to mere speculation, as to who the biological father might be of Dayon and Davia, if appellant's paternity was excluded. But even assuming, as appellant apparently does, that Carlos Casiano is the father of both minor children, there was not one scintilla of evidence that Mr. Casiano had any interest in establishing his status as the natural father. As the trial judge pointed out, no evidence was presented as to Mr. Casiano's ability to pay child support or whether he had any interest, whatsoever, in the children.

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. We therefore hold that Judge Dugan did not err when he denied appellant's request for DNA testing.

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

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

2. In his brief, appellant argues that "if DNA testing is not ordered, the children have no way of knowing the identity of their biological father. How will the children then be able to provide medical information for the purposes of treatment?"

3. At the time of the hearing before Judge Dugan, Mr. Pattawi was not incarcerated. Apparently, however, between the time of Judge Dugan's denial of the requested DNA testing and the date that appellant's brief was filed, appellant had begun serving a two-year sentence imposed by a Federal Judge.

NO TEXT

**Cite as 9 MFLM Supp. 17 (2012)**

**Custody: modification: evidence**

# Heather Thomeczek, f/k/a Heather Wooldridge v. Christopher Coquia

*No. 1212, September Term, 2011*

*Argued Before: Meredith, Kehoe, Eyler, James R. (Ret'd, Specially Assigned), JJ.*

*Opinion by Eyler, James R., J.*

*Filed: July 17, 2012. Unreported.*

**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, appellant, appeals from an order of the Circuit Court for Carroll County, awarding sole legal and physical custody of Ryan George Coquia ("Ryan"), minor child, to Christopher Coquia, appellee. On appeal, 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, utliz[ed] a biased custody report, and [took] into account improperly authenticated Facebook entries. . . ." Perceiving no abuse of discretion or error, we shall affirm.

### Factual & Procedural Background

Ryan was born to the parties on December 13, 2005. The parties cohabitated together with Ryan for approximately nine months following his birth. In August of 2006, however, the parties separated following an allegation of domestic violence by appellant against appellee. Thereafter, in July of 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 a complaint for modification of custody after learning that appellant intended to move to Illinois with Ryan. An emergency modification of custody hearing was held before a master on November 17, 2010. Following the hearing, on November 24, 2010, the master issued a report and recommendation, and on February 7, 2011, a memorandum opinion was issued.[1]

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

Subsequently, 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 from counsel regarding the admissibility at the merits hearing of certain Facebook postings from appellant's Facebook page. Counsel for appellee argued that, at the hearing before the master,[2] appellant had admitted, either implicitly or explicitly, to making certain postings. Specifically, appellant had explicitly admitted to making the following statements, which her counsel before the circuit court did not dispute:

> "Heather Wooldridge-Thomeczek is in a sad and dark place in her life." (July 25, 2010)
>
> "Heather Wooldridge-Thomeczek wishes I could crawl into a whole [sic] cause [sic] no one would miss me." (August 1, 2010)
>
> "Heather Wooldridge-Thomeczek ok drama came to my door again today aka my dad to tell me he hates me wow is it too early to have a drink???????????? Maybe I just need a hug." (September 24, 2010)
>
> "Heather Wooldridge-Thomeczek Yep it is [expletive] up at least he didn't call me a stupid little [expletive] in front of my kids this time." (September 24, 2010)

With regard to the last posting, upon further questioning by her own counsel at the hearing before the master, appellant admitted that "[h]e has actually never called me a stupid little [expletive] in front of any of [her] children," and that was "a lie." Evidence was also presented to the circuit court that appellant had made entries on her Facebook page, which entries reflected a conversation between appellant and another woman named Melissa Fields. Upon questioning by

her own counsel at the hearing before the master, the following transpired in that regard:

> Q Was this a private conversation or was this on your main account?
>
> A *It was a private conversation*.
>
> Q Do you have any idea how someone would have gotten a private conversation you were having?
>
> A Not unless they hacked my account.

(Emphasis added). Appellant denied, however, making certain other statements that appeared on her Facebook page, specifically, certain "status shuffle" messages that "randomly" appeared on her Facebook page "without [her] knowledge." Appellant argued that pursuant to Griffin v. State, 419 Md. 343 (2011), the Facebook entries that she did not admit to making, including the "status shuffle" messages and the private conversation between herself and Melissa Fields were not properly authenticated; thus, inadmissible.

After hearing arguments on the admissibility issue, and taking into consideration Griffin, the court ruled as follows:

> . . . [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 that 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 who is alleged to have made them.
>
> So in the event that there is further foundation relative to the new requirements of *Griffin*, that could change. But at least currently under what has been presented to the Master, those disputed statements that I have identified would not be.
>
> All right. Any questions about that?
>
> APPELLEE'S COUNSEL: Just simply that the [c]ourt is then reserving on the status shuffle ones pending any further foundation.
>
> THE COURT: Yes. There has to be a foundation that meets *Griffin*.
>
> * * *

Following the court's admissibility ruling, the hearing commenced, and the following was adduced, in relevant part.

Alice Doyle, a custody evaluator for the circuit court, testified that she did a study with regard to Ryan, and prepared a 26-page "Custody Evaluator Report" reflecting the results of that study. The report was admitted into evidence as "Court's Exhibit 1" without objection. Ms. Doyle recommended in her report that Ryan be in the sole physical and legal custody of appellee.

Ms. Doyle testified that in making her custody evaluation, she interviewed both appellant and appellee. She stated that she had spent approximately 60 hours conducting her investigation and preparing her report, which was "way more" time than she usually spent conducting family studies. She agreed that she had spent more time with appellee and Ryan than she had with appellant and Ryan, but testified that that had no impact on her report. Ms. Doyle's report also indicated, however, that after appellant moved to Illinois, Ms. Doyle suggested to appellant that she visit her home there while on a business trip to the Midwest, but that appellant declined her request.

Appellant's counsel asked Ms. Doyle whether she had looked at appellant's Facebook entries as part of her investigation. Ms. Doyle responded that she had, and also that she was aware that objections had been raised as to certain Facebook entries at the hearing before the master. Ms. Doyle stated that she discussed the Facebook entries with appellant, and that appellant told her that she "made some and she didn't make some others, the status shuffle in particular." Ms. Doyle did not testify as to any particular Facebook entries, although her report indicated that she had discussed "status shuffle" Facebook entries with appellant, and that appellant had "advanced the position that her Facebook account was possibly 'hacked'. . . ." The specific substance of the Facebook entries at issue was not set forth in the report.

Ms. Doyle admitted on cross-examination that appellee had disclosed to her that he had attended anger management classes after an alleged domestic violence incident between appellant and appellee, but that she did not include that in her report because she had to "cut down and kind of stop somewhere."

Eric Bowers testified on appellee's behalf Mr. Bowers stated that he had known appellee for fifteen years and had never seen him have outbursts of anger, violence, or abusive behavior. Mr. Bowers also knew appellant for most of his life, as she had been his neighbor and a friend of the family. He testified that appellant was a "difficult personality to deal with," and could be "extremely volatile." He admitted that he had not spent any extended periods of time with appellant since she was nineteen years-old.

Frank Maccia testified on appellant's behalf. Mr. Maccia was a neighbor of appellant and appellee dur-

ing the time that they lived together. According to Mr. Maccia, appellee was "extremely loving, patient, [and] caring," and he was very "loving" both to Ryan and to Austin, appellant's other son. Mr. Maccia never saw appellee exhibit any abusive or violent behavior towards appellant or the children. Mr. Maccia testified that appellant, on the other hand, did not exhibit affectionate behavior towards the children. Mr. Maccia characterized appellant as "rude" and not "fully stable."

Terry Lee Sheffler, appellee's stepfather, testified on appellee's behalf. Mr. Sheffler testified that he had never known appellee to be violent or physically or verbally abusive. Mr. Sheffler testified that his wife is on medication for anxiety.

Connie Sheffler, appellee's mother, testified on appellee's behalf. Ms. Sheffler testified that it is not in appellee's nature to be aggressive or prone to angry outbursts or violence. She stated that appellee would never harm Ryan. According to Ms. Sheffler, appellant is very "unwelcoming" to Ryan when Ryan is dropped off to her home after visitation with appellee. Ms. Sheffler testified that she takes blood pressure medication, but does not take medication for anxiety. She stated that she has taken Lorazepam for anxiety in the past.

Ms. Sheffler testified that she could provide care for Ryan during the week while appellee is at work. She stated that she does not work because she is on disability for anxiety. She stated that she has "adjusted very well to [her] condition," which is why she does not "need the medication," but even though she is able to fully function, she still receives Social Security disability. Ms. Sheffler also has a fourteen year-old son who she cares for.

Appellant testified to the following, as an adverse witness. Appellant agreed that she had previously testified that appellee had hit her in the face, threatened to kill her on numerous occasions, put a knife to her throat, tried to cut off her hair, pushed her down the steps when she was holding Ryan, constantly yelled at her and Austin, and that he was abusive. She agreed that she never sought counseling and did not have any medical records relating to the alleged abusive incidents, other than one incident where appellee threw a glass dish at Austin's head, causing him to need stitches. Appellant could not locate the medical records relating to that incident, however.

Appellant testified that on August 20, 2006, appellee was arrested after he hit her. She stated that the previous day, appellee had pushed her down the steps while she was holding Ryan and that the police had been called. She stated that the police did not arrest anyone, but instead stated that if they had to come back again, either appellant or appellee would go to jail. According to appellant, one of the police officers knew appellee. After the police left, appellant took the children to her parents' house and went to work. She believed appellee went fishing. The following day she gave appellee a note staling that she "wanted to work things out," that appellee was a "good dad," that she "was in the wrong," that she had been "rude" to appellee's mother, and that she was "sorry for [her] immature behavior." Appellant stated that she wrote the note because appellee's police officer friend had come to her job and told her that she had "better apologize to [appellee], if [she] knew what was good for [her]." Appellant agreed that she did not call the police when appellee put a knife to her throat, or when he threatened to kill her, or when he tried to cut off her hair.

Appellant testified that she thought that Ms. Doyle's report was biased against her. She agreed that following a Social Services investigation into an incident where appellee allegedly choked Ryan, Social Services ruled out the possibility of child abuse.

Appellant testified that she did not post "status shuffle" entries on her Facebook account and that she rarely uses Facebook. She agreed that she did put some entries that may have appeared to be sad and depressing on her Facebook account, but stated that they were related to a friend passing away.

Appellant testified that prior to moving to Illinois, her husband, Nate, had applied for jobs in Texas, Florida, Ohio and Maryland. She stated that she discussed staying in Maryland with Nate, but he chose the best financial option. Appellant agreed that when she had been in Maryland for a prior court hearing, the only time appellee was allowed visitation with Ryan was during a three-hour period of time that Ms. Doyle had set up so that she could observe appellee with Ryan. She agreed that appellee had sent her text messages asking for visitation while Ryan was in town, but she "figure[d] . . . [her] parents would like to see their grandson."

Appellee testified that he and Ryan "do everything together." He stated that if he was awarded custody, his mother, Ms. Sheffler, could watch Ryan while appellee was at work. He stated that his work schedule is "pretty flexible" and that he can "come and go as need be. . . ." Appellee testified that Ryan has a "strong relationship" with appellee's family, and that Ryan also has a close relationship with appellant's family. He agreed that he would "[a]bsolutely" allow appellant's family the opportunity for visitation with Ryan, and would be willing to work with appellant regarding visitation.

Appellee testified that he did not push appellant down the stairs on August 19, 2006. He stated that he did not know either of the officers who arrived at his house after appellant called the police. He testified

that the following morning, he awoke and found a letter from appellant on the table. Later that day, appellant started ranting at appellee and then slapped him in his face. Appellee called 911. Appellant then said that she could not believe appellee had called the police, and started hitting herself in the face. As a result of that incident, appellant filed a domestic violence petition and assault charges against appellee. Appellee testified that the petition was later dismissed and appellant dropped the assault charges. Appellee denied ever hitting appellant, or trying to cut off her hair, or locking Austin in a closet, or holding a knife to appellant's throat.

Appellee also testified that appellant filed a complaint with the Department of Social Services alleging that appellee had burned Ryan with a cigarette. After an investigation, however, the allegations were ruled out. Appellant filed another domestic violence petition and another complaint with the Department of Social Services in 2010. That petition was also dismissed and the complaint with the Department ruled out. Appellee testified that he did not take anger management classes, but that he had taken a parenting class because appellant would not allow him to have overnight visitation until he took the classes.

Appellee testified that he and appellant had discussed counseling for Ryan as a result of "him making up stories." Appellee stated that because of the previous false accusations against him, he takes a witness with him when he picks up or drops off Ryan for visitation.

Appellee testified that appellant did not discuss removing Ryan from preschool with him. In October of 2010, appellant told appellee that she would be moving to Illinois. On December 2, 2010, appellant arrived to pick Ryan up for visitation, and appellant "just wasn't there."

The hearing was continued until May 24, 2011. When the hearing resumed, the following additional testimony was adduced, in relevant part.

Appellee testified that he does not believe that appellant views his role in Ryan's life as important. He stated that appellant does not notify him of Ryan's doctor or dentist appointment, did not discuss removing Ryan from preschool with him, and did not inform him of when she was moving to Illinois. He stated that since appellant moved to Illinois, visitation with Ryan has been made difficult. He also stated that phone conversations have been cut short.

Pauline Reisberg, the preschool director at the preschool that Ryan had attended in Maryland, testified that appellant dropped Ryan off at the preschool every day and attended parent/teacher conferences. She only recalled seeing appellee at one Christmas program at the school.

Suzanne Wheatley, a witness called by appellant, testified that she had known appellant for 3 1/2 years, and that she had never seen appellant have any mood swings. Ms. Wheatley believed that appellant treated Ryan appropriately.

Doris Woolridge, appellant's mother, testified that appellant and Ryan had come to live with her after appellant and appellee ended their relationship. Ms. Woolridge believed that appellant is a good mother. She stated that Ryan gets along very well with his other siblings.

Betty Stanton, appellant's aunt, testified that appellant is a "loving, caring" mother. Ms. Stanton did not have any concerns about appellant's ability to parent Ryan.

Appellant was recalled to testify. She testified that living with appellee "was a living nightmare." She stated that she had never taken medication for depression and that she had only experienced depression once in her life after her friend committed suicide.

She testified that she took Ryan to all of his doctors appointments, and that she always made appellee aware of the appointments. She stated that she made efforts for appellee and Ryan to have visitation after she moved to Illinois, but that appellee "doesn't talk to [her] at all." She stated that appellee had "never even once asked . . . how Ryan's been since he's been in Illinois." Appellant believed that she had made good faith efforts to foster visitation. She stated that she does not restrict the amount of time that Ryan can speak to appellee on the telephone.

Appellant testified that she did not believe Ms. Doyle's report was accurate with regard to her. She stated that Ms. Doyle talked to her "maybe a total of 30 minutes" with regard to Ryan. She stated that she has concerns regarding appellee's ability to parent Ryan because appellee has a "temper."

Appellant believed that it would be in Ryan's best interest to remain in her custody. She stated that she would continue to keep appellee informed regarding all of Ryan's appointments, and that she would "love to have that communication line open" with appellee.

On July 8, 2011, the court issued a memorandum opinion and order. After noting that it had received evidence, including custody evaluation report, and making findings of fact, including that appellant "has made Facebook entries which reveal her to be depressed and untruthful," the court set forth its conclusions of law, providing as follows, in relevant part.

1. Custody

> The parties have stipulated that the Mother's move to Illinois is a material change of circumstances affecting Ryan.

* * *

. . . [A] child custody determination is made based on the best interests of the child. The [c]ourt must consider . . . some factors to give guidance with this determination:

(a) The capacity of the parents to communicate and to reach shared decisions affecting the child's welfare.

These parties do not have a history of effective communication about Ryan, nor do they have the capacity to do so.

(b) Willingness of parents to share custody.

Given the distance between the parties, neither seeks to share legal or physical custody; rather each seeks sole custody.

(c) Fitness of the parents

Mother is certainly fit for the day to day care of Ryan, although she refused to provide counseling for Ryan after having agreed to do so and threatened the counselor when Father attempted to do so. Her interference with, and her unwillingness to promote, Father's relationship with Ryan detracts from her fitness.

Father cared for Ryan about one-third of the time before Ryan moved to Illinois. Father is fit for the day to day care of Ryan, although Father did not insist on counseling for Ryan until Mother decided to move. There is no credible evidence that Father interferes with Mother's relationship with Ryan.

(d) Relationship established between child and each parent.

The evidence presented at trial supports the finding that each parent has an excellent and loving relationship with Ryan.

(e) The preference of the child.

No evidence was introduced on this factor.

(f) Potentiality of maintaining natural family relations.

Regardless of who has custody, the loss of a regular relationship between Ryan and the other parent will be a great loss for Ryan.

The evidence supports the conclusion that Mother does not promote the importance of Father's relationship with Ryan. Her misconduct during visitation exchanges in front of Ryan, the cavalier manner in which she left Maryland with Ryan and without advising Father, her early refusal to let Father have overnight visitation with Ryan until he completed a parenting course (after he had lived with Ryan for eight months), her refusal to permit two weeks visitation since being in Illinois, her refusal to permit Ryan additional time with Father during her trips from Illinois to Maryland during this litigation, her refusal to advise Father timely of medical appointments, her refusal to correct Ryan when he calls Nate "daddy," her interference with Ryan while he is talking on the phone with Father — all of these facts and others do not bode well for Father's relationship with Ryan if Ryan lives with Mother.

Father has not negatively affected Mother's relationship with Ryan. Father eventually turned down week long visitation when Mother offered it because Mother kept changing the day and time. If Ryan lives with Father he will be near virtually all of his family, except Mother and his half-siblings.

(g) Demands of parental employment.

Mother's part time employment coincides with Nate being at home to provide daycare, so there will be no impact. Father will need to work full time, and Ryan will be cared for by Father's mother before and/or after school.

(h) Age and number of children.

Ryan is the only child of the parties. He is five and one-half years of age.

(i) Sincerity of the parties' requests.

Both parties are sincere in their desire for custody.

(j) The adaptability of the prospective custodian to the task.

With the exception of following through with Ryan's counseling, Mother has a history of taking care of Ryan's physical needs. She is less adaptable emotionally, apparently not knowing or not caring how her provocative conduct at visitation exchanges and her persistent allegations of domestic violence and child abuse will affect Ryan. Her anger for Father seemingly overrides any concern she may have for Ryan's emotional well being.

By attitude and by action, Father appears to be more adaptable to all of Ryan's parenting needs. He has prudently taken witnesses to visitation exchanges to try to avoid conflict. His demeanor and testimony impress this [c]ourt that he will make allowances for Mother that will maximize her relationship with Ryan. This shows a level of commitment to Ryan's best interest never shown by Mother.

(k) The physical, spiritual and moral well being of the child.

Ryan would be physically safe with either parent. No evidence was adduced regarding any religious or spiritual training. Since children learn what they live, the moral well being of Ryan will be negatively affected by the Mother's lack of truthfulness and emotional outbursts, as discussed below. Father is of better moral character and will provide Ryan with a better moral compass.

(l) The child's environment and surroundings

Mother lives in a single family home in Illinois and Ryan would share a room with Austin. Father lives in a two bedroom apartment in a rural setting in which Ryan would have his own bedroom. Both environments are suitable.

(m) Influences on the child.

Although Mother loves Ryan and he loves her, it is likely that Mother's mercurial temper and penchant for not telling the truth would negatively affect Ryan. Ryan's false abuse allegations about Father reflect Mother's own views and the false abuse allegations about Nate evidence Ryan's confusion. Nate, as well as Ryan's half siblings, would be a positive influence on Ryan. Father, as well as Ryan's extended family in Maryland, would likely be a positive influence on Ryan.

(n) The character and reputation of both parties.

Father is a man of good character and reputation. Mother accuses but has not proven that Father is emotionally and physically abusive. Father has proven that Mother is given to serious mood swings in front of Ryan. Mother's lack of truthfulness is a major character flaw.

(o) Potential disruption of child's social and school life.

Living with Father would take Ryan from his half siblings as well as any friends he has made in Illinois. Living with Mother would deprive Ryan of the friendships he made while living in Maryland. Since Ryan starts a new school in the fall, disruption of school life is not a factor.

(p) Proximity of parental homes.

Not applicable

(q) Material opportunities for the child

As between these parties, Father is fully employed and is capable of providing better material opportunities for Ryan. Although Nate earns a significant income, and Ryan will benefit from the standard of living Nate brings to Mother's family, Mother does not have a history of domestic tranquility, so that while Nate's salary may currently benefit Ryan the [c]ourt cannot find that it will continue to do so.

(r) Other factors.

As to which parent should be granted sole custody, the maternal preference doctrine was abolished long ago in Maryland.

* * *

The [c]ourt must focus on Ryan's best interests. Ryan is entering a part of his life when he will assume more responsibility for his own personal care. Of primary importance will be not only a custodial parent that loves him, and he them, but one who can

> help him develop a sense of right and wrong, personal morals and the courage to tell the truth. As between these parents, the person best suited for this task if the Father. Additionally, because of the distance between these parties, Ryan needs to live with a parent who will encourage and foster as normal relationship with the noncustodial parent as possible by being flexible. Again, as between this Mother and this Father, the evidence establishes that the parent most likely to be able to accomplish this goal is the Father. Therefore, the [c]ourt will grant sole legal and physical custody of Ryan to Father.
>
> * * *

After the court denied appellant's motion for new trial, this appeal followed.

**Discussion**

As noted above, appellant contends that the court abused its discretion or committed error when it granted sole legal and primary physical custody to appellee. In that regard, appellant contends that 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 with appellant.

Maryland Rule 8-131(c) provides that:

> 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 that regard, an appellate court "should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence." Van Wyk v. Fruitrade Intern., Inc., 98 Md. App. 662, 669 (1993) (internal citations omitted); *see also* Nixon v. State, 96 Md. App. 485, *cert. denied*, 332 Md. 454 (1993) (holding that if there is any competent material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous).

The standard of appellate review in child custody cases is both limited and deferential. McCarty v. McCarty, 147 Md. App. 268, 272 (2002). Of importance, an appellate court does not make its own determination as to a child's best interest, and the scope of appellate review is limited to whether the trial court abused its discretion or whether its factual findings were clearly erroneous. Best v. Best, 93 Md. App. 644, 655 (1992) (*citing* Montgomery County v. Sanders, 38 Md. App. 406, 419 (1977) (other citations omitted)). A finding is not clearly erroneous if it is supported by "competent and material evidence in the record." Lemley v. Lemley, 109 Md. App. 620, 628 (1996). The trial court's "findings of fact are to be given great weight since [it] has the parties before [it] and has 'the best opportunity to observe their temper, temperament and demeanor, and so decide what would be for the child's best interest. . . .'" Best, 93 Md. App. at 655 (*citing* Sanders, 38 Md. App. at 419) (other citations omitted)).

Physical custody determines where a child will live; "[l]egal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." Taylor v. Taylor, 306 Md. 290, 296 (1986). In any child custody case, the determination as to physical and legal custody must be made upon careful examination of the facts on a case by case basis, Bienenfeld v. Bennett-White, 91 Md. App. 488, 503, *cert. denied*, 327 Md. 625 (1992), and "the paramount concern is the best interest of the child." Taylor, 306 Md. at 303. Other factors that courts consider in determining custody include: (1) the fitness, character and reputation of each parent and their adaptability to the task of legal custodian; (2) the relationship established between the child and each parent; (3) the preference of the child; (4) the age, sex, and health of the child; (5) the residences of the parents, the environment and surroundings in which the child will be reared, the opportunity for visitation, and the influences likely to be exerted on the child; (6) potential disruption to the child's social and school life; (7) the demands of the parents' employment; (8) the age and number of children; (9) the desire of parents, any agreements between them, and the sincerity of their request; (10) the potentiality of maintaining normal family relations; (11) the financial status of the parents; and (12) any other circumstances that reasonably relate to the issue. Id. at 303-10; Wagner v. Wagner, 109 Md. App. 1, 39, *cert. denied*, 343 Md. 334 (1996); Sanders, 38 Md. App. at 420.

In the case before us, the court explicitly recognized each of the factors that it needed to consider. The court went through each factor in detail, seriatim. After hearing testimony from both parties over the course of a 2-day trial, during which both appellant and appellee proffered testimony with respect to, *inter alia*, their respective relationships with Ryan and the allegations of abuse, 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."

To the extent appellant is asserting on appeal that the court erred or abused its discretion in determining Ryan's best interests, as we set forth above in our lengthy review of the testimony and evidence adduced at trial, the court's findings are clearly supported by the record, including its credibility determination regarding appellant. We reiterate that the court carefully considered all of the 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 on appeal, as best we can discern them from the brief, first appellant contends that the trial court "failed to give any deference to the master," i.e., the master's finding that it was in Ryan's best interests to remain with appellant. In that regard, we note that this case does not involve the 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 here did.

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

Finally, appellant claims that the court abused its discretion in allowing into evidence various Facebook entries. Appellant asserts that pursuant to Griffin, *supra*, the Facebook entries relied upon by Ms. Doyle in making her recommendations and considered by the court in rendering its opinion, were not properly authenticated; thus, inadmissible.

Our review of the record reveals that the court only admitted into evidence Facebook entries that appellant admitted to making, either explicitly or implicitly. There is no evidence that 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, as set forth above, support such a finding. We perceive no abuse of discretion.

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

1. Appellant asserts in her brief that the master recommended that she continue to have primary physical custody of Ryan. The record extract provided to this Court does not include the master's report and recommendations, nor does it include the master's memorandum opinion or any transcripts from the hearing before the master. As noted previously, one of appellant's assertions is that the circuit court abused its discretion and/or erred when it "failed to give any deference to the master," even though the court "referred to the transcripts from the prior hearings," in its memorandum opinion. Without being provided with the transcripts of the master's hearings, or the report and recommendations or memorandum opinion, we can not reach any conclusions as to what those documents provided. In any event, however, those documents are unnecessary to our disposition on the merits.

2. Appellee included an excerpt from the transcript of the hearing before the master as an appendix to his brief in this Court. Those pages reflect appellant's testimony regarding postings made on her Facebook account.

**Cite as 9 MFLM Supp. 25 (2012)**

**CINA: sibling neglect: protective supervision**

# In Re: Elijah G.

*No. 2300, September Term, 2011*

*Argued Before: Krauser, C.J., Graeff, Kenney, James A., III (Ret'd, Specially Assigned), JJ.*

*Opinion by Graeff, J.*

*Filed: July 17, 2012. Unreported.*

**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., appellant ("Ms. S."), and Justin G. ("Mr. G."). Upon petition by the Montgomery County Department of Health and Human Services (the "Department"), appellee, the Circuit Court for Montgomery County, sitting as a juvenile court, adjudicated two-month-old Elijah to be a child in need of assistance ("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 juvenile court erred in finding Elijah to be a CINA.[1] As we set forth below, we shall affirm the judgment of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

At the CINA adjudicatory hearing, held on November 28 and November 30, 2011, the Department presented testimony and reports from Department workers, psychological counselors, law enforcement personnel, and others who had worked with Ms. S., Mr. G., and their other children, both before and after Elijah's birth.

Elijah G. was born on September 28, 2011. Following his birth, the Department placed Elijah in shelter care because of his parents' history of neglecting Elijah's siblings, Victoria G., and Jayden G., and Ms. S's history of neglecting Elijah's half-sibling, Daeshawn E.[2]

Beginning in May 2008, the Department and the police received multiple reports of domestic violence between Mr. G. and Ms. S., leading the Department to conduct neglect investigations. In December 2008, the Department interviewed Daeshawn, who was four years old at the time, and Daeshawn advised that his parents fought all of the time, yelling and hitting each other. He described an incident during which Mr. G. stabbed himself. In January 2009, the Department concluded that Ms. S. and Mr. G. had neglected Daeshawn, Victoria, and Jayden.

On January 30, 2009, Ms. S. contacted the Montgomery County Crisis Center ("Crisis Center") alleging that Mr. G. was trying to poison her and her children were trying to communicate with her by underlining sentences in certain books. She expressed "some fear/reluctance to return to her home (due to the history of domestic violence with Mr. G.)," and the Crisis Center assisted Ms. S. in moving to a shelter. The next morning, the Department learned that, when Ms. S. woke up, she stated that "they are after me." With no shoes and no coat, she jumped out the window and ran to the wooded area behind the shelter, leaving the children behind in the shelter. Police were called, and when they located Ms. S. in the woods, they described her as delusional and transported her to the hospital, where she was subsequently transferred to another facility for placement in the psychiatric unit.

In February 2009, all three children were adjudicated CINA based on findings of neglect. Daeshawn and Victoria were placed with Mr. G's mother under a plan of custody and guardianship, while Jayden was placed in a foster care home.

On October 12, 2010, during a supervised visit at the Department, Ms. S. and Mr. G. absconded with all three children, who were later recovered by police from Mr. G's apartment. Ms. S. and Mr. G. were convicted of child abduction based on that incident. Ms. S. was sentenced to consecutive terms of 30 days for each of three counts, with 18 months of supervised probation.[3]

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

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

Heather Conversano discussed with Ms. S. the Department's concerns stemming from their neglect of Elijah's siblings, their history of domestic violence and absconding with the children, and Ms. S's mental health needs. According to Ms. Conversano, Mr. G. declined to speak with them. Although Ms. S. acknowledged "mistakes in the past with Mr. G," she insisted that both parents had matured and learned from them.

Ms. Conversano recounted that, although Ms. S. sought "a fresh start" with Elijah, she had no firm housing plans following discharge. Immediately prior to Elijah's birth, Ms. S. had been staying with her aunt Ms. S. told Ms. Conversano that she hoped to return there "temporarily," and "her backup plan was to be living with her girlfriend," Ms. A.C.

Concerned that Ms. S's living arrangements were both temporary and unverified, and given the family history of child neglect requiring continuing out-of-home placements, Ms. Conversano filed a petition, on behalf of the Department, on September 29, 2011, alleging that Elijah was a CINA because he was at substantial risk of neglect. Ms. Conversano simultaneously initiated emergency shelter care proceedings and attempted to verify Ms. S's living arrangements. The juvenile court initially ordered shelter care, but on October 4, 2011, it 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 support services, pending consideration of the Department's CINA petition.

On October 12, 2011, Ms. Conversano met with Ms. S. at the home of her aunt. On that occasion, Ms. S. declined to sign a service agreement with the Department before talking to her lawyer, stating that she did not want to be "cornered."

Ms. Conversano met with Ms. S. weekly at her aunt's home, through November 3, 2011. During this time, Mr. G. made occasional visits with Ms. S. and Elijah. Ms. S's housing plans remained unsettled; her credit problems and criminal conviction were obstacles to securing independent housing. Ms. S. variously told Ms. Conversano that she was going to move into the basement of an unidentified woman she knew, that she was going to move to the home of another friend, and that she obtained a $300 emergency housing allowance to secure a temporary home for 30 days while she was on a housing wait list. During a November 9 phone call, Ms. S. informed Ms. Conversano that her new plan was to alternate, two weeks at a time, between the homes of her aunt and Ms. A.C. Ms. Conversano was concerned that Ms. S's extended stays would jeopardize the "Section 8" housing for both women.

