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COURT OF SPECIAL APPEALS

Unreported opinions

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CINA: change in permanency plan: adoption by non-relative

In Re: Ishmail A.

No. 0130, September Term, 2012

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

Opinion by Hotten, J.

Filed: October 10, 2012. Unreported.

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, as the child and his parents had a close relationship and his foster parents were amenable to continued contact.

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.

Once again, we must review a case in which a parent's fundamental right to raise a child is balanced against the State's interest in protecting that child from abuse or neglect. Ishmail A., who was born to Rolanda M. and Ekuade A. on May 3, 2006, was declared a Child In Need of Assistance ("CINA")[1] on February 20, 2009. Ishmail A. was subsequently placed in foster care. A permanency plan of reunification was ordered and the parties worked toward that end. Approximately three years later, the Circuit Court for Montgomery County, sitting as a juvenile court, changed the permanency plan from reunification to adoption by non-relative. Rolanda M., Ekuade A., and Ishmail A., separately, noted an appeal,[2] challenging the permanency plan change.[3] For the reasons that follow, we affirm the judgment of the juvenile court.

BACKGROUND

On June 26, 2008, Rolanda M.'s vehicle ran out of gas. She then went to a gas station and the attendant called the police because her behavior became suspicious. Rolanda M. left before the police arrived. The police then received a report that a woman, who looked disoriented, was walking across a street toward a gas station. At that gas station, Rolanda M. purchased five dollars worth of gasoline. Another customer, James H., offered Rolanda M. a ride to her vehicle. Because he had a curfew, and the search was taking a long time, James H. dropped Rolanda M. and her children off on a random road. As he drove away, without realizing it, James H. struck Jasmine A., