THE DAILY RECORD Maryland
Family Law Monthly
DECEMBER 2012

TheDailyRecord.com/Maryland-Family-Law-Monthly

SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Appeals court recognizes marriage by proxy

A World Bank employee who had his cousin stand in for him during a Congolese wedding ceremony, while he participated by phone from another country, cannot claim the marriage by proxy was invalid in Maryland to defeat a judgment of absolute divorce, the Court of Special Appeals has held.

Marie-Louise Tshiani and Noel Tshiani were natives of Kinshasa, in the Democratic Republic of Congo, where they met in 1993, according to the opinion. They set the date of Dec. 23, 1993 for their wedding, but when the day came Noel was on assignment in another country; so, Noel designated his cousin to represent him and participated in the ceremony over the phone. The next day, Marie-Louise traveled to live with Noel in Arlington, Va.

In the next 18 years, the couple lived together in Virginia and Maryland, purchased two pieces of property and had three children together, all the while representing themselves as husband and wife. They also participated in a "renewal of vows" ceremony at Arlington, Va., in 1994, for which they obtained a "Proof of Marriage" certificate from the Congolese Embassy, and after which the church gave them a certificate that they were "united in matrimony…in conformity with the laws of the State of Virginia and the Republic of Zaire."

Noel also obtained a "dependency allowance" and health insurance coverage for Marie-Louise from his employer, the World Bank, and added her as the beneficiary of his life insurance policy. He obtained a green card for her from the U.S. Immigration Service and his listed her as his spouse on his state and

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VISITATION

Parents' rights trump sibling's in visitation case

The parents' right to control who visits their children applies even to the children's adult siblings, the Court of Special Appeals has held.

The court reversed a ruling that let a 19-year-old woman, who was a minor and in foster care when the trial started, visit her half-brothers, who live with her father and stepmother.

"In my opinion, being denied access to a sibling is cruel and unusual," said the woman's attorney, Constance J. Ridgway of Wakefield & Ridgway P.A. in Woodstock.

The court said parents have the right to decide the care, custody and control of their children and the court could therefore not impose a third-party visitation against their wishes. The court also said the girl failed to prove there would be a "significant deleterious effect" if she could not visit her siblings.

"I think it's a continuation of the court's ongoing trend to strengthen the fundamental rights of parents to control the upbringing of their children," said the father and stepmother's attorney, Samantha Z. Smith, of Timchula & Smith P.A. in Westminster.

Victoria C., now 19, entered the custody of the Carroll County Department of Social Services because of a contentious relationship with her father, who refused to let her live in his house.

Victoria's mother is dead, and her father remarried in 2005. Her father and stepmother have two boys — a 5-year-old and a 3-year-old. Victoria lived with the family until 2009, when she went to live with an aunt in Texas after an abuse allegation against her father was sustained.

Victoria returned after a year and

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Proxy

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federal tax returns since 1994. And, in a protective order case and in Marie-Louise's action for absolute divorce, he admitted they were married.

However, at the circuit court hearing, Noel argued that he had not participated in the Congolese ceremony and that it was not valid outside the Congo at any rate.

The Montgomery County Circuit Court granted Marie-Louise a Judgment of Absolute Divorce, along with alimony, child support, attorneys' fees and a share of the marital property. The court found that Noel's actions subsequent to the Congolese ceremony demonstrated his recognition that the marriage was lawful.

Noel appealed. The Court of Special Appeals affirmed.

To determine this issue, the appeals court said, the first question was whether the marriage was valid in the Congo. Noel contended the circuit court could not make a valid determination because there was no evidence of how the marriage-by-proxy was viewed in the Congo. However, the appeals court found the evidence of the Tshiani's lives together raised a presumption of validity that Noel failed to rebut.

Under the doctrine of comity, Maryland courts will honor foreign marriages that were valid where performed, even if the marriage would not have been valid if performed in Maryland. *Henderson v. Henderson*, 199 Md. 449, 457-58 (1952), The general rule is subject to two exceptions, however: First, the marriage must not be expressly prohibited by the General Assembly. Second, the marriage must not be repugnant to Maryland public policy. *Port v. Cowan*, 426 Md. 435, 444-45 (2012).

The court found no statute that precludes Maryland from recognizing a proxy ceremony that is valid in the jurisdiction where it was performed. In fact, a proxy marriage performed in Maryland carries no criminal penalty for the couple or the celebrant.

Nor has any Maryland court found a valid foreign marriage repugnant to public policy.

One family law treatise hypothesized that "it is doubtful that Maryland would ever recognize proxy marriages, marriage by telephone, or marriage by mail." 1-3 Bender's Maryland Family Law §3-4(c). However, that hypothesis originated with a Maryland Law Review article written in 1938, when Maryland required a religious ceremony, and it was based on that requirement. The Court of Special Appeals found it outdated.

Although Maryland has not adopted it, the Unif. Marriage & Divorce Act, 9A U.L.A. 182 (1998), permits proxy marriage. *Id.* at § 206(b). In fact, distant marriages are becoming more common. See Bob Kuszynski, Do Couples Need to Be in the Same Place to Get Married? Two Michigan Professors Say 'No', Scripps TV Station Group (Oct. 6, 2011). For example, the men and women who serve in our armed forces sacrifice a great deal of control over their daily lives for this country and they often are married by proxy. See Andrea B. Carroll, *Reviving Proxy Marriage*, 76 Brook. L. Rev. 455, 492 (2011).

Under the circumstances, the court found the principles of comity governed and affirmed the judgment for Marie-Louise Tshiani.

The case is *Tshiani v. Tshiani*, No. 2655, Sept. Term 2010. Reported Opinion by Zarnoch, J., filed Nov. 21, 2012.

THE DAILY RECORD Maryland Family Law Monthly

11 E. Saratoga Street, Baltimore, MD 21202
Vol. XXIV, No. 12

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THE DOLAN COMPANY

Maryland Family Law Monthly (USPS #014-143), published monthly, is a review of events as they affect the practice of domestic relations in law in the state of Maryland published by The Daily Record, 11 E. Saratoga Street, Baltimore, MD, 21202. Annual subscription price $385 (MD residents please add 6% sales tax). Periodicals postage paid at Baltimore, MD. Postmaster, send address change to: The Daily Record, 11 E. Saratoga Street, Baltimore, MD 21202.

Cite as 12 Md. Fam. L.M. ___ (2012)

Monthly Memo

• High court hears international custody case. The U.S. Supreme Court justices appeared divided over an international custody dispute testing whether an American man can appeal a ruling in favor of his foreign-born wife once she and their daughter legally moved to Scotland.

Chief Justice John G. Roberts Jr. voiced support for the father at oral arguments this month, saying depriving the non-custodial parent the chance to appeal would spur the custodial parent to "find the first flight" out of the United States.

Justices Stephen G. Breyer and Anthony M. Kennedy expressed similar sentiments.

But Justice Ruth Bader Ginsburg said an international treaty was designed to bring finality to such disputes and "stop this shuttling of the child back and forth."

Army Sgt. Jeffrey L. Chafin hopes to appeal an order that permitted Lynne H. Chafin to take their child to Scotland in 2011.

A federal appeals court found the case moot, saying Scotland now has jurisdiction. Miles & Stockbridge partner Stephen J. Cullen, lead attorney for the mother, defended that ruling in the high court, citing the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the federal International Child Abduction Remedies Act.

Michael E. Manely, who represents Chafin, and Assistant U.S. Solicitor General Nicole A. Saharsky both argued that the 11th Circuit has jurisdiction because the order cannot become final until the appellate court has an opportunity to review it.

• DOMA denial? The Supreme Court, which agreed to review the constitutionality of the Defense of Marriage Act, has invited Massachusetts lawyer Vicki C. Jackson to argue that it should not do so. The court asked Jackson to argue that there is no controversy, since the Obama administration agrees that DOMA is unconstitutional, and that House Republicans lack standing to defend it.

A few months, not a few years

Reducing the timeline to implement the permanency plan of adoption

By Joan Little
Guest columnist

A baby is born in a hospital to a mother who is addicted to illicit substances and an unidentified father. The mother refuses substance abuse treatment, so the Department of Social Services makes a removal due to the emergency situation.

Because no maternal relatives are located who would be willing to care for the baby, she is placed in foster care. The DSS files a petition to initiate the necessary legal process.

In accordance with the statute, the first hearing occurs the next court day after placement to determine whether the baby should be sheltered in foster care for 30 days. Md. Ann. Code, Courts and Judicial Proceedings, §3-815; Md. Rule 11-112. The baby is sheltered, and the next hearing, which is the hearing on the merits called the adjudication, should be heard within 30-day shelter period.

On the adjudication date, the department indicates that they have a name for the father, but do not know his address and he has not been notified of this hearing. The case is rescheduled no later than the 60th day. Maryland Rule 11-114. The baby remains sheltered in foster care under a new shelter order that shelters the baby until the next hearing. Md. Ann. Code, Courts and Judicial Proceedings, § 3-815(c).