Between November 15 and November 21, 2011, Ms. Conversano was unable to reach Ms. S. in order to schedule another home visit. Ms. S. eventually responded to Ms. Conversano's multiple voice mail messages on November 21, and she scheduled an appointment at the Department's office on November 23, 2011, which she did not attend. At that time, Ms. S. "still refused to agree to participating in continuing services with the Department." That same day, the Department filed an amended CINA petition in preparation for the CINA hearing scheduled to begin on November 28.

At the hearing, Ms. S's probation officer, Jamie Fleming, testified that Ms. S. had violated her probation for her criminal conviction by failing to report between June and November 17, 2011, failing to provide verification of psychological or psychiatric evaluation and treatment, and failing to verify that "she's been taking her medication as prescribed." When Ms. S. did report on November 17, she admitted that she had not been taking her prescribed psychotropic medication because she was breast feeding, nor had she attended counseling, as mandated by her conditions of probation. As a result, Ms. Fleming requested a warrant for Ms. S's arrest, although Ms. Fleming testified that she would reconsider asking for the full back-up time if Ms. S. took proper "steps to be back in compliance."

Cornelia Skipton, a therapist with the Abused Persons Program, testified as an expert in clinical professional counseling with expertise in domestic violence. Ms. S. received group counseling through the program, attending inconsistently from July 2009 until she unilaterally stopped attending in June 2010. While in the program, Ms. S. was "working on her independence," but "was very conflicted about" continuing her relationship with Mr. G. and was still in an abusive relationship with him. Although Ms. Skipton was not aware of Ms. S's current relationship with Mr. G., she was concerned that, if the relationship continued as it was, Elijah would be exposed to domestic violence between Ms. S. and Mr. G.

Ms. S's friend, Ms. A.C., testified that Ms. S. had been living with her, her husband, and her child, for the two and a half weeks immediately prior to the CINA hearing. During this time, Mr. G. brought Ms. S. and Elijah to Ms. A.C's home and he had visited once. According to Ms. A.C., although Ms. S. and Mr. G. "have anger issues" for which they need "couples counseling," "they obviously want to be together."

Steven Miller, a licensed clinical professional counselor, testified that he initially treated Ms. S. from April to August 2011, as a result of a referral from Child Welfare Services. On one occasion when Ms. S. had no place to stay, Mr. Miller made arrangements for her to stay in a shelter. At the time Ms. S. stopped

attending counseling sessions, she was in the late stages of pregnancy, and Mr. Miller concluded that she was "having some marked impairment in her ability to function," with a "fairly low" "global functioning" assessment of "around 40," and a diagnosis of bipolar disorder in partial remission. Mr. Miller recommended psychiatric evaluation and counseling. He resumed treating Ms. S. after Elijah was born, receiving authorization to treat her at home. In Mr. Miller's view, housing instability and the stress of potential homelessness could be expected to undermine Ms. S's mental health.

Barbara Jacobs, a licensed clinical social worker with the Department, had been working with Daeshawn, Victoria, and Jayden since April 2010. Testifying as an expert in social work, including safety and risk assessment, Ms. Jacobs opined that Elijah would be at risk in Ms. S's custody given her "significant mental health history," as well as her history of inconsistent compliance with prescribed treatment and counseling, history of becoming anxious and overwhelmed under stress, the significant stressors of having a newborn, no permanent home, no job, three other children in foster care, and the history of domestic violence between Ms. S. and Mr. G. In Ms. Jacob's view, as long as Ms. S. continued a relationship with Mr. G., it would not be in the children's best interests to be reunited with Ms. S.

The juvenile court made the following findings:

> 2. The child's older siblings Daeshawn E, Victoria G, and Jayden G were found CINA due to neglect on February 18, 2009. At the time, the facts sustained, as agreed to by the parties, noted multiple referrals to Child Welfare Services, a history of domestic violence between the parents, a suicide attempt by [Mr. G.], and unstable behavior by [Ms. S.]
>
> 3. Both parents have criminal histories: Between 2006 and 2011, Mr. [G.] was convicted of disorderly conduct, possession of marijuana, possession of CDS paraphernalia on two occasions, 2nd degree assault on two occasions, violation of an ex-parte order, and child abduction. Ms. [S.] was convicted of child abduction. Ms. [S.] was convicted of child abduction stemming from an October 12, 2010 visit at the Department, where both parents absconded with the three older siblings.
>
> 4. The parents have a significant domestic violence history together: [Ms. S.] filed four petitions for a domestic violence protective [order] between 2008 and 2010. Two of these petitions were filed during the pendency of the siblings' CINA case. Only one Final Order resulted from the petitions; in the other cases [Ms. S.] failed to appear and the cases were dismissed. The parents have reconciled on multiple occasions, without successfully integrating the lessons of the Abused Person's Program.

Thereafter, the juvenile court entered a written Adjudication/Disposition Order that expressly incorporated and affirmed those factual findings, and further found that

> 5. The Department attempted to provide services to [Ms. S.] and [Mr. G.] in the siblings' case. The attempts have been largely ineffective because of the parents' sporadic engagement or refusal to cooperate. The Mother on two occasions verbally berated a Department Community Services Aide, and on one occasion physically assaulted the same aide. The Mother and the Father had reputedly violated Orders in the older siblings' cases; specifically, having contact with each other before, during, or after visits. Recently, [Ms. S's] probation officer in the abduction ease filed a Violation of Probation petition because of [Ms. S's failure] to report and failure to provide verification of psychiatric treatment, counseling and medication. The Department offered [Ms. S.] continuing services for Elijah. However, [Ms. S.] refused to sign any documents, including the two most recent service contracts in her other children's CINA cases. Since Elijah's birth, [Ms. S.] has been unclear and inconsistent when informing the Department of her housing plan. [Mr. G.] has not spoken with the social worker in this case.

Based on these findings, the juvenile court found that Elijah is a CINA for the following reasons:

> 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 Mothers' mental health issues remain unresolved.

The court ordered that Elijah may remain with his Mother while under the protective supervision of the Department, subject to the following conditions:

**That** the Mother shall:

1. obtain and maintain stable housing for the Child;

2. participate in the Abused Persons Program and follow all recommendations;

3. participate in a parenting class, separate from the Father, under the direction of the Department;

4. participate in a psychiatric evaluation and medication assessment and follow through with all treatment recommendations, including therapy;

**That** Father shall:

1. have visitation with the Child at the Visitation House, in one-to-two hour increments, under the direction of the Department;

2. participate in a parenting class, separate from the Mother, under the direction of the Department;

3. participate in an anger management class, under the direction of the Department;

4. participate in a mental health evaluation and follow all treatment recommendations, including individual therapy, under the direction of the Department;

**That** the Child shall receive the services of a Court Appointed Special Advocate (CASA);

**That** the Department shall assist the Mother in acquiring housing.

Ms. S. noted this timely appeal.

## STANDARD OF REVIEW

Allegations in support of a CINA petition must be proven by a preponderance of the evidence. *In re Nathaniel A.*, 160 Md. App. 581, 595, *cert. denied*, 386 Md. 181(2005); Md. Code (2006 Repl. Vol., 2011 Supp.) § 3-817(c) of the Courts & Judicial Proceedings Article ("CJP"). In reviewing a CINA finding, this Court determines whether the juvenile court's factual findings are clearly erroneous and whether the court applied the correct legal standards. *In re Shirley B.*, 419 Md. 1, 18 (2011). "[W]hen the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion." *In re Yve S.*, 373 Md. 551, 586 (2003) (emphasis added). In doing so, we recognize that

> [q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. In sum, to be reversed the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

*Id.* at 583-84 (citations and quotations omitted).

## DISCUSSION

Among the fundamental rights protected under the United States Constitution "are a parent's Fourteenth Amendment liberty interest in raising his or her children as he or she sees fit, without undue interference by the State." *Id.* at 565 (footnote omitted). Parental rights, however, are not absolute because the State has an interest in protecting minors who are subjected to abuse or neglect. *Id.* at 569-70. In the exercise of its *parens patriae* power, a juvenile court may determine that a child is a child in need of assistance and "order that the child be committed to the local department 'on terms that the court considers appropriate[.]" *Id.* at 574. *See* CJP § 3-819(b)(ii).

A "[c]hild in need of assistance"is defined as "a child who requires court intervention because: (1) the child . . . has been neglected. . . . and (2) [t]he child's parents . . . are unable or unwilling to give proper care and attention to the child and the child's needs." CJP § 3-801(f). "Neglect," which as statutorily defined, means:

> The leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child, under circumstances that indicate:
>
> (1) That the child's health or welfare is significantly harmed or placed at risk of significant harm; or
>
> (2) That the child has suffered mental injury or been placed at substantial risk of mental injury.

CJP § 3-801(s).

Under this standard, a juvenile court "need not

wait until the child suffers some injury before determining that he is neglected," *In re William B.*, 73 Md. App. 68, 77 (1987), *cert. denied*, 311 Md. 719 (1988). A neglect finding may be made when "the child is merely *placed at risk* of significant harm." *In re Dustin T.,* 93 Md. App. 726, 735 (1992), *cert. denied*, 329 Md. 480 (1993). In evaluating whether such a risk exists, both the local Department and the juvenile court have "a right — and indeed a duty — to look at the track record, the past, of [a parent] in order to predict what her future treatment of the child may be." *Id*. That track record includes evidence that the parent has neglected the child's sibling. *See William B.*, 73 Md. App. at 77 ("The parents' ability to care for the needs of one child is probative of their ability to care for other children in the family.").

Nevertheless, because "the circumstances of the parties can improve over time, a parent should not automatically lose his or her parental rights in a perfunctory proceeding" premised solely upon the record from a prior CINA determination. *Nathaniel A.*, 160 Md. at 601. When, as in this case, the parent previously has been found to have neglected a child, she "should be permitted to present evidence demonstrating that circumstances have improved." *Id*.

Ms. S. argues that the juvenile court erred in declaring Elijah to be a CINA. She acknowledges that a CINA declaration may be premised upon an anticipatory finding that the child is at substantial risk of neglect and that there have been cases in which a parent's neglect or abuse of one child provided a factual basis for a determination that such a risk of neglect or abuse also exists for another child. Ms. S. contends, however, that her case is distinguishable from those cases 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:

> The uncontroverted evidence . . . was that Ms. S. was taking appropriate care of Elijah . . . 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, showing affection, demonstrating the ability to comfort them when needed, and interacting with them without ever having to be redirected by the supervising social worker. . . . 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. Therefore . . . Ms. S. had shown an improvement in her circumstances. 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.

According to Ms. S., the progress shown by this evidence "attenuated the link between her prior conduct and issues and her present circumstances with Elijah," so that "the court erred in finding Elijah to be a CINA based on substantial risk of neglect."

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.

As the court pointed out at the disposition hearing, despite the many services that the Department offered during the preceding 22 months, Ms. S's circumstances had not improved to the point that she had "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 in the totality of the circumstances. *See Dustin T.*, 93 Md. App. at 734 ("[T]he court failed to return Dustin to Ms. H. because of a *plethora* of factors, and not 'merely' because of Ms. H.'s drug addiction, *per se*.").[4]

Other factors included the risk of domestic violence, which the court found was still present at the time of the CINA hearing for Elijah. Although Ms. Skipton testified that Ms. S. made some progress when

she participated in the Abused Persons Program, Ms. S. unilaterally left the program against Ms. Skipton's recommendation in June 2010, after which she made another report of domestic violence against Mr. G. in November 2010. 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. Following Elijah's birth, that pattern continued when Mr. G. visited Ms. S. and Elijah in the hospital and at her aunt's house and Ms. A.C.'s residence. As Ms. A.C. observed at the CINA hearing, despite their contentious relationship and need for "couples counseling" regarding their "anger" issues, the couple still "want to be together."

Another factor was Ms. S's unstable behavior and the juvenile court's conclusion that Ms. S. failed to address consistently the mental health problems that factored into her neglect of Elijah's siblings. Ms. S's probation officer and psychologist testified that Ms. S. admitted that 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.

In light of this record, *Nathaniel A.* is instructive. There, we held that the juvenile court did not abuse its discretion finding that Mother's newborn daughter was a CINA based on evidence that the mother fractured her son's arm, subjected him and his sister to unnecessary doctor visits, and had an untreated depression problem. 160 Md. App. at 596-98. Because the mother failed to persuade the court that she had remedied these prior conditions, we held that the juvenile court had sufficient factual and legal grounds to find that the newborn was at risk of neglect or abuse. *Id*. at 600-01. Here, 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, the juvenile court considered other circumstances that had changed for the worse over the preceding year. In the court's view, Ms. S's abduction of Daeshawn, Victoria, and Jayden on October 12, 2010, approximately one year before Elijah's birth on September 28, 2011, was a "watershed event" with important negative consequences. By itself, that incident indicated continued poor judgment on the part of both parents, who acted on impulse in an extreme manner that was not warranted by the circumstances, and exposed the children to unnecessary and unfortunate trauma. In addition, Ms. S's conviction for that crime created new obstacles to her prospects for employment and independent housing. It was undisputed that Ms. S. did not have a job and that her housing plans had become at best uncertain and temporary, and at worst, non-existent and untenable. Moreover, her psychologist described such housing instability as a significant stressor that could reasonably be expected to undermine Ms. S's mental health. The abduction also marked a significant deterioration in the relationship between Ms. S. and the Department, which resulted in Ms. S. declining services offered by the Department while at the same time resuming behavior that the court clearly had identified as escalating the risks to her children (e.g., letting Mr. G. attend visits and unilaterally ceasing medications and therapy). As the court observed, Ms. S's failure to cooperate with the Department continued after Elijah's birth, manifested by her refusal to enter into any of the service agreements proffered by the Department.

Based on this evidentiary record, we hold that the juvenile court did not abuse its discretion in finding that Elijah is a CINA. 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 since the prior CINA declarations, the evidence supports the court's decision that Elijah is in need of the monitoring and services provided by the Department under the order of protective supervision. Finding no abuse of discretion, we shall affirm the judgment of the circuit court.

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

1. Mr. G., who only participated in the first day of the adjudicatory hearing, did not appeal the Child(ren) in Need of Assistance ("CINA") adjudication or disposition.

2. Elijah G. has three older siblings: Daeshawn E., Victoria G., and Jayden G., who were adjudicated to be CINA on February 18, 2009, and remain in placements outside of the home.

3. Ms. S. and Mr. G. asserted they removed the children because Ms. S. suspected that Victoria was being abused by her foster parents based on scratches seen on Victoria's face. Officer Karen Palardy, of the Montgomery County Police Department's Missing Children Section, and Wanda Durst, a Community Service Aide with the Department, testified that they observed only a few superficial scratches on Victoria's face on that date.

4. The court did credit Ms. S. with enough improvement to leave Elijah in her custody subject to an order of protective supervision.

**Cite as 9 MFLM Supp. 31 (2012)**

**CINA: sibling abuse and neglect: independent assessment of potential harm**

# In Re: Jania S

*No. 2461, September Term, 2011*

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

*Opinion by Eyler, James R., J.*

*Filed: July 17, 2012. Unreported.*

**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 ("Jania"), a child, and the Frederick Counter Department of Social Services (the "Department"), appellants, appeal from the Circuit Court for Frederick County's dismissal of a CINA[1] petition, filed to protect Jania from her parents. Kevin S. ("Kevin") and Erica M. ("Erica"), Jania's parents, are appellees. Appellants contend the circuit court erred in not making the required independent assessment of the potential risk of harm to Jania. We agree and shall remand the case for further proceedings.

### Factual and Procedural Background

Jania was born on September 24, 2011. On September 25, 2011, the Department placed Jania in shelter care. *See* CJ § 3-801 (y). By consent order dated September 26, 2011, the court placed Jania in the custody of the Department and, with the consent of the parties, in the care of her maternal aunt, Linda M. ("Linda"). The court further ordered that the parents be permitted visitation at their home, supervised by the Department, no less than two hours in length, two times per day.

The shelter care ruling was based on prior proceedings involving Jania's sibling, Aaron S. ("Aaron"), who was born on 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.

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

Appellees stated that they did not know how the injuries occurred. The Department filed a CINA petition, and on April 16, 2009, the court found as facts the pertinent allegations in the operative CINA petition, found Aaron to be a CINA, and placed custody in the Department. Aaron was placed in the physical care of Linda. The court, *inter alia*, ordered appellees to take parenting and anger management classes.

On August 10, 2011, the parties in Aaron's case stipulated that Aaron could engage in unsupervised visits with appellees. On August 11, 2011, the court entered a permanency planning review order. The court changed the permanency plan for Aaron from reunification 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 that appellces have unsupervised visitation with Aaron at least one time per week, plus a supervised visit per week. The unsupervised visit was 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. We shall briefly summarize the testimony at the hearing. There is no need to go into detail because legal sufficiency of the evidence to sustain a finding is not before us.

Kevin testified to the following. He acknowledged that he was aware that Jania had sustained serious injuries between January and March 2009 which, according to doctors, had been caused by non-accidental trauma. He acknowledged that he and Erica were the primary caregivers at that time, and they were not working outside of the home. Kevin and Erica were living with Erica's grandmother at the time, and she was employed outside of the home. Kevin stated he had no knowledge as to how the injuries occurred, but he had suspicions about the grandmother. In March, 2009, when he was interviewed by a detective, Kevin stated that if he did know who abused Jania he would not tell. He explained that he said that out of anger and "the whole situation. The police, the confusion that my child was taken because of signs of

abuse. So I was pretty upset."

Kevin completed anger management counseling in August 2010, he completed parenting classes, and he attended some individual therapy sessions. He participated in a substance abuse treatment program but tested positive on occasions and missed various meetings. He was discharged after he got into an altercation with a staff member.

Erica's testimony was similar to Kevin's testimony except that she expressed the belief that Jania had not been abused and that her issues could have resulted from sickness.

Kristin Dunn, a child protective services investigator, testified to the following. She first investigated the family in March 2009 in connection with Aaron's case. Ms Dunn concluded that Aaron had been physically abused by Kevin and Erica. The Department found indicated child abuse by both parents, and they did not appeal the administrative findings. Ms. Dunn also investigated the family in connection with Jania's case.

At the hearing, Ms. Dunn testified as an expert. She stated that Kevin and Erica had not acknowledged a problem or need for change. She opined that, if returned to her parents, Jania would be at risk of harm.

Virginia Wolfhart, a foster case worker, was assigned to Aaron's case in March 2009. Ms. Wolfhart expressed concerns about the ability of Kevin and Erica to parent and noted their lack of acknowledgement of Aaron's abuse. She also noted that their compliance with counseling and therapy requirements was intermittent She acknowledged there were no safety concerns during the unsupervised visits with Aaron.

At the conclusion of the above testimony, the court sustained various allegations in Jania's CINA petition, including the nature and extent of Aaron's injuries and that Kevin and Erica was responsible for his care at the time he sustained the injuries.

The court proceeded to disposition. In that connection, Dr. Carl Munson, an expert in social work and child welfare, testified based on his review of records, as Kevin and Erica did not attend their scheduled evaluation. Dr. Munson assessed each parent's suitability to parent and identified various factors. He concluded that Kevin and Erica should not be reunified with their children until after all of their deficiencies had been addressed by treatment and they had demonstrated 9 to 12 months compliance with a reunification plan.

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

> In this case it is undisputed by all the parties that nobody has hurt Jania. She's not been hurt. Nothing has happened to her. The basis of the Department's complaint and pet — CINA petition is the abuse which occurred to Aaron. Now it is also undisputed that Aaron was abused. Aaron was viciously abused. Viciously abused. And I don't know how that happened but I know one of two things. Either one of you did it or you let it happen by not protecting your baby. That's our respon, [sic] you know, before coming to this job, before walking into this courtroom most of us are parents and we have the first responsibility to protect our children. And children get hurt for a whole lot of reasons. But mostly they get hurt because those of us in charge of making sure they don't get hurt let them get hurt. So obviously this court is very, very concerned about the obvious abuse of Aaron. Nevertheless I have to recognize that that abuse occurred over two and a half years ago and I don't believe there has been any further allegations. Obviously there have been no further allegations and I do agree with the representation of counsel that nothing that has happened in Aaron's case has led the court to believe that there is any safety concern with, for Aaron in his environments.
>
> Now the only way this court could find Jania a child in need of assistance would be to find that she has been abused, neglected, has a developmental disability or a mental disorder. Jania has not been abused. What is at issue here is the concept of neglect, which the case law tells the court can be found if the court were to find that Jania would be at sub, substantial risk of harm in her home and the Department has relied upon the very horrible abuse that occurred to Aaron and the slow to respond behavior of his parent to convince the court that if Jania were to go home she's be at a substantial risk of harm.
>
> The court has reviewed those cases. You know, nobody loves babies more than me. But I sit here as representative of all the people and I'm bound by the law as established by our legislature and by our appellate

courts, who, who construe our legislation. I have reviewed those cases and I absolutely agree we're not supposed to wait around for a child to get hurt. I recognize that. But before I could find that she is a child in need of assistance I would have to find that she is at substantial risk of harm. Those cases the court has reviewed, you've all referred to them. One of them is *In Re: Nathaniel*, 160 Md. App. 581 at page 601. "The child may be considered neglected before actual harm occurs as long as there is a fear of harm in the future based on 'hard evidence and not merely a gut reaction." And I think it's very easy here to have that gut reaction in light of the horrible abuse which Aaron suffered. But I've not heard anything here today in, in reviewing Aaron's situation, and Aaron's case, which the court has taken judicial notice of, to indicate to the court that if Jania were in her home she's be at substantial risk of harm.

First of all, I'm a little alarmed and worried about the fact that Aaron's case does not seem to be moving forward and I understand that we come from different disciplines and I understand that the Department comes from different disciplines, from a dis, different discipline, and has different tools to use. And I think, ah, without any disrespect to the Department, I, I received Ms. Wolfhart and Ms. Dunn as experts, they're clearly far more expert that I in what they do, but I believe that, I think they're sort of boxed in by their Child Welfare Services safety assessment which indicates to them and gives them pause when a child has sustained sus, serious injury that the caregiver does not sufficiently explain, that happened here, and the caregiver's justification or denial of his or her own, own harmful behavior or harmful behaviors of others places the child in immediate danger. I don't find that that denial, I , that, that assessment is not binding on this court. I can understand it guides the Department, but it's not binding on this court and the Department based on the testimony the court heard seems to be stymied because there's no answer because in fact Aaron's case is unresolved. We don't know how he got hurt.

And Dr. Munson, I listened carefully to his testimony, and gave this court good information as to the tests he used, but this is not a best interest analysis such as the court might engage in in a custody case or a visitation case or the court the court determines what's in the best interest of the child. Here the court has to determine substantial risk of harm. The, the parents were not, did not promptly and with, ah, all intent get involved in the Department's requirements. But they did it. They did the parenting, they did the assess, they did the evaluations, they did the psychological, um, they did the anger management. These issues which were brought up, conflict with the family, alcohol and marijuana use, um, didn't appear to the court to have any criminal problems, um, no medical evaluations, employment history, these are all certainly factors which the court would take into consider (sic) in, in a best interest analysis. But it was very glaring to me that absent from Dr. Munson's testimony and the Department did not elicit from him an expert opinion that his child would be in substantial risk of harm in the home and that, ah, lack of that opinion was very telling to the court. Would it be in the child's best interest if the parents did all this stuff? Well, sure. Of course. He also talked about something that, that once again I want to go back to this stymied issue. You know, nurturing classes. Well, then, you know, why hasn't the, if that's so important why hasn't the Department done that? I got the impression from the testimony that until the resolution of why this happened I don't know how much more is gonna get done. Most importantly I have to take into consideration what I believe is collateral estoppel. This, court, Theresa Adams signed an order upon the recommendation of Richard Sandy, it's dated October 11, 2010, but I don't think it is because the front page talks

about the hearing being in 2011 and it was in fact filed on August 16th, 2011. I think that's a handwritten error that it's 2010. On August 11th, excuse me, August 10th, 2011, and by order of this court of August 11th this court found there is no further likelihood of abuse or neglect by the mother and/or the father in the matter of Aaron S., Case Number I-09-20777. It is a finding which I believe is binding upon this court. Collateral estoppel, you know, the, the Department has, we've all conceded there's no abuse as to Jania. The entire case is Aaron's case. The entire basis for this court attempting to find substantial risk of harm is based on Aaron's case and the very same evidence which the court heard in August in Aaron's case is what this court heard today. Same, one of the tests for collateral estoppel is the same evidence. Same parties. Aaron and his parents. Litigated and a final judgment. I'm sure this is an appealable or it's a permanency planning review hearing order. It's clearly appealable. It's a final order. I believe that finding is binding on the court. This court has made a finding that in the home there was no further likelihood of abuse or neglect. I don't know how, despite the frustrations that I recognize the Department feels and the trepidation in this court's heart for seeing babies protected, I don't know how I could find that the Department has met its burden to convince the court that Jania is at substantial risk of harm with her parents. Are her parents the sophisticated parents that we wish all children had? Sometimes sophisticated parents aren't the best parents. I believe they love them. I believe they have some, ah, unsophistication . . . And if either one of you comes back here with a hurt baby . . . A baby that either one of you hurt or you allowed to get hurt . . . because it's not easy for a judge making that decision of what's in the best interest of this child, and 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.

**Standard of Review**

There is no dispute as to the applicable standard of review. We shall quote the standard set forth in the Department's brief.

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting In re Yve S., 373 Md. 551, 586 (2003)) (emphasis and citations omitted).

**Discussion**

Appellants make two contentions on appeal. First, appellants contend that the court erred in applying the doctrine of collateral estoppel and not making an independent finding, including a finding under Maryland Code, (2006 Repl. Vol.), § 9-101 (b) of the Family Law Article ("FL"). 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 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.

Section 9-101 (b) requires:

> (a) Determination by court. — In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether the abuse or neglect is likely to occur if custody or visitation rights are granted to the party.

> (b) Specific finding required. - Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

The parties do not dispute the elements of collateral estoppel. They are:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> 2. Was there a final judgment on the merits?
>
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
>
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Burruss v. Bd. of Co. Comms. of Frederick Co., ____Md. ____, No. 99, Sept. Term, 2011 (filed June 25, 2012), slip op. at 18, (quoting Wash. Suburban Sanitary Comm'n v. TKU Assocs., 281 Md. 1, 18-19, (1977)).

Appellants argue that the court erroneously ruled that it was bound by its determination on August 11, 2011 that there was no likelihood of further abuse or neglect of Aaron. Appellants explain that none of the elements of collateral estoppel were satisfied because the issue in Jania's case was not identical to the issue in Aaron's case; there was no final judgment in Aaron's case; Jania was not a party in Aaron's case; and Jania had no opportunity to be heard. According to appellants, as a result of the erroneous application of the doctrine of collateral estoppel, the court did not make a specific finding that there was no likelihood that Jania's parents would abuse or neglect her.

Appellees acknowledge that a court need not wait until a child suffers an injury before determining that the child has been neglected, *see* In re Nathaniel A., 160 Md. App. 581, 596 (2005), and thus, they assert that the appropriate inquiry is whether the parents' conduct placed Jania at substantial risk of harm. 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, while "unfortunate" 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 based 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 court's 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. If that were the only question, we would resolve our doubt in favor of the child and remand for further proceedings. In addition, however, the court failed to make a specific finding pursuant to FL 9-101(b).

The court found that Aaron was a CINA, had sustained serious injuries on three separate occasions when he was one to four months old, and that appellees were responsible for his care and supervision at the time he sustained the injuries. The court also found that appellees had failed to acknowledge their role in the abuse of Aaron. The court did not return Aaron to his parents' home.

On September 25, 2011, Jania was placed in shelter care. The consent shelter care order, dated September 26, 2011, stated that Jania could not be returned to her parents' home and a "plan needs to be established for this child's safety." The order placed Jania in the custody of the Department "with kinship care."

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) (neglect or abuse of a child in the past, under FL 9-101(b), refers to neglect or abuse of any child, not just the child at issue). 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 the court's decision with directions to hold an adjudicatory hearing on the CINA petition and make a determination. At oral argument, in response to questions from the Court inquiring as to the appropriate relief in the event the Court found error, appellants' counsel agreed that the above disposition would be appropriate. In that connection, appellants's counsel advised the Court that there is a private custody proceeding pending in which the circuit court awarded custody pendente lite to Erica.

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.

**JUDGMENT NEITHER AFFIRMED NOR REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR FREDERICK COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. EACH PARTY TO BEAR HIS/HER OWN COSTS.**

**FOOTNOTE**

1. *See* Maryland Code, (2006 Repl. Vol.) § 3-801 of the Courts and Judicial Proceedings Article ("CJ").

**Cite as 9 MFLM Supp. 37 (2012)**

**Estates and trusts: probate: presumption of testamentary capacity**

# Thomas F. Bernikowicz

# v.

# James H. Porter, Jr., Special Administrator of The Estate of Veto John Bernikowicz, et al.

*No. 40, September Term, 2009*

*Argued Before: Woodward, Kenney, James A., (Ret'd, Specially Assigned), Alpert, Paul E. (Ret'd, Specially Assigned), JJ.*

*Opinion by Woodward, J.*

*Filed: July 25, 2012. Unreported.*

**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, appellant, challenges the judgment of the Circuit Court for Somerset County affirming the decision of the Orphans' Court of Somerset County, which held that the last will and testament of appellant's father, Veto Bernikowicz ("Veto") was a valid will. On October 26, 2006, Veto died domiciled in Somerset County, Maryland. On January 22, 2007, Curtis Farrow, appellee[1] and Veto's personal representative, filed a petition for administrative probate of Veto's estate in the orphans' court, and the court admitted to probate Veto's Last Will and Testament executed on January 15, 2002 ("2002 Will"). The beneficiaries under Veto's 2002 Will, Barbara Dubray, Dennis Degulis, Paul Degulis, and Michael Degulis, are also appellees in this appeal. Appellant filed a petition to caveat the probate of Veto's will, arguing that the 2002 Will was invalid, because Veto lacked testamentary capacity when he wrote the will. On October 2, 2007, after a hearing, the orphans' court ordered that Veto's 2002 Will be accepted as a valid will.

On October 30, 2007, appellant filed an order of appeal to the circuit court from the final judgment of the orphans' court. After a bench trial, the circuit court found that Veto had the testamentary capacity to execute the 2002 Will and affirmed the ruling of the orphans' court. Appellant filed a timely notice of appeal to this Court.

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

On appeal, appellant presents fourteen questions for review by this Court, which we have consolidated and rephrased for clarity:

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

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

## BACKGROUND

On August 27, 1998, Veto executed a last will and testament ("1998 Will"). In the 1998 Will, Veto left $5,000.00 to his "good friends and neighbors," Ronald and Shirley Anderson ("the Andersons"), and the remainder of his estate to his sister, Helen Degulis ("Helen"). Veto specified that, if Helen should predecease him, the remainder of his estate should go to Helen's children, Barbara, Dennis, Paul, and Michael. Veto appointed the Andersons as his personal repre-

sentatives and, in the event that the Andersons predeceased Veto, he appointed the Honorable R. Patrick Hayman as his personal representative.

On January 15, 2002, Veto executed the 2002 Will, which revoked any and all former wills, codicils, and other testamentary dispositions. In the 2002 Will, Veto his estate to Helen, and if she should predecease him, to Helen's children. He did not leave any part of his estate to the Andersons. Veto appointed Farrow and Tony Bruce[2] as his personal representatives.

