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COURT OF SPECIAL APPEALS

Unreported opinions

Cite as 10 MFLM Supp. 3 (2012)

Custody: access to investigation report: due process claim

Millicent Sumpter

v.

Sean Sumpter

No. 120, September Term, 2011

Argued Before: Bell, C.J., Harrell, Battaglia, Greene, Adkins, Barbera, McDonald, JJ.

Opinion by Harrell, J., Bell, C.J., and Adkins, J., dissent.

Filed: August 21, 2012. Reported.

While the Court of Appeals may have reservations about the viability of a local policy or 'rule' that bars parties' counsel from obtaining a copy of a court-ordered custody investigation report prior to trial, the record in this case was insufficient to proceed with that determination; therefore, the court directed a remand, without affirmance or reversal, for supplementation of the record on the contours, application, and purpose of the policy or rule, and invited the Office of the Attorney General to submit an amicus brief.

Sean Sumpter ("Father") filed in 2010 for an absolute divorce from Millicent Sumpter ("Mother") in the Circuit Court for Baltimore City. In that proceeding, the parties contested physical and legal custody of their two daughters. Prior to the merits hearing, a Circuit Court judge ordered preparation by court-related personnel a custody investigation report (hereinafter referred to sometimes as the "report") to evaluate the custodial abilities of each parent. Apparently, the Circuit Court has in place a local, unwritten policy or "rule" (as Mother's attorney referred to it in briefing and oral argument before us) that limits counsel of record in any child custody proceeding to viewing a single copy of such a report only in person in the Family Division Clerk's Office during normal public business hours. Counsel of record may make only hand-written notes of the contents of the report, yet are forbidden from copying verbatim significant passages.[1]

The report in the present case was completed one week before the merits hearing. Mother's counsel was able only to review, in person and pre-hearing, the report for approximately 90 minutes. As a consequence, Mother's attorney moved, prior to commencement of the merits hearing, to exclude the report or, alternatively, to be provided with a copy of the report. The Circuit Court denied the motion. At the conclusion of the hearing (during which the author of the report testified and the report was received in evidence on motion of Father's counsel), the judge granted a divorce and awarded custody of the children to Father, with visitation to Mother. The Court of Special Appeals, upon Mother's appeal, affirmed, in an unreported opinion, the Circuit Court's judgment.

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

Mother petitioned successfully this Court for a writ of certiorari. *Sumpter v. Sumpter*, 424 Md. 629, 37 A.3d 317 (2012). Neither Father's nor the children's best-interest attorneys opposed Mother's petition and, moreover, did not file briefs with this Court or appear at oral argument. Mother poses the question, "Did the Court of Special Appeals err in refusing to vacate and remand the case to the [C]ircuit [C]ourt when the parties, their counsel[,] and the best interest attorney were not provided a copy of the custody investigation report[,] in violation of constitutional due process and the Maryland Rules?"[2]

If, as represented by Mother's counsel, the policy or rule is applied uniformly and vigorously to custody proceedings in the Circuit Court for Baltimore City (as it was in this case), we may have reservations about its viability. We are apprehensive, however, to make a conclusive determination on the present case for at least two reasons. First, we are uncomfortable with the state of the record, which does not purport to elucidate the full contours of the policy or rule and how it is applied. Apparently, the policy or rule is unwritten. The only tangible and direct indicia in the record of the existence of the policy or rule (other than some verbal exchanges between the judge and counsel at the hearings) is a letter to Mother's counsel, which informed them that the report was completed and may be reviewed at the Family Division Clerk's Office. The scanty record does not reveal when or why the Circuit Court enacted the policy or rule originally. Second, Mother's appeals before this Court and the Court of Special Appeals were unopposed. Neither Father's nor the children's best-interest attorney filed responsive briefs or argued orally at either appellate level. No potentially interested person, e.g., the State Attorney General's Office on behalf of the Circuit Court or the

hearing judge, moved to participate as an amicus curiae. Thus, Mother's contentions in this regard were uncontested, and, as such, the appellate "debate" has been one-sided so far.

Therefore, we shall direct remand of the case ultimately to the Circuit Court, without affirmance or reversal; for supplementation of the record as to the full contours of the relevant policy or rule, why it exists (if it does), what (if any) alternatives were considered, any written expression(s) of the relevant rule or policy, and its application generally. Md. Rule 8-604(d)(1).[3] Further, when the case returns to this Court, we invite the Office of the Attorney General of Maryland, in its role as legal counsel to the Circuit Court, to address, as amicus curiae, Mother's arguments in the present case regarding the viability and effect of the asserted policy or rule.

1. FACTUAL AND PROCEDURAL HISTORY

The following evidentiary facts were adduced at the two-day merits custody/divorce hearing in the Circuit Court, held on 13–14 December 2010. Mother, Father, and the children were represented each by counsel at the hearing.

Mother and Father were married in Tennessee on 27 November 2001. The marriage yielded two daughters. The parties separated in June 2006. For some time thereafter, apparently by agreement of the parties, the children lived alternately with Mother in Baltimore, Maryland, and with Father in Edgewood, Maryland. In 2007, Mother and the children left Maryland and, after a brief stay in Georgia, settled in Jacksonville, Florida. The children spent the summer of 2007 with Father in Edgewood before returning to Mother in Jacksonville. In March 2008, Mother discovered that one of the daughters was assaulted sexually in Jacksonville by someone with whom Mother had a personal relationship. She sent the children to live with their maternal grandmother in Tennessee. The children returned to Jacksonville in late June/early July 2008.

Another traumatic series of events took place in and around Mother's Jacksonville residence on 20 July 2008. Dan Waters, Mother's first cousin, attacked her in her home. The cousin then left Mother's home and murdered an individual living nearby. Jacksonville police officers responded to the incident and shot fatally the cousin when he resisted arrest.

The children returned to Maryland during the summer of 2009. They lived with Father and his fiancée in Baltimore. At the merits hearing, the parties disputed the intended duration of the children's time with Father in Baltimore in 2009–2010. Mother testified that she permitted the children to live with Father for the 2009–2010 school year only. The hearing judge concluded, however, based on the testimony of non-party witnesses, that the parties agreed to allow the children to live with Father indefinitely.

Father, self-represented at the time, filed a complaint for absolute divorce on 24 March 2010, seeking also sole physical and legal custody of the children. In response, Mother made several attempts, judicially and extra-judicially, to regain control of the children. First, she fabricated a story to dupe Father into sending the children to Georgia. She told Father that a relative of the children was injured mortally in Georgia, and that the relative wanted to see the children before the relative died. Father was skeptical of Mother's claim and refused to allow the girls to leave. Second, Mother attempted unsuccessfully to remove the children from their Baltimore school, without Father's permission or knowledge. Third, Mother went to the Circuit Court courthouse to obtain an order granting her emergency custody of the children. A daughter from a previous marriage accompanied her. Serendipitously, Father was in the courthouse at the same time, accompanied by his fiancée and mother. The two entourages met and an altercation ensued. Father was charged with assault as a result, but the charge was *nol prossed* subsequently.

Father obtained counsel. His counsel filed an amended complaint for absolute divorce on 24 May 2010. The amended complaint requested temporary custody of the two children and an injunction against Mother from removing them from Maryland. Mother, self-represented at the time, filed an answer that same day, seeking custody of the girls. On 15 June 2010, Mother secured two pro bono publico attorneys. On 12 July 2010, the Circuit Court appointed a best-interest attorney for the children.[4]

The merits hearing was scheduled for 13–14 December 2010. Prior to the hearing, the hearing judge ordered the Adoption and Custody Unit for the Circuit Court ("ACU") to evaluate the custodial abilities of the parents and to prepare a written custody investigation report. The judge directed that the report be completed by 1 November 2010. The ACU, however, did not complete the report until 3 December 2010. On that date, the ACU mailed to Mother's counsel (and presumably to counsel for Father and the children) a letter stating that the report could be reviewed by visiting the Family Division Clerk's Office in the courthouse. The letter did not elaborate further about the asserted Circuit Court policy or rule regarding access to custody investigation reports generally. Moreover, presumably, as the order directing preparation of the report provided, the hearing judge was sent a copy of the report.

The report totals 164 pages and contains sensitive, personal information about the children, the parties, and the parties' families. The report is divided into

two parts, findings and appendices. The findings are spread over 17 pages, but do not reach a conclusory recommendation regarding custody of the children. Rather, the findings summarize ACU–staff interviews with the children, the parties, and the parties' families, as well as recitation of their personal, criminal, health, education, housing, child protective services, and employment histories. The 17 appendices comprise the remaining 147 pages and contain supporting documentation for the findings. The appendices include Maryland Department of Public Safety and Correctional Services records for Mother, Father, and Father's fiancée; school records for the children; mental health records for the children and Mother; peace orders awarded to Father's mother and Father's fiancée against Mother; peace orders award to Mother against Father and Father's fiancée; a guilty plea by Mother in a matter in the Superior Court of Liberty County, Georgia; a Jacksonville police report about the death of Mother's cousin; and, an order of the Circuit Court for Baltimore City removing a child of Mother from another marriage from the "Child in Need of Assistance" ("CINA") program and placing her in Mother's care.

On 6 December 2010, Mother's counsel received the letter notice from the ACU that the custody investigation report was available for viewing. That same day, both of her counsel visited the Family Division Clerk's Office at 2:30 p.m. It is represented to us by Mother that the Circuit Court has an unwritten policy or "rule" that limits parties' attorneys' access to custody investigation reports. The rule prohibits counsel from viewing the report outside of the Family Division Clerk's Office and prohibits copying the report in any manner. Handwritten notes made from viewing the report are permitted, so long as verbatim transcription of significant passages are not made.[5] How the latter provision is enforced goes unexplained. Mother's counsel studied and took notes from the report for 90 minutes, until the Family Division Clerk's Office closed to the public for the day and counsel was obliged to leave. Due to their self-described "incredibly full" schedules, Mother's two attorneys did not see the custody investigation report again until the merits hearing.

On 13 December 2010, the first day of the divorce and custody hearing, one of Mother's counsel moved in limine to exclude from evidence the custody investigation report or, in the alternative, that the hearing judge provide the parties' attorneys with copies of it. Mother's counsel argued that the application of the Circuit Court policy or "rule" prejudiced his client's case for two primary reasons. First, the policy or rule prevented Mother's counsel from consulting with independent experts in preparation for the merits hearing. Second, the limited time to review and access the custody investigation report prevented Mother's counsel from reviewing the "voluminous" report sufficiently to prepare for the hearing. Specifically, the "rule" limited their ability to prepare Mother to testify and to prepare cross-examination of the author of the report, especially because the report was completed and made "available" only one week before the hearing. Prior to ruling on the motion, the hearing judge asked if Mother's counsel requested a continuance for additional time to review the report. Mother's lead counsel stated, "I don't need a continuance, Your Honor. I need an actual copy of the report."

The hearing judge denied the motion. He explained that the Circuit Court imposes "practical restrictions" on the access to custody investigation reports because of the sensitive information contained in them. He stated further that the burden is on counsel to create time in their hectic schedules to review the report sufficiently, at the Clerk's office, in order to prepare for the hearing. The judge reviewed also the content of the 17 appendices to the report. He observed that most of the documents in the appendices appeared to him to be easy to comprehend and otherwise already in possession of the parties or obtainable elsewhere by them. With regard to being unable to prepare and conduct a thorough examination of the report's author, the hearing judge observed that, "while there is a prohibition on copying the report, there is no prohibition on having the report and using it in the course of the proceedings in the courtroom." The judge granted the parties' attorneys access to the custody investigation report during the hearing for purposes of examining witnesses. The hearing judge, however, would not permit the attorneys to study the report over the lunch break.

The decision to limit the attorneys' access to the custody investigation report during the hearing proved, at times, a hindrance to the flow of the proceeding. The scene is reminiscent of the Greek mythological story of three Cyclopes with one eye between them that had to be passed around as needed or desired. Just before Father's attorney commenced her examination of the report's author, the following exchange occurred between the parties' attorneys and the judge:

> **MOTHER'S ATTORNEY**: Your Honor, may I have the custody report to use —
>
> **THE COURT**: Yes.
>
> **MOTHER'S ATTORNEY**: — to prepare for my cross examination?
>
> **FATHER'S ATTORNEY**: Your Honor, actually, I was about to ask the same thing —
>
> **THE COURT**: Well, you're going to have to share it, then.
>
> **FATHER' S ATTORNEY**: — for pur-

poses of examination.

> **THE COURT**: Let's have [Father's Attorney] have it now, since it's her examination. [Mother's Attorney], if you need a few minute break before you cross, I'll allow you that.

Additionally, Father's attorney requested the court's indulgence on three occasions while she located specific content in the report, explaining, "It's just that I'm not that familiar with the report." Prior to Mother's cross-examination ofthe report's author, the hearing judge offered Mother's counsel a brief recess to review the report. Lead counsel declined, stating that his co-counsel would follow along in the report during his examination.

At the end of the testimony of the report's author, Father's attorney moved to have the child custody report entered in evidence. Mother's lead counsel renewed his objection based on not having been given a copy of the report, reiterating the reasons articulated in his prehearing objection. He urged further that the report was cumulative, in light of the author's live testimony, thus diminishing the need to submit a document containing "double, triple, and quadruple hearsay." The hearing judge overruled Mother's objection and allowed the report into evidence.

At the conclusion of the hearing, the judge granted a divorce and sole legal and physical custody of the children to Father. The judge observed that Father's testimony was credible and that he provided a stable environment for the children. He observed further that Mother had an "impaired" character; admittedly lied to the court; failed to respond sufficiently to the sexual assault of her child; and attempted to remove surreptitiously the children from Maryland. He required that Mother be consulted by Father about "major decisions involving the children" and that she have access to the children's health and school records. The hearing judge awarded Mother a specific visitation schedule, attuned to holidays and the academic school year.

Mother noted timely an appeal to the Court of Special Appeals. Neither Father's nor the children's best-interest attorneys appealed or cross-appealed, nor filed a responsive brief with that court. Mother argued that the Circuit Court policy or "rule" denying her counsel a copy of.the report violated her due process rights.[6] A unanimous panel of the Court of Special Appeals, in an unreported opinion, affirmed the Circuit Court. The panel concluded that there was no violation of Mother's due process rights for two primary reasons. First, although having weeks to review the custody investigation report while preparing her appeal, Mother did not argue that any of the report's findings were untrue, misleading, or rebuttable. The panel concluded also that apparently Mother's counsel was knowledgeable sufficiently about the report at the time of the merits hearing in the Circuit Court because he did not move for a continuance and declined a recess to review the report prior to his cross-examination of the report's author. The panel's unreported opinion, however, indicated that its decision was a close call, noting that the Circuit Court's apparent access policy regarding custody investigation reports "could, under certain circumstances, be unfair to a litigant."

II. DISCUSSION

A.

Mother continues to argue primarily that the Circuit Court policy or "rule" violated her due process rights. Specifically, her counsel's limited access to the custody investigation report denied her the right "to be aware of all of the evidence considered by the trier of fact in making an adjudicatory determination and to have the opportunity to challenge and answer that evidence." *Denningham v. Denningham*, 49 Md. App. 328, 337, 431 A.2d 755, 760 (1981) (concluding that a judge violated appellant-father's due process rights by denying parties access to the custody investigation report that was admitted later into evidence). Although recognizing that, unlike in *Denningham*, her counsel had *some* access to the relevant custody investigation report, Mother maintains that the Circuit Court policy or rule is so restrictive that she was denied effectively the opportunity to review, challenge, and respond to the report in a meaningful manner.

Mother recapitulates the assertedly prejudicial limitations of the policy or rule that she identified at the custody hearing. First, the limited access to the custody investigation report prevented her counsel from reviewing sufficiently the "voluminous" report and appendices. As a result, Mother's counsel could not prepare Mother for her hearing testimony, could not challenge fully the evidence by interviewing witnesses whose statements were incorporated in the report, and could not prepare an exacting cross-examination of the report's author. Further, without a copy of the report, Mother's counsel could not refer to the report during opposing counsel's examination (recalling that the hearing judge permitted only the examining attorney to possess the sole copy of the report during direct examination). Second, the rule prevented Mother's counsel from consulting pre-hearing with possible independent experts. The Circuit Court policy or rule limits attorneys to taking handwritten notes, which, she argues, lack the detail and context necessary for an expert to appreciate what he or she is expected to analyze and perhaps respond critically. *See* American Psychological Association, *Speciality Guidelines for Forensic Psychology*, http://www.apa.org/practice/guidelines/forensic-psy-

chology.aspx (last visited 10 July 2012) (highlighting rules 1.02 and 2.01, which require forensic psychologists to "weigh all data, opinions, and rival hypothesis impartially" and to base their competency on the "preparation and study they are able to devote to the matter"). Mother argues also that the seven day notice of the report's completion and availability exacerbated the adverse effects of application of the Circuit Court policy or rule in this particular case. Mother's counsel were limited in their ability to collaborate with her because she lived in Georgia at the time just prior to the hearing.

The Circuit Court and the Court of Special Appeals endeavored to explain why Mother was not prejudiced by application of the policy or rule. The Circuit Court opined that the custody investigation report was comprehensible, without the need for intensive study. The Court of Special Appeals agreed, noting that Mother's counsel declined a continuance to review further the report, indicating, to it at least, that counsel was prepared sufficiently.[7] The intermediate appellate court added that Mother did not contend on appeal before it that any portion of the report was untrue, misleading, or rebuttable. The Circuit Court justified the policy or rule also by noting that its existence protects sensitive material about the parties and their children from being re-published more generally.[8] The Circuit Court believed that an attorney's professional obligation to keep confidential custody investigation reports is not sufficient unto itself to safeguard the privacy of the parties and implicated individuals.

B.

One hurdle to issuing a ruling in this case is the dearth of justification in the record for the Circuit Court policy or rule. This absence is significant when the greater context of the law and rules is considered. The report is a "case record," defined as "a document, information, or other thing that is collected, received, or maintained by a court in connection with one or more specific judicial actions or proceedings." Md. Rule 16-1001(c)(1)(A), (e)(3). When sealing or limiting access to a case record, a trial judge must make findings about the interest sought to be protected from inspection, supported by specific findings. Md. Rule 16-1009(d)(2); *see also Balt. Sun Co. v. Colbert*, 323 Md. 290, 305, 593 A.2d 224, 231 (1991) (citing *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984) ("A court ruling on a motion to seal judicial records should articulate the interest sought to be protected by the seal, supported by specific findings."). When determining whether to preclude or limit inspection of a case record, as was the case here, the trial judge must consider "whether a special and compelling reason exists" to justify restricted access. Md. Rule 16-1009(d)(4)(A). The trial court's final order that precludes or limits inspection of a case record "shall be as narrow as practicable in scope and duration to effectuate the interest sought to be protected by the order." Md. Rule 16-1009(d)(3); *see also Colbert*, 323 Md. at 306, 593 A.2d at 231. Moreover, the trial court must state why alternatives to sealing or limiting access to the case record were rejected. *Balt. Sun v. Thanos*, 92 Md. App. 227, 246, 607 A.2d 565, 574 (1992) (discussing requirements for sealing a pre-sentencing report in a first-degree murder case).[9]

The limited record before us does not illuminate sufficiently the full contours of the Circuit Court policy or rule, its origin, the balancing of the interests sought to be protected by it against competing interests, whether less restrictive alternatives were considered and why they were rejected, and any special or compelling reasons to prohibit the parties' attorneys from receiving a copy of the custody investigation report. Effective review of the Circuit Court policy or rule is not possible given the paucity of the present record. *Thanos*, 92 Md. App. at 246, 607 A.2d at 574. Therefore, remand to the Circuit Court for supplementation of the record is appropriate. *Colbert*, 323 Md. at 307, 593 Md. at 232; *Thanos*, 92 Md. App. at 246, 607 A.2d at 574.

C.

We observe, without concluding, that the custody investigation report may have been "sealed" effectively or limited by the Circuit Court policy or rule or otherwise subject to nondisclosure under the Maryland Access to Court Records Rules. The Maryland Access to Court Records Rules state that, generally, court records are presumed open to inspection by the public. Md. Rule 16-1002(a). The context of a custody investigation report, however, may trigger exceptions to the presumption of openness. For instance, the report may be unaccessible to the public because the hearing judge, through invocation of the Circuit Court policy or rule, "sealed" it, Md. Rules 16-1005(a)(5) & 16-1006(k), because the report may have touched upon alleged child abuse or neglect and therefore is required by statute to be kept confidential, Md. Rule 16-1006(d), or because the report contains a psychological report about the parties and their children, Md. Rule 16-1006(i)(1)(A), (B).

The above assumption notwithstanding, Mother's counsel may have been entitled to "access" the custody investigation report.[10] After the initial adoption of the Maryland Access to Court Records Rules, this Court amended Maryland Rule 16-1002(f) in 2006 to state, "The [Maryland Access to Court Records] Rules do not limit access to . . . *a case record by a party or counsel of record in the action*." (Emphasis indicates 2006 amendment.) In the 156th report of the Standing Committee on Rules of Practice and Procedure, the

Rules Committee commented that "[t]he proposed amendment to Rule 16-1002 makes clear that access to a case record by a party to the proceeding or counsel of record is not limited by the Rules in Title 16, Chapter 1000." Moreover, in the related context of CINA cases,[11] counsel of record is permitted to "review" confidential and sensitive evidence about juveniles and their parents contained in the court record: *See* Maryland Code (1973, 2006 Repl. Vol.), Courts & Judicial Proceedings Article, § 3-827(a)(2)(iii) (allowing a party's attorney to "review" a confidential court record in a CINA proceeding).

What constitutes an acceptable opportunity to "access" or "review" such a record is not conceptualized so easily. The practice of several other circuit courts around the State[12] concerning pre-hearing access to custody investigation reports indicates that "reviewing" such reports includes allowing counsel of record to obtain a pre-hearing copy of a custody investigation report or a pre-hearing transcription of the author's oral report. In Prince George's County, for example, it appears that copies of the custody investigation report are made available to the parties' counsel and the assigned judge. Jeanne F. Allegra, *Elements of a Custody Evaluation, in Matyland State Bar Association Family Law News* 13 (Feb. 2009), *available at* http://www.msba.org/sec_comm/sections/family/newsletter/FamLawFebruary09.pdf. In Montgomery County, a "court evaluator" presents his or her custody investigation report orally, on the record, at a pre-hearing settlement conference. Court Evaluators, *Montgomery County Circuit Court*, http://www.montgomerycountymd.gov/cibtmpl.asp?url=/Content/CircuitCourt/Court/FamilyDivision/Court_Evaluators/CourtEvaluators.asp (last visited 10 July 2012). A transcript of the evaluator's oral report may be ordered by a party's attorney. The Montgomery County Circuit Court may provide, in some cases, a copy of the child custody report to the parties, their counsel, and the assigned judge. In Harford County, a child custody evaluator provides, at a pre-hearing settlement conference, a verbal custody investigation report, which is rendered on the record. *Child Custody/Visitation Evaluations, Family Services Program, Circuit Court for Harford County*, http://mdcourts.gov/family/harford.html#custodyevaluations (last visited 10 July 2012). Again, a transcript of the verbal report may be ordered by a party's attorney.

Our limited survey of other State circuit court practices concerning pre-merits-hearing access to custody investigation reports suggests that the apparent policy or rule of the Circuit Court for Baltimore City, at least as portrayed to date in the present case, may be much more restrictive than the policies of other circuit courts. Thus, it may be out of the mainstream, for reasons that presently are not apparent entirely. Although not the end-all and be-all of the present bone of contention, we note this seeming outlier status nonetheless. Assuming, for the sake of argument, that we are asked here to address the equivalent of a local rule and that the rule is applied consistently and strictly in that jurisdiction, such a local rule cannot be "inconsistent with or . . . superseded by the general rules of practice and procedure." *Bastian v. Watkins,* 230 Md. 325, 330, 187 A.2d 304, 307(1963) (discussing a Circuit Court rule regulating who may file pleadings in that court). We are reticent, however, on the state of this record to go "all in"[13] and announce that the Circuit Court's apparent policy or rule is impermissibly outside the mainstream and, if so, without adequate cause.

The alternative approaches of the other circuit courts described above, however, seem reasonable and appear to be "as narrow as practicable in scope and duration" to protect the privacy of persons discussed in a custody investigation report, but still allowing a full prehearing discovery of relevant evidence. Md. Rule 16-1 009(d)(3). These practices enable the parties' attorneys "to be aware of all of the evidence considered by the trier of fact in making an adjudicatory determination and to have the opportunity to challenge and answer that evidence." *Denningham*, 49 Md. App. at 335, 431 A.2d at 759.[14]

The Circuit Court policy or rule here, by comparison, appears to impede significantly that ability. Counsel for the parties, it seems, could access the report pre-hearing only in the Clerk's office during its public hours, could not make verbatim notes of extensive passages from the report, and could not make or receive copies of the report (or any portion thereof). These limitations curtailed Mother's counsel's ability (and presumably Father's and the children's best-interest counsel as well) to prepare for the merits hearing, review critically the probable evidence contained in the report, or obtain independent expert opinions. For example, the merits hearing transcript suggests that the parties' attorneys were not prepared fully to cross-examine the report's author. At one point, both attorneys requested simultaneously possession of the single available copy of the report. Additionally, counsel received notice that the custody investigation report was completed approximately one week before the hearing. With such a short turnaround, providing the parties' attorneys with a copy or transcript of the custody investigation report could have provided them with a greater opportunity to incorporate the report into their respective preparation. Further, it may be unfair that parties who must pursue their child custody claims in Baltimore City[15] have diminished access to child custody reports, relative to parties similarly situated in other circuit courts throughout Maryland.

While the seeming practice of Montgomery,

Prince George's, and Harford counties fosters greater pre-hearing access by the parties' attorneys to custody investigation reports, they seem also to safeguard the privacy of the people discussed in those reports. An attorney's unique role as an "officer of the court" diminishes ordinarily, to an acceptable level of risk, the concern that sensitive information in the report will be disseminated more broadly. Maryland attorneys have an enforceable duty to treat sensitive records with care. *See* Maryland Lawyers' Rules of Professional Conduct (MLRPC) 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure, is impliedly authorized in order to carry out the representation," or permitted by the MLRPC). Further, attorneys are obliged to follow the lawful and considered instructions of the court. *Falik v. Hornage*, 413 Md. 163, 189—90, 991 A.2d 1234, 1250 (2010) (citing MLRPC 3.4(c));[16] *see also* Md. Rules 15-201 to -208 (empowering the presiding judge to issue sanctions for contempt). Obviously, other circuit courts have confidence that their trial judges can implement confidentiality safeguards that balance sufficiently the privacy concerns of persons mentioned in a custody investigation report with the parties' and/or their counsels' need to discover and prepare to address the report's contents. *See Falik*, 413 Md. at 189—90, 991 A.2d at 1250 (stating that the implementation of confidentiality restrictions should be left to the sound discretion of trial judges).

Although we are wary of the apparent policy or "rule" of the Circuit Court for Baltimore City described to us so far, we are even more wary of issuing a definitive holding, as sought by Mother, on the limited, uncontested appellate record in this case. Therefore, we shall reserve a final ruling until after the case is remanded for supplementation of the record about the Circuit Court policy or rule and, upon return to this Court, the Attorney General's response to our invitation to defend the policy or rule.

JUDGMENT NEITHER AFFIRMED NOR REVERSED; CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH INSTRUCTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO ABIDE THE RESULT.

Dissenting Opinion by Adkins, J., which Bell, C.J., joins.

I respectfully dissent from the majority opinion.

There is no question that in this case, the Circuit Court applied a rule limiting access to the custody investigative report, which prohibited counsel from viewing it outside the courthouse or possessing a copy of the report for counsel's use. The record contains a letter from the ACU to counsel, 10 days before trial, stating that the report could be reviewed by vising the Family Division Clerk's Office in the courthouse. At trial, the judge explained that the Circuit Court imposes "practical restrictions" on the access to custody investigation reports because of the sensitive information contained in them. The judge would not permit the attorneys to study the report over the lunch break. During trial, both attorneys requested use of the report at the same time, but the judge did not permit copying to facilitate that, and directed which counsel could use the report first. Thus, there is no need to remand to the Circuit Court to determine whether or how this restricted access policy was applied *in this case*.

To be sure, the majority's goal to understand the full terms of the Circuit Court's policy, the rationale for adoption, and alternatives considered by the Court, is a laudable one. Perhaps we do not have full appreciation of the Circuit Court's thinking or the experiences with abuses by the parties or attorneys when given such reports. But the majority has not been clear about *how* the parties should accomplish the proposed "supplementation of the record as to the full contours of the relevant policy or rule, why it exists (if it does), what (if any) alternatives were considered, any written expression(s) of the relevant rule or policy, and its application generally." Maj. Slip. Op. at 3. Certainly neither party can subpoena the judges who formulated and adopted the rule to testify as to the "full contours" sought by the majority. Moreover, unlike this Court, which has rule-making power and established procedures governing the adoption of rules, including a public hearing, and public records of the hearing as well as the recommendations made to the Court by its Rules Committee, no such power exists in the Circuit Court.

If the majority intends that the Circuit Court should provide some statement and explanation of the rule, either by oral opinion or by providing written documentation of the rule, then the opinion should say so. Absent a directive to that effect, the majority opinion leaves the parties, especially Petitioner, dangling.[1] The opinion does not say what occurs if Petitioner is unable to discover and add to the record, the "full contours" of the rule, including the rationale for adoption and alternatives that were considered. Absent full supplementation of the record as called for, there is no clear pathway for the Petitioner to return to this Court for a decision on whether the rule survives the legal challenges posed by Petitioner.

If we do not decide the case on the present record, as I think we can, the opinion should direct that we are seeking clarification and explication of the rule

or policy *by the Circuit Court*, and that if the Circuit Court does not provide same, we will decide the issue on the record we have. We certainly have the authority to issue such order. Moreover, often we are faced with a case having a less than desirable record. Normally, we proceed to decide it, allocating the burden of having failed to provide the record to the appropriate party and utilizing presumptions based on that burden. Here, if the record is incomplete regarding the nature of and rationale underlying the policy, it is the Circuit Court's failure, not that of the parties. The procedure adopted by the majority is not only highly unusual, but, in light of the clear application of the restriction with respect to this highly relevant report, is decidedly unfair.

Chief Judge Bell authorizes me to state that he joins the views expressed here.

FOOTNOTE TO DISSENT

1. Respondent did not appear in this Court, and may have no interest in appearing in Circuit Court on remand.

FOOTNOTES

1. No printed version of this policy or rule appears in the record; if, indeed, such exists.

2. Mother attempted to argue in her brief to this Court that the Circuit Court local "rule" is prohibited under Maryland Rule 1-102, which limits the scope of permissible circuit court and local rules. She did not, however, present this question in her petition for writ of certiorari. Therefore, we shall not consider directly here this question. Md. Rule 8-131 (b)(1); however, we shall add, on our motion, this question to the writ of certiorari issued in this case and, upon return of the case to this Court after remand proceedings, consider it based on Mother's prior briefing.

3. Maryland Rule 8-604(d)(1) provides:

Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

4. The hearing judge's order described the role of the "best-interest attorney" as "a court-appointed lawyer who provides independent legal services for the purposes of protecting a child's best interest, without being bound by the child's directive or objebtives." The hearing judge's order provided also that the best-interest attorney would serve as the children's "privilege attorney." *See Nagle v. Hooks*, 296 Md. 123, 460 A.2d 49 (1983).

5. Mother's counsel represented at oral argument before this Court that the actual parties are prohibited from reviewing the custody investigation report for their case; only their attorneys may read it. If a party in a custody dispute is self-represented, the party may review only those portions of the custody investigation report pertaining to that party. Again, how the latter is policed goes unexplained on this record.

6. Mother argued also that the awarded visitation schedule, which required Mother to pay for some ofthe children's travel between the parents, was an abuse of discretion because she could not afford to pay for the children's travel. The Court of Special Appeals disagreed and affirmed the hearing court on this issue. Mother did not raise this issue in this Court.

