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COURT OF SPECIAL APPEALS

Unreported opinions

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Estates & trusts: trustee's duty of loyalty: pre-distribution demand for release and indemnity

Barbara Hastings, et al
v.
PNC Bank, NA

No. 109, September Term, 2011

Argued Before: Bell, C.J., Battaglia, Greene, Adkins, Barbera, McDonald, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Barbera, J.

Bell, C.J., Greene and Adkins, JJ., Dissent

Filed: September 27, 2012. Reported.

Trustee did not violate its duty of loyalty by refusing to distribute trust funds unless beneficiaries first executed a release and indemnification agreement, as the agreement merely expanded upon an interest the trustee already possessed and was not so one-sided as to impermissibly place the trustee's interests ahead of those of the beneficiaries.

Petitioners, Barbara Hastings, R. Cort Kirkwood, and Ann K. Robinson are beneficiaries of a testamentary trust who have sued the trustee, Respondent PNC Bank, NA (PNC). Petitioners allege that PNC improperly demanded that each beneficiary execute a broad release agreement prior to distribution and misapplied the provisions of the Maryland Code, Tax-General Article,[1] in calculating the amount of inheritance tax owed on the trust's assets and the amount of commission to which PNC was entitled as trustee. The Circuit Court for Baltimore County granted summary judgment in PNC's favor, finding no legal impropriety in PNC's distribution plan or its calculation of the tax and commission. Petitioners appealed and the Court of Special Appeals affirmed the Circuit Court in an unreported opinion. We granted certiorari to decide whether PNC's actions are in accord with Maryland law and, for the reasons that follow, hold that they are. We therefore affirm.

I.

In 1995, Marion W. Bevard executed a Last Will and Testament that directed the disposition of his estate by, in part, providing for the establishment of a trust. The will appointed Mercantile Safe Deposit and Trust Company (Mercantile) to serve as trustee and

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

mandated that the trust be divided into four equal shares. The will granted one of those shares to Marion's sister, Rebecca "Reba" Bevard, for the duration of her life (the Trust). Following Marion's death in February 2002, his estate was probated in the Orphans' Court for Baltimore County. Pursuant to the terms of the will, the personal representative of the estate established the Trust and funded it with a $450,450.98 contribution. Under the terms of the Trust, Reba was to receive income from the Trust as well as discretionary distributions of the Trust principal, for life. Upon her death, the remainder of the Trust was to be distributed to Robert B. Kirkwood and, if he died before Reba, the remainder was to be distributed in equal shares to his descendants. The Trust, therefore, had two components: the life estate created for the benefit of Reba, *see* § 7-201(c)(2)(i), and the remainder interest, which qualifies as a "subsequent interest" for tax purposes, created for the benefit of Robert B. Kirkwood or his descendants, *see* § 7-201(e)(1).

Robert B. Kirkwood predeceased Reba, who died on October 11, 2007. Therefore, upon Reba' s death, the remainder of the Trust — the subsequent interest — passed to Robert B. Kirkwood's four children: Petitioners Barbara Hastings, R. Cort Kirkwood, and Ann K. Robinson; and their brother, Robert Garth Kirkwood. Because Reba was the testator's sister, the income and principal she received through the Trust was not subject to inheritance tax. *See* § 7-203(b)(2)(vii). Petitioners and their brother, however, inherited as collateral heirs, so they were obligated to pay ten percent (10%) of the value of the assets on the subsequent interest in the Trust.[2] The inheritance tax was owed, prior to distribution of the assets to Petitioners and their brother, because the personal representative had not opted to prepay the tax on the subsequent interest, as authorized by § 7-219, at the time the Trust was created.[3] Thus PNC, as the successor trustee to Mercantile, filed an Application to Fix Inheritance Tax on Non-Probate Assets with the Register of Wills for Baltimore County on December 8, 2007. In its filing, PNC reported that the Trust had a fair market value of $261,306.72 on the date of Reba's death, October 11, 2007. Of that amount, approximately $218,100.00 constituted the remainder of the original $450,450.98 principal contributed by Marion's estate, and the remaining approximate $42,200.00

was income earned on that principal. To calculate the necessary inheritance tax and commission it was entitled to draw as trustee, PNC used the fair market value of the Trust — $261,306.72. PNC first subtracted a one-half percent final-distribution commission ($1306.53), to which it was statutorily entitled according to § 14-103(e) of the Maryland Code (2001, 2011 Repl. Vol.), Estates and Trusts Article (ET),[4] as well as a separate trustee fee ($366.69). From the resultant difference of $259,633.50, PNC applied the ten percent inheritance tax rate. Consequently, PNC tendered a $25,963.35 check to pay the inheritance tax, drawn from the Trust account, that was accepted and recorded by the Register of Wills on December 17, 2007.

With the inheritance tax paid, PNC began the task of distributing the Trust's assets to the beneficiaries. To that end, PNC sent to each Petitioner and Robert Kirkwood a letter that included, among other things, an accounting of the entire Trust and a "Waiver, Receipt, Release and Indemnification Agreement" (Release Agreement). The letter directed that, if the beneficiaries approved of the accounting, they should sign the attached Release Agreement and return it to PNC. The letter further explained that, "[u]pon receipt of the executed Releases from all of the [beneficiaries], we will be in a position to have the cash disbursed."

The Release Agreement provided that "the Trust has terminated; and . . . the parties in interest have requested that PNC distribute the Trust assets . . . without the filing, audit and adjudication of an account of PNC's administration of the Trust with a court of competent jurisdiction." In consideration of terminating the Trust by "settl[ing] PNC's administration of the Trust on an informal basis without having an accounting filed with [a] Court," the Release Agreement requested, among a number of items, that the beneficiaries: (1) acknowledge that they had consulted with an attorney (or had chosen affirmatively not to do so); (2) declare that they had reviewed the books, records, and statements of the Trust, and; (3) approve of PNC's handling and administration of the Trust. Pertinent to this appeal, the Release Agreement contained a clause releasing PNC from liability and requiring the beneficiaries to indemnify PNC for certain expenses attached to the termination of the Trust (release and indemnity clause). That clause read:

> [E]ach of the undersigned hereby: . . . Releases, indemnifies and holds PNC, in its corporate capacity and as Trustee, harmless from and against any and all losses, claims, demands, surcharges, causes of action, costs and expenses (including legal fees), which may arise from its administration of the Trust, including, but not limited to, the overall investment strategy of the Trustee, all decisions made and actions taken or not taken with regard to the administration of the Trust, and PNC's distribution of the assets to the Beneficiaries as set forth on the attached schedule.

By letter dated January 2, 2008, John M. Robinson, an attorney and the husband of one of the Petitioners, Ann K. Robinson, objected on behalf of all four beneficiaries to PNC's plan for distribution of the Trust assets. The objection touched off a flurry of correspondence between Mr. Robinson and PNC during the subsequent four months. Mr. Robinson voiced two major objections on behalf of the beneficiaries: (1) the release and indemnity clause was far too favorable to PNC and the beneficiaries could not be required to execute it before receiving their distributions; and (2) PNC misinterpreted provisions of the Tax-General Article, which caused it to over-calculate its commission and the inheritance tax owed on the Trust assets. The beneficiaries therefore demanded an immediate distribution of the Trust assets and the return of overpaid monies paid to the Register of Wills on the Trust's behalf

In response, PNC defended its calculation of the inheritance tax and explained that execution of the Release Agreement, including execution of the release and indemnity clause, was not a required step towards obtaining a distribution. PNC advised that, instead of utilizing a private agreement, under Maryland law it could petition a court for a final accounting and termination of the Trust to obtain the protection it had sought in the release and indemnity clause. The agreement and clause were offered to the beneficiaries as a matter of industry practice, "since the majority of beneficiaries prefer to terminate their trust via private agreement instead of petitioning a court." Nonetheless, PNC released a partial distribution of $33,319.97 to each of the beneficiaries, seemingly in response to their objections, while predicating final distributions upon the execution of the appropriate Receipt and Release Agreement or court approval of a final accounting.

Petitioners, contemporaneous with the partial distribution and therefore without knowledge of it, filed a three-count complaint for declaratory judgment in the Circuit Court for Baitimore County.[5] In Count I Petitioners alleged that "[n]othing in Maryland law gives PNC the right to demand the Agreement and withhold payment absent its execution." Petitioners sought a judgment declaring unlawful PNC's "demand" for the execution of the release and indenmity clause prior to the distribution of any funds from the Trust.

Count I also prayed for declaratory relief directing PNC to distribute the entire corpus of the Trust without further delay.

In Counts II and III Petitioners addressed their challenge to PNC's calculation of the distribution commission and inheritance tax. Petitioners alleged that PNC wrongly based its calculation on the $261,306.72 fair market value of the Trust, because that amount included the income earned on the $218,130.00 remaining principal that had been contributed by Marion's estate. Instead, according to Petitioners, PNC should have computed the tax solely on the amount of principal because § 7-203(j) provides that "[t]he inheritance tax does not apply to the receipt of property that is income, including gains and losses, accrued on probate assets after the date of death of the decedent." PNC's alleged failure to use the correct value resulted in a $4,313.71 overpayment in inheritance taxes and a $69.59 overpayment in the distribution commission. Count II prayed for relief declaring "that PNC must use $218,130.00 as the basis for calculating inheritance tax in this case"; Count III prayed for similar relief in the calculation of PNC's commission. Both counts prayed for monetary damages from loss of income, prejudgment interest, and attorneys' fees.

PNC timely filed an answer and a counterclaim. In the answer PNC raised a number of defenses to liability and in the counterclaim petitioned the Circuit Court to assume jurisdiction over the Trust pursuant to Rule 10-501.[6] The counterclaim further prayed that the court "eventually approve a Final Account by the Trustee, approve distributions to the interested persons, and release and discharge PNC Bank as Trustee from further liability."

After a period of discovery, the parties filed cross-motions for summary judgment. PNC filed a motion requesting summary judgment on Counts II and III, arguing that Petitioners suffered from a "fundamental misunderstanding of the Maryland Inheritance Tax scheme as it applies to Trusts and remainder interests." PNC asserted that Petitioners' reliance on § 7-203(j) was misguided because that subsection, by its own terms, applies only to "probate assets," and the finds in the Trust were not probate assets. According to PNC, those finds constituted only a subsequent interest, so § 7-210(c), establishing the method for calculating the inheritance tax on a subsequent interest, provided the only proper method for determining the value of the Trust. That subsection states: "[T]he inheritance tax on the subsequent interest shall be determined based on the value of the interest when it vests in possession." PNC argued that, because the Petitioners' interest in the remainder of the Trust vested upon Reba's death and the Trust's fair market value was $261,306.72 on the date of Reba's death, $261,306.72 was the correct value for calculating the inheritance tax and the commission.

PNC did not move for summary judgment on Count I because it believed that its counterclaim, asking the Circuit Court to assume jurisdiction over the Trust, "moot[ed]" that issue. PNC agreed with Petitioners that a trustee could not demand the execution of a private release and indemnity clause. PNC argued, though, that it did not demand that the Petitioners sign the Release Agreement or accede to the release and indemnity clause; it *requested* that the Petitioners do so in order that the Trust could be terminated expeditiously while obtaining the same protection the Trust would have received from a court's accounting. Therefore, according to PNC, the lawfulness of a demand for a release and indemnity clause became moot when PNC withdrew its request and moved, by counterclaim, to terminate the Trust by filing a petition with the Circuit Court.

Petitioners responsively moved for summary judgment on all three counts. On Count I they argued that, by demanding execution of the release and indemnity clause, PNC required the Petitioners to release and indemnify PNC against all losses and expenses that arose from the administration of the Trust. Petitioners asserted that nothing under Maryland law granted PNC the ability to demand as much, and no court in the State could grant an order that released PNC from liability and indemnified PNC for expenses as broadly as the proffered clause. In relation to Counts II and III, Petitioners reasserted that § 7-203(j), excepting the inheritance tax from "receipt of property that is income . . . accrued on probate assets after the date of death of the decedent," applied to the Trust. As a result, $218,130.00 was the proper amount on which the inheritance tax should have been calculated.

After a hearing, the Circuit Court issued an order assuming jurisdiction of the Trust. By the same order, the court also granted PNC's motions on Counts II and III and entered judgment on those counts in PNC's favor, agreeing with PNC's interpretation of §§ 7-203(j) and 7-210(c). The court denied Petitioners' motion on all counts and specified in its order, in relation to Count I, that Petitioners "were not required to sign any [Release Agreement]." The court, however, did not enter judgment in favor of either party on Count I, reasoning that there remained a question of whether Petitioners lost income because of PNC's request.

PNC subsequently filed with the court an inventory and final accounting of the assets in the Trust. PNC also filed a Petition for Attorney's Fees and a Petition for Court Approval of Final Account and Termination of Trust and for Discharge of PNC Bank, N.A. as Trustee.

Because no judgment had been entered on Count I, Petitioners renewed their Motion for Summary Judgment as to Count I. After a second hearing, the Circuit Court granted in part PNC's Petition for Attorney's Fees, awarding PNC $20,000 in fees, and issued an order terminating the Trust, directing distribution of the Trust assets, and discharging PNC from further responsibility following the distribution. Finally, the court denied Petitioners' renewed motion for summary judgment, specifically finding that PNC requested, rather than "required," that the release and indemnity clause be executed. Because the court could not "find . . . any Maryland Law against a fiduciary requesting a [Release Agreement] as was done in this case," the court entered judgment in favor of PNC on Count I and dismissed the complaint with prejudice.

Petitioners noted an appeal to the Court of Special Appeals. That court affirmed the judgment of the Circuit Court in an unreported opinion. Petitioners sought, and we granted, a writ of certiorari, *Hastings v. PNC Bank, NA*, 424 Md. 291, 35 A.3d 388 (2012), to answer the following questions:

> 1. Whether a Maryland trustee can lawfully demand or request an indemnity from its beneficiaries that is broader than the protection that the trustee could have obtained through a court order or a release like that permitted for a personal representative?
>
> 2. Whether Section 7-203(j) of the Tax-General Article should have been applied to the trust assets in this case being distributed to remaindermen so as to exempt the income and gains they received from any inheritance tax?

II.

In this appeal, the Circuit Court entered summary judgment in favor of PNC on Counts I and II[7] of the complaint. "A trial court may grant summary judgment when there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law." *Appiah v. Hall*, 416 Md. 533, 546, 7 A.3d 536, 544 (2010) (quoting *120 West Fayette Street, LLLP v. Mayor of Baltimore*, 413 Md. 309, 329, 992 A.2d 459, 471 (2010)). Our task on appellate review is therefore two-fold: we "must first determine whether there is any genuine dispute of material facts," *Beka Indus., Inc. v. Worcester Cnty. Bd. of Educ.*, 419 Md. 194, 227, 18 A.3d 890, 910 (2011) (quoting *Dashiell v. Meeks*, 396 Md. 149, 163, 913 A.2d 10, 18 (2006)), and then determine the legal correctness of the Circuit Court's judgment, *Appiah*, 416 Md. at 546, 7 A.3d at 544.

Petitioners' challenge to the Court's judgment in PNC's favor on Counts I and II are grounded in purely legal arguments, to which we accord a non-deferential standard of review.

Legal Validity of the Release Agreement

Petitioners' first challenge relates to the Release Agreement that PNC sought to have Petitioners and their brother execute. They focus on the following clause in the Agreement, which we restate for clarity and ease of reference:

> 6. Releases, indemnifies and holds PNC, in its corporate capacity and as Trustee. harmless from and against all losses, claims, demands, surcharges, causes of action, costs and expenses (including any and all legal fees), which may arise from its administration of the Trust. including, but not limited to, the overall investment strategy of Trustee, all decisions made and actions taken or not taken with regard to the administration of the Trust, and PNC's distribution of the assets to the Beneficiaries as set forth on the attached schedule.

(Emphasis added by Petitioners.)

Petitioners argue that PNC demanded unanimous execution of the release and indemnity clause "as a condition precedent to any distribution," and such a demand "violates the Maryland law of trusts by turning it on its head." They cite several provisions of the Estates and Trust Article but make no argument that any of those provisions, either expressly or by implication, prohibits the action PNC took. The heart of Petitioners' argument, instead, is that the release and indemnity clause is over-broad. In Petitioners' words, the release and indemnity clause would force them to release and indemnify PNC "against *all losses and expenses* that arise from [PNC's] administration of the Trust." (Emphasis added). Such terms, according to Petitioners, are so favorable to PNC that the clause, in effect, "attempt[s] to contractually place the beneficiaries in the position of protecting the trustee when it should be the other way around." Petitioners claim that PNC, by requesting execution of the clause, breached its common law, "universally recognized[,] basic duty of good faith" by placing its own interests before the interest of Petitioners. Not surprisingly, PNC disagrees.

Generally, to determine whether a trustee wields lawful authority to take certain actions in connection with trust matters we look to three different sources: (1) the instrument that creates the trust; (2) applicable statutes; and (3) the common law. *See* ET, § 15-102(b)(2); *see also* Restatement (Third) of Trusts § 85 (2007)[8] ("In administering a trust, the trustee has, except as limited by statute or the terms of the trust, (a) all of the powers over trust property that a legally

competent, unmarried individual has with respect to individually owned property, as well as (b) powers granted by statute or the terms of the trust."). In this case, the creating instrument (*i.e.* Marion Bevard's Last Will and Testament) and applicable statutes are of no assistance.[9] Disposition of this appeal, therefore, requires us to determine whether PNC's request for execution of the release and indemnity clause contravenes Maryland common law.

Preliminarily, nothing in the testator's will precluded the trustee from exercising whatever authority the trustee was already allowed by law. The law of Maryland, moreover, permits a trustee to request a release, and Petitioners do not argue the contrary. As for Petitioners' assertions of breach of fiduciary duty and overbreadth, both fall short.

A trustee owes to the beneficiaries of a trust duties of administration, prudence and loyalty. The trustee's duty of loyalty — as the duty is known in this state — is well-established in the common law. *Bd. of Trustees v. Mayor of Baltimore*, 317 Md. 72, 109, 562 A.2d 720, 738 (1989). Broadly put, the duty prohibits a trustee from using the property of a beneficiary for the trustee's own purposes. *Gianakos v. Magiros*, 238 Md. 178, 185-86, 208 A.2d 718, 722 (1965). A trustee is otherwise prohibited from "placing himself in any position where his self-interest will or may conflict with his duties as trustee," and "using the advantage of his position to gain any benefit for himself at the expense of the beneficiary." *Hughes v. McDaniel*, 202 Md. 626, 632, 98 A.2d 1, 4 (1953). A trustee also must refrain from using the advantages of the fiduciary relationship for the benefit of a non-beneficiary third party. *Bd. of Trustees*, 317 Md. at 109, 562 A.2d at 738.

Of course, it is equally well-established that the restrictions associated with the duty of loyalty are not absolute. *See, e.g., Goldman v. Rubin*, 292 Md. 693, 705-06, 441 A.2d 713, 720 (1982); *Turk v. Grossman*, 176 Md. 644, 666, 6 A.2d 639, 650 (1939). A trustee may engage in an otherwise-prohibited course of action if authorized "by statute, by the instrument creating the trust, or by the court having jurisdiction of the subject matter." *Goldman*, 292 Md. at 706, 441 A.2d at 720 (quoting *Harlan v. Lee*, 174 Md. 579, 593, 199 A. 862, 869 (1938)); *accord* Restatement *supra* § 78 cmt (a); 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts*, § 17.2 at 1084 (5th ed. 2007). Likewise, and important for the purposes of this appeal, a trustee may engage in a self-interested course of action so long as the beneficiaries provide valid, informed consent. *Goldman*, 292 Md. at 706, 441 A.2d at 720; *Grossman*, 176 Md. at 666, 6 A.2d at 650; *accord* Restatement *supra* § 78 cmt (c)(3) ("A particular transaction that would otherwise violate a trustee's duty of loyalty may be authorized by consent properly obtained from or on behalf of all of the trust beneficiaries.").[10]

It almost goes without saying that, if the law countenances consent to what would otherwise be a breach of the duty of loyalty, the law also must countenance requests for consent. If not, then a trustee would be unable to solicit consent without first breaching the duty. Put simply, one must be able to ask for permission in order to obtain it. It is easy to see, then, that PNC could not have breached its duty of loyalty in this case merely by asking Petitioners and their brother to execute a reasonable release and indemnity clause.

The terms of the release and indemnity clause, moreover, are not so broad and one-sided as to place impermissibly PNC's interests before those of Petitioners. The clause, as we read it, contains two terms: First it "[r]eleases" PNC, "in its corporate capacity and as Trustee," from "any claims," "demands," and "causes of actions" arising from the administration of the Trust; and second, it requires that PNC be "indemnifie[d]" for "all" "surcharges," "costs," and "expenses (including legal fees)" arising from the administration of the Trust. These two terms track closely, although not perfectly, to the terms PNC would have received had it petitioned for (and received) a court order formally approving the accounting and termination of the Trust.

Maryland Rule 10-501 authorizes a fiduciary or any "interested person"[11] to "file a petition requesting a court to assume jurisdiction over a fiduciary estate other than a guardianship of the property of a minor or disabled person." A trustee or beneficiary may invoke Rule 10-501 to obtain instruction from a court on how to proceed with the distribution of trust funds when there is some doubt as to the powers or duties of the trusteeship. *See* Restatement, *supra* § 71. A trustee may choose to petition a court under Rule 10-501 to obtain a court order that approves of the trustee's accounting of the trust's corpus. *See* Restatement, *supra* § 71 cmt. (c). Generally, a trustee will do this because "the judicial settlement of a trustee's account renders *res judicata* all matters in dispute and determined by the court in settling the account, as well as all matters that were open to dispute but not actually disputed," 4 Scott, *supra* § 24.25 at 1789; thus, "a court order approving all or part of a trustee's accounts discharges the trustee from liability (or further liability) for matters appropriately disclosed," Restatement, *supra* § 83 cmt. (c). *Accord Harlan v. Gleason*, 180 Md. 24, 30, 22 A.2d 579, 581-82 (1941) ("The long-accepted practice in closing trust estates, as indicated by all the authorities, . . . is for the trustee to collect all trust funds, report to the court, have an audit stated, and actually distribute the fund according-

ly as the court orders. That procedure must be followed, otherwise the trustee could not secure proper and binding releases so as to relieve himself and his bond."); Restatement, *supra* § 71 cmt. (b) ("[I]nstructions provided by an appropriate court will bind the trustee and beneficiaries who . . . are properly made parties to the proceedings."); 4 Scott, *supra* § 23.1 at 1645 ("Judicial approval of a trustee's accounts generally gives the trustee the defense of *res judicata* as to all matters adequately disclosed. Thus, judicial approval generally bars the beneficiaries from subsequently surcharging the trustee with respect to anything that is within the scope of the accounting.").

Moreover, a trustee is generally entitled to indemnity for expenses incurred reasonably and properly in the course of administering a trust. Restatement, *supra* § 38(2). Maryland law provides explicitly for this right to indemnification, mandating that "a trustee . . . [i]s entitled to reimbursement from trust property for reasonable expenses incurred in the performance of fiduciary services." ET § 14-405(m)(1). Satisfaction of the trustee's right to indemnification can be accomplished by lien; that is, the trustee gains a security interest in the trust's assets upon incurring reasonable and proper expenses on the trust's behalf. 4 Scott, *supra* § 22.1.1 at 1627. This security interest takes priority over the interest of the beneficiaries, so "[t]he beneficiaries are not entitled to distribution of the trust property until the trustee has been indemnified." *Id.* at 1629. Finally, the amount of indemnification to which a trustee is entitled can be "enlarged or diminished by agreement between the trustee and the beneficiaries." Restatement, *supra* § 38 cmt. (f).

All this is to say that, before PNC presented the Release Agreement to Petitioners and their brother, PNC was legally entitled to some measure of protection and indemnity. With or without the consent of Petitioners, PNC was free under Rule 10-501 to begin judicial proceedings to audit and terminate the Trust. Those proceedings eventually would have resulted in a court order that would have barred, as *res judicata*, all matters disputed and open to dispute in settling the Trust account. Moreover, PNC was entitled to indemnification for "reasonable expenses incurred in the performance of fiduciary services," ET § 14-406(m)(1), before distribution of the Trust's corpus took place. No matter what occurred in connection with the Release Agreement, then, Petitioners, in this narrow and specific context, would have ended up in a position where their interest in the distribution of the Trust's funds was subordinated to PNC's interest in protection from legal liability and indemnification for costs.

Against this backdrop, the terms of PNC's release and indemnity clause are not a radical departure from the common law protection and statutory right to which PNC already was entitled. To be sure, the release and indemnity clause sought protection for PNC in its role as trustee *and* "in its corporate capacity."[12] The clause also sought a right to indemnification for "all" costs arising from the administration of the Trust, rather than all costs reasonably and properly incurred. These differences are material and represent a fairly sizeable increase in the amount of protection PNC would have received, as trustee, from liability and cost. The differences, though, are of degree rather than kind. The differences do not represent a reorientation of the interests that PNC and Petitioners respectively possess, but represent, at bottom, PNC's arm's length request to exchange increased protection and indenmity for a quicker and less costly distribution of trust funds. Petitioners retained the choice to accede to that request, perhaps negotiate a release agreement not as broad in its protection of PNC, or simply reject it out of hand and accept the delay in distribution.

It is also worth noting that, no matter the terms of the clause itself, the Release Agreement could not protect PNC from liability arising from fraud, material mistake or irregularity on PNC's part. *See Allen v. Ritter*, 424 Md. 216, 229-30, 35 A.3d 443,450-51 (2011). Had PNC presented a fraudulent or inaccurate accounting to a court, that court's order approving the accounting, distribution, and termination of the trust would not have stood as a *res judicata* bar to those matters fraudulently or inaccurately represented. *See* Restatement *supra* §83 cmt. (c) ("Because a trustee has an affirmative duty to disclose relevant information, a matter involving sensitive issues must be revealed in the accounting with sufficient clarity to invite attention to the issue if the court order is to protect the trustee as a matter of issue preclusion."); *see also*, 4 Scott, *supra* § 23.1 at 1645 ("Of course, a trustee who in rendering the account is guilty of fraud or fraudulent concealment is not protected."). Moreover, "this Court has consistently held that fraud can and will invalidate an otherwise-complete release of liability." *Allen*, 424 Md. at 229, 35 A.3d at 450.

We therefore hold that the Circuit Court correctly denied Petitioners' motion for summary judgment as to Count I. PNC's request for execution of the release and indemnity clause was only that — a request for consent to take a certain course of action. Moreover, PNC's request, though expanding upon an interest already possessed, was not in its terms so one-sided as to place impermissibly its own interests ahead of those of Petitioners. PNC's action, not prohibited by statute, was likewise lawful under the common law. The Circuit Court properly entered judgment in PNC's favor on Count I of the complaint.

Application of the Inheritance Tax Rate to the Trust

We turn next to Petitioners' challenge to the Circuit Court's grant of summary judgment in favor of PNC on Count II of the complaint, which assailed the method used by PNC to calculate the amount of inheritance tax due the Register of Wills prior to distribution. On this issue the parties are generally in accord. They agree that Petitioners are collateral relatives of Marion Bevard, owing a ten percent inheritance tax on the value of the Trust assets.

The parties past company, though, on the value of the assets upon which the tax rate should be calculated. Petitioners argue that the tax should be assessed on the $218,130.00 that constitutes the remainder of the original contribution from Marion's estate, while PNC asserts that $261,306.72, which includes income accrued on that contribution, is the correct figure. Understanding how each party arrives at its respective figure necessitates a brief explanation of the application of inheritance taxes in Maryland.

Section 7-202 of the Tax-General Article imposes a ten percent inheritance tax "on the privilege of receiving property that passes from a decedent and has a taxable situs in the State." *See* § 7-204(b) ("The inheritance tax rate is 10% of the clear value of the property that passes from a decedent."). The tax applies broadly to property passing by devise, including property held in trust. *See* § 7-201(d)(1)(i). A devisee need not hold a vested, absolute interest in the devised property for the inheritance tax to apply; by law, the inheritance tax is applicable to a range of future and non-absolute interests. *See* §§ 7-208, 7-209. Pertinent to this case, the inheritance tax applies to property in which a devisee holds only a "subsequent interest," which is defined as "a vested or contingent remainder, executory or reversionary interest, or other future interest that is created by a decedent and will or may vest in possession after the death of the decedent." § 7-201(e)(1). Because operation of Marion's will granted the beneficiaries a remainder interest that vested only upon the deaths of Reba Bevard and Robert Kirkwood, Petitioners and their brother each held only a subsequent interest in the assets of the Trust.

Taxation of a subsequent interest proceeds differently than taxation of a present possessory interest because a subsequent interest does not vest into possession when it is created. Under Maryland law, a subsequent interest can be taxed by either of two methods. A personal representative administering an estate that contains a subsequent interest may prepay the inheritance tax or defer payment. Prepayment is accomplished when the personal representative pays the inheritance tax at some "reasonable time" after the initial valuation of the devised property, but before the interest vests in the devisee's possession. § 7-219(a). Alternatively, deferring payment is accomplished by merely waiting to pay the tax until the subsequent interest vests into a present, possessory interest.

In terms of the present case, prepayment could have occurred at some reasonable time after Marion's death in 2002, when Marion's estate was administered and the Trust was established. Deferred payment could only happen after Reba's death in 2007, when Reba's life estate terminated and the beneficiaries' remainder interest vested in their possession. The personal representative of Marion's estate opted not to prepay the tax upon creation of the Trust. Petitioners, moreover, filed no application to prepay. They, therefore, necessarily chose to defer payment. This choice is important for a number of reasons, chief among them is that the value used for the calculation of the inheritance tax differs depending on whether a devisee prepays or defers payment.

Pursuant to § 7-210, the general rule for calculating inheritance tax on a subsequent interest is as follows: after a personal representative elects when to pay, the inheritance tax payment is made in the amount of ten percent of the value of the subsequent interest *at the time of the payment*. This is because Maryland law provides that for inheritance tax purposes, a subsequent interest is valued at the time of the payment, § 7-210(a)(1) & (c)(1)(i), and the tax amount is based on that timely value, § 7-210(a)(2) & (c)(1)(iii). In practice, this means that, if a personal representative prepays, the personal representative pays a ten percent tax on the value of the interest at the time of the devisor's death. More important, if a personal representative defers payment, the remainderman pays a ten percent tax on the value of the interest when it vests, regardless of whether the interest has appreciated or depreciated from its original valuation, *Shaughnessy v. Perlman*, 198 Md. 619, 626, 85 A.2d 38, 41 (1951), because the inheritance tax is a tax on "the estate as it passes to the beneficiary, and not merely . . . the estate as it passes from the person who dies 'seized and possessed thereof.'" *Lilly v. State*, 156 Md. 94, 104-05, 143 A.661, 665 (1928) (quoting *Safe Deposit & Trust Co. v. State*, 143 Md. 644, 648, 123 A.50, 51 (1923)).

Petitioners argue that PNC miscalculated the amount of inheritance tax due on the assets of the Trust. Specifically, they argue that, in addition to § 7-210, § 7-203(j) applies to the taxation of subsequent interests. That provision states: "The inheritance tax does not apply to the receipt of property that is income, including gains and losses, accrued on probate assets after the death of the decedent." Petitioners thus argue that, when a devisee chooses to defer payment, the devisee pays inheritance tax on the value of the interest at the time it vests *less any*

income gained or lost during the running of the prior estate. In other words, according to Petitioners, the value of a vested subsequent interest is derived only from the property that was devised from the devisor to the devisee and not from any income that may have accrued during the intervening estate. Consequently, they assert, PNC should have calculated the inheritance tax on the $218,130.00 value of the beneficiaries' interest that constituted property devised from the estate, instead of using the $261,306.72 figure that included the principal plus accrued income.

In support of their reading of the Tax-General Article, applying § 7-203(j) to the taxation of subsequent interests, Petitioners cite a number of secondary sources and testimonial letters from the legislative history. Their reading, however, relies primarily on two assertions: first, that the assets of the Trust are "probate assets" within the meaning of § 7-203(j); and second, that § 7-203(j) can be read in harmony with § 7-210 so as not to render superfluous or nugatory any provision in the statute.

In support of the former assertion, Petitioners rely on a treatise definition of "probate assets" that includes "remainder interests." In support of the latter assertion, Petitioners argue that the structure of § 7-210 itself provides for what they claim is the proper result.[13] Specifically, Petitioners point to § 7-210(c)(1)(ii), which dictates that when a devisee defers payment, the subsequent interest "shall be valued when it vests in possession in the manner stated in subsection (a)." Petitioners assert that this provision grants a reader license to move to subsection (a), skip over subsection (a)(1), and apply subsection (a)(2) to those instances in which a devisee who has deferred payment must calculate the inheritance tax due. Subsection (a)(2) provides that "[t]he total inheritance tax on all interests in the property valued shall equal the inheritance tax that would have been due if an absolute interest in the property passed from the decedent." Petitioners explain that, if an absolute interest in the Trust had passed to them from the estate, it could not have included income accrued on the Trust's assets, and therefore § 7-210 can be read harmoniously with § 7-203(j) in excluding income from the calculation of the inheritance tax.

PNC disagrees with Petitioners' reading of the Tax-General Article, as does Amicus Curiae State of Maryland.[14] PNC's argument proceeds as follows: the beneficiaries' remainder interest in the Trust is a "subsequent interest," as that term is defined by § 7-201(e). As a result, only § 7-210, entitled "Subsequent interests," governs the taxation of the beneficiaries' interest. Subsection (c) of that provision specifically controls the calculation of the inheritance tax for a devisee who defers payment, providing that the tax amount "shall be determined based on the value of the interest when it vests in possession." Subsection (c) makes no mention of excepting income from the value of the interest when it vests in possession; therefore, income is not so excepted. Moreover, § 7-203(j), by its own plain language, applies only to "probate assets." The assets in the Trust were probate assets only while held by the personal representative of the estate during administration of it. Those assets lost their character as probate assets and became Trust assets when, at the close of probate, they were used to fund the Trust. As a result, § 7-203(j) is inapplicable to this case, and $261,306.72 was the correct value upon which to base the inheritance tax calculation.

PNC provides the better interpretation of the pertinent provisions. The primary goal of statutory interpretation is to effectuate the intent of the legislature. *Allen*, 424 Md. at 223, 35 A.3d at 446. The task of interpretation begins with an examination of the plain language of the statute. *Id.*, 35 A.3d at 446. "A plain reading of the statute assumes none of its language is superfluous or nugatory." *Newell v. Runnels*, 407 Md 578, 640, 967 A.2d 729, 766 (2009) (quoting *Bost v. State*, 406 Md. 341, 350, 958 A.2d 356, 361 (2008)). We do not add or delete words from an unambiguous statute, nor do we entertain a forced or subtle interpretation that extends or limits a statute's meaning. *Id.* at 640-41, 967 A.2d at 766. "When a statute's plain language is unambiguous, we need only to apply the statute as written, and our efforts to ascertain the legislature's intent end there." *Carven v. State Ret. & Pension Sys.*, 416 Md. 389, 407-08, 7 A.3d 38, 49 (2010) (quoting *Crofton Convalescent Ctr., Inc. v. Dep't of Health & Mental Hygiene*, 413 Md. 201, 216, 991 A.2d 1257, 1266 (2010)).

The first defect in Petitioners' interpretation is the definition Petitioners assign to "probate assets," as that term is used in § 7-203(j). We agree with the State, amicus in this appeal, that income earned by a trust during the life tenancy of a beneficiary is not income "accrued on probate assets." As the State points out, neither the Tax-General Article nor the Estates and Trusts Article explicitly defines "probate assets," but ET § 1-301 provides insight into the term's meaning. That section, in outlining the type of property subject to the provisions of the Estates and Trusts Article, provides that "[a]ll property of a decedent shall be subject to the estates of decedents law, and upon the person's death shall pass directly to the personal representative, who shall hold the legal title for administration and distribution." ET § 1-301(a). We can surmise then, that whether an asset is a "probate asset" is linked inexorably to whether legal title to that asset is held by a personal representative for administration and distribution.

We agree with PNC and the State that the personal representative of the estate did not hold legal title to the assets of the Trust after Reba's life estate was established. The personal representative only held title to those assets during the administration of the estate. The assets of the Trust, therefore, were only "probate assets" during the administration of Marion's estate. Once the administration concluded and the assets were contributed to the Trust, to be administered by a trustee, the assets lost their character as "probate assets" and became simply trust assets. Consequently, the assets of the Trust do not qua1ify for the exemption laid out in § 7-203(j).

The assets also could not qualify as "probate assets" because such a reading of § 7-203(j) would conflict with the mandates of § 7-210. As our colleagues on the Court of Special Appeals illustrated, Petitioners' reading of § 7-210 forces an interpretation that does not comport with the statute. Specifically, § 7-203(j) can only be made to harmonize with § 7-210 if the latter, parallel to § 7-203(j), excepts income from the calculation of inheritance tax on subsequent interests. In order to read § 7-210 as doing that, one would need to accept that § 7-210(a)(2) governs the determination of inheritance tax when the personal representative defers payment. There is no conceivable support for such a contention.

Subsections (a) and (c) of 7-210 are distinct subsections. Subsection (a) governs the valuation and calculation of inheritance tax for personal representatives who elect to prepay, while subsection (c) does the same for those who defer payment. Subsection (c)(1)(i) begins by directing that "the whole property shall be valued when the subsequent interest vests in possession." Subsection (c)(1)(ii) then adds that "the value of the subsequent interest shall be valued when it vests in possession in the manner stated in subsection (a)." The last six words of that subsection — "in the manner stated in subsection (a)" — direct the reader to the provision in subsection (a)(1) that prescribes how a subsequent interest is valued ("subtracting the value of all preceding and concurrent interests from the value of the whole property"). Contrary to Petitioners' argument, those six words do not direct the reader to subsection (a)(2), which describes how the inheritance tax is calculated.

Instead, § 7-210(c)(1)(iii) provides explicitly for the determination of inheritance tax when a personal representative defers payment. That subsection states that "the inheritance tax due on the subsequent interest shall be determined *based on the value of the interest when it vests in possession* and on the relationship of the original decedent to the person in whom the interest ultimately vests in possession." (Emphasis added). It is clearly intended to be the sole provision governing deferred payment, never sharing that duty vith § 7-210(a)(2). Simply put, if, as Petitioners argue, § 7-210(c)(1)(ii) directed that § 7-210(a)(2) governed the calculation of inheritance tax for a personal representative who deferred payment, it would directly conflict with and render nugatory the provision in subsection (c) that explicitly mandates how to calculate inheritance tax after deferring payment. Reading § 7-210(c)(1)(ii) as Petitioners do essentially reads § 7-210(c)(1)(iii) out of the law, which we are not permitted to do.

Only § 7-210(c)(1)(iii) was intended by the General Assembly to govern the determination of the amount of inheritance tax owed on a subsequent interest when a personal representative chooses to defer payment. Under Petitioners' interpretation, § 7-210 cannot be harmonized with § 7-203(j). Section 7-203(j) excepts income from the inheritance tax, and we have repeatedly interpreted the language of § 7-210(c)(1)(iii) as including income in the inheritance tax calculation. *See Mercantile-Safe Deposit & Trust Co. v. State*, 264 Md. 455, 464, 287 A.2d 502, 507 (1972) (noting that when payment is postponed under Article 81 § 161, which is now § 7-210(c), the remainderman "pays a tax on the value of the interest at the time it comes into possession"); *Shaughnessy*, 198 Md. at 626, 85 A.2d at 41 (stating that the statutory inheritance tax scheme provides that "the taker pays on the basis of what he gets, whether more or less than the value at the date of the testator's death"); *Lilly*, 156 Md. at 15, 143 A. at 665 (noting that the inheritance tax is a tax "on the transmission of the estate, and is a premium for the enjoyment of the benefit thereby secured," therefore the tax must be valued on "the current money and the appraised assets thus transmitted and acquired") (quoting *Safe Deposit Trust Co.*, 143 Md. at 649, 123 A. at 52). We cannot assume that the legislature intended two provisions, § 7-203(j) and § 7-210, both to apply to the taxation of subsequent interests and to conflict directly with one another. Under Petitioner's interpretation, § 7-203(j) cannot be made to harmonize with § 7-210. We therefore hold that the legislature did not intend for § 7-203(j)'s "probate assets" to include assets like those found in the Trust.

PNC correctly included the income that accrued on the assets of the Trust in its valuation of the Trust for inheritance tax purposes. The Circuit Court properly entered judgment in PNC's favor on Count II.

III.

In conclusion, PNC's request for execution of the Release Agreement did not contravene Maryland common law. The request was simply that — a request — and it did not ask for a reorientation of the parties' interests. It only asked to redefine the scope of protection and indemnity to which PNC was already entitled,

in return for a less costly and more efficient distribution of trust funds. Moreover, PNC was correct in its calculation of the inheritance tax owed on the assets of the Trust. Section 7-203(j), excepting income on "probate assets" from the inheritance tax equation, is not applicable to the tax scenario presented here. The Circuit Court therefore was legally correct in granting summary judgment in favor of PNC.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY PETITIONERS.

Dissenting Opinion by Adkins, J., which Bell, C.J., and Greene, J., join.

Just last term, this Court reiterated that "in no state are trustees, whether individuals or corporations, held to a stricter account than in Maryland." *D 'Auost v. Diamond*, 424 Md. 549, 605 (2011) (citation and quotation marks omitted). The Majority's opinion in this case is a sharp departure from that principle. The Majority sees "material" differences between the protection the trustee sought under a release and indemnification agreement and the protection it could obtain from the court. Despite that, the Majority approved this practice. This will encourage more widespread use of such unlawful releases, and enable banks and other trustees to cite this case to justify other breaches as one "of degree rather than kind." Maj. Slip Op. at 21.

Alternatively, the Majority holds that, even if the release and indemnification agreement breached the trustee's duty of loyalty, a beneficiary may always consent to a breach of trust. In so holding, the Majority ignored the issue of whether the trustee provided the beneficiaries with full and complete information, which is required in any dealings between trustees and beneficiaries, and concluded all too swiftly that the beneficiaries in this case were in a position to give a "valid, informed" consent.

I do not share the Majority's view and respectfully dissent. In this case, the trust beneficiaries ("Beneficiaries") sought a declaratory judgment on the issue of whether "PNC's policy of requiring [a broad release and indemnification prior to the distribution of trust funds] violates Maryland law."[1] For the reasons set forth below, I would hold that it does.

I would add that, although beneficiaries may consent to a breach of trust, they can only do so when they have full and complete information regarding the transaction.

I. PNC's Practice of Seeking Release and Indemnification

No one disputes that it is PNC's common practice to seek release and indemnification agreements such as the one at issue in this case. All along, PNC has characterized such agreements as "customary" and "a prevalent practice." In this case, the preamble to the Release and Indenmification Agreement ("Agreement") recited that the Beneficiaries "requested" trust fund distribution "without the filing, audit and adjudication" of the final accounting by a court, when in fact they had not.[2] After the Beneficiaries protested, pointing out that it "is not true" that they made such a request, PNC continued to insist that it would not "be in a position" to make distributions without the Agreement. It explained that, even though there was no request, "[t]his is standard language and is based on the fact that there is no reason to petition the Circuit Court to terminate the trust."[3] Without any explanation of why "there is no reason" to seek court approval of the final accounting, or the differences between the proposed Agreement and distribution pursuant to a court order, PNC asserted: "the majority of beneficiaries prefer to terminate their trust via private agreement instead of petitioning a court."[4]

II. The Impermissible Breadth of the Agreement

No one denies that the Agreement would give PNC broader protection from liability than a court order. The Circuit Court noted that "it must have been frustrating to have this demand for the *extremely broad* Waiver Release and Indemnity Agreement that was used. . . ."[5] (Emphasis added.) The Majority concluded that there were "*material [differences* that] represent a fairly sizeable increase in the amount of protection PNC would have received" under a court order. Maj. Slip Op. at 21 (emphasis added). Yet, the Majority condones PNC's self-initiated upgrade in protection, at the risk and the expense of the Beneficiaries.

"Material" Differences the Majority Noticed

The Majority acknowledges two aspects in which the Agreement went too far. First, the Agreement "sought protection for PNC in its role as trustee *and* 'in its corporate capacity."' Maj. Slip Op. at 20. The Majority admits that this clause would allow PNC to "effectively use its position as trustee to obtain a release for its securities division, which would appear at odds with the duty of loyalty."[6] *Id.* n.10. Second, the Agreement "also sought a right to indemnification for '*all*' costs arising from the administration of the Trust, rather than all costs *reasonably and properly* incurred." *Id.* at 20-21 (emphasis added). Inexplicably, however, after assessing these differences as "represent[ing] a fairly sizeable increase in the amount of protection PNC would have received," the Majority proceeds to hold that the Agreement is "not so broad and one-sided as to place impermissibly PNC's interests before those of [the Beneficiaries]." *Id.* at 17.

The dichotomy between the Majority's perception of the "material" differences and its holding is striking. The Majority minimizes the differences by later characterizing them as "differences . . . of degree rather than

kind," *id.* at 21, but this rationalization is unconvincing. In my view, these two "material" differences should have led the Court to conclude that the Agreement was overly broad and entitled the Beneficiaries to declaratory relief in their favor.

The Indemnification Clause

Supplementing the two "material" differences noted by the Majority, I add a third, arguably the most significant one: the indemnification of PNC from "any and all liabilities, relating in any way to its administration of the Trust." Unlike a court order approving trust finds distribution, which would have discharged PNC from liability to the Beneficiaries, but not third parties; and unlike the limited common-law indemnity right, this •broad indemnification clause shifts all liability for the trustee's actions to the beneficiaries, even if the liability arose out of the trustee's own negligence. This shift is significant because a trustee's negligence is a risk it assumes in undertaking the often-lucrative[7] position as a trustee.

The Majority, however, fails to see this third material difference by focusing exclusively on the release clause and whitewashing the indemnification clause, reading it in such a way that it only pertains to expenses, surcharges, and costs, but not to claims, liabilities, and causes of action by third parties.[8] The Majority's reading of the Agreement is wrong. Paragraph 6 of the Agreement states that, by signing, the beneficiary "[r]eleases, indemnifies, and holds PNC . . . harmless from and against any and all losses, claims, demands, surcharges, causes of action, costs and expenses (including legal fees)." From a grammatical standpoint, paragraph 6 consists of two complete predicates or clauses: (1) a release and (2) an indemnification of PNC against "against any and all losses, claims, demands, surcharges, causes of action, costs and expenses (including legal fees)."

The Majority, however, dilutes the indemnification clause into something it considers palatable by redacting the terms "any claims," "demands," and "causes of action" and limiting it to "surcharges," "costs," and "expenses."[9] Maj. Slip Op. at 17. This allows the Majority to conveniently avoid the analysis of PNC's attempt to get the Beneficiaries to agree to indemnify it against all possible claims. Instead, the Majority quickly addresses only (1) a release from liability to the beneficiaries, *Id*. at 18, concluding that a release would have been similar to *res judicata* resulting from a court order, and (2) indemnification, i.e. reimbursement, for expenses, holding that trustees are entitled to reimbursement for reasonable expenses. The Majority's one-sided analysis of the release and indemnification clause comes at a great cost to all trust beneficiaries.

Under common law, upon full disclosure by the trustee, a beneficiary generally may agree to release a trustee from liability for "breach of trust" and "thereby extinguish such cause of action as may exist." George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 943 (rev. 2d ed. 1981). Similar to a release, when a trustee or another interested party petitions a court for trust fund distribution under Maryland Rule 10-501, the court's approval of the final accounting "renders *res judicata* matters which were open to dispute, whether or not actually disputed." See also *Restatement (Second) of Trusts* § 220 cmt. a (1959). What this means for our purposes is that once the court approves a final accounting, a beneficiary is barred from suing the trustee on a claim that was or could have been addressed by the court in the first instance. *See Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 106-07, 887 A.2d 1029, 1036-37 (2005).

Barred claims are, for example, a claim for loss by the beneficiary caused by breach of duty of loyalty, breach of duty of impartiality, breach of trust by selling trust property, breach of trust by improperly investing funds, and breach of trust by failing to make proper investment. *Restatement (Second) of Trusts* § 183, §§ 206 through 212. So long as the trustee makes no "misrepresentation or concealment in presenting [the] account or in obtaining the approval of the court," the court's approval of the final accounting renders these beneficiaries' claims against the trustee *res judicata. Restatement (Second) of Trusts* § 220 cmt. a. A release or *res judicata*, however, does not go as far as the Agreement.[10] Unlike *res judicata* that only bars relitigation of the same or similar claim by the same parties,[11] an agreement to indeninify "is a promise to safeguard or hold the indemnitee harmless against either existing and/or future loss liability" to "a third person, or against loss resulting from the liability." 41 Am. Jur. 2d *Indemnity* § 4. Thus, no court approval of a final accounting would ever have the effect of indemnifing the trustee against third-party claims.

These third-party claims may be significant, too. The Restatement (Second) of Trusts gives examples:

> [ ] A is a trustee of a tailoring business. He negligently allows the floor of the premises to fall into disrepair. A customer falls through the floor and breaks an arm. Although A is liable to B, he is not entitled to indemnity out of the trust estates.
>
> [ ] A is trustee of an apartment house. By statute owners of apartment houses are required to maintain escapes. A fails to provide such a fire escape. The house burned and as a result of the lack of a fire escape B is

> in the fire. Although A is liable to B, he is not entitled to indemnity out of the trust estate.
>
> [ ] A is trustee of a grocery business. He employs B to deliver groceries. A knows that B is not a competent driver. In delivering groceries by automobile B negligently runs over C. Although A is liable to C, he is not entitled to indemnity out of the trust estate.

Restatement (Second) of Trusts § 247 cmt. d.

As these examples illustrate, under common law, a trustee's right to indemnification is limited. Indemnity for liability upon a contract with third parties or for liability in tort to third persons is only available to a trustee if the liability "was properly incurred" and the trustee "was not personally at fault in incurring the liability." *Restatement (Second) of Trusts* § 246, § 247.[12]

Not so for PNC under the Agreement. The Agreement sought to expand PNC's protection — at the Beneficiaries' expense — to include "any and all losses, claims, demands [and] causes of action." In this regard, the Agreement is impermissibly broad. I see no justification for shifting liability for potential misdeeds of the trustee over to the beneficiaries.

III. Lack of Full and Complete Disclosure

The Majority brushes off the Trustee's overreaching, preferring instead to focus on the doctrine that "a trustee may engage in self-interested course of action so long as the beneficiaries provide valid, informed consent." Maj. Slip. Op. at 17 (citations omitted). In supporting its conclusion that a valid and informed consent would have negated a breach of the duty of loyalty, the Majority quotes comment c(3) to Section 78 of the Restatement (Third) of Trusts, which, *inter alia*, states: "A particular transaction that would otherwise violate a trustee's duty of loyalty may be authorized by consent properly obtained from or on behalf of all of the trust beneficiaries." Maj. Slip Op. at 17. To the Majority, PNC's efforts to get the Beneficiaries to sign the Agreement are "at bottom, [an] arm's length request to exchange increased protection and indemnity for a quicker and less costly distribution of trust funds." *Id.* at 21. The Majority comforts itself with the idea that the Beneficiaries "retained the choice to accede to that request, . . . negotiate one not as broad in its protection of PNC, or simply reject it. . . ." *Id.*

The Majority's analysis of consent, however, misses an important point: a beneficiary cannot properly consent to a breach of fiduciary duty without having full and complete information relating to the breach.[13] *Restatement (Third) of Trusts* § 78 cmt. g (for a beneficiary's consent to be valid, the trustee "must be able to show that the dealings were fair and that all relevant and material information that was known, or that should have been known, by the trustee was communicated to the beneficiary or beneficiaries involved."). This Court has emphasized that in all dealings between trustees and beneficiaries, the beneficiary must have "full information and complete understanding of all the facts" pertaining to an otherwise-prohibited transaction. *McDaniel v. Hughes*, 206 Md. 206, 220; 111 A.2d 204, 210 (1955).

This is particularly true when the trustee has superior knowledge of the transaction at issue, such as when the trustee is an attorney for the beneficiaries and is "experienced in the law." *Id.* In those instances, "[t]ransactions for the personal advantage of a trustee . . . are even more improper than similar dealings between laymen," and "[t]o sustain such a tranaction [sic] the trustee must show that there was a full and complete disclosure on his part of all the facts essential to an intelligent understanding by the beneficiaries of the subject matter and the consequences of the transaction." *Id.* at 221, 111 A.2d at 211.

PNC did not provide the Beneficiaries with full information explaining their rights or the consequences of their signing of the Agreement.[14] Importantly, PNC failed to explain to the Beneficiaries how the liability protection it sought under the Agreement was more favorable to the bank than the protection it would have received upon the court's approval of a final accounting.[15]

Furthermore, PNC's demanding tone demonstrates that PNC failed to give the Beneficiaries "full and complete information" or explain that they were free to reject the Agreement's sweeping provisions and go to court. In at least two communications with the Beneficiaries, PNC stated that — unless the Beneficiaries executed the Agreement — it would not be "in a position" to distribute the trust funds. For instance, in the closing line of the letter accompanying the Agreement, PNC stated: "Upon receipt of the executed Releases from *all* of the distributees, we will be in a position to have the cash disbursed." (Emphasis in original.) Even the Circuit Court, which ultimately held that there was no "demand,"[16] agreed that "any reasonable person looking at PNC's correspondence would understand that PNC Bank was not going to release funds until all of the beneficiaries had signed off on this agreement."[17]

Unlike the Majority, I do not find comfort in the Beneficiaries' purported ability to reject a disadvantageous proposal. As a fiduciary — and especially as a fiduciary with superior knowledge on the transaction in issue — PNC was only permitted to engage in negotiations of an agreement advantageous to it upon full and complete disclosure to the Beneficiaries of all relevant

information. *See McDaniel*, 206 Md. at 220; 111 A.2d at 210. This record reveals no such disclosure.[18] We should not condone the practice of a bank's asking beneficiaries to provide the bank insurance against the bank's own blunders.

For these reasons, I dissent.

Chief Judge Bell and Judge Greene have authorized me to say that they join this dissenting opinion.

FOOTNOTES TO MAIN OPINION

1. All statutory references hereafter are to the Tax-General Article (1988, 2010 Repl. Vol.), unless otherwise specifically noted.

2. Section 7-204 provides, in pertinent part:

> (b) *Collateral tax rate*. — The inheritance tax rate is 10% of the clear value of the property that passes from a decedent.

3. The Maryland Tax Code provides two different methods of paying the inheritance tax. Pursuant to § 7-219, the tax may be prepaid. Section 7-219 provides:

> (a) *Application*. — Within a reasonable time after the valuation of a less than absolute interest in property that passes from a decedent, an application to prepay the inheritance tax for a subsequent interest in the same property may be filed with the register of the county where the inventory was filed under § 7-225 of this subtitle.
>
> (b) *Applicant*. — (1) An application under subsection (a) of this section may be filed by or for a person or class of persons, whether or not then in being, in whom may vest a subsequent interest in the property valued.
>
> (2) An application under subsection (a) of this section may not be made by or for a person who, under the instrument that created the property interests, has no interest other than the possibility of becoming an appointee by the exercise of a power of appointment.
>
> (3) A person who only has the interest described in paragraph (2) of this subsection is entitled to receive the benefits of prepayment under § 7-210(b) of this subtitle.

Section § 7-210 provides:

> (a) *If application to prepay tax is filed*. — (1) If an application to prepay inheritance tax for a subsequent interest in property is filed under § 7-219 of this subtitle, the value of the subsequent interest is determined by subtracting the value of all preceding and concurrent interests from the value of the whole property.
>
> (2) The total inheritance tax on all interests in the property valued shall equal the inheritance tax that would have been due if an absolute interest in the property passed from the decedent.
>
> (b) *If interest vests in nonapplicant*. — (1) If a subsequent interest in property ultimately vests in possession in a person other than the person by or for whom an application to prepay the inheritance tax was filed under § 7-219 of this subtitle and if the inheritance tax determined under the prepayment application was paid:
>
> (i) the subsequent interest shall be revalued when it vests in possession; and
>
> (ii) the inheritance tax due on the subsequent interest shall be redetermined based on the value of the interest when it vests in possession and on the relationship of the original decedent to the person in whom the interest ultimately vests in possession.
>
> (2) A deduction from the inheritance tax calculated under paragraph (1)(ii) of this subsection for prepaid inheritance tax on the interest shall be allowed.
>
> (c) *If no application to prepay tax is filed or no tax paid*. — (1) If an application to prepay the inheritance tax for a subsequent interest is not filed in accordance with § 7-219 of this subtitle or if the inheritance tax determined for the subsequent interest under a prepayment application is not paid when due under § 7-217(d) of this subtitle:
>
> (i) the whole property shall be valued when the subsequent interest vests in possession;
>
> (ii) the value of the subsequent interest shall be valued when it vests in possession in the manner stated in subsection (a) of this section; and
>
> (iii) the inheritance tax due on the subsequent interest shall be determined based on the value of the interest when it vests in possession and on the relationship of the original decedent to the person in whom the interest ultimately vests in possession.
>
> (2) A deduction for inheritance tax previously paid on any interest in the property may not be allowed.
>
> (d) *When applicants pay different rates*. — (1) If the inheritance tax applies to 1 or more of the persons by or for whom an application to prepay the inheritance tax is filed under § 7-219 of this subtitle and the exemption under § 7-203(b) of this subtitle applies to others, the inheritance tax applies to the subsequent interest.
>
> (2) (i) On application of a party in interest, the inheritance tax due may be apportioned among the persons by or for whom the application to prepay the inheritance tax is filed.

(ii) After the apportionment, each of those persons is responsible only for the amount of the inheritance tax apportioned to that person.

4. ET § 14-103 provides, in pertinent part:

(e) *Final distribution*. — Upon the final distribution of any trust estate, or portion of it, an allowance is payable commensurate with the labor and responsibility involved in making the distribution, including the making of any division, the ascertainment of the parties entitled, the ascertainment and payment of taxes, and any necessary transfer of assets. The allowance is subject to revision or determination by any circuit court having jurisdiction. In the absence of special circumstances the allowance shall be equal to one half of one percent upon the fair value of the corpus distributed.

5. As mentioned, Petitioners' brother, Robert Garth Kirkwood, a resident of Florida, did not join the suit. PNC moved to dismiss the complaint, citing Maryland Rule 2-211 and arguing that his joinder was "necessary and indispensable for relief on the merits and as requested by the plaintiffs." After a hearing, the Circuit Court denied the motion, reasoning that the court could not join Robert as a plaintiff, defendant, or involuntary plaintiff, pursuant to Rule 2-211(a)(2), because it could not exercise personal jurisdiction over him. That decision has not been appealed.

6. Rule 10-501 provides, in pertinent part:

(a) **Who may file**. A fiduciary or other interested person may file a petition requesting a court to assume jurisdiction over a fiduciary estate other than a guardianship of the property of a minor or disabled person.

7. Petitioners have not pursued in this Court their appeal of the Circuit Court's judgment in PNC's favor on Count III. Petitioners only mention in their brief that "[b]oth parties have always agreed that the result in Count III follows the result in Count II." Because Petitioners make no "stand alone" challenge to Count III, we have no cause to, and thus do not, address the Circuit Court's entry of judgment in favor of PNC on Count III, nor do we comment on the parties' agreement that "the result in Count III follows the result in Count II."

8. All references hereafter to the Restatement are to the Restatement (Third) of Trusts, unless otherwise noted.

9. Marion Bevard's Last Will and Testament provides in Section 5.2.D.(3):

The receipt and release of the person or institution to whom any distribution is made pursuant to the terms of Sections 5.2.D.(1) or 5.2.D.(2) shall be a sufficient and complete discharge of the fiduciaries making such distribution with respect to such distribution.

Section 5.2.D(3), however, is applicable, by its own terms, only to distributions made to minors, disabled beneficiaries, and for education or medical care. It is not applicable to distributions like the one at issue in the present appeal and therefore not applicable to resolution of this case.

In regards to applicable statutes, we have interpreted ET § 9-111 to "allow[ ] a personal representative to obtain a release from legatees even when acting pursuant to the distribution order of an orphans' court, and such a court may order those legatees to sign the release when the personal representative so requests." *Allen v. Ritter*, 424 Md. 216, 231, 35 A.3d 443, 452 (2011). ET § 9-111, though, by its own terms, applies only to the power of a personal representative making a distribution from an estate. There exists no comparable subsection in the Maryland Code applicable to trustees making a distribution from a fiduciary trust.

10. The dissent accuses PNC of not providing the beneficiaries with "full and complete information" explaining their rights sufficient to overcome this prohibition against self-interested dealings. We do not dispute that a trustee has the duty to provide beneficiaries with "full information and complete understanding of all the facts." *McDaniel v. Hughes*, 206 Md. 206, 220, 111 A.2d 204, 210 (1955). But that is not the question before this Court, and the parties did not brief or argue that issue on appeal. Instead, we are asked to decide whether a Maryland trustee lawfully can request the type of indemnity PNC sought here, not whether PNC's release agreement provided sufficient information to the beneficiaries. We note, however, that trustees seeking similar indemnification agreements in the future should adhere to the principle of "full information" in order to allow beneficiaries to make informed decisions.

11. Maryland Rule 10-103(f)(2) defines "interested person" as, among other things, "a current income beneficiary of the fiduciary estate."

12. We note that such language would not extend protection to other services provided to the Trust by PNC. For example, although the trust department of a financial institution could obtain a release of liability and indemnification agreement for the activities of its trust department in administering the trust, it could not seek a release of liability of its securities brokerage for brokerage services provided to the trust, if the trustee happened to employ the institution's own brokerage division to execute trades on behalf of the trust. Otherwise, the financial institution would effectively use its position as trustee to obtain a release for its securities division, which would appear at odds with the duty of loyalty.

13. For reference, we offer again the pertinent text of § 7-210:

(a) *If application to prepay tax is filed*. — (1) If an application to prepay inheritance tax for a subsequent interest in property is filed under § 7-219 of this subtitle, the value of the subsequent interest is determined by subtracting the value of all preceding and concurrent interests from the value of the whole property.

(2) The total inheritance tax on all interests in the property valued shall equal the inheritance tax that would have been due if an absolute interest in the property passed from the decedent.

* * *

(c) *If no application to prepay tax is filed or no tax paid*. — (1) If an application to prepay the inheritance tax for a subsequent interest is not filed in accordance with § 7-219 of this subtitle or

if the inheritance tax determined for the subsequent interest under a prepayment application is not paid when due under § 7-217(d) of this subtitle:

> (i) the whole property shall be valued when the subsequent interest vests in possession;
>
> (ii) the value of the subsequent interest shall be valued when it vests in possession in the manner stated in subsection (a) of this section; and
>
> (iii) the inheritance tax due on the subsequent interest shall be determined based on the value of the interest when it vests in possession and on the relationship of the original decedent to the person in whom the interest ultimately vests in possession.

(2) A deduction for inheritance tax previously paid on any interest in the property may not be allowed.

14. Article V, Section 6 of the Maryland Constitution provides, "It shall be the duty of the Clerk of the Court of Appeals and the Clerks of any intermediate courts of appeal, respectively, whenever a case shall be brought into said Courts, in which the State is a party or has interest, immediately to notify the Attorney General thereof." Following oral argument in this case, this Court, realizing that the State of Maryland generally has an interest in the payment and collection of taxes and in the proper interpretation and application of the Maryland Tax Code, invited the State of Maryland to submit a Memorandum of Amicus Curiae. The State did so on behalf of the Comptroller of the Treasury and the Registers of Wills.

FOOTNOTES TO DISSENT

1. In addition to the declaratory judgment on this issue, in their Complaint filed on April 28, 2008, the trust beneficiaries ("Beneficiaries") sought loss of income, prejudgment interest, and attorney fees, all resulting from PNC's insistence that the Beneficiaries release and indemnify PNC prior to the trust distribution. The Complaint's other two counts were for declaratory relief in relation to the inheritance tax and PNC's final distribution fee. I concur in the Majority's holdings with respect to these other counts.

2. The Waiver, Receipt, Release and Indemnification ("Agreement") began by stating:

> the parties in interest have requested that PNC distribute the Trust assets to the beneficiaries . . . without the filing, audit and adjudication . . . with a court of competent jurisdiction . . ., and PNC has agreed to do so, provided that the parties in interest waive the filing with and auditing of an account of PNC's administration of the Trust with the Court and release and indemnify PNC from any and all claims and liabilities relating in any way to its administration of the Trust.

3. Elaborating further, PNC maintained that the release and indemnification agreement in lieu of seeking approval of an accounting by a court "is based more on practice than the procedure of asking the Distributees if they want to incur additional expenses to Petition the Court, legal fees, etc. Accordingly, there is no formal 'request.'"

4. According to PNC, "Trustees, both institutional and individual, request such Agreements on a daily basis."

5. The Circuit Court went on to say that although "it must have been frustrating . . . it was not improper."

6. Without further elaboration, the Majority chose to read this broad clause narrowly by noting in a footnote that "such [corporate capacity] language would not extend protection to other services provided to the trust by PNC." Maj. Slip Op. at 20 n.10. I would, instead, declare this provision illegal and unenforceable.

7. Section 14-103 of the Trusts and Estates Article sets forth the percentages for income commissions, corpus commissions, sales commissions, and final distribution allowances. Md. Code Ann, Est. & Trusts (1974, 2002 Repl. Vol.), § 14-103. The percentages of income commissions vary, depending on the nature and the size of the trust's income. For instance, the commissions "upon all income from real estate, ground rents, and mortgages collected in a year" are six percent. *Id.* at (b)(1).

8. The gravity of such a mis-reading is magnified when the risk is not disclosed to the Beneficiaries, as I discuss below.

9. The Majority's reading of the term "indemnifies" only in conjunction with the terms "surcharges," "costs," and "expenses" does not comport with the parties' understanding of the clause. PNC did not limit the indemnification clause to expenses as the Majority did. Indeed, in the preamble to the Agreement, PNC expressly stated that by way of the Agreement, the beneficiaries would "release and indemnify PNC from any and all claims." The Beneficiaries also read the term "indemnifies" to pertain not only to expenses but to the other terms contained within paragraph 6 of the Agreement, including "any and all losses, claims, demands [and] causes of action." To illustrate, in his letter to the motions court, one of the beneficiaries complained:

> I do not own a law dictionary; but, in my dictionary of the English language, the word "indemnify," is defined as: "compensate (someone) in respect of harm or loss; secure (someone) against legal responsibility for their actions." . . . So, in order for me to receive my inheritance, my 25% of the Trust, I have to agree to indemnify the bank from any claims, losses, liabilities, legal fees etc. related to this Trust. This is an intolerable situation. . . . I [will not] sign a document, which promotes deflection of personal responsibility from the bank onto me.

10. The parties appreciated this difference too. At the last summary judgment motion hearing, the Beneficiaries' counsel emphasized this difference, arguing that, although PNC continuously referred to the Agreement as a "Release Agreement," "[i]t wasn't [just] a release. It was a waiver and indemnification in which PNC Bank asked the beneficiary to indemnify and hold harmless PNC from its entire administra-

tion of the trust estate." At oral argument before this Court, PNC likewise acknowledged that "[T]he release is probably better than a court order" because it contains an indemnity clause. Oral Argument at 10:34, *Hastings v. PNC Bank, NA* (No. 109, Sept. Term 2011), *available at* http://www.courts.state.md.us/coappeals/webcastarchive.html#april20 12.

11. As this Court has explained on more than one occasion, *res judicata* bars "the *same* parties from litigating a second lawsuit on the *same* claim, or any other claim arising from the *same* transaction or series of transactions and that could have been — but was not — raised in the first suit." *Anne Arundel County Bd. ofEduc. v. Norville*, 390 Md. 93, 106, 887 A.2d 1029, 1036 (2005) (quoting *Black's Law Dictionary* 1336-37 (8th ed. 2004) (emphasis added)).

12. Similarly, the current Draft of the Restatement (Third) of Trusts discusses the "now-prevalent practice" of authorizing third parties to file suits against the trustee in its representative capacity, "whether or not the trustee is personally liable, with the trustee protected from personal liability to the extent the trustee acted properly." *Restatement (Third) of Trusts*, Tentative Draft No. 6, March 14, 2011), § 106, Reporter's Notes. Under the Draft, a trustee acts "properly" if it has not "committed a breach of trust" or "is [not] personally at fault" for the liability. *Id.* at § 106.

13. Furthermore, in obtaining the consent, the "trustee must not violate other fiduciary duties, such as the duty of prudence or impartiality. . . ." *Restatement (Third) of Trusts* § 78 cmt. g.

14. As discussed earlier, the Agreement not only failed to contain full information, but it also contained a misrepresentation. The Agreement stated that the Beneficiaries — rather than PNC — was the party initiating distribution of trust funds without court approval. Although this may seem like a minor misrepresentation, because there are four beneficiaries in this case (each receiving the Agreement), this statement has a great potential to mislead. After all, each of the four beneficiaries may have gotten the impression that the other three beneficiaries had requested distribution of trust funds in this manner, when, in fact, they had not.

15. PNC seemingly was impatient with explanations. Although the Beneficiaries insisted upon explanation of PNC's tax and fees calculations, those requests seem to have irritated PNC. In one letter to the Beneficiaries, PNC wrote: "The trust document that you request is in your possession. . . . Your other questions about fees and taxes are adequately addressed in [prior] correspondence to you. Nevertheless, I will attempt to dissect this for you."

16. The Beneficiaries did not appeal this finding.

17. The court went on to say that "although that certainly is the import of PNC's correspondence as well as Mr. Lyons [sic] correspondence on behalf of PNC Bank, PNC Bank didn't in fact do that. They did release some of the money. Unfortunately that happened just as the Plaintiffs [sic] law suit was in the mail to the Court to be filed."

18. As a PNC lawyer has written, it may be "time consuming and difficult to get beneficiaries to understand" the process of trust termination. Robert Owings, Esq., C.F.P, PNC Bank, *Closing Up Shop: Wrapping Up the Trust*, *in* Being the Trustee: Understanding Role and Responsibilities 173 (MSBA 2012). But, as a trustee, PNC owes trustee beneficiaries the duty to provide full and complete information.

Cite as 11 MFLM Supp. 19 (2012)

Administrative law: OASDI: DSS' right to foster child's survivor benefits

In Re: Ryan W.

No. 1503, September Term, 2011

Argued Before: Eyler, Deborah S., Woodward, Rodowsky, Lawrence F. (Ret'd, Specially Assigned), JJ.

Opinion by Eyler, Debroah S., J.

Filed: September 5, 2012. Reported.

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

Department of Social Services' practice of reimbursing itself for the direct cost of foster care services, when acting as a representative payee for Social Security Old Age, Survivor, and Disability Insurance benefits, was in compliance with the Social Security Act and the regulations and did not violate the Equal Protection clause; furthermore, the juvenile court lacked authority to invalidate COMAR regulations providing for the offset.