On October 26, 2006, Veto died domiciled in Somerset County with the 2002 Will as his last will. Veto was survived by two children, Linda Jean Quillen and appellant, and by one granddaughter, Lisa Bernikowicz, who was the daughter of Veto's other son, James, who predeceased Veto. Veto was also survived by Helen's children, Barbara Dubray, Dennis Degulis, Paul Degulis, and Michael Degulis. Helen had died on December 14, 2002, after Veto executed the 2002 Will.

**Proceedings in the Orphans' Court**

On January 22, 2007, Farrow filed a petition for administrative probate of Veto's estate in the Orphans' Court for Somerset County. On the same day, the orphans' court admitted to probate the 2002 Will as Veto's Last Will and Testament. On July 19, 2007, appellant filed a petition to caveat Veto's will. Appellant argued that the 2002 Will was not valid, because Veto had suffered from delusions and had been incompetent when he wrote the will. He prayed that Veto's estate be distributed to Veto's "lawful heirs," appellant, Linda, and Lisa. After a hearing on October 2, 2007, the orphans' court ordered that Veto's 2002 Will be accepted as a valid will.

**Proceedings in the Circuit Court**

On October 30, 2007, appellant filed an order of appeal to the circuit court from the final judgment of the orphans' court. On January 22 and 23, 2009, the court held a bench trial and affirmed the ruling of the orphans' court, finding that Veto "had the mental capacity to execute a will on January 15th, 2002." The court's oral ruling was memorialized in an order entered on January 29, 2009.

On February 2, 2009, appellant filed a motion for new trial or to amend and alter judgment, which the court denied on March 4, 2009. Appellant then filed a timely notice of appeal to this Court. Additional facts will be set forth below as necessary to resolve the questions presented.

## DISCUSSION

### I.
### STANDARD OF REVIEW

Maryland Code (1974, 2006 Repl. Vol.), § 12-502(a) of the Courts and Judicial Proceedings Article ("C.J.") governs a party's right to appeal to the circuit court from a final judgment of an orphans' court:[3]

> (1)(i) Instead of a direct appeal to the Court of Special Appeals pursuant to § 12-501 of this subtitle, a party may appeal to the circuit court for the county from a final judgment of an orphans' court.
>
> (ii) The appeal shall be heard de novo by the circuit court.
>
> (iii) The 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.
>
> (iv) The circuit court shall give judgment according to the equity of the matter.

In *Williamson v. National Grange Mutual Insurance Co.*, 166 Md. App. 150 (2005), this Court explained that we have

> interpreted the phrase "shall give judgment according to the equity of the matter," to mean that the "circuit court, in a trial *de novo* of an appeal from an orphans' court, may render judgment according to the evidence presented by the parties and decide the case as if the matter had never been adjudicated in the orphans' court."

*Id.* at 155-56.

Thus our review in this appeal is pursuant to Maryland Rule 8-131(c):

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

### II.
### DEMAND FOR JURY TRIAL

In his "Order for Appeal to the Circuit Court," appellant demanded a "trial by jury in this caveat contesting the validity of the will being probated herein of January 15, 2002." On April 8, 2008, an assignment notice was issued and mailed to appellant and appellees scheduling a non-jury trial. On April 25, 2008, appellant filed an Application for Postponement

of Trial Date, in which he objected to "the assignment to the non-jury calendar, as a jury trial was demanded when the case was appealed from the Orphans' Court." On June 17, 2008, appellant sent a letter to the presiding judge, stating: "Further the order setting the caveat hearing, stated it was a bench trial, but I demanded a jury trial when I filed the order for appeal." At a hearing on August 1, 2008, the court held that it did "not believe that this is a matter that should be decided by a jury. It should be decided by the court."

***The Parties' Contentions***

Appellant argues that the circuit court committed reversible error when it denied appellant the right to a jury trial in the *de novo* appeal. Appellees respond that, "although appellant would have been entitled to a jury trial, he did not elect to have the issues transmitted to the circuit court for trial by jury" prior to the time that the orphans' court entered its final decision, and thus the orphans' court properly determined the issues and entered judgment. Contrary to appellant's claim that "he has been denied his right to jury trial on the *de novo* appeal from the judgment of the Orphans' Court," appellees assert that appellant "was not entitled to a jury trial at that stage of the proceedings."[4]

***Analysis***

As provided above, C.J. § 12-502 allows a party to appeal to the circuit court from a final judgment of an orphans' court, and the appeal will be heard *de novo.* C.J. § 12-502(a)(1)(iii) further states that "[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." Although C.J. § 12-502 speaks of an appeal, the Court of Appeals has clarified that C.J. § 12-502 requires a trial *de novo*, where "neither the testimony before the Orphans' Court nor its findings thereon are now of any controlling effect." *Soothcage's Estate v. King*, 227 Md. 142, 146 (1961). The statute, however, is silent on whether there is a jury trial right in an appeal to the circuit court from a final judgment of the orphans' court. The first question, then, is whether a common law right to a jury trial exists in a caveat proceeding.

**1.**
**Common Law History of Caveat Proceedings**

The prevailing view is "there is no constitutional right to a jury trial of an issue in a will contest." 9 Am. Jur. 2d Wills § 895 (2011). "The guaranty of trial by jury in the [F]ederal Constitution, is limited to the right to a jury trial as it existed at common-law." *Id.*

Article 5 of the Declaration of Rights provides that "the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law . . . subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State." Md. Const. Decl. of Rts. art. 5. If, then, there was a historical, common law right to a jury in a caveat proceeding, then appellant would be entitled to a jury trial as a matter of constitutional right.

In England, however, there was "no inherent right to trial by jury in a proceeding to probate or contest a testament of personal property under the procedure in England." Page on Wills § 26.85 (2003). "Trial by jury was peculiar to the courts of common law. Power to make a testament was recognized and enforced by ecclesiastical law, and not by common law." *Id*. The ecclesiastical court did not have jurisdiction to admit a will to probate if the will disposed of real property only. Lewis M. Simes & Paul E. Basye, *The Organization of Probate Courts in America*, 42 Mich. L. Rev. 965, 971 (1944). In the event a will disposed of both real and personal property, the ecclesiastical court's determination of the validity of the will did not determine whether the will was a valid devise of real estate. *Id.* A party would bring an action, such as for trespass or ejectment, to test the validity of the devise in a common-law court. *Id*. But a common-law judgment in an action for ejectment or trespass was not equivalent to a probate of a will. *Id*.; *see also* Page on Wills § 26.85. Nor did such a judgment preclude further actions from being filed, where the validity of the will might be adjudicated anew. 42 Mich. L. Rev, at 971.

As a British colony, Maryland inherited many of the English practices of testamentary law. *See* 1 P. Sykes, *Maryland Practice: Probate Law and Practice* Introduction, 1-7 (1956) (outlining the early history of Maryland probate law). "[T]he real judicial power in testamentary cases was vested in the Prerogative Court of the Commissary General." *Id*. at 5. The Prerogative Court was derived from the Ecclesiastical Courts. *Hourie v. State*, 53 Md. App. 62, 65 n.5 (1982) *aff'd*, 298 Md. 50 (1983). Unlike in England, however, the Commissary General had authority to probate wills that concerned lands. *Maryland Practice: Probate Law and Practice* Introduction at 4-5. This system remained in effect until 1777, when the General Assembly abolished the office of Commissary General and created the Orphans' Court. *Id*. at 5.

**2.**
**Maryland Development of Caveat Procedure**

Without an inherent right to a jury in a caveat proceeding at common law, legislatures were free to create a statutory right to trial by jury, to limit that right, or to not provide the right at all. Page on Wills § 26.85; *see also* Eunice L. Ross and Thomas J. Reed, Will Contests § 14:5 (2011) (describing development of American testamentary doctrine). In Maryland, the laws and rules concerning wills and testaments were compiled, expanded, and amended in 1798. *See* 1798

Md. Laws ch. 101 (Dorsey 1840); *see also Kao v. Hsia* 309 Md. 366, 373-74 (1987) (discussing the history of the orphans' court). The 1798 Act granted the orphans' court the "full power, authority, and jurisdiction to examine, hear and decree upon, all accounts, claims and demands, existing between . . . legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators." 1798 Md. Laws ch. 101, sub-ch. 15, § 12 (Dorsey 1840). This authority included the power to decide a caveat entered against a will. 1798 Md. Laws ch. 101, sub-ch. 2, § 9 ("If any person whatever shall enter a caveat against any such will . . . the said caveat shall be decided by the [orphans'] court."); *see also Schull v. Murray*, 32 Md. 9, 16 (1870) ("[T]he jurisdiction of the Orphans' Court is limited to inquiries which relate to the probate alone, as in other like cases, such as testamentary capacity, fraud, undue influence, and the due execution of the instrument.").

The 1798 Act further states:

> Sec. 16. Whenever either of the parties have a contest in the orphans court shall require, the said court may direct a plenary proceeding . . .
>
> * * *
>
> Sec. 17. And on such plenary proceeding . . . and in case either party shall require, the court shall direct an issue or issues to be made up, and sent to any court of law . . . and the said issue or issues shall be tried in the said court of law.

1798 Md. Laws ch. 101, sub-ch. 15, §§ 16-17.

According to the Court of Appeals, "[a]n issue is a single, definite, and material question framed from the allegations of a petition and the answers thereto." *Fid. Trust Co. v. Barrett*, 186 Md. 483, 487 (1946); *accord Ward v. Poor*, 94 Md. 133, 141 (1901). A party thus did not have a right to a jury trial in the orphans' court; the right to a jury trial was available only in a court of law upon a request by a party for a transmittal of issues from the orphans' court.

The practice of directing issues to a court of law was likely borrowed from chancery and ecclesiastical courts, and was observed in Maryland prior to the passage of the 1798 Act. *Pegg v. Warford*, 4 Md. 385, 393 (1853). Although chancery courts could, and often did, direct issues to a court of law, they by no means were required to. *See Hilleary v. Crow*, 1 H. & J. 542 (1804); *see also* C. Christopher Brown, *The Law/Equity Dichotomy in Maryland*, 39 Md. L. Rev. 427, 458-66 (1990) (discussing the history of the equity court's ability to decide issues of fact). The Court of Appeals stated, however, that it is "imperative" that the orphans' court direct an issue to the circuit court upon the request of either party. *Schmidt v. Johnston*, 154 Md. 125, 133(1928); *see also Russell v. Gaither*, 181 Md. App. 25, 29-30, (2008) (discussing the imperative duty of the orphans' court to transfer issues at the request of a party).

> **The evident purpose of these provisions, was to enable either of the parties** to any contest, upon plenary proceedings, **to control the action of the Court**, in reference to the matter in dispute, **by the finding of a jury on issues so framed** as to present the subject of the contest. The duty of the Orphans' Court to make up and transmit issues to a Court of law, when required, is imperative.

*Price v. Taylor*, 21 Md. 356, 363 (1864) (emphasis added).

In sum, under the 1798 Act, issues of fact could be sent to the court of law for determination by a jury, but the orphans' court was only required to send issues for jury determination upon the request of a party. *See* 1798 Md. Laws ch. 101, sub-ch. 15, § 17. In the event that neither party requested that an issue be transferred to a court of law, the orphans' court had the authority to decide issues of fact raised by a caveat, and its determination was binding. *See McDaniel v. McDaniel*, 86 Md. 623, 626 (1898) ("It is true that either party to a caveat has the right to have issues sent to a Court of Law for Trial, but when they submit to have the issues tried by the Orphans' Court . . . the decision of that Court upon the issues thus presented, is binding and conclusive.").

Today, as was the case in 1798, "[a]t the request of an interested person . . . the issue of fact may be determined by a court of law." Maryland Code (1974, 2011 Repl. Vol.), § 2-105(b) of the Estates and Trusts Article ("E.T."). Such a petition "shall set forth separately each issue to be transmitted" and "[e]ach issue shall present a single, definite, and material question of fact." Md. Rule 6-434. In the absence of such a request, however, the orphans' court has the authority to determine issues of fact. E.T. § 2-105(a). The orphans' court, then, has the complete authority to decide issues of fact, such as testamentary capacity, without sending the issues to the circuit court for jury determination where neither party has requested the transmittal of such issues.

### 3.
### Application to the Circuit Court Sitting in *De Novo* Appeal

As discussed in Part 1, *supra*, there is no common law right to a jury trial in caveat proceedings. Therefore, the only way that appellant would be enti-

tled to a jury trial in a *de novo* appeal in the circuit court is if the General Assembly granted such a right by statute.

As noted, C.J. § 12-502(a)(1)(iii) provides that "[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." No where in that section or in any other section of the statute governing *de novo* appeals is there a mention of a jury trial right. The requirement that a *de novo* appeal "be treated as if it were a new proceeding" does not, in our view, imply a right to a jury trial. We find support for this view in the case of *Ford v. Ford*, 307 Md. 105, 119 (1986), which discussed "[t]he orderly way for the civil proceeding in the circuit court" contemplated by C.J. § 12-502. In *Ford*, the Court of Appeals explained that, after the parties present evidence, "[t]he *judge* would then make the necessary findings of fact, apply the applicable law, and render a decision." *Id.* at 119 (emphasis added). Similarly, this Court affirmed the factual findings of a circuit court judge who was sitting in *de novo* appeal in *Jennings v. Jennings*, 20 Md. App. 369, 383 (1974).

In addition, granting a jury trial right in a *de novo* appeal from the orphans' court would inevitably lead to giving a party the right to two jury trials. In the orphans' court, a party can request that issues of fact be transferred to the circuit court for a jury trial. E.T. § 2-105(b). The jury's decision on the issues is conclusive, and the orphans' court must enter a judgment based on that decision. *See Kao v. Hsia*, 309 Md. 366, 377 (1987). Under C.J. § 12-502(a)(1)(iii), however, a *de novo* appeal shall be treated "as if there had never been a prior hearing or judgment by the orphans' court." Thus a jury trial in a *de novo* appeal could be a second jury trial, because the first jury trial, which resulted in the orphans' court judgment, would be treated as if it had never occurred.

We do not believe that granting a party the right to two jury trials is consistent with the traditional precept of judicial economy or with the policy in the administration of estates that "there should be a prompt settlement and distribution of decedents' estates." *Parshley v. Mott*, 241 Md. 577, 578 (1966). Therefore, in absence of express statutory language authorizing a jury trial, we hold that there is no statutory right to a jury trial in a *de novo* appeal from a judgment of the orphans' court.

In the case *sub judice*, appellant had the opportunity to request that issues of fact be decided by a jury while the caveat was before the orphans' court.[5] E.T. § 2-105(b). Had appellant made such a request, the orphans' court would have been required to transfer those issues to the circuit court for a jury trial. *Id.* Appellant, however, failed to make such a request. Accordingly, the circuit court did not err in refusing to grant appellant a jury trial in the *de novo* appeal from the judgment of the orphans' court.

## III.
## PRESUMPTION OF TESTAMENTARY CAPACITY

On January 23, 2009, the circuit court rendered its oral ruling. The court characterized the issue it was to decide as whether Veto had testamentary capacity when he executed the 2002 Will on January 15, 2002. The court provided in great detail the relevant background and "the evidence [that] was critical to the case." The court addressed (1) the testimony of Judge Hayman who prepared the 1998 Will and testified that Veto was "legally competent to execute a will"; (2) the testimony of Dr. Adam Rosenblatt, appellant's expert witness, who opined that "Veto was not legally competent" in 1998 or 2002; (3) Veto's medical records; (4) the observations of lay witnesses; and (5) the observations of Veto's medical professionals.

The court determined that the only expert testimony regarding Veto's competency was Dr. Rosenblatt's testimony. Although the court found that Dr. Rosenblatt's qualifications were "excellent," it determined that "the factual basis for his opinion was lacking" and that Dr. Rosenblatt's opinion was "inconsistent with much of the evidence to which [the court] gave credence."

The court concluded:

> It is presumed that Veto was sane on January 15th, 2002 when he executed his will. The caveator has the burden of proving otherwise. Neither the opinions of Doctor Rosenblatt nor the other evidence produced in this case convinces me otherwise.
>
> I find that Veto Bernikowicz had the mental capacity to execute a will on January 15th, 2002 and affirm the ruling of the Orphan's [sic] Court.

Maryland Rule 8-131(c) sets forth that, in a bench trial, we "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." "If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Conrad v. Gamble*, 183 Md. App. 539, 550 (2008) (quotations omitted). Furthermore, for mixed questions of law and fact, "we will affirm the trial court's judgment when we cannot say that its evidentiary findings were clearly erroneous, and we find no error in that court's application of the law." *Id.* at 551 (quotations omitted).

Preliminarily, we note that appellant asks us to

review the trial court's weighing of the evidence and its determinations regarding the credibility of certain witnesses. We, however, "may not — and obviously could not — decide upon an appeal how much weight must be given, as a minimum to each item of evidence." *Walker v. Grow*, 170 Md. App. 255, 275 (2006) (quoting *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725 (1977)). In *Walker*, we reiterated the principle that "[t]he trier of fact may believe or disbelieve, accredit or disregard, any evidence introduced." *Id*. (quoting *Great Coastal Express, Inc.*, 34 Md. App. at 725). We further explained that "[e]ven if a witness is qualified as an expert, the fact finder need not accept the expert's opinion. . . . The weight to be given the expert's testimony is a question for the fact finder." *Id*.

Appellant argues that the trial court erred in not finding that the evidence presented at trial overcame the presumption of sanity. We disagree and shall explain.

In *Jackson v. Jackson*, 249 Md. 170 (1968), the Court of Appeals stated that a presumption exists that "one has the capacity to execute a valid will." *Id*. at 175. The Court explained:

> The law presumes that every man is sane and has capacity to make a valid will, and the burden of proving the contrary rests upon those who allege that he lacked mental capacity. Moreover, in the absence of proof of prior permanent insanity, it must be shown that the testator was of unsound mind at the time the will was executed in order to overcome the presumption of sanity.

*Id*. (citations and quotations omitted).

Although evidence tending to prove competency in general may span "the entire period of acquaintance of a witness with a testator both before and after the date of the making of a will," the caveator must demonstrate that the testator lacked testamentary capacity *at the time the will was executed* to rebut the presumption of sanity. *Webster v. Larmore*, 268 Md. 153, 157-58 (1973) (quoting *Arbogast, Ex'r v. MacMillan*, 221 Md. 516, 525 (1960)). Without such requirement, "a caveat action could never be defended, as it frequently is, on the ground that a will was executed at a time when the testator had a lucid interval." *Id*. at 165.

In *Webster*, the Court of Appeals provided the classic test for determining whether a testator had sufficient mental capacity:

> It must appear that at the time of making the will, he had a full understanding of the nature of the business in which he was engaged; a recollection of the property of which he intended to dispose and the persons to whom he meant to give it, and the relative claims of the different persons who were or should have been the objects of his bounty.

*Id*. at 165-66 (quotations omitted). The Court further explained what evidence may be insufficient to rebut the presumption of sanity:

> While there was testimony to support the notion that [the decedent] was eccentric, erratic, forgetful, and may have had delusions of persecution, this, standing alone, is not enough. We have held that mere eccentricity is not enough; nor are forgetfulness, lapse of memory, failure to recognize acquaintances; nor delusions, unless the will is a product thereof. Neither old age or debility is necessarily a yardstick of mental capacity; nor are peculiarities or oddities.

*Id*. at 165 (citations omitted).

Appellant points to evidence indicating that Veto suffered mental incapacity before and after the signing of the 2002 Will. On December 7, 2001, Veto drove himself to the hospital, because he was concerned about one of his medications and felt weak. His family doctor, Dr. Madhav Barhan, described him as confused and paranoid. Dr. Barhan referred Veto to Dr. Bruce Lobar, because he thought Veto may have had a stroke. Dr. Lobar evaluated Veto for mental status change, finding that Veto's test results fell mainly in the "non-impaired range" and that he suffered from "very mild cognitive impairment," and was "only slightly disoriented" with "some gaps in his remote memory." That same day, Dr. Al Kamme evaluated Veto for an episode of confusion and weakness. He observed that Veto was "awake, alert, oriented x 3," but had a "decrease in recent memory with a lot of confabulation and possible visual hallucination and paranoid thoughts." Dr. Kamme concluded that Veto "probably" experienced an "episode of confusion" and noted that this "could be [an] early sign of Alzheimer's disease."

In April 2002, 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 that Veto had "regular dementia probably Alzheimer's type" when he was admitted and that he could not understand or sign any paper work. Dr. Belosso, however, explained that he could not testify as to whether Veto had Alzheimer's type dementia prior to April 2002 and that any assessment made prior to April 2002 was "speculation."

The above evidence relied upon by appellant, however, 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 that Veto signed his 2002 Will.

As previously stated, the presumption of sanity must be rebutted by evidence from the date when the will was executed. *Id.* at 157-58. The only evidence presented regarding January 15, 2002, the date when Veto executed his 2002 Will, was the testimony of the 2002 Will witnesses, Janet Bedsworth and Jacqueline Bowen Hill and, a locksmith, Paul Ward.

Bedsworth testified that she did not remember Veto specifically, but, based on her normal procedure, she believed Veto understood that he was signing a will and was capable and competent to execute the will, because she would not have witnessed it otherwise. Similarly, Hill agreed that she did not recall very much of the will signing, but that she believed Veto understood what he was signing and was capable and competent to execute the will, because it was not "normal practice" for them to witness a will if the testator "wasn't just right."

Ward testified that he came to Veto's residence on January 15, 2002 to change three locks. Ward recalled that Veto was "nervous" and "felt the neighbor next door was watching what he was having done." Ward stated that "[Veto] seemed perfectly normal. . . . The only thing I found unusual and maybe I don't find this unusual he thought the neighbor was watching what he was doing."

From a review of all of the evidence, we conclude that the court did not err in finding that appellant had not overcome the presumption of sanity.[6]

Appellant, nevertheless, argues that, because evidence exists of "incapacitating enfeeblement immediately prior to and after the will signings," the presumption of sanity is "gone" and thus the burden of proof shifted to appellees to prove that Veto signed the 2002 Will in a lucid moment. According to appellant, there was "proof of total confusion and Alzheimer's one month before the will signing" and there was "proof of fraud" that Farrow hid Veto's incompetence in the nursing home three months after the will signing. Therefore, appellant concludes that the court erred by "refusing to consider fraud" when determining whether the presumption of sanity had been overcome. We disagree with appellant.

In *Doyle v. Rody*, 180 Md. 471 (1942), the Court of Appeals acknowledged that,

> when it appears that a person was in such an enfeebled condition of mind and body immediately before and immediately after the date of a transaction as to render him incompetent to transact business, the presumption arises that he was unable to understand what he was doing at the time of the transaction, and the burden of proof as to his capacity to dispose of his property at that particular time is imposed upon the [caveatee].

*Id*. at 476.

As explained *supra*, the evidence indicated that, in December 2001, Veto's physicians stated that he was confused and paranoid, but that his test results fell in the "non-impaired range" and he likely suffered from "very mild cognitive impairment." Even with Dr. Kamme's conclusion that Veto could be suffering from an "early sign of Alzheimer's disease," appellant has not demonstrated that Veto suffered "*incapacitating enfeeblement* immediately prior to" signing the 2002 Will. *See Doyle*, 180 Md. at 476. *Doyle* requires that incapacitating enfeeblement is demonstrated for both *prior to* and after the signing of the will. *Id*. Having not shown incapacitating enfeeblement prior to the 2002 Will signing, appellant did not establish that the burden of proof should be shifted to appellees to prove Veto's capacity. Therefore, we need not address whether the court should have considered the evidence of alleged fraud, and we conclude that the court did not err in determining that the presumption of sanity had not been overcome.

## IV.
## AMENDED PETITION TO CAVEAT

On October 31, 2008, appellant filed an amended petition to caveat in the circuit court. Whereas appellant's original petition, which was filed in the orphans' court, was not formally organized into counts, his amended petition consisted of four counts: Count I - Lack of Testamentary Capacity, Count II - Insane Delusion/Undue Influence, Count III - Fraud, and, in the alternative to Count III, Count IV - Construction of Ambiguity in Will, Containing Latent Ambiguity, Presumption Against Disinheritance. Appellant's original petition contained allegations regarding lack of testamentary capacity, insane delusion, and undue influence, which were encompassed in Counts I and II of the amended petition; appellant, however, set forth numerous new factual allegations regarding these causes of action in his amended petition.

Counts III and IV of the amended petition were wholly new. In Count III, appellant alleged that Farrow and Tony Bruce, in their representative and personal capacities, represented to appellant that "Veto was competent and could handle his own affairs when he entered the nursing home at Manokin Manor in April, 2002," but that such statements were untrue. Appellant

claimed that Farrow and Bruce knew that "Veto was incompetent and needed someone to consent for medical treatment and for financial matters for him," and Farrow then took over Veto's power of attorney. Appellant further alleged that Farrow and Bruce misrepresented to the court in a guardianship proceeding before Veto's death that Veto was competent and could communicate with his attorneys, when Veto actually suffered from "end-stage Alzheimer's and had practically no brain function at all." According to appellant, Farrow and Bruce knew these statements were false, made the statements with the intent to deceive, defraud, and induce appellant not to file a guardianship petition or fight the power of attorney. Appellant asserted that he believed Farrow and Bruce's statements to be true and relied on them when he did not file a guardianship petition and decided not to proceed with his guardianship action. Appellant prayed for monetary damages against Farrow and Bruce, in both their representative and personal capacities, for "any diminution of the shares [appellant] and his sister and niece would receive in his father's estate caused by the disinheriting will subsequently probated by [ ] Farrow, compared to what they would receive if the estate were to pass intestate." Appellant also sought "a fair amount" of monetary damages "to compensate [him] for his pain and emotional anguish" and reasonable attorney's fees and costs and expenses.

In the alternative to Count III, appellant alleged in Count IV that "a latent ambiguity exists in the [2002] [W]ill in that Veto does not mention that he had three children of his own, and there is no language clearly disinheriting his own children." Appellant claimed that, "where there is such an ambiguity, the presumption against disinheritance arises to require a construction of the will to include the children of the decedent." Appellant concluded that, because "[t]here is no clear expression of intent to exclude [Veto's] children," then "the [2002] [W]ill must be construed to include them."

On November 3, 2008, Barbara Dubray, Dennis Degulis, Paul Degulis, and Michael Degulis ("the beneficiaries") filed a motion to strike appellant's amended petition. The beneficiaries argued that the "circuit court's jurisdiction to hear an appeal from an orphans' court *de novo* depends upon whether the orphans' court had jurisdiction in the first place." According to the beneficiaries, the orphans' court had before it only the issues of Veto's "alleged incompetence" and "the asserted undue influence," *i.e.*, Counts I and II. The beneficiaries asserted that the circuit court did not have appellate jurisdiction over Counts III and IV, because they were new causes of action unrelated to the caveat proceeding. The beneficiaries also contended that the introduction of a cause of action in fraud against Farrow and Bruce individually would "unnecessarily delay the trial of this caveat" because Farrow and Bruce individually were not parties to the proceedings. Lastly, the beneficiaries argued that, by allowing appellant's amended petition, the court would be denying appellees the ability to conduct discovery related to the new claims.

On December 8, 2008, the court entered an order granting the beneficiaries' motion to strike and striking appellant's amended petition, "having . . . read and considered" the beneficiaries' motion to strike.

### *The Parties' Contentions*

Appellant argues that the circuit court erred when it struck his amended petition. He asserts that the court's ruling was prejudicial to him, because it took "out clear allegations of fraud, undue influence and laches as defenses, as well as the presumption against the disinheritance of lawful heirs" based on the lack of clear intent by Veto to disinherit his children. Appellant further contends that Maryland law requires that "no case should be dismissed on basis that all parties are not before the court without giving a chance to join."

Appellees respond that, through appellant's amended petition, he attempted to introduce new parties and time barred causes of action into the *de novo* appeal. Specifically, appellees assert that appellant's added claims for monetary damages based on fraud and a declaratory judgment would not have been within the jurisdiction of the orphans' court and thus could not be within the jurisdiction of the circuit court on a *de novo* appeal from the orphans' court. Appellees also contend that the amendment was untimely. Appellees conclude that the circuit court exercised its sound discretion by refusing to allow the amended petition.

### *Analysis*

E.T. § 5-207 requires that a petition to caveat a will must be filed "at any time prior to the expiration of six months following the first appointment of a personal representative under a will."[7] Similarly, an amended petition to caveat must be filed within six months following the appointment of a personal representative. *Hegmon v. Novak*, 130 Md. App. 703, 715 (2000) (recognizing that E.T. § 5-207 applies to amended petitions to caveat). Thus an orphans' court does not have jurisdiction to address a petition to caveat filed beyond the six month period. *Id.*

In an appeal from the orphans' court, "the circuit court, although expected to make its own determination, is limited to those that could properly have been made by the orphans' court; the circuit court does not exercise *its* plenary jurisdiction over the matter." *Kaouris v. Kaouris*, 324 Md. 687, 715 (1991) (emphasis in original). A circuit court's appellate jurisdiction "depends upon whether the orphans' court had juris-

diction over the case in the first place." *Id*. Therefore, where an amended petition is filed beyond the six months limitation under E.T. § 5-207, the circuit court does not have jurisdiction over the amended petition, because the orphans' court did not have jurisdiction over such petition.

In the case *sub judice*, on January 22, 2007, Farrow was appointed as the personal representative of Veto's estate by the orphans' court. Appellant filed his amended petition to caveat on October 31, 2008, in the circuit court, 21 months after Farrow was appointed as personal representative and well beyond the six month time period allowed under E.T. § 5-207. The orphans' court thus would not have had jurisdiction over the amended petition, *see Hegmon*, 130 Md. App. at 715, and, similarly, the circuit court did not have jurisdiction over such petition, *see Kaouris*, 324 Md. at 715. Accordingly, the circuit court did not err in striking appellant's amended petition to caveat.

## V.
## UNDUE INFLUENCE

Appellant argues that the circuit court erred in not finding that Helen (Veto's sister) and Barbara Dubray ("Barbara") exerted undue influence over Veto.[8] Appellant, however, did not preserve this issue in the circuit court. We explain.

Under Maryland Rule 8-131(a), we "will not decide any other issue [than jurisdiction] unless it plainly appears on the record to have been raised in or decided by the trial court." In other words, "we do not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court." *Drug Fair of Md., Inc. v. Smith*, 263 Md. 341, 356 (1971) (quotations omitted) (interpreting Rule 8-131(a)'s predecessor Rule 885). The "clear meaning" of Rule 8-131(a) is that no unpreserved appellate issue, other than jurisdiction, may serve as the reason for an appellate reversal. *Beeman v. Dep't of Health & Mental Hygiene*, 107 Md. App. 122, 159 (1995) (quotations omitted).

In the case *sub judice*, in his original petition to caveat, appellant claimed that Helen and Barbara exercised undue influence over Veto

> to obtain control over his estate against his lawful heirs by pressuring Veto to execute the complained of will and to execute a companion power of attorney to [Farrow and Bruce], giving them power over his property without the necessity of a guardianship proceeding which would bring into the open his mental disability and the tragic flaw of his will, that he was incompetent when he wrote it.