Finally, on the day of the second attempted adjudication, the case does not proceed because the father, who has been located, is incarcerated, but not brought into court. The adjudication is then delayed again, often by tacit agreement of the parties, beyond the 60th day.

With this postponement begins the extension of the case well beyond the timelines mandated by federal and state law. The delay of the adjudication subsequently delays the disposition, and then is likely to delay the permanency planning review, which is supposed to occur 11 months after a child is placed in foster care. Md. Ann. Code, Courts and Judicial Proceedings, § 3-823.

Meanwhile, by the time of the adjudication, the baby is four months old. She has remained in the same foster home, which has the potential to be a long-term resource for her. She smiles and interacts with her foster parents. She is beginning to build muscle tone and to develop regular sleep patterns.

She has had eight, one-hour visits with her biological mother at the department. Her mother struggles to adhere to requirements of the treatment of her addiction.

Since 1980, the federal mandate has been clear that foster care is intended to be a temporary solution.*(1)* At that time, it was legislated that permanency should be established for children within 18 months of their entry into the foster care system.

Then, in 1997, that time frame was more narrowly defined. Any child in foster care for 15 of the last 22 months was required to be moved toward permanency.*(2)*

In 2009, the national average length of stay for a child for whom adoption the plan was adoption was just under three years.*(3)* In Maryland, in 2010 the average length of stay for a child for whom the plan was adoption was slightly more than five years.*(4)*

This means that a child who is placed in foster care at birth will wait until she starts school before the child welfare system provides a permanent home for her.

As illustrated above, there are many reasons for delay at the commencement of a case. In a case such as this, adoption may become the permanency plan at the first permanency planning review.

Ideally, this would occur just before the baby is a year old. The reality, however, is that that first review may not occur until the baby is 18 months old. By this time, the baby is walking and talking. If she has been maintained in the same foster home, she views her caregivers as her parents.

Even if the permanency plan is changed at the first permanency planning review, there are still further legal processes that must occur before the child is adopted. These legal processes of terminating parental rights and holding an adoption hearing can add another year and a half to the timeline.

By this time, the child is a 3-year-old toddler. The toddler is learning language and, based on the secure relationship with her caregivers, she begins to learn independence.

Despite the difficulty of reducing delays, systemic changes could make a significant impact. Change could occur if the initial part of the removal and the legal process was targeted and additional resources were applied.

For example, immediately providing resources to address issues that arise related to the father of a child would eliminate some postponements. In addition, managing casework so that follow up with the mother occurred prior to court would provide clear evidence of her progress (or lack thereof).

Finally, encouraging all the professionals associated with a case to resist the inertia of the system and instead make resources available to expedite the creative resolution of a case would minimize delays.

Although the implementation of change can be challenging, the result is rewarding: a child placed through the system at birth, adopted before she even is aware of the months, not the years, that have passed.

Endnotes

1. The Adoption Assistance and Child Welfare Act of 1980 (PL 96-272).
2. The Adoption and Safe Families Act of 1997 (PL 105-89).
3. http://www.fosteringconnections.org/tools/assets/files/Connections_Adoption.pdf 4
4. http://www.nacac.org/policy/statefactsheets/MD.pdf

Joan Little is chief attorney of Maryland Legal Aid's Child Advocacy Unit in Baltimore.

Sister

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entered foster care. When Victoria sought visitation rights with her siblings, her father and stepmother opposed her, even though they agreed that Victoria and their sons shared "a loving and caring relationship" when they lived together, according to court documents.

Though Victoria had not kept in contact with her siblings while in Texas, she told the court she would like to see them.

"It has been like a hold, kind of," she told the court. "I just — I miss them. They were an entire section of my life."

Richard P. Barth, dean of the University of Maryland School of Social Work, who has written about foster care dynamics and child abuse and neglect, said in an interview that it is valuable for foster children to stay connected to family, but that has to be balanced with the potential harm that could come with visitation.

"Siblings tend to appreciate each other and give each other value and support," Barth said. "If you move to a new school where you don't know anybody and are best trying to understand how to get along in a foster care environment with different rules and different kids, there are some stress-relieving properties of being with someone who understands you and the special person you are."

Victoria's father and stepmother, however, testified in court that they thought her visitation would be "emotionally damaging" to the boys because of Victoria's strained relationship with her father.

"Throughout this case, my clients took the approach that the decision of whether a sibling visits or not should be their decision, and it was not appropriate for the court to order visitation over their objections," Smith said. "That was the argument we made at every level."

Victoria turned 18 in August 2011, and the Circuit Court for Carroll County heard arguments that September. Victoria left foster care in October 2011. The circuit court made its decision in February 2012, granting Victoria supervised visitation with her two younger brothers. The father and stepmother filed an appeal in March.

The Court of Special Appeals said the court was not allowed to impose third-party visitation that infringes upon parents' right to make decisions about the care of their children.

Victoria argued that sibling visitation rights were an exception under Maryland law, but the court said these cases usually deal with minor siblings wanting to visit other minor siblings and Victoria is now an adult.

"We recognize that siblings often enjoy close relationships, and that some courts have held that the sibling relationship enjoys constitutional protection," the court wrote in its opinion. "Maryland courts, however, have not found that the sibling relationship is of constitutional dimension."

The court also said Victoria could not prove that there would be a negative effect if she did not visit her brothers. The youngest does not ask about her, and the older brother only inquires occasionally, according to court documents.

"A court may certainly empathize with the plight of an adult sibling seeking visitation, particularly under facts as fraught as those presented in the instant case," the court wrote. "Courts must, however, in the absence of proof of significant deleterious effect, abide by the choices of a fit parent to deny visitation."

The case is *In Re: Victoria C.*, September Term 2012, No. 174. Argued Sept. 29, 2011. Decided Nov. 26, 2012. Reported. Opinion by Berger, J. The case will be reprinted in next month's Maryland Family Law Monthly supplement. Meanwhile, it is available on the court's website or as RecordFax 12-1126-03 (20 pages).

— Kristi Tousignant
Contributing writer

UNREPORTED CASES IN BRIEF

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

*B.H. v. Anne Arundel County Department of Social Services**

ADMINISTRATIVE LAW: INDICATED CHILD ABUSE: EVIDENCE

CSA No. 1835, September Term 2011. Unreported. Opinion by Matricciani, J. Filed Oct. 16, 2012. RecordFax #12-1016-00, 27 pages. Appeal from Anne Arundel County. Affirmed.

The ALJ properly allowed a third party to offer hearsay testimony, subject to cross-examination, in support of DSS' allegation of indicated child abuse; and the ALJ's fact-finding, which was entitled to judicial deference, was sufficient to establish that the "nature, extent, and location of the injury indicate that the child's health or welfare was harmed or was at substantial risk of harm" and that the parent's actions in disciplining a 4-year-old who would not eat his dinner exceeded the realm of reasonable corporal punishment.

"On April 22, 2010, B.H. prepared spaghetti with a sauce containing mushrooms. Brayden, B.H.'s four-year-old son, refused the food because he disliked mushrooms. B.H. responded by informing Brayden that if he did not finish his dinner, he would not get dessert and would be unable to go play with his friends. Brayden left the table. B.H. returned Brayden to his seat and told him his presence was required while B.H. and eleven-year-old Brianna finished eating. Brayden resisted and B.H. held Brayden by the arm to ensure his attendance.

Mrs. H. picked [the children] up from school on April 23, 2010. Mrs. H. found several bruises on Brayden's neck and a scratch under his chin. Mrs. H. brought Brayden to his pediatrician. The pediatrician's office referred the matter to DSS. DSS contacted police, and on the morning of April 24, 2010, Officer Laura Witherspoon, of the Anne Arundel County Police Department, joined by Officer Josh Ingerebretson, of the Annapolis Police Department, investigated.

DSS assigned social worker Lauren Askew to conduct a civil investigation. Askew's investigation resulted in a finding of indicated child abuse as defined in Family Law §5-701(b)(l) and COMAR § 07.02.07.12 (A) (2012).

The ALJ found appellant's actions "rise to abuse." The ALJ reasoned that "Brianna and Brayden's statements, the photographs, and the medical report are credible evidence" of the injury. The ALJ said: "I have consid-

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ered that the [a]ppellant is an adult confronting a four-year-old boy. The [a]ppellant's size and strength relative to Brayden's size and strength magnifies the [a]ppellant's force and, if he is angry or out of control, renders that force physically dangerous to a small child. Thus, the [a]ppellant's actions placed Brayden's health and welfare at substantial risk of harm."

DISCUSSION

As the Court of Appeals said in *Charles County Dep't of Soc. Servs. v. Vann,* 382 Md. 286 (2004), "[t]o determine the proper standard of review, we must first determine whether the agency decision was a legal conclusion, a factual finding, or a mixed question of law and fact."