7. At oral argument before us, Mother's attorney countered this contention, explaining that he declined a continuance because it would not cure the already-worked prejudice. With a continuance, but without a copy of the report, he argued that he still could not consult with a competent expert, who would require a copy of the report to review before he or she could decide whether and to what extent he or she could testify.

8. Although perhaps true to some extent while the matter was pending in the Circuit Court, anomalously, this seems less true after an appeal is taken. We, the intermediate appellate court, the parties (and their counsel), and the public appear to have had full access to the unsealed report as contained in the record transmitted on appeal.

9. Both *Baltimore Sun Company v. Colbert* and *Baltimore Sun v. Thanos* were issued prior to this Court's adoption of the Maryland Access to Court Records Rules in 2004. The Maryland Access to Court Records Rules are in sections 16-1001 through -1011 of the Maryland Rules. Despite the timing of these cases, we believe they are consistent with the intent and purpose of the Maryland Access to Court Records Rules. The Maryland Ad Hoc Committee on Electronic Access to Court Records (whose recommendations lead to the formation of the Committee on Access to Court Records) relied on *Thanos* and *Colbert* in its report about the legal considerations of publicizing court records. Report to the Maryland Ad Hoc Committee on Electronic Access to Court Records, *Constitutional and Common Law Rights of Access to Court Records* 6–12 (25 June 2001).

10. Although Mother argued primarily that the Circuit Court policy or rule in the present case violated her due process rights, we must "exercise the utmost care" whenever asked to extend due process protection to a liberty interest because doing so overemphasizes "the policy preferences of the members of this Court" and, as a result, removes the issue from the "arena of public debate." *Conaway v. Deane*, 401 Md. 219, 315, 932 A.2d 571, 629 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 787 (1997)). In any event, we will not reach a constitutional argument when an issue may be decided on a non-constitutional basis. *Prof'l Staff Nurses Ass'n v. Dimensions Health Corp.*, 346 Md. 132, 138-39, 695 A.2d 158, 161 (1997) (quoting *State v. Lancaster*, 332 Md. 385, 404 n.13, 631 A.2d 453, 463 n.13 (1993)). Constitutional avoidance may be appropriate in this case, and certainly constitutional hesitation is at this juncture.

11. A "Child in Need of Assistance" ("CINA") proceeding contemplates many sensitive issues—such as sexual, physical, or mental abuse; developmental disabilities; mental disorders; and neglect—and involves a child's parents, relatives, and custodians. *See generally* Maryland Code (1973, 2006 Repl. Vol.), Courts & Judicial Proceedings Article, § 3-801. Similar sensitive issues arise in a child custody proceeding. *See, e.g., Volodarsky v. Tarachanskaya*, 397 Md. 291, 916 A.2d 991 (2007) (discussing, in a child custody case, alleged sexual abuse by the father); *Malin v. Mininberg*, 153 Md. App. 358, 837 A.2d 178 (2003) (discussing, in a child custody case, the substance abuse problem of father and developmental disability of his child). Thus, the need for confidentiality in CINA cases is at least comparable to the need for confidentiality in private child custody proceedings.

12. For ourjudicial notice comparison purposes, only the websites ofthe circuit Courts for Harford and Montgomery Counties provide substantial information about their treatment of access to custody investigation reports by parties' counsel or parties directly.

13. To go "all in" is a term of art in the game of poker where, in one iteration, a player bets all of his or her chips at any point during a betting round to ensure that he or she will be able to remain in competition at the final call, although the amount of money he or she may win from the other players is limited to the stack bet when going "all in."

14. The *Denningham* court concluded ultimately that denying the parties access to the custody investigation report was harmless error. *Denningham v. Denningham*, 49 Md. App. 328, 337, 431 A.2d 755, 760 (1981). Nonetheless, the analysis in the opinion bears on the present case.

15. A hearing court's jurisdiction to resolve a child custody dispute depends on the domicile of the child. *Schwartz. v. Schwartz,* 26 Md. App. 427, 428, 338 A.2d 386, 387 (1975) (citing *Renwick v. Renwick*, 24 Md. App. 277, 284, 330 A.2d 488, 492 (1975)). The domicile of the child is the domicile of the parent with legal custody. *Id*. (citing *Taylor v. Taylor*, 246 Md. 616, 618–19, 229 A.2d 131, 132–33 (1967)).

16. Maryland Lawyers' Rule of Professional Conduct 3.4(c) provides, "A lawyer shall not: knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. . . ."

NO TEXT

Cite as 10 MFLM Supp. 13 (2012)

Custody: enforcement of custody agreement: UCCJEA

Joseph D. Miller

v.

Amanda Lee Mathias

No. 146, September Term, 2008

*Argued Before: Bell, C.J., Harrell, Battaglia, Greene, *Murphy, Adkins, Barbera, JJ.*

Opinion by Bell, C.J.

**Murphy, J., now retired, participated in the hearing and conference of this case while an active member of this Court, but did not participate in the decision or adoption of this opinion.*

Filed: August 27, 2012. Reported.

Family Law Article Section 9.5-207 does not preclude a court from conducting an inconvenient-forum analysis under the UCCJEA simply because the court has continuing, exclusive jurisdiction.

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

The appellant, Joseph D. Miller, in this case, presents three issues for review: whether the Circuit Court for Montgomery County erred in granting the Motion To Alter Or Amend, Or Alternatively To Revise Judgment, filed by the appellee, Amanda Lee Mathias, prior to when the answer was due, pursuant to Maryland Rule 2-311(b),[1] and, therefore, without first receiving and considering that answer during an in-person hearing pursuant to Maryland Rule 2-311(e),[2] whether the "inconvenient forum" provisions of Maryland Code (1984, 2006 Repl. Vol.), § 9.5-207[3] of the Family Law Article apply to a child custody case in which the court has acquired "continuing, exclusive jurisdiction" pursuant to § 9.5-202[4] of the same article; and whether, if the inconvenient forum provisions are applicable, the Circuit Court properly applied them or abused its discretion in doing so. We shall affirm the judgment of the Circuit Court. First we reject the appellant's arguments based on Rule 2-311(b) and (e), and hold that the court was not required to hold a hearing prior to granting the appellee' s motion seeking to revise the court's dismissal of her action, and, in any event, the appellant suffered no prejudice. We also hold that § 9.5-207 of the Family Law Article clearly and unambiguously contemplates that a party or a court, upon motion, will raise the issue of inconvenient forum, even when the jurisdiction of the court is continuing and exclusive, pursuant to § 9.5-202. Finally, we shall hold that the Circuit Court did not abuse its discretion when it found Maryland to be an inconvenient forum for the underlying child custody dispute and therefore relinquished its jurisdiction to Virginia.

I. Background

The appellant and the appellee are the parents of a minor child, whose custody, legal and physical, they agreed to share. That joint custody agreement, contained in the Child Custody, Visitation And Child Support Agreement, executed when the parties both resided in Maryland, was incorporated, but not merged, into a Court Order of the Circuit Court and provided that "[t]he parties jointly agree that regardless of the precise number of hours each party shall have custody of the minor child as set forth herein, neither party shall be deemed to have primary residential custody of the minor child." Also addressed by the parties in that agreement was how future disputes arising under the agreement would be settled. Section III, entitled "Miscellaneous," article 5, a mediation clause, indicates that they opted for mediation as the preferred dispute resolution mechanism.[5] It provides:

> "Settlement of Future Disputes. The parties recognize that disagreements may arise between them in the future, and they agree to attempt to settle these disagreements without court action to the fullest extent that may be possible. If the parties cannot resolve a controversy as to the modification, interpretation or alleged breach of this Agreement, they agree to first attempt to resolve the controversy in three (3) hours of mediation with mutually agreed upon mediator and to share equally the costs of the mediation. In the event they are unable to resolve the controversy through mediation, either party may apply to a court of competent jurisdiction for resolution of the issue."

Although when the agreement was signed, the parties both resided in Maryland, it was known and contemplated that the appellee would be moving to

Virginia with her new husband. Now the appellant lives in Takoma Park, Maryland, while the appellee lives in Burke, Virginia, in Fairfax County, in northern Virginia.

For approximately two years, the circumstances of the parties remained unchanged. Thereafter, without first pursuing the mediation option, the appellee, who had, by then, moved to, and was living in, Virginia, filed, in the Juvenile and Domestic Relations Court of Fairfax County, Virginia, a Motion to Modify Custody. Concurrently, again without resorting to mediation, she filed, in the Circuit Court for Montgomery County, a Motion to Relinquish Jurisdiction to the Commonwealth of Virginia. In the Maryland motion, while acknowledging that, pursuant to 28 U.S.C. § 1738 (A) (f), the Parental Kidnapping Prevention Act, and § 9.5-202, the Circuit Court, because it made the initial custody determination and the appellant continues to reside in the State, had "exclusive, continuing jurisdiction," the appellee averred that the court could relinquish such jurisdiction "if it finds that it is an inconvenient forum," offering a nuthber of reasons why she believed the court to be an inconvenient forum.[6] Specifically, the appellee averred:

> "I. The nature and location of much of the evidence required to resolve the pending litigation is in the Commonwealth of Virginia, first and foremost, the child's school, health care professionals and church.
>
> "J. The Plaintiff and the minor child have been attending a 21-week program in Fairfax County called 'Nurturing Parenting,' and the social workers associated with the program are expected to be witnesses in the custody action between the parties.
>
> "K. Therefore, most of the witnesses essential in a custody and visitation proceeding such as teachers, doctors, therapists and coaches, are all in Virginia. It would be unduly burdensome for these witnesses to have to travel to Maryland to testify and unnecessarily costly for the Plaintiff to have to compensate professional witnesses for their time and their travel.
>
> "L. The balance of hardships in terms of witnesses and evidence weighs heavily in favor of the Plaintiff."

The appellant responded to both actions.[7] The unifying theme of the motion he filed in the Virginia action to dismiss on jurisdictional grounds and the Opposition To Motion To Relinquish Jurisdiction To The Commonwealth Of Virginia, Or In The Alternative, Motion For Stay Of Proceedings, filed in the Circuit Court, was the allegation that the Maryland court had, and retained, "exclusive, continuing jurisdiction" of their child custody matter. As indicated, the appellee did not dispute this fact. The appellant, however, rejected the applicability of the inconvenient forum provision to that situation, where the custody decision has been made by the court which retains "exclusive, continuing jurisdiction." Interpreting § 9.5-207 as being applicable only "in the circumstances of an initial custody determination, not a motion to modify a prior determination," he argued:

> "The issue is not whether the Court should 'make a child custody determination,' that was done in July 2006, by consent. Rather, the issue is whether the Court has 'exclusive, continuing jurisdiction' pursuant to § 9.5-202—Plaintiff freely acknowledges that this Court does have suchjurisdiction, and that is and should be the end of this Court's inquiry. It makes a mockery of the term 'exclusive, continuing jurisdiction' to argue that such jurisdiction is neither exclusive nor continuing, yet that is precisely what the Plaintiff argues."

The Circuit Court, upon consideration of the appellee's motion, the appellant's opposition and the entire court record, and without a hearing, denied the appellee's Motion to Relinquish. On the same day, the Virginia Court "denied [the appellant's motion to dismiss] without prejudice at this time," stayed the proceedings and "Adjudged, Ordered and Decreed . . ."

> "1. As soon as a judge is appointed in the [appellee's] Motion to Relinquish Jurisdiction to Virginia, currently pending in the Montgomery County Circuit Court in Montgomery County, Maryland, case number 52467-FL, counsel for [the appellee] shall immediately notify [the appellant's] counsel.
>
> "2. The Honorable David S. Schell shall communicate with the presiding judge in Maryland on the question of jurisdiction pursuant to § 20-143.17[8] and §20-146.[9] of the Code of Virginia, 1950, as amended. Counsel shall set up a conference call between Judge Schell and the Maryland Judge. All parties shall be present at the communication and a record of said communication shall be made. Said communication shall take place via conference call, with Judge

> Schell appearing via telephone from Virginia."

On August 1, 2008, 16 days after the Circuit Court entered its order denying her motion to relinquish jurisdiction, the appellee filed in that court a "Motion to Alter or Amend, or Alternatively to Revise Judgment." In that motion, citing § 9.5-206(b)(2),[10] as consistent, she referenced, and attached, the initial Virginia Court Order, as well as the Order issued subsequently by the next judge assigned to the case, which indicated that

> "Both counsel . . . agree that the Courts in Maryland and Virginia have not communicated per the requirements of UCCJEA. The Court will set two status hearings (8-6-08 9:30 A.M. and 9-22-08 11:40 A.M.) and counsel shall coordinate with Maryland to allow the two Courts to resolve jurisdiction."

For those reasons, the appellee

> "Request[ed] that the Court vacate its July 15, 2008 Order and allow this matter to proceed in accordance with the Orders issued by the Virginia Court; that is, that a telephone conference take place and that Judges from the respective Courts communicate with each other, with the parties and counsel participating, to determine where jurisdiction and venue are appropriate."

The communication between the Maryland and Virginia courts occurred in the form of a telephone conference call hearing, initiated in Virginia and lasting approximately 20 minutes. In addition to Judge Ann Harrington of the Circuit Court and Judge Gayle B. Carr of the Juvenile and Domestic Court of Virginia, also present on the call were a sworn court reporter and both of the parties' attorneys. Both the appellant and the appellee had Virginia counsel for the Virginia action and Maryland counsel for the Maryland action. It was Virginia counsel who appeared with and participated in the telephone cohference call hearing.

At the outset of the phone conference, the judges addressed its nature and purpose:

"Judge Carr: As I understand, we had competing petitions for custody filed in both courts. And I know the parties have been here before on several motions which I really wasn't involved in, other than the last hearing where counsel for the father represented that Maryland had already declined the mother's petition to allow Virginia to have jurisdiction. And as I understood, the two courts had not had a chance to talk about that. So that was the reason we set up this hearing.

"Judge Harrington: Yes, that is correct. And I believe our ruling on that was probably premature, but it was based on the objection that was filed. We don't have a motion to modify access or custody files in this court. What we have filed was the request to relinquish jurisdiction.

"Judge Carr Okay, yes.

"Judge Harrington: And then an opposition to that.

"Judge Carr: Okay. Well, I guess she filed — the mother filed for custody here on May 20th, 2008, to modify. And then I guess she filed in Maryland to ask Maryland to relinquish jurisdiction.

"Judge Harrington: Yes. That was opposed by the father.

"Judge Carr: So I guess the purpose of today's hearing is for us to decide which court should assume jurisdiction. And did you want to hear any arguments from counsel? I have reviewed my pleadings, and they sort of argued the case a little bit before me at the last hearing. But I know you have not had an opportunity to hear from counsel.

"Judge Harrington: I'd be delighted to hear from counsel."

Counsel for the appellee began, submitting that whether a particular court has exclusive, continuing jurisdiction of a case "is kind of a red herring because anybody can petition the court that has exclusive, continuing jurisdiction to relinquish that, if that court determines that another court is the more appropriate forum." The appellee thus argued, consistent with her Motion to Relinquish Jurisdiction, that the crucial witnesses in this custody modification proceeding are in Virginia and that, particularly in the case of professional witnesses, requiring them to go to Maryland to testify would be a hardship. She also identified the professional witnesses to whom she referred: the child's pediatrician and pediatric dentist, a licensed clinical social worker, and two preschool teachers. The appellee concluded:

> "It is our position that, with respect to the lay witnesses, they're probably about both equal, the father being in Takoma Park, Maryland, mom's witnesses being in Northern Virginia. But I think the balance of the hardship

> weighs in favor of having the proceeding where the professional witnesses, at a location, and the court, at a location which is closer to their offices. And that would be here in Virginia."

The appellant, through counsel, rejoined that Maryland, not Virginia, was the appropriate jurisdiction and venue, noting, in agreement with the appellee, that it had the exclusive, continuing jurisdiction over the child custody matter. He argued, in any event, that Maryland was not an inconvenient forum. Noting the absence of "allegations or issues concerning the child's health [or] mental health," he submitted that the Virginia witnesses could be "deposed in Virginia and their testimony offered or for audio-visual means to be set up or for them to testify by telephone." The appellant also indicated that for "all the witnesses that mom has in Virginia, dad, too, has professional witnesses over in Maryland, as well, because he has — there's doctors and pediatricians that the child sees in Maryland." Although he was asked by the court to do so, the appellant did not identify the professional witnesses to which he had referred.[11]

Judge Harrington relinquished the jurisdiction of the Circuit Court for Montgomery County to Virginia. She reasoned:

> "The parties litigated in Maryland. They came to an agreement. They reached a custody decision that basically shared time with their child who is, I think, four years old now 50-50.
>
> "Dad lives in Takoma Park, Maryland. Mom lives in Burke, Virginia.
>
> "Each of those locations, I think its about 45 minutes to the Rockville courthouse. So in terms of access, I was thinking that Rockville is probably equally inconvenient to both of them.
>
> "And the factors that make traveling inconvenient for one side are exactly the same as the factors that make traveling inconvenient for the other side.
>
> "On the other hand, dad acknowledges in his pleadings in Maryland that it was contemplated that mom was going to move to Virginia because she had remarried and she was relocating there with her husband. So this did not come as a surprise to the parties. That was apparently in the works when they reached this agreement.
>
> "So I think it's really a question of both cases, I mean, both jurisdictions being almost equally poised to do this. And what puts me over the top in coming to a decision that it would be appropriate to relinquish jurisdiction is, I do think that mom has lined up professional witnesses and they're more concrete than what dad has proposed.
>
> "And I do think it's important to consider the convenience of the professionals, their schedule, their time and their ability to appear because what they present may or may not be significant in this case if the parties can't settle it ahead of time and it certainly will be if it goes to trial.
>
> "So I'm persuaded that it is appropriate to relinquishjurisdiction and allow the matter to proceed in Virginia where it's been filed."

In implementation of that decision, Judge Harrington issued two orders, one granting the appellee's Motion to Alter or Amend or Alternatively to Revise Judgment and vacating the court's earlier denial of the appellee's Motion to Relinquish Jurisdiction to the Commonwealth of Virginia and the other relinquishing jurisdiction to Virginia. The petitioner thereafter filed a Motion to Alter or Amend and Motion to Vacate or Stay Order of August 25, 2008. In support of those motions, he advanced, among other arguments,[12] that the appellee's motion to alter or amend was ruled on prior to the expiration of the time given him by the Rules to answer and was granted without a hearing, in contravention of the Rules and "reiterated the argument that the 'inconvenient forum' provisions of § 9.5-207 do not apply where Maryland, as is admittedly the case here . . . has 'exclusive, continuing jurisdiction' pursuant to § 9.5-202." Alternatively, pursuant to Md. Rule 2-632, the appellant sought a stay of the Circuit Court's order, pending appeal. The appellee filed an Opposition to the Motion to Alter or Amend.

When the appellant's motions were denied, he filed a Notice of Appeal in the Court of Special Appeals. While the case was pending in that court, this Court, on its own motion, granted certiorari. The appellant argues in this Court that the Circuit Court erred: in granting the appellee's motion to alter or amend without allowing the appellant to respond and without holding a hearing, in violation of Maryland Rule 2-311(b) and (e); in conducting an "inconvenient forum" analysis when it was the State with "continuing, exclusive" jurisdiction; and, assuming the "inconvenient forum" analysis were appropriate, in relinquishing jurisdiction.

II. Motion To Alter or Amend - Rule 2-311 (b) and (e) Requirements

"In general, the denial of a motion to alter or amend a judgment or for reconsideration is reviewed by appellate courts for abuse of discretion." RRC Northeast, LLC v. BAA Maryland, Inc., 413 Md. 638, 673, 994 A.2d 430,451(2010) (quoting Wilson-X v. Dep't of Human Res., 403 Md. 667, 674-75, 944 2d 509, 514 (2008)). We have also noted that, when reviewing a trial judge's discretionary rulings, "[t]his Court has recognized that trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." Id. at 675, 944 A.2d at 515. See also In Pasteur v. Skevofilax, 396 Md. 405, 433, 914 A.2d 113, 130 (2007) (holding that "a failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion"); Ehrlich v. Perez, 394 Md. 691, 708, 908 A.2d 1220, 1230 (2006), citing LeJeune v. Coin Acceptors, Inc., 381 Md. 288, 301, 849 A.2d 451, 459 (2004) and Alston v. Alston, 331 Md. 496, 504, 629 A.2d 70, 74 (1993) (stating that, "even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards"). In summation, "[t]he relevance of an asserted legal error, of substantive law, procedural requirements, or fact-finding unsupported by substantial evidence, lies in whether there has been such an abuse." Wilson-X, 403 Md. at 675-76, 944 A.2d at 514.

The appellant argues that the Circuit Court abused its discretion when it granted the appellee's motion to alter or amend without a hearing and without having given him an opportunity to respond to the motion. He relies on Maryland Rule 2-311, two sections of which, he submits,[13] are applicable and when applied, mandate a result contrary to the one reached by the Circuit Court. With regard to the denial of his opportunity to respond, the appellant points out that, while the Rule prescribes a longer time for answering a motion, the consultation between the Maryland and Virginia judges occurred within 6 days of the filing of the motion to alter or amend, and the motion itself was granted prior to the expiration of the time prescribed by the Rule for filing an answer. Significant, even critical, to the hearing prong of his argument is that the motion to alter or amend judgment was a Rule 2-534 motion, that is, one filed pursuant to that Rule. This Court has held that, in the case of a Rule 2-534 motion, the hearing requirement of Rule 2-311(e) is mandatory. See Renbaum v. Custom Holding, Inc., 386 Md. 28, 46, 871 A.2d 554, 564-65 (2005) ("[t]he responding party must have an opportunity to address the merits of the Rule 2-534 motion (and the request to receive additional evidence)") (citing Paul V. Niemeyer et al., Maryland Rules Commentary 456 (3rd ed. 2003)) (stating that before a court may grant a Rule 2-534 motion, a hearing must be held in accordance with Rule 2-311(e)).

The appellant is correct, Rule 2-311 does prescribe the time that the opponent of a motion has to respond to that motion and when a hearing is required to resolve that motion. Section (b), which addresses the former point, provides:

> "Except as otherwise provided in this section, a party against whom a motion is directed shall file any response within 15 days after being served with the motion, or within the time allowed for a party's original pleading pursuant to Rule 2-321(a), whichever is later. Unless the court orders otherwise, no response need be filed to a motion filed pursuant to Rule 2-532, 2-533, or 2-534. If a party fails to file a response required by this section, the court may proceed to rule on the motion."

Sections (e) and (f) pertain to the latter, hearings on motions. Certain post trial motions are the subject of Rule 2-311 (e)'s hearing requirements, while Rule 2-311 (f) treats hearings on the other motions that are not addressed in section (e). They provide:

> "(e) When a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.
>
> "(f) Hearing — Other motions. A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading 'Request for Hearing.' The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section."

Referenced in each of the aforementioned relevant sections of Rule 2-311 are post trial motions "filed pursuant to Rule 2-532, 2-533, or 2-534." Only in the case of a motion filed pursuant to Rule 2-534,[14] however, as Rule 2-311(e) makes clear, is a hearing required before the motion can be granted. According to — as defined by — the Rule, a Rule 2-534 motion, a motion

filed pursuant to Rule 2-534, is one seeking revision of the judgment — its alteration or amendment that is filed "[i]n an action decided by the court" and "within ten days after entry of judgment." Rule 2-535 is another rule that implicates the revisory power of the court. Indeed, as we shall see, it overlaps with Rule 2-534, when "the action was tried before the court." It provides:

> "Revisory power — (a) Generally. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket."

Unlike Rule 2-534, Rule 2-535 is not specifically referenced in Rule 2-311 and, thus, even though it too addresses the court's revisory power, permitting the court to "take any action that it could have taken under Rule 2-534," a motion pursuant to it does not require a hearing to be granted. Nor are motions filed pursuant to Rule 2-535 limited to actions decided by the court and filed within ten days after entry of judgment.

The record reflects that the appellee filed her motion to alter or amend the Circuit Court judgment in response to the Circuit Court's ruling denying her motion asking it to relinquish its jurisdiction to Virginia. That ruling was filed on July 15, 2008. The appellee's motion was filed on August 1, or 16 days after entry of the judgment sought to be revised. Thus, although styled as a motion to alter or amend and filed "in an action decided by the court," it was not filed "within ten days after the entry of judgment." Accordingly, the motion was not filed pursuant to Rule 2-534; rather it was filed pursuant to Rule 2-535. It follows, therefore, that the requirement prescribed by Rule 2-311(e), that the motion not be granted without a hearing, does not apply.[15] Rather, the Maryland rule addressing "other motions," Rule 2-311(f), mandates a hearing only if a party requests one and if the court "render[s] a decision that is dispositive of a claim or defense." Here, the appellant did not comply with Rule 2-311(f); he never requested a hearing for the motion to alter or amend. Accordingly, Rule 2-311(f) simply does not assist him.

The appellant also asserts that his time to respond to the appellee's motion to alter or amend was cut short by the Circuit Court's phone conference and subsequent ruling. The appellant is correct, without regard to the time provided to answer the motion and without there being an order shortening time to answer, the Circuit Court consulted with the Virginia court, signed the order granting the appellee's motion to alter or amend and filed that order, all before the time for the appellant's answer had expired.[16] Nevertheless, he is not entitled to relief on this ground. It is significant that the appellant was very much aware of the reason for the appellee's post trial motion — to facilitate the consultation between the Maryland and Virginia courts on the jurisdictional issue — and the relationship of that consultation to the initial motion she filed — that motion, if granted, would have resolved any conflict between the courts. Notwithstanding that knowledge, the appellant neither answered the appellee's motion nor filed an objection to proceeding with the consultation prior to resolution of the motion.[17] Instead of objecting to the conference call, the appellant cooperated in facilitating the consultation. His first objection to the ruling on the motion to alter or amend or to proceeding with the consultation came 10 days after the ruling, after the time for answering the motion had expired. Tellingly, he did not object during the telephonic consultation, even when, by her admission that it had been ruled on prematurely, Judge Harrington signaled that the appellee's motion would be granted; on the contrary, he willingly participated in the proceedings. Rule 2-311(a) expressly does not require a party to answer the motion and also expressly permits the court to rule on the motion when no response is made. Where, as was the case here, the overriding issue in both the Maryland and the Virginia courts was the determination of jurisdiction between them, as required by the UCCJEA, the court appropriately ruled on the motion to alter or amend and did not err in doing so.

We next address whether it was an abuse of discretion, procedurally, to disregard the petitioner's 15-day window to file a response to the motion to alter or amend. The conference call took place on August 6, cutting short by 10 days the petitioner's time to file an answer opposing the motion. Assuming that it was error — an abuse of the Circuit Court's. discretion — to have proceeded to consider, and grant, the appellee's motion before the appellant's time to answer had expired, we believe the error to have been harmless.

To be sure, the appellant was entitled to the opportunity to respond to the appellee's motion before that motion was ruled on and certainly before it was granted. Rule 2-311(b) states, as we have seen, that "[i]f a party fails to file a response required by this section, the court may proceed to rule on the motion." We have made clear that "[n]ecessarily implicit in that [provision] is the direction that the court not rule on the motion before the time allowed for a response has elapsed. Otherwise, there would be no point in allow-

ing time for a response." Carroll County Dep't of Social Services v. Edelmann, 320 Md. 150, 162, n.2, 577 A.2d 14, 19, n.2 (1990). By making a ruling prior to the expiration of the time allowed for filing an answer, the Circuit Court acted in direct contravention of Rule 2-311(b).

It is just as well settled, however, as the appellee points out, an error that is not shown to be prejudicial does not warrant reversal. Bradley v. Hazard Tech. Co., 340 Md. 202, 206, 665 A.2d 1050, 1052 (1995) ("Unless an appellant can demonstrate that a prejudicial error occurred below, reversal is not warranted.") (citing Wooddy v. Mudd, 258 Md. 234, 237, 265 A.2d 458, 460 (1970)).

The appellant argues, without specifying exactly how, that he was prejudiced by the court's early ruling. We do not agree. In fact, we believe this issue is resolved by the principle enunciated by the Court of Special Appeals in Johnson v. Rowehouses. Inc., 120 Md. App. 579, 707 A.2d 933 (1998). There, the appellants filed their answer to a motion for summary judgment, and received a hearing and an adverse ruling, before the 15-day deadline for answer had passed. Id. at 588-589, 707 A.2d at 937. They challenged as premature, and, thus, a violation of Rule 2-311(b), both the hearing and the ruling. Id. at 589, 707 A.2d at 937. The Court of Special Appeals affirmed the trial court's rejection of that argument, reasoning:

> "Once appellants responded to the revised motion for summary judgment, the issue of how much time they should have been given to respond was mooted. Put another way, when an opposing party responds early to a summary judgment motion and in the response does not indicate that any additional response time is needed, the court is justified in deciding the motion forthwith. Appellants' request for more response time made after they had already lost the motion for summary judgment plainly was made too late . . . Additionally, at no time prior to the filing of this appeal did appellants make a proffer as to what [their expert witness] would have said if additional time had been granted. In a civil case, in order to win on appeal, an appellant must show not only error but that the error was prejudicial. Bradley v. Hazard Tech. Co., 340 Md. 202, 206, 665 A.2d 1050 (1995). Here, appellants have shown no prejudice and hence have shown no reversible error was committed by the court's failure to allow appellants until March 29, 1997, to file an additional response to appellee's motion."

Id. at 591-592, 707 A.2d at 938-39. Compare with Concerned Citizens v. Constellation-Potomac. LLC, 122 Md. App. 700, 755-56, 716 A.2d 353, 380 (1998) (holding that the Board's violation of the 10-day window to respond to new evidence, alone, did not constitute prejudicial error, but when the Board compounded its procedural errors by closing the record and thereby failing to give the appellant an adequate and reasonable opportunity to respond to the new evidence, the sum total of the procedural errors rose to the level of reversible error).

Johnson obviously is distinguishable factually, as, there, the appellants filed a response to the motion for summary judgment, which was considered during the litigation of, and decision on, the motion, while, here, the appellant did not file an answer to the motion to alter or amend. Another factual distinction is that, in Johnson, the only matter before the court for decision and decided was the motion for summary judgment, while here, although related, there were two separate matters, the appellee's motion to alter or amend and the merits of the inconvenient forum issue, only one of which, the latter, was expressly argued and decided. Nevertheless, the principle announced in Johnson — where the merits of the dispositive issue are litigated without objection with regard to response time, there is no prejudicial error — is equally applicable to this case.

Here, although the appellant did not file an answer to the motion to alter or amend, and even if we assume that he did not have the full opportunity to do so, it is clear that the appellant was able to, and did, litigate the inconvenient forum issue. Indeed, his counsel cooperated in the facilitation of the telephone conference at which that occurred, appeared at the conference on the appellant's behalf and asserted, during the phone conference, not simply a response to the appellee's arguments, but the arguments in support of the appellant's position that Maryland, and not Virginia, was the appropriate jurisdiction in which to resolve the custody dispute. Therefore, as with the time to respond to the motion to alter or amend, the appellant voiced no objection to the hearing. In fact, the Virginia judge stated, without objection, that both counsel agreed that the consultation had not occurred, indicating that it was appropriate that it do so. Stated differently, by agreeing to participate in the phone conference, and making no objection to its taking place, we can assume that the appellant had no opposition to its taking place before the jurisdictional issue was decided and before the window of time for a response had lapsed.

The inconvenient forum issue was a substantive issue that required resolution before the custody proceedings pending in Virginia could proceed. The motion to alter or amend related to the issue of the appropriate forum, to be sure, but, however it was decided, it would not have resolved the forum issue; it still would have had to have been addressed via the consultation of the judges. A ruling on the motion to alter or amend was, in short, tangential to the forum matter. Consequently, the forum issue was the dispositive, ultimate issue. Once that issue was decided, except for record conformance, a ruling on the motion to alter or amend was of little or no moment. We hold that, even if it were error to have granted the motion to alter or amend prior to the expiration of the time for the appellant to answer the motion, the error was harmless.