Appellant alleged that Helen and Barbara exercised undue influence over Veto when he exhibited signs of mental illness and an inability to care for himself.

At trial before the circuit court, however, appellant did not raise any claim regarding undue influence. Although appellant presented evidence that could be construed as supporting an undue influence claim, appellant did not argue the issue of undue influence to the court. In contrast, during his closing argument, appellant presented argument regarding his testamentary capacity claim, specifically citing to case law and applying the facts of the instant case to the relied upon law. Furthermore, at the end of the trial, when the court explained that the only issue before it was "did Veto [ ] have testamentary capacity on January 15th, 2002 at the time he executed his last will and testament," appellant made no objection that the court also had before it the issue of undue influence. In sum, because appellant failed to raise his claim of undue influence at trial, the court did not err in failing to rule on whether Veto was subject to undue influence by Helen and Barbara.

## VI.
## STRIKING THE PERSONAL REPRESENTATIVE

On December 12, 2007, appellant filed a petition to remove the personal representative in the circuit court.[9] On October 24, 2008, appellant filed a Motion for Rule to Show Cause to Issue on Petition to Remove Personal Representative, demanding that Farrow respond in writing to the petition. On October 31, 2008, appellees filed a motion to strike appellant's motion for rule to show cause. On November 14, 2008, the circuit court signed an order granting appellees' motion to strike and striking appellant's petition to remove personal representative and motion for rule to show cause, because appellant did not have standing to maintain 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. E.T. § 1-101(i) defines "interested person" as

> (1) A person named as executor in a will;
>
> (2) A person serving as personal representative after judicial or administrative probate;
>
> (3) A legatee in being, not fully paid, whether his interest is vested or contingent;
>
> (4) An heir even if the decedent dies testate, except that an heir of a testate decedent ceases to be an "interested person" when the register has

given notice pursuant to § 2-210 or § 5-403(a) of this article.

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

E.T. § 2-210 requires that

> [w]ithin five days after receiving the text of the first published newspaper notice as provided in § 7-103 of this article and the written notice from the personal representative of the names and addresses of the heirs and legatees as provided in § 7-104 of this article, the register shall forward to each such person a copy of the newspaper notice published according to § 7-104 of this article, in the manner prescribed in § 1-103(a) of this article, directed according to the information received from the personal representative.

On January 22, 2007, the orphans' court received a list of interested persons, including appellant, from Farrow. On January 31, 2007, a notice of appointment pursuant to E.T. § 7-103 was published in the newspaper. On February 1, 2007, the register sent by certified mail the notice of appointment and notice to interested persons to the individuals on Farrow's list of interested persons, which included appellant. Because the register gave notice under E.T. § 2-210, appellant ceased to be an "interested person" after February 1, 2007, and thus did not have a standing to file a petition to remove the personal representative on December 12, 2007. *See* E.T. § 1-101(i); Rule 6-452(a). Accordingly, the circuit court did not err in striking appellant's petition to remove personal representative and motion for rule to show cause.

## VII.
## EVIDENTIARY RULINGS
### A.
### Motion in Limine

On December 3, 2008, appellant filed a motion in limine requesting the court to deny appellees' request for Judge Hayman to testify as a defense witness prior to the testimony of the "witnesses to the will." Appellant argued that Judge Hayman's testimony regarding Veto's testamentary capacity was "too remote to be of value in determining [Veto's] capacity in this case and would be prejudicial to [appellant]'s case." Appellant further contended that "Judger [sic] Hayman's inconvenience in having to wait in regular order as [sic] not enough reason to deny [appellant] a fair trial and to prejudice his case." According to appellant, a "great injustice" was being done to him in "calling a pre-eminent local judge as the first witness in the case as to a will not being probated." Appellant asserted that appellees were "attempting to switch wills on th[e] [circuit] court and they cannot be allowed to do this."

On December 4, 2008, in response to appellant's motion in limine, appellees asserted that they were not offering the testimony of Judge Hayman as "probative of the testamentary capacity of [Veto] when the [2002] Will was executed," and were not "trying to 'switch Wills.'" Appellees explained that Judge Hayman's testimony would "demonstrate a consistent pattern and desire on the part of [Veto] to benefit [Helen] to the exclusion of [appellant and his siblings] with whom [Veto] had little contact throughout his life." Appellees concluded that "[i]t is very common for witnesses to be taken out of order as an accommodation" and that "no inconvenience or prejudice to [appellant] is conceivable."

At a hearing on December 17, 2008, appellant raised the additional argument that "evidence of [the 1998 Will] cannot be introduced into a proceeding probating [the 2002 Will] where there is a dispute as to the testator's testamentary capacity at the time of the [1998 Will]." Specifically, appellant asserted that "Judge Hayman's testimony should not be allowed certainly at the beginning of the case prior to those witnesses because that's not the will being probated. And . . . where it's disputed as to [Veto's] sound of his mind at the time he made the [1998 W]ill that should not be allowed in this case either."

The court ruled:

> The first issue is whether to grant the motion in limine with respect to Judge Hayman's testimony. The proffered testimony is to show who he considered to be the objects of his bounty. And [appellees] wish to introduce a prior will to help substantiate that testimony. I believe it would be admissible for that purpose. I'm going to deny the motion in limine.
>
> Now, as far as — this is a non jury trial. The court is perfectly able to consider testimony taken out of turn. And whether your expert is taken out of turn . . . I'm going to permit if Judge Hayman is here to — ready to call him first so he can go and handle his docket in the District Court for Somerset County.

That same day, appellees called Judge Hayman as a witness out of order. The court allowed Judge

Hayman to testify as a witness, explaining that Judge Hayman's "testimony will be considered as part of [appellees'] case. And I won't consider it until such time it properly should be considered in the order."

During Judge Hayman's testimony, appellees sought to introduce the 1998 Will into evidence. Appellant renewed his objection "that's a prior will that we are disputing. [Veto] did not have testamentary capacity as [my witness] can testify to and I can have him testify right now to exclude the will." The court admitted the 1998 Will subject to its relevancy being established.

At the end of the trial, appellant renewed his objection to the entry of the 1998 Will and Judge Hayman's testimony and argued that the court reserved its ruling on whether Judge Hayman's testimony should be admissible. In its oral ruling, the court stated that its recollection was that it "did admit th[e] [1998] Will into evidence," and that, if it had not previously admitted the 1998 Will, it was presently entering the will into evidence.

**The Parties' Contentions**

Appellant argues that the circuit court erred in denying his motion in limine to exclude the 1998 Will, thus allowing the prior will into evidence without reservation. He explains that the court had "allowed in the evidence of the prior disputed will, subject to objection to its relevancy later on." He contends that the court "should have reversed its decision when [appellees[10]] did not produce evidence" to show that appellant and his siblings were "never the object of Veto's bounty." Appellant asserts that the evidence showed that he and his siblings were "the objects of [Veto's] bounty until 1996-98." According to appellant, "the will was an unnatural disposition, requiring the court to give great weight to the children's interest." Appellant concludes that "[t]he court's denial of the motion in limine was prejudicial to [him]," and the 1998 Will should have been stricken from the evidence.

Appellees respond that the trial court had "broad discretion" in determining the order of witnesses and thus the court "properly exercised [its] discretion when [it] allowed the testimony of Judge [ ] Hayman to be taken out of order." Appellees further argue that the 1998 Will was "admissible to show that the challenged Will [wa]s consistent with the established wishes of the testator." They contend that "Judge Hayman's authentication of the 1998 Will . . . demonstrated a consistent pattern and desire on the part of [Veto] to benefit his sister to the exclusion of Appellant and his siblings."

**Analysis**

Appellant presents two main arguments; (1) the circuit court should not have allowed Judge Hayman to testify prior to the witnesses of the will and (2) the court should not have accepted the 1998 Will into evidence. We will address each argument in turn.

**1.**
**Order of Testimony**

"Trial judges have broad discretion in determining the order of presentation of evidence." *Ware v. State*, 360 Md. 650, 684 (2000). Specifically, Maryland Rule 5-611(a) gives the trial court "reasonable control over the mode and order of interrogating witnesses and presenting evidence." As the Court of Appeals explained in *Beka Industries, Inc. v. Worcester County Board of Education*, 419 Md. 194 (2011):

> [j]udicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.

*Id.* at 231 (alteration in original).

In the instant case, the court allowed Judge Hayman to testify before the witnesses to the will so that Judge Hayman could "handle his docket in the District Court." The court specifically stated that it "wo[uld not] consider [Judge Hayman's testimony] until such time it properly should be considered in the order." Because a judge's training and experience allows him to be less susceptible, as compared to a jury, to being influenced by evidence taken out of the normal order, we conclude that the trial court in the case *sub judice* was capable of properly assessing the evidence and thus appellant was not prejudiced by the court's decision to allow Judge Hayman to testify first. *See Cornish v. State*, 272 Md. 312, 322 (1974). Accordingly, we hold that the trial court did not abuse its discretion in deciding the order of the testifying witnesses.

**2.**
**Admission of 1998 Will**
***Admissibility of a Prior Will***

In *Spengler v. Sears, Roebuck & Co.*, 163 Md. App. 220, 247, *cert. denied*, 389 Md. 126 (2005), we explained that "[i]t is well established that the admission or exclusion of evidence is within the sound discretion of the trial court." (Quotations omitted). Maryland Rule 5-401 defines probative or "relevant" evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Rule 5-402, all relevant evidence is "generally admissible."

Before the circuit court, appellant argued that 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. Maryland case law indicates that, where a testator was "indisputably competent" at the execution of a prior will, the testator's prior will was admissible to prove that a later contested will "was in substantial conformity with the testator's previous and formally expressed purpose." *Bowers v. Kutzleb*, 149 Md. 308, 316 (1925). *See also Whisner v. Whisner*, 122 Md. 195, 205-06 (1914) (holding that no error was committed where a prior will was admitted for comparison with the contested will where it was "conceded that the testator was of sound and disposing mind at the date of the first will").

In the case *sub judice*, Veto's testamentary capacity in 1998 was in dispute. Therefore, the court should not have admitted the 1998 Will to demonstrate substantial conformity of the 2002 Will with Veto's testamentary intent. The court's error, however, was harmless. In its oral ruling, the court did not rely on the similarities between the 1998 Will and the 2002 Will to determine that Veto had the mental capacity to execute the 2002 Will. Instead, the court focused its holding on the presumption that Veto was sane in 2002 and that appellant did not overcome that presumption. Accordingly, we hold that the court committed harmless error in admitting the 1998 Will.

***Defense of Laches***

Appellant also argued to the circuit court that the admission of the 1998 Will into evidence was barred by laches. The court ruled that laches was not an issue in the case and would not be unless the 2002 Will was deemed invalid, and the 1998 Will was then subject to probate.

Appellant contends that the circuit court committed prejudicial error by denying him the opportunity to argue a defense of laches against the admission of the 1998 Will. According to appellant, appellees should not be able to rely on the 1998 Will and "drop" the 2002 Will. He contends that the court erred in ruling that "laches could not be heard until the second will was invalidated and the prior will brought to the fore, when [the 1998 Will] was used in evidence in this case, to substantiate the [2002 Will]."

Ordinarily, the doctrine of laches is an affirmative defense that must be pled by the defendant. *See* Md. Rule 2-323(g). In *Skeen v. McCarthy*, 46 Md. App. 434 (1980), this Court discussed the applicability of laches:

> There is no inflexible rule to be applied in determining the application of the equitable defense of laches. . . . This Court has had occasion to deal with the question of laches many times. It is a defense in equity against stale claims, and is based on grounds of sound public policy by discouraging fusty demands for the peace of society. There is no inflexible rule as to what constitutes, or what does not constitute, laches; hence its existence must be determined by the facts and circumstances of each case.

*Id.* at 438 (quotations omitted). *See also Kaufman v. Plitt*, 191 Md. 24, 28-29 (1948).

In the case *sub judice*, appellant is challenging the introduction of the 1998 Will into evidence on the ground of laches. The defense of laches, however, applies against stale *claims*, and in the instant case, no claim has been brought regarding the probate of the 1998 Will. Instead, the 2002 Will was the subject of probate and the caveat proceeding. As the circuit court held, if the 2002 Will was found invalid and then the 1998 Will was subject to probate, then appellant could argue the defense of laches. Accordingly, we determine that the circuit court did not err.

We note that, even if the court should have allowed appellant to raise the defense of laches, appellant has not shown that he was prejudiced by the court's error. As explained *supra*, the court did not rely on the 1998 Will to determine that the 2002 Will was valid. Again, the court's admission of the 1998 Will was harmless error.

**B.**
**Court's Examination of Judge Hayman**

On cross-examination, Judge Hayman testified that Veto visited his office twice regarding the 1998 Will, "once when he related what he wanted in the will and then to come back and sign it." Judge Hayman explained that, in his practice, "[i]t is entirely possible . . . that I would get back to the office from court and [my secretary] would say so and so came in, said they wanted to make a simple will." Then the following exchange took place:

> [APPELLANT]: So you wouldn't have actually have seen the client during that initial interview?
>
> [JUDGE HAYMAN]: There wouldn't have been an initial interview with me. They simply would — if it was a case where there is no disinheritance. . . .
>
> [APPELLANT]: So you're saying in simple cases you maybe didn't even do the consultation with the client it was then the secretary?
>
> [JUDGE HAYMAN]: No. But I would go over when the people came —

> THE COURT: Do you know in this case whether you had a consultation with Veto Bernikowicz?
>
> [JUDGE HAYMAN]: Yes, there was a consultation. And the further consultation at execution of the will.
>
> THE COURT: All right.

Appellant argues that "[t]he court erred by injecting itself into the cross-exam of Judge Hayman" by asking a leading question regarding whether a consultation took place between Judge Hayman and Veto. According to appellant, "earlier answers on cross were leading to the conclusion there was no such consultation." Appellant concludes that the court "improper[ly] manipulat[ed] . . . the process" and "violat[ed] appellant's right of cross-exam." We disagree.

The Maryland Rules not only allow the court to exercise reasonable control over the mode and order of interrogating witnesses, *see* Rule 5-611, but they also allow the court itself to interrogate any witness. Rule 5-614(b). Based on these rules, we hold that the court did not abuse its discretion in interrogating Judge Hayman about his consultation with Veto.

**C.**

**Exclusion of Appellant's Redirect Testimony**

During the cross-examination of appellant, the following questioning took place:

> [APPELLEES' COUNSEL]: When was the first time that your father had occasion to meet any of his grandchildren?
>
> [APPELLANT]: The first time that he met my children was in July of 1987. As far as opportunity I have no idea.
>
> [APPELLEES' COUNSELj: And to the best of your knowledge and based upon the testimony of your witness is your niece Lisa only met Veto [ ] one time; is that correct?
>
> * * *
>
> [APPELLANT]: No, that's not true.
>
> [APPELLEES' COUNSEL]: She had more than one meeting with her grandfather?
>
> [APPELLANT]: Well, it may have been much more than that. I know that there was an initial visit in '87. I know that he came out and visited all of us in '88. So that's at least two. So she had a visit with him in '87 and at least in '88. And there may have been other visits. There was also a lot of phone contact between her and her grandfather. . . .

On redirect, appellant started to testify:

> I just want to state that when my mother took us out of — took us to Indiana from Maryland, I can't remember the exact year, it must have been '54, she took us to Milwaukee which is where her — my father's brother lived Matchy. And we stayed for some time with Matchy and his wife in Milwaukee. They later on moved to Kenosha.
>
> * * *
>
> When my father visited us in 1998 Helen and Tony went up to Kenosha to visit Matchy's nephew. And Matchy was already dead in 1988 and they were going to visit the nephew. So there has been an allegation here that my father didn't know that Matchy was dead because he never talked to his brother — well, he said —

Appellees' counsel objected to appellant's redirect testimony as being outside the scope of cross examination. The court sustained the objection of appellees' counsel.

On appeal, appellant argues that the court "committed reversible error by not allowing, in redirect, testimony" regarding appellant's visits with Veto. Appellant asserts that the court excluded the testimony "as outside the cross-exam," even though "[t]he cross-exam centered on the infrequency of the visits." Appellant contends that "[i]t is within the trial court's discretion to allow in exceptional new testimony which could have been put in before, or even a repetition of matters already testified to." Appellant concludes that the court abused its discretion in not allowing into evidence "th[is] exceedingly important testimony" to show that Veto thought "long dead relatives were alive in April, 2002."

As stated *supra*, "[i]t is well established that the admission or exclusion of evidence is within the sound discretion of the trial court." *Spengler*, 163 Md. App. at 247 (quotations omitted). In *Oken v. State*, 327 Md. 628, 669 (1992), the Court of Appeals explained that "the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is clear abuse of discretion." The Court also stated that

> [w]ith respect to the scope of redirect examination, it is well settled that: As a general rule, redirect examination must be confined to matters brought out on cross-examination. However, it

> is within the court's discretion to allow the introduction of something new or forgotten if the purposes of justice seem to demand it. . . ."

*Id.* (quotations omitted).

In the instant case, appellant attempted on redirect to testify that Veto's memory had deteriorated to the point that he thought that his deceased brother was still alive, and thus Veto lacked testamentary capacity. Although appellees had asked appellant on cross-examination about Veto's visits with appellant's family, this line of questioning did not open the door to appellant testifying about Veto's alleged mistaken belief that certain deceased family members were still alive. Accordingly, we hold that the court did not abuse its discretion in not allowing appellant's redirect testimony regarding Veto's knowledge of his brother's death.

**D.**
**Barbara's Admissions**

Appellant argues that the circuit court erred in refusing to admit Barbara's statements in her answer and her deposition as admissions by a party opponent. According to appellant, Barbara and her siblings are real parties in interest, because she filed an answer *pro se*, had a lawyer appear for her and her siblings, and fully participated in the proceeding. Appellant asserts that, for the court to rule that Barbara and her siblings were not parties, would mean that they have "'special appearance'" status, which has been abolished and declared against public policy." He contends that the court's denial was prejudicial, because Barbara's statements showed that Veto lacked testamentary capacity in 2002.[11]

Appellant, however, fails to provide this Court with citations to the record extract or the record indicating that the circuit court (1) refused to admit Barbara's statements in her answer, (2) refused to admit Barbara's statements in her deposition, and (3) refused to make inferences that "Barbara hired [Farrow], knew of Veto's Alzheimer's impairment, and exerted undue influence in admitting guardianship was best course." Appellant cites to the point in the trial where he attempted to introduce into evidence the depositions of himself, Barbara, and Farrow, because they were "all parties in this case. The trial judge stated that "[t]hey will [be] able to testify," and then started to say, "I'm not going to — ", but did not finish his sentence, because appellant interrupted him. The court did not return to the issue and thus never ruled on whether the depositions would be admitted into evidence. Moreover, no citations to the record extract or record have been provided showing that appellant objected to their exclusion or sought a ruling by the trial court on their admission.

Maryland Rule 8-504(a)(4) requires appellant to provide "[r]eference . . . to the pages of the record extract supporting the assertions." As this Court explained in *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 761 (2007), *aff'd*, 403 Md. 367 (2008),

> [a]ppellate courts are not obliged to go through the record to find where a point was actually ruled upon, if it was. Under the circumstances, [we shall assume that] the matter was not raised in or addressed by the trial court and therefore is not properly before this Court for review.

(Quotations and citations omitted) (second alteration in original). *See also Kennedy v. Mobay Corp.*, 84 Md. App. 397, 430 (1990), *aff'd*, 325 Md. 385 (1992) (holding that appellants' argument that trial court erred by postponing the case several times was not properly before this Court, because appellants did not "direct[ ] [this Court's] attention to anything in the record extract (or the record) indicating the reason or reasons for these various postponements.").

In addition, under Maryland Rule 8-131(a), "the appellate court will not decide any other issue [than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court." Because appellant never objected to the exclusion of Barbara's statements or sought a ruling from the trial court, we see no reason to exercise our discretion to review this issue. *See Parex*, 174 Md. App. at 760-61.

**E.**
**Cross-Examination of Dr. Rosenblatt**

On cross-examination, appellees asked Dr. Rosenblatt:

> Mr. Robins also eluded to the fact that there may have been other designations of [Veto]'s family that may have gone to Helen [ ]. He mentioned a life insurance policy that was done some time back prior to the early 1980's. Would it surprise you to know that he also named her as beneficiary on a mortgage that he held back in the early 1980's, and that in fact he had put her name on other documentation not only life insurance policies but mortgages but bank accounts at that time? Would that that tend to skew your opinion as to who actually was the benefactor of his bounty?

Dr. Rosenblatt responded that it would not change his view on who was the beneficiary of Veto's bounty, explaining that the fact that Veto chose to pro-

vide Helen with some assets did not show an intention that Veto meant to provide Helen with all his assets. Appellees then asked Dr. Rosenblatt: "What if I told you that [Veto] had placed his sister's name either on the mortgages or on the deeds to the properties not only in Maryland but in Virginia during 1982 and the early 1980's —"

Appellant then objected to appellees' question, arguing, "that's not in the record anywhere in any the documents." The court agreed, but stated that "maybe it will later when [appellees] have time to put on their evidence. So I think he's not going to be back I think that you can ask him the question." Appellees then resumed questioning and appellant did not object to the remaining questions pertaining to this topic.

On appeal, appellant argues that 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." Specifically, appellant asserts that Dr. Rosenblatt was cross-examined about "a pension designation from 1981, deeds, and mortgages on properties in Virginia and Maryland where Helen was in title with Veto." According to appellant, "[t]his was allowed based on the fact the other side would be bringing in the proof at the next hearing," but appellees never offered such proof. [12]

Even assuming that the trial court erred in allowing a cross-examination question based on facts not in evidence or not otherwise acknowledged to be true by Dr. Rosenblatt, we conclude that such error was harmless. At the end of the trial, the court provided an extensive recitation of the facts and its rationale behind its ruling that Veto had the mental capacity to execute the 2002 Will. Nowhere in the court's ruling did the court indicate that it relied upon appellees' questions or Dr. Rosenblatt's testimony regarding the alleged "pension designation from 1981, deeds, and mortgages on properties in Virginia and Maryland where Helen was in title with Veto." Thus appellant has not shown how he has been prejudiced by cross-examination of Dr. Rosenblatt.

**F.**
**Witness Bonnie Stone**

Appellant called as his witness, Bonnie Stone, the administrator of Manokin Nursing Home where Veto resided prior to his death. On direct examination, appellant showed Stone a document dated July 8, 2004 and asked her what the document was. Stone responded that the document indicated that in 2004 Veto was not able to make decisions regarding whether he should or should not be resuscitated. The following exchange then took place:

> [APPELLANT]: Right, right. But this earlier document — I mean I know they're not letting you answer some questions here, but there is a document there that's from April 2002, April 23, 2002. Does that document not say he's unable to manage his affairs?
>
> [APPELLEES' COUNSEL]: Objection.
>
> THE COURT: The document will speak for itself, Counselor. There is no basis for this witness to give opinions on this matter.
>
> [APPELLANT]: Did you read this document? Can I ask her to read it now?
>
> THE COURT: Well, I mean it will speak for itself. She doesn't have to read it to me.
>
> [APPELLANT]: Okay. But is this a document you normally use in your —
>
> THE COURT: Has that been admitted into evidence?
>
> [APPELLANT]: Yes.
>
> THE COURT: Okay. Then it will speak for itself.
>
> [APPELLANT]: Right. But I want to cross examine about that because this is what —
>
> THE COURT: This is your witness you can't cross examine.
>
> [APPELLANT]: Well, I'll call her as an adverse witness then.
>
> THE COURT: Any objection?
>
> [APPELLEES' COUNSEL]: Yes.
>
> THE COURT: I don't see where she's an adverse witness. Just ask her a question.

Relying on Maryland Rule 5-611(c), appellant argues that "[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." Thus appellant seems to argue that Stone was (1) an adverse party, (2) a hostile witness, and (3) a witness identified with an adverse party.

The trial court has discretion in deciding whether to allow leading questions, but such questions should ordinarily be allowed on cross-examination or on direct examination of a "hostile witness, an adverse party, or a witness identified with an adverse party." Md. Rule 5-611(c).

***Hostile Witness***

"To show that the witness is hostile, the examiner will have to demonstrate the requisite degree of hostility, bias, or reluctance to the court's satisfaction." 1-2 Weinstein's Evidence Manual § 2.02. In the instant case, appellant attempted to categorize Stone as an hostile witness only after the trial court did not allow Stone to read and opine on the document at issue. The record, however, does not reveal that Stone was hostile to appellant at any point during her testimony. Appellant also makes no showing of hostility, bias, or reluctance by Stone in his brief before this Court.

***Adverse Party***

Maryland's "adverse witness" statute is found in C.J. § 9-113. *See Keefover v. Giant Food, Inc.*, 83 Md. App. 306, 309 (1990). C.J. § 9-113 states: "In a civil case, a party or an officer, director, or managing agent of a corporation, partnership, or association may be called by the adverse party and interrogated as on cross-examination." Stone does not fall under any of these categories and thus is not an adverse party.

***Witness Identified with an Adverse Party***

The phrase "witness identified with" is designed to enlarge the category of persons automatically regarded and treated as hostile. *See* Fed. R. Evid. 611 advisory note; *see also* Md. Rule 5-611(c) ("This Rule is derived from F. R. E[vid]. 611."). Once the examiner has made a "sufficient showing of the witness's status," leading questions should be permitted. 1-2 Weinstein's Evidence Manual § 2.02.

The exact scope of this rule is unclear, because the Maryland courts have not had the opportunity to interpret Md. Rule 5-611(c) at length. Federal courts, however, have interpreted the scope of Fed. R. Evid. 611(c), and their interpretation is persuasive authority for interpreting the state law counterpart. *See Stoddard v. State*, 389 Md. 681, 695 (2005) ("When the words of a Maryland rule and federal rule are the same or similar, often we look to interpretations of the federal rule in construing the Maryland Rule.").

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. Federal courts have held that employees of the adverse party qualify as witnesses identified with the adverse party. *See, e.g., Perkins v. Volkswagen of America, Inc.*, 596 F.2d 681, 682 (5th Cir. 1979). A client of an accountant, however, is not in a similar position as an employee. The client of an accountant is not dependent on the accountant for his or her livelihood, nor does the client owe any legal obligation to the accountant, except to pay for services rendered.

Appellant also argues that Stone was "a friend" of Farrow, and thus was identified with the adverse party. The record does not support this contention. Stone testified that she only knew Farrow, because he was her accountant and that she did not have a social relationship with him. Appellant's assertion that Stone and Farrow have known each other for thirty-five years, and nothing more, is insufficient to show that Stone was a witness "identified" with the adverse party.

Accordingly, the circuit court did not abuse its discretion in not allowing appellant to cross-examine Stone.

**G.**
**Testimony of Susan Metzger Fountaine**

At trial, Farrow's attorney called as a witness, Susan Metzger Fountaine, a director of social services at Manokin. Fountaine admitted Veto to Manokin, saw him on "a weekly or daily basis," and wrote quarterly reports about Veto. She further testified that Veto "was a person whose cognition varied during the day. He was typically very clear in the morning. . . . Typically in the afternoon or evening he may become more confused." She explained that, in her conversations with him, he understood her "on most occasions" and he could answer the questions she would typically ask him. Specifically, she stated that when "engaging him and asking him questions about hobbies and family and social activities," during the quarterly assessments, "he seemed to be able to answer most of those questions accurately." She described him as a "creature of habit," "very alert, very sociable, engaged very easily with other residents, . . . and was actually a pleasure to be around." Farrow's counsel then asked Fountaine the following question:

> [APPELLEES' COUNSEL]: 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 that you requested and the testing?
>
> [APPELLANT]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [FOUNTAINE]: Yes.

Appellant argues that the court erred in allowing Fountaine to respond to this leading question over appellant's objection. He contends that "[n]o foundation was laid for [Fountaine's] opinion." According to appellant, the trial court "placed such great emphasis on leading questions" to reach "the necessary elements to sustain the will," which "resulted in appellant not receiving a fair trial." Specifically, appellant asserts that Fountaine's testimony "was one of the foundations of the [trial court's] decision that Dr. Rosenblatt's opinion was conflicted by the evidence."

As a preliminary matter, we note that appellant's brief regarding this issue does not comply with Maryland Rule 8-504(a)(5), in that it contains no citations to legal authority in support of appellant's argument. *See, e.g., Rollins v. Capital Plaza Assocs*., L.P., 181 Md. App. 188, 201, *cert. denied*, 406 Md. 746 (2008) (holding that the appellant's brief violated Rule 8-504(a)(5), because it did not contain citations to legal authority in support of her position); *Kramer v. Mayor of Baltimore*, 124 Md. App. 616, 633 n.4, *cert. denied*, 354 Md. 114 (1999) (refusing to address the appellant's contention, because the appellant violated Rule 8-504(a)(5) by failing to support his contention with citation to legal authority and argument). Notwithstanding this violation, we shall exercise our discretion to address the merits of appellant's argument.

Although "[o]rdinarily, leading questions should not be allowed on the direct examination of a witness," 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). The trial court is vested with a "broad discretion" concerning leading questions. *Boone v. State*, 2 Md. App. 80, 109 (1967).

In the case *sub judice*, Fountaine had testified at length about her interactions with Veto and her opinions regarding Veto's cognition, clarity, and comprehension during such interactions. Appellant did not object to Fountaine's testimony on these issues. Farrow's counsel then asked Fountaine whether there were times in her evaluation of Veto when Veto was lucid and competent to answer her questions and to engage in the types of conduct that she requested. Although the question appears to have been leading, Farrow's counsel was essentially asking Fountaine to summarize her previously stated opinions. In other words, his question served "as a synopsis or repetition of [Fountaine's] prior direct testimony." *See Boone*, 2 Md. App. at 109 (holding that trial court's allowance of leading question was not error where leading question was a synopsis or repetition of witness's prior testimony).

Accordingly, we hold that the trial court did not abuse its discretion in allowing the subject question by Farrow's counsel over appellant's objection.

**JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED; APPELLANT TO PAY COSTS.**

**FOOTNOTES**

1. Curtis Farrow died on March 17, 2011, during the pendency of this appeal. On March 22, 2011, James H. Porter, Jr. was appointed Special Administrator of the Estate of Veto John Bernikowicz. Porter has been substituted as a party appellee pursuant to Maryland Rules 8-401(b) and 2-241.

2. Charles Antonio "Tony" Bruce died on August 5, 2006, prior to Veto's death.

3. Maryland Code (1974, 2006 Repl. Vol.), § 12-502(a)(1) of the Courts and Judicial Proceedings Article ("C.J.") does not apply to Harford or Montgomery Counties. C.J. § 12-502(a)(2).

4. Appellees also contend that appellant never raised his objection to the denial of a jury trial before the circuit court and thus did not preserve his right to pursue this issue on appeal. We disagree. As explained above, appellant raised his objection to the non-jury trial on multiple occasions and thus sufficiently raised the issue under Maryland Rule 8-131.

5. We note that, in the orphans' court, *appellees* had filed a petition to transmit issues to the circuit court. Appellees, however, withdrew the petition to transmit issues prior to any action by the orphans' court and chose instead to proceed with the caveat proceeding in the orphans' court.