This appeal concerns the right of a local department of social services acting as a representative payee for social security survivor benefits for a child committed to its care to use those benefits to reimburse itself for the cost of the child's care. The Baltimore City Department of Social Services ("the Department"), the appellant, acting as representative payee for Ryan W., the appellee, received $31,693.30 in Social Security Old Age, Survivor, and Disability Insurance ("OASDI") benefits for Ryan. The Department applied all of those benefits to reimburse itself for a portion of the direct cost of foster care services it paid on Ryan's behalf over a three and one-half year period. By the end of that period, the direct costs of foster care services for Ryan totaled $233,305.51.

After the benefits were paid, Ryan filed a "motion to control conduct" in his Child In Need of Assistance ("CINA") case, in the Circuit Court for Baltimore City, challenging the Department's application of his OASDI benefits. In the motion, Ryan asked the Juvenile Court to order the Department to "conserve" in a trust account the entire $31,693.30 in OASDI benefits it had received, to be used for his benefit when he leaves foster care.

After holding two hearings, the Juvenile Court ruled that the Department had violated Ryan's due process and equal protection rights by applying the OASDI benefits it had received on his behalf as it did; declared void two COMAR regulations purporting to authorize the Department's actions in this case; and found, as a matter of fact, that the OASDI benefits were not applied in a manner consistent with Ryan's best interests. The court granted the relief sought by Ryan, ordering the Department to place in a trust account, subject to court supervision, the full $31,693.30 in OASDI benefits it had received as Ryan's representative payee.

The Department noted an appeal, presenting three questions for review, which we have rephrased slightly:

I. Did the Department lawfully apply for and use Ryan's OASDI benefits for the cost of his foster care?

II. Does a Juvenile Court have authority to declare a Maryland regulation invalid, to supervise a local department of social services' activities as representative payee for a foster child's OASDI benefits, and to mandate the creation and funding of a trust account as a remedy for a local department's alleged prior misuse of those benefits?

III. Does sovereign immunity bar the Juvenile Court from ordering the Department to establish and maintain a trust account for Ryan with funds from the State Treasury?

The Department concedes that roughly $8,100 in OASDI benefits that it received for Ryan as part of two lump sum payments should not have been used for the cost of Ryan's care, and must be reimbursed to him.

Ryan has moved to dismiss the appeal or, in the alternative, to strike certain portions of the Department's brief.

For the reasons to follow, we shall deny the motion to dismiss and reverse the order of the juvenile court in part, *i.e.*, except for reimbursement of roughly $8,100 to Ryan. We also shall deny Ryan's motion to strike certain portions of the Department's brief.

STATUTORY AND REGULATORY FRAMEWORK

A. Old Age, Survivor, and Disability Insurance Benefits and Representative Payees

Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, establishes the framework for OASDI, which is a cash benefit paid to elderly and disabled workers, and their survivors and dependents. In the instant case, we are concerned only with OASDI *survivor's* benefits. An unmarried child under the age of 18 (or 19 if attending school full time) who is a surviving dependent of a deceased parent is entitled to receive OASDI benefits if the deceased parent earned sufficient work credits during his or her lifetime. 42 U.S.C. § 402(d). The amount of the child's benefit is based on the earnings of the deceased parent. *Id.*

Ordinarily, OASDI benefits are paid directly to the beneficiary. The Social Security Administration ("SSA") may pay the benefits to a "representative payee," however, if doing so will serve the interests of the beneficiary. 42 U.S.C. 405(j)(1)(A); 20 C.F.R. 404.2001 (SSA selects a representative payee if it is "in the interest of a beneficiary" to do so). Except in certain limited circumstances that do not apply here, when a beneficiary is under the age of eighteen, as is usually the case with beneficiaries of survivors' benefits, the SSA pays OASDI benefits to a representative payee. 20 C.F.R. 404.2010(b).[1]

SSA regulations provide that the SSA shall choose a representative payee who will best serve the interests of the beneficiary. The regulations establish an order of priority for selection of a representative payee for a minor child:

> (1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;
>
> (2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary's support and is demonstrating strong concern for the beneficiary's well being;
>
> (3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary's well being;
>
> (4) A relative or stepparent who has custody of the beneficiary;
>
> (5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary's support and is demonstrating concern for the beneficiary's well being;
>
> (6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary's well being; and
>
> *(7) An authorized social agency or custodial institution.*

20 C.F.R. 404-2021(c) (emphasis added).

Once the SSA has selected a representative payee, it notifies the beneficiary in writing prior to issuance of the first benefit payment. 42 U.S.C. 405(j)(2)(E)(ii); 20 C.F.R. 404.2030(a). When the, beneficiary is a minor child, however, the notice is directed to the child's legal guardian or legal representative. *Id.* The notice advises the beneficiary, *inter alia*, that he or she has a right to appeal the determination that representative payment is necessary and designation of the particular representative payee. *Id.*

The responsibilities of a representative payee are delineated by 20 C.F.R. 404.2035. That regulation provides, in pertinent part, that a representative payee shall "[u]se the benefits received on[ ] behalf [of a beneficiary] only for [the beneficiary's] use and benefit in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in [the beneficiary's] best interests." 20 C.F.R. 404.2035(a).

Pursuant to 20 C.F.R. 404.2040(a), payments made by a representative payee are for the "use and benefit" of the beneficiary if the benefits are "used for the beneficiary's current maintenance." "Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." *Id.* The regulation provides the following illustration:

> *Example*: An aged beneficiary is entitled to a monthly Social Security benefit of $ 400. Her son, who is her payee, disburses her benefits in the following manner:
>
> | | |
> |---|---|
> | Rent and utilities | $200 |
> | Medical | 25 |
> | Food | 60 |
> | Clothing (coat) | 55 |
> | Savings | 30 |
> | Miscellaneous | 30 |
>
> The above expenditures would represent proper disbursements on behalf of the beneficiary.

The regulation further provides that, when a beneficiary is institutionalized "because of a mental or physical incapacity," the "customary charges" of the institution may constitute "current maintenance." *Id.* at (b). Expenditures for costs falling outside of those customary charges also would be allowed, however, even

if the benefits would not otherwise cover the cost of the institution's charges.[2]

Finally, the regulation provides that a representative payee may not be required to use benefits to cover a debt of a beneficiary that arose prior to the date on which an OASDI payment was certified to the beneficiary. *Id*. at (d). For example, if a beneficiary receives a lump sum retroactive benefit payment certified in 2010, and that beneficiary had an outstanding bill for costs incurred in a nursing home in 2009, the representative payee must first ensure that the beneficiary's current maintenance needs are met. If those needs are met and excess benefits remain, the representative payee can use the lump sum benefit or a part of it to pay the outstanding bill.

After a representative payee has provided for the beneficiary's current maintenance and other permissible uses as discussed above, "any remaining amount shall be conserved or invested on behalf of the beneficiary." 20 C.F.R. 404.2045(a).

B. Maryland statutes and regulations

Pursuant to Md. Code (2006 Repl. Vol., 2010 Supp.), section 5-524 of the Family Law Article ("FL"), the Department of Human Resources ("DHR") shall provide "child welfare services" to a child placed in foster care who cannot return to his or her parents and/or guardians. DHR shall "develop and implement" a permanent placement for the child. *Id*. In carrying out these duties, DHR "shall provide for the care, diagnosis, training, education, and rehabilitation of children by placing them in group homes and institutions that are operated by for-profit or nonprofit charitable corporations." FL § 5-526(a). DHR shall reimburse the for-profit or non-profit corporations that operate the group homes at "appropriate monthly rates that DHR determines, as provided in the State budget." *Id*. at § 5-526(b).

DHR has promulgated regulations respecting out-of-home placements for foster children. As relevant here, COMAR 07.02.11.29, entitled "Child Support and Other Resources for Reimbursement Towards Cost of Care," governs the means by which a local department may seek reimbursement for costs incurred in caring for a foster child in an out-of-home placement. At part A, the regulation states that

> [a]ll of[a foster] child's resources, including parental support, *the child's own benefits*, insurance, cash assets, trust accounts, and, for the child who is preparing for independent living, the child's earnings, are considered, as established in the service agreement, in determining the amount available for reimbursement of the cost of care.

(Emphasis added.) The "cost of care" includes "the board rate, clothing allowance, any medical care payments made on behalf of the child, and any supplemental purchases made to meet the child's special needs." 07.02.11.29.B. The primary resource for reimbursement of the cost of care is child support; and, unless parental rights have been terminated, the local department is obligated to pursue support enforcement proceedings against parents of foster children. 07.02.11.29C-I. A foster child's own earnings also may be considered a resource for reimbursement "in a manner consistent with a plan for the child to eventually assume responsibility for the child's support as provided for in the service agreement." 07.02.11.295.

Part K of the regulation pertains to "Other Resources for the Child." It states that "survivor's disability insurance," *i.e.*, OASDI benefits, may be considered a resource for a child in an out-of-home placement. 07.02.11.29K(1) ("Other resources available for the child may be in the form of cash assets, trust accounts, insurance (including survivor's disability insurance), or some, type of benefit or supplemental security income for the disabled child." A child over age 18 in an out-of-home placement who is eligible for OASDI benefits may choose either to pay the benefits over to the local department or to designate the local department as the representative payee for the benefits. 07.02.11.29K(2).

Part L of the regulation governs how the local department shall apply a child's resources, including OASDI benefits:

> The child's resources shall be applied directly to the cost of care, with any excess applied first to meeting the special needs of the child, and the net excess saved in a savings account for future needs. Any potential benefits from other resources shall be pursued and made available if possible to the local department as payee.

07.02.11.29L. Finally, Part M is implicated when the local department has conserved a "net excess" in resources for a child and the child is discharged from out-of-home placement:

> If excess funds saved for the child have not been spent before the child is discharged from out-of-home placement, the funds shall be:
>
> (1) Returned to the child upon discharge if the child is 18 years old or older; or
>
> (2) If the child is younger than 18 years old, transferred to the legal parent or guardian with whom the child will reside.

07.02.11.29M.

FACTS AND PROCEEDINGS

Ryan was born on February 26, 1993, to Mary W. and Gregory M. He is now 19 years old.

In 2002, Ryan was removed from his parents' care, based upon allegations of neglect. Both of his parents were active drug addicts.[3] On June 4, 2002, when he was 9 years old, Ryan was adjudicated a CINA by the Circuit Court for Baltimore City acting as the Juvenile Court, and was committed to the care and custody of the Department. Since that time, Ryan has remained committed to the Department and has lived in various out-of-home, non-relative placements.

Ryan's mother died in August of 2006. Two years later, in November of 2008, his father died.

Beginning in April of 2009, Nathan Exom became (and remains) the Department caseworker assigned to Ryan. In June of 2009, Exom provided copies of Ryan's parents' death certificates to the Department's Foster Care & SSI Reimbursement Unit ("Reimbursement Unit").[4] In November of 2009, the Reimbursement Unit applied to the SSA for OASDI benefits on Ryan's behalf and asked to be appointed as his representative payee. On a date soon thereafter, but not revealed by the record, Ryan's application was approved by the SSA, which appointed the Department to serve as his representative payee.

In December of 2009, the Department began receiving, in its capacity as representative payee, $771 per month in OASDI benefits for Ryan. The first monthly payment was for the month of November of 2009. The Department also received two lump sum payments for retroactive OASDI benefits for Ryan. The first lump sum payment, received on November 13, 2009, was for $8,481, and covered the period from December of 2008 to October of 2009, *i.e.*, between Ryan's father's death and the commencement of OASDI benefit payments. The second lump sum payment, received on December 15, 2009, was for $11,647.50, and covered the period from August 2006 to November 2008, *i.e.*, from the time Ryan's mother died until his father died. The Department continued to receive monthly OASDI benefits on Ryan's behalf until Ryan turned 18 in February of 2011. Over the entire time that the Department acted as Ryan's representative payee, it received a total of $31,693.50 in OASDI benefits (lump sum and monthly) on his behalf. It applied all of the benefits toward the cost of Ryan's foster care.

A. Ryan's Motion to Control Conduct

In March of 2011, Ryan, through his CINA counsel, contacted Exom to determine if the Department had received any OASDI benefits on his behalf. The Department gave Ryan an accounting of his OASDI benefits that had been received and disbursed by the Department over the period of time in which it had acted as representative payee.

On April 5, 2011, in his CINA case, Ryan filed a "motion to control conduct" under Md. Code (2006 Repl. Vol., 2010 Supp.), section 3-821 of the Courts and Judicial Proceedings Article ("CJP").[5] He asked the Juvenile Court to order the Department to "conserve the [OASDI] benefits [the Department] surreptitiously applied for on his behalf and ha[d] been receiving as his representative payee since 2009" and to "maintain" all of the benefits "collected and to be collected in a separate account" in his name. He asserted that the Juvenile Court had jurisdiction over the matter pursuant to CJP section 3-803(b)(i), as the matter concerned "support" for him and the dispute was not preempted by federal law.[6]

On May 16, 2011, the Department filed an opposition to Ryan's "motion to control conduct," arguing that the Juvenile Court lacked jurisdiction to decide the matter and maintaining that the Department's actions as representative payee had been proper under governing federal and state law.

In the interim, by letter dated April 30, 2011, Ryan filed a notice of claim with the State Treasurer pursuant to the Maryland Tort Claims Act ("MTCA"), Md. Code (2009 Repl. Vol., 2010 Supp.), section 12-101 *et seq.* of the State Government Article ("SG"). The letter was received on May 3, 2011. In the letter, Ryan asserted that the Department, in its capacity as representative payee, had violated its fiduciary duty to him by using his OASDI benefits to reimburse itself for the cost of his care; that this practice had violated his rights under the Maryland Declaration of Rights and the federal constitution; and that the COMAR regulations purporting to authorize the practice were promulgated in violation of the Maryland Administrative Procedure Act.

B. The First Hearing

On May 17, 2011, the Juvenile Court held an evidentiary hearing on the "motion to control conduct." Counsel for the Department argued at the outset that the court lacked jurisdiction to consider the motion. The court made clear that it intended to "make a complete record" before ruling on the issue of jurisdiction.

Ryan testified on his own behalf. He explained that he currently lives in the home of one Mr. B., in the Phoenix area of Baltimore County, and attends Dulaney High School, where he was about to finish 11th grade. He had been living with Mr. B. for two to three weeks. Before then, he had spent the most recent 9 months living at All Star Flight Enterprises, Inc. ("Star Flight"), a therapeutic group home in Pikesville. Prior to that placement, he had spent seven months at Dream Keepers, a therapeutic group home

in Baltimore City; two to three months at Franklin Homes ("Franklin"), a non-therapeutic group home in Baltimore City; seven to eight months in a foster home in Bel Air; and another year at Franklin.[7]

Ryan testified that he had not known that the Department had applied for or was receiving OASDI benefits on his behalf. He asserted that, had he received the benefits directly, he would have invested the funds "in stock." Finally, Ryan testified that until his CINA counsel requested it, he had never received an accounting of his OASDI benefits and their use.

In response to questions from the court, Ryan testified about his plans for his future. He said he wants to be a park ranger and is thinking about attending college. He had done some preliminary research and was interested in Garrett College, in western Maryland, which offers a forestry program.

The Department called as a witness Georgette Griffith, a manager with the Reimbursement Unit. She testified that her unit is responsible for applying for OASDI benefits for children in the care and custody of the Department and using the benefits for the cost of the children's care, and that it is not her unit's practice to not if' the child when it applies for or uses OASDI benefits. She testified that the Department had received a total of $31,693.50 in OASDI benefits on Ryan's behalf. She was unaware whether Ryan's cost of care also was covered by Title IV E funds.[8] Griffith had not met Ryan and was not familiar with his case.

The Department also called Exom. He testified that Ryan was not Title IV E eligible and therefore the cost of his care was paid for directly with Department funds.

The Department introduced into evidence an accounting of all of the OASDI benefits received on behalf of Ryan during the period in which it acted as his representative payee (November of 2009 through February of 2011) and the lump sum retroactive payments received. It further detailed the amount expended by the Department for the cost of Ryan's care each month during this period. The accounting revealed that the Department expended $93,199.49 for Ryan's care between August of 2006 and November of 2008 (the period covered by the second received lump sum check); $57,897.86 between December of 2008 and October of 2009 (the period covered by the first received lump sum check); and that it had expended $72,208.16 in the 15 months since it began receiving current benefit payments. Thus, the Department expended $223,305.51 for Ryan's care during the three and one-half year period of time for which it received benefits payments on Ryan's behalf.

At the conclusion of all the evidence, the Juvenile Court heard argument of counsel and then advised the parties the matter would be held *sub curia*

C. The June 16, 2011 Opinion and Order.

On June 16, 2011, the Juvenile Court issued a memorandum opinion and order.[9] In the order, the court made the following findings:

> 1. [The Department's] practice of applying [Ryan]'s [OASDI] benefits toward the cost of his foster care without notice to [him], or opportunity to be heard on the matter violate[d] [Ryan]'s due process rights;
>
> 2. [The Department]'s practice violate[d Ryan]'s equal protection rights;
>
> 3. COMAR 07.02.11.29(K)(2) and (L) are nullified because these regulatory sections exceed the statutory authority granted to [the Department];
>
> 4. COMAR 07.02.11.29(K)(2) and (L) violate [the Department's] fiduciary duty to [Ryan]; and
>
> 5. [The Department]'s actions in this case have not been shown to be in the best interests of [Ryan].

The order directed that the "matter shall be set in for a permanency planning review on July 15, 2011," at which hearing the Department would be required

> to address a) whether its past actions in reimbursing itself were in the best interests of [Ryan] and b) if the Court should conclude that self reimbursement was not in the best interests of [Ryan], [the Department] shall be prepared to state what the proper use of the $31,693.30 [sic] with which it has reimbursed itself should now be, given the current age and circumstances of [Ryan].

The order further provided that, if the Department still was Ryan's representative payee as of the time of the July 15, 2011 hearing, it would be obligated to present a plan for the future use of OASDI benefits to be received on Ryan's behalf; and the court would determine whether the proposed use would be in Ryan's best interest.[10] Finally, the order afforded Ryan the opportunity at the July 15, 2011 hearing to challenge the Department's proposed use of any past or current OASDI benefits and advised that either party could submit written memoranda on the issues by July 11, 2011.

In its attached memorandum opinion, the Juvenile Court first addressed the Department's jurisdictional challenges. The Department had argued that the Juvenile Court lacked jurisdiction to make rulings about Ryan's OASDI benefits because Ryan had failed to exhaust federal and state administrative remedies; a

Juvenile Court does not have subject matter jurisdiction to issue an order controlling the conduct of the Department in expending a child's OASDI benefits; Ryan's filing of an MTCA notice of claim deprived the Juvenile Court of whatever jurisdiction it might have had to begin with; and the separation of powers doctrine barred the relief sought. The Juvenile Court rejected those arguments. It reasoned that because receipt of notice of the agency action is the triggering event for an administrative appeal, and the Department never notified Ryan that it was applying for OASDI benefits on his behalf, that it had been designated as his representative payee, or that it was receiving and using the benefits, Ryan could not have been required to exhaust administrative remedies.

On the issue of subject matter jurisdiction, the Juvenile Court ruled that it has broad authority and power to protect and advance the best interest of a CINA, and that that jurisdiction extends to the "custody, visitation, *support*, and paternity" of the child. CJP § 3-803(b)(1). (Emphasis added.) The court concluded that its deciding the "motion to control conduct" would not violate the separation of powers doctrine because the Department's actions as representative payee for a foster child were undertaken in its capacity as Ryan's guardian and fiduciary, and the Juvenile Court has broad, proactive responsibilities to oversee the Department's conduct in that respect. Finally, the Juvenile Court rejected the argument that Ryan's filing of an MTCA notice of claim with the State Treasurer had preclusive effect.

Turning to the substantive issues, the Juvenile Court first addressed the impact of the Supreme Court's holding in *Washington State Department of Social Services v. Guardianship Estate of Danny Keffeler*, 537 U.S. 371(2003) (*"Keffeler II"*). It concluded that the *Keffeler II* decision, which we shall discuss later in more detail, held only that a local department of social services does not run afoul of the anti-attachment sections of 42 U.S.C. section 407(a) when it uses a foster child's OASDI benefits to reimburse itself for the cost of the child's care. The Juvenile Court ruled that, because Ryan did not challenge the Department's actions under the anti-attachment provisions, *Keffeler II* did not control.

The Juvenile Court next addressed Ryan's argument that the Department's practice of applying for OASDI benefits on behalf of a minor foster child, seeking appointment as representative payee, and using the benefits received as representative payee to reimburse itself for the cost of care of the foster child without giving the child notice violated the child's due process rights under the 5th and 14th Amendments to the United States Constitution and Article 24 of the Maryland Declaration of Rights. It concluded that this practice involved governmental action and that OASDI benefits are a property interest. On the question whether Ryan received adequate notice and an opportunity to be heard, the Juvenile Court looked to the sections of the Social Security Act that require the SSA Commissioner to provide notice to a beneficiary whenever a representative payee is designated. As discussed above, under those sections and the regulations thereto, when the OASDI beneficiary is under the age of 18, the notice shall be sent to the beneficiary's legal guardian or "legal representative." *See* 42 U.S.C. § 405 (i)(2)(E). The notice informs the beneficiary of his or her right to contest the designation of the representative payee. The Juvenile Court decided that, although notice to the Department, as Ryan's legal guardian, was technically sufficient under the S SA regulations, the Department should have notified Ryan's CINA counsel as well; and its failure to do so deprived Ryan of an opportunity to "challenge the appointment of [the Department] as the representative payee, to be heard as to what his best interests are, or to challenge the propriety of any expenditures."

The Juvenile Court went on to rule that the Department's practices violated Ryan's rights under the equal protection clauses of the federal and Maryland constitutions. It opined that, by using OASDI benefits for self-reimbursement, the Department created "a substantial and arbitrary distinction between children whose families become representative payees and those for whom [the Department] becomes the representative payee." To illustrate the point, the Juvenile Court explained that, in Ryan's case, the Department had used the full amount of Ryan's OASDI benefits received — $31,693.50 — to reimburse itself for a portion of the cost of Ryan's care; in contrast, a child whose parents had died but who had a relative willing to act as representative payee also would have received foster care services but would have retained all of his OASDI benefits for future use. This would be so, the Juvenile Court posited, because the relative caregiver would be under no obligation to use the funds to reimburse the Department for the cost of the foster child's care.

The Juvenile Court further declared COMAR 07.02.11.29L and COMAR 07.02.11.29K(2) "ultra vires" and unsupported by any statutory authority. As we have explained, COMAR 07.02.11.29L directs the Department to apply a child's resources, including OASDI benefits, first to reimbursement for the child's cost of care; and COMAR 07.02.11.29K(2)provides that an OASDI-eligible foster child over age 18 receiving benefits directly may designate the Department as his or her representative payee or choose to receive his or her benefits directly and then reimburse the Department. The Juvenile Court reviewed the provisions of the Family Law Article and the Courts and

Judicial Proceedings Article cited as statutory authority for the regulations. It concluded that these sections failed to authorize these regulations and that the regulations "conflict[ed] with the spirit of the statute." It also observed that in *Keffeler II,* the Supreme Court noted that the State of Washington is authorized by state law to seek reimbursement for the cost of foster care from the foster child's parents and from the foster child's own resources. No similar state law exists in Maryland.

The Juvenile Court also considered the Department's fiduciary duty to Ryan. Relying upon this Court's opinion in *Ecolono v. Division of Reimbursement of DHMH*, 137 Md. App. 639 (2001), it concluded that when the Department acts in its role as representative payee, it must exercise discretion in determining how to expend a foster child's OASDI benefits in keeping with the child's best interests. The Juvenile Court found that the *ultra vires* COMAR regulations deprived the Department of any such discretion by requiring that the child's resources be applied first to reimburse the Department for the cost of care without any consideration of the child's individualized needs. The Juvenile Court held that by following that practice the Department had violated its fiduciary duty to Ryan.

Finally, the Juvenile Court considered an appropriate remedy. It emphasized that, had the Department given notice to Ryan when it applied to be and was appointed representative payee for Ryan's OASDI benefits, Ryan could have challenged the Department's designation as representative payee and/or its use of his OASDI benefits; and the Juvenile Court in the CINA case could have supervised the Department's expenditures to ensure that the funds were being applied in keeping with Ryan's best interests. The Juvenile Court decided that, because that did not occur, the remedy was "three fold." First, having reached the age of 18, Ryan could opt to receive his OASDI benefits directly;[11] and, if he did so, he would be "under no obligation to pay the funds to [the Department]." (Ryan would remain eligible to receive OASDI benefits beyond the age of 18, until age 19, because he still was in high school full time.) If for some reason the Department continued to act as Ryan's representative payee, however, the Department would be obligated to "come before the court with a plan for the use of the moneys [sic] received, and the court must rule on whether the proposed use [was] in [Ryan]'s best interests." Moreover, "[g]iven [Ryan]'s age, use of the funds to assist [him] in transitioning out of care [would] be given great weight."

Second, the Juvenile Court ruled that the Department was obligated to place a sum equal to the OASDI benefits for Ryan it already had received "in a constructive trust on behalf of [Ryan]." Third, the Juvenile Court held that the Department had to make a showing that its past actions in self-reimbursing with Ryan's OASDI benefits were in Ryan's best interests and, if it did not, suggest an alternative use of the funds. As noted, a second hearing was scheduled for July 15, 2011, at which time evidence would be taken with regard to past and future uses of Ryan's OASDI benefits.

D. The Second Hearing

On July 15, 2011, the parties reconvened for the second hearing. At the outset, counsel for the Department declared that the Department's accounting records revealed that it had erroneously applied at least $7,415.32 in OASDI benefits for Ryan to the cost of his care. Counsel explained that, pursuant to the governing "federal policy," the Department only is permitted to apply benefits received to cover current maintenance, which would include the beneficiary's prior month's cost of care. Thus, the $8,481 retroactive lump-sum benefit payment the Department received for Ryan in November of 2009 only could be used to pay for the cost of Ryan's care for October of 2009. Similarly, the $11,647.50 lump-sum benefit payment the Department received for Ryan in December of 2009 only could be used to pay for the cost of Ryan's care for November of 2009 (in addition to the $771 current monthly payment received for that month). Department records also showed that it had expended just $111 for Ryan's care in May of 2010.[12] The Department's counsel stated that, assuming that figure to be accurate, the Department also should have conserved $660 of Ryan's $771 monthly benefit for that month. Thus, the total sum of the Department should have conserved was $8,075.32.

The Department called Exom to testify about the services Ryan had received while in foster care. The court accepted Exom as an expert in the field of social services. Exom testified that, in 2009, Ryan was diagnosed with an anxiety disorder, "NOS";[13] attention deficit hyperactivity disorder ("ADHD"); and a learning disorder. As a result of these diagnoses, an individual education plan ("IEP") was prepared for Ryan and he was assigned to special education classes at his school. Ryan also had problems with substance abuse, mostly marijuana.

According to Exom, at first Ryan was placed in a foster home. He was removed, however, because the foster parent claimed that he stole a gun. Thereafter, Ryan was placed in Franklin, a regular (*i.e.*, non-therapeutic) group home. Staff from Franklin attended Ryan's IEP meetings at his school and monitored his school attendance. Franklin employed a full-time social worker as well. The Department paid Franklin between $5,000 and $6,000 per month for Ryan's care.

Ryan moved from Franklin into another foster

home, under the care of a Mrs. C. Mrs. C was a friend of Ryan's aunt from church.[14] After approximately five months, Mrs. C. asked the Department to remove Ryan from her care. At Ryan's request, he returned to Franklin.

About one month after returning to Franklin, Ryan assaulted a staff member. He was removed from Franklin and placed at Dream Keepers, a therapeutic group home. After just two weeks, the Department declined to renew Dream Keepers's license. As a result, Ryan was moved to Star Flight, which, as discussed, also is a therapeutic group home.

At Star Flight, Ryan received a psychiatric assessment, therapy, and life skills training. While there, Ryan tested positive for marijuana. Thereafter, he was referred to Mountain Manor for substance abuse treatment. He was compliant with Mountain Manor's program until he turned 18. Exom acknowledged that these services were paid for by the Maryland medical assistance program, not Department funds. Star Flight staff provided 24-hour supervision and room and board.

Exom testified that Ryan was repeatedly truant from school. While workers at the various group homes could ensure that he arrived at school on time in the morning, they could not ensure that he stayed there. Ryan rarely brought homework home with him. The staff at the group homes assisted foster children with their homework if they brought it home.

Exom was asked on cross-examination whether Department staff ever sought out additional educational resources for Ryan, such as one-on-one tutoring. He replied that they did not. He also was asked whether the Department had offered Ryan individualized assistance in pursuing his stated career goal of becoming a park ranger. Exom testified that he had tried to arrange for Ryan to meet with one of Exom's friends who is a park ranger, but that he had been unable to find a suitable date.

In response to questioning by the Juvenile Court judge, Exom explained that he personally had not had any knowledge that the Department was receiving OASDI benefits on behalf of Ryan; therefore, the receipt of those benefits had not had any impact on Ryan's placements or on the resources made available to him.

The Department next called Emily Tarbutton, the Unit Manager in its Permanency Division. Tarbutton holds a Master's Degree in social work and is a Licensed Clinical Social Worker. At the relevant times she was in charge of between five and six supervisors in the division, each of whom in turn supervised six caseworkers. The Juvenile Court accepted Tarbutton as an expert in the fields of social work and foster care.

Tarbutton testified that Exom was transferred to her unit in April of 2010. Since then, she had met Ryan one time, in April of 2011, at a family involvement meeting ("FIM"). The FIM was held to discuss the possibility of Ryan's entering Mr. B.'s care. The Department ultimately determined that Mr. B. met its criteria for a "fictive kin,"[15] so Ryan could be placed in his home even though Mr. B. was not a licensed foster parent. Tarbutton also testified generally concerning the DHR's contracts with group homes and licensed foster care providers. She explained that each contract requires the homes or individual providers to supply services to a foster child in six "domains": 1) education, 2) employment, 3) health and mental health, 4) housing, 5) financial, literacy and resources, and 6) family and friend support. Franklin, Dream Keepers, Star Flight, and Mrs. C. all were required to provide or support these services for Ryan and Tarbutton testified that each in fact had done so. She further testified that the Department paid Franklin $6,221.40 for care for Ryan for the month of November 2009.

The Juvenile Court judge asked Tarbutton whether the Department was enforcing a COMAR regulation that allowed it to take a foster child's earnings through employment and apply the earnings to the cost of the child's care. She replied that the Department was not doing so. She analogized the use of OASDI benefits to contribute to the cost of care to the use of child support collected from a foster child's parents to contribute to the cost of care.

Steven Youngblood was called as the Department's last witness. Youngblood ran the Department's "Ready by 21" program, which is a"supportive arm" of the Permanency Division. It is designed to assist in preparing foster children for independent living when they reach age 21 and no longer are eligible for any foster care services. He explained that finding "meaningful connections" for foster children is key.

Youngblood became involved in Ryan's case after Mr. B. contacted him directly to inquire about services that could help Ryan prepare for independent living. Thereafter, Youngblood arranged the FIM, which resulted in Ryan's entering Mr. B.'s care.

On cross-examination, Youngblood testified that Ready by 21 encourages foster youth to save their earned and unearned income, including OASDI benefits, when they are living in certain independent or semi-independent living situations. *See* 20 C.F.R 404.2010(b). He also testified that Ryan is eligible to attend an in-state college free of charge or to receive a partial tuition stipend for an out-of-state college.

Ryan testified on his own behalf. With respect to his placements in the various group homes, he reported that they provided food and shelter and nothing else. He said he was supposed to be paid a weekly

allowance of between $ 15-20 at Franklin for performing chores, but rarely, if ever, received it. In the ten months that he resided at Franklin, he was taken shopping for clothing and personal items on two occasions. Each time he was given $150 to spend on clothing. He described the staff at Franklin as "thugs off the street."[16]

Ryan characterized the staff at Star Flight as "supportive" but said the home was poorly managed. He was not provided clothes while he was there and was unable to do his laundry for weeks because the washing machine or dryer was broken. At that time, Ryan was spending his Sundays with Mr. B. and his family. Even though Ryan had an arranged, scheduled drop-off time at Star Flight on Sunday evenings, he routinely returned there to find nobody home. Mr. B. bought him toiletries while he was placed at Star Flight.

With respect to education, Ryan explained that he did not attend school "to learn"; rather, he "went to school and had fun." He rarely brought homework home with him when it was assigned.

At the conclusion of all the evidence and after hearing argument of counsel, the Juvenile Court ruled from the bench. It framed the issue before it as follows:

> So the question today, and the only question today was could we establish that the past monies paid by Social Security which were taken by [the Department] and applied to reimburse itself represented the best interests of [Ryan], and then going forward what is the best plan for the use of the money, however it would be?

Referencing the Department's admission that between "$7,400 and some dollars or [$]8,019" of Ryan's benefits had been improperly applied to reimburse it for some of the costs of Ryan's care, the judge opined that the "concession" illustrated the problem with the Department's "automatic practice" of self-reimbursement. Specifically, the judge observed that "it's not supervised by a court, it does not go through the normal review processes which are fairly elaborate here in Juvenile Court by which all other matters of the child's care and conduct are reviewed." The judge noted that the mistake in the use of some of Ryan's OASDI benefits only was discovered because Ryan had challenged the Department's right to use his funds at all. The judge analogized the Department's role as Ryan's representative payee to a trustee-beneficiary relationship, opining that "trusts are subject to supervision by courts . . . to protect the respondents or the beneficiaries of a trust from error and possible wrong doing and to make sure that in fact the money is being used for proper purposes."

Turning once again to COMAR 07.02.11.29, the Juvenile Court judge emphasized that, by the plain language of the regulation, a foster child would never be permitted to use any of his or her resources — be they OASDI benefits, an inheritance, or monies earned through employment — for any purpose except for reimbursement of the cost of care, unless his or her resources exceeded that amount. The judge noted, however, that Department witnesses had testified that the Department did not enforce the regulation that required foster children over the age of 18 to pay over to the Department any OASDI benefits received.

The Juvenile Court judge opined as follows about the Department's past use of Ryan's OASDI benefits:

> [The Department] described some fairly intensive and wide-ranging service[s] which [ ] were provided for Ryan, and the services included a variety of placements and therapy sessions and other kinds of services, and I think made the argument that the number one, all those services were appropriately given, and number two, that they were costly and that the Department in fact expended substantial amounts of money for these purposes.
>
> Now the testimony also was pretty clear that regardless of whether or not Ryan [ ] had money from the outside, his own resources, Social Security payments or anything else those services would have been provided and they would have been provided in the same manner.
>
> I think that is in fact a good mark for [the Department] in the sense that its people are not paying attention to that kind of financial issue but rather are focused on the child.
>
> Now, [Ryan] has commented that he received poor services in the various placements he was at, that is actually not the issue in the case, it is something worth exploring perhaps on the part of [the Department] as to whether [its] contractors are in fact providing what's being paid for, but that's an issue for a different day.
>
> Right this minute just for the sake of argument we are assuming that the services were provided as contracted for and were paid in for in the normal course of business and the like, but there was no statement here

> indicating that the money that he was receiving was used for anything other than reimbursement, they did not buy services over and above what would have been [the Department]'s obligation under any circumstances to provide, as a result I cannot find that the past use of these monies represented the use in the best interest of the child. It seems to me that these monies were in the best interest, an understandable interest, but nevertheless best interest of the agency itself.
>
> I can understand exactly why especially in times of fiscal tightness why that might be something that the agency would want to do, but nevertheless I don't believe it's justified in this case.

Based on this conclusion, the Juvenile Court judge determined that a sum equal to the entire amount of OASDI benefits the Department had received on behalf of Ryan ($31,693.50) should be placed in a constructive trust. The judge credited Youngblood's testimony that it would be in Ryan's best interest to have the use of these funds as he transitions out of foster care in a few years.

As a matter of logistics, counsel for the Department explained that it maintains trust accounts for some foster children who receive benefits that exceed the cost of their care, and that it could maintain such a trust account for Ryan. Counsel for Ryan asked that Mr. B., not the Department, be appointed as the trustee. The judge ruled that the Department would act as trustee for the following six months, and would be obligated to notify the court and Ryan any time it sought to make an expenditure from the account. The judge denied the Department's request for the ruling to be stayed pending appellate review.

That same day, the Juvenile Court entered an order directing that the "[m]onies [should] remain in [a] trust account for 6 months with [the Department]," with a review hearing in six months. The order further specified that Ryan's "education [was] to be made a priority" and that the Department was to give notice to the Juvenile Court and to Ryan before making any expenditures from the trust account.

On August 12, 2011, the Department noted this appeal.

DISCUSSION

I.

Motion to Dismiss

Ryan has moved to dismiss this appeal or, in the alternative, to strike several sections of the Department's brief as untimely. He argues that the Juvenile Court's June 16, 2011 Order declaring that the Department had violated the federal and Maryland constitutions by using OASDI benefits it had received as his representative payee to reimburse itself and further declaring that two COMAR regulations invalid was a final, appealable order, and that the Department failed to note an appeal from the Order within 30 days of its entry, as the rules require. *See* Md. Rule 8-202. Ryan maintains that only the court's July 15, 2011 Order directing the Department to hold a sum equal to all of Ryan's OASDI benefits in a trust account subject to Juvenile Court supervision properly was appealed, as the notice of appeal of that order was filed on August 11, 2011, within 30 days of the order's entry.

The Department opposes the motion to dismiss, arguing that the July 15, 2011 Order "finally resolved the claims in Ryan's motion [to control conduct]" and, accordingly, the August 11, 2011 notice of appeal was timely filed and covered all of the decisions and rulings made by the Juvenile Court on Ryan's "motion to control conduct," including those addressed in the June 16, 2011 Order and those addressed in the July 15, 2011 Order. We agree with the Department.

CJP section 12-301 provides that, with limited exceptions not relevant here, a party may appeal only from a final judgment.

> To qualify as a final judgment, an order "must either decide and conclude the rights of the parties involved or deny a party the means to prosecute or defend rights and interests in the subject matter of the proceeding," *Nnoli [v. Nnoli]*, 389 Md. [315,] 324, 884 A.2d at 1219-20 [(2005)], and must, ordinarily, satisfy three criteria:
>
> > (1) [I]t must be intended by the court as an unqualified, final disposition of the matter in controversy, (2) unless the court properly acts pursuant to Md. Rule 2-602(b), it must adjudicate or complete the adjudication of all claims against all parties, and (3) the clerk must make a proper record of it in accordance with Md. Rule 2-601.

Rohrbeckv. Rohrbeck, 318 Md. 28, 41, 566 A.2d 767, 773 (1989).

Miller & Smith at Quercus, LLC v. Casey PMN, LLC, 412 Md. 230, 242-43 (2010). In deciding whether an order meets these criteria, we consider whether it "was unqualified, whether there was any contemplation that a further order [was to] be issued or that anything more [was to] be done." *Rohrbeck*, 318 Md. at 41-42

(citations omitted).

Here, the Juvenile Court's June 16, 2011 Order contained "findings" that the Department's practice of self-reimbursement violated Ryan's due process and equal protection rights; that COMAR 07.02.11.29K(2) & L were void; that enforcement of those same regulations resulted in a breach of the Department's fiduciary duty to Ryan; and that the Department's actions "have not been shown to be in the best interests of [Ryan]." By that order, however, the parties were directed to appear for a second hearing on July 15, 2011, to address, *inter alia*, whether the Department's "past actions in reimbursing itself were in the best interests of [Ryan]" and what remedy to impose for the violations the Juvenile Court had found. Thus, it is plain that the June 16, 2011 Order "contemplat[ed] that a further order" would issue and that there was something more to be done.

Moreover, the June 16, 2011 Order left open the possibility that the Juvenile Court would find that the Department's actions in applying Ryan's OASDI benefits toward the cost of his care were in his best interests. In reliance upon the June 16, 2011 Order, both the Department and Ryan presented testimony and other evidence at the July 15, 2011 hearing bearing on that issue. At the conclusion of the July 15, 2011 hearing, the Juvenile Court ruled that the Department's self-reimbursement was not in Ryan's best interests and that the appropriate remedy for the Department's violations was for it to deposit the entire amount of OASDI benefits it had received on behalf of Ryan into a court-supervised trust account. The Juvenile Court issued and docketed its final order that day (July 15, 2011). The Department's notice of appeal was filed within 30 days of the entry of that final judgment. Accordingly, the Department's notice of appeal was timely filed, and Ryan's motion to dismiss or in the alternative to strike must be denied.

II.
The Department's Use of Ryan's OASDI Benefits

A. The *Keffeler* Trilogy

In 2001, the Supreme Court of Washington decided *Guardianship Estate of Danny Keffeler v. Department of Social and Health Services*, 32 P.3d 276 (Wash. 2001) ("Keffeler I"). In that case, a group of foster children sued the Washington State Department of Social and Health Services ("DSHS") alleging that its practice of serving as representative payee for foster child social security benefits — both OASDI benefits and supplemental security income ("SSI")[17] — and of applying those benefits to reimburse itself for the cost of the children's care violated the anti-attachment provision of 42 U.S.C. section 407(a); deprived foster children of their property without due process of law; and abridged the rights of the foster children to equal protection of the laws. The trial court certified a class comprised of all foster children in the State of Washington, "past, present, and future . . . that receive [social security benefits] for whom the State of Washington acts or has sought to act as 'representative payee.'"[18] *Id*. at 273. On cross-motions for summary judgment, the trial court ruled that the DSHS's practice of self-reimbursement violated the anti-attachment clause of the Social Security Act, as found in 42 U.S.C. section 407, and also violated the foster children's due process rights under the Fourteenth Amendment of the United States Constitution.

Under Washington statutory law, the Secretary of the DSHS may act as custodian of any monies or funds coming into the possession of any person committed to the agency's care. Wash. Rev. Code § 74.13.060 (2011). The DSHS may use those funds to cover the costs of the beneficiary's "personal needs . . . as the secretary may deem proper and necessary" and also may "apply such funds against the amount of public assistance otherwise payable to [the beneficiary]," including through self-reimbursement for costs expended on the beneficiary's behalf. *Id*. Under this legislative authority, the DSHS promulgated a regulation providing that whenever a foster child is entitled to "financial benefits," including those under OASDI, the benefits "shall be used on behalf of the child to help pay for the cost of the foster care received. . . ." Wash. Admin. Code § 388-70-069 (1983). (Although this regulation subsequently was repealed, WAC 388-25-0210, another regulation, which took effect on April 30, 2001, similarly provides that a foster child's "unearned income," including social security benefits, will be applied to cover the cost of the child's care.)

The DSHS was acting as representative payee for 1,411 children in foster care who were receiving social security benefits. Two units of DSHS played a role. The Children's Administration Unit provided services to all children in foster care; applied for social security benefits for children in its custody; and appealed adverse social security benefit determinations. The social security benefits that were received were deposited in a foster care trust fund account at the state treasurer's office. There the Trust Fund Unit maintained a "subsidiary account" for each child. 32 P.3d at 272. Each month that a child was in DSHS's care, the Children's Administration Unit issued a report for the child showing the amount of money paid on his or her behalf for the prior month. Using this report, the Trust Fund Unit then would direct the state treasurer to disburse the child's social security benefits to the Children's Administration Unit to reimburse DSHS up to the full amount of those costs.

DSHS had discretion to spend a foster child's

benefits "on items other than current basic foster care expenses." *Id*. For example, social workers in the Children's Administration Unit could "request that a child's benefits be used for extra items or special needs, such as computers, educational expenses, summer camps, counseling, toys, clothing, athletic equipment and orthodontics." *Id*. The Trust Fund Unit and the Children's Administration Unit worked together to determine whether any given expense was authorized.

Lastly, DSHS was authorized to "conserve and invest" social security benefits received on behalf of foster children. *Id*. Benefit money received but not spent on the foster child's basic needs or on special expenses would be deposited into an interest-bearing account for the child. The benefit money would be disbursed to a successor representative payee or would be paid directly to the child upon emancipation.

In considering the propriety of DSHS's practices, the Washington Supreme Court focused primarily on the anti-attachment provision in the Social Security Act, at 42 U.S.C. section 407(a). That statute, entitled "Assignment of benefits," provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The court opined that the above provision was intended to "remove Social Security benefits from the reach of creditor's employing legal process." 32 P.3d at 273. It concluded that DSHS's practice of "confiscat[ing]" foster children's social security benefits for the state violated that provision. *Id*. at 274. The court noted that the evidence from DSHS was that it would not apply to be the representative payee for a foster child unless it could self-reimburse. It also emphasized that DSHS lacked authority to "seek reimbursement from benefits paid to *private* representative payees" on behalf of a child. *Id*. (Emphasis in original.) Thus, the court reasoned, DSHS received social security benefits on behalf of foster children only if it was acting as a representative payee for the child and only for the purpose of "confiscat[ing] the child's money." *Id*. at 275 (footnote omitted). The court concluded that a foster child necessarily would be "better off with any payee other than the state because DSHS must provide foster care under state law *regardless* of whether it receives a reimbursement." *Id*. (Emphais in original; footnote omitted.)

The court read federal cases interpreting the anti-attachment provision to "evince an expansive interpretation of the protections of § 407" and support the proposition that social security benefits are "beyond the reach of the state, however clever or subtle its attempt to seize them." *Id* at 276. It held that, although the DSHS was acting permissibly, and as expressly contemplated under federal regulations by applying to act as representative payee for foster children, its practice of self-reimbursements was a means of reaching the benefits by "other legal process," in violation of the anti-attachment provision of the Social Security Act. Moreover, "the reimbursement scheme," manifested a creditor-debtor relationship because, by its nature, foster children's benefits were being used to repay DSHS for services rendered. *Id*. at 275. Having concluded that DSHS's practices violated the anti-attachment provision, the court declined to reach any of the constitutional issues.

The United States Supreme Court granted *certiorari* and, in *Keffeler II*, reversed. Justice Souter, writing for a unanimous Court, held that DSHS's practice of receiv[ing] and manag[ing] Social Security benefits" for foster children and using those benefits to "reimburse itself for some of its initial expenditures" did not violate the anti-attachment provision of the Social Security Act. 537 U.S. at 375. This was so because under the Social Security Act and the regulations implementing it, the DSHS properly could be appointed representative payee for a foster child and, acting in that role, properly could apply a child's benefits to pay for the child's "current maintenance."

Pointing out that foster children have no legal obligation to repay the state for the cost of their care, the Supreme Court rejected the Washington Supreme Court's reasoning that the DSHS occupied a creditor-type relationship *vis-a-vis* a foster child. Moreover, the Court emphasized that case law interpreting the anti-attachment provision did not mention "creditors" but instead barred the use of legal process to reach social security benefits. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973) (interpreting the anti-attachment provision of the Act to bar New Jersey from enforcing agreements with welfare recipients requiring them to assign to the state their retroactive lump-sum social security benefit payments as a means of reimbursing the state for welfare benefits received). Construing the phrase "other legal process," the Court explained that it

> should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not

> necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.

537 U.S. at 385. The DSHS's actions as representative payee clearly fell outside of this definition as it was in rightful possession of the foster children's benefits as their representative payee and had used the benefits as permitted under the federal regulations to self-reimburse for the cost of the children's current maintenance. The Court went on to say:

> The regulations previously quoted specify that payments made for a beneficiary's "current maintenance" are deemed to be "for the use and benefit of the beneficiary," and define "current maintenance" to include "cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 CFR §§ 404.2040(a), 416.640(a). There is no question that the state funds to be reimbursed were spent for items of "current maintenance," and although the State typically makes the accounting reimbursement two months after spending its own funds, this practice is consistent with the regulation's definition of "current maintenance" as "costs incurred" for food and the like. That the State is dealing with the funds consistently with Social Security regulations is confirmed by the Commissioner's own interpretation of those regulations as allowing reimbursement by a representative payee for maintenance costs, at least for costs incurred after the first benefit payment is made to the payee. *Cf.* POMS GN 00602.030 (defining a "past debt," which may be satisfied only if a beneficiary's current and reasonably foreseeable needs arc met, as "a debt the beneficiary incurred before the date of the first benefit payment is made to the current payee").

Id. at 386-87 (footnote omitted).

Having concluded that DSHS's practice of self-reimbursement did not amount to "other legal process," Justice Souter turned to "the real basis of [the foster children's] objections to the reimbursement practice," which he concluded was their position that the practice was "antithetical to the best interest of the beneficiary foster child." *Id.* at 389. The Court disagreed, opining:

> Although it is true that the State could not directly compel the beneficiary or any other representative payee to pay Social Security benefits over to the State, that fact does not render the appointment of a self-reimbursing representative payee at odds with the Commissioners mandate to find that a beneficiary's "interest . . . would be served" by the appointment. 42 U.S.C. §§ 405(j)(1)(A), 1383 (a)(2)(A)(ii)(I). Respondents' premise that promoting the "best interests" of a beneficiary requires maximizing resources from left-over benefit income ignores the settled principle of administrative law that an open-ended and potentially vague term is highly susceptible to administrative interpretation subject to judicial deference. *See Chevron*, 467 U.S., at 842-843. Under her statutory authority, the Commissioner has read the "interest" of the beneficiary in light of the basic objectives of the Act: to provide a "minimum level of income" to children who would not "have sufficient income and resources to maintain a standard of living at the established Federal minimum income level," 20 CFR § 4I6.110(SSI); *see also Sullivan v. Zebley*, 493 U.S. 521, 524 (1990), and to provide workers and their families the "income required for ordinary and necessary living expenses," § 404.508(a) (OASDI); *see also Califano v. Jobst*, 434 U.S. 47, 50 (1977). **The Commissioner, that is, has decided that a representative payee serves the beneficiary's interest by seeing that basic needs are met, not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants.**

Id. at 389-390 (emphasis added) (footnote omitted).

The Supreme Court declined to reach the arguments raised by the class that DSHS violated § 405(j) of the Act by, *inter alia*, "failing to exercise discretion in how it uses benefits," noting that the class was free to "press their stand-alone § 405(j) arguments before the Commissioner, who bears responsibility for overseeing representative payees, or elsewhere as appropriate." *Id.* at 389-90 n.12. It emphasized, however, that local departments of social services are the representative

payees of last resort because the Commissioner appoints them "only when no one else will do." *Id.* at 391. If these state agencies are to be discouraged from accepting appointment as representative payees for foster children, it is likely that the foster children "would either obtain no Social Security benefits or need some very good luck to get them." *Id.*

On remand from the Supreme Court's decision, the Washington Supreme Court considered the constitutional challenges raised by the plaintiff class. *Keffeler III*, 88 P.3d 949 (Wash. 2004). The plaintiff class argued that the DSHS practice created two classes of foster children "based on who is appointed as the representative payee." *Id.* at 953. Foster children for whom DSHS was acting as representative payees comprised the first class. Under state law, those children's benefits would be applied to cover the cost of their care and only any excess above and beyond that amount would be conserved for future use. The second class was comprised of foster children for whom a relative or other non-agency people were acting as representative payee. As DSHS had conceded that it could not require a private representative payee to pay for the foster child's cost of care, such a child with a private representative payee would be able to let the State pay for the cost of his care and conserve his OASDI benefits for future use. Thus, the plaintiff class argued, the two classes of children were treated unequally.

The *Keffeler III* court rejected this argument. It opined:

> Keffeler's arguments fail because there are not two groups of foster children but one group: all foster children receiving social security benefits with appointed representative payees. The identity of the representative payee does not create a differentiation in this group because *all representative payees* must use the benefits according to state and federal laws and regulations. This means that the benefits first should be used for the child's cost of care and reasonably foreseeable needs. Then, only after the cost of care and foreseeable needs are provided, may the benefits be conserved or invested. 20 C.F.R. §§ 404.2045(a), 416.645(a) (2003). In accordance with 42 U.S.C. § 407, the State may not go after a private representative payee to obtain the benefits. However, if the private representative payee is not using the benefits for the child's cost of care and reasonably foreseeable needs, this may violate federal regulations and the commissioner may remove the representative payee. 20 C.F.R. § 404.2050, 416.650 (2003).

Id. at 953-54 (emphasis in original) (footnotes omitted). The court further emphasized that, pursuant to Washington state law, the secretary of DSHS maintained discretion over how to use the benefits and could authorize disbursements for special needs or "conserve[e] funds prior to a child's emancipation." *Id.* at 954. Because both state and private representative payees were bound by the same laws and regulations and because both were accorded and did exercise discretion in applying benefits according to those laws and regulations, the court concluded that only one class "of foster children" existed and, on that basis, rejected the equal protection challenge.[19]

The court next addressed the due process challenge, rejecting it as well. It explained that the Commissioner, not DSHS, notified beneficiaries whenever a representative payee was appointed. The notice would be sent to "the legal guardian or legal representative of beneficiaries under 15, or unemancipated minors under 18" in advance of the first benefit payment. *Id.* at 955. The plaintiff class argued that this was insufficient and that DSHS should have sent "notice to the juvenile court and assign[ ] an attorney to each child to either find another representative payee or start a judicial guardianship." *Id.* at 956. Finding no merit in this argument, the court concluded that the federal notice was sufficient to protect the foster children's due process rights and that any interest in additional notice was outweighed by the State's interest in the efficient administration of the foster care program.

B. Maryland Cases

Conaway v. Social Services Administration, 298 Md. 639 (1984), is important to our analysis. In that case, the Court of Appeals framed the issue as "whether the Baltimore City Department of Social Services may use federal benefits conserved for a foster child as reimbursement for the cost of past care." *Id.* at 640. The Court answered the question in the negative.

The relevant facts were as follows. In 1967, when he was six years old, Crystal Conaway was committed to the custody of the local department. He remained in a foster home until he turned 18. During this 12-year period, his foster parent received regular foster care payments from the local department. Also during that time, Conaway's father, a veteran, became totally disabled. As a result, in 1967, Conaway became eligible to receive veteran's benefits and, in 1970, he also became eligible to receive social security disability insurance benefits. While the amounts varied, his monthly benefits generally ranged between $73 and $83. He stopped receiving them in 1979, when he

turned 18.

For the entire time that Conaway received benefits, the Department acted as his representative payee. Pursuant to then-existing COMAR 07.02.11.07(B)(4)(l980),[20] the Department was permitted to conserve a foster child's federal benefits beginning when the child turned 12 for the child's "future educational or vocational needs." *Id*. at 641. Thus, for the first six years that the Department was acting as representative payee for Conaway, it applied his benefits toward the cost of his care, as permitted by federal regulation; and then beginning in 1975,[21] the Department began conserving Conaway's federal benefits in a trust account established in his name. "Disbursements from this account were made to Conaway for various educational programs including driving school, modeling school, and music schools." *Id*.

In September of 1981, the DHR promulgated the amended version of 07.02.11.07, now present 07.02.11.29, which, as discussed, requires the Department to apply a foster child's benefits toward the cost of the child's care. Only monies in excess of that cost can be conserved for future use. Funds conserved under the prior policy would be retained "as long as the child continued in foster care and held to the original plan." *Id*. at 641. Under the prior policy, if the foster child reached the age of 18 and remained in school, the conserved funds would be applied toward his educational needs. If the child no longer was in school, however, any remaining conserved funds would be applied retroactively to the cost of the child's care. In keeping with this policy, the State issued a circular directing the local department heads to "recoup immediately all conserved funds of foster children age eighteen and over not attending school on September 1, 1981." *Id*.

Prior to his 18th birthday, Conaway was warned of the consequence of not staying in school. Nevertheless, he did not remain in school and, in November of 1981, received a notice of intended action from the Department. The notice stated that because he no longer was enrolled in school of any kind his "conserved funds w[ould] be reverted back to th[e] agency to pay for the cost of [his] foster care." *Id*. at 642. The notice explained that the "conserved funds" referred to "money that had been conserved for [his] education, from [his] benefits from the Veterans' Administration and the Social Security Administration." *Id*.

Conaway filed an administrative appeal of this decision. DHR held a hearing and approved the Department's decision. Conaway petitioned for judicial review in the circuit court, which affirmed. Before his appeal could be heard in this Court, the Court of Appeals granted *certiorari*.

Conaway argued before the Court of Appeals that, because "he was not financially liable for the cost of his foster care," he could not be "compelled to reimburse the State for payments properly made on his behalf." *Id.* at 643. The Court concluded that a child who has reached the age of majority cannot be compelled, after reaching that age, to reimburse the Department with "subsequently acquired assets." *Id*. The assets in Conaway's case had been acquired previously, however, during his time in foster care. The Court emphasized that under federal regulations the benefits "could have been used to pay for the cost of [his] care." *Id*. at 644. However, under the anti-attachment provision of the Act, once the Department acted to conserve benefits for a foster child's future needs, it could not later seize those funds to reimburse itself for the cost of the foster child's past care. Because that is what had happened with Conaway, the Court of Appeals agreed that he was not obligated to pay for the cost of his care.

In *Ecolono, supra*, 137 Md. App. at 639, also an administrative appeal, this Court considered whether the Department of Health and Mental Hygiene ("DHMH") violated state or federal law when, as representative payee for a patient committed to a state hospital, it used the patient's social security benefits to reimburse itself for the cost of the patient's care. The patient, Ecolono, was committed to the Clifton T. Perkins Hospital Center for one year and three months. During his commitment, a financial agent supervisor for the DHMH Division of Reimbursements applied to SSA to have the Secretary of DHMH be appointed representative payee for Ecolono for purposes of receiving social security disability benefits on his behalf.[22] The application was approved and, in February of 1996, less than two months before Ecolono's release, the DHMH received a lump sum back-payment of $17,155.40; The Division of Reimbursement calculated the eligible amount expended or to be expended for Ecolono's care for the months of February and March of 1996 and applied the benefits to the cost of care. Ecolono received $2,580 in excess above that amount.[23]

On March 26, 1996, Ecolono was released on the condition that, within 90 days thereafter, he move out of his parents' house and attend AA and NA meetings daily for 90 days, and weekly thereafter. The 90-day provision was based in part on his treatment team's understanding that he would be the recipient of social security benefits in the near future and 90 days would be sufficient time for him to access those funds and attempt to become self-supporting.

Subsequently, Ecolono challenged the application of his. benefits to the cost of his care. At a hearing

before an Administrative Law Judge ("ALJ") at the Office of Administrative Hearings ("OAH"), he argued that federal law required a representative payee to use benefits in the beneficiary's best interests, and that that had not been done in this instance. He also argued that the DHMH had violated federal law by seizing his benefits under the federal anti-attachment statute and had violated state law by failing to assess his expenses before assessing charges against him.

During the OAH hearing, a member of Ecolono's treatment team testified that, after his release, Ecolono would incur living expenses and costs involved in restarting a prior business. She further testified that, as part of Ecolono's discharge plan, a portion of the social security benefits were to be set aside to cover those costs. She opined that a lack of funds upon release compromised Ecolono's discharge plan. Testimony at the hearing also established that when the officer in the Division of Reimbursement applied the social security benefits to cover the cost of Ecolono's care, he did so without any communication with Ecolono's treatment team and without knowing that Ecolono was about to be released. Similarly, the treatment team was unaware that the benefits had been paid out.

The ALJ concluded that, under state law, Ecolono was primarily responsible for the cost of his care and that DHMH did not violate state or federal. law by using his benefits to reimburse itself for those costs. The circuit court affirmed that decision on judicial review.

On appeal to this Court, Ecolono argued that DHMH had a fiduciary duty to use social security benefits received on behalf of patients in their best interests and that it had breached that duty to him by failing to consider his discharge needs. He also argued that the use of the benefits violated the anti-attachment provision of the Act and that it violated state law because the Division of Reimbursement had not investigated his financial condition and expenses before assessing charges against him.

We first addressed the issue of subject matter jurisdiction. We concluded that a state court has subject matter jurisdiction to consider a challenge to the use of social security benefits, notwithstanding the SSA's role in supervising representative payees generally and the existence of federal mechanisms to challenge the appointment of a representative payee and/or the representative payee's use of a beneficiary's benefits.

Turning to the argument that the DHMH had a fiduciary duty to use Ecolono's benefits in his best interests, and had breached that duty, we concluded, after a discussion of applicable federal and state regulations, that "the application of social security benefits to current maintenance is regarded by the SSA as being in the best interest of the beneficiary" and that the services rendered by the hospital qualified as current maintenance expenses. *Id.* at 655. Upon exhaustive review of cases bearing on the application of social security benefits to the cost of care for a beneficiary in a state institution, we opined:

> [A] representative payee does have a duty to expend Social Security benefits in the best interest of the beneficiary and does have discretion in fulfilling that duty. Contrary to appellant's assertion, we see nothing in the ALJ's opinion, adopted by appellee, that indicates a conclusion to the contrary. Rather, on the strength of 20 C.F.R. §§404.2035 and 404.2040, the ALJ concluded that the representative payee fulfilled its duty by applying the benefits to appellant's charges for current maintenance, a federally approved expenditure. As stated earlier, such payment is expressly permitted but not mandated by Federal law. The cases discussed herein are helpful, but for the most part, are not on point in that they do not involve the application of social security benefits to the costs of current maintenance by a State acting as representative payee when the issue is whether the funds should be conserved for future use. We find nothing in the Social Security Act or its regulations expressly establishing a preferred order of otherwise acceptable expenditures.
>
> In the end, however, we are left with the conclusion that, under federal law, a representative payee has a duty to exercise discretion and, in fact, the Secretary [of DHMH] did not exercise discretion. As a result, we shall reverse and remand so that the Secretary can exercise discretion and determine whether any or all of the funds applied to the cost of current maintenance should be refunded to appellant or applied to other charges.

Id. at 667 (footnote omitted). In a footnote, we emphasized that had the Secretary of DHMH exercised discretion and determined that Ecolono's benefits should be used to cover the cost of his care, we would not have found an abuse of discretion under the circumstances. Also, in reliance on *Conaway*, we rejected

Ecolono's contention that the use of his benefits implicated the anti-attachment provision of the pertinent social security statute and held that the DHMH did not assess charges against Ecolono in violation of state law.

C. Contentions of the Parties

As discussed, the Juvenile Court concluded that the Department's actions in using Ryan's OASDI benefits to reimburse itself for the cost of his care violated his right to equal protection of the law; that its failure to provide Ryan with notice of its appointment as his representative payee violated Ryan's right to due process of law; and that the COMAR regulations permitting the Department to reimburse itself for the cost of Ryan's care were invalid. The Department argues that it acted "in accordance with the requirements of federal and state law when it expended [Ryan's OASDI benefits] for the costs of [his] foster care." In reliance on *Keffeler III*, the Department maintains that Ryan's equal protection challenge lacks merit because all foster children are treated identically under state and federal law. It also asserts that Ryan was not deprived of due process of law where, as here, the only notice required under governing federal law was notice to Ryan's representative payee and the Juvenile Court found that the SSA had sent notice to the Department in compliance with the federal regulations. Finally, the Department argues that the Court of Appeals in *Conaway* upheld the COMAR regulations that the Juvenile Court in this case declared to be invalid.

Ryan responds that the Juvenile Court correctly concluded that the Department's actions in taking his OASDI benefits without notice to him violated his due process rights; that the Department violated Maryland law by using his retroactive lump-sum social security benefit payments to reimburse itself for the cost of past and current care; and that the Department generally failed to comply with federal and state law by using his benefits to reimburse itself rather than conserving his benefits for future use at such time as he aged out of foster care.

D. Compliance with State and Federal Law

It is plain that the Department acted in compliance with the Social Security Act and the regulations thereto when it applied with the SSA to be representative payee for Ryan and, upon its application being granted, used the benefits received on Ryan's behalf to cover the cost of his current maintenance in foster care.[24] We explain.

When Ryan's parents died, he was under age 18 and did not meet the necessary criteria to receive OASDI benefits directly. 20 C.F.R § 404.2010(b). Therefore, he could receive OASDI benefits only through a representative payee. The federal regulations permit a local department of social services to act as a representative payee when, as here, no other alternative representative payee is available. 20 C.F.R. § 404.2021(c). As Ryan's representative payee, the Department, like any other representative payee, was obligated to apply the OASDI benefits received for Ryan first to cover the cost of his current maintenance. 20 C.F.R. § 404.2040. Those costs include food, shelter, clothing, medical care, and personal comfort items. *Id*. During the time the Department was acting as Ryan's representative payee, it was receiving $771 per month in OASDI benefits on his behalf. Exom testified that the Department reimbursed the group homes that were providing food, clothing, and shelter to Ryan between $5,000 and $6,000 a month, a sum that far exceeded the monthly OASDI benefit amount. After paying the $771 monthly OASDI benefit for Ryan's current maintenance, no excess remained. Accordingly, the Department was not under an obligation to "conserve or invest" any of Ryan's monthly OASDI benefits. *See* 20 C.F.R. § 404.2045(a) (requiring conservation and investment of benefits received by a representative payee when the benefits exceeded the cost of current maintenance and other authorized expenditures for the beneficiary).

We find support for this conclusion in *Keffeler II* and *Conaway*. In *Keffeler II*, notwithstanding that the Supreme Court's primary concern was with whether the Act's anti-attachment provision barred the Washington DSHS's practice of using social security benefits to self-reimburse, it also addressed the plaintiff class's core argument that it was "antithetical to the best interest of the beneficiary foster child" to allow the practice. 537 U.S. at 389. The Court soundly rejected this contention, emphasizing that the SSA Commissioner had interpreted the "interest" of the beneficiary "in light of the basic objectives of the Act: to provide . . . workers and their families the 'income required for ordinary and necessary living expenses.'" *Id*. at 390 (quoting 20 C.F.R. § 404.508(a). These objectives were served, according to the Commissioner, by using the child's OASDI benefits to pay for his or her basic, current needs, "not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants." *Id*.

The Court of Appeals in *Conaway* has made clear that federal benefits received by a local department of social services on behalf of a foster child may be applied to cover the child's current cost of care. As explained above, the *Conaway* Court distinguished between the Department's prior practice of using a foster child's already conserved social security and veteran's benefits to reimburse itself for the prior cost of his care and its later adopted practice of using "current benefits for current costs of care." 298 Md. at 648. While finding the prior practice to violate the anti-attachment provision of the Act, the Court held the lat-

ter practice to be appropriate and fully in compliance with federal law and state regulations. In so concluding, the Court explicitly addressed the authority for COMAR 07.02.11.07, now COMAR 07.02.11.29L. That regulation permits local departments of social service to use a foster child's resources, including OASDI benefits, to reimburse itself for the cost of the child's present care. As the Court explained:

> [T]he State followed the procedure outlined in COMAR 07.02.11.07. Furthermore, the relevant statute authorizes the procedure as having the force of law. Article 88A, § 5(a) provides that the State Director of Social Services may "adopt from time to time such rules and regulations as may be necessary to carry out any of the duties imposed upon him by law, and when adopted, . . . such rules and regulations shall have the force and effect of law." Article 88A, § 60 authorizes various payment rates for foster care; however, it does not delineate the source(s) of the funds to be used. The State Director of Social Services is responsible for administering these aspects of the foster care program. Therefore, regulations about foster care payment rates and the source of funds to make these payments are necessary to carry out duties imposed by law. The regulation at issue in this case has, accomplished precisely that. COMAR 07.02.11.07 is entitled "Resources for Reimbursement towards Cost of Care." Federal benefits were paid to the State and could have been used to pay for the cost of the child's care. These benefits were committed to the department for the child's benefit. *As resources that could offset the cost of care, their use was a proper subject for regulation. Because these regulations were within the statutory authority, they had the force of law; thus, they provided an adequate legal basis for the local department's actions.*

Id. at 644 (emphasis added). In the instant case, the Juvenile Court declared two subsections of the current version of this regulation, COMAR 07.02.11.29, invalid based on its conclusion that the regulation exceeded the DHR's statutory authority. That conclusion clearly is at odds with *Conaway*, and is legally incorrect.[25]

Ryan also contends that *Conaway* prohibits the use of *any* of his lump sum benefit payments to reimburse for "past care," and that the Department used funds in that manner over and above the concededly misapplied amount. The *Conaway* opinion did not address lump sum retroactive benefit payments, however. It addressed only the propriety of using voluntarily conserved benefits to self-reimburse for past care. Here, none of the lump sum benefits were conserved and thus *Conaway* is inapposite. Moreover, *Ecolono* lends support to the Department's practice of applying lump sum retroactive benefit payments for the cost of care for the month in which the lump sum is received, and the prior month. *See* 137 Md. App. at 643-44 (describing the accounting and application of Ecolono's lump sum benefits). Ryan does not point to any other authority to support his argument that the use of a lump sum payment for "current maintenance" expenses incurred in the prior month would violate the Social Security Act, and we have found none.

Alternatively, Ryan maintains, in reliance upon *Ecolono*, that, even assuming that state and federal law permitted the Department to use his OASDI benefits for the cost of his care, the Department failed to exercise any discretion in deciding how to use his OASDI benefits, and thereby violated federal law. As we understand it, he argues that, had the Department given consideration to his individual needs, it would have chosen to conserve his OASDI benefits every month, so he would accumulate a resource he can use when he ages out of foster care, instead of choosing to use the benefits to pay for the cost of his current care. He points to testimony from Youngblood that conservation of a foster child's resources is in the child's best interest when the child is preparing to transition to independence. He also argues that his poor school performance showed that he had special educational needs and that the Department could (and should) have exercised its discretion to use a portion of his OASDI benefits to provide additional services in that area.

The Department responds that *Ecolono* is distinguishable on its facts because, in that case, there was evidence that the State had applied a portion of a retroactive lump sum benefit payment to cover the cost of Ecolono's care when his treatment team had recommended to the contrary. As discussed, the lump sum payment had been received from the SSA the month before Ecolono was to be released from State care and, as permitted by federal regulations, the State had used a portion of those benefits to self-reimburse for the cost of care. Ecolono's release from State care was predicated upon his ability to become self-supporting within 90 days and to abstain from drugs and alcohol. Ecolono's treatment team had taken into account his imminent receipt of social security benefits in making its release recommendation. In that context,

this Court held that the State's failure to exercise any discretion before it applied a portion of his social security benefits to the cost of his care was impermissible, and remanded for discretion to be exercised. We also emphasized, however, that had the State exercised discretion to do precisely what it did, *i.e.*, to use the funds to cover the cost of care, we would not have found any abuse.

In the case at bar, the Juvenile Court did not find that the Department failed to apply the benefits to meet Ryan's needs; in fact, the Juvenile Court assumed that the Department did so. Rather, the court concluded that it would have been in Ryan's best interests to instead conserve those funds for his future use. We do not understand *Ecolono* to stand for the proposition that a State agency acting as representative payee for a beneficiary in its custody always must exercise discretion to consider whether conservation of benefits would better serve the beneficiary's interests. Under the federal regulations, conservation of benefits is explicitly provided for *only after* a representative payee has provided for the beneficiary's current maintenance and other permissible uses. *See* 20 C.F.R. 404.2045. And, as discussed, use of benefits by a representative payee to cover a beneficiary's current maintenance costs is deemed to be a proper expenditure made in the interest of the beneficiary. *See* 20 C.F.R. 404.2040(a). Thus, the discretion that must be exercised is the discretion to apply benefits among the various current maintenance needs of the child, not the discretion to use or conserve the benefits.

