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SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

1 **Court of Special Appeals**

4 **Unreported Cases in Brief**

23 **Index**

FEATURES

2 **Monthly Memo**

National Adoption Day ceremonies set in Maryland circuit courts; Greater Baltimore Medical Center adds Hospital-Based Domestic Violence Program to SAFE services

3 **Guest column**

New policy directive on adoption subsidies could have unwanted long-term consequences, Simone Fields writes.

13 **Alcoholism and custody**

Sobriety issues that precluded unsupervised visitation were nevertheless no bar to joint legal custody, Court of Special Appeals affirms in an unpublished opinion.

Same-sex marriage builds the client base

Family law attorneys in Maryland predict that the passage of a referendum legalizing same-sex marriage in the state earlier this month will be a boon to business, but are proceeding with caution as they navigate previously uncharted legal territory.

"Clearly it will increase the client base," Jeffrey N. Greenblatt, an attorney at Joseph, Greenwald & Laake P.A. in Rockville. "The more people that get married, the more people that get divorced."

The referendum, Question 6, appeared on Maryland's Nov. 6 general election ballot. Voters approved the Civil Marriage Protection Act, which the General Assembly passed in February and which allows same-sex couples to obtain a civil marriage license.

As a result, same-sex couples will be able to legally marry in the state beginning on Jan. 1.

Greenblatt said that roughly 40 percent to 50 percent of heterosexual marriages end in divorce, and he expects the statistics will be the same for homosexual unions in Maryland.

He said that under Maryland law the use and possession of a family home is normally awarded to the parent who receives custody.

"Historically this is the mother, but if you have two male parents, who would be the 'mom'?" Greenblatt said. "It's an interesting twist."

Anne Grover, an attorney at Brodsky Renehan Pearlstein Lastra & Bouquet Chtd. in Gaithersburg, said the legalization of same-sex marriage is going to result in an increase in the

See SAME SEX page 2

MARKETING

Improve your law firm's SEO with blogs, video

While 95 percent of law firms now have a website, not all are getting the biggest bang for their Internet dollars. If you have a site that no one visits, said Stephen Fairley, the CEO of The Rainmaker Institute, a Gilbert, Ariz. legal marketing company, "it's just a pretty brochure online."

The solution is search-engine optimization, or SEO — essentially, the manipulation of search engines to improve your firm's ranking in a Google search.

How do firms get to the top of the Internet search heap?

Some firms sink tens of thousands of dollars each month into SEO, said Micah Buchdahl, a Moorestown, N.J. attorney who is president of HTMLawyers, Inc., a legal marketing consulting firm.

According to Fairley, though, the key is content – fresh content and lots of it.

Blogs often provide the best kind of content for SEO purposes, said Sharon Nelson, a lawyer and president of Sensei Enterprises, Inc., a Fairfax, Va. forensics and legal technology corporation.

"A blog is the best Google juice you can have," she said.

LaSheita Sayer, chief marketing officer for Denver-based ZoZo Marketing Group, said that Google and its search algorithm prefer sites that use a mix of media, such as images, PDF files and video.

It's also important to consider the phrasing consumers will use to search for an attorney. For example, said Sayer, "They might not search for 'medical malpractice attorney.' They might search for 'attorney to sue doctor.' Those are the types of terms that Google and

See SEO page 3

Same sex

Continued from page 1

number of prenuptial and separation agreements, divorce proceedings and custody battles.

"[Legalization of same-sex marriage] should have a good impact on increasing family law business in Maryland because the pool of potential clients will be greater."

In the short time since Question 6 passed, Pessin Katz Law P.A., has already heard from homosexual couples who want to discuss the potential pluses and minuses of getting married.

"Before they say 'I do' they need to think about the ramifications are," said Mark Scurti, an attorney at the firm. "One way to do this is to create a prenuptial agreement."

Grover said that a big question that needs to be resolved is who has custodial rights in same-sex relationships when one partner does not have a biological or legal relationship to the child.

"This issue will arise in the courts and go up to the Court of Appeals," she predicted.

Grover cited *Janice M. v Margaret K.*, a 2008 decision in which the Court of Appeals refused to allow a woman who had not legally adopted a child to receive visitation with the child over the legal parent's objection.

"Now with same-sex marriage being legalized in Maryland, the non-legal parent may have greater or more custodial rights by being married," she said.

Ferrier R. Stillman, a partner at Tydings & Rosenberg LLP in Baltimore, said that a same-sex couple who had been raising a child together all along, and now gets married, is the type of case that could lead a court to overturn *Janice M.*

"The law has changed significantly but we're not necessarily done, and there are a lot of situations that could come up," she said.

She said the legalization of same-sex marriage could lead to an increase in parenthood among same-sex couples. And that, she said, creates more potential for complicated legal situations.

"A same-sex couple cannot biologically have a child without the involvement of a third party," she said. "Because of the biological necessity for a third party there is a greater need for legal protection, especially for a non-biological parent."

Even if *Janice M.* is reversed, though, Scurti said he would still advise same-sex couples to enter into a second-parent adoption agreement to be sure their rights will be recognized in other states.

"That's a final judgment," Scurti said.

He said that same-sex marriages will still have some challenges because of the federal limitations imposed under the Defense of Marriage Act.

"Family law practitioners have to proceed with caution because of the interplay of state law and federal law," he said.

— By Beth Moszkowicz

Monthly Memo

• **Nov. 17 is National Adoption Day**, and several courts in Maryland have special plans in place. First in line is Prince George's County, where newly finalized adoptions were celebrated at the county courthouse in Upper Marlboro on Nov. 15 with speeches and gifts from several bar associations, attorneys and community businesses and organizations.

In Baltimore City Circuit Court, adoptions will be finalized on Nov. 17 for more than 30 children at the Clarence M. Mitchell Jr. Courthouse, followed by cake, balloons and activities, with support from the Bar Association of Baltimore City and Baltimore City Department of Social Services.

Similar plans are in place for Baltimore County on Nov. 17 at the Old Courthouse Ceremonial Courtroom, where participants and guests will be greeted with music by the Baltimore Philharmonic Orchestra. A dozen children will be adopted into 11 families, followed by gifts and a party hosted by the county DSS and the Baltimore County Bar Association.

• **Baltimore County has a new Hospital-Based Domestic Violence Program**, thanks to state funding and a grant of $15,000 from CareFirst. As part of the Domestic Violence Health Care Screening and Response Initiative established by executive order in 2010, the program seeks to identify victims at an early stage in the domestic violence cycle and extend comprehensive services to prevent future injuries (physical and emotional), according to a statement from the office of Lt. Governor Anthony Brown.

The Domestic Violence Program will expand the services that GBMC provides through its Sexual Assault Forensic Examination program, the county's only SAFE program for adolescent and adult victims. The Domestic Violence Program expects to serve an average of 30 patients per month by 2014. Programs are already in place in Anne Arundel Medical Center; Mercy Medical Center and Sinai Hospital in Baltimore; Northwest Hospital in Baltimore County; Prince George's Hospital Center; and Meritus Medical Center in Hagerstown.

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New policy directive reduces eligibility for adoption subsidies

Ideally, all children in foster care who are not reunited with their parents are supposed to be placed in "forever families" by the local Department of Social Services. Placements in "forever families" are then made permanent by the court through an order of custody and guardianship to a relative or non-relative, or an order of adoption.

Permanent arrangements can be difficult to achieve, particularly with children who have special needs. These children may require intensive therapy, a variety of educational supports, and complex medical treatment and care. Many of these children wait for long periods of time for a family—and sometimes age out of the system without ever finding a place to call home or a family to support them.

By Simone Fields

The Adoption Assistance and Child Welfare Act of 1980 provided the first federal subsidies to provide an incentive for the adoption of children from the nation's foster care system. The subsidized adoption program (Social Security Act Title IV, Part E) provides needed federal funding (a 50 percent match in Maryland) to help defray the cost of adoptive parents caring for a special-needs adopted child.

Maryland's subsidy language is found in the Code of Maryland Regulation (COMAR). Section 07.02.12.05 states that "adoption assistance is medical benefits, and in appropriate cases, a monthly payment, provided to adoptive families on behalf of eligible children to help the family defray the costs of meeting a child's special needs."

In 2008, the Maryland Department of Legislative Services audited the Social Services Administration (part of the Department of Human Resources). The audit report specified some changes that needed to be made in order to ensure compliance with state and federal regulations.

Specifically, finding 9 of the report states that "SSA had not established a monitoring process to help ensure that monthly adoption assistance subsidies were only provided for eligible children."

SSA recently provided to local departments a new policy directive that is intended to address the audit's concerns. The implementation of this policy, however, will result in less adoption subsidies—effectively causing less adoptions to occur.

All of the children impacted by this new policy directive were placed due to a background of neglect or abuse which puts them at high risk of experiencing the reoccurring effects of that maltreatment. Many of the therapeutic foster homes for children, who are placed by the local department, are also adoptive resources.

Some of the children have made great improvements in their health and therapeutic needs since being placed in the home. Some have not. Due to the new policy directive, many of these potential adoptive homes are finding that they will not qualify for any monetary assistance if they adopt.

The language of the subsidy is that it "provides vital support to families raising children with serious behavioral, emotional, or physical disabilities" (Social Services Administration (SSA) Policy Directive #13-1, July 15, 2012, hereinafter, "SSA #13-1"). If a child is eligible to receive the adoption subsidy, he or she is also eligible for Medical Assistance through Title XIX Medicare Act. SSA #13-1 states that the amount of the monthly assistance payment is based on the child's specific needs, as well as the adoptive family's individual circumstances.

If a child is at risk for developing a medical or mental health issue later, but is otherwise healthy, the SSA #13-1 policy directs caseworkers to make the subsidy zero and to only implement Medical Assistance.

Impact on adoptions

In light of this new policy directive, adoptive families seeking subsidies must be prepared to bring specific documentation (no more than one year old) to the subsidy negotiation. That includes receipts such as those not covered through Medical Assistance, medical, educational and psychological records, the prescription history, and any documented risk factors for physical or mental disability or disease.

Furthermore, adoptive families should also be aware that COMAR 07.05.03.06 (B)(2) states that the adoption subsidy can be given to an adoptive parent who meets income qualifications and requires a subsidy to permit the parent to adopt a child who has special needs. An adoptive parent should utilize this regulation in negotiations with the local department.

Finally, if an adoptive parent is not satisfied, COMAR 07.02.12.09 gives them the right to appeal the denial, reduction, suspension, or termination of adoption assistance and to request a fair hearing.

It is clear that the immediate consequence of this new policy directive is that potential adoptive parents may have to aggressively negotiate and then appeal any denials. The longer term impact of this new policy directive, however, will extend more broadly.

If it becomes too difficult for families to obtain a subsidy, they will simply not adopt — creating a reservoir of children in the system for whom there is no "forever family." They will move from family to family, drifting through foster care until they age out.

Is this what Maryland wants for its abused and neglected children?

Simone Fields is a staff attorney in the Child Advocacy Unit of Maryland Legal Aid in Baltimore.

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SEO

Continued from page 1

Yahoo use."

Mark A. Jacobsen, senior director for strategic development at FindLaw, said law firms have a tendency to be fixated on the ranking of "pet search" phrases, striving to be in the top five or top 10 for a specific phrase.

But he said such rankings can be overrated.

"The vast majority of queries that end with a certain law firm are from unique or long tail searches" — lengthier, very specific inquiries, such as "Child custody attorneys in Texas," Jacobsen said.

— Dan McDonald, Dolan Media Newswires

UNREPORTED CASES IN BRIEF

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

*Guetatchew Fikrou v. Genet Aklilu et al.**

CHILD SUPPORT: WAGE GARNISHMENT: APPEAL

CSA No. 2379, September Term, 2010. Unreported. Opinion by Woodward, J. Filed Oct. 1, 2012. RecordFax #12-1001-06, 6 pages. Appeal from Montgomery County. Affirmed.

Appellant's issues were not properly before the court, as he (1) failed to timely appeal from the substantive rulings on his child support obligations and wage garnishment; (2) did not raise any issues regarding the denial of his motion to reconsider those rulings; and (3) failed to present any argument in support of his timely appeal of the circuit court's ruling on a later motion to suspend enforcement of his child support obligation.

"On Oct. 7, 2010, the Circuit Court entered an order denying the motion of Guetatchew Fikrou, appellant, for relief from his child support obligation and earnings withholding thereon. On Oct. 21, 2010, appellant filed a motion to reconsider, which the court denied on Nov. 17, 2010. Appellant filed a notice of appeal on December 17, 2010.

On Jan. 6, 2011, the Montgomery County Office of Child Support Enforcement ("MCOCSE"), appellee, entered the case by sending a notice directing appellant to send future support payments to the MCOCSE. On Jan. 28, 2011, appellant filed a motion for suspension of enforcement of his child support obligation, which the circuit court denied in an order entered March 14, 2011. Appellant filed a second notice of appeal on March 23, 2011.

Appellant presents two questions for review:

I. Did the Trial Court commit reversible error when it denied Appellant's Motion to stop wage garnishment, and used said finding as a factor in awarding Appellee's attorney fees?

II. Did the Trial Court commit reversible error when it denied Appellant's Motion to stop enforcement of wage garnishment while [the] Appeal was pending?

We shall hold that appellant's issues are not properly before this Court and affirm the judgments.

BACKGROUND

On April 2, 2010, appellant filed a request to enroll certain orders and judgments regarding appellant's obligation to pay appellee, Genet Aklilu, child support that were entered by multiple Superior Courts in California. Attached to the request was a copy of an audit from the California Health and Human Services Agency, which stated that appellant's child support arrears totaled $136,196.

Appellant also filed a Motion for Termination of Earnings Withholding. On May 11, 2010, Aklilu filed an opposition.

The circuit court held a hearing on appellant's motion for termination of earnings withholding. On Oct. 7, 2010, the court entered an order denying the motion and a separate order requiring appellant to pay $3,000 in attorney's fees to Aklilu. On Oct. 21, 2010, appellant filed a motion to reconsider, which the court denied on Nov. 17, 2010. Appellant filed a notice of appeal on Dec. 17, 2010.

On Jan. 6, 2011, MCOCSE entered the case by filing, pursuant to FL §10-108.5, a notice directing appellant to redirect payments of child support to MCOCSE. On Jan. 28, 2011, appellant filed a motion for suspension of enforcement, which the court denied. Appellant filed a second notice of appeal on March 23, 2011.

DISCUSSION

In his brief, appellant argues that the calculations in one of the support orders from the Los Angeles Superior Court was "filled with plenty of irregularity/errors and the numbers do not add up." Because of this, appellant asserts that the circuit court "should not have used [the order] to deny his motions," and that "the circuit court did abuse its discretion when ruling against Appellant, to terminate enforcement of wage garnishment." Appellant also claims he "was not allowed to present his case" and that the Circuit Court "did not allow [MCOCSE] to present their accounting."

October 7, 2010 Order

In a civil action, a motion for reconsideration under Rule 2-535 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).

Appellant's motion for reconsideration, on Oct. 21, 2010, was not filed within 10 days of the entry of the Oct. 7, 2010 order. Consequently, he was required to note an appeal within 30 days after Oct. 7, or by Nov. 8, 2010. *See* Md. Rule 8-202. Because appellant's notice of appeal was not filed until December 17, 2010, this Court has no jurisdiction to review the Oct. 7, 2010 order. Therefore, appellant's issue and arguments relating to the failure to terminate his child support obligation and/or wage garnishment are not before this Court.