III. Application of Inconvenient Forum Analysis

The appellant next argues that the Circuit Court erred in applying an "inconvenient forum" analysis because Maryland has "continuing, exclusive jurisdiction," thus precluding any and all such claims. That jurisdiction, he reasons, can be terminated pursuant to § 9.5-202(a), but, because that section applies to initial child custody determinations, its exercise cannot be declined pursuant to § 9.5-207(a). Pointing out that "both [he] and the child continue to reside in Maryland," thus negating the circumstances prescribed by § 9.5-202(a), and that "the circumstances of the custody arrangement have not changed," citing Frase v. Barnhart, 379 Md. 100, 112, 840 A.2d 114, 121 (2003) and Domingues v. Johnson, 323 Md. 486, 492-93, 593 A. 2d 1133, 1136 (1991) for the proposition that some change is a prerequisite for a change in custody, the appellant "submits that an inconvenient forum analysis is not appropriate."[18] More particularly, relying on the "strong preference of the UCCJEA and the P[arental] K[idnapping] P[revention] A[ct, 28 U. S. C. § 1738 (A) ((f)] to eliminate conflicts of jurisdiction and to establish the principles of continuing jurisdiction" and this Court's "material change in circumstances" requirement for a change in custody arrangements, the appellant urges "a bright line rule that absent a showing of a material change in circumstances, such as a move by one party not contemplated by the original custody order, an inconvenient forum analysis is not called for and constitutes error."

The appellee rejoins, there is no inconsistency or conflict between § 9.5-202 and § 9.5-207. Although she concedes that Maryland has continuing, exclusive jurisdiction, which has not been terminated pursuant to § 9.5-202(a), she concludes, "[t]aken together, these statutes clearly establish that a court that has jurisdiction to modify a child custody order may also decline to exercise that jurisdiction if it determines that it is an inconvenient forum." The appellee likewise rejects the appellant's argument that whether there has been a change in circumstances since entry of the custody order is a relevant and threshold element to be considered when the convenience of the forum is at issue. She notes that neither by its terms nor context does § 9.5-207 (a) contain such an element or requirement and, in any event, determining the most convenient forum is separate and distinct from deciding the custody question, which, by the way, was not an issue to be decided at that time.

Determining whether the inconvenient forum analysis conducted in this case was appropriately done involves statutory construction, as it requires us to construe § 9.5-207(a). Statutory construction is a legal question, which we approach and decide de novo, Davis v. Slater, 383 Md. 599, 604, 861 A.2d 78, 80-81 (2004) (interpretations of the Maryland Code and the Maryland Rules are reviewed de novo); Nesbit v. Gov't Employees Ins. Co.. 382 Md. 65, 72, 854 A.2d 879, 883 (2004) (interpretations of Maryland statutory and case law are conducted under a de novo review), without deference or regard to a prior interpretation. The canons governing statutory construction are well-settled and straightforward:

> "In statutory interpretation, our primary goal is always 'to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional or part of the Rules.' Barbre v. Pope, 402 Md. 157, 172, 935 A.2d 699, 708 (2007); Gen. Motors Corp. v. Seay, 388 Md. 341, 352, 879 A.2d 1049, 1055 (2005). See also Dep't of Health & Mental Hygiene v. Kelly, 397 Md. 399, 419-20, 918 A.2d 470, 482 (2007). We begin our analysis by first looking to the normal, plain meaning of the language of the statute, reading the statute as a whole to ensure that 'no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.' Barbre, 402 Md. at 172, 935 A.2d at 708; Kelly, 397 Md. at 420, 918 A.2d at 482. See also Kane v. Bd. of Appeals of Prince George's County, 390 Md. 145, 167, 887 A.2d 1060, 1073 (2005). If the language of the statute is clear and unambiguous, we need not look beyond the statute's provisions and our analysis ends. Barbre, 402 Md. at 173, 935 A.2d at 708-09; Kelly, 397 Md. at 419, 918 A.2d at 482; City of Frederick v.

> Pickett, 392 Md. 411, 427, 897 A.2d 228, 237 (2006); Davis v. Slater, 383 Md. 599, 604-05, 861 A.2d 78, 81 (2004)."

Ray v. State, 410 Md. 384, 404-405, 978 A.2d 736, 747-48 (2009).

Section 9.5-207 is a part of the UCCJEA, a statutory scheme. In that circumstance, the statute to be interpreted

> "must be interpreted in that context. GEICO v. Ins. Comm'r, 332 Md. 124, 131-32, 630 A.2d 713, 717-18 (1993). That means that, when interpreting any statute, the statute as a whole must be construed, interpreting each provision of the statute in the context of the entire statutory scheme. See Roberts v. Total Health Care, Inc., 349 Md. 499, 523, 709 A.2d 142, 154 (1998); County Comm'rs v. Bell Atlantic, 346 Md. 160, 178, 695 A.2d 171, 180 (1997); Hyle v. Motor Vehicle Admin., 348 Md. 143, 149, 702 A.2d 760, 763 (1998); Blondell v. Baltimore Police. 341 Md. 680, 691, 672 A.2d 639, 645 (1996). Thus, statutes on the same subject are to be read together and harmonized to the extent possible, reading them so as to avoid rendering either of them, or 'any portion, meaningless, surplusage, superfluous or nugatory.' GEICO, 332 Md. at 132, 630 A.2d at 717."

Whiting-Turner Contractor Co. v. Fitzpatrick, 366 Md. 295, 302-303; 783 A.2d 667, 672 (2001).

At the outset, we acknowledge the correctness of the appellee's position with regard to the appellant's "changed circumstances" argument. As the appellee points out neither § 9.5-202, on which the appellant heavily, if not exclusively, relies, nor § 9.5-207 contains any such threshold requirement or addresses, as an element, the determination of custody. Indeed, as the appellant recognizes, the purpose of the UCCJEA is "to provide stronger guidelines for determining which state has jurisdiction, continuing jurisdiction, and modification jurisdiction over a child custody determination," In re Kaela C., 394 Md. 432, 455, 906 A.2d 915, 928 (2006), an important, but essentially preliminary, procedural matter, not to resolve the substantive issue of custody.

We also agree with the appellee that the statutes are not in conflict. Both § 9.5-202(a) and 9.5-207 are clear and unambiguous and they address separate situations, the former, the circumstances in which the court's continuing exclusive jurisdiction may be terminated and the latter, when the court's exercise of the jurisdiction to make a child custody determination may be declined. These statutes can, and do, co-exist. Indeed, a statute that defines when a court's jurisdiction will be terminated is not at all inconsistent with one which permits a court with jurisdiction, upon consideration of enumerated factors, to decline to exercise that jurisdiction. After all, in order to be able to decline to exercise jurisdiction, the court must have jurisdiction in the first place. This very point was made by the Supreme Court of Nebraska in Watson v. Watson, 724 N. W. 2d 24, 33 (2006):

> "A court with exclusive and continuing jurisdiction may decline to exercise its jurisdiction if it determines that it is 'an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum."

See Stoneman v. Drollinger, 64 P. 3d 997, 1000 (Mont. 2003) ("As the 'home state' of a child, Montana will continue to have exclusive, continuing jurisdiction unless a Montana court declines to exercise its jurisdiction. Section 40-7-202(2), MCA. •A court may decline to exercise its jurisdiction at any time if the court determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum to make the child custody determination."); Shanoski v. Miller, 780 A.2d 275, 278-79 (ME 2001).

The appellant suggests that § 9.5-207 may have applicability only in the context of an initial child custody determination. We do not agree. Section 9.5-207 (a)(1) provides:

> "A court of this State that has jurisdiction under this title to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum."

(Emphasis added.) This language does not include any reference to the "initial child custody determination" and, as a matter of fact, its generality belies any such interpretation. The appellee has it right when she posits, "'[j]urisdiction under this title' clearly includes § 9.5-202, one of the statutes in Title 9.5 of the Family Law Article. . . . Section 9.5-101(d)(2) very specifically states that a 'child custody determination' includes 'a permanent, temporary, initial and modification order.'"

We hold that the Circuit Court was not precluded from conducting an inconvenient forum analysis simply because it had "continuing, exclusive jurisdiction;" on the contrary, it was required by § 9.5-207(a) to do so.

If this Court were to hold, as we do, that an

inconvenient forum analysis was appropriate under the circumstances of this case, the appellant argues nevertheless that the Circuit Court erred in the conclusion that it reached as a result of that analysis. For the reasons he proffered in support of his "continuing, exclusive jurisdiction" argument and the further reason that, on balance, the factors the court was required by § 9.5-207(b) to consider in making its jurisdiction determination favor Maryland as the appropriate jurisdiction to hear the custody matter, he concludes that its decision to relinquish that jurisdiction "constituted an abuse of discretion under the governing state and federal law."

Not unexpectedly, the appellee sees the matter entirely differently. She believes, and therefore argues, that, because the Circuit Court's decision is fully supported by the evidence, the court did not abuse its discretion in reaching it.

The decision whether to relinquish the court's jurisdiction in favor of a more convenient one is one addressed to the sound discretion of the court. See Krebs v. Krebs. 183 Md. App. 102, 117, 960 A.2d 637, 646 (2008) (reviewing a court's decision to decline jurisdiction for abuse of discretion). This is confirmed by the fact that the statute authorizing the making of the decision enumerates a number of factors that the court must consider, without prescribing what the decision should be. "Before finding an abuse of discretion we would need to agree that, 'the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."

In re Yve S., 373 Md. 551, 583-84, 819 A.2d 1030, 1049 (2003) (quoting In re Adoption/Guardianship No. 3598, 347 Md. 295, 312-13, 701 A.2d 110, 118-19 (1997) (some internal citations omitted)). More recently, in Touzeau v. Deffinbaugh, 394 Md. 654, 669, 907 A.2d 807, 816 (2006), we have defined abuse of discretion more expansively:

> "We have defined abuse of discretion as 'discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' Jenkins v. City of College Park, 379 Md. 142, 165, 840 A.2d 139, 153 (2003) (emphasis not included). See also Garg v. Garg, 393 Md. 225, 238, 900 A.2d 739, 746 (2006) ('The abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.') quoting Jenkins v. State, 375 Md. 284, 295-96, 825 A.2d 1008, 1015 (2003); In re Adoption/Guardianship No. 3598, 347 Md. 295, 312, 701 A.2d 110, 118-19 (1997) ('There is an abuse of discretion where no reasonable person would take the view adopted by the trial court,' or when the court acts 'without reference to any guiding rules or principles.' An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court,' or when the ruling is 'violative of fact and logic.') (citations and some internal quotations omitted).

Section 9.5-207(b)(2) sets out eight factors, the relevant ones of which §9.5-207(a)(1) requires the court to consider when addressing the question of the convenience of the forum. In her motion to the Circuit Court seeking relinquishment of jurisdiction to Virginia, the appellee addressed some of those factors, emphasizing those that she believed best supported her case for shifting jurisdiction to Virginia. More particularly, she focused on the nature and location of the evidence she believed "essential in a custody and visitation proceeding," concluding that it would come from "teachers, doctors, therapists and coaches." The appellee alleged that all of these witnesses were in Virginia and that some were professional witnesses, who would have to be compensated for their time and travel. That cost would be "unnecessarily costly," she opined, if the professional witness had to travel to Maryland. She concluded that "[t]he balance of hardships in terms of witnesses and evidence weighs heavily in favor of the [appellee]." As we have seen, the appellee continued her focus and emphasis on the nature and location of the evidence essential to the trial of the custody matter at the telephone conference on jurisdiction. Indeed, in response to a question from Judge Harrington, she identified the professional witnesses she intended to call. She did not, at that time, address in argument each of the factors she believed relevant, nor was she asked to do so.

The appellant also addressed the § 9.5-207(b)(2) factors in his opposition to the motion to relinquish. He did so by denying the appellee's allegations with regard to the factors, while noting that

> "Every factor that [the appellee] claims makes Maryland an inconvenient forum also makes Virginia an equally inconvenient forum for the [appellant]. The difference is that this

> case was originally litigated and settled in Maryland, not Virginia. Pursuant to § 9.5-202, it is Maryland, not Virginia, that has exclusive, continuing jurisdiction, until one of the two conditions of that statute have been met. Neither have been met, and this Motion, therefore, is wholly without merit."

Thus, as he has done at all stages of this litigation, the appellant's main argument was that Maryland, as the continuing, exclusive jurisdiction, was the appropriate venue for determining this custody matter, that inconvenient forum analysis did not apply. He made that argument during the telephone conference. But he also, as we have seen, countered the appellee's "Maryland is an inconvenient forum" argument, denying that was the case and pointing to the ability to depose Virginia witnesses for later use of their testimony in Maryland and the possibility of the witnesses testifying by telephone. Like the appellee, the appellant did not try to relate how each of the enumerated factors was relevant or supported his case.

Having heard the arguments, Judge Harrington issued her ruling, relinquishing Maryland's jurisdiction. Pertinently, she said:

> "So I think it's really a question of both cases, I mean, both jurisdictions being almost equally poised to do this. And what puts me over the top in coming to a decision that it would be appropriate to relinquish jurisdiction is, I do think that mom has lined up professional witnesses and they're more concrete than what dad has proposed. And I do think it's important to consider the convenience of the professionals, their schedule, their time and their ability to appear because what they present may or may not be significant to this case if the parties can't settle it ahead of time and it certainly will be if it goes to trial. So I'm persuaded that it is appropriate to relinquish jurisdiction and allow the matter to proceed to Virginia where it's been filed."

That ruling was grounded in the inconvenient forum arguments that counsel, specifically the appellee's counsel, made, to be sure, but, also, implicitly, it reflects an understanding and appreciation of some of the relevant factors, i.e. § 9.5-207(b)(2)(ii), (iii), (vi), (vii) and (viii). Judge Harrington, consequently, had a basis for her conclusion and her rationale was certainly not unreasonable. Her decision was not "beyond the fringe" of what this Court deems acceptable. We discern no abuse of discretion. We hold, therefore, that the Circuit Court did not abuse its discretion when it, pursuant to § 9.5-207, relinquished jurisdiction to the Virginia court.

JUDGMENT AFFIRMED, WITH COSTS.

FOOTNOTES

1. Maryland Rule 2-311(b) provides:

"Except as otherwise provided in this section, a party against whom a motion is directed shall file any response within 15 days after being served with the motion, or within the time allowed for a party's original pleading pursuant to Rule 2-321(a), whichever is later. Unless the court orders otherwise, no response need be filed to a motion filed pursuant to Rule 1- 204, 2-532, 2-533, or 2-534. If a party fails to file a responserequired by this section, the court may proceed to rule on the motion."

2. Maryland Rule 2-311(e) provides:

"When a motion is filed pursuant to Rule 2-532, 2-533,or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing."

3. Maryland Code (1984, 2006 Repl. Vol.), § 9.5-207 of the Family Law Article provides:

"(a) Action if this State is inconvenient forum. —

> "(1) A court of this State that has jurisdiction under this title to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.
>
> (2) The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

"(b) Factors in determination. —

> "(1) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction.
>
> "(2) For the purpose under paragraph (1) of this subsection, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> > "(i) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
> >
> > "(ii) the length of time the child has resided outside this State;
> >
> > "(iii) the distance between the court in this State and the court in the state that would assume jurisdiction;
> >
> > "(iv) the relative financial circumstances of

the parties;

"(v) any agreement of the parties as to which state should assume jurisdiction;

"(vi) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

"(vii) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

"(viii) the familiarity of the court of each state with the facts and issues in the pending litigation."

4. " That section provides:

"(a) In general: — Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State that has made a child custody determination consistent with § 9.5-201 or § 9.5-203 of this subtitle has exclusive, continuing jurisdiction over the determination until:

"(1) a court of this State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or

"(2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

"(b) Modification of custody determination. — A court of this State that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under § 9.5-201 of this subtitle."

5. Section I of the custody agreement also contains a mediation requirement. It provides, in the "parenting" context:

"Legal Custody. The parties shall have joint legal custody of the minor child and agree to mutually discuss and agree upon all major issues involving the child's health, education, religion, recreation, discipline and other matters of major significance concerning the minor child's life and welfare. If the parties are unable to reach a mutually satisfactory decision with respect to legal custody decisions, they hereby agree that they will submit such issues to mediation prior to seeking judicial intervention."

During the phone conference on August 6, it was clear that the parties disagreed on whether the mediation clause is triggered only upon disputes regarding legal custody decisions, or disputes in general. The appellee argued that she did not violate the mediation requirement, because she "ha[d] every intention to engage the services of the mediator prior to a trial being set in the [modification of the custody order] matter[,]" and thus her filing a motion to relinquish jurisdiction was not premature or in contravention of the custody agreement and order, as the appellant argued. The Circuit Court accepted the appellee's argument.

6. The appellee referenced § 9.5-202 in support of the inconvenient forum proposition. She undoubtedly meant § 9.5-207, which lists the factors, some of which are reflected in the appellee's submission and allegations, to be considered when assessing the relative convenience of the potential fora.

7. The appellant's response to the Maryland action was filed late, after the appellee had moved for judgment by default for failure to answer. Although, in her Motion To Alter Or Amend, Or Alternatively To Revise Judgment, see infra, she alleged this lateness, the court's subsequent resolution of the jurisdictional issue — it denied the appellee's motion — and subsequent events — on the record telephonic communications between the judges and the order reflecting their decision - rendered this point moot. It is not before us for review, therefore.

8. Va. Code. Ann. § 20-143.17 (2008) corresponds with Section 206 of the Uniform Child Custody Jurisdiction and Enforcement Act (1997) (UCCJEA). That section provides:

"SIMULTANEOUS PROCEEDINGS.

"(a) Except as otherwise provided in Section 204, a court of this State may not exercise its jurisdiction under this [article] if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another State having jurisdiction substantially in conformity with this [Act], unless the proceeding has been terminated or is stayed by the court of the other State because a court of this State is a more convenient forum under Section 207. "(b) Except as otherwise provided in Section 204, a court of this State, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Section 209. If the court determines that a child-custody proceeding has been commenced in a court in another State having jurisdiction substantially in accordance with this [Act], the court of this State shall stay its proceeding and communicate with the court of the other State. If the court of the State having jurisdiction substantially in accordance with this [Act] does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding.

"(c) In a proceeding to modify a child-custody determination, a court of this State shall determine whether a proceeding to enforce the determination has been commenced in another State. If a proceeding to enforce a child-custody determination has been commenced in another State, the court may:

"(1) stay the proceeding for modification pending the entry of an order of a court of the other State enforcing, staying, denying, or dismissing the proceeding for enforcement;

"(2) enjoin the parties from continuing with the proceeding for enforcement; or

"(3) proceed with the modification under conditions it considers appropriate."

(Emphasis added). Maryland's version of UCCJEA § 206 is §

9.5-206.

9. Va. Code. Ann. § 20-146.9 (2008) corresponds with Section 110 of the UCCJEA, which states:

> "COMMUNICATION BETWEEN COURTS.
>
> "(a) A court of this State may communicate with a court in another State concerning a proceeding arising under this [Act].
>
> "(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
>
> "(c) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.
>
> "(d)Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.
>
> "(e) For the purposes of this section, 'record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

Maryland also has adopted UCCJEA § 110. The equivalent Maryland statute is § 9.5-109.

10. Fam. Law Art. § 9.5-206(b)(2), is Maryland's version of the applicable section of the UCCJEA. It provides:

> "(b) Inquiry before hearing as to proceeding in other state. — (1) Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties under § 9.5-209 of this subtitle.
>
> > "(2) If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this title, the court of this State shall stay its proceeding and communicate with the court of the other state.
> >
> > "(3) If the court of the state having jurisdiction substantially in accordance with this title does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding."

11. Rather than identify the professional witnesses who would testify on his behalf, the appellant raised another issue. To the question, "Is dad planning to call professional witnesses?," the appellant responded:

> "Your Honor, at this point, what dad's trying to do is file the order with respect to what the parties agreed to. If there's any problems, that they're going to mediate this cause."

His later attempt to answer the question provided no greater clarity:

> "To answer your question, your Honor, we're trying to resolve this through mediation. That is what we're trying to do. We've not received any response from mom to that effect.
>
> "So that's why we do feel that the litigation is premature, and we argued that both in our motion to dismiss the case here in Virginia, and I know that [the appellant's Maryland counsel] also argued that in his opposition motion to mom's motion to transfer the jurisdiction to Virginia."

The appellee did not dispute that the parties had agreed to mediate their disputes prior to litigation. She maintained, however, that their agreement did not preclude the filing of a court action; it simply precluded the pursuit of that action until after the parties have tried mediation.

12. The appellant made a number of arguments and identified procedural flaws that he does not pursue on appeal: that the appellee was given relief — the relinquishment of jurisdiction — that she did not request in her motion to alter or amend; that the consultation with Virginia was done without providing the appellant's Maryland attorney, his principal counsel on the relinquishment of jurisdiction issue, with notice and an opportunity to be heard on that issue; that the vacation of the court's prior order denying the appellee's motion that it relinquish jurisdiction was on a basis not argued by the appellee and on the basis of facts not in the record or supported by affidavit; that the appellee never requested that the court's prior order be vacated; that the appellee "duped" the court with regard to the witnesses that needed to be, and would be, called; that the appellee proceeded prematurely since "the parties' agreement, encompassed inthe Court's July 21, 2006 order, requires the parties to mediate any disputes before court action is taken."

13. There actually are three sections, we submit, that are relevant. Section (f) of the Rule treats when hearings are required in the case of the post trial motions permitted but not mentioned in section (e).

14. Maryland Rule 2-534. Motion to alter or amend a iudment — Court decision

In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend ajudgment may be joined with a motion for new trial. A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

15. To be sure, as we have long recognized, see Office of People's Counsel v. Advance Mobilehome Corp.. 75 Md. App. 39, 45 n.6, 540 A.2d 151, 154 n.6, cert denied, 313 Md. 30, 542 A.2d 857 (1988) (citing Unnamed Attorney v. Attorney Griev. Comm'n, 303 Md. 473, 486, 494 A.2d 940, 946 (1985) and Young v. Young, 61 Md. App. 103, 484 A.2d 1054 (1984)), a motion filed pursuant to Rule 2-534 and one filed pursuant to Rule 2-535 deal with the same subject matter and seek the same or similar relief. They both seek a change in the

judgment, entered by the court, to which they relate - the Rule 2-534 motion seeks alteration or amendment in some particular, while the Rule 2-535 motion would revise the judgment in some way. Therefore, consistent with the canons of statutory construction, applicable fully to the interpretation of Rules, Hurst v. State, 400 Md. 397, 417, 929 A.2d 157, 168 (2007), "where two statutes purport to deal with the same subject matter, they must be construed together as if they were not inconsistent with one another . . . In this regard, the courts strongly favor a harmonious interpretation . . ." Taxiera v. Malkus, 320 Md. 471, 481, 578 A.2d 761, 765 (1990) (internal citations omitted); Serio v. Baltimore County, 384 Md. 373, 390, 863 A.2d 952, 962 (2004); Drew v. First Guar. Mortgage Corp., 379 Md. 318, 327, 842 A.2d 1, 6 (2003); Bowen v. City of Annapolis, 402 Md. 587, 613-14, 937 A.2d 242, 258 (2007); Magnetti v. Univ. of Md., 402 Md. 548, 565, 937 A.2d 219, 229 (2007); Clipper Windpower. Inc. v. Sprenger, 399 Md. 539, 554, 924 A.2d 1160, 1168 (2007).

Accordingly, we have held that "a Rule 2-535 motion, if filed within 10 days of the entry of judgment by the court, will be treated as a Rule 2-534 motion and have the same effect on appeal time." Alitalia v. Tornillo, 320 Md. 192, 200, 577 A.2d 34, 38 (1990) (citing Unnamed Attorney, 303 Md. at 486, 494 A.2d at 946; Sieck v. Sieck, 66 Md.App.37, 42-44, 502 A.2d 528, 531-532 (1986); Committee Note to Rule 8-202(c); B & K Rentals v. Universal Leaf, 319 Md. 127, 132, 571 A.2d 1213, 1215-1216 (1990); Yarema v. Exxon Corp., 305 Md. 219, 241 n. 19, 503 A.2d 239, 250 n. 19 (1986)). This is consistent with that provision of Rule 2-535 that instructs, "if the action was tried before the court, [the court may take any action that it could have taken under Rule 2- 534," and with the well-settled proposition that it is the substance of the motion, not its form or caption, that is dispositive of its nature:

> "[u]nder Maryland law, when motions and other pleadings are considered by a trial judge, it is the substance of the pleading that governs its outcome, and not its form. In other words, the nature of a motion is determined by the relief it seeks and not by its label or caption."

Hill v. Hill, 118 Md. App. 36, 44, 701 A.2d 1170, 1174 (1997), cert denied, 349 Md. 103, 707 A.2d 89 (1998) (citing Alitalia, 320 Md. at 195-96, 577 A.2d 34, 36 (1990); Gluckstern v. Sutton, 319 Md. 634, 650-51, 574 A.2d 898 (1990); State v. Hogg, 311 Md. 446, 457, 535 A.2d 923 (1988); Higgins v. Barnes, 310 Md. 532, 536 p.1, 530 A.2d 724, 726 n.1 (1987) ("Our concern is with the nature of the issues legitimately raised in the pleadings, and not with the labels given to the pleadings").

In Hill, the appellant's motion, though labeled as a motion to modify the child support order, was construed as a motion to alter or amend, as it was filed four days after the judgment, without putting forth any new arguments or presenting any additional facts. 118 Md. App. at 43, 701 A.2d at 1173-74.

That the two motions serve the same purpose from the perspective of the appellate process, they both are substitutes for appeal, or the moving party's last attempt to win in the trial court, instead of the Court of Special Appeals, Alitalia at 198-99, 577 A.2d at 38 (citing P. Niemeyer & L. Richards, Maryland Rules Commentary 324 (1984)), doesnot make them interchangeable for all purposes and, in particular, within the meaning of Rule 2-311 (e)'s hearing requirement. To hold otherwise would render Rule 2-535 largely nugatory notwithstanding that each of the rules has an element that the other does not, the time in which the motion must be filed is different.

16. The appellee submits that, in any event, the August 6 conference call was a proper substitute for a Rule 2-311(e) hearing. We do not agree with this view.

It is true, of course, that this Court has not narrowly defined "hearing" to mean only an in-person appearance in court. In Alitalia, 320 Md. at 199, 577 A.2d at 38, we said:

> "No violence is done to the meaning of 'hearing' by reading it as extending to something other than an oral presentation before the tribunal. We have recognized the concept of a 'paper hearing.' Phillips v. Venker, 316 Md. 212, 218, 221-222, 557 A.2d 1338, 1341, 1343 (1989). See Talley v. Talley, 317 Md. 428, 435 n. 2, 564 A.2d 777, 781 n. 2 (1989); Gray Panthers v. Schweiker, 652 F.2d 146, 148 n. 3 (D.C. Cir.1980) ('paper hearing' falls within meaning of 'hearing'). Even in the context of due process at the appellate level, a hearing need not include oral presentations. Ad + Soil. Inc. v. County Comm'rs, 307 Md. 307, 318-319, 513 A.2d 893, 899 (1986). And compare Sieck v. Sieck, 66 Md. App. 37, 40 n. 1, 502 A.2d 528, 530 n. 1(1986) ('[T]ried by the court' as used in Rule 2-534 includes disposition by motion for summary judgment.). Words in statutes and rules should be read in a way that advances the legislative policy involved. Morris v. Prince George's County, 319 Md. 597, 603-604, 573 A.2d 1346, 1349 (1990)."

The phone call between the judges and counsel for the parties was a "hearing," we agree. The title page of the transcript of the conference referred to it as such:

> "The above-entitled matter came on for hearing, without a jury, before the Honorable Gayle B. Can, a Judge in and for the Juvenile and Domestic Court for the County of Fairfax, in the courthouse, Courtroom H., Fairfax, Virginia, pursuant to notice, beginning at 9:33 o'clock a.m., where there were present . . . [listing counsel for the parties and Judge Harrington, who appeared by phone]"

That was confirmed by Judge Can when stating the purpose of the conference, "So I guess the purpose of today's hearing is for us to decide which court should assume jurisdiction." As with any in-person, in-court hearing, counsel for both parties were present and participated fully, having been afforded ample time to make their arguments and respond to the courts' inquiries.

The arguments counsel made, and the inquiries pursued by Judge Harrington, however, were directed at the merits of the jurisdiction issue; they sought only to resolve which of the courts should assume jurisdiction of the child custody case. No argument with respect to why the appellee's motion to alter or amend should have been granted or denied was made by either party. Indeed, other than Judge Harrington's admission that her previous ruling on the appellee's motion to relinquish jurisdiction was "premature," the propriety of that ruling was never mentioned, never mind explored. In short, rather than a hearing pursuant to Rule 2-311 (f), assuming one had been requested, prerequisite to granting a Rule 2-535 motion, the conference call was the consultation on jurisdiction ordered by the Virginia court and required by Maryland Code (1984, 2006 Repl. Vol.) § 9.5-206 (b) (2), in implementation of the UCCJEA, § 206 (b).

17. In fact, the only procedural objection made at the telephone conference was in regards to the mediation clause of the parties' custody agreement.

18. The appellant cites, as bearing out his conclusion, Pickett v. Pickett, 167 P. 3d 661 (Wyo. 2007); Watson v. Watson, 724 N. W. 2d 24 (Neb. 2006); Stoneman v. Drollinger, 64 P. 3d 997 (Mont. 2003); Shanoski v. Miller, 780 A. 2d 275 (Me. 2001); Marriage of Hocker, 752 N. W. 2d 447 (Iowa App.2008); Griffith v. Tressel, 925 A. 2d 702 (Super. 2007). The appellee also relies on Pickett, Watson, Stoneman and Shanoski to support her position. She points out, in that regard, that, whatever was the court's decision on the merits, each of the courts conducted an inconvenient forum analysis. Pickett, 167 P. 3d at 665; Watson, 724 N. W. 2d at 29 ("Jurisdiction remained in the district court either until jurisdiction was lost under § 43-1239(a) [Nebraska's version of UCCJEA § 202] or until the court declined to exercise its jurisdiction under § 43-1244 [Nebraska's version of UCCJEA §207] for the reason of an inconvenient forum."); Stoneman, 64 P, 3d at 145-153; Shanoski, 780 A. 2d at 278-79 (after noting that "[p]ursuant to the UCCJEA, Maine has exclusive continóing jurisdiction over this visitation dispute because Maine made the initial child custody determination and one parent has a significant connection with Maine," the court stated that the UCCJEA "contemplate[s] a court declining to exercise jurisdiction".

NO TEXT

Cite as 10 MFLM Supp. 29 (2012)

CINA: parental contact: suspension of written communication

In Re: Michael G., Renee G., and Guinnivere S.

No. 1591, September Term, 2011

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

Opinion by Woodward, J.

Filed: August 15, 2012. Unreported.

Based on an earlier finding in a CINA proceeding that a father had abused his oldest daughter and the lack of any evidence from which the court could conclude that no further abuse was likely to occur, the trial court did not err or abuse its discretion in concluding that it was not in the best interest of his two younger children to have any contact with him, including receiving letters from him.

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

Appellant, William G., is the natural father of Guinnivere S. (DOB 5/30/2002), Michael G. (DOB 4/9/2007), and Renee G. (DOB 5/23/2009). All three children were adjudicated by the Circuit Court for Frederick County, sitting as a juvenile court, to be Children in Need of Assistance ("CINA") on October 8, 2010.[1]

Mr. G. appeals from the circuit court's order of August 9, 2011, amending the existing permanency plans to suspend all contact between Mr. G. and his two younger children.[2] In his timely appeal, Mr. G. presents a single question for our review, which we have rephrased as follows: Did the circuit court abuse its discretion by denying appellant's request to continue written communication with his minor children, Michael and Renee?

Mr. G. presents the issue as one of visitation; therefore, we shall consider Mr. G.'s rights in light of existing statutes and case law governing the court's power to limit the parental right to have contact with one's children. For all of the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Guinnivere, Michael, and Renee are the minor children of Mr. G. and Jennifer S. Mr. G. and Ms. S. have engaged in an on-again, off-again relationship for more than thirteen years. There is a long history of domestic violence between Mr. G. and Ms. S. At all relevant times the parties have resided in Frederick County, Maryland.