Moreover, unlike in *Ecolono*, where the beneficiary patient's release from State custody was imminent at the time the State received a lump sum benefit payment on his behalf and applied the payment toward the cost of care, here, in contrast, the Department began receiving OASDI benefits on Ryan's behalf when he was 16 years old, a full five years before he would age out of the system, and ceased receiving them on his behalf when he turned 18. During that time, the Department expended between $5,000 and $6,000 per month on Ryan's care — an amount far exceeding the monthly OASDI benefit — and exercised discretion constantly with respect to the appropriate placements and services for him. There was no evidence that Ryan, his CINA attorney, or Exom ever made known to the Department an unmet need of Ryan.[26] On the contrary, there was ample evidence before the Juvenile Court that the Department provided intensive services for Ryan during his commitment, including 24-hour therapeutic and non-therapeutic supervision and care in group homes, drug treatment, food, clothing, summer school, and tutoring (a service that Ryan acknowledged not taking advantage of). As Ryan's benefits never exceeded the cost of his current maintenance expenses, we conclude that the benefits were properly expended under federal and state law.

E. Equal Protection

We now turn to Ryan's argument, accepted by the Juvenile Court, that the Department's practice of applying to become representative payee of last resort for foster children and then using their social security benefits to reimburse itself for the cost of the children's care had the effect of creating two distinct classes of foster children receiving social security benefits: those with a private representative payee and those with a Department representative payee. Given the Department's acknowledgment that it did not seek reimbursement from private representative payees for the cost of foster children's care, the Juvenile Court concluded that a foster child with a private representative payee would be able to conserve his or her social security benefits, rather than having those benefits applied to the cost of the child's foster care services. According to the Juvenile Court, this constituted discriminatory treatment in violation of the equal protection clause of the 14th Amendment of the Federal constitution and Article 24 of the Maryland Declaration of Rights.[27]

This identical argument was presented to and rejected by the Washington Supreme Court in *Keffeler III* and we are persuaded by that court's reasoning. As discussed, the *Keffeler III* court concluded that the identity of the representative payee for a foster child who is receiving social security benefits does not have the effect of creating two distinct classes of foster children beneficiaries. This is so because "there are not two groups of foster children but one group: all foster children receiving social security benefits with appointed representative payees," and because "*all representative payees* must use the benefits according to state and federal laws and regulations." 88 P.3d at 953 (emphasis in original). Under the regulations set forth above, a foster child's representative payee must first apply any benefits received to the child's current maintenance and reasonably foreseeable needs. "Then, only after the cost of care and reasonably foreseeable needs are provided, may the benefits be conserved or invested." *Id.* at 954 (citing 20 C.F.R. §§ 404.2045(a), 416.645(a) (2003)). Thus, while the *Keffeler III* court noted that the anti-attachment provision of the pertinent parts of the Social Security Act would prevent a state from seeking reimbursement from a private representative payee for the cost of a foster child's care, if a private representative payee was "not using the benefits for the child's cost of care and reasonably foreseeable needs, this may violate federal regulations and the Commissioner may remove the representative payee." *Id.* (citing 20 C.F.R. §§ 404.2050, 416.650 (2003) (footnotes omitted)).

Even if we were to agree with Ryan that the

Department's practice of reimbursement effectively created two classes of foster children (which we do not), we nonetheless would uphold the constitutionality of its practice. In assessing challenges under the Equal Protection Clause, "unless a suspect or quasi-suspect class is created . . ., the appropriate standard of review of constitutionality is whether there is a rational basis for the created class . . . ." *Rios v. Montgomery County*, 386 Md. 104, 121 (2005). Ryan does not assert that foster children or, more precisely, foster children for whom the Department acts as representative payee, constitute a "suspect" or "quasi-suspect" class. *See, e.g., Conaway v. Deane*, 401 Md. 219, 277-78 (2007) (discussing characteristics of suspect and quasi-suspect classes); *Gean v. Hattaway*, 330 F.3d 758, 771(6th Cir. 2003) (no "suspect class" implicated in challenge by delinquent youth to Tennessee Department of Children's Services's practice of using social security benefits to self-reimburse for the cost of care). Thus, if the alleged legislative classification bears a rational relationship to some legitimate governmental interest, it is constitutional. *Tyler, supra*, 415 Md. at 501. In *Gean, supra*, the Court of Appeals for the Sixth Circuit easily concluded that the Tennessee Department of Children's Services ("DCS") had a rational basis for distinguishing between two classes of delinquent youth in State operated live-in treatment facilities — those receiving social security benefits (and for whom the DCS was acting as representative payee) and those with no source of income — and for using benefits received on behalf of the former class to self-reimburse. The court explained, quite reasonably, that Tennessee has "an interest in saving money and obtaining funds, where legally possible, to pay for the large number of social services it provides its residents." 330 F.3d at 771.

Here, the Department's practice plainly has a rational basis in that it comports with federal regulations governing the use of social security benefits by a representative payee and with state regulations that require that all of a foster child's resources are to be used, first and foremost, to cover his or her cost of care. As in *Gean*, these practices serve the legitimate governmental purpose of decreasing a state's costs associated with foster care. In the instant case, the Department expended well over $200,000 on Ryan's care and supervision during the period of time that he received the $31,693.30 in OASDI benefits. The Department's practice of using the OASDI funds to reimburse itself for the cost of Ryan's current maintenance did not run afoul of the Equal Protection Clause.

F. Procedural Due Process

The Juvenile Court also concluded that the Department's failure to notify Ryan's CINA attorney of its appointment as Ryan's representative payee and/or of its receipt of benefits on Ryan's behalf deprived Ryan of due process of law. The Juvenile Court quoted extensively from the provision of the Social Security statute governing notice of the appointment of a representative payee. That statute provides in relevant part:

> (ii) In advance of the certification of payment of an individual's benefit to a representative payee under paragraph (1), the Commissioner of Social Security shall provide written notice of the Commissioner's initial determination to certify such payment. Such notice shall be provided to such individual, except that, if such individual —. . . (II) is an unemancipated minor under the age of 18 . . . then such notice shall be provided solely to the legal guardian or legal representative of such individual.

42 U.S.C. 405(j)(2)(E). *See also* 20 C.F.R. 404.2030(a) (explaining that if a beneficiary is an "unemancipated minor under the age of 18" written notice of the appointment of a representative payee "goes to [the beneficiary's] legal guardian or legal representative").

The Juvenile Court acknowledged that Ryan, an unemancipated minor when the payments started, "appear[ed] to fall into one of the notice exceptions under the statute." Nevertheless, the court concluded that the Department had an independent obligation to give notice of its appointment as Ryan's representative payee to his CINA counsel. The court reasoned that this duty derived from language in the same statute that mentions notice to a beneficiary's "legal representative" as an *alternative* to notice to a beneficiary's "legal guardian." The court admonished the Department for not disclosing its status as Ryan's representative payee during any of the permanency plan review hearings.

Putting aside the important fact that the Commissioner, not the Department, was obligated to provide notice of the appointment, the Juvenile Court's conclusion finds no support in the SSA statute or regulations. Both section 405(j)(2)(E) and the regulation implementing it are phrased in the disjunctive, requiring notice *either* to a minor's "legal guardian" or to a "legal representative." Here, the Commissioner provided notice to the Department, which was Ryan's legal guardian. This is all the Commissioner was required to do. We perceive no due process violation under the facts of this case.

III.
Jurisdiction of the Juvenile Court

The Department advances an alternative contention that the Juvenile Court lacked the authority to

declare COMAR regulations invalid, to supervise the Department's actions as Ryan's representative payee, and to fashion an equitable remedy to address the assertedly improper use of Ryan's benefits. We have concluded that the Department's practice of self-reimbursement complied with federal and state law and that the COMAR regulations authorizing its practice are valid. It follows that no equitable remedy was necessary because there was no wrong to be corrected. We agree with the Department, however, that the Juvenile Court is not, as Ryan argues, vested with broad equitable powers to supervise the Department when it is acting in its role as representative payee for foster children committed to its care.

The juvenile courts are "statutorily created courts of limited jurisdiction" that only may exercise "those powers expressly designated by statute." *Smith v. State*, 399 Md. 565, 574 (2007). There is "[n]o principle [ ] better established than that in exercising a statutory power, a court is without jurisdiction unless it complies with the statute." *In re Franklin P.*, 366 Md. 306, 333 (2001) (quoting *Austin v. Director of Patuxent Inst*, 245 Md. 206, 209 (1967), in turn quoting, *Scherr v. Braun*, 211 Md. 553, 563 (1957); *see also In re Glenn S.*, 293 Md. 510, 515 (1982) (juvenile court is a court of special jurisdiction and may only exercise those powers specifically granted it by statute); *In re John F.*, 169 Md. App. 171, 181-82 (2006) (emphasizing that while the juvenile court's subject matter jurisdiction may be presumed where it exercises jurisdiction over a child, its authority to act in a CINA proceeding is constrained by its "statutorily enumerated powers").

The vehicle for relief that was used in this case — a motion to control conduct — is not a means by which a Juvenile Court may expand its statutorily enumerated powers. *See* CJP § 3-821. Here, the Juvenile Court purported to act under its broad authority to protect and advance the best interests of foster children and, more specifically, in keeping with its statutorily enumerated authority over "support" of children declared CINA. *See* CJP § 3-803(b)(1)(i). In his motion to control conduct, Ryan did not seek an order directing a party to pay child support, nor did he allege that he was not receiving support payments to which he was entitled. Rather, he sought to challenge the Department's use of benefits it had received on his behalf as his duly appointed representative payee. Even if "support" of a child declared CINA could be understood to encompass OASDI benefits properly received by the Department under a federal regulatory scheme, that would not mean that the Juvenile Court has plenary equitable powers to order the Department to place monies already collected and disbursed in a trust for the benefit of the CINA.[28] Accordingly, even if we had not already concluded that such a remedy is not warranted under the facts of this case, we would nonetheless conclude that the Juvenile Court exceeded its authority by imposing a constructive trust.

IV.
Sovereign Immunity

Finally, the Department asserts that the remedy imposed by the Juvenile Court — creation of a constructive trust — is barred by sovereign immunity. It argues that any claim against the Department for damages for monies already spent must proceed under the MTCA. For the reasons already discussed, we conclude that the Department acted properly in applying Ryan's benefits to reimburse itself for the cost of his care, and that, even if the Juvenile Court had the power to impose a constructive trust, which it did not, a trust was not warranted. Accordingly, we need not decide whether sovereign immunity barred such a remedy.[29]

JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY, SITTING AS A JUVENILE COURT, WITH DIRECTIONS TO ENTER AN ORDER THAT THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES SHALL REIMBURSE RYAN W. $8,075.32 IN OASDI BENEFITS RECEIVED BY THE DEPARTMENT IN ITS FORMER CAPACITY AS REPRESENTATIVE PAYEE FOR RYAN W. COSTS TO BE PAID ONE-HALF BY THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES AND ONE-HALF BY RYAN W.

FOOTNOTES

1. The SSA may pay benefits directly to a minor beneficiary if: 1) the minor is receiving disability payments based on his own earning record; 2) the minor is in the military; 3) the minor is living alone and is self-supporting; 4) the minor is a parent and is filing for benefits for him/herself and/or his/her child *and* has experience handling finances; 5) the minor is capable of using the benefits to meet his/her needs *and* no other payee is available; or 6) the minor is within seven months of attaining majority and filing an initial application for benefits. 20 C.F.R. 404.2010(b).

2. By way of example, the regulation sets forth a scenario in which an institutionalized beneficiary is charged $700 per month for room and board. He receives just $320 a month in social security benefits. His brother, not the institution, is his representative payee. Ordinarily, the representative payee pays over to the institution $295 of the monthly benefit, reserving $25 for the beneficiary's personal needs. One month, however, the representative payee learns that the beneficiary needs a new pair of shoes. He takes him to a store to buy shoes for $29, takes him to a movie for $3 and gives him $3 to use at the institution canteen. As a result, the institution receives $10 less that month. The SSA would con-

sider all of these expenditures to be proper. *Id.*

3. Ryan's siblings also were removed from the parents' care as well. His sister Kelly later was adopted by non-relatives and moved out-of-state. Ryan has no contact with her. He sees his sister Leah "occasionally." The record does not reflect the age of either sister.

Ryan's older brother, whose name we cannot discern from the record, died in November of 2010.

4. Exom investigated whether Ryan was eligible for survivor's benefits after receiving a Department memorandum regarding the Department's practice of applying for OASDI benefits on behalf of foster children.

5. That section, entitled "Order controlling conduct of person before court," states:

> (a) *In general*. — The court, on its own motion or on application of a party, may issue an appropriate order directing, restraining, or otherwise controlling the conduct of a person who is properly before the court, if the court finds that the conduct:
>
> (1)Is or may be detrimental or harmful to a child over whom the court has jurisdiction;
>
> (2) Will tend to defeat the execution of an order or disposition made or to be made under this subtitle; or
>
> (3) Will assist in the rehabilitation of or is necessary for the welfare of the child.
>
> (*b) Application to person not party to petition.* — Subsection (a) of this section shall apply to a person not a party to the petition if the person is given:
>
> (1) Notice of the proposed order controlling the person's conduct; and
>
> (2) The opportunity to contest the entry of the proposed order.
>
> (c) Enforcement. — An order issued under this section is enforceable under Title 15, Chapter 200 of the Maryland Rules.

6. CJP section 3-803(b)(i) provides that the Juvenile Court has concurrent jurisdiction over "[c]ustody, visitation, support, and paternity of a child whom the court finds to be a CINA."

7. The time line provided by Ryan conflicts in certain respects with the testimony of Exom at a later hearing.

8. Title IV-E refers to the Adoption Assistance and Child Welfare Act of 1980. It is a "cooperatively run federal-state program through which the federal government provides participating states with funding to advance the adoption of special needs children." *Greenfleld v. FL Dep't of Children & Family Servs.*, 794 So. 2d 739, 740 (Fla. Dist. Ct. App. 2001).

9. The record includes an "Opinion and Order" dated June 16, 2011. That document actually is a 23-page memorandum opinion. There also exists a June 17, 2011 "Order," which states that it is "NUNC-PRO-TUNC to 6/16/2011." We treat both as having been entered on June 16, 2011.

10. As mentioned, the Department no longer was-acting as Ryan's representative payee as of February 2011.

11. Again, the evidence before the Juvenile Court was that the Department had ceased receiving benefits on Ryan's behalf as of February 2011.

12. The accounting of Ryan's benefits received and the Department's disbursements made on his behalf introduced into evidence at the May 17, 2011 hearing reflected a disbursement of $5,663.39 for that month, however.

13"NOS" is an abbreviation for "not otherwise specified," meaning that the disorder did not otherwise meet the criteria for any specific, recognized anxiety disorder. American Psychiatric Association, *Diagnostic And Statistical Manual Of Mental Disorders*, 444 (4th ed. 1994).

14. Ryan's aunt is referenced at various times in the transcript. It is unclear whether she is a maternal or paternal aunt. Apparently, she never was a custodial resource.

15. Tarbutton explained that the term "fictive kin," refers to a non-relative with whom a foster child has developed a familial relationship. A placement with a fictive kin is treated like a relative placement.

16. On cross-examination, Ryan was asked why he had asked to be returned to Franklin after his brief placement with Mrs. C. He responded that he made the request because Franklin was familiar to him, so returning there was better than being placed in a new, unfamiliar environment.

17. Eligibility for SSI is determined based upon income, with the benefit amount being calculated upon need. In contrast, OASDI is an insurance program, with eligibility and the benefit amount dependent on the number of work credits earned by the insured worker.

18. The class representative, Danny Keffeler, was a foster child who was living with his grandmother and receiving social security benefits. His grandmother, as his legal guardian, acted as his representative payee. As the court described it, an "overzealous [DSHS] employee sought to have Danny's grandmother and guardian removed as representative payee," *id.* at 273, and have the DSHS appointed in her place. After four years of litigation against the DSHS involving Danny's case, his grandmother brought suit on his behalf and asked that it be certified as a class action consisting of Danny and all similarly situated foster children. Thereafter, DSHS abandoned its efforts to replace Danny's grandmother as representative payee.

19. The plaintiff class also alleged that DSHS was misusing the benefits of a sub-class of foster children by double-dipping, sweeping children's accounts to pay for past expenses, and using benefits for programmatic costs. The Washington Supreme Court concluded that these arguments would more appropriately be directed to the Commissioner.

20. That regulation, entitled "Conservation of Child's Income for Future Identifiable Needs," provided in relevant part:

> (a) The child's earnings or other income may be conserved for his current or future educational needs when he is 12 years old or older and there is indication that he will graduate from high school or be enrolled in a training program related to self-support. . . .
>
> (b) The child's earned income may be con-

> served for his other future identifiable needs related to employment, cultural and educational pursuits, recreation, and the establishment of a home.
>
> (c) Receipts conserved for future needs of the child are to be deposited to an interest bearing trust account on a monthly basis. If at any time conserved funds are not used or are not to be used for the agreed upon educational or other identifiable needs, they become a resource to be taken as a refund for the cost of foster care. . . .

21. While Conaway turned 12 in 1973, for reasons not explained the Department did not begin conserving his funds until he turned 14.

22. Ecolono was eligible for disability benefits by reason of his addiction to drugs and/or alcohol. Since that time, federal law has been amended to exclude this as an eligible disability.

23. He later was refunded an additional $1,347 because he was released prior to the end of March.

24. As discussed, the Department concedes that it misapplied approximately $8,100 of Ryan's *retroactively paid lump sum* benefit payments. During oral argument in this Court, counsel for Department reemphasized that it concedes the amount and that that amount will be "restored" to Ryan after the Department's accounting division determines the precise amount of improperly applied benefits.

25. In its June 16, 2011 opinion, the Juvenile Court declared COMAR 07.02.11.29K(2) and COMAR 07.02.11.29L invalid. COMAR 07.02.11.29(L) provides that a foster child's "resources," which, as discussed, include OASDI benefits,

> shall be applied directly to the cost of care, with any excess applied first to meeting the special needs of the child, and the net excess saved in a savings account for future needs. Any potential benefits from other resources shall be pursued and made available if possible to the local department as payee.

It was in keeping with this authority that the Department applied to act as Ryan's representative payee and used Ryan's OASDI benefits to cover a small portion of the cost of his care. COMAR 07.02.11.29(K)(2) directed that, if a foster child over age 18 is in an out-of-home placement and is the beneficiary of OASDI benefits, the child may choose whether to receive the benefits directly and "pay the local department" or "[d]esignate the local department as the payee." This regulation was not implicated in Ryan's case as he was under 18 when the Department became his representative payee and, in any event, during proceedings before the Juvenile Court, a Department witness testified that the regulation is not enforced.

26. Ryan testified that he complained to employees at his group home about a delay in obtaining his state identification card. He acknowledged that he never brought this issue to Exom's attention.

27. Article 24 of the Maryland Declaration of Rights provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

While Article 24 does not contain an explicit equal protection clause, the Court of Appeals has held that one is "embodied within the Article." *Frey v. Comptroller of the Treasury*, 422 Md. 111, 134 n. 13 (2011). As a general rule, the equal protection and due process clauses of Article 24 are construed in *pari materia* with their federal counterparts. *Tyler v. City of College Park*, 415 Md. 475, 499 (2010).

28. We note that the two Maryland cases challenging the State's use of social security benefits for self-reimbursement both were raised in the context of administrative actions; that forum properly is suited to address the Department's enforcement of valid COMAR regulations permitting the practice of self-reimbursement with OASDI benefits. *See Conaway, supra, and Ecolono, supra.*

29. As noted above, the Department and Ryan agree that, of the $31,693.50 that the Department received in OASDI benefits for Ryan, a portion should have been conserved for Ryan, as that amount was received at a time when it could not be applied to cover costs of current care for Ryan. The parties acknowledge that this was simply a mistake by the Department, and the Department's counsel has acknowledged that the appropriate sum shall be returned to Ryan forthwith. Under the circumstances, this money does not constitute tort damages that must be sought pursuant to the MTCA. The money is in the hands of the Department, which received it from the SSA, and must be reimbursed to Ryan. As explained above, we calculate the money subject to reimbursement to be $8,075.32. If that figure is incorrect, either party may file a timely motion for reconsideration explaining why.

NO TEXT

Cite as 11 MFLM Supp. 43 (2012)

Custody: emergency modification: jurisdiction under UCCJEA

Janet Kalman

v.

Jose Fuste

No. 1617, September Term, 2011

Argued Before: Eyler, Deborah S., Matricciani, Kenney, James A., III (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: September 5, 2012. Reported.

The circuit court did not have temporary emergency jurisdiction over the parties' custody dispute, because the evidence failed to establish that their child was subjected to or threatened with mistreatment or abuse.

On July 31, 2008, the Circuit Court for Frederick County awarded appellee, Jose Fuste ("Father"), an absolute divorce from appellant, Janet Kalman ("Mother"). The court granted the parties joint legal custody of their Daughter and granted Mother primary physical custody, with Father to have liberal visitation.

Despite Mother's relocation to Florida with Daughter, the parties continued to litigate custody disputes in Maryland. On January 20, 2011, Father filed a petition to modify his visitation with Daughter in the Circuit Court for Montgomery County. On April 13, 2011, Mother filed a petition to modify custody, also in Montgomery County, along with her answer to Father's petition to modify visitation. The circuit court conducted a scheduling hearing on May 2, 2011, where it set a merits hearing on the modification petitions for August 29, 2011.

Just prior to the August 29 merits hearing, Father filed an Emergency Motion for Custody with an accompanying affidavit asserting that Mother had been arrested in Florida and charged with felony possession of a controlled dangerous substance (the drug hydrocodone) with intent to distribute. Mother did not respond to this motion, but a circuit court judge granted the motion the day it was filed, pending the outcome of the hearing on August 29, 2011.

Mother appeared with counsel for the hearing on August 29 and challenged the Maryland court's continuing jurisdiction over Daughter's custody, as well as the basis for emergency jurisdiction. A second judge found that the Circuit Court for Montgomery County had continuing jurisdiction over Daughter and concluded that the Mother's legal troubles in Florida created an emergency requiring a modification in custody. The court awarded Father temporary sole legal and physical custody of Daughter, with reasonable visitation for Mother and Daughter's grandparents, pending the outcome of further custody proceedings. The court set a status conference for November 30, 2011, to reevaluate the parties' situations. The judge suggested that one of the parties would have to file a complaint in order to obtain a "final custody" hearing. Mr. Fuste did that on September 6, 2011. On October 3, 2011, Ms. Kalman noted an appeal from the temporary custody order dated September 2, 2011.

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

QUESTIONS PRESENTED

Appellant's brief presents three questions for our review, which we have combined into two as follows:

I. Did the circuit court err when it held that it had continuing exclusive jurisdiction to entertain appellee's emergency motion without determining whether the jurisdictional requirements of FL § 9.5-202(a) were satisfied?

II. Did the circuit court err in finding that the unstable circumstances of appellant in Florida constituted an emergency requiring a temporary modification of child custody?

For the reasons that follow, we answer yes to both questions, we vacate the judgment of the circuit court, and we remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

The parties were married in 1997 and resided in Maryland until Mother became pregnant with their child. At that point the parties separated and Mother moved to Florida, where she gave birth to Daughter on July 14, 2006. The parties finalized their divorce in the Circuit Court for Frederick County in July of 2008, agreeing that Mother would be Daughter's primary physical custodian and that Father would retain the right to liberal visitation.

Mother raised Daughter in Florida with the help

of Daughter's maternal grandmother and paternal grandparents. Father visited three to four times each year until 2011, when he began visiting monthly. Prior to the events of this case, Daughter had spent only one week in Maryland, on the occasion of her fifth birthday in July of 2011.

On August 14, 2011, Daughter was with Father's parents when Florida police detained Mother on a charge of shoplifting. The arresting officers found in her possession a bottle of hydrocodone whose prescription label bore someone else's name. Mother was arrested and charged with theft and drug trafficking, held overnight, and released on her own recognizance.

When Father learned of Mother's arrest, he decided to remove Daughter to Maryland. He traveled to Florida and told Mother that he and his parents would watch Daughter overnight on August 23, 2011, while Mother finished moving into a new residence. That evening, Father returned to Maryland with Daughter, and the next day filed an emergency motion for custody in the Circuit Court for Montgomery County. In an affidavit supporting his motion, Father stated that he believed Mother was using and possibly selling drugs and would abscond with Daughter to Switzerland, where Mother is also a citizen. Father averred that Mother had been terminated from her employment and could lose her license to practice nursing, and that she was residing with her sister, who had two pending theft charges, and with "a live-in boyfriend who has a prior drug conviction." Father stated that Mother's "arrests are a drastic change in [her] behavior which makes me very concerned for the safety and well-being of my [daughter]."

The circuit court granted Father temporary sole custody of Daughter, pending a hearing on the merits of his emergency motion. On August 29, 2011, the parties appeared before the court for that hearing, where Father testified to the foregoing facts.[1] Mother moved for judgment at the close of Father's case, arguing in part that the court lacked emergency jurisdiction over the matter. The court rejected Mother's argument:

> [COUNSEL]: [T]here's been no indication of any emergency with [Daughter]. There's been no indication that there has been any harm to the child or an impending harm.
>
> THE COURT: The Mother has been charged with a felony drug charge and you don't consider that an emergency or harm?
>
> [COUNSEL]: Harm to the child? Not at this time, no sir.
>
> THE COURT: No? I do.

Mother then took the stand and testified that on the night of her arrest, she had finished shopping and wanted to rent a movie from an automated kiosk at the store's entrance; in attempting to do so, she took her shopping cart past the checkout lines, which led to her being accused of shoplifting. Mother further testified that she had accidentally brought home a dead patient's hydrocodone from her work as a hospice nurse, and she had it in her purse only so that she could destroy it later that night, at work.

Father introduced a printout of a commercial website showing that Mother had been arrested twice before, once in 2008 and once in 2009. Mother testified that in 2009, Daughter had an accident in a store, and when Mother hastily left to change Daughter's clothes, she unintentionally carried out a pair of the store's underwear. Mother averred that the charges were dropped, and Father introduced no evidence of a conviction. Mother had earlier testified that this was her only prior arrest; when confronted with the computer printout showing an arrest in 2008, she stated that she did not remember that occurrence.

Mother testified that she was fired after her most recent arrest because company policy forbade possession of patients' drugs outside of the workplace; but Mother stated that she had found a better-paying job with a firm that will hire her as long as she is not convicted of drug trafficking. Mother introduced the results of random drug tests that had been conducted for her job—including one from two days after her arrest—none of which indicated the presence of narcotics. Mother also testified that she had been denied communication with Daughter since her removal to Maryland.

In his closing argument, counsel for Father reviewed the evidence and argued that the court should temporarily grant sole physical and legal custody to Father:

> [Father is] very concerned that either Ms. Kalman has a drug problem or something is going on in her life that is going to take a registered nurse, a person in a highly respected career and have them be arrested two, three times for petty theft and now a petty theft with unexplained prescriptions in her pocketbook.
>
> Those factors gave Mr. Fuste a good faith basis to believe that his daughter was not being cared for in the best manner possible.
>
> * * *
>
> [S]he's facing a very serious felony charge in Florida for prescription drug fraud. That can have negative consequences for her in a couple

of critical ways as it affects [Daughter], as Your Honor knows, a felony, incarceration possible.

Also, even if she does a sentence, as Your Honor knows, many felonies get pled out to something less. If she ends up with a lesser charge and she's on probation she still very well could lose her, her medical license so that she still has real factors that are negatively impacting on her life.

* * *

But what we are saying is Your Honor, at this stage we don't know what's going to happen with Ms. Kalman. She may prevail on all charges and might come back in and make an argument that she is the fittest parent in the room and that may well be the case, Your Honor. But at this present juncture, I don't think that she can say that she's in, on par with her ex-husband. She's got serious felony charges.

She runs the risk of everything that I just suggested, even in addition to the possible easy out of going to Switzerland which she's denied. It's a concern, Your Honor, but the primary concern is the best interest of the child. The best interest of [Daughter], we believe Your Honor in the short term, would be to leave her with her Father.

* * *

Ms. Kalman doesn't even have a trial date yet, she has an arraignment set for September. I was going to suggest that we come back in 90 days, Your Honor. We would ask that [Father] remain with custody, we can provide the Court with progress reports, give mom unlimited access in terms of skyping and telephone, things like that. If she wants to come up to Maryland, dad is fine with her exercising her visitation. I'm not going to say, you know, she needs to be supervised given her representations to the Court, but Your Honor, we think that what would be worse [is] for [Daughter] to go back to Florida.

Let's assume Your Honor doesn't feel that there's sufficient evidence at this stage and [Daughter] goes back to Florida, and then mom has a negative turn of events at the Florida courts, Your Honor. Or, even if she gets probation dates, take her license, that's going to cause Mom additional financial hardship and she's, what if she can't afford to take care of her daughter? That's going to be more stressful for [Daughter] to go back to Florida and then possibly have to come back up here and dad kind of pull [Daughter] out of the fire so to speak.

Counsel for Mother again argued that the court should grant judgment for lack of emergency jurisdiction and proffered that Mother would pursue the matter in Florida on her own accord:

> My client has indicated that she will ask the State of Florida[,] which is the child's proper home state[,] to become involved and to solidify the custody order down there. She'll be asking for legal as well as physical custody. And Florida is also the appropriate place for Mr. Fuste to be asking for custody. The emergency will arise out of a conviction. If an arrest is grounds for a change in custody, that is for the State of Florida to decide.

The court stated its ruling on the record, finding that Mother's explanation of her arrests were not credible and that the court had jurisdiction over the parties' custody dispute:

> This Court had jurisdiction, continues to have jurisdiction of those matters. That's the reason why a petition as to modify were filed including your client, Ms. Kosak. And there is not an existing case in Florida, there has been and continues to be an existing case in the State of Maryland.
>
> So one, this Court finds that it has jurisdiction in light of that, and secondly, I do find this to be an emergency situation because of the circumstances that clearly this child would be subjected to abuse under certain circumstances that could occur and have already occurred in this case. But for the fact that she had the defendant's parents that were available to her she would have been in jail [2]

Mother subsequently noted this appeal, and at

argument the parties informed us that proceedings in Florida have been initiated and are stayed pending resolution of the instant action.

DISCUSSION

I. Continuing, Exclusive Jurisdiction

Jurisdiction over child custody matters is governed by the Maryland Uniform Child Custody Jurisdiction and Enforcement Act ("the Act"), Maryland Code (1984, 2006 Repl. Vol.), §§ 9.5-101 to 9.5-318 of the Family Law Article ("FL").[3] The existing custody order in this case was issued by a Maryland court and was consistent with the Act; thus, Family Law § 9.5-202(a)(1) governs and provides that the circuit court has "exclusive, continuing jurisdiction" over the determination of Daughter's custody "*until a court of this State determines* that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships[.]"[4] (Emphasis added.) *See also* Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") § 201 cmt. (Draft 1997) ("[E]ven if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of Section 201 are met. If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.").[5]

Mother argued before the circuit court that Daughter had resided in Florida since her birth and that Daughter's only connection to Maryland was her *father's* residence and the one week of her life which she spent here, and that substantial evidence was not available to the court.[6] Rather than ruling on whether it did or did not have the required "significant connections" or "substantial evidence" to exercise continuing jurisdiction,[7] the circuit court presumed that it had continuing, exclusive jurisdiction over the custody dispute because Maryland was the decree state and the parties continued to litigate their divorce and its related matters in Maryland.[8] This, however, was an error of law.

Under the Act, parties cannot confer jurisdiction upon the court by consent. UCCJEA § 201 cmt. ("[A]n agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective."); *M.B.L. v. G.G.L.*, 1 So. 3d 1048, 1051 (Ct. Civ. App. Ala. 2008); *Stauffer v. Temperle*, 794 N.W.2d 317, 322 (Ct. App. Iowa 2010); *Friedman v. Eighth Judicial Dist. Court of Nev.*, 264 P.3d 1161, 1167 (S. Ct. Nev. 2011); Kelly v. Kelly, 806 N.W.2d 133, 138-39 (5. Ct. N.D. 2011); *In re Parentage of Ruff*, 168 Wn. App. 109, 118 (Ct. App. Wash. 2012). Further, to hold that ongoing custody proceedings *themselves* create a "significant connection" satisfactory of § 9.5-202(a)(1) would introduce a circular definition of jurisdiction and defeat the principles embodied in the law by its drafters, the National Conference of Commissioners on Uniform State Laws, whose comments inform us that the Act should be interpreted so as to:

> (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
>
> (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
>
> (3) Discourage the use of the interstate system for continuing controversies over child custody;
>
> (4) Deter abductions of children;
>
> (5) Avoid relitigation of custody decisions of other States in this State;
>
> (6) Facilitate the enforcement of custody decrees of other States;

UCCJEA § 101 cmt. (1997); *Paltrow v. Paltrow*, 283 Md. 291, 293 (1978). Finally, FL § 9.5-202(a)(1) grants Maryland continuing, exclusive jurisdiction over the dispute *until* the circuit court determines that this state lacks significant connections or substantial evidence. It is not the intent of the Act, however, to postpone those determinations and thereby extend continuing jurisdiction indefinitely, for this also would defeat the Act's purposes.

Although the circuit court retained continuing, exclusive jurisdiction over Daughter's custody *until* it found that the requisites of FL § 9.5-202(a) were *not* satisfied by the facts of the case, the court erred when it *presumed* that it retained jurisdiction simply because of the parties' history of litigation in Maryland. This error would have been rendered harmless if the circuit court had other grounds for jurisdiction, but as we now explain, it did not.

II. Temporary Emergency Jurisdiction

Having failed to determine whether Maryland passed the "significant connection" or "substantial evidence" tests of FL § 9.5-202(a)(1), the trial court's

judgment could yet be upheld if it correctly ruled that it had temporary emergency jurisdiction under the Act. For the reasons that follow, we hold that it did not, and we therefore remand the case for further proceedings.

Section 9.5-204(a) of the Act grants a Maryland court "temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." Admittedly, our cases do not provide much guidance on what constitutes an "emergency." Sometimes circumstances that appear to rise to an emergency situation in one judge's judgment will not even gain a hearing before another court. But where the circuit court has entered a child custody order either by agreement of the parents or following an evidentiary hearing, it should not be subject to sudden modification based solely on the subjective judgment of another judge that an emergency justifies it, without some requisite fact finding.

Our question, then, is whether the facts of this case constitute actual or threatened "mistreatment or abuse" under FL § 9.5-204(a). This is a matter of statutory interpretation, which we address with the following rubric:

> [T]he paramount rule of statutory construction is to ascertain and effectuate the intent of the legislature. The starting point in the first instance is the plain language of the statute. We view the words of a statute in ordinary tenns, in their natural meaning, in the manner in which they are most commonly understood. If the words of a statute are clear and unambiguous, our inquiry ordinarily ends and we need investigate no further, but simply apply the statute as it reads. We neither add nor delete words to an unambiguous statute in an attempt to extend the statute's meaning. We interpret statutes to give every word effect, avoiding constructions that render any portion of the language superfluous or redundant.

Gillespie v. State, 370 Md. 219, 221-22 (2002) (internal citations and quotation marks omitted). "If . . . the meaning of the plain language is ambiguous or unclear, we seek to discern legislative intent from surrounding circumstances, such as legislative history, prior case law, and the purposes on which the statutory framework was based." *Lewis v. State*, 348 Md. 648, 653 (1998). Further, when the statute to be interpreted is part of a statutory scheme, we read it in context, together with the other statutes on the same subject, harmonizing them to the extent possible. *Mid-Atlantic Power Supply Ass'n v. Pub Serv. Comm'n*, 361 Md. 196, 204 (2000). Finally, we are guided by the model law's drafters, whose general admonitions are set forth, above, and reiterated here because of their importance to the present question:

> (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
>
> (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
>
> (3) Discourage the use of the interstate system for continuing controversies over child custody;
>
> (4) Deter abductions of children;
>
> (5) Avoid relitigation of custody decisions of other States in this State;
>
> (6) Facilitate the enforcement of custody decrees of other States;

UCCJEA § 101 cmt.; *Paltrow*, 283 Md. at 293.

A. "Abuse" under FL § 9.5-204 (a)

The first sufficient condition of temporary emergency jurisdiction under FL § 9.5-204(a) is satisfied where the child, or a sibling or parent of the child, is subjected to or threatened with "abuse." We agree with appellant that "abuse" as used in FL § 9.5-204(a) should be reconciled with existing statutory definitions of that word. *See Mid-Atlantic Power Supply Ass'n*, 361 Md. at 204. Thus, we take note that Title Four of the Family Law Article authorizes protective orders for victims of domestic violence and defines "abuse" as "any of the following acts:"

> (i) an act that causes *serious bodily harm*;
>
> (ii) an act that places a person eligible for relief in *fear of imminent serious bodily harm*;
>
> (iii) *assault* in any degree;
>
> (iv) *rape or sexual offense* under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
>
> (v) false imprisonment; or
>
> (vi) stalking under § 3-802 of the Criminal Law Article.

FL § 4-501(a)(1) (emphases added). *See also Kaufman v. Motley*, 119 Md. App. 623 (1998) (standard in the context of the domestic violence statute for an "emergency" change in child custody is proof by clear and convincing evidence that the children are placed in fear of imminent bodily harm). Elsewhere,.Title Five of the Family Law Article, which provides for centralized reporting of child abuse and neglect, defines "abuse" as:

> (1) the *physical or mental injury* of a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, *under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed*; or
>
> (2) *sexual abuse* of a child, whether physical injuries are sustained or not.

Family Law § 5-701(b) (emphases added). Finally, § 3-601(a)(2) of the Criminal Law Article (2002, 2012 Repl. Vol.) defines "abuse" in the same vein: "*physical injury* sustained by a minor as a result of cruel or inhumane treatment or as a result of a malicious act under *circumstances that indicate that the minor's health or welfare is harmed or threatened by the treatment or act*." (Emphasis added.)

A simple reading of these definitions reveals their common factor *actual physical or mental harm or injury, or a substantial risk thereof.* We therefore agree with appellant that "abuse" under FL § 9.5-204(a) requires some actual injury or substantially probable threat to the victim's physical or mental welfare.[10]

B. "Mistreatment" under FL § 9.5-204(a)

The second sufficient condition of temporary emergency jurisdiction under FL § 9.5-204(a) is satisfied where the child, or a sibling or parent of the child, is subjected to or threatened with "mistreatment." Our present task is to determine the meaning of this word in light of the rules of statutory interpretation, set forth above. And while we note that the uniform drafters' word choices are important, we must account for both the plain meaning of "mistreatment" and the specific meanings imparted by the various laws of this state. As to the former, "mistreatment" is commonly held to be a synonym of "abuse,"[11] and as to the latter, what is now criminal "abuse" in Maryland was previously labeled "mistreatment" by criminal law statutes, *Bowers v. State*, 283 Md. 115, 118 (1978) (discussing the history of child abuse legislation in Maryland). Thus, both the plain meaning of "mistreatment" and the relevant history of this word in Maryland statutes equate it with "abuse" and imply that FL § 9.5-204(a) contains a redundancy, which the law abhors. But we can both eliminate this redundancy and reconcile the Act with Maryland statutes and case law if we read "mistreatment" as a proxy for "neglect," as defined by Maryland law.

The drafters of the UCCJEA purposefully excluded "neglect" as a basis for emergency jurisdiction in replacing its predecessor, thereby indicating a heightened standard for use in emergency custody determinations. They did so ostensibly because "[n]eglect is so elastic a concept that it could justify taking emergency jurisdiction in a wide variety of cases." UCCJEA § 204 cmt. We are skeptical of this reasoning, for we doubt that the plain meaning of "mistreatment" is any less "elastic" than "neglect." Regardless of our doubts, we need not concern ourselves with "elasticity"—be it relative or absolute—because the Maryland Code consistently and explicitly defines "neglect" as *a complement* to "abuse." First, Family Law § 5-701 provides:

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

(Emphases added). Second, Criminal Law § 3-602.1(a)(5) states:

> (5)(i) "Neglect" means the *intentional failure to provide necessary assistance and resources* for the physical needs or mental health of a minor that *creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor*.
>
> (ii) "Neglect" does not include the failure to provide necessary assistance and resources for the physical needs or mental health of a minor when the failure is due solely to a lack of financial resources or homelessness.

(Emphases added). Thus, in both the family law and criminal law contexts, the terms "abuse" and "neglect" require *at least a substantial risk of mental or physical injury*. The difference between the two is that the actual or potential mental or physical injury must be the result of some *positive action* to constitute abuse,

while "neglect" accounts for actual or potential injuries resulting from some *failure to act*.

Because the uniform drafters' intent was to grant jurisdiction to a state lacking significant connections or "home state" status only under "extraordinary circumstances," UCCJEA § 204 cmt., and because the Act can be reconciled with Maryland law only by equating "mistreatment" and "neglect," we conclude that both "abuse" and "mistreatment" under FL § 9.5-204(a) require at least a substantial risk of physical or mental harm or injury.[12] Therefore, a court cannot exercise temporary emergency jurisdiction under FL § 9.5-204(a) unless there is evidence of actual physical or mental harm or injury, or a substantial risk of physical or mental harm or injury.

C. Temporary Emergency Jurisdiction in the Present Case

Turning to the record, we agree with Mother that the evidence does not rise to such a level as to establish actual or threatened "mistreatment or abuse." The record lacks any positive assertion of physical or mental injury, and there was no evidence or finding that Daughter faced a "substantial risk" of harm from either abuse or neglect as defined above. Other than Father's general concern for his daughter's "safety" expressed in his complaint and affidavit, the word does not appear anywhere else in the record, nor do the words "harm," "injury," "violence," *et cetera*. Instead, the motions and hearing transcript leave the indelible impression that Father's fears were contingent on Mother's conviction and potential loss of freedom and income, none of which had occurred (and none of which could occur for at least the next ninety days).[13] It is clear that Father did not believe that Mother herself posed a threat to Daughter, for he conceded that Mother should be allowed to exercise unsupervised visitation. Nor did Father express any specific danger from Daughter's environment in Florida; Father's closing argument conveyed only generalized concerns that Daughter "was not being cared for in the best manner possible," "that [Mother] still has real factors that are negatively impacting on her life," that Mother is not "on par with her ex-husband," and that if Mother is convicted she may not be able to afford to take care of her daughter, and her relocation to Maryland would be "more stressful" than if she remained in Maryland until the matters in Florida are resolved. None of these statements demonstrate or express the sort of immediate danger inherent in the words "abuse" or "mistreatment." Consequently, the facts adduced here fell woefully short of an emergency.

We recognize that the trial court was faced with a difficult choice. Mother's testimony was not credible to the trial judge and undoubtedly raised concerns for him about Daughter' immediate care and safety. Acting in what he termed "the child's best interests,"[14] he granted the Father's emergency motion and set the case for status review in approximately ninety days.[15]

What is clear from the record is that it was the uncertainty of the Mother's situation which caused the trial court to grant the emergency motion. But uncertainty is a far cry from imminent harm or abuse or mistreatment, and there was no evidence of abandonment here. Father's concerns for his daughter's care and safety, albeit legitimate, did not constitute an emergency, particularly because the Mother's criminal case was not even scheduled for trial yet. Daughter had grandparent support in Florida and very limited experience living with her Father in Maryland. There was no need for emergency intervention here to protect Daughter from her Mother. The trial court's findings, under the circumstances presented, were clearly erroneous and its Temporary Custody Order of September 2, 2011, was entered in error.

For the foregoing reasons, we vacate the judgment and remand for further proceedings so that the circuit court may proceed under FL § 9.5-202 to determine whether it *can* exercise jurisdiction over this case and, after conferring with the Florida court, whether it *should* exercise jurisdiction. *See* FL § 9.5-109 (authorizing communication between courts); FL § 9.5-207 ("A court of this State that has jurisdiction under this title to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum."); UCCJEA § 110 cmt (communication between courts is strongly suggested in applying UCCJEA section enacted as FL § 9.5-207).

JUDGMENT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. In the meantime, the charging authority in Florida had increased Mother's larceny charges from under $100.00 to over $100.00. For this new charge, she was again placed under arrest and then released.

2. The trial judge also noted, later in his ruling, that the parties' ongoing divorce litigation had come before him on various dockets, "petitions for modification, this Court having subject matter jurisdiction to hear those cases."

3. For an explanation of the Act, its history and its adoption in Maryland, *see Toland v. Futagi*, 425 Md. 365, 370-77 (2012).

4. Alternatively, FL § 9.5-202(a)(2) terminates continuing jurisdiction if "a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State."

Father's residence in Maryland is not disputed, so we need not address this subsection.

5. We note that the UCCJEA introduces some jurisdictional confusion by making positive assertions as to when "subject matter jurisdiction" does (or does not) exist based only on the UCCJEA, itself. But there are factors in the law outside the UCCJEA that can deprive a court of subject matter jurisdiction. For example, FL § 1-201 sets forth Maryland equity courts' jurisdiction over various family matters and, in so doing, places conditions on the existence of subject matter jurisdiction, such as the requirement that a custody case concern a "child." *See Early v. Early*, 338 Md. 639, 654 (1995) (FL § 1-201 confers subject matter jurisdiction over specified cases). Thus, it would be more appropriate to couch the UCCJEA's provisions in terms that explain that they all are *necessary* elements—rather than *sufficient* conditions—of subject matter jurisdiction.

In a similar vein, the Supreme Court of Washington noted that the UCCJEA "might have more accurately used the term 'exclusive venue' instead of 'subject matter jurisdiction." *In re Custody of A.C.*, 165 Wn.2d 568, 573 n.3 (S. Ct. Wash. 2009). We agree with that general sentiment except that UCCJEA drafters intended to co-opt certain universal rules of subject matter jurisdiction from bodies of law outside UCCJEA, such as the condition that parties cannot confer subject matter jurisdiction on the courts by consent. *See* UCCJEA § 201 cmt. ("It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective."). It would therefore seem unwise to excise all references to "subject matter jurisdiction" from the UCCJEA.

6. Father argued before the trial court and this Court that Maryland is Daughter's "home state," but he appears to be unaware of that term's relevant statutory definition, in FL § 9.5-101(h)(1), as "the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence, immediately before the commencement of a child custody proceeding[.]"

Moreover, "home state" jurisdiction is not controlling in this case because it is subordinate to continuing, exclusive jurisdiction. By the terms of FL § 9.5-201(a), "home state" jurisdiction ordinarily applies to initial child custody determinations, and it arises in cases with an existing decree *only if* the decree state lacks continuing jurisdiction under FL § 9.5-202. See FL § 9.5-202(b) ("A court of this State that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under § 9.5-201 of this subtitle.").

7. The one week that Daughter spent in Maryland before these events is undoubtedly insignificant. See *Olson v. Olson*, 64 Md. App. 154, 166 (1985) (visiting another state for four consecutive weeks each summer does not constitute a significant connection). The record does not reveal, however, whether the requisite substantial evidence ekisted in Maryland.

8. The trial court's decision would have been correct under the original rule of continuing jurisdiction in Maryland, but that was abrogated with the enactment of the Uniform Child Custody Jurisdiction Act ("UCCJA")—the predecessor of the current Act—in 1975. *Olson v. Olson*, 64 Md. App. 154, 167-68 (1985) (citing *Berlin v. Berlin*, 239 Md. 52, 56-57 (1956); *Howard v. Gish*, 36 Md. App. 446 (1977)).

9. These purposes were explicit in the text of the UCCJEA's predecessor, the UCCJA. *See Paltrow*, 283 Md. at 293. They now appear only in the comments accompanying § 101 of the UCCJEA, whose text was enacted in Maryland as FL § 9.5-318, without the accompanying comments. The present comments to UCCJEA § 101 explain that although these principles were extensively cited bycourts during the UCCJA era, they were eliminated from the text of the UCCJEA "because Uniform Acts no longer contain such a section."

10. We say "victim" because FL § 9.5-204(a) contemplates abuse or mistreatment of a child or "a sibling or parent of the child."

11. *See, e.g.,* "Mistreated," Princeton University WordNet, http://wordnetweb.princeton.edu/perl/webwn?s=mistreated (last visited July 19, 2012) ("abused, ill-treated, maltreated, mistreated (subjected to cruel treatment) 'an abused wife'"); "Mistreat," Merriam-Webster.com, http://www.m-w.com/dictionary/mistreat (last visited July 19, 2012) ("Synonyms: brutalize, bully, ill-treat, ill-use, kick around, maltreat, manhandle, mess over [slang], mishandle, abuse, misuse"); "Mistreat," Dictionary.com, http://dictionary.com/browse/mistreat. (last visited July 19, 2012) ("to treat badly or abusively").

12. We therefore join the ranks of several state courts that hold similar interpretations of the UCCJEA and its predecessor, the UCCJA. *See, e.g., Ex parte J. R. W.*, 667 So. 2d 74, 80 (S. Ct. Ala. 1994) (emergency authority under the UCCJEA's federal analogue, the Parental Kidnapping Prevention Act of 1980, 28 U.S.C.S. § 1738A(c)(2)(C), is limited to "temporary modifications necessary to protect the child from substantial and imminent harm"); *Devine v. Martens*, 371 Ark. 60, 69 (S. Ct. Ark. 2007) ("[T]he issue of whether an emergency exists hinges upon whether there is an immediate danger to the life or health of the child, including actual or threatened mistreatment or abuse."); *In re Nada R.*, 89 Cal. App. 4th 1166, 1174 (Cal. App. 4th Dist. 2001) ("The courts have interpreted 'emergency' as a situation in which a child is in immediate risk of danger if returned to a parent's care"); *In re Marriage of Anderson*, 25 Kan. App. 2d 754, 758 (Kan. Ct. App. 1998) (an emergency under the UCCJEA exists "when a child is in immediate danger from a source within the state's borders"); *Schoeberlein v. Rohlfing*, 383 N.W.2d 386, 389 (Minn. Ct. App. 1986) (emergency jurisdiction requires "present danger").

13. Father also feared that Mother would flee to Switzerland, but Father has not argued this point on appeal, and there is no indication that flight *alone* is a risk or harm contemplated by FL § 9.5-204.

14. Although the "best interests" of a child are relevant to jurisdictional inquiries under the UCCJFA, they are not the controlling standard. As the UCCJEA drafters explain in their prefatory note:

> **5. Role of "Best Interests."** The jurisdictional scheme of the UCCJA was designed to promote the best interests of the children whose custody was at issue by discouraging parental abduction and providing

> that, in general, the State with the closest connections to, and the most evidence regarding, a child should decide that child's custody. The "best interest" language in the jurisdictional sections of the UCCJA was not intended to be an invitation to address the merits of the custody dispute in the jurisdictional determination or to otherwise provide that "best interests" considerations should override jurisdictional determinations or provide an additional jurisdictional basis.
>
> The UCCJEA eliminates the term "best interests" in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.

See also Garg v. Garg, 393 Md. 225, 239-40 n.7 (2006).

15. The record indicates that the judge thought the parents should resolve the custody dispute before November 30th.

NO TEXT

Cite as 11 MFLM Supp. 53 (2012)

Custody: modification: material change in circumstances requirement

Mark Langstein
v.
Marie Campagnone

No. 2287, September Term, 2011

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

Opinion by Thieme, J.

Filed: September 10, 2012. Unreported.

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 September 7-8, 2011 contested hearing, the Circuit Court for Montgomery County 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 February 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' February 3, 2009 Custody Agreement and awarding the parties 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' February 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?

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

For the reasons that follow, we vacate the circuit court's order and remand to that court for further findings consistent with this opinion.

FACTS AND LEGAL PROCEEDINGS

Appellant, Mark Langstein (hereinafter "Father"), and appellee, Marie Campagnone (hereinafter "Mother"), were married in Virginia on January 1, 2000. The parties are the natural parents of two minor children, twins Daniel Langstein and Arianna Langstein (hereinafter "the children"), born on June 17, 2004.[1] During the time period relevant to this action, the parties resided in Rockville, Maryland.

After encountering difficulty in their marriage, the parties mutually agreed to separate. Mother filed a complaint for limited divorce on July 30, 2008, and Father filed a counter-complaint for limited divorce on August 29, 2008. Each party sought sole custody of the children and child support, reserving to the other party reasonable visitation.

On February 3, 2009, the parties settled their contentious battle over physical and legal custody of the children and entered into a comprehensive custody agreement, which was incorporated into a consent order of the same date. In the February 3, 2009 custody agreement, the parties agreed that Father would have sole legal and primary physical custody of the children, with Mother to "have a voice in the care, upbringing, and education of the said minor children, and in the making of decisions regarding the health, religious training, education, discipline, choice of schools, extra-curricular activities, summer and vacation plans, and all other matters of importance pertaining to the general welfare of the children." Each parent was also tasked with exerting "every reasonable effort to maintain free access and unhampered contact between the children and the other party." Mother was ordered to pay Father $1290 per month toward the support of the children, beginning March 1, 2009.

The custody agreement detailed the following visitation schedule with Mother: (1) every other weekend from Saturday at 6:00 p.m. until Monday morning

at 8:00 a.m. "or until fifteen (15) minutes prior to the arrival of the school bus, whichever is earlier;" (2) every Tuesday for dinner from 6:00 p.m. until 7:30 p.m.; (3) on the other weekend, from Saturday at 6:00 p.m. to Sunday at 6:00 p.m., and; (4) every other Thursday for an overnight visit from Thursday at 6:00 p.m. to Friday morning at 8:00 a.m. "or until fifteen (15) minutes prior to the arrival of the school bus, whichever is earlier." School breaks, holidays, and family birthdays were to be shared equally between the parents.

Following numerous disagreements between the parties and requests to modify the consent order of February 3, 2009, to include changes in custody and visitation, the circuit court made findings of fact and entered judgment of absolute divorce to Mother on May 19, 2010. Although both parties had requested changes to the February 2009 custody agreement, the court found no substantial change in circumstance to warrant modification of custody as set forth in the consent order. Based on Mother's drastic reduction in income since the February 3, 2009 consent order was entered, however, the court reduced her child support obligation to $596 per month.

A flurry of pleadings continued in the custody litigation, and on January 3, 2011 Father filed his motion for contempt, alleging that Mother was in contempt of the consent order through her "willful continuous disregard of the visitation schedule and [Father's] custody rights." Father noted that in September 2010, Mother had requested, and Father had agreed to, a voluntary modification to the visitation schedule, which would eliminate Mother's Thursday and Sunday overnight visits with the children. According to Father, however, since requesting and obtaining Father's consent to the revised schedule reducing her overnights with the children, Mother had "utterly failed to adhere to it," returning the children between one and two hours late on numerous occasions and more than one day late on Christmas 2010. In addition, Mother continued to arrive unannounced at Father's home or the children's school bus stop seeking to take the children for visits at times when she was not entitled to visitation.

Father supplemented his motion for contempt when he discovered that Mother had been taking the children to Catholic Mass services and introducing them to that religion, in violation of the custody agreement, which made it clear that the parties had agreed that the children would be raised in the Jewish faith. Father further sought a modification of Mother's child support obligation, based on the circuit court's May 19, 2010 finding of fact that her income should have increased significantly subsequent to the end of the divorce litigation and the numerous hours she had spent involved in the litigation to the detriment of her career.[2]

On February 4, 2011, Mother filed the petition to modify custody implicated in this appeal, arguing that Father had "actively excluded [Mother] from important decisions affecting the children's welfare" and limited her access to the children. As such, she sought sole legal and physical custody of the children. Mother later amended her petition to request joint legal custody, or, in the alternative, sole legal custody, along with shared physical custody, or in the alternative, primary physical custody with reasonable visitation with Father.

The circuit court heard argument on the outstanding motions on September 7 and 8, 2011, wherein the following testimony was adduced. Mother stated that she did not believe that Father had abided by the terms of the February 2009 custody agreement, in that he had not involved her in, or kept her informed about, important decisions regarding the children. For example, the children, who have learning disabilities, have Individual Education Plans ("IEPs"), which sets forth the extra attention they are given by their school; the school is required to conduct IEP review meetings twice a year, but Mother was not included in any of those meetings, despite asking the school administrators to keep her informed of said meetings.

Mother conceded, however, that she had called the school and asked to be kept informed only once, at the start of the school year, as she did not want to "aggravate the teachers" or "make it look bad for the kids that [she] was pestering the school." She had also not asked Father about any information relating to the IEP meetings, nor had she attended any of those meetings, although she knew that, by law, those meetings occurred twice a year. Neither did she inquire of Father what transpired at those meetings.

Mother also claimed that Father had not kept her informed of medical issues relating to the children, including a fall requiring stitches to Arianna's forehead. In addition, after the children's long-term nanny apparently quit, Father did not notify Mother or involve her in the hiring of a new nanny.

Additionally, when she was near Father's house, Mother attempted to spend time with the children, "just to take them to McDonalds for an hour" or the like, but Father objected, telling her such visits were not authorized by the custody agreement. Mother did not believe that her actions were a violation of the custody agreement because the agreement calls for each party to exert every reasonable effort to maintain free access to, and unhampered contact with, the children. As such, in her view, the amount of visitation provided for in the custody agreement was "a minimum, not a maximum," and Father should consent to "a reasonable threshold" of extra time with the children.

Mother stated that she had requested the September 2010 reduction in the number of weekly

overnight visits with the children because, at that time, the children had started first grade and had trouble sleeping. She thought it was in their best interest to get as much sleep as possible, particularly on school nights, which would mean no overnight visit with her on Thursday or Sunday nights. She no longer believed that modification to the custody agreement to be in their best interest because they were sleeping better and needed more time with their mother.

Mother further testified about the reduction in income she had suffered since 2009, due, in part, to the time and attention required of her by the ongoing divorce litigation and, in part, to a governmental record-keeping error regarding her credentialing as a psychiatrist, which kept her from obtaining lucrative positions. She stated, however, that it was her intent to reconnect with professional contacts and rebuild her private practice after the divorce litigation was complete.[3]

Mother indicated her desire for the court to award the parties joint custody. She thought it would be in the children's best interest because, as they get older, it becomes ever more important to have both parents involved in their lives, which, in her opinion, had not happened to that point. If the court were not inclined to grant her requested change in custody, she sought two extra weeks with the children during their summer vacation, raising the total time spent with their mother to four weeks during the summer.

At the close of Mother's case, Father moved for judgment on Mother's change of custody motion, arguing that there had been no material change in circumstance to justify a modification of legal or physical custody. Furthermore, there had been no evidence presented as to why a change in custody would be in the children's best interest, as no witness had testified that the access schedule then in place was bad for them or that it had deprived them of anything. The only benefit of a modification in custody, Father argued, would be to Mother, who simply wanted to spend more time with the children.

Mother countered that the custody agreement provided that Father would have sole legal custody, so long as Mother had a say in the care and upbringing of the children. Given Father's failure to communicate with Mother or to include Mother in educational or child care decisions, Father had caused a material change in circumstances from what the agreement contemplated would be in the best interest of the children.

Even before considering Father's testimony and evidence, the circuit court found that there had been a material change in circumstances, as Father had not substantially complied with the custody agreement in failing to keep Mother informed as to decision making and to seek and consider her input. Because the agreement stated that Father has sole legal custody "provided that" certain events occurred, he did not actually have sole legal custody unless Mother was given a voice in making decisions.

As far as physical custody and visitation, the court continued, Father had construed the custody agreement "very, very strictly" in failing to allow Mother extra hours of visitation, which was to the derogation of Mother's rights. The facts demonstrated enough of a change in circumstances that the court considered itself at least entitled to look at what was in the best interest of the children, and it thus denied Father's motion at that stage of the proceedings.

In Father's case-in-chief, the children's school principal testified that Mother's attorney had requested that Mother be kept informed of school issues, but that the request came only several weeks before the end of the previous — 2010/11 — school year. Prior to the start of the 2011/12 school year, Mother had requested that she be kept apprised of school information, and she had been so informed, but she had not made similar requests in the past. The principal added that Father had never made any attempt with the administration to preclude Mother from receiving school information.

Father testified that he had not notified Mother about the school IEP meetings because he assumed that the school had done so. He had never intended to exclude Mother from the IEP process; instead, he said he was surprised that Mother had displayed no interest in the process. He reiterated that in the years he had attended the meetings, Mother had not inquired about the meetings, nor asked to be provided information or documentation about the children's IEPs.

As for hiring a new nanny without including Mother's input, Father stated he did not, at the time he had hired the nanny, believe that the custody agreement required Mother's input, but as of the date of the hearing, he was no longer of that opinion, and he admitted that he "probably should have" discussed a change in child care with Mother. In any event, however, Mother, once she knew about the new nanny, had asked no questions regarding the nanny's background, experience, or qualifications, nor had she objected to the new nanny, other than to the fact that the nanny attended college, which made her less available to care for the children during the day.

Father stated he did not object to Mother spending unscheduled time with the children, so long as he had some advance notice of it so he could provide the children with stable, consistent information about their schedule. He stated there had been occasions when Mother asked for additional time and he had agreed to it. In the "vast majority of the cases," however, Mother had not notified him in advance of her desire to spend

time with the children and had just shown up at his home or the children's school bus stop and tried to pick the children up. In general, he said, she has been "awful" about picking up and dropping off the children in a timely manner, which has caused the children uncertainty and instability.

Father stated that Mother's earlier testimony that she had not administered Clonidine, a blood pressure medication for adults that causes sleepiness in children, to the children was "an outright lie."[4] During a previous deposition during the divorce litigation, she had stated that part of the children's bedtime routine included taking medication, Clonidine, which had astounded Father.

Thereafter, he discovered that the children's prescription records showed that a pediatrician had prescribed Clonidine to the children without Father's knowledge or consent. Furthermore, he discovered that Mother had also written prescriptions for Clonidine for the children in 2010, which is when Father filed the first of his motions for contempt against Mother. It was his belief that Mother continued to administer Clonidine to the children against his wishes. That belief was one of the things that raised concerns about a potential change to the visitation schedule.

In sum, Father asserted that he has kept Mother adequately informed of the events called for in the custody agreement. He further did not believe that, if he and Mother were awarded joint legal custody, they would be able to make decisions together.

At the close of Father's testimony, Mother argued that modification to the custody agreement was necessary because Father was using the original and amended access schedule as a weapon against her and the children to limit the amount of time the children spend with Mother, in violation of the explicit language of the custody agreement that allows for free and unhampered access by both parents. Mother advocated the court's finding of a material change in circumstances because Father had not conformed to the obligations and conditions required of him under the terms of the custody agreement.

Joint legal custody would be in the children's best interest, Mother said, because the parties agreed that it was important for both parents to have a voice in the care and upbringing of the children, but Father had not caused that to happen. Effective communication between the parties, an important consideration in a determination of the propriety of joint legal custody, appeared to be possible, if only via email. In addition, the parties appeared to be able to make shared decisions.

Mother also argued that there was no reason to impute income to her for purposes of a modification of her child support obligation, as her decreased income was not the result of a voluntary act on her part to reduce her income.

In opposition of Mother's position, Father returned to his argument about a modification in child support, based on testimony that Mother should be able to earn more income than she had been, with a suggestion that she was not working to the extent of her ability to do so. He further argued that the "free and unhampered access" terminology in the custody agreement did not mean that Mother was able to show up at Father's home any time she wanted to pick up the children, without some responsibility to contact Father first. The agreement simply did not contemplate Mother taking the children whenever she might be available, without regard for Father's plans or the children's activities. Although the parties would certainly be free to amend the fixed schedule of visitation, he said, prior communication would be required.

Finally, Mother's argument that Father failed to keep her informed of important decisions — *e.g.*, IEP meetings and the hiring of the new nanny — when she, time and again, failed to ask questions or respond to his communications, was unavailing. Given the almost "complete breakdown of communication between these parties," he believed it would be inappropriate to find a material change warranting an award of joint custody. In Father's view, the best solution regarding legal custody would thus be a continuation of the agreement contained in the custody order because there was no evidence that it was not in the children's best interest.

The court issued its oral ruling on the motions on September 19, 2011. Therein, it found that the February 2009 custody agreement was intended to be a very flexible arrangement between Mother and Father. Although the agreement provided sole legal custody to Father, such custody was conditioned on: Mother having a voice in the care, upbringing, and decision making regarding the children; Father keeping Mother informed of major decisions, and; both parties allowing free access and unhampered contact with the children to the other.

To the court, however, the divergence of the parties' behavior "seems to have little or nothing to do with this document that the parties signed." As their behavior has drifted from the terms of the agreement, the court found, the parties have "drifted away from meaningful communication."

Mother, "perhaps more fluid in terms of the way she regulates her life," was found not to have not done anything terribly irrational or unreasonable, even if it seemed so to Father. Father, "seemingly more structured," read the custody agreement very strictly, not "remotely like the meaning he has imbued to this consent document." Father's strict responses to Mother's

requests for extra visitation did not address what might be good for the children and evidenced his belief that he was within his rights to exert complete control over the custody and visitation arrangement.

Based on the foregoing analysis, the circuit court found a material change in circumstances, noting that despite the terms of the custody agreement, Mother was being cut out of the children's lives and relegated to secondary status to such an extent that "it would appear this document was intended for some other case, some other couple, some other children." As such, the court moved on to look at the best interest of the children in deciding legal and physical custody going forward.

The court determined that the custody agreement "really contemplates shared legal custody, without saying that." Relating the parties' situation to the factors to be considered in awarding custody, as set forth in *Taylor v. Taylor*, 306 Md. App. 290, 304-11 (1978),[5] the court awarded joint legal custody to the parties and physical custody to be shared on a 50/50 basis — Monday, Tuesday overnight, and every other weekend to end with school on Monday with Mother; Wednesday, Thursday, and every other weekend to end with school on Monday with Father; alternating vacations and holidays, and; four weeks with each parent in the summer, unless the parties agree otherwise. The parties were instructed to consult with each other about "everything" and grant each other full access to all records pertaining to the children.

Given the change in custody, the court found it appropriate to change child support obligations, as well. Finding that Mother was not "even remotely" making what she could, with no adequate explanation why not, the court imputed income to Mother of $165,000 per year, which, considering Father's reported income and expenses, including health insurance and child care, came out to Mother paying $300 per month to Father for child support under the child support guidelines.

As for the contempt issues of access, medication, and religion, the court did not find that Mother had acted in willful violation of a court order in returning the children late to Father following visitation. Instead, she merely was in violation of what Father authorized, which was not what the custody agreement contemplated.

With regard to the issue of medicating the children without Father's consent, the court found that Mother had not been truthful in her denial of giving the children Clonidine in the past, as she had testified otherwise at a prior hearing. The court was not able to determine whether Mother was still giving the drug to the children, but it directed that its written order would not permit Mother to give any prescription drugs to the children unless prescribed by an independent, third party, unrelated to her. In addition, any prescription drug must be consented to by both parents.

As for the religion issue, the court concluded that it did not appear that Mother was "trying to sneak under the tent of religion and carry them off to the Roman Catholic faith rather than the Jewish faith." Instead, the court saw the access to both religions as "a wonderful opportunity" to teach the children there a lot of kinds of people in the world. The court therefore denied Father's motion for contempt. The court's order incorporating its oral ruling was filed on September 27, 2011.

On October 6, 2011, Mother filed a motion to alter or amend the court's order, arguing that the court's child support order did not take into account the fact that she would have to incur work-related child care expenses. Father opposed the motion on the ground that Mother had not, at the hearing, presented evidence that she would incur child care expenses. In addition, she had testified that her work schedule was flexible and she could adjust her schedule in accordance with the custody schedule, which should obviate the need for child care.

Father filed his own motion to alter or amend the court's May 14, 2010 opinion and judgment related to the proceeds from the sale of the marital home. Mother opposed that motion on the ground that, in the absence of fraud, mistake, or irregularity, his motion was untimely.

The court denied both parties' motions to alter or amend on November 23, 2011. Father filed his notice of appeal from the court's September 27, 2011 order on December 27, 2011.[6]

ANALYSIS

On appeal 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. Mother counters that the circuit court properly engaged in the required two-step process in reaching its decision to modify the custody agreement and awarding joint custody of the children to the parties. Given the deference to be afforded courts in custody decisions and the evidence presented in support of the court's ruling, Mother concludes, the court's order should not be disturbed.

Even though parents can make agreements regarding the custody of their children prior to and during the divorce process, in child custody cases, the circuit court functions as "both a protector of the child and as the resolver of a dispute between the parents."

McMahon v. Piazze, 162 Md. App. 588, 593 (2005). No private agreement by the parties would bar the court from determining what is in the best interest of the child.

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 court is required to assess whether there has been a material change in circumstance, *i.e.*, one the affects the welfare of the child. *Id*. at 594. The requirement is intended to preserve stability for the child and to prevent re-litigation of the same issues. *Id.* at 596. 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 *35-6.

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. The two analyses are, however, often interrelated because deciding whether the change in circumstances is sufficient to require a change in custody necessarily requires a consideration of the best interest of the child. *Id*. (citing *McCready v. McCready*, 323 Md. 476, 482 (1991)).

As oft-stated, in any child custody case, the "paramount concern" is the best interest of the child. The best interest of the child is not merely considered as one of the factors in determining custody; it is "the objective to which virtually all other factors speak." *Flynn v. May*, 157 Md. App. 389, 407 (2004) (quoting *Taylor*, 306 Md. at 303). The rights of the parents "sink into insignificance before that." *Id*. at 409 (quoting *Kartman v. Kartman*, 163 Md. 19, 22 (1932)).

Upon a sufficient showing of a material change in circumstance and the best interest of the child, it is within the sound discretion of the circuit court to modify custody based on the exigencies of the case before it. *Gillespie*, LEXIS 89 at *34. As such, a reviewing court may interfere with the circuit court's determination only upon a clear showing of an abuse of that discretion. *Id*.

In the instant matter, before Father had spoken one word of testimony or presented one piece of evidence, the circuit court found that a material change in circumstances had occurred as a result of Father's violation of what the court perceived as the *spirit* of the February 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. In so doing, the court reasoned, Father had not concerned himself with what might be good for the children, and his actions evidenced his belief that he was within his rights to exert complete control over the custody arrangement. As a result, the court concluded, Mother was being cut out of the children's lives and relegated to secondary status. No evidence presented in Father's case-in-chief persuaded the court otherwise.[7]

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 made much of, and 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 presented that would suggest that the parties' intent in including 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, to construe the phrase otherwise, that is, 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. To that end, the court did not address what effect Mother's attempts at picking the children up from their school or Father's house without prior notice or consideration of their activities would have on the sense of stability that may be required of small children.

Likewise, the circuit court did not sufficiently explain how Father's admitted failure to keep Mother informed of issues regarding the children's school and child care provider created a material change in circumstances affecting the children's best interest, particularly in the face of Father's concession that he no longer believed the agreement did not require him to inform Mother of such issues and the presumption that he would thus keep her adequately informed in the future.