Appellant's notice of appeal was filed within 30 days of the circuit court's denial of his motion for reconsideration of the Oct. 7, 2010 order. Accordingly, we have jurisdiction to review the court's denial of that motion. However, appellant fails to make any argument pertaining to the denial of his motion for reconsideration. Indeed, appellant never even mentions the denial of his motion for reconsideration in the argument section of his brief. Accordingly, there is no challenge before this Court to the denial.

March 14, 2011 Order

Appellant's second notice of appeal, filed March 23, 2011, was within 30 days of the circuit court's order of March 14, 2011 denying suspension of enforcement of his child support obligation. Appellant, however, fails to present any argument relating to the circuit court's order of March 14, 2011. Appellant also does not cite any law to argue that the circuit court erred or abused its discretion in denying appellant's motion. Accordingly, we decline to review the March 14, 2011 order on appeal." *Slip op at various pages, citations and footnotes omitted.*

*Kimberly Hamby v. Reuben I. Hamby**

DOMESTIC VIOLENCE PROTECTIVE ORDER: APPEAL: MOOTED BY EXPIRATION

CSA No. 2868, September Term, 2011. Unreported. Opinion by Eyler, James R., J. Filed Sept. 20, 2012. RecordFax No. 12-0920-07, 4 pp. Appeal from Anne Arundel County. Dismissed.

The expiration of a domestic violence protective order renders the appeal moot, and the possibility that the expired order could prejudice

See UNREPORTED CASES IN BRIEF page 5

UNREPORTED CASES IN BRIEF *Continued from page 6*

appellant in future litigation is not a matter of public interest that would warrant consideration of the moot appeal.

"Kimberly Hamby appeals from a protective order in favor of Reuben I. Hamby, appellee. Because the protective order has expired, we shall dismiss the appeal as moot.

Background

On Jan. 30, 2012, appellee filed a petition for protection from domestic violence in the District Court of Maryland, in Howard County. Appellee alleged that, on Jan. 27, 2012, appellant, his spouse, committed acts of domestic violence. The court granted a temporary protective order. Subsequently, the case was transferred to the Anne Arundel County circuit court.

On Feb. 7, 2012, the circuit court held a hearing. Both parties and a witness, Julie Ann Drabenstadt, testified. Not surprisingly, the court was presented with different versions of the events in question. On Feb. 14, the court entered an amended final protective order, effective until Aug. 7, 2012.

On Feb. 21, 2012, appellant noted an appeal to this Court.

Discussion

Appellant argues that the court abused its discretion with respect to factual findings because (1) "the court concluded that Appellee had more credibility than Appellant after finding that Appellant's version of events was accurate, which lead inescapably to the conclusion that Appellee's version of events was inaccurate," (2) the court entered the order "not because it believed the allegations of events as presented by Appellee, but rather because it concluded that Appellant's reasons for her actions, which did not amount to actual abuse, were insufficient because it found Appellee to have more credibility," and (3) the relief was "based on less than clear and convincing evidence."

Appellee disagrees and asserts that the appeal should be dismissed as moot. Appellant acknowledges that the case is moot but requests that we review the matter on the merits because the order may prejudice appellant in future litigation between the parties.

It is well established that a controversy is not generally justiciable if it has become moot. *Albert S. v. Dep't of Health & Mental Hygiene,* 166 Md. App. 726, 743 (2006). The Court of Appeals has also recognized, however, that an appellate court may address the merits of a moot case if we are convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct. *See* [*State v. Peterson,* 315 Md.[73] at 82-83, 553 A.2d at 677 [1989]. We stated in *Lloyd v. Supervisors of Elections,* 206 Md. 36, 111 A.2d 379 (1954), that if "the matter involved is likely to recur frequently" and "the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision," we would be justified in deciding a moot issue. 206 Md. at 43, 111 A.2d at 382. *Coburn v. Coburn,* 342 Md. 244, 250 (1996).

Coburn involved a protective order, but in that case the issue was one of admissibility of evidence which was likely to arise in future domestic violence cases. In the case before us, the sole issue is credibility. The court found that "abuse did occur and that there was an assault by Mrs. Hamby on Mr. Hamby." The court explained that the "bottom line" is credibility, and "in this particular case I believe Mr. Hamby." The issue of credibility is not one of public interest, and in the event of any future alleged acts of violence by one party against the other, the ruling has absolutely no bearing on how a court might resolve any such dispute." *Slip op at various pages, citations and footnotes omitted.*

*In re: Adoption/Guardianship of Precilla C. and Selena C.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: INABILITY TO PROVIDE LONG-TERM CARE

CSA Nos. 226 and 138, September Term, 2012. Unreported. Opinion by Kehoe, J. Filed Sept. 18, 2012. RecordFax #12-0918-03, 15 pages. Appeal from Queen Anne's County. Affirmed.

Termination of parental rights of the children's father was warranted where the unchallenged evidence established his longstanding sexual abuse of the children's mother, who was 12 when they started dating and had two children by the age of 15; his assistance in the mother's attempt to run away when she learned of her first pregnancy; his minimal to non-existent relationship with the children due to his incarceration; and his imminent deportation based on those crimes.

"Hector C. appeals a judgment granting the petition of the DSS to terminate his parental rights in his daughters, Precilla T. C. and Selena C. The court also terminated the parental rights of the children's mother, Megan H. (not a party to this appeal.) Hector presents two issues, which we have reworded:

I. Were the juvenile court's findings and conclusions as to the children's best interests supported by sufficient evidence?'

II. Did the juvenile court err by failing to consider placing the children in the custody of their paternal uncle?

BACKGROUND

Hector's parental rights to Precilla and Selena were terminated after a full-day hearing on Jan. 19, 2011. The following has been taken from the testimony and exhibits admitted as evidence in that proceeding.

Hector and Megan's sexual relationship began in May 2006. At the time, Megan was twelve and Hector twenty-six. These events had several relevant ramifications: 1) Megan was declared to be a CINA; 2) Precilla was declared to be a CINA; 3) Selena was declared to be a CINA; and 4) Hector, eventually, pled guilty to second-degree rape arising from his sexual relationship with Megan.

After Megan became pregnant with Precilla, Hector helped her run away from Maryland to Virginia and obtain false identification and employment documents. Megan gave birth to Precilla in Virginia on Oct. 8, 2007, giving both herself and Precilla false names, again with the help of Hector and/or his acquaintances.

Megan and Precilla's whereabouts were unclear until June 2008 when Megan took Precilla to live in a residence which belonged to Hector's brother, Adan C., in Queen Anne's County. At that residence, Adan resided with his significant other, Myra Flores, their child, and Hector's other two children (not by Megan.) The record indicates a strong likelihood that Hector also resided at that address. Regardless of Hector's actual residence, Hector and Megan, then around age fifteen, continued their sexual relationship.

On Aug. 22, 2008, when Precilla was approximately ten months old, Megan was injured during a physical altercation with Ms. Flores. Megan and Precilla were transported to a hospital and the hospital staff alerted DSS. DSS intervened. Both Precilla and Megan were found to be CINA on and DSS put a safety plan in place. However, Megan returned to the residence within days of each familial placement. In September 2008, DSS

See UNREPORTED CASES IN BRIEF page 6

UNREPORTED CASES IN BRIEF *Continued from page 7*

learned that Megan was pregnant with her second child, Selena. Selena was declared a CINA on Sept. 13, 2009.

Hector was arrested and charged with various sex offenses arising out of his relationship with Megan. He pled guilty to one count of second-degree rape of Megan. Hector remained incarcerated through July 2011 when he was released to, and detained by, the United States Immigration and Customs Enforcement Department pending deportation proceedings.

The TPR Proceeding

On Aug. 10, 2011, DSS brought TPR actions seeking to terminate Megan's and Hector's parental rights. The witness whose testimony was most relevant to Hector's contentions was Susan Spiering, the DSS case-worker for Precilla and Selena from July 6, 2010 until the time of the TPR proceeding.

After the conclusion of the hearing, the juvenile court issued an order terminating both Megan's and Hector's parental rights.

ANALYSIS

I. Sufficiency of the Evidence

In the instant case, Hector argues that the juvenile court erred in terminating his parental rights where there was insufficient evidence that placing the children under the guardianship of the department of social services was in their best interests.

As we understand Hector's argument, he asserts Spiering's testimony was an inadequate factual basis for the court's findings regarding the child impact factors of § 5-323(d)(4). These arguments are unpersuasive.

The child impact factors set forth in §5-323(d)(4), summarized, address the child's: i) emotional ties to the parent and other relevant persons, ii) adjustment to the foster community, home, placement, and school; iii) feelings about the termination of parental rights; and iv) possible effects of termination upon well-being.

The court stated, "by all appearances, at this point, neither child has significant ties or feelings toward the termination of [Hector's] parental rights, and no adverse impact on Precilla or Selena will result." There is little to no room for debate on this issue as Precilla (then four-years-old) had not seen Hector since she was eleven-months-old and Selena (then two-years-old) had never met him. We see no error in the court's reliance upon Ms. Spiering's unchallenged testimony to determine Precilla and Susan's adjustment to their foster home and community

Second, there was ample evidence to support the court's ultimate conclusion that termination of Hector's parental rights was in the best interests of Precilla and Selena. The unchallenged evidence established Hector's (1) long-standing sexual abuse of Megan; (2) his assistance in Megan's attempt to run away from Maryland and live under an assumed name in Virginia; (3) his minimal relationship with Precilla; (4) his nonexistent relationship with Selena; and (5) his imminent deportation. These facts support a conclusion that Hector was incapable of providing long-term care to the children. *See In Re Adoption/Guardianship No J9700J3,* 128 Md. App. 242, 252-53 (1999).

We perceive no error in the court's findings or its reasoning.

II. Placement with the Paternal Uncle

Hector argues that the lower court erred by not properly considering placement of Precilla and Selena with their paternal uncle.

We considered much the same argument in *In Re Adoption/Guardianship of Cross H.,* 200 Md. App. 142 (2011), cert. granted, 422 Md. 352 (2011). Writing for this Court, Judge Matricciani noted, "we believe the circuit court was correct in noting that the appropriate focus of the TPR hearing was not the potential suitability of the paternal grandmother as a placement for Cross H. — as this was an issue properly addressed in the CINA case — but rather, the fitness of Virginia H. and Aaron R. as parents."

Much the same occurred in the case before us. In short, the juvenile court's treatment of Adan's interest in having the children placed with him was completely consistent with the law as explained in Cross H." *Slip op at various pages, citations and footnotes omitted.*

*In re: Adoption/Guardianship of Ronald J.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: INCARCERATED PARENT

CSA No. 2301, Sept. Term 2011. Unreported. Opinion by Wright, J. Filed Sept. 11, 2012. RecordFax #12-0911-00, 32 pages. Appeal from Prince George's County. Affirmed.

The circuit court did not violate an incarcerated father's due process rights by terminating his parental rights after finding, among other things, that he was an unfit parent due to substance abuse and mental problems, and where he had the assistance of counsel and all the benefits and protections of a formal, adversarial proceeding, including those described in In re: Rashawn H.

"Warren L. presents two questions we have rephrased:

1) Did the circuit court violate Warren L.'s right to due process by proceeding to a termination of parental rights hearing without providing him notice of or an opportunity to participate in the underlying CINA proceedings?

2) Did the circuit court properly consider the appropriate statutory factors before terminating Warren L.'s parental rights?

I. Background

Ronald J. was born on Aug. 20, 2009. Toxicology screens on Ronald and Patrina J. were positive for cocaine. Patrina J. informed the Department that [then-putative father] Warren L. did not want anything to do with the child. She could not provide contact information for Warren L.

On Jan. 21, 2010, the Department placed Ronald in foster care. Ronald has remained with the same foster parents.

In September 2009, Warren L. was incarcerated to serve twenty-seven months for possession with intent to distribute illegal drugs and on Sept. 20, 2011, was released on parole. When the court conducted a TPR hearing on Oct. 19 and 20, 2011, Warren L. was living at his grandparents' former house, in the process of reinstating his disability benefits, and unemployed.

II. CINA Proceedings

On Sept. 17, 2009, the circuit court determined Ronald was a CINA and placed him in the care and custody of the Department. Throughout the proceedings, the Department attempted to maintain contact with Charlise J., Ronald's paternal grandmother. Charlise J. informed the Department that Warren L. was incarcerated. On Oct. 12, 2010, Charlise J. contacted Faye Korcak, Ronald's case worker, and expressed an unwillingness to establish a relationship with Ronald.

On Jan. 7, 2011, paternity test results confirmed Warren L. is the father of Ronald. The Department contacted him through a letter sent May 10, 2011. On Aug. 3, 2011, Warren L. confirmed he had received the letter [but] would defer making decisions about Ronald until released from prison.

III. TPR Proceedings

On Aug. 4, 2010, the Department modified its permanency plan to recommend [Ronald] be adopted by his foster parents. On Sept. 27, 2010, the Department filed for Guardianship with the Right to Consent to

See UNREPORTED CASES IN BRIEF page 7

UNREPORTED CASES IN BRIEF *Continued from page 8*

Adoption. Ronald filed a notice of objection. The circuit court held a trial on Oct. 19 and 20, 2010, at which it heard testimony from Ronald's foster parents, Korcak, Charlise J., and Warren L. The court ruled in favor of terminating Warren L.'s parental rights.

Discussion

I. Due process

At no point prior to or during the TPR hearing did Warren L. argue he was deprived of due process as a result of the court's failure to involve him in the CINA proceedings. Warren L. did not file a motion to dismiss on due process grounds prior to the TPR hearing, nor did he make an oral motion at the start of proceedings. Additionally, although Warren L.'s attorney claimed Warren had been deprived of an opportunity to participate in the CINA proceedings due to the delay in the paternity test, he did not take the additional step of arguing that the failure violated Warren L.'s right to due process in the guardianship proceedings. This specific issue needed to be raised to preserve the issue for review.

The remaining attack is on due process during the TPR hearing. We turn to *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 498 (2007), where the Court stated that although the best interests of the child is the overriding statutory criterion, three factors "give heightened protection to parental rights in the TPR context." The first is the "substantive presumption that the interest of the child is best served by maintaining the parental relationship, a presumption that may be rebutted only by a showing that the parent is either unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest."

Second, unfitness or exceptional circumstances "must be established by clear and convincing evidence." The third factor was the General Assembly's effort to circumscribe and guide the circuit court through FL §5-323(d).

Warren L. was notified of the guardianship petition, had the assistance of counsel and all the benefits and protections of a formal, adversarial proceeding, including the protections described in *Rashawn H.* Specifically, the court found Warren L. was an unfit parent, explicitly stated its findings were by clear and convincing evidence, and individually considered each applicable factor from §5-323(d). Warren L. had the opportunity to examine witnesses, present evidence and confront the State's witnesses. Warren L. was not deprived of his right to due process.

II. Requisite statutory factors

Warren L. argues the Department did not make reasonable efforts to reunite him with Ronald [under] FL §5-323(d)(1)(i)-(iii), and that the court lacked any basis to find he was an unfit parent because he had never been provided with services or an opportunity to raise Ronald; additionally, that the court erred in finding exceptional circumstances without evidence Ronald would be harmed by living with his biological family or by being removed from his foster parents.

FL §5-323(b) authorizes the court to terminate the parent-child relationship if the court finds by clear and convincing evidence the parent is unfit or exceptional circumstances would make continuing the parent-child relationship detrimental to the child such that ending the relationship is in the child's best interests. The court is required to consider factors set out in §5-323(d), make specific findings of fact as to each factor and determine expressly whether those findings demonstrate parental unfitness or exceptional circumstances. *See In re Adoption/Guardianship No. 95195062/CAD*, 116 Md. App. 443 (1997). The court is not required to weigh any one factor above the others; rather, it "must review all relevant factors and consider them together." *In re Adoption/Guardianship No. 94339058/CAD*, 120 Md. App. at 105.