Although the case before us does not involve a finding that corporal punishment was administered, it does parallel the facts of *Vann.* In *Vann,* the finding that "a substantial risk of harm resulted from respondent's swinging of a belt buckle at a six-year old attempting to evade the blows—was an application of law to a specific set of facts." Such is the case here. Therefore, we are reviewing a mixed question of law and fact. "When the agency decision being judicially reviewed is a mixed question of law and fact, the reviewing court applies the substantial evidence test." *Taylor v. Harford County Dep't of Soc. Servs.,* 384 Md. 213, 223 (2004).

Admission of Hearsay Statements

B.H. argues that admission of the children's out of court statements constitutes reversible error, citing *Jones v. State,* 68 Md. App. 162 (1986).

This was a civil investigation and not a criminal case. In a contested case administrative proceeding, hearsay "may not be excluded solely on the basis that it is hearsay." SG §10-213(c).

The factors of [Criminal Procedure] Section 11-304(e) have been cited with approval for assisting an ALJ "in determining what testimony to credit and in sifting through contradictory evidence. *See Montgomery County Health & Human Servs. v. P.F.,* 137 Md. App. 243, 271 (2001).

While it is true that in an administrative hearing testimony may not be excluded simply because it is hearsay, "[i]t is improper for an agency to consider hearsay evidence without first carefully considering its reliability and probative value." *Travers v. Baltimore Police Dep't,* 115 Md. App. 395, 413 (1997). "For instance, statements… sworn under oath, or made close in time to the incident, or corroborated [] ordinarily [are] presumed to possess a greater caliber of reliability." *Travers,* 115 Md. App. at 413.

Askew testified "having first been duly sworn." Askew's interviews followed in close temporal proximity the alleged events. Finally, the statements made to Askew by Mrs. H., Brayden, and Brianna are self-referential and corroborate each other.

In *Maryland Dep't of Human Resources v. Bo Peep Day Nursery,* 317 Md. 573 (1989), because "those who testified concerning statements made by the children were subject to cross-examination" concerning accuracy, the danger was cured and they were properly considered by the hearing officer. B.H. had the opportunity to, and did, subject the testimony of Witherspoon, Askew, and Mrs. H. to cross examination.

Additional Fact Finding

B.H. contends the ALJ "erred by failing to make a specific finding of fact to establish that the location, nature or extent of the four-year-old child's alleged injury injured or placed the child at a substantial risk of harm…"

The ALJ found "[a]ppellant caused three bruises on Brayden's neck and a scratch under his chin when he grabbed the boy." Brayden's bruises and the scratch satisfy the nature and extent requirements. The location is while running away from the dinner table, down a hall at B.H.'s home. The scene may have been painted more clearly, but error cannot be predicated on this ground.

B.H. cites *Turner v. Hammond,* 270 Md. 41 (1973) for the proposition that "[t]he Court of Appeals has rejected administrative decisions that rely only upon a recitation of the statutory criteria without making specific factual findings."

Turner is low tide on the high seas of administrative decision making. In *Turner* an administrative body made insufficient factual findings, adopted a "cavalier attitude" and ultimately generated a record "utterly devoid of any evidence." *Turner,* 270 Md. at 56.

We cannot conclude that this record is "utterly devoid of any evidence." The ALJ heard testimony, credited the testimony which persuaded her, and applied the law to the facts in order to uphold a finding of indicated child abuse. *Turner* defined substantial evidence as "more than a scintilla" *Id.* at 60. A record completely absent of evidence merited at most five gossamers; here, the ALJ's findings of fact, combined with the hearing testimony, rises to the level of eleven gossamers at least. Ten being sufficient, the ALJ has committed no error.

Parent's Right to Use Reasonable Physical Force in Disciplining a Child

FL Section 4-501(b)(2) states that "[n]othing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child."

Under *Anderson v. State,* 61 Md. App. 436, corporal punishment is legal as long as "the force [is] truly used in the exercise of domestic authority by way of punishing or disciplining the child … and [is] not [] a gratuitous attack."

B.H. argues that he "acted reasonably under the circumstances in trying to ensure that his four-year-old son sat at the dinner table and ate the mushrooms prepared with his dinner." The ALJ found "[a]ppellant chased the boy, forced him back to the table and pressed food into his mouth. These are the actions of an angry or out-of-control person, not a parent imposing reasonable corporal punishment."

The ALJ determined that B.H.'s actions were unreasonable. That fact finding and the inferences therefrom are entitled to deference. On the record before us, the same as that before the ALJ, we conclude that "a reasoning mind reasonably could have reached the factual conclusion that the agency reached." *Eberle,* 103 Md. App. 166." *Slip op at various pages, citations and footnotes omitted.*

*Aminata Camara v. Macky Silimana**

DISCOVERY SANCTIONS: EVIDENCE PRECLUSION: ATTORNEYS' FEES

CSA No. 1464, September Term, 2011. Unreported. Opinion by Meredith, J. Filed Oct. 23, 2012. RecordFax #12-1023-00, 11 pages. Appeal from Montgomery County. Affirmed.

Where the party who moved for modification of custody and child support failed to respond to several discovery requests by her ex-husband in a timely fashion, the trial court did not abuse its discretion by precluding her from introducing evidence at the hearing on her motion and awarding her ex-husband attorneys' fees for expenses related to the

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pursuit of discovery and discovery sanctions.

"Aminata Camara moved for a modification of child custody and alimony in January 2011. Macky Silimana, appellee, propounded interrogatories and sought production of several documents, including Camara's tax returns, canceled checks and W2s. Because Camara did not respond within the time prescribed by the Maryland Rules, the circuit court sanctioned Camara by restricting her from presenting evidence or testifying at the hearing for modification. The court also ordered Camara to pay $820 in attorney's fees to Silimana as part of the sanctions. We affirm the judgments.

DISCUSSION

I. Discovery Sanctions and Evidence Preclusion

Our review of discovery disputes is "quite narrow." *Warehime v. Dell,* 124 Md. App. 31, 44 (1998). The Court of Appeals has noted: "[T]rial judges are vested with great discretion in applying sanctions for discovery failures." *Rodriguez v. Clarke,* 400 Md. 39, 66 (2007).

"[A]ppellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery." *Warehime, supra,* 124 Md. App. at 44. "A decision constitutes an abuse of discretion if it is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Rolley v. Sanford,* 126 Md. App. 124, 131 (1999) *(quoting North v. North,* 102 Md. App. 1, 14 (1994).).

Camara cites *Rolley* for the proposition that extreme discovery sanctions should not be ordered in cases involving child support or child custody because these cases involve the welfare of minor children. In *Rolley,* Rolley filed a motion for modification of child support. Sanford propounded interrogatories and sought production of several financial documents. Rolley refused. Sanford filed a motion for sanctions, and the circuit court ordered Rolley to comply. She failed to do so, and, at a subsequent hearing, the court granted Sanford's motion to dismiss Rolley's petition. This Court reversed, holding that the outright dismissal was "beyond the fringe of what we deem minimally acceptable."

We view the present case as distinguishable. The circuit court did not dismiss Camara's petition outright. Instead, the court conducted a hearing in which Silimana presented testimony concerning the couple's financial circumstances. Camara was permitted to and did cross-examine Silimana. Because of her discovery violations, Camara was not able to offer evidence, but was free to argue against Silimana's evidence. Additionally, the court allowed Camara to proffer evidence she would have presented. Although it may have been difficult for Camara, as the moving party, to convince the court to modify child support and custody without offering evidence or testifying, we are not convinced that the court abused its discretion in ordering sanctions.

Camara asserts that she did not respond to discovery requests because her counsel experienced a medical emergency, and she moved and lost or misplaced several of the documents. But these conditions were not placed before the court for consideration — even after an order to compel discovery — until after the sanctions had been imposed. "[T]he trial judge, 'as he is allowed to do…assigned little weight to the appellant's unsupported explanation for the failure to file timely' answers to interrogatories." *Warehime, supra,* 124 Md. App. at 46 (quoting *Lone v. Montgomery Cnty., 85* Md. App. 477, 486 (1991)).

The first time Camara brought her counsel's medical emergency to the court's attention was in the motion to reconsider the sanctions. Had Camara communicated her mitigating circumstances to the court in a timely fashion, the court might have taken a different view of matters. We do not find, however, an abuse of discretion in the refusal to reconsider the order for discovery sanctions based on reasons known by counsel at the time but brought to the court's attention only after the order had been filed.

Additionally, the circuit court gave Camara an opportunity to comply with Silimana's discovery requests. Before imposing sanctions, the court issued an order compelling discovery, and Silimana's counsel communicated with Camara's counsel in an attempt to resolve this discovery dispute. Under such circumstances, we are not persuaded that the court abused its discretion in sanctioning Camara for a "total failure to provide discovery." *See Rodriguez, supra,* 400 Md. at *57* (citing *Mezzanotti, supra,* 227 Md. at 13).

II. Attorney's Fees

Maryland Rule 2-433 provides for attorney's fees to be assessed against the party that necessitated the filing of a motion for discovery sanctions. *See* Md. Rule 2-433(d).