We fail to find, in the circuit court's ruling or order, sufficient specific findings of fact supporting a material change in circumstance. Without sufficient findings of fact by the circuit court, we are unable to make an adequate determination of whether the lower court abused its discretion in modifying custody. Therefore, giving, as we must, due deference to the circuit court's observation of the demeanor of the parties and witnesses, *Gillespie*, LEXIS 89 at *34, we remand the matter 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, after finding a material change in circumstances, 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, as set forth above, but in conclusion, only stated that "when I weigh all of these factors, which I have, with some care, I come to the conclusion, I think which I have already stated, that [Mother and Father] can jointly parent these children, and I will award joint legal custody." The court made no specific mention of the interplay of each factor with the best interest of the children, other than to go on to say that "[t]hese children are entitled to have both of these imperfect parents." Simply because the parties may be able jointly to parent their children does not itself mandate a finding that it is in the best interest of the children for them to do so, and further findings of fact are required.

Furthermore, the court specifically decided against requiring the parties to abide by the terms of the February 2009 custody agreement in a more liberal manner, inexplicably refusing to "default to something that was agreed upon in 2009" and instead imposing joint custody upon the parties. Although the desires of the parents and the agreements between them are one factor a judge should consider in a best interest analysis, *Braun v. Headley*, 131 Md. App. 588, 610 (2000), the court did not explain whether or why the agreement as drafted by the parties was unworkable, and even presuming a violation of the agreement by one or both parents, we are aware of no Maryland case that holds that a violation of the terms of a custody agreement voids the agreement. Rather, courts have recognized that parental agreements concerning custody are entitled to considerable deference:

> [T]he virtues of parental agreement are strong, and the law appreciates them. The parents obviously know more about the family than a judge is likely to learn in a short, formal hearing. In a more or less amicable dissolution, the parents' natural desire to do what is best for their children gives any agreement about custody great weight as an indicator of what is in the best interest of the children.

McCready v. McCready, 323 Md. 476, 483 (1991) (quoting *Herron v. Herron*, 393 N.E.2d 153, 1155 (Ill. App.3d 1979)).

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.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED; CASE REMANDED TO THAT COURT FOR FURTHER FINDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. Dr. Campagnone has another child, Therese Woodbridge, from a previous marriage. Mr. Langstein has two children, Hanna Langstein and Alec Langstein, from a previous marriage. All three of those children are over the age of eighteen, and none is implicated in this appeal.

2. Father is an attorney for the federal government earning in excess of $150,000 per year. Mother is a child psychiatrist who, prior to the start of the divorce/custody litigation, had earned approximately the same income as Father. After losing a contract position and involving herself in numerous activities related to the litigation, she said her income had dropped to approximately $39,000 per year. The circuit court found that once the divorce litigation ended, there was no reason to assume her income could not rebound to its pre-divorce level or higher.

3. Father's vocational rehabilitation consultant testified that Mother was capable of earning approximately $165,000 per year. He further testified that a search had located 40 to 50 current psychiatrist positions then available in the greater Washington, D.C. area in that income range. In his opinion, Mother's job search effort had been "very weak."

4. On direct examination, Mother had vehemently denied having given Clonidine to the children.

5. Those factors include the: capacity of the parents to communicate and reach shared decisions affecting the children's

welfare; willingness of the parents to share custody; fitness of the parents; relationship established between the children and each parent; preference of the children; potential disruption of children's social and school life; geographic proximity of parental homes; demands of parental employment; age and number of children; sincerity of parents' requests; financial status of the parents; impact on state or federal assistance; benefit to the parents, and; other factors reasonably related to the issue of custody.

6. Although the 30 day period within which the appeal was required to be filed ended on Friday December 23, 2011, all Maryland judiciary offices were closed that day for an administrative furlough day. Judiciary offices were also closed on Monday, December 26, 2011 for the observance of Christmas, so, pursuant to Md. Rule 1-203, the notice of appeal was timely filed on December 27, 2011.

7. In its ultimate ruling, the court stated it "had some things to say about [the change in circumstances] at the end of the plaintiff's case, and really, nothing changed my mind as I heard all of the evidence as to whether this is a case that merits the Court addressing the best interest of the children." After citing alleged examples of Father's digression from the spirit of the custody agreement, the court concluded that the change in circumstances "is that despite the language of the consent agreement, [Mother] has been, and is being, cut out of the children's lives to such an extent that it would appear this document was intended for some other case, some other couple, some other children."

Cite as 11 MFLM Supp. 61 (2012)

Adoption/Guardianship: termination of parental rights: incarcerated parent

In Re: Adoption/Guardianship of Ronald J.

No. 2301, September Term, 2011

Argued Before: Krauser, C.J., Wright, Eyler, James R. (Ret'd, Specially Assigned), JJ.

Opinion by Wright, J.

Filed: September 11, 2012. Unreported.

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.*

This appeal arises from guardianship proceedings before the Circuit Court for Prince George's County, in which the circuit court terminated the parental rights of Warren L., appellant, and Patrina J., a non-party in this appeal, to their son, Ronald J. On September 17, 2009, the circuit court determined that Ronald J. was a Child in Need of Assistance ("CINA")[1] due to maternal neglect, and it committed him to the custody of the Prince George's County Department of Social Services ("the Department"). On September 27, 2010, the Department filed a petition for guardianship, which sought to terminate the parental rights of Warren L., Ronald J.'s then putative father, and Patrina J., Ronald J.'s mother. Patrina J. failed to file an objection to the termination of her parental rights;[2] however, on January 4, 2011, Warren L. timely objected. On October 19, 2011, and October 20, 2011, the circuit court held a hearing on the termination of Warren L.'s parental rights. On December 2, 2011, the court granted the Department's petition, and this appeal followed.

Questions Presented

Warren L. presents two questions for our review, which we have rephrased as follows:[3]

> 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?

Because we conclude that the circuit court did not violate Warren L.'s due process rights, it properly considered the appropriate statutory factors before terminating Warren L.,'s parental rights, and it did not abuse its discretion in concluding that termination of Warren L.'s parental rights was in Ronald J.'s best interests, we affirm.

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

Facts

I. Background

Ronald J. was born on August 20, 2009. At birth, he weighed four pounds and eleven ounces. Following his birth, the hospital performed toxicology screens on Ronald J. and Patrina J., both of which were positive for cocaine. The Department was notified, and on August 21, 2009, a representative of the Department visited Patrina J. and Ronald J. at the hospital. The Department issued "limited custody" to the hospital staff and Patrina J. and requested that Ronald J. remain in the care of the hospital staff until a facilitation meeting could take place on August 24, 2009.

At the facilitation meeting, the Department learned that Patrina J. had used cocaine three to five times per week during her pregnancy and that she used cocaine the day before Ronald J.'s birth. The Department also learned that she had been in treatment for drug abuse on five previous occasions, but she always left the program after about a week. Furthermore, the Department discovered that Patrina J. had three other children who were living with various relatives. During the meeting, the family agreed to place Ronald J. with his maternal great aunt. Patrina J. also agreed to enter treatment if Ronald J. could be with her. Additionally, Patrina J. informed the Department that she had been diagnosed with bi-polar disorder, major depression, and schizophrenia approximately two years before Ronald J.'s birth, but she was not currently taking her medication. Patrina J. further

informed the Department that Ronald J.'s father, Warren L., did not want to have anything to do with the child. She could not provide the Department with accurate contact information for Warren L.

On September 4, 2009, Ronald J. was taken to the Second Genesis drug treatment facility, where Patrina J. was receiving treatment, so that he could be with his mother. Shortly thereafter, Patrina J. left the Second Genesis Program, leaving Ronald J. at the facility. After Patrina J. abandoned him, the Department placed Ronald J. with his maternal great aunt. He remained in the custody of his great aunt until January 21, 2010, when the Department determined that Ronald J.'s maternal relatives could not provide a safe living space and placed Ronald J. in foster care. Ronald J. has remained with the same foster parents since that time.

In September 2009, Warren L. was incarcerated in the District of Columbia Central Detention Center to serve a sentence of twenty-seven months for possession with intent to distribute illegal drugs. Warren L. was later transferred to the Edgefield Federal Correctional Institution in Edgefield, South Carolina, and on September 20, 2011, Warren L. was released on parole. When the circuit court conducted a termination of parental rights ("TPR") hearing on October 19 and 20, 2011, Warren L. was living at his grandparents' former house, he was in the process of reinstating his social security disability benefits, and he was unemployed.

II. CINA Proceedings

On September 17, 2009, the circuit court determined that Ronald J. was a CINA due to maternal neglect and placed him in the care and custody of the Department. Throughout the proceedings, the Department attempted to maintain contact with Charlise J., Ronald J.'s paternal grandmother, regarding the paternal family's plans to care for Ronald J. On March 24, 2010, the Department filed a report with the circuit court stating that Charlise J. had "expressed an interest in being a possible placement resource for [Ronald J.] if [Warren L.] is shown to be the father through paternity testing." The report further stated that the Department's first contact with Charlise J. was at a hearing on February 4, 2010, and that Charlise J. had informed the Department that Warren L. was incarcerated and would remain in prison until sometime in 2011. On April 23, 2010, the Department contacted Charlise J. to ask if she was interested in visiting with Ronald J. on April 30, 2010. Charlise J. was initially undecided and expressed concern about meeting Ronald J. before Warren L.'s paternity had been established, and on April 25, 2010, she informed the Department that she would be unavailable to meet Ronald J. because she had to travel for a funeral. On October 12, 2010, Charlise J. contacted Faye Korcak, Ronald J.'s case worker with the Department, and Charlise J. again expressed an unwillingness to establish a relationship with Ronald J. because she had a "full plate" taking care of her father.

After learning on February 4, 2010, that Warren L. was incarcerated, the court ordered a paternity test. Warren L. did not provide a sample for the paternity test until November 24, 2010. On January 7, 2011, the paternity test results confirmed that Warren L. is the father of Ronald J.[4] After Warren L.'s paternity was established, the Department contacted him through a letter sent on. May 10, 2011. The letter informed Warren L. of Ronald J.'s adoptive placement and the Department's position that adoption was in Ronald J.'s best interests. The letter further asked Warren L. to contact the Department to discuss his plans for Ronald J. The Department did not receive a response to its letter, and on July 19, 2011, it contacted Warren L.'s case manager and asked her to arrange a telephone call with Warren L. On August 3, 2011, Korcak spoke with Warren L., and he confirmed that he had received the Department's letter. Warren L. further stated that he would defer making any decisions about Ronald J. until after he was released from prison.

III. TPR Proceedings

On August 4, 2010, the Department modified its permanency plan for Ronald J. to recommend that he be adopted by his foster parents, and on September 27, 2010, the Department filed a Petition for Guardianship with the Right to Consent to Adoption. On December 6, 2010, Warren L. received notice of the Petition for Guardianship proceedings, and on January 4, 2011, he filed a notice of objection to the termination of his parental rights. The circuit court held a trial regarding the termination of Warren L.'s parental rights on October 19 and 20, 2010, at which time it heard testimony from Ronald J.'s foster parents, Faye Korcak, Charlise J., and Warren L.

At the TPR hearing, Ronald J.'s foster parents testified that Ronald J. has had no contact with Warren L. since entering foster care at five months old. According to Ronald J.'s foster parents, the first time Ronald J. met Warren L. was the first day of the TPR trial. They further testified that Ronald J. had adjusted well to living with them, that he regularly visited with their extended family, and that they hoped to be able to adopt him.

Korcak testified regarding her involvement in the CINA proceedings.[5] Korcak testified that she first met Charlise J. following a hearing on February 4, 2010. According to Korcak, during their conversation, Charlise J. expressed some interest in caring for Ronald J., but wanted to wait until after Warren L. was determined to be the father through a paternity test

before she became involved. Korcak further stated that Charlise J. informed her that Warren L. had a serious drug problem with which he had struggled for about 20 years and that he received social security benefits for a mental disability.

Additionally, Korcak testified as to her efforts to contact Warren L. She stated that she first learned on October 12, 2010, that Warren L. was in prison in South Carolina. She further stated that, after Warren L.'s paternity was established, she sent him a letter to inquire about his plans regarding Ronald J. but never received a response. Korcak testified that she scheduled a phone call with Warren L. during which he told her that he would not make any decisions regarding Ronald J. until after he was released. Korcak further testified that she has had no other contact with Warren L.

Charlise J. also testified at the TPR trial regarding her discussions with Korcak and her opinion as to Warren L.'s ability to care for Ronald J. Specifically, Charlise J. testified that she first became aware of Ronald J. in September or October 2009 when Patrina J. called her to tell her about the child. She further testified that, at the time, she wanted to wait to care for Ronald J. until Warren L.'s paternity was established. Charlise J. also stated that she had concerns about Warren L.'s ability to care for Ronald J. She discussed Warren L.'s criminal history and stated that she was concerned he might not take the initiative to find employment so he could meet Ronald J.'s financial needs. According to Charlise J., Warren L. does not financially support himself except for government benefits that he receives for a mental disability. Charlise J. also stated that she did not let Warren L. live with her because he had previously stolen from her, but she would let him stay if he had custody of Ronald J.

Warren L. testified on his own behalf. He testified that he wants to care for Ronald J. and that he wants Ronald J. to be placed in the custody of Charlise J. until he is able to provide for the child. Warren L. admitted that he was not in a position to provide for Ronald J. at the time of the TPR trial, but he stated that he wanted to raise Ronald J. if he is financially able to do so.

At the end of the TPR trial, the circuit court ruled in favor of terminating Warren L.'s parental rights to Ronald J., stating as follows:

> [The Court]: I had a chance to review the father's proposed findings. I reviewed the proposed findings by the Department and the child's counsel. And preliminarily, I do state that I adopt the following of the proposed finding[s] by the father. That is, that the child, [Ronald J.,] was born on August 20, 2009. And it's undisputed that both the child and the mother tested positive for cocaine at the time of the birth.
>
> Two, that efforts were made to keep the child with the mother, but those efforts ultimately proved unsuccessful.
>
> Three, the child was then placed with the maternal relatives, but that placement failed.
>
> Four, the child was then placed in a foster home with the foster parents who wish to become adoptive parents.
>
> And five, it is undisputed that the child and foster parents have established a loving relationship, and that the child is well cared for.
>
> I further make the following findings, and all my findings [are] by clear and convincing evidence, unless I state otherwise. That the mother in this case is [Patrina J.], born on November 2nd, 1980 and is thus 29 years old.
>
> She was served by publication in this case on December 23, 2010. She did not respond, and therefore she is deemed to have consented to the termination of parental rights.
>
> The father is [Warren L.], born May 11, 1967. He is thus 43 years of age. He did file an objection. The issue of his paternity was not resolved until DNA[6] testing, conducted January 7, 2011. And the child's attorney withdrew her objection and consented to the Department's petition.
>
> I find in this case that the parents are, well, that the mother is unfit, and that there are exceptional circumstances that exist that make a continuation of the parental relationship detrimental to the best interests of the child, such that termination of the rights of the parent is in the child's best interest.
>
> * * *
>
> I find that the father is unfit to remain in a parental relationship with the child. He has had no contact with the child, except for in court the day of the hearing. That is in part due to his

incarceration.

He suffers from both drug dependence and a mental health disorder that makes it unhealthy and unsafe for him to be in a parental relationship with the child.

He admitted to not being able to care for the child at this time, and his express desire was to have his mother do that for him.

The mother's desire was to have the son step up and assume responsibility if he wished to do so. I further find the exceptional circumstances that exist in this case making a continuation of the parental relationship detrimental to the best interest of the child such that terminating the rights of the parents is in the child's best interest, as follows: The child has been in the foster care placement with his prospective adoptive parents from age five months until the present, which he is now two years and three months old.

He's had no relationship whatsoever with either biological parent His father, as I say, was just released immediately prior to the hearing that we held in this case. And that incarceration lasted, I guess, basically the child's entire life.

Since his release, in the month prior to the hearing, [Warren L.] made no attempt to contact the child or to make any plans for his care.

Again, he stated that he was unable to care for the child himself presently and wanted his mother to provide the care.

His mother stated that he, [Warren L.], was not able to care for the child now. And that while she would help, she wants [Warren L.] to be the primary caretaker if that is to occur. I have given consideration to the health and safety of the child, as well as all the factors that are required in Section D of the statute, including as follows: *The services that were provided to the parent before the child's placement.*

* * *

Then with regard to [Warren L.], the Department made efforts to locate [Warren L.], who was at that time the putative father to arrange for a DNA paternity test.

The Department learned that he had been transferred to a federal prison in South Carolina in 2010. And the Department wrote to him, May 10 of 2011, and did not receive a response.

The Department then made telephone contact to the father's case worker in the prison, and requested that the phone conversation be arranged. And ultimately in August of 2011, the [D]epartment spoke with [Warren L.] by telephone, while [Warren L.] was incarcerated.

That was the only direct contacts for successful back and forth contact between the Department and [Warren L.], until the date of the trial.

In that phone conversation, [Warren L.] stated that he would like to see the child but wouldn't make any decisions concerning his care until he was released from prison.

The Department also had several contacts with [Warren L.'s] mother, and offered to arrange visitation. *There were no service agreements, so that factor is not relevant.*

The results of the parents efforts to adjust their circumstances to make it in the child's best interest for the child to be returned to [the] home, including the extent to which the parent has maintained regular contact with the child.

* * *

[Warren L.] had no contact with the child until, as I say, the meeting in the courthouse, at the hearing which lasted about 30 minutes. The next appearance, contacts with the local department, ... [T]here's been no other contact with regard to [Warren L.]. I have already talked about the contact, and that was again failure to respond to a letter, one telephone conversation and then meeting in connection with the hearing.

Contact with the child's caregiver. Again, the mother saw the child

sporadically for the four months between September '09 and January of 2010 when the child was at his great aunt's house.

From that point on where the mother has had no contact with the child's caregivers and [Warren L.] has had no contact.

The parents['] contributions to the child's care and support. Neither of the parents are financially able to do so. Neither parent has provided any support. I [find] no evidence that they were able to do so.

Next is the existence of a parental [disability] that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for ongoing periods of time.

* * *

[Warren L.] also suffers from drug dependence, and was just recently released . . . from incarceration for a drug charge.

He is on supervised parole and must take drug tests as a condition of his parole. He has been using or selling drugs since he was 18 years old. He has several convictions relating to drugs, criminal convictions relating to drugs here, and in the District of Columbia.

He was referred to Second Genesis as a condition of probation in one of those cases, but violated his probation by failing to complete that program. He violated his probation a couple more times, picked up new charges, ultimately, the drug charge that resulted in his incarceration in a federal prison in South Carolina.

He also admitted to having been diagnosed with paranoid schizophrenia and paranoia, for which he receives social disability income. And he said he's not able to care for the child independently and he wants his mother to take custody.

The next factor is whether additional services would be likely to bring about a lasting parental adjustment so the child can be returned to the parent in an ascertainable time which is not to exceed 18 months from the date of placement.

Well, the child has already been in the custody of the Department for about two and a half years, 26, 27 months. There are no additional services the Department could offer the parents that would be likely to bring about a lasting parental adjustment. [Warren L.] is unable, admittedly unable, to care for the child at this time. And the mother has demonstrated no ability to care for the child.

Next is whether the child is abused or the parent has abused or neglected the child or another minor, and the seriousness of that abuse or neglect.

* * *

With regard to [Warren L.], I don't find that he has abused or neglected the child, and I reject those proposed findings from the Department.

The next factor is when on admission to the hospital for the child's delivery, the mother tested positive for drugs, and she did [test] positive for cocaine, heroin, and a heroin derivative. And again, as I noted, so did the child.

* * *

The next factor which is relevant here today is the child's emotional ties with and feelings toward the child's parents, the child's siblings and others who may affect the child's best interests significantly. The child has no emotional ties or feelings toward the mother. He hasn't seen her since he was six weeks old, nor to the father, who he saw only briefly in court, during the hearing in this case.

He has no emotional ties towards his siblings, two of whom he's never met, and one of whom he met one time for a half hour, when he was a year and a half old.

He does have, the child does have very close emotional ties to his prospective adoptive parents, and the father, Samuel G., who is the only father figure the child has known, and who he calls daddy.

He also has close emotional ties with his prospective adoptive mother, Elizabeth G., calls her mommy. And that's the only mother figure he's ever known. And again he calls her mommy.

He has further close emotional ties with the extended paternal family of the . . . prospective adoptive parents.

The child's adjustment to community, any home and placement in school. Well, he has adjusted well to the community. He doesn't attend school. He does attend day care. He's doing well there. He attends church. He's reached all his normal developmental milestones in the care of the prospective adoptive parents.

The child's feelings about severance of the parent/child relationship. The child is only two and hasn't sufficient basis to form a rational judgment with regard to those.

He doesn't have any parent/child relationship with his biological parents, and further, the Court can only assume that there wouldn't be any feelings about the severance of the parent/child relationship since he's not aware of such a relationship.

And the likely impact of terminating parental rights on the child's well-being. The Court finds that the impact of terminating parental rights of the natural parents would be in the child's best interests and well-being in that he would be immediately free to be legally adopted by the G.'s, the prospective adoptive parents, who are the only family that he has ever known.

The Court has considered the evidence under D-3, (1) and (2), as a continuance of serious act or condition that both apply to this case and find[s] that the legal department fulfilled its obligation to provide services to the parents.

So based on all those findings, which I think are all the ones that I'm required to make, I conclude that it's in the child's best interest that the rights of the natural parents to whom he has no contact, who have, who were unfit, and given the exceptional circumstances here, I find that those rights should be terminated, that it's in the child's best interest, and that I am going to order the termination of those parental rights.

(Emphasis added). Following the circuit court's announcement of its ruling, the Department asked that the court clarify on the record that those factors about which the court did not make findings were not applicable in this case, and the court did so.

Standard of Review

When reviewing the circuit court's ruling in cases involving the custody of children, we simultaneously apply three different levels of review:

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (first two alterations added, all other alterations in original). *See also In re Adoption/Guardianship No. 94339058/CAD*, 120 Md. App. 88, 101 (stating that when reviewing the circuit court's decision to terminate an individual's parental rights, "we must ascertain whether the trial court considered the statutory criteria, whether its factual determinations were clearly erroneous, whether the court properly applied the law, and whether it abused its discretion in making its determination.") (Citation omitted). When reviewing the court's exercise of its discretion as to the ultimate conclusion of whether to terminate parental rights without the consent of the parent, we are guided by the best interests of the child standard. *In re Abiagail C.,* 138 Md. App. 570, 586-87 (2001). Thus, where the circuit court's factual findings are not clearly erroneous and the court properly applied the law, we must affirm the circuit court's decision terminating an individual's parental rights unless we determine that no reasonable person would conclude that terminating the individual's parental rights was in the best interest of the child, *In re Adoption/Guardianship*

No. 3598, 347 Md. 295, 312 (1997), or that the circuit court's decision is so far removed from any center mark imagined by this Court and beyond the fringe of what we deems minimally acceptable as to constitute an abuse of discretion. *In re Shirley B.*, 419 Md. at 19.

Here, Warren L.'s due process claim asserts that the circuit court erred as a matter of law by proceeding to a hearing on the Department's TPR petition without providing Warren L. with notice and an opportunity to be heard in the CINA proceedings. Therefore, we review Warren L's due process argument *de novo*. Warren L.'s second argument is that the circuit court erred in its consideration of the statutory factors contained in Md. Code (1984, 2006 Repl. Vol.) § 5-323(d) of the Family Law Article ("FL"). Because Warren L.'s second argument challenges the court's ultimate conclusion that a review of the factors contained in FL § 5-323(d) warranted terminating Warren L.'s parental rights, we review the circuit court's decision for an abuse of discretion.

Discussion

I. Warren L. failed to preserve his due process claim for appellate review.

Warren L. argues that he was denied his right to due process when the circuit court held a TPR hearing and terminated his parental rights without providing him with notice of the underlying CINA proceedings or an opportunity to participate in Ronald J.'s permanency planning. Warren L. further contends that he was deprived of due process when he was not notified of his right to counsel in the CINA proceedings and was not represented in that matter. Additionally, he asserts that his rights were violated when the CINA proceedings were conducted without identifying him as the father because the court was obligated to make such a determination, his identity was known to the court since the filing of the initial petition, and he could easily be located as he was known to be incarcerated in federal prison. Finally, Warren L. asserts that he was denied his statutory rights to receive progress reports from the Department regarding Ronald J., which he argues the Department is required to provide to him pursuant to Md. Code (1973, 2006 Repl. Vol.), § 3-826 of the Courts & Judicial Proceedings Article ("CJP"), as well as his right to be represented by counsel at every stage of the proceedings involving Ronald J. afforded to him by CJP § 3-813.

The State responds that Warren L.'s claims with respect to the CINA proceedings are meritless for five reasons: 1) Warren L. was a putative father during the CINA proceedings, 2) the circuit court made no findings during the CINA proceedings that were adverse to Warren L., 3) the circuit court, in making its findings at the guardianship hearing, expressly found that Warren L. had never abused or neglected Ronald J., 4) during the CINA proceedings, Warren L. failed to respond to the Department's efforts to involve him in Ronald J.'s life, and 5) Warren L. failed to make his due process argument in the circuit court, and therefore, he did not preserve his claim for appellate review. The State further contends that the circuit court conducted the guardianship proceedings in full accordance with all constitutional and statutory requirements. Specifically, the State avers that Warren L. personally appeared for the TPR hearing, had the assistance of counsel, and enjoyed all of the protections of a formal, adversarial proceeding, including the presumption that it is in the child's best interest to continue the parent-child relationship, the requirement that parental unfitness or exceptional circumstances sufficient to overcome the presumption in favor of the natural parents be established by clear and convincing evidence, and the requirement that the circuit court's exercise of its discretion be guided by the factors set forth in FL § 5-323(d).

Our review of the record leads us to conclude that Warren L. never raised his due process claims before the court in the guardianship proceedings, and therefore, he has failed to preserve the issue for our consideration on appeal. Maryland Rule 8-131(a) provides that "[o]rdinarily, the appellate court will not decide any . . . issue [, other than subject matter jurisdiction and, where it has not been waived, personal jurisdiction,] unless it plainly appears by the record to have been raised in or decided by the trial court." *See Robinson v. State*, 404 Md. 208, 216 (2008) ("It is well-settled that an appellate court ordinarily will not consider any point or question 'unless it plainly appears by the record to have been raised in or decided by the trial court.") (Citations omitted); *Fitzgerald v. State*, 384 Md. 484, 505 (2004) ("It is well-established and this Court has held consistently that we, in accordance with Rule 8-131, ordinarily will not consider any point or question not plainly raised or decided by the trial court.") (Citations omitted). As the Court of Appeals noted in *Baltimore Teachers Union v. Board of Education*, 379 Md. 192, 205-06 (2004), "[i]t is particularly important not to address a constitutional issue not raised in the trial court in light of the principle that a court will not unnecessarily decide a constitutional question." (Citations omitted). *See also Burch v. United Cable Television of Balt. Ltd. P'ship*, 391 Md. 687, 694-96 (2006). Thus, we can only reach the merits of Warren L.'s due process claims if he asserted them during the guardianship proceedings. Because we conclude that he did not, we affirm.

At no point prior to or during the TPR hearing did Warren L. argue that he was deprived of his right to 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 to dismiss at the start of the proceedings. Additionally, although Warren L.'s attorney claimed that Warren L. had been deprived of an opportunity to participate in the CINA proceedings due to the delay in conducting the paternity test, he did not take the additional step of arguing that the failure to include Warren L. in the CINA proceedings violated Warren L.'s constitutional right to due process in the guardianship proceedings. This specific issue needed to be raised to preserve the issue for appellate review, and, in its absence, we need not address the merits of Warren L.'s claims.

To the extent that the remaining attack is on the sufficiency of due process during the TPR hearing, we will restrict our discussion to that issue. As we stated in *In re Cross H.,* 200 Md. App. 142, 150, *cert. granted*, 422 Md. 352 (2011), "[w]hile a CINA adjudication must precede a TPR determination, it is a separate legal proceeding." Although Warren L. relies on alleged deficiencies in the process afforded to him during the CINA proceedings to create the foundation for his due process claims, we need only review the process afforded to Warren L. during the TPR proceedings to decide his only assertable due process claim.

Both the Fourteenth Amendment to the United States Constitution[7] and Article 24 of the Maryland Declaration of Rights[8] provide Warren L. with a right to due process before the State can deprive him of his life, liberty, or property. Generally, the right to due process requires that the litigants have "an opportunity to be heard suitable to the occasion and an opportunity for judicial review at least to ascertain whether the fundamental elements of due process have been met." *In re Maria P.*, 393 Md. 661, 674 (2006) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 23-24 (1996)). In *In re Maria P.*, the Court of Appeals further stated:

> Due process, thus, is a flexible concept that calls for such procedural protection as a particular situation may demand. It does not require procedures so comprehensive as to preclude any possibility of error. Stated another way, due process merely assures reasonable procedural protections appropriate to the fair determination of the particular issues presented in a given case. Therefore, the asserted denial of due process is to be tested by an appraisal of the totality of the facts in a given case.

Id. at 674-75 (citations omitted).

The right to raise one's child without excessive interference from the State has long been recognized as a fundamental liberty interest of a parent that cannot be taken away unless clearly justified. *In re Blessen H.*, 163 Md. App. 1, 15 (2005), *aff'd*, 392 Md. 687 (2006). *See also Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982); *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981); *In re Yve S.,* 373 Md. 551,566 (2003). "Consequently, any proceeding involving an intrusion upon that fundamental right must comport with due process." *In re Blessen H.*, 163 Md. App. at 16. As we stated in *In re Blessen H.*, 163 Md. App. at 16:

> "*Lassiter, Santosky*, and their progeny recognize three basic principles: 1) parents have a fundamental liberty interest in the care, custody and management of their children, 2) when the State moves to abrogate that interest, it must provide the parents with fundamental fair procedures, and 3) the process due to parents in the circumstances runs on a balancing of the three factors specified in *Matthews v. Elderidge*, 424 U.S. 319, 96 S. Ct. 893,47 L. Ed. 2d 18 (1976), *i.e.*, the private interests affected by the proceeding, the risk of error created by the State's chosen procedure, and the countervailing governmental interest supporting the use of the challenged procedure."

Id. (quoting *In re Adoption No. 93321055*, 344 Md. 458, 491 (1997).

In considering whether Warren L. received sufficient process in the guardianship proceedings, we turn to the Court of Appeals's decision in *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 in TPR cases, three factors "serve to give heightened protection to parental rights in the TPR context." *Id.* The first factor that the Court identified "is the implicit 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." *Id*. The second element that protects the parental relationship is that, in a TPR case, "the kind of unfitness or exceptional circumstances necessary to rebut the substantive presumption must be established by clear and convincing evidence," rather than the lower preponderance standard that applies in custody cases. *Id.* at 499. The third factor that the Court identified was the General Assembly's effort to circumscribe and guide the circuit court's exercise of its discretion

through the factors set forth in FL § 5-323(d). *Id.* Thus, as the Court of Appeals stated in *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90 (2010):

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

Id. at 110 (quoting *In re Rashawn H.*, 402 Md. at 501).

Here, Warren L. was notified of the guardianship petition, he had the assistance of counsel at the TPR hearing, and he had all the benefits and protections of a formal, adversarial proceeding, including the protections described in *In re Rashawn H.* Specifically, the circuit court found that Warren L. was an unfit parent thereby rebutting the presumption in favor of continuing the parent-child relationship, the court explicitly stated that all of its findings were by clear and convincing evidence, and it individually considered each applicable factor from FL § 5-323(d). Moreover, during the TPR hearing, Warren L. had the opportunity to examine witnesses, present evidence, and confront the State's witnesses. The proceedings before the circuit court during the TPR hearing were in no way deficient; therefore, Warren L. was not deprived of his right to due process.

II. The circuit court properly considered all of the requisite statutory factors before terminating Warren L.'s parental rights.

Second, Warren L. argues that the circuit court erred when it terminated his parental rights because the Department did not make reasonable efforts to reunite him with Ronald J. Therefore, Warren L. contends that the court incorrectly concluded that FL §§ 5-323(d)(1)(i)-(iii) were satisfied and that the court could not properly consider whether additional services would have been likely to result in a lasting parental adjustment such that the child could be returned to his or her parents pursuant to FL § 5-323(d)(2)(iv). Warren L. further asserts that the circuit court erred in finding that he was an unfit parent and that there were exceptional circumstances that made continuing the parent-child relationship between Warren L. and Ronald J. detrimental to Ronald J.'s best interests. Specifically, Warren L. argues that the court lacked any basis to find that he was an unfit parent because he had never been provided with services or an opportunity to raise Ronald J. Additionally, Warren L. contends that the court erred in finding exceptional circumstances without hearing any evidence indicating that Ronald J. would be harmed by living with his biological family or by being removed from his current foster parents. Finally, Warren L. argues that the court erred in declining to place Ronald J. in his grandmother's custody.

The State responds that the circuit court did not abuse its discretion because it carefully considered all of the evidence, made specific findings on each of the applicable statutory factors, and faithfully followed the statutory mandates. The State further argues that the record sufficiently supports the court's findings that Warren L. was unfit to raise Ronald J. and that there were exceptional circumstances such that termination of the parent-child relationship was in Ronald J.'s best interests. Finally, the State asserts that the circuit court was not required to place Ronald J. in the custody of his grandmother because relative placement is only favored over non-relative placement to the extent that placement with the child's relatives is consistent with the child's best interests. According to the State, there was sufficient evidence that placement with Ronald J.'s grandmother was not in his best interests, and therefore, the court did not err in declining to do so.

FL § 5-323 is the Maryland statute that governs the termination of parental rights. FL § 5-323(b)[9] authorizes the circuit court to terminate the parent-child relationship if the court finds by clear and convincing evidence that the parent is unfit or that exceptional circumstances exist that would make continuing the parent-child relationship detrimental to the child such that ending the relationship is in the child's best interests. When the circuit court determines whether terminating the parent-child relationship is in the child's best interests, it is required to consider a number of factors set out in FL § 5-323(d), which provides as follows:

> *Considerations*. Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and

safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:

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

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

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

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

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

I. the child;

2. the local department to which the child is committed; and

3. if feasible, the child's caregiver;

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

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

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

(3) whether:

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

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to;

1. chronic abuse

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

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

1. a crime of violence against;

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

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

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

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

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

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

(iv) the likely impact of terminating parental rights on the child's wellbeing.

The court is further required to make specific findings of fact as to each factor listed in FL § 5-323(d) and determine expressly whether those findings demonstrate parental unfitness or exceptional circumstances

that would make a continuation of the parent-child relationship detrimental to the child's interests. See *In re Adoption/Guardianship No. 95195062/CA*D, 116 Md. App. 443, 457 (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 (citation omitted).

Here, the circuit court considered all of the required factors before terminating Warren L.'s parental rights. In issuing its ruling from the bench, the court stated its findings as to each factor on the record and explained that all of its findings were by clear and convincing evidence. Specifically, regarding the services the Department provided to Warren L., FL § 5-323(d)(1), the court found that the Department attempted to locate Warren L. to determine his paternity, the Department wrote to Warren L. on May 10, 2011, after learning that he had been transferred to a federal prison in South Carolina, and the Department contacted him by phone to inquire as to his intentions regarding Ronald J. The court further found that the Department had several contacts with Warren L.'s mother and attempted to arrange an opportunity for her to visit with Ronald J. Finally, the court concluded that the Department did not enter into a service agreement with Warren L., so that factor was not relevant.

Warren L. focuses on the paucity of reunification services provided to him by the Department to argue that the circuit court erred in terminating his parental rights. However, as stated above, no one factor is determinative when the court considers whether terminating the parent-child relationship is in the child's best interest. See *In re Adoption/Guardianship No. 94339058/CAD*, 120 Md. App. at 105; *In re Adoption No. 2428*, 81 Md. App. 133, 139 n.1 (1989). Rather, the court must consider all of the factors together in making its decision, and it is only when we conclude that in light of all of the factors taken together that the circuit court abused its discretion that we will reverse the court's decision.

After making the above findings as to the Department's reunification efforts towards Warren L., the court continued its discussion of the statutorily required factors by addressing the parents' efforts to adjust their circumstances such that it would be in Ronald J.'5 best interests to be returned to them. FL § 5-323(d)(2). The court concluded that Warren L. had no contact with Ronald J. prior to a meeting just before the commencement of the TPR hearing. The court further found that Warren L. was unresponsive when the Department contacted him, and that Warren L.'s mother had very little contact with the Department as well.

Additionally, the court found that neither parent had provided financial support for Ronald J. and that neither parent was financially able to support him. FL § FL 5- 323(d)(2)(ii). Next, the court found that Warren L. suffers from a disability that makes him unable to care for Ronald J.'s physical and psychological needs for long periods of time. FL § 5-323(d)(2)(iii). Specifically, the court found that Warren L. suffered from drug dependence, that he had a lengthy criminal history with a number of periods of incarceration, and that he has been diagnosed with paranoid schizophrenia and paranoia. The court also considered whether additional services would be likely to bring about a lasting parental adjustment such that Ronald J. could be placed in Warren L.'s care. FL § 5-323(d)(2)(iv). The court found that there are no additional services that the Department could offer Warren L. that would be likely to bring about such an adjustment. Ronald J. had already been in the custody of the Department for two and a half years. The court further found that neither Warren L. nor his mother had demonstrated an ability to care for Ronald J. and that Warren L. had admitted this fact.

Next, the court considered whether Ronald J. had been abused or neglected by his parents. FL § 5-323(d)(3)(i). The court found that Patrina J. had neglected Ronald J., but it concluded that Warren L. did not abuse or neglect Ronald J. The court also considered whether the child tested positive for drugs at birth, FL § 5-323(d)(3)(ii), and found that both Patrina J. and Ronald J. had tested positive for cocaine, heroin, and a heroin derivative.

The court proceeded to address Ronald J.'s emotional ties with, and feelings towards, Warren L. and Warren L.'s family. FL § 5-323(d)(4)(i). The court found that Ronald J. has no emotional ties with Warren L. as he had only met Warren L. for the first time just before the TPR hearing. The court further found that Warren L. has close emotional ties with both of his foster parents and with his foster father's extended family. The court also addressed Ronald J.'s positive adjustment to the community. FL § 5-323(d)(4)(ii). It noted that Ronald J. was doing well in day care and had become a part of his church community. The court further considered Ronald J.'s feelings about terminating the parent-child relationship with Warren L., FL § 5-323(d)(4)(iii), and the likely impact of terminating the parent-child relationship on Ronald J.'s well-being, FL § 5-323(d)(4)(iv). The court found that, as Ronald J. had no relationship with Warren L., he would not have strong feelings about terminating Warren L.'s parental rights. The court further found that terminating Warren L.'s parental rights would be in Ronald J.'s best interests and well-being, as Ronald J. would then be free to be adopted by his foster parents, who are the only family he has ever known.

Based on all the factors taken together, the court

correctly ruled that Warren L. was an unfit parent and that exceptional circumstances existed such that terminating Warren L.'s parental rights was in Ronald J.'s best interests.

Subsequently, at the Department's request, the court clarified that any factor that the court did not directly address was not applicable in this case. The circuit court considered each factor as required by FL § 5-323(d) and, in light of the court's findings as to each factor, we cannot conclude that it abused its discretion in ruling that Warren L. was an unfit parent, or that exception circumstances made continuing the parental relationship detrimental to Ronald J.'s best interests. Therefore, the circuit court did not err in terminating Warren L.'s parental rights.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. A "Child in Need of Assistance" is a child who requires court intervention because he or she has been abused, has been neglected, has a developmental disability, or has a mental disorder, and his or her parents, guardian, or custodian, are either unwilling or unable to provide proper care and attention to the child and the child's needs. Md. Code (1973, 2006 Repl. Vol.), § 3-801(f) of the Courts & Judicial Proceedings Article.

2. By failing to file a timely objection to the petition, Patrina J. consented to the termination of her parental rights by operation of law pursuant to Md. Code (1984, 2006 Repl. Vol.), § 5-320(a)(1)(iii)(C) of the Family Law Article.

3. Warren L. presented the issues as stated below:

> 1. Were the father's due process rights afforded to him by both the Maryland and Federal Constitutions violated by proceeding to a termination of parental rights hearing without allowing him notice of or an opportunity to participate in the underlying CINA proceedings?
>
> 2. Did the court err in terminating the father's parental rights pursuant to the statutory factors in Md. Code Ann. Fam. Law Art., § 5-323?

4. According to the Department's brief, for unknown reasons, the paternity test results were not transmitted promptly to either the Department or Warren L.

5. The circuit court admitted her as an expert witness in child welfare.

6. DNA means deoxyribonucleic acid. Maryland Code (2003, 2011 Repl. Vol.), Pub. Safety Art., § 2-501(g). DNA is the carrier of genetic information that comprises chromosomes and is individual to each person, aside from identical twins. For a comprehensive review of the science behind DNA, *see Armstead v. State*, 342 Md. 38 (1996).

7. The Fourteenth Amendment provides in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, arc citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

8. Article 24 of the Maryland Declaration of Rights provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land.

9. FL § 5-323(b) provides as follows:

> *Authority*. If, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.

Cite as 11 MFLM Supp. 73 (2012)

Custody and visitation: CINA: award to other parent

In Re: Miriam R.

No. 02546, September Term, 2011

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

Opinion by Salmon, J.

Filed: September 11, 2012. Unreported.

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.

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

Miriam R. (born September 16, 2004), appellee, is the daughter of Sylvia R. ("Mother"), appellant, and William M. ("Father"). Miriam was declared a child in need of assistance ("CINA") in June 2010, based on findings that Mother neglected Miriam; that the child was in need of educational and therapeutic 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. Miriam was placed in the protective custody of the Prince George's County Department of Social Services (the "Department" or "DSS"), appellee. The Department placed her in foster care while simultaneously working to reunite her with Mother or Father. 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 appeals the order of the Circuit Court for Prince George's County, sitting as a juvenile court, granting sole legal and primary physical custody of Miriam to Father, awarding Mother "limited, supervised visitation . . . including any telephone or other contact, on dates, times and conditions agreed by Father in consultation with the child therapist," and closing the CINA case. Mother raises two issues that we revise as follows:

> 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 Md. Code, § 9-101 of the Family Law Article ("FL")?
>
> II. Did the juvenile court err in awarding Mother supervised visitation as permitted by Father?

Because the record supports the juvenile court's conclusion that it is in Miriam's best interest to be in the custody of Father, against whom there have been no allegations or findings of child abuse or neglect, we conclude that the court did not abuse its discretion in awarding Father custody and that it did not err in doing so without making the findings required under FL § 9-101. Nevertheless, we shall vacate the visitation order because it improperly delegates to Father the court's responsibilities to determine whether and how often visitation may occur, fails to make the "no likelihood" determination required under FL § 9-101 with respect to Mother, and fails to establish the supervision conditions under which Mother may visit Miriam.

FACTS AND LEGAL PROCEEDINGS
May 10, 2010 to June 22, 2010: Shelter Care and CINA Declaration

On May 10, 2010, six-year-old Miriam was removed from Mother's custody and placed into shelter care as a result of Mother's psychiatric hospitalization and a report of neglect. On June 22, 2010, the juvenile court declared Miriam a CINA because she had "no home to which to return at present where [her] proper care and safety can be ensured."

That declaration was premised on the court's factual finding that

> the following circumstances exist: The Respondent [Miriam R.] and her mother [Sylvia R.] relocated from Cleveland Ohio, and had been staying in the Cadillac Motel in Brandywine, MD for several days. A local church and friend, Robin Duncan-Chisholm, assisted the mother with paying for

the motel. On 5/8/10 the mother indicated that she began receiving threatening phone calls. She told the DSS worker she has been receiving calls on her cell phone saying someone (who she usually identified as Donald) was going to shoot her in the head. The Respondent [Miriam R.] has stated repeatedly that someone (Donald) was trying to shoot her mother in the head. At one point the Respondent stated that the person trying to shoot her mother in the head wanted to "steal her mother's brain because her mother is smarter than him." The mother of the Respondent called the police to report each threat after she states it was received and police responded on three occasions to investigate. Mother also called 911 on 5/9/10 stating that another man, a member of the church named Marcus Carr, had shot a police officer in the head at the home of the Respondent's godmother, Robin Duncan-Chisholm, and had taken a police car and was on his way over to shoot Mother. During the call, Mother insisted she could hear the man talking over the radio stating he was coming to shoot her. Mother was frantic and repeatedly insisting she needed the police and was going to be shot and that a policeman had already been shot and his police car taken and the shooter was on his way to the Cadillac Motel to shoot her. Mother had the Respondent with her at the time and the Respondent can be heard in the background on the 911 call while Mother is making these statements. Mother can be heard repeatedly telling the Respondent to get up and get ready and they had to go. The police arrived at both the Respondent's godmother's home and the motel where Respondent was staying armed and ready to confront an armed man [that] shot a police officer even though no such thing had occurred.

On 5/9/10, the Respondent's mother also called EMS because she was experiencing shortness of breath. While en route to the hospital, the Respondent told the EMS paramedic that "her father threatened her mother with a handgun last night." The mother wouldn't give any further information about the incident. While at Southern Maryland Hospital, the mother indicated that she was treated, left the hospital building, but returned for help after being assaulted on hospital grounds. At some point, the mother was admitted to the psychiatric ward for 5 days. She was discharged with a referral for a follow-up assessment. Her diagnosis upon discharge was psychosis NOS. She was prescribed medication while in the hospital but apparently stopped taking it upon discharge. Before being medicated at the hospital, Mother was paranoid and combative, and was responding to internal stimuli. Mother reported hearing, "I will shoot you." Mother denies she has any mental health issues and insists she is fine and can properly care for the Respondent. Mother went for a mental health assessment after hospital discharge and reported no issues and that she stopped taking the medication prescribed in the hospital even though the hospital records indicate she told the staff at the hospital she would keep taking the medication. The Respondent's mother states her parents are deceased and she has no family in this area. She states she and the Respondent used to live in Charles County, MD. **The Respondent father's name is William [M.] and he lives in Cleveland Ohio. The father was contacted and stated he does not have a relationship with the Respondent and only saw her a few times when the Respondent and her mother lived in Cleveland Ohio.**

At each court hearing, the Respondent talks incessantly about a man trying to shoot her mother in the head and needing a safe place. The Mother's mental health issues have clearly put the Respondent in jeopardy and have affected her own mental health. The Respondent is obsessive about a man trying to "shoot her mommy" and "steal her mommy's brain." Mother has clearly stated that someone is trying to shoot her in the

head on many occasions and has even gone so far as to call 911 based on her belief. These fears have been transmitted to the Respondent who has adopted the fears. Worse yet, the Respondent's safety has been placed at issue by Mother calling 911 and having police officers and SWAT team members arrive at locations believing an armed man is present that shot people in the head. If Mother is not delusional, then the Respondent's safety is in jeopardy given that an armed man is out to shoot Mother and Mother is on the run from him with Respondent in tow. If Mother is delusional, as all the evidence indicates, then the Respondent is in jeopardy given that Mother had psychotic episodes and involves the Respondent such that the Respondent is in fear and is placed in jeopardy by Mother's actions as a result of her delusions. In any event, it is contrary to the Respondent's welfare and not in her best interests to be placed back in the care and custody of her mother.

The Father does not have a relationship with the Respondent and wants her to remain with the godmother while Mother gets housing and mental health treatment. He states he would like to build a relationship with the Respondent and would be a possible placement resource for the Respondent if all other options fail. He does not state that he is ready, willing or able to care for the Respondent today and given the Respondent's age and her lack of relationship with Father it would not be in the Respondent's best interests and it would be contrary to her welfare to place her in Father's care and custody. In addition, Father has never physically presented himself to the Court and has not been assessed by DSS as a placement for the Respondent. Father has stated he has issues with his driver's license and cannot drive to Maryland or get here otherwise.

(Emphasis added.)

In its June 22, 2010 order, the juvenile court placed Miriam in the care and custody of the Department and directed the Department to place the child with her godmother. Mother and Father were given "liberal and supervised [visitation] as arranged by DSS or its designee[,]" with Mother's visitation to occur "at least weekly[.]" Mother and Father were ordered to "enter into a service agreement with DSS," to "attend parenting classes," and to sign any releases and consents necessary for the Department "to monitor attendance, progress, and results[.]" In addition, Mother was ordered to "attend mental health treatment, including individual and family therapy, and psychological and psychiatric evaluations and take psychotropic medications as prescribed and sign consents, releases, and waivers necessary for DSS to monitor attendance, progress, and results[.]"

In turn, the Department was ordered to provide the following services:

- All necessary medical, dental, and vision services for Respondent;
- Individual therapy for the Respondent;
- Individual therapy for Mother;
- Family therapy for the Respondent, Mother, and Father as deemed therapeutically appropriate;
- Parenting classes for Mother and Father;
- Visitation with Mother;
- Exploration of Father as a possible placement resource; and
- Housing assistance for Mother[.] (App.6)

August 18, 2010: Order Changing CINA Placement

On August 18, 2010, after a CINA review hearing requested by the Department regarding Miriam's placement, the juvenile court ordered Miriam to be moved to a non-kinship foster home, on the grounds that

> Mother knows where the Respondent is living and going to day care while the Respondent is placed with her godmother and the mother has made credible threats to kidnap the Respondent by stating she was going to do so and by calling several people, including the day care to inquire about the criminal liabilities for doing so and stating she was coming to get the Respondent. Mother even said in

> open court that she had to restrain herself with great difficulty from kidnapping the Respondent on or about 8/17/10. . . . The Respondent's safety in her placement is an issue given Mother's statements about kidnapping the Respondent.

(Emphasis added).

In addition, the juvenile court suspended Mother's supervised visitation with Miriam, based on her kidnap threats and the following problems that occurred during the weekly visits supervised [since June, 2012] by the Department.

> During the visits, Mother has blocked the [Department] worker's view of the Respondent, has cut the Respondent's clothing with scissors, has questioned why the Respondent leaves by another door, and has hidden in the bushes to watch the Respondent leave. During her last visit with the Respondent, Mother prevented the DSS workers and the security guard from removing the Respondent from the visitation room, asked the security guard if she had "hypnotized" the Respondent, and ma[de] "gang signs" at the security guard and worker, and made veiled threats to the security guard and worker. . . . Mother threatened to kill or bomb the DSS supervisor . . . when the DSS supervisor called to discuss a placement change for the Respondent and suspending visitation. Mother made statements such as, "You won't live to see the next day," "You don't know who you are messing with," "I'm going to come there and bust you in your f____ face," and "Woman, you won't wake up tomorrow."

In light of these circumstances, the juvenile court ordered that "telephone contact between Respondent, Miriam R. and her Mother is to be liberal but supervised in consultation with Respondent's therapist[.]" Father's visitation with Miriam remained "liberal and supervised as arranged by DSS[.]" In addition, the court affirmed all other Department services and conditions previously ordered in June 2010.

August 2010 Through August 9, 2011: Evaluation, Services, and Visitation

Throughout the ensuing year, during which permanency planning hearings were held on October 10, 2010 and February 14, 2011; the Department's plan remained for Miriam to be reunited with Mother or Father. To achieve that goal, the Department offered services to Miriam, Mother, and Father.

In September 2010, Miriam was diagnosed with post-traumatic stress disorder ("PTSD") "due to persistent parenting and educational neglect and exposure to Mother's unresolved psychotic disorder and mental health issues." During her regular therapy sessions, Miriam reported to her therapist that she "has nightmares about Mother" and did not want to visit with Mother by phone. Although Miriam initially made calls to Mother with the therapist, the child had "bad dreams afterward that her mother is coming to take her away." In addition, Mother called the therapist's office and was "making threats, cursing staff, and being disrespectful."

In February 2011, the juvenile court adopted the therapist's recommendation that Miriam's calls to Mother be made only at bi-weekly therapy sessions "and only when the Respondent is willing[.]" Miriam thereafter "declined telephone contact with her mother," and her "nightmares stopped when she was no longer forced to talk to her mother on the phone."

During this year following the suspension of supervised in-person visitation between Mother and Miriam, Mother persistently declined or delayed acting on referrals to court-ordered counseling and parenting classes. As the juvenile court found after an August 9, 2011 permanency planning hearing,

> DSS referred Mother to Dr. Lewis for a psychological evaluation before the [February 2011] review hearing and at that time she spoke to him by phone but has not gone in for an evaluation. Mother wrote Dr. Lewis a letter that she submitted as evidence at the last hearing [in February 2011] in which she insists that she has no issues. In the letter Mother also admitted stating she was going to punch the DSS supervisor in the face. (The DSS supervisor obtained a peace order against Mother regarding that and other threats.) Mother has stated she is in therapy and will get parenting classes through the therapist. Mother has refused to sign a service agreement with DSS and refused to sign consents to release information about any mental health treatment she has sought on her own. DSS also tried to work with Mother on housing, parenting classes, and therapy but DSS has had trouble communicating with

> Mother and Mother has cursed staff and hung up on them. Mother refused parenting classes through DSS and has sought her own mental health treatment to prove she has no mental health issues. Mother refused housing assistance. DSS reports Mother continues to use inappropriate language with the DSS workers and hangs up on them when they try to talk to her by phone.

During 2011, Miriam's therapist and the Department also complied with the juvenile court's order to work with Miriam "to get her accustomed to her father and his family," which includes three children, the youngest of whom is a half-sister who is between one and two years older than Miriam. Miriam visited Father in Ohio for five days after Thanksgiving, accompanied by a Department worker. Father came to visit Miriam in Maryland just after Christmas, and Miriam thereafter enjoyed return visits with Father and other family members in Ohio over Easter and Memorial Day holidays, and for two extended summer visits. The Department did a home health assessment at Father's house in Ohio. Father completed one-one-one parenting classes and participated in family therapy by phone.

On July 25, 2011, the Department recommended to the juvenile court that Miriam be placed into Father's care and custody and that the CINA case be closed. In support, the Department cited Mother's continuing declination of its referrals "for individual therapy, parenting classes, a psychological and psychiatric evaluation," her failure "to discuss her progress with these court ordered tasks or provide any documentation that they have been completed[,]" her uncertain mental health condition, and her contentious communications with the Department. Based on Miriam's therapeutic and educational progress, her development of a good relationship with Father, Father's successful completion of therapy and parenting classes, Father's ability and willingness to provide a safe home, the Department believed that it would be in Miriam's best interest for Father to be awarded custody.

August 9, 2011: Permanency Planning Hearing

At the permanency planning review hearing on August 9, 2011, before a juvenile court master, court-appointed counsel for Miriam reported that Miriam was "doing great" and had developed a good relationship with Father through "a lot of successful visitation[.]"

Counsel for Miriam agreed with the Department's recommendations regarding custody and visitation, asking for a continuation of the "no contact" order and the supervised telephone visitation order that had been in effect.

The master concluded that the Department made reasonable efforts to reunify Miriam with both Mother and Father,

> because DSS maintained the Respondent in a foster home for her educational, medical, and therapeutic needs are being addressed while continuing to work with Father and attempting to work with Mother on the issues that brought the Respondent into care and reunifying the Responded with family. The Respondent attends school and day care. She completed Kindergarten. She did well at school and day care. The Respondent is in weekly therapy and her therapist had worked with the Respondent to get her accustomed to her father and his family. The Respondent had telephone contact with Father and visited with Father four times since the last hearing, including two extended visits in Ohio over the summer. . . . The Respondent has declined telephone contact with Mother and her therapist continues to state it is not therapeutically appropriate. The Respondent's nightmares stopped when she was no longer forced to talk to her mother on the phone. The Respondent indicated to the court that she has not talked to "Sylvia" lately and last did [so] at her therapist's office. She also said that sometimes she likes to talk to her because she misses talking to her "real mommy." Father is attending one-on-one parenting classes and is participating in family therapy with the Respondent by phone. The Respondent was able to meet with Father's therapist when she visited him in Ohio.

After reviewing the evidence and consulting with Miriam, the master concluded and stated on the record that it would be in Miriam's best interest for Father to have "sole physical and legal custody" and for Mother to have

> supervised telephone contact . . . as arranged by father and as agreed upon by father, taking into consideration Miriam's therapeutic needs, at least bi-weekly, and that any visitation or contact between Miriam and her

mother would be supervised and only as agreed to by father on any dates, times or locations that are agreed upon by father, so it would be in father's discretion based on the circumstances as to whether or not there will be visitation and contact other than the telephone contact I've already described.

The master then recommended the following findings:

> The court finds that it is appropriate to place the Respondent in the care and custody of her father as it is not contrary to the Respondent's welfare and it is in her best interest to be "returned" to his custody at this time. There are no allegations against Respondent's father that pose a safety issue for her. The only allegation sustained regarding Father was that he and the Respondent did not know each other and had not had a relationship when the case came in and he lived in Ohio. Everyone agreed that it would not be appropriate to place the Respondent with Father early on before they had forged a relationship and had had some therapy sessions and visits and DSS has had a chance to flesh out Father's situation to ensure he was ready, willing, and able to care for the Respondent. Father has cooperated with DSS in every way. He and the Respondent have gotten to know each other over the past year. Even though father lives out-of-state, Father and the Respondent have participated in family therapy by phone. The Respondent has visited Father in his home state. DSS has gone out and accompanied the Respondent on a visit to Father in Ohio and has seen his home and fleshed out the situation. Father has gone to parent counseling and the Respondent has even met this counselor. Father has visited the Respondent in Maryland and has met and interacted with her foster family. Father is now prepared to take custody of the Respondent and the Respondent is ready to go live with him. The new school year is getting ready to begin and the Respondent should be settled in with Father prior to the school year commencing. The Respondent has been in care for over a year and Mother has done little to work with DSS to demonstrate that she has addressed her mental health issues such that she can safely care for the Respondent and meet the Respondent's needs. The Respondent's mother still has not engaged in services with DSS and her past actions and mental health history are such that the Respondent is not safe with her. It is not for appropriate to return the Respondent to Mother's care and custody as Mother has suffered from at least one psychotic episode that placed the Respondent's safety in jeopardy and she has not been cooperative with DSS to allow DSS to ensure that she is receiving appropriate mental health treatment and is stabilizing such that she can once again care for the Respondent safely. Mother states she has done all that has been asked but she refuses to work with DSS to allow DSS to confirm this and to assess Mother's ability to safely parent the Respondent. Mother's inappropriate cursing, threats, and uncooperative attitude make it difficult to assess her parenting skills and her current mental health status. In addition, the Respondent's therapist and her psychological evaluation indicate that she has mental health issues as the result of her experiences with Mother and needs mental health treatment. Even supervised visitation with Mother is not therapeutically recommended for the Respondent, much less placing the Respondent back in her mother's care and custody.
>
> The Court finds that the appropriate permanency plan for the Respondent is reunification with Father with implementation 8/2011. The Court finds that it is no longer contrary to the Respondent's welfare or best interest to be placed in Father's care and custody. There are no allegations regarding Father in the petition other than their lack of relationship and familiarity with one another at the time the Respondent came into care. Father and

> Respondent have now gotten to know each other and have been in individual and family therapy. The Respondent has had many extended visits at Father's residence since Father was located and notified that Respondent was in the foster care system. DSS has done a home visit to Father's residence. The Respondent is almost 7 years old and has been in care for over a year. It is in her best interest to be placed in Father's custody so she can return to family, be enrolled in school before school starts, and have permanence. It is not appropriate to return her to Mother's care and custody due to Mother's violent actions and threats, threats to kidnap Respondent, and Mother's unresolved mental health issues that pose a danger to the Respondent. The Respondent suffers from PTSD due to parental neglect and emotional abuse by Mother and it is not therapeutically recommended that Respondent visit with Mother or speak to her on the phone, much less be placed in Mother's custody.
>
> The Court did consult with the Respondent in an age-appropriate manner on the record today and heard from the Respondent's attorney at the hearing concerning the Respondent's views on the case and permanency plan. The Respondent showed videos of her singing at her Kindergarten graduation, sang a song, and stated she was going today to live with her Father "forever" in Ohio. She indicated she would be sharing a bedroom with her 8 year old half-sister. The Respondent stated she would be visiting her foster mommy and godmother and "Ms. Nicole" [the Department worker] and was very excited about going to live with Father. The Respondent stated she had not talked to "Sylvia" in some time and the last time was at her therapist's office. She stated she sometimes missed talking to her "real mommy."

In a separate proposed order, the master recommended that Father be awarded custody and that Mother,

> because of her history of neglect and abuse of the minor child, shall have no visitation or contact with the minor child unless agreed upon by Father and supervised by Father or his designee on such date and times as agreed upon by Father and Mother in light of any therapeutic issues experienced by Respondent as a result of such contact; and . . .
>
> that the Respondent is to have liberal but supervised telephone contact with the Respondent bi-weekly as arranged by and as agreed upon by Father in light of any therapeutic issues experienced by Respondent as a result of such contact.

August-December 2011: Exceptions, Visitation, and Final Order

After the August permanency planning hearing, Miriam was placed with Father in Ohio, began attending first grade, and had frequent telephone visitation with Mother. The Department worker assigned to the case made monthly visits to Miriam.

Mother filed exceptions to the master's recommended findings and order. On November 17, 2011, the juvenile court held an evidentiary hearing on Mother's exceptions. Counsel for Mother complained, *inter alia*, that

> the father has prevented [Mother] from seeing her daughter. There is no visitation agreement of any sort in this case. Care and custody was just provided to the father, and mom really has no visitation because the Court allowed the father to make the decision, and the father has consistently said, "You haven't proven to me that you have no problem," even though the doctors, as the Court can reference in the paperwork, have said that there is no problem, to the point where the father won't let my client take her daughter to church-related activities, which are very important to her and had been in their family prior to Department involvement.

Mother requested that custody be awarded to her. Alternatively, Mother asked that the CINA case be kept open with Miriam "remain[ing] in Ohio" and that Mother be given "a specific visitation plan" that would "allow Mom to see the daughter."

In response, counsel for Miriam pointed out that "it's my understanding that since Miriam has been

placed with her father that [Mother] talks to Miriam almost daily on the phone, which is actually more contact than was being had when Miriam was in foster care."

Father, who participated in the hearing by telephone, acknowledged that Miriam's "relationship with her mom is very important[.]" He stated that, although he had "no problem with [Miriam] visiting with her mom[,]" he still had "concern" regarding "some of the threats . . . received from her mom on her mom's end via email."

By order dated December 28, 2011, the court denied Mother's exceptions, adopted the master's proposed findings of fact, and entered an order that differed from the master's recommendation only in that it did not set a bi-weekly schedule for telephone visitation. In this appeal, Mother challenges the following terms of the order:

- "that Father, William M . . ., is awarded primary physical and sole legal custody of the minor child, Miriam R.";
- "that Mother, Sylvia R. is awarded limited, supervised visitation with the minor child, including any telephone or other contact, on dates, times and conditions agreed by Father in consultation with the child therapist"; and
- "that this case is closed for statistical purposes."

DISCUSSION

Standards and Statutes Governing Change in Permanency Plan for a CINA and Award of Custody/Visitation

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 changing the permanency plan for Miriam by awarding custody to Father and visitation to Mother, as follows:

> In child custody disputes, Maryland appellate courts simultaneously apply three different levels of review:
>
> > When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly,] if it appears that the [juvenile court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.
>
> Accordingly, . . . with regard to the juvenile court's ultimate decision to modify the . . . permanency plans, we must determine whether the court abused its discretion. In doing so,
>
> we must be mindful that
>
> > [q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred. In sum, to be reversed the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. . . .
>
> In CINA cases where a child ha[s] been removed from the family home, a juvenile court is required to periodically conduct "a permanency planning hearing to determine the permanency plan for a child[.]" Md. Code (1974, 2006 Repl. Vol., 2009 Supp.), § 3-823(b) of the Courts and Judicial Proceedings ("CJP") Article. Thereafter, the court must review the child's permanency plan "at least every 6 months until commitment is rescinded. . . ." CJP § 3-823(h)(1)(iii). . . .
>
> > The permanency plan is an integral part of the statutory scheme designed to expedite the movement of Maryland's children from foster care to a permanent living, and hopefully, family arrangement. . . . Services to be provided by the local social service department and commitments that must be made by the parents and children are determined by the permanency plan.
>
> It is the court's "responsibility [to] determin[e] the permanency plan, . . . and [to] justify[ ] the placement of chil-

dren in out of home placements for a specified period or on a long-term or permanent basis. . . ."

At the hearing, the court must consider the following factors:

> (i) **the child's ability to be safe and healthy in the home of the child's parent;**
>
> (ii) **the child's attachment and emotional ties to the child's natural parents and siblings;**
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;
>
> (iv) the length of time the child has resided with the current caregiver;
>
> (v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and
>
> (vi) the potential harm to the child by remaining in State custody for an excessive period of time.

Md. Code (1999, 2006 Repl. Vol., 2009 Supp.), § 5-525(f)(1) of the Family Law ("FL") Article.

Moreover, at the hearing, the court shall:

> (i) **Determine the continuing necessity for and appropriateness of the commitment;**
>
> (ii) Determine and document in its order whether reasonable efforts have been made to finalize the permanency plan that is in effect;
>
> (iii) **Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment;**
>
> (iv) Project a reasonable date by which a child in placement may be returned home, placed in a preadoptive home, or placed under a legal guardianship;
>
> (v) Evaluate the safety of the child and take necessary measures to protect the child; and
>
> (vi) **Change the permanency plan if a change in the permanency plan would be in the child's best interest.**

CJP § 3-823(h)(2) (emphasis added). *See also* FL § 5-525(e)(1) (The Department shall make "reasonable efforts . . . to preserve and reunify families[.]").

The statute, however, must be interpreted and applied in light of the constitutional rights of parents. This is because "we have recognized that parents have a fundamental, Constitutionally-based right to raise their children free from undue and unwarranted interference on the part of the State, including its courts." . . . [W]hen the fundamental rights of parents are involved,

> . . . we have not discarded the best interest of the child standard, but rather have harmonized it with that fundamental right.
>
> We have created that harmony by recognizing a substantive presumption — a presumption of law and fact — that it is in the best interest of children to remain in the care and custody of their parents. The parental right is not absolute, however. The presumption that protects it may be rebutted upon a showing either that the parent is "unfit" or that "exceptional circumstances" exist which would make continued custody with the parent detrimental to the best interest of the child.

Thus, [the Court of Appeals] has often recognized that, **absent compelling circumstances to the contrary, the plan should be to work towards reunification as it is presumed that "it is in the best interest of the children to remain in the care and custody of their [biological] parent[ ]."** Nevertheless, that course must be "consistent with the best interests of the child[.]" CJP § 3-823(e)(1)(i). In

other words, "where the fundamental right of parents to raise their children stands in the starkest contrast to the State's effort to protect those children from unacceptable neglect or abuse, the best interest of the child remains the ultimate governing standard."

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 the past neglect or abuse will not be repeated.

Id at 18-22 (case citations omitted and emphasis added).

Mother challenges the decision to change Miriam's permanency plan by awarding custody to Father, rather than Mother. In addition, Mother challenges the award of supervised visitation on the terms permitted by Father. For the reasons set forth below, we shall affirm the custody award but vacate the visitation award.

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 pursuant to the Family Law Article and in failing to award custody to her mother, who is a more fit parent." We address each contention in turn.

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

Mother's threshold complaint alleges procedural error — that the juvenile court erred as a matter of law in awarding Father custody without complying with FL § 9-101, which provides:

> (a) *Determination by the court.* — In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> (b) *Specific finding required*. — Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

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 and, instead, agree with the Department and Miriam that the juvenile court was not required to make FL § 9-101 findings with respect to Father before awarding him custody.

Our task in construing any statute is to implement the General Assembly's intent, and our primary tool is determining legislative purpose is the language of the statute itself. *See Lockshin v. Semsker*, 412 Md. 257, 275 (2010). "If the language of the statute is unambiguous and clearly consistent with the statute's apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written, without resort to other rules of construction." *Id*.

In this instance, we need look no further than the words of 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 of custody or visitation only to parents who previously neglected or abused a child, not to parents against whom there have been no allegations of abuse or neglect. The further abuse or neglect determination mandated in subsection (a) of FL § 9-101 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*." (Emphasis added.) 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*[.]" (Emphasis added.) 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) ("The burden . . . is on the parent previously having been found to have abused or neglected his or her child to adduce evidence and persuade the court to make the requisite finding under § 9-101(b).").

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 FL § 9-101 findings with respect to him. We are not persuaded by Mother's contention that Father neglected Miriam by abandoning her 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's financial support to Miriam or the reasons for the lack of relationship between Miriam and Father before the Department became involved. Instead, 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.

At the CINA declaration hearing in June 2010, the only finding with respect to Father was that he did "not have a relationship with the child and state[d] he only saw her briefly when the child and her mother lived in Cleveland, Ohio." By the February 14, 2011 permanency planning hearing, the juvenile court concluded that it was in Miriam's best interest to "remain in the care and custody of DSS," because Miriam and Father "are just getting to know each other and everyone agrees that it would not be in [Miriam's] best interest to place her in Father's care and custody at this time until her mental health issues are addressed and the school year is over." By August 2011, the Department, the master, and ultimately the court determined that it would be in Miriam's best interest for Father to be awarded custody because he had "cooperated with DSS in every way" and had developed a good relationship with Miriam "over the past year," so that Miriam would have a safe and permanent home with him.

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

B. Custody Award to Father Rather than Mother

Mother also challenges on substantive grounds the juvenile court's decision to award custody of Miriam to Father, rather than to her. She argues that

> the court had no basis to believe that the mother would be unfit to parent Miriam for three reasons. First, Miriam was removed from her mother based on an allegation that she threatened the child, which was later proved to be not true. Second, there was no credible evidence that Miriam's problems were related to trauma from living with her mother, as opposed to trauma from being removed from her only parent. And three, the Department's continual allegations that the mother suffered from a mental health condition were not supported by the various medical records offered by the mother.

We shall address — and reject — each of Mother's contentions.

As a threshold matter, because Mother did not challenge either the shelter care order or the CINA declaration, she failed to preserve her complaint that Miriam was initially removed from her care and custody in May 2010 on the basis of a false allegation that Mother threatened to shoot Miriam. In any event, the record establishes that Miriam was neither adjudicated to be a CINA, nor continued in foster care, on the basis of such a false allegation.

To be sure, the Department initially proffered at the May 10, 2010 shelter care hearing that "[o]n 5/9/10 the Respondent's mother told the Respondent she was going to shoot the Respondent in the head." However, that proffer was subsequently clarified in the Department's May 25, 2010 "Merits Report" to the juvenile court and an addendum thereto, which did not repeat the allegation but instead reported that Miriam consistently said that someone was coming to shoot Mother in the head.[1] Moreover, the evidentiary basis for the CINA declaration, as stated in the juvenile court's June 22, 2010 order, was the Department's proffer "that its witnesses would testify" that the shooting threat was to Mother, rather than to Miriam.