Regarding services, the court found the Department attempted to locate Warren L. to determine paternity, wrote to and contacted him by phone to inquire as to his intentions regarding Ronald. The court found the Department had several contacts with Warren L.'s mother and attempted to arrange for her to visit with Ronald.

The court concluded that Warren L. had no contact with Ronald prior to a meeting just before the commencement of the TPR hearing, that Warren L. was unresponsive when the Department contacted him, and that Warren L.'s mother had very little contact with the Department.

The court found neither parent provided financial support for Ronald and neither was financially able to support him.

The court found Warren L. suffers from a disability that makes him unable to care for Ronald's needs for long periods: specifically, that Warren L. suffered from drug dependence, had a lengthy criminal history with a number of periods of incarceration, and has been diagnosed with paranoid schizophrenia and paranoia.

The court found there are no additional services the Department could offer that would likely bring about an adjustment. Ronald had already been in the custody of the Department for two and a half years.

The court found neither Warren L. nor his mother had demonstrated an ability to care for Ronald and that Warren L. had admitted this fact. The court concluded that Warren L. did not abuse or neglect Ronald.

The court found Ronald has no emotional ties with Warren L. as he only met Warren L. for the first time just before the TPR hearing. The court found Ronald has close emotional ties with his foster parents and his foster extended family. The court addressed Ronald's positive adjustment to the community, his feelings about terminating the relationship with Warren L., and the likely impact of terminating the parent-child relationship on Ronald's well-being.

At the Department's request, the court clarified that any factor the court did not directly address was not applicable in this case.

The circuit court considered each factor required by §5-323(d) and, in light of the findings, we cannot conclude it abused its discretion in ruling Warren L. was an unfit parent, or that exceptional circumstances made continuing the parental relationship detrimental to Ronald's best interests."

Slip op at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of Zanelle D.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: CULTURALLY SENSITIVE SERVICES

CSA No. 224, Sept. Term, 2012. Unreported. Opinion by Watts, J. Filed Sept. 18, 2012. RecordFax #12-0918-00, 36 pages. Appeal from Montgomery County. Affirmed.

The record did not support appellant's contention that the Department failed to make reasonable reunification efforts tailored to her background as a woman from southern Africa, and incorrectly viewed the cultural gap as a symptom of mental illness; rather, clear and convincing evidence supported the finding of parental unfitness, including appellant's refusal to allow medically necessary treatment for her daughter, her refusal to acknowledge her own mental health issues, and her threats against her daughter and caregivers.

"Gwendoline D. and Karl D. — who is not a party to this appeal — are the married parents of Zanelle, born Feb. 24, 2010. On July 14, 2011,

See UNREPORTED CASES IN BRIEF page 8

UNREPORTED CASES IN BRIEF *Continued from page 9*

the Department filed a Petition seeking guardianship of Zanelle with the right to consent to adoption or another permanent living arrangement.

As a woman from southern Africa, appellant argues that there was a "cultural gap[,]" which caused a barrier to communication between appellant and the Department and prevented appellant from meaningfully participating in reunification services. Appellant asserts that the Department incorrectly viewed the "cultural gap" as a symptom of mental illness and failed to ameliorate the gap through meaningful efforts. Appellant maintains that there was no evidence appellant would present a danger to Zanelle.

The Department responds that appellant "is an unfit parent as the result of her persistent serious mental illness and termination of parental rights is in Zanelle's best interests." The Department argues that appellant's refusal to participate in the services provided does not render them unreasonable or insufficiently tailored to her needs. The Department asserts that the circuit court "properly determined that [appellant]'s initial life-threatening neglect was at risk of repetition because [appellant] had failed to 'acknowledge or participate in treatment,' and likely would 'continue to make dangerous decisions that might seriously harm Zanelle[.]"

Zanelle contends that the circuit court properly exercised its discretion in terminating appellant's parental rights.

We conclude that the circuit court properly exercised its discretion in terminating appellant's parental rights. In the Findings of Fact and Conclusions of Law, the circuit court carefully considered the relevant statutory factors, making specific findings based on the evidence with respect to each consideration.

The circuit court observed that no preremoval services had been offered because Zanelle was removed emergently when appellant refused to allow proper medical care for her; however, that beginning in March, 2010, the Department attempted to provide services aimed at reuniting appellant and Zanelle. The services included referring appellant for therapy, and for psychological and psychiatric evaluations with Dr. Mario Pruss, Dr. Giselle Aguilar Hass, and Dr. Richard Ruth. In each instance, appellant "terminated her participation before the evaluation was concluded." Each evaluator "reported that [appellant] suffers from a constellation of mental disabilities." The circuit court noted that the Department facilitated supervised visitation, attempted to provide parenting education, and attempted to assist appellant with housing and transportation. The circuit court found that appellant refused to sign service agreements with the Department.

As to appellant's efforts to adjust her circumstances, condition, or conduct, the circuit court noted that appellant's "unacknowledged and untreated mental health issues are the overriding concern in this case" and that appellant has "failed to cooperate with …mental health evaluations and treatment, which dramatically and negatively affect[s] her relationship with Zanelle."

As to contact with Zanelle, the circuit court noted appellant's interactions with Zanelle evidenced her "resistance to developing the skills and bond necessary for competent parenting." The court found that appellant exhibited inappropriate behavior at visits, including instances in which she yelled at Zanelle's foster parents or the social worker in Zanelle's presence, and that these were "example[s] of [appellant]'s inability to focus on [Zanelle]."

As to contact with the Department, the court observed that appellant "was combative with Department personnel." The circuit court found that appellant's communication with the Department had deteriorated since the change in Zanelle's permanency plan, and that, as a result, any contact was largely "unsuccessful and unproductive."

With regard to contact with Zanelle's caregivers, the court found the relationship to be poor. Appellant made allegations of abuse and neglect that were proven false. The court observed that appellant was verbally aggressive toward M. and C.T. and had made threats against them, and as a result, her contact "became unsafe."

The circuit court found that appellant "has not contributed to Zanelle's care and support."

With regard to "existence of a parental disability that makes [appellant] consistently unable to care for [Zanelle]'s immediate and ongoing needs[,]" the circuit court found appellant "has significant mental health issues, [for] which she refuses to acknowledge or participate in treatment"; that, as a result, appellant "consistently becomes angry, blames others, and reacts defensively and irrationally when she feels she is losing control, does not get what she wants, or otherwise feels threatened." Contrary to the contentions of appellant's counsel and the Guardian ad litem — that appellant's actions stemmed from her cultural background and were misdiagnosed as mental illness — Drs. Hass and Ruth both "testified about their cross-cultural professional experience, specifically with Africans, and Africans from Zimbabwe and South Africa, and… neither saw [appellant]'s irrational and delusional actions as related to her African heritage."

With regard to "[w]hether additional services would be likely to bring about a lasting parental adjustment," the circuit court found that, based on appellant's refusal to participate even in diagnostic testing, "[i]t is not foreseeable that [appellant] would be willing to participate …." [and] that, even if appellant began treatment, "[appellant] would likely need to participate at least two years of consistent, intensive therapy, in conjunction with psychotropic medication."

With regard to abuse or neglect, the circuit court found that appellant's unwillingness to allow doctors to provide Zanelle with AZT treatment at birth constituted life-threatening neglect. The circuit court reiterated that "it is likely [appellant] would continue to make dangerous decisions that might seriously harm Zanelle[,]" as appellant "continues to suffer from the same paranoid delusional thought processes that endangered Zanelle in the first place."

As to Zanelle's emotional ties with appellant, the circuit court found them to be weak. The court found Zanelle is bonded to her foster parents, that she "does well with the children in her day care and is developmentally appropriately engaged."

The circuit court found, based on Zanelle's bond with her foster parents, her lack of a bond with appellant, and appellant's continued inability to care for Zanelle, that "termination of parental rights will not negatively impact Zanelle's well being."

We find no support in the record for appellant's contention that an alleged "cultural gap" resulted in the Department's decision to seek termination of her parental rights. In sum, we conclude that the circuit court's findings as to appellant's parental unfitness with regard to Zanelle are supported by clear and convincing evidence and that terminating the rights of appellant was in Zanelle's best interest."

Slip op at various pages, citations and footnotes omitted.

See UNREPORTED CASES IN BRIEF page 9

UNREPORTED CASES IN BRIEF *Continued from page 10*

*In re: Hazell D.**

CINA: RISK OF FUTURE ABUSE OR NEGLECT: MENTAL HEALTH ISSUES OF PARENT

CSA No. 0129, September Term, 2012. Unreported. Opinion by Zarnoch, J. Filed September 25, 2012. RecordFax #12-0925-00, 18 pages. Appeal from Montgomery County. Affirmed.

Although a woman with mental health and anger management issues was learning parenting skills and making progress in treatment, ample evidence supported the court's finding that her seven-month-old child would face a high risk for future abuse or neglect if he were returned to her unsupervised care in light of his age, his mother's history of striking him in anger, and the likelihood that her outbursts would focus on him due to proximity and the stress of caring for him.

"Keiana I. appeals from the March 1, 2012 decision of the juvenile court adjudicating her minor son, Hazell D., to be a CINA and placing him in the care and custody of the Montgomery County Department of Health and Human Services.

Hazell is the child of Keiana I. and Benjamin D. Prior to Hazell's birth on April 14, 2011, Keiana tested positive for speed, PCP, and crystal methamphetamine. She maintains that someone put the drugs in her food. Keiana reports that Hazell did not test positive for drug exposure at birth.

In July 2011, MCDHHS became involved with the family in response to a report of child neglect. Benjamin, Keiana, and Hazell were residing at the home of Benjamin's mother, Anita D. Keiana stated that her mother, Geraldine I., was helping her to care for Hazell.

In her appeal, Keiana contends that the evidence presented by the Department was insufficient to support the circuit court's determination that Hazell was a CINA. Specifically, Keiana asserts that the Department failed to prove by a preponderance of the evidence that Hazell had been abused or neglected, or that Keiana was unable to provide adequate care for him. Keiana concedes that she has mental health problems and anger issues, and that she is currently residing in a shelter. She argues, however, that these facts are not a sufficient basis upon which to deprive her of the right to parent her child.

The circuit court judge made the following findings of fact. First the judge discussed the incident when Benjamin struck Keiana while Keiana was holding Hazell, causing the baby to fall to the floor. The court noted that instead of immediately seeking to ascertain whether Hazell was hurt, Benjamin and Keiana continued yelling and "fist fighting" in Hazell's presence. The court further noted that after the altercation, contrary to the recommendation of the MCDHHS investigator, Keiana chose not to seek a protective order. The judge opined that Keiana's decision indicated a failure to fully appreciate the impact on her child of such threatening behavior.

The judge recounted the evidence presented at the hearing regarding Keiana's behavior in stressful situations and how her actions impacted Hazell. The court particularly emphasized Keiana's admission that she had, on one occasion, struck Hazell out of frustration and anger, and Keiana' s acknowledgment to the social worker that "my baby gets the outcome of my anger." Though the court acknowledged Keiana's testimony that she had not hit Hazell since that singular incident, the court found particularly significant the testimony of the other witnesses who recounted multiple occasions when they observed Keiana handling Hazell roughly, pulling him up from the floor or his carseat by one arm and yelling and cursing at him.

The court also noted the largely uniform testimony by multiple witnesses regarding Keiana's frequent, largely unprovoked demonstrations of uncontrolled anger and frustration. The judge emphasized how Keiana's behavior often caused conflicts between her and adults with whom she associated, repeatedly making things more difficult for both herself and Hazell by alienating those who cared enough to offer them lodging, care, and assistance. The court commented that Keiana's frequent angry outbursts indicated that Keiana lacked the ability to effectively control her own actions and emotions.

The court discussed Keiana's diagnosed mental health disorders, stating that she apparently lacked the ability to interact with others and to form and maintain healthy relationships. Noting that there was some ambiguity regarding Keiana's current diagnosis, the court found Keiana had previously been diagnosed with bipolar disorder, and that she had been prescribed medication to control her symptoms, including irritability, anger, stress, and mood swings. The court acknowledged that Keiana continued to make progress in treatment, that she had become compliant with her medication regimen, and that she was learning techniques that allowed her to make good decisions and better manage her mental health issues.

However, the court also reviewed the persuasive expert opinions offered by the MCDHHS investigator and social worker, who testified that Hazell would be at a high risk for future abuse or neglect if he was returned to the care of his mother. The court emphasized the experts' views that Hazell's age rendered him unable to protect himself, report abuse, or care for himself; that Keiana's unresolved mental health issues characterized by aggressive angry outbursts and frustration were likely to be focused on Hazell due to his proximity and the stress of caring for him; and that Keiana's past behavior of striking Hazell in anger portended future acts of abuse.

Finally, the court acknowledged Keiana's recent successful demonstration of parenting skills and the observations of others regarding Hazell, who appeared to be a happy, healthy baby, well bonded with his mother. The court expressed its belief that Keiana genuinely loves Hazell and honestly desires to regain custody and be the best mother she could be. However, after weighing all the evidence, the court concluded that Hazell was a CINA.

Contrary to appellant's assertion that the court based its determination on the fact that Keiana "was unemployed, had no income, and had inappropriate housing," we conclude that the circuit court properly focused on the evidence demonstrating a significant risk of future abuse and neglect. Our review of the record indicates that Keiana's lack of financial resources and less than ideal living situation played no significant part in the determination of Hazell's CINA status.

The circuit court's finding that Hazell was at a substantial risk of being subjected to additional abuse and neglect if he were returned to the custody of his mother was well supported by the evidence; therefore, not clearly erroneous. Moreover, we agree with the determination that the State produced sufficient evidence to demonstrate by a preponderance of the evidence that Hazell had been neglected and that Keiana was unable to give proper care and attention to his needs. Under the circumstances, the court did not abuse its discretion in finding Hazell to be a CINA." *Slip op at various pages, citations and footnotes omitted.*

See UNREPORTED CASES IN BRIEF page 10

UNREPORTED CASES IN BRIEF *Continued from page 11*

*In re: Miriam R.**

CUSTODY AND VISITATION: CINA: AWARD TO OTHER PARENT

CSA 2546, Sept. Term 2011. Opinion by Salmon, James P., J. (Retired, Specially Assigned). Filed Sept. 11, 2012. Unreported. RecordFax #12-0911-03, 36 pages. Appeal from Prince George's County. Affirmed in part, vacated in part.

The court did not abuse its discretion in awarding custody to the child's out-of-state father and closing the CINA case without making an FL 9-101 determination as to him, since there was no finding of past abuse or neglect against him; however, the court did abuse its discretion in delegating to the father the court's responsibility to determine the parameters of the mother's visitation rights and in not making a 9-101 determination as to her.

"Miriam R. (born Sept. 16, 2004) is the daughter of Sylvia R., appellant, and William M.

Miriam was declared a CINA in June 2010, based on findings that the child was in need of services due to her experiences in Mother's care; and that Father, although he might be willing and able to provide a home in the future, lived in Ohio and had no relationship with the child. Because Mother failed to establish that she could safely care for Miriam, and Father demonstrated that he was ready, willing, and able to do so, the Department and a juvenile court master recommended that Father be awarded custody.

Mother raises two issues:

I. Did the juvenile court err by awarding custody of Miriam to Father rather than Mother, and in doing so without making the "no likelihood of further abuse or neglect" finding required under §9-101 of the Family Law Article?