The initial order compelling discovery warned Camara that, for noncompliance, she would be ordered to pay Silimana's attorney's fees in the amount to be determined by the judge. ..At the August 1 hearing, Silimana presented evidence of hours worked. The bill for services indicated that Silimana's counsel had spent 4.1 hours on matters related to discovery at a rate of $200/hour. The circuit court observed that this is "well below the average fee[] being charged in this country for the services provided. Accordingly, "the sum of $820 is fair and reasonable for the efforts related to the discovery and motion for sanctions …." We perceive no abuse of discretion." *Slip op at various pages, citations and footnotes omitted.*

*Sandra Lee Fazenbaker v. Webster Bradley Fazenbaker**

DIVORCE: EXCEPTIONS TO MASTER'S REPORT: APPEAL

CSA No. 2676, September Term 2011. Unreported. Opinion by Salmon, James P. (Retired, Specially Assigned), J. Filed Oct. 19, 2012. RecordFax 12-1019-03, 15 pages. Appeal from Garrett County. Affirmed.

Appellant failed to timely appeal the denial of her First Motion to Revise Judgment; and her Second Motion, requesting additional time to amend exceptions, was properly denied because it was filed on the same day the final Judgment of Divorce became enrolled, and once the judgment became enrolled the trial judge had no power to grant additional time to amend exceptions.

"Sandra Fazenbaker and Webster Bradley Fazenbaker were married on July 23, 1999. Webster Lee Fazenbaker was born August 25, 2006. In March, 2009, the parties separated.

Mother filed a complaint for custody. Father asked that he be granted a divorce, sole physical and legal custody.

The assignment office scheduled a merits hearing for September 20, 2011. Both parties agreed, on the record, that the only contested issues would be custody and visitation. The Master who heard the case was the Honorable Daryl T. Walters.

The Master made his recommendations on September 20, 2011. On September 30, Mother filed a pleading titled "Exceptions Letter." The

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clerk typed on the bottom: "No Certificate of Service. As a courtesy, Clerk's office placed copy in Defendant's Attorney box."

On October 7, 2011, Judge James E. Sherbin signed a "Final Order of Divorce and Custody," docketed October 11.

Mother, by counsel, filed a "Motion to Set Aside Order and Set Matter for Exceptions Hearings and Reconsideration" ("First Motion") on November 7, 2011.

On December 12, an Opinion and Order denying the First Motion was docketed. Judge Sherbin expressed his reasons for the denial:

"Plaintiff filed a paper styled "Exceptions Letter" on September 30, 2011, within 10 days after the master issued recommendations in the above captioned case. This court entered a final order of divorce and custody on October 11, 2011 without first ruling on the "Exceptions Letter." Plaintiff filed a Motion to Set Aside Order and Set Matter for Exceptions Hearing and Reconsideration on November 7, 2011. No response was filed by Defendant.

"A court "shall not direct the entry of an order or judgment based upon the master's recommendations… if exceptions are timely filed, until the court rules on the exceptions." Maryland Rule 9-208(h)(l)(A).

"In this case, Plaintiff's filing was not served on the opposing party, and there is no indication that a transcript was ordered as required by Rule 9- 208(g). Rule 9-208(1) makes clear that "[e]xceptions… shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise." The body of Plaintiff's filing states, in its entirety, "Master did not follow the law, abuse with his [discretion] to the facts." Filing a paper titled "Exceptions Letter" and broadly disagreeing with the master's recommendations is not filing exceptions as defined by the Rules."

Mother's counsel waited 16 days after Sherbin's order was docketed before filing a "Motion to Reconsider and Grant Additional Time to Amend Exceptions" ("Second Motion").

An order denying Mother's Second Motion was docketed on January 27, 2012.

On February 24, 2012, approximately three and one-half months after Sherbin's "final order" was docketed, Mother filed an appeal.

We must first decide what Order, if any, has been timely appealed.

The order docketed on October 11, 2011 was a final order. Appellant's First Motion did not stop the thirty-day clock from running in regards to the final order. That order became final on November 10.

The order denying the motion was docketed December 12. No appeal was filed and the 30 day period was not tolled. Therefore, this Court has no jurisdiction to consider any contention by appellant that the trial judge erred in denying [her] First Motion or any allegation that error was committed when the court entered the final order of divorce and custody.

Appellant's Second Motion asked the court, *inter alia,* to grant additional time to file exceptions. The court did not err in denying appellant's request. Judge Sherbin's final Judgment of Divorce became enrolled prior to December 28, 2011, which is the date that the Second Motion was filed. A judge has no power to grant additional time to amend exceptions once a final judgment of divorce becomes enrolled.

The question then becomes whether the denial of a Second Motion to Revise Judgment is an appealable order. On two occasions, this Court has answered that question in the negative. *See Pickett v. Noba,* 114 Md. App. at *560; People's Counsel v. Advance Mobilehome,* 75 Md. App. 39,47 (1988).

OTHER MATTERS

During oral argument, counsel for appellant stated that his client was particularly concerned about visitation; as things now stand, unless the parties otherwise agree, she must travel from Kent Island to her mother's house in Garrett County. Moreover, the visitations are all to be supervised by the grandmother.

Mother argues that this is unreasonable and harsh. This may be, but we have no jurisdiction to entertain the merits. We stress, however, that nothing in this opinion should be construed as discouraging Mother from filing a petition for a change in visitation. To succeed, Mother would have to show a material change in circumstances since October 11, 2011." *Slip op at various pages, citations and footnotes omitted.*

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

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: INCARCERATED PARENT

CSA No. No. 2912, September Term, 2011. Unreported. Opinion by Kehoe, J. Filed Oct. 23, 2012. RecordFax 12-1023-01, 22 pages. Appeal from Baltimore County. Affirmed.

The juvenile court properly concluded that exceptional circumstances were present in the form of the uncertain prospects of an incarcerated father's ability to provide a safe and stable home for his 4-year-old son in the foreseeable future, coupled with the lack of any significant emotional bond on the child's part with his father, and the child's attachment to the foster parents with whom he had lived for all but three weeks of his life.

"Walter D. (Mr. D.) presents one question, which we have reworded:

Did the juvenile court err in granting the Department's petition to terminate Mr. D.'s parental rights in Damien because the evidence presented was legally insufficient to permit a finding of exceptional circumstances?

We conclude that the juvenile court did not err in granting the petition.

BACKGROUND

This is the second time this case has reached this Court. As Judge Woodward explained in *In Re: Adoption/Guardianship of Damien D. ("Damien I"),* No. 848, September Term 2010, filed January 25, 2011, slip. op. at 2-3: "the circuit court adjudicated Damien CINA, because (1) Ms. C. and Damien tested positive for cocaine at Damien's birth (2) Ms. C. was a victim of domestic violence and continued to engage in a relationship with the abuser in violation of a protective order, (3) Ms. C. was unable to provide adequate care due to the use of drugs, and (4) paternity [has] not yet been determined."

Mr. D. did not know he was Damien's father until a paternity test was conducted in April 2008. Since Damien's birth, Mr. D. has been serving a seven year sentence for a second degree assault committed on November 28, 2007. While incarcerated, Mr. D. has participated in parenting classes, substance abuse classes, and victim awareness classes. His mandatory release date is in 2013.

On November 4, 2009, BCDSS filed an action to terminate Ms. C. and Mr. D.'s parental rights in Damien. Ms. C. consented on the condition that Damien was adopted by the P.s. Mr. D. moved to dismiss the petition on the grounds that BCDSS had failed to offer him reunification

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UNREPORTED CASES IN BRIEF *Continued from page 7*

services. The juvenile court granted the motion. Damien appealed, and, in *Damien I,* this Court reversed and remanded. The panel explained that "Whether BCDSS provided reunification services… is not a required element of a prima facie TPR case. Instead, it is a consideration to be addressed under F.L. §5-323(d)."

During the pendency of that appeal, BCDSS began arranging for Damien to meet Mr. D. in prison, between six and eight times prior to the TPR hearing. Mr. D. was not permitted to identify himself as Damien's father, instead, Mr. D. was identified as a friend named Frank. Mr. D. also began writing to Damien and phoning him once a month.

Further TPR proceedings were held on November 29-30th, 2011, and January 4, 2012. The juvenile court granted the TPR petition. This appeal followed.

DISCUSSION

"In TPR cases, a parent's right to custody of his or her children 'must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect." *In Re Adoption/Guardianship of Amber R & Mark K*, 417 Md. 701, 709 (2011) (quoting *In Re Adoption/Guardianship of Rashawn H.,* 402 Md. 477,497 (2007)).

Mr. D. contends the juvenile court erred in granting the Department's petition because (1) "no relevant evidence was presented" to support the court's finding of exceptional circumstances and (2) the evidence established several of the § 5-323(d) factors favored him." Our review of the record yields contrary conclusions.

Because *Damien I* previously determined the evidence was sufficient to support a finding of exceptional circumstances prior to the interaction between Damien and Mr. D., we will focus our analysis primarily on whether this change alters our earlier determination.