The family was first brought to the attention of the Frederick County Department of Social Services ("DSS") in June 2006, when Ms. S. reported her belief that Mr. G. had sexually abused Guinnivere. In her report of June 2006, Ms. S. also disclosed that Mr. G. had previously raped and physically abused her, as well.[3]

In November 2008, DSS received a second report alleging that Mr. G. had sexually abused Guinnivere.[4] During the DSS investigation of the second report, Guinnivere disclosed details of four occasions when Mr. G. had exposed his genitals to her. Mr. G. denied any wrongdoing.

As part of the DSS intervention following Ms. S.'s disclosures in November 2008, Mr. G. underwent evaluations in November 2009 and November 2010, as a result of which he was diagnosed with multiple sexual and mental disorders and anger management issues.[5] The November 2009 evaluation indicated an increased risk of offensive sexual behavior if Mr. G.'s sexual disorder was left untreated. The evaluations concluded with multiple recommendations, including that Mr. G. undergo additional evaluation and treatment, and that he have no unsupervised contact with his children.

Ms. S. entered into multiple Safety Plans with DSS, and agreed not to allow Mr. G. to have any unsupervised contact with the children. In February 2010, Ms. S. requested that her case with the DSS Family Preservation Unit be closed. Between February 2010 and June 2010, Ms. S. allowed Mr. G. to have unsupervised contact with the children.[6]

On June 2, 2010, Ms. S. reported to DSS that she had observed Mr. G. masturbating in bed while their son, Michael, was asleep beside him. During the investigation that followed this disclosure, Mr. G. admitted to the improper conduct. DSS also discovered that Mr. G. had not obtained any of the psychological treatment or additional testing that had been recommended pursuant to his previous evaluations. Moreover, Ms. S. indicated that she was not willing to pursue any legal action to protect the children from Mr. G. On June 11,

2010, Mr. G. communicated that he was no longer willing to cooperate with DSS. On June 16, 2010, Ms. S. also indicated that she would no longer communicate or cooperate with DSS.

On August 2, 2010, DSS filed a petition in the circuit court, seeking to have the children declared CINA. Following Guinnivere's subsequent disclosures to DSS in September 2010, indicating that Mr. G. had exposed himself to her and masturbated in front of her during the summer of 2010, DSS filed amended CINA petitions on September 22, 2010 and October 6, 2010.[7] The amended petitions also included the fact that Ms. S. had filed for a protective order against Mr. G. on August 29, 2010, alleging therein that Mr. G. had physically and sexually assaulted her on numerous occasions and that Mr. G. had kicked Guinnivere. Ms. S.'s request for a protective order effective through September 7, 2011, was granted by the court.[8]

Following an adjudicatory hearing on October 8, 2010, the court found Guinnivere, Michael, and Renee to be CINA, and placed them in the care and custody of Ms. S., under the protective supervision of DSS. Per the court's disposition order, Mr. G. was allowed to have supervised visitation with the children. An amended order was filed on December 7, 2010, in response to Ms. S.'s motion to amend the language of the original disposition order to foreclose any possibility of unsupervised visitation between Mr. G. and the children.

A warrant was issued for Mr. G.'s arrest on January 19, 2011. Mr. G. was arrested and charged with the sexual abuse of a minor, third and fourth degree sexual offenses, and second degree assault. Pending resolution of the charges, Mr. G. was incarcerated in the Frederick County Detention Center.[9]

Following a review hearing on February 14, 2011, the circuit court master recommended, among other things, that visitation between Mr. G. and his children be discontinued. Mr. G. filed exceptions to the recommended suspension of visitation, which were denied following an exceptions hearing on April 27, 2011. Under the terms of the court's April 27, 2011 order, however, Mr. G. was permitted to maintain contact with Michael and Renee through written correspondence.[10]

Mr. G. wrote several letters to the younger children. Due to the necessity that the letters be read to Michael and Renee in such a manner that they would not be associated with Ms. S. or overheard by Guinnivere, DSS workers took Michael and Renee from their home to a nearby park and attempted to read the letters to them there. After observing Michael and Renee's response to Mr. G.'s letters, DSS concluded that Michael was not receptive to the communication,[11] and that the procedure for reading the contents of the letters outside of Ms. S.'s presence caused Renee significant trauma.[12] DSS and the children's counsel also questioned the propriety of the language and content of the letters, noting that the letters were "neither age appropriate, nor relevant to the children's lives." Also of concern was the possible negative impact that the communications might have on Guinnivere if she discovered that Mr. G. continued to have contact with Michael and Renee, but not with her. DSS and the children's counsel concluded that the letters were not beneficial to the children and recommended that all written communication be suspended, and Mr. G. not be permitted to engage in any additional contact with Michael and Renee.

Following an unsuccessful attempt to mediate the communication issue on July 29, 2011, the circuit court conducted a hearing to consider the issue on August 9, 2011. After hearing arguments from all of the parties, the court found that continued communication with Mr. G. was not in the best interest of the children, and ordered, *inter alia*, that henceforth Mr. G. would not be permitted to have any contact of any kind with Michael and Renee. The court made the following comments on the record in support of its ruling:

> The Court at this time finds that it is not in any of the children's best interest to have contact, to have their father attempt to contact them at this time or the children to . . . have contact with Mr. G. at this time. The Court will review this situation again at the September 21st hearing. . . .
>
> I make that decision after reference to Family Law Article Section 9-101.1 and Family Law Article 9-101. 9-101 of course is what . . . guides the Court. And reminds the Court and admonishes the Court that unless the Court specifically finds there is no likelihood of further child abuse or neglect the Court shall deny custody or visitation. Of course there is a section there that talks about supervised. I have learned today that more limited attempts to provide for contact between the father and the children, those attempts are not working well. The children are being traumatized by being removed from their mother's home to receive the contact.
>
> I cannot say the mother is being unreasonable in light of the circumstances of this case, in light of the protective order she has been granted in Case Number 10-3 – 3232, in light

of my review of those letters, certain of those letters, the earlier letters, which appear to be not age appropriate for the children, but contains other information which would only be meaningful if deciphered by an adult and I don't think it's appropriate that [the] mother be that adult in light of the protective order she has received. I don't think that it's unreasonable for the Department to try to, to have made the attempts to try to remove the children from the home to get the letters, but that's not working well and it's traumatizing the children and I am satisfied from the affidavit by Ms. [Acquaah-Harrison] that both children were traumatized. Michael to a lesser degree, ...

In any event I do not believe it is in Michael and [Renee]'s best interest at this time that those efforts to try to facilitate contact are in their best interest at this time. I, I know, I have further heard that this could be damaging to Guinnivere that the other two children are receiving communications and contact from their father and she is not. I think that could be, um, I think that it could be harmful to her and therefore not in her best interest if Michael and Renee are receiving communications from their father and she is not. . . .

I'm in Family Law 9-101.1(c). "If the Court finds that a party has committed abuse against any child residing within the party's household the Court shall make arrangements for custody and visitation that best protect, number one, the child who is the subject of the proceeding," here Michael and [Renee], ". . . and the victim of the abuse." Guinnivere. So the statute requires the Court to look at quite frankly the, the entire household. There has been a finding in the CINA proceedings that abuse occurred. I recognize there has not been a criminal conviction but there is a finding. So the Court is required to make arrangements that protect both Guinnivere and the other two children. . . .

The Court, unless the Court specifically finds there's no likelihood of abuse or neglect the Court shall deny custody or visitation. I believe the legislative intent is to focus these decisions on the best interest of the children and I cannot find at this time it is in, certainly not in Guinnivere's best interest that she have contact with her father. I cannot find at this time that it is in Michael's best interest he have contact with his father or, or [Renee]'s best interest. Therefore the Court denies further contact between Mr. G. and Guinnivere, Michael or [Renee] subject to any further findings of this Court at the September 21 review hearing.

Mr. G. timely filed the instant appeal of the circuit court's determination on September 7, 2011. Additional facts will be provided as necessary to support our discussion of the issues.

STANDARD OF REVIEW

In reviewing a circuit court' s decision to amend a CINA permanency plan, we employ three related standards:

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

In re Yve S., 373 Md. 551, 586 (2003) (citation and quotations omitted).

The circuit court's decisions concerning visitation are generally left to that court's sound discretion, and should not be disturbed unless there has been a clear abuse of discretion. *In re Billy W.*, 387 Md. 405, 447 (2005); *In re Yve S.*, 373 Md. at 585-86. This Court may conclude that an abuse of discretion has occurred if the circuit court's challenged ruling is "clearly against the logic and effect of facts and inferences before the court" or when the ruling is "volatile of fact and logic." *In re Yve S.*, 373 Md. at 583 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)).

ANALYSIS

The parental right to raise one's child free from undue and unwarranted interference on the part of the State, including its courts, is a "fundamental, Constitutionally-based right." *In re Adoption/-Guardianship of Rashawn H.*, 402 Md. 477, 495 (2007); *see also In re Samone H.*, 385 Md. 282, 299-300 (2005). Parental rights are not absolute, however. *See In re Yve S.*, 373 Md. at 568-71 (discussing the limitations that may be placed parental rights if the limits are in the child's best interest). Although it is the intent of the courts to "harmonize" the fundamental rights of the parents with the best interests of the child, when there is a conflict between these two interests, the best interest of the child must prevail. *See In re Rashawn H.*, 402 Md at 496 (footnote omitted) ("[W]here the fundamental right of parents to raise their children stands in the starkest contrast to the State's effort to protect those children from unacceptable neglect or abuse, the best interest of the child remains the ultimate governing standard.").

Visitation or other regular contact between a parent and child constitutes an important part of a parent's natural and legal rights, although it, too, "is not an absolute right, but is one which must yield to the good of the child." *Roberts v. Roberts*, 35 Md. App. 497, 507 (1977) (citation and quotations omitted). Generally, courts have the authority to deny visitation only if there is clear evidence demonstrating that continued contact with the parent is not in the best interest of the child. *See In re Yve S*, 373 Md. at 568-72; *In re Mark M.*, 365 Md. at 705-06 (noting that visitation may be restricted or even denied when the child's health or welfare is threatened).

As this Court has previously stated:

> A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied. And in the absence of extraordinary circumstances, a parent should not be denied the right of visitation, even though the parent has been guilty of marital misconduct. But when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child.

Roberts, 35 Md. App. at 507 (citation and quotations omitted). A complete denial of all visitation rights, including supervised visitation, is an extreme option that Maryland courts have only exercised in rare circumstances. *See In re Iris M.*, 118 Md. App. 636, 648 (1998) ("It is extremely unusual to deny visitation of a child by the natural parent in this State.").

Where, however, a child has been declared a CINA due to previous incidents of abuse or neglect, the circuit court's discretion to order visitation is constrained by statute. Maryland Code (1984, 2006 Repl. Vol.), § 9-101 of the Family Law Article ("FL."); *In re Billy W.*, 387 Md. at 447. F.L. § 9-101, entitled "Denial of custody or visitation on basis of likely abuse or neglect," provides:

> (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 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.**

(Emphasis added).

Additional guidance for the application of F.L. § 9-101 is provided by F.L. § 9-101.1, which provides:

> (a) Definition.— In this section, "abuse" has the meaning stated in § 4-501 of this article.
>
> (b) Evidence of abuse against certain individuals. — In a custody or visitation proceeding, **the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:**
>
> (1) the other parent of the party's child;
>
> (2) the party's spouse; or
>
> (3) **any child residing within the party's household, including a child other than the child who is the**

subject of the custody or visitation proceeding.

(c) Protection of child and victim. — **If the court finds that a party has committed abuse against** the other parent of the party's child, the party's spouse, or **any child residing within the party's household, the court shall make arrangements for custody or visitation that best protect:**

(1) **the child who is the subject of the proceeding;** and

(2) the victim of the abuse.

(Emphasis added).

"Thus, when a court has reasonable grounds to believe that neglect or abuse has occurred, . . . custody or visitation must be denied, . . . unless the court makes a specific finding that there is no likelihood of further abuse or neglect." *In re Billy W.*, 387 Md. at 458-59 (citing *In re Yve S.*, 373 Md. at 566-68). Moreover, by the plain language of F.L. § 9-101.1, the court is obliged to consider the parent's prior neglect or abuse of any child, not just the child at issue in the current proceeding. *In re Adoption No. 12612*, 353 Md. 209, 234 (1999). When considering the likelihood of future abuse, the focus is not on a particular child but on the likely actions of the previously abusive parent. *Id.* The burden of proving that the neglect or abuse that occurred in the past is unlikely to be repeated remains upon the parent seeking visitation. *In re 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 § 9-101(b)."); *In re Adoption No. 12612*, 353 Md. at 238 (noting that the statute "does not require a finding that further abuse or neglect is impossible or will, in fact, never occur, but only that there is no likelihood — no probability — of its recurrence").

As an exception to the requirements of F.L. § 9-101, the court *may* provide supervised visitation between a child and an abusive parent subject to any conditions imposed by the court to assure the safety and well-being of the child. *See In re Billy W.*, 387 Md. at 447-48. Consequently, a court's determination that a parent has been abusive does not automatically necessitate the termination of a parent's visitation rights as a matter of law. *See, e.g., Arnold v. Naughton*, 61 Md. App. 427, 433 ("[T]he statute makes clear that supervised visitation by a non-custodial parent found to have sexually abused a child may be approved where the safety of the child is assured."), *cert. denied*, 303 Md. 295 (1985). On the other hand, the law *does not require* that a parent be permitted to have supervised visitation or any other contact with his or her child if there is evidence that the contact would be detrimental to the child's best interest. *See, e.g., Painter v. Painter*, 113 Md. App. 504, 518-21 (1997) (upholding the circuit court's decision to suspend all contact, including in-person visitation and telephone communication, between father and son where father had subjected son and other family members to extreme physical and emotional abuse, leading to son's mental health problems and disinclination to engage in further contact with father). "Every case must be considered on its own facts." *Arnold*, 61 Md. App. at 433.

In the instant appeal, Mr. G. asserts that the circuit court abused its discretion by suspending his written communication with Michael and Renee, "based on scant and speculative evidence." Specifically, Mr. G. emphasizes how infrequently visitation is completely suspended by Maryland courts, and provides examples of cases wherein the courts have protected the visitation rights of both known and suspected abusers. Mr. G. further asserts that there was no evidence that his letters caused any trauma to Michael and Renee, but only that the process utilized to deliver the letters caused Renee some separation anxiety. Finally, Mr. G. contends that speculative fears regarding Guinnivere's possible reactions to her younger siblings receiving letters from Mr. G. were not appropriate considerations for the circuit court.

In response to Mr. G.'s assertions, the minor children, Michael and Renee, emphasize the presumption contained in F.L. § 9-101, mandating that visitation is not appropriate between a known abuser and his children, unless the court concludes "that there is no likelihood of further child abuse. . . ." Michael and Renee point to the results of bio-psychosocial evaluations of Mr. G., wherein he was diagnosed with multiple mental and sexual disorders, as well as anger management issues, for which it was recommended that he obtain additional evaluation and treatment, none of which he had completed at the time of the hearing. The children set forth in detail the evidence supporting the circuit court's factual finding that continued communication with Mr. G. was not in the best interest of the children, demonstrating that the court's finding was amply supported. The children conclude, therefore, that the court's decision to suspend all contact between Mr. G. and Michael and Renee was not an abuse of discretion.[13]

DSS argues that Mr. G.'s failure to establish that continued communication with Michael and Renee could be accomplished in a manner that "assured the children's physiological, psychological, and emotional well-being," is dispositive of the instant appeal. Alternatively, DSS asserts that neither the circuit

court's factual determination that continued written communication from Mr. G. would not be in the children's best interests, nor the court's ultimate decision to suspend all contact between Mr. G. and his younger children was erroneous in any way.

In the instant case, the circuit court expressly recognized its obligation to consider F.L. §§ 9-101 and 9-101.1 in rendering a determination regarding Mr. G.'s continued contact with Michael and Renee. After reviewing the record and hearing the arguments of the parties, the circuit court found that Mr. G. had engaged in abusive conduct at some point in the past. Before the court at the time it made this determination was the order issued by the circuit court following the original CINA hearing on October 8, 2010, wherein the circuit court sustained all of the allegations contained in the second amended CINA petition, finding that they had been proven by a preponderance of the evidence, including allegations that Mr. G. had physically and sexually abused Guinnivere and Ms. S., and had engaged in sexual misconduct in Michael's presence.[14] Also before the court was evidence of (1) Guinnivere's continued suffering from anxiety consistent with a person who had been sexually abused; (2) Ms. S.'s accounts of physical and sexual abuse inflicted upon her by Mr. G., for which she had obtained a protective order, and (3) Mr. G.'s own admissions to investigators that he had masturbated while Michael was asleep in the same bed. Moreover, at the time of the hearing, Mr. G. had been arrested and was incarcerated pending the resolution of multiple criminal charges arising from his alleged sexual abuse of Guinnivere.[15] Based upon the foregoing evidence in the record, we conclude that the circuit court's determination that Mr. G. had previously abused a child, as contemplated by F.L. §§ 9-101 and 9-101.1, was not clearly erroneous.

Because the circuit court found that Mr. G. had abused Guinnivere, Ms. S., and Michael, the court was statutorily required to deny Mr. G. any contact with his children unless the court determined that further instances of abuse were not likely to occur. *See* F.L. §§ 9-101, 9-101.1. The evidence before the circuit court indicated that Mr. G. suffered from multiple mental and sexual disorders and anger management issues, which, if left untreated, created a continued elevated risk of abuse. As of the date of the hearing, however, Mr. G. had failed to undergo any of the testing or treatment that had been recommended by the professionals who evaluated him. Furthermore, at the hearing, beyond expressing his own desires to maintain contact with Michael and Renee so that they would not forget him, appellant offered no evidence from which the court could conclude that future abuse to the children was unlikely to occur.

Even without a finding that there was no likelihood of further child abuse by Mr. G., the circuit court was authorized to allow Mr. G.'s requested communication if he satisfied his burden to show that such communication would assure his children's "physiological, psychological, and emotional well-being." F.L. § 9-101(b); *see In re Shirley B.*, 419 Md. at 22. The court reviewed the letters written by Mr. G. to Michael and Renee. Representatives for DSS, the mother, and the children asserted that the letters, especially the first few letters, were not age appropriate for four-year-old Michael and two-year-old Renee — the writing and pictures were too small and complicated, the content and vocabulary were too advanced, and the letters were too long. Although more recent letters had improved in some respects, they still included passages that would only be meaningful to Michael and Renee if they were interpreted by an adult.

Most compellingly, there was substantial evidence before the circuit court that the delivery of Mr. G.'s letters and drawings to Michael and Renee was, at best, ineffective to convey the sentiments Mr. G. purportedly wished to express, and at worst, was causing traumatic damage to his children. Renee would scream and cry when she was taken from her home in order have the letters read to her. Renee was unable to listen and understand the letters as they were read, demanding, instead, to be put down and to return home. Michael was calmer but inattentive on the occasion when the letters were read to him at the park. On other occasions, however, Michael displayed avoidance behaviors when Mr. G. was mentioned during therapy sessions.[16] Based on this evidence, the trial court found that "[t]he children are being traumatized by being removed from their mother's home to receive the contact." This finding is amply supported by the record and thus is not clearly erroneous.

The trial court also considered the potential damaging effect the letters might have on Guinnivere if she were to discover that Michael and Renee were receiving letters from Mr. G., while she was not. Evidence in the record indicates that Guinnivere expressed increased fear and anxiety related to having any contact with her father, Mr. G., even in a supervised visitation setting. She was afraid that Mr. G. would hurt her again, or that he would come to her house and take her or hurt her mother, Ms. S. Guinnivere also expressed concern that Mr. G. might eventually have another daughter and abuse her as he abused Guinnivere. Despite her fear, Guinnivere continued to say that she loved her father, but that she felt "mixed-up," because she "want[ed] to see him, but then [she did not] want to see him." Guinnivere continued to exhibit fear, anxiety, and self-doubt regarding what she chould have done in the abusive situations with Mr. G.

Although there was no evidence that Guinnivere

had become aware of the communication between Mr. G. and her younger siblings as of the time of the hearing, the possibility that she might, at some point, learn of the communication and be emotionally or psychologically damaged as a result, was argued by counsel for DSS, the children, and Ms. S.[17] Given her conflicting emotions regarding her relationship with Mr. G., it was not unreasonable for the court to conclude that damage would be the likely result of such a discovery.

Mr. G., nevertheless, asserts that the court erred by considering speculative evidence of the potential injuries to Guinnivere in the instant case, which concerned only the best interest of Michael and Renee. As the circuit court correctly noted, F.L. § 9-101.1(c) requires the court to consider not only the child or children who are the subject of the proceeding, i.e., Michael and Renee, but also the victim of the abuse, in this case, Guinnivere. Therefore, to the extent that the circuit court's determination was based on the arguments about Guinnivere's potential injuries, we conclude that the court's reliance on the parties' concerns regarding this issue was appropriate.

Mr. G. further asserts that it was the process of delivering the letters, not the content of the letters themselves, that was causing any trauma that was observed by the DSS workers. Whether the children were harmed by the contents of Mr. G.'s letter or the procedure for delivering the letters, to which Mr. G. had previously agreed, would appear to this Court to matter very little in the circuit court's analysis of the children's best interest; in either instance, the children were injured as a result of their continued contact with Mr. G.[18]

The circuit court applied the statutory requirements of F.L. § 9-101 and 9-101.1 to its factual findings, which we have held are not clearly erroneous, to conclude that it was not in the children's best interest to continue to have any contact with Mr. G. at the present time. The court pointed to the inappropriate content of Mr. G.'s letters, the traumatization of Michael and Renee by their removal from the home to hear the letters, the potential damage to Guinnivere upon hearing of such communications, and the statutory requirement to make arrangements that protect both Guinnivere and the other two children. Accordingly, the court ordered that Mr. G.'s contact with Michael and Renee be suspended until such time as the court was able to determine that the requested communication was not likely to cause any additional harm to the children. Based on our independent review of the record, we conclude that there was no error in the trial court's application of the law to the facts as determined by the court, and that there was no abuse of discretion by the court in ordering that Mr. G. have no further contact with Michael and Renee.

Mr. G., however, cites to this Court's determination in *In re Iris M.* and the Court of Appeals' decision in *In re Billy W.* in support of his assertion that the circuit court's decision was an infringement upon his parental rights. He argues that even in cases where a parent is adjudged or alleged to have sexually abused their child, the courts have, nonetheless, permitted the parents to continue to have contact, including in-person visitation, with their children.

In *In re Iris M.*, we considered the propriety of the district court's order suspending visitation where a daughter accused the father of sexually abusing her. 118 Md. App. at 637-38. Her father, however, vehemently denied any wrong doing. *Id.* at 643. Moreover, the father's guilt had not been adjudicated by any court, nor had he been diagnosed with any sexual or mental disorders. *Id.* at 643, 646, 650. Additionally, the evidence indicated a strong possibility that the daughter's allegations of sexual abuse were fabricated. *Id.* at 650. This Court reversed the trial court's decision to preclude all visitation between the father and daughter, stating:

> The State attempts to justify the existence of the no contact order by alleging that Mr. M. has failed to obtain therapy to treat his status as a sex offender. What the State disregards is the fact that Mr. M. has never admitted to a sex offense and the court has not found that he has committed a sex offense. It is not unreasonable for Mr. M. to decline such treatment if he did not commit the offense. The District Court, however, proceeded in the case as though he was in fact guilty.
>
> We, of course, have no knowledge of whether he is guilty. The record contains a report from Ms. Weigert, the clinical psychologist hired by Mr. M., that indicates that there is a strong possibility that the charges were fabricated. The only evidence pointing to his guilt is the child's complaint.
>
> As recognized by the trial judge early on, but then disregarded, the existing evidence did not justify a no contact order. To cut off a parent totally from his or her child is an extraordinary step and should only be taken for the most compelling reasons and on clear evidence. The court should have known that this case did not warrant such an extraordinary step. The great-

> est restriction that should have been placed upon the father was supervised visitation until the issue of sexual abuse had been determined.

Id. at 650.

We note that in *In re Iris M.*, there were only allegations of abuse that were not sufficient to support a finding that any abuse had, in fact, occurred. *Id.* at 650. Indeed, the lower court in *In re Iris M.* made no finding of abuse, as required by F.L. § 9-101(a), prior to suspending all visitation between the father and his daughter. *Id.* at 648, 650. In the instant case, however, as we have discussed, the circuit court was in possession of substantial evidence from which the court could reasonably conclude that Mr. G. had previously abused Guinnivere, Ms. S., and Michael. Having made that determination, the circuit court in the instant case was then constrained by the statute to prohibit contact between Mr. G. and his children unless the court could ensure the safety and well-being of the children. F.L. § 9-101(b). We conclude, therefore, that *In re Iris M.* is factually distinguishable from the instant case.

In the case of *In re Billy W.*, a father who admitted to sexually abusing his stepdaughter was, nonetheless, allowed to engage in supervised visitation with his natural-born son. 387 Md. at 411-12. On appeal, a majority of Court of Appeals upheld the circuit court's order allowing one hour of supervised visitation each month, concluding that the court did not abuse its discretion by further limiting the father's supervised visitation by imposing conditions intended to ensure the safety and well-being of the child, including the requirement that the father pay for the services of an off-duty policeman to provide security during the visitations. *Id.* at 450-51, 456-57.

Appellant's reliance on the Court of Appeals' opinion in *In re Billy W.* is also inappropriate in the instant case. In *In re Billy W.*, the Court of Appeals was asked to consider whether the circuit court erred by imposing certain stringent conditions upon the visitation of an admittedly abusive father, which conditions were intended to ensure the child's safety during the visitation. *Id.* at 446. The Court's conclusion in *In re Billy W.*, that the circuit court did not err by including specific protective measures in the child's permanency plan with which the abusive father was obliged to comply if he wanted to continue supervised visitation, was specifically limited to the facts therein. Beyond reviewing the applicable statutes and facts, the *In re Billy W.* Court was not asked to consider and did not specifically remark upon the appropriateness of the circuit court's decision to allow visitation. *Id.* at 446-51.

In sum, the holdings in *In re Iris M.* or *In re Billy W.* cannot be construed as suggesting that courts are obligated to provide abusive parents the opportunity to engage in supervised visitation or have contact with their children. We conclude, therefore, that the holdings in these opinions do not conflict with our conclusion in the instant case.[19]

ORDER OF AUGUST 9, 2011, BY THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. A CINA is a child who requires court intervention because "[t]he child has been abused, neglected, has a developmental disability, or has a mental disorder," and whose "parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code (1974, 2006 Repl. Vol., 2009 Supp.), § 3-801(f) of the Courts and Judicial Proceedings Article.

2. Mr. G. does not challenge the court's suspension of all contact between himself and Guinnivere.

3. The record does not conclusively reveal the outcome of this initial report. Mr. G. reported during a psychological interview in November 2010, that the 2006 investigation was dropped, because the claims were determined to be unfounded by the investigators.

4. We note that in the interim between the reports of Mr. G.'s abuse of Guinnivere in June 2006 and November 2008, Mr. G. and Ms. S.'s son, Michael, was born in April 2007. Mr. G. and Ms. S.'s daughter, Renee, was born during the course of the second DSS investigation, in May 2009.

5. Throughout the multiple DSS investigations of Mr. G.'s alleged abuse of his children, Mr. G. consistently avoided or refused to cooperate with the bio-psycho-social evaluations or testing requested by DSS or the court. Despite his failure to fully cooperate with the testing, evaluators diagnosed Mr. G. with multiple mental and sexual disorders, as well as anger management issues. Evaluators consistently recommended that Mr. G. undergo additional testing, treatment, and therapy to address his mental and sexual disorders, and further recommended that Mr. G. have no unsupervised contact with any children. Evaluators also observed that Mr. G. was evasive and deceptive, that he was easily agitated, highly suspicious, manipulative, and dishonest, and that he demonstrated the tendency to minimize his misconduct and the effects of his actions on others, including his children.

6. There is some indication in the record that Ms. S. felt compelled to allow the unsupervised contact pursuant to the terms of a court order allowing Mr. G. unsupervised visitation with the children.

7. Guinnivere also reported to her therapist that Mr. G. made attempts to force her to touch his genitals with her hand, attempted to touch her genitals, and locked her in her room for resisting the sexual contact.

8. Ms. S.'s protective order against Mr. G. was subsequently extended for an additional six months by the circuit court.

9. After filing the instant appeal, Mr. G. entered a guilty plea

on the charge of second degree assault in the Circuit Court for Frederick County and was sentenced to 10 years incarceration, all but time served suspended, to be followed by five years of probation. All other charges against Mr. G. were nolle prossed. Mr. G. was subsequently released from incarceration on October 27, 2011.

10. Mr. G.'s letters to Michael and Renee were to be mailed to DSS and then approved by the children's attorney prior to being read to Michael and Renee outside the presence of Ms. S. and Guinnivere.

11. Michael's new therapist noted that four-year-old Michael functioned at the level of a two-and-a-half-year-old child. He exhibited significant speech and motor delays, and was unable to sit still, follow structure, or transition between activities without support. Due to the relatively short time that she had been treating Michael, the therapist was not able to opine regarding the potential impact that continued contact with Mr. G. would have upon Michael.

12. We note testimony from the DSS representative indicating that other less formal attempts to read the letters to Michael and Renee were made in an effort to mitigate the trauma caused by removing them from their home, including taking the children out onto the porch to hear the letters; but these efforts were also unsuccessful. The circuit court concluded that the workers from DSS made every reasonable effort to reduce the trauma suffered by Michael and Renee while still complying with the court's mandate that Mr. G.'s letters be read to the children, including playing with the kids, as Mr. G. suggests they should have, or otherwise attempting to establish rapport and trust, prior to taking the children from their home.

13. We decline to address the second argument raised in the children's brief, contending that the record before this Court becomes more "stale and outdated" every moment, rendering the facts and issues presented in the instant appeal an ever more inaccurate reflection of the reality the parties currently face. On this basis, the children contend that the present appeal should be dismissed, and the case returned to the jurisdiction of the circuit court, which may more appropriately decide what contact between Mr. G. and his younger children is in Michael and Renee's best interest considering the circumstances as they presently exist. Although this Court is permitted to take judicial notice of events that have occurred in the instant case subsequent to the hearing and order from which the instant appeal was taken, we are generally constrained to consider only those issues that were raised before or decided by the circuit court. Md. Rules 5-201 and 8-131; *see also Marks v. Criminal Injuries Comp. Bd.*, 196 Md. App. 37, 78 (2010) (noting that "this Court has taken judicial notice of official entries in circuit court records"). The instant appeal was properly filed to challenge a modification of the children's permanency plans that was detrimental to Mr. G.'s interests and continues to be in effect at this time. No subsequent developments in this case have rendered the instant appeal moot. Therefore, we find no merit in the second argument raised in the brief submitted by the children.

14. Evidence before the court indicated that Mr. G. had repeatedly exposed his genitals to Guinnivere, had knowingly masturbated in her presence, and had attempted to engage in sexual contact — forcing Guinnivere to touch his genitals or forcibly touching Guinnivere's genitals. There was also evidence that Mr. G. had kicked Guinnivere, and had locked her in her room for refusing his sexual advances. Mr. G. also admitted to DSS investigators that he had masturbated in Michael's presence.

15. Subsequent to the hearing, Mr. G. pled guilty to the charge of second degree assault in return for the State's agreement to drop the charges of sexual abuse of a minor and third and fourth degree sexual offenses pending against him.

16. Michael's counsel recounted the observations of Michael's therapist that "anytime that [the therapist] raises the topic [of Mr. G.,] [Michael] goes into avoidance mode. He completely ignores the topic and does not want to discuss his father at all."

17. The parties expressed their concerns that potential damage to Guinnivere could take many forms, i.e., by causing her to think that her father still loved Michael and Renee, but not her, or by increasing her previously expressed anxieties about Mr. G. hurting her and her mother or another child, all of which might negatively impact Guinnivere's emotional, psychological, and even physiological well-being.