II. Did the juvenile court err in awarding Mother supervised visitation as permitted by Father?

DISCUSSION

In *In re Shirley B.,* 419 Md. 1(2011), the Court of Appeals thoroughly summarized the applicable standards and statutes that govern our review of this order. "Additionally, where … there is a proven history of abuse or neglect, "the proper issue before the hearing judge [is] whether there was sufficient evidence that further abuse or neglect [is] unlikely." *See also* FL § 9-101(b) ("Unless the court specifically finds that there is no likelihood of further child abuse or neglect by [the parent], the court shall deny custody or visitation rights to that party").

The burden of proof rests upon the parent to show that past neglect or abuse will not be repeated.

I. Custody Order

Mother argues that "the trial court erred by placing Miriam in the custody of her father without making the mandatory §9-101 findings and in failing to award custody to her mother, who is a more fit parent."

A. Failure to Make §9-101 Findings as to Father

Mother alleges procedural error — that the juvenile court erred as a matter of law in awarding Father custody without complying with FL §9-101.

Under Mother's interpretation of the statutory scheme, the juvenile court's finding that child in question had been abused or neglected triggered the need for a §9-101 "no likelihood" finding regardless of whether the parent being awarded custody/visitation was the neglectful/abusive parent. We disagree.

We need look no further than FL §9-101, which governs "any custody or visitation proceeding" regardless of whether a CINA is involved, to discern that the Legislature intended to restrict an award only to parents who previously neglected or abused a child. The determination is required if "a party to the proceeding" is reasonably believed to have previously abused or neglected a child, but only "if custody or visitation rights are granted *to the party."* Subsection (b) directs the court to deny custody or visitation "to that party" "[u]nless the court specifically finds that there is no likelihood of further child abuse or neglect by the party[.]"

When this language is read in *pari materia*, the statute restricts custody and visitation awards when a parent who has a history of child abuse or neglect is seeking custody or visitation, indicating that the purpose of the statute is to require heightened judicial scrutiny of an award to an abusive or neglectful parent. *Cf In re Yve S.,* 373 Md. 551, 587 (2003).

Here, the record supports the juvenile court's determination that there were no grounds to believe that Father had abused or neglected Miriam, and therefore no factual or legal predicate for §9-101 findings with respect to him.

We are not persuaded by Mother's contention that Father neglected Miriam because he "was absent from the first five years of her life," did not provide financial support, and "never visited her." There is nothing in the record regarding Father before the Department became involved. The record contains undisputed evidence that Father, rather than abandoning Miriam when he became aware of her needs, successfully worked within the court-ordered framework to meet them.

In the absence of any evidence that Father abused or neglected Miriam, the juvenile court did not err in awarding custody without making a §9-101 determination with respect to him.

B. Custody Award to Father

Mother also challenges on substantive grounds the juvenile court's decision to award custody to Father.

As a threshold matter, Mother failed to preserve her complaint that Miriam was initially removed on the basis of a false allegation. In any event, the record establishes that Miriam was neither adjudicated a CINA, nor continued in foster care, on the basis of such allegation.

It was undisputed that when she came into the Department's care, six-year-old Miriam was homeless, had not been enrolled in school, and had adopted her mother's fear that someone was trying to shoot her. At the permanency planning hearings, the juvenile court found Miriam was in need of mental health treatment for "PTSD due to persistent parenting and educational neglect and exposure to Mother's unresolved psychotic disorder and mental health issues."

After Mother's supervised visitation was suspended in Aug. 2010 because of her threats to kidnap Miriam, telephone visitations continued under the supervision of Miriam's therapist, who eventually recommended that Miriam be permitted to decline such contact because the calls triggered nightmares. The court adopted that recommendation, and Miriam consistently declined telephone visitation with Mother, after which her nightmares ceased.

Furthermore, throughout the CINA proceedings, the child progressed from "talk[ing] incessantly about a man trying to shoot her mother in the head and needing a safe place" in June 2010, to demonstrating her success in graduating from kindergarten and expressing her excitement about going "to live with her Father 'forever' in Ohio" in August 2011.

From this evidence, the court could reasonably infer that Miriam's educational and emotional challenges were cured, rather than caused, by

See UNREPORTED CASES IN BRIEF page 11

UNREPORTED CASES IN BRIEF *Continued from page 10*

the Department's removal of the child from Mother's care and custody.

There was ample evidence that Mother suffered psychotic delusions in May 2010, resulting in Miriam coming into shelter care; that Mother was hospitalized for psychiatric treatment, diagnosed with Psychosis NOS [Not Otherwise Specified], and treated with medication; that Mother discontinued the prescribed medications; and that Mother persistently failed to provide the Department the necessary documentation to evaluate her mental condition. On this record, the court did not abuse its discretion in concluding that it was not in Miriam's best interest for custody to be awarded to Mother.

Nor did the court abuse its discretion in awarding Father custody. The law rightly presumes that it is in the best interest of every child to live with a parent, and this presumption protects the fundamental right of parents to raise their own children when there is no reason for government intervention. *See Shirley B.*, 410 Md. at 21; *Yve S.*, 373 Md. at 571.

The award of custody to Father properly protected both Miriam's best interests and Father's constitutional rights.

II. Visitation Order

Invoking the Court of Appeals' holding that a "court may not delegate judicial authority to determine the visitation rights of parents to a non-judicial agency or person," *In re Mark M., 365* Md. 687, 704 (2001), Mother argues that "the trial court erred by refusing to structure a visitation order between two parents who had no history of communicating with each other."

Applying *Mark M.*, its predecessors *In re Justin D.*, 357 Md. 431 (2000), and *Shapiro v. Shapiro*, 54 Md. App. 477 (1983), and progeny of those decisions, we agree that the order awarding visitation as permitted by Father must be vacated.

A court must not permit another agency or person to perform its duty to resolve a visitation dispute. Furthermore, when the child has been neglected by the parent seeking visitation, the court must deny visitation unless it makes an affirmative finding on the record that future abuse or neglect is not likely. In the absence of such a finding, the court may fashion a supervised visitation order, if the court establishes terms for the protection of the child's physical and emotional well-being during visitation.

Under these standards, the juvenile court erred in giving Father unfettered discretion as to whether and when and how Mother could visit with Miriam and in awarding Mother visitation without making the determinations required by §9-101.

Furthermore, the order improperly delegates to Father the judicial responsibility to decide the terms of supervision that are reasonably necessary to protect Miriam's "physiological, psychological, and emotional well-being" during visitation with Mother.

On remand, the juvenile court must determine, based on the current circumstances, whether supervised visitation with Mother remains in Miriam's best interest, and, if so, it must then enter an appropriate order that establishes a minimum level of visitation and complies with §9-101."

Slip op at various pages, citations and footnotes omitted.

*Maureen Joan Johnson v. Patrick Andrew Konka**

CIVIL PROCEDURE: APPELLATE BRIEFS: DISMISSAL FOR VIOLATION MARYLAND RULES

CSA No. 1852, Sept. Term 2010. Unreported. Opinion by Watts, J. Filed Sept. 17, 2012. RecordFax #12-0917-05, 13 pages. Appeal from Carroll County. Appeal dismissed.

Dismissal of the appeal was warranted where the appellant's brief violated the Maryland Rules in several serious ways (which, in combination, genuinely interfered with the appellate court's ability to address the merits of the appeal) and where counsel was already given one opportunity to amend the brief.

"The Circuit Court granted an absolute divorce to Maureen Joan Johnson, appellant, and Patrick Andrew Konka, appellee.

Appellant's brief contains serious errors that rise beyond mere technicalities and genuinely interfere with this Court's ability to address the merits of the appeal.

"[T]he Maryland Rules are not guides to the practice of law but precise rubrics established to promote the orderly and efficient administration of justice and … are to be read and followed." *Rollins v. Capital Plaza Assocs.*, 181 Md. App. 188, 197, cert. *denied*, 406 Md. 746 (2008).

In *Rollins*, *id.* at 203, this Court dismissed an appeal where "the contents of [appellant's] brief and the Record Extract [were] so far removed from the boundaries of the rules and acceptable appellate practice that they [were] an affront to the process."

This Court stated:

"We recognize that dismissing an appeal on the basis of an appellant's violations of the rules of appellate procedure is considered a drastic corrective measure. … This Court will not ordinarily dismiss an appeal in the absence of prejudice to appellee or a deliberate violation of the rule. The instant appeal, however, presents us with many and substantial violations of the appellate rules of procedure … . Any one of [appellant's] violations alone may not warrant dismissal. In combination, however, her violations represent a complete disregard of the rules of appellate practice. Accordingly, we shall dismiss pursuant to Rule 8-602(a)(8)." *Id.* at 202-03.

Returning to the instant case, we discuss in descending order of importance, the errors which necessitate dismissal.

(1) Questions presented.

Appellant's brief does not comply with Rule 8-504(a)(3), which provides, in part: "A brief shall … include … [a] statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case …."

Appellant's brief contains: (1) a "Statement of the Issues," which contains five unnumbered questions, (2) a section labeled "Points of Error," which contains eight unnumbered statements, and (3) a section labeled "Statement, Argument, and Authority," which contains two headings — "A. Standard of Review," containing alphabetized sections and ten numbered sub-headings, and "B. Procedural Errors," with no sub-headings but eight paragraphs addressing several issues that are unrelated to each other.

The "Statement of the Issues" and "Points of Error" are inconsistent, *i.e.* the issues and points of error are not the same. Neither the "Statement of the Issues" nor the "Points of Error" correspond to the "Statement, Argument, and Authority." More importantly, the issues are not explained and supported by argument and case law.

Where appellant's brief fails to state the questions presented and to argue them distinctly from one another, an appellate court should dismiss the appeal. *See generally Clarke v. State*, 238 Md. 11, 22-23 (1965); *State Roads Comm'n of Md. v. Halle*, 228 Md. 24, 26-27 (1962); *Poole v. Miller*, 211 Md. 448, 453 (1957).

(2) References to the Record

See UNREPORTED CASES IN BRIEF page 12

UNREPORTED CASES IN BRIEF *Continued from page 11*

Appellant's brief does not comply with Rule 8-504(a)(4), which provides in part: "Reference shall be made to the pages of the record extract supporting the assertions."

Appellant's brief contains references to the record for some, but not the majority, of the facts appellant asserts. Even where appellant's brief does reference the record, the reference does not account for all the facts alleged in the preceding sentence. There are countless examples.

An appellate court should "decline to comb through the … record extract to ascertain information that [the party] should have provided — a clear reference to a page or pages of the record extract." *Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 760-61 (2007), *aff'd*, 403 Md. 367 (2008). *See also Rollins*, 181 Md. App. at 201.

(3) Generally — Contents and Order of Brief

Appellant's brief does not comply with Rule 8-504(a). It is an appellant's obligation to place: (1) all the procedural history in a distinct statement of the case, (2) all issues in a distinct statement of the questions presented, and (3) all factual history in a distinct statement of facts. Appellant's brief spreads out the factual and procedural history across two statements of the case and a "Statement of the Subject Matter and Appellate Authority" which Rule 8-504(a) does not authorize. In addition, in three different sections appellant's brief lists an inconsistent number of issues which differ from one another in each section.

(4) Complaint for Deceit

Appellant's brief contains a complaint for deceit. A trial court is the appropriate venue for initiating a claim for deceit.

(5) Other Errors

On page one, appellant cites "Md. Code §12-301" without specifying an Article. In "Statement, Argument, and Authority," subheading "6" is used twice. There are countless other examples of irregularities.

Conclusion

Where a brief fails to comply with the Maryland Rules, an appellate court has wide discretion in determining the proper remedy.

Because we are reluctant to refrain from addressing the merits, see *Rollins*, 181 Md. App. at 202-03, we considered ordering that appellant's brief be reproduced at appellant's counsel's expense pursuant to Rule 5-804(c). However, after filing her brief, appellant moved to replace her brief "in order to put references [to the record] in the body of the brief, as they are currently in the end-notes." This Court granted the motion, and appellant's counsel submitted a second version of the brief. Appellant's counsel having been given a second opportunity to properly reference the record and failing to do so — combined with counsel's failure to identify and brief the questions presented, and include the items required by Rule 8-504(a) — convinces us that a third version would not assist this Court in addressing the merits of the appeal.

Where an appellant's brief violates the Maryland Rules in several serious ways — which, in combination, genuinely interfere with an appellate court's ability to address the merits of the appeal — dismissing the appeal is the proper remedy. See *Rollins*, 181 Md. App. at 202-03. We dismiss the appeal pursuant to Maryland Rule 8-602(a)(8)." *Slip op at various pages, citations and footnotes omitted.*

*Dana W. Johnson v. Darielys Pinto**

DIVORCE: ALIMONY AND CHILD SUPPORT: RECUSAL OF MASTER

CSA No. 549, September Term, 2011. Unreported. Opinion by Watts, J. Filed Sept. 20, 2012. RecordFax #12-0920-06, 12 pages. Appeal from Prince George's County. Affirmed.

While the appellant failed to preserve either issue for appeal, the court found he was properly served with the motion to modify child support, and that he had waived both the issue of the master's recusal and the issue of the master's alimony order by failing to file exceptions to the master's recommendations,

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"This appeal concerns the denial of a motion filed by appellant, Dana W. Johnson, to vacate an order modifying his child support obligation and ordering him to pay an alimony arrearage to Darielys V. Pinto. Appellant raise[s] two issues:

I. Balancing Appellant's First Amendment Right of due process, in light of his sworn affirmation that Appellee did not properly serve him notice of the Motion for Modification, with Appellee's right to request modification of an existing order of support, whether the Circuit Court should have determined if Appellant's constitutional rights were properly safeguarded? Or in the alternative, whether Appellant has recourse to the Court of Special Appeals to ensure protection of his constitutional right of due process in light of the Circuit Court's failure to safeguard that right?

II. Should [the m]aster have recused himself in light of the fact that he and Appellee previously worked together and was it proper for [the m]aster to grant Appellee rehabilitative alimony when she did not request such in her Motion for Modification?

DISCUSSION

I.

Appellant contends he was not properly served with the Motion for Modification of Child Support and Other Relief.

Appellee responds that the private process server's Return of Service "is *prima facie* proof of valid service" which cannot be rebutted by "a simple denial of service."

We conclude that the circuit court did not abuse its discretion in denying the Motion to Vacate. On Feb. 14, 2011, appellee filed with the circuit court a private process server's Return of Service, attesting to service of process on appellant at the W— Avenue address. In compliance with Maryland Rule 2-126(a)(1), the Return of Service included the following: (1) the name of the person served, (2) the date of service, (3) the place and manner of service, (4) a description of the individual served, and (5) the facts upon which the process server determined that the individual served was of "suitable age and discretion." The private process server's Return of Service constituted *prima facie* evidence of valid service. *Roddy-Duncan*, 157 Md. App. at 202.

Appellant's denial of service "is not sufficient to rebut the presumption arising from [ ] a [proper] return" of service. *Id.* Upon review of the record, we discern no external circumstances indicating that service of process should have been reviewed for irregularities. It is evident from the record that the Motion for Modification, the circuit court summons, the Notice of Order of Default, the Notice of Hearing, and the proposed Order of Court were all sent to the W— Avenue address. This is the same address which appellant listed as his current address in the Motion to Vacate. Appellant provided no evidence in the circuit court that he was not properly served with the Motion for Modification. We perceive no abuse of discretion.

II.

Appellant contends that the master presiding at the March 28, 2011, hearing should have recused himself, as the master "had previously worked

See UNREPORTED CASES IN BRIEF page 13

UNREPORTED CASES IN BRIEF *Continued from page 12*

with Appellee."