6. Appellant also points to evidence of Veto's 1998 hospital visit at which he was treated for slow heart rate. Appellant contends that the doctor's notes that Veto was "somewhat forgetful" and a "poor historian" were evidence of dementia. However, as the Court of Appeals explained in *Webster v. Larmore*, 268 Md. 153, 165 (1973), evidence of forgetfulness and lapse of memory is insufficient to demonstrate lack of testamentary capacity. Furthermore, evidence from 1998 is too remote in time to be of probative value. *See id*. at 167 (stating that evidence of mental illness 28 months from the date of the will was "too remote to have any probative value").

7. The only exception to the six month limitation to file a petition to caveat, *see* Maryland Code (1974, 2001 Repl. Vol.), § 5-207 of the Estates and Trusts Article ("E.T."), is if there was fraud, material mistake, or substantial irregularity. *Durham v. Walters*, 59 Md. App. 1, 12 (1984). In *Pellegrino v. Maloof*, 56 Md. App. 338, 347 (1983), this Court explained that, in the context of a petition to caveat, fraud arises

> [w]here the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; . . . these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained.

(Ellipsis in original) (quotations omitted).

In the instant case, appellant attempted to add two new causes of action to the caveat proceedings 21 months after the appointment of the personal representative. As explained in his amended petition to caveat, appellant was prevented from presenting Counts III and IV in his original petition, because he did not learn of these potential causes of action until "after he looked over the medical documents he subpoenaed to the Orphans' Court hearing in October,

2007." His own failure to obtain and review the documents does not constitute a "fraud or deception practiced on him by" appellees. *Pelligrino*, 56 Md. App. at 347 (quotations omitted). Therefore, appellant has not demonstrated any fraud, material mistake, or substantial irregularity to toll the six month time limitation.

8. Appellant also argues that the circuit court erred in not finding that the Andersons exerted undue influence over Veto. Appellant, however, raised the claim that the Andersons exerted undue influence in only his *amended* petition to caveat, which was stricken by the circuit court. Thus, because we have upheld the striking of appellant's amended petition, we need not address this issue.

9. Appellate also filed the same petition to remove in the orphans' court on January 22, 2008. It is unclear from the record why appellant did this. There was a hearing before the orphans' court on April 8, 2008. According to the docket entries in the case file, the orphans' court filed an order regarding the petition to remove, but the order is not in the record. Appellant noted in his brief that the orphans' court denied his petition. Then, on October 24, 2008, appellant filed in the circuit court a motion for rule to show cause to issue on petition to remove personal representative. The rest of the procedural history regarding the petition for removal is set forth *infra*.

10. Appellant's argument originally stated that the court "should have reversed its decision when the appellant's [sic] did not produce evidence." After reviewing the record, it appears that appellant likely meant that the court should have reversed its decision when appellees did not produce evidence.

11. In his reply brief, appellant asserts that "[a]ppellees have acknowledged that Farrow and [Barbara] were parties by not arguing against this point in their brief, and [Farrow and Barbara's] depositions should have been admitted in evidence as well as admissions in answer of [Barbara]." Although appellees did not respond to appellant's argument regarding this issue, we do not conclude that they are conceding this point, and instead, are submitting on the record for this issue.

12. We note that appellant did not object to appellees' prior question, in which appellees asked: "Would it surprise you to know that [Veto] also named her as beneficiary on a mortgage that he held back in the early 1980's, and that in fact he had put her name on other documentation not only life insurance policies but mortgages but bank accounts at that time?" Because appellant did not object to this question, he has not preserved that issue for appellate review. *See* Md. Rule 8-131(c).

**Cite as 9 MFLM Supp. 55 (2012)**

**Custody and visitation: modification: delegation to non-judicial entity**

# Siata Diarraassouba

# v.

# Alhanif Abdur-Rashid

*No. 2073, September Term, 2011*

*Argued Before: Wright, Graeff, Hotten, JJ.*

*Opinion by Hotten, J.*

*Filed: July 26, 2012. Unreported.*

**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 Alhanif Abdur-Rashid ("appellee") married on November 7, 2004. On July 2, 2005, Sabriya Diarrassouba Rashid ("Sabriya"), a minor child, was born. In September of 2008, the parties were granted an absolute divorce by the Circuit Court for Montgomery County. Prior to that, the parties entered into a consent custody and visitation order on July 10, 2008. The agreement provided that the parties would have joint legal custody and appellee would have primary residential custody. Sabriya would reside with appellee Monday through Friday, but spend Friday through Monday with appellant, three weekends of the month. More than two years later, each party filed a request for modification. After a two-day hearing in September of 2011, the circuit court modified the visitation schedule. Most notably, the court changed appellant's visitation to alternating weekends, and prohibited her from having overnight visitation until she established that she had obtained housing that included a separate bedroom for Sabriya. Appellant noted an appeal, asserting that there was insufficient evidence concerning appellant's apartment, and that the circuit court improperly delegated authority to a non-judicial entity.[1] For the reasons that follow, we affirm the judgment of the circuit court.

## BACKGROUND

On November 7, 2004, the parties married in a civil ceremony in Montgomery County. Sabriya was born on July 2, 2005. From September of 2004 until December of 2005, the parties resided together in Takoma Park. They separated in December of 2005 when appellee departed to care for his ailing mother. After his mother's death, appellee elected not to return to the household because appellant was allegedly abusive and exhibited irrational behavior. Over the next year, the parties shared care and custody of Sabriya. In January of 2007, appellant moved and refused to disclose her address. From then until mid-April of 2007, appellee retained physical custody of Sabriya to accommodate appellant's work schedule. Additionally, according to appellee, he maintained custody because appellant "did not want her address known."

On or about March 31, 2007, the parties drafted a shared custody schedule. Appellant, however, refused to sign it. Soon thereafter, appellant obtained physical custody of Sabriya without appellee's consent. Over the next couple months, appellee saw Sabriya sporadically because appellant, again, refused to disclose her address. Accordingly, appellee filed a complaint for custody, requesting permanent legal and shared physical custody. Appellee also submitted a request for temporary custody. In that motion, appellee noted that appellant threatened to forbid visitation if she obtained custody, intimated that she would allege appellee was abusive if custody was challenged, and was fearful that appellant would take Sabriya to Africa.

On June 12, 2007, the circuit court awarded the parties temporary legal and shared custody. Each person would have custody for alternating weeks, and exchanges would occur in the parking lot of the Montgomery County Police Department, Third District in Silver Spring ("Third District Police Station"). A consent order for custody and visitation was subsequently signed on July 10, 2008. Appellant was provided primary residential custody, and the parties shared legal custody. Sabriya would reside with appellee Monday through Friday, but for three weekends a month, she would reside with appellant. All custody exchanges were supposed to occur inside the Third District Police Station. Additionally, the non-custodial parent was permitted one telephone call per day that could not exceed fifteen minutes.

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

Except in the case of an emergency, the decision-making process was envisioned to be a cooperative venture. Specifically, decisions regarding Sabriya's health, education, welfare, and upbringing were supposed to be mutual. If a mutual decision was not possible, appellee possessed tie-breaking authority. Communication would be conducted through email, but in the event of an emergency, or when email was impracticable, the telephone would be used. Additionally, the parties were supposed to refrain from addressing collateral issues; discussions regarding financial situations, personal issues, or parental decisions were not supposed to occur in the presence of Sabriya; and Sabriya was not to be used as an intermediary. Moreover, neither parent was permitted to suggest a modification of custody to Sabriya, challenge the parental authority of the other, or encourage the diminution of Sabriya's love and respect.

On December 10, 2010, appellant filed a request for modification, asserting that there were material changes that warranted an alteration of the circumstances. In the motion, appellant posited that appellee had interfered with the visitation schedule, was not providing adequate care for Sabriya, precluded her from accessing Sabriya's school records, limited telephone access to Sabriya, and refused to contribute to Sabriya's extracurricular activities. Not long after, appellee filed a motion for temporary custody, arguing that appellant's living conditions were unsafe. Particularly, appellee asserted that appellant's residence had been cited for numerous housing code violations. Appellee also posited that appellant routinely left Sabriya unattended.

Appellee thereafter filed a motion for modification, arguing that there were changes in the custodial arrangement that warranted a modification. Appellee asserted that appellant refused to comply with the visitation schedule; had someone other than Sabriya's pediatrician examine her; declined to communicate with him regarding Sabriya's education; enrolled Sabriya in extracurricular activities without consulting him; forced Sabriya to wear diapers, sleep on the floor, and stand in a corner in a closet; exposed Sabriya to unsupervised dogs, one of which bit her; ignored Sabriya's need for medical assistance; provided unsafe living conditions; abandoned Sabriya on numerous occasions; and was abusive.[2]

On July 27, 2011, the parties signed a consent *ne exeat* order. The order provided that neither party would remove Sabriya from the Washington D.C. Metropolitan Area until further order from the court; Sabriya's passport would be placed in the court's registry; the parties were prohibited from unilaterally obtaining a passport or travel documentation for Sabriya without an order from the court; a body attachment would be issued to the individual that removed Sabriya from the area; and if Sabriya was taken from the area, law enforcement would remove Sabriya from the offending party and deliver her to the other parent.

A hearing regarding the requests to modify custody was held on August 24-25, 2011. There, appellee testified regarding the relationship between himself and appellant. In his opinion, the relationship was volatile because appellant had issues with his wife, Amina Mukiibi ("Amina"). On one occasion, appellee explained that appellant attacked Amina following a custody exchange. Appellee also indicated that there were other incidents in which appellant attempted to physically assault him and Amina. Separate and apart from that, appellee testified that the parties disagreed about Sabriya's medical treatment, education, visitation, clothing, and faith. Because the parties were generally unable to resolve these disputes, appellant noted that he often used his tie-breaking authority to make decisions.

After the consent order was entered, appellee explained that he was informed that Sabriya was uncooperative at school, ignored teachers, urinated on herself, and was rough with classmates. Additionally, he was told that Sabriya appeared withdrawn and depressed following an extended period of time with appellant. Nevertheless, based on the overall situation, appellant thought Sabriya should remain at the Al-Huda School to maintain stability in her life. Moreover, he believed that it had a strong academic background, focused on aspects of the family, had a spiritual component that was important to the family, and would nurture her growth and development.

Appellee thereafter testified that he was opposed to appellant having overnight visitation. He alleged that he was unable to communicate with Sabriya when appellant cared for her; he was concerned about Sabriya's state of mind following overnight visitations with appellant; and appellant had previously left Sabriya unattended. Moreover, in an attempt to highlight his concern about the sleeping arrangements at appellant's previous residence, appellee testified that Sabriya had her own bedroom at his house. Nonetheless, appellee was not opposed to appellant having visitation. He believed that appellant should have occasional dinner visits and a few hours of visitation every other Saturday.

Not surprisingly, appellant provided testimony in contrast. Appellant acknowledged that the parties discussed important issues, but testified that appellee made most decisions without considering her opinion. For instance, appellant stated that appellee changed Sabriya's pediatrician without notification. Additionally, appellant suggested that Sabriya should attend public school, but appellee unilaterally foreclosed that option.

Appellant then testified that she did not believe the Al-Huda School was the best fit for Sabriya. Furthermore, with regard to Sabriya's hygiene, appellant indicated that there were instances in which Sybria had a rash on her face, or her hair was messy, before she picked her up.[3]

Appellant also testified with regard to her past and present living arrangements. Prior to the hearing, appellant lived in a basement apartment that had a bedroom, bathroom, and kitchen. At that place, appellant and Sabriya slept in the same bed. Moreover, on occasion, there were overnight visitors that slept within close proximity to them. Approximately nine days before the hearing, appellant leased a one bedroom apartment in Chevy Chase. Appellant explained that she leased the apartment because the best interest attorney indicated that she would not recommend overnight visitation unless she had obtained suitable housing. Appellant believed that her new apartment was suitable because it was located in a nice neighborhood, and Sabriya would effectively have her own bedroom. Appellant explained that Sabriya would sleep in her bedroom and she would sleep in the living room.

Thereafter, Amina testified regarding her interactions with appellant. On one occasion, Amina explained that appellant physically assaulted her following a custody exchange. After that, appellant verbally assault her on several occasions. Amina also testified that appellant encroached on appellee's time with Sabriya. Namely, appellant attempted to persuade Sabriya to abandon them on multiple occasions. Additionally, Amina provided the following concerns: (1) Sabriya was previously returned without clothes that she was wearing on Friday, (2) Sabriya had been sent to school wearing dirty clothes, (3) Sabriya was previously returned wearing clothes that were too small, and (4) Sabriya had been dressed inappropriately on occasion (i.e., no jacket in the winter).

Amber Kayun ("Kayun"), Sabriya's former kindergarten home room teacher, testified that appellee actively participated in her schooling, and appellant did not. Although she was never concerned about Sabriya's hygiene, Kayun noted that she was late and not dressed in "proper" uniform on some Mondays. Most notably, Kayun indicated that Sabriya's "head scarf," better known as a hijab, was occasionally missing. Additionally, after suggesting that Sabriya and appellee had a "very" good relationship, Kayun stated that she had observed Sabriya occasionally cry when appellant was supposed to pick her up for the weekend.

Another former teacher, Shemsiya Au ("Ali"), testified that the parties were responsive parents. Ali then explained that Sabriya approached her upset several times about different incidents. Specifically, there was an incident in which Sabriya was upset as a result of appellant expressing unflattering comments about appellee. Additionally, there were multiple incidents in which Sabriya was upset about something involving appellant's significant other. Ali also testified that Sabriya had no hygiene issues. However, she noted that Sabriya was late for school on some Mondays. Sadi Ansari, another former teacher, testified that Sabriya had several accidents that generally coincided with days that followed visitation with appellant.

In recognizing that there were disputes concerning Sabriya's education, medical care, hygiene, clothing, and religious observance, the circuit court noted that appellee did not consider appellant's opinion in the decision-making process. Most significantly, appellant wanted Sabriya to attend public school, but she remained at the Al-Huda School because appellee wanted her there. After that, the court found that appellant was combative and confrontational. Specifically, it noted that she used "extremely derogatory terms" toward Amina in the presence of Sabriya. Thereafter, recognizing that appellant had recently signed a lease for a one bedroom apartment, the court articulated:

> I have considered the best interest attorney's recommendation[ ] . . . that visitation not be overnight because of the mother's living situation and that includes even her current living situation where she's now in a one bedroom in Chevy Chase. And I interpret that, at least in part, to be because of the lack of a separate sleeping arrangement for the child, particularly under the historical circumstances where the mother has had a panoply of people coming in and out of the residence, whether short-term or long-term, with the child sleeping in the presence of other adults, whether male or female, or even in the mother's bed.
>
> The child is now at an age where the child needs a separate sleeping situation apart from her mother and apart from other people, adult or even other children unless peer where the child knows this other person.
>
> The living, as I say, the living situation of [appellant] is not conducive for the child's growth.

After considering the evidence presented, the circuit court held that the parties would continue to have

joint legal custody. Appellee would retain tie-breaking authority, but important decisions regarding Sabriya would be mutual. The circuit court then required the parties to communicate by telephone or in person. Additionally, appellant's visitation was changed to alternating weekends. However, appellant was precluded from having overnight visitation until she resided somewhere that had a separate bedroom for Sabriya. Once the best interest attorney was satisfied that appellant had obtained housing that included a separate bedroom for Sabriya, overnight visitation would resume. Furthermore, the circuit court held that custody exchanges would occur without third parties at the Third District Police Station or at the Al-Huda School.

On September 23, 2011, the following modification order, which in relevant part states, was entered:

> **ORDERED**, that [appellee's] Motion To Modify Custody, Visitation and Access is GRANTED IN PART and DENIED IN PART; and it is further
>
> **ORDERED**, that [appellant's] Motion for Modification of Custody, Access and Visitation be GRANTED IN PART and DENIED IN PART; and it is further
>
> **ORDERED**, that all provisions of the Consent Order For Custody entered on July 10, 2008 shall remain in full force and effect, except as specifically modified by the instant Order; and it is further
>
> **ORDERED**, that the Consent Ne Exeat Order entered July 29, 2011 . . . shall remain in full force and effect, except as modified by any future Court Order; and it is further
>
> **ORDERED**, that [appellee] and [appellant] shall continue to be awarded joint legal custody of . . . [Sabriya] . . .; with tie-breaking authority concerning any significant decisions allocated to [appellee]; and it is further
>
> **ORDERED**, that [the parties] are directed to fully and specifically observe and perform all requirements of joint legal custody as previously defined in the Consent Order For Custody; and it is further
>
> * * *
>
> **ORDERED**, that [appellant's] access shall be modified as follows:
>
> Until such time as [appellant] shall obtain appropriate living facilities which shall include, at a minimum, a separate bedroom for [Sabriya], the access shall be as follows:
>
> A. Normal Schedule
>
> i. Every Tuesday from 4:00 p.m. through 7:00 p.m.
>
> ii. Alternating Saturdays commencing September 24, 2011 from 9:30 a.m. to 6:00 p.m.
>
> iii. Alternating Sundays commencing Sunday 25, 2011 from 9:30 a.m. to 6:00 p.m.
>
> * * *
>
> **ORDERED**, that all visitation exchanges shall take place inside the Montgomery County Police (3rd) District Station in Silver Spring, Maryland; and it is further
>
> **ORDERED**, that all exchanges inside the Silver Spring Police Station shall be accomplished solely by [appellee] and [appellant] without the presence of any third party, including [appellee's] current spouse; and it is further
>
> **ORDERED**, that [appellant's] access shall revert to all access delineated in the Consent Custody Order . . . upon proof demonstrated to Annemarie Wall, Esquire, Best Interests Attorney, that [appellant] has obtained an appropriate residence for herself and [Sabriya] which shall, at a minimum, provide a separate bedroom for [Sabriya's] use only, with the following modification of the Consent Order For Custody . . .:
>
> That [Sabriya] shall reside with [appellant] on alternating weekends from Friday after school through Monday morning return to school during the school year. During the Summer vacation, as defined by the regular school year schedule of the Al Huda School, [appellant] shall return [Sabriya] to the Al Huda School unless such is not in session; in which event the exchange shall take place inside the Silver Spring (3rd) District Police Station; and it is further
>
> **ORDERED**, that on any occasion when [appellant] shall return [Sabriya] to the Al Huda School; that

> the Child shall be appropriately dressed in any school uniform, including hijab; and it is further
>
> **ORDERED**, that [Sabriya's] clothing, books, and any other material provided at the commencement of a visit shall be returned at its conclusion in clean and appropriate condition; and it is further
>
> * * *
>
> **ORDERED**, that only [appellee] and [appellant] shall be present at any exchange, whether at the Al Huda School or inside the Silver Spring Police Station, and that no third party, including [appellee'sl current spouse shall be present. . . .

On October 3, 2011, appellee submitted a motion to hear new evidence and reconsider the modification order. Appellee asserted that the evidence presented at the modification hearing was sufficient to award him sole physical and legal custody; the circuit court improperly delegated authority to the best interest attorney when it ordered overnight visitation would resume once appellant obtained housing that the best interest attorney considered suitable; and that the consent *ne exeat* order should be stricken because it violated appellee's constitutional rights. Additionally, appellee argued that there was new evidence that warranted a modification of custody. Noting that appellee purchased Sabriya a cellular telephone to take with her during visitation, he asserted that appellant "routinely" searched Sabriya to confiscate it. Appellee noted that one of the searches was particularly "abusive" because appellant restrained Sabriya and searched her underwear. Appellee further asserted that appellant, again, was verbally abusive in front of Sabriya, and that there was a resurgence of issues associated with Sabriya's bodily functions while in the care of appellant.

On October 3, 2011, appellant also filed a motion to alter or amend the modification order. In the motion, appellant asserted that overnight visitation should not be prohibited because she was unable to afford more than a one bedroom apartment. Aware of her financial limitations, appellant alleged that the best interest attorney recommended that she obtain a one bedroom residence in which Sabriya could sleep in the bedroom and appellant would sleep in a separate area. Appellant then inferred that the best interest attorney should not have made a recommendation regarding her living arrangement because she never visited her the apartment. Lastly, appellant posited that appellee continued to "abuse" the tie-breaking authority.

An opposition to appellant's motion to alter or amend was submitted by the best interest attorney. Specifically, she asserted that there was new evidence that there was continued difficulty regarding communication between the parties, alienation of parental relationships, Sabriya was fearful, and that there was an increased exposure to disputes, altercations, and inappropriate language. Additionally, the best interest attorney argued that the court improperly delegated judicial authority to her when it concluded that overnight visitation would resume once she was satisfied that appellant had obtained suitable housing. Finally, the best interest attorney argued that the consent *ne exeat* order should be amended to conform with the modification order.

On October 25, 2011, without explanation, the circuit court denied appellant's motion to alter or amend. That same day, the court denied appellee's motion to hear new evidence. In the same order, the circuit court denied the motion to reconsider, except for the issue of overnight viitation. The court, on that note, instructed the best interest attorney to produce a written report that detailed whether appellant's residence was suitable for overnight visitation. Additionally, the circuit court ordered that the consent *ne exeat* order would be amended to reflect the custody determination.

On November 14, 2011, the best interest attorney submitted a motion to alter or amend, asserting that she was prohibited from filing a written report with the court. Additionally, noting that the modification order made her a witness instead of a best interest attorney, counsel argued that the provision regarding overnight visitation should be stricken. Appellant opposed the motion; appellee consented. Before the motion was addressed, appellant noted an appeal.[4] Soon thereafter, the court granted in part and denied in part the motion to alter or amend. Most notably, the circuit court ordered that the requirement that the best interest attorney submit a written report regarding appellant's housing situation should be stricken. The court then denied the request to strike the portion of the order that stated overnight visitation would resume upon proof of suitable living arrangements.

## DISCUSSION

### I.

A court that retains continuing jurisdiction over a minor child is permitted to modify an award of custody. *See Frase v. Barnhart*, 379 Md. 100, 112 (2003). When a modification request based on a material change in circumstances is presented, a court must consider the best interest of the child when determining whether that change warrants a modification. *McCready v. McCready*, 323 Md. 476, 482 (1991). In reviewing such a determination, we shall not cast aside a court's fac-

tual findings unless clearly erroneous; nor shall "we . . . interfere with a decision regarding custody that is founded upon sound legal principles unless there is a clear showing that the [court] abused his discretion." *Id.* at 484 (quoting *Davis v. Davis*, 280 Md. 119, 124-26 (1977)).

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. Appellant believes that the circuit court should have considered testimony from the best interest attorney, but instead, made a "blanket decision" that failed to consider "the rights of a poor spouse." At bottom, relying on *Shanbarker v. Dalton*, 251 Md. 252 (1968), and *Jester v. Jester*, 246 Md. 162 (1967), *superceded 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. Appellee then posits that it was not within the court's "purview" to conduct a "spontaneous" and independent investigation. Appellee next avers that additional evidence was unnecessary because terminating overnight visitation was not predicated on the dimensions of appellant's new apartment. Lastly, noting that the circuit court's determination was not a "blanket decision," 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.

In *Shanbarker*, 251 Md. at 259, the Court of Appeals held that a custody determination should have been deferred until additional evidence regarding living conditions was generated. Specifically, the Court suggested that "[s]uch evidence might include investigations and reports of qualified social agencies concerning these conditions. . . ." *Id.* Additionally, in *Jester*, 246 Md. at 170-71, the Court of Appeals remanded a custody determination because there was no investigative report that addressed living conditions. 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, as explained below, additional information regarding appellant's apartment was unnecessary.

Before the hearing, appellant resided in a basement apartment that was condemned. There, appellant and Sabriya slept in the same bed. Additionally, on occasion, there were overnight visitors that slept within close proximity to appellant and Sabriya. Appellant stated that things would be different in her new apartment. Specifically, she indicated that 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 had 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. To be sure, appellant testified that she had leased a one bedroom apartment. Thus, 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 argues that the circuit court abused its discretion because it relinquished authority to the best interest attorney. Specifically, appellant posits that the best interest attorney was provided too much control when the court held that overnight visitation would resume once counsel was satisfied that appellant had secured housing that included a separate bedroom for Sabriya. At bottom, 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, 447 (2000)); *see also Meyr v. Meyr*, 195 Md. App. 524, 546 (2010) ("[A] court may not delegate to other individuals decisions regarding child visitation and custody."); *Shapiro v. Shapiro*, 54 Md. App. 477, 484 (1983) ("Jurisdiction over custody and visitation . . . of children is vested in the equity courts. There is no authority for the delegation of any portion of such jurisdiction to someone outside the court.") (citation omitted). 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, 134 (2011); *Meyr*, 195 Md. App. at 546; *In re: Caya B.*, 153 Md. App. 63, 81(2003).

*Shapiro* was one of the first cases that addressed the issue. There, the lower court awarded Betty Sue Shapiro ("Betty Sue") permanent custody of Lonnie, the sole child born during her marriage to Harry Shapiro ("Harry"). *Shapiro*, 54 Md. App. at 478-79. Among other things, the court ordered that Harry "shall have no right of visitation with Lonnie until such

time as Dr. Robert B. Lehman recommends that such visitation shall commence, and such visitation shall be on the terms, guidelines and at such places as recommended by Dr. Robert B. Lehman. . . ." *Id*. at 479. On appeal, we recognized that our first "difficulty" with this provision was that it, in effect, denied Harry access to Lonnie for an indefinite period of time. *Id*. at 483. Second, we concluded that the other "difficulty" was that it was an improper delegation of judicial authority. *Id*. at 484. 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." *Id*.

*Meyr* and *Van Schaik* are also noteworthy. In *Meyr*, 195 Md. App. at 529-31, the parties, Chona Meyr ("Chona") and Ronald Meyr ("Ronald"), prior to the divorce proceedings, agreed to participate in family reunification therapy. At the conclusion of trial, the lower court concluded that there were several steps necessary to family reunification, *id*. at 538-41, and, in relevant part, awarded custody and visitation:

> ORDERED, that the children's best interests attorney, Jean Meta, Esquire, shall remain appointed to coordinate the children's reunification therapy with [Chona], for as long as she deems said therapy is needed by the family, or until she petitions to the Court to be relieved for said duties; and it is
>
> ORDERED, that Jean Meta, Esquire, is vested with the power to direct family reunification therapy, including but not limited to the power to choose alternate therapists or care providers as necessary; and it is
>
> ORDERED, that Jean Meta, Esquire, is vested with the power to modify [Chona's] access schedule upon consultation with the family's care providers, as therapy progresses and she deems appropriate . . . .

*Id*. at 541-42.

In the following statement, the lower court explained the best interest attorney's authority:

> The court is . . . ordering the children's best interest attorney, Jean Meta, Esquire, to oversee the children's therapy. As such, the Court is vesting with her the power to direct family reunification therapy subject to supervision and modification by the Court. Lastly, the Court is assigning the best interest attorney the authority to modify [Chona's] access schedule as the family therapy progresses.

Id. at 547.

Chona filed a motion to alter or amend, asserting that the lower court could not delegate authority concerning a custody determination to a third party. *Id*. at 543. Agreeing, the lower court "deleted the provisions that the best interest attorney was vested with the power 'to direct family reunification therapy' and to 'modify [Chona's] access schedule upon consultation with the family's care providers, as therapy progresses and she deems appropriate.'" *Id*. at 544. The amended section read as follow:

> ORDERED, that the children's best interests attorney, Jean Meta, Esquire, shall remain appointed to coordinate the children's reunification therapy with [Chona], for as long as she deems said therapy is needed by the family, or until she petitions the Court to be relieved of said duties. . . .

*Id.* at 547.

Ronald noted an appeal, arguing that the lower court exceeded its authority when it ordered that the best interest attorney would determine the duration of the family reunification therapy. *Id.* at 545. Ronald then averred that the lower court, not a non-judicial entity, was supposed to exercise discretion with regard to visitation decisions. *Id.* Chona responded that the lower court merely instructed the best interest attorney to coordinate existing therapy until she believed that her assistance was unnecessary. *Id.* at 546. 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." *Id.* at 549.

In *Van Schaik*, 200 Md. App. at 129, Judith Van Schaik ("Judith") and Stephen Van Schaik ("Stephen") were awarded joint physical and legal custody of their two children. After Stephen moved the children to South Carolina without notifying Judith, the lower court issued an ex parte order permitting her to travel to South Carolina to retrieve the children. *Id*. at 130. Each party thereafter requested a modification of custody. *Id.* In granting Judith sole legal and physical custody, the lower court recognized that the parties were unable to cooperate, *Id.* at 131-32, and, in relevant part, ordered:

> **ORDERED**, that except in emergencies, the parties shall communicate through e-mail and any contentious matters or disputed e-mail issues shall be forwarded to the attorney for

> the minor children, Leigh R. Melton, Esquire, for her review. In the event [Stephen] and [Judith] cannot reach a mutual agreemcnt on any disputed matter regarding the minor children within twenty-four (24) hours, then the attorney for the minor children shall serve as the "tie-breaker" and resolve the dispute. . . .

*Id*. at 132.

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. *Id.* at 133-36. Initially, we noted that the lower court did not restrict the best interest attorney's "decision-making authority to 'ancillary' matters." *Id.* at 135. Instead, we recognized that counsel was provided "broad authority" to resolve disputes with regard to *any* dispute. *Id.* (emphasis in original). We then opined that the lower court did not indicate that the best interest attorney's actions were subject to the court's review or modification. *Id.* at 135-36. Accordingly, we concluded that the lower court erred because it improperly delegated authority to a non-judicial entity. *Id.* at 136.

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. The modification order, in relevant part, read:

> **ORDERED**, that [appellant's] access shall revert to all access delineated in the Consent Custody Order . . . upon proof demonstrated to Annemarie Wall, Esquire, Best Interests Attorney, that [appellant] has obtained an appropriate residence for herself and [Sabriya] which shall, at a minimum, provide a separate bedroom for [Sabriya's] use only.

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.

**JUDGMENT OF TIIE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

1. Appellant presented the following question: "Did [the circuit court] abuse its discretion and fail to use its discretion in determining the custody and visitation rights of the parties?" We rephrased the issue because the question presented does not accurately reflect the panoply of issues presented in appellant's brief.

2. A best interest attorney was appointed soon after appellee's motion was filed. In the order, the circuit court precluded the best interest attorney from testifying or filing a written report.

3. Appellee maintained that he properly cared for Sabriya.

4. Appellant's notice of appeal is unclear whether she was appealing the circuit court's denial of her motion to alter or amend the modification order, or the denial of appellee's motion to hear new evidence and alter or amend the modification order. Nevertheless, because the issues are similar and intertwined, we shall not differentiate between the respective motions. On a separate note, appellee also filed a notice of appeal. However, it was untimely.

**Cite as 9 MFLM Supp. 63 (2012)**

**Divorce: contribution awards: lack of ouster**

# David P. Olslund

# v.

# Mary E. Olslund

*No. 1175, September Term, 2010*

# David Olslund, Sr.

# v.

# Mary E. Olslund

*No. 3035, September Term, 2010*

# Consolidated Cases

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

*Opinion by Matricciani, J.*

*Filed: August 1, 2012. Unreported.*

**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.**

Appellant, David Olslund and appellee, Mary Olslund, were married in 1989 and separated in 2007. The Circuit Court for Anne Arundel County granted the parties an absolute divorce on July 27, 2009. Mr. Olslund filed a motion to modify custody and support of the parties' minor son on October 26, 2009. On June 11, 2010, Ms. Olslund responded with a motion for summary judgment on the both issues. Ms. Olslund's motion was denied on June 22, 2010, but was subsequently granted after an evidentiary hearing on June 24, 2010. On June 28, 2010, Ms. Olslund filed a complaint for contribution, seeking from Mr. Olslund half of all expenses related to the maintenance of their marital home. Her request was granted on January 7, 2011. Mr. Olslund appealed both the award of summary judgment and the award of contribution, and he now brings a consolidated appeal of the two judgments.