I. Exceptional Circumstances

The factual bases for the juvenile court's decision are as follows: Damien (at approximately four-and-a-half years old) has lived with the P.'s for all but three weeks of his life. Damien is emotionally attached to and has bonded with the P.'s, and refers to Mr. P. as his father. Mr. D. acknowledges Damien "had thrived in his placement."

Even though Damien has met with Mr. D. on several occasions, Damien does not know Mr. D. as his father and there is no indication Damien is emotionally attached to or bonded with Mr. D. Mr. D. blames this, in part, on BCDSS.

In light of this and the security measures necessarily attendant upon any visitation at a prison, it is difficult for us to understand exactly what BCDSS could have done in terms of additional reunification services. Even if we were to accept Mr. D.'s contention, as the *Damien I* panel emphasized, adequacy of reunification services is *a factor* to be considered, not dispositive. We see no error in the juvenile court's findings that (1) Damien had not developed a meaningful bond with Mr. D. and (2) Damien would not be adversely affected by his feelings about severance of this vestigial relationship.

In reaching these conclusions, the juvenile court accepted, to some extent, the testimony of Ms. Sandruck, the adoptions services unit social worker assigned to Damien's case since November 2009.

Mr. D. argues Sandrucks' testimony is legally insufficient to support the findings of exceptional circumstances. He cites *In Re Adoption/Guardianship of Alonza D.,* 412 Md. 442 (2010). There are two problems with this argument. First, while the juvenile court did base its conclusions in part on Ms. Sandruck's testimony, the court also considered other evidence, most prominently the challenges and uncertainties confronting Mr. D. Second, *Alonza D.* is factually distinguishable.

The brothers in *Alonza D.* had lived with Father for a time prior to being placed in foster care, and Father had been able to visit and spend time with the brothers on a regular basis prior to the TPR proceeding. In contrast, Damien has never resided with Mr. D., and the two have spent an extremely limited amount of time together. The father in *Alonza D.* was able to care for his children at the time of the TPR proceeding. In contrast, whether and when Mr. D. will be able to provide a stable and safe home for Damien was a matter of speculation at the time of the TPR hearing.

II. The FL §5-323(d) Factors

Mr. D. contends "an analysis of all of the relevant factors [set out in FL § 5- 323(d)] indicate Mr. D. prevails on most."

We can set aside the juvenile court's factual determinations as to any of the FL § 5-323(d) factors only if we conclude the findings were clearly erroneous. As our summary of the evidence adduced at trial indicates, there was evidence to support each of the juvenile court's findings.

At a more fundamental level, Mr. D.'s arguments skew the proper balance between his parental rights and Damien's best interest. In *Ta'niya C.*, the Court warned against a court's "focus[ing] exclusively or even primarily, on the parent, or her interests or perspectives, in determining 'exceptional circumstances' and then, finding none, fail to treat the child's best interests as transcendent." 417 Md. at 111 n.19.

In the case before us, the juvenile court examined Damien's circumstances and concluded exceptional circumstances were present in the form of the uncertain prospects of Mr. D.'s ability to provide a safe and stable home for his son in the foreseeable future, coupled with the lack of any significant emotional bond *on Damien s part* with his father. The evidence supporting these conclusions was largely uncontroverted and we are unable to say that any of the court's findings were clearly erroneous.

In conclusion, our review of the record of these proceedings leaves us satisfied the juvenile court understood the law, correctly applied it to the facts as it found them and did not abuse its discretion in making the difficult decision to terminate Mr. D.'s parental rights." *Slip op at various pages, citations and footnotes omitted.*

*In re: Ishmail A.**

CINA: CHANGE IN PERMANENCY PLAN: ADOPTION BY NON-RELATIVE

CSA. No. 0130, September Term 2012. Unreported. Opinion by Hotten, J. Filed Oct. 10, 2012. RecordFax 12-1010-01, — pages). Appeal from Montgomery County. Affirmed.

After three years, a change in permanency plan from reunification to adoption by a non-relative was not an abuse of discretion, where the record supported the finding that the child's mother was uncooperative and resistant to services; nor was it inconsistent for the juvenile court to suggest that an open adoption would be in the child's best interest, where the child and his parents had a close relationship and his foster parents were amenable to continued contact.

"Ishmail A., born to Rolanda M. and Ekuade A. on May 3, 2006, was declared a Child In Need of Assistance on February 20, 2009. Ishmail A. was subsequently placed in foster care. A permanency plan of reunifica-

See UNREPORTED CASES IN BRIEF page 9

tion was ordered and the parties worked toward that end. Approximately three years later, the juvenile court changed the permanency plan from reunification to adoption by non-relative. We affirm the judgment of the juvenile court.

DISCUSSION

Rolanda M.

A.

Rolanda M. argues the juvenile court was clearly erroneous in concluding she was resistant to services. Specifically, she contends the court ignored that she completed two psychiatric evaluations, participated in family and individual therapy, engaged in weekly supervised visitation, and completed a substance abuse evaluation. The Department responds, and we agree, that the court's determination was supported by the record.

Rolanda M. was ordered to participate in a psychological and psychiatric evaluation on April 20, 2009. However, Rolanda M. completed her psychiatric evaluation in December 2010, and her psychological evaluation in March 2011. Rolanda M. also repeatedly disregarded the juvenile court's orders to sign consent forms that would permit the Department to ascertain whether services were being completed. Furthermore, [[Sharon Jordan, the Department's assigned social worker] testified Rolanda M. was uncooperative. Jordan explained she was unable to contact Rolanda M. on several occasions; Rolanda M. was unwilling to provide a home address on one occasion; Rolanda M. was not consistent with visitation; Rolanda M. was difficult to work with; and Rolanda M. was unwilling to complete the court ordered services. Thus, we believe the juvenile court's determination that Rolanda M. was resistant to services and uncooperative was supported by the record.

B.

Rolanda M. asserts the juvenile court abused its discretion in holding it would be harmful to remove Ishmail from his current placement, and determining that Ishmail's well-being would be jeopardized in Rolanda M.'s care, because of her resistance to its services and unwillingness to cooperate with the Department. Rolanda M. asserts the court abused its discretion when it concluded reunification was not possible because there was "discord" between herself and Jordan. Rolanda M. infers the juvenile court focused on her relationship with Jordan and ignored that she "substantially" complied with the court's orders.

In re Yve S., , 373 Md. at 551, is instructive. There, the Court of Appeals explained that the record was devoid of evidence that Yvonne S. was terminated from employment as a result of unsound judgment; it was unable to understand how Yvonne S.'s religious conviction and volunteering placed Yve S. at risk of future abuse or neglect; Yvonne S.'s "testimonial demeanor" did not indicate she would be unable to provide structure for Yve S., or that there was a potential for future abuse or neglect; and there was insufficient support to conclude Yvonne S. was unable to care for Yve S. Ultimately, the Court of Appeals noted the court inappropriately focused "on what would be the best environment for Yve S., not whether future neglect or abuse was not likely if returned to [Yvonne S.'s] custody."

The case *sub judice* is distinguishable because there was sufficient support for the juvenile court's inference that there was the possibility of future abuse or neglect. If a person neglects to complete a psychological or psychiatric evaluation required for reunification, it is not inconceivable that the same person would be neglectful in the day-to-day care of a child. Thus, we believe the complete disregard for completing services to ensure reunification supports the notion that Ishmail would not be safe or healthy with Rolanda M. in the near future.

Furthermore, the juvenile court believed it would be unsafe and unhealthy for Ishmail to be with Rolanda M. because she was unwilling to cooperate with the Department. The record supports this contention. Prior to the change in the permanency plan, Rolanda M. was unwilling to provide Ms. Jordan an address to her new residence. Absent this information, a determination whether Ishmail would be safe or healthy with Rolanda M. was impossible. Additionally: (1) Rolanda M. left a visit following an outburst, missed part of a visit because of an errand, and fell asleep during a visit. If these issues occurred during limited visitation, it follows Rolanda M. might neglect Ishmail in the near future.

Ekuade A.

Ekuade A. avers it was inconsistent to order a permanency plan that requires termination of parental rights, and yet, articulate that it is in the best interest of Ishmail to maintain contact with his parents. Ekuade A. suggests *In re Shirley B.*, 419 Md. 1 (2011), is instructive.

Almost everyone involved in the case *sub judice* recognized the strong bond between Ishmail and Ekuade A. Most people believed reunification with Ekuade A. was the best option for Ishmail. However, reunification was not possible until Ekuade A. stopped using marijuana. Ekuade A.'s repeated unwillingness to cease using marijuana, or complete the substance abuse treatment, was sufficient to undermine the notion that Ishmail would be safe and healthy with Ekuade A. in the near future.