Maryland Rule 9-208(a)(l)(H) permits a circuit court to refer "modification of an existing order or judgment as to the payment of alimony or support" to a master for domestic relations. "Within ten days after recommendations are placed on the record or served [on the parties], a party may file exceptions with the clerk. …Exceptions shall be in writing and shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the circuit court finds that justice requires otherwise." Md. R. 9-208(f) "[I]f exceptions are not timely filed, the circuit court may direct the entry of the order or judgment as recommended by the master." Md. R. 9-208(h)(l)(B).

In this case, appellant failed to raise an issue as to the master's recusal in the circuit court. Appellant did not attend the hearing over which the master presided, and, thus, made no motion at that hearing. Following the hearing, appellant failed to file exceptions to the proposed order — which appellant concedes he received from the circuit court. Pursuant to Maryland Rule 9-208(f), in failing to file exceptions to the master's recommendations, appellant waived both the issue of the master's recusal and the issue of the master's alimony order.

We note that, in the Motion to Vacate, appellant failed to raise either the issue of the master's recusal or the alimony award. Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" As neither the recusal nor the alimony award matters were raised in or decided by the circuit court, the issues are not preserved for appeal. Accordingly, this Court shall not address the matters." *Slip op at various pages, citations and footnotes omitted.*

*James F. Knott Jr. v. Charissa Gatti F/K/A Charissa Knott**

CUSTODY AND VISITATION: JOINT LEGAL CUSTODY: ALCOHOLISM NO BAR

CSA No. 824, Sept. Term, 2011. Unreported. Opinion by Zarnoch, J. Filed Sept. 17, 2012. RecordFax #12-0917-07, 17 pages. Appeal from Baltimore County. Affirmed.

Concerns about mother's sobriety and other issues, which led the court to deny her unsupervised visitation, did not preclude the court from awarding joint legal custody with tie-breaking authority to the children's father; nor did the court fail to exercise its independent judgment in relying, in part, on an independent psychologist's report in its custody decision.

"James Knott appeals a judgment providing for joint legal custody of Knott's children with appellee, Charissa Gatti.

Knott and Gatti were married on Feb. 19, 2005. They have two children: O., born Aug. 28, 2007, and I., born Oct. 8, 2008.

Gatti has struggled with alcoholism, prescription medication abuse and an eating disorder. She has undergone treatment several times. In July 2009, Gatti was hospitalized and admitted for four weeks of treatment and relapsed several times in the following months.

Knott filed for Limited Divorce in December 2009. In June 2010, Knott filed an Amended Complaint for Absolute Divorce.

The court granted an absolute divorce, awarded physical custody to Knott, and joint legal custody, under most of the terms suggested by [independent psychologist] Dr. Killeen. Given concerns about Gatti's health and stability, the court declined to permit unsupervised visitation between Gatti and the children.

The Judgment of Absolute Divorce, issued April 4, 2011, forms the basis for this appeal.

Knott presents two questions which we have recast:

1. Whether the circuit court abused its discretion in awarding joint legal custody; and

2. Whether the court abused its discretion by incorporating the findings of an independent psychologist in its order.

DISCUSSION

Joint Legal Custody

The record contains ample support for the ruling of shared legal custody and demonstrates the judge's consideration of the children's best interests. The parties and witnesses testified that both parents were actively engaged in the children's lives and that the children responded to both with love and affection. The parties testified that prior to the divorce, they made decisions about the children jointly and believed it was in the children's best interests to continue to do so.

The court had "no doubt that both [parents] are capable of being extraordinary parents" [and] that "both parties have reasonable character and reputation."

The judge did not make an explicit finding about Gatti's fitness but noted she was articulate, intelligent, capable, and employable. Gatti's alcohol problems led the court to require that visitation between her and the children be supervised, but the judge did not "in any way believe it is necessary to deny [I.] and [O.] time with their mother." Further, the court recognized that Gatti acted in the best interests of the children when she agreed to the *pendente lite* sole legal and physical custody for Knott because "[i]t was what the children needed."

Knott correctly points out that Gatti testified that joint decision-making would be "difficult" in the near future. However, after hearing all the evidence, the circuit judge believed that "with time these parents will be able to maintain some semblance of natural relations."

Given the testimony about the parties' pre-divorce level of communication, it was not unreasonable for the judge to conclude that, present acrimony notwithstanding, there was a reasonable probability of effective future communication between Knott and Gatti. *See Barton v. Hirshberg,* 137 Md. App. 1, 27 (2001).

Knott argues that the circuit court erred by awarding joint legal custody while denying Gatti unsupervised visitation. The judge's concerns about Gatti's behavior around the children is clearly reflected in the decision. That decision does not, however, automatically lead to the conclusion that Gatti is incapable of legal custody.

It was not unreasonable for the judge to find Gatti was able to contribute to the "long range decisions" inherent in legal custody even if she was not, at the time, capable of overseeing the day-to-day decisions and requirements of physical custody.

In sum, the judge considered the "best interest" factors, and the record supports her findings. Her decision to award joint legal custody, with tie-breaking authority for Knott, was not an abuse of discretion.

Independent Judgment

Knott argues that the circuit court failed to exercise independent judgment when it relied on Dr. Killeen's findings in its custody order.

A trial court must exercise independent judgment when making a custody evaluation. *See Domingues v. Johnson,* 323 Md. 486, 490-91 (1990). A court can, however, rely on the findings of a master or outside expert without entirely foregoing its independent judgment. *Cousin v. Cousin,* 97

See UNREPORTED CASES IN BRIEF *page 14*

UNREPORTED CASES IN BRIEF *Continued from page 13*

Md. App. 506, 512 (1992).

Dr. Killeen interviewed and observed the parties over several months following their separation. She conducted personality tests and spoke with Knott and Gatti's respective physicians and psychiatrists. She produced a thirty-page report that set forth a detailed proposed custody arrangement. Dr. Killeen also testified in detail at trial.

Knott argues that by adopting four pages of Dr. Killeen's report, the judge failed to exercise her independent judgment. We disagree. In an oral ruling, the judge made detailed findings based on the evidence at trial. She considered the extent of Gatti's alcohol problem and her steps toward recovery, the candor of the testimony, and the effects on the children of denying either parent access, among other factors. Much of Gatti's attempts at recovery took place in the months between completion of Dr. Killeen's report and trial, meaning that the parties presented evidence that only the court, not Dr. Killeen, could consider.

Moreover, although the court adopted some of Dr. Killeen's report in the Judgment, it did not copy the report wholesale. The fact that the judge reached a different conclusion from Dr. Killeen on visitation indicates that she exercised independent judgment in making the custody determination. *See Cousin,* 97 Md. App. at 516. We do not find any abuse of discretion."

Slip op at various pages, citations and footnotes omitted.

*Mark Langstein v. Marie Campagnone**

CUSTODY: MODIFICATION: MATERIAL CHANGE IN CIRCUMSTANCES REQUIREMENT

CSA No. 2287, September Term, 2011. Unreported. Opinion by Thieme, J. (Retired, Specially Assigned). Filed Sept. 10, 2012. RecordFax No. 12-0910-00, 24 pages. Appeal from Montgomery County. Vacated and remanded.

In the absence of further explanation, the court erred in finding a material change in circumstances, and therefore modifying custody, based on its finding that the children's father was requiring strict adherence to a visitation schedule that he and the children's mother had meticulously drafted and freely entered into.

"Following a contested hearing, the Circuit Court entered an order denying a motion for contempt filed by appellant, Mark Langstein, and granting a petition to modify custody filed by appellee, Marie Campagnone, both related to a Feb. 3, 2009 custody agreement regarding the divorced couple's minor children. After the circuit court denied both parties' motions to alter or amend portions of its order, appellant Langstein filed a timely notice of appeal.

Appellant presents two questions for our consideration:

I. Did the trial court err in modifying the parties' Feb. 3, 2009 Custody Agreement and awarding shared (50/50) physical custody and joint legal custody when there was no evidence of any material change in circumstance?

II. Did the trial court err in modifying the parties' Feb. 3, 2009 Custody Agreement and awarding the parties shared (50/50) physical custody and joint legal custody absent evidence to show that such a change was in the minor children's best interest?

ANALYSIS

Father contends the circuit court abused its discretion in modifying the February 2009 custody agreement because Mother had not met her burden of establishing the existence of a material change in circumstance, nor presented evidence how joint custody would be in the best interest of the children.

As both parents point out, when a circuit court is presented with a request for a change in custody from a prior order, the court must employ a two-step analysis. First, the burden is on the party moving for change in custody, here Mother, to show that there has been a material change in circumstances since the entry of the original custody order. *Gillespie v. Gillespie,* Nos. 960 and 2153, 2012 Md. App. LEXIS 89 at *356.

Only if a finding of a material change in circumstance is made may the court move on to the second step of the analysis, a consideration of the best interest of the child. *McMahon* 162 Md. App. at 594.

In the instant matter, before Father had spoken one word of testimony or presented one piece of evidence, the circuit court found a material change in circumstances had occurred as a result of Father's violation of what the court perceived as the *spirit* of the Feb. 3, 2009 custody agreement, through his over-strict construction of the *letter* of the agreement in denying Mother's requests for extra visitation with the children and in failing to keep Mother adequately informed about the children's lives. No evidence presented in Father's case-in-chief persuaded the court otherwise.

We, however, cannot say that the circuit court adequately explained how Father's alleged violation of the terms of the ostensibly valid custody agreement — by requiring strict adherence to the visitation schedule he and Mother had themselves created — comprised a material change in circumstances such that the children's welfare was affected. The circuit court merely stated that Father had construed the agreement strictly, in violation of the spirit intended by the parties, but, in the absence of further explanation, we fail to see how strict construction of an agreement meticulously drafted and freely entered into by both parents affected the welfare of the children such as to create a material change in circumstances, especially in light of the un-rebutted testimony that the children were happy, healthy, and performing well at school under the arrangement as set forth in the custody agreement.

Although the court and Mother relied heavily on the phrase in the custody agreement that stated each party was to "exert every reasonable effort to maintain free access and unhampered contact between the children and the other party," there was no testimony that would suggest the parties' intent in that phrase was anything more than to allow each parent free access to the children within the parameters of the visitation schedule. Without further information, reading it as allowing one parent completely free access to the children, without consideration of the other parent's schedule or children's planned activities, would appear to subvert the very purpose of the detailed visitation schedule.

Without sufficient findings of fact, we are unable to make an adequate determination of whether the lower court abused its discretion. Therefore, giving due deference to the circuit court's observation of the demeanor of the parties and witnesses, *Gillespie,* LEXIS 89 at *34, we remand for a detailed explanation as to whether and how Father's actions in adhering to the letter of the custody agreement but arguably deviating from the spirit thereof served to create a material change in circumstance that would support moving on to the second step of the two-step process of determining the best interest of the children in a modification of custody case.

We further point out that the circuit court did not adequately explain how a change from the 2009 custody agreement as created by the parents would be in the children's best interest. The court did make specific findings of each *Taylor* factor.

Furthermore, the court did not explain whether or why the agreement

See UNREPORTED CASES IN BRIEF page 15

UNREPORTED CASES IN BRIEF *Continued from page 14*

as drafted by the parties was unworkable, and even presuming a violation, we are aware of no Maryland case that holds that a violation of the terms of a custody agreement voids the agreement.

Upon remand, the circuit court is thus also required to address any reasons it may have for failing to re-impose the 2009 custody agreement upon the parties, with the proviso that the behavior of each party comply with both the letter and the spirit of the agreement, as discussed at length during the September 2011 hearing on the parties' motions and the circuit court's oral ruling thereon." *Slip op at various pages, citations and footnotes omitted.*

*Vincent Joseph McAvoy v. Sacha Williers Simmons**

CHILD VISITATION: CONTEMPT: ATTORNEYS' FEES

CSA No. 1501, September Term, 2011. Unreported. Opinion by Wright, J. Filed Sept. 28, 2012. RecordFax No. 12-0927-00, 11 pages. Appeal from Baltimore County. Affirmed.

Contrary to a pro se father's belief, there was no evidence of favoritism, bias, impropriety or abuse of discretion in the proceedings or the court's ultimate denial of his petition to hold his child's mother in contempt of a visitation order, nor in the court's finding that he lacked substantial justification for bringing the action, and the resulting award of attorneys' fees to the child's mother.

"This is a *pro se* appeal from the dismissal of a petition for contempt of a court order and award of attorney's fees to appellee, Sacha Simmons, in the amount of $1,300. Simmons and appellant, Vincent J. McAvoy lived together until June 2009. The petition for contempt at issue in this case is one of several filed by McAvoy with regard to a court order mandating visitation with his son, Joshua.

McAvoy presented the following five questions:

1. Did the circuit court abuse its discretion by (a) dismissing statements of an impeached witness on [the] stand; (b) not accepting/garnering all evidence relative to the ends of justice towards Joshua; and (c) allowing [the] attorney to testify overtop S. Simmons' statements on the stand?

2. Did the circuit court, in failing appropriate preparation and reasonable directives to perform duties, demonstrate bias and irregularities?

3. Did the circuit court fail to demonstrate confidence and demonstrate judicial discretion through favoritism and *Ex Parte* Communications with the attorney for defense?

4. Did the circuit court demonstrate bias against this *pro se,* single father?

5. Did the circuit court commit reversible error by granting counsel fees to the Appellee by prompting motion from appellee counsel and by demonstrating bias/abuse of discretion?

McAvoy has not properly briefed the above issues. Instead, McAvoy advances sections of the Maryland Rules, excerpts from House Bills in the Maryland House of Delegates, cases which provide limited or merely persuasive authority over this Court, and bald accusations of judicial bias and abuse of discretion. Nevertheless, we will strive to answer his appeal in a cohesive and cogent manner.

Documents submitted by parties who are proceeding pro se are to be construed liberally by the courts. *Simms v. State,* 409 Md. 722, 731 (2009); *see also Hughes v. Rowe,* 449 U.S. 5, 9 (1980). However, "the Maryland Rules of Procedure, the Rules of Evidence, the burdens of proof, production, and persuasion are party-based." *Tretick v. Layman, 95* Md. App. 62, 78 (1993) (emphasis omitted). "There are no separate rules for attorneys and for parties." *Id.*

McAvoy argues that the circuit court abused its discretion by not considering statements given by Simmons on the stand, not "accepting/garnering" all the necessary evidence to produce a just result for Joshua, and allowing Simmons' attorney to testify for Simmons while she was on the stand.

None of McAvoy's contentions are supported by a legal argument, let alone any facts, that would justify a finding that the circuit court abused its discretion.

McAvoy attempted to prove that Simmons was in contempt with only inefficacious questioning of Simmons and uncertified phone records that were not admissible as evidence. Based on a fair reading of the trial transcript, the circuit court did not "dismiss statements of admissions and perjury" from Simmons.

Under Maryland law, "one may not be held in contempt of a court order unless the failure to comply with a court order was or is willful." *Dodson v. Dodson,* 380 Md. 438, 452 (2004). Based on the record, McAvoy did not meet his burden of proof by the preponderance of the evidence standard.

McAvoy also accuses the trial court of allowing Simmons' attorney, Mr. Cahn, to testify for Simmons while she was on the stand. The transcript pages referenced by McAvoy's brief reflect that Mr. Cahn objected to a question and noted another objection based on relevance that was overruled by the trial court. Objections are certainly not testimony.

McAvoy next contends that the judge was derelict in his duties by not properly preparing for the contempt hearing. The trial judge reviewed the applicable pleadings, response, and court order, and heard evidence put on by the parties. Any further preparation was unnecessary on the civil contempt issue.

"To overcome the presumption of impartiality, the party … must prove that the trial judge has 'a *personal* bias or prejudice' concerning him." [*Jefferson-El v. State,* 330 Md. 99, 107 (1993).]