18. In his brief, Mr. G. suggests an alternative method of delivering the letters to Michael and Renee that allegedly would mitigate some of their anxiety about being taken from their home and mother, and thereby allow the children to receive his letters without being traumatized by the experience. However, Mr. G.'s suggested procedure for reading his letters to Michael and Renee, *i.e.*, allowing the letters to be read to the children in their home while Ms. S. and Guinnivere wore earplugs or headphones, or otherwise took actions to avoid hearing the letters, would not address Ms. S.'s fundamental desire not to have any contact or association with Mr. G., even through his letters to the children. By holding Renee on her lap while Mr. G.'s letters were read by a DSS worker, Ms. S. would be tacitly communicating her acceptance of the contents of the letter and of Mr. G. to her two younger children, which she wanted to avoid. Allowing the letters to be read to Michael and Renee in their home also would have greatly increased the chances that Guinnivere would have become aware of the communication.

19. On June 29, 2009, counsel for the children filed a Petition for Counsel Fees with this Court. We deny this petition without prejudice to the circuit court's consideration of a similar petition if filed in that court.

NO TEXT

Cite as 10 MFLM Supp. 39 (2012)

CINA: removal from parental care: mentally abusive behavior

In Re: Rachel B.

No. 2701, September Term, 2011

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

Opinion by Watts, J.

Filed: August 15, 2012. Unreported.

The circuit court did not abuse its discretion in declaring a 15-year-old girl a CINA and removing her from the custody of her mother, where, although the mother presented evidence that she was taking steps to better control her behavior, the record reflected that she continued to struggle with serious emotional outbursts, and the girl's father admitted violating the shelter care order by facilitating visits between the mother and daughter.

Patricia B., appellant appeals the decision of the Circuit Court for Montgomery County, sitting as a juvenile court, declaring her fifteen-year-old daughter, Rachel B., a Child in Need of Assistance ("CINA") and removing Rachel from her care. Appellant raises two issues, which we quote:

> I. Did the [circuit] court err in finding Rachel to be a [CINA]?
>
> II. Assuming *arguendo* that the CINA finding was not erroneous, did the [circuit] court err in removing Rachel from [appellant]'s custody and limiting [appellant]'s access to Rachel?

For the reasons set forth below, we answer both questions in the negative and, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 7, 2011, the Montgomery County Department of Health and Human Services, Child Welfare Services (the "Department") filed a petition with the circuit court requesting that Rachel, who was born on October 8, 1996, be found a CINA and placed in shelter care. In the petition, the Department alleged, in pertinent part, the following:

> **b) [Appellant] has threatened to harm [Rachel] such that [Rachel] is in immediate danger.**

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.

* * *

> 2. On December 5, 2011, there was a physical altercation when Rachel refused to give a cell phone to [appellant]. [Appellant] attacked Rachel. Rachel bit [appellant] to get her off of her and [appellant] threw a telephone against the wall and pushed Rachel to the ground. The police were called and noted upon their response to the home that [appellant] appeared mentally unstable and they believed that Rachel was being mistreated.
>
> 3. According to [appellant], Rachel was the aggressor and she, [appellant,] had suffered bruises and nerve damage from the assault. [Appellant] blamed the situation on Mr. B[.]'s [1] failure to comply with a safety agreement and [Family Involvement Meeting] agreement.
>
> 4. Mr. B[.] reported that he had been in [appellant]'s home during the morning hours of December 5[, 2011,] and that he had asked [appellant] to drop the issue of the cell phone, noting that there was no reason for Rachel to give it up. He indicated that he had spoken with Rachel during the evening hours of December 5[, 2011,] and that she was calm. He noted that he could hear [appellant] screaming in the background about the phone. He indicated that he asked Rachel to remain calm and he overheard her ask [appellant] to l[ea]ve her alone and give her space, but [appellant] refused.

On December 7, 2011,the circuit court held a contested shelter care hearing. The Department, Rachel, appellant, and Michael B. were present and represented by counsel. At the conclusion of the hearing, the circuit court granted the shelter care petition, ordering that Rachel remain in Michael B.'s custody,

where she had been placed following the altercation with appellant on December 5, 2011. The circuit court authorized weekly visitation for appellant to be supervised by the Department, pending an adjudicatory CINA hearing. On the same day, the circuit court issued a written opinion, stating:

> [T]he evidence presented sustained the finding that continuation of [Rachel] in [appellant]'s home **is contrary to [Rachel]'s welfare** and that it is not possible to return [Rachel] to that home because the following circumstances exist: that there is an atmosphere of arguments and violence that exist between [appellant] and [Rachel]: that [appellant] has a history of mental issues: [Rachel] and [appellant] have had multiple physical altercations including an incident on December 5, 2011 where the police were called; and that the Department has issues working with [appellant] to provide services.
>
> [T]he Department **made reasonable efforts** to prevent or eliminate the need for removal of [Rachel] as follows: Family Preservation Services for the past six months, safety plan, a Family Involvement Meeting following the last incident with the Department, and mental health services.

(Emphasis and underlining in original).

An adjudicatory CINA hearing was scheduled for January 27, 2012. On January 24, 2012, the Department filed an amended CINA petition alleging, in pertinent part, the following: [2]

> **1. Mental Health Issues:** [Appellant] has significant, long-standing mental health issues (bipolar disorder, borderline, and ADHD). She has a history of missing therapy appointments for herself and Rachel, and self-adjusting her medication. Rachel has special needs, including ADHD, which have been addressed by sporadic attendance at therapy.
>
> **2. [Appellant]'s physically/verbally abusive behavior**: On a regular/chronic basis, [appellant] berates Rachel in public (including at school in front of teachers and peers) and/or in private — concerning school (asserting that Rachel, who receives A's and B's in honor courses is a bad student); Rachel's daily itinerary, dress, sexual activity; calls her a "liar", "s[ ]", "whore"; uses inappropriate discipline or physically beats her; makes 911 calls for non-emergency issues (precipitating the police to recently charge telephone misuse); makes credible threats to "kill her"; and conversations between [appellant] and [Rachel] often escalate into screaming matches which sometimes escalate into physical altercations with each striking the other.
>
> **3. Effect on [Rachel]:** Rachel asserts that although she was once afraid that [appellant] might hurt her, Rachel now just gets mad when [appellant] yells and screams. Sometimes she cries. Rachel asserts that her life would not be safer or better anywhere else. [Appellant] threatened to kill Rachel during a 911 call, and Rachel cried and asked [appellant] to stop and said she would not be abused any more.
>
> **4. [Department] efforts to keep [Rachel] safe:** [Appellant] has told [the Department] that she is at the breaking point; that people were supposed to help, but no one has helped her. From April-Nov[ember] 2011, [the Department]/Families Now have provided in-home services. [The Department] has also rendered assistance since Families Now's involvement ceased.
>
> **5. Other efforts to keep [Rachel] safe:** The School, police and [Department] personnel have often intervened to de-escalate [appellant] — and to keep Rachel safe — when [appellant] has been in the process of yelling/screaming at Rachel. [Appellant] has yelled on school premises and has been escorted out. School personnel have witnessed none of the issues raised by [appellant] concerning Rachel (bad grades, bad behavior, indecent dress); nor do they consider [appellant]'s demands concerning [Individual Education Plan]s to be reasonable given Rachel's stellar scholastic performance. In conversations with [the Department], [appellant] has sometimes been extremely labile (crying, yelling, whispering, joking, and laugh-

ing — all in one interview). [Appellant]'s resident [Housing Opportunities Commission] worker is regularly compelled to calm [appellant] to keep Rachel safe — and the [Housing Opportunities Commission] practice is that a minimum of 2 social worker[s] must deal with [appellant] at any time; [appellant] has voiced to the [Housing Opportunities Commission] worker a threat to kill the [Department] worker.

6. Other significant factors precipitating the filing of this Petition:

- Oct 17, 2011: [Appellant] was enraged on account of a kiss that Rachel had received from a boy at homecoming dance, and fought Rachel for her cell[ ] phone.

- Nov 18, 2011: [Appellant] voicemails [the Department] that Rachel scratched her during an argument and she worries for her own safety. [Appellant] later stated that she and Rachel were going away and that [the Department] would never find them again.

- Nov 21, 2011: [Appellant] yelled at the [Family Involvement Meeting] convened to ameliorate the situation.

- Dec 5, 2011: [Appellant] admitted to [the Department] that she had fought with [Rachel] over a cellphone. Rachel asserted that she bit [appellant] to get [appellant] off of her. Police were called.

7. [Michael B.]: The Court sheltered Rachel with [Michael B.] on Dec 7, 2011; in the course of the hearing, the Court had [appellant] removed from the courtroom. [Michael B.] had not recently been [Rachel]'s custodian. [Appellant] has since assaulted [Michael B.] during an unapproved visit with [Rachel]. [Michael B.] violated a safety plan and [Family Involvement Meeting] by allowing Rachel to stay with [appellant] because [appellant] had had tooth surgery and needed someone to stay with her. [Michael B.] has a history with the criminal justice system. [Michael B.] and [appellant] violated the Shelter Order; [Rachel] was placed with [Michael B.]. [Appellant] was only to receive supervised visits with [Rachel]. Instead, [Michael B.] and [Rachel] spent 5 days in [appellant]'s home.

On January 27, 2012, February 21, 2012, and February 22, 2012, the circuit court held an adjudicatory CINA hearing.[3] At the hearing on January 27, 2012, the Department moved to have Rachel removed from Michael B.'s care on the grounds that Michael B. had violated the shelter care order by staying with Rachel at appellant's home. Officer Aaron Bachofsky of the Montgomery County Police Department testified that, in the early morning of January 27, 2012, he responded to a 911 call at appellant's home, at which point he learned from appellant that Rachel and Michael B. had been staying in the home for more than five days. Pamela M., appellant's sister, testified that Michael B. and appellant had both told her that Michael B. and Rachel had been visiting appellant for several weeks prior to the January 27, 2012, hearing. Michael B. admitted that he let appellant and Rachel see each other while he was present because Rachel wanted to see appellant. When asked if he would continue to let Rachel see appellant despite knowing it was in violation of the shelter care order, Michael B. responded: "I mean, I don't know. That's hard to say[.]"

The circuit court granted the motion to remove Rachel from Michael B.'s care, ruling:

> I don't really see that I have an option at present other than to grant the Department's request for an emergency change in placement to [Pamela M.]'s house. . . .
>
> I will find that it's contrary to [Rachel's] welfare to remain with [Michael B.] based on the testimony that we have here today, about which there is no dispute, which is that [Michael B.] has regularly allowed Rachel to stay overnight in [appellant]'s house even though the order is quite clear about there being no contact except under the direction of the Department.

Rachel was placed in shelter care with Pamela M., her maternal aunt.[4]

During the CINA hearing, the circuit court admitted into evidence, over the objections of Rachel, appellant, and Michael B., a recording of seven 911 calls made by appellant. On January 4, 2011, appellant called 911 claiming that Rachel "was trying to run away and not go to school." Appellant requested that law enforcement officers come to the home and make Rachel go to school. On January 17, 2011, appellant called 911 and alleged that Rachel was making her

late to work. Appellant stated: "I need the police to come get her out of here, and they can take her and do whatever they want with her." On May 4, 2011, appellant made two 911 calls. In the first call, made at 7:02 am., appellant stated that she wanted Rachel arrested for assault. In the second call, made at 9:08 p.m., appellant stated that Rachel had beaten her up and that Rachel had locked herself in the bathroom. Rachel can be heard in the background of the call shouting that appellant is a liar. Appellant implied to the dispatcher that Rachel had taken drugs, but conceded at the CINA hearing that "she probably had not." On July 14, 2011, appellant called 911 because Rachel had locked herself in the bathroom after appellant had attempted to take her cellular telephone. Appellant stated: "I'm mad now and I'm going to beat the h[ ] out of her. I need you to take her out of here[.]" On August 4, 2011, appellant called 911 alleging that Rachel was "trying to beat [her] up and run away." Appellant stated that she wanted to have Rachel admitted to a psychiatric facility. It is apparent from the exchanges between Rachel and appellant on the recording that the two were arguing about clothes that appellant had bought for Rachel, and whether or not Rachel had done her chores. Rachel can be heard in the background of the call shouting: "You pulled my hair[,]" "Let me go[,]" "Don't touch me[,]" and "Don't punch me or I will hurt you." On November 15, 2011, appellant called 911 requesting that an officer take Rachel and "put her in custody" because Rachel had broken things and was "sassing" her.

At the CINA hearing, Officer Aaron Bachofsky of the Montgomery County Police Department testified that he had responded to approximately fifty emergency 911 "calls at [appellant's] residence [, and] calls for her in the community." Officer Bachofsky testified that, in the Fall of 2011, he responded to a domestic violence 911 call at appellant's home. Upon his arrival, appellant told Officer Bachofsky that "a young gentleman that had gone to the [Homecoming] dance with Rachel had sexually assaulted her." Appellant told Officer Bachofsky she learned this upon reading "incriminating messages" on Rachel's cell phone. According to Officer Bachofsky, "Rachel stated that she kissed a young boy at the dance." "When [the officers] stated to [appellant that], without further evidence, a sexual assault charge could not be filed, she began to shout at [the] officers, demanding a supervisor come on scene[.]" According to Officer Bachofsky, appellant continued to shout at the officers for five minutes before they were able to calm her. When Officer Bachofsky requested to see the text messages, appellant "first stated she could not find the phone[.] . . . [When s]he located a cell phone[, she] stated that she could not retrieve the messages because there was a password on the phone." On cross-examination, Officer Bachofsky testified that Rachel informed him that there was no password on the phone. Officer Bachofsky testified that appellant "would not show any officer on scene any message."

Officer Bachofsky testified that he responded to a 911 call in mid-December, 2011. He was "advised that [appellant] and her daughter, Rachel, were involved in a physical argument, that [appellant] had been stabbed in the arm with a pencil, and that she was [ ] holding her daughter, Rachel, to the ground in the kitchen." Upon arriving, Officer Bachofsky observed no signs of physical injury to either Rachel or appellant. Appellant could not explain the discrepancy between her report to the 911 operator and Officer Bachofsky's observations.

Officer Bachofsky testified that approximately ninety percent of the fifty times that he responded to 911 calls involving the family, appellant requested that law enforcement officers take Rachel to "the hospital." During the incident in mid-December, when officers refused to take Rachel to a hospital, appellant "began to shout at the officers [for] roughly eight minutes." Officer Bachofsky testified that on this occasion, as well as other occasions, Rachel was present when appellant requested that officers transport her to the hospital, and that she responded with "a numbness[.]" Officer Bachofsky described Rachel's demeanor as "exhausted, tired. . . . Head sunk low, bags under the eyes, shoulders forwarded, soft-spoken." Officer Bachofsky testified that, although he had not removed Rachel from the home after any of the fifty 911 calls to which he had responded, he had contacted the Department in both Spring and December of 2011, regarding Rachel and appellant.

As a witness for the Department, Paula Weiss, a licensed clinical social worker at St. Luke's House in Bethesda, Maryland, testified that she was a therapist who had been working with appellant since April 2011. Weiss testified that she was concerned about appellant's emotional stability because "she [ ] ha[s] angry outbursts from time to time . . . in [the St. Luke's House] waiting rooms with [ ] some of our other staff." Weiss testified that she was concerned about appellant's relationship with Rachel due to appellant's admission "that some of their arguments have become physical[,]" including an incident in which "Rachel bit [appellant]" when "[appellant], as a punishment, asked Rachel to turn over her cell phone[.]" Weiss testified that she and appellant had been discussing parenting strategies since April 2011. Weiss testified that appellant's blood is checked for levels of lithium, one of the psychiatric medications which she has been prescribed, and that "her levels are at a therapeutic dose."

On cross-examination, Weiss testified that appellant voluntarily came to St. Luke's House, and that

appellant's medication was changed after she voluntarily sought psychiatric services. Weiss testified that, since appellant began taking lithium, she is "much calmer. . . . [s]he listens better. She shows good insight, and she has a strong desire to make her relationship with [Rachel] improve." Weiss testified that, in recent months, appellant's attendance at therapy is "[m]uch improved. In the beginning she missed quite a few sessions or she would come very late . . . but she has made a great effort to come on time and be there every session." Weiss testified that appellant planned to participate in behavioral therapy for her borderline personality disorder, which would require her to attend two sessions per week for fifty-two weeks.

As a witness for the Department, Lesia Dunkins, a resource counselor with the Montgomery County Public Schools, testified that appellant is involved with Rachel's education and has attended several meetings at the school regarding Rachel's classes and accommodations for Rachel's ADHD. Dunkins testified that Rachel told her about an incident in which she and appellant argued over a phone: "They had a tussle about the phone [ ], and [appellant] says Rachel bit her, but Rachel says [appellant] bit her." Dunkins testified that, when she asked Rachel how she dealt with having "a tough mom," Rachel told her: "It's all I know." Dunkins described Rachel as "numb." Dunkins testified that Rachel told her that appellant has "threatened, but she's never actually . . . harmed" Rachel.

As a witness for the Department, William Gregory, the principal of Sherwood High School, Montgomery County Public Schools, testified regarding his interactions with appellant and Rachel. Gregory described his interactions with appellant as "heated" in that "[appellant] would get angry and start yelling at people. She would contact the school, possibly call in the morning and then call [fifteen] minutes later, call [fifteen] minutes later . . . [T]here were times things became abusive, screaming on the telephone, screaming in person[.]" Gregory testified that he was concerned about Rachel's welfare based on an exchange he witnessed between Rachel and appellant in the school office in which appellant was "yelling and, and screaming in public and [ ] telling Rachel she wasn't telling the truth." Gregory testified that, in his only other interaction with Rachel while investigating the kiss that Rachel received at the homecoming dance, "Rachel was almost withdrawn and she[was] very quiet, looking down[.]"

As a witness for the Department, Donna Cruickshank, who provided therapy to Rachel as a licensed clinical social worker with Family Services, Inc., testified that Rachel had not made much progress in therapy because "[s]he's very, very guarded, and [ ] she, it's — therapy is hard for her."' Cruickshank testified that she is concerned for Rachel's emotional safety because appellant "usually comes in and begins either picking on [Rachel], criticizing her, berating her, demeaning her." Cruickshank testified that appellant participated in the first few therapy sessions with Rachel, but was not permitted to continue because, when she was there, "it was argumentative, volatile, and at one point, [Cruickshank] had to stand up and get in between the two to keep them from, to stop them from arguing[.]"

As a witness for the Department, Mary Phillips, a licensed graduate social worker with the Housing Opportunities Commission of Montgomery County, testified that she had intervened in several altercations between appellant and Rachel. Phillips testified that appellant had described to her an argument with Rachel in the Summer of 2011, during which appellant "indicated she had pulled [Rachel's] hair and tried to grab her [ ] to get her into the house." Phillips testified that "Rachel is actively involved in the arguments, yelling and screaming and getting upset . . . but when she's removed from the situation, you know, she's doing pretty good, kind of numb to it." Phillips testified that, in March 2011, after having argued with Rachel, appellant made what Phillips considered to be a credible threat to kill Rachel. Phillips testified that she considered the threat credible because appellant made the threat two and one half hours after the argument and in Rachel's presence. Phillips testified that appellant had also told her that "she wanted to 'kill" Chris Carmello, a Department social worker involved in Rachel's case. Phillips testified that the Housing Opportunities Commission has an "unprecedented" policy "that [they] always have two staff members in the vicinity" when dealing with appellant" [b]ecause [appellant] is unpredictable and there's been a lot of hostile/aggressive conversations with her and it's for [the] staff's safety."

As a witness for the Department, Dorne Hill, a Department supervisor, testified that she became involved with Rachel and appellant after "[t]he Department received allegations of concern for Rachel's safety in the home with" appellant because appellant "was irrational and berated [Rachel,] Rachel and [appellant] would get into physical altercations and verbal altercations[, appellant] had been working with the Department since April of 2011 without much change in the home for Rachel's safety[, a]nd there was a concern about [appellant]'s mental health[.]" Hill described her initial meeting with appellant as follows:

> There was a concern about her berating [Rachel] and threatening to harm [Rachel]. [Appellant] denied that she used physical discipline with Rachel, but then later in the conversa-

tion, said that she did at times hit [Rachel], but not to hurt her.

[Appellant] denied berating [Rachel] or belittling her, but then later in the conversation said that she did belittle and berate [Rachel], but she apologized later if she hurt [Rachel's] feelings. [Appellant] admitted that she [had] bipolar disorder and that she [had] ADHD and that she was taking medication.

[Appellant] became upset when I continued to ask her question[s] inquiring about her mental health and about Rachel's mental health. Rachel[,] she stated[,] was seeing a therapist, a family service agency; was on medication; had been diagnosed with a mood disorder and ADHD. And that [appellant] wasn't happy with their services because there had been a change in therapist several times[.] . . .

[Appellant] became enraged and started to throw papers and bang on the table and acted as if she was going to flip the table over.

* * *

For about 15 minutes, she threw things, continued to yell, bang on the table and then she started to cry and say that she was overwhelmed with Rachel's behavior, overwhelmed with Social Services being involved in her life. That the family's worker[ ] was supposed to be helping her, but no one was helping her. That she needed help. And then as we proceeded on in the conversation, she actually joked with [ ]me and laughed.

* * *

The minute that [Rachel] walked in the door, [appellant] started screaming at her about where she had been, calling her a liar and other derogatory names, screaming at her saying that her grades are bad. Rachel said they're not. I'm an A and B student. [Appellant] was calling her a liar. I tried to interview Rachel separately. [Appellant] refused to leave the room and proceeded to intercede when I interviewed her so that I had to end the interview.

Hill testified that, in meetings, appellant's mood was "very labile[,]" meaning that "it was up and down. Sometimes she was angry, sometimes she would cry. Sometimes she would laugh and joke." According to Hill, when appellant yelled at her, Rachel had "no expression on her face . . . But then she started to yell back at" appellant. Hill testified that this concerned her because it meant that Rachel "was used to it[.]" Hill described a telephone call she received from appellant in November 2011, as follows:

> There had been a situation where [appellant] and Rachel had had an argument. It had gotten physical. [Appellant] said that she didn't feel as though Rachel could safely stay in her home anymore. That she wanted [Rachel] placed emergently out of the home and that she needed my assistance immediately.

Hill stated that, when the Department informed appellant at that time that Michael B. was coming to pick up Rachel, "she said that she would leave with" Rachel. Shortly after that incident, a Family Involvement Meeting was held in which the parties developed a plan "that Rachel would stay with appellant Monday through Friday and then on alternating weekends, would go between [Michael] B. and the alternating weekend would be with [Pamela M.] and her husband[.] And that every evening, [Michael] B. would go pas[t] the house on his way home from work and check on Rachel and [appellant) . . . And that [appcllant] was going to work with [ ] Carmello for continuing services in the home."

On cross-examination, Hill testified that, as the social worker assigned to Rachel's case, she "encouraged [appellant] to be more frequent and regular with [her therapy] appointment[s] and to not lower her medication on her own without speaking to a psychiatrist. And [Hill] tried to implement the in-home [ ] services to avoid placement. But because of [appellant]'s inconsistency in wanting a service or not wanting a service, wanting to work with [the Department] or not wanting to work with [the Department], it was never implemented." Hill testified during redirect examination that she did not believe in-home services would be helpful in this case because "those services are for people who are cooperative and willing and able to work with the service and want the service. [Appellant] has displayed [ ] throughout the course of [the] investigation . . . that even though she says she wants the service, she has an inability to follow through and to communicate effectively with [Department] services."

As a witness for the Department, Carmello, a licensed graduate social worker employed as a continuing services social worker with the Department, testified that, during the visits that she supervised between

appellant and Rachel, appellant was "constantly questioning Rachel, ordering her that she's going to do this or going to do that. Getting on her about her grades, her school work; was telling her that she needed to exercise. She was spending too much time on the phone with boys." Carmello testified that Rachel "[s]eemed to be frustrated with the constant barrage[ ] of questions and [appellant] saying this is what you need to do. She was very annoyed at [appellant] continuing on that she needed to exercise and exercise an hour a day." Carmello described an incident involving the family at New Year's as follows:

> [Michael] B. said that [appellant] begged him to bring Rachel so that she could see her and he felt bad because she was upset and she was crying and she missed Rachel. Apparently Rachel actually was already over visiting a friend in the neighborhood and [Michael] B. [ ]went there and they met. And that [appellant] was calling Rachel a s[ ] and a whore and [Michael] B. tried to get her to stop and she wouldn't stop.
>
> * * *
>
> So [Michael B.] said okay, well you know, he wasn't going to continue to allow Rachel to, you know, continue to be berated like that so he said okay, the visit's over. [Appellant] got mad. [Appellant] was pushing him. Again, they went to the car. He and Rachel, [Michael] B. and Rachel[. A]nd [Michael] B. stated that [appellant] actually opened the driver's door and jumped on top of him to prevent him from leaving. He had to climb out from underneath her. She wouldn't get out of his vehicle and subsequently he had to call the police. The police arrived. [Appellant] tried to tell the police that he didn't have custody of Rachel[.]

As a witness for appellant, Don Miller, II, Ph.D., a licensed clinical psychologist who had been conducting family therapy with appellant and Rachel on and off since 2007, testified that "[i]nitially . . . Rachel was depressed. She was very quiet, very withdrawn, spoke very softly and very infrequently. Over the years she's become more outspoken and much more communicative of her opinions, desires, her preferences." Dr. Miller testified that he had previously expressed concern that Rachel suffered from low self-esteem and emotional trauma from her interactions with appellant. Dr. Miller testified that, when appellant yelled at Rachel during therapy sessions, Rachel had "gotten extremely frustrated and often replie[d] somewhat in kind by being hypercritical of [appellant] and condescending[.] When asked whether he had "seen behavior in the session[s] that[had] given [him] real cause for concern about Rachel's welfare[,]" Dr. Miller responded: "Yes[.]" Dr. Miller testified that "a neutral therapeutic environment would be ideal for [Rachel. Appellant] is making progress but there is much work yet to be done. In recent sessions there's been significant improvement but that work should stabilize before Rachel [sh]ould resume on a full-time basis with her."

As a witness for appellant, Yolanda Vasquez testified that appellant has been participating in a class to manage her anger since March 2011. Vasquez testified that she asked appellant to leave the class "because she was having problems with other leaders" but that she was permitted to remain on the condition that she followed the class's rules. Vasquez testified that appellant was "trying hard at this point."

On her own behalf, appellant testified that "I called [911] because I felt that the police w[ere] there to protect me and that it's okay to call." Appellant testified that "[i]t wasn't like anybody was hurt, so I really should not have been calling [911]. And I do realize that now and I'm working on that issue[.]" Appellant testified that no one from the Department had established any services for her or Rachel. Appellant testified that, if Rachel retumed to her care, she "definitely wouldn't call [911] unless it was a bleeding or emergency emergency [sic], like an[ ] ambulance or drastic. I might call the non-emergency line, but I have a whole list of other support people . . . that I can call." Appellant testified that she began participating in an adult intensive outpatient therapy group at Montgomery General Hospital in mid-February 2011. Appellant testified that her supervised visits with Rachel had gone well, and that the two did not bicker and argue, but stated that: "I feel [Rachel] definitely [ ] needs to be in a neutral place without [me] and without [Michael B.] and with somebody that can nurture her and help her sort out what her issues are at this time."

On cross-examination, appellant testified that Michael B. had brought Rachel to appellant's house after she was removed from appellant's custody because Rachel "wanted to come back home." Appellant continued that "Rachel was pushing for coming home. She missed her bed. She said she missed her room. She missed her, her surroundings."

As a witness on his own behalf, Michael B. testified that he believed appellant could take proper care of Rachel, stating: "I know she [can]. I mean, [Rachel]'s 15 years old. She's been [with appellant] all her life." Michael B. stated that he did not believe it was necessary to separate Rachel and appellant. Michael B. tes-

tified that, although he believed it was not appropriate for appellant to scream at Rachel, appellant "[i]s just that way[.]"

Ruling from the bench, the circuit court sustained the allegations in all seven paragraphs of the petition, finding as follows:

> The summary of this is that [appellant] is not presently able to manage Rachel in her home. [Appellant] focuses on Rachel's behavior, not her own. She's not able to control herself and her emotions in court and by every account in other settings in her life. It is not safe for Rachel to be with her.
>
> The recording of the police calls heard in court [ ] are clear evidence of [appellant]'s inability to manage this, and also extremely disturbing. [Appellant] has accused Rachel of assaulting her. Rachel is in the background screaming that she didn't and that [appellant] is a liar. [Rachel]'s lived a life over the last two years where the police have appeared 50 times because she's behaving like a teenager.
>
> * * *
>
> With regard to the first amended [CINA] petition, I will find that [ ] the allegations in paragraph 1 were substantiated by the testimony in the case. In fact, Rachel does have [ADHD], which has been diagnosed and has been addressed by what I would call sporadic therapy. I don't think it's been consistent and regular. I think it has depended on a lot of things, including convenience.
>
> And I also find that [appellant] has had a history of missing therapy appointments, although it is also true that in the last several months, I guess I'd say since the Department has been even tangentially involved in the family's life, the therapy appointments have been more consistent. And while that's a good thing, it doesn't make the statements about inconsistency unsubstantiated.
>
> I also find the allegations in paragraph 2 were substantiated. In fact, [appellant] does berate Rachel in public. [Appellant] does berate [Rachel] about school. [Appellant] does use words that one would hope a parent would not use to a child, including liar, s[ ], and whore.
>
> [Appellant] makes [911] calls for non-emergency reasons. She did, in fact, make a threat to kill [Rachel] if she wasn't removed from her house. I heard her say it, and she acknowledged it was her saying it. And the conversations between [appellant] and Rachel often escalate into screaming matches. Again, I only heard a small segment of those, but I don't think, actually, there's any disagreement about that. I think [appellant] has told other people, Dr. Miller, Ms. Weiss, that the relationship does not proceed in a way that anybody would say was good.
>
> With regard to paragraph 3, what I'd say overall is that once again, the overall summary from all of the witnesses supports that, in fact, the, Rachel clearly does retaliate. I don't think I have to hear testimony from a third party; I heard it from Rachel on those [911] tapes. She was screaming back, calling [appellant] a liar. And this is sort of the, maybe proof, I guess I would say, that she's not afraid of [appellant]. That isn't the same thing as, this is a good thing for her, but that she's concluded that she should yell back, or be disrespectful and obstinate, and push back, I guess, maybe not physically, although that's possible too, but verbally when [appellant] makes allegations or assertions that Rachel thinks are not true.
>
> . . . I find the balance of the allegations [in paragraph 4] were, in fact, supported.
>
> I heard what counsel for [appellant] said about how the in-home services weren't provided. And they weren't provided because [appellant] would not cooperate and would not take them. The Department tried, but [appellant] wants to control everything, and wants to control how everything goes, including how things go in the courtroom. She didn't like it when other people weren't doing what she wanted them to do. She really didn't like it when I told her she wasn't

allowed to talk at the decibel level that I'm now talking while other people are testifying. She clearly doesn't have the capacity to respect the rights and social norms of other people.

I find that the allegations in paragraph 5 have also been substantiated. Much of what I have already said is the, are the findings, specifically, with regard to facts about what's in paragraph 5.

With regard to paragraph 6, in fact, [appellant] was enraged with regard to what we'll call the Homecoming incident. She did, in fact, fight Rachel for her cell phone, and then when Rachel wouldn't give it to her, she called the police, so that Rachel's emotional connection to this boy, which led to kissing, ended up as an altercation involving the police in a parking lot. I don't know that I have to say anything more about why that's not good for Rachel.

* * *

The same with the November 21 allegation that [appellant] yelled, raised her voice, became angry and irrational at the family involvement meeting.

And on December 5th, also, the testimony supports that allegation with regard to a fight for a cell phone, and that the police were once again called.

* * *

With regard to paragraph 7, . . . I actually don't think there's any disagreement about that by anybody. I think [Michael B.] and [appellant] agree that, in fact, that is what happened. . . .

The interesting claim that [appellant] has made is that the Department didn't use reasonable efforts here. If the test of reasonable efforts is whether the Department has succeeded in mending the relationship between Rachel and [appellant], or that the Department has succeeded in getting [appellant] to understand that her behavior toward [Rachel] and toward everybody else who doesn't to[e] the line, in her view, is a sign that nobody's trying to help her, then she would be right, but that cannot possibly be the standard.