With respect to Mother's second claim, the record fully supports the inference drawn by the juvenile court that Miriam's educational and mental health problems stemmed from the neglect and trauma she experienced while in Mother's care and custody, not from the Department's removal of Miriam from Mother. It was undisputed that when she came into the Department's care on May 10, 2010, six-year-old Miriam was homeless, that she had not been enrolled in school, and that she had adopted her mother's fear that someone was trying to shoot her. At the October 18, 2010, February 14, 2011, and August 9, 2011 permanency planning hearings, the juvenile court found that as a result of a psychological evaluation conducted on September 14, 2010, 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 August 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 telephone contact because the calls triggered nightmares that Mother would come and get her. The court adopted that recommendation, and Miriam consistently declined telephone visitation with Mother, after which her nightmares ceased. Furthermore, the court consulted with Miriam and her court-appointed counsel throughout the CINA proceedings, during which 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 the Department's removal of the child from Mother's care and custody.

Finally, we are not persuaded by Mother's contention that "the Department's continual allegations that [she] suffered from a mental health condition were not supported by the various medical records offered by the mother." Mother does not even identify in the record "the various medical records" that she relies on, much less state why she believes that such records establish that she does not have a mental health disorder. As we have detailed, there was ample evidence presented throughout the CINA proceedings 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 health 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 in turn, this presumption protects the fundamental right of parents to raise their own child when there is no reason for government intervention. *See Shirley B.,* 410 Md. at 21; *Yve S.*, 373 Md. at 571. In light of these paramount principles promoting preservation of parent-child relationships, the statutory scheme governing CINA proceedings is designed to ensure that a child who has been placed into foster care will be returned to the home of a parent as soon as the court determines that the child can be physically and emotionally safe there. *See Shirley B.*, 419 Md. at 21. *See generally* FL § 5-525(f)(1)(i) (juvenile court must conduct a permanency planning hearing every six months, at which the court must consider "the child's ability to be safe and healthy in the home of the child's parent"); CJP § 3-801(f)) (defining CINA as "a child who requires court intervention because" she has been abused or neglected "and . . . [t]he child's parents . . . are unable or unwilling to give proper care and attention to the child and the child's needs"); CJP § 3-823(h)(2) (at a permanency planning hearing, the juvenile court must "[d]etermine the continuing necessity for . . . the commitment" and "[d]etermine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment," and "[c]hange the permanency plan if a change . . . would be in the child's best interest.").

Because CINA proceedings may not be used to hold a child in foster care when, as in Miriam's case, there is a parent who is ready, willing, and able to care for her, the juvenile court did not abuse its discretion in declining Mother's request to continue the CINA proceedings in order to give her additional time and opportunity to obtain custody of Miriam. Based on the record we have set forth in detail, we hold that 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's 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." In Mother's view, the award of visitation is legally flawed because it "abdicated" to Father, a non-judicial person, the power to determine whether and how often Mother may have supervised visitation with Miriam.[2]

Applying lessons from *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. These cases teach that when parents cannot agree to terms of visitation, a court may not award visitation to one parent at the discretion of the other parent, and that when the child in question has been neglected by the parent seeking visitation, the court may not award supervised visitation to the neglectful parent without making the determinations mandated by FL § 9-101, including what conditions of supervision are necessary to protect the child's well-being.

In *Shapiro*, this Court held that "a denial of visitation until such visitation is recommended by the child's physician and then only upon such terms, guidelines

and at such places as the physician may recommend constitute[d] an improper delegation of judicial responsibility to the physician." *Shapiro*, 54 Md. App. at 484. In *Justin D.,* the Court of Appeals approved our holding in *Shapiro*, observing that "*Shapiro* sets the proper framework" for the principle that the task of resolving disputes regarding visitation may not be delegated to a person outside the judiciary. *See Justin D.,* 357 Md. at 446-47. *See also Mark M.*, 365 Md. at 704 ("The legal principle fashioned . . . in *In re Justin D.* . . . . was that a trial court may not delegate judicial authority to determine the visitation rights of parents to a non-judicial agency or person."); *Von Schaik v. Von Schaik*, 200 Md. App. 126, 134 (2011) ("Maryland cases have made it clear that a court may not delegate to a non-judicial person decisions regarding child visitation and custody.").

Justin D. and *Mark M.* concluded, that judicial authority to establish visitation may not be delegated to the Department or the child's therapist. *See Mark M.,* 365 Md. at 407; *Justin D.*, 357 Md. at 447. And in *Van Schaik*, 200 Md. App. at 134-35, we vacated an order providing that if the divorcing parents did not agree "on any disputed matter within twenty-four (24) hours, then the attorney for the minor children shall serve as the 'tie- breaker' and resolve the dispute."

None of these cases involved a visitation award in which the custodial parent held a "trump" card permitting him to disallow all visitation to the other parent, to decide the nature and frequency of any visitation, and to establish the terms of supervision during visitation. Yet the "anti-delegation" principle clearly applies to this scenario, as the Court of Appeals recognized in *Justin D.*, when it affirmed "the unchallenged notions that a court may not delegate judicial authority to a non-judicial agency or person and that the vesting of complete discretion in decisions regarding visitation *to the custodial parent* amounts to an improper delegation." *Justin D.*, 357 Md. at 446 (emphasis added and internal quotation marks omitted).

As *Justin D* and *Mark M* make clear, it is a court's duty to resolve parental disputes over visitation. To be sure, the Court of Appeals has recognized that when parents agree and there is no indication that the child has been neglected or abused, a visitation award may "run the gamut" from "'reasonable,' but otherwise unspecified, visitation," to "a rather detailed schedule with respect to times, places, and conditions." *Justin D.*, 357 Md. at 447. *Cf. Meyr v. Meyr*, 195 Md. App. 524, 551 (2010) (court did not err in ordering visitation on a schedule comparable to that previously agreed to by divorcing parents, where no specific schedule was proposed). But when two parents "are unable or unwilling" to reach an agreement, the court may not delegate its responsibility to settle that dispute by establishing a minimum schedule of visitation. *Justin D.*, 357 Md. at 447-48.

This "non-delegation" principle applies with greater urgency when the child in question has been abused or neglected by the parent seeking visitation, because in such cases the court has a heightened statutory duty under FL § 9-101 to ensure that any award of visitation adequately considers the "special needs" and history of a such a "troubled child." *Id.* at 449. Thus, in every instance where the parent seeking visitation has abused or neglected the child (regardless of whether the child has ever been declared a CINA), the court has a duty under FL § 9-101 to "determine whether abuse or neglect is likely to occur if . . . visitation rights are granted" and to deny visitation unless it "specifically finds that there is no likelihood of further child abuse or neglect by" that parent. Although the statute permits a court to "approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child," it clearly contemplates that the court, rather than a non-judicial person, will determine what conditions of supervision would be appropriate to protect the child from abuse or neglect during such visitation.

In summary, a court must not permit another agency or person to perform its duty to resolve a visitation dispute between parents. Fundamental decisions as to whether any visitation will be allowed, and if so, how much at a minimum, must be made by the court, not a non-judicial entity such as the Department, a therapist, an attorney, or a parent. Furthermore, when as in this case, the child in question 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, but only if the court establishes supervision terms for the protection of the child's physical and emotional well-being during such 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 FL § 9-101.The order improperly delegates the judicial responsibility to decide visitation, permitting Father to decide whether Mother may have any visitation at all and, if so, how much. Furthermore, the order is silent as to likelihood of abuse or neglect by Mother and 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.

For these reasons, we must vacate the visitation order and remand for further proceedings. More than eight months have elapsed since the December 28, 2011 order. From the appellate bench, we cannot evaluate what type of visitation has taken place, what effect such visitation has had on Miriam, or whether there is a dispute as to the nature, frequency, or conditions of visitation. 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 the applicable statutory requirements under FL § 9-101.

ORDER OF DECEMBER 28, 2011 AFFIRMED AS TO CUSTODY BUT VACATED AS TO PARENTAL VISITATION. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 1/2 BY APPELLANT, ½ BY PRINCE GEORGE'S COUNTY.

FOOTNOTES

1. In that May 25, 2010 report, the Department advised the court that its report in support of the shelter care petition stated, "Reportedly, Ms. R's daughter, Miriam R. approached the security guard in the hospital, reporting that her mother had threatened to shoot her in the head." However, the Department subsequently corrected that statement, recounting the following information developed after the shelter care petition:

- On May 10, 2010, Mother told the Department worker that when she returned to the hospital to get her ankle treated, "her daughter (Miriam) told the Security Guard that someone was going to shoot her mother in the head."
- During the May 10, 2010 shelter care hearing, "Miriam stood up three times in the Court stating that "Donald was going to shoot mommy in the head."
- Ms. Duncan-Chisholm told the Department worker that 25 police officers came to her home on May 8, 2010 "because [Mother] called 911 stating an officer had been shot in the head in her home then that a man was coming to the motel to shoot her in the head."
- On May 12, 2010, Mother reported to the Department worker that while she was staying at the Cadillac Motel, "she started receiving phone calls on her cell phone that someone was going to shoot her in the head[.]"

In an addendum dated May 24, 2010 [sic], the Department further stated that during a May 14, 2010 visit with the Department worker, Miriam insisted that "Don was trying to kill her mommy and take her brain" and that she "needs to protect her mommy with knives."

2. The Department contends that Mother "has waived any challenge to the court's visitation award in this Court" because she "agreed to these visitation terms in the trial court[.]" We disagree. The record shows that, at the November 2011 exceptions hearing, Mother opposed the visitation award on the ground that it failed to set a minimum level of visitation and permitted Father to unilaterally decide whether and when Mother could visit with Miriam. Moreover, the juvenile court explicitly stated that it understood Mother's concerns to be that (1) "what the Master proposed was just sole custody to the father and that we need to be more specific about a visitation plan for the mom," and (2) "the visitation allowed to her in the proposed custody order was simply that which the father agrees to and supervised by the father, even though there is no history of the two parents communicating in a positive manner." Thus, Mother did preserve her complaint that the court erred in ordering supervised visitation as permitted by Father.

Cite as 11 MFLM Supp. 87 (2012)

Custody and visitation: joint legal custody: alcoholism no bar

James F. Knott, Jr.
v.
Charissa Gatti f/k/a Charissa Knott

No. 824, September Term, 2011

Argued Before: Zarnoch, Graeff, Pierson W. Michael (Specially Assigned), JJ.

Opinion by Zarnoch, J.

Filed: September 17, 2012. Unreported.

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 making its custody decision.

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

Appellant, James Knott ("Knott"), appeals a judgment of the Circuit Court for Baltimore County providing for joint legal custody of Knott's minor children with appellee, Charissa Gatti ("Gatti"), formerly Charissa Knott. Knott also challenges the court's requirement of an updated custody evaluation. For the following reasons, we affirm the circuit court's rulings.

FACTS AND LEGAL PROCEEDINGS

Knott and Gatti were married on February 19, 2005, in Florida. Both are residents of Maryland. They have two minor children: O., born August 28, 2007, and I., born October 8, 2008.

Gatti has struggled with alcoholism, prescription medication abuse, and an eating disorder. She has undergone outpatient and inpatient treatment and evaluations several times over the past ten years and has been diagnosed with anorexia nervosa (purging type) and alcohol abuse. Medical and psychiatric records in evidence also indicate that Knott has struggled with anger problems during the marriage. In July 2009, Gatti was hospitalized for alcohol and prescription medication abuse and subsequently admitted to a residential treatment facility for inpatient addiction treatment. Gatti returned home after four weeks of addiction treatment and relapsed several times in the following months, sometimes when she was alone with the children.

Knott filed a Complaint for Limited Divorce in December 2009, seeking, *inter alia*, permanent legal custody and sole physical custody of the children. Knott and Gatti separated in January 2010, when Gatti left Maryland for Kentucky, where her parents reside. The circuit court entered a consent order on February 16, 2010, granting *pendente lite* sole physical and legal custody of the children to Knott. More permanent custody and visitation arrangements were to be proposed by Dr. Kathleen Killeen, a psychologist selected by the parties to evaluate and make recommendations regarding Gatti's contact with the children.

In her Counter-Complaint for a Limited Divorce, filed in April 2010, Gatti sought, *inter alia*, joint legal and shared physical custody of the children. In June 2010, Knott filed an Amended Complaint for Absolute Divorce, alleging adultery, abandonment, and constructive abandonment as grounds for divorce and requesting sole legal and sole physical custody of the children, with supervised rights of visitation by Gatti.

Dr. Killeen completed her evaluation of the parties and their children in August 2010 and recommended that Knott and Gatti share joint legal custody, with Knott holding tie-breaking authority. Dr. Killeen made two sets of recommendations for physical custody: "Phase I" and "Phase II." Phase I recommended that Gatti be granted unsupervised visitation with the children three days each week, provided that Gatti met certain requirements for alcoholism treatment. These requirements included Gatti's placing of an interlock device on her car, undergoing random drug testing eight times each month, attending ninety Alcoholics Anonymous meetings within the first ninety days following the adoption of the custody recommendations, and submitting to the supervision of a case manager. If Gatti failed to meet any of these requirements, unsupervised visitation would be suspended immediately and replaced by visitation supervised by a neutral and independent third party. Once Gatti achieved six consecutive months of sobriety under the Phase I terms,

the parties could move to Phase II of the physical custody recommendations, which would allow for unsupervised overnight visits between Gatti and the children. Additionally, Dr. Killeen recommended that the parties undergo an "update evaluation" within twelve to eighteen months of the implementation of the custody arrangement.

Trial on the merits began on January 24, 2011,[1] and continued on January 25, January 28, and March 4. Evidence was presented concerning the grounds for divorce,as well as the parties' parental fitness, financial situations, potential living arrangements post-divorce, and monetary and non-monetary contributions to the marriage. The court also heard evidence on Gatti's alcohol abuse and steps towards recovery, though both pre-trial discovery and testimony on these subjects were protracted and marred by disputes between the parties. For example, Gatti failed to disclose relevant information about her treatment and relapses on several occasions, including withholding information from her own experts.

Dr. Killeen testified extensively about Gatti as an individual and a parent, based on her written evaluation and observations. She found that Knott and Gatti had not had any disagreements about major decisions in the children's lives, such as decisions about their pediatrician, their preschool, or religious matters. From her interviews with people who knew the parties well, such as their doctors and therapist, she learned that "there was never any issue raised about [Gatti's] parenting" and that Knott "often [spoke] very positively about her." Dr. Killeen also described how Gatti exercised "good judgment in terms of setting boundaries with" the children, such as deterring them from "dangerous or inappropriate" behavior, engaging them in "play that was appropriate for their level," and "cook[ing] them appropriate meals." She observed that since Knott and Gatti's separation, the children had suffered from "disruptive attachment" and that their attachment to their mother "had an anxious rather than a secure quality to it."

At the conclusion of the last day of the trial, the court granted an absolute divorce on the grounds of a voluntary separation of one year. The court awarded physical custody of the children to Knott and joint legal custody to Knott and Gatti under most of the terms suggested by Dr. Killeen.[2] The judge found it "abundantly clear that both parents love these children very, very much" and observed that "both parties deserve time with their children." She had "no doubt that both [parties] are capable of being extraordinary parents" and found no evidence that Knott was unfit as a parent. She noted that although "[i]t may take some time for things to settle down," she believed that the parties "will be able to maintain some semblance of natural relations" in the future.

Because Gatti was college-educated, "articulate," and "intelligent," the judge found "no reason why [Gatti] cannot become working in very short order." However, the court also said that Gatti had "a very, very serious alcohol problem" and was not convinced that she was in recovery. The judge was likewise convinced that Gatti's testimony about her alcoholism was not credible and that she would need "extensive help in hopefully recovering from this disease." The court noted that it would not, however, "fault [Gatti] or counsel for agreeing to sole physical and legal custody" for Knott earlier in the divorce proceedings and in fact gave Gatti and her counsel "credit for agreeing to the *pendente lite* sole physical custody under the circumstances."

Ultimately, given the concerns about Gatti's health and stability, the court declined to permit any unsupervised visitation between Gatti and the children.[3] The court therefore ordered supervised visitation for Gatti and the children on Tuesdays, Thursdays, and alternate Fridays and Saturdays. The court also ordered an updated evaluation of the visitation and access schedule to follow twelve to eighteen months after the implementation of the Judgment of Absolute Divorce, to be performed by Dr. Killeen or another evaluator by mutual agreement of the parties.

The court also considered the award of counsel fees and, in doing so, noted that "it has become clear that perhaps [Gatti] was not fully candid with her Counsel over the course of this year's worth almost of proceedings." Without making a formal finding, the court speculated that Gatti's alcoholism contributed to the "unconscionable" delay and defense of the proceedings. The court ultimately awarded Knott $30,000 in attorneys' fees.

The court's factual findings and rulings were reflected in a Judgment of Absolute Divorce issued on April 4, 2011, which forms the basis for this appeal.

After this appeal had been filed,[4] in February 2012, Gatti filed a Petition for Modification of Judgment, alleging that her continued sobriety since the entry of the Judgment constituted a material change in circumstances and requesting, *inter alia*, that the court terminate Knott's tie-breaking authority as well as the requirement of supervised visitation. Knott's Answer, filed in June 2012, requested, *inter alia*, that he retain legal and physical custody of the children and that the court deny Gatti's request for an updated evaluation by Dr. Killeen. On June 18, 2012, the court ordered an updated evaluation with Dr. Killeen and required that Dr. Killeen's report be made available not less than ten days before the then-scheduled hearing date of September 19 and 20, 2012. Dr. Killeen filed an updated custody evaluation under seal

on August 29, 2012.

Additional facts relevant to the analysis are discussed below.

QUESTIONS PRESENTED

Knott presents two questions for review, which we have recast as follows:[5]

1. Whether the circuit court abused its discretion in awarding joint legal custody to Knott and Gatti; and
2. Whether the circuit court abused its discretion by incorporating the findings of an independent psychologist in its order.[6]

We answer these questions in the negative and affirm the decision of the circuit court.

DISCUSSION

1. Award of Joint Legal Custody

A. Standard of Review

Knott first argues that the circuit court erred in awarding joint legal custody to both parties. Orders concerning visitation or custody "are generally within the sound discretion of the trial court, not to be disturbed unless there is a clear abuse of discretion." *Barrett v. Ayres*, 186 Md. App. 1, 10 (2009). "There is an abuse of discretion where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles." *In re Adoption / Guardianship No. 3598*, 347 Md. 295, 312 (1997) (Internal citations omitted). "Such broad discretion is vested in the chancellor because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Davis v. Davis*, 280 Md. 119, 125 (1978).

B. Best Interest Factors

Joint legal custody concerns a parent's equal "right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). The appropriate "best interest factors" a court must consider when making a determination of legal custody are discussed at length in *Taylor*, 306 Md. at 304-311, and *Montgomery County v. Sanders*, 38 Md. App. 406, 420 (1978). These factors include:

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender [of the children].

Sanders, 38 Md. App. at 420 (citations omitted).

When awarding joint custody, the court must also consider the age and number of children; the ability of the parents to communicate and reach shared decisions; the parents' willingness to share custody and their relationships with the children; the parents' employment demands and financial status; the effect on the children's social and school life; the proximity of each home; the impact on state or federal assistance; the benefit to the parents; and any other relevant factor.[7] *See Taylor*, 306 Md. at 304-11.

In examining all of these factors, a court should "generally not weigh any one to the exclusion of all others" and "should examine the totality of the situation . . . avoid[ing] focus[ ] on any single factor." *Sanders*, 38 Md. App. at 420-21. Notably, "a trial judge's failure to state each and every consideration or factor in a particular applicable standard does not, absent more, constitute an abuse of discretion, so long as the record supports a reasonable conclusion that appropriate factors were taken into account in the exercise of discretion." *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 445 (2007).

C. Analysis

Here, although the judge did not explicitly list all of her factual findings in support of each of the above stated factors, the record contains ample support for the court's ruling of shared legal custody and demonstrates the judge's consideration of the children's best interests. For example, the parties and corroborating witnesses testified that-both parents were actively engaged in the children's lives and that the children responded to both parents with love and affection.[8] The parties also testified that prior to the divorce proceedings, they had made decisions about the children jointly and that they believed it was in the children's best interests to continue to do so.

The court also found it "abundantly clear that both parents love these children very, very much" and had "no doubt that both [parents] are capable of being extraordinary parents." The court further concluded that "both parties have reasonable character and reputation." Regarding the fitness of the parties, the court found that there was no evidence that Knott was unfit

as a parent.[9] The circuit judge did not make an explicit finding about Gatti's fitness but otherwise noted that she was articulate, intelligent, capable, and employable. Gatti's alcohol problems led the court to require that any visitation between her and the children be supervised, but the judge also took care to note that she 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 and noted that "[ut was the right thing to do" because "[i]t was what the children needed."

Knott correctly points out that Gatti testified that she thought that joint decision-making would be "difficult" in the near future. However, the court also heard testimony on the parties' past ability to cooperate on decisions about the children, such as decisions involving medical treatment, schooling, and religion. After hearing all of the evidence, the circuit judge believed that "with time these parents will be able to maintain some semblance of natural relations. It may take some time for things to settle down, but I do believe that that will happen at some point in the future." Given the testimony about the parties' pre-divorce level of communication, it was not unreasonable for the circuit judge to conclude that, the 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) (Divorce-related tensions and disagreements did not overshadow parties' past track record of effective communication).

Knott also argues that the circuit court erred by awarding joint legal custody while denying Gatti unsupervised visitation. The circuit judge's concerns about Gatti's behavior around the children is clearly reflected in the judge's decision not to award unsupervised visitation. That decision does not, however, automatically lead to the conclusion that. Gatti is likewise incapable of legal custody. The court found that Gatti was intelligent and capable and heard evidence from both parties about how she had participated in decision-making about the children both before and during the divorce. For the court, the fact that Gatti voluntarily agreed to the *pendente lite* sole physical and legal custody for Knott reflected her awareness of what was best for the children at that time and what would be necessary to preserve their "life and welfare." *See Taylor*, 380 Md. at 296. Therefore it was not unreasonable for the circuit judge to find that Gatti was able to contribute to the types of "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. *See Id*.

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

II. Independent Judgment

A. Standard of Review

Knott next argues that the circuit court failed to exercise independent judgment when it relied on Dr. Killeen's findings in its custody order. Again, "[t]he standard of review in custody cases is whether the trial court abused its discretion in making the custody determination." *McCarty*, 147 Md. App. at 272 (citations omitted).

B. Analysis

A trial court must exercise independent judgment when making a custody evaluation.[10] *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. In *Cousin v. Cousin*, 97 Md. App. 506, 512 (1992), a custody award was challenged on the grounds that the circuit court improperly relied on a domestic relations master's report and failed to exercise independent judgment. This Court rejected the challenge, finding that the fact that the circuit court had reached a different conclusion than the master on whether to award joint custody demonstrated that the court had in fact exercised independent judgment. *Id*. at 516.

Dr. Killeen interviewed and observed the parties over several months following their separation. She conducted various personality tests and spoke with Knott and Gatti's respective physicians and psychiatrists. She ultimately produced a thirty-page report that summarized the concerns raised by each party and set forth a detailed proposed custody arrangement. Dr. Killeen also testified in detail about her methods and findings at trial. She noted that at the time of her evaluation, in August 2010, her primary concern was that the children had an "anxious rather than a secure" attachment to their mother, which caused her to recommend that the children spend a significant amount of visitation time with Gatti. She testified that in her opinion, Gatti demonstrated good judgment when she was with the children. She noted that, prior to the divorce proceedings, Knott had often spoken positively to others about Gatti's parenting.

However, due to her concerns about Gatti's sobriety, Dr. Killeen recommended a number of safeguards, such as the interlock device and the required Alcoholics Anonymous meetings, to ensure that Gatti would refrain from alcohol and that the children would be safe around her. When asked at trial if new information about Gatti's relapses changed her opinion, Dr. Killeen responded that it did not, because her custody

recommendation was based on what was in the children's best interests, namely a "more normalized relationship with their Mom which will lead to decreased anxious attachment which can only be good for them in the long run."

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

Moreover, although the circuit court adopted some of Dr. Killeen's report in the Judgment of Absolute Divorce, it did not copy the report wholesale. The circuit judge specifically declined to follow Dr. Killeen's recommendation of unsupervised visitation for Gatti, noting instead that unsupervised visitation "would be . . . a risk and a danger to these very young children." The fact that the judge reached a different conclusion from Dr. Killeen on the visitation issue indicates that she exercised independent judgment in making the custody determination. *See Cousin*, 97 Md. App. at 516. We therefore do not find any abuse of discretion.

III. Updated Custody Evaluation

In our view, to the extent Knott complains of the circuit court's requirement of an updated custody evaluation, that issue is moot. In response to Gatti's February 2012 Petition for Modification, the circuit court ordered a new custody evaluation by Dr. Killeen, which was in fact conducted and submitted to the court. Obviously, this evaluation — unchallenged by Knott — will take the place of the evaluation order apparently challenged here.

For all of these reasons we affirm the judgment of the circuit court.

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

FOOTNOTES

1. Trial was first scheduled for September 15, 2010, but was postponed at Gatti's request.

2. One of Dr. Killeen's recommendations was that the parties were not required to consult on "day-to-day decisions."

3. Although Dr. Killeen had recommended that Gatti be awarded unsupervised visitation, the court declined to follow that recommendation, finding instead that "unsupervised visitation with [Gatti] would be indeed a risk and danger to the children."

4. We consider these post-appeal events solely because they bear on an issue of mootness.

5. Knott's questions presented are:

> 1. Did the trial court abuse its discretion in awarding joint legal custody to Gatti when it did not identify any reasons for awarding joint legal custody and after finding that she posed a danger and risk to her children, that she was not in recovery, and that, she lacked credibility?
> 2. Did the trial court abuse its discretion by prospectively ordering an updated custody evaluation to be conducted twelve to eighteen months after the conclusion of the trial, when the only issue of fitness concerned Gatti, when the court did not identify the scope of the evaluation, and without any showing that either Knott's or the minor children's physical or mental status was at issue?

6. Although the question Knott presents purports to focus on the impermissibility of the circuit court ordering an updated custody evaluation, his argument appears to relate to the, circuit court's allegedly improper reliance on Dr. Killeen's custody evaluation and its recommendation for a future updated evaluation.

7. Our recitation of these factors combines the *Sanders* factors, which are taken into consideration in any custody determination, and the *Taylor* factors, which arise primarily in situations granting joint legal and shared physical custody. Several factors overlap, and in such instances, are only listed once.

8. Dr. Killeen also testified that the children's attachment to the mother had been disrupted, causing some anxiety on their part.

9. Although Knott argues that the court found Gatti to be unfit, the record discloses no such explicit finding on this issue by the circuit judge.

10. Related to the duty of independent judgment is a judge's responsibilities as the fact-finder in a bench trial. When presiding over a bench trial, a judge must determine the credibility of a witness and the weight to be accorded to his testimony. *Leavy v. American Fed. Say. Bank*, 136 Md. App. 181, 199-200 (2000). As the fact-finder, the judge "may believe or disbelieve, accredit or disregard, any evidence introduced," including expert testimony. *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725 (1977). The role of an appellate court reviewing that judge's finding is limited to a determination of whether the evidence is legally sufficient, not whether it would have drawn the same conclusions. *Carling Brewing Co. v. Belzner*, 15 Md. App. 406, 411-12 (1971) ("[I]f there is any

competent, material evidence to support the factual findings below, the weight and value of such evidence must be left to the trier of facts, as it is not our function to determine the comparative weight of conflicting evidence."). The circuit judge was therefore free to consider the testimony of Dr. Killeen and other expert witnesses and draw her own conclusions from the evidence. Given the plethora of testimony both parties presented at trial, we do not find the evidence legally insufficient to support the circuit judge's award of joint legal custody.

Cite as 11 MFLM Supp. 93 (2012)

Civil procedure: appellate briefs: dismissal for violation Maryland rules

Maureen Joan Johnson

v.

Patrick Andrew Konka

No. 1852, September Term, 2010

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

Opinion by Watts, J.

Filed: September 17, 2012. Unreported.

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 had already been given one opportunity to amend the brief.

The Circuit Court for Carroll County granted an absolute divorce to Maureen Joan Johnson, appellant, and Patrick Andrew Konka, appellee. Appellant noted an appeal raising several issues.[1] For the reasons discussed below, we shall exercise our discretion to dismiss the appeal pursuant to Maryland Rule 8-602(a)(8).

FACTUAL AND PROCEDURAL BACKGROUND

In 1991, the parties were living together and were both grocery store clerks working for Giant. On December 30, 1991, appellant purchased Bittersweet Farm, which is located on Old Fridinger Mill Road in Westminster, Carroll County, Maryland. In January 1992, the parties began to occupy Bittersweet Farm, which the parties used to run a business of raising horses. On August 30, 1997, the parties were married. The parties did not have any children together.

At trial, appellee testified that appellant "has somewhat of a temper" and that "once in a while . . . her response to anger was balling up her fist and taking a swing." According to appellee, following an argument over money, appellant stabbed, punched, and kicked him, to the point that he "had bruises on [his] face and [he] was . . . pretty bloody." On April 7, 2008, appellee left Bittersweet Farm, and since then, the parties have remained separated without interruption. On April 30, 2008, the District Court of Maryland for Carroll County issued two protective orders, which directed the parties not to contact each other.

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

On June 10, 2008, appellee filed with the circuit court a Complaint for Absolute Divorce and Other Relief. After hearing testimony from the parties and other witnesses at trial in April 2010, in an Order dated September 1, 2010, the circuit court: (1) granted the parties an absolute divorce, (2) granted a marital award of $177,639.50 to appellee, (3) found that certain tools and farm equipment were non-marital property belonging to appellee, (4) disposed of the marital property by ordering that certain marital property be divided between the parties, and that certain marital property be sold, with the proceeds to be divided equally between the parties, (5) denied appellant's claim for alimony, (6) set aside a conveyance of Bittersweet Farm from appellant as an individual to herself as a trustee, and (7) found that appellant "failed to adequately prove" her claim that appellee "was responsible for significant dissipation of the mar[it]al assets during the course of the parties' marriage[.]" Appellant timely appealed.

DISCUSSION

For the reasons set forth below, we conclude that 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., L.P., 181 Md. App. 188, 197, cert. denied, 406 Md. 746 (2008) (alteration and omission in original) (citation and internaj quotation marks omitted). In Rollins, id. at 203, this Court dismissed an appeal where "[t]he contents of [appellant's] brief and the [r]ecord [e]xtract [were] so far removed from the boundaries of the rules and acceptable appellate practice that they [were] an affront to the process." (Some alterations in original). In Rollins, id. at 198-99, we determined that appellant's brief violated Maryland Rule 8-501(c) by fail-

ing to "contain all parts of the record that are reasonably necessary for the determination of questions presented by the appeal." In Rollins, id. at 200-01, appellant's brief also violated Maryland Rule 8-504(a) by "fail[ing] to provide sufficient reference to pages in the record extract supporting the facts asserted." Recognizing an appellate court's reluctance to dismiss an appeal based on violations of procedural rules, 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. We also are mindful that reaching a decision on the merits of a case is always a preferred alternative. 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 that have clearly caused needless difficulty (1) to [appellee] in addressing the merits of [appellant's] appellate issues, as well as the additional time and expense in bringing these violations to our attention, and (2) to this Court in determining what documents are or are not in the record and where supporting facts are located in the record. 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 [appellant's] appeal pursuant to [Maryland] Rule 8-602(a)(8).

Id. at 202-03 (emphasis added) (citations, footnote, and internal quotation marks omitted).

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

(1) Maryland Rule 8-504(a)(3) — Statement of the Questions Presented

Appellant's brief does not comply with Maryland Rule 8-504(a)(3), which provides, in pertinent 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 without unnecessary detail."

Appellant's brief contains: (1) a section labeled "Statement of the Issues," which contains five unnumbered questions,[2] (2) a section labeled "Points of Error," which contains eight unnumbered statements,[3] and (3) a section labeled "Statement, Argument, and Authority," which contains two headings —"A. Standard of Review," containing various alphabetized sections and ten numbered sub-headings, and "B. Procedural Errors," containing a section with no sub-headings but eight paragraphs addressing several issues that are unrelated to each other.[4]

In appellant's brief, the "Statement of the Issues" and the "Points of Error" are inconsistent, *i.e.* the issues and points of error are not the same. Only four of the five questions in the "Statement of the Issues" have identifiable counterparts in the "Points of Error." Neither the "Statement of the Issues" nor the "Points of Error" correspond to the "Statement, Argument, and Authority," whose ten numbered sub-headings do not correspond to the eight unnumbered statements in the "Points of Error" or the five unnumbered questions in the "Statement of the Issues:" More importantly, the issues that appellant seeks to raise are not explained and supported by argument and case law.

Where an 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) (The Court of Appeals declined to "delve through the record extract to unearth motions or contentions that are not named and argued in the brief' where the defendant's brief—stating that "the court erred in overruling defendant's various motions for a mistrial"—merely cited parts of the record that "contain[ed trial] motions made by defense counsel."); State Roads Comm'n of Md. v. Halle, 228 Md. 24, 26-27 (1962) ("The method of setting up the questions and the manner of arguing them in appellant's brief has made it very difficult (as well as time consuming) to deal with them with any reasonable degree of preciseness. . . . With a record extract of more than 300 pages, this places an undue burden upon the Court (and also violates Maryland Rule [8-504]) by necessitating, if the questions are to be answered, an attempt to piece together, from the whole record extract, what the questions are, and whether they have been sufficiently reserved for decision. . . . [Appellant's brief] proceeds with its argument in such a manner as to render the task of relating the specific arguments made to any one or more of the questions, and, if so, which one or ones, arduous, if not at times impossible."); Poole v. Miller, 211 Md. 448, 453 (1957) ("The issues which the appellants raise or seek to raise are ill defined.").

(2) Maryland Rule 8-504(a)(4) — References to the Record

Appellant's brief does not comply with Maryland Rule 8-504(a)(4), which provides in pertinent 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 that appellant asserts on brief. For example, on page thirteen of appellant's brief, the following sentence lacks a citation to the record: "Bittersweet Farm was in foreclosure during the separation, and [a]ppellee did not assist financially." There are countless other examples.

Even where appellant's brief does reference the record, the reference does not account for all of the facts alleged in the preceding sentence. For example, on page twenty-one of appellant's brief, the following sentence appears: "Rather than exclude testimony regarding fault grounds, the court found both parties responsible for verbal and physical altercations, even though [a]ppellee had assaulted [a]ppellant, and had injured her hand." After this sentence, appellant's brief contains a reference to two pages of the circuit court's order, which say nothing about whether or not appellee "assaulted" appellant and "injured her hand." There are countless other examples.

Where a brief fails to adequately reference the record, 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 ("[W]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." (Second alteration in original) (citation omitted)).

(3) Maryland Rule 8-504(a) Generally — Contents and Order of Brief

Appellant's brief does not comply with Maryland Rule 8-504(a), which, in pertinent part, requires the following sections in the following order: (1) a table of contents, (2) a statement of the case, (3) a statement of the questions presented, (4) a statement of material facts, and (5) an argument.

Appellant's brief contains the following sections in the following order: (1) a table of contents, (2) a "Statement of the Subject Matter and Appellate Authority," which contains some of the procedural history, (3) a "Statement of the Issues," (4) a "Statement of the Case," which contains some more of the procedural history and some of the facts, (5) a "Statement of the Nature of the Case," which contains still more of the procedural history and still more of the facts, (6) the "Points of Error," and (7) the "Statement, Argument and Authority."

In brief, it is an appellant's obligation to place: (1) all of the procedural history in a distinct statement of the case, (2) all of the issues in a distinct statement of the questions presented, and (3) all of the factual history in a distinct statement of facts. See Md. R. 8-504(a)(2)-(a)(4). In this case, 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 Maryland Rule 8-504(a) does not authorize. In addition, in three different sections—the "Statement of the Issues," the "Points of Error," and the "Statement, Argument and Authority"— 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. On page seventeen of appellant's brief, the following accusation appears: "Appellee defrauded the marital estate, the trial court, and the partnership in the horse business." Over the next two pages, appellant's brief outlines the five elements of deceit and, with minimal references to the record, argues that appellee deceived appellant and the circuit court. A trial court, not an appellate court, is the appropriate venue for a initiating a claim for deceit.

(5) Other Errors

On page one of appellant's brief, appellant cites "Md. Code § 12-301" without specifying an Article of the Annotated Code of Maryland. In the "Statement, Argument, and Authority," although the last sub-heading is numbered "9," there are actually ten subheadings because "6" is used twice.[5] There are countless other examples of irregularities.

Conclusion

Because of appellant's failure to coherently state the questions presented, facts, argument, and supporting case law, this Court is unable to discern the issues that appellant is attempting to raise. Because of appellant's failure to properly reference the record and to address the merits of the appeal, this Court is unable to independently identify and determine whether or not any parts of the record support appellant's factual allegations.

Where an appellant's brief fails to comply with the Maryland Rules, an appellate court has wide discretion in determining the proper remedy. See Md. R. 8-602(a)(8) ("On motion or on its own initiative, [an appellate c]ourt may dismiss an appeal for any of the following reasons: . . . [ ] the style, contents, size, format, legibility, or method of reproduction of a brief . . . does not comply with [Maryland] Rules 8-112, 8-501, 8-503, or 8-504[.]"); Md. R. 5-804(c) ("For noncompliance with this Rule, the appellate court may dismiss the appeal or make any other appropriate order with

respect to the ease, including an order that an improperly prepared brief be reproduced at the expense of the attorney for the party for whom the brief was filed."); Rollins, 181 Md. App. at 203 (This Court dismissed an appeal because of appellant's brief's failure to comply with Maryland Rule 8-501 (c) and Maryland Rule 8-504(a).).

Because we are reluctant to refrain from addressing the merits of an appeal, 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 Maryland Rule 5-804(c). We note, however, that after filing her original 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.[6] The circumstance of appellant's counsel's having been given a second opportunity to properly reference the record and failing to do so—combined with appellant's counsel's failure: (1) to identify and brief the questions presented, and (2) to include the items required by Maryland Rule 8-504(a) in the designated order — convinces us that a third version of appellant's brief would not assist this Court in addressing the merits of the appeal.[7] 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 (This Court dismissed the appeal because of appellant's briefs failure to comply with Maryland Rule 8-501(c) and Maryland Rule 8-504(a).). For all the reasons discussed above, we dismiss the appeal pursuant to Maryland Rule 8-602(a)(8).[8]

APPEAL DISMISSED. APPELLANT TO PAY COSTS.

FOOTNOTES

1. As discussed below, the issues that appellant raises are difficult to identify.

2. In appellant's brief, the following appears in the "Statement of the Issues":

> Whether the court abused its discretion by an arbitrary and capricious application of a marital award based on the separate property of [a]ppellant.
>
> Whether it was an abuse of discretion when the court denied [a]ppellant the marital share of [a]ppellee's pension?
>
> Whether the Court erred when it granted a marital award based upon "Source of Funds" theory.
>
> Did the Court impermissibly transfer ownership of property, and was this an abuse of discretion.
>
> Did procedural errors constitute reversible error?

3. In appellant's brief, the following appears in the "Points of Error":

> The trial court abused its discretion by an arbitrary and capricious application of a Marital Award which was impermissibly speculative.
>
> The trial judge did not designate marital from nonmarital property or value all property interests of each party, Crawford credits for the two year separation when [a]ppellant maintained real property, without contribution from [a]ppellee, or the marital debt, taxes, or Farm Loan.
>
> The trial judge entered a marital award in favor of the [a]ppellee, when there was compelling evidence that the [a]ppellee was engaged in defrauding the marital estate, and the court did not take into account [a}ppellants' [sic] income.
>
> The trial judge did not consider the health of [a]ppellant[.]
>
> The trial court found fault grounds, when the basis for divorce was a two (2) year separation.
>
> The court abused it's [sic] discretion when it denied [a]ppellant the marital share of [a]ppellee's pension or IRA.
>
> The Court erred when it calculated "Source of Funds" theory, and did not take into account [a]ppellant's financial circumstances when making a marital award.
>
> The Court impermissibly transferred ownership of property.

(Italics omitted).

4. On brief, appellee elected to respond only to the five unnumbered points raised in appellant's "Statement of the Issues."

5. Because of this error, the table of contents in appellant's brief is inconsistent with the sub-headings in the "Statement, Argument, and Authority."

6. On July 30, 2012, appellee filed with this Court a Motion to Strike and Not Receive Replacement Brief Filed by Appellant. Appellee contends that appellant — violating this Court's order that appellant make no changes other than moving references to the record from endnotes to the briefs body — made in her replacement brief "a significant number of [other] changes, modifications, additions, and deletions[.]" As of this writing, appellant has not responded to the motion. In light of our dismissal of the appeal, we need not rule on the motion.

7. Our conclusion is bolstered by the circumstance that appellant's other filings in this Court contain errors that are similar to those in her brief. For example, in an Answer to Dismiss and Response to Motion to Replace Brief, appel-

lant's counsel wrote: "Appellee has provide [sic] previous counsel with copy [sic} of [a]ppellant's brief[.]"

8. On April 6, 2012, appellee moved to dismiss the appeal, observing that appellant's brief failed to state the questions presented. On June 29, 2012, this Court denied the motion and allowed appellant to replace her brief with references to the record in text rather than in endnotes. The second version of appellant's brief contains serious errors and omissions of references to the record that cannot be readily corrected.

> Maryland Rule 8-602(a)(8) allows this Court to dismiss an appeal *sua sponte.* After reading the second version of appellant's brief, we conclude that dismissal is the proper remedy.

NO TEXT

Cite as 11 MFLM Supp. 99 (2012)

Adoption/Guardianship: termination of parental rights: culturally sensitive services

In Re: Adoption/Guardianship of Zanelle D.

No. 224, September Term, 2012

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

Opinion by Watts, J.

Filed: September 18, 2012. Unreported.

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.

This appeal involves the grant by the Circuit Court for Montgomery County[1] of a Petition (the "Petition") filed by the Montgomery County Department of Health and Human Services (the "Department"), appellee, to terminate the parental rights of Gwendoline D., appellant, and Karl D., Zanelle D.'s parents, and to appoint the Department as Zanelle's guardian with the right to consent to adoption or to long-term care short of adoption. Appellant noted an appeal raising one issue, which we quote:

> Did the [circuit] court err in terminating [a]ppellant's parental rights when the Department [ ] failed to provide services tailored to meet [a]ppellant's specific need[s] and there was no evidence to support a conclusion that [appellant] was unfit or that exceptional circumstances warranted such an act?

We answer this question in the negative and, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Karl D. — who is not a party to this appeal — are the married parents of Zanelle, who was born on February 24, 2010.[2] On July 14, 2011, the Department filed a Petition — in which it stated that termination of appellant's and Karl D.'s parental rights was in Zanelle's best interest — seeking that the Department be granted guardianship of Zanelle with the right to consent to adoption or another permanent living arrangement. In the Petition, the Department quoted orders by the circuit court demonstrating that, since her birth, Zanelle's care and custody have been as follows: From the time of her birth until March 5, 2010, Zanelle remained at George Washington University Hospital for treatment, in her parents' care and custody. During that time, appellant — who is HIV positive — refused medically necessary treatment for Zanelle, including administration of AZT.[3] From March 5, 2010, through March 31, 2010, Zanelle was placed in shelter care.[4] On March 31, 2010, the circuit court adjudicated Zanelle a Child in Need of Assistance ("CINA") and committed her to the Department for placement in foster care. From March 31, 2010, to the date of the Petition, Zanelle remained committed to the Department. On October 13, 2010, following a review hearing, the circuit court ordered that Zanelle's permanency plan be reunification with her parents.

On June 14, 2011, at the request of Zanelle's court-appointed attorney and the Department, the circuit court ordered that Zanelle's permanency plan be changed to adoption by a non-relative. Appellant noted a timely appeal to the change in Zanelle's permanency plan. In an unreported opinion, this Court affirmed the circuit court's change in Zanelle's permanency plan. In re: Zanelle D., No. 884, Sept. Term 2011 (Md. Ct. Spec. App., Feb. 3, 2012) (unreported).

On July 29, 2011, appellant filed an objection to the Petition. On July 27, 2011, Zanelle's attorney filed a notice of assent to the Petition.

From February 13, 2012, through February 15, 2012, the circuit court held a hearing on the Petition.[5] During the hearing, as a witness for the Department, Mario Pruss, a board-certified psychiatrist, testified regarding a psychological assessment of appellant that he conducted on May 28, 2010, at the Department's request. The Department offered into evidence Dr. Pruss's report containing the results of

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

the assessment as Exhibit 36. The report provided, in pertinent part, as follows:

> [Appellant's] denial of [her] HIV [positive] status may be later overcome if presented to her by a trusted person with pertinent documents on hand and it may be rooted in rejection/terror towards its medical treatment side effects that has not been properly enunciated. Ignorance would not explain it, [as appellant] brags about having some medical knowledge. It is unclear [ ] what difference in her medical prognosis [ ] implementation of antiviral treatment [would] make at this stage.
>
> The concept of pursuing psychiatric treatment is unpromising due to [appellant's] repeated refusal to accept such [a] concept[.] Based mostly on her husband's testimony and observations made in early 2010 at [George Washington University] Hospital, [appellant] may well have PRIMARY DELUSIONAL DISORDER with paranoid content, a condition that waxes and wanes if left to its natural unfolding and known to not respond convincingly to antipsychotic drugs or psychotherapy.
>
> A PSYCHOLOGICAL ASSESSMENT (not done yet) may disclose more areas of deficient reality testing and faulty reasoning.
>
> * * *
>
> An observation period of at least another 6 months is indicated to further estimate medical and psychological functionality[.]

As a witness for the Department, Giselle Aguilar Hass, a licensed clinical psychologist, testified about a psychological evaluation of appellant and a parent-child interactive assessment of appellant and Zanelle that she performed in January and February, 2011, at the Department's request. The Department offered both assessments into evidence as Exhibits 13 and 14, respectively. As to appellant, the Report of Psychological Assessment provided, in pertinent part, as follows:

> [Appellant] is a 39-year-old woman, originally from Zimbabwe, mother of 11-month old Zanelle[. Appellant's] family came to the attention of [the Department] due to a report that [appellant] was withholding medical care from her newborn baby.
>
> * * *
>
> The theme of [appellant's] narrative was that, since she came in contact with hospital staff due to a swollen fingertip, all professionals involved have deceived her, betrayed her, lied to her, and abused her. Most of all, they have kept secrets and strategized against her and she does not understand why they are doing such. . . .
>
> [Appellant's] contact with reality was impaired. Her thoughts were fairly coherent but not always connected logically, and [appellant] voiced many beliefs that defy logic and appeared oversimplistic and fantasized, **even while taking into consideration cultural and traditional values**.
>
> * * *
>
> [Appellant] described the situation that led to the removal of her daughter Zanelle from her care [ ] as follows. She found out she was pregnant when she was already [three and a half] months along. . . . She said she developed . . . a cyst on her finger when she was approximately four or five months pregnant. . . . She . . . went to Shady Grove Hospital, where the doctor cut the cyst off but it grew back again. She was at Shady Grove for [eight] days because she had high fevers and abdominal pain. She was transferred to John[s] Hopkins Hospital without her knowledge or authorization. . . .
>
> Once at John[s] Hopkins Hospital, she woke up and the next thing she saw was three doctors and their jacket's ID's said that they were psychiatrists. . . . They told her that her infection could go into her brain and could have killed her and her baby. She said that the doctors were acting as if she was refusing to be treated for HIV, but she did not tell them about her HIV status because it was irrelevant and not an issue. They wanted to give her [psychotropic medications] and they gave her a diagnosis of Bipolar Schizophrenia, even though they did not do a thorough evaluation of her. [Appellant] said that there was nothing wrong with her, [as] she did not hear voices or see things that were not

there. . . .

[Appellant] said that she refused to take her psychotropic medications, but that she was forced to take her [medications] in front of security guards or [that] they tried to inject her. She said that she put the pills under her tongue and spit them out later because the pills made her drowsy and gave her hallucinations. However, she emphasized that she took other [medications] that were good for her and the baby. . . .

[Appellant] was finally released on December 31, 2009, and was given an appointment [in] early January, 2010 for follow up. However, she took the train and went home with her mind made up that she was not [go]ing back for the follow up because "There was something fishy going on." . . . During January, 2010, she did not see her OB-GYN and did not see other doctors because she was very upset about the past ordeal.

. . . [Appellant] went to [George Washington University] Hospital requesting that they deliver her baby [and] they kept her. She was not due to have her baby, but she asked to deliver early by C[aesarean] section because she was "too scared to push." She said that, once again, they acted as if she did not know she had HIV because she did not tell them, and they asked her if she was a prostitute. [Appellant] said that she refused AZT (the HIV treatment) because of their attitude. . . .

Shortly after [appellant's] delivery, hospital staff called [the Department] and reported that she was "irresponsible" because she refused AZT and she "had a mental problem."

* * *

[Appellant's] intellectual capacity was going to be evaluated with the Wechsler Abbreviated Scale of Intelligence, but she walked out of the office in the middle of the administration. At the time, she stood up and shouted, "You are wasting my time, you are wasting tax payer's money, there is nothing wrong with me, they took my baby with lies[."]

* * *

The self-report personality inventory showed [appellant] as suffering from severe paranoid ideation.

* * *

Moreover, [appellant] is suffering from a host of unresolved issues of personal safety and life-and-death fears that seem to influence the way she perceives events, presents herself to others and how she explains things to herself. For instance, she has limited tolerance for frustration, has difficulty to perceive people and events realistically, has a degree of impairment in reality testing that makes her distort events and the meaning of other's behavior, and prevents her at times to anticipate the consequences of her actions and boundaries of appropriate behavior. She also shows poor judgment; impulsivity and difficulty controlling negative emotions in relation to her feeling persecuted. [Appellant] finds it hard to trust other people and is quite rigid in her thinking and set in her ways, is disinclined to alter her perspective and reluctant to modify her currently held beliefs. She is fiercely independent, does not like to ask or receive help, or follow anybody's advice, and believes herself to be right. This attitude leaves her all alone in her current predicament and without needed social support, not even from her husband. These issues interfere with [appellant's] parenting capacity in that she may find it hard to maintain the equanimity that child care requires, make[ ] child-centered decisions in an appropriate manner, and request help with parenting when necessary. In particular, [appellant] seems to have a blind spot when it comes to dealing with her own and Zanelle's medical issues.

* * *

[Appellant] is in need of an evaluation to assess her need for psychotropic medication to address her paranoid delusions, anxiety, and altered thought processes. She needs to accept her psychological problems before she can benefit from psychiatric treatment[.]

(Emphasis added). As to appellant and Zanelle, Dr. Aguilar Hass concluded in the Parent-Child Interactive Assessment, as follows:

> [Appellant] did not display anxiety or depression. However, she did have a period of negativity, not directed to Zanelle but to her husband who called her on the phone. [Appellant] commented to Zanelle when her cellular phone rang, "Maybe it's your daddy![”] After she answered, [appellant] engaged in a hostile exchange with the person on the other end of the phone by saying loudly, "Zanelle is playing with my phone . . . 'cause she's my daughter I let her do whatever she wants. . . . 'cause you don't love your daughter" and then she hung up. However, this attitude did not transfer to Zanelle, and [appellant] was able to turn her attention to Zanelle and continue playing with her in a relaxed mood. Nevertheless, [appellant's] difficulties to control expressing her irritation during challenging times was evident in this short exchange with her husband, and exposing Zanelle to this type of interaction is unhealthy.
>
> * * *
>
> [Appellant] demonstrated cooperative behavior with [Zanelle], in that for the most part, she allowed her to play with structure and guidance, and kept her immediate environment safe. Although there were a couple of occasions in which [appellant] interfered with [Zanelle]'s wishes, this was necessary in order to change her diaper and feed her. However, at one point when Zanelle tried to get out of the baby carriage, [appellant] told her "Don't play that game with me, stop being silly, I tell you when to stop eating, I'm your mother, I control you. You don't control me." Then Zanelle pushed [appellant's] hand away and [appellant] told Zanelle, "Stop it, stop being silly, if you eat quietly we would've finished by now, stop stressing yourself, you're such a piece of work!" At that point, Zanelle turned her face away from [appellant], displaying avoidant behavior. In this one instance, [appellant] acted in a way that was authoritarian and controlling, which is unhelpful to the development of a cooperative relationship. [Appellant] showed that she is capable of being in charge, but her style of setting boundaries appeared punitive. Therefore, Zanelle demonstrated protesting behavior. Controlling behavior on the part of a parent and protesting behavior on the part of the child may eventually lead to power struggles if not therapeutically addressed.
>
> * * *
>
> [Appellant] has an emotional and intellectual understanding regarding the needs of her child and the skills that make up adequate caretaking and can put them into practice. It seems that **when she is not obsessing about being persecuted and when she is in a relaxed and comfortable environment**, [appellant] is capable of showing fairly appropriate parenting skills.

(Emphasis added). In response to a question by Zanelle's attorney concerning her experience, Dr. Aguilar Hass testified that she has extensive experience working with patients who have immigrated to the United States. Dr. Aguilar Hass testified that appellant's cultural background did not explain her behavior, including "the forcefulness of her verbal aggression, the paranoid thinking, and the blaming everybody for her problems[.]"

Richard Ruth, a clinical psychologist, testified as a witness for the Department regarding a psychological evaluation of appellant that he performed on November 17, 2011. The Department offered into evidence Dr. Ruth's report of his evaluation as Exhibit 42. In the report, Dr. Ruth concluded, in pertinent part, as follows:

> [Appellant] shows disorientation to situation, disinhibition, tangentiality, lapses in attention and concentration, disordered thinking and cognitive slippage characterized by loosened associations and idiosyncratic process, grandiosity, suspiciousness, and irritability. She at times made statements that seemed mutually contradictory and that she could not reconcile on inquiry, and at several times made statements that either strained credulity or were clearly false[.] These fmdings are similar to what [other clinicians] observed, and thus seem to

have been present since at least [June,] 2010. They can be considered to constitute evidence of a psychological disability. This seems established to a very high degree of clinical psychological certainty.

From the information currently available [ ], [Dr. Ruth] c[ould] not say with certainty what that disability may be. Possibilities include a delusional disorder, early-stage paranoid schizophrenia (schizophreniform disorder), personality disorder, post-traumatic stress disorder, a psychological disorder related to her HIV disease, or some combination of these. To determine the underlying disorder(s) with more certainty, more extensive interviewing, and testing (to encompass measures of cognitive, academic, emotional, personality, and neuropsychological functioning) would be necessary. Such interviewing and testing would require [appellant's] cooperation, and several weeks' time. It is to be noted that [appellant] has twice refused to cooperate with such assessment.

Dr. Ruth observed that appellant "seems to harbor a belief that this case is based in unfair prejudice against her, despite the court's clearly established finding that she neglected her child [.]"

On March 30, 2012, the circuit court issued a "Final Order" granting the Department's Petition, terminating appellant's and Karl D.'s parental rights, and appointing the Department as Zanelle's guardian with the right to consent to adoption or long-term care short of adoption. The circuit court provided the basis for the Order in a document titled "Findings of Facts and Conclusions of Law," stating, in pertinent part, as follows:

II. Findings of Fact

* * *

F. Md. Code Ann., Fam. Law Art. ["F.L."] § [ ]5-323(d) provides that when a Court considers a request for granting [termination of parental rights] over the objection of a parent,

. . . a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests. . . .

The analysis of these factors appears below.

1. All services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional (F.L.] § [ ] 5-323(d)(1)(i)).

Due to the emergent nature of the situation that [led] to the removal of Zanelle from [appellant]'s care, i.e. [appellant]'s refusal of necessary medical care and refusal to plan for the newborn Zanelle, the Department could not offer significant pre-placement services. The Department met with both parents on March 26, 2010, and attempted to engage them in discussion about how they could care for themselves and Zanelle, including housing, food, clothing, and baby supplies. The parents were not able to plan together, and on March 4 the Department attempted to meet with Father at the parent's alleged address (where they found no one home) and met with [appellant] at the hospital. [Appellant] appeared to the Department to be delusional. Zanelle was discharged from the hospital on March 4, 2010, when she was sheltered with her current foster parents.

2. **The extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent ([F.L.] § [ ] 5-323(d)(1)(ii))**.

The Department attempted to provide services to [appellant] when Zanelle first came into the care of the Department, in March, 2010. Early on, [appellant] refused to sign a service agreement with the Department. [ ]

a. Therapy: The Department attempted to get [appellant] to participate in therapy. After much resistance from [appellant], including her initial refusal to use her own insurance for therapy, it began. However, she abruptly terminated the therapy, reverting to her refusal to allow her insurance to cover it, despite the Department's offer to pay the co-pay. [Appellant] also initially refused to sign releases for the Department to obtain information

from service providers, making it very difficult for the Department to obtain accurate information.

b. Evaluation: The Department referred [appellant] for three psychological evaluations on three separate occasions, and one psychiatric evaluation. Each time, [appellant] began the evaluation but terminated her participation before the evaluation was concluded. [Appellant] became angry and/or accusatory when the evaluator asked questions she did not like or made observations with which she did not agree. Psychologists Boss,[6] Aguilar Hass, and Ruth each reported that [appellant] suffers from a constellation of mental disabilities. Drs. Boss and Aguilar Hass diagnosed this as delusional disorder. Dr. Ruth concluded that among other things [appellant] suffers from[:]

> disorientation to situation, disinhibition, tangentiality, lapses in attention and concentration, disordered thinking and cognitive slippage characterized by loosened associations and idiosyncratic process, grandiosity, suspiciousness, and irritability.

[ ] While Dr. Ruth was certain that [appellant] suffers from a psychological disability, he could not be more specific in his diagnosis because [appellant] refused to complete the evaluation.

The psychiatrist who evaluated [appellant], Dr. Pruss, also concluded that [appellant] suffers from a delusional disorder. Drs. Aguilar[ ]Hass, Pruss, and Ruth testified at the [Termination of Parental Rights] trial.

[Appellant] engaged Dr. Ling Loui Wu, a psychologist, to perform yet another evaluation of her. It was the only evaluation which concluded that [appellant] had no cognitive dysfunction, although Dr. Wu also noted that [appellant] presented herself in an overly positive light. As [appellant] refused to sign a release for Dr. Wu, neither the Court, nor the Department, could explore her opinion further. Dr. Wu did not testify at the [Termination of Parental Rights] trial.

[Appellant] rejected the conclusions of all evaluations (other than Dr. Wu's) which made it impossible for the Department to assist [appellant] with her significant mental health problems.

c. Visitation: The Department also facilitated supervised visitation throughout the CINA and Guardianship proceedings. [Appellant] usually participated, on time, and often was early. Despite [appellant]'s strange and/or angry behavior at times and resistance to suggestions about how to care for Zanelle, the Department continued to provide staff and transportation for Zanelle to enable visits.

d. Parenting Education: The Department attempted to provide parenting education for [appellant]. [Appellant] would not participate in the programs recommended by the Department. Instead, [appellant] found, and between March and May, 2011 participated in, four two-hour classes through a program unaffiliated with the Department. These parent-only classes addressed how to deal with potty training, temper tantrums, how to handle a difficult child, and one "open forum counseling" session[ ], instead of the overall child development and care education [appellant] needed. The Department social worker referred [appellant] to Families Foremost, because it was a hands-on, extended program that would provide an extra weekly visitation between [appellant] and Zanelle. [Appellant] refused to

participate.

e. Housing & Transportation: The Department also attempted to assist the parents with housing and transportation.

The Court finds that the extent, nature, and timeliness of the Department's efforts to refer [appellant] to services were reasonable and targeted at facilitating reunification of Zanelle with her parents.

3. **The extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any ([F.L.] § [ ] 5-323(d)(1)(iii)[])].**

The Department and [appellant] reached oral agreements for some services, some of which [appellant] carried through. [Appellant] refused to sign a social services agreement with the Department. Thus, this provision of the statute is inapplicable.

4. **The results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including [i-iv, below]([F.L.] § [ ]5-323(d)[ ](2)).**

[Appellant] made good progress in dealing with her physical health issues related to her HIV, in obtaining housing, and participating regularly in visitation. However, [appellant] failed to cooperate with other reunification services, most crucially in mental health evaluations and treatment, which dramatically and negatively affected her relationship with Zanelle. [Appellant]'s unacknowledged and untreated mental health issues are the overriding concern in this case.

a. **The extent to which the parent has maintained regular contact with . . .**

i. the child.

Until January 2012, [appellant] regularly participated in visitation with Zanelle. [Appellant]'s initial sporadic attendance was due primarily to scheduling conflicts, which were subsequently resolved and [appellant]'s attendance improved. [Appellant] was consistently on time, and often early, for these visits.

Unfortunately, during visits, [appellant] was consistently distracted from Zanelle by her telephone, talking to or about her husband, and especially by her efforts to discuss this case and/or the foster parents with the social worker. Efforts by the social worker to refocus [appellant] on Zanelle were only moderately successful, as [appellant] did not accept suggestions or direction.

While [appellant] participated in visitation with Zanelle, the interactions evidenced [appellant]'s resistance to developing the skills and bond necessary for competent parenting. In 2011, [appellant] forced Zanelle to eat, even when she did not want to. Zanelle would pull away from the food or push a spoon away, shake her head from side to side, and scream and cry, but [appellant] would persist. When the supervising social worker asked [appellant] to stop, [appellant]'s response was "I'm the mother and I know what to do and no one can tell me what to do." When [appellant] became tired during a visit, [appellant] tried to make Zanelle sleep. When those efforts failed, [appellant] ended the visit early. Further, during visits [appellant] would call her husband, or others, and talk with those people rather than focus on Zanelle, sometimes trying to have infant Zanelle talk on the phone. The social worker described an ongoing struggle to get [appellant] to focus on the purpose of the supervised visits, to wit, the building of skills for [appellant] as a parent.

[Appellant] was also easily angered during visits, which was upsetting to Zanelle. At the end of one early visit, after Zanelle was placed in the foster mother's car, [appellant] demanded medical records from the foster mother. When the foster mother declined, [appellant] angrily asserted "This is my f[ ]ing daughter and you are supposed to give me what I ask of you." This interaction in Zanelle's presence is an example of [appellant]'s inability to focus on [Zanelle].

More recently, in January 2012, Zanelle behaved strangely on days she and [appellant] had visits. Upon returning from visits she was often highly combative and cried inconsolably. This was in contrast to Zanelle's generally compliant and cheerful nature.

In January 2012, [appellant] missed two visits, on January 3, and January 31, without notifying the social worker. No explanation was given by [appellant].

ii. [ ] the local department to which the child is committed.

Prior to the change in the permanency plan in June, 2011 (to Adoption by a Non-Relative), [appellant] maintained frequent, though ineffective, contact with the Department. Initially, Ms. Boswell was the social worker, who testified that the relationship with [appellant] was one with good days and bad days. Communication between [appellant] and Ms. Boswell swung from productive to threatening, as in a September, 2010 voicemail message where [appellant] asserted that "if [Ms. Boswell] take my blood, I will take your blood." [Appellant] thereafter requested a different social worker. The Department acquiesced and a new social worker was assigned.

When Ms. JuaTina Temple became the new social worker, in January, 2011, [appellant] called her up to five times per day during work hours and dropped in at her office without notice. This behavior continued even though Ms. Temple told [appellant] that she could not make progress in the case if [appellant] occupied her time this way. Eventually, Ms. Temple informed [appellant] that she would only return her calls twice per day.

[Appellant] was combative with Department personnel, including with the social workers and/or community service aides who supervised visits between [appellant] and Zanelle. [Appellant] angrily told Ms. Carla Matal, a Department social worker who supervised visits in 2011, that Ms. Matal was not doing her job when Ms. Matal refused to allow [appellant] to do what she pleased with Zanelle. At the end of visits, while the social worker would take Zanelle to the car and put her in the car seat, [appellant] would scream and call the social worker names, following her all the way to the car where she would grab the car windows and scream. This only stopped when, by Court Order, [appellant] was disallowed from going to the car at the end of visits.

[Appellant] threatened Department personnel that she was working on an exposé of the Department to get Zanelle back. [Appellant] also told Ms. Matal that she had contacted the Oprah [Winfrey] show and that the show would be coming to Ms. Matal's house.

[Appellant] was non-compliant with services and repeatedly refused to follow through with referrals, specifically for Court Ordered mental health services. As noted above, the Department referred [appellant] for three psychological evaluations on three separate occasions, and one psychiatric evaluation. Each time, [appellant] began the evaluation but terminated her participation before the evaluation concluded. The one time [appellant] did complete an evaluation, with Dr. Wu, [appellant] refused to sign a release for the Department to obtain information from Dr. Wu. [Appellant] also refused to see therapy providers referred by the Department (who accepted Maryland Medical Assistance), except for one six week period, before she abruptly terminated treatment. [Appellant] further informed Ms. Temple that she would not sign service agreements or releases for evaluators because everyone lied.

Since the June, 2011 change in the permanency plan, [appellant] communicated less and was largely uncooperative with the Department. [Appellant] stopped talking to Ms. Temple directly and only called to leave long, rambling messages after

office hours. In the presence of Department personnel, [appellant] has threatened to kill for Zanelle, which Department staff took as a threat toward them if Zanelle was not returned to her care. Thus, while it is true that [appellant] was in contact with the Department throughout the time Zanelle has been in care, it was usually for the purpose of delivering her message. She was abusive and threatening when she did not hear what she wanted. Thus, there was contact, but [appellant]'s behavior rendered it unsuccessful and unproductive.

iii. [ ] if feasible, the child's caregiver.

[Appellant]'s relationship with Zanelle's caregivers is poor. [Appellant] initially was cordial, but when Zanelle was not returned to [appellant]'s care when [appellant] wanted, the caregivers became the enemy. [Appellant] alleged that the caregivers were burning Zanelle's head and failing to properly clothe and care for Zanelle. Neither was true. The Department had to provide transportation for Zanelle for visitation due to [appellant]'s verbally aggressive behavior with the caregivers, including swearing at and insulting the caregivers in an angry and elevated tone when transferring Zanelle after visits. [Appellant] also threatened to kill the caregivers and to hire a private investigator to follow them. The contact became unsafe.

b. **The parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so**.

[Appellant] has not contributed to Zanelle's care and support. No evidence was presented at trial as to her ability to provide for Zanelle though she is allegedly physically able to be employed.

c. **The existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time[.]**

[Appellant] has significant mental health issues, which she refuses to acknowledge or participate in treatment for, but which were diagnosed by the Department's experts, Dr. Aguilar Hass, Dr. Boss, Dr. Ruth, and Dr. Pruss. Based on the psychological evaluation [appellant] partially participated in, Dr. Aguilar[ ]Hass diagnosed [appellant] with Axis I Delusional Disorder and Axis II Personality Disorder with paranoid ideation and narcissistic traits. [Appellant] refused to participate in some tests, including a Wechsler Abbreviated Scale of intelligence, [ ] and became angry and left in the middle of an evaluation session. Dr. Ruth, in examining [appellant] to determine whether she had a disability preventing her from participating in this case, found "evidence of a psychological disability" which could include[:]

> delusional disorder, early-stage paranoid schizophrenia . . . personality disorder, post-traumatic stress disorder, a psychological disorder related to her HIV disease, or some combination of these.

[ ] Dr. Pruss diagnosed [appellant] with a Delusional Disorder, persecutory type, [ ] which he testified manifests as an individual believing that an outside actor, or actors, are deliberately trying to harm them (by making false accusations or following the individual). [Appellant] 's behavior is consistent with all of these partial diagnoses.

Testimony and documentary evidence revealed that [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. She has repeatedly alleged that the CIA or FBI were trying to get her. Ms. Temple testified that during the week of February 6 through February 10, 2012, [appellant] informed her that a tall woman with long dark hair in a Montgomery County car was following [appellant]; when Ms. Temple asked

[appellant] to get the car identification number from the bumper so she could resolve the issue, [appellant] never responded.

Testimony adduced at trial further established that [appellant] accused administrative personnel at a service provider's office of falsifying her medical records. [Appellant] threatened to wait for the administrative staff member outside in the parking lot, and loudly cursed at her. She was asked to leave the building by the Doctor. In short, when [appellant] does not feel threatened or challenged, she is able to function; but when faced with even minimal adversity she operates in a world all her own, where conspiracy against her is the basis for all that occurs.

[Appellant]'s counsel and her Guardian *Ad Litem* argued that [appellant]'s behaviors were misunderstood throughout her involvement with the Department. They attributed this to cultural differences based on [appellant] having been born, raised, and a young professional adult in Zimbabwe and South Africa before moving to the United States in 1999. This argument fails. Both Dr. Aguilar Hass and Dr. Ruth testified about their cross-cultural professional experience, specifically with Africans, and Africans from Zimbabwe and South Africa, and that each used that experience in evaluating [appellant]. Neither saw [appellant]'s irrational and delusional actions as related to her African heritage, but rather, driven by her mental illness.

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

Testimony established that to begin to address her mental health issues, [appellant] would likely need to participate in *at least* two years of consistent, intensive therapy, in conjunction with psychotropic medication. Drs. Ruth and Aguilar Hass testified that mental health diagnoses of [appellant]'s type are difficult to treat, even more difficult when the patient does not perceive a problem in their own behavior, and that delusional disorder does not generally respond to drugs or therapy.

It is not foreseeable that [appellant] would be willing to participate in the necessary treatment. She refused to participate in so basic a step as testing to determine whether she had a disability. [Appellant] has clearly stated that she has no mental disorders, that she did not like therapy, and that she only participated in therapy because she was required to do so by the Court. Therapy cannot succeed if the patient will not participate. [Appellant]'s refusal, or inability, to acknowledge her diagnosis makes it unlikely that she would be successful in treatment even if provided with additional services.

Significantly, assuming that [appellant] was successful in treatments, Zanelle would be in care for at least two additional years. While the two year period, if a guarantee, might be favorably balanced against the need to minimize Zanelle's time in State care, there is no such guarantee. In reality, it is so unlikely that [appellant] will participate in, much less respond to, treatment, that the Court concludes that it is not in Zanelle's best interest to extend her time in foster care.

5. **Whether ([F.L.] § [ ]5-323(d)(3)):**

a. **The parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect**.