In any event, *In re Shirley B.* suggests it was not inconsistent for the juvenile court to change the permanency plan from reunification to adoption by non-relative — noting an open adoption would be in Ishmail's best interests — and recognizing Ishmail had a close relationship with his parents. The record suggested Ishmail could not be safely returned to Rolanda M. or Ekuade A, and that his foster parents would be amenable to continued contact with his parents. Thus, as in *In re Shirley B.*, we believe it was not error for the juvenile court to change the permanency plan from reunification to adoption by non-relative, and suggest the child maintain contact with his natural parents." *Slip op at various pages, citations and footnotes omitted.*

*Thomas M. Lawrence Jr. v. Nachelsea Williams**

CUSTODY AND SUPPORT: LEGAL CUSTODY: ABILITY TO COMMUNICATE

CSA. No. 2382, September Term 2011. Unreported. Opinion by Watts, J. Filed Oct. 19, 2012. RecordFax 12-1019-00, 19 pages. Appeal from Prince George's County. Affirmed.

The trial judge's decision to award sole legal custody of two children to their mother was supported by the record, and the father's other complaints, regarding the amount of child support and the schedule for shared physical custody, were not raised below.

"Thomas M. Lawrence Jr., *pro se,* appeals an order issued awarding Nachelsea Williams, appellee, sole legal custody of the parties' two minor children and child support, and appellant physical custody of the children three weekends a month and during periods of the summer. Appellant presents three issues:

I. Is the total award of Child Support of $915 correctly calculated on Worksheet A - Child Support Obligation?

See UNREPORTED CASES IN BRIEF page 10

UNREPORTED CASES IN BRIEF *Continued from page 9*

II. Is it justified in all aspects to award Sole Legal Custody to Appellee?

III. Are the Physical Custody dates assigned to Appellant affected by the Legal Custody ruling, and compatible with Appellant's working schedule?

BACKGROUND

Appellant and appellee have never been married. On March 4, 2004, appellee gave birth to their son, Azariah Lawrence. On February 23, 2010, appellee gave birth to a second son, Isaiah Cameron Lawrence. On February 6, 2012, appellant filed a Motion to Disestablish Paternity, and, on appeal, takes the position that he is not, or may not be, Isaiah's natural father. On April 1, 2011, appellant filed a Complaint for Custody. On April 29, 2011, appellee filed a Countercomplaint. Shortly before the circuit court held a hearing on December 5, 2011, seeking a protective order, appellee filed a petition alleging appellant had abused Azariah. On December 5, 2011, the circuit court conducted a hearing on the merits of the custody case, and heard evidence relating to the petition alleging abuse.

The circuit court set forth a specific schedule under which appellant would have primary physical custody, the schedule to be followed on holidays and other instances affecting the children's schedule, provided specific guidelines under which the parents were to communicate with one another and the children, and directed appellant to pay child support. Appellant filed a Notice of Appeal.

DISCUSSION

I.

Appellant contends the circuit court erred in awarding child support of $840 per month plus arrears of $75 per month. Appellant argues the guidelines worksheet displayed "incorrect calculations" pertaining to certain expenses and that his own "financial statement[s] were not in the case file." Appellant asserts appellee submitted inaccurate receipts to the circuit court that were relied upon by the circuit court in calculating Worksheet A. Simply put, we disagree.

Preliminarily, we observe appellant had ample opportunity to raise the issues relating to the child support payments, but failed to do so in the circuit court prior to the determination of the child support award. See Md. Rule 8-131(a). Nonetheless, we conclude that a review of the record reveals no such discrepancies, nor has appellant identified any specific alleged errors in the child support calculations. Absent a finding that the determination was clearly erroneous or that the circuit court miscalculated the award under the guidelines, we will not disturb the child support award. See *In re Shirley B.*, 419 Md. at 18.

II.

Appellant contends the circuit court abused its discretion in awarding sole legal custody to appellee. Joint custody requires that the parties be able to get along not just in court proceedings relating to the children, but also on a day to day basis without intervention. See *Taylor v. Taylor*, 306 Md. 290 (1986) In *Boswell v. Boswell*, 352 Md. 204 (1998), the Court of Appeals explained the child's best interest is the primary factor to be considered in visitation and custody disputes. In *Montgomery Cty. Dep't of Social Serv's. v. Sanders*, 38 Md. App. 406 (1978), this Court described the factors to be used in determining the best interests of the child. While the court considers all the factors, it will generally not weigh any one to the exclusion of all others.

Returning to the case at hand, notably, the instances appellant identifies as those in which he and appellee communicated — (1) in a "sit down meeting… for a scheduling conference and (2) for a settlement conference held at Upper Marlboro Court House"— occurred during the course of litigation before the circuit court, *i.e.* the parties communicated while participating in proceedings overseen by the circuit court.

Although the circuit court complemented the parties on their ability to share custody previously, the record demonstrates the circuit court properly determined the parties did not communicate well enough to make major decisions jointly. At the second hearing, ruling from the bench, the court discussed each of the factors set forth in Sanders.

As this Court stated in Sanders, the appellate court must give the finder of fact's conclusions great weight since he has the parties before him and has "the best opportunity to observe their temper, temperament and demeanor, and so decide what would be for the child's best interest.… This Court may not set aside the factual findings of the [fact-finder] unless they are clearly erroneous, and absent a clear showing of abuse of discretion, the decision of the trial judge in a custody case will not be reversed.

In this case, the circuit court thoroughly assessed the credibility of the witnesses and the parents, and absent a clear showing of an abuse of discretion, we shall not disturb its findings.

Although appellant highlights several facts he believes weighed heavily in his favor, these are each but individual factors to be weighed in considering the best interests of the children. After evaluating all the factors — such as the potential disruption of the child's social and school life, parental employment, and the residences of the parents and opportunity for visitation — the circuit court found it was "in the best interests of the children that legal custody be granted to [appellee]." We are satisfied the circuit court did not abuse its discretion.

III.

Appellant seeks reversal of the order as to physical custody on the grounds that the order requires that he pick up the children on Thursdays and drop them off on Mondays, and that "transportation will be an issue" because he is employed. Appellant failed to raise these points before the circuit court. Accordingly, we shall not address the matters. See Maryland Rule 8-131(a). We observe, however, that appellant filed the initial complaint in the circuit court in which he sought primary physical custody of the children, and it is inconsistent for him to now claim that scheduling difficulties preclude him from taking the children for a part of the time he would have been responsible for them had his complaint met with success." *Slip op at various pages, citations and footnotes omitted.*

*Lydia F. Leverenz v. Lance S. Leverenz**

CHILD CUSTODY AND VISITATION: SUPERVISED VISITATION: FEES

CSA. No. 0250, September Term 2011. Unreported. Opinion by Woodward, J. Filed Oct. 10, 2012. RecordFax 12-1010-09 (27 pages). Appeal from Frederick County. Affirmed.

In awarding or modifying custody and visitation, the trial court is under no obligation to fashion a visitation schedule that gives the non-custodial parent a chance to prove that unfettered access to the children would be in their best interest; nor did the court err in awarding the custodial parent attorneys' fees, or in splitting the cost for reunification therapy equally between the parties.

"On June 4, 2009, the Circuit Court entered a judgment of absolute

See UNREPORTED CASES IN BRIEF page 11

UNREPORTED CASES IN BRIEF *Continued from page 10*

divorce between Lydia F. Leverenz, appellant, and Lance S. Leverenz, appellee. The court granted the parties joint legal and physical custody of the minor children and awarded primary physical custody to appellant.

On August 26, 2009, appellee filed an emergency ex parte motion alleging appellant had removed their children from the State. On August 27, 2009, the trial court issued an amended custody order, awarding custody of the children to appellee.

On January 22, 2010, the trial court issued a consent order for reunification therapy with Dr. Rebecca Snyder. On June 1, 2010, appellant filed a motion for visitation or custody, and on July 8, 2010, appellee filed a motion for child support. After trial, the court awarded appellant supervised visits with the children and ordered appellant to pay child support. The court also awarded attorney's fees to appellee and directed the parties to divide Dr. Snyder's fees equally.

Appellant presents three questions, which we have rephrased:

1. Did the trial court err in not fashioning a visitation schedule that would permit appellant to prove that greater access with the children is in the children's best interest?

2. Did the trial court err in awarding attorney's fees to appellee's counsel?

3. Did the trial court err in ordering that the parties pay equally the fees incurred in connection with Dr. Snyder?

DISCUSSION

A. Visitation Schedule

At the outset, appellant claims the trial court found the best interest of the children would be served by appellant having unfettered and uncontrolled access. Appellant is mistaken. Indeed, the court found the opposite. The best interest of the children would be served by supervised access, because appellant could not be trusted to abide by the court's order. In addition, the court found appellant would do everything she could to thwart appellee's influence, that appellant's influence on the children was negative, and that in the past appellant had "traumatized" the children. There simply was no finding by the court as claimed by appellant.

Appellant does not cite to any authority, nor have we found any, for the proposition that the trial court erred or abused its discretion for not including in the order "a mechanism whereby the Appellant could prove to the satisfaction of the Court she had met the Court's requirements to enable the Court to reinstate unfettered and uncontrolled access to the parties' minor children." Indeed, the inclusion of such mechanism could be contrary to the right of a non-custodial parent to raise *any* material change in circumstance in an effort to modify a custody or visitation order. Further, nowhere in appellant's brief does she state specifically what mechanism the trial court should have included. We conclude the trial court did not err or abuse its discretion.