There's not one and not two, but three Department social workers here. I think, particularly with regard to the testimony that [ ] Hill gave, it was clear that there were efforts being made to try not to have this end up the way it has, which is that [Rachel] is living with her aunt, which is fine — that's actually Rachel's take on the whole thing — but far away from her life as a teenager, as a good student, as a kid who deserves not to be having me talk about her.

I will find that Rachel's been abused by [appellant] and neglected by [appellant and Michael B.], and that they are not now able to give her proper care and attention. . . .

I am going to find that Rachel's a [CINA]. I think she is in every way that could be meant. I am going to leave her placed, for now, with her maternal aunt and uncle[.]

(Emphasis added). On February 22, 2012, the circuit court issued a written order consistent with its oral ruling.[5] On February 29, 2012, appellant noted a timely appeal.

DISCUSSION

Standard of Review

The Court of Appeals recently set forth the standards guiding our review of child custody disputes, stating:

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

In re: Shirley B., 419 Md. 1, 18 (2011) (quoting In re: Yve S., 373 Md. 551, 586 (2003)) (omission and some alterations in original).

I.

Appellant contends that the circuit court erred in finding Rachel a CINA, as there was no evidence that Rachel suffered physical or mental injuries as a result of contact with appellant, and there is no evidence that appellant was unable to care for Rachel. Specifically, appellant argues that there is no evidence that Rachel was harmed because "[t]here was no evidence that [she] was crying, not eating, not sleeping, having psychosomatic illnesses, withdrawn, lacking an interest in activities, lethargic, depressed, unable to concentrate in school, or even desiring to be away from" appellant. Appellant maintains that the circuit court erred in finding that appellant neglected Rachel because "Rachel was at all times fed, clothed and housed[,]" attended medical, dental, and psychiatric appointments, and received good grades in school. Appellant contends that the circuit court erred in finding that she was unable to care for Rachel, and that her "practice of enlisting the help of police to referee Rachel's and her arguments should not be dispositive" of that question.

The Department responds that the circuit court's CINA finding is supported by substantial evidence. The Department contends that appellant "engaged in a relentless pattern of destructive behavior that constituted abuse and neglect of Rachel[.]" The Department argues that, due to her psychiatric conditions, appellant is unable to care for Rachel. The Department asserts that "the [circuit] court reasonably inferred that [appellant's] conduct placed Rachel at substantial risk of harm."[6]

The United States Supreme Court and Maryland appellate courts have recognized that a parent has a fundamental constitutional right to raise his or her children. See. e.g., In re: Samone H. & Marchay E., 385 Md. 282, 299 (2005); In re: Yve S., 373 Md. at 566-67. This right is not absolute — it must be balanced against the State's interest in protecting a child's best interest. In re: Yve S., 373 Md. at 568-69. Upon finding a child to be a CINA, therefore, trial courts are permitted to "direct the [D]epartment to provide services to a child, the child's family, or the child's caregiver to the extent that the [D]epartment is authorized under State law[,]" in order to fulfill the statutory purpose "[t]o provide for the care, protection, safety, and mental and physical development of [the] child[.]" Md. Code Ann., Cts. & Jud. Proc. Art. ("C.J.P.") § 3-802(c)(1),(a)(1).

C.J.P. § 3-801(1) defines "CINA" as follows:

> "Child in need of assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

"Abuse" is defined, in pertinent part, as:

> Physical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or is at substantial risk of being harmed by: [ ] A parent or other individual who has permanent or temporary care or custody or responsibility for supervision of the child [.]

C.J.P. § 3-801(b)(2)(i). "Neglect," in turn, is defined as follows:

> "Neglect" 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 harmed or placed at substantial risk of harm; or
>
> (2) That the child has suffered mental injury or been placed at substantial risk of mental injury.

C.J.P. § 3-801(s). Allegations ofabuse or neglect in a CINA petition must be "proved by a preponderance of the evidence." C.J.P. § 3-817(c).

In this case, we conclude that the circuit court did not abuse its discretion in finding Rachel a CINA. To substantiate a CINA finding, the circuit court was required to determine that Rachel was abused or neglected by both of her parents[7] and that her parents were "unable or unwilling to give proper care" to Rachel. C.J.P. § 3-801(f). At the CINA hearing, the circuit court heard testimony regarding how appellant's behavior impacted Rachel. Officer Bachofsky described Rachel as "exhausted[and] tired" when dealing with appellant, with her "[h]ead sunk low, bags under [her eyes], shoulders forwarded[.]" Gregory testified that appellant's behavior toward Rachel raised his concern about Rachel's welfare. Cruickshank testified that appellant's actions impact Rachel's emotional safety because of appellant's criticism, in which she "berat[es Rachel and] demean[s] her." Dr. Miller expressed concern about Rachel's emotional trauma from interactions with appellant causing low self-esteem, and admitted concern for Rachel's welfare. Several witnesses described Rachel as being "numb" to appellant's behavior, which Hill explained was concerning because it meant that Rachel was used to the behavior. Phillips testified that, following an argument,

appellant threatened to kill Rachel.

This testimony, which appellant does not contest, sufficiently established that appellant inflicted "mental injury" upon Rachel and that Rachel was "at substantial risk of being harmed." We are unpersuaded by appellant's argument that, because "[t]here was no evidence that Rachel was crying, not eating, not sleeping, having psychosomatic illnesses, withdrawn, lacking an interest in activities, lethargic, depressed, unable to concentrate in school, or even desiring to be away from" appellant, and because Rachel is a good student, there was no evidence of harm. Despite the lack of certain potential symptoms identified by appellant, those who interacted with appellant and Rachel, including the therapists, Dr. Miller, Cruikshank, and Phillips — who, by definition, are trained to interpret and diagnose behavior — testified that Rachel's demeanor evidenced mental injury stemming from appellant's treatment of her. We conclude that the circuit court's finding that Rachel was abused by appellant is not clearly erroneous.

Pursuant to C.J.P. § 3-801(c), "neglect" is "the leaving of a child unattended or other failure to give proper care and attention to a child" in a situation in which the child "has suffered mental injury[.]" Although it is not alleged that appellant left Rachel unattended, the Department presented evidence that appellant failed to give Rachel proper care. As stated above, those who interacted with Rachel and appellant observed that appellant's behavior inflicted injury upon Rachel. By subjecting Rachel to emotional abuse, appellant failed to give her proper care and attention. See In re: Joseph G., 94 Md. App. 343, 347 (1993) (A child who is "abused, [is] therefore [ ]not receiving 'proper care and attention.'"). It is evident from the testimony given at the adjudicatory CINA hearing that, although appellant is currently attempting to be able to provide proper care for Rachel, she continues to struggle with controlling her behavior. As recently as January of 2012, Michael B. called the police because appellant would not stop calling Rachel derogatory names, appellant "jumped on top of him [Michael B.] to prevent him from leaving[,]" and "wouldn't get out of his vehicle." We perceive no error in the circuit court's finding that appellant neglected Rachel.

As to Michael B., despite appellant's abusive behavior, Michael B. not only took no action to protect Rachel, but, in fact, facilitated interactions between appellant and Rachel by bringing Rachel to visit appellant after she was removed from appellant's custody.[8] At the CINA hearing, Michael B stated that he did not know if he would follow the circuit court's shelter care order in the future—that Rachel remain in his custody with weekly visitation with appellant as directed by the Department—because he believed Rachel and appellant were family and should not be kept apart. Under the circumstances, we conclude that the circuit court did not err in finding, by a preponderance of the evidence, that both appellant and Michael B. neglected Rachel and are unable to give her proper care at this time.

Because the Circuit court's findings fulfill the relevant requirements of C.J.P. § 3-801(f), we perceive no abuse of discretion in the circuit court's determination that Rachel is a CINA.

II.

Appellant contends that "the evidence in this case did not support a finding that Rachel was at a substantial risk of harm, necessitating that she be placed outside of [appellant's] care." Appellant argues that, rather than removing Rachel from the home, the circuit court should have ordered in-home services to help appellant and Rachel better deal with their conflicts. Appellant asserts that, because Rachel is fifteen-years-old and, as such, is old enough to "cry out for help if necessary[,]" the circuit court "abused its discretion in removing Rachel from [appellant]'s care and curtailing their contact[.]"

The Department responds that the circuit court did not abuse its discretion in removing Rachel from appellant's custody. The Department contends that, despite attempts to avoid placement, both in therapy and through the Department itself, appellant continued to pose a risk of harm to Rachel.

> Maryland has adopted, in . . . custody proceedings, a *prima facie* presumption that a child's welfare will be best served in the care and custody of its parents rather than in the custody of others. That presumption is overcome if opposing parties show that the natural parent is unfit to have custody, or exceptional circumstances make parental custody detrimental to the best interests of the child.

In re: Yve S., 373 Md. at 572 (citation omitted). Such exceptional circumstances include "[w]here the child has been declared a '[CINA]' because of abuse or neglect[.]" In re: Caya, 153 Md. App. 63, 76 (2003) (citation omitted). In such cases,

> the [luvenilel court is . . . constrained by the requirements of § 9-101 [(b) of the Family Law Article][9] . . . to deny custody to the parent unless the court makes a specific finding that there is no likelihood of further abuse or neglect. . . . *The burden is on the parent previously having been found to have abused or neglected the child to adduce evidence and persuade the court to make the requisite finding*

under § 9-101(b).

Id. (Omissions, emphasis, and some alterations in original). Because the question of whether appellant has met her burden to present sufficient evidence to show that Rachel will not be abused in the future if returned to her custody is within the discretion of the trial court, we will reverse only for an abuse of that discretion. See In re: Shirley B., 419 Md. at 18.

In this case, the Department rebutted the presumption that it was in Rachel's best interest to remain in appellant's custody by demonstrating that appellant had abused Rachel. As noted above, although appellant presented evidence that she was taking steps to better control her behavior, including taking new medication and participating in therapy, the record reflects that she continues to struggle with serious emotional outbursts. For example, as discussed above, only one month before the start of the CINA adjudication, appellant refused to stop calling Rachel derogatory names, and Michael B. was forced to call law enforcement when appellant "jumped on top of him." Dr. Miller, who testified on behalf of appellant, stated that appellant was "making progress but there is much work yet to be done. . . . [Her work should stabilize before Rachel [sh]ould resume on a full-time basis with her." We are satisfied that the circuit court properly exercised its discretion in removing Rachel from appellant's custody and finding that appellant failed to demonstrate that Rachel would not be abused in the future if returned to her care.[10]

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

FOOTNOTES

1. Michael B., Rachel's father, and appellant were not married or residing together at the time of the incidents in question. Rachel was in the sole legal and physical custody of appellant pursuant to a court order issued by the circuit court.

2. At the February 21, 2012, hearing, the Department amended the petition. The petition quoted below reflects the amendments as noted by the circuit court.

3. The second day of the hearing was to occur on February 9, 2012. On February 8, 2012, appellant was hospitalized and unable to attend the hearing the following day. Upon finding that appellant was "being held at the hospital[,]" rather than staying there voluntarily, the circuit court continued the case to February 21, 2012.

4. Although the circuit court's written order states that Rachel would be placed in shelter care with Angela M., appellant's aunt, the record reflects that Rachel was placed in shelter care with Pamela M., appellant's sister.

5. In its February 22, 2012, order, the circuit court found that appellant had been diagnosed with Bipolar Disorder III. Appellant argues that this finding is clearly erroneous, as her therapist diagnosed Bipolar Disorder II. We conclude that this error is harmless, as it was not appellant's diagnosis, but rather her actions, on which the circuit court relied in finding that appellant abused and neglected Rachel.

6. Although appellant submitted a reply brief, she advances no new legal arguments in response to the Department's positions. Rather, appellant states only that her "position is articulated in her primary [b]ind" and reiterates her request that the CINA finding be vacated and that Rachel be returned to her custody. In the altemative, appellant requests that the case be remanded to the circuit court.

7. C.J.P. § 3-819(e) provides, in pertinent part:

> **If the allegations in the petition are sustained against only one parent** of a child, and there is another parent available who is able and willing to care for the child, t**he court may not find that the child is a child in need of assistance**, but, before dismissing the case, the court may award custody to the other parent.

(Emphasis added).

8. In this case, the circuit court found that Michael B. neglected Rachel and that he was "not now able to give [Rachel] proper care and attention[.]" On appeal, appellant argues that neither she nor Michael B. were "unable or unwilling to provide proper care," and that Michael B.'s allowing Rachel to see her did not constitute neglect on his part.

9. Md. Code Ann., Fam. Law Art. § 9-101(b) provides:

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.

10. Appellant's reliance on In re: Jertrude O., Raissa O., Letycia O., 56 Md. App. 83, 56 (1983), for the proposition that Rachel should not have been removed from her home is unpersuasive. In In re: Jertrude O., id. at 94, 96, three children, who had recently immigrated to the United States from Central Africa, were adjudicated CINA because "they were not receiving ordinary and proper care and attention" "in accord with our standards of child rearing." This Court held, however, that the children should not have been removed from the family home because, although they were in need of assistance, "[t]here was not the slightest evidence that the parents, [ ] either of them, had abused the child[ren]." Id. at 97-98. Here, the circuit court found that appellant had abused and neglected Rachel. In re: Jertrude O. is, therefore, inapposite.

In In re: Joseph G., 94 Md. App. 343, 352, 348 (1993), another case on which appellant relies, this Court refused to deny the previously non-custodial father custody of the child. Although the child was adjudicated a CINA, the court made no finding that the father had abused or neglected him. Rather, the CINA adjudication was based on abuse by the mother and an unwillingness or inability by the father to properly care for the child. Id. at 348. In re: Joseph G. is, therefore, not dispositive.

Cite as 10 MFLM Supp. 51 (2012)

Domestic protective order: final order: jurisdiction

Gerald Anthony Forest
v.
Vivian K. Morrison-Forest

No. 2661, September Term, 2010

Argued Before: Wright, Berger, Kenney, James A., III (Ret'd, Specially Assigned), JJ.

Opinion by Berger, J.

Filed: August 24, 2012. Unreported.

The trial court had jurisdiction to proceed with a Final Protective Order Hearing even after the petitioner had filed a motion to rescind the Temporary Ex Parte Protective Order, because the temporary order had not expired and could not be rescinded without a hearing.

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

This appeal arises from a final protective order issued at the request of Vivian K. Morrison-Forest, appellee. The Circuit Court for Charles County entered the final protective order on January 3, 2011. Gerald Anthony Forest, appellant, filed this timely appeal.

Forest presents the following question for our consideration:[1]

> I. Did the trial court have jurisdiction to proceed with a Final Protective Order Hearing under § 4-506 of the Family Law Article of the Annotated Code after the Petitioner (the Appellee) filed a Motion to Rescind the Temporary Ex Parte Protective Order under § 4-507 of that Article, before anything had been filed by Defendant (Appellant) and prior to such hearing?

For the reasons set forth below, we conclude that the Circuit Court for Charles County had jurisdiction to proceed with the final protective order hearing, and accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 2010, Vivian K. Morrison-Forest ("Morrison-Forest") filed a petition against Gerald A. Forest ("Forest") for protection from domestic violence. In her petition, Morrison-Forest stated that, on several occasions, she had returned to her home to find Forest there although he had not been invited. Morrison-Forest stated that she had asked Forest to stay away from her home but he had not acquiesced to her requests. A temporary protective order was issued on November 17, 2010. A hearing was held on November 22, 2010. Forest, having not yet been served, did not appear. Morrison-Forest did appear at the November 22, 2010 hearing. The court scheduled a protective order hearing for December 13, 2010.

On November 29, 2010, Morrison-Forest filed a Petition to Modify/Rescind Protective Order. In her petition, Morrison-Forest asked the court to rescind the protective order, giving the reason, "am not being threatened." The court did not respond to Morrison-Forest's petition to rescind. On December 2, 2010, unaware that Morrison-Forest had filed a petition to rescind, Forest filed a motion for postponement of the December 13 hearing because he was scheduled for surgery. That motion was denied. The final protective order hearing was held on December 13, 2010. Neither Forest nor Morrison-Forest appeared at the hearing; Forest's attorney, however, did appear at the December 13, 2010 hearing. The circuit court extended the temporary protective order and set a final protective order hearing for January 3, 2011.

On January 3, 2011, the final protective order hearing was held.[2] Morrison-Forest appeared *pro se* and Forest appeared represented by counsel. Both parties agreed to the entry of a consent final protective order with no finding of abuse.[3] The final protective order issued by the Circuit Court for Charles County (Harrington, J.) included a finding of abuse rather than no finding of abuse. Forest filed a timely notice of appeal to this Court on January 21, 2011.

On May 24, 2011, while the appeal was pending before this Court, Judge Harrington wrote to this Court, requesting leave to correct a clerical error pursuant to Maryland Rule 2-535(d)[4], stating that, "[t]he final protective order with a finding of abuse in this case should have been entered as a consent protective order with no finding of abuse." On November 7,

2011, Appellant's counsel submitted a letter to this Court stating, "[i]t seems to me that, if the Court of Special Appeals granted such leave and Judge Harrington entered the corrected Order under Maryland Rule 2-535(d), as she has proposed, this entire appeal would be rendered moot."

On April 5, 2012, this Court ordered that the Circuit Court for Charles County was granted leave to correct the clerical error by changing the final protective order with a finding of abuse to a final protective order with no finding of abuse. We ordered that, upon correction of the clerical error, Forest, through counsel, "shall advise the Court of Special Appeals whether he wishes to withdraw the appeal, and if so, Appellant shall file a notice of dismissal pursuant to Maryland Rule 8-601." On April 11, 2012, the Circuit Court for Charles County (Harrington, J.) issued an amended final protective order with no finding of abuse. Forest has not filed a notice of dismissal, and accordingly, we are left to address the merits of his first argument regarding the circuit court's jurisdiction to proceed with the final protection order hearing after the filing of Morrison-Forest's petition to rescind. We decline to address the merits of Forest's second argument, regarding the clerical error, as our April 5, 2012 order, as well as the Circuit Court for Charles County's April 11, 2012 order, render it moot.

DISCUSSION

Forest argues that because Morrison-Forest filed a petition to rescind the protective order on November 29, 2010, the circuit court did not have jurisdiction to proceed with a final protective order hearing on January 3, 2011. We disagree, and conclude that the circuit court had jurisdiction to proceed with a final protective order hearing and issue a final protective order.

Maryland Rule 2-506, governing voluntary dismissals of claims, provides, in pertinent part:

> *Except as otherwise provided in these rules or by statute*, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss all or part of the claim without leave of court by filing (1) a notice of dismissal at any time before the adverse party files an answer or (2) by filing a stipulation of dismissal signed by all parties to the claim being dismissed.

Maryland Rule 2-506(a) (emphasis added). Forest argues that Rule 2-506 applies in the instant case, and that Morrison-Forest's petition to rescind the protective order qualifies as a notice of dismissal. Because Forest had not filed an answer prior to the filing of the petition to rescind, Forest argues that pursuant to Maryland Rule 2-506(a), Morrison-Forest was entitled to dismiss the claim without leave of court by filing the petition to rescind the protective order.[5]

Maryland Rule 2-506(a), however, explicitly states that its terms apply "[e]xcept as otherwise provided in these rules or by statute." Section 4-507 of the Family Law Article, governing modification or rescission of protective orders, provides, in pertinent part:

> (a) Modification or rescission of orders; appeals. —
>
> (1) A protective order may be modified or rescinded during the term of the protective order after:
>
> (i) giving notice to all affected persons eligible for relief and the respondent; and
>
> (ii) a hearing.

Md. Code (1984, 2006 Repl. Vol.), § 4-507 of the Family Law Article ("FL"). *See Torboli v. Torboli*, 365 Md. 52, 63 (2001) ("[M]odification or rescission of a protective order must occur, by the court that issued it, during the term of the order and after notice and a hearing."). By its terms, FL § 4-507 provides that an order may not be modified or rescinded merely by filing a petition to modify or rescind a protective order. Rather, a hearing is required before a protective order is rescinded.[6] Accordingly, in the instant case, Morrison-Forest's temporary protective order was not rescinded when she filed her petition to modify or rescind. The petition to modify or rescind did not divest the circuit court of jurisdiction, and therefore, the circuit court retained jurisdiction when it considered the petition at the January 3, 2011 hearing and granted a final protective order.

Because we conclude that the circuit court retained jurisdiction at the point of the January 3, 2011 final protective order hearing, we affirm the judgment of the Circuit Court for Charles County.

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

FOOTNOTES

1. Forest presented a second question for our consideration regarding whether the circuit court erred by entering a final protective order with a finding of abuse. We have since addressed this issue by order, as discussed *infra*. Accordingly, we do not address this question in this opinion.

2. Up until the January 3, 2011 hearing, the matter had been before the Honorable Amy Bragunier of the Circuit Court for Charles County. The January 3, 2011 hearing was conducted before the Honorable Helen I. Harrington of the Circuit Court

for Charles County.

3. At times during the hearing, the term "consent without prejudice" was used rather than "consent order with no finding of abuse." It was clear, however, that both parties were consenting to a final protective order with no finding of abuse, and it is undisputed that both parties consented to the entry of a final protective order with no finding of abuse.

4. Maryland Rule 2-535(d) provides: "Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court."

5. Forest cites no authority to support his assertion that Maryland Rule 2-506(a) provides that filing a petition to rescind a protective order divests a circuit court of jurisdiction to hold a hearing on the matter.

6. In her brief, Morrison-Forest stated, "The court does need to have some mechanism in place to ensure that people that filed protective orders are not being coerced into dropping them." Although we do not speculate regarding the motivation underlying the hearing requirement found in FL § 4-507, we do believe that such a hearing may serve to address Morrison-Forest's concern regarding coercion.

NO TEXT

Cite as 10 MFLM Supp. 55 (2012)

Civil procedure: time to appeal: jurisdiction

Jeffery L. Brooks
v.
Jacqueline Brooks

No. 1270, September Term, 2010

Argued Before: Meredith, Woodward, Alpert Paul E. (Ret'd, Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: August 27, 2012. Unreported.

Because of the elapsed time between the judgment of absolute divorce, the filing of the motion for reconsideration and the appeal, the Court of Special Appeals had jurisdiction only over the denial of appellant's motion for reconsideration; and, since all of appellant's issues and argument related instead to the underlying Judgment of Absolute Divorce, the case was not properly before the 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 April 28, 2010, the Circuit Court for Baltimore City entered a Judgment of Absolute Divorce as to appellant, Jeffery L. Brooks, and appellee, Jacqueline Brooks, which required, among other things, that the parties sell the real property located at 3833 Lyndale Avenue, Baltimore, MD 21213 (the "3833 Property"). On May 19, 2010, appellant filed a motion to revise, alter, or amend the judgment pursuant to "[Maryland] Rule 2-534/2-535." On June 28, 2010, the circuit court entered an order denying appellant's motion. On July 23, 2010, appellant filed a Notice of Appeal.

Appellant presents three questions for review by this Court, which in the words of his brief are:

> 1. In considering disposition of the parties' marital property, including the two homes, did the trial court err in balancing the needs of the minor children, in its attempt to avoid potential future "elevated tension" between their parents, while ignoring the risk of loss of visitation with [appellant], due to his inability to afford alternative housing to meet their needs?
> 2. Did the trial court err in ordering [appellant] to sell the [3833 Property], when their was another, simple method available to achieve the identical financial adjustment of debt and equity between the parties, without requiring a sale and relocation?
> 3. Did the trial court have the authority to order [appellant] to vacate the [3833 Property], thereby dictating where he would not be allowed to reside?

For the reasons set forth herein, we shall hold that appellant's issues are not properly before this Court and therefore shall affirm the judgment of the circuit court.

Maryland Rule 8-202(a) sets forth that, "[e]xcept as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." This filing requirement is jurisdictional and, if not met, this Court does not acquire jurisdiction and the appeal must be dismissed. *Houghton v. Cnty. Comm'rs of Kent Cnty.*, 305 Md. 407, 413 (1986).

In a civil action, when a party files a motion within ten days after the entry of judgment under Rules 2-532, 2-533, 2-534, or 2-535, the time for noting an appeal is extended until the disposition of the motion. However, a motion for reconsideration under Rule 2-535 filed more than ten days after entry of judgment does not stay the running of the period for noting an appeal. *Pickett v. Noba, Inc.*, 122 Md. App. 566, 570 (1998).

As previously indicated, the circuit court entered the Judgment of Absolute Divorce on April 28, 2010. Appellant filed a motion to revise, alter, or amend the judgment pursuant to "[Maryland] Rule 2-534/2-535" on May 19, 2010. Appellant's motion to revise, alter, or amend the judgment thus was not filed within 10 days of the entry of the Judgment of Absolute Divorce, and the time to appeal that judgment was not extended. *See id.* Consequently, in order for appellant to appeal the Judgment of Absolute Divorce, he was required to note an appeal within 30 days after the April 28, 2010 entry of judgment, or by May 28, 2010. *See* Maryland Rule 8-202(a). Because appellant's Notice of Appeal

was not filed until July 23, 2010, this Court has no jurisdiction to review that judgment.

Appellant's Notice of Appeal, however, was filed within 30 days of the circuit court's denial of his motion to revise, alter, or amend the judgment. Accordingly, we have jurisdiction over appellant's appeal of the court's denial of that motion.

In the instant appeal, appellant contends, as to the first issue presented, that the circuit court's stated reasoning for ordering the sale of the 3833 Property, namely to avoid increased tension between the parties, was "inconsistent with the court's anticipation of better communication in the future" between the parties. Appellant also claims that the court ignored appellant's testimony that forcing him to sell the 3833 Property would leave him with insufficient assets to obtain appropriate housing to accommodate the needs of his children. According to appellant, the sale of the 3833 Property "will result in his having to give up his schedule of visitation with the children, either because he is unable to afford appropriate replacement accommodations for them or because he will need to take a second job, in order to afford his new housing expenses and not have time to spend with the children."

Regarding the second issue raised in this appeal, appellant contends that his alternative proposal "to retain the [3833 Property] and mortgage the property in an amount sufficient to pay off the home equity line of credit attached to the [other real property at 3835 Lyndale Avenue] would accomplish the exact same financial result, without the need to sell the [3833 Property] or to incur costs of sale." Finally, as to the third issue, appellant claims that "the trial court had no authority, absent a protective order, to decide that Appellant would not be permitted or entitled to reside adjacent to Appellee, if he so chooses, regardless of whether there is any sale of [the 3833 Property]."

Each of the above issues and arguments are directed only to the Judgment of Absolute Divorce. They do not address whether and how the circuit court abused its discretion in denying appellant's motion to revise, alter, or amend the judgment. Because we have no jurisdiction to review the Judgment of Absolute Divorce, the issues and arguments raised by appellant in the instant case are not properly before this Court. Accordingly, we affirm the judgment of the circuit court.

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

Cite as 10 MFLM Supp. 57 (2012)

Civil procedure: time to appeal: jurisdiction

Richard Katz
v.
Elizabeth Katz

No. 1661, September Term, 2010

Argued Before: Meredith, Woodward, Alpert, Paul E. ,(Ret'd, Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: August 27, 2012. Unreported.

Because of the elapsed time between the judgment, the filing of the motion for reconsideration and the appeal, the Court of Special Appeals had jurisdiction only over the denial of appellant's motion for reconsideration; and, since all of appellant's issues and argument related instead to the underlying judgment, the case was not properly before the court.

On July 13, 2010, the Circuit Court for Howard County entered a memorandum opinion and order which, among other things, (1) vacated an April 8, 2008 order that found Dr. Elizabeth Katz, appellee, in contempt of a previous order by interfering with the visitation rights of Richard Katz, appellant, with one of the parties' two minor children, David, and (2) ordered that appellant pay $10,966.61 to appellee for out-of-network medical expenses for the parties' minor children. On August 11, 2010, appellant filed a motion for reconsideration of the July 13, 2010 opinion and order. On August 31, 2010, the court denied appellant's motion. On September 28, 2010, appellant filed a notice of appeal.

Appellant presents three question for our review:

1. Did the Court err in vacating its April 8, 2008 Order?
2. Did the Court err in determining the amount of payments [appellant] made for extraordinary medical expenses?
3. Did the Court err in determining the amount [appellant] had to pay for extraordinary medical expenses?

For the reasons set forth herein, we shall hold that appellant's issues are not properly before this Court and therefore shall affirm the judgment of the circuit court.

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

DISCUSSION

Maryland Rule 8-202(a) sets forth that, "[e]xcept as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." This filing requirement is jurisdictional and, if not met, this Court does not acquire jurisdiction and the appeal must be dismissed. *Houghton v. Cnty. Comm'rs of Kent Cnty.*, 305 Md. 407, 413 (1986).

In a civil action, when a party files a motion within ten days after the entry of judgment under Rules 2-532, 2-533, 2-534, or 2-535, the time for noting an appeal is extended until the disposition of the motion. However, a motion for reconsideration under Rule 2-53 5 filed more than ten days after the entry of judgment does not stay the running of the period for noting an appeal. *Pickett v. Noba, Inc.*, 122 Md. App. 566, 570 (1998).

As previously indicated, the circuit court entered, on July 13, 2010, an order vacating its April 8, 2008 order and ordering appellant to pay $10,966.61 to appellee. Appellant filed a motion for reconsideration on August 11, 2010. Appellant's motion thus was not filed within 10 days of the entry of the July 13, 2010 order, and the time to appeal that order was not extended. *See Id.* Consequently, in order for appellant to appeal the July 13, 2010 order, he was required to note an appeal within 30 days after July 13, 2010, or by August 12, 2010. *See* Maryland Rule 8-202(a). Because appellant's notice of appeal was not filed until September 28, 2010, this Court has no jurisdiction to review the July 13, 2010 order.

Appellant's notice of appeal, however, was filed within 30 days of the circuit court's denial of his motion for reconsideration of the July 13, 2010 order. Accordingly, we have jurisdiction to review the court's denial of that motion.

In the instant appeal, appellant contends, as to the first issue, that the circuit court erred in vacating its April 8, 2008 order, because appellee failed to adequately demonstrate an exigent basis to enroll the par-

ties' minor son, David, in any outpatient facility, RedCliff Ascent, without securing the court's permission to do so. Appellant claims that the record did not show, and the court failed to identify, any "urgent need" for appellee to ignore the court's order prohibiting such interference with appellant's visitation rights with David. Appellant asserts that the court failed to review all of the transcripts, exhibits, testimony, and evidence, because "such a review demonstrates that there was no exigency and there was ample time to file a motion or petition" before sending David to the outpatient facility.

Regarding his second issue, appellant contends that the circuit court, in calculating the amount of payment for medical expenses appellant owed to appellee, erred in crediting him for only a single medical payment to appellee of $182.70, because the court failed to "account for all of the payments that [appellant] made" to appellee.

Finally, as to the third issue, appellant argues that the circuit court erred in ordering appellant to pay his pro-rata share of the parties' minor children's out-of-network medical expenses. First, appellant contends that the court erred in determining that the children's medical expenses were "medically necessary and reasonable." In support of his contention, appellant argues that (1) the court erred in relying on appellee's testimony as to whether the expenses were medically necessary and reasonable, (2) the court erroneously charged appellant for medical expenses that could have been covered by an in-network medical care provider, (3) the court erred in a variety of its factual findings that supported its determination that the expenses were medically necessary and reasonable, and (4) there was no competent proof on the record that the expenses were medically necessary and reasonable and the court failed to consider evidence that the expenses were unnecessary.

Second, appellant contends that the court erred in some of its evidentiary rulings. Specifically, appellant argues that the court erred in (1) allowing appellee's testimony about a doctor's recommendations for treatment facilities for David over appellant's hearsay objection, and (2) not permitting appellant to question appellee about benefits to her relationship with David after his stay at RedCliff Ascent. Finally, appellant contends that the court erred in failing to presume that appellee's failure to produce medical witnesses to testify as to whether the expenses were medically necessary and reasonable indicates that such testimony would have been unfavorable to appellee.