This family came to the Department's attention due to [appellant]'s untreated HIV, which impaired her ability to care for [Zanelle], and [appellant]'s refusal of AZT treatment at the hospital for Zanelle upon her birth. [Appellant]'s mental health issues subsequently came to light, as

did [appellant]'s complete failure to prepare for the arrival of the baby. [ ] On March 31, 2010, in the [CINA] proceeding, [appellant] was found to have neglected Zanelle for these, and other, reasons. [ ]

While [appellant]'s physical health is markedly improved, she refuses to address her mental health issues. Given [appellant]'s continuing untreated mental disorders, [appellant]'s neglect of Zanelle in the future is likely. There has been no change in [appellant]'s behavior indicating she is better able to make rational decisions, nor take advice from others. When offered advice by Department personnel, she regularly responds that she is the mother, she knows what is best, and no one can tell her what to do with her child. Under the circumstances, it is likely that [appellant] would continue to make dangerous decisions that might seriously harm Zanelle.[7]

* * *

c. [Appellant]'s unwillingness to allow doctors to provide Zanelle with AZT treatment to protect her from possible HIV infection falls within subpart **iii of § 5-323(d)(3),** to wit, [appellant] exposed Zanelle to life-threatening neglect. This neglect was ended within days of Zanelle's birth, by the timely intervention of the Department, and thus did not become chronic[8]

* * *

6. **([F.L.] § [ ]5-323(d)(4))**

a. **The child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly.**

Zanelle has no siblings of which the Court is aware, and has had little, if any contact with any biological relatives other than [appellant]. Her emotional ties with [appellant] are weak. Since she was eight days old, Zanelle has only seen [appellant] at supervised visits. The quality of these visits has varied dramatically. [Appellant] appears to love Zanelle and, at times, is tender and engaged with her. However, [appellant]'s zeal for parenting her way, coupled with her conviction that only she knows what Zanelle needs, results in her forcing Zanelle to eat, even when she screams in protest, or picking Zanelle up like a doll by her arm. Further, as discussed [ ] above, [appellant] has frequently been distracted from Zanelle during visits.

Ms. Koslow, the Court Appointed Special Advocate (CASA) testified that when Zanelle is with her foster parents, she is happy, outgoing, and engaged, versus when she is with [appellant], where her affect is subdued, she is not engaged, and she separates from [appellant] without any expression of emotion. This testimony was corroborated by other witnesses at trial. The Court finds that Zanelle is disengaged when with [appellant], often confrontational and unhappy on visit days, and separates unemotionally.

b. **The child's adjustment to:**

1. community;

The foster parents testified that Zanelle does not yet have friends in their apartment complex, as she is just over 2 years old. However, she does well with the children in her day care and is developmentally appropriately engaged.

2. home;

Zanelle has been placed outside of the home, with the foster parents, since March 4, 2010, when she was eight days old. She resides with them in a two bedroom apartment with a den, and Zanelle is the only child residing there. The foster parents also have a small dog with which Zanelle gets along well. She has appropriate furniture, clothing, and equipment. The foster parents' extended families are also engaged with Zanelle.

3. placement;

The foster parents and Ms. Koslow each testified that Zanelle is doing remarkably well in her placement in foster care and has developed a strong emotional bond to her foster parents. At a consultation with the Court before the start of the [Termination of Parental Rights] trial,

Zanelle could count to twenty, read a beginner book and identify words on the page when asked. She is a happy and healthy little girl. She calls her foster father "daddy" and her foster mother "mommy."

Zanelle is bonded with her foster parents. It would be contrary to Zanelle's best interest to disturb this placement, as she has thrived in their care.

4. school.

At trial, the Court received no evidence that [Zanelle] attends school yet, though the foster parents and social worker testified that she has been enrolled in day care since she was twelve months old and is doing very well learning to socialize there.

c. **The child's feelings about severance of the parent-child relationship.**

Zanelle is too young to articulate her feelings in words. As noted elsewhere in this opinion, the evidence overwhelmingly establishes Zanelle's strong bond with the foster parents and lack of relationship with [appellant].

d. **The likely impact of terminating parental rights on the child's well-being**.

The foster parents testified that Zanelle has made significant developmental progress with them. The evidence adduced at trial show[s] that [ ] Zanelle and the foster parents are strongly bonded as a family. In contrast, evidence regarding the relationship between Zanelle and [appellant] showed that Zanelle is not attached to [appellant], though [appellant] loves Zanelle, and that [appellant] continues to be unable to provide proper care and attention to Zanelle. The termination of the parental rights of [appellant] will not negatively impact Zanelle's well-being.[9]

* * *

8. ***Specific Finding Required* — If a juvenile court finds that an act or circumstance listed in subsection (d)(3)(iii), (iv) or (v) of this section exists, the juvenile court shall make a specific finding, based on facts in the record, whether return of the child to a parent's custody poses an unacceptable risk to the child's future safety [ ] ([F.L.] § [ ]5-323(f))**.

This finding is not required, as [appellant]'s potentially life-threatening neglect of Zanelle was interrupted before it could become chronic. However, [appellant] continues to suffer from the same paranoid delusional thought processes that endangered Zanelle in the first place. The evidence adduced at trial, including testimony of Ms. Turner, Ms. Koslow, the testimony and reports of Dr. Aguilar Hass [ ], and Dr. Ruth [ ], and the pleadings, reports, and orders entered in the CINA case [ ] show that [appellant] continues to be unable to make rational decisions, and that her delusions would endanger Zanelle, and pose an unacceptable risk to the child's future safety.

III. Conclusions of Law

* * *

E. The facts overwhelmingly establish that [appellant]'s mental illness is the most significant and intractable underlying cause of her inability to care for her daughter. The testimony irrefutably demonstrated [appellant]'s detachment from reality where Zanelle is concerned. From her accusations against the hospital to her harassment of the foster parents to her threats of death against the Department social worker to her inability to take constructive suggestions on parenting to her absence from the [Termination of Parental Rights] trial, [appellant]'s actions are the proof of her unfitness as a parent. The Court finds that [appellant]'s mental health is so compromised that it is unlikely that [appellant] could ever be trusted with a young child without intensive treatment and supervision, which she will not accept. [Appellant]'s course of conduct and her untreated mental illness are clear and convincing evidence of her inability to safely parent Zanelle.

At trial, [appellant]'s counsel and

her Guardian *Ad Litem* (whom the Court allowed to question witnesses and make argument, with the agreement of all parties) argued that [appellant] was culturally misunderstood. The Court finds that no such misunderstanding exists. In fact, [appellant] misunderstands the severity of her mental illness. She refuses to address it. It is that refusal, or perhaps inability, which leads to the conclusion, by clear and convincing evidence, that it is in Zanelle's best interest that [appellant]'s parental rights be terminated.

In closing, the Guardian *Ad Litem* asked that the Court order an open adoption. The Court does not have the power to do so. Regardless, [appellant] cannot function in a cooperative manner when her warped world view is challenged. While the Court does not question [appellant]'s feelings for Zanelle, that alone is insufficient to overcome the clear and convincing evidence of the real danger [appellant] poses to [Zanelle] and those who provide care for her.

F. The Court has made findings of fact pursuant to the statutory factors found in [F.L.] § [ ]5-323(d). The Court has weighed the evidence in its entirety, including the credibility of the witnesses before it. Taking all of the above into consideration, the Court finds by clear and convincing evidence that [appellant] is unfit, that [appellant] poses an unacceptable risk to Zanelle's future safety, and that it is in Zanelle's best interest that the parental rights of [appellant] and Karl D[.] (by consent) be terminated.

(Some alterations, emphasis, and omissions in original) (footnotes omitted). On April 10, 2012, appellant noted an appeal.

DISCUSSION

Appellant contends that the circuit court erred in terminating her parental rights because the Department did not make reasonable efforts toward reunification tailored to accommodate appellant's background 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 "cultural gap" through meaningful efforts. Appellant maintains that, even if the Department's efforts were sufficient, the circuit court erred in terminating her parental rights, as there was no evidence that appellant would present a danger to Zanelle as a result of her perceived mental illness if Zanelle were returned to her care.

The Department responds that the circuit court did not err in terminating appellant's parental rights, because appellant "is an unfit parent as the result of her persistent serious mental illness and termination of [appellant]'s parental rights is in Zanelle's best interests." The Department contends that it provided appellant with "culturally sensitive services" tailored to treat appellant's continuing mental illness and aimed at returning Zanelle to her care. 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, because termination of appellant's rights was in her best interest as appellant's mental illness, "if left untreated, prevent[ed] her from sustaining adequate functioning in stressful circumstances[,]" such as raising a child. Zanelle argues that the Department provided reunification services tailored to appellant's needs in the form of psychiatric referrals — however, appellant refused to participate.

The Court of Appeals has set forth the standards guiding appellate review of an order of the juvenile court terminating parental rights as follows:

> [W]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Maryland Rule 8-131(c)] applies. [Second, i]f it appears that the [trial 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 [trial court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [trial court's] decision

> should be disturbed only if there has been a clear abuse of discretion.

In re: Adoption/Guardianship of Ta'Niya C., 417 Md. 90, 100 (2010) (some alterations in original) (citations omitted).

The United States Supreme Court and Maryland appellate courts have recognized that a parent has a fundamental constitutional right to raise his or her children. See, e.g., In re: Samone H. & Marchay E., 385 Md. 282, 299 (2005); In re: Yve S., 373 Md. 551, 566-67 (2003). A parent's fundamental right encompasses the "right . . . to make decisions concerning the care, custody, and control of [his or her] children." Troxel v. Granville, 530 U.S. 57, 66 (2000) (citations omitted). This right is not absolute — it must be balanced against the State's interest in protecting a child's best interest. Yve S., 373 Md. at 568-69.

"When the State seeks to terminate parental rights without the consent of the parent(s), the standard is whether the termination of rights would be in the best interests of the child." In re: Adoption/Guardianshi[ ]p of Cross H., 200 Md. App. 142, 152, cert. granted sub nom., In re: Adoption of Cross H., 422 Md. 352 (2011) (citation omitted). Accompanying the best interest standard is a rebuttable presumption that it is in the best interest of a child to maintain the parent's rights. See, e.g., In re: Rashawn H. & Tyrese H., 402 Md. 477, 495 (2007) ("We have created [the] harmony [between a parent's fundamental right and the best interest standard] by recognizing a substantive presumption . . . that it is in the best interest of children to remain in the care and custody of their parents."), abrogated in part as noted in concurring opinion, Ta'Niya C., 417 Md. at 118; Yve S., 373 Md. at 571 ("The best interests of the child standard embraces a strong presumption that the child's best interests are served by maintaining parental rights." (Citations omitted)).

The presumption in favor of the natural parent is rebutted, and parental rights will be terminated, "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." Rashawn H., 402 Md. at 498. This showing must be established by clear and convincing evidence as set forth in F.L. § 5-323(b), which provides:

> If, after consideration of factors as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection.[10]

F.L. § 5-323(d) sets forth the "criteria for determining the kinds of exceptional circumstances that would suffice to rebut the presumption favoring a continued parental relationship and justify termination of that relationship." Rashawn H., 402 Md. at 499. In completing this analysis, a trial court "must faithfully examine" and make findings of fact as to each statutory factor. In re: Adoption/Guardianship Amber R. & Mark R., 417 Md. 701, 714 (2011). FL. § 5-323(d) provides:

> Considerations. — Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1)(i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or a professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
>
> (i) the extent to which the parent has maintained regular contact with:
>
> 1. the child;
>
> 2. the local department to which the child is committed;

and

3. if feasible, the child's caregiver;

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

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

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

(3) whether:

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

(ii) 1. A. on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or

B. upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist, as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

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

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

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

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

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

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

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

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

The Court of Appeals summarized the process involved in a termination of parental rights case as follows:

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

> parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.

Rashawn H., 402 Md. at 501 (emphasis and footnote omitted). The Court of Appeals has explained that this summary should be the "touchstone for courts" in termination of parental rights proceedings. Ta'Niya C., 417 Md. at 111.

Applying the principles set forth above, 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.

With regard to the services offered to appellant, the circuit court observed that no preremoval services had been offered because Zanelle was removed from appellant's care emergently when appellant refused to allow proper medical care for her. The circuit court found, however, that beginning in March, 2010, the Department had attempted to provide services to appellant aimed at reuniting appellant and Zanelle. The reunification services included referring appellant for therapy, which she initially refused, and ultimately attended for only a short time before "abruptly terminat[ing] the therapy[.]" The Department's reunification efforts included referring appellant for psychological and psychiatric evaluations with the following mental health professionals: 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 and the Department reached only oral agreements for services, as appellant refused to sign service agreements with the Department.

As to appellant's efforts to adjust her circumstances, condition, or conduct to make it in Zanelle's best interest to be returned to her custody, 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 appellant's contact with Zanelle, the circuit court noted that appellant attended visits with Zanelle regularly until January 2012, but, at that point, she began to miss visits without explanation. The circuit court found that appellant's interactions with Zanelle evidenced her "resistance to developing the skills and bond necessary for competent parenting." The circuit court observed that appellant attempted to force Zanelle to eat when she was not hungry and to sleep when she was not tired, repeatedly focused on phone calls and conversations with the social worker rather than Zanelle, and refused to accept suggestions from the social worker regarding care of Zanelle. The circuit court found that appellant exhibited inappropriate behavior at visits with Zanelle, 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 appellant's contact with the Department, the circuit court noted that "[p]rior to the change in the permanency plan in June, 2011 (to Adoption by a Non-Relative), [appellant] maintained frequent, though ineffective, contact with the Department." The circuit court observed that appellant "was combative with Department personnel," including "scream[ing] and call[ing] the social worker names," and "[advising] Department personnel that she was working on an exposé of the Department . . . and that the [Oprah Winfrey] show would be coming to [the social worker]'s house." 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 appellant's contact with Marie and Cyruss T., Zanelle's caregivers, the circuit court found the relationship to be poor. Appellant made allegations of abuse and neglect against Marie and Cyruss T. that were proven to be false. The circuit court observed that appellant was verbally aggressive toward Marie and Cyruss T. and had made threats against them, and that, as a result, her contact with Marie and Cyruss T. "became unsafe."

As to appellant's ability to contribute to Zanelle's financial support, the circuit court found that appellant "has not contributed to Zanelle's care and support."

With regard to "[t]he existence of a parental disability that makes [appellant] consistently unable to care for [Zanelle]'s immediate and ongoing [ ] needs[,]" the circuit court found that appellant "has significant mental health issues, [for] which she refuses to acknowledge or participate in treatment[.]" The circuit court noted that, as a result of her psychological issues, 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." The circuit court found that, 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 — Dr. Aguilar Hass and Dr. Ruth both "testified about their cross-cultural professional experience, specifically with Africans, and Africans from Zimbabwe and South Africa, and . . . [n]either 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 so that the child could be returned to the parent[,]" 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 in the necessary treatment." The circuit court concluded that, even if appellant began participating in treatment, "[t]estimony established that to begin to address her mental issues, [appellant] would likely need to participate *at least* two years of consistent, intensive therapy, in conjunction with psychotropic medication." (Emphasis in original).

With regard to whether or not appellant abused or neglected Zanelle, the circuit court found that appellant's "unwillingness to allow doctors to provide Zanelle with AZT treatment to protect her from possible HIV infection" at birth constituted life-threatening neglect. The circuit court observed that "[g]iven [appellant]'s continuing untreated mental disorders, [appellant]'s neglect of Zanelle in the future is likely. There has been no change in [appellant]'s behavior indicating she is better able to make rational decisions, nor take advice from others." The circuit court reiterated that "[u]nder the circumstances, it is likely that [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 circuit court noted that Zanelle, who is generally an outgoing and happy child, is subdued when visiting with appellant, "often confrontational and unhappy on visit days," and "separates from [appellant] without any expression of emotion."

As to Zanelle's adjustment to the community and her foster home, the circuit court found that her adjustment has been good, as Zanelle is bonded to her foster parents. The circuit court found that Zanelle is too young to attend school or to have friends in the apartment complex where she resides, but that she "does well with the children in her day care and is developmentally appropriately engaged."

With regard to the likely impact of terminating appellant's parental rights on Zanelle's well being, the circuit court 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 "[t]he termination of the parental rights of [appellant] will not negatively impact Zanelle's well being."

Based on the evidence in the record, we are satisfied that the circuit court properly considered the applicable statutory criteria, and that the circuit court's factual findings are amply supported by the evidence. 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.

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

FOOTNOTES

1. The circuit court was sitting as a juvenile court during the proceedings in this case.

2. The Department's petition states that appellant and Karl D. were married at the time of Zanelle's birth. Although married, appellant and Karl D. maintain separate addresses.

3. HIV is the acronym for for "human immunodeficiency virus," a potentially fatal disease. http://www.nlm.nih.gov/-medlineplus/hivaids.html. AZT is a medication used "to treat human immunodeficiency virus (HIV) infection in patients with or without acquired immunodeficiency syndrome (AIDS)[,]" and may "be used sometimes to treat . . . individuals exposed to HIV infection after accidental contact with HIV-contaminated blood, tissues, or other body fluids." http://www.nlm.nih.gov/medlineplus/druginfo/meds/a687007.html. Zanelle was prescribed AZT as a prophylactic measure at the time of her birth, as the hospital was not "really clear on her HIV status[.]" Zanelle was retested for HIV at four months, six months, and eighteen months. Zanelle tested negative for HIV in each instance.

4. Zanelle has remained in the home of Marie and Cyruss T. from her initial placement in shelter care until the present time. Marie and Cyruss T. are an adoptive resource for Zanelle.

5. Both appellant and Karl D. voluntarily elected not to attend the hearing. By the date of the hearing, Karl D. had consented to the termination of his parental rights.

6. A review of the record reveals a psychologist identified as "Dr. Boss" did not testify at the termination of parental rights hearing, and no report from "Dr. Boss" is in the file before this Court. All of the conclusions attributed to Dr. Boss are, however, equally attributable to psychologists Aguilar Hass and Ruth. The reference to Dr. Boss's findings by the circuit court,

therefore, does not affect our analysis in this case.

7. The circuit court found that there was no evidence of the actions described in F.L. § 5-323(d)(3)(ii).

8. The circuit court found that there was no evidence of the actions described in F.L. § 5-323(d)(3)(iv) or (v).

9. The circuit court found the issues described in F.L. § 5-323(e) not to be at issue in this case.

10. This higher burden of proof is required by the Due Process Clause of the Fourteenth Amendment. Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

Cite as 11 MFLM Supp. 117 (2012)

Adoption/Guardianship: termination of parental rights: inability to provide long-term care

Consolidated Cases

In Re: Adoption/Guardianship of Precilla C.

No. 226, September Term, 2012

In Re: Adoption/Guardianship of Selena C.

No. 138, September Term, 2012

Argued Before: Matricciani, Kehoe, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: September 18, 2012. Unreported.

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 first became pregnant; his incarceration due to those crimes; his minimal to non-existent relationship with the children due to those arrests; and his imminent deportation.

Hector C. ("Hector") appeals a judgment of the Circuit Court for Queen Anne's County, sitting as the juvenile court, granting the petition of the Queen Anne's County Department of Social Services ("DSS" or the "Department") to terminate his parental rights in his daughters, Precilla T. C. and Selena C. In the same action, the court also terminated the parental rights of the children's mother, Megan H. ("Megan"). (Megan is 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?

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

We will affirm the judgments of the juvenile court.

BACKGROUND

Hector's parental rights to Precilla and Selena were terminated by the juvenile court after a full-day hearing on January 19, 2011. The following has been taken from the testimony and exhibits admitted as evidence in that proceeding. We focus our summary on those aspects relevant to Hector's parental rights.

Hector and Megan are the biological parents of Precilla, born October 8, 2007, and Selena, born April 6, 2009. 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 Child In Need of Assistance ("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.

I. Precilla's and Selena's Births and Their Experiences in Foster Care

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

Megan's and infant 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. ("Adan"), located on Bloomingdale Road 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, who was then around age fifteen, continued their sexual relationship during this time.

On August 22, 2008, when Precilla was approximately ten-months-old, Megan was injured during a physical altercation with Ms. Flores at the

Bloomingdale Road house. Megan and Precilla were transported to a local hospital and the hospital staff alerted DSS. At that time, DSS intervened by placing Precilla in emergency shelter care and filing CINA emergency petitions. Both Precilla and Megan were found to be CINA on October 9, 2008 and DSS put a safety plan in place to address: (1) the threat of Megan's continued victimization by Hector in the Bloomingdale Road residence, (2) Megan's injury during a physical altercation with Ms. Flores at the Bloomingdale Road residence, and (3) a concern that Megan would run away with Precilla.[1] DSS placed Megan with various family members, each of whom agreed to the safety plan. However, Megan returned to the Bloomingdale Road residence, and presumably Hector, within days of each familial placement. In September, 2008, DSS learned that Megan was pregnant with her second child, Selena.

Shortly after Selena was born on April 6, 2009, Selena was placed in foster care and DSS petitioned for her to be found CINA. Megan consented to the petition. Selena was declared a CINA on September 13, 2009. From that point forward, Megan and her two children, Precilla and Selena, remained in foster care and fluctuated among various joint and separate placements and visitation schedules. Megan ran away from her foster home in April, 2011 and had no contact with either her children or DSS for several months. At about the same time, Precilla and Selena were placed in the same foster home with prospective adoptive parents. In August, 2011, after she had reached the age of eighteen, Megan contacted DSS and asked to resume visitation with her children.

II. Hector's Incarceration and Detention

On or around November, 2008, Hector was arrested and charged with various sex offenses arising out of his relationship with Megan. He was held in pretrial detention until he pled guilty to one count of second-degree rape of Megan in the Circuit Court for Queen Anne's County on April 24, 2009. The court sentenced Hector to a term of imprisonment of fifteen (15) years with all but four (4) years suspended.[2] 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 court in Megan's CINA proceeding prohibited her from having contact with Hector.[3] In light of the court's no contact order and his incarceration, DSS's reunification services for Hector were quite limited. DSS did explore placing the children with Adan. These efforts came to naught because DSS social workers were concerned that Adan would permit either Hector or Megan to abscond with the children if given the opportunity. DSS staff also invited Hector to a family involvement meeting for Precilla and Selena which he was unable to attend because of his incarceration. In May 2010, the juvenile court relieved DSS of any obligation to provide reunification services to Hector pursuant to § 3-812 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code, which authorizes the court to take this step where the DSS determines the parent has either: 1) abused or neglected the child; 2) been convicted of a crime of violence against the child, another of the parent's children, or the other parent to the child; or 3) involuntarily lost parental rights of a sibling of the child.

III. The TPR Proceeding

On August 10, 2011, DSS brought TPR actions seeking to terminate Megan's and Hector's parental rights in Precilla and Selena. Both Megan and Hector filed written objections to the termination of their parental rights. The court consolidated Precilla's and Selena's proceedings and conducted an evidentiary hearing which neither party attended: Hector remained incarcerated with barriers to transportation;[4,5] and Megan had dropped out Of contact with DSS. At the time of the evidentiary hearing, Megan's whereabouts were unknown. However, Megan and Hector were both represented by counsel at the TPR proceeding.

The witnesses called during the TPR proceedings were primarily social workers who, at various times, had been assigned either to Megan or to Precilla and Selena. The only non-DSS witness testimony heard was from Adan and Myra Flores (Adan's significant other). Adan and Ms. Flores briefly testified regarding their willingness to take custody of the children, their respective personal relationships with Megan, and the condition of their home.

Kristin Roemer of the Queen Anne's County DSS testified regarding DSS home studies that she conducted to determine whether or not Precilla and Selena could be placed with Adan at the Bloomingdale Road residence. DSS, however, did not recommend placement with Adan, because: 1) DSS concluded that he would not be able to prevent Megan and Hector from absconding with the children, 2) Precilla and Selena had no relationship with Adan or other household members; and 3) a move to another placement would not be in the children's best interests.

Adan and Ms. Flores testified as to their willingness to take Precilla and Selena and their ability to provide a good home for the children. Their testimony was confined to their own willingness and qualifications as potential guardians for Precilla and Selena. The record does not contain testimony on Hector's behalf by either Adan or Ms. Flores pertaining to Hector's parenting abilities.

Jennifer Kovach, a former foster care worker with

Queen Anne's County DSS, who had been a caseworker for Megan, Precilla, and Selena from August 2008 through February 2010, testified that Precilla, then aged four, had not seen Hector since September 2008 when she was eleven-months-old. Selena, aged two years, was born while Hector was incarcerated and had never met Hector. Ms. Kovach also stated that Hector had never financially contributed to the support of either child.

The witness whose testimony was most relevant to Hector's contentions to this Court was Susan Spiering, the DSS caseworker for Precilla and Selena from July 6, 2010 until the time of the TPR proceeding. Ms. Spiering testified that she had observed the children at their current foster home (with their prospective adoptive family) approximately fourteen (14) times. Based on her observations, she testified that Precilla and Selena had made a good adjustment to their foster home, appearing both happy and well-adjusted. Ms. Spiering also stated that the children had made a good adjustment to their community, where they attended church, preschool, and dance classes. Ms Spiering also testified that, based on her observations, terminating Megan's and Hector's parental rights would have very little negative effect on Precilla and Selena and would enable the children to "move on with their lives."

After the conclusion of the hearing, the juvenile court issued an order terminating both Megan's and Hector's parental rights. In a comprehensive and well-reasoned written opinion, the court addressed the relevant factual issues and summarized both the evidence presented and the applicable law. After doing so, the court concluded:

> Having thoroughly reviewed this matter, the Court concludes that the return of Precilla and Selena to [Hector] would impose an unacceptable risk to the future safety and development of each child . . . . Hector clearly criminally victimized Megan and was irresponsible, at best, in doing so. [Hector] is presently [un]able to care for [himself], much less Precilla and Selena. [He] is presently [un]able to provide for either child [and is not] ready and willing to accept the responsibility [or] to provide . . . the care and attention . . . require[d.] A return of either child to [Hector] would place the child at substantial risk of harm and is contrary to their welfare. . . . Based upon the Court's analysis of the relevant statutory framework, the Court finds by clear and convincing evidence that it is in the best interests of Precilla [ ] and Selena [ ] to terminate the parental rights of both parents.
>
> For all the reasons stated above, the Court finds and determines, based upon the facts of this case, by clear and convincing evidence, that . . . Hector [is] presently unfit to remain in a parental relationship with Precilla and Selena, and that a continued parental relationship . . . would be detrimental to the best interests of both Precilla and Selena. Furthermore, and more to the point in this case, based upon Hector's incarceration for the past more than 3 years[ ] and [his] present deportation proceedings and parole status, the Court finds and concludes, by clear and convincing evidence, that there are exceptional circumstances that would make the continued parental relationship between Hector and Precilla and Selena detrimental to the best interests of Precilla and Selena. . . .

STANDARD OF REVIEW

In reviewing an order terminating parental rights, we employ three related standards:

> [W]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] [i]f 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 Adoption/Guardianship of Ta'niya C., 417 Md. 90, 100 (2010) (quoting *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 297 (2005)).

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 chil-

dren under the guardianship of the department of social services was in their best interests. He elaborates:

> The information provided to the court was general and vague. In light of the requirement that terminating parental rights must be in the child's best interests, it was necessary for the court to have more information about the children. There must be a basis for the court to conclude that cutting off the girls' legal ties to their natural parents would be in their best interests and that it would not cause them harm. The fact that they were 'happy' or 'doing well' is not telling on the issue. . . .
>
> Because of the lack of evidence, the court did not — because it could not — make express findings as to . . . [MD. CODE ANN., FAM. LAW § 5-323(d)(4)]. . . . The court failed to make specific findings, making only generalized and sweeping findings that mirrored the general and sweeping language used by the [DSS's] witness, Susan Spiering, when testifying briefly about the children. This was a reversible error. . . . Because there was hardly any evidence about the girls, the circuit court could not have made specific express findings. Remanding the case for further findings, therefore, would be fruitless. The ruling below must be vacated.

(Appellant's Br. 9-12.) As we understand Hector's argument, he asserts Ms. Spiering's testimony was an inadequate factual basis for the court's findings regarding the child impact factors of § 5-323 (d)(4). Hector then argues that because the court was unable to make proper findings as to the effect that termination of Hector's parental rights would have on the children, it was unable to properly make its determination that termination of his parental rights was in the best interests of Precilla and Selena. These arguments are unpersuasive because the court had sufficient evidence on which to base its determination as to the child impact factors of §5-323(d)(4) and there was ample evidence to support the trial court's conclusion that Precilla and Selena's best interests were served by termination of Hector's parental rights.[6]

First, we conclude that the court had sufficient evidence on which to base its determination as to the child impact factors set forth in §5-323(d)(4). Summarized, these factors 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. *See* MD. CODE ANN., FAM. LAW § 5-323(d)(4) (1984, 2006 Repl. Vol., 2010 Supp.) ("F.L.").

Our review of the lower court's factual determination, "assume[s] the truth of all the evidence, and of all of the favorable inferences fairly deducible therefrom, tending to support the factual conclusion of the trial court." *See In Re Abiagail C.*, 138 Md. App. 570, 587 (2001) (citing *In Re Adoption No. 09598*, 77 Md. App. 511, 518 (1989)). Applying this standard, we hold that its analysis of the child impact factors was sufficient and consistent with the record. 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. Hector's trial counsel did not contend that either child had any emotional attachments or ties of any sort to their natural father. In light of this, 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. From this, the court properly considered the child impact factors of § 5-323 (d)(4) and we will not disturb its ruling.

Second, we conclude that 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. Hector argues that the lower court only based its decision on testimony that Precilla and Selena "appeared to be settling in[to]' their foster home, appeared 'very happy' and 'well-adjusted,' attended church, preschool, and dance class, and caused [DSS] no concerns." (Appellant's Br. 9.) Hector criticizes the court's analysis as unduly conclusory and inadequate to overcome the presumption that it was in the children's best interest to maintain a familial relationship with him. We disagree.

When we read the court's opinion as a whole and consider that opinion in the context of the evidence before it, we find ample support for the court's ultimate decision. As is relevant to Hector, the unchallenged evidence established Hector's (1) long-standing sexual abuse of Megan;[7] (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 J970013*, 128 Md. App.

242, 252-53 (1999) (affirming the court's decision to terminate parental rights of a parent sentenced to life with the possibility of parole which, in reality, would never "come to be" as a critical factor to determining the best interests of the child). Additionally, as we have noted, the testimony of the DSS witnesses as to the effect of termination upon Precilla and Selena was unchallenged.

The juvenile court correctly understood the relevant legal standards and applied those criteria appropriately to the facts as it found them to be. 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. In his brief, Hector asserts that "[i]t was an abuse of discretion for the [lower] court not to consider custody and guardianship to the [paternal] uncle as an alternative to terminating parental rights." (Appellant's Br. 13). Hector contends that this is a reversible error.

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).[8] In that case, the juvenile court denied a motion to intervene filed by the child's paternal grandmother and refused to admit evidence of the grandmother's suitability as a placement at the TPR hearing. *Id.* at 151. Writing for this Court, Judge Matricciani noted that, in the child's CINA case, the CINA court ordered that Cross's permanency plan be amended to explore the possibility of placement with the grandmother but that the Department concluded that such a placement would not be appropriate. *Id.* at 151-52. Judge Matricciani continued:

> These considerations were explicitly referenced by the circuit court in its oral ruling[ ] Moreover, 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.

Id. (footnote omitted).

Much the same occurred in the case before us. During the pendency of the CINA proceedings, DSS conducted two separate assessments of Adan's residence as a placement resource for the children. DSS concluded on each occasion that such a placement would not be in the children's best interests. As in *Cross H.*, the juvenile court referenced DSS's recommendations in its opinion. Moreover — unlike in *Cross H.* — the TPR court permitted both Adan and Ms. Flores to testify as to their suitability as custodians and Hector does not now assert that the court erred in refusing to admit any evidence proffered by Adan. Finally, in its order terminating Hector's and Megan's parental rights, the court did not make any provisions as to the children's placement, but instead scheduled a guardianship review hearing at a future date to address that issue.

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.*

THE JUDGMENTS OF THE JUVENILE COURT FOR QUEEN ANNE'S COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.

FOOTNOTES

1.Megan did, in fact, make an unsuccessful attempt to kidnap Precilla during a supervised visit. She was apprehended and detained at the Lower Shore Detention Center for Juveniles for approximately one month.

2. This conviction rendered Hector a child sexual offender who would be required, upon release, to register at the Maryland Sex Offender Registry. *See* MD. CODE ANN., CRIM. PROC. §§ 11-701-727 (2008).

3. On March 21, 2009, Megan wrote a letter to the circuit court requesting that it "lift the [n]o-[c]ontact order from the criminal court . . . as soon as possible" so that she and Hector could plan for the future and so that her children can have contact "with their father (FOREVER)." This request was denied on March 30, 2009.

4. Hector did not attend any TPR proceedings as counsel's efforts to obtain his transportation from the Dorchester County Detention Center were unsuccessful.

5. In his brief, counsel for the children suggests that Hector was deported "7 days prior to the TPR hearing." This assertion appears to be incorrect. The TPR proceeding was conducted on January 19, 2012. Respondent Minor Children's Brief attaches a document titled "Request to Close Unsatisfactorily" from the State of Maryland Department of Public Safety and Correctional Services. This document indicates that, according to the Department of Homeland Security, Hector was deported from the United States to Guatemala on June 12, 2012, and not January 12, 2012, as asserted.

6. We note that, ordinarily, the scope of our appellate review is restricted to issues "that plainly appear[ ] to have been raised in or decided by the trial court." Md. Rule 8-131(a). Hector's trial counsel did not assert that there was an insufficient evidentiary basis for termination of his parental rights. Instead, trial counsel's argument was that termination of Megan's parental rights was not justified because the Department had failed to provide her with adequate reunification services. As an alternative, he asserted that, if the court terminated Megan's parental rights, Precilla and Selena

should be placed in the custody of Adan and Ms. Flores At no time did Hector's trial counsel contend that there was insufficient evidence as to the effect upon the children of the termination of his parent rights. We will nevertheless exercise our discretion and consider the substance of Hector's argument.

7. Precilla and Selena are the products of Hector's ongoing criminal sexual abuse of Megan. Whether, or to what extent, this affects the degree of protection which shall be afforded to Hector's paternal rights was not raised before the circuit court nor, consequently, briefed by the parties. The resolution of this question must await another day.

8. As of the date of this opinion, the Court of Appeals has not issued an opinion in *Cross H.* Pending instruction by the Court, our decision in *Cross H.* is the law of the state and we see no reason why it should not be applied.

Cite as 11 MFLM Supp. 123 (2012)

Custody: psychological evaluation of parent: timeliness of request

Shirley Wallace
v.
Michael Wallace

No. 1393, September Term, 2011

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

Opinion by Eyler, James R., J.

Filed: September 18, 2012. Unreported.

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, in the Circuit Court for Anne Arundel County. On August 4, 2011, the circuit court issued a judgment of absolute divorce which, *inter alia*, provided for the joint legal and physical custody of the parties' minor child. This timely appeal followed. For the reasons set forth below, 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.

Factual and Procedural 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 August 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.

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

Questions Presented

As phrased by appellant, the following questions are presented for our review:

> 1. Did the trial judge abuse his discretion in awarding Father the joint legal and shared physical custody of the parties' son in light of evidence of Father's extreme behavior?
>
> 2. Did the trial court err in failing to order the Appellee to comply to comply [sic] with a valid trial subpoena?
>
> 3. Did the trial court err in failing to grant Appellant's request for a psychological evaluation of Appellee?

Discussion

The trial court did not abuse its discretion in awarding joint physical custody of the parties' son. Because we are unable to discern the basis for some aspects of the court's decision relating to joint legal custody, we vacate the portion of the judgment awarding joint legal custody and remand for further proceedings on that issue.

The trial court did not err in determining that appellee substantially complied with a trial subpoena by bringing all documents in his possession and did not err in denying appellant's request for a postponement for appellee to obtain additional documents. Finally, the trial court did not err in denying appellant's request for a psychological evaluation of appellee because appellant never made a proper request for one until the middle of trial.

1. Joint Legal and Physical Custody

First, appellant argues that the court abused its discretion in awarding joint legal custody and shared physical custody to both parties. Maryland appellate courts practice a limited review of a trial court's decision concerning a custody award. "[W]hen the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous,

the chancellor's decision should be disturbed only if there has been a clear abuse of discretion." Davis v. Davis, 280 Md. 119, 125-26 (1977).

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 in determining the best interests of the child, including:

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Id. at 420 (internal citations omitted). Factors particularly relevant to a consideration of joint custody include: 1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; 2) willingness of parents to share custody; 3) fitness of parents; 4) relationship established between the child and each parent; 4) preference of the child; 5) potential disruption of child's social and school life; 6) geographic proximity of parental homes; 7) demands of parental employment; 8) age and number of children; 9) sincerity of parents' request; 10) financial status of the parents; 11) impact on state or federal assistance; and 12) benefit to parents. Taylor v. Taylor, 306 Md. 290, 304-311(1986).

In coming to a custody decision, the circuit court in this case analyzed the circumstances, and stated in part:

> The factors that I am required to consider, first let's deal with joint legal and physical custody. The case of Taylor v. Taylor spells out all of those factors. And I am going to go through them as I think counsel did in their questioning and perhaps in their closing.
>
> The first factor is capacity of parents to communicate and to reach shared decisions affecting the child's welfare. Well, we know for the last 18 months that since the parties' last separation that they came to an agreement.
>
> The difference of opinion is whether the agreement is really an agreement or whether it was really something forced upon the mother because she just wanted to be done with Mr. Wallace and threatened by Mr. Wallace as a result of some prior conduct on his part.
>
> And let me say something about the conduct. This court does not and never will condone the use of force, the use of inappropriate language. To the contrary, our children are deserving of parents who treat each other with respect and it is clear in this case that at least that has not happened.
>
> One thing that I will observe is that, and perhaps it is a part of the adversarial process, which one expects, but from the Plaintiff's side, I have heard much about that — Mr. Wallace's responsibility and indeed he does have a fair amount of responsibility for the negative behavior that has been talked about.
>
> However, I conclude that is not unusual but I certainly based upon listening that there are two sides to every story. And I have not heard — and candidly, I have heard Mr. Wallace acknowledge his shortcomings in terms of his mental health issues and his behavior. And so apparently whatever buttons were — there were buttons pushed that enabled him to or at times set him off but I also think the testimony is clear to me that although it has been not something that is entirely the responsibility of Mr. Wallace.
>
> He, himself, mentioned how he was reacting to yelling and screaming and Ms. Wallace, herself, acknowledged in her testimony that she was at times yelling and screaming. And I have little doubt that Zachary and unfortunately the other children have been subjected to this. I certainly heard it from Andrew and Andrew's version of it.
>
> But I do not believe that is a one-way street. I do not believe that it is Mr. Wallace who is responsible for everything. And I have some concern that Ms. Wallace doesn't take any responsibility because she doesn't seem to, at least, I haven't seen that she has taken any responsibility for her.

Although, she did say — and she did say and tell the Court what she felt she had wanted, intended in terms of that relationship. She has similar problems with, perhaps not as severe, but she also had problems and anger issues with her first husband. I am persuaded that she had some conversations where she hung up on him and so this is a two-way street.

. . .

We cannot here control what you have done in the past. I can control what you do in the future because the order that I am going to pass is going to be conditioned upon certain things and certain behavior. So, I conclude that you both do have the capacity to, as parents, to communicate and reach shared decisions. You all have chosen that you will communicate by text. Sometime that works for parents, it certainly worked to the extent in your case for 18 months. The level of animosity has been much less than it was although it still is not where it needs to be.

So I do believe that you have the capacity to reach shared decisions. I do think, although certainly it is clear to me, that Ms. Wallace would like, is willing to share the kinds of decisions assuming that the relationship what she now think is similar to her ex-husband and that is a good goal.

Although her view of it, sir, is that you are not willing to do it. She says, and she probably did reach out to you and you have been somewhat resistant because of reasons that you have. But I think that at some point in time, although candidly, you did indicate that you could, you were willing, you just didn't think it was something that could happen right now.

Fitness of the parents. I think you are both fit parents. There is no indication of that. There is no indication other than negative exposure that we may talk about that you all don't provide the appropriate care. There is no indication that you are not otherwise upstanding citizens with good jobs and actually nice people. I think you are.

Mr. Wallace has some issues, health issues, that he has to and has dealt with in the past. I am not persuaded that he is abusing drugs. I am not persuaded that he is out there going from doctor to doctor. I have been doing this a long time. I have seen lots of people who do that and he certainly does not appear to me to be one who is in that category.

And perhaps the misunderstanding of that would be if you all had better communication and that is kind of an important issue and I don't criticize mom for wanting to know about it. But you all don't talk — you don't about anything except through text. So, therefore, she doesn't know much about what goes on in your house with your son and certainly doesn't know much about what goes on in your house in terms of your mental health issues except as it is revealed to her in your text messages.

The relationship that the child establishes between the parent. Well you both have a good relationship with him. There is no question about it. I am sure he loves both of you. He spent the last 18 months pretty much 50/50 with each. I have heard nothing that suggests anything but that he has thrived under that. I certainly — that is a good thing.

Preference of the child. He is too young for that. Potential disruption of the child's social school life. I don't see any disruption potential here. This child has two different families. He has two different sets of friends that I have heard about and seems to work both ways. So I don't see that having a joint legal custodial arrangement as opposed to a shared arrangement would be something that would disrupt his social life or school life.

Geographic proximity of the homes. Well, you all live 15 minutes apart. You don't live all that far apart. That is not a negative factor.

Demands of parental employment. Well, you both have jobs, full time jobs. The mother has — because of her flexibility has quite a bit more of an opportunity to be able, and —

does, to her credit use that flexibility to take care of medical issues and all of that. Of course, she makes more money but that is good because if she can do it and her employer pays her, then that is the wiser thing to do because it won't take money away from the father who doesn't make as much and it would impact him much more if he had to take off work.

Age and number of the children. Well, let's see Zack, we have one child although there are other siblings that are not from this marriage. And Zack I believe is born July 15, 2006 — I am sorry, April 8, 2007, so he is now four years of age.

Sincerity of the parents request. I don't think either one of you are insincere in your request. The mother's request is that because of her concern with the behavior of Mr. Wallace that she should be the one who has proven herself to be able to make the decision for Zack. And while I think that is a sincere request, I am not sure that it is the correct assessment of the situation.

I think that Mr. Wallace has been sincere. I will say the same thing about him. I don't necessarily agree with his view about some things but I think he has been — I listened carefully to both of you and I think you are both sincere in the positions that you have taken.

Impact on State and Federal Assistance. I don't see anything here that would suggest that is an issue.

And financial status of the parents. Well, we know the incomes and the income I will find that the income of Mr. Wallace is $3,911 per month. Mother makes substantially mote. She makes $9,583 a month. And she pays for daycare that is $810 a month and health insurance that is $110 a month.

Other than that, the parties' financial situation is not the greatest. They have remaining in asset I think there is a pension. The mother has a slight pension, the father has — there is a house that worth four hundred and one thousand dollars that is apparently about the same as the mortgage. So it is close to being underwater. So, there is not a significant issue in terms of the financial status.

Benefit to the parents. Well, I do believe that you all will — that there is some benefit to a consideration of a joint legal custody because you are both unhappy and dissatisfied with the way things were before 18 months and I am sure even the way they were during the 18 months. Clearly during the .18 months the e-mails did continue. I have seen the e-mails and they are awful.

. . .

So more importantly and other factors, I have heard of some others, there are no specific other factors that I think I need to address except to say that I think it is in the best interest of Zack that he benefit from the wisdom of both of you.

. . .

And I do conclude after considering all the factors and I sincerely believe that it is in the best interest of Zack that he have the benefit of both of you so Jam going to award the joint legal care and custody to both of you.

. . .

Now, let's deal with the physical custody. Many of the same factors and I don't intend to repeat myself because I will incorporate all of the criteria and the factors that I just considered in terms of the actual residential or physical custody.

That includes the fitness of the parents, the character and representation. I don't conclude that either one of you are anything but appropriate — have a good character and representation.

. . .

The desire of the natural parents and any agreement between them, the most important thing there is that once they were not going to remain together they did come to an agreement. I do not conclude that that agreement was forced upon Ms. Wallace or that it was actually an inappropriate agreement.

. . .

> Again, the preference of the child. He is too young for that.
>
> Material opportunities affecting the future life of the child. It is even here. Ms. Wallace makes more money than Mr. Wallace but they live in a similar community and there is no indication that — and nobody gets an upper hand because they makes less money.
>
> Now age, health and sex of the child. His health from what I gather is good. We have talked about his age and obviously he is a male.
>
> And in terms of the length of any separation of the parents. Well, the last 18 months it has really been a 50/50 shared arrangement. Haven't seen the separation except for a couple of times when there was an illness and neither one of the parents have ever abandoned or surrendered custody of the children. So, I don't see that as an issue.
>
> So, I think having gone over all of the factors here. I do not agree with the premise that Mr. Wallace's illness is not — and his conduct shows that he is not amenable to treatment. To the contrary, this Court recognizes how difficult it is to deal with mental health issues and he has deal [sic] with that.
>
> . . .
>
> So, I am going to continue with the 50/50 arrangement that exists. I will prepare an order that is consistent with that. You will share the holidays as well on a 50/50 basis.

There is nothing to support a conclusion that the court abused its discretion. 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. At trial, appellant's counsel asked appellee whether he had produced medical records from six different doctors in compliance with appellant's trial subpoena served approximately one month prior to trial in July, 2011. Appellee responded that he brought what was in his possession. Appellant's counsel asked appellee where on the trial subpoena it stated to only bring what was in his possession. Appellee's counsel objected and the court sustained his objection, noting that "we are not here on discovery." Appellant's counsel then requested a postponement so that appellee could produce the medical records. The circuit court denied this request.

Appellant contends that appellee was responsible not only for the requested documents that were in his possession but also those that were in his "control." In so arguing, appellant cites Pleasant v. Pleasant, 97 Md. App. 71.1 (1993), which held that Maryland 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. Appellant argues that

because appellee had the right to obtain his own medical records, under the power of the trial subpoena, he was required to obtain those records from his medical providers and produce them at trial. Appellant argues that to hold otherwise "undermines the basic principles of civil litigation by permitting circumvention of the purpose and intent of a trial subpoena."

Appellant used the following language from Pleasant as support for her contention that a party must produce documents that are within their "control," but are not within their possession, under a trial subpoena governed by Rule 2-510:

> Appellant asserts that appellee could have used the trial court's subpoena power to obtain the desired information from the IRS and from his employer. Whether a Maryland court may reach the IRS and the District of Columbia is questionable. Moreover, appellant misunderstands the proper exercise of subpoena power. A subpoena is to be used to compel the attendance and testimony of witnesses, and production of documents at either a court proceeding or a deposition, and "shall not be used for any other purpose." Maryland Rule 2-510(a). Although a party may choose to depose the non-party holder of documents rather than utilize a request for production of documents, that option is not one that may be forced upon the party seeking discovery. Where documents are within the control of the party upon whom a request for production of documents has been made, that party must obtain and produce those documents. To hold otherwise would be to permit circumvention of the discovery process and create unnecessary expense.

Id. at 732-733.

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. Additionally, Rule 2-422 contains language requiring the production of items that are "in the possession, custody, or control of the party" but Rule 2-510 does not, thus implying that a subpoena only forces a person to bring those documents within the party's possession. The fact that a party need only serve a subpoena five days prior to a trial or hearing under Rule 2-510(d) also supports this interpretation because providing five days to acquire documents not already in a person's possession could easily create an undue burden or cost.

Although it is correct that during discovery, a party does not necessarily have to subpoena and depose a non-party holder of documents instead of requesting the production of documents from the opposing party, that option is foreclosed once the time period for seeking discovery has passed and courtroom proceedings have begun. 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. The trial court did not abuse its discretion in determining that appellee substantially complied with the trial subpoena by bringing all documents in his possession and did not err in refusing to grant a postponement for appellee to seek out medical records not already in his possession.

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 argues on appeal that it did not become clear that a psychological evaluation would be necessary in the case until the middle of trial. Appellant also notes that during a pretrial proceeding it was recommended that both parties obtain a psychological evaluation, that appellant was willing to undergo such an evaluation, but that appellee refused to undergo the evaluation.

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).

In this case, a scheduling conference was held on December 16, 2010. The discovery deadline was set for March 4, 2011 and later extended to March 28, 2011. The scheduling order provided an option for

either party to request a psychological evaluation, but no such evaluation was requested. In fact, appellant did not formally request such an evaluation through motion until August 3, 2011, in the middle of trial and over four months after the expiration of discovery. As we noted in Naughton v. Bankier, 114 Md. App. 641, 653 (1997), "if scheduling orders are to be permitted to be treated in such a casual fashion, why bother with them?"

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 for an evaluation 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. Although appellant may have desired to obtain a psychological evaluation when it was recommended, the record does not reflect that her counsel pursued the proper steps to formally request one from the court through a motion until trial. Until her counsel took such steps and the court ordered an evaluation, appellee could freely refuse any such recommendation.

The fact that appellant's counsel may not have adequately prepared for trial by obtaining medical records and seeking a psychological evaluation prior to trial did not require the trial court to postpone the case in order for appellant to obtain that evidence. 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.

PORTION OF JUDGMENT AWARDING JOINT LEGAL CUSTODY VACATED. JUDGMENT OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID THREE-FOURTHS BY APPELLANT AND ONE-FOURTH BY APPELLEE.

NO TEXT

Cite as 11 MFLM Supp. 131 (2012)

Custody: modification: relocation of one parent

Raymond J. Pearson, Jr.

v.

Naomi Mason

No. 2652, September Term, 2011

Argued Before: Eyler, Deborah S., Kehoe, Watts, JJ.

Opinion by Eyler, Deborah S., J.

Filed: September 18, 2012. Unreported.

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.

In the Circuit Court for Wicomico County, Raymond J. Pearson, Jr., the, appellant, filed a motion to modify custody of Jorryn G. Pearson ("Jorryn"), his child with Naomi Mason, the appellee. Mason filed a countermotion to modify custody.

After an evidentiary hearing, the trial court entered an order modifying custody of Jorryn from joint physical custody in Pearson and Mason to sole physical custody in Mason. Pearson noted a timely appeal, raising four questions for review, 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 of Jorryn to Mason?

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

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

For the following reasons, we shall affirm the order of the circuit court.

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

FACTS AND PROCEEDINGS

Jorryn was born to Pearson and Mason on December 24, 2003. Pearson and Mason never married, but they lived together until 2005. In 2005 the parties separated, but shared custody of Jorryn by informal agreement.

In 2010, Pearson filed a petition to establish joint physical and legal custody of Jorryn. On February 14, 2011, Pearson and Mason came to an agreement regarding custody. On February 18, 2011, they signed a Consent Order for joint physical and legal custody of Jorryn. The Consent Order was approved and adopted by the court.

At the time the Consent Order was entered, Jorryn was attending a private school in Wicomico County, where Mason was living. The parties each paid one-half of the tuition. By then, Pearson was living in Laurel, Delaware, with his fiancée and their two children. Nevertheless, Jorryn visited with him overnight every Tuesday and Wednesday and every other weekend, pursuant to the Consent Order. Under the Consent Order, Jorryn was with Mason the remainder of the time. The Consent Order also provided two weeks vacation time with Jorryn for each parent per year.

On August 2, 2011, Mason sent an e-mail to Pearson expressing her intent to relocate to Virginia in order to move in with her fiancé, Daniel Rinaldi. (They have since married.) Rinaldi is in the United States Navy, and his job requires him to live in Virginia. In response to that e-mail, on August 12, 2011, Pearson filed an emergency motion to modify custody, seeking sole physical and legal custody of Jorryn. On September 30, 2011, Mason filed a countermotion to modify custody, asking the court to deny Pearson's motion and to reaffirm the parties' joint physical and legal custody arrangement, but to alter the specific days on which Jorryn would be with each parent given that they would no longer be living near each other.

On January 11, 2012, the court held an evidentiary hearing on the motion and countermotion. Neither party was represented by counsel. The court took tes-

timony from both parties. By the time of the hearing, Jorryn was attending a public school in Wicomico County, where Mason still was living. Pearson argued that Jorryn's proposed relocation to Virginia would disrupt the stability that the parties' existing joint custody agreement had given Jorryn; would bring about yet another change of schools for him; and would greatly reduce the time that Pearson could spend with Jorryn. Mason countered that she wanted to maintain joint physical custody for Jorryn but to shift the parenting time frames. She testified that she was willing to drive the full distance from Virginia to Delaware every other weekend so that Jorryn could be with Pearson, and that she also was willing for Pearson to have eight full weeks with Jorryn during the summer.

The court held the matter *sub curia* for one week. On January 18, 2012, it issued a written opinion and order. The court found that Mason's proposed relocation to Virginia was a material change in circumstances and that Jorryn's best interests needed to be reconsidered in light of Mason's planned relocation. The court modified custody to sole physical custody of Jorryn in Mason; joint legal custody of Jorryn in the parties; and visitation to Pearson every other weekend, and one three-week and one four-week period during the summer, for a total of seven weeks. The court analyzed Jorryn's best interests, finding that "[t]he best interests of the child will be served by having the Mother continue to be the custodial parent."[1] The trial court determined that Jorryn's best interests would be served by having him attend school in Virginia. Explaining the difficulty that the distance between the parties would create, the court stated that the revised visitation schedule was an "attempt[ ] to balance these issues."

On February 13, 2012, Pearson, who by then had retained counsel, filed a notice of appeal. On February 17, 2012, he filed a "Motion for New Trial, to Revise, Alter or Amend Order and Stay." In that motion, he argued for the first time that the circuit court should have appointed a Best Interest Attorney ("BIA") for Jorryn. He also complained that the trial judge did not engage in any reasoning in reaching his decision to award sole physical custody of Jorryn to Mason.

Pearson's motion was denied on March 8, 2012. Thereafter, he filed a second notice of appeal.

DISCUSSION

I.

Burden on Parents

In deciding a motion to modify custody, the circuit court engages in a two-step process. First, it determines whether there has been a material change in circumstances so as to warrant a modification of the existing custody order. Second, if it finds a material change in circumstances, it decides what modification in custody will be in the best interest of the child. *Braun v. Headley*, 131 Md. App. 588, 610 (2000). In custody modification cases involving parental relocation, the same two-step process applies. *See, e.g., id*. First, the court determines whether the party moving for modification has established that the relocation of a parent is a material change in circumstance that warrants reconsideration of the existing custody order. *See Domingues v. Johnson*, 323 Md. 486, 500 (1991) ("[C]hanges brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody. The result depends upon the circumstances of each case."). Second, if the court finds that the relocation of a parent is a material change in circumstances, it must decide what custody arrangement will serve the child's best interests given the relocation. *Braun*, 131 Md. App. at 610; *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996).

When we review a trial court's decision in a custody case, except with respect to pure questions of law, which we review *de novo*, *see Karen P. v. Christopher J.B.*, 163 Md. App. 250, 264 (2005), "our scope of review is limited to whether the trial judge abused his discretion or whether his findings of fact are clearly erroneous." *Montgomery Cnty. Dep't of Soc. Sen's. v. Sanders*, 38 Md. App. 406, 418 (1977). Neither Maryland case law nor statutory law has propounded hard and fast rules for determining what custody arrangement is in a child's best interest. In *Sanders*, however, this Court provided a non-exclusive list of factors a court should consider in making its best interest decision. Those factors are

> 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Id. at 420 (citations omitted).

Pearson first contends the trial court erred by requiring him to prove that Mason's relocation *would not be* in Jorryn's best interest; instead, he maintains, the burden should have been on Mason to prove that her relocation *would be* in Jorryn's best interest. In this regard, Pearson maintains that the trial court incorrectly assessed Jorryn's best interest under the erroneous assumption that Mason had been his primary custodial

parent and, by doing so, and emphasizing the right of a custodial parent to relocate, the court burdened him with proving that the relocation *would not be* in Jorryn's best interests.

Mason responds that the trial court made a non-clearly erroneous factual finding that her proposed relocation to Virginia was a material change in circumstances and the court then engaged in an appropriate best interest analysis by considering and weighing the *Sanders* factors and other relevant information. She maintains that, in making these decisions, the trial court did not assign a burden of proof to either party, and in particular did not make its best interest decision based on any risk of non-persuasion.

The trial court's finding that Mason's upcoming relocation to Virginia was a material change in circumstances is not at issue on appeal. The parties agree that that finding was not clearly erroneous. The contention Pearson advances concerns the trial court's best interest of the child decision. We are not persuaded by his argument about error in assignment of the burden of proof.

Mason's plan to move to Virginia to live 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: primary residence with his mother and visitation with his father, and if so how much visitation and when; primary visitation with his father and visitation with his mother, and if so how much visitation and when; or shared residence with the parents. There is no suggestion in the record that the trial court required Pearson to prove that primary residence with Mason *would not be* in Jorryn's best interest, such that without meeting that burden, primary residence with Mason would be the default decision. Rather, the hearing transcript clearly shows that the trial court gave each party a full opportunity to present evidence about what living arrangement he or she was advocating as being best for Jorryn, and then made a decision, memorialized in its opinion, about what custody arrangement would be in Jorryn's best interest. Nothing in the court's opinion 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.

In addition, there is no suggestion in the record that the court's characterization of Mason as having been the "custodial parent" had any effect on the outcome of the case. Citing *Braun*, Pearson seems to argue that the trial court's characterization of Mason as the "custodial parent" resulted in her receiving some sort of favorable presumption relating to her right to travel. Conflating the two prongs of a custody modification decision, Pearson also seems to argue that the court factored Mason's right to travel into its determination of Jorryn's best interest, when, in fact, the court simply decided that Mason's upcoming relocation was a material change in circumstances.

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. We explained that in deciding a motion to modify custody, once a material change of circumstances has been found, the court should engage in a traditional best interest analysis regardless of the custodial parent's right to travel. *Id*. Thus, neither parent bears any special burden of proof on the issue of best interest when the material change of circumstances is the relocation of a parent. Here, the court properly did not impose any special burden on Pearson, or on Mason.

The fact that the court characterized Mason as having been the custodial parent was of no moment. As mentioned above, this characterization likely referred to the fact that Jonyn went to school where Mason lived, not where Pearson lived, and spent slightly more than 50% of his time with her. In its opinion, the court referred to the parties' custody consent agreement and fully acknowledged that the parents shared parenting time for Jorryn. Thus, the court was not mistaken or confused about the custody arrangement the parties were seeking to modify. And, as we shall discuss, 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 making its decision and concluding that Mason should be awarded sole physical custody. He delves into each factor, making the same arguments that he made at the hearing as to why Jorryn's best interests are not served by Mason's relocation. In an argument that harkens back to Issue I, he complains that the court treated Mason's right to move as absolute, rather than as a factor to be considered in determining Jorryn's best interests.

Mason counters that the trial court fully and fairly considered the relevant factors in making its custody modification determination as evidenced by its opinion referring to each factor listed in *Sanders*.

As mentioned above, on review of the trial court's custody decision, we scrutinize factual findings for clear error, legal decisions for correctness, and the ultimate ruling for abuse of discretion. *Davis v. Davis*, 280 Md. 119, 125-26 (1977).

We first note that Pearson's argument about the trial court's consideration of the right to move as absolute evidences the same misunderstanding of the

law displayed in Issue I. In *Braun*, we explained that a parent's right to travel is subject to the State's compelling interest in protecting the best interests of a child. *Braun*, 131 Md. App. at 602. That simply means that relocation of a parent can be a material change in circumstances and if so it may warrant a modification of custody by the court upon consideration of the best interests of the child. It does not mean the court can prevent the parent from relocating. In fact, in *Braun* we held that the mother's move to Arizona, which she was entitled to make, was a material change in circumstances so that custody could be modified if that would be in the best interests of the child. Relocation by a parent is simply one reason the court may modify custody of a child. If, after considering the best interests of the child, the court determines that, due to the relocation of one parent, the child's best interests will be served by being in the physical custody of the other parent, the court can fashion its custody decision to accomplish that objective. Likewise, if, after considering the bet interests of the child, the court decides that due to the relocation of one parent, the child's best interests will be served by being in the physical custody of the relocated parent, the court can fashion its custody decision to accomplish that objective. The court does not decide whether a parent can relocate. It decides whether the relocation is a material change in circumstances and, if so, its consequences, with the best interests of the child as the guiding principle.

We agree with Pearson that a court deciding the issue of custody must give a reason for its decision. We disagree, however, that in this ease the trial court failed to do so; nor do we find any error or abuse of discretion in the court's best interest of the child analysis.

Pearson argues that in making its custody decision 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." (Quoting Pearson's Brief, at 13-14.) He maintains that he adopted this list of factors from several cases and that the factors listed above "mirror or dovetail into those factors identified by [*Sanders*]." *Id*. at 14.

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

Once again, Pearson is conflating the two stages of a custody modification determination. Relocation of a parent may constitute a material change in circumstances; and when it does, it prompts a determination by the court as to whether custody should be modified. That determination must focus on the best interests of the child, with the non-exclusive *Sanders* factors being taken into account, to the extent relevant. Although relocation may inform that analysis, the focus is on the child's best interest, not on the relocation.

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." Furthermore, the trial court found that "the alleged hardships of changing schools and moving away from an extended family network, without more, is not sufficient to show that the child's best interests will be impacted negatively." The court explained that, "[a]side from how the anticipated move would impact the amount of time the Father and his extended family would spend with the minor child, no evidence was introduced to show that this lack of family time would negatively affect the child's best interest."[2] 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 of Jorryn's best interest, or in its decision to award sole physical custody of Jorryn to Mason with very substantial visitation time for Pearson.

III.
Best Interest Attorney

Pearson contends the trial court erred by not appointing a BIA for Jorryn. Mason responds that although a trial court may choose to appoint a BIA, it is within the court's discretion to do so. Furthermore, Pearson never requested that a BIA be appointed for Jorryn.

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 whether to appoint independent counsel for the child is a discretionary one, reviewable under the rather constricted standard

of whether the discretion was abused." *Garg v. Garg*, 393 Md. 225, 238 (2006).

In *Garg*, one party moved to have counsel appointed for the child in a custody case. The trial court deferred ruling on the motion, the motion was not pressed at the ultimate hearing on custody, and no BIA was appointed. On appeal, the Court of Appeals stated that it was "unable to discern anything even approaching an abuse of discretion" on the part of the trial court. It was soundly within the trial court's discretion to decide whether to appoint a BIA, and that discretion was not abused by the court when it did not revisit the deferred motion to appoint a BIA.

Here, unlike in *Garg*, neither party prior to or during the evidentiary hearing on custody asked the court to appoint a BIA to represent Jorryn. The first time Pearson argued the court should have appointed a BIA was on February 17, 2012, 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 by the trial court in *Garg* for failing to appoint a BIA when one party asked that a BIA be appointed but did not press the request, 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 on the motion and countermotion to modify custody. He did not testify. That same day, January 11, 2012, he sent a letter to the court purportedly attempting to clarify his employment situation with the United States Navy. Pearson argues that the "trial court erred legally" by failing to return the letter to Rinaldi and by failing to state that the letter would not be considered by it in deciding the motions. Mason responds that there is no evidence that the trial court considered the *ex parte* communication from Rinaldi in making its ruling.

Pearson had notice of Rinaldi's letter because he was copied on it. Yet, he did not move to strike the letter. If he had wanted a statement from the court to make clear that the court was not going to look at the letter he should have filed a motion. Moreover, Pearson has failed to point to any evidence in the record that the trial judge considered Rinaldi's letter in making the custody decision or that the letter had any influence whatsoever over the trial judge's decision.

ORDER OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

FOOTNOTES

1. As discussed below, we understand the trial court's characterization of Mason as the "custodial parent" to mean that she had been the *primary* physical custodial parent. The characterization was made when the trial court was referring to Jorryn's having attended school where Mason was living, and to Mason's having physical custody of Jorryn slightly more than 50% of the time. The trial court was aware that Pearson parented Jorryn every Tuesday and Wednesday and every other weekend.

2. In explaining its best interest analysis, the trial court mentioned that there was not anything to convince it that Jorryn's "best interests will be impacted negatively compared to the restrictions on [Mason's] right to travel." Although this part of the opinion also seems to conflate the stages of a custody modification analysis, it is apparent that the trial court properly engaged in an independent best interests analysis when evaluating custody.

NO TEXT

Cite as 11 MFLM Supp. 137 (2012)

Custody: modification: appellate procedure

Christopher L. Zembower
v.
Lisa M. Zembower

No. 2026, September Term, 2011

Argued Before: Wright, Matricciani, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: September 19, 2012. Unreported.

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

The parties to this case, appellant, Christopher L. Zembower, and appellee, Lisa M. Zembower, have one child together. The parties divorced in 2008. In August of 2010, Ms. Zembower filed a petition to modify custody in the Circuit Court for Allegany County. A Master issued a report that included proposed findings of fact, conclusions of law, and recommendations. Both parties filed exceptions to the Master's recommendations. On October 21, 2011, the circuit court entered an order granting certain exceptions to the Master's recommendations and modifying the judgment of divorce with respect to child custody issues. Mr. Zembower filed a timely appeal on November 14, 2011.

QUESTIONS PRESENTED

Mr. Zembower does not raise any clearly cognizable legal issues for our review.[1] Having reviewed the circuit court's October 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.[2]

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

FACTUAL AND PROCEDURAL HISTORY

The circuit court described the relevant facts as follows:

> The parties in this matter were married in 2002. A female child, Liliana, was born on April 28, 2005. [The Zembowers] separated in April 2007. They executed a Mediated Separation, Property, Custody and Visitation Agreement dated May 30, 2007. They agreed that [Ms. Zembower] would have sole physical custody of the child with defined scheduled visitation rights reserved to [Mr. Zembower]. Their agreement also provided for joint legal custody of Liliana.
>
> On December 24, 2008 [the circuit court] entered a Judgment of Absolute Divorce. At the parties' request, the judgment incorporated without merger the Agreement of May 30, 2007 as well as an amendment to that agreement dated July 11, 2007. In addition, the judgment set further supplemental provisions for access to the child.
>
> In August 2010 [Ms. Zembower] filed a Petition to Modify Custody. She alleged that since the entry of the judgment, there had been material changes in circumstances affecting the child's best interest. Specifically that (1) the parties were unable to effectively communicate with respect to the child, (2) [Mr. Zembower] had deviated from the vacation schedule and (3) the child was entering kindergarten and that the physical custody in place was no longer in her best interest. [Ms. Zembower] sought sole legal custody and a reduction in [Mr. Zembower's] weekday overnight visi-

tation.

> [Mr. Zembower] responded by filing his own Petition to Modify Custody. He alleged deception and dishonesty by [Ms. Zembower] and her attorney, abnormal behavior by [Ms. Zembower], motivation for financial gain and excessive control by [Ms. Zembower] over decisions concerning the child. He sought a modification of the judgment, ". . . (a) by awarding him joint legal, physical and custodial control of the child; and (b) reducing [Ms. Zembower's] overnight visits to equal overnight visits [Mr. Zembower] has with his child."
>
> On April 26 and 27, 2011 a hearing on the cross petitions was conducted by the Family Law Master. On June 8, 2011, the Master issued his report that included proposed findings of fact, conclusions of law, and recommendations. He recommended change[s] to the original judgment including, (1) sole legal custody to [Ms. Zembower], (2) alternating weeks of visitation during summer school vacation, (3) elimination of Veteran's and Columbus Day holiday visitations, (4) daily telephone contacts between [Mr. Zembower] and the child, (5) elimination of a Wednesday overnight visitation; and (6) a 90 day written notice of a parties' intention to move/relocate.
>
> Thereafter, both parties (for different reasons) filed exceptions to the Master's Recommendations. A hearing on these exceptions was conducted by [the circuit court) on October 14, 2011.

The circuit court filed its order modifying the judgment of divorce as to certain child custody issues on October 21, 2011. We infer that Mr. Zembower disagrees with two aspects of the circuit court's order. 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 November 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.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The "Issues Presented" as originally phrased in Mr.

Zembower's brief are as follows:

I. The Circuit Court used fraudulent and fabricated testimony in considering its Order dated October 21, 2011.

II. Appellant should have been granted a continuance to fully recover from heart surgery.

III. No testimony or evidence was submitted to substantiate a decision to reduce Appellant's Holiday Schedule.

IV. Appellant requested a return to Mediation to resolve these issues and was denied costing both Appellant and Appellee thousands of dollars in legal fees that would have been better used for the betterment of the child.

V. Judge Leasure erred in sending a contentious case as this to Law Master Maslow's Court which has a history of discriminatory and biased decisions.

VI. Appellant's Lawyer committed malpractice in failing to meet deadlines for Requesting Additional Testimony and evidence to bring illegalities to light.

VII. Mr. Kelly was caught committing Fraud upon the Court by lying to the Law Master about Appellant's interrogatories and discovery documents.

VIII. Law Master Maslow cites evidence and testimony not presented or submitted at the hearing dated 4/26-27/2011.

IX. Law Master's Hearing dated 4/26-27-2011 audio tapes are edited, testimony dubbed into, evidence tampered with and omitted illegally.

2. Mr. Zembower was not awarded joint physical custody, as he requested, but the record would not support such an award in any event. *Taylor v. Taylor*, 306 Md. 290, 303-11 (1986).

NO TEXT

Cite as 11 MFLM Supp. 141 (2012)

Divorce: alimony and child support: recusal of master

Dana W. Johnson
v.
Darielys Pinto

No. 549, September Term, 2011

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

Opinion by Watts, J.

Filed: September 20, 2012. Unreported.

Although the appellant failed to preserve either matter for appeal, the court found he was properly served with the motion to modify child support, and that he had waived his issues regarding the master's recusal as well as the alimony order by failing to file exceptions to the master's recommendations.

This appeal concerns the denial by the Circuit Court for Prince George's County 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, appellee. Appellant noted an appeal raising two issues, which we set forth verbatim:

> I. Balancing [a]ppellant's First Amendment Right of due process, in light of his sworn affirmation that [a]ppellee did not properly serve him notice of the Motion for Modification, with [a]ppellee's right to request modification of an existing order of support, whether the [c]ircuit [c]ourt should have determined if [a]ppellant's constitutional rights were properly safeguarded? Or in the alternative, whether [a]ppellant has recourse to the Court of Special Appeals of Maryland to ensure protection of his constitutional right of due process in light of the [c]ircuit [c]ourt's failure to safeguard that right?
>
> II. Should [the m]aster have recused himself from the [c]ircuit [c]ourt proceedings in light of the fact that he and [a]ppellee previously worked together and was it proper for [the m]aster to grant [a]ppellee rehabilitative alimony when she did not request such in her Motion for Modification?

For the reasons set forth below, we shall affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

On June 27, 1998, the parties were married in Prince George's County, Maryland. On July 15, 1998, the parties had a child together, Anthony Breathand Johnson.[1] On January 24, 2001, appellant filed a "Complaint for Limited Divorce and Related Relief" in the circuit court. On March 18, 2001, appellee filed an "Answer to [Appellant]'s Complaint for Limited Divorce and Related Relief." In an order dated April 23, 2002, the circuit court: (1) granted the parties an absolute divorce, (2) awarded sole legal and primary physical custody of Anthony to appellee, (3) ordered appellant to pay appellee $143 per month in child support, (4) ordered appellant to pay appellee $200 per month in rehabilitative alimony for twelve months, and (5) ordered that each party provide the other with any change in address.