B. Attorney's Fees

F.L. §12-103 sets out the considerations a court must assess before awarding attorney's fees in a custody, visitation, or child support case. A trial judge need not articulate the reasoning behind each and every decision, "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 (2003).

We conclude the trial court properly considered all three factors required by §12-103(b). First, the court made detailed findings as to the financial status of both parties. Next, the court demonstrated its cognizance of the parties' needs in articulating why it ordered the parties to split evenly Dr. Snyder's fees.

The court specifically explained it was "taking into account" that appellant was already required to pay other costs, such as child support and attorney's fees, when it decided to split Dr. Snyder's fees. The court's intent to "err on the low side" in calculating appellant's income illustrates its consideration of her needs and weaker financial position.

Lastly, the court's findings make clear that appellee had substantial justification in defending appellant's motion for visitation or custody and for his own motion for child support. As a result of appellant's abduction of the children, it was necessary for appellee to defend against appellant's request for increased visitation or custody, because, as the court found, appellant could not be trusted not to abscond again with the children were she to gain unfettered access to them.

In sum, the trial court considered all the required factors under §12-103(b) and thus did not abuse its discretion in awarding attorney's fees.

Appellant argues the trial court failed to evaluate the reasonableness of the fees. Although F.L. § 12-103 "does not expressly mandate the consideration of reasonableness of the fees, this Court and the Court of Appeals have indicated that evaluation of the reasonableness of the fees is required." *Sczudlo,* 129 Md. App. at 550.

Even if there had been no waiver, we hold the award of $3,000 in attorney's fees was reasonable, because the record fully supports such a finding. Of particular significance, although the court found $6,725 to be "quite reasonable," the court ordered appellant to pay less than half the amount.

Sczudlo is factually distinguishable. In that case, we noted the trial court had "little proof before it as to the amount of the fees, or their reasonableness." In the case *sub judice,* plaintiff's Exhibit No. 12 detailed all of appellee's attorney's fees, including time expended and services rendered. Not only did the court make an explicit finding as to reasonableness, but appellant did not challenge the reasonableness of the fees, nor did she object to the admission of the document. Although the law articulated in *Sczudlo* controls our analysis, the facts of the instant case are sufficiently distinguishable to warrant a different outcome.

Dr. Snyder's Fees

In *Sitter v. Stuckey,* 402 Md. 211 (2007), the Court of Appeals explained, "The rule that there is no right to appeal from a consent [order] is a subset of the broader principles underlying the right to appeal. The availability of appeal is limited to parties who are aggrieved by the final judgment. A party cannot be aggrieved by a[n] [order] to which he or she acquiesced."

As appellee noted, appellant signed the consent order for reunification therapy in which the circuit court "reserve[d] jurisdiction to require additional deposits and to apportion the expenses related to Dr. Snyder between the parties." By signing the consent order with this express reservation of jurisdiction, appellant acquiesced to such apportionment. Accordingly, appellant's objection to the apportionment of fees is waived." *Slip op at various pages, citations and footnotes omitted.*

*Stephen Austin Meehan v. Nicole B. Garzino, F/K/A Nicole B. Meehan**

CUSTODY AND VISITATION: UCCJEA: INCONVENIENT FORUM

CSA No. 1524, September Term, 2011. Unreported. Opinion by Matricciani, J. Filed Nov. 5, 2012. RecordFax #12-1105-12, 15 pages.

See UNREPORTED CASES IN BRIEF page 12

UNREPORTED CASES IN BRIEF *Continued from page 11*

Appeal from Talbot County. Affirmed.

Where the children and their mother had not lived in Maryland for nearly five years, and had been living in California for about a year, the circuit court in Maryland had to determine whether California courts were the proper venue for modification of the parties' custody arrangements. Because they were, and because appellee had initiated proceedings there, the UCCJEA authorized the circuit court in Maryland to dismiss appellant's motions to modify and to enforce the existing custody order.

"On April 7, 2008, the Circuit Court granted Nicole Garzino an absolute divorce from appellant, Stephen Meehan. The court awarded appellee primary physical custody; appellant was granted specified visitation and joint legal custody.

On December 16, 2009, appellant filed a petition to hold appellee in contempt for denial of visitation. On June 14, 2010, the circuit court held it was no longer a convenient forum and lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), §9.5-101 to 9.5-318 of the Family Law Article. On June 20, 2011, appellant filed a second petition to hold appellee in contempt. On June 28, 2011, appellant filed a petition to hold appellee in contempt for violation of custody and requested a modification hearing. Appellant simultaneously filed for "Enforcement Under [UCCJEA] and Parental Kidnapping Prevention Act Pending Transfer to Pennsylvania."

The circuit court dismissed appellant's pending matters for lack of jurisdiction. Appellant noted this appeal.

Appellant's brief presents seven questions, which we have consolidated and rephrased:

Did the circuit court err when it dismissed appellant's petitions for lack of jurisdiction, without a hearing?

We affirm the judgments

DISCUSSION

Appellant argues the court violated the UCCJEA as well as his and his children's due process rights by "issuing a Memorandum that modifies custody retroactively without a proper filing by Appellee, and without a hearing." The court's order dismissing appellant's petitions did not "modify custody," and the court did not err by issuing it without a hearing.

The due process right to a hearing attaches only where there is a dispute of law or fact. And even if the UCCJEA seems to call for a hearing where there is no such dispute, an appellant must establish the decision prejudiced him. *See Bland v. Larsen,* 97 Md. App. 125, 131 (1993).

Where, as here, an appellant argues the court should have conducted a hearing on jurisdiction but fails to allege facts that would have altered the decision, any error is harmless.

The UCCJEA governs Maryland's jurisdiction over custody and enforcement proceedings. *Toland v. Futagi, 425* Md. 365 (2012). Here, the Circuit Court had entered the original custody decree as part of the parties' divorce, and modified custody on August 1, 2008. As such, it could exercise "exclusive, continuing jurisdiction" to modify custody until either:

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

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

UCCJEA § 202(a).

If the court no longer had "exclusive, continuing jurisdiction" under §202(a), any further action required jurisdiction under §201. We shall not delve into the complex jurisdictional scheme in §201, because all that matters here is whether the circuit court could *decline* to exercise jurisdiction on the grounds "that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." UCCJEA §207(a)(1). That decision can be made upon the court's own motion, *see* §207(a)(2), and the court must weigh all relevant facts, including enumerated factors.

First, appellant argues the court excluded evidence of domestic violence; specifically, of false 'abuse or harassment' filings, and harassment at drop-offs, where appellee would threaten "such filings" if appellant did not consent to her relocation with the children. This is not domestic violence. *See, e.g.,* FL §4-513.

Second, appellant argues that the distance between California and Maryland should not be considered because, "[i]f proper procedure had been followed, this would have been reason to disallow the relocation to begin with." But we see no error in any existing custody decrees, and appellant does not dispute that the "significant distance between the children's current home in Monterey, California and Talbot County, Maryland … would cause disruption and hardship in the lives of the children" if proceedings were conducted in Maryland.

Third, appellant argues neither party had the opportunity to "assert financial difficulty," to wit, that "Appellee has now abandoned a home in Massachusetts valued at $130,000, and has caused $57,000/year travel expense for visitation alone." These past costs make no difference to *a prospective* analysis of the parties' "relative financial circumstances" under §207(a)(2). To make an inconvenient forum determination, a court must know the parties' financial *resources* and the *comparative costs of future litigation* in each potential venue. Appellant's limited, proffered evidence establishes neither these facts nor, consequently, any error in the trial court's findings and judgment.

Fourth, appellant argues "[t]here was indeed 'agreement of the parties' as to jurisdiction…." Our review of the transcripts revealed no such agreement.

Fifth, appellant argues the court erred when it weighed the possibility of delay under §207(a)(2)(vii). Appellant argues, vaguely, that the court "is simply rushing to modify its own order, and speed Modification in California to accommodate Appellee, and legally 'insulate' the abduction, without regard for the rights of [appellant] or [his] children…" We disagree; expeditious proceedings are in the interest of all involved. The court rightly found that proceedings would conclude more quickly in California, and considered that as part of its overall decision balancing appellant's rights and interests with those of his children and former spouse.

Finally, appellant makes several arguments that depend on his assumption that the circuit court should have treated a proceeding for custody modification differently from custody enforcement. None of these contentions has merit because the UCCJEA's provisions for jurisdiction over enforcement are subordinate to its provisions for jurisdiction over modification. Section §307 provides:

(a) *Communication between courts.* — If a proceeding for enforce-

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ment under this subtitle is commenced in a court of this State and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Subtitle 2 of this title, the enforcing court shall immediately communicate with the modifying court.