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

## QUESTIONS PRESENTED

Mr. Olslund presents two questions for our review, which we have rephrased as follows:[1]

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?

For the reasons that follow, we answer no to these questions and affirm the judgments of the circuit court.

## FACTUAL AND PROCEDURAL HISTORY

On April 1, 1989, the parties were married in Baltimore County, Maryland. The marriage produced two children, David Park Olslund, Jr., born July 22, 1989, and Kyle James Olslund, born September 2, 1991. At the time of the divorce proceedings, only Kyle was still a minor subject to the court's jurisdiction over custody.

Mr. Olslund is a graduate of West Point Military Academy and a former Commissioned Officer in the United States Army. He also holds a master's degree and a law degree. At the beginning of the parties' marriage he worked as a lawyer, representing personal injury plaintiffs. Ms. Olslund worked for the United States government in the Defense Security Service of the Department of Defense. Throughout the parties' marriage, she continued to work for the government in similar capacities.

In December of 1992, the Olslunds relocated from Maryland to Phoenix, Arizona for Ms. Olslund's job. During their time in Arizona, Mr. Olslund did not work as an attorney; rather, he stayed home with the couple's sons and performed many of the household duties while Ms. Olslund was the "breadwinner" for the family. The family, however, began to experience financial difficulties, so Mr. Olslund got a job as a high school physical education teacher and basketball coach. He also became a landlord for a short time, but with limited success.

After living for some time in Arizona, the

Olslunds again relocated due to Ms. Olslund's job with the United States government, this time to New Jersey. Just as he did in Arizona, Mr. Olslund stayed home with his children and worked sporadically when the family's finances were strained. In New Jersey, he taught math classes at a community college and then at a high school.

After living in New Jersey for a time, the Olslunds moved back to Maryland, where they bought a house in Severn. Mr. Olslund fashioned a law office in this house, from which he worked occasionally when his law school friends would send him legal work.

In June of 2007, Ms. Olslund became aware that Mr. Olslund was having an extramarital affair and, shortly thereafter, the marriage deteriorated. Following an altercation on July 4, 2007, Mr. Olslund left the marital home the next day and he did not return there to live. He did, however, continue to use the home as his law office.

Mr. Olslund filed a complaint for limited divorce in January of 2008, to which Ms. Olslund responded with a counter-claim, alleging that Mr. Olslund's infidelity and use of pornography were the reasons for their separation. On June 10, 2008, the court held a *pendente lite* hearing and awarded Ms. Olslund custody of Kyle and use and possession of the marital home in Severn. The court also ordered Mr. Olslund to pay $580.00 per month in *pendente lite* child support.

On July 27, 2009, after a trial lasting several days, the court granted an absolute divorce on the ground of a two year separation. Under the court's order, Ms. Olslund retained use and possession of the home and sole legal and physical custody of Kyle, and she was awarded $441.00 per month in child support from Mr. Olslund. The court assigned Ms. Olslund responsibility for the mortgage, property tax, homeowner's insurance, and all repairs under $250.00, but reserved her right to file a claim for contribution for these expenses at a later date.

Throughout the divorce proceedings, Kyle expressed a desire to live with Mr. Olslund. The court, finding that the father related to his son more like a friend than a parent,[2] discounted Kyle's desires. However, Kyle turned eighteen on September 2, 2009 and decided to move in with his father the next month. Mr. Olslund filed a motion for modification of custody and support, contending that the change in circumstances warranted a change in the court's earlier order. Ms. Olslund responded with a motion for summary judgment. After a hearing on the matter, the court granted Ms. Olslund's motion for 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 seeking money to put toward mortgage payments, property taxes, insurance, homeowners' association dues, and repair and maintenance costs. After a hearing on the matter, the circuit court awarded Ms. Olslund the full contribution which she had requested and entered judgment against Mr. Olslund in the amount of $32,859.00. Mr. Olslund filed a timely appeal and moved for consolidation of the two appeals, which we allowed.

## DISCUSSION

### I.

The Court of Appeals summarized the summary judgment standard of review in *Dashiell v. Meeks*, 396 Md. 149, 163 (2006):

> With respect to the trial court's grant of a motion for summary judgment, the standard of review is *de novo*. . . . Prior to determining whether the trial court was legally correct, an appellate court must first determine whether there is any genuine dispute of material facts. . . . Any factual dispute is resolved in favor of the non-moving party. . . . Only when there is an absence of a genuine dispute of material fact will the appellate court determine whether the trial court was correct as a matter of law.

Appellant first contends that the circuit court erred when it granted summary judgment and denied his motions to modify custody and support, arguing that emancipation is a "factual determination." Appellant relies on the statement that "Emancipation of a minor child is never presumed, and the burden of proof is upon him who alleges it." *Holly v. Maryland Auto. Ins. Fund*, 29 Md. App. 498, 506 (1975) (quoting *Parker v. Parker*, 94 S.E.2d 12, 13 (S. Ct. S.C. 1956)). While this statement may be true, it is not germane to the case at hand because it describes emancipation of *minor children*, and Kyle was not a minor child at the time appellant filed the motion, by virtue of Maryland Code Art. 1 § 24(a)(1).[3] It is undisputed that as of September 2, 2010, Kyle was eighteen years of age. Md. Family Law Code, Art. 1 § 201(a)(5), states, an "equity court has jurisdiction over: custody or guardianship of a child except for a child who is under the jurisdiction of any juvenile court and who previously has been adjudicated to be a child in need of assistance." Md. Family Law Code (1999, 2006 Repl. Vol.), Art. 1 § 201(a)(5). As an eighteen-year-old, Kyle was an adult as defined by statute. The court, therefore, lacked subject matter jurisdiction and could not modify or assign custody of Kyle. The court lost subject matter jurisdiction on the issue of custody simply because Kyle was no longer a child, not for any reason related to emancipation.

On the issue of child support, appellant asserts that Kyle was still subject to child support between his eighteenth birthday and his high school graduation and that, because of the purported change of custody, child support should have been changed. Appellant is correct that the court could order the parties to support Kyle during this time. After its definition of adult, Article 1, § 24 continues:

> A person who has attained the age of 18 years and who is enrolled in secondary school has the right to receive support and maintenance from both of the person's parents until the first to occur of the following events:
>
> (i) The person dies;
>
> (ii) The person marries;
>
> (iii) The person is emancipated;
>
> (iv) The person graduates from or is no longer enrolled in secondary school; or
>
> (v) The person attains the age of 19 years.

Md. Code Vol. 1 (2005 Repl. Vol.), Art. 1 § 24(a)(2). Because Kyle was enrolled in high school and was not yet nineteen years old, he was entitled to child support until his graduation.

For the court to modify child support, however, appellant needed to show that there was a substantial, material change in circumstances *that warranted the modification. Pettino v. Pettino*, 147 Md. App. 280, 306 (2002) ("[A] court has discretion to modify a child support award, provided that there has been "a material change in circumstances, needs, and pecuniary condition of the parties from the time the court last had the opportunity to consider the issue.") (quoting *Kierein v. Kierein*, 115 Md. App. 448, 456). Appellant asserts that the change in Kyle's living situation constitutes a material change in circumstances. However, appellant offers only Kyle's presence in the household as the material change in circumstances but failed to set forth any material changes *relevant to child support*, such as increased expenses due to Kyle's presence. *Id.* at 307 ("A change . . . [must be] . . . relevant to the level of support a child is actually receiving or entitled to receive. . . . Thus, the court must focus upon 'the alleged changes in income or support' that occurred after the child support award was issued. . . . A change 'that affects the income pool used to calculate the support obligations upon which a child support award was based' is necessarily relevant."). For these reasons, the circuit court correctly granted appellee's motion for summary judgment.

**II.**

Mr. Olslund next contends that the circuit court erred in awarding Ms. Olslund $32,589.00 in contribution. In support of this contention, he makes two arguments. First, Mr. Olslund argues that he was ousted from the property in July of 2007, and therefore does not owe Ms. Olslund any contribution. Alternatively, Mr. Olslund claims that, instead of being ordered to pay the full amount of contribution, he should be awarded a credit for the "fair rental value" of the property, to be subtracted from the total contribution he would owe Ms. Olslund.

We see no error in the circuit court's finding that appellant was *not* ousted from the property in July of 2007. 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, 125 (1869) and *Van Bibber v. Frazier*, 17 Md. 436, 451 (1861)). This Court has held explicitly that a court's order of use and possession, as in this case, 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 circuit court's finding that there was no ouster, which we review for clear error. Md. Rule 8-131(c). *Dickerson v. Longoria*, 414 Md. 419, 432 (2010). Though Mr. Olslund stopped living in the Severn house permanently in July of 2007, he left largely of his own accord and returned frequently to work from the house during the day. These circumstances do not constitute an ouster; there was no "notorious and unequivocal act" by Ms. Olslund. Rather, Mr. Olslund first moved out of the house and then, gradually, stopped using it as an office. Therefore, Mr. Olslund's argument that he is relieved from contribution payments because he was ousted from the property fails.

Nor do we see error in the circuit court's ruling on appellant's contention that he is entitled to a fair rental value credit against the contribution award. Appellant cites no legal authority to support his claim that he is entitled 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.[4]

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

**FOOTNOTES**

1. Mr. Oslund's questions in their original form were as follows:

> I. Whether Judge North abused her discretion in the dismissal of the Appellant's Motion for Change of Custody and Support.
>
> II. Whether Judges North and Wolff abused their discretion in entering contribution awards for the Appellee despite the evidence presented at trial and subsequent hearing.

2. The judge stated:

> Kyle explained to me that he would, given his choice, rather live with his father. And it appears to me, and I think also to the custody investigator, that the relationship there is not really father-son, but more of a pal, a buddy relationship. . . . And I have to discount, although he is certainly old enough, I have to discount a little bit of his preference.

3. Md. Code Art 1 § 24(a)(1) provides:

> Except as provided in paragraph (2) of this subsection or as otherwise specifically provided by statute, a person eighteen years of age or more is an adult for all purposes whatsoever and has the same legal capacity, rights, powers, privileges, duties, liabilities, and responsibilities as prior to July 1, 1973, persons had at twenty-one years of age, and the "age of majority" is hereby declared to be eighteen years. Md. Code Vol. 1(2005 Repl. Vol.), Art. 1 § 24(a)(1).

4. Even if there had been ouster, appellant's claim of ouster appears to be collaterally estopped. *Colandrea v. Wilde Lake Community Ass'n*, 361 Md. 371, 387 ("[The] collateral estoppel . . . doctrine [states] when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim"). Appellant argues that he was ousted from the marital home in July of 2007. However, during both the *pendente lite* hearing in 2008 and the subsequent divorce trial, appellant failed to raise ouster as a defense. If Appellant wanted to raise the issue of ouster, he should have done so then. Therefore, even if the trial court was incorrect on the issue of ouster, appellant is collaterally estopped from relying upon ouster as a defense because the issue has been litigated already.

**Cite as 9 MFLM Supp. 67 (2012)**

**Child support: genetic testing: department's motion to compel**

# Department of Human Resources, Queen Anne's County Office of Child Support Enforcement ex rel Mary Rebecca Poteat

# v.

# Daniel Dominic Rosendale

*No. 1404, September Term, 2010*

*Argued Before: Krauser, C.J., Wright, Davis, Arrie W. (Ret'd, Specially Assigned), JJ.*

*Opinion by Krauser, C.J.*

*Filed: August 1, 2012. Unreported.*

**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.**

The Department of Human Resources of the Queen Anne's County Office of Child Support Enforcement (the "Department"), filed a petition, on behalf of Mary Poteat, the mother of Christian E. Goodwin ("Christian"), under the Uniform Interstate Family Support Act ("UIFSA"), in the Circuit Court for Queen Anne's County, alleging that Daniel Rosendale was Christian's biological father and requesting that he be compelled to pay child support for Christian. In response, Rosendale filed a motion to dismiss the petition, and the Department, in turn, filed a motion to compel Rosendale to submit to genetic testing. Ultimately, the circuit court granted Rosendale's motion to dismiss and denied the Department's motion to compel Rosendale to submit to genetic testing.

For reasons that follow, we reverse the grant by the circuit court of Rosendale's motion to dismiss and remand with instructions to grant the Department's motion to compel genetic testing.

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

**Background**

Christian Goodwin, now fifteen-years old, was born in 1997, while Mary Poteat was still married to her former husband, Mark Goodwin. Three years later, Ms. Poteat and Goodwin were divorced, and eight years after that, Ms. Poteat filed a motion, in the Circuit Court for Frederick County, demanding child support from Goodwin. Although a genetic test, arranged by Goodwin, had purportedly ruled him out as Christian's biological father, Goodwin filed a motion that he and Christian be genetically tested. Several days later, Poteat filed a petition to modify the custody provisions in the divorce judgment. Following a hearing on Poteat's petition, Goodwin agreed to a *pendente lite* consent order, requiring him to pay $350 per month child support for Christian, and filed a petition to establish paternity.

After a hearing on Goodwin's petition, the Frederick County circuit court ordered that it be amended to a petition "to establish and or disestablish paternity" and further ordered that genetic testing of Goodwin and Christian be performed or, in the alternative, that the earlier results from the initial test, arranged by Goodwin, be admitted into evidence, if the laboratory that had performed that test was on a list of laboratories that are approved by Frederick County child support authorities.

Several weeks later, having determined that the previous test had been performed by an approved laboratory, the Frederick County circuit court appointed a best interest attorney to represent Christian. The circuit court thereafter granted the petition to disestablish paternity and denied Poteat's petition to modify custody as moot. After Goodwin's child support obligation was terminated by consent, a final judgment was entered declaring that Mark Goodwin is not the father of Christian Goodwin.

Sometime during this same period, Poteat moved to North Carolina. There, with the assistance of a local North Carolina child support agency, the day after the notice of recorded judgment in favor of Goodwin was docketed in Maryland, Poteat sent a "Child Support Enforcement Transmittal," under the UIFSA,[1] to the Maryland Child Support Enforcement Administration,

requesting that proceedings be initiated in Maryland[2] to establish Rosendale as Christian's biological father and to compel him to pay child support. Having been duly notified of receipt of that transmittal by the Maryland Child Support Enforcement Administration,[3] the Department filed the transmittal in the Circuit Court for Queen Anne's County. Attached to the transmittal were an affidavit executed by Poteat, alleging that she had sexual intercourse with Rosendale at about the time Christian was conceived and that he was Christian's father, as well as a copy of the Frederick County judgment disestablishing Mark Goodwin's paternity and a genetic test report, showing that Mark Goodwin could not be the father of Christian.

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 for genetic testing of Rosendale 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." As to the Department's motion to compel Rosendale to submit to genetic testing, 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 then noted this appeal.

**Discussion**

The Department claims that the lower court erred in dismissing the UIFSA petition because, under Maryland's liberal pleading rules, 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 Department's motion to compel Rosendale to submit to genetic testing, to establish paternity, and, in so doing, "is likely to deprive Christian permanently of the opportunity to have paternity established."

In dismissing the Department's petition, the circuit court noted what it described as "multiple inconsistencies" in the affidavit, signed by Poteat, accompanying the UIFSA petition: specifically, the answers to question 3(b) of Section I and question 1 of Section II of the affidavit. Question 3(b) of Section I asked whether "[a] man was married to the natural mother, and the child's birth occurred within a year of the end of the marriage" and if so, who that man was and the date the marriage ended. Poteat responded "Yes" and that "Mark Alan Goodwin" was the man who was married to her and that their marriage ended on December 18, 2000. Although Mark Goodwin was, in fact, married to Poteat when Christian was born, it states elsewhere in the affidavit that Christian was born July 17, 1997, which was more than one year before the end of the marriage, contrary to Poteat's response that Christian was born "within a year of the end of the marriage."

Question 1 of Section II of the affidavit asked whether Poteat "had sexual intercourse with another man (other than the man [she was] naming as the child's natural father) during the time 30 days before or 30 days after the child was conceived," to which she answered that she had and that the "other man" was Rosendale, another apparent inconsistency. In light of these "inconsistencies," the court held that it was "impossible . . . to determine whether the action is well-pled against [Rosendale], and whether Poteat is entitled to the relief she seeks." "For those reasons alone," concluded the court, it was required to grant Rosendale's motion to dismiss.

Upon review of the grant of a motion to dismiss, we "must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643 (2010).

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." As the Department points out, it was clear that the "petition, with affidavit, alleges that . . . Rosendale is Christian's father, and states the facts necessary to support that allegation." Thus, the circuit court erred in dismissing the petition.

As for the inconsistencies that the court below held were fatal to the petition, the first such inconsistency — 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 Mark Goodwin in December 2000. Not only are those facts both readily verifiable, but they are not in dispute. And, on those facts, Poteat (and the Department) would not be barred from relief, and, consequently, this discrepancy, that Christian was not, as the affidavit stated, born "within a year of the end of the marriage," is not material.

As for the second inconsistency in the affidavit — naming Rosendale as both the natural father and as "another man" with whom Poteat had sexual intercourse during the time Christian was conceived — that inconsistency appears to be simply the product of mis-

reading the reference to "natural father" to be a reference to "legal father."[4] Moreover, as the Department points out, Poteat's allegation that Rosendale is Christian's father, at Section II of the affidavit, 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 now to the denial of the motion for 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 circuit court 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. *Id*. at 678.

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, "[i]f [he] wishes," and refused to consider the Department's motion for genetic testing "until [Rosendale] has been given a reasonable opportunity to reopen the judgment in the Circuit Court for Frederick County."

But he has no reason to challenge that ruling. Thus, its practical effect is to allow Rosendale to delay indefinitely any efforts to establish his paternity and thereby avoid payment of child support and arrearages. Moreover, the Frederick County judgment, disestablishing Mark Goodwin's paternity, was recorded in 2009, and, under Maryland Rule 2-535(b), an enrolled judgment may be reopened only for "fraud, mistake, or irregularity." But even if we were to assume that the Frederick County circuit court misapplied *Kemp* and abused its discretion in ordering genetic testing of Mark Goodwin, such a legal error does not provide a sufficient basis for reopening the enrolled judgment in that case. In sum, Rosendale has neither an incentive nor a legal basis to seek to reopen the Frederick County judgment, as proposed by the court below.

The Department further contends that, under Family Law Article § 5-1029, the circuit court lacked discretion to deny the genetic testing requested. That statute provides in part:

> (a) Requests and orders for tests. —
>
> (1) The Administration may request the mother, child, and alleged father to submit to blood or genetic tests.
>
> (2) If the mother, child, or alleged father fails to comply with the request of the Administration, the Administration may apply to the circuit court for an order that directs the individual to submit to the tests.
>
> (b) In general. — On the motion of the Administration, a party to the proceeding, or on its own motion, the court shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child.

On its face, Family Law § 5-1029(b) requires the court to order genetic testing, upon the request of the Administration, that is, the Department. *See* Family Law § 5-1001(b) (defining "Administration"). Rosendale maintains, however, that Family Law § 5-1029 applies only where the child is born out of wedlock and is thus inapplicable here, since Christian was born during the marriage of Poteat and Mark Goodwin. *See Stubbs v. Colandrea*, 154 Md. App. 673 (2004) (holding that a third party, claiming to be a child's biological father, where the child was conceived and born during a marriage, is not a "putative father" and is not entitled to rely on the mandatory genetic testing provisions of Family Law §§ 5-1002 and 5-1029). The applicable statute, according to Rosendale, is Estates and Trusts § 1-208,[5] subject to the procedural provisions of Maryland Rule 2-423,[6] which, together, have been construed as requiring a determination of the child's best interests, before genetic testing may be ordered. *See Turner v. Whisted*, 327 Md. 106 (1992).

As a preliminary matter, even if the circuit court had been required to conduct a best interest analysis before ordering that Rosendale submit to genetic testing, we fail to see how Christian's best interests were served by denying the Department's motion for genetic testing. In fact, Christian's interests would presumably best be served by resolving the instant case on its merits and determining, once and for all, and as soon as reasonably possible, whether Rosendale is the biological father, especially given that, as things currently stand, Christian is fatherless. But, we cannot conduct a best interest analysis in the first instance, because we are not fact-finders. And, because a holding that Estates and Trusts § 1-208, not Family Law § 5-1029, applies, would require a remand, so that the lower court could perform a best interest analysis, we must

resolve the legal issue presented. Thus, we next consider, under the circumstances here, 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 or deny the motion.

Several cases have addressed the same question, but none of them presents the peculiar factual circumstances of the case before us. Those cases have all held that Family Law § 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[7] 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 (holding that child conceived during a marriage but born after divorce is "a presumptively legitimate child" and that a third party claiming to be her father may not invoke the mandatory blood testing provisions of Family Law § 5-1029 but must, instead, "first show that blood testing is in the best interests of the child"); *Kamp*, 410 Md. at 665 (holding that, where marital father, "who is the presumed father of the child," moved for genetic testing, six years after divorce, he must show "good cause, tied to and determined by the best interest of the child"); *Evans v. Wilson*, 382 Md. 614, 628 (2004) (observing that "where a child is presumed 'legitimate' and 'where two men each acknowledge paternity' of that child, the procedure for considering the issue of paternity under the Estates and Trusts Article is preferable because it presents the 'more satisfactory' and 'less traumatic' means of establishing paternity") (quoting *Turner*, 327 Md. at 113); *Ashley v. Mattingly*, 176 Md. App. 38, 62 (2007) (holding that, in dispute between divorced couple, Estates and Trusts Article, not Family Law Article, applied to paternity determination where child was born during parties' marriage); *Stubbs*, 154 Md. App. at 682-88 (holding that Estates and Trusts Article applied to situation where a third party, claiming that he was the biological father of a child born during a marriage, sought to compel genetic testing and where child was being supported by mother and presumed father).

But, here, although Christian was born during his mother's marriage to Mark Goodwin, the legal presumption that the marital father, Goodwin, is Christian's father was conclusively rebutted when the Frederick County circuit court enrolled the judgment disestablishing Mark Goodwin's paternity. The instant case is thus distinguishable from the foregoing cases because of that enrolled judgment, the effect of which is to legally recognize Christian as "an illegitimate child." *See Mulligan*, slip op. at 30 (observing that "born out of wedlock" is a "euphemism for an illegitimate child" and defining such a child as either "[b]orn to an unmarried female" or "born to a married female but begotten during the continuance of the marriage status by one other than her husband") (quoting Ballentine's Law Dictionary (3d ed. 1969)). Under these circumstances, we believe that the provisions of the Family Law Article, Title 5, Subtitle 10, which govern paternity proceedings for children born out of wedlock, should apply. That leads us to conclude that the circuit court was required, under Family Law § 5-1029, to grant the Department's motion for genetic testing to establish paternity, and it was error for the court to deny that motion.

**JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.**

**FOOTNOTES**

1. In Maryland, the UIFSA is codified at Code, section 10-301 *et seq*. of the Family Law Article.

2. Under Maryland Code (1984, 2006 Repl. Vol., 2009 Supp.), section 10-313(b) of the Family Law Article, an "individual or a support enforcement agency may initiate a proceeding authorized under this subtitle by filing a complaint in an initiating tribunal for forwarding to a responding tribunal." Here, the UIFSA transmittal constituted the petition, which was filed in the "initiating tribunal" in North Carolina and forwarded to the "responding tribunal" in Maryland.

3. Among the duties of the Maryland Child Support Enforcement Administration, under the UIFSA, is to "take all steps necessary to enable an appropriate tribunal in this State or another state to obtain jurisdiction over the defendant." Md. Code (1984, 2006 Repl. Vol., 2009 Supp.), section 10-319 of the Family Law Article.

4. Question 2, Section II, of the affidavit asked whether Poteat was married at the time of Christian's birth, to which she answered, "No." This answer would be correct only as to Rosendale, not Mark Goodwin.

5. Maryland Code (1974, 2011 Repl. Vol.), § 1-208 of the Estates and Trusts Article ("Illegitimate child"), states in part:

> (b) Child of his father. — A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:
>
> (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;

(2) Has acknowledged himself, in writing, to be the father;

(3) Has openly and notoriously recognized the child to be his child; or

(4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

6. Maryland Rule 2-423 governs mental or physical examinations of persons, where the mental or physical condition of a party is in controversy in a civil proceeding. The rule permits a circuit court to order a party to submit to such an examination, but only "for good cause shown."

7. Estates and Trusts § 1-206(a) states in part that a "child born or conceived during a marriage is presumed to be the legitimate child of both spouses." Family Law § 5-1027(c) provides a "rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception."

NO TEXT

**Cite as 9 MFLM Supp. 73 (2012)**

**Administrative law: child neglect: evidence of risk of harm**

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

*No. 1678, September Term, 2010*

*Argued Before: Matricciani, Graeff, Hotten, JJ.*

*Opinion by Graeff, J.*

*Filed: August 1, 2012. Unreported.*

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

**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 (the "Department"), appellee, received a report that Mr. John Doe, appellant, had been giving his son, J.T., medication without a prescription.[1]

The medication was Adderall, an amphetamine.

The Department concluded an investigation with a finding of "unsubstantiated child abuse." Mr. Doe sought review at the Office of Administrative Hearings ("OAH"), and a contested hearing was held before an Administrative Law Judge ("ALJ"). The ALJ modified the finding from "unsubstantiated child abuse" to "indicated child neglect." Mr. 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 Mr. Doe and the Department appealed.

Mr. Doe presents the following questions for our review, which we have rephrased slightly:

1. Did the Department meet its burden of proving that appellant engaged in unsubstantiated child abuse when it failed to adduce any evidence of harm or a substantial risk of harm to appellant's son?
2. Is an ALJ authorized to decide an issue that was not presented by the Department and about which appellant had no notice?
3. If the ALJ was permitted to decide the issue of neglect, despite it not being presented to the agency and appellant having no notice, did the Department meet its burden of proving neglect?
4. Did the ALJ violate the "exclusiveness of the record doctrine," codified in the State Government Article, or erroneously conclude that there was a substantial risk of harm in providing J.T. with Adderall, despite there being no expert testimony on the issue?
5. Did the ALJ err in modifying the Department's finding from "unsubstantiated child abuse" to "indicated child neglect"?[2]

For the reasons set forth below, we agree with Mr. Doe that there was not substantial evidence adduced to show a substantial risk of harm to J.T. based on Mr. Doe's actions. Accordingly, we affirm the judgment of the circuit court and remand for further proceedings by the OAH.

## FACTUAL AND PROCEDURAL BACKGROUND

On December 4, 2008, the Department received a report that Mr. 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"). Mr. Doe gave J.T. Adderall that had been prescribed for Mr. Doe, mixing the Adderall in his son's applesauce.

After an investigation, the Department found that Mr. Doe was responsible for "unsubstantiated child physical abuse" for administering Adderall to J.T. on an inconsistent basis, in secret, and without a prescription. Mr. Doe appealed from the Department's finding, requesting a hearing before an ALJ.

A hearing was held on September 17, 2009. Counsel for the Department characterized the case as

one involving a finding of unsubstantiated child neglect, stating: "[W]e will seek to show that the finding of unsubstantiated child neglect is appropriate and should be affirmed." The ALJ noted that the May 1, 2009, notice of agency action stated that the finding was "unsubstantiated child physical abuse," Counsel for Mr. Doe stated that he had been "proceeding with the impression that [abuse] was the finding, not neglect." The court and counsel discussed that the Department at times referred to unsubstantiated abuse and at other times to unsubstantiated neglect. The ALJ stated that "we can go forward because under the regulations I have the authority to modify — based on the evidence, modify any finding to child neglect or child abuse, and also to substantiate — I mean, indicated, unsubstantiated and ruled out."

At the end of the discussion, the following occurred:

> JUDGE: And tell me what you're going under, abuse or neglect?
>
> THE DEPARTMENT: Under unsubstantiated child neglect, the actual finding was unsubstantiated physical abuse. Therefore, the evidence and testimony expects to show that there is insufficient evidence to show that the child sustained any injury. Again, the child was 10 years old at the time this incident occurred, and the alleged maltreater was his father.
>
> There's also insufficient evidence to show that the child, in fact, did sustain any harm here. However, there is substantial risk of harm, which is why this case was not ruled out and is appropriate for an unsubstantiated finding. Therefore, we'll seek to affirm the local department's decision of unsubstantiated physical abuse.

Counsel for Mr. Doe then argued that, based on the facts, he would "be asking for a ruled out finding with respect to the allegations."

Ms. Isabelle Max-Johnson, the social worker who investigated the incident, testified that she began her investigation on December 4, 2008, when the Department received a report that Mr. Doe was giving his son his medication after the child was diagnosed with ADHD. J.T. told her that Mr. Doe had "been giving [J.T.] his own medication, and that [J.T.'s] mother was opposed to . . . [J.T.] taking the medication." J.T. had been prescribed his own medication at the time, something similar to Adderall, but his mother had refused to give it to him "because of the side effects." Mr. Doe declined to be interviewed during the investigation.

When asked what risk of harm was presented to the child, Ms. Max-Johnson testified:

> The medication that the child was given was prescribed for an adult, and this child is a minor who is only 10. And given the child, we don't know the dosage of the father's medication, but whatever it is, I know it's a very high dosage. And the child taking his father's medication could have caused him substantial risk of harm, you know, which could have meant placing the child's health and welfare at risk.

Ms. Max-Johnson confirmed that her finding was unsubstantiated child abuse.

On cross-examination, Ms. Max-Johnson acknowledged that, in her report, she stated that "there is insufficient evidence that the father's poor judgment to give his son his own medication had placed the child at substantial risk of being harmed." She testified that she had no pharmacological or medical training, that she did not talk with J.T.'s health care providers, and that she was not aware of the dosage of Adderall pills, in general or what was given to J.T.

After Ms. Max-Johnson's testimony, counsel for Mr. Doe made a motion for summary judgment. He asserted that a finding of "ruled-out child abuse" was appropriate, because the Department failed to meet its burden of showing physical or mental injury. He argued that "what the Department would need to have is a medical expert come in here and have some evidence that he was, in fact, given a dose that would not be appropriate."

Counsel for the Department responded that there was no factual dispute regarding Mr. Doe's conduct. Counsel argued that J.T. did not have a reaction to the medication, but that "it was a possibility when the doctor did not fill this prescription."

The ALJ denied the motion, finding that "there is some evidence at least that — of a risk of harm that's not yet been refuted that [Mr. Doe] gave an adult prescription to his son, who was a minor." The ALJ was "not ready at this point" to decide whether an expert was needed for the Department to prove its case.

Mr. Doe then testified. He stated that J.T. had "focus issues" about which he and his ex-wife had been concerned for approximately four years. After consulting J.T.'s pediatrician, Mr. Doe and his then-wife completed several assessments of J.T. designed to measure the degree of J.T.'s focus and attention issues and determine whether J.T. needed medication. After completing the first of such assessments, J.T.'s pediatrician offered to prescribe medication for ADHD, but J.T.'s mother was opposed to it. The pediatrician did not indicate what she was going to prescribe at that

time.