On October 27, 2010, appellee filed a Motion for Modification of Child Support and Other Relief; seeking: (1) an increase in the amount of child support commensurate with the Maryland Child Support Guidelines, (2) health, dental, and vision insurance for Anthony, and (3) "such other and further relief as the nature of the [appellee]'s cause may require and as may be just and proper." On the same day, appellee filed a request for a hearing on the motion and a request for summons to be issued to appellant. On October 27, 2010, the circuit court issued a Writ of Summons to appellant at an address on Woodbine Avenue in Philadelphia, Pennsylvania (the "Woodbine Avenue address"). On November 22, 2010, according to a private process server's Return of Service, the Writ of Summons, Motion for Modification of Child Support and Other Relief, and other pertinent documents were served on appellant at the Woodbine

Avenue address. Included in the Return of Service was an affidavit from the private process server stating his name, address, and telephone number, and attesting that he was "over eighteen (18) years of age and [ ] not a party in this matter." The Return of Service described the individual served as follows: "Age: 45, Sex: M, Race/Skin Color: BLACK, Height: 5'8, Weight: 200, Hair: BALD, Glasses: N[.]"

On February 14, 2011, appellee filed a Motion for Order of Default, stating that "more than sixty (60) days ha[ve] elapsed since [appellant] was served and he has not filed an Answer with the [circuit c]ourt." Accompanying the Motion for Order of Default, appellee filed the private process server's Return of Service.

On February 15, 2011, the circuit court entered an Order of Default against appellant. On February 22, 2011, the circuit court issued a Notice of Order of Default to appellant at the Woodbine Avenue address. On February 24, 2011, the circuit court issued a Notice of Hearing, scheduling a "Modifications Hearing" for March 28, 2011. The circuit court mailed the Notice of Hearing to appellant at the Woodbine Avenue address.

On March 28, 2011, with a master presiding, the circuit court held a hearing, which appellant did not attend. On the same day, the circuit court mailed a Notice of the Master's Recommendations and proposed Order of Court to appellant at the Woodbine Avenue address. The proposed order stated, in pertinent part, as follows:

It is by the Circuit Court for Prince George's County, Maryland,

> ORDERED, that [appellee]'s Motion for Modification of Child Support and Other Relief filed October 27, 2010 be and is hereby granted; and it is further,
>
> ORDERED, that the Order of the Court dated April 23, 2002 be and hereby is modified to the extent that [appellant] pay to [appellee] the sum of $932.00 per month for the support of the minor child, Anthony Breathand Johnson, born July 15, 1998, commencing November 1, 2010. . . . ; and it is further,
>
> ORDERED, that the alimony arrearages be and hereby are assessed at $2,400.00 as of March 28, 2011; and it is further,
>
> ORDERED, that [appellant] is directed to pay $200.00 per month towards the arrearages until the arrearages are paid in full.

The Notice stated that "if written exceptions [we]re not filed on or before April 11, 2011, the attached Order w[ould] be submitted to the [circuit c]ourt for approval." Appellant failed to file exceptions to the proposed order. On April 13, 2011, the circuit court entered the master's proposed order as the order of the circuit court.

On May 5, 2011, appellant filed a Motion to Vacate the circuit court's order modifying support, alleging that he "was not properly served notice of [appellee]'s Motion to Modify Child Support in accordance with the Constitution of the United States and the laws of the State of Maryland." On May 11, 2011, appellee filed an opposition to the Motion to Vacate. On May 18, 2011, the circuit court denied the Motion to Vacate. On May 23, 2011, appellant filed a Reply to Opposition to Motion to Vacate. In the reply, appellant argued as follows:

> The dispositive issue is whether or not [appellant] was provided notice [of the proceedings which are the subject of his Motion to Vacate for lack of service] in accordance with the Due Process Clause of the Constitution and served pursuant to the Maryland Rules prior to being denied his property rights. . . . The answer to that is no. [Appellant] was not properly served and, in fact, does not fit the physical description of the person allegedly served [in the private process server's Return of Service].

On May 23, 2011, appellant noted a timely appeal.

DISCUSSION

I.

Appellant contends that the circuit court abused its discretion in denying his request to vacate the order modifying child support because 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." Appellee contends that the circuit court properly denied the Motion to Vacate, as appellant merely stated in the Motion to Vacate that he was not properly served without providing any evidence of a failure of service. In short, we agree.

Appellate courts "review the denial of a motion to vacate an enrolled judgment under an abuse of discretion standard." Bland v. Hammond, 177 Md. App. 340, 346 (2007) (citation omitted). Abuse of discretion may be found only where the decision by the trial court was arbitrary or prejudicial. See Neustadter v. Holy Cross

Hosp. of Silver Spring, Inc., 418 Md. 231, 241(2011). This standard is met when "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the finge of what the court deems minimally acceptable." Renbaum v. Custom Holding. Inc., 386 Md. 28, 43 (2005) (citation omitted) (alteration in original).

Maryland Rule 2-121 (a) states the general rule as to the service of process, in pertinent part, as follows:

> Service of process may be made within this State or, when authorized by the law of this State, outside of this State (1) by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it; **(2) if the person to be served is an individual, by leaving a copy of the summons, complaint, and all other papers filed with it at the individual's dwelling house or usual place of abode with a resident of suitable age and discretion;** . . . Service outside of the State may also be made in the manner prescribed by the court or prescribed by the foreign jurisdiction if reasonably calculated to give actual notice.

(Emphasis added). "If service is by delivery, the proof shall set forth the name of the person served, the date, and the particular place and manner of service. If service is made [by an individual other than a sheriff], the proof also shall set forth a description of the individual served and the facts upon which the individual making service concluded that the individual served is of suitable age and discretion." Md. R. 2-126(a)(1). "If service is made by an individual other than a sheriff, the individual also shall file proof under affidavit that includes the name, address, and telephone number of the affiant and a statement that the affiant is of the age of 18 or over." Md. R. 2-126(a)(2). "[A] proper return [of service] is prima facie evidence of valid service of process and a simple denial of service by the defendant is not sufficient to rebut the presumption arising from such a return." Roddy-Duncan v. Duncan, 157 Md. App. 197, 202 (2004) (citations and internal quotation marks omitted). There may, however, exist external indications that the service of process should be reviewed for irregularities. Id. at 203 (This Court held that, although there was a proper return of service, the circuit court should have reviewed service of process because the private process server listed the same home address as the plaintiff, indicating that the private process server was not a disinterested party.).

Maryland Rule 2-321 (b)(1) states the rule as to the time for filing an answer by an out-of-state party as follows: "A defendant who is served with an original pleading outside of the State but within the United States shall file an answer within 60 days after being served." If an out-of-state party fails to file an answer within the sixty days prescribed by Maryland Rule 2-321 (b)(1), that party may be subject to an order of default pursuant to Maryland Rule 2-613, which provides, in pertinent part, as follows:

> (b) Order of default. If the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of the plaintiff, shall enter an order of default. The request shall state the last known address of the defendant.
>
> (c) Notice. Promptly upon entry of an order of default, the clerk shall issue a notice informing the defendant that the order of default has been entered and that the defendant may move to vacate the order within 30 days after its entry. The notice shall be mailed to the defendant at the address stated in the request and to the defendant's attorney of record, if any. The court may provide for additional notice to the defendant.
>
> * * *
>
> (f) Entry of judgment. . . . [T]he court, upon request, may enter a judgment by default that includes a determination as to liability and all relief sought, if it is satisfied (1) that it has jurisdiction to enter the judgment and (2) that the notice required by section (c) of this Rule was mailed. . . .
>
> (g) Finality. A default judgment entered in compliance with this Rule is not subject to the revisory power under [Maryland] Rule 2-535(a) except as to the relief granted.

Maryland Rule 2-535(a) provides, in pertinent part, as follows:

> On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under [Maryland] Rule 2-534.[2]

Returning to the instant case, we conclude that the circuit court did not abuse its discretion in denying the Motion to Vacate. On February 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 Woodbine 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.

In the Motion to Vacate, appellant alleged only that he was not properly served, and that he first learned of the motion upon receiving, correspondence from the circuit court clerk's office.[3] This denial of service, however, "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 Woodbine Avenue address. This is the same address which appellant listed as his current address in the Motion to Vacate. The record reflects that 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 in the circuit court's denial of the Motion to Vacate.

II.

Appellant contends that the master presiding at the March 28, 2011, hearing should have recused himself, as the master "had previously worked with [a]ppellee[.]" Appellant argues that the master's bias was evident in the order that appellant pay an alimony arrearage when appellee did not request such relief in her Motion for Modification.

Appellee responds that the recusal issue is not properly before this Court because it was not raised in the circuit court. Alternatively, appellee contends that the issue of recusal is not relevant because the final order of the circuit court was issued by a circuit court judge who had no prior relationship with appellee.

Maryland Rule 9-208(a)(1)(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. "[T]he master shall prepare written recommendations, which shall include a brief statement of the master's findings and shall be accompanied by a proposed order. . . . Promptly after notifying the parties, the master shall file the recommendations and proposed order with the circuit court." Md. R. 9-208(e)(1). "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) (emphasis added). "[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)(1)(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 that the master recuse himself. Following the hearing, appellant failed to file exceptions to the master's proposed order — an 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 the circuit court's order, 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.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The minor child's name was changed in the parties' 2002 divorce decree from "Breathand Balance Nuheritage" to "Anthony Breathand Johnson."

2. Maryland Rule 2-534 provides, in pertinent part, as follows:

> In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings- or new reasons, may amend the judgment, or may enter a

new judgment.

3. Appellant argues before this Court that he "attested that he did not fit the physical description of the person allegedly served by [a]ppellee's third party agent." Appellant made this allegation, however, in the Reply to Opposition to Motion to Vacate filed on May 23, 2011, five days after the circuit court denied the Motion to Vacate.

NO TEXT

Cite as 11 MFLM Supp. 147 (2012)

Domestic violence protective order: appeal: mooted by expiration of order

Kimberly Hamby
v.
Reuben I. Hamby

No. 2868, September Term, 2011

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

Opinion by Eyler, James R., J.

Filed: September 20, 2012. Unreported.

The expiration of a domestic violence protective order renders the appeal moot, and the possibility that the expired order could prejudice appellant in future litigation is not a matter of public interest.

Kimberly Hamby, appellant, appeals from a protective order entered by the Circuit Court for Anne Arundel County in favor of Reuben I. Hamby, appellee. Because the protective order has expired, we shall dismiss the appeal as moot.

Factual and Procedural Background

On January 30, 2012, appellee filed a petition for protection from domestic violence in the District Court of Maryland, in Howard County. Appellee alleged that, on January 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 February 7, 2012, the circuit court held a hearing. At the 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 February 7, the court entered a final protective order in favor of appellee, effective until July 7, 2012. Appellee filed a motion to correct the order, reciting that the court had orally stated that the order would be in place for six months, but the written order was effective for five months. On February 14, the court entered an amended final protective order, effective until August 7, 2012.

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

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

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 with appellant's arguments and also asserts that the appeal should be dismissed as moot. In response to the mootness argument, 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). A question is considered moot if, at the time it is before this Court, "there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." Hagerstown Reproductive Health Servs. v. Fritz, 295 Md. 268, 271 (1983) (citing Attorney Gen. v. A.A. Co. School Bus, 286 Md. 324, 327 (1979)). As a general rule, moot questions will be dismissed "without expressing [appellate] views on the merits of the controversy." In re Sophie S., 167 Md. App. 91, 96 (2006) (quoting Mercy Hosp., Inc. v. Jackson, 306 Md. 556, 562 (1986)).

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. Namby on Mr. Namby." The court explained that the "bottom line" is credibility, and "in this particular case I believe Mr. Namby." 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.

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

Cite as 11 MFLM Supp. 149 (2012)

CINA: risk of future abuse or neglect: mental health issues of parent

In Re: Hazell D.

No. 0129, September Term, 2012

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

Opinion by Zarnoch, J.

Filed: September 25, 2012. Unreported.

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.

Appellant, Keiana I., appeals from the March 1, 2012 decision of the Circuit Court for Montgomery County, sitting as a juvenile court, adjudicating her minor son, Hazell D., to be a Child in Need of Assistance ("GINA"), and placing him in the care and custody of the Montgomery County Department of Health and Human Services ("MCDHHS" or "the Department").[1] In her timely appeal, Keiana raises a single issue for our consideration: Did the trial court err in concluding that Hazell was a CINA?

Discerning no error, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Hazell is the minor child of Keiana I. and Benjamin D.[2] At all relevant times, the parties have resided in Montgomery County. Prior to Hazell's birth on April 14, 2011,[3] 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.[4]

In July 2011, MCDHHS became involved with the family in response to a report of child neglect. At the time of their initial interview on July 18, 2011, both parents expressed to the investigator that they were "very upset" about the Department's involvement. 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.[5]

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

Keiana reported to the investigator that she had been diagnosed with bipolar disorder at the age of 12. Keiana was receiving disability benefits for her mental disorder,[6] but was not taking any medication or otherwise receiving any mental health treatment at that time.[7] Keiana further disclosed that she had tested positive for illegal drugs during her pregnancy, but denied that she was currently using any illegal substances. Keiana entered into a safety plan on that date, wherein she agreed to undergo drug testing.

After reviewing the results of Keiana's drug test, the investigator scheduled a family involvement meeting on August 11, 2011.[8] At the meeting, which was attended by both parents and Geraldine I., Keiana was "very upset . . .very angry" and became increasingly "worked up" as the meeting progressed. The investigator also observed at the meeting that Hazell had a "crust in his neck" and he smelled unclean. At the conclusion of the meeting, Keiana signed another safety plan, agreeing to undergo twice-weekly urinalysis, to cooperate with the Department, and to allow Hazell to stay with Geraldine I. during the week, and spend weekends with Keiana and Benjamin at the home of Anita D.

On August 27, 2011, Keiana missed her scheduled urinalysis appointment. The investigator requested that the Montgomery County Police check on Hazell's welfare that weekend, which they did. The police did not find a problem. Keiana was very angry that the police had come to her home, however, and left a voice mail for the investigator indicating that if such visits were going to continue, then she would not cooperate with the Department.

On August 29, 2011, Keiana contacted the investigator to report that she and Benjamin had engaged in an altercation over the weekend. This was not the first physical fight the couple had. Keiana stated that she and Benjamin were fighting while she was holding Hazell. Benjamin struck Keiana, causing Hazell to fall to the floor. Keiana picked Hazell up and placed him on the bed, then continued to fight with Benjamin. Police and an ambulance responded to a 911 call placed by a

neighbor. Hazell was examined and determined to be unharmed. Keiana left the residence prior to the arrival of the police and did not return. She has had no further physical contact with Benjamin.

The investigator directed Keiana to take her drug test, to file a protective order against Benjamin, and to take Hazell to Geraldine I. or to go to the Crisis Center to obtain emergency shelter for her and Hazell. Keiana declined to file a protective order against Benjamin because she did not believe that he was a danger to her or their son. Instead of going to a shelter, Keiana made arrangements to stay with her friend, Alicia M.

On the basis of her observations and the information she collected, the investigator concluded that neglect was indicated. She did not recommend that Hazell be removed from his mother's care at that time, however, because Keiana was cooperating with the previously agreed upon arrangements under which her mother provided care for Hazell most of the time. A report summarizing the investigator's conclusions was completed at the end of August 2011. At that time, the case was turned over to a social worker, who began providing continuing services to the family in early September 2011.

During her first phone conversation with the social worker, Keiana indicated that the previously established plan where she cared for Hazell on weekends and her mother took care of him during the week was "no longer viable."[9] Instead, Keiana indicated that her friend, Alicia M. would assist her with Hazell's care. At a home visit on September 30, 2011, Alicia M. told the social worker that Keiana was experiencing unstable moods and anger and provided examples of how Keiana was taking her anger out on Hazell. She said that Keiana spoke aggressively and cursed at Hazell[10] and that on at least two occasions Keiana had hit Hazell on the leg.[11]

The social worker discussed with Keiana why hitting Hazell, who was then seven-months-old, was inappropriate and ineffective. Keiana told the social worker that she had difficulty controlling her anger when she felt stressed out, provoked, or cooped up. Keiana was frustrated with her housing situation, her inability to find a job, and her desire to go back to school. Keiana admitted that she had "anger issues," and that she had taken her anger out on Hazell. The social worker observed Keiana become angry in various manifestations almost every time she saw her. At the adjudication hearing, Keiana admitted that she was not always honest with the social worker, because she did not want the Department to take Hazell from her.

Regarding her drug use, Keiana reported to the social worker that the last time she used marijuana was July 19, 2011. She continued, however, to have positive results at her regular drug tests. Keiana told the social worker that she thought smoking marijuana made her calmer and better able to parent Hazell. At the hearing, Keiana testified that she had not smoked marijuana since Hazell was born.

On November 4, 2011, Keiana signed a family service plan that required her to attend therapy and take her medication as prescribed, to take Hazell to the pediatrician and follow his recommendations, to participate in the Infants and Toddlers Program, to attend a structured parenting class, and to maintain regular contact with MCDHHS. In mid-November, following a disagreement with Alicia M., Keiana and Hazell left Alicia M.'s home and moved in with another friend, Charlene B. for about a week. Keiana and Hazell then returned to Alicia M's.

On December 13, 2011, Keiana called the social worker and said that she wanted to give her mother temporary custody of Hazell because she had "a lot of emotions and stress" and "my baby gets the outcome of my anger." Keiana said she needed some time to "get herself together to better care for Hazell." Keiana later changed her mind, saying that she wanted to take care of her son. Keiana signed another safety plan on December 14, 2011, wherein she agreed to attend a family involvement meeting the next day.

The next day, in addition to Keiana, Hazell, and MCDHHS staff, Geraldine I., Alicia M. and Ms. Donna Marie J.[12] were also present at the family involvement meeting. Again, Keiana started off the meeting acting and engaging appropriately, but she soon became sarcastic and frustrated. Though she signed the agreement crafted by the parties at the end of the meeting, she then stormed out with Hazell in his carrier, swinging him in a dangerous manner. Keiana walked home, leaving Hazell with Alicia M., instead of getting a ride from the social worker. Under the agreement of the meeting participants, Alicia M. would primarily care for Hazell while Keiana continued to work with the Department.

About 2:30 a.m. on December 20, 2011, Alicia M. called the police and Child Welfare to report that Keiana had started a disruption in the house in the middle of the night and that Keiana expressed her intent to take Hazell and leave. Keiana asserts that after Alicia M. assumed temporary custody of Hazell, every time she tried to interact with her son other people in the house would take him away from her. So she stopped trying to interact with him. In response to Alicia M.'s report, the Department obtained a Shelter Order and took temporary custody of Hazell to shelter him from Keiana. Keiana has not returned to Alicia M.'s home.

Pursuant to the original shelter order, Hazell initially stayed with Alicia M. In a subsequent Shelter Order, issued at Keiana's request on January 5, 2012,

Hazell was moved to the custody of Geraldine I. He continued to reside at the home of Geraldine I. at the time of the adjudication and disposition hearing. Keiana participated in supervised visitation with Hazell for one hour every week at the Department's visitation office.

Keiana testified at the adjudication hearing that she was attending therapy every week. Her psychiatrist had placed her on a new medication that she had been taking as prescribed for the last month. Keiana felt that the new medication was effective, that it helped her to remain calm and focused. At the time of the hearing, Keiana was residing at a shelter.[13] She had started taking cosmetology classes, and was participating in several programs in an effort to find a permanent job and stable housing. Keiana testified that while she was looking for housing, she preferred that Hazell remain in the custody of her mother, with whom she had been speaking daily and getting along very well.

At the adjudication hearing, the social worker expressed her expert opinion that there was a high risk that Hazell would be neglected or abused if he were returned to his mother's care.[14] Because of his young age, the social worker opined that Hazell had no ability to report abuse, to protect himself from abuse, or to care for himself should his mother fail to do so, making him extremely vulnerable to future abuse and neglect. Moreover, 1) Keiana's mental health problems, as demonstrated by her inconsistent record with respect to mental health services and medication, 2) her inability to adhere to safety plans, 3) rapidly changing her mind after making decisions, and 4) observed mood instability and anger that she acknowledged taking out on Hazell, also indicate an increased risk of future abuse or neglect if she were to retain custody of her son.[15] The social worker also considered the fact that Keiana had actually hit seven-month-old Hazell because he would not stop crying as indicative of a serious lack of judgment and parenting skills, which also presaged an increased risk of future abuse.

In mitigation, the social worker considered the fact that Hazell appeared healthy, happy, and developmentally on-track each time she saw him. She also considered Keiana's cooperation with many of the requirements in the safety plans she signed. Weighed against the potential risk of harm to Hazell, however, the social worker believed that Keiana's potential and progress were insufficient to justify continued placement.

After reviewing the testimony and making detailed findings of fact regarding whether the evidence presented was sufficient to prove the allegations in the CINA petition, the court concluded that the Department had sustained its burden of proof by establishing that Hazell had been neglected and that his parents were unable to give proper care and attention to Hazell and his needs. Applying the law to its conclusions of fact, the trial court determined that Hazell was a CINA. The court ordered Hazell to be committed to MCDHHS for continued placement with Geraldine I. The court further provided for weekly supervised visitations with Hazell for both Keiana and Benjamin. In the interest of assisting Keiana with her efforts to regain custody of Hazell, the court ordered a full psychological evaluation of Keiana, and required that she continue to participate in therapy and treatment as recommended by her mental health treatment providers. The court further required Keiana to participate in a parenting education and support program, and if recommended, an Abused. Persons Program. Keiana also was ordered to continue to keep MCDHHS apprised of her current contact information, phone number, and address. With the exception of the court's conclusion that Hazell was a CINA, Keiana did not challenge any of the provisions of the court's order, and expressed her endorsement of the court's plan.

Keiana appealed the circuit court's determination on March 12, 2012. Additional facts will be provided as necessary in our discussion of the issues.

STANDARD OF REVIEW

In reviewing a circuit court's decision regarding whether a child is entitled to the protection of the court as a CINA, we employ three related standards:

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

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

An allegation that a child is a CINA must be proven by a preponderance of the evidence. *In re Nathaniel A.*, 160 Md. App. 581, 595 (2005) (citing CJP § 3-817(c)). A circuit court's ultimate determination that a child is a CINA will not be set aside unless it is

clearly erroneous. *Id*. In reviewing the court's decision, this Court is mindful that questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, including determinations regarding the credibility of the witnesses. *See In re Shirley B.*, 419 Md. at 19. Moreover, to be reversible, the decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. *In re Yve S.*, 373 Md. at 584. (Quotations omitted).

ANALYSIS

The parental right to raise one's child free from undue and unwarranted interference on the part of the State, including its courts, is a fundamental Constitutionally-based right. *See In re Adoption/Guardianship of Rashawn H.*, 402 Md 477, 495 (2007), abrogated in part by, *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90 (Md. 2010). Parental rights are not absolute, however. See *In re Yve S.*, 373 Md. at 568-71 (discussing the limitations that may be placed parental rights if the limits are in the child's best interest). Though it is the intent of the courts to "harmonize" the fundamental rights of the parents with the best interests of the child, when there is a conflict between these two interests, the best interest of the child must prevail. *In re Rashawn H.*, 402 Md at 495-96.

As noted above, Maryland law defines a child in need of assistance as "a child who requires court intervention because . . . [t]he child has been abused [or] neglected . . . and [t]he child's parents . . . are unable or unwilling to give proper care and attention to the child and the child's needs." CJP §3-801(f). In pertinent part, the statute defines "abuse" as the "[p]hysical or mental injury of a child under circumstances that indicate that the child's health or welfare is harmed or is at substantial risk of being harmed by . . . a parent." CJP §3-801(b). "Neglect" is statutorily defined as the "failure to give proper care and attention to a child by any parent . . . under circumstances that indicate . . . [t]hat the child's health or welfare is harmed or placed at substantial risk of harm; or . . . [t]hat the child has suffered mental injury or been placed at substantial risk of mental injury." CJP §3-801(s).

"The purpose of a CINA proceeding is to protect children and promote their best interests. It is not intended to punish the parents. . . ." *In re Rachel T.*, 77 Md. App. 20, 28 (1988). A court may seek to accomplish its protective purpose by "temporarily separating the child from his parents or by supervising the parents in the raising of their child." *Id*. (Citation omitted). In crafting its intervention, the court is reminded that in most cases, "a parent's past conduct is relevant to a consideration of his or her future conduct." *In re Dustin T.*, 93 Md. App. 726, 731 (1992).

Ideally, a court's intervention under the CINA statute will enable the State to step in and protect children before they suffer any lasting physical or emotional injury as a result of neglect or abuse. *See In re William B.*, 73 Md. App. 68, 77-78 (1987)(opining that a juvenile court "need not wait until the child suffers some injury before determining that he is neglected. This would be contrary to the purpose of the CINA statute. The purpose of the act is to protect children — not wait for their injury."). We note, however, that "[t]he fear of harm to the child or to society must be a real one predicated upon hard evidence, it may not be simply gut reaction or even a decision to err-if-at-all on the side of caution." *In re Yve S.*, 373 Md. at 588 (quoting *In re Jertrude O.*, 56 Md. App. 83, 100 (1983)).

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.

In reviewing the evidence prior to rendering her decision, 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 because she did not believe that Benjamin would ever purposely hurt her or the baby. The judge opined that Keiana's decision not to seek a protective order for either herself or for Hazell, 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 tes-

timony 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 in an abusive manner. The court opined that Keiana's actions were completely inappropriate and ineffective methods of addressing Hazell's normal infantile behavior.

The court also noted the largely uniform testimony presented by multiple witnesses regarding Keiana's frequent, largely unprovoked demonstrations of uncontrolled anger and frustration. The circuit judge emphasized how Keiaha's behavior often caused conflicts between her and the other adults with whom she associated, thereby exacerbating her already difficult living situation, and repeatedly making things more difficult for both herself and Hazell by alienating those friends and family who cared enough to offer the two of them lodging, care, and assistance. In fact, Keiana's behavior had caused her own mother to refuse to continue to help her care for Hazell not long after the Department became involved with the family. Even now, when Hazell is living with Geraldine I. under the temporary custody order, she does not feel comfortable allowing Keiana to know her home address. 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 that 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 placed 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 if Keiana had unsupervised custody of her son, 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 noted the observations of others regarding Hazell, who in all respects appeared to be a happy, healthy baby who was 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 for her son. However, after weighing all the evidence, the court ultimately concluded that Hazell was a CINA.

Contrary to appellant's assertion that the circuit 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 that if he were returned to the care of his mother, Hazell would bear 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 circuit court's determination of Hazell's CINA status.

We conclude that 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 presented at the adjudication hearing; therefore, this finding was not clearly erroneous. Moreover, we agree with the circuit court's determination that the State had 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 Hazell and his needs. Under all the circumstances, we conclude that the court did not abuse its discretion in finding Hazell to be a CINA.

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

FOOTNOTES

1. A CINA is a child who requires court intervention because the child has been abused or neglected, or has a developmental disability or mental disorder, and whose parents, guardian, or custodian cannot, or will not, give proper care and attention to the child and the child's needs. Md. Code (1973, 2006 Repl. Vol., 2011 Supp.) §3-801(f) of the Courts and Judicial Proceedings ("CJP") Article.

2. At the adjudicatory hearing on January 18, 2011, Benjamin conceded the allegations against him as asserted in the CINA Petition. He agreed that due to his continued substance abuse, untreated mental health problems, and anger management issues, he was unable to provide proper care and

attention to Hazell's needs. Moreover, Benjamin has not provided any support, or otherwise participated in Hazell's life since September 2011. Benjamin did not contest the CINA Petition and is not a party to the instant appeal. We shall, therefore, only include additional facts regarding Benjamin in this opinion insofar as they are integral to the circuit court's determination of the appropriateness of Hazell's continuing relationship with his mother, Keiana.

3. We note that the date of Hazell's birth is recorded as either April 4, 2011 or April 14, 2011 in various documents throughout the Record. We shall accept April 14, 2011 as his birth date, however, because that is the date his mother, Keiana I., testified he was born.

4. Hazell was born in Jefferson County, West Virginia. An attempt by the Department to obtain the medical records pertaining to his birth were unsuccessful.

5. Geraldine I. testified that even before MCDHHS became involved, she was caring for Hazell during the week. Geraldine I. reported that Anita D.'s home, where the family was residing, was dirty, fill of smoke and empty liquor bottles, and smelled bad.

When Geraldine I. first saw Hazell about two months after his birth, he appeared to be underweight for his age, his skin was dry, and his hair was hard. Geraldine I. took Hazell to the doctor out of concern for his health and to have his immunizations updated, because he had only had the shots that were provided while he was in the hospital following his birth due to Keiana's lack of medical insurance.

6. At the time of the adjudicatory hearing, Keiana was receiving $742 each month in disability related to her mental health problems.

7. Keiana does not believe that the diagnosis made by the doctors when she was 12-years-old was accurate. She believes her actions and emotions at that time were just a reaction to the death of her maternal grandmother, who had been her primary caregiver. Keiana acknowledges that she had previously been prescribed medication for her disorder, but that she did not like to take it because of the side effects and because she did not think that it helped her in any way. Her reports to the social worker regarding the regularity with which she took her prescribed medication were often contradictory, leading the social worker to believe that Keiana was not compliant with her prescribed medication regimen.

At the adjudicatory hearing Keiana testified that she had only been taking her medication as prescribed for about a month. Prior to that, she testified that she had been prescribed several different medications, but that she did not take them regularly because she did not feel that they were effective.

8. Later testimony indicates that Keiana's drug test was positive for marijuana. She attributed the positive result to exposure to the smoke from others who were smoking marijuana in the D. home.

9. Geraldine I. reported that she could no longer care for Hazell because she found it difficult to deal with Keiana's unstable moods. Geraldine I. was concerned that Keiana would accuse her of abusing or neglecting Hazell and thereby endanger her own two children.

10. Alicia M. had heard Keiana yell at Hazell, "Shut the fuck up," and "You crying too damn much," beginning when Hazell was only three or four months old.

11. Alicia M. is vision impaired, but she stated that she heard Keiana hit Hazell.

12. Ms J. was a person that frequently visited Alicia M.'s home and observed Keiana and Hazell.

13. Keiana was initially residing at a different shelter, but moved when she was asked to leave following "an incident" where she got into a verbal confrontation with another resident.

14. Keiana's mother, Geraldine I., also expressed her concerns that it would not be safe for Hazell to be with his mother at this time because of Keiana's mental health problems and anger issues.

15. Alicia M. testified that Keiana would become angry over "the littlest things," and that when she was angry, she would take it out on everybody. Alicia M. also characterized Keiana's treatment of her when she was angry or frustrated as "mental[ ] abuse."

Ms. J. agreed that Keiana became frustrated or mad easily and frequently, such as when Hazell cried or when things did not go her way. In addition to the abusive language and the incident where Keiana hit Hazell on the leg to which Alicia M. testified, Ms. J. noted that when Keiana gets angry, she lashes out, snatching Hazell up by the arm, yelling and cursing at him, telling him "nobody wants to pick you up and nobody wants to be bothered with you." Ms. J. has also observed Keiana hit Hazell several times.

Geraldine I. also testified that Keiana angers easily, screaming and cursing, and that she feared what Keiana might do to her while she was in one of her rages. Geraldine I. characterized Keiana's anger as "out of control." Geraldine I. said that she had never observed Keiana become angry or violent toward Hazell. However, at the time of the hearing, Geraldine I. had moved, and did not want Keiana to have her new address, though she hoped that Keiana would be able to visit "in the future."

Cite as 11 MFLM Supp. 155 (2012)

Child visitation: contempt: attorneys' fees

Vincent Joseph McAvoy

v.

Sacha Williers Simmons

No. 1501, September Term, 2011

Argued Before: Wright, Mattriciani, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Wright, J.

Filed: September 28, 2012. Unreported.

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

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 refusal to hold his child's mother in contempt of a visitation order, nor in the court's award of attorneys' fees to the child's mother.

This is a *pro se* appeal from the Circuit Court for Baltimore County's dismissal of a petition for contempt of a court order and award of attorney's fees to appellee, Sacha Simmons, in the amount of Thirteen Hundred Dollars ($1,300.00). Simmons and appellant, Vincent J. McAvoy ("McAvoy") are the parents of Joshua T. McAvoy ("Joshua"). McAvoy and Simmons lived together until June 1, 2009. The petition for contempt at issue in this case is one of several filed by McAvoy with regard to a violation of a court order mandating visitation with his son, Joshua.

Questions Presented

McAvoy presented the following five questions in his brief:

> 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['s] 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['s] counsel and by demonstrating bias/abuse of discretion[?]

Facts and Proceedings

The circuit court issued an original custody order on March 19, 2010, giving Simmons custody of Joshua and providing for visitation between McAvoy and Joshua on Sundays between 6:30 a.m. and 8:00 p.m. and by phone no less than three times per week, ending by 9:30 p.m. On April 12, 2010, McAvoy filed an initial petition for contempt based on a violation of the original custody and visitation order. The circuit court found Simmons to be in contempt only as to the issue of lateness and phone access. Simmons could purge the contempt by being on time or calling and allowing phone access on Mondays, Wednesdays, and Fridays between 8:00 p.m. and 9:00 p.m. A subsequent order was issued on September 13, 2010, allowing Simmons to purge her contempt by complying with the following provisions: dropping Joshua off by 6:30 am. on Sundays or calling if she was running late, as well as designating Mondays, Wednesdays, and Fridays for up to 30 minutes between 8:00 p.m. and 9:00 p.m. for phone visitation. On April 4, 2011, McAvoy filed an amended Petition for Contempt because of alleged violations of the September 13, 2010 order mandating visitation between Joshua and McAvoy. The trial court granted a motion to dismiss the Petition for Contempt stating:

> The Motion is granted. You bear the burden of production and persuasion. The one and only bit of evidence you put on the stand [was] to have Ms.

> Simmons testify that on one occasion, June 21st, 2011, you weren't afforded an opportunity to call the child at 8:00 p.m. Recognizing her error, she testified that she recognized that, contacted you, allowed you to have contact with the child the next day. None of which has been rebutted. Meaning there is no evidence to the contrary. I asked you if you had any witnesses, any evidence to present and you said no. Nothing stopped you from getting on that witness stand and telling this [court to] award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person — and it goes on to list various things. What's applicable here is a proceeding to enforce a decree of custody or visitation. Your Petition for contempt was a pleading and a proceeding in order to force — or to enforce visitation. It goes on to say before a Court may award costs and counsel fees under this Section, the Court shall consider — see, I'm not making this stuff up. It's in the book.

The trial court awarded attorney fees to Simmons.

Discussion

McAvoy has not properly briefed all of the above issues for this Court. A brief must not only contain legal questions presented with the appropriate legal standard of review, but also a legal "[a]rgument in support of the party's position on each issue." Md. Rule 8-504(a)(6). "A necessary part of any argument are case, statutory, and for constitutional authorities to support it." *HNS Dev., LLC v. People's Counsel for Bait. County*, 425 Md. 436, 458 (2012). Briefs must be supported by providing legal authority to properly support the appellant's contentions. *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008). Instead, McAvoy advances sections of the Maryland Rules, excerpts from House Bills in the Maryland House of Delegates, cases in the Table of Authorities of his brief which provide limited or merely persuasive authority over this Court, and bald accusations of judicial bias and abuse of discretion. These limited authorities are combined with mere factual allegations as "support" for McAvoy's appeal. 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) (stating that *pro se* filings, "however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers"') (citations omitted). 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*. "In our adversarial system of justice, a trial court is the referee between the parties." *Id*. It is the job of the trial judge to ensure "that the rules are followed by everyone." *Id*.

> If an uneven 'playing field' results when parties represent themselves, it is not because the rules are applied differently, but that one side has available the education, training, and experience of a lawyer who functions in the legal arena to assist and represent his clients to the fullest extent of his ability.

Id. at 86.

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's attorney to testify for Simmons while she was on the stand. Abuse of discretion occurs '"where no reasonable person would adopt the view of the trial court' . . . or when the court acts 'without reference to any guiding rules or principles.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (citations omitted). "An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court.'" *Id*. (citations omitted). 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 his contention that Simmons was in contempt at the trial level 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. Nowhere in the transcript does Simmons admit to "willfully" violating a court order. The only evidence presented in support of the petition for contempt was that Simmons had inadvertently missed a phone visitation and promptly rectified the lapse by allowing a makeup call the following day. 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). It is the petitioner's burden to establish "that the defendant did or failed to do what

was required" by the court order. *Lynch v. Lynch*, 342 Md. 509, 520 (1996) (superseded by statute on other grounds by Md. Rule 15-207(e)). "[I]n Maryland civil contempt need be proved only by a preponderance of the evidence." *Winter v. Crowley*, 245 Md. 313, 317 (1967). Based on the limited evidence on the record, McAvoy did not meet his burden of proof by the preponderance of the evidence standard as required of a petitioner in a contempt hearing.

McAvoy also accuses the trial court of allowing Simmons's 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 about a document without McAvoy first establishing an evidentiary foundation for the document and noted another objection based on relevance that was overruled by the trial court. Objections are certainly not testimony. Thus, the trial court could not have abused its discretion in allowing Mr. Cahn to object, an action that is beyond the control of the trial court.

McAvoy next contends that the trial judge was derelict in his duties by not properly preparing for the contempt hearing in violation of Maryland Rule 16-813 Code of Judicial Conduct Rule 2.5(a). Rule 2.5(a) states that "[a] judge shall perform judicial and administrative duties competently, diligently, promptly, and without favoritism or nepotism."

McAvoy's appeal alleges a lack of preparedness by the trial judge regarding the lack of review of background information contained in a case file sent to this Court for an earlier related appeal. McAvoy avers that the information was "relevant to what was being reviewed in the contempt charge." To support his arguments, McAvoy cites to a page of the contempt hearing transcript that, to him, indicates that the judge was not sufficiently prepared to hear the case. However, that portion of the transcript discusses McAvoy's lack of evidence to defend against Simmons's motion for attorney's fees, rather than the merits of the contempt charge.

Regardless, a thorough review of the record reveals that this was not a complicated case for the trial court to adjudicate based on the allegations and the facts presented. To determine whether Simmons should be held in civil contempt, the trial judge properly reviewed the applicable pleadings, response, and court order, and heard evidence put on by the parties. Any further preparation was unnecessary to make a proper ruling on the civil contempt issue.

McAvoy next argues that the trial court engaged in an improper *ex parte* communication with Simmons's attorney, thereby showing favoritism, and demonstrating bias against McAvoy. "There is a strong presumption in Maryland . . . that judges are impartial participants in the legal process." *Jefferson-El v. State*, 330 Md. 99, 107 (1993) (citations omitted). "To overcome the presumption of impartiality, the party . . . must prove that the trial judge has 'a *personal* bias or prejudice' concerning him." *Id.* (citation omitted) (emphasis added). "Only bias [and] prejudice . . . derived from an extrajudicial source is '*personal*.'" *Id.* (citation omitted) (emphasis added).

There is nothing in the transcript of this case 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. As a result, there could not have been any bias by the trial judge because he had no personal knowledge of McAvoy prior to the hearing.

The trial court did not show favoritism to Simmons or her attorney nor bias against McAvoy. 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. The judge's spelling of Simmons's attorney's name for the benefit of the record is not indicative of any favoritism or bias. In fact, the trial judge also spelled McAvoy's name for the record. The trial judge's question asking for a motion from Simmons's attorney seems to have been merely an attempt to move the proceeding along and not to suggest a specific action. A fair reading of the transcript does not show any favoritism towards Simmons with regard to objections and questions.

Moreover, the court's request of a document pertinent to the case was not an *ex parte* communication as McAvoy alleges. Because of an earlier appeal filed by McAvoy, documents normally contained in the case file had been sent to this Court in Annapolis and were not available to the trial court. To properly prepare for the case, the trial judge, through his staff, requested a court document from Simmons's attorney's staff. There is nothing to indicate that 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 Md. Code (1984, 2006 Repl. Vol.), § 12-103(a)-(b) of the Family Law Article ("FL").

> The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person: . . . (2) files any form of proceeding: . . . (iii) to enforce a decree of custody or visitation. . . . Before a court may award costs and counsel fees under this section, the court shall consider: (1) the financial status of each

party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

McAvoy takes umbrage with the denial of a request for a continuance for him to prepare for the issue of attorney's fees, claiming he had received notice of the matter that day. 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 on June 1, 2011. Since the rules of procedure are equally applicable to McAvoy, as a *pro se* petitioner, as they are to a seasoned attorney, McAvoy had the same obligation to prepare for the issue of attorney's fees. *Tretick*, 95 Md. App. at 78. Therefore, the trial court did not abuse its discretion by denying McAvoy's motion for a continuance.

Alternatively, McAvoy claims that the trial court abused its discretion in awarding attorney's fees to Simmons, because he presented evidence on the financial status of each party and the needs of each party, which were not fully considered by the court. McAvoy points to testimony by Simmons on both parties' salaries, documents in the case file sent to Annapolis regarding the finances of each party, and the recession in the United States and the accompanying broad unemployment rate as not being fairly considered.

During the contempt hearing, the trial judge took note that McAvoy introduced evidence as to the relative earnings of both parties. However, the transcript also makes clear that McAvoy did not introduce any additional evidence for the court to consider regarding the parties' relative needs or expenses. While McAvoy refers to documentation contained in the case file, he did not submit those documents as evidence to be considered on the specific and distinct issue of attorney's fees related to the contempt hearing. It was not the responsibility of the trial court to present evidence on behalf of the petitioner. In fact, doing so would be just the type of "conduct that would create in reasonable minds a perception of impropriety" to be avoided under the canons of judicial conduct. Md. Rule 16-813 Code of Judicial Conduct Rule 1.2(b).

McAvoy also ignores the third provision of FL § 12-103(b), that allows the judge to consider the "substantial justification for bringing, maintaining, or defending the proceeding." Based on the paltry evidence presented to the trial court regarding the petition for contempt, it cannot be said that the trial court abused its discretion by concluding that McAvoy lacked substantial justification for the petition and, accordingly, awarding attorney's fees.

For all the foregoing reasons, we affirm the judgment of the circuit court.

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

Cite as 11 MFLM Supp. 159 (2012)

Divorce: marital property: financial settlement agreement

Joey Dayle Richards f/k/a Joey Maruschak v. Gary Maruschak, et al.

No. 881, September Term, 2010

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

Opinion by Graeff, J.

Filed: October 1, 2012. Unreported.

A Judgment of Absolute Divorce, based on an oral agreement reached by the parties in open court, was analogous to a consent judgment, and appellant, who agreed to the terms of the financial settlement, cannot appeal the judgment that arose from 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?

For the reasons stated below, we shall affirm the judgments of the circuit court.

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

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Maruschak filed a Complaint for Absolute Divorce on February 5, 2008, in the Circuit Court for Baltimore County.[1] In his complaint, he requested an absolute divorce on the grounds of a one-year mutual and voluntary separation, a determination of the value of the marital property, a monetary award, and attorney's fees and costs.

Ms. Marusehak filed an Answer to Complaint for Absolute Divorce, through counsel, on March 12, 2008. In her answer, Ms. Maruschak denied that the parties mutually and voluntarily agreed to live separate and apart from one another. She requested that the circuit court dismiss Mr. Maruschak's complaint and "award [her] such other and further relief as the nature of her cause may require."

On January 27, 2009, Ms. Maruschak filed an Emergency Motion for Change of Venue on the grounds of undue hardship and inconvenience. On February 23, 2009, the circuit court ordered the case transferred to the Circuit Court for Baltimore City.

On February 2, 2010, Mr. Maruschak filed an Amended Complaint for Absolute Divorce.[2] In the amended complaint, he requested a divorce on the ground of a two-year separation, and he repeated his requests for a determination of marital property and the value of that property, a monetary award, and attorney's fees and costs. Alternatively, he requested that a receiver be assigned to sell a business, "Charm City Signs," now doing business as "Cyantif*k," that he claimed to be marital property.

A divorce hearing was held on March 4, 2010. Mr. Maruschak was represented, while Ms. Maruschak appeared pro se. The trial judge referred the case to Sue German, a trained mediator, in an attempt to allow the parties an opportunity to reach an agreement as to marital property.

That afternoon, the parties reappeared in court after they were unable to reach an agreement as to all outstanding issues. The court explained to Ms. Maruschak that because she failed to plead alimony or a monetary award, she had waived those issues. The court discussed the possibility of an agreement, but Ms. Maruschak refused. Mr. Maruschak and his sister

then testified as to the grounds for divorce. Ms. Maruschak did not present any evidence. Mr. Maruschak then testified regarding marital assets, to the extent time permitted.

The court reconvened the case on March 9, 2010. Mr. Maruschak was about to retake the stand and resume testifying when Ms. Maruschak stated that she would like to agree to the settlement that was discussed on March 4. Pursuant to that agreement, each party would retain his or her car. The parties also agreed

> that the business would be sold and that a receiver be appointed for purposes of selling the business . . . and that the proceeds of the sale would be split forty-eight percent to [Mr. Maruschak] and . . . fifty-two percent to [Ms. Maruschakj, and the receiver is to be paid from those proceeds. And if the proceeds were insufficient for purposes of paying the receiver and the related fees, the parties would be responsible to pay fifty percent of whatever that deficiency is; and that . . . there's a waiver of alimony, mutual waiver.

That same date, the court issued an order granting a Judgment of Absolute Divorce. The judgment provided that it was issued pursuant to "evidence having been considered, testimony taken and an oral agreement reached by the parties as to marital property." It stated that the parties agreed to sell the marital business, "Charm City Signs, LLC, also known as Cyantif*k, LLC through a court appointed receiver who shall arrange to sell the business," and the parties mutually waived alimony.

On April 1, 2010, the court appointed Ralph L. Sapia as receiver for the purpose of selling Cyantif*k, LLC. The court also ordered

> that Cyantif*k and its affiliates, owners, directors, officers, partners, employees and agents are hereby enjoined from entering upon or affecting the . . . property of the Receivership Estate at any time during the pendency of the receivership without the prior express permission of the Receiver, and from interfering with, obstructing or preventing in any manner the actions of the Receiver.

The court further ordered that Cyantif*k officers, directors, and employees were "prohibited from transferring, concealing, destroying, moving, depleting or otherwise affecting the assets belonging to the Receivership Estate. . . ," providing that any violation "may be penalized as a criminal or civil contempt."

On April 22, 2010, Mr. Sapia filed a Motion for Order Enforcing the Court's Order of Appointment and for Sanctions as to Ms. Maruschak, Chukuemeka Okoro, and Laura Okoro a/k/a Laura Wilkinson. Mr. Sapia stated that, on April 21, 2010, Mr. Okoro and his wife, Ms. Wilkinson, would not give him access to the property. Mr. Sapia then obtained an emergency order from the circuit court to gain access to the property, but Mr. Okoro continued to refused access. Mr. Sapia stated: "Mr. Okoro still refused to allow him access, predicated upon an assignment which he maintained granted him a priority interest in the assets of the business." The assignment, which was dated April 6, 2010, and signed by Ms. Maruschak as tenant and Mr. Okoro as landlord. Mr. Sapia requested that the court find Ms. Maruschak and Mr. Okoro in Contempt of the Order of Appointment and the Judgment of Absolute Divorce and find Ms. Wilkinson in contempt of the Order dated April 21, 2010, and that the court grant sanctions against all three persons. He further requested that they pay the amount of $3,541.67 each, and that Ms. Maruschak pay all receiver fees to date. The certifications attached to the motion stated that Mr. Sapia "attempted to inform[ ] [Ms.] Maruschak by telephone but her voicemail was full," and that, on April 22, 2010, a copy of the motion was sent by facsimile to Ms. Maruschak.

The same day, the court held an emergency hearing. Ms. Maruschak was absent. Another hearing was set for May 11, 2010, at 2:00 p.m. The docket reflects that a hearing notice was mailed to Ms. Maruschak at 2104 Piney Branch Circle, the address she listed on her Emergency Motion for Change of Venue, and the address where, according to the docket entries, multiple pleadings and court notices were sent.

On April 23, 2010, Mr. Okoro filed an Emergency Motion to Remove Appointed Receiver Ralph Sapia. Mr. Okoro contended that, "[o]n April 22, 2010 at approximately 5 pm, [Mr.] Okoro granted [Mr.] Sapia access to the Property, pursuant to a Court Order." At approximately 5:55 p.m., Mr. Okoro returned to the property and saw Mr. Sapia with Baltimore City police officers outside of the property. Mr. Sapia informed Mr. Okoro that he was changing the locks under his authority as receiver. Mr. Okoro "strongly objected and explained that he was the Property owner and had granted access to [Mr.] Sapia, complying with the Court Order of two (2) hours[ ] earlier." Despite Mr. Okoro's objections, a locksmith engaged by Mr. Sapia subsequently came and installed new locks on the door. Mr. Okoro showed the April 22, 2010 Order to Officer Clemons, who ordered Mr. Sapia to pay for new locks and installation and for Mr. Okoro to keep all the

keys. Mr. Okoro contended in his motion:

> After the locksmith replaced both locks, the top lock was not able to lock and the locksmith admitted that it was damaged when he drilled into the door and that he did not have the materials to fix it. The top lock to the door was damaged due to the actions of [Mr.] Sapia, which were taken despite [Mr.] Okoro's objections.

Ms. Wilkinson, acting as an attorney, submitted the motion on behalf of Mr. Okoro. The Certificate of Service stated that it was sent to Ms. Maruschak via facsimile.

On April 29, 2010, Mr. Maruschak filed a Motion to Strike Emergency Motion to Remove Appointed Receiver. He contended that the motion wag not supported by an affidavit as required by Maryland Rule 2-311(d). He further asserted that Mr. Okoro had "gone to great lengths to obstruct the duties of the court appointed Receiver," and that "his conduct and that of his wife/attorney, Lara Wilkinson, have been in bad faith and without substantial justification." The Certificate of Service attached to the motion indicates it was mailed to Ms. Maruschak at 2104 Piney Branch Circle.

On that same day, Mr. Maruschak filed a Motion to Join Receiver's Motion for Order Enforcing the Court's Order of Appointment and for Sanctions, and to Supplement Motion and for Further Relief, adopting the allegations therein. Mr. Maruschak asserted that a hearing was held on April 22, 2010, during which Mr. Okoro testified under oath. Ms. Maruschak was absent. Mr. Maruschak supplemented the facts as to the contempt charges for Ms. Maruschak, Mr. Okoro, and Ms. Wilkinson. The Certificate of Service attached to the motion indicates that it was mailed to Ms. Maruschak at 2104 Piney Branch Circle.

On May 11, 2010, a hearing was held to resolve, in the court's words: the "plethora of filings and pleadings that have arisen as a result of the Court appointing Mr. Sapia as a receiver for purposes of disposing of or closing down what was marital property." Specifically, Mr. Sapia had filed a Motion for Order Enforcing the Court's Order of Appointment, Mr. Maruschak had filed a Motion to Join Receiver's Motion, and Mr. Okoro had filed an Emergency Motion to Remove Appointed Receiver Ralph Sapia.

At the hearing, Ms. Maruschak testified that, on March 8, 2010, Cyantif*k received a Notice of Default for failure to pay rent from Mr. Okoro. On April 6, 2011, five days after the receiver was appointed, Ms. Maruschak and Mr. Okoro entered into an agreement in which Cyantif*k would transfer trade fixtures to Mr. Okoro, and in return, Mr. Okoro would, among other things, release Cyantif*k from the rent for the remainder of the lease. Mr. Okoro then employed a moving company, Mike's Moving and Storage, to move a large printer, paper, and miscellaneous office furniture and supplies out of Cyantif*k and into a storage facility paid for by Mr. Okoro.

On May 27, 2010, the court issued its Order. The court dismissed Mr. Okoro's Emergency Motion to Remove the Receiver for "failure to plead in accordance with the Maryland Rules." The Court further ordered "that the Agreement for Transfer of Trade Fixtures Et Al as Payment of Rent, dated April 6, 2010, made by and between [Ms. Maruschakj for Cynatif*k, LLC, and [Mr.] Okoro is invalid and declared to be null and void," finding that Ms. Maruschak "lacked the authority to execute the agreement," and Mr. Okoro "had notice or constructive notice of the appointment of a receiver." The court found Ms. Maruschak in contempt of the Judgment of Absolute Divorce and in violation of the Charm City Signs Operating Agreement for having entered into the agreement with Mr. Okoro, finding that Ms. Marusehak "committed exspoliation of the assets of the marital estate, and that such exspoliation prevented the receiver from carrying out his duties and violated the terms and conditions of the Judgment of Absolute Divorce and Order Appointing Receiver." The court ordered that, to purge herself of contempt, Ms. Maruschak would pay 100% of the fees and costs of the Receiver, "which shall be paid from her portion of the proceeds of the sale of the property"; that she "shall also be responsible for 100% of any deficit owed to the Receiver for fees and costs that are not covered by her share of the proceeds of the sale of the property"; and that she "shall pay $1,867 of Mr. Marusehak's attorney's fees and costs." It further ordered that "any proceeds that remain from the sale of the property shall remain the sole and individual property of' Mr. Maruschak.[3]

On June 24, 2010, Ms. Maruschak filed a Notice of Appeal.

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)

("A consent judgment or consent order is an agreement of the parties with respect to the resolution of the issues in the case or in settlement of the case, that has been embodied in a court order and entered by the court, thus evidencing its acceptance by the court.").

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) ("We have had many opportunities to reaffirm the basic principle that a judgment, if it was consented to, cannot be appealed."). As the Court of Appeals explained in *Suter*:

> The availability of appeal is limited to parties who are aggrieved by the final judgment. *Thompson v. State*, 395 Md. 240, 248-9, 909 A.2d 1035, 1041 (2006) (citing *Adm'r, Motor Vehicle Adm. v. Vogt*, 267 Md. 660, 664, 299 A.2d 1, 3 (1973)). 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 "right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal." *Rocks v. Brosius*, 241 Md. [612,] 630, 217 A.2d [531,] 541 [(1966)]. 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).

Id. at 224.

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 the parties had 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." Mr. Maruschak replies that the circuit court had personal jurisdiction over Ms. Maruschak and that service was proper.

First, we note that, although Ms. Maruschak states that she "informed the court that she was unaware as to why she was called to [the May 11, 2010 hearing] and had not received any documents from Appellee's attorneys," she did not cite to anywhere in the transcript to support this statement. As this Court has stated: "We cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008) (quoting *von Lusch v. State*, 31 Md. App. 271, 282 (1976)). 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, "if a court obtains personal jurisdiction initially over parties to an action . . . 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, in a motion, Mr. Sapia requested sanctions against Ms. Maruschak; including that she be found in contempt of the Order of Appointment and the Judgment of Absolute Divorce. The record supports

the circuit court's finding that she received reasonable notice of the proceedings.

Whether a pleading was received is a factual issue. *Mermelstein v. Maki*, 830 F. Supp. 180, 183-84 (S.D.N.Y. 1993). We will not set aside a circuit court's factual findings unless they are clearly erroneous. *Clickner v. Magothy River Ass'n*, 424 Md. 253, 266 (2012).

Although Ms. Maruschak denied receiving the papers for the May 11th hearing, and she stated that she was only there "because your clerk called me and asked me to be [there] at two o'clock," the circuit court stated that it was "more than satisfied" that Ms. Maruschak received copies of notices and pleadings. The record supports this finding. The certificate of service attached to Mr. Maruschak's pleadings state that it was served to Ms. Maruschak at the address she provided to the court. The docket entries reveal that a notice of the May 11, 2010, hearing was mailed to Ms. Maruschak on both April 22 and 29, 2010, and she admitted receiving actual notice of the May 11, 2010 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.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. As indicated, *infra*, the case ultimately was transferred to the Circuit Court for Baltimore City.

2. This pleading is included in the record extract, but we did not find it in the record on appeal.

3. The court also found Mr. Okoro in contempt, stating that he had knowledge of the terms and conditions of the divorce judgment, he engaged Mike's Moving & Storage to remove and store marital assets that were used in the operation of Cyantif*k, and he obstructed the duties of the receiver and assisted Ms. Maruschak in the exspoliation of marital assets. Mr. Okoro was ordered to return all of the Cyantif*k's property and pay all related expenses. The court ruled that Mr. Okoro could retain the $4,400 security deposit given to him by Ms. Maruschak, on behalf of Cyantif*k, and apply that amount to any outstanding rents owed.

NO TEXT

Cite as 11 MFLM Supp. 165 (2012)

Child support: wage garnishment: appeal

Guetatchew Fikrou
v.
Genet Aklilu, et al.

No. 2379, September Term, 2010

Argued Before: Woodward, Matricciani, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: October 1, 2012. Unreported.

The appellant's issues were not properly before the appellate court, as he (1) failed to timely appeal from the circuit court's substantive rulings on his child support obligations and wage garnishment; (2) did not raise any issues regarding the circuit court's 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.

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

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

On January 6, 2011, the Montgomery County Office of Child Support Enforcement ("MCOCSE"), appellee,[1] entered the case by sending a notice directing appellant to send future support payments to the MCOCSE. On January 28, 2011, appellant filed a motion for suspension of enforcement of his child support obligation, which the circuit court denied in an order entered on March 14, 2011. Appellant filed a second notice of appeal on March 23, 2011.

On appeal, appellant presents two questions for our review:

> I. Did the Trial Court commit a reversible error when it denied Appellant'[s] Motion to stop wage[ ] garnishment, and used said finding as a factor in awarding Appellee's attorney[']s fees[?]
>
> II. Did the Trial Court commit a reversible error when it denied Appellant'[s] Motion to stop enforcement of wage[ ] garnishment while [the] Appeal [was] pending[?]

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

BACKGROUND

On April 2, 2010, appellant filed a request to enroll, in the Circuit Court for Montgomery County, certain orders and judgments regarding appellant's obligation to pay appellee, Genet Aklilu, child support that were entered by multiple county Superior Courts in the State of California. In particular, appellant sought to enroll the relevant support orders, declarations of payment history, and a Notice to Withhold Income for Child Support. Attached to the request was a copy of an April 12, 2007 audit from the California Health and Human Services Agency, which stated that appellant's child support arrears totaled $136,196.60. On April 2, 2010, appellant also filed a Motion for Termination of Earnings Withholding in the circuit court. On May 11, 2010, Aklilu filed an opposition to appellant's motion for termination of earnings withholding.

The circuit court held a hearing on appellant's motion for termination of earnings withholding on September 10, 2010. On October 7, 2010, the court entered an order denying the motion and a separate order requiring appellant to pay $3,000.00 in attorney's fees to Aklilu. On October 21, 2010, appellant filed a motion to reconsider the court's orders, which the court denied in an order entered on November 17, 2010. Appellant filed a notice of appeal to this Court on December 17, 2010.

On January 6, 2011, MCOCSE entered the instant case by filing, pursuant to Maryland Code (1984, 2006 Repl. Vol.), § 10-108.5 of the Family Law Article, a notice directing appellant to redirect payments of child support to MCOCSE. On January 28, 2011, appellant filed a motion for suspension of

enforcement of his child support obligation, which the court denied in an order entered on March 14, 2011. Appellant filed a second notice of appeal on March 23, 2011.

DISCUSSION

In his brief to this Court, appellant argues that the calculations in one of the child 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 alleged "fraudulent order," 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 that he "was not allowed to present his case" and that "[t]he Circuit Court did not allow [MCOCSE] to present their accounting."

In response, MCOCSE contends that appellant "presents no competent evidence or arguments in support of either of" his questions presented. Citing to *Beck v. Mangels*, 100 Md. App. 144, 149 (1994), MCOCSE argues that "this Court may decline to consider [appellant]'s unsupported arguments.

October 7, 2010 Order

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

As previously indicated, the circuit court entered, on October 7, 2010, an order denying appellant's motion for termination of earnings withholding. Appellant filed a motion for reconsideration on October 21, 2010. Appellant's motion thus was not filed within 10 days of the entry of the October 7, 2010 order, and the time to appeal that order was not extended. *See Id.* Consequently, in order for appellant to appeal the October 7, 2010 order, he was required to note an appeal within 30 days after October 7, 2010, or by November 8, 2010.[2] *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 October 7, 2010 order. Therefore, appellant's issue and arguments relating to the trial court's failure to terminate his child support obligation and/or wage garnishment are not before this Court.

Appellant's notice of appeal, however, was filed within 30 days of the circuit court's denial of his motion for reconsideration of the October 7, 2010 order. Accordingly, we have jurisdiction to review the court's denial of that motion.

In his brief to this Court, however, appellant fails to make any argument pertaining to the denial of his motion for reconsideration of the court's October 7, 2010 order. Indeed, appellant never even mentions the court's denial of his motion for reconsideration anywhere in the argument section of his brief. Accordingly, there is no challenge before this Court to the denial of appellant's motion for reconsideration of the court's October 7, 2010 order.

March 14, 2011 Order

"It 'is not our function to seek out the law in support of a party's appellate contentions.'" *Higginbotham v. PSC*, 171 Md. App. 254, 268 (2006) (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1997)). If a party fails to adequately brief an issue, we may decline to address it on appeal. *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003).

Appellant's second notice of appeal, filed on March 23, 2011, was within 30 days of the circuit court's order of March 14, 2011 denying appellant's motion for 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 circuit court's March 14, 2011 order on appeal.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; APPELLANT TO PAY COSTS.

FOOTNOTES

1. The other appellee, Genet Aklilu, did not file a brief in this case.

2. Thirty days from October 7, 2010, was November 6, 2010, which was a Saturday. Under Maryland Rule 1-203(a), appellant had until the following Monday, November 8, 2010 to file his appeal.

Cite as 11 MFLM Supp. 167 (2012)

Child support: factors beyond parent's control: immigration status

Montgomery County Office of Child Support Enforcement, Ex Rel. Carlos Palomera-Valdez

v.

Algeris Arias

No. 678, September Term, 2011

Argued Before: Eyler, Deborah S., Matricciani, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: October 3, 2012. Unreported.

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 any income to her due to her inability to obtain employment without breaking the law.

On September 17, 2010, appellant, the Montgomery County Office of Child Support Enforcement ("the County"), filed a complaint against appellee, Algeris Arias, in the Circuit Court for Montgomery County. The complaint sought to enforce Ms. Arias's child support obligations to her then-thirteen-year-old child. On May 19, 2011, the circuit court entered an order denying the request for child support and dismissing the complaint without prejudice. The County's timely appeal followed.

QUESTIONS PRESENTED

The County presents two questions for our review, which we have rephrased as follows:

I. Did the circuit court err in holding that Arias's 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?

For the reasons that follow, we answer yes to both questions. We therefore vacate the judgment of the circuit court, and remand the case to that court for further proceedings consistent with this opinion.

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

Factual And Procedural 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's work visa one time; thereafter, she remained in the United States without a current visa.[1] In November of 2007, Arias and Palomera-Valdez separated, and they are no longer married. The child has lived with Palomera-Valdez since her parents' separation. In the time since the parties separated, Arias has never paid child support.

Arias has not been employed steadily since the separation. She worked for two years at a retail store, where she earned seven dollars per hour and worked approximately forty hours per week. She was terminated two years ago when her employer learned that she did not have a work visa, and she has remained unemployed since that time. Arias now lives with a man who pays all of her expenses, including telephone and food.

The County filed a complaint under Maryland Code (1984, 2006 Repl. Vol.), § 10-115(b) of the Family Law Article ("FL") to enforce Arias's duty of support under FL § 10-203. On February 3, 2011, a master held a hearing on the complaint.[2] Arias claimed that she could not find further employment due to her undocumented status. Arias admitted that she had not made any efforts to become legally employable in the United States, and she blamed her nonfeasance on a lack of financial resources and ignorance of the procedure required to obtain legal status. The master concluded that, under Maryland law, Arias had no legal obligation to provide child support and so recommended that the complaint be dismissed.

The County filed six exceptions to the master's findings, two of which are central to this appeal. First, the County argued that Arias was voluntarily impoverished based on her failure to remedy her immigration status. Second, the County argued that Arias's previous two-year term of employment demonstrated that

she was able to earn *some* income, even if only a minimal amount. The circuit court overruled the County's exceptions, reasoning that, because Arias is an undocumented worker, her only means of earning an income would be illegal. Thus, in the circuit court's view, it did not have discretion to impute income to Arias: "this Court cannot find that [Arias] is capable of earning income, since it would require the Court to impose upon [Arias] the expectation that she work in violation of the law." On May 19, 2011 the circuit court entered an order dismissing the complaint. The County filed a timely appeal to this Court on June 3, 2011.

Discussion

As in *Lorincz v. Lorincz*, 183 Md. App. 312, 316 (2008), "[t]he prominent factor in this case, controlling the answers to all of the subsumed questions, was the Mother's status" as an undocumented immigrant. Our task is to determine whether the circuit court had discretion to impute income to Arias for the purposes of computing her child support obligation. For the reasons that follow, we hold it did, and that the circuit court erred in failing to exercise that discretion.

Standard of Review

Generally, child support orders are within the discretion of the trial court, and are not to be disturbed absent a clear abuse of discretion. *Child Support Enforcement Admin. v. Shehan*, 148 Md. App. 550, 556 (2002). Here, however, the circuit court had to interpret and apply statutory and case law governing the child support guidelines and Arias's immigration status. Accordingly, we must determine whether its order was legally correct under a *de novo* standard of review. *Id*.

I. Arias's Immigration Status

The circuit court held that Arias's immigration status divested it of discretion to impute income to her based on a finding of voluntary impoverishment. In so holding, the circuit court considered Arias's 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 the necessities of life. *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 that 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 as follows:

> 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 at least 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.

Here, the circuit court excused Arias's failure to rectify her immigration status based on her lack of financial resources and ignorance of the proper procedures. In so doing, the circuit court overlooked the resources available to indigent individuals who need help complying with immigration laws.[3] For example, both the University of Maryland Francis King Carey School of Law and the University of Baltimore School of Law offer clinics that represents individuals in immigration proceedings. Many of those 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. Thus, the circuit court erred in holding that Arias's immigration status was a factor beyond her control.[4]

II. Voluntary Impoverishment

Because Arias's 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. Still, the circuit court declined to impute income to Arias:

> This Court can only assume that in striving to prevent parents from purposefully reducing their income by imputing potential income, the Maryland legislature did not intend to urge parents to violate the law by including illegally obtained income in the calculation of potential income. Having reached this conclusion, the Court concedes that there appears to be some manifest injustice present in these cases, and invites further analy-

> sis and/or legislative intervention to ameliorate the problem. At present, the Court finds that it lacks sufficient tools to remedy the situation.

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.

A basic child support obligation is calculated from the child support guidelines in FL § 12-204. Those guidelines use as a starting point "actual adjusted income." Actual adjusted income is derived from "actual income," if the parent is employed to full capacity, FL § 12-201(c), or from "potential income," if the parent is voluntarily impoverished. FL § 12-201(j); *Harbom v. Harbom*, 134 Md. App. 430, 460 (2000). Actual income is income from *any* source. FL § 12-201(b)(1). Potential income is:

> income attributed to a parent determined by the parent's employment potential and probable earnings based on, *but not limited to*, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community.

FL § 12-201(j) (emphasis added).

The statute's text does not exclude income earned through illegal activity such as working without the proper documentation. FL §§ 12-201(b)(5) and 12-201(j). 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. *C.f. In re Joshua W.*, 94 Md. App. 486, 497 (1994) (holding that the guidelines apply to a child support case involving government financed child care and no custodial parent because "there is nothing in the statute or its legislative history to suggest that the General Assembly intended that the child support guidelines only be applied to the usual child support cases."). The circuit court erred in holding that it lacked discretion to impute income to Arias.[5]

Thus, we have removed the two barriers the circuit court cited in declining to impute income to Arias: that her status as an undocumented immigrant was a factor beyond her control, and that the General Assembly did not intend income earned as an undocumented worker to be considered for purposes of a child support order. We shall therefore vacate the judgment of the circuit court and remand the case to that court to make a finding on Arias's voluntary impoverishment and to impute income to her. On remand, the circuit court should consider the following principles.

"A person shall be considered 'voluntarily impoverished' whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate means." *Goldberger*, 96 Md. App. at 327 (holding that father was voluntarily impoverished due to a chosen lifestyle of religious study that prevented him from working at an income-earning vocation). "Whether the voluntary impoverishment is for the purpose of avoiding child support or because the parent simply has chosen a frugal lifestyle for another reason, doesn't affect that parent's obligation to the child." *Id.* at 326. In *John O. v. Jane O.*, 90 Md. App. 406 (1992), we set forth the factors that a trial court should consider when determining whether a parent is voluntarily impoverished:

> 1. his or her current physical condition;
> 2. his or her respective level of education;
> 3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;
> 4. the relationship of the parties prior to the divorce proceedings;
> 5. his or her efforts to find and retain employment;
> 6. his or her efforts to secure retraining if that is needed;
> 7. whether he or she has ever withheld support;
> 8. his or her past work history;
> 9. the area in which the parties live and the status of the job market there; and
> 10. any other considerations presented by either party.

Id. at 422.[6]

These factors may support a finding of voluntary impoverishment, but it is not our place to so find as a matter of fact. Rather, that is the task of the circuit court on remand. If the circuit court finds that Arias is voluntarily impoverished, it "must then determine the amount of potential income to attribute to that parent in order to calculate the support dictated by the guidelines." *Goldberger*, 96 Md. App. at 327. We enumerated the factors that a circuit court should consider when imputing potential incometo a voluntarily impoverished parent in *Goldgberger*:

> 1. age
> 2. mental and physical condition
> 3. assets
> 4. educational background, special

training or skills

5. prior earnings

6. efforts to find and retain employment

7. the status of the job market in the area where the parent lives

8. actual income from any source

9. any other factor bearing on the parent's ability to obtain funds for child support.

Id. at 328; *see also* FL § 12-201(j). On remand, the circuit court is free to consider the fifth factor — prior earnings. Arias's previous two-year term of employment demonstrated that she was able to earn some income, even if only a minimal amount. If she takes steps to alter her undocumented status, she should be able to find similar employment.[7]

CONCLUSION

Arias's immigration slams is a barrier to her legal entry into the workforce, but it is surmountable and the circuit court therefore erred in dismissing the County's complaint. To remedy this error, we must vacate the judgment and remand the case to the circuit court to determine whether Arias has voluntary impoverished herself and, if appropriate, to impute income to her.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITHTHIS OPINION. COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. Palomera-Valdez is not a United States citizen. He is in this country legally as an employee of the Brazilian Embassy. Thus, Arias did not become a citizen by virtue of the marriage.

2. Arias did not have representation at the hearing before the master or in the circuit court, and she did not file a brief with this Court.

3. *See* United States Department of Justice, Free Legal Service Providers in Maryland, *available at* http://www.justice.gov/eoir/probono/freelglchtMD.htm.

4. Although the County did not address this point in its arguments, there appears to be no authority restricting the court to consider, as it did in this case, only the parent's ability to work *in this country*. Thus, even if Arias may have been prevented from working in the United States due to circumstances beyond her control, there *may* be nothing to prevent her from working in the Dominican Republic. But without either evidence or argument on Arias's foreign employment prospects, we shall not rest our opinion on those grounds.