(b) *Continuation of enforcement proceedings.* — The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

Thus, regardless of whether the circuit court in this case was dealing with appellant's motion to enforce the existing order or his motion to modify the existing order, the court had to determine whether California courts were the proper venue for modification. Because they were, and because appellee had initiated proceedings there, the UCCJEA authorized the circuit court to dismiss appellant's motions to modify *and to enforce* the existing custody order." *Slip op at various pages, citations and footnotes omitted.*

*John Gary Seymour v. Ann Marie Seymour**

CHILD SUPPORT: DOWNWARD DEVIATION FROM GUIDELINES: REQUIRED FINDINGS

CSA No. 1677, September Term 2010. Unreported. Opinion by Davis, Arrie W. (Retired, Specially Assigned), J. Filed Oct. 10, 2012. RecordFax #12-1010-08, 11 pages. Appeal from Talbot County. Vacated and remanded.

Although the circuit court's award of rehabilitative alimony was within its discretion, the court's complete failure to make the required finings to support a downward deviation from the child support guidelines led the appellate court to vacate and remand the entire judgment for further proceedings consistent with the opinion.

"John Gary Seymour (Husband), timely appeals the award of alimony to his ex-wife, Ann Marie Allen Seymour (Wife), and the failure of the circuit court to award him child support for the couple's two children.

Appellant presents two questions for our consideration:

(1) Did the circuit court err as a matter of law in failing to award child support in this case, in failing to apply the child support guidelines?

(2) Did the trial court err as a matter of fact and law in ordering alimony payments despite uncontroverted evidence that the appellant is currently operating with a negative balance per month and has additional obligations for a minor child attending college?

We answer Husband's second question in the negative, but because we answer his first in the positive, we shall vacate the judgment and remand the matter to the circuit court to make factual findings as to an award of child support pursuant to the guidelines.

FACTS and PROCEEDINGS

With certain additions gleaned from the record, we accept the findings of fact made by the circuit court in its August 27, 2010 divorce order and opinion.

Husband and Wife were married September 7, 2001. Two children were born prior to marriage, Linda (DOB 6/13/93) and John Jr. (DOB 2/12/98). [John Jr. was born with diplegic cerebral palsy and has special needs.] Husband and Wife separated no later than July 2009.

On January 6, 2010, a standing master on domestic relations issued his report and recommendations regarding pendente lite alimony, custody and child support. As Linda was scheduled to graduate from high school in June, Husband and Wife agreed it would not be in Linda's best interest to relocate to Virginia with Wife. The custody issues thus centered on John Jr. The master recommended sole legal and primary physical custody to Husband.

Using the child support guidelines, the master determined Wife's obligation to be $146 per month, but recommended a downward deviation based on Wife's lengthy time out of the work force, her minimal work history and the poor job market in the area in which she resides. The master suggested that Wife pay $100 per month.

Wife excepted to the master's recommendations. Following a contested hearing on the merits, the circuit court granted Husband an absolute divorce along with sole physical custody. Wife was entitled to liberal visitation. The parties were granted joint legal custody.

In addition, the court ordered Husband to pay Wife $400 per month for three years as rehabilitative alimony. No child support was awarded to either party.

DISCUSSION

I

Husband first alleges the circuit court erred in failing to award him child support.

Generally, the circuit court is required to utilize the child support guidelines. *Drummond v. State,* 350 Md. 502,511 (1998). Although there is a presumption that the amount of child support resulting from the application of the guidelines is correct, that presumption may be rebutted by evidence that application of the guidelines would be unjust or inappropriate. If the court makes such a determination, however, it "shall make a written finding or specific finding on the record stating the reasons for departing from the guidelines." FL § 12-202(a)(2)(v). That finding must state: the amount of child support that would have been required under the guidelines; how the order varies from the guidelines, and; how the deviation from the guidelines serves the best interests of the child. If the circuit court fails to make these specific findings, its order must be vacated. *In re Joshua* W., 94 Md. App. at 501.

In this matter, the circuit court made no mention of the master's recommendation or a child support award, either during the hearing or in its written opinion and order, despite the fact that Husband's attorney raised the issue in closing argument at the hearing.

The circuit court, in completely failing to address the issue of child support in its order and opinion, did not specify any of the required findings. Therefore, we will remand the matter to the circuit court to make a determination regarding the propriety of child support. If the court deviates from the child support guidelines, it is directed to place the findings required by §12-202(a)(2)(v) on the record.

II

Husband also avers that the circuit court erred in ordering $400 per month for three years as rehabilitative alimony to Wife when the uncontroverted evidence showed that Husband was "operating with a negative balance per month" and would be responsible for the $3,000 college costs for Linda.

The circuit court specifically considered the twelve factors in FL §11-106(b). The circuit court determined that Husband and Wife began dating while Wife was still in high school and Wife had resided with Husband nearly her entire adult life. After the birth of the children, Wife had stayed home and was primarily responsible for the children's care

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and household duties. Her work was part-time and earned between $8 and $13 per hour. With only a GED, Wife would have to further her education to obtain her desired position as a nurse or nurse's assistant. Despite Wife's denial of cognitive or memory problems, the court found such problems evident during the hearing.

Husband estimated his monthly expenses, together with his children's monthly expenses, totaled $3,105, an amount $251 in excess of his monthly net income of $2,854. Husband testified that he does "sidejobs," such as crabbing on the weekends, to manage his deficit. He had also received a $3,319 tax refund the previous year.

Wife earned $245 every other week, with monthly expenses of $1,600, "far in excess of her estimated monthly net income of $900." While residing with her brother, who provides Wife with financial assistance, she was "not currently self-supporting."

Although the court did not specifically enumerate how it arrived at $400 per month, the court clearly engaged in the required considerations under §11-106(b). We cannot say the determination depended on clearly erroneous factual findings, nor that the court did not act within its discretion." *Slip op at various pages, citations and footnotes omitted.*

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

CUSTODY AND VISITATION: LEGAL CUSTODY: INABILITY TO COMMUNICATE

CSA No. 2026, September Term, 2011. Unreported. Opinion by Matricciani, J., On Motion for Reconsideration. Filed Nov. 5, 2012. RecordFax #12-1105-10, 10 pages. Appeal from Allegany County. Affirmed in part, reversed in part and remanded.

The circuit court erred in (1) granting joint legal custody where the master found, and the parties agreed, that the parties could not effectively communicate; (2) setting a time for exchanging the child that both parties argue is not in the best interest of the child; and (3) failing to address the master's recommendation to end weekend visitations on Sunday evening, rather than overnight.

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

QUESTIONS PRESENTED

Mr. Zembower does not raise any clearly cognizable legal issues for our review. 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.

Ms. Zembower presents three questions in her cross appeal:

I. Did the circuit court err in rejecting the master's recommendation that sole legal custody be awarded to the mother?

II. Did the circuit court err in rejecting the master's recommendation that no weekly visitation be given?

III. Did the circuit court err in rejecting the master's recommendation that Mr. Zembower's weekend visitation end on Sunday during the day?

For the reasons that follow, we hold that Mr. Zembower has not demonstrated any error in the court's judgment, but we answer yes to Ms. Zembower's questions presented, and we therefore remand the case for further proceedings.

I. Mr. Zembower's Appeal

Mr. Zembower acted pro *se* for the majority of the proceedings in the circuit court and 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 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. Mr. Zembower did not preserve his objection to the changes in holiday visitation, *see In re Tyrek S.*, 351 Md. 698, 708-09 (1998), nor has he explained how and why the master or the circuit court erred in their determinations. And as we explain, below, the court *did not go far enough* when it curtailed overnight visitation on Wednesdays. Mr. Zembower has therefore given no cogent reason to disturb the order.

II. Ms. Zembower's Cross-Appeal

Ms. Zembower argues the court erred when it granted the parties joint legal custody because it ignored the parties' general failure to communicate. We agree. The master found from ample evidence that the parties could not effectively communicate, the parties concede this point, and the circuit court disregarded it only because the parties have not yet communicated specifically about "long range" decisions. As the Court of Appeals explained in *Taylor v. Taylor,* 306 Md. 290, 304 (1986): "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."

It is obvious from the parties' history of disputes over minor matters that they would not communicate effectively about a major decision. The trial court therefore erred when it granted Mr. Zembower's exception to the master's recommendation to award Ms. Zembower sole legal custody.

Ms. Zembower next argues that exchanging the child at 8:00 p.m. on Wednesdays is not in the child's best interests. Mr. Zembower concedes this point in his brief, where he argued — in favor of overnight visitation — that exchanging custody at 8:00 p.m. is a "detriment to the Child" due to her early morning weekday schedule. Because the primary concern in any case is the child's best interests, *Taylor,* 306 Md. at 303, the circuit court erred in this part of its judgment.

Finally, Ms. Zembower argues the circuit court erred when it failed to address the master's recommendation to end weekend visitations on Sunday at 6:00 p.m., rather than overnight. This appears to have been an oversight by the court.

Because the circuit court erred in awarding Mr. Zembower visitation on Wednesday nights, we remand the case so that the court can determine if eliminating that visitation warrants adjustment to other aspects of the custody order. On remand, the court also should address the matter of Sunday visitation and amend its judgment to award Ms. Zembower sole legal custody." *Slip op at various pages, citations and footnotes omitted.*

TOPIC INDEX

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

CASE INDEX

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