There is nothing in the transcript to suggest that the trial judge had a personal bias against McAvoy. There is nothing in the record to indicate that the trial judge even knew anything about McAvoy before he stepped into the courtroom on June 1, 2011.

McAvoy points to the spelling of defense counsel's name, defense counsel's objections to McAvoy's questions, and the trial judge's question of "Do you have a motion?" as evidence of favoritism and bias. Moreover, the court's request of a document pertinent to the case was not an *ex parte* communication as McAvoy alleges. There is nothing to indicate this request was anything other than an innocuous staff-to-staff communication.

Finally, the circuit court did not abuse its discretion by awarding attorney's fees to Simmons under FL § l2-103(a)-(b).

McAvoy takes umbrage with the denial of a request for a continuance for him to prepare for the issue of attorney's fees. As the trial judge noted, McAvoy was given notice of the issue through the properly served response to his petition for contempt over a month prior to the contempt hearing. Since the rules of procedure are equally applicable to a *pro se* petitioner as they are to a seasoned attorney, McAvoy had the same obligation to prepare for the issue. *Tretick, 95* Md. App. at 78. Therefore, the trial court did not abuse its discretion by denying McAvoy's motion for a continuance.

McAvoy also ignores the third provision of FL §12-103(b), "substantial justification." Based on the paltry evidence presented, it cannot be said

See UNREPORTED CASES IN BRIEF *page 16*

UNREPORTED CASES IN BRIEF *Continued from page 15*

that the trial court abused its discretion by concluding that McAvoy lacked substantial justification for the petition and, accordingly, awarding attorney's fees." *Slip op at various pages, citations and footnotes omitted.*

*Montgomery Co. OCSE, ex rel. Carlos Palomera-Valdez v. Algeris Arias**

CHILD SUPPORT: FACTORS BEYOND PARENT'S CONTROL: IMMIGRATION STATUS

CSA No. 678, September Term, 2011. Unreported. Opinion by Matricciani, J. Filed Oct. 3, 2012. RecordFax # 12-1003-00, 12 pages. Appeal from Montgomery County. Vacated.

Where the evidence showed that a woman had not taken any steps to adjust her immigration status in order to meet her child support obligations, the circuit court erred in holding that it lacked discretion to impute income to her based due to her inability to obtain lawful employment in this country.

"On Sept. 17, 2010, appellant County filed a complaint against appellee, Algeris Arias, to enforce Ms. Arias' child support obligations to her thirteen-year-old child. The circuit court entered an order denying the request for support and dismissing the complaint without prejudice. The County presents two questions:

I. Did the circuit court err in holding that Arias' immigration status was a factor beyond her control?

II. Did the circuit court err in holding that it lacked discretion to impute income to an undocumented parent?

We answer yes, vacate the judgment and remand for further proceedings.

History

Approximately fifteen years ago, Carlos Palomera-Valdez obtained a work visa for Arias, a citizen of the Dominican Republic, to come to the United States to be his domestic worker. Palomera-Valdez and Arias later married and had one child together. Palomera-Valdez renewed Arias' work visa one time; thereafter, she remained in the United States without a current visa.

In November 2007, Arias and Palomera-Valdez separated and are no longer married. The child has lived with Palomera-Valdez since her parents' separation.

Arias has never paid child support. Since the separation, she worked for two years at a store, where she earned seven dollars per hour, approximately forty hours per week. She was terminated two years ago when her employer learned she did not have a work visa, and has remained unemployed. Arias now lives with a man who pays her expenses.

The County filed a complaint under FL §10-115(b) to enforce Arias' duty of support under FL §10-203. The County argued that Arias was voluntarily impoverished based on her failure to remedy her immigration status. Second, the County argued that Arias previous employment demonstrated that she was able to earn *some* income, even if only a minimal amount.

In the circuit court's view, it did not have discretion to impute income "since it would require the Court to impose upon [Arias] the expectation that she work in violation of the law." The circuit court entered an order dismissing the complaint. The County filed a timely appeal.

Discussion

I. Arias' Immigration Status

The circuit court held that Arias' immigration status divested it of discretion to impute income to her based on a finding of voluntary impoverishment. The court considered Arias' immigration status to be a factor beyond her control, which precludes a finding of voluntary impoverishment. The County argues that, as a matter of law, an unauthorized immigrant controls his or her immigration status. We agree.

Parents must, if necessary, alter their previously chosen lifestyle to provide their children with necessities. *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993). When a parent fails to do so by "free and conscious choice, not compelled by factors beyond his or her control," the parent shall be considered voluntarily impoverished. *Id.*

It is apparent to us that Arias made a free and conscious choice not to pursue a means of remaining in this country legally. Arias admitted she has not taken any steps to adjust her immigration status to meet her child support obligations. At the domestic relations hearing, the Master questioned Arias:

Q: Have you taken, made any effort to get legal status here?

A: No. I haven't been able to. One, because I don't have the money to do it. And another reason is because I don't know how to do it either.

While the ultimate decision on whether she obtains legal status lies with the government, Arias certainly has the ability to begin the process. Her failure to make any attempts to alter her lifestyle to be able to meet her child support obligations was not a factor beyond her control.

The circuit court excused Arias' failure to rectify her immigration status based on her lack of financial resources and ignorance of the proper procedures. In so doing, the court overlooked resources available to indigent individuals who need help complying with immigration laws. For example, both University of Maryland Carey School of Law and the University of Baltimore School of Law offer clinics in immigration proceedings. Many resources and the law school clinics offer pro *bono* or discounted legal services. Had Arias availed herself of any of those resources during the past fifteen years, she might have found a cure for both of her purported excuses. Instead, she made a free and conscious choice not to pursue legal immigration status.

H. Voluntary Impoverishment

Because Arias' immigration status was not a factor beyond her control, the circuit court did have discretion to find that Arias voluntarily impoverished herself, and to impute income to her for purposes of calculating her child support obligation.

The County argues that the circuit court erred in assuming that the General Assembly did not intend to protect the interest of a minor child of an undocumented parent. We agree.

If the General Assembly wished to carve out an exception in the child support statute for illegal income earned by undocumented workers, it could have done so. That it did not is evidence that it intended the guidelines be used in all child support cases, including those involving an undocumented non-custodial parent of a minor child. *Cf In re Joshua W.*, 94 Md. App. 486, 497 (1994). The circuit court erred in holding that it lacked discretion to impute income to Arias.

We therefore vacate the judgment of the circuit court and remand the case to that court to make a finding on Arias' voluntary impoverishment and to impute income to her." *Slip op at various pages, citations and footnotes omitted.*

*Raymond J. Pearson Jr. v. Naomi Mason**

CUSTODY: MODIFICATION: RELOCATION OF ONE PARENT

CSA No. 2652, September Term, 2011. Unreported. Opinion by Eyler, Deborah S., J. Filed Sept. 18, 2012. RecordFax #12-0918-01, 16 pages.

See UNREPORTED CASES IN BRIEF page 17

UNREPORTED CASES IN BRIEF *Continued from page 16*

Appeal from Wicomico County. Affirmed.

In modifying custody based on a relocation by one parent, the court properly considered the Sanders factors in light of the best interest of the child; it did not create any presumption based on the relocating parent's right to travel, and was not required to examine why the parent was relocating.

"Raymond J. Pearson, Jr., appellant, filed a motion to modify custody of Jorryn G. Pearson, his child with Naomi Mason, appellee. Mason filed a countermotion.

After an evidentiary hearing, the trial court entered an order modifying custody of Jorryn from joint physical custody, to sole physical custody in Mason. Pearson noted a timely appeal, raising four questions which we have rephrased:

I. Did the trial court err by placing the burden on Pearson to show that Mason's planned relocation from Maryland to Virginia was not in the best interest of Jorryn?

II. Did the trial court commit legal error or abuse its discretion by awarding sole physical custody to Mason?

III. Did the trial court err in failing to appoint a Best Interest Attorney during the custody modification hearing?

IV. Did the trial court err by considering an *ex parte* communication from Mason's husband, then fiancé?

I. Burden on Parents

In custody modification cases involving parental relocation, the court determines whether the party moving for modification has established that the relocation is a material change in circumstance. *See Domingues v. Johnson,* 323 Md. 486, 500(1991). If the court finds relocation is a material change, it must decide what custody arrangement will serve the child's best interests. *Braun,* 131 Md. App. at 610; *Wagner v. Wagner,* 109 Md. App. 1, 28 (1996).

Pearson contends the trial court erred by requiring him to prove that Mason's relocation *would not be* in Jorryn's best interest; he maintains the burden should have been on Mason to prove that her relocation *would be* in Jorryn's best interest. We are not persuaded.

Mason's plan to move to Virginia with her fiancé was a given; the best interest issue to be decided was, once Mason was living in Virginia, what living arrangement would be best for Jorryn. The trial court gave each party a full opportunity to present evidence about what living arrangement he or she was advocating, and then made a decision about what custody arrangement would be in Jorryn's best interest. Nothing suggests that a burden of proof was placed on Pearson, that he failed to meet a burden of proof, or that the court's decision hinged on a burden of proof.

Braun does not support Pearson's argument. In that case, we explicitly disavowed any presumption arising from a custodial parent's right to travel. *Braun,* 131 Md. App. at 607-08.

The fact that the court characterized Mason as having been the custodial parent was of no moment. The court engaged in a traditional and proper best interest analysis that did not factor in the existence of a "custodial parent."

II. Custody Award

Pearson contends the trial court erred by failing to consider the relevant *Sanders* factors in concluding that Mason should be awarded sole physical custody.

Pearson argues that the trial court should have analyzed 1) "whether the relocating parent is currently the primary custodial parent and if so, for how long"; 2) "the reasons why the relocating parent is moving and why the non relocating parent is objecting"; 3) "the residential history of the parties"; 4) "what the relocating parent's and child's circumstances will be in the new location as to living arrangements, schooling, employment, financial circumstances"; *5)* "the presence of other family members"; 6) "age, general stage of development and any special needs"; 7) "effect of relocation on non relocating parent"; and 8) "preference of the Child."

To be sure, Pearson's list overlaps some factors in *Sanders.* He has eliminated some *Sanders* factors, however, and, more important, has modified the factors to shift the focus away from the best interests of the child to an examination of why the parent is relocating.

In this case, the trial court sufficiently explained its best interest analysis in its memorandum opinion. After listing the *Sanders* factors, and acknowledging that they should be considered, the trial court explained that its decision was reached because "[b]oth parents are willing to continue to keep communications open and allow for frequent visitations."

The trial court was not required to discuss, in detail, every point that it considered in making its best interest decision. All it was required to do was provide a "brief statement of the reasons for its decision." Md. Rule 2-522. We find no error in the trial court's analysis or its decision.

III. Best Interest Attorney

Rule 9-205.0 provides that a "court should provide for adequate and effective child's counsel in all cases in which an appointment is warranted." It is for the trial court to determine whether such an appointment is warranted. "The decision … is a discretionary one, reviewable under the rather constricted standard of whether the discretion was abused." *Garg v. Garg,* 393 Md. 225, 238 (2006).

Here, unlike in *Garg,* the first time Pearson argued the court should have appointed a BIA was when he filed a "Motion for New Trial, to Revise, Alter or Amend Order and Stay." By then, there was little point in appointing a BIA. Obviously, if there was no abuse of discretion in *Garg,* there was no abuse of discretion here where the court was never asked, at a meaningful time, to appoint a BIA.

IV. *Ex Parte* Communication

Finally, Pearson contends the trial court erred by considering an *ex parte* communication from Mason's then fiancé (now husband), Daniel Rinaldi. Rinaldi attended the hearing. He did not testify. That same day, Jan. 11, 2012, he sent a letter to the court purportedly attempting to clarify his employment situation with the Navy.

Pearson had notice of Rinaldi's letter because he was copied on it. Yet, he did not move to strike. Moreover, Pearson has failed to point to any evidence in the record that the trial judge considered Rinaldi's letter or that the letter had any influence whatsoever over the trial judge's decision." *Slip op at various pages, citations and footnotes omitted.*

*Joey Dayle Richards F/K/A Joey Maruschak v. Gary Maruschak et al.**

DIVORCE: MARITAL PROPERTY: FINANCIAL SETTLEMENT AGREEMENT

CSA No. 881, September Term, 2010. Unreported. Opinion by Graeff, J. Filed Oct. 1, 2012. RecordFax No. 12-1001-04, 14 pages. Appeal from Baltimore City. Affirmed.

A Judgment of Absolute Divorce, based on an oral agreement reached by the parties in open court, was analogous to a consent judgment, and

See UNREPORTED CASES IN BRIEF page 18

UNREPORTED CASES IN BRIEF *Continued from page 17*

appellant, who agreed to the terms of the financial settlement, cannot appeal the court's judgment based on that agreement.

"This appeal arises from two orders issued by the Circuit Court for Baltimore City: (1) a Judgment of Absolute Divorce; and (2) an Order Appointing Receiver. The Judgment of Absolute Divorce incorporated the agreement that a receiver would be appointed to sell the parties' shared business. Subsequently, the lower court held a hearing regarding the appointment of the receiver and found that appellant, Joey Dayle Richards f/k/a Joey Maruschak ("Ms. Maruschak"), was in contempt of the Judgment of Absolute Divorce and the Order Appointing Receiver.

On appeal, Ms. Maruschak presents two questions, which we have rephrased:

1. Did the circuit court err when it failed to perform the test under the Marital Property Act and when it failed to grant a monetary award?

2. Did the circuit court lack personal jurisdiction over Ms. Maruschak in the May 11, 2010, hearing because she had never been served?

We affirm the judgments.

DISCUSSION

I. Monetary Award

Ms. Maruschak first contends that the circuit court erred when it failed to grant her a monetary award under the Marital Property Act. Mr. Maruschak disagrees, arguing that the parties entered into a consent decree, and Ms. Maruschak cannot appeal from a valid consent judgment.

The Judgment of Absolute Divorce, although not entered specifically as a consent judgment, was based on the oral agreement reached by the parties in open court, and therefore, it was analogous to a consent judgment. *See Long v. State,* 371 Md. 72, 82 (2002).

Here, Ms. Maruschak entered into an agreement regarding the terms of the parties' financial settlement. She cannot now appeal the court's judgment based on that agreement. *See Suter v. Stuckey,* 402 Md. 211, 223 (2007).

As the Court of Appeals explained in *Suter:* "The availability of appeal is limited to parties who are aggrieved by the final judgment. A party cannot be aggrieved by a judgment to which he or she acquiesced. *See Dietz [v. Dietz],* 351 Md. [683,] 689-90, 720 A.2d [298,] 301-02 [(1998)]. … The rationale for this general rule "has been variously characterized as an 'estoppel', a 'waiver' of the right to appeal, an 'acceptance of benefits' of the court determination creating 'mootness', and an 'acquiescence' in the judgment." *Franzen v. Dubinok,* 290 Md. [65,] 68, 427 A.2d [1002,] 1004 (1981).

To be sure, there is an exception to this rule if there was not actual consent because, for example, "the judgment was coerced, exceeded the scope of consent, or was not within the jurisdiction of the court, or for any other reason consent was not effective." *Id.* n.10. Here, Ms. Maruschak contends on appeal that "the court was hostile towards her and [she] agreed to a disadvantageous settlement rather than jeopardise [sic] her health and well-being in going forward with [contentious] divorce proceedings in a hostile environment, which she was ill equipped to handle." The record, however, does not support her claim.