During this process, Mr. Doe realized that he had long struggled with his own focus and attention issues, so he obtained a prescription for Adderall for himself. His dosage was ten milligrams.

Mr. Doe testified that he began administering some of his own Adderall to J.T. from late August 2007 until the end of March or the beginning of April 2008. He broke his ten milligram pill in half, ground up the pill, and put it in J.T.'s morning applesauce. He administered the Adderall "sometimes twice a week, sometimes three times a week." Mr. Doe eventually increased the dosage to ten milligrams. J.T. did not have a prescription for Adderall at the time. Mr. 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., Mr. Doe checked with J.T.'s teachers to determine if there were any side effects or if the medication was working.

Mr. Doe testified that he had conducted "extensive online research" about Adderall and ADHD medications, using sources like Web M.D. and Consumer Reports. He administered the five milligram dose to J.T. based on his conversations with J.T.'s pediatrician over the course of several years, from whom he learned about the proper dosage to administer and whether or when one should stop taking it.

Prior to spring break in 2008, Mr. 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. Her instructions were to give him it once a day, in the morning, and to increase the dosage after a couple of weeks and see how it goes, with an eventual increase to ten milligrams. Eventually, at the request of J.T.'s mother, the pediatrician switched the prescription from Adderall to Focalin.

Mr. Doe gave J.T. Adderall because, though he "could care less whether he gets an A or a B on homework or a test," 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."

On cross-examination, Mr. Doe testified that he was not a medical doctor, nor was he able to write prescriptions. Mr. Doe eventually told his wife that he had been secretly administering Adderall to J.T. in March 2008. He acknowledged that giving ADHD medication to someone who has no prescription for it is "against the law."

During closing argument, counsel for the Department asserted that the Department's finding of unsubstantiated child abuse should be affirmed because Mr. Doe's conduct created a "risk of harm" to J.T. Counsel noted that Mr. Doe's conduct ran afoul of criminal prohibitions on drug distribution, and that Mr. Doe's lack of a medical degree made him ill-equipped to administer Adderall.

Counsel for Mr. Doe argued that Mr. Doe's conduct did not create a substantial risk of harm. He argued that the pediatrician's prescription confirmed that Mr. Doe's conduct did not constitute a substantial risk of harm to J.T., and that no medical expert testified to establish what, if any, risk existed. Counsel acknowledged that Mr. Doe exercised poor judgment, but he argued that poor judgment is not a substantial risk of harm or child abuse.

On September 29, 2009, the ALJ issued its decision, modifying the finding from "unsubstantiated child abuse" to "indicated child neglect." It made the following factual findings:

1. The Appellant is [J.T.]'s father. [J.T.] was born on February 12, 1998, and is now eleven years old.
2. When [J.T.] entered kindergarten, his teacher noticed that [J.T.] had difficulty focusing on class assignments.
3. [J.T.]'s attention problems continued through the primary grades, and the Appellant and his wife . . . had [J.T.] evaluated by his pediatrician, who diagnosed Attention Deficit Disorder (ADD). [J.T.] underwent several psychological evaluations.
4. The Appellant and [J.T.'s mother] discussed medication for [J.T.] in 2004 with [J.T.]'s pediatrician, but decided to pursue other therapies.
5. When other therapies were unsuccessful, the Appellant wanted to give [J.T.] medication, but his wife did not agree.
6. In August 2007, the Appellant still resided with [J.T.'s mother] and [J.T.] He was also diagnosed with ADD and his physician prescribed him Adderall, an amphetamine. He received ten milligram pills that he was able to cut in half.
7. In late August 2007, during [J.T.]'s first week of school, the Appellant began crushing half of his tablet of Adderall and giving it to [J.T.] in applesauce. He gave [J.T.] the medication on the two or three

mornings during the week that he prepared [J.T.]'s breakfast and drove him to school.

8. The Appellant gradually increased the dose he gave [J.T.] to ten milligrams.
9. The Appellant did not tell [J.T.], his wife, [J.T.'s pediatrician], or [J.T.]'s school that he was giving [J.T.] medication.
10. The Appellant continued to give [J.T.] medication through March 2008.
11. In April 2008, [J.T.]'s pediatrician prescribed [J.T.} Adderall for ADD, and [J.T.] began to take that medication in the same dose the Appellant administered.

The ALJ continued:

> The local department did not present any evidence, even insufficient evidence, to show that [J.T.] suffered an injury as the result of the Appellant's actions. Thus, the local department failed to prove that the Appellant is responsible for child abuse. COMAR 07.02.07.12A(1)(a). Instead, the evidence establishes that the Appellant failed to provide [J.T.] with proper care when he administered the child prescription medication, and that he placed [J.T.]'s health and welfare at substantial risk of harm as a result.
>
> It is illegal for an individual to administer a controlled dangerous substance that is prescribed for that individual, to another person. Amphetamines are a Schedule II controlled dangerous substance. Md. Code Ann., Crim. Law §§ 5-101(f), 5-403(d)(1), 5-601(a)(1) (2002 & Supp. 2009). No matter how much research the Appellant completed before giving [J.T.] Adderall, it is never appropriate care for an individual, much less a father and caregiver, to administer a prescription drug to another person when the drug has not been prescribed for that person. Additionally, the Appellant's failure to tell [J.T.]'s mother, pediatrician, school, and [J.T.] himself that he was giving the child medication placed [J.T.]'s health and welfare at substantial risk of harm. Serious harm might have resulted if [J.T.] suffered side effects or a severe reaction from the medication and no one, except the Appellant, would have recognized that the effects were related to the drug. Also, [J.T.] could have had a medical emergency during the months the Appellant was administering the drug and his caretakers, except for the Appellant, would have been unable to tell emergency medical personnel the medications the child was taking. Also, the Appellant did not give [J.T.] the prescription consistently, but on different days of the week and for a different number of days each week depending on his schedule and whether he fixed [J.T.]'s breakfast that day. There is no evidence that the Appellant considered what harm he might have caused by this inconsistent dosing. The Appellant gave [J.T.] a prescription drug that may only be legally and safely administered under the direction of a physician. The Appellant's actions constitute a failure to provide [J.T.] proper care that placed the child's health and welfare at substantial risk of harm.
>
> * * *
>
> Having independently considered the merits of the case and basing my decision on the complete record, I find that the Appellant is responsible for indicated child neglect. Because the Appellant did not injure [J.T.], a finding of indicated or unsubstantiated child abuse is not consistent with the law or supported by credible evidence. Instead, the Appellant's admission that he administered [J.T.] a controlled dangerous substance that was not prescribed for the child constitutes credible evidence that the Appellant failed to provide [J.T.] proper care. The Appellant's admission that he administered the medication, taken with his admission that he did not tell [J.T.]'s mother, pediatrician, school, or [J.T.] that he was doing so, is credible evidence that the Appellant placed [J.T.]'s health and welfare at substantial risk of harm. Because there is credible evidence that the Appellant failed to provide [J.T.] proper care and that his

> actions placed [J.T.]'s health and welfare at substantial risk of harm, a finding of unsubstantiated or ruled out child neglect is not correct. The Appellant is responsible for indicated child neglect.

The ALJ discussed its authority to modify the finding from unsubstantiated child abuse to indicated child neglect:

> If I find that the law and the evidence do not support the local department's finding, I may modify the finding to indicated or ruled out, and change the type of maltreatment from abuse to neglect. COMAR 07.02.26.14D.[3] At the hearing, I advised the parties that I had the authority to change the local department's finding and the type of maltreatment. In the present case, I will modify the finding to indicated and change the type of maltreatment to child neglect.

Mr. Doe appealed to the Circuit Court for Prince George's County. In his Petition for Judicial Review, Mr. Doe argued that: (1) the ALJ erred in not granting his Motion for Summary Judgment; (2) the ALJ lacked authority under COMAR 07.02.26.14D to both modify the finding (from unsubstantiated to indicated) and change the type of maltreatment in the Department's report (from child abuse to child neglect);[4] and (3) "{t}here was insufficient evidence to support a finding of indicated child neglect." The Department responded that the ALJ had the authority to change the finding and type of maltreatment and relied on substantial evidence in making its ruling.

The circuit court affirmed, in part, and reversed, in part. In its August 25, 2010 order, the circuit court affirmed the ALJ's decision to deny Mr. Doe's motion for summary judgment, "recognizing already that there was sufficient evidence on the record reflecting child neglect, and recognizing a genuine issue as to neglect exists." It found, however, that the ALJ exceeded her authority under COMAR 07.02.26.14D, which it found permits the ALJ to either modify the Department's finding from "unsubstantiated" to "indicated" or modify the maltreatment to "neglect" from "abuse," but not both. The court remanded to the OAH for a *de novo* hearing. Mr. Doe noted a timely appeal, and the Department noted a timely cross-appeal.

## STANDARD OF REVIEW

We set forth the standard of review for administrative agency decisions in *Tuzeer v. Yim, LLC*, 201 Md. App. 443, 458 (2011), *cert. denied*, 424 Md. 293 (2012):

> In reviewing a circuit court decision on appeal from an administrative agency decision, "our role 'is precisely the same as that of the circuit court.'" *Tabassi v. Carroll County Dep't of Soc. Servs.*, 182 Md. App 80, 85 (2008) (quoting *Howard County Dep't of Soc. Servs. v. Linda J.*, 161 Md. App. 402, 407 (2005)). We "review[ ] the agency's decision, and not that of the circuit court." *P Overlook, LLLP v. Bd. of County Comm'rs*, 183 Md. App. 233, 247 (2008). *Accord Md. Bd. of Phys. v. Elliott*, 170 Md. App. 369, 401, *cert. denied*, 396 Md. 12 (2006).
>
> We further explained:
>
> "A court's role in reviewing an administrative agency adjudicatory decision is narrow; it 'is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'"
>
> "In applying the substantial evidence test, a reviewing court decides 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.' A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court 'must review the agency's decision in the light most favorable to it . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence."

*Assateague Coastkeeper v. Md. Dep't of the Env't*, 200 Md. App. 665, 690 (2011) (quoting *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 173 (2011)), *cert. denied*, 424 Md. 291 (2012). The Court of Appeals had made clear that "a court's task on review is *not* to 'substitute its judgment for the expertise of those persons who constitute the administrative agency.'" *Najafi*, 418 Md. at 173-74 (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571-72 (2005)).

## DISCUSSION

### I.

### Abuse

Mr. Doe contends that "the local department failed to meet its burden of proof on the single issue

before OAH: whether the finding of unsubstantiated child abuse was correct." Specifically, Mr. Doe asserts that "there was no evidence in the record that J.T. suffered any injuries and the ALJ correctly concluded that there was no injury to J.T."

The Department does not respond to this argument or challenge the contention. Rather, it asserts that the ALJ's decision regarding child neglect was supported by substantial evidence.

Our review of the record reveals that there was no finding adverse to Mr. Doe regarding child abuse. Instead, the ALJ specifically found that "the local department failed to prove that [Mr. Doe] is responsible for child abuse." The circuit court similarly made no adverse finding regarding child abuse, limiting its findings to those made by the ALJ regarding neglect. Because there was no finding adverse to Mr. Doe regarding child abuse, there is no appealable issue in this regard. *Adm'r, Motor Vehicle Admin. v. Vogt*, 267 Md. 660, 664 (1973) ("Generally, a party cannot appeal from a judgment or order which is favorable to him, since he is not thereby aggrieved.").

## II.
## Neglect

Mr. Doe presents several reasons why, in his opinion, the decision of the ALJ of indicated child neglect should be reversed. First, he argues that "the ALJ made a finding on an issue — neglect — that was not presented and about which appellant had no notice, which violated his due process rights." Second, he contends that the Department failed to meet its burden of showing neglect because there was "no evidence in the record of any actual harm or any risk of harm, let alone a *substantial* risk of harm."[5] Third, Mr. Doe argues that "the COMAR provision under which the ALJ changed the type of alleged maltreatment exceeds the scope of the agency's authority."

### A. Due Process

Mr. Doe argues that the notice of the hearing presented a single issue before the ALJ:

"Whether the Department['s] [ ] finding of indicated or unsubstantiated child abuse is correct." He asserts that he had "no notice that changing the type of maltreatment was at issue, and, indeed, that was never an issue at the hearing before the ALJ." He claims that this failure to provide adequate notice constitutes an infringement on his right to a fair hearing and right to due process.

The Department responds that this argument is not preserved for appellate review. It asserts that, "[d]espite some confusion in the agency's notices, the local department repeatedly stated at the hearing that it was proceeding under a theory of child neglect," and that Mr. Doe "did not challenge the ALJ's authority to consider a child neglect finding, object on the grounds that he did not have sufficient notice, or request a continuance to further prepare." The Department adds that Mr. Doe also "did not argue that he was deprived of due process" at the circuit court level.

"We do not allow issues to be raised for the first time in actions for judicial review of administrative agency orders entered in contested cases because to do so would allow the court to resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency." *Miller v. City of Annapolis Historic Pres. Comm'n*, 200 Md. App. 612, 638 (2011) (quoting *Motor Vehicle Admin. v. Weller*, 390 Md. 115, 129 (2005)). In *Board of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 207-08 (1999), the Court of Appeals discussed the importance of preservation in the context of a constitutional challenge during an administrative proceeding:

> We have held, consistently, that questions, including Constitutional issues, that could have been but were not presented to the administrative agency may not ordinarily be raised for the first time in an action for judicial review. See *Cicala v. Disability Review Bd.*, 288 Md. 254, 418 A.2d 205 (1980); *Consumer Protection v. Consumer Pub.*, 304 Md. 731, 501 A.2d 48 (1985); *Heft v. Md. Racing Comm'n*, 323 Md. 257, 592 A.2d 1110 (1991); *Holiday v. Anne Arundel*, 349 Md. 190, 707 A.2d 829 (1998). In *Heft*, we stated:
>
> > When one is entitled to raise a matter before an agency by making a timely objection or request, and thereby obtain a hearing at which the agency will consider the merits of the matter, but the person fails to take the required timely action and the agency therefore denies him a hearing and refuses to consider the merits of the matter, such person is not entitled to have a court consider the issue. In this situation, the procedural default before the agency ordinarily precludes judicial review of the merits.

Here, the Department began the hearing by stating: "[W]e will seek to show that the finding of unsubstantiated child neglect is appropriate and should be affirmed." The ALJ observed that the agency notice for

the hearing "states it's unsubstantiated child physical abuse [that] was the finding." There was then a lengthy discussion regarding the basis on which the Department was proceeding, during which counsel for Mr. Doe stated that he had been "proceeding with the impression that [abuse] was the finding, not neglect." The ALJ stated that "we can go forward because under the regulations I have the authority to modify — based on the evidence, modify any finding to child neglect or child abuse, and also to substantiate — I mean, indicated, unsubstantiated and ruled out." Counsel for Mr. Doe did not object or raise any argument that proceeding on this basis was a violation of due process. Under these circumstances, Mr. Doe's due process argument is not preserved for appellate review.

**B. Burden of Proof**

Mr. 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 Department contends that "the ALJ relied on substantial evidence in the record to find that [Mr. Doe] exposed his son to a substantial risk of harm when, without a prescription, he gave his son Adderall two or three times a week." It asserts that the ALJ relied on the testimony of Mr. Doe and Ms. Max-Johnson to reasonably conclude that Mr. Doe had exposed his son to a substantial risk of harm, based on the ALJ's conclusion that the safe administration of Adderall required the supervision of a doctor for dosage amount, form, and a safe interval for administration. The Department argues that the ALJ was entitled "to consider that, by failing to tell anyone that [J.T.] was taking Adderall, [Mr. Doe] exposed his son to additional risks," such as a serious adverse reaction either from the drug itself or from additional medications that could have been administered without knowing about the Adderall. It further asserts that "[Mr. Doe] exposed his son to additional risks posed by his inconsistent administration of the drug."

The General Assembly has defined "neglect" as follows:

> (s) *Neglect.* — "Neglect" means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate:
>
> (1) that the child's health or welfare is harmed or placed at substantial risk of harm; or
>
> (2) mental injury to the child or a substantial risk of mental injury.

Md. Code (2006 Repl. Vol.) § 5-701(s) of the Family Law Article ("F.L.").

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 07.02.07.13A.

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 Mr. Doe's actions created a substantial risk of harm to J.T., we apply the substantial evidence standard.

We agree with Mr. 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 Mr. 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 Mr. 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.[6]

We remand the case to the circuit court with instructions to remand to the OAR for further proceedings consistent with this opinion.[7]

**JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REMAND TO THE OFFICE OF ADMINISTRATIVE HEARINGS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY APPELLANT, 50% BY APPELLEE.**

**FOOTNOTES**

1. Pursuant to the request of the parties, we will refer to the parties by pseudonyms or initials to protect their privacy. *See S.B. v. Anne Arundel County Dep't of Soc. Servs.*, 195 Md. App. 287, 290 n. 1 (2010).

2. The Department filed a cross-appeal, which also addressed the propriety/authority of the ALJ to find that the correct disposition was "indicated child neglect."

3. The ALJ stated: "I recognize that notwithstanding the inclusive language 'to do any of the following,' the regulation could be read to mean that I am authorized to modify the finding or maintain the finding and change the type of maltreatment, but not both. Based on case law, however, I interpret the regulation to authorize me to both modify the finding and change the type of maltreatment."

4. The definitions of indicated, ruled out or unsubstantiated are as follows:

> (m) *Indicated*. — "Indicated" means a finding that there is credible evidence, which has not been satisfactorily refuted, that abuse, neglect, or sexual abuse did occur.
>
> * * *
>
> (w) *Ruled out*. — "Ruled out" means a finding that abuse, neglect, or sexual abuse did not occur.
>
> * * *
>
> (y) *Unsubstantiated*. — "Unsubstantiated" means a finding that there is an insufficient amount of evidence to support a finding of indicated or ruled out.

Md. Code (2006 Repl. Vol.) § 5-701(m), (w) and (y) of the Family Law Article.

5.As a subpart to this contention, appellant contends that the Department needed an expert opinion regarding harm to J.T., and without such testimony, it could not have met its burden of proof. He also argued that the ALJ's decision was based on her own belief that administering Adderall would create a risk of harm to J.T., which exceeded the confines of the record and violated the "exclusiveness of the record doctrine codified at Md. Code Ann., State Gov. § 10-214(a)."

6. Based on this finding we need not address Mr. Doe's contention that the ALJ went "outside the confines of the record and violated the exclusiveness of the record doctrine" in finding a substantial risk of harm to J.T. based on the administration of Adderall.

7. Although the circuit court indicated that a de novo hearing was warranted, we disagree. As the Court of Appeals has explained:

> If a party seeking relief, who has the burden of establishing his rights to that relief, fails to produce evidence legally sufficient to sustain that burden, the relief must be denied. Absent some extraordinary circumstance, the party does not get two bites at the apple. It would be unfair, after the issue has been vigorously defended and all of the evidence has been presented, for the court to say, "well, you haven't convinced me, but see if you can get me some better evidence," and it is doubly unfair for an appellate court to insist that a trial court do that.

*Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank*, 400 Md. 718, 759-60 (2007).

**Cite as 9 MFLM Supp. 81 (2012)**

**Custody and visitation: modification: notice**

# Starsha Sewell

# v.

# John Howard, Sr.

*No. 2236, September Term, 2011*

*Argued Before: Zarnoch, Hotten, Salmon, James P. (Ret'd, Specially Assigned), JJ.*

*Opinion by Zarnoch, J.*

*Filed: August 3, 2012. Unreported.*

**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."**

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

## STATEMENT OF THE CASE

This case involves two appeals in one record of orders of the Circuit Court for Prince George's County: one finding appellant, Starsha Sewell ("Sewell") in contempt of court for violating a prior visitation order involving her two minor children; and the other, a contempt sanction, conferring *pendente lite* custody and unsupervised visitation of the children on appellee, their father, John Howard ("Howard").

## FACTS AND LEGAL PROCEEDINGS

Sewell and Howard are the parents of two minor children: 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. On February 23, 2007, the circuit court awarded Sewell primary physical custody of John, both parties joint legal custody,[1] and Howard reasonable visitation to consist of alternate weekends. In November 2010, the Prince George's County Department of Social Services (the "Department") began an investigation into allegations by Sewell that Howard and Donte were sexually abusing/molesting Sean and John. The investigation, which consisted of interviews with the children and Howard and review of the childrens' medical records, was closed two months later after the Department concluded that there were no safety concerns. The Department explained:

> Although John Howard Jr. provided a disclosure of sexual abuse to the Department with regards to his stepbrother . . . Donte, at that point John had already been interviewed by the emergency room, his pediatrician, the Sexual Assault Center [at Prince George's County Hospital], a therapist and most likely his family. After being interviewed by the Department, John was then interviewed by a Prince George's County Detective. John's disclosure became very fluid as it changed and grew in the number of alleged maltreators. The Department is concerned as to whether someone touched John inappropriately or if he has witnessed something but there is no way of knowing who would be connected to that because of John's inconsistencies at this time.

On May 26, 2011, Sewell filed a petition to modify custody and visitation on the grounds that Howard was a "person of interest in an on going police investigation for sexual molestation of both minor children" and "[would] not provide legal consent to have both children examined by a psychiatrist." Sewell requested "temporary sole legal and physical custody" to allow both children to receive "medical treatment needed to recover from their abuse" and a *pendente lite* award was entered June 16, 2011, which granted Howard supervised visitation only.

Dispositive motions were heard on August 5, 2011.[2] After receiving testimony and reviewing the Department's report, the court found "absolutely no evidence to suggest that [Howard] sexually abused the children." Although the court expressed concerns that Donte may have engaged in inappropriate sexual behavior with the children, the court denied Sewell's modification petition and oral motion for a best interest attorney, awarded Howard visitation so long as the children were never left with Donte unsupervised, and

ordered Howard to place the children in counseling.

Two months later, Sewell filed a motion to alter or amend and a request for an emergency modification hearing.[3] Before the court ruled on the motion, Howard filed a petition for contempt on September 19, 2011, alleging that Sewell refused to allow him any contact with his children, in violation of the court's August 8, 2011 order. At the November 15, 2011 contempt hearing, Sewell admitted that she had not complied with the August 8 order because she had not received any communication from the Department regarding the status of its investigation and was concerned about the safety of her children.

In addition, Sewell stated that she had served subpoenas on several staff members of the Department of Social Services and Child Protective Services, but that none had appeared to testify. Instead, she called Paulette Dendy, a sexual assault forensic nurse examiner who performed a sexual assault forensic examination on John on November 24, 2010, and made "no findings of sexual assault[,]" and Karalyn Mulligan, a domestic violence coordinator and sexual assault therapist, who "saw each of the boys five times for individual counseling" because Sewell represented to her that the boys were sexually abused. Although the court found this testimony to be irrelevant, it later concluded:

> I am very concerned with what's going on in this case and that goes both ways. But I'm very concerned about these allegations [of sexual abuse]. If they are true, then, of course, there shouldn't be any visitation [with Howard]. If they are not true and, Ms. Sewell, you continue to raise them again and again as you have, I'm going to award custody, very likely, of the children to Mr. Howard.

The court reserved its ruling on the motion to alter or amend and the contempt petition until it received certain documents from the Department. On November 21, 2011, the court issued an opinion and order which emphasized that the Department had "determined that there [were] no safety concerns regarding the children," found Sewell in contempt, and denied her motion to alter or amend, which it characterized as a motion for reconsideration.[4] The court ordered Sewell to provide Howard with "make-up time" to spend with the children.

Sewell apparently continued to refuse to comply with the court's visitation orders, and, on December 7, 2011, Howard filed a Motion to Modify Child Custody and Child Support and Certificate of Service,[5] asserting that Sewell's noncompliance and continued allegations of sexual abuse, were "harmful to the children" and interfered with his relationship with them. On December 12, 2011, Howard filed a Request for Contempt Sanctions for Sewell's alleged non-compliance, as well as an affidavit of service indicating that Sewell was personally served with a show cause order on December 29.

Sewell failed to appear at the February 7, 2012 hearing. After Howard testified that Sewell was personally served with the show cause order and that she continued to refuse access to his children, the court issued its ruling and imposed the following sanctions:

> The record should reflect that the — we're technically only here on the petition for contempt and sanctions. We're not here on the motion to modify because there's never been a hearing notice sent from the clerk indicating that we're here on that, so we're only here on the motion for sanctions; however, one of the requests in the motion for sanctions is such other further relief that the Court deems appropriate . . . what I'm inclined to do is an order that you will receive that will be sent to [Sewell's] last-known address that simply says that you are awarded . . . temporary custody of the children. . . .[O]nce you have the children, the matter is going to . . . have to be set in on a hearing on the motion to modify.

The court additionally explained that Sewell's "continual blatant contempt of Court Orders herein and her failure to even appear and defend her actions [made] it apparent . . . that the appropriate relief herein is to modify custody of the children on a pendente litebasis."

Accordingly, on February 8, the court awarded Howard *pendente lite* custody of both minor children, authorized law enforcement officers to assist Howard in obtaining physical custody of the children, ordered that Sewell's *pendente lite* access to the children be limited to telephone communications, and suspended Howard's child support obligations pending further court orders. Sewell noted an appeal of this order.

## QUESTIONS PRESENTED

Sewell devotes significant portions of her brief to making new factual allegations concerning the actions of the Department and argues that she was never properly served to attend the February 7, 2012 hearing. Not without some difficulty, we have deciphered from her brief that she takes exception to the circuit court's decision to find her in contempt and the court's award to Howard of *pendente lite* custody without proper notice.[6]

Thus, we address these questions:

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?[7]

We answer no to the first question, and yes to the second. Thus, we affirm the contempt finding, but vacate the custody modification sanction, and remand to the circuit court for proceedings not inconsistent with this opinion.

## DISCUSSION

### A. The November 21, 2011 Finding of Contempt

Sewell first contends that the November 21 contempt finding and award of unsupervised visitation should be "reversed and quashed" because the court issued its ruling in absence of witnesses that she contends were subpoenaed to appear and knew that the Department's sexual abuse investigation was under appeal.

We will not reverse a finding of contempt unless "clearly erroneous" or we find "that the court abused its discretion in finding particular behavior to be contemptuous." *County Comm'rs for Carroll County v. Forty West Builders, Inc.*, 178 Md. App. 328, 394 (2008). "Civil contempt need be proved only by a preponderance of the evidence." *Marquis v. Marquis*, 175 Md. App. 734, 746 (2007) (Citation and internal quotations omitted).

At the November 15 hearing, Sewell admitted that 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 in light of their disclosures of sexual abuse. 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 about the children on December 6, 2010. On this evidence, we are hard-pressed to find error in the court's ruling, particularly when Sewell makes no attempt to proffer how the testimony of the absent witnesses or the appeal of the Department's sexual abuse investigation would have related to the contempt hearing, which concerned her failure to comply with the court order granting Howard visitation.

### B. The February 8, 2012 Order

Sewell next argues that the February 8, 2012 *pendente lite* custody modification / contempt sanction must be reversed because she did not have adequate notice of the hearing.[8]

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). In that case, the court's notice to the mother of a status conference affirmatively stated that the conference was not a hearing or trial and would last only fifteen minutes. *Id*. at 523. The letter also indicated that witnesses would not be allowed to speak. *Id.* Because the letter failed to inform the mother that the court would make a custody determination, we reversed and remanded, explaining that, pursuant to the precursor to Md. Code (1999, 2006 Repl. Vol.) Family Law Article ("Fam Law") § 9.5-205, "if a court is contemplating holding a hearing at which it will, or may, determine custody issues, a parent with custodial rights . . . must be notified that such an issue may be the subject of the hearing," *id*. at 526, (quoting *Van Schaik v. Van Schaik*, 90 Md. App. 725, 738 (1992)). We also noted that because the circuit court's reason for modifying custody was the mother's alleged non-compliance 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.[9]

Although the court indicated that it was not ruling on the motion to modify custody, it ordered a change of custody, albeit on a *pendente lite* basis, without providing adequate notice to Sewell.[10] The circuit court judge admitted that the clerk had never sent a hearing notice informing Sewell that custody was at issue, and the affidavit of service in the record and testimony taken at the contempt proceeding indicated that Sewell was only personally served with the contempt petition and show cause order, neither of which indicated that the court might consider a temporary change in 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. Id.

Because there was no notice that the court was contemplating making a custody decision and because there is no evidence that 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 that the circuit judge could lose patience with Sewell's repeated efforts to frustrate the visitation arrangements, after he warned her this could lead to a change in custody — all aggravated by her failure to appear at the February 7, 2012 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)(Citations and internal quotations omitted). These are matters more appropriately addressed in ruling on Howard's Motion to Modify Child Custody and Child Support.

Thus, while we affirm the circuit court's 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 circuit court. As we have done in other cases, *see e.g., B.G. v. M.R.*, 165 Md. App. 532, 552 (2005), and *Simonds v. Simonds*, 165 Md. App. 591, 613 and 617 (2005), we will direct that the child custody and support order remain in force and effect as a *pendente lite* order pending further action by the circuit court.

**JUDGMENT AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION; CHILD CUSTODY AND SUPPORT ORDER TO REMAIN IN FORCE AND EFFECT AS A *PENDENTE LITE* ORDER PENDING FURTHER ORDER OF THE CIRCUIT COURT. COSTS TORE EVENLY DIVIDED BETWEEN THE PARTIES.**

**FOOTNOTES**

1. There appears to be no court order addressing the custody of Sean.

2. The court apparently heard "cross motions for modification of visitation." The docket entries reflect that on January 8, 2011, Howard filed a letter "regarding the visitation of the minor child." We presume the court considered this letter Howard's motion for modification.

3. The pleading was titled: "Motion to Alter or Amend Judgment with Supporting Exhibits and a Request for an Emergency Hearing to Modify Custody and Visitation for the Safety and Emotional well being of minor victims of sexual abuse during the care of the Plaintiff [Howard]."

4. Sewell appealed this order on December 21, 2011.

5. The Certificate of Service indicated that a copy of the motion was mailed to Sewell, postage prepaid, that day.

6. We express no view on whether the circuit court's ruling on custody was an order in excess of the court's jurisdiction and thus, reviewable on appeal *sua sponte*.

7. Sewell frames the issue in the following terms:

> Whether the Court of Special Appeals of Maryland should reverse and Quash the Honorable A. Michael Chapdelaines[']  orders on Appeal on the Basis of Mistrial and improper service?

8. Most of Sewell's contentions with respect to the February 2012 order complain of the lack of "personal service" on her to appear at the sanctions hearing. Such service on a party already properly adjudicated to be in contempt and notified of the request for sanctions was not legally required.

9. We recognize that *Burdick* involved a custody change ordered at a status conference, not at a contempt proceeding. However, there are some limits to the power of a court at a contempt proceeding. "[I]n selecting contempt sanctions, a court is obliged to use the least possible power adequate to the end proposed." *Spallone v. United States*, 493 U.S. 265, 276 (l990)(Internal citations and quotations omitted).

10. While ordinarily *pendente lite* orders are not final judgments, *see In re Katherine C.*, 390 Md. 554, 557, n. 4 (2006), when such an order is entered as a contempt sanction, it is reviewable as a final judgment.