All of the above issues and arguments are directed only to the July 13, 2010 order. They do not address whether and how the circuit court abused its discretion in denying appellant's motion for reconsideration. Indeed, appellant never even mentions the court's denial of his motion for reconsideration anywhere in the argument section of his briefs. Because we have no jurisdiction to review the July 13, 2010 order, the issues and arguments raised by appellant in the instant case are not properly before this Court. Accordingly, we affirm the judgment of the circuit court.

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

Cite as 10 MFLM Supp. 59 (2012)

Divorce: attorneys' fees: assignment of judgment

Alan Billups
v.
Patricia DaSilva

No. 537, September Term, 2011

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

Opinion by Woodward, J.

Filed: August 28, 2012. Unreported.

Appellant failed to cite any legal authority to support his contention that the appellee's assignment of her judgment for attorneys' fees should be voided or that he has standing as a third party to challenge that assignment; nor was the court aware of any such authority. Therefore, the court declined to address the issue on appeal.

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 November 26, 2007, Alan Billups ("appellant") filed a Complaint for Custody in the Circuit Court for Anne Arundel County against his wife, Patricia DaSilva ("appellee"). On December 12, 2008, appellee filed a supplemental counterclaim for absolute divorce, custody, and child support. A merits hearing on custody, visitation, and child support was held on May 6 and May 8, 2009, and in an order entered on May 11, 2009, the court awarded appellee, among other things, attorney's fees in the amount of $10,000.

Following a merits trial on divorce, alimony, and monetary award held on June 8, 2009, the circuit court, in an order entered on June 9, 2009, (1) denied appellee's request for absolute divorce, (2) awarded alimony to appellee, (3) amended a prior child support award, and (4) awarded an additional $5,000 in attorney's fees to appellee. The court also ordered the entry of a money judgment in favor of appellee and against appellant for $15,000 to reflect the $10,000 and $5,000 awarded to appellee for attorney's fees.

Over one year later, on June 25, 2010, appellee filed a Notice of Assignment of Judgment, assigning her $15,000 judgment to her counsel's law firm. On July 6, 2010, the clerk of the circuit court issued a Notice of Modification of Judgment. On July 30, 2010, appellant, proceeding *pro se*, filed a motion in opposition to the notice of assignment of judgment and a motion to vacate the notice of modification of judgment, and filed a supplement to these motions on March 23, 2011. On April 19, 2011, the court entered an order denying appellant's motions.

Appellant presents one question for our review, which we have slightly rephrased: Did the circuit court err or abuse its discretion in denying appellant's Motion in Opposition to Assignment of Judgment? For the reasons set forth herein, we shall answer the question in the negative and accordingly affirm the judgment of the circuit court.

BACKGROUND

The parties were married on June 17, 2006 in Silver Spring, Maryland. One child, Agapi, was born of the marriage on December 28, 2006. The parties developed serious marital problems in November 2007, and appellee fled from the marital home and filed for a protective order. On November 26, 2007, appellant filed a Complaint for Custody and a Request for Emergency Relief in the circuit court, alleging that appellee intended to take Agapi to Brazil and requesting that the court grant appellant emergency custody and prohibit Agapi's removal from the State of Maryland. On the same day, the court granted appellant's emergency motion.

On December 10, 2007, the parties and their child went on a previously scheduled trip to Brazil. In January 2008, appellant returned to Maryland, but appellee and Agapi remained in Brazil. Appellant intermittently returned to Brazil from May 2008 through April 2009, but the parties did not resume their marital relationship.

On December 12, 2008, appellee filed a supplemental counterclaim for absolute divorce, custody, and child support in the circuit court. A merits hearing was held on May 6 and May 8, 2009, on the issues of custody, visitation, and support. In an order entered on May 11, 2009, the court awarded (1) custody of Agapi to appellee, subject to reasonable rights of visitation to appellant, (2) child support in the amount of $670 per month to appellee, and (3) attorney's fees in the amount of $10,000, plus the costs of the proceedings to appellee. The court also ordered that a merits trial on the issues of the divorce, alimony, and monetary

award be scheduled for June 8, 2009.

Following the June 8, 2009 merits trial, the circuit court, in a order entered on June 9, 2009, (1) denied an absolute divorce, (2) awarded alimony to appellee in the amount of $750 per month for a period of 18 months, (3) amended the child support award downward to $570 per month, and (4) awarded an additional $5,000 in attorney's fees to appellee. The court also ordered the entry of a money judgment in favor of appellee and against appellant for $15,000 to reflect the $10,000 and $5,000 awarded to appellee for attorney's fees.

On June 25, 2010, appellee filed a Notice of Assignment of Judgment, assigning her $15,000 judgment to the law firm of Joseph, Greenwald, and Laake, P.A. On July 6, 2010, the clerk of the circuit court issued a Notice of Modification of Judgment.

On July 30, 2010, appellant filed a motion in opposition to the notice of assignment of judgment and a motion to vacate the notice of modification of judgment, and sent a copy of his motions to appellee's counsel. On March 23, 2011, appellant filed a supplement to his motion in opposition to the assignment of judgment and motion to vacate the notification of modification of judgment. On April 19, 2011, the circuit court entered an order denying appellant's motions. On May 16, 2011, appellant filed a Notice of Appeal.

DISCUSSION

The Parties' Agreement

Appellant contends that "[t]he circuit court never reviewed the evidence presented outlining [appellee]'s joint agreement that waves [sic] [appellant]'s obligation to pay legal fees, which should void any and all obligations toward the balance of fees owed to [appellee']s council [sic]." Appellant claims that appellee's counsel deliberately withheld evidence of the joint agreement that was "in full effect as of August 24, 2009" from the court "prior to the judge's decision to grant the order of assignment." Appellant also contends that appellee "has clearly committed a fraudulent act by conferring assignment of her said attorney's fees over to council [sic], after making a joint agreement with [appellant] to remove liability to those fees."

Appellee claims that appellant's appeal should be dismissed for failure to cite legal authority for his arguments. We agree with appellee and shall explain.

"It 'is not our function to seek out the law in support of a party's appellate contentions." *Higginbotham v. PSC*, 171 Md. App. 254, 268 (2006) (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1997)). If a party fails to adequately brief an issue, we may decline to address it on appeal. *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003). In the instant appeal, appellant fails to cite any legal authority, nor are we aware of any, to support his contention that appellee's assignment of the judgment should be voided or that he has standing as a third party to challenge such assignment.[1] Because appellant provides no legal authority for his argument, it is not adequately briefed, and thus we decline to address it on appeal.

Appellee's Perjury

Appellant claims that appellee committed perjury by stating in the notice of assignment of judgment that appellant "has to date paid nothing toward the outstanding judgment for attorney's fees." In support of his argument, appellant directs us to two checks made by appellant and payable to appellee for "[l]egal fees." The first check is in the amount of $100 and the second is in the amount of $50. Although appellant's apparent payment of $150 on the judgment appears to be in conflict with appellee's statement in the assignment of judgment that appellant had paid nothing toward the judgment, such conflict has no effect on the validity of the judgment or on its assignment. Appellee and her assignee are required by law to credit all payments made by appellant on the judgment toward the satisfaction of such judgment. *See Univ. Sys. of Md. v. Mooney*, 407 Md. 390, 411 (2009) ("An unqualified assignment generally operates to transfer to the assignee all of the right, title and interest of the assignor in the subject of the assignment and does not confer upon the assignee any greater right than the right possessed by the assignor." (quotations and citations omitted)); *Rohr v. Anderson*, 51 Md. 205, 216 (1879) (a defendant sued on a judgment is not precluded from the benefit of partial payments of the judgment, under the plea of payment).

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

FOOTNOTE

1. Appellant's brief is replete with citations to and quotations from the law, none of which have any relevance to the issue presented in this appeal.

Cite as 10 MFLM Supp. 61 (2012)

CINA: OASDI benefits: reimbursement for cost of foster care

Alex Myers
v.
Baltimore County Department of Social Services, et al.

No. 2765, September Term, 2009

Argued Before: Krauser, C.J., Mattricciani, Graeff, JJ.

Opinion by Krauser, C.J.

Filed: August 29, 2012. Unreported.

The circuit court properly dismissed an action by a young man who had 'aged out' of the foster system regarding the Department of Social Services' practice of using his OASDI benefits to reimburse itself for costs incurred for his care, as the young man had no standing to bring an action under the Administrative Procedures Act, or to seek a declaratory judgment and a permanent injunction; and his remaining claims were either time-barred under the Maryland Tort Claims Act or lacked any merit.

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.

Following the death of his mother, appellant Alex Myers, then twelve years old, entered the foster care system under the auspices of the Baltimore County Department of Social Services ("DSS"). Two years later Alex's father died, making Alex eligible for his father's Social Security benefits under the Old-Age, Survivors, and Disability Insurance ("OASDI") plan of the Social Security Act. See Title II, Social Security Act, 49 Stat. 622, as amended, 42 U.S.C. § 401 et seq. The Commissioner of the Social Security Administration, upon application by DSS, designated DSS the "representative payee" of Alex's OASDI benefits. In October 2002, DSS began receiving Alex's monthly OASDI benefits and applied those funds each month to the costs of Alex's foster care until Alex "aged out" of the system in late December 2005.

In October 2006, a couple of months shy of his nineteenth birthday, Alex filed a written claim with the Maryland State Treasurer seeking to recoup those funds.[1] *See* Md. Code (2004 Repl. Vol.), § 12-101 et seq. of the State Government Article.[2] On November 1, 2006, the Treasurer acknowledged receipt of the claim, which was deemed denied on May 1, 2007, after six months had elapsed without a "final decision" by the Treasurer. See State Gov., § 12-107(d).[3]

On November 26, 2008, Alex filed an action in the Circuit Court for Baltimore County in which he named appellees, DSS and the Maryland Department of Human Resources and the Department's Secretary, as defendants. In his twelve-count complaint, Alex alleged that, by using his OASDI benefits to reimburse itself for the cost of his foster care, appellees had breached its fiduciary obligations to him under the Social Security Act and were liable to him for conversion, negligence, and unjust enrichment. He further maintained that DSS had violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights and had taken his property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article III of the Maryland Constitution. Finally he claimed that COMAR 07.02.11.29.L,[4] a Maryland regulation requiring that a foster child's resources "shall be applied directly to the cost of [foster] care," is not supported by any statutory authority, contravenes federal law and the United States and Maryland Constitutions and, therefore, violates the Maryland Administrative Procedure Act ("APA").

As relief, Alex sought a declaratory judgment that COMAR 07.02.11.29.L is invalid and illegal and a "permanent injunction prohibiting DSS and all other Maryland state agencies from taking the OASDI and other Social Security benefits belonging to a foster child to reimburse the State for the cost of foster care." Furthermore, he demanded $11,500 in damages (the estimated amount of OASDI benefits DSS received as his representative payee) and an unspecified amount of "[a]dditional damages to reimburse [him] for the additional harm he has suffered" as a result of DSS's appropriation of his OASDI benefits.

Appellees filed a motion to dismiss the complaint on the grounds that Alex lacked standing to bring the action, that the action was moot, and that it was time-barred under the Maryland Tort Claims Act ("MTCA"). The circuit court granted the motion *in toto*, ruling that

Alex had no standing to bring the APA claim or to seek a declaratory judgment and a permanent injunction. It further ruled that the remaining claims were time-barred under the MTCA and that, even if not time-barred, they had no merit.

The issue before us is whether the court erred in granting the motion to dismiss. Accordingly, we shall first address whether the court erred in ruling that Alex had no standing to bring the APA and the declaratory judgment claim.[5] Because we conclude that that ruling was not erroneous, we shall next address whether the circuit court erred in ruling that Alex lost his right to sue appellees in tort because he did not file a written claim with the State Treasurer within one year after the "injury" and failed to file his complaint within three years after the cause of action arose as required by the MTCA. Hence, the key issue for resolution is when the "injury" occurred. To the extent that Alex's claims are based on any loss sustained because of DSS's appointment as his representative payee, we hold that any such claims are clearly time barred under the MTCA. To the extent, however, that Alex alleged he suffered loss as a result of DSS's monthly expenditures of his OASDI benefits, we conclude that the cause of action arose each month DSS appropriated those funds, and, therefore, the time restrictions under the MTCA began running anew each month.

Consequently, because Alex filed his notice of claim with the Treasurer on October 16, 2006, and his complaint in the circuit court on November 26, 2008, his tort claims based on DSS's use of his OASDI benefits prior to November 26, 2005, are barred by the time restrictions in the MTCA. That means that his claim was timely filed under the MTCA only with respect to DSS's actions in November and December 2005. Nonetheless, we hold that the court properly dismissed Alex's tort claims because DSS spent his OASDI benefits on his behalf and in a manner consistent with federal and Maryland law and regulations. Finally, we hold that the court did not err in dismissing Alex's constitutional challenges. Accordingly, we shall affirm the judgment of the circuit court.

LEGAL BACKDROP[6]

Before we begin our analysis of Alex's contentions, we shall engage in a brief discussion of relevant law and regulations and what Alex's complaint does not contend.

Under the OASDI plan an unmarried, dependent child under the age of 18 (or under the age of 19 if a full-time elementary or secondary school student) may obtain benefits upon the death of his or her parent, provided the parent is an eligible wage-earner. 42 U.S.C. § 402(d)(1). The child typically receives the benefits until the month in which he or she attains the age of eighteen. *Id.*; 20 CFR § 404.352(b)(1).[7] Alex, who entered the foster care system in "late 1999" when he was about twelve years old, became eligible for OASDI benefits when his father died in 2001. His eligibility ended in December 2005 when he turned eighteen and left foster care.

The OASDI plan is administered by the Social Security Administration ("SSA"). Although the general policy of the SSA is that every beneficiary has the right to manage his or her own benefits, it recognizes that some beneficiaries may not be able to do so. CFR § 404.2001(b). If the SSA determines that it would be in the beneficiary's interest, regardless of his or her legal competency, it may appoint a "representative payee" and deposit the monthly payments with the payee to be used by the payee for the beneficiary's "use and benefit." 42 U.S.C. § 405(j)(1); 20 CFR § 404.2001. When the beneficiary is under the age of eighteen, as Alex was when he became eligible for the benefits, the SSA customarily appoints a representative payee. 20 CFR § 404.2010(b).

In appointing a representative payee, the SSA selects "the person, agency, organization or institution that," it believes, "will best serve the interest of the beneficiary." 20 CFR 404.2020. To implement that policy, the SSA has established a list of "preferred payees." 20 CFR §§ 404.2021. As for beneficiaries under age 18, the SSA prefers:

> (1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;
>
> (2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary's support and is demonstrating strong concern for the beneficiary's well being;
>
> (3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary's well being;
>
> (4) A relative or stepparent who has custody of the beneficiary;
>
> (5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary's support and is demonstrating concern for the beneficiary's well being;
>
> (6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary's well being; and

(7) An authorized social agency or custodial institution.

20 CFR § 404.2021(c).

That DSS is the last in the list of preferences is not of utmost concern, as these "preferences," according to the SSA, are "flexible" given that the SSA's "primary concern is to select the payee who will best serve the beneficiary's interest." 20 CFR § 404.2021.

Prior to designating a representative payee, the SSA provides written notification of its intention to the beneficiary.[8] 20 CFR § 404.2030(a). If the beneficiary is under age 15 or is an unemancipated minor under the age of 18, as Alex was when DSS applied for OASDI benefits on his behalf, the SSA will provide the written notice to the beneficiary's legal guardian or legal representative. *Id*. In his complaint Alex alleged that DSS did not notify him that it had applied for OASDI benefits on his behalf or that it had been designated his representative payee.[9]

In October 2002, the SSA appointed DSS to be Alex's representative payee. At the time of the designation Alex was about two months shy of his fifteenth birthday. The SSA sent DSS a "back-payment" and, from October 2002 until about December 2005, disbursed to DSS Alex's monthly OASDI benefits.[10] DSS then, each month, applied Alex's OASDI benefits to the cost of his foster care in accordance with COMAR 7.2.11.29.L, a Maryland regulation which authorizes DSS to utilize a foster child's "resources" to pay for or offset the cost of foster care services provided to the child.[11] In his complaint, Alex questioned the legality of this regulation and further alleged that DSS "took OASDI funds that it received while [he] was not in a placement provided by DSS, including stays with family members." He did not, however, support this allegation with any specific facts, such as the length of time he resided outside placements provided by DSS.[12]

COMAR 07.02.11.29 is entitled "Child Support and Other Resources for Reimbursement Towards Cost of Care" for the "Out-of-Home Placement Program."[13] The regulation provides in part:

> A. All of the child's resources, including parental support, the child's own benefits, insurance, cash assets, trust accounts, and, for the child who is preparing for independent living, the child's earnings, are considered, as established in the service agreement, in determining the amount available for reimbursement of the cost of care.
>
> B. In calculating the cost of care, the local department shall include the board rate, clothing allowance, any medical care payments made on behalf of the child, and any supplemental purchases made to meet the child's special needs.
>
> C. The local department shall:
>
> (1) Initiate child support for every child in out-of-home placement; and
>
> (2) Pursue support enforcement activity for both absent parents, unless the: (a) Legal rights of the parents or legal guardian have been officially terminated; and (b) Parents, parent, or legal guardian have been officially notified of the termination.
>
> * * *
>
> K. Other Resources for the Child.
>
> (1) Other resources available for the child may be in the form of cash assets, trust accounts, insurance (including survivor's disability insurance), or some type of benefit or supplemental security income for the disabled child.
>
> * * *
>
> **L. The child's resources shall be applied directly to the cost of care, with any excess applied first to meeting the special needs of the child, and the net excess saved in a savings account for future needs. Any potential benefits from other resources shall be pursued and made available if possible to the local department as payee.**

(Emphasis added.)

The federal regulations governing OASDI expenditures by a representative payee provide that the payee may use the OASDI benefits only for the "use and benefit" of the beneficiary as determined by the payee to be in the beneficiary's "best interests." 20 CFR § 404.2035(a). Spending the funds for "current maintenance," which, according to SSA regulations, includes "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items," is considered by the SSA to be "for the use and benefit of the beneficiary." 20 CFR § 404.2040(a)(1).

Citing a federal regulation that, if any OASDI funds remain after expenditures "consistent with the guidelines," the representative payee is required to conserve or invest those funds on behalf of the beneficiary, 20 CFR § 404.2045(a), Alex alleged, however, that DDS "did not preserve" any of his OASDI benefits and that he "aged out of foster care penniless." That does not appear to be entirely true. Although we are confined to the facts as set forth in his complaint, we

note that at the hearing on DSS's motion to dismiss the complaint, defense counsel informed the circuit court that "there were some excess funds that were remaining in [Alex's] account and they were paid to him" and offered an affidavit in support of that assertion.

At least once a year, the representative payee is obligated to provide the Commissioner of the SSA with an accounting of how the OASDI benefits were used. 42 U.S.C. § 405(j)(3)(A); 20 CFR § 404.2065. If the SSA has reason to believe that a representative payee is misusing a beneficiary's funds, the payee may be directed, "at any time," to file a "report." 42 U.S.C. § 405(j)(3)(D). A payee who misuses a beneficiary's funds may lose representative payee status and may be subject to criminal charges. 42 U.S.C. § 408.

If a representative payee is an "organization" (such as a "State or local government agency with fiduciary responsibilities or whose mission is to carry out . . . social service . . . related activities") and is found to have misused the benefits, the SSA may pay the beneficiary or an alternative representative payee "an amount equal to the misused benefits." 20 C.F.R. § 404.2041(b); 20 C.F.R. § 404.2040a(a)(1). Alex did not allege, however, that he sought recourse from the SSA with respect to his claim that DSS misused his OASDI benefits by reimbursing itself for expenses it had paid on his behalf.

STANDARD OF REVIEW

"In reviewing the Circuit Court's grant of a motion to dismiss, 'our task is confined to determining whether the trial court was legally correct in its decision to dismiss.'" *Menefee v. State*, 417 Md. 740, 747 (2011) (quoting *Washington Suburban Sanitary Commission v. Phillips*, 413 Md. 606, 618 (2010) (further citations omitted)). "In doing so, 'we accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party,' and 'will only find that dismissal was proper if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff.'" *Ferguson v. Loder*, 186 Md. App. 707, 713 (2009) (quoting *Zimmerman-Rubert v. Board of Education*, 179 Md. App. 589, 593 (2008)), *aff'd on other grounds*, 409 Md. 200 (2009).

I.
DISCUSSION
Administrative Procedure Act & Declaratory Judgment Counts

Alex contends that the circuit court erred in dismissing his Administrative Procedure Act ("APA")[14] claim and his request for a judgment avowing that COMAR 07.02.11.29 is invalid and illegal. Specifically, Alex asserts that DSS's use of his OASDI benefits to reimburse itself for the cost of his foster care, based on COMAR 07.02.11.29, violated the APA because that regulation, he contends, was promulgated in the absence of any State statute authorizing DSS to utilize a foster child's social security benefits or other resources to pay for the cost of foster care. He further claims that he is entitled to declaratory relief on this issue because, although he is no longer in foster care, DSS "continues to rely on COMAR 07.02.11.29 to retain his benefits."

Appellees respond that the circuit court properly dismissed these counts because of the lack of a justiciable controversy. They point out that, by the time Alex filed suit, he had aged out of the foster care program and that, as a consequence, DSS was no longer the representative payee of his OASDI benefits. And because Alex was no longer affected by COMAR 07.02.11.29 and the regulation could not be applied to him in the future, they assert that he could not maintain an action for declaratory judgment.

We begin our analysis by noting:

> A court, in the absence of certain exceptions not applicable here, may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceeding, and if:
>
> (1) An actual controversy exists between contending parties;
>
> (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; or
>
> (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.

Maryland Code (2006 Repl. Vol.), § 3-409(a) of the Courts & Judicial Proceedings Article:

Furthermore, a court may "determine the validity of any regulation if it appears to the court that the regulation or its threatened application interferes with or impairs or threatens to interfere with or impair a legal right or privilege of the petitioner." State Gov., § 10-125(b). Although "a party is not required to wait until a regulation is enforced against it to seek a declaratory judgment that the regulation is invalid," *Oyarzo v. Maryland Dept. Of Health & Mental Hygiene*, 187 Md. App. 264, 272 (citing *Medstar Health v. Health Care Commission*, 376 Md. 1, 17 (2003)), *cert. denied*, 411 Md. 601(2009), "the controversy must be ripe for adju-

dication, because 'the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action." *Id*. at 18 (quoting *Hatt v. Anderson*, 297 Md. 42, 45 (1983)).

"Part of showing a justiciable controversy is pointing to specific 'factual allegations which, under all the circumstances, show that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Green v. Nassif*, 426 Md. 258, 292 (2012) (quoting *Hamilton v. McAuliffe*, 277 Md. 336, 340 (1976) (further citations omitted)). In other words, for a court to entertain a declaratory judgment action there must be a "live controversy" between the parties to the action. But where there is no "real possibility" that the regulation may be applied adversely against the plaintiff, the issue is moot and declaratory relief is inappropriate. *Jackson v. Millstone*, 369 Md. 575, 587-588 (2002).

By the time Alex filed suit he was no longer in or eligible for foster care, and DSS was no longer acting as his representative payee for his OASDI benefits. In fact, it appears that Alex was no longer even entitled to OASDI benefits. Consequently, Alex could not seek a declaratory judgment challenging the legality of COMAR 07.02.11.29 because there was no real possibility that the regulation would or could ever apply to him again.

Furthermore, we disagree with Alex's assertion that it is "irrelevant" that he is no longer in foster care because DSS "continues to rely on COMAR 07.02.11.29 to retain his benefits." Not only is there no suggestion in his complaint that the benefits have been retained by DSS, but, in fact, Alex repeatedly asserted that his OASDI benefits were spent by DSS each month to cover his foster care costs and that DSS failed to conserve any of those benefits.

In any event, as appellees point out, the Court of Appeals has rejected the contention that the Maryland regulation directing DSS to utilize a child's resources to pay for the cost of foster care lacks statutory authority. In *Conaway v. Social Services Administration*, 298 Md. 639, 644 (1984), the Court determined that the use of a foster child's social security and veteran's benefits by the Department of Social Services to pay for the cost of foster care "is authorized by regulation and does not otherwise violate State law." *Id*. at 644.

The regulation at issue in *Conaway*, COMAR 07.02.11.07 entitled "Resources for Reimbursement Towards Cost of Care," was the predecessor to COMAR 07.02.11.29, which is at issue here. *Id*.[15] Because Article 88A, section 60 (now codified at Md. Code (2006 Repl. Vol.), Family Law, § 5-527), authorized payment rates for foster care providers but did not specify the source of funds to be used, and because Article 88A, section 5(a) (now codified at Md. Code (2007), Human Services, § 4-207) authorized the State Director of Social Services to adopt rules and regulations to carry out his responsibilities, the Court reasoned that "regulations about foster care payment rates and the source of funds to make these payments are necessary to carry out duties imposed by law." *Id*. Expounding upon that point, the Court stated:

> Federal benefits were paid to the State and could have been used to pay for the cost of the child's care. These benefits were committed to the department [as the foster child's representative payee] for the child's benefit. As resources that could offset the cost of care, their use was a proper subject for regulation. Because these regulations were within the statutory authority, they had the force of law; thus, they provided an adequate legal basis for the local department's actions [in using the benefits to reimburse itself for the cost of the beneficiary's foster care].

Id.

Consequently, we hold that the circuit court did not err in dismissing the APA and declaratory judgment counts of Alex's complaint.

II.
TIMELINESS OF CLAIMS UNDER MARYLAND TORT CLAIMS ACT

The doctrine of sovereign immunity bars individuals from bringing actions against the State. By enacting the MTCA in 1981, however, the General Assembly waived the State's immunity and "afforded a remedy for individuals injured by tortious conduct attributable to the State," if certain conditions are met. *Condon v. State*, 332 Md. 481, 492 (1993). Specifically, the MTCA provides that: "A claimant may not institute an action under this subtitle unless:"

> (1) the claimant submits a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim;
>
> (2) the Treasurer or designee denies the claim finally; and
>
> (3) the action is filed within 3 years after the cause of action arises.

State Gov. § 12-106(b).

The time restriction for filing a written claim with the Treasurer is not a statute of limitations but rather "a condition precedent to the initiation of an action under

the [MTCA]." *Johnson v. Maryland State Police*, 331 Md. 285, 290 (1993) (quoting *Simpson v. Moore*, 323 Md. 215, 219 (1991). In drawing that distinction, the Court of Appeals explained:

> We have previously defined a condition precedent as a condition attached to the right to sue at all. It operates as a limitation of the liability itself as created, and not of the remedy alone. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. Conversely, a statute of limitations affects only the remedy, not the cause of action. A condition precedent cannot be waived under the common law and a failure to satisfy it can be raised at any time because the action itself is fatally flawed if the condition is not satisfied. This requirement of strict or substantial compliance with a condition precedent is of course subject to abrogation by the General Assembly. . . .

Rios v. Montgomery County, 386 Md. 104, 127-128 (2005) (quotation marks and citations omitted).

Accordingly, failure to file a written claim with the State Treasurer within one year after the injury that is the basis of the claim "extinguishes the right" to sue the State in tort. *Ferguson, supra*, 186 Md. App. at 727. *Accord, State v. Sharafeldin*, 382 Md. 129, 148 (2004) (holding that the one-year time restriction in State Gov. § 12-202 for filing an action against the State for breach of contract "is not a mere statute of limitations but sets forth a condition to the action itself" and hence, "[t]he waiver of the State's immunity vanishes at the end of the one-year period.").

Tolling principles applicable to statutes of limitations are inapplicable to conditions precedent and, consequently, inapplicable to the time restrictions in the MTCA. *Ferguson, supra*, 186 Md. App. at 714 (citations omitted). Thus, in *Johnson, supra*, the Court of Appeals held that the general tolling provision applicable to minors in Courts, § 5-201[16] does not apply to the MTCA and, therefore, could not be invoked to extend or toll the time period for filing a written claim with the Treasurer. 331 Md. at 291. In so holding, the Court stated: "The Maryland Legislature has not, in any way, indicated that the Maryland general tolling statute [set forth in the Courts Article] should be applicable to the Tort Claims Act's [then] 180-day claim requirement." *Id.* at 290.[17] *See also Rios, supra*, 386 Md. at 142 (holding that the 180-day notice provision in the Local Government Tort Claims Act ("LGTCA") applied to minors and that minority status *per se* does not excuse, under that statute's "good cause" exception, strict compliance with the LGTCA's notice provision). The *Johnson* Court stated that it was irrelevant that the facts "might show that the State suffered no prejudice" because of the plaintiff's failure to timely file a notice of claim, 331 Md. at 291, pointing out that in 1993, the Governor vetoed a bill passed by the General Assembly that would have amended State Gov., section 12-106, to allow a court to entertain an action under the MTCA despite the untimely filing of a written claim, unless the State could show that it was prejudiced thereby. *Id.* at 291 n.5.

Thus, while there *is* an express "good cause" exception to the time restriction for filing a written claim under the LGTCA,[18] there is no corresponding exception under the MTCA. *Simpson, supra*, 323 Md. at 228. Nor may the Court "'judicially place in the statute language which is not there' in order to avoid a harsh result." *Leppo v. State Highway Administration*, 330 Md. 416, 423 (1993) (quoting *Simpson, supra*, 323 Md. at 225) (further quotations omitted)). And finally, "[i]f the State chooses, by legislative action, to waive its sovereign immunity, this Court strictly construes the waiver in favor of the State." *Proctor v. WMATA*, 412 Md. 691, 709 (2010). *See also, Rios, supra*, 386 Md. at 142 ("We 'are not free to enlarge that consent to be sued which the Government, through [the General Assembly] has undertaken to carefully limit.'") (quotation omitted).

Consequently, the "discovery rule" does not apply to the MTCA's written claim requirement. *State v. Copes*, 175 Md. App. 351, 366 (2007) (citing *Cotham v. Board of County Comm'rs for Prince George's County*, 260 Md. 556, 561-562 (1971)). *Accord, Trimper v. Porter-Hayden*, 305 Md. 31, 35-36 (1985) (rejecting application of the discovery rule to wrongful death actions because to apply it "would be violating the legislatively imposed time limitation on the legislatively created right of action.").

Under the discovery rule, a cause of action in tort does not accrue for statute of limitations purposes, "until such time as the plaintiff was on inquiry notice of the alleged wrong." *Copes, supra*, 175 Md. App. at 366 (citations omitted). But, where a notice of claim requirement, such as that under the MTCA, is a condition precedent to filing an action, the time restriction for filing the notice begins to run "when the elements of [the] cause of action have come into existence." *Id.* at 373.

In *Haupt v. State*, 340 Md. 462, 474 (1995), the Court addressed the MTCA's written claim requirement in the context of a third-party claim, a situation not expressly provided for in the statute. While a third-party claim is not at issue here, the Court's discussion

of the timeliness of the notice of claim under the MTCA is relevant to the facts before us.

The *Haupt* Court observed that the purpose of the notice requirement "obviously is designed to give the State early notice of claims against it." *Id*. at 470. "That early notice, in turn, affords the State the opportunity to investigate the claims while the facts are fresh and memories vivid, and, where appropriate, settle them at the earliest possible time." *Id*.

The *Haupt* Court also observed that the MTCA "requires that there be a nexus between the claim made and the injury incurred." *Id*. Thus, when a tort claim is made by the potential plaintiff in the underlying action (verus a third-party claimant seeking contribution or indemnification from the State), the Court stated that "it is patent that the [then] 180-day period [for filing a written claim] begins to run as soon as the plaintiff or the plaintiff's property is injured." *Id*. at 472. In other words, "[t]he timeliness of the [State Gov.] § 12-106(b)(1) notice is not tied to when a particular cause of action accrues; rather it is dependent upon the point at which the claimant suffered personal or property damage injury." *Id.* at 477.[19] *But see Heron v. Strader*, 361 Md. 258, 265 (2000) (where a majority of the Court held that, under the LGTCA, the date of "injury," for purposes of filing a claim with the local government, is "equivalent to the time when the plaintiff's cause of action has arisen").