Before accepting the parties' agreement, the circuit court detailed the agreement and then asked Ms. Maruschak if she wanted to accept the agreement reached regarding marital property issues. She responded: "Yes, I do, sir." The court asked if anyone forced or coerced her to make that decision, to which she responded: "No, sir." The court asked if she was "doing so freely and voluntarily." She answered: "Yes, Your Honor." She assured the court that she was not under the influence of any drugs, alcohol or narcotics. Ms. Maruschak agreed to the terms of the parties' financial settlement, and she cannot now challenge on appeal the court's judgment incorporating that agreement.

II. Personal Jurisdiction

Ms. Marusehak argues that the circuit court lacked personal jurisdiction over her "in the May 11, 2010 hearing because she had never been served."

First, we note that, although Ms. Maruschak states that she "informed the court that she was unaware as to why she was called … and had not received any documents from Appellee's attorneys," she did not cite to anywhere in the transcript to support this statement. This deficiency, by itself, is grounds to decline to address the argument.

We will, however, exercise our discretion to consider her contention, which we find to be without merit. The circuit court obtained personal jurisdiction over Ms. Maruschak when she filed an answer to the initial complaint. Under the doctrine of continuing jurisdiction, "its jurisdiction continues throughout all subsequent proceedings which arise out of the original cause of action." *Flanagan v. Dep't of Human Res. ex rel Balt. City Dep't of Soc. Servs.*,412 Md. 616, 628 (2010). "In order for the court to maintain personal jurisdiction under the doctrine, however, the defendant must receive reasonable notice and be afforded an opportunity to be heard at each new step in the case if an *in personam* decree is to be rendered against him." *Id.*

Here, the record supports the circuit court's finding that she received reasonable notice of the May 11th hearing and pleadings. The certificate of service states that it was served at the address she provided to the court. The docket entries reveal that notice was mailed to Ms. Maruschak on April 22 and 29, 2010, and she admitted receiving actual notice of the hearing by phone. The record reflects that Ms. Maruschak had reasonable notice of the hearing and the opportunity to be heard. The court had personal jurisdiction over Ms. Maruschak." *Slip op at various pages, citations and footnotes omitted.*

*David A. Samuels v. Linda O. Samuels**

CHILD SUPPORT: ARREARAGES: WAIVER OF RIGHT TO HEARING

CSA No. 0090, September Term, 2011. Unreported. Opinion by Wright, J. Filed Oct. 5, 2012. RecordFax No. 12-1005-04 (19 pages). Appeal from Montgomery County. Affirmed.

The trial court did not violate husband's due process rights in denying, without a hearing, his Motion for Reconsideration of a Consent Order and Reduction of Child Support, as the procedure the court followed was the one the parties had agreed upon.

"Appellant, David A. Samuels, and appellee, Linda O. Samuels, were divorced on April 10, 2007. The parties' Separation Agreement granted joint legal custody of the parties' minor children, and sole physical custody, to Wife.

On Nov. 9, 2010, the parties appeared in the circuit court and, in lieu of a hearing, reached a settlement resolving all outstanding issues except Husband's outstanding child support arrearage. The terms of the settlement were placed on the record and the parties requested 14 days to reach an agreement on an arrearage amount. When the parties were unable to reach an agreement, each side agreed to submit letters and documentation to the

See UNREPORTED CASES IN BRIEF page 19

UNREPORTED CASES IN BRIEF *Continued from page 18*

court and allow the court to make the final determination of Husband's arrearage.

On Feb. 2, 2011, pursuant to the agreement, the court entered a Consent Order incorporating the terms of the parties' Nov. 9, 2010 agreement ("November Agreement") and the court's ruling that Husband owed $21,826.48 in child support arrearage. Husband filed a Motion for Reconsideration, which was denied on March 24, 2011.

Husband argues that the trial court erred in its denial of his Motion for Reconsideration. Husband initially contends that the court's determination of his child support arrearage, set forth in the Feb. 2, 2011 Consent Order, was based solely on the written documentation provided by Wife and failed to credit Husband with payments on the Potomac home pursuant to §13(a) of the Separation Agreement. Wife responds that the Consent Order considered all documentation provided by the parties, as agreed subsequent to the November Agreement, and accurately considered only direct child support payments and the payments contemplated by §13(c) of the Separation Agreement, as was agreed by the parties on the record on Nov. 9, 2010. We agree with Wife. This agreement excluded Section 13(a) of the Separation Agreement from consideration by the court.

Husband next argues that his due process rights were violated by the denial of his motion. At no point in the proceedings below did Husband argue that his voluntary agreement on Nov. 9, 2010 — that the parties would confer for 14 days in attempt to resolve the arrearage dispute and subsequent agreement that the parties would submit written documentation regarding payment with proposed consent orders to the trial judge for her adjudication of what Husband owed — deprived him of any procedural rights.

Husband argues that *Mathews v. Eldridge,* 424 U.S. 319 (1976), requires an evidentiary hearing before any deprivation of property. Husband misapplies *Mathews,* a case which involved the termination of Social Security disability benefits.

At oral argument, Husband's counsel asserted that Husband was denied due process because he did not have the opportunity to explain or challenge the calculations and documentation provided in the written submissions to the trial judge in a meaningful manner. If this was the state of the record, the Husband would be correct.

In this case, the parties decided how the evidence was to be considered by the court. The evidence was not hidden, and each party knew what the other was presenting. The judge was involved in the negotiations preceding the November Agreement and conducted *voir dire* of the parties. The parties agreed on the procedure wherein the judge was given the opportunity to review the Settlement Agreement and documentation submitted by each party prior to issuance of the Consent Order. The trial judge's use of the submitted documentation did not constitute a violation of due process.

Nevertheless, Husband argues that he had no procedural safeguard, that is, no opportunity for a hearing. However, the record is clear that Husband and Wife submitted the case for what was in essence "a paper review." A request for a hearing would be antithetical to their agreement.

Nowhere in the transcript from the November 2010 hearing does Husband request a hearing if the parties cannot agree on the amount of arrearage.

Husband submitted a letter to the trial judge on Jan. 24, 2011, which stated:

Enclosed please find a Consent Order for your signature that, we believe, represents the parties' agreement placed on the record before you on Nov. 9, 2010. As Ms. Haspel indicated, the sole area of disagreement is whether or not there are any child support arrears owed Ms. Samuels by Mr. Samuels as a result of the November [Agreement]. It is our position that there are no child support arrears. Below we have documented the payments made by Mr. Samuels that qualify as support paid by Mr. Samuels for the period March 1, 2010 through Jan. 30, 2011.

Husband's counsel proceeded to document which parts of Wife's counsel's Jan. 11, 2011 letter were disputed and presented Husband's accounting of payments.

Nowhere in Husband's Jan. 24, 2011 letter does Husband request a hearing regarding the disputed facts. The finality of the language in Husband's letter and the absence of a specific request for a hearing supports Wife's assertion that the parties had consented to the trial judge making the determination of arrearage based on the written submissions to her.

Pitsenberger v. Pitsenberger, 287 Md. 20 (1980), cited by Husband, is unpersuasive. As this Court has explained, "[D]ue process is satisfied by the court's ascertaining, from the totality of the circumstances, that the [party] desires to forego a contested hearing." *In re Blessen H.,* 163 Md. App. 1, 20 (2005).

Husband also cited to *Micro Focus (US) Inc., v. Bell Canada,* 686 F. Supp. 2d 564, 569 (D. Md. 2010), arguing that "Waiver of a constitutional right, such as the due process right implicated here [personal jurisdiction], must be clear and unequivocal." Where the parties have already agreed on the record to attempt to resolve the issue informally and then follow up with affirmatory correspondence, the waiver was clear and unequivocal.

Husband filed his Motion for Reconsideration pursuant to Maryland Rule 2-534, as a motion to amend the judgment of the Consent Order, entered by the trial court after the parties had submitted their proposed consent orders and supporting documentation. Maryland Rule 2-311(e) states that "When a motion is filed pursuant to Rule … 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." We agree with Wife that denial of a motion under Rule 2-534 does not require a hearing.

The trial court did not abuse its discretion in denying Husband's Motion to Reconsider as the trial court followed the procedure as agreed upon by the parties. There could not be a violation of one's due process rights under these facts." *Slip op at various pages, citations and footnotes omitted.*

*David A. Samuels v. Linda O. Samuels**

CHILD SUPPORT: MODIFICATION: ATTORNEYS' FEES

CSA No. 1615, September Term, 2011. Unreported. Opinion by Wright, J. Filed Oct. 5, 2012. RecordFax No. 12-1005-06 (40 pages). Appeal from Montgomery County. Affirmed.

Where the children's father, upon changing counsel, sought to have the court revise or undo virtually every term in the settlement agreement reached less than a year earlier, and exhibited a pattern of challenging every court ruling without possessing substantial justification, the evidence supported the trial court's refusal to modify his child support obligations, its decision to grant the mother sole legal custody, and its award to her of attorneys fees and advance attorneys fees.

"Appellant David A. Samuels and appellee Linda O. Samuels were divorced on April 10, 2007. The parties' Settlement Agreement granted joint legal custody of Brandon (since emancipated), Eric, and Eliana, and

See UNREPORTED CASES IN BRIEF page 20

UNREPORTED CASES IN BRIEF *Continued from page 19*

sole physical custody, to Wife.

On Nov. 9, 2010, after two failed settlement conferences, the parties appeared in the circuit court and in lieu of a hearing, reached a settlement resolving all outstanding issues except Husband's child support arrearage. The terms of the settlement were placed on the record ("the November Agreement"), and the parties agreed to submit letters and documentation to the court and allow the court to make the final determination of Husband's arrearage.

On Feb. 2, 2011, the trial court issued a Consent Order, incorporating the terms of the November Agreement and its determination of child support arrearage.

On Feb. 9, 2011, Husband filed a Motion for Reconsideration of Consent Order, Petition for Reduction in Child Support and Request for Hearing. The Motion was denied on March 24, 2011, and that denial is the subject of another appeal. *[Editor's Note: see prior opinion digest.]*

DISCUSSION

I. Modification of Child Support

Husband argues that the trial judge erred in finding no material change in circumstances because, according to his calculations, the children's extracurricular activities amounted to $833 per month instead of $1,500. The trial judge explained in her Memorandum Opinion that circumstances had not materially changed since the entry of the Consent Order. The minor children were still living in Eldersburg, engaged in the same or substantially similar extracurricular activities, Wife's occupation had not changed, nor had the children's expenses. Husband's arguments on appeal that Wife's income increased, because of the payments he made pursuant to the Consent Order, are unpersuasive. Those payments were an essential part of the November Agreement incorporated into the Consent Order. Husband's further argument that the children's expenses decreased is not supported by the record.

II. Modification of Child Custody

Husband asserts that the judge only considered two isolated incidents as the basis for finding the parties could not communicate and awarding Wife sole legal custody: the disagreements surrounding Eric's hockey trip to Canada and the reunification therapist for Eliana. Husband argues that the decision to award sole legal custody to Wife stripped him of his substantive due process rights.

Wife argues that the trial judge properly considered the best interest of the child, testimony, the record [and] *Taylor v. Taylor*, 306 Md. 290 (1986).

Our review of the record revealed substantial evidence to support the change in legal custody to Wife. The trial judge discussed each *Taylor* factor in her Memorandum Opinion, and the record shows that over the course of the litigation she considered the factors in Sanders. While the judge cited two specific examples of disagreement, she expanded her discussion to include the admitted hostility and inability of the parties to resolve any issue without turning to the court. The record supports the findings that the parties have a history of acrimony about where the children live, their school priorities, the need for therapy, extracurricular activities, vacations, and even the cost of their food. The judge further explained in her Memorandum Opinion: "The current joint legal custody arrangement has only served to delay decision-making regarding the minor children's welfare, as well as elevating the existing tension between the parties."

We affirm the award of sole legal custody to Wife.

III. Attorney's Fees

Husband argues that the November Agreement required each party to pay their own attorney's fees, and that the Consent Order memorialized the agreement by ordering "that each party shall be responsible for their respective attorneys fees in this matter." A plain meaning interpretation of the phrase "in this matter" refers only to the litigation leading to the November Agreement and Consent Order, not subsequent litigation challenging both.

Husband emphasizes the judge's statement in her October 2011 Memorandum Opinion that "[t]he Consent Order is silent on the matter of attorney's fees." This statement is given little weight, because the trial court correctly stated it has statutory authority to award attorney's fees under Maryland Rule 1-341.

Husband argues that the trial court erred in awarding advance attorney's fees and did not follow *Ridgeway v. Ridgeway,* 171 Md. App. 373 (2006), because the court did not hear or receive evidence regarding the financial resources of each party.

Husband argues that the trial court should have considered that Wife received $320,000 for her interest in the Potomac home, $43,131 in retirement fund equalization, and a $70,000 alimony buy-out from him in 2011 in determining that she possessed sufficient funds to defend not only any appeals, but also to fund the ongoing litigation between them. However, on Aug. 3, 2011, Husband's counsel argued to the trial court that the $70,000 buy-out was intended to cover Wife's housing expenses for 4 years. Additionally, in several filings to the court, Husband argues that the $320,000 was intended to allow Wife to purchase a home in Montgomery County where she and the children could live.

The record shows the judge had considered the parties' relative financial positions and needs throughout the course of the litigation.

Husband's counsel argues that the judge found Wife "at least has the means to advance her defense in this appeal." However, Husband ignores the remainder of the transcript from the July Hearing where Wife and Husband's relative financial situations and supporting documentation were discussed. Further, Husband's counsel, at the July Hearing, admitted that no opposition to Wife's motion for advance attorney's fees had been filed, and that the court had the discretion to advance attorney's fees in the case of hardship.

In her Memorandum Opinion, the trial judge stated that she considered Husband had greater financial resources than Wife. The judge was specially assigned to the case on March 31, 2010, and had been involved with nearly every motion and hearing since Nov. 9, 2010. The judge heard testimony and received evidence regarding the parties' financial positions following entry of the Consent Order, including during the July Hearing, the August Hearing, as well as affidavits documenting attorney's fees with specificity. The record supports the judge's conclusion that she possessed enough information to assess attorney's fees.

Husband argues that he is "impoverished" and cannot meet his support obligations nor should he be required to pay Wife's attorney's fees. While Husband never provided a certified financial statement to the trial court, Husband represented to several mortgage companies that he earns in excess of $300,000 per year in salary, bonuses, and investments; had zero obligations outside of a "modest" car loan and child support payments; and had a net worth ranging from $1,000,000 to over $2,000,000. Wife, on the other hand, provided a certified long form financial statement to the trial court reflecting $75,000 per year in salary and a net worth of $492,000. Husband's argument is unpersuasive.

In awarding attorney's fees pursuant to Maryland Rule 1-341, the trial judge noted in her Memorandum Opinion that Husband is responsible for

See UNREPORTED CASES IN BRIEF page 21

UNREPORTED CASES IN BRIEF *Continued from page 20*

the majority of the costs incurred by Wife since the November Agreement because of Husband's unwillingness to adhere to the terms of the November Agreement. The trial judge stated, "[from Nov. 9, 2010] forward, Plaintiff has engaged in a ceaseless campaign to renege on his agreement." The trial judge discussed how Husband and Wife repeatedly turn to the court to resolve disputes that could be settled otherwise, with Husband demonstrating a pattern of challenging every court ruling without substantial justification for those challenges. It is instructive that the record contains 101 docket entries from 2007, when the parties divorced, to November 2010, but 472 entries between December 2010 and Oct. 18, 2011.

Like the appellant in *Jenkins [v. Cameron & Hornbostel*, 91 Md. App. 316 (1992)], Husband's present counsel sought to undo, or at the least have revised, everything her predecessor did leading up to and including the consent decree on Nov. 9, 2010.