**Cite as 9 MFLM Supp. 85 (2012)**

**Adoption/guardianship: termination of parental rights: concurrent appeal of change in permanency plan**

# In Re: Adoption/Guardianship of Jayden G.

*No. 2299, September Term, 2011*

*Argued Before: Meredith, Kehoe, Eyler, James R. (Ret'd, Specially Assigned), JJ.*

*Opinion by Meredith, J.*

*Filed: August 7, 2012. Unreported.*

**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. (hereinafter "Mother" or "appellant"), appeals from the determination of the Circuit Court for Montgomery County, sitting as the juvenile court, 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 ("TPR") adjudication while Mother's appeal of a change in Jayden's permanency plan ("the CINA case") was pending before this Court.

## QUESTIONS PRESENTED

Mother presents the following questions for our review:

1. Did the court err in proceeding with the TPR hearing while the CINA order changing the permanency plan from reunification to nonrelative adoption was still pending in the Court of Special Appeals?
2. Did the court err in basing its decision to terminate parental rights on Jayden's prospect of being adopted by, as well as the quality of care being provided by, his current foster care providers?
3. Did the court err by failing to consider granting custody and guardianship of Jayden to his paternal grandmother?
4. Did the court err in terminating parental rights where the mother was deemed fit to provide care for her newborn child, Jayden was bonded to her, and there was no evidence that Jayden would suffer deleterious harm by having an ongoing relationship with his mother?

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

We perceive no error, and affirm the judgment of the circuit court.

## FACTS AND PROCEDURAL HISTORY

Jayden G. was born on September 26, 2007, the third of Mother's four children. Jayden has an older half-brother, Daeshawn E., who was born on October 22, 2004; an older sister, Victoria G., who was born on September 21, 2006; and a younger brother, Elijah G., who was born on September 28, 2011.[1] Jennifer S. is the mother of all the children. Justin G. is the father of the youngest three, but not Daeshawn. Justin G. has not noted an appeal of the termination of his parental rights to Jayden. Jayden was represented at trial and filed a brief in this appeal, but withdrew his appeal on June 4, 2012, and stated that he "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 (hereinafter "the Department") in May 2008 as a result of a domestic violence complaint by Mother against Justin G. Jayden was ultimately adjudicated to be a child in need of assistance ("CINA") on February 18, 2009, with the court finding the following as facts:

a. On January 31, 2009, CWS [the Department] received its most recent report on the [G.] children. At the time of the referral, CWS had two open investigations, one for neglect and a second report alleging sexual abuse of all three children by [Justin G.].
b. On January 30, 2009,

Montgomery County police contacted the Crisis Center because [Mother] had left messages, alleging that her boyfriend [Justin G.] was trying to poison her and her children were trying to communicate with her by underlining sentences in certain books. [Mother] subsequently appeared at the Crisis Center with the three children. Crisis Center staff noted that [Mother] presented well. As there was no sign of psychosis or paranoia and [Mother] did not appear suicidal or homicidal, there was insufficient reason to file an emergency admission petition. Crisis Center staff noted that the children were unkempt, Victoria had redness in her eye and it was unclear if they had been fed. As [Mother] expressed some fear/reluctance to return to her home (due to the history of domestic violence with [Justin G.]), Crisis Center staff sought an alternative arrangement for the family.

c. Early on January 31, 2009, CWS staff learned that [Mother] and the children had been placed at the Krahnke Center[2]. Crisis Center staff reported that there was a problem at the shelter that might require CWS intervention. CWS staff learned that when [Mother] woke up, she stated that "they are after me." [Mother] opened a window and jumped out and ran to the wooded area behind the shelter, barefoot and wearing no coat and leaving the children behind in the shelter. The police were called and located [Mother] in the woods. The police described [Mother] as delusional and transported her to Shady Grove Adventist Hospital. [Mother] was subsequently transferred to Washington Adventist Hospital for placement in the psychiatric unit.

d. On February 2, 2009, CWS staff met with [Mother] at the hospital to discuss placement options. [Mother] suggested that the children could stay with her 20-year-old cousin who has a baby. Her step-father was also suggested. He indicated that he is not able to care for the children. CWS staff concluded that it was not a good plan to place the children with the cousin. [Mother] adamantly requested that the children not be placed with [Justin G.] or his mother. She again alleged that [Justin G.] and his mother had been trying to poison her. [Mother] admitted she lied to CWS staff about domestic violence with [Justin G.] in previous interviews. [Mother] admits she has an ongoing problem with domestic violence with [Justin G.].

e. On February 5, 2009, [Justin G.] was arrested on a violation of probation order.

f. On February 6, 2009, CWS staff met with [Mother]. [Mother] again stated that she has not been honest regarding the domestic violence. [Mother] stated that the children are aware of the fighting between their mother and [Justin G.]. [Justin G.] denies fighting with [Mother].

g. On February 9, 2009, Montgomery County Police reported that [Justin G.] and [Mother] smoke marijuana at the family home. [Mother] and [Justin G.] deny this. [Mother] stated that she smoked marijuana outside the home while her children were inside.

h. A review of CWS records noted multiple contacts since May 2008 with [Mother] regarding her children. In May 2008, the family was referred following a domestic violence incident during which [Justin G.] attempted suicide and [Mother] hit the windshield of his car. CWS staff learned that there was an earlier domestic violence incident in which [Justin G.] climbed through a window into the home and physically assaulted [Mother]. The police reported that there was an extensive history of domestic violence. In May 2008,

[Mother] obtained a protective order against [Justin G.].

i. In December 2008, CWS received a report that [Mother] had been seen fighting with [Justin G.] again. CWS also spoke with Daeshawn. He reported that his mother and [Justin G.] fight all the time. He indicated that they yell and hit one another and it frightens him when they fight. Daeshawn recounted the incident in May 2008 in which [Justin G.] stabbed himself. He also spoke of the police coming to their home. The investigations have been completed with an[ ] indicated finding of neglect. [Mother] and [Justin G.] are named as maltreators. [Justin G.] denies any hostile contact with [Mother] or that he stabbed himself.

j. On January 25, 2009, [Mother] contacted the police, reporting that Daeshawn made an allegation regarding sexual abuse by [Justin G.]. The police and CWS initiated an investigation. They interviewed Daeshawn who made no disclosure. Of note, Daeshawn has speech delays. [Mother] was referred to the Abused Persons Program and for a mental health assessment at the Tree House. The police contacted [Justin G.] who was at his mother's home. He agreed to come in for an interview, but failed to keep the initial appointment. He agreed to come for a subsequent interview, and he was arrested at that time for violation of a protective order.

Both Mother and Justin G. stipulated to the above facts, and agreed to the CINA finding. Jayden was committed to the Department for placement on that date. Since February 3, 2009, pursuant to a shelter care order, Jayden has been living in the foster home of Vera B. and Marquis B.

Periodic review hearings followed. The first of these appears, from the record, to have occurred on July 30, 2009. Jayden continued to be a CINA, with a permanency plan of reunification, and he had unsupervised visits with Mother at least weekly. Mother was ordered to find suitable housing for herself and the children, complete the Abused Persons Program, and comply with psychiatric treatment under the Department's direction. The court permitted Justin G. to have supervised weekly visits, ordered him to complete a parenting program and the Abused Persons Program, continue to receive outpatient mental health treatment, and undergo weekly urinalysis. Both parents were ordered to provide the Department with a list of relatives who might be investigated as placement resources for the children.

A permanency planning hearing was held on December 10, 2009. Reunification continued to be Jayden's permanency plan. It was noted that Mother "has been less consistent with her visits during this reporting period," and missed visits on September 22, October 21, October 27, November 3, and November 17. Mother "indicated she was sick on 9/22 and overslept on the remaining dates." Mother was noted to have been "mostly compliant" with the Abused Persons Program, but not compliant with mental health treatment during the reporting period. It was also noted that Mother missed a scheduled Family Involvement Meeting on October 29, 2009, claiming to have overslept. The purpose of this meeting was to explore other family placement options. Two of Mother's cousins, Justin G., Justin G.'s mother, and a cousin of Justin G. attended, although none of these relatives was found to be a viable placement option. The court ordered Mother to participate in psychiatric treatment and psychotherapy, complete the Abused Persons Program, and find suitable housing for herself and the children.

On January 27, 2010, a review hearing was held on an expedited basis as a result of the Department's request that Mother's visitation be suspended. This request resulted from Mother's increasing hostility toward Department workers, culminating in an incident in which Mother physically assaulted a 71-year-old Department staff member. The court ordered Mother's visits to be supervised, but permitted them to continue. The periodic review hearings in the CINA case continued to occur. 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 earlier ordered not to visit with the children at the same time — absconded with the children. As a result, both parents were charged with, and convicted of, abduction of a child relative in the lawful custody of another, pursuant to Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL"), § 9-305.

Jayden's permanency plan continued to be reunification until the permanency plan review hearing on May 19, 2011, at which time the court ordered that Jayden's permanency plan be changed to adoption by a non-relative. That change was appealed to this Court as noted above. In an unreported opinion, filed

January 19, 2012, this Court vacated the order in the CINA case changing Jayden's permanency plan, and the case was remanded to the Circuit Court for Montgomery County for further proceedings, to include a new hearing. *In re: Jayden G.*, No. 1291, Sept. Term, 2011.

**B. The TPR Case**

On June 24, 2011, the Department filed its petition to terminate the parental rights of Mother and Justin G., and to grant the Department guardianship with the right to consent to adoption. Trial occurred November 14-18, 2011. On December 21, 2011, the court granted the Department's petition. In a 30-page document captioned Findings of Fact and Conclusions of Law, 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 court's findings were detailed and tailored to address the requisite statutory factors, and were prefaced by the following finding:

> 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 the Department first became involved in 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.

The court then went into greater detail regarding the parents' unfitness:

> In addition, the Court finds that both parents have demonstrated a recurring pattern of unfitness since Jayden has come into care. The Court is unable to predict whether their situation can be conclusively remediated in the foreseeable future. They have been on a roller coaster of failed attempts at compliance, mingled with good intentions and destructive behaviors. The overlay of the domestic violence issue in this case has proven to be damaging in the extreme. The Mother has made repeated claims over the years, describing disturbing acts of abuse. She has nonetheless established a pattern of reconnecting with her abuser, and now has an infant with this same person. The only time she seemed able to step away from this pattern was when she engaged with the Abused Persons Program. Both parties claim, through their attorneys, that they are well past this time of destructive behavior, and that with couples' therapy they can resolve their problems. The Court is not even sure that they *are* a couple, other than conceiving the child born in September 2011.
>
> Neither parent has realistically and consistently addressed their mental health issues. While both participated in evaluations, they seemed not to understand that follow-up care was important, not only on the issue of "compliance," but for their own benefit and the benefit of their children. Jennifer S. chose not to participate in therapy in late 2009/early 2010, while at the same time, informed the Department that she was, in fact, attending. The Court is unaware of any reason why she was so resistant to following the advice of every caregiver and service provider that she encountered. She chose, as well, not to take medications. When asked about this in 2011 when it became clear that she was pregnant, she indicated that it was not a problem, because she had not been taking them anyway. Her behavior at the beginning of 2009 was truly alarming, and there was every reason to believe that follow-up care was necessary and appropriate.

(Emphasis in original.)

**STANDARD OF REVIEW**

In *In re: Cross H.*, 200 Md. App. 142 (2011), *cert. granted,* 422 Md. 352 (2011), this Court outlined the standard of review applicable to appeals of judgments terminating parental rights:

> When the State seeks to termi-

nate parental rights without the consent of the parent(s), the standard is whether the termination of rights would be in the best interests of the child. Md. Code (1984, 2006 repl. vol.), Family Law article ("FL") § 5-323. *See Washington County Dep't of Social Services v. Clark*, 296 Md. 190, 198 (1983). To determine what is in the child's best interest, the court must consider the factors enumerated in FL § 5-323(d), which provides:

(d) Considerations. Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:

(1)(i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;

(ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and

(iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;

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

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

1. the child;

2. The local department to which the child has been committed; and

3. If feasible, the child's caregiver;

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

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

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

(3) whether:

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

(ii) (1.)(A.) on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or (B.) upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and (2) the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

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

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child;

or

C. another parent of the child;

or

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

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

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

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

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

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

The Court of Appeals explained the juvenile court's role as follows in *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 501 (2007):

> The court's role in TPR cases is to give the most careful consideration to the relevant statutory factors, to make specific findings based on the evidence with respect to each of them, and, mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make a continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. If the court does that — *articulates its conclusion as to the best interest of the child in that manner* — the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.

(Footnote omitted.)

The standard of review on appeal is more limited. In reviewing a circuit court's decision to terminate parental rights, we must "ascertain whether the [court] considered the statutory criteria, whether its factual determinations were clearly erroneous, whether the court properly applied the law, and whether it abused its discretion in making its determination." *In re Adoption/Guardianship/CAD No. 94339058*, 120 Md. App. 88, 101 (1998). We explained in *In re Abiagail C.*, 138 Md. App. 570 (2001):

> On review, our function . . . is not to determine whether, on the evidence, we might have reached a different conclusion. Rather, it is to decide only whether there was sufficient evidence — by a clear and convincing standard — to support the chancellor's determination that it would be in the best interest of [the child] to terminate the parental rights of the natural [parent]. In making this decision, we must assume the truth of all the evidence, and of all of the favorable inferences fairly deducible therefrom, tending to support the factual conclusion of the trial court.

*Id.* at 587 (citing *In re Adoption No. 09598*, 77 Md. App. 511, 518 (1989)).

The Court of Appeals observed in *In re Yve S.*, 373 Md. 551 (2003), that appellate scrutiny of such TPR cases requires the reviewing court to "simultaneously apply three different levels of review": (1) as to the juvenile court's factual findings, the appellate court looks for clear error; (2) if the juvenile court committed error as to a matter of law, a remand for further proceedings will be the ordinary result unless harmless error is present; and (3) "[f]inally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.* at 586.

We also note that, in *In re Shirley B.*, 419 Md. 1 (2011), a case in which a mother challenged the juvenile court's change of a permanency plan from reunification to adoption, the Court of Appeals observed that, in cases

> with a proven history of abuse or neglect, "the proper issue before the hearing judge [is] whether there was sufficient evidence that further abuse or neglect [is] unlikely." *In re Yve S.*, 373 Md. [551] at 593 [2003]. See also FL § 9-101(b) ("Unless the court specifically finds that there is no likelihood of further child abuse or neglect

> by [the parent], the court shall deny custody or visitation rights to that party[.]") The burden of proof rests upon the parent to show that the past neglect or abuse will not be repeated. *See Yve S.*, 373 Md. at 587 ("The burden is on the parent previously having been found to have abused or neglected his or her child to adduce evidence and persuade the court to make the requisite finding under [Section] 9-101(b)."). Yet, "even upon substantial evidence of past abuse or neglect, [Section 9-101] does not require a finding that future abuse or neglect is impossible or will, in fact, never occur, but only that there is no likelihood — no probability — of its recurrence." *In re Adoption No. 12612,* 353 Md. 209, 238 (1999).

*Id*. at 22.

**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., supra*, 200 Md. App. 142, a case more analogous to the case at bar. In the *Cross* case, the parent filed an appeal in this Court from the decision of the Circuit Court for Montgomery County to change Cross H.'s permanency plan from reunification to nonrelative adoption. While that appeal was pending, the Department filed a TPR petition in the juvenile court. When the parent ultimately had her parental rights terminated and appealed that decision to this Court, she included, as one of her issues on appeal, her contention that "the circuit court erred in proceeding with the termination of parental rights hearing when the appeal of the CINA order was pending." *In re: Cross H., supra*, 200 Md. App. at 148-49. The parent who was appealing the TPR order in that case relied, as Mother does here, on *In re Emileigh F*. This Court discussed the distinguishing factors in *Emileigh F.* and *Cross H.*, in a discussion which applies with equal force to the instant appeal:

> The situation in *Emileigh F*. was notably different from the facts of the present case. There, the mother appealed her daughter's adjudication as a CINA. We affirmed, and the Court of Appeals granted certiorari. While the case was pending before the Court of Appeals, the juvenile court granted the Department's motion for an order of recission and termination of juvenile court jurisdiction, effectively closing the CINA case. The Court of Appeals held that this action was inconsistent with the pending appeal, and vacated the judgment closing the CINA proceedings. In the present case, on the other hand, when the TPR case was heard, the CINA appeal was pending before this Court. No action was taken to close the CINA case proceedings.
>
> While a CINA adjudication must precede a TPR determination, it is a separate legal proceeding. Moreover, the changing of the permanency plan from reunification, or adoption by a relative, to adoption by a non-relative, is not required before the Department can file a TPR petition. Thus, we see no error in the actions of the circuit court in the present case.

*Id*. at 149-50.

Nor do we in this case. *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 in that Court took place on January 9, 2012, at this juncture, our opinion, quoted above, controls this case.

Finally, we note that one of the reasons 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 and thus improperly foreclosed the issue." We view that objection as one which mixes apples and oranges. The question before the court in the TPR case focused on the lack of fitness of the parents. Whether Jayden's grandmother can play a role in his placement going forward is a matter than has not yet been adjudicated, and it is not before us at this time.

**II. The propriety of the court's judgment terminating Mother's parental rights**

Mother's second, third, and fourth questions all challenge, on differing grounds, the court's order terminating her parental rights. Mother does not attack the sufficiency of the evidence or allege that the court committed any factual errors. Mother also does not contend that the court failed to apply the statutory factors. Most significantly, Mother does not attack the circuit court's finding that she is unfit. Mother's argu-

ments on appeal — with the possible exception of the procedural issue dealt with in Section I — fail to counter the juvenile court's finding of unfitness. Her contentions focus on the findings the court made with respect to the exceptional circumstances justifying the termination of her parental rights. But the State is correct to point out that the court's finding of unfitness, alone, is enough to justify termination of parental rights. Md. Code (1984, 2011 Supp.), Family Law Article ("FL"), § 5-323(b) provides:

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

(Emphasis supplied). *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.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, SITTING AS THE JUVENILE COURT, AFFIRMED. COSTS TO BE PAID BY APPELLANT.**

**FOOTNOTES**

1. Elijah was the subject of a CINA petition filed by the Department immediately after his birth, and was found CINA on December 2, 2011. Upon information and belief, Daeshawn and Victoria were in foster care beginning February 3, 2009, and now reside with Justin G.'s mother.

2. The Betty Ann Krahnke Center is a 54-bed domestic violence shelter in Montgomery County serving women and children.

**Cite as 9 MFLM Supp. 93 (2012)**

**Domestic protective orders: final order: sufficiency of evidence**

# Stephen Love

# v.

# Alonda Love

*No. 1520, September Term, 2009*

*Argued Before: Eyler, Deborah S., Meredith, Davis Arrie W. (Ret'd, Specially Assigned), JJ.*

*Opinion by Meredith, J.*

*Filed: August 8, 2012. Unreported.*

**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, appellant, appeals the entry of a final protective order against him by the Circuit Court for Montgomery County. He presents the following questions for our review:

1. Did the trial court err in issuing a final protective order without making any finding of fact as to the alleged abuse?
2. Did the trial court err in issuing a final protective order which is unsupported by fact?

We perceive no reversible error by the trial court, and shall affirm.

## BACKGROUND

Appellant was married to Alonda Love, appellee, in 1998, and the couple divorced in 2005. One child was born as a result of the marriage, and he was ten years old at the time of the events in question. According to appellee's testimony in this matter, she had been granted sole custody of the minor child and, at one point, had moved with him to Georgia. In December 2008, circumstances compelled her to return to the D.C. metro area with the child. Appellee testified that, because she was initially unable to find a place for herself and the minor child to stay, appellant offered to permit her and the child to stay with him at his apartment in Beltsville on a temporary basis until appellee was able to arrange for other housing. Appellee and the parties' child moved into appellant's apartment around the first of December 2008. On or about March 21, 2009, appellant formally notified appellee that she had thirty days to quit the premises.

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

Appellee testified that she and the minor child moved out on April 20, 2009, but they left certain of their possessions. They returned the next evening to get some of the items they had left. As we will describe in more detail below, there was a confrontation between appellee and appellant on April 21, 2009, and another on April 25, 2009, appellee filed a Petition for Protection from Domestic Violence in the District Court for Montgomery County. An Interim Protective Order was granted by a commissioner on that date. The interim order would have expired April 28, 2009.

On April 28, 2009, the parties, both of whom were represented by counsel, appeared before a judge of the District Court of Maryland for Montgomery County for a hearing on whether or not a Temporary Protective Order should be issued. From our review of the record, it appears appellant consented to the entry of the Temporary Protective Order, which was set to expire on May 5, 2009. The District Court action was transferred to the Circuit Court for Montgomery County for a Final Protective Order hearing, slated for May 5, 2009, and for consolidation with a family law case (No. 46095-FL) then pending in that court. From our review of the docket entries, it appears that the May 5 hearing was continued to May 22, and the temporary protective order, with some modifications, was extended to that date.

At the hearing for the court to consider granting a final protective order on May 22, 2009, both parties testified as to the events which took place in April 2009. Appellee testified that she and the parties' son returned to appellant's apartment on April 21 to retrieve a few of appellee's belongings. She still had a key which appellant had provided to her, and she used that key to let herself in at a time when appellant was

not present. She testified that appellant was aware that appellee would be returning to the apartment that evening. Appellee testified that, while she was there, appellant came home, and when he saw her there ironing some of their son's clothes, appellant threatened her:

> [APPELLEE:] So he walked in. He slammed the door. And he started yelling, you know, "What are you doing here? Don't you know you're breaking and entering? I could have you arrested." Because he's a police, Prince George's police [officer]. And so, you know, we were in Prince George's County.
>
> And. so I just said, "You know what? I'm just ironing some clothes for tomorrow for him [parties' son]. I'll get my stuff and go."
>
> * * *
>
> The clothes I was ironing I just dropped them on the basket that I had brought up front and went straight into the kitchen. He was already standing, the door is by the kitchen so he was, you know, standing back there kind of following me around. So I went inside the kitchen to get the keys and he walked in behind me. And he cornered me in the kitchen and he said that, he put his hand like on his hip because that's where he keeps his gun. He had his civilian clothes on. He didn't have his uniform on. And he said to me, "I know how to kill you and get away with it. If you come back again, I'll kill you."

Appellee said that, although he did not raise his voice, appellant "cornered" her in the kitchen by getting in her face and backing her up until she was almost against a wall. Appellee took appellant's threats seriously because "he carries that gun around. He's threatened with it before. He's beat me in the past. He busted my eardrum once, he hit me so hard. I mean, I was scared of him. I was."

Appellant testified that he believed the encounter relative to the ironing board occurred on April 22. He testified that he "wasn't happy" at the sight of appellee in his apartment using his ironing board, which he knew she had to have gotten out of his room, which was off-limits to appellee. Nevertheless, he testified: "I wasn't mad. I didn't lose control." Appellant testified that neither he nor appellee ever raised their voices at each other, and that appellee left after she finished her ironing without incident. Appellant denied threatening appellee that night.

Appellee also testified about the events of the night of April 24, 2009. At approximately 10 p.m. that evening, appellee was to meet appellant in the parking lot of his apartment complex to pick up the parties' son, who had spent the day with appellant. Appellee testified that the parties began to argue about appellant's expressed intention to take their son to the grocery store at that late hour. 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's testimony describing the events of April 24 — like appellant's description of the events of April 21 — was quite different than appellee' s testimony. Appellant testified that, at the time of the exchange of custody on April 24, his son was crying and upset because appellee would not allow him to go to the grocery store with appellant. For that reason, appellant decided to see if he could talk appellee into allowing them a brief trip to the store to purchase some chips as appellant had previously promised the child. Appellant noted that, prior to this contact with appellee, "I still hadn't even spoken to Alonda yet the entire evening." Appellant gave his version of the encounter as follows:

> [APPELLANT:] I pulled out and I was just going to drive back to my apartment, but as I passed the space that Alonda was parked in, I thought, okay, you know, I was feeling bad. I don't like it when [the parties' son] cries. You know, I pretty much try to give him what he wants. So I said, let me go talk to her [*i.e.*, appellee] and see if she, you know, see why, you know, if I can talk her into letting me go get the chips [at the grocery store].
>
> So I stopped my car, got out and started walking towards her car. And her window was down. And as I was walking towards her, you know, getting close enough for her to hear me, I'm like, I said, you know, can we go get the, is it okay if I go to Giant and get [the minor child] some chips because he wanted some snacks and you said that he needed snacks at your house.
>
> And basically she put the car in reverse and she looked at me and it

> was like she was trying to talk, but she was crying like there were tears in her eyes. And it was like she was trying to talk, but couldn't talk. And then she just, without saying anything, backed up and drove away.

Appellant denied threatening appellee at any time on April 24. Upon questioning by his attorney, appellant did admit to having previously hit appellee, which was consistent with appellee's testimony about him having ruptured her eardrum. Appellant claimed that, on that prior occasion, which was many years ago, appellee

> had been throwing things at me, and yelling at me, and you know, I did something stupid. I was just trying to slap her in the, I just wanted to give her a soft slap in the cheek to try and get her attention because, and I realize how stupid that sounds now, but at the time, you know, I was thinking of 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 protective order proceeding occurred, but the second was in December 2004. Appellant consented to the entry of the first protective order, but the second was entered after a contested hearing at which the court found that appellant had threatened appellee during a phone conversation. Appellant further expanded on the facts behind the entry of the second protective order, and admitted that he had said, in the presence of his young son, that he wished appellee would just die. He explained:

> Basically, her allegation was that I had said that I wish she was dead. But what I said, what happened was we had had some kind of phone conversation where she, you know, pushed all my buttons, got me angry. And then after the phone disconnected I said something like I wish she would just die. You know, I said something stupid to that effect that my son overheard and apparently got back to her.

Two witnesses testified for appellant, but neither was able to corroborate either party's version of the April 21 or April 24 incidents. The trial court was left to assess the relative credibility of two conflicting accounts of encounters on two different days.

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

> Well, credibility in these cases act[s] as both a shield and a sword. That is to say when a person is honest and tells the truth sometimes it hurts them, even though telling the truth and being honest is the appropriate thing to do.
>
> This case is very troubling. It's troubling because the parties have, because of the fact that they have a child in common, have constantly been in touch with each other as is often the case when people have children together. And this has not been a good thing.
>
> Now, the court said in Co[ ]burn v. Co[ ]burn[, 342 Md. 244(1996),] that you can consider past conduct in these domestic violence cases. The philosophy espoused in Co[ ]burn essentially is that a person who has been once injured by someone doesn't have to wait until it happens again before a court can take action. That if conduct is engaged in which places an individual in fear of serious bodily harm or further injury that a court can take action.
>
> And the Katsenelenbogan [v. Katsenelenbogen, 135 Md. App. 317, *rev'd*, 365 Md. 122 (2001)] case, which is at 135 Md. App. 317, talks of the remedial nature of a protective order and what a court can do.
>
> The court said in that case that where a protective order was vacated there was no reason to presume that a trial court applied an objective standard and no indication that the court attempted to tailor terms and duration of the order to the conduct that was specifically complained of in that case.
>
> But the Katsenelenbogen case went on to reaffirm the notion that this is a preventative or prophylactic measure, the [F]amily [L]aw [A]rticle.
>
> It's troubling because of the consequences that come about. And I think we shouldn't be cavalier about just issuing protective orders because people claim they are afraid.

That is not the case here. Mr. Love was, to his credit, he was, unfortunately as I said it's going to cut two ways, he's honest, straightforward. He said that he overreacted, those weren't his words, and he hit his wife on a previous occasion, caused her injury. He wishes he hadn't done it.

The unfortunate thing is you can't undo it. Under Co[ ]burn v. Co[ ]burn it is still one of those things that the Court has to consider. You have to consider it.

She then testified that because of that past, when he gets angry and when he says things to her that it places her in fear. It is not for the Court to look behind what she says and decide whether that fear is reasonable fear or unreasonable fear.

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.

This Court is very, don't do these things lightly because of the consequence.

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.

**STANDARD OF REVIEW**

Because this action was tried without a jury, our review is governed by Rule 8-131(c). Accordingly, we will review the case on both the law and the evidence, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses, and will not set aside the judgment of the trial court unless clearly erroneous.

"A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996). It is not the function of this Court, on review, to weigh conflicting evidence or "sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." *Id.*; *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566 (1999). We review the record to determine if there was evidence to support the factual findings of the trial court, viewing the evidence in a light most favorable to the prevailing party. *GMC v. Schmitz*, 362 Md. 229, 234 (2001).

We review the legal conclusions of the trial court for legal correctness, and do not afford legal conclusions the same deference we do factual findings:

> Although the factual determinations of the circuit court are afforded significant deference on review, its legal determinations are not. "[T]he clearly erroneous standard for appellate review in [Maryland Rule 8-1311 section (c) . . . does not apply to a trial court's determinations of legal questions or conclusions of law based on findings of fact." Indeed, the appropriate inquiry for such determinations is whether the circuit court was "legally correct."

*Goss v. C.A.N. Wildflfe*, 157 Md. App. 447, 456 (2004).

**DISCUSSION**

Although appellant suggests in his phrasing of the issues on appeal that the trial court failed to make any finding of abuse that would support the issuance of a protective order, we disagree with that interpretation of the trial court's ruling. Maryland Code (1984, 2006 Repl. Vol., 2008 Supp.), Family Law Article ("FL"), § 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(1)(1). 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 for the court to consider in support of a request for protective order:

> 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.** Allegations of past abuse provide the court with additional evidence that may be relevant in

assessing the seriousness of the abuse and determining appropriate remedies. The legislature expressly recognized this by including the history of abuse between the parties as a factor in ordering at least one remedy, the vacation of the home. *See* [FL] § 4-506(e)(5)[1]. Admitting prior acts of abuse aids in assessing the need for immediate and future protection. The fact that there is a history of prior abusive acts implies that there is a stronger likelihood of future abuse. *See Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. App. 1991) ("[A] defendant's past conduct is important evidence — perhaps the most important — in predicting his probable future conduct."); *Providing Legal Protection for Battered Women*, 21 HOFSTRA L. REV, at 900 ("Due to the cyclical nature of domestic violence, introduction of evidence of the relationship's history of abuse . . . is vital in allowing a court to fully comprehend the risk posed to a particular petitioner.") (footnote omitted). Thus, there is a corresponding need for more severe remedies.

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 that led to the entry of the protective order, 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.

In our view, it was not clearly erroneous for the court to find that appellee was in fact fearful in 2008, and that appellant's conduct which had induced such fear constituted abuse within the definition of FL § 4-501 (b)(1). The testimony of appellee — which an appellate court is obligated to view in a light most favorable to the prevailing party — was sufficient to support a finding by clear and convincing evidence that appellant committed abusive acts within the scope of the definition in FL § 4-501(b)(1)(ii) (*i.e.*, any "act that places a person eligible for relief in fear of imminent serious bodily harm"). Here, 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 court's issuance of the protective order pursuant to FL § 4-506(c)(1)(ii) (authorizing the issuance of a final protective order "if the judge finds by clear and convincing evidence that the alleged abuse has occurred.").

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

**FOOTNOTE**

1. The current statutory reference to consideration of "the history and severity of abuse in the relationship" is found in FL § 4-506(h)(5). At the time of the hearing in the present case, the pertinent subsection was FL § 4-506(f)(5).

NO TEXT

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