5. As above, we note that the circuit court presumed that the child support guidelines capture only income earned within the United States and thus failed to consider whether Arias could or should seek employment outside the United States. Maryland courts have applied the child support guidelines internationally, *see, e.g., Gladis v. Gladisova*, 382 Md. 654, 657 (2004) (the Guidelines apply without regard to the lower cost of raising a child in another country), and we see no reason to ignore the possibility of Arias working abroad, legally.

6. In addition to these factors, we note that Arias has been in the United States for approximately fifteen years. During that time — whether through marriage, employment, or the generosity of a romantic partner — she has been able to support herself. Since her separation from Palomera-Valdez in 2007, however, Arias has *never* paid child support.

7. At argument, the County suggested that Arias plans to marry her current partner, which would facilitate her in obtaining favorable immigration status or citizenship.

Cite as 11 MFLM Supp. 171 (2012)

Child support: arrearages: waiver of right to hearing

David A. Samuels
v.
Linda O. Samuels

No. 0090, September Term, 2011

Argued Before: Meredith, Wright, Cahill, Robert E., Jr. (Specially Assigned), JJ.

Opinion by Wright, J.

Filed: October 5, 2012. Unreported.

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.

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

Appellant, David A. Samuels ("Husband"), and appellee, Linda O. Samuels ("Wife"), were divorced in the Circuit Court for Montgomery County on April 10, 2007. The parties executed a Separation, Custody, and Property Settlement Agreement ("Separation Agreement"), dated February 26, 2007, which was incorporated but not merged into the Judgment of Absolute Divorce. Pursuant to the Separation Agreement, Wife retained use and possession of the marital home in Potomac, Maryland ("Potomac home") but had the option to sell the Potomac home prior to the expiration of the use and possession period. The Separation Agreement granted joint legal custody of the parties' minor children, Brandon (since emancipated), Eric, and Eliana, and sole physical custody to Wife.

On February 25, 2010, Wife filed a Motion to Immediately Enforce, for Sale in Lieu of Partition, for Contempt, to Increase Child Support, Attorney's Fees, Sanctions, and Other Related Relief. On November 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 court and allow the court to make the final determination of Husband's arrearage.

On February 2, 2011, pursuant to the agreement between the parties, the court entered a Consent Order incorporating the terms of the parties' November 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 of Consent Order, Petition for Reduction in Child Support and Request for Hearing on February 8, 2011 ("Motion for Reconsideration"), which was denied on March 24, 2011. A timely appeal followed.

Pursuant to the November Agreement and Consent Order, Husband was obligated to execute a promissory note, or other document prepared by Wife, that would create a lien on the Potomac home to secure payment of $43,141.00 and $70,000.00 from Husband to Wife, due March 31, 2011, and August 1, 2011, respectively. On March 31, 2011, Wife presented a promissory note and deed of trust to Husband at settlement for the refinance action to remove her from the title of the Potomac home, but Husband refused to sign the documents. On March 31, 2011, Wife filed an Emergency Motion to Enforce Consent Order. An emergency hearing was held that day. Husband agreed, on the record, to sign the deed of trust and present it to Wife on April 1, 2011. Husband failed to present the signed deed of trust on April 1, 2011, and the court extended the time for signing until April 7, 2011. Husband did not comply. On June 13, 2011, at a hearing on numerous motions of the parties pending before the court and arising out of the Consent Order, the court found Husband in constructive civil contempt for failing to sign the deed of trust and entered judgment in the amount of $70,000.00, with payment as a purge provision. A timely appeal followed. Both appeals were consolidated.

Husband presents two questions, rephrased as follows:[1]

> 1) Did the trial court abuse its discretion by not granting Husband's Motion for Reconsideration?
>
> 2) Did the trial court abuse its discretion by entering judgment for

> $70,000 and limiting the purge to payment, instead of allowing Husband to sign the Deed of Trust?[2]

Factual and Procedural History

It is undisputed that the parties entered into a Separation Agreement that was incorporated into their Judgment for Absolute Divorce. Section 19(c) of the Separation Agreement, allowing Wife to sell the former marital home in Potomac, Maryland, led to a disagreement between the parties when Husband refused to sign a listing agreement in February 2010. On February 25, 2010, Wife filed a Motion to Enforce, for Sale in Lieu of Partition, for Contempt, to Increase Child Support, Attorney's Fees, Sanctions and for Other Related Relief. In June 2010, Wife and the children moved out of the Potomac home and into Wife's fiancé's home in Eldersburg, Maryland.

On November 9, 2010, the parties agreed that Husband would buy out Wife's equity interest in the Potomac home; Husband would pay $3,700.00 per month as child support, replacing his existing obligations of $2,400.00 per month and 75 percent of the children's expenses, retroactive to March 1, 2010; and, *inter alia*, Husband would pay Wife $70,000.00 on or before August 1, 2011, as an alimony buy-out, to be secured by documents prepared by Wife as a lien against the Potomac home. When putting the terms of the settlement on the record, Husband's attorney stated, "And as I mentioned a moment ago, we agreed that both of those numbers, the [$43,131.00] and the [$70,000.00] will be a lien against the property. And we'll execute whatever documents need to be done to take care of that."[3]

On November 9, 2010, the parties agreed on the record to confer for 14 days regarding a reconciliation of the amount of child support and other expenditures for which Husband was to receive credit. Husband's counsel stated, regarding any arrearage, "There will be . . . [an arrearage]." Regarding expenses, the parties agreed that:

> The agreement with regard to these expenses that we've talked about, and the sharing of expenses, that's now been superseded by the amount of child support, that applies to all expenses except for college expenses. College expenses remain as written in the [Separation Agreement].

The parties were unable to agree on the amount of arrearage owed by Husband, and subsequently the court made a final determination of the arrearage based on documentation and proposed consent orders submitted to the judge by each party. On February 2, 2011, the trial court entered a Consent Order, incorporating the terms of the November Agreement and the determined arrearage. The arrearage included the period from March 1, 2010, through January 5, 2011. The total amount owed was calculated using the agreed-upon $3,700.00 per month which, for the 10.5-month period, equaled $38,850.00. Husband was credited with the amounts paid in child support and expenses, pursuant to §§ 13(b) and (c) of the Separation Agreement, proven by cancelled checks totaling $17,023.52. Section 13 of the Separation Agreement states:

> (a) Commencing on the first day of the month after the execution of this Agreement, and due and payable on the first day of each month thereafter, Husband shall pay the monthly mortgage including property insurance and real estate taxes on the family home until the Home is sold consistent with paragraph 19 below. Husband will be entitled to a tax deduction for the mortgage payments; all other payments will not be taxable to Wife.
>
> (b) Commencing on the first day of each month, until the oldest child reaches his eighteenth (18th) birthday or graduates from high school, whichever comes second, Husband will pay $2,400 per month as child support payable in two equal payments on the 5th and 20th day of each month. This amount will be increased annually on January 1st based on the CPI for the Washington, D.C. Metropolitan area. Thereafter the parties will modify child support for the parties' two remaining minor children. Husband shall pay child support to the Wife for the remaining minor children until each has reached the age of eighteen years or graduated from high school, which ever occurs second, but no later than age nineteen and agree that the support will be modified when Eric reaches the age of termination.
>
> (c) The parties agree that the following expenses shall be shared between them in proportion to their incomes: Summer camp, Eric's ice hockey, Eric's Hebrew tutoring, Eric's travel soccer, Eliana's Hebrew education, Country Glen Swim Club membership fees, Driver's Education for each child,

> synagogue fees/dues (capped at $500.00 annually), extraordinary medical expenses (such as braces), and the costs and fees for the Macabbi Games and other mutually agreed upon significant extra curricualar [sic] activities that the children engage in, provided neither party will unreasonably withhold agreement[.]

The Consent Order required Husband to pay the $21,826.48 arrearage within 10 days of the Order.

The Consent Order also incorporated the terms discussed above regarding the alimony buy-out by ordering Husband to execute "any promissory note or document prepared by [Wife] regarding the payment of [$43,131.00] by March 31, 2011 and [$70,000.00] by August 1, 2011."

The parties filed numerous motions regarding the refinance of the Potomac home following the Consent Order, leading to a March 31, 2011 emergency hearing. At the hearing, Wife's attorney stated on the record:

> It's my understanding that [Husband] is going to sign both of the documents that we presented to him, the deeds of trust for $43,131 and the second for $70,000.
>
> He's agreed to review and sign those with his attorney, and present them to myself tomorrow at, we have a hearing tomorrow for an earnings withholding order hearing. He's going to bring those signed documents to me tomorrow, and we will agree not to file those [earlier than Wednesday.]

Husband's attorney agreed to those terms but, as of the June 13, 2011 hearing, Husband had not signed the deed of trust. At the June 13, 2011 hearing, Husband stated he was willing to have a lien executed against the Potomac home, but not a deed of trust because of "the penalties that a deed of trust gives." Wife argued to the court, "And now here we are, two and a half months [after March 31, 2011], they haven't come up with anything — they haven't even said, ['']Look, we don't like your document. Can you change it.['] They haven't given us another alternative."

The court then found:

> Based on this issue of the, of securing this amount of $70,000 that's due in August, I think that it's fair to say that I have tried to extend Mr. Samuels as much time as I could.
>
> Based on his promises though [sic] his counsel that he would rectify this situation — and these documents were given to him at the end of March — I extended more time so that he could consult with a real estate attorney, so that the three-day recission period would run, and it's still — it's not done and it is now June 13th, and this same argument is made that we don't want to sign this deed of trust for some reason.
>
> I find that it's a willful disregarding of the Court's order. I am going to find him in contempt, and the purge of this contempt will be as follows:
>
> I will enter an immediate judgment for $70,000, and that can be duly recorded as a lien on the property, $70,000 . . . he agreed to a note, or some document, by his own words, that would act as a lien on the property. He just doesn't like this particular type of lien, although what the consent order says is that the document will be prepared by the defendant, so when they did prepare a document, the documents, he simply has refused to sign them, giving excuse after excuse.

At the close of the June 13, 2011 hearing, Husband asked the court, "If [Husband] were to execute that deed of trust immediately, as in, in this chamber right now, would the Court reconsider the [$70,000.00] judgment?" The court then asked Wife if she opposed the request; she did, and the court let the judgment stand. The judgment served as the purge provision for the contempt order and created the required lien on the Potomac home.

The $70,000.00 judgment was paid by Husband on July 11, 2011.

DISCUSSION

I. Standard of Review

We review the trial court's denial of Husband's Motion for Reconsideration for an abuse of discretion. An abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court" or the trial court "acts without reference to any guiding rules or principles." *Das v. Das*, 133 Md. App. 1, 15-16 (2000) (citing *North v. North*, 102 Md. App. 1, 13-14 (1994)): An abuse of discretion constitutes "an untenable judicial act that defies reason and works an injustice." *Id.* This court affords the trial judge a "wide latitude," and "will not reverse simply because we would have made a different ruling had we been sitting as trial judges." *Smith v. Luber*, 165 Md. App. 458, 467

(2005); Das, 133 Md. App. at 16 (citing *Wormwood v. Batching Syss., Inc.*, 124 Md. App. 695, 700 (1999)).

H. Denial of Motion for Reconsideration

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 February 2, 2011 Consent Order, was based solely on the written documentation provided by Wife and failed to credit Husband with payments made against the mortgage, property insurance, and taxes 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 November 9, 2010. We agree with Wife. Section 13(c) of the parties' Separation Agreement specified that the following expenses would be shared: summer camp, ice hockey, Hebrew tutoring and education, travel soccer, swim club membership fees, driver's education, synagogue fees, extraordinary medical expenses, cost and fees for the Macabbi games, and other "mutually agreed upon significant extra curricular activities." On November 9, 2010, Husband's counsel and the court engaged in the following exchange:

> THE COURT: And I also understood that there perhaps was a discussion that this child support figure then *will take the place of the old, I guess, arrangement*, that —
>
> MS. DUMAIS: That is correct.
>
> THE COURT: — called for a certain, sum certain, and then also 75 percent and 25 percent —
>
> MS. DUMAIS: Of expenses.
>
> THE COURT: — on various expenses,
>
> MS. DUMAIS: That is correct. So, this is a modification of their agreement
>
> THE COURT: Yes.
>
> MS. DUMAIS: —so that instead of sort of sharing expenses—
>
> THE COURT: Yes.
>
> MS. DUMAIS: — other than—yes, that is correct.

(Emphasis added).

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 trial Court's denial of his motion, resulting further in a deprivation of his property, valued at $21,826.48. At no point in the circuit court proceedings below did Husband argue that his voluntary agreement on November 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's counsel cites to numerous cases in support of his argument that Husband was not afforded due process when his Motion to Reconsider was denied. We decline to distinguish the majority of those cases because they are not relevant to the standard applied in a domestic case but will discuss those tangentially related.

Husband argues that *Mathews v. Eldridge*, 424 U.S. 319 (1976), requires that an evidentiary hearing be held before any deprivation of property can occur.[4] Husband misapplies *Mathews*, a case which involved the termination of Social Security disability benefits. In *Mathews*, the Court stated, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Court held that a full evidentiary hearing was not required before benefits could be terminated and noted that *Mathews* had the opportunity to put forth relevant facts in a detailed questionnaire provided by the Social Security Administration. *Id.* at 345, 349. The questionnaire was then used in an administrative adjudication of eligibility for benefits, much like child support guidelines are used by the court in determining support levels. *Id.* at 337. The Court explained that "the decision to discontinue disability benefits will turn, in most cases, upon 'routine, standard, and unbiased medical reports by physician specialists." *Id.* at 344 (quoting *Richardson v. Perales*, 402 U.S. 389, 404 (1971)).

While Husband ignores the holding of *Mathews*, that due process does not always require a full, formal evidentiary hearing, he does correctly articulate the test for a violation of due process.

> To establish a violation of procedural due process of law in this case, the aggrieved party must show that state action has resulted in a deprivation of a property interest within the meaning of the due process clause. Once deprivation of a property interest is demonstrated, the court must ascertain what procedures are constitutionally required before an individual may be deprived of a protected property

> interest. Due process does not require adherence to any particular procedure. On the contrary, due process is flexible and calls only for such procedural protections as the particular situation demands. Procedures adequate under one set of facts may not be sufficient in a different situation. Therefore, determination of what is required must be made by balancing the private and government interests affected. In that case, the Supreme Court set forth the appropriate factors:
>
> > "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Dep't of Transp., Motor Vehicle Admin. v. Armacost, 299 Md. 392, 416-17 (1984) (quoting *Mathews*, 424 U.S. at 334-35) (internal citations omitted).

Husband argues that "the ferreting out of the truth" could not occur 'by the parties' attorneys submitting letters to [the trial judge] on the issue." 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 to the trial court. The trial judge was involved in the negotiations preceding the November 9, 2010 Agreement and conducted the *voir dire* of the parties. The parties agreed on the procedure wherein the trial judge was given the opportunity to review the Settlement Agreement and review the documentation submitted by each party prior to the trial judge's 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," and therefore a request for a hearing would be antithetical to their agreement.

Nowhere in the transcript from the November 9, 2010 hearing does Husband request a hearing before the court if the parties cannot agree on the amount of arrearage.

The parties agreed that they will return to the court for "help" if they could not reach an agreement within 14 days. Apparently unable to reach agreement within 14 days, the parties' letters were submitted to the trial judge on the sixty-third and seventy-sixth calendar days following the November 9, 2010 hearing. E-mails by the Husband show that the parties were in contact with the trial judge prior to, and on, January 10, 2011. Husband's counsel's e-mail to Wife's counsel, dated January 10, 2011, states "I would appreciate receiving some feedback from you on the draft Consent Order and documents I sent to you last week so that we can be clear about the issues to discuss with [the trial judge]." A later e-mail on January 10, 2011, sent by Husband's counsel to Husband, states:

> Conference call was very short. I made it clear I was not going to go through all of the extraneous issues by phone and stated that I had done the Consent Order and that they had not indicated to me what, if any, changes would be required other than the dispute about whether or not there are any child support arrearages [sic].

Wife submitted a letter to the trial judge on January 11, 2011, which began:

> The parties have been unable to agree on the terms of their *Agreement* and the final child support arrearage amount that Mr. Samuels owes to Ms. Samuels. To that end, pursuant to your instruction, enclosed please find Ms. Samuel's proposed *Consent Order*. Ms. Samuel's proposed *Consent Order* memorializes the parties' *Agreement* which was placed on the record before you on November 9, 2010, and also provides for an appropriate child support arrearage figure based on the financial records for the parties.

(Italics in original).

Husband submitted a letter to the trial judge on January 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 November 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 January 30, 2011.

Husband's counsel then proceeded to document which parts of Wife's counsel's January 11, 2011 letter were disputed and presented Husband's accounting of payments. Husband's letter also referenced the portions of the parties' Separation Agreement on which each calculation was based. Husband's letter concluded:

> Mr. Samuels owes no child support arrears for the period of March 1, 2010 through January 30, 2011 and will begin paying Ms. Samuels $3,700 per month in February 2011. If Ms. Samuels does not have the three $800 checks sent by Mr. Samuels in October and November, 2010, then he will obviously pay her the $2,400 he included in the accounting above. Ms. Samuels owes Mr. Samuels the sum of $3,175.14 for her share of the college expenses for Brandon as documented above.
>
> Thank you for your patience and attention to this matter. Certainly if you have any further questions, please do not hesitate to contact me.

Nowhere in Husband's January 24, 2011 letter to the trial judge does Husband request a hearing regarding the disputed facts of what should be considered in calculating the arrearage. Contrary to Husband's position at oral argument that the proposed Consent Orders were provided to the trial judge as a routine, pre-hearing courtesy, 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 their written submissions to her, without the need for a hearing.

Pitsenberger v. Pitsenberger, 287 Md. 20 (1980), cited by Husband, is unpersuasive. Husband argues that "a state may properly limit the issues which may be raised at a hearing prior to a proposed deprivation of interest, if (1) the previously ignored issue may be raised at a subsequent hearing, and (2) the postponement furthers an important state purpose." Husband avers that the issue of child support arrearage was not heard at a subsequent hearing, thus denying Husband due process.[5]

In *Pitsenberger*, the parties were married in 1962 and the wife filed for divorce in 1979. On February 16, 1979, a master found at a hearing, relying on testimony and a Court Investigator's Report regarding the five minor children, that the wife should be granted *pendente lite* relief. The relief granted included use and possession of the family home. The husband appealed the circuit court's adoption of the master's findings on the grounds that his procedural due process rights were violated by granting the wife use and possession of the family home prior to a determination that her petition for divorce was meritorious. The Court of Appeals found no violation of due process in the application of Md. Code (1973, 2006 Repl. Vol.), Courts & Judicial Proceedings Article § 3-6A-06, because the State's interest in providing for the welfare of the minor children outweighed the husband's interest, noting that the merits of the divorce action would be heard at a later date and that *pendente lite* relief is modifiable. *Pitsenberger*, 287 Md. at 32-33.

Again, in this case there is evidence of a voluntary submission to the court, and thus no need for a hearing at a later date. 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.[6]

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 to the court. Rule 2-534 states in pertinent part:

> In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive

> additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment.

Maryland Rule 2-311(e) states that "When a motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing." 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.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. COSTS TO BE PAD) BY APPELLANT.

FOOTNOTES

1. In his brief, Husband presented the following questions:

1) Was the Appellant denied his constitutional rights to procedural due process when the trial judge made an "off-the-record determination" of child support arrearage and subsequently denied Appellant the right to be heard on his Motion for Reconsideration?

2) Did the trial judge abuse her discretion by reducing a $70,000 payment ("more than a month in advance of its due date") to an immediate judgment with the threat of incarceration for non-payment — rather than let the Appellant sign the Deed of Trust?

2. During the oral argument of the case, Husband's counsel withdrew this issue.

3. The $43,131.00 refers to a payment to equalize Husband and Wife's respective retirement accounts. That payment is not at issue in this appeal.

4. During oral argument, Husband's counsel cited *Fuentes v. Shevin*, 407 U.S. 67 (1972). However, we note that even before *Mathews* was decided, the Supreme Court had stated that a full formal hearing was not required to satisfy due process. Concurring in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 623 (1974), Justice Powell stated:

> In sweeping language, *Fuentes v. Shevin*, 407 U.S. 67 (1972), enunciated the principle that the constitutional guarantee of procedural due proess requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property. The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the *Fuentes* opinion is overruled.

5. We note that *Pitsenberger's* two part test was applied to *pendente lite* statutory relief under Md. Code (1973, 2006 Repl. Vol.), Courts and Judicial Proceedings Article §§ 3-6A-01 to 3-6A-07, not post-settlement relief, and in particular, analyzed if the pendente lite award of use and possession of the family home amounted to a "taking" for which compensation was owed.

6. This assumes, without deciding, that an order setting the amount of child support arrearage would amount to a constitutional taking and therefore a potential violation of a constitutional right.

NO TEXT

Cite as 11 MFLM Supp. 179 (2012)

Child support: modification: attorneys' fees

David A. Samuels

v.

Linda O. Samuels

No. 1615, September Term, 2011

Argued Before: Meredith, Wright, Cahill, Robert E., Jr. (Specially Assigned), JJ.

Opinion by Wright, J.

Filed: October 5, 2012. Unreported.

Where the children's father sought to have the court revise or undo virtually every term in the settlement agreement reached in court 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.

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

Appellant, David A. Samuels ("Husband"), and appellee, Linda O. Samuels ("Wife"), were divorced in the Circuit Court for Montgomery County on April 10, 2007. The parties executed a Separation, Custody, and Property Settlement Agreement ("Separation Agreement"), dated February 26, 2007, which was incorporated but not merged into the Judgment of Absolute Divorce. The Settlement Agreement granted joint legal custody of the parties' minor children, Brandon (since emancipated), Eric, and Eliana, and sole physical custody to Wife.

On February 25, 2010, Wife filed a Motion to Immediately Enforce, for Sale in Lieu of Partition, for Contempt, to Increase Child Support, Attorney's Fees, Sanctions, and Other Related Relief ("Motion to Enforce"). On November 9, 2010, after two failed settlement conferences, the parties appeared in the circuit court and in lieu of a hearing, the parties' reached a settlement resolving all outstanding issues except Husband's outstanding 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 February 2, 2011, the trial court issued a Consent Order, incorporating the terms of the November Agreement and its determination of child support arrearage.

On February 9, 2011, Husband filed a Motion for Reconsideration of Consent Order, Petition for Reduction in Child Support and Request for Hearing ("Motion for Reconsideration"), pursuant to Maryland Rule 2-534; the Motion for Reconsideration was denied on March 24, 2011, and that denial is the subject of another appeal.[1] On February 15, 2011, Wife filed a Petition for Modification of Legal Custody and for Other Related Relief. When Husband failed to pay the agreed upon $3,700.00 per month and accrued child support arrears over 30 days, Wife filed a Motion for Service of Earnings Withholding Order ("EWO") on February 22, 2011, and Husband filed an Opposition to the Motion for Service of [EWO]. A slew of discovery requests and oppositions, garnishment requests and oppositions, and other motions ensued.

On April 1, 2011, Wife filed a Supplemental Petition for Modification of Legal Custody and a hearing was held regarding the EWO. The Family Division Master recommended the issuance of an EWO, and Husband filed Exceptions to the Master's recommendations. On April 13, 2011, Wife filed Defendant's Motion to Advance Attorney's Fees ("Motion to Advance") seeking $10,000.00 in advance attorney's fees to defend the appeal related to Husband's Motion for Reconsideration. Husband filed no opposition to Wife's Motion to Advance.

On May 16, 2011, Husband filed a second Motion to Modify the Parties' Separation Agreement and Consent Order Due to Material Change in Circumstances ("Second Motion"). Husband's Second Motion was denied on June 8, 2011. On June 10, 2011, Wife filed a Petition to Increase Child Support ("Petition to Increase"). On June 13, 2011, at a hearing regarding Wife's Motion to Advance, Husband orally opposed Wife's Motion to Advance. The June 13, 2011 hearing ("June Hearing") included the issues of visitation, reunification, and Husband's Exceptions to the EWO. During the June Hearing, Wife withdrew her Petition to Increase. The EWO was granted and the trial court later awarded Wife $2,645.84 in attorney's fees for defending Husband's Exceptions.

On June 21, 2011, the trial court awarded Wife $5,000.00 in advance attorney's fees. On June 30, 2011, Husband filed Plaintiff's Motion for Reconsideration of Attorney's Fees: Husband filed his Third Petition for Reduction in Child Support on July 5, 2011. On July 13, 2011, a hearing ("July Hearing") was held on Wife's Petition for Contempt and the issues of custody and attorney's fees. Another hearing on Husband's pending motions and Wife's motion for sole custody was held on August 3, 2011 ("August Hearing"). On August 13, 2011, Husband filed a Supplemental Motion for Reconsideration of [$5,000.00] in Advance Attorney's Fees ("Supplemental Motion").

The trial court ordered Husband to pay Wife $6,750.00 in attorney's fees on October 4, 2011.[2] On October 11, 2011, Husband filed his Second Supplement to Third Petition for Reduction in Child Support. In a Memorandum Opinion entered on October 18, 2011, the trial court denied Husband's Supplemental Motion, awarded sole legal custody of the minor children to Wife, and ordered Husband to pay Wife an additional $44,000.00 in attorney's fees. A timely appeal followed.

Husband presents four questions, consolidated, rephrased and reordered as follows:[3]

> 1) Did the trial court err as a matter of law or abuse its discretion in finding a material change of circumstances and awarding sole legal custody to Wife?
>
> 2) Did the trial court err as a matter of law or abuse its discretion in denying Husband's petition to modify child support?
>
> 3) Did the trial court abuse its discretion in awarding attorney's fees, including advance attorney's fees to Wife?

FACTS

It is undisputed that the parties entered into a Separation Agreement that was incorporated into their Judgment for Absolute Divorce. Section 19(c) of the Separation Agreement, allowing Wife to sell the former marital home in Potomac, Maryland ("Potomac home"), led to a disagreement between the parties when Husband refused to sign a listing agreement in February 2010. Wife filed her Motion to Enforce on February 25, 20l0. In June 2010, Wife and the children moved out of the Potomac home and into Wife's fiancé's home in Eldersburg, Maryland.

On November 9, 2010, the parties agreed that Husband would buy out Wife's equity interest in the former marital home; Husband would pay $3,700.00 per month as child support instead of his existing obligation of $2,400.00 per month and 75 percent of the children's expenses, retroactive to March 1, 2010; and, *inter alia*, Husband would pay Wife $70,000.00 on or before August 1, 2011, as an alimony buy-out, to be secured by documents prepared by Wife as a lien against the Potomac home.

In determining the new child support amount, the parties agreed to use $6,000.00 per month, or $72,000.00 per year, as Wife's income, $85.00 per month as the children's health insurance, and $1,500.00 on line 4(e) of the child support guidelines as additional expenses for the children. The parties used $14,167.00 per month, or $170,004.00 per year, as Husband's income. At the time of the November Agreement, Husband was unemployed and Wife's actual 2010 income was $73,354.92. In their negotiations, the parties completed four child support guideline worksheets, using both $1,500.00 and $2,000.00 per month as additional expenses for the children. Husband's records show that from January to July 2010, Wife provided him with invoices for, and he paid, $8,223.96, or $1,174.85 per month, in additional expenses for the children, representing his 75 percent contribution share under the Separation Agreement. When the Consent Order was entered, Husband was employed making at least $16,667.00 per month, or $200,000.00 per year.

In the Consent Order, the trial court determined Husband's child support arrearage to be $21,826.48. Husband filed his Motion to Reconsider and, when it was denied, filed an appeal. This appeal prompted Wife to file her Motion to Advance stating that "without assistance of the Court, [she] cannot properly defend the appeal or continue to prosecute this litigation." As of February 28, 2011, prior to filing her Motion to Advance, Wife had $77,034.00 in an investment account and $67,690.00 in her retirement account. The record shows that Wife removed funds from her investment account three times before, and five times after, April 1, 2011.

Wife received no child support payments from Husband between November 2010 and March 2011, when Husband, in his own discretion, paid either nothing or only $2,800.00 per month, $900.00 less than the $3,700.00 required by the Consent Order. The Consent Order states that "should the obligor accumulate arrears in support in excess of thirty (30) days, the obligor may be subject to an [EWO]. . . ." On March 15, 2011, an EWO was entered against Husband for $3,700.00 per month. Pursuant to the Consent Order, on April 1, 2011, Husband paid Wife $320,000.00 for her equity in the former marital home and $43,131.00 in retirement equalization several days later.[4]

During the August Hearing, Husband's counsel argued that payments made from Husband to Wife

pursuant to the Consent Order constituted a material change in circumstances:

> MS. CARP: No, the change in circumstances is that there's now
>
> [$70,000.00] on the ledger on the other side because alimony, a
>
> [$70,000.00] alimony buyout has been paid to the defendant and that is a material change.
>
> THE COURT: No, it's not. That was part of the agreement —
>
> THE WITNESS: No, it wasn't.
>
> THE COURT: — for alimony.
>
> * * *
>
> THE COURT: The [$70, 000.00] was a part of the agreement. It was an alimony buyout. She can go use it to buy shoes if she wants. It was an alimony buyout and it was a part of this same agreement. You cannot go back and call everything by a different name and now say it's not fair.

Husband then testified that the children's needs have decreased "much more so than they were last year [2010]." The court then explained to Husband that "we start at this agreement, that's what we start at. The substantial change has to come postagreement[.]" Husband's counsel then asked:

> Q: Mr. Samuels, at the time in November, on November 9, 2010, when you agreed to [$3,700.00] per month in child support, what was your understanding of the children's cost of extracurricular activities?
>
> A: That they were probably going to be 15 [sic] to [$20,000.00] per year.
>
> Q: And based on your research of the children's current cost of extracurricular activities,what is that cost now?
>
> THE COURT: He said it three times already.
>
> THE WITNESS: It's [$10,000.00].

Husband testified that he had researched the costs of some of the children's expenses and determined that Eric's hockey should cost $2,200.00 per year plus some equipment costs, an estimated $1,500.00 for hockey-related travel, $2,000.00 for Eliana's religious school, and $3,000.00 for Eliana's camp. Husband was asked by his counsel about the costs for Eric's soccer:

> Q: Mr. Samuels, do you know whether the cost of Eric's soccer is higher or lower in Eldersburg than it was in Potomac?
>
> A: It's lower.
>
> MS: HASPEL: Objection, Your Honor. Again, not relevant because when we reached the agreement we were talking about soccer in Eldersburg because the children were living in Eldersburg in November of 2010.
>
> THE COURT: Ms. Carp, is that an accurate statement of fact that the children were living in Eldersburg?
>
> * * *
>
> THE COURT: . . . Were the children living in Eldersburg in November of 2010?
>
> MS. CARP: Yes, Your Honor . . .

On cross-examination, Husband testified that he believed his child support obligation should be "about 17 [sic] to [$1,800] a month." Husband conceded that at the time of the November Agreement, the children were living in Eldersburg in Wife's fiancé's house and were engaged in extracurricular activities in Eldersburg. Husband also admitted that his calculations did not include both of the camps attended by Eliana in 2011, Eric's sports camp, Eliana's therapy costs of $200.00 per month, Eliana's swim club, or Eliana's additional braces. Husband's research of expenses was excluded from evidence under a hearsay objection.

During the August Hearing, Wife testified that the children's costs had not changed since the November Agreement was negotiated. Prior to the August Hearing, on June 10, 2011, Wife filed her Petition to Increase accompanied by a long form financial statement certifying total monthly expenses for the children at $7,790.00. Wife testified she paid $1,410.00 for food, $2,170.00 for recreation and entertainment, $100.00 for school, $200.00 for Eliana's therapy, and that Eliana needed additional braces and her lifetime cap of insurance coverage had been exceeded. According to the record, Wife paid $4,188.00, or $348.33 per month, for Eliana's camps; $1,350.00 per year, or $112.50 per month, for Eliana's religious education; $100.00 per month for Eliana's year-round swim team plus health club dues of $142.00 per month; $400.00 per year, or $33.33 per month plus licensing fees, for Eric's driver's education; $2,200.00 per year, or $193.33 per month, exclusive of travel or equipment costs for Eric's hockey; and $445.00, or $37.08 per month, for Eric's soccer camp. Wife testified that travel and equipment associated with Eric's ice hockey ranged from $6,000.00-7,000.00 per year, with the Canada trip costing over $1000.00.[5] The extracurricular activities accounted for in the record amounted to $1,466.57 per month.

Husband's counsel also told the court during the

August Hearing that Husband's income constituted a material change in circumstances:

> Right. And at the time that he agreed to both [$7,700.00], [$4,000.00] plus, actually more like [$8,000.00] a month for college and child support, he had an expectation of a similar, or at least [$250,000.00] in income. That's a material change andthat's fine. We'll move on. Something else will change, but we'll move on.

On cross-examination, Wife's counsel questioned Husband regarding his income. The record shows that on March 9, -2011, Husband wrote the following information in an e-mail to Michael Meyer of Ever Home in connection with the refinance of the Potomac home:

> Base —$200,000
>
> Bonus —$50,000
>
> Consulting —$50,000 (averages more than this for each of the past few years]
>
> W-2 for 2010— $202k
>
> 1099 for 2010—[$]75k
>
> Investment Property
>
> To refinance — 12008 Edge Park Court, Potomac, MD 20854
>
> Built 1970, purchased for $490k
>
> 5469 Grove Ridge Way, N. Bethesda, MD
>
> 2141 I Street, NW, Washington DC

In an e-mail dated March 24, 2011, to Teresa from F & M Mortgage regarding the refinance of the Potomac home, Husband stated, "this fax may help us in case they have an issue with my approx. $300K income, $1M in financial assets, and significant equity and cash flow in all of my fully leased investment properties[.]" In an e-mail sent approximately fifteen minutes later, Husband reiterates those values and states, "I have zero living expenses excluding my child support and a modest car loan."

Regarding his child support expenses, Husbandrepresented to Teresa, in a signed letter dated March 23, 2011, that:

> I pay [$2,400.00] per month, plus an allocation of extra-curricular expenses, if incurred in certain months. . . . In June 2010, my oldest child reached the age of eighteen and the monthly support was reduced to [$1,600.00] per month plus expenses as referenced above. . . . Since the agreement was executed in 2007, we agreed to a lump sum inflation adjustment for the past four years (2007-2011) to the [$1,600.00] per month payment. The newer payments shown for the month of March, 2011 include this adjustment plus a pro-rata allocation of extra-curricular expenses. This amount reflects prepayments for activities planned for the children in the summer. Therefore, this amount will be reduced in future months.

In a signed letter to Teresa dated March 24, 2011, Husband reiterated that his child support was reduced:

> When my oldest child reached the age of 18 last year, my monthly child support was reduced to a base amount of [$1,600.00] per month for the two minor children. This amount excludes any expenses for extra-curricular activities for which I share a proportion of this cost as well.

On cross-examination, Husband testified that he filled out a mortgage application and gave his income as $16,666.00 per month with a bonus income of $4,166.00 per month, for a total monthly income of $20,832.00. This loan application, dated March 10, 2011, lists Husband's total rental property income as $2,996.00. It also lists Husband's total assets as $1,780,000.00. A March 29, 2011 application lists Husband's base income as $16,666.00 per month with a bonus income of $3,281.25 per month, dividends of $191.00, and "other" income of $4,371.58, for a total monthly income of $24,510.50. A March 31, 2011 application for a home equity loan lists Husband's base and bonus income as $25,833.00 per month. On cross-examination, Husband admitted it was his handwriting that listed his income as $25,833.00 per month. Another loan application dated March 29, 2011, values Husband's total assets at $2,975,000.00 and his net worth at $1,984,000.00. Husband testified that his representations of his income were "pure puffery."

Financial matters were not the only issue resulting in litigation following the November Agreement. The November Agreement provided that the parties share joint legal custody and required the parties to consult about major decisions, but gave Wife final decision-making authority if the parties could not agree to mediate any given dispute. In the November Agreement, the parties agreed to engage in therapy sessions to facilitate Husband's reunification with the minor children and named Karen McClelland, LCSW, as the therapist. Beginning in November 2010, Husband and his current counsel sent numerous e-mails to McClelland demanding that she "cease and desist" treating Eliana,[6] and that she meet with Husband on days she did not normally work or that

she had booked with other clients. Husband then reported McClelland to the Maryland Board of Social Work Examiners, resulting in McClelland refusing to serve as the reunification therapist.

McClelland was deposed on June 22, 2011, and testified that Eliana is "very nervous about the contact between [Husband and Wife] and being exposed to that." McClelland expressed concerns about Husband's "ability to have relationships with other people, as he constantly threatens people in order to get his way, and that's based on my own experience."[7] When questioned, "[d]o you have any concerns about [Husband] and [Wife] being able to make joint decisions for the welfare of Eliana[,]" McClelland answered, "I don't think they agree on anything, so yes." On cross-examination, Husband's counsel asked McClelland, "And is it your opinion that this case has nothing to do with parental alienation?" McClelland answered, "I feel that [Wife's] lack of trust of her ex-husband and his lack of trust of her influences them both in this case, and influences their ability to make joint decisions."

The record shows that the parties disagreed on a newtherapist with Husband levying allegations of conspiracies and collusion between Wife and the therapists. During the July Hearing, Husband's counsel requested a mental examination of Wife stating, "we have a request for a mental examination, which goes to our argument that there is parental alienation due to implacable hostility in this case."

As part of the July Hearing, the trial judge interviewed both minor children on the record. During that interview, Eric testified that he plays ice hockey and soccer. When questioned regarding visitation with Husband, Eric stated:

> [H]e hasn't gotten his act together. I mean, he, like I think he wants to see us, sort of, then he really doesn't. Like, we're more for show than anything else. He wants to say he has superior kids and that's really how I feel. Money is more important, so he appeals everything. He, if money is involved, he just wants money. He doesn't even care, so.

The court then questioned Eric further about the relationship with Husband, and the following exchanges occurred:

> THE COURT: What? Say that again. He said what?
>
> [ERIC]: If we don't have a relationship with him, he's not going to pay for college or anything else for us.
>
> * * *
>
> [ERIC]: He says if I testify against him . . . he won't have a relationship with me.
>
> * * *
>
> [ERIC]: I think it would go easier, the, the relationship better, which means he's, end all this divorce stuff, stop, like, doing it, a little bit.
>
> * * *
>
> [ERIC]: He's [Husband] not, he doesn't pay for, he doesn't have to pay for [his lawyer]. That's like the money thing. I just want it to be over. And with, if he, if he still has his lawyer, it won't be over . . . she keeps on appealing and appealing.
>
> * * *
>
> THE COURT: And again, tell me what would getting his act together look like to you?
>
> [ERIC]: Just, I mean, a guy who cares more about us than like anything else, so.
>
> * * *
>
> THE COURT: I mean, what if you — I mean, I'm not putting you on the spot here, I hope I'm not, because you're saying, "I want him to get his act together and care about us." What if he heard that from you? Not face-to-face, I mean, that would be too awkward, but what if he heard that from you in an e-mail?
>
> [ERIC]: I don't think. He, really, the only reason he wants to get with me is so I won't testify against him in the criminal case where he subpoenaed before.[8] Like, he tricked my brother and saying to check my e-mail, that there's an apology letter. All it says is, "Eric, we need to talk, call me back." That's all it was. I mean, my brother is like, he's so worried that he's not going to get his college paid for, he isn't, you know.

Eric further stated that "the only thing that upsets me is how long it's taking[,]" referring to the litigation.

When questioned by the trial judge, Eliana explained that she did not want to have visitation with Husband even with a counselor present because of several events preceding November 2010.[9] Eliana also explained that, while she was not physically afraid of Husband, she was afraid that he would disrupt her life in other ways, particularly using the court system:

> [ELIANA]: But one thing I was sort of upset about was, I, since I'm going to sleep away camp, I was sort of upset that maybe he would come [to court] to say something like, I don't want my daughter to go to that camp, I don't want her there.
>
> THE COURT: Yes.
>
> [ELIANA]: And then, just like when my brother went to Canada, she, my mom would have to come [to court] and pay money to get that to be fixed.
>
> * * *
>
> THE COURT: So you're afraid he might interfere with the camp, —
>
> [ELIANA]: Yeah.

Wife echoed the children's concerns during the August Hearing stating that she was seeking sole legal custody "to be able to make decisions for my children without having to come to court and spend thousands of dollars, take off work, the emotional stress on me and the children to be able to make those decisions that are appropriate for my children." In addition to the disagreements about Eric's travel to Canada for a hockey tournament and therapy, Wife explained that Eliana needs specific medical care because she has Hepatitis B, but that Husband "has taken no interest in his daughter's health needs[,]" or not taken them seriously. Regarding Eliana's necessary weekly Interferon injection, Wife testified, "It was like [$3,000.00] a month and he refused, he said no way he would pay it [if insurance did not]."

In the October 18, 2011, Memorandum Opinion, the trial court, addressing the child support issue, found that "Plaintiff alleges several bases to support a material change in circumstances, none of which meet the standard of materiality, and the majority of which do not amount to any change in circumstances whatsoever." The court noted that while it was uncertain of Husband's actual income, it was clear that in calculation of child support on November 9, 2010, Husband chose to use $170,004.00 to represent his income, an amount lower than the $200,000.00 he submitted to the court in his petitions to reduce his support obligation. The court stated, "An increase in Plaintiff's income is clearly not a basis for a reduction in his child support obligation."

Regarding Husband's allegation that the minor children's financial needs have decreased since November 9, 2010, the court found that because the children were living in Eldersburg at the time of the November Agreement, and were still living there, no change in dircumstances as to their residence had occurred. Addressing Husband's contention that the children's activities only amounted to $833.00 per month instead of $1,500.00 per month, the court explained that even using $833.00 per month, given Husband's increased income, his support obligation would still be greater than his current payment under the child support guidelines. In a footnote, the court elaborated:

> Under the child support guidelines, using Plaintiffs monthly gross income of [$16,666.00]; Defendant's gross monthly income of [$6000.00]; Defendant's monthly health insurance payments for the children of [$85.00]; and Defendant's additional expenses for the children in the amount of [$833.00] per month, Plaintiffs monthly child support obligation would be [$3842.00].

Addressing Husband's argument that he is impoverished and cannot afford his current child support, the court stated:

> Again, Plaintiff had failed to provide a material change in circumstances warranting a reduction in child support. Plaintiff does not present a scintilla of evidence that his financial obligations to the children render him financially destitute in any degree. To the contrary, the weight of the evidence show that he has sizeable assets, including several real estate properties, and that he may generate even more income than the substantial amount he now represents to the Court.

The court dismissed Husband's argument that Wife should have increased income imputed to her by saying:

> Again, Plaintiff fails to prove the threshold matter of a material change in circumstances. In fact, since the November 9, 2010 hearing, there has not been any change in circumstances regarding Defendant's employment capacity, let alone a material change. At the time of that hearing, [Defendant] worked from home for the same company and for the same number of hours, earning the same amount of income.
>
> * * *
>
> Plaintiff further argues that given that he paid Defendant a [$70,000.00] alimony buyout, her annual income for the coming year has increased by [$70,000.00]. Again, Plaintiff alleges

> no actual change in circumstances. The parties agreed at the November 9, 2010 hearing, as memorialized in the [Consent Order], that Plaintiff would make a one-time payment of [$70,000.00] as an alimony buyout no later than August 1, 2011, in addition to paying ongoing child support in the amount of [$3700.00] per month. The parties negotiated this as part of the Consent Order, and the Court cannot reasonably find that the actual one-time lump payment anticipated in the Consent Order amounts to a change in circumstances.

Regarding the modification of child custody, the court discussed the factors to be considered in a determination to modify custody, noting that at the time of the November Agreement, despite a deterioration of the parties' ability to communicate, "beginning in July 2010 . . . the parties apparently believed that they could work cooperatively to make decisions for the minor children." The court then stated, "However, it is clear from the events that ensued since the November 9, 2010 agreement that joint custody is unsustainable." The court explained:

> It is clear to this Court that the parties are fatally lacking in their ability to communicate and make decisions on behalf of the minor children. The parties themselves have both testified as to their poor level of communication. The Plaintiff testified that Defendant often does not communicate with him before making decisions on behalf of the minor children. The Defendant, on her part, testified that Plaintiff has exhibited hostility toward her and bullied her in the communications they have had, which has deterred her from attempting to consult with him.
>
> This Court itself has witnessed the parties' inability to resolve matters between themselves, both inside and outside the courtroom. As is evident in the procedural history of this case . . . the parties have filed voluminous motions, including numerous emergency motions, asking for the Court's asistance in resolving a variety of disputes. Such disputes could have otherwise been handled between the parties if there were some semblance of communication and a spirit of cooperation between them. . . . The Court credits Defendant's testimony that when the parties do try to communicate, it often results in the filing of another motion with the Court.

The court stated, regarding the parties' willingness to share custody, that "Defendant testified that she does not wish to share legal custody with Plaintiff due to their inability to communicate and the extreme acrimony between them . . . Plaintiff's desire [to continue having joint legal custody] will not support a finding that joint legal custody is in the best interest of the children[.]"

> Considering the fitness of the parents, the court found:
>
> [T]hat Defendant, as the primary physical custodian of the minor children, has been making decisions that are [in] their best interest and has been diligent in meeting their needs. She has tended to Eliana's therapeutic and medical needs. She has fostered Eric and Eliana's participation in extracurricular activities. Plaintiff, on the other hand, has offered no actual evidence that Defendant is in any way unfit to make decisions for the minor children. The Court finds that Defendant is fit to have legal custody of the minor children. When the evidence that the parties cannot jointly reach decisions is overwhelming, and where the Court finds that Defendant is fit to have legal custody, the Court need not reach the question of whether Plaintiff is also fit to make decisions for the children.

The court concluded that "[t]he 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."

In discussing attorney's fees, the court stated that "the Consent Order provides that the parties' original [Separation] Agreement remain in full force and effect insofar as it is not overridden by any provisions in the Consent Order. The Consent Order is silent on the matter of attorney's fees." Citing its authority pursuant to Maryland Rule 1-341 to assess fees when it finds a party has engaged in conduct in bad faith or without substantial justification, the court stated, "[t]he instant case is an unfortunate example of excessive and unjustified claims, responses and demands for emergency relief." The court awarded fees in favor of Wife in the following amounts: $20,000.00 for "Discovery issues, Plaintiff's failure to provide discov-

ery, and Plaintiff's inappropriate discovery requests[;]" $15,000.00 for Wife's "Petitions for Contempt[;]" $2,000.00 "for Collection on Judgment for Child Support Arrears[;]" and $7,000.00 "for Fees Incurred Defending Plaintiff's Motions. . . ."[10]

DISCUSSION

I. Modification of Child Support

Pursuant to Md. Code (1984, 2006 Rep!. Vol.) § 12-104(a) of the Family Law Article ("FL"), a court "may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." *See also Ley v. Forman,* 144 Md. App. 658, 665 (2002) ("When presented with a motion to modify child support, a trial court may modify a party's child support obligation if a material change in circumstances has occurred which justifies a modification."). "Whether to grant a modification rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Ley*, 144 Md. App. at 665 (citing *Dunlap v. Fiorenza*, 128 Md. App. 357, 363 (1999)).

In Smith v. Freeman, 149 Md. App. 1, 20 (2002), we noted that FL § 12-104(a) "does not define the concept of 'a material change in circumstance." Rather:

> [T]he meaning of that concept has been elucidated in several appellate decisions. In particular, the case law has established that, for purposes of the modification of child support, a material change in circumstances may be based either on a change in "the needs of the children *or in the parents' ability to provide support*." *Unkle* [*v. Unkle*, 305 Md. 587,] 597 [(1986)] (emphasis added); see *Drummond v. State*, 350 Md. 502, 509-10; 714 A.2d 163 (1998); *Wills* [*v. Jones*, 340 Md. 480,] 488-89 [(1995)]; *Wagner v. Wagner*, 109 Md. App. 1, 43, 674 A.2d. 1, *cert. denied*, 343 Md: 334, 681 A.2d 69 (1996). Moreover, the term "material" has been construed to "limit[] a court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order." *Wagner*, 109 Md. App. at 43 (footnotes and citations omitted).
>
> **Nevertheless, a material change in circumstances does not necessarily compel a modification**. Rather, a decision regarding modification is left to the sound discretion of the trial court, so long as the discretion was not arbitrarily used or based on incorrect legal principles. See *Moore v. Tseronis*, 106 Md. App. 275, 281, 664 A.2d 427 (1995).

Id. at 20-21 (emphasis added).

Husband argues that the trial judge erred in finding no material change in circumstances because, according to his calculations, the children's extracurricular activities only amounted to $833.00 per month instead of $1,500.00. Husband argues that the trial judge erred in finding that using his current income, his child support obligation would be higher than the agreed-upon $3,700.00 per month. He argues that his obligation would only be $3,454.70, resulting in an overpayment of $245.30 per month beginning on March 1, 2010.[11]

The trial judge explained in her Memorandum Opinion that the 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 argument 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 had decreased so as to create a material change in circumstances is not supported by the record.[12]

The party seeking the modification bears the burden of proving a material change in circumstance. To be "material," a change must satisfy two requirements: 1) it must be "relevant to the level of support a child is actually receiving or entitled to receive[,]" and 2) it "must be 'of sufficient magnitude to justify judicial modification of the support order."' *Petitto v. Petitto*, 147 Md. App. 280, 307 (2002) (quoting *Wills v. Jones*, 340 Md. 480, 488-89 (1995)). In her Memorandum Opinion, as to the child support issue, the trial judge reviewed the reasons provided by Husband and correctly found that none of them constituted a material change in circumstances. Moreover, the trial judge explained how Husband's increased income would actually increase his support obligation, regardless of whether his figure or Wife's figure for cost of the minor children's extracurricular activities was used.[13]

II. Modification of Child Custody

"For cases involving the custody of children generally, our precedents establish a three part review of the decisions of the lower courts, addressing the findings of fact, conclusions at law, and the determination of the court as a whole." *In re Yve S.*, 373 Md 551, 584

(2003). In sum:

> "When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8-131(c)] applies. If it appears that the chancellor 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 chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion."

Sider v. Sider, 334 Md. 512, 534 (1994) (quoting *Davis v. Davis*, 280 Md.. 119, 125-26 (1977)); *accord Yve S.*, 373 Md. at 584-86. "Additionally, the trial court's opportunity to observe the demeanor and credibility of the parties and witnesses is of particular importance" *Wagner*, 109 Md. App. at 40 (citing *Petrini v. Petrini*, 336 Md. 453, 470 (1994)).

To be clear, "[t]he test is not whether we would have made the same decision the trial judge made. The test is whether the trial judge was clearly erroneous in [her] findings." *Leary v. Leary*, 97 Md..App. 26, 39(1993).

> Under the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case. Instead, our task is to search the record for the presence of sufficient material evidence to support the chancellor's findings.
>
> Additionally, all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party below. *Maryland Metals* [*v. Metzner*], 282 Md. [31, 41(1978)].

Lemley v. Lemley, 109 Md. App. 620, 628 (1996).

When deciding if a modification of custody is warranted, the court performs a two-step analysis:

> First, unless a material change of circumstances is found to exist, the court's inquiry ceases. In this context, the term "material" relates to a change that may affect the welfare of a child. *See McCready v. McCready*, 323 Md. 476, 593 A.2d 1128 (1991). . . . If a material change of circumstances is found to exist, then the court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding. . . . [B]oth steps may be, and often are resolved simultaneously.

Wagner, 109 Md. App. at 28-29. While the court must examine each custody case on an individual basis, certain factors must be considered. *Id*. at 39; *Maness v. Sawyer*, 180 Md. App. 295, 313 (2008).

> The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health, and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Montgomery County Dep't of Soc. Servs. v. Sanders, 38 Md. App. 406, 420 (1978) (internal citations omitted).

Husband asserts that the trial judge only considered two isolated incidents as the basis for finding the parties could not communicate and in awarding Wife sole legal custody: the disagreements surrounding Eric's hockey trip to Canada and the reunification therapist for Eliana. Husband argues that the trial judge failed to consider the "potential for maintaining natural family relations" factor in her Memorandum Opinion and the decision to award sole legal custody to Wife stripped him of his substantive due process rights under the Fourteenth Amendment.[14] Husband's argument is unpersuasive.

Wife argues that the trial judge properly considered the best interest of the child, heard testimony from both parties and the minor children, Eliana's therapist, and the record. Wife argues that the trial judge properly considered *Taylor v. Taylor*, 306 Md. 290 (1986), in which the Court of Appeals stated:

> *Capacity of the Parents to Communicate and to Reach Shared Decisions Affecting the Child's Welfare*. This is clearly the most important factor in the determination of whether an award of joint legal custody is appropriate, and is relevant as well to a consideration of shared physical custody. Rarely, if ever, should joint legal custody be awarded in the absence of a record of mature

> conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child, and then only when it is possible to make a finding of a strong potential for such conduct in the future.
>
> * * *
>
> When the evidence discloses severely embittered parents and a relationship marked by dispute, acrimony, and a failure of rational communication, there is nothing to be gained and much to be lost by conditioning the making of decisions affecting the child's welfare upon the mutual agreement of the parties. Even in the absence of bitterness or inability to communicate, if the evidence discloses the parents do not share parenting values, and each insists on adhering to irreconcilable theories of child-rearing, joint legal custody is not appropriate.

Taylor, 306 Md. at 304-05.

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 espoused in *Sanders, supra*. While the trial judge cited only two specific examples of disagreement between the partie, she expanded her discussion to include the admitted hostility and inability of the parties to resolve any issue without turning to the court and filing multiple pleadings. The record supports the trial judge's findings that the parties have a history of acrimony about where the children live, their school priorities, the need (or not) for therapy, their extracurricular activities, vacations, and even the cost of their food.

> The trial judge further explained her reasoning in her Memorandum Opinion:
>
> Based on its consideration of the entirety of the *Taylor* factors, the Court now finds that it is *not* in the best interest of the children for the parties to continue to have joint legal custody[.] 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.[15]

(Emphasis in original).

We affirm the award of sole legal custody to Wife.

III. Award of Attorney's Fees

When a case permits attorney's fees to be awarded, the fees "must be reasonable, taking into account such factors as labor, skill, time and benefit afforded to the client [by the attorney], as well as the financial resources and needs of each party." *Petrini*, 336 Md. at 467 (citations omitted). "The standard of review for the award of counsel fees and costs in a domestic case is that of whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002) (citations omitted); *see also Lemley*, 109 Md. App. at 633. Thus, "[a]n award of attorney's fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini*, 336 Md. at 468 (citations omitted).

A trial court can award the costs and counsel fees that are just and proper under all the circumstances in any case in which a person applies for a decree concerning the custody, support, or visitation of a child of the parties. Before a court can award such costs, it shall consider: (I) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing or defending the proceeding. *Lemley*, 109 Md. App. at 632 (citing *Randolph v Randolph*, 67 Md. App. 577, 589 (1986) (citing FL §§ 12-103(a)-(b)). The trial court must award attorney's fees when it finds "that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees." FL § 12- 103(c).

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 attomeys fees in this matter." Husband asserts that "in this matter" refers to all matters arising out of the November 9, 2010 hearing, including all the issues currently on appeal. Wife counters that the language refers only to the litigation leading to the November Agreement and not litigation arising afterward challenging it. Husband argues that the Consent Order is ambiguous and subject to *de novo* review by this court.

We disagree that the Consent Order is ambiguous. We are "constrained to read the judge's order in a manner that assigns the words contained in it their plain meaning." *Leary*, 97 Md. App. at 37-38. By definition, "this" means, "used to indicate one or two or more persons, things, etc. already mentioned, referring to the one nearer in place, time, or thought." WEBSTER'S

ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1476 (1989). A plain meaning interpretation, thus, of the phrase "in this matter" refers only to the litigation leading to the November Agreement and Consent Order, not the subsequent litigation challenging both.

Husband also emphasizes the trial judge's statement in her October 18, 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 that it has the statutory authority to award attorney's fees under Maryland Rule 1-341.[16]

Wife argues that Husband did not raise the issue that Wife was not entitled to attorney's fees based on the language of the Consent Order with the trial court, and therefore the issue was not preserved for appeal. Wife points out that, while Husband filed numerous motions opposing Wife's requests for attorney's fees, Husband never argued that the Consent Order does not permit attorney's fees.[17] Wife also directs our attention to Husband's several pleadings requesting attorney's fees, demonstrating that he did not believe that the parties had agreed to waive attorney's fees in perpetuity. We decline to address this argument further because we agree with the trial court that it has the authority to award fees pursuant to 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.[18] In *Ridgeway*, the husband was ordered to pay the wife indefinite alimony of $1,750.00 per month and a pro rata share of his retirement. Upon retiring, the husband filed a petition for modification, which was granted, as was the wife's request for attorney's fees for defending the modification petition. The husband appealed the award of attorney's fees, and the wife filed a petition for advance attorney's fees to defend that appeal. The wife's petition for advance attorney's fees was granted, and husband appealed that award. In making its determination, the trial court heard testimony and took evidence regarding the parties' incomes, assets, and expenses. Finding no abuse of discretion by the trial court, this Court explained:

> We have said repeatedly that the circuit court is in the best position to make determinations concerning an award of attorney's fees pursuant to FL §§ 11-110. *See Randolph v. Randolph*, 67 Md. App. 577, 581, 508 A.2d 996 (1986) (declining to address appellee's petition for' to be considered, including the financial status, resources, and needs of each of the parties . . .with which the trial court is familiar"); *Wallace v. Wallace*, 46 Md. App. 213, 230, 416A.2d 1317 (1980) (declining to award attorney's fees to appellee but remanding the issue to the circuit court for consideration of the request). Our cases also make clear that the trial court may award attorney's fees attendant to prosecuting the appeal from an award of alimony. In *Randolph*, for example, we stated our agreement with the contention that FL §§ 11-110 and 12-103 contemplate an award of appellate attorney's fees when an appeal is taken from a decision resolving alimony and child custody issues. 67 Md. App. at 581; *see also Staley* [*v. Staley*], 25 Md. App. [99,] 113 n.4 [(1975)].

Ridgeway, 171 Md. App. at 388.

Husband argues that the trial court should have considered that Wife received $320,000.00 for her interest in the Potomac home, $43,131.00 in retirement fund equalization, and a $70,000.00 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 August 3, 2011, Husband's counsel argued to the trial court that the $70,000.00 alimony buy-out was intended to cover Wife's housing expenses for 4 years. Additionally, in several filings to the court, Husband argues that the $320,000.00 was intended to allow Wife to purchase a new home in Montgomery County where she and the minor children could live. Husband argues that all the funds paid by him pursuant to the November Agreement, as well as all child support payments, should be imputed to Wife as income for 2011.[19] The record shows that the trial judge had considered the parties' relative financial positions and needs throughout the course of the litigation.

Husband's counsel argues that the trial judge found that 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. The following exchange between

Husband's counsel and the trial judge is instructive:

> [COUNSEL]: You know, I hesitate to waste the Court's time with my opinion of the merits of the matter on appeal, for example, and will not do so now, but I have no answer [as to why no opposition was filed], and that's all I can say.
>
> THE COURT: Okay. Given the fact that there's no opposition, I'm going to award $5,000 at this juncture for the defendant's appeal costs.

In her Memorandum Opinion, the trial judge stated that she considered Husband had greater financial resources than Wife. The trial judge was specially assigned to the case on March 31, 2010, and had been involved with nearly every motion and hearing since November 9, 2010. The trial judge heard testimony and received evidence regarding the parties' relative financial positions following the entry of the Consent Order, including during the July Hearing, the August Hearing, as well as affidavits documenting attorney's fees with specificity. Our review of the record supports the trial judge's conclusion that she possessed enough information to asses 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. However, while Husband never provided a certified financial statement to the trial court, Husband represented to several mortgage companies that he earns in excess of $300,000.00 per year in salary, bonuses, and investments; had zero obligations outside of a "modest" car loan and his child support payments; and had a net worth ranging from $1,000,000.00 to over $2,000,000.00. Wife, on the other hand, provided a certified long form financial statement to the trial court reflecting that she earns $75,000.00 per year in salary and had a net worth of $492,000.00. 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 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 November 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 possessing 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 October 18, 2011.

Husband nevertheless argues that he engaged in "legitimate advocacy" and should not be penalized for asserting his rights. To this end, Husband cites *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316 (1992). In *Jenkins*, this Court stated that "[b]efore imposing sanctions under Rule 1-341, the trial court must make an evidentiary finding that the subject pleading either (1) was filed in bad faith or (2) lacked substantial justification." *Id*. at 324 (citations omitted). Explaining further, this Court stated that "conduct lacks substantial justification when there is no basis in law and/or fact to support the plaintiff's claim against the defendants who seek fees and costs." *Id*. (quoting *Johnson v. Baker*, 84 Md. App. 521, 529 (1990)). The Court of Appeals has defined "bad faith" as it applies to Maryland Rule 1-341 to mean "vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." *Id*. at 324 (quoting *Inlet Assocs. v. Harrison Inn Inlet, Inc*., 324 Md. 254, 268 (1991). Elaborating, the *Jenkins Court* stated that "the bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith . . . but may be found . . . in the conduct of the litigation.' Generally, the '[m]isuse of a pleading . . . amounts to bad faith." *Id*. (quoting *Johnson*, 84 Md. App. at 531).[20] Like the appellant in *Jenkins*, 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 November 9, 2010.

In addition to Husband's attempts to go back to the past, 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 on June 21, 2011, the trial judge found that Husband had filed exceptions to the Master's findings that an EWO was required, but that Husband's exceptions were either lacking the necessary transcript to support his arguments or irrelevant given the applicable statute. The trial judge found in her October 18, 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.[21]

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 that the trial judge abused her discretion in finding that Husband brought actions without substantial justification, as she was intimately familiar with the litigation and was in the best position to assess Husband's actions. We agree with the trial judge that Husband engaged in conduct outside of "legitimate advocacy"

and hold that the trial judge did not err or abuse her discretion in awarding attorney's fees to Wife.

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

FOOTNOTES

1. *Samuels v. Samuels*, No. 00090, September Term 2011.

2. This amount includes $2,645.84 for defending Husband's Exceptions, $2,004.17 related to the trial court's granting of Wife's Emergency Motion for Contempt, $1,000.00 to defend Husband's Motion to Modify the Parties' Separation Agreement, and $920.84 for defending Husband's Motion to Strike *Lis Pendens*.

3. In his brief, Husband presented the following questions:

1) Did the trial judge commit clear legal error and/or abuse her discretion in ordering [Husband] to pay $5,000 in advance appellate counsel fees since [Wife) had sufficient financial resources of her own?

2) Did the trial judge commit clear legal error and/or abuse her discretion in modifying legal custody of the parties' minor children by stripping [Husband] of his legal custody where there was no change in material circumstances affecting the welfare of the children?

3) Did the trial judge commit clear legal error andlor abuse her discretion in denying [Husband's] Third Petition for Reduction in Child Support since the material change in the children's extracurricular expenses would have reduced his child support obligation by approximately 1,000 [sic] per month?

4) Did the trial judge commit clear legal error and/or abuse her discretion by ordering [Husband] to pay $50,570 in legal fees where parties agreed to pay their own legal fees, neither financial status nor needs of the parties were considered and [Husband] engaged in legitimate advocacy?

4. The $43,131.00 payment was due on March 31, 2011.

5. Assuming the lowest estimate and excluding the cost of the Canada tournament, the hockey costs for travel and equipment were $500.00 per month.

6. The "cease and desist" appears to have resulted from a disagreement between the parties and confusion on the part of the therapist regarding whether the parties had previously attempted to mediate the therapy and failed, thus giving Wife decision-making authority to continue Eliana's therapy with McClelland.

7. McClelland's statement was made immediately following a question where she was asked, "Do you have any concerns about [Husband's] ability to make proper decisions about Eliana?" and as she was preparing to answer, Husband apparently shouted, "You've never met me. God." and either threw or violently spilled water on McClelland.

8. The criminal case references an alleged assault that occurred in July 2010.

9. Eliana described one incident "a couple years" before July 2010, where Husband "came to our house in the middle of the night and he was just ringing the doorbell over and over again, and, like he was trying to break in. And I was crying the whole night." She described the July 2010 incident as "I saw my dad push down my mom at my grandma's house and that was just, that totally terrified me." She stated that after they moved to Eldersburg, Husband "let out the dogs at our house. He came to our house and let, let out [Wife's fiancé's] dog, well, now it's my dog too, Lexi. . . .

Eliana described a nightmare she had:

> [Husband] came to our house and he picked up our dog, Lexi, and threw her all the way across the street, and then she, like, died. And I was so upset that I, I called my dad and I told him about the dream and he said, "Well, you know I wouldn't do that." And I knew that he was lying because I've seen him do that. I've seen him do stuff like that.

Eliana also explained that she looked scared before talking to the judge because:

> It was just because my dad and [Husband's attorney] were here. I don't like them very much. They pretty much, like, threatening, not threatening my life, like my home life. I don't really, they've been mean, really mean. And I remember we were driving in a car and, we were driving from, I think, Westminister, going back somewhere to drop me off, and [Husband's attorney] was being really, like, mean. And she was saying a bunch of things about . . . [a]nd Dad was just driving, he wasn't even saying stop, stop. He was allowing it and he was saying, she was saying really, just horrible things about [Wife's fiancé's dog] and my mom.

10. We note that Husband's challenges to the award of attorney's fees related to the contempt petition and subsequent ruling that Husband was in contempt are moot. Husband withdrew his appeal of the contempt ruling at oral argument on September 6, 2012. Therefore, Husband's appeal excludes the award of $15,000.00 for "Defendant's Petitions for Contempt."

11. We note that while FL § 12-104(a) permits a modification of a child support obligation, FL § 12-104(b) limits what can be modified by stating, "The court may not retroactively modify a child support award prior to the date of the filing of the motion for modification." Therefore, any adjustment of child support is not modifiable back to March 1, 2010. The earliest date possible, if supported by the evidence (and we do not so hold) for a modification to retroactively apply would be February 8, 2011.

12. Husband contends that the children's expenses amounted to $833.00 per month. A review of the record shows that the extracurricular expenses were at least $1,466.57 per month. Husband's argument that the $1,500.00 used to calculate the minor children's extracurricular expenses on November 9, 2010, was actually Wife's mortgage payment is unpersuasive. The record shows that Husband had been receiving invoices from Wife since 2007 regarding the children's expenses and therefore he knew, or shouldhave known, the amounts of those expenses. We also note that at oral argument for *Samuels v. Samuels*, No. 00090,

September Term 2011, which was the same day oral argument was heard in the instant case, Husband's counsel stated that he had no disagreement with how the parties agreed on the $3,700.00 figure.

13. Husband argues that the trial judge incorrectly calculated that Husband's support obligation would increase using Husband's increased salary and figure for expenses. We find no error in the trial judge's calculations and disagree with Husband's calculation of the basic child support guideline amount because it assumes the income figures used on November 9, 2010, not the current incomes used by the trial judge. We note that the guidelines, even extrapolated, are not relevant to a support obligation, because, as here, in cases where the parties' income exceeds the statutory maximum, the determination of the child support obligation rests soundly in discretion of the trial judge. FL § 12-204(d). *See also Tucker v. Tucker*, 156 Md. App. 484, 493-94 (2004) (citations omitted).

14. Citing *McDermott v. Dougherty*, 385 Md. 320 (2005), Husband argues that without a finding of parental unfitness of either parent, both have an equal constitutional right to parent the minor children. However, *McDermott* involved a parent-third party custody dispute. In those types of disputes, the best interest of the child "trumps all other considerations." *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 111 (2010).

15. Husband's counsel argues that the trial judge expressed bias by noting in her Memorandum Opinion that Husband had discharged the attorney who represented him on November 9, 2010, and was currently represented by his girlfriend, a member of the Maryland Bar and a partner in a Washington, D.C. law firm. We observe that the trial judge merely stated this as a factor that contributed to the hostility in the litigation that followed the entry of the Consent Order.

16 Maryland Rule 1-341 states:

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.

17. We recognize that Husband's Response and Opposition to [wife's counsel's] Affidavit in Support of Legal Fees from November 10, 2010[, t]hrough August 3, 2011[,] states that "[t]he Consent Order unequivocally states, 'ORDERED, that each party shall be responsible for their respective attorney's fees incurred in this matter.'"

18. We decline to address the majority of case law cited by Husband because it relates to attorney's fees awarded in conjunction with alimony and monetary awards in marital property distribution, not post-settlement litigation.

19. Child support payments are not included in calculations of actual income under FL § 12-201(b)(3). *See, e.g., Tucker v. Tucker*, 156 Md. App. 484 (2004) (explaining that Social Security.benefits paid for the benefit of the minor children are not to be included as wife's income in computing child support obligations). The $70,000.00 "alimony buyout" cannot be imputed as income, despite Husband's assertions to the contrary. The parties' Separation Agreement, § 20. Alimony, states:

> (a) After the sale of the family home (see 19. Family Home), the parties shall divide the proceeds equally, and Husband shall pay to Wife, from his portion of the proceeds, [$70,000.00] as a 4-year alimony buyout.
>
> (b) If four (4) years after the sale of the family home, Wife, is not remarried and not cohabitating, Husband will pay her [$30,000.00] as a buy out [sic] of an additional one and a half years of alimony. Husband shall pay Wife this amount as follows: [$20,000.00] on the 1st day of the month of the four year anniversary of the sale of the family home and [$10,000.00] on the first day of the month of the fifth year anniversary of the sale of the family home. The parties agree that the payments Husband makes to Wife pursuant to this paragraph are not taxable to her and are not deductible by Husband.
>
> (c) In no event shall Husband have any liability to make any alimony payments or any payment as a substitute for such payments after the death of Wife, death of Husband or Wife's remarriage or Wife's cohabitation per (b) above.
>
> The parties agree that the alimony provisions herein are not modifiable by any court.

The language of the Separation Agreement clearly intends the payment to be a property settlement, the section heading of "alimony" notwithstanding. The Internal Revenue Code, 26 U.S.C. 71(b)(1)(B), excludes payments designated as "not includible in gross income under this section and not allowable as a deduction[.]"

20. The trial court in *Jenkins* stated to the appellant that he had abused the discovery process not just because he filed two motions but because he, "questioned everything that your predecessor did. I have read the file. You have gone back over that. You have gone over the material he did." 91 Md. App. at 327 (emphasis omitted).

21. At oral argument, Husband averred that he had complied with discovery by producing over 1,000 documents; Wife countered that the volume of documents was irrelevant because Husband did not actually provide the requested information. Husband argues that the duty judge's finding that Husband had substantially complied with discovery on July 6, 2011, indicates that he had not failed to provide discovery. Wife argues that the duty judge had no knowledge of the case's history, and that Husband's filing the motion while the specially assigned trial judge was unavailable was done surreptitiously.

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