Because the time restriction for filing a claim with the Treasurer is not tolled by either Alex's minority status, *Johnson, supra*, or by the discovery rule, *Copes, supra*, the key question here is when did the alleged injury occur. After determining that Alex's alleged injury occurred in October 2002, when DSS was appointed Alex's representative payee and began receiving his OASDI benefits and using those funds for Alex's foster care, the lower court ruled that Alex's action was untimely because both the written claim, filed on October 16, 2006, and the complaint, filed on November 26, 2008, were filed beyond the time periods set forth in the MTCA.

Maintaining that the court below erred in so ruling, Alex does not focus on the date(s) he allegedly sustained injury but rather relies on tolling principles applicable to statutes of limitations to support his argument that the time periods for filing his written claim and action should have been extended. Alex does not, however, cite any authority for applying the various tolling theories he relies upon to conditions precedent for filing suit under the MTCA. And, as we previously observed, conditions precedent are quite different from statutes of limitations, as tolling principles applicable to statutes of limitations do not apply to conditions precedent absent express statutory authority. *Ferguson, supra*, 186 Md. App. at 714 (citations omitted). [20]

Alex responds, however, that DSS "committed tortious acts each month by taking the benefits for its own use." From that assertion it appears that Alex believes he sustained injury each month that DSS used his OASDI benefits to offset his foster care costs, instead of applying those funds to some undefined needs or conserving them for his ultimate transition out of foster care.

Disagreeing, appellees contend that DSS's actions "in receiving and disbursing payments through time as a representative payee are merely the continuing aspects of a unitary action that was initiated when DSS became the representative payee." Appellees, therefore, maintain that Alex's alleged injury occurred in October 2002, and as such, the conditions precedent under the MTCA began to run at that time.

In support of their position, appellees rely on *Miller v. Pacific Shore Funding*, 224 F. Supp 2d 977 (Md. 2002), *affm'd* 92 Fed. Appx. 933 (4th Cir. 2004). But their reliance upon that case is misplaced.

In *Miller*, the plaintiff borrowers brought an action against mortgage lenders alleging that the lenders violated the Maryland Secondary Mortgage Loan Law (Md. Code.(2000 Repl. Vol.), §§ 12-401 – 12-415 of the Commercial Law Article) and the Maryland Consumer Protection Act (Com. Law, §§ 13-101 – 13-501)), by charging and collecting excessive or unauthorized fees when making and securing loans. *Id*. at 983. The defendants moved to dismiss the action on the ground, among others, that the plaintiffs had failed to file the action within three years after the loan closed. *Id*. at 985. The plaintiffs opposed the motion, claiming that, because the allegedly illegal fees were included in the total indebtedness on the loan, the lender charged, received, and collected the illegal fees with each monthly mortgage payment and, therefore, "a new and actionable violation" of the law occurred with each month and, consequently, their claim for payments made in the three-year period prior to filing the complaint was timely. *Id*. at 989.

In rejecting that argument, the United States District Court opined: "The apparently punctuated charging, receipt, and collection are no more than the lingering, ongoing, continuing aspects of a unitary action initiated more than three years ago." *Id*. at 990. "The allegedly illegal fees," it expounded, "were itemized on the face of the loan documents [plaintiff] signed [at closing]. The continued charging, collecting, and receiving of those fees by the lender or its assignees do not continuously renew the accrual of his cause of action." *Id*. Rather, the "actions" attributed to the lender, concluded the District Court, "are but one *action*," *id*. at n.6, and "[t]he alleged statutory violation, though continuing, is solitary." *Id*. Thus, "the wrong that continues over time," reasoned the court, differs from

"*wrongs* that are perpetrated seriatim." *Id*.

To the extent that Alex is alleging that he suffered injury or his rights were violated because of DSS's appointment as his representative payee, any such claims are clearly time barred under the MTCA because that appointment was a single act that occurred in October 2002, although it continued through December 2005. But, to the extent Alex suffered injuries as a result of DSS's alleged misuse of his monthly OASDI benefits, we believe that a new claim arose each month DSS allegedly misappropriated those funds, and, consequently, the time restrictions for filing a claim and cause of action under the MTCA also began to run anew each month. That is to say, we disagree with appellees that DSS's expenditure of Alex's OASDI benefits was a unitary action that merely continued over time. In our view, because DSS received Alex's OASDI benefits each month, and each month DSS had the discretion to spend or conserve those benefits in a manner consistent with the SSA's guidelines, each alleged misappropriation was a separate and distinct "wrong."

Because Alex filed his notice of claim with the Treasurer on October 16, 2006, and then his complaint on November 26, 2008, his cause of action based on DSS's actions during December 2005 (and possibly November 2005, depending on the day DSS appropriated the OASDI benefits that month), were timely under the MTCA. But any claims based on DSS's use of Alex OASDI benefits prior to November 2005 are clearly barred by the time restrictions in the MTCA.[21]

That is not to say that Alex was left without a remedy. As noted above, the SSA has regulations permitting reimbursement to a beneficiary upon its determination that a representative payee has misused the beneficiary's OASDI benefits. *See* 20 CFR. § 404.2041(b). But it is not clear from the record before us whether Alex pursued a "misuse of funds" claim with the Commissioner of the SSA, who bears responsibility for the OASDI program (including oversight of representatives payees) and who, therefore, is in the best position to determine whether DSS acted in Alex's best interests when using his OASDI benefits for foster care costs.

III.
Tort Claims

Turning now to the court's dismissal of Alex's tort claims, we hold that the court committed no error in dismissing them.

A. Breach of Fiduciary Duties (Negligence and Social Security Act Violation Claims)

Alex contends that the circuit court erred in dismissing his negligence claim because DSS breached its "state law" fiduciary duties, he maintains, by applying his OASDI benefits to the cost of his foster care, even though he claims he had no obligation to pay for that care.[22] Alex asserts that the level of care provided to him by DSS was no different than the care provided to other foster care children and, as such, he obtained no benefit from DSS's use of his OASDI funds. By applying his OASDI benefits to his foster care costs, DSS was, Alex charges, "engaged in self-dealing" and failed to act in his "best interests."

Alex further contends that the circuit court erred in dismissing his claim that DSS violated the Social Security Act and thereby breached its "federal law" fiduciary duties. It did that, insists Alex, by using his OASDI benefits to reimburse itself for the cost of his foster care and by not considering his "best interests or individual needs" when appropriating those funds for itself. Alex proposes that COMAR 07.02.11.29, which authorizes DSS to apply for representative payee status and reimburse itself with OASDI benefits for foster care services provided to the beneficiary, violates the Social Security Act's requirement that representative payees exercise individualized discretion to determine how to best use OASDI benefits on behalf of a beneficiary.

Appellees respond that, because DSS applied to be Alex's representative payee in accordance with State regulations and used Alex's OASDI benefits to pay for his current maintenance, as permitted by State and federal regulations, it did not breach any fiduciary duty.

In *Washington State Dept. of Social & Health Services v. Keffeler*, 537 U.S: 371, 386 (2003), the Supreme Court declared that a social service agency's use of OASDI benefits to reimburse itself for the cost of foster care services is "consistent with" the SSA's regulations directing payees to use the funds for the beneficiary's use and benefit, including current maintenance. Rejecting the notion that "allowing a state agency to reimburse itself for the costs of foster care is antithetical to the best interest of the beneficiary foster child," *id*. at 389, the *Keffeler* Court observed that the "premise that promoting the 'best interests' of a beneficiary requires maximizing resources from left-over benefit income ignores the settled principle of administrative law that an open-ended and potentially vague term is highly susceptible to administrative interpretation subject to judicial deference." *Id*. at 390. "Under her statutory authority, the Commissioner has decided," the Court pointed out, "that a representative payee serves the beneficiary's interest by seeing that basic needs are met, not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants." *Id*. at 390.[23]

Following *Keffeler*, the intermediate appellate court of the State of Washington held that, assuming the state social service agency had a fiduciary duty as representative payee of a mental patient's OASDI benefits, it did not breach that duty by using those benefits to reimburse itself for the beneficiary's hospitalization costs. *Kolbeson v. Dept. of Social & Health Services*, 129 Wn. App. 194, 211, 118 P.3d 901 (2005). The court reasoned that the agency's actions were "consistent with state and federal law." 129 Wn. App. at 211. The court also stated that if the plaintiff "suspects misuse of his benefits, this complaint should properly be directed to the SSA Commissioner," who oversees representative payees. *Id*.

The United States Court of Appeals for the Sixth Circuit reached the same conclusion in *Gean v. Hattaway*, 330 F.3d 758, 770 (6th Cir. 2003). There, the Sixth Circuit held there was no breach of fiduciary duty where the social security disability benefits of certain juveniles in the custody of the State of Tennessee, after having been adjudicated delinquent, were applied by the department of children's services, their representative payee, to offset the cost of the juveniles' current maintenance while in state custody, even though other federal and state funds were available to pay those costs. *Id*. The Court declared that the Supreme Court in *Keffeler, supra*, "soundly rejected" such a contention. *Id.* (citing *Keffeler, supra*. 537 U.S. at 390.)

Because DSS used Alex's OASDI benefits in a manner consistent with both State and federal law and regulations, we conclude that the circuit court did not err in dismissing Alex's negligence and breach of Social Security Act claims.

B. Conversion

Alex contends that the circuit court erred in dismissing his claim for conversion. As the purported "beneficial owner of the benefit checks," Alex claims that he "had a right to have the funds applied in his best interests." Because, in his words, "DSS's decision to pay the OASDI checks to itself interfered with [his] rights, and permanently excluded him from enjoyment of those rights," he maintains that that decision "constituted a conversion."

Appellees reply that Alex's conversion claim was rightfully dismissed because DSS "did not exert ownership or dominion over [Alex's] property, but rather, it merely acted in accordance with the guidance given by the SSA's own regulations regarding how the benefits are to be used." Appellees assert, moreover, that Alex "did not have actual possession of the benefits, nor was he entitled to immediate possession of such, because SSA determined that he needed a representative payee." They, conclude, therefore, that "there could be no conversion pursuant to Maryland law."

"Conversion is an intentional tort, consisting of two elements, a physical act combined with a certain state of mind." *Darcars Motors v. Borzym*, 379 Md. 249, 261 (2004). "The physical act can be summarized as 'any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it.'" *Id*. (quoting *Allied Investment Corp. v. Jasen*, 354 Md. 547, 560 (1999) (further quotation omitted)). "The gist of a conversion is not the acquisition of the property by the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled." *Id*. at 262 (quoting *Wallace v. Lechman & Johnson, Inc.*, 354 Md. 622, 633 (1999)).

In addition to the physical act of exerting unlawful control over the property of another, conversion requires a "state of mind," such that, "[a]t a minimum, a defendant liable of conversion must have 'an intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights." *Id*. (quoting *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 414 (1985)). "The defendant may have the requisite intent even though he or she acted in good faith and lacked any consciousness of wrongdoing, as long as there was an intent to exert control over the property." *Id*.

"The general rule is that monies are intangible and, therefore, not subject to a claim for conversion." *Lasater v. Guttmann*, 194 Md. App. 431, 447 (2010) (quoting *Allied Investment Corp., supra*, 354 Md. at 564), *cert. denied*, 417 Md. 502 (2011). "An exception to this rule exists, however, if the monies alleged to have been converted are 'specific segregated or identifiable funds.'" *Id*.

Assuming that Alex's OASDI benefits were kept by DSS as "segregated or identifiable funds," Alex nonetheless failed to state a cause of action for conversion given that DSS, as his representative payee, used his OASDI benefits on his behalf and in a manner consistent with State and federal law.

C. Unjust Enrichment

Alex claims that the circuit court erred in dismissing his claim for unjust enrichment. Alex's complaint alleged, first, that DSS "obtained a benefit by the wrongful act of receiving and wrongfully retaining and/or wrongfully applying [his] OASDI payments"; second, that "DSS accepted and retained [his] OASDI benefits and did not apply those payments to [his] benefit, nor did it assess his individual needs before applying the payments"; and, third, that "DSS has inequitably retained [his] OASDI benefits without paying him the value of those benefits." Therefore, according to Alex, his complaint set forth "all the elements of an unjust enrichment claim."

Appellees respond that, because DSS used the

funds in accordance with State and federal law, and DSS used the benefits "for the interest of" Alex, DSS was not unjustly enriched, and, hence, the circuit court properly dismissed this claim.

"Unjust enrichment is a form of restitution." *NRT Mid-Atlantic, Inc. v. Innovative Properties*, 144 Md. App. 263, 286 (2002). In other words, "[t]he restitutionary remedies and unjust enrichment are simply flip sides of the same coin." *Alternatives Unlimited, Inc. v. New Baltimore City Board of School Comm'rs*, 155 Md. App. 415, 454 (2004).

In Maryland, unjust enrichment consists of three elements:

> 1. A benefit conferred upon the defendant by the plaintiff;
>
> 2. An appreciation or knowledge by the defendant of the benefit; and
>
> 3. The acceptance or retention by the defendant of the benefit under circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Hill v. Cross Country Settlements, 402 Md. 281, 295 (2007) (quotations omitted).

"A successful unjust enrichment claim serves to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits quite honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses.'" *Id*. at 295-296 (quoting *Dept. of Housing & Community Development v. Mullen*, 165 Md. App. 624, 659 (further quotation omitted), *cert. denied*, 391 Md. 579 (2006). "A person who receives a benefit by reason of infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment." *Id*. (quoting *Berry & Gould, P.A. v. Berry*, 360 Md. 142, 151 (2000)).

The OASDI plan was enacted "to provide persons dependent on the wage earner with protection against the economic hardship occasioned by loss of the wage earner's support." *Califano v. Jobst*, 434 United States 47, 50 (1977). As such, the Commissioner of the SSA, as the Supreme Court observed, "has decided that a representative payee serves the beneficiary's interest by seeing that basic needs are met, not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants." *Keffeler, supra*, 537 U.S. at 390.

Because DSS applied to be Alex's representative payee and, after appointment to that position, used Alex's OASDI benefits in accordance with State and federal law and regulations, we conclude that DSS was not unjustly enriched at Alex's expense and, therefore, the circuit court properly dismissed Alex's unjust enrichment claim.

IV.
Constitutional Claims

Alex next avers that the circuit court erred in dismissing his claims that DSS violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, as well as Article 24 of the Maryland Declaration of Rights and that DSS's use of his OASDI benefits constituted an unconstitutional taking of his property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article III of the Maryland Constitution. We fail to find any merit to any of these claims.

A. Due Process

DSS, Alex proffers, "had a constitutional duty to provide [him] with notice and an appropriate hearing prior to depriving him of his OASDI benefits," but, instead, DSS, he claims, "kept its actions secret" and never notified him "that it was confiscating his funds." While acknowledging that the SSA provided notice to DSS (his legal guardian) that it had appointed DSS to be his representative payee, Alex maintains that DSS did not pass that information along to him and, therefore, DSS violated his due process rights.

Appellees point out that Alex "was an unemancipated minor" when DSS became his representative payee and that, in such situations, the SSA's policy is to provide written notice of its intent to designate a representative payee to the beneficiary's legal guardian or legal representative rather than directly to the minor himself. *See* 20 CFR § 404.2030(a). Appellees assert, moreover, that they have "no responsibility for creating or carrying out the notice provisions."

To begin with, Alex's statements that DSS "secretly" acted to "deprive" him of his OASDI benefits and "confiscated" his funds, we believe, is a gross mischaracterization of the facts. It is more accurate to say that the SSA determined that a fourteen-year old orphan in the custody of DSS needed a representative payee to manage his benefits. While federal regulations permit a relative or close friend to serve as representative payee for a beneficiary under age eighteen, we can only assume that such a person was not identified in Alex's case as the SSA appointed DSS, the last on its list of "preferred payees." *See* 20 CFR § 404.2021(c). *See also, Keffeler v. Department of Social & Health Services*, 151 Wn.2d 331,345, 88 P.3d 949, 956 (2004) ("[A] decision by the Commissioner [of the SSA] that the State should serve as representative

payee [for a child beneficiary] indicates that a search for another payee would be fruitless.").

If Alex was "deprived" of anything, it was not his OASDI benefits but rather the ability to freely spend or manage those benefits. *McGrath v. Weinberger*, 541 F.2d 249, 253 (10th Cir. 1976), *cert. denied*, 430 U.S 933 (1977). DSS, moreover, did not "confiscate" Alex benefits, but legitimately received them as his representative payee and used them for his current maintenance as permitted by the SSA. Because of the SSA's reporting requirements, we assume that the SSA was fully aware of how DSS spent Alex's OASDI benefits.

In *McGrath, supra*, the United States Court of Appeals for the Tenth Circuit rejected the notion that an adult beneficiary's due process rights were violated when the SSA determined, without prior notice and an opportunity for a hearing, that the beneficiary was incapable of managing his benefits because of a mental condition and, therefore, intended to appoint a representative payee. The Tenth Circuit held that "the Due Process Clause does not demand that prior notice and an opportunity for a hearing be afforded Social Security beneficiaries who are determined to be incapable of managing their own benefits." *Id*. at 254.

Resuming jurisdiction following the United States Supreme Court's decision in *Keffeler, supra*, the Supreme Court of the State of Washington addressed Keffeler's unresolved constitutional issues and rejected the proposition that foster care children's due process rights were violated by the State's failure to give prior notice to them of its appointment as the representative payee of their social security benefits. *Keffeler v. Department of Social & Health Services*, 151 Wn.2d 331,345, 88 P.3d 949, 956 (2004) ("*Keffeler II*"). In so doing, the Court noted that the "risk of erroneous deprivation of any private interest the child [beneficiary] may have is low because the notice [sent by the SSA] notifies the beneficiary/guardian of the appointment prior to any payment and encourages the beneficiary/guardian to contact the agency if he/she disagrees." 151 Wn.2d. at 344. The court further observed:

> Additional [notice] procedures are unnecessary because the identity of a representative payee does not influence eligibility for benefits and all representative payees must use the benefits in accordance with federal and state laws and regulations. Further, the Commissioner [of the SSA] does an investigation of potential representative payees prior to appointment, and the Commissioner may remove a representative payee if misuse of funds is found.
>
> Moreover, the governmental interest in not implementing additional procedures is high. Keffeler suggests sending notice to the juvenile court and assigning an attorney to each child to either find another representative payee or start a judicial guardianship. These procedures would impose substantial costs on the State and result in a small benefit for the children. . . . Usually, the State is appointed as representative payee only if there is no one else. . . . While the juvenile court is considered the guardian of the child, sending notice to the court is unnecessary because the court has entrusted the custody to DSHS [the Department of Social & Health Services].

Id. at 344-345 (citations omitted).

The Court then concluded:

> [W]e find the State has not violated procedural due process. The federal notice sent to beneficiaries and their guardians is sufficient to fulfill any procedural due process rights the children may have. Any potential private interest in additional notice is outweighed by the State's interest in efficient administration of its foster care program.

Id. at 345.

We agree that the risk of an erroneous deprivation of a minor's interest in the free use of his OASDI benefits is relatively slight, especially where, as here, the beneficiary is an orphan in the custody of DSS. We also agree that requiring DSS to provide notice in addition to that provided by the SSA would impose substantial costs on the State and result in a small benefit for the children. Accordingly, we hold that the court did not err in dismissing Alex's due process claim.

B. Equal Protection

Alex claims that appellees have created "at least two classes of children" and treats them disparately, namely: "(1) foster care children for whom DSS serves as a representative payee and who therefore *pay for foster care*; and (2) all other foster children, who *do not pay for foster care*." Not content with those two purported classes of children allegedly created by appellees, he adds: "In the alternative, it creates the following two classes: (1) foster children for whom DSS serves as a representative payee; and (2) foster children who receive Social Security benefits but have a

representative payee other than DSS."

Alex asserts that, while DSS uses the OASDI benefits of foster children for whom it acts as representative payee to pay for their foster care, it "does not take equivalent funds from any other foster children, regardless of their ability to pay, but provides the same level of service to both classes of children." He suggests that DSS is therefore discriminating between different classes of children in its care in violation of the Equal Protection Clause of the United States Constitution and the Maryland Declaration of Rights.[24]

Appellees respond that Alex incorrectly states that only foster care children for whom it acts as representative payee are required to contribute assets to pay the cost of their foster care. They point out that Maryland regulations require that "all of the child's resources, including parental support, the child's own benefits, insurance, cash assets, [and] trust accounts" are considered in determining the amount of funds available to offset the State's cost of providing foster care. COMAR 07.02.11.29.A. *See also, In Re: Katherine C.*, 390 Md. 554, 571 (2006) (holding that a parent is obligated to support his or her child financially, even when the child is removed from the parent's custody by social services and adjudicated a child in need of assistance).

Moreover, appellees argue that, even if there are two distinct groups of foster care children, the "classification" does not "involve fundamental rights or suspect classes" and therefore it enjoys a "strong presumption of validity." They further assert that "there is a rational basis for COMAR 07.02.11.29, requiring all available resources to be used toward the cost of care" and their actions implementing that regulation are "based upon a legitimate government interest in saving funds and in maximizing the resources available to fund its social services programs."

In *Keffeler II*, the Supreme Court of the State of Washington held that there was no equal protection violation based on the petitioners' claim, as here, that the State created two groups of foster children based on who served as their representative payee. The court declared that the argument was without merit:

> because there are not two groups of foster children but one group: all foster children receiving social security benefits with appointed representative payees. The identity of the representative payee does not create a differentiation in this group because *all representative payees* must use the benefits according to state and federal laws and regulations.

151 Wn.2d at 340, 88 P.3d at 953-954.

The court further noted that if a foster child has a "private representative payee," the State will still provide foster care services, but "the underlying obligation of supporting the child remains on the parents." *Id*. at 341 n.6.

In *Gean, supra*, the Sixth Circuit held that there was no violation of the equal protection clause of the 14th Amendment where the social security disability benefits of certain juveniles, in the custody of the State of Tennessee after having been adjudicated delinquent, were applied by the department of children's services, their representative payee, to offset the cost of the juveniles' current maintenance while in state custody. 330 F.3d. at 771-772. The plaintiffs in that case argued, as does Alex, that there were two groups of juveniles: (1) those who contributed to their current maintenance with their Social Security benefits and (2) other juveniles who did not receive Social Security and, therefore, did not have such funds to contribute. *Id*. at 770-771.

Spurning this claim, the Sixth Court concluded that "Tennessee has a legitimate interest in preserving its funds, and requiring those persons with the ability to pay to contribute towards the cost of their care is a reasonable means to achieve that interest." *Id*. at 772. The Court, in support of its finding that the state had a rational basis for its practices, observed that "in managing social welfare programs, the state makes distinctions among its citizens based upon a sort of 'ability to pay,'" and that, "[i]n levying taxes and providing a broad range of social services, a state regularly makes constitutionally permissible distinctions between its citizens based upon their differing abilities to pay." *Id*. at 771-772.

The rationale set forth in *Keffeler II* and in *Gean* for rejecting equal protection challenges to the state's use of federal benefits to offset the cost of state-provided custodial care applies equally here. Accordingly, we hold that the circuit court did not err in dismissing Alex's claims alleging violations of equal protection.

C. Unconstitutional Taking

Finally, Alex claims that DSS "committed an unconstitutional takings" when it "took his benefits" without providing him "just compensation." The Sixth Circuit in *Gean, supra*, rejected a similar claim raised by juveniles whose Social Security benefits were used by the State to offset the cost of their custodial care. 330 F.3d at 769-770. The federal appellate court noted that the SSA's regulations permit state agencies to act as representative payees and use the beneficiaries' benefits for current maintenance, and it concluded that, "[t]he Supreme Court's decision in *Keffeler*, considered in conjunction with the [SSA's] regulations, makes it clear that the defendants have not breached any established Fifth or Fourteenth Amendment right

in this instance." *Id.* at 770. We agree and hold that the circuit court committed no error in dismissing Alex's takings claims.

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

FOOTNOTES

1. Pursuant to Md. Code (2009 Repl. Vol.), § 12-107(a)(1) of the State Government Article, the notice of claim shall include "a concise statement of facts that sets forth the nature of the claim, including the date and place of the alleged tort." While Alex alleged that he filed a written claim, he did not attach a copy of it to his complaint nor summarize its content.

2. Pursuant to the Maryland Tort Claims Act set forth in State Gov., § 12-101 et seq., the State waived its immunity to tort actions, subject to certain exclusions and limitations.

3. A claim is "denied finally" upon a "written notice of denial" by the Treasurer or the Treasurer's designee or within 6 months after the filing of the claim if the Treasurer or designee fails to give notice of a final decision. State Gov., § 12-107(d).

4. When Alex filed his complaint in 2008, the regulation was numbered COMAR 07.02.11.26.L. Effective November 30, 2009, the regulation was renumbered 07.02.11.29.L, without any changes to the text. Throughout this opinion we shall refer to the regulation as COMAR 07.02.11.29.L.

5. We assume that Alex concedes that the circuit court did not err in dismissing his request for a permanent injunction, as he makes no argument on appeal as to that particular count.

6. The facts set forth in this opinion are taken from the complaint filed by Alex in the Circuit Court for Baltimore County on November 26, 2008. *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 644 n.1 (2010) (when reviewing the granting of a motion to dismiss, the facts "as recounted" are drawn directly from the complaint).

7. If the child turns 18 while a full time elementary or secondary school student the benefits may continue until the earlier of the first month during no part of which he or she is such a full-time student or the month in which the child turns nineteen. 20 CFR § 404.352(b)(3). Alex did not allege in his complaint that his eligibility for OASDI benefits continued after his 18th birthday.

8. If the beneficiary, legal guardian, or legal representative objects to representative payment or to the designated payee, he or she may file an appeal with the SSA. 20 CFR § 404.2030(b).

9. Alex averred that he did not learn of his OASDI benefits, or that DSS had been appointed his representative payee, until about March 13, 2006, when he first consulted with legal counsel.

10. Although Alex did not indicate in his complaint either the amount of the "back payment" received by DSS or the amount of the monthly OASDI payment, he requested damages "estimated at approximately $11,500, equaling the full amount of OASDI benefits received by DSS on [his] behalf."

11. The complaint did not indicate how much money DSS spent on Alex's foster care each month or how that figure compared with the amount of Alex's monthly OASDI benefits.

12. Alex also alleged that, between approximately May 22, 2003, and July 1, 2005, DSS received "Title IV-E federal foster care reimbursement to pay for" his foster care during that specific time period. Although he cited "Title IV-E federal foster care reimbursement," we assume Alex was referring to Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679a, which provides for federal grants to the states for the provision of foster care and adoption assistance for certain children. Alex did not, however, make any attempt to show how this factual allegation was relevant to any particular claim in his complaint.

13. "Out-of-home placement" is defined as "placement of a child into foster care, kinship care, group care, or residential treatment care." COMAR 07.02.11.03 .B.34.

14. The Administrative Procedure Act is set forth in State Gov., § 10-101 et seq.

15. At issue in *Conaway* was COMAR 07.02.11.07, entitled "Resources for Reimbursement Towards Cost of Care." It provided in pertinent part:

> Other resources which may be available for the child may be in the form of cash assets, trust accounts, insurance (including survivor's disability insurance), or some type of benefit or supplemental security income for the handicapped child. . . . These resources shall be applied directly to the cost of care, with any excess applied to either the maintenance of the child to meet special needs or conserved for future needs. . . . Any potential benefits from other resources shall be cleared and made available if possible to the local department as payee.

Now renumbered as "COMAR 07.02.11.K. and L," the language of this regulation remains substantially the same today.

16. Maryland Code (2006 Repl. Vol.), section 5-201 of the Courts & Judicial Proceedings Article provides that when "a cause of action subject to a limitation" under certain provisions in that Article accrues in favor of a minor or mental incompetent, the cause of cause shall be filed "within the lesser of three years or the applicable period of limitations after .the date the disability is removed."

17. *See also* COMAR 25.02.03.03.B.2 (The requirement that a written claim must be received by the State Treasurer's Office "within 1 year after the injury that is the basis of the claim . . . is not suspended or tolled by reason of infancy, incompetency, other disability, or filing of suit.").

18. While the Local Government Tort Claims Act requires a claimant to submit a notice of claim within 180 days after an injury, it also provides that, "unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the

court may entertain the suit even though the required notice was not given." *See* § 5-304(b) & (d) of the Courts & Judicial Proceedings Article.

19. This position is supported by the fact that "a claim filed to the Treasurer need not contain proof of all elements of the action, but only a 'concise statement of facts that sets forth the nature of the claim, including the date and place of the alleged tort. . . ."' *Lopez v. Maryland State Highway Administration*, 327 Md. 486, 493 (1992) (quoting State Gov., § 12-107(a)(1)).

20. For instance, Alex contends that the MTCA limitations period was tolled because of DSS's allegedly "fraudulent concealment of its conduct." While Courts, section 5-203 provides that, when a cause of action is kept from a party by fraud, the cause of action is deemed to accrue when the party discovered, or by the exercise of ordinary diligence should have discovered, the fraud, there is no authority to support Alex's contention that this provision applies to a condition precedent under the MTCA. Moreover, even if it did apply, Alex's complaint is devoid of any factual support for the claim he makes on appeal that DSS acted fraudulently in applying to be his representative payee and using his OASDI benefits to offset his foster care costs or that DSS intentionally concealed its actions from him. To toll the statute of limitations based on the defendant's fraud or intentional concealment of the facts giving rise to the cause of action, "the pleadings must demonstrate specific facts that support" such a finding "and must go beyond mere conclusory statements." *Dual, Inc.. V. Lockheed Martin Corp.*, 383 Md. 151, 170 (2004).

Alex fairs no better with his claim that the "continuation of events" or the "continuing harm" theory applies in this case. Even if we assume that DSS's actions may be characterized as a "continuation of events" or a "continuing harm," those theories have been invoked to toll a statute of limitations, not conditions precedent. *See MacBride v. Pishvaian*, 402 Md. 572, 575 n.1 & 2 (2007). Moreover, in *Anne Arundel County v. Litz*, 45 Md. App. 186 (1980), this Court stated that, "[a]lthough a cause of action for a continuous injury is not cut off by the limitations period, damages for recovery in cases where there is a continuous invasion have been limited by the statutory period." *Id.* at 197 (citations omitted). Thus, in *Litz* we held that the plaintiffs, in their action against the county, could only recover for damages occurring in the 180 days prior to giving notice of their claim where a 180-day statutory notice provision was a condition precedent to the right to maintain the cause of action. *Id.* at 198.

21. While Alex alleged in his complaint that he "did not become aware of his OASDI benefits or that DSS was taking his benefits until on or about March 13, 2006, when he first consulted with legal counsel," he waited another seven months to file a notice of claim with the Treasurer.

22. In his brief, Alex stated that Md. Code (2006 Repl. Vol.), section 5-527 of the Family Law Article, requires the State to pay the costs of foster care for all foster children. In fact, section 5-527 directs the Department of Human Resources to establish guidelines for rates to be paid to providers of foster care services. The statutue is not authority for Alex's claim that the State cannot pursue reimbursement for foster care services from resources belonging to foster care children. Moreover, while not addressing the precise issue before this Court, the Court of Appeals has held that a parent is obligated to support his or her child financially, even when the child is removed from the parent's custody by social services and adjudicated a child in need of assistance. *See In Re: Katherine C.*, 390 Md. 554, 571 (2006). In short, Alex errs in asserting that the State bears sole financial responsibility for providing out-of-home placement services for needy children.

23. The issue before the Supreme Court was whether a government social service agency in Washington State violated the "anti-attachment" provision of the Social Security Act when the agency sought to become the representative payee of certain foster children's OASDI benefits and when it used those benefits to pay for the children's foster care services. 537 U.S. at 382-383. The Supreme Court held that it did not. *Id.* at 392.

24. "While the Maryland Constitution does not contain an express equal protection clause," the Court of Appeals "has said that 'the concept of equal protection [ ] is embodied in Article 24'" of the Maryland Declaration of Rights. *Lonaconing Trap Club v. Maryland Dept. of the Environment*, 410 Md. 326, 340 (2009) (quoting *State v. Good Samaritan Hospital*, 299 Md. 310, 327 n.7 (1984)).

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