In addition, the record shows that the trial judge considered Husband's actions that were done to delay or otherwise harass Wife. In her Memorandum Opinion filed June 21, 2011, the judge found Husband's exceptions were lacking the necessary transcript to support his arguments or irrelevant. The judge found in her October 2011 Memorandum Opinion, that Husband had abused discovery by improperly seeking to depose Wife's counsel, force Wife to undergo a court-ordered mental examination, and by failing to provide requested information.

The record is replete with filings by Husband that were obvious attempts to forestall or negate his obligations under the November Agreement. We cannot say the judge abused her discretion in finding that Husband brought actions without substantial justification, as she was intimately familiar with the litigation and in the best position to assess Husband's actions. We agree that Husband engaged in conduct outside of "legitimate advocacy." The trial judge did not err or abuse her discretion in awarding attorney's fees to Wife."

On Nov. 9, 2010, after two failed settlement conferences, the parties appeared in the circuit court and in lieu of a hearing, reached a settlement resolving all outstanding issues except Husband's child support arrearage. The terms of the settlement were placed on the record ("the November Agreement"), and the parties agreed to submit letters and documentation to the court and allow the court to make the final determination of Husband's arrearage." *Slip op at various pages, citations and footnotes omitted.*

*Shirley Wallace v. Michael Wallace**

CUSTODY: PSYCHOLOGICAL EVALUATION OF PARENT: TIMELINESS OF REQUEST

CSA No. 1393, September Term, 2011. Unreported. Opinion by Eyler, James R., J. Filed Sept. 18, 2012. RecordFax #12-0918-05, 18 pages. Appeal from Anne Arundel County. Affirmed in part, vacated in part and remanded.

The trial court did not abuse its discretion in refusing to stay the trial and grant appellant's request for a psychological evaluation of the appellee, as appellant failed to make a timely request for such an evaluation; however, because the trial court failed to explain the basis for its award of joint legal custody with split decision-making authority, the decision was vacated and remanded for that explanation.

"This appeal arises out of a divorce action filed by Shirley Wallace, appellant, against Michael Wallace, appellee. The circuit court issued a judgment of absolute divorce which, *inter alia*, provided for joint legal and physical custody of the parties' child. This appeal followed. We vacate the portion of the judgment awarding joint legal custody and remand for further proceedings on that issue. We affirm the remaining portions of the judgment.

Background

The parties were married on July 15, 2006, and had one son born on April 8, 2007. Appellant filed for divorce on April 14, 2010, shortly after separating from appellee, and requested joint custody. During the separation, the parties agreed to a joint custody arrangement; however, in July, 2010, appellant amended her complaint and asked for sole custody of her son. A trial was held on Aug. 2 and 3,2011. During trial, appellant accused appellee of adultery, domestic violence, verbal abuse, mental illness, drug abuse, and general neglect of their child throughout their marriage and ensuing separation.

We shall include additional facts when we discuss the issues.

Discussion

1. Joint Legal and Physical Custody

The overarching inquiry for a custody determination is determining what arrangement is in the best interests of the child. *Montgomery County Dep't of Social Services v. Sanders*, 38 Md. App. 406, 419 (1977). The Court weighs a variety of factors. Id. at 420; *Taylor v. Taylor*, 306 Md. 290, 304-311(1986).

The circuit court considered each of the relevant factors and case law in coming to its conclusion. Appellant contends the trial court abused its discretion because "[t]he evidence was replete with uncontroverted evidence of Michael's physical abuse, verbal abuse of the worst imaginable kind, threats of intimidation, lack of respect for the child's mother and a stated unwillingness to cooperate with her." However, in its oral opinion the trial court clearly discussed and analyzed all of the evidence presented in the case in making its decision. The joint custody award was essentially the same as had been in existence by agreement of the parties, and there was no compelling evidence that would require a change. In light of the trial court's significant consideration, we are unable to say that the court abused its discretion, and the joint physical custody order is affirmed.

In awarding joint legal custody, the court awarded final decision making authority regarding health care and religious issues to appellant and final decision making authority regarding education issues to appellee. While the evidence was legally sufficient to support an award of joint legal custody, we cannot discern a basis in the evidence or the court's reasoning for splitting the final decision making authority. At oral argument, counsel for appellant and appellee, self represented, could not offer a satisfactory explanation. We vacate the award of joint legal custody and remand to circuit court to address that issue and to explain its reasoning when it enters a new order. With respect to legal custody, and specifically with respect to final decision making authority of joint legal custody is awarded, we note that, at oral argument, appellee stated that, from his perspective, joint legal custody was not a significant issue, and that he has "never questioned [appellant's] judgment.'"

2. Trial Subpoena

Appellant also alleges that the court erred in prohibiting her from questioning appellee regarding his compliance with a subpoena requesting appellant's medical records and in refusing to grant a postponement of the trial so that appellee could provide the medical records.

Appellant contends that appellee was responsible not only for the requested documents that were in his possession but also those that were

See UNREPORTED CASES IN BRIEF page 22

UNREPORTED CASES IN BRIEF *Continued from page 21*

in his "control." Appellant cites *Pleasant v. Pleasant,* 97 Md. App. 71.1 (1993), which held that Maryl4nd Rule 2-422, which governs the requests for production of documents during discovery, requires parties to obtain documents not only within their possession but also documents for which they have the "right, authority, or ability to obtain upon demand." 97 Md. App. at 732 (internal citation omitted). Appellant argues that this principle also governs the production of documents under Maryland Rule 2-510, which governs the use of subpoenas to compel individuals to testify and provide documents at court proceedings.

Limiting *Pleasant's* holding to pretrial discovery under Rule 2-422 does not circumvent the purpose and intent of a trial subpoena. Rule 2-422 pertains only to parties while Rule 2-510 applies to parties and non-parties alike. It would be burdensome and impractical to require a person who is not a party to a proceeding to affirmatively go out and seek documents not already within the party's possession.

A trial subpoena is designed to produce, not discover, evidence. If appellant wanted appellee to produce medical records not already in his possession, appellant should have sought to do so either during discovery by requesting the production of documents under Rule 2-422 or by serving subpoenas on the custodians of appellant's medical records.

3. Psychological Evaluation

Appellant also alleges that the court abused its discretion in denying her mid-trial request to stay the case and for appellee to undergo a psychiatric evaluation. In denying her motion, the trial court explained that requests for evaluations are typically made during a scheduling conference and that "this is something that should be done as a matter of pretrial or as preparation for the case."

Appellant cites Maryland Rule 2-423, which states that a court may order the mental or physical evaluation of a party when that person's mental or physical condition is in controversy. Such an order may only be entered on motion for good cause shown. This rule is in the chapter governing discovery. The determination as to when discovery should cease rests in the sound discretion of the trial court. *Hirsch v. Yaker,* 226 Md. 580,584(1961).

The fact that the parties received a recommendation during a pretrial proceeding to undergo psychological evaluations but appellee refused has no bearing whatsoever on the trial court's discretion to grant or refuse appellant's request in the middle of trial. If anything, this recommendation indicates that appellant's counsel should have known prior to trial that a psychological evaluation would be necessary.

The fact that appellant's counsel may not have adequately prepared for trial did not require the trial court to postpone the case. The time to address these issues was during pre-trial discovery and by pre-trial motion, not in the middle of trial. The court did not abuse its discretion." *Slip op at various pages, citations and footnotes omitted.*

*Christopher L. Zembower v. Lisa M. Zembower**

CUSTODY: MODIFICATION: APPELLATE PROCEDURE

CSA No. 2026, September Term 2011. Unreported. Opinion by Matricciani, J. Filed Sept. 19, 2012. RecordFax #12-0919-00, 6 pages. Appeal from Allegany County. Affirmed.

While a pro se parent's brief revealed him to be a concerned parent who is unhappy with his reduced visitation rights, it failed to clearly identify any specific legal issues for review, nor did it specify findings he feels were erroneous; and, as the circuit court's conclusions were founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the appellate court saw no reason to disturb the modification of custody issues.

"Appellant Christopher L. Zembower and appellee Lisa M. Zembower have one child together. The parties divorced in 2008. In Aug. 2010, Ms. Zembower filed a petition to modify custody. A Master issued a report. Both parties filed exceptions. On Oct. 21, 2011, the circuit court entered an order granting certain exceptions to the Master's recommendations and modifying the judgment with respect to child custody issues. Mr. Zembower filed a timely appeal.

Mr. Zembower does not raise any clearly cognizable legal issues for our review. Having reviewed the Oct. 21, 2011 order, however, we surmise that Mr. Zembower is complaining about those parts of it that reduced his visitation rights: the elimination of overnight visitations on Wednesdays during the school year; and, the elimination of certain holidays from the visitation schedule.

First, the circuit court adjusted Mr. Zembower's visitation rights "to provide that Wednesday visitation [is] to begin at 4:00 p.m. and end at 8:00 p.m. that same day[.]" Because Mr. Zembower previously had overnight visitation rights on Wednesday, the order reduced his visitation rights slightly. Second, the circuit court eliminated Columbus Day and Veteran's Day from the parties' agreed-upon holiday visitation schedule. That schedule provided that the parties would share physical custody of the child on an alternating yearly basis. Because Ms. Zembower has sole physical custody of the child, (with defined scheduled visitation rights reserved to Mr. Zembower), the elimination of two holidays from the schedule further reduced Mr. Zembower's visitation rights. Mr. Zembower appealed to this Court on Nov. 14, 2011.

DISCUSSION

Our review of the modification of child custody orders involves three related standards:

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

In re Yve S., 373 Md. *551,* 586 (2003).

Mr. Zembower acted *pro se* for the majority of the proceedings in the circuit court and in this Court. His brief reveals him to be a concerned parent who is unhappy with his reduced visitation rights. It does not, however, identify with sufficient clarity any specific legal issues for our review. Nor does Mr. Zembower specify which of the circuit court's factual findings he feels were erroneous. The circuit court filed a memorandum in which it explained, its ruling on each of the Zembowers' exceptions to the Master's recommendations. In our view, the circuit court's conclusions were "founded upon sound legal principles and based upon factual findings that are not clearly erroneous." *In re Yve* S., 373 Md. *551, 586* (2003). We see no reason to disturb the order modifying the judgment of divorce with respect to certain child custody issues." *Slip op at various pages, citations and footnotes omitted.*

TOPIC INDEX

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

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: INABILITY TO PROVIDE LONG-TERM CARE
In re: Adoption/Guardianship of Precilla C. and Selena C.(Md.App.) (Unrep.)* 5

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: INCARCERATED PARENT
In re: Adoption/Guardianship of Ronald J.(Md.App.) (Unrep.)* 6

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: CULTURALLY SENSITIVE SERVICES
In re: Adoption/Guardianship of Zanelle D.(Md.App.)(Unrep.)* 7

CHILD SUPPORT: ARREARAGES: WAIVER OF RIGHT TO HEARING
David A. Samuels v. Linda O. Samuels(Md.App.) (Unrep.)* 18

CHILD SUPPORT: FACTORS BEYOND PARENT'S CONTROL: IMMIGRATION STATUS
Montgomery Co. OCSE, ex rel. Carlos Palomera-Valdez v. Algeris Arias(Md.App.) (Unrep.)* 16

CHILD SUPPORT: MODIFICATION: ATTORNEYS' FEES
David A. Samuels v. Linda O. Samuels(Md.App.) (Unrep.)* 19

CHILD SUPPORT: WAGE GARNISHMENT: APPEAL
Guetatchew Fikrou v. Genet Aklilu et al.(Md.App.) (Unrep.)* 4

CINA: RISK OF FUTURE ABUSE OR NEGLECT: MENTAL HEALTH ISSUES OF PARENT
In re: Hazell D.(Md.App.) (Unrep.)* 9

CIVIL PROCEDURE: APPELLATE BRIEFS: DISMISSAL FOR VIOLATION MARYLAND RULES
Maureen Joan Johnson v. Patrick Andrew Konka(Md.App.) (Unrep.)* 11

CUSTODY: MODIFICATION: APPELLATE PROCEDURE
Christopher L. Zembower v. Lisa M. Zembower(Md.App.) (Unrep.)* 22

CUSTODY: MODIFICATION: MATERIAL CHANGE IN CIRCUMSTANCES REQUIREMENT
Mark Langstein v. Marie Campagnone(Md.App.) (Unrep.)* 14

CUSTODY: MODIFICATION: RELOCATION OF ONE PARENT
Raymond J. Pearson Jr. v. Naomi Mason(Md.App.) (Unrep.)* 16

CUSTODY: PSYCHOLOGICAL EVALUATION OF PARENT: TIMELINESS OF REQUEST
Shirley Wallace v. Michael Wallace(Md.App.) (Unrep.)* 21

CUSTODY AND VISITATION: CINA: AWARD TO OTHER PARENT
In re: Miriam R.(Md.App.) (Unrep.)* 10

CUSTODY AND VISITATION: JOINT LEGAL CUSTODY: ALCOHOLISM NO BAR
James F. Knott Jr. v. Charissa Gatti F/K/A Charissa Knott(Md.App.) (Unrep.)* 13

DIVORCE: ALIMONY AND CHILD SUPPORT: RECUSAL OF MASTER
Dana W. Johnson v. Darielys Pinto(Md.App.) (Unrep.)* 11

DIVORCE: MARITAL PROPERTY: FINANCIAL SETTLEMENT AGREEMENT
Joey Dayle Richards F/K/A Joey Maruschak v. Gary Maruschak et al.(Md.App.) (Unrep.)* 17

DOMESTIC VIOLENCE PROTECTIVE ORDER: APPEAL: MOOTED BY EXPIRATION
Kimberly Hamby v. Reuben I. Hamby(Md.App.) (Unrep.)* 4

VISITATION: CONTEMPT: ATTORNEYS' FEES
Vincent Joseph McAvoy v. Sacha Williers Simmons(Md.App.) (Unrep.)* 15

CASE INDEX

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

Guetatchew Fikrou v. Genet Aklilu et al.(Md.App.) (Unrep.)* 4

Kimberly Hamby v. Reuben I. Hamby(Md.App.) (Unrep.)* 4

In re: Adoption/Guardianship of Precilla C. and Selena C.(Md.App.) (Unrep.)* 5

In re: Adoption/Guardianship of Ronald J.(Md.App.) (Unrep.)* 6

In re: Adoption/Guardianship of Zanelle D.(Md.App.)* 7

In re: Hazell D.(Md.App.) (Unrep.)* 9

In re: Miriam R.(Md.App.) (Unrep.)* 10

Maureen Joan Johnson v. Patrick Andrew Konka(Md.App.) (Unrep.)* 11

Dana W. Johnson v. Darielys Pinto(Md.App.) (Unrep.)* 12

James F. Knott Jr. v. Charissa Gatti F/K/A Charissa Knott(Md.App.) (Unrep.)* 13

Mark Langstein v. Marie Campagnone(Md.App.) (Unrep.)* 14

Vincent Joseph McAvoy v. Sacha Williers Simmons(Md.App.) (Unrep.)* 15

Montgomery Co. OCSE, ex rel. Carlos Palomera-Valdez v. Algeris Arias(Md.App.) (Unrep.)* 16

Raymond J. Pearson Jr. v. Naomi Mason(Md.App.) (Unrep.)* 16

Joey Dayle Richards F/K/A Joey Maruschak v. Gary Maruschak et al.(Md.App.) (Unrep.)* 17

David A. Samuels v. Linda O. Samuels(Md.App.) (Unrep.)* 18, 19

Shirley Wallace v. Michael Wallace(Md.App.) (Unrep.)* 21

Christopher L. Zembower v. Lisa M. Zembower(Md.App.) (Unrep.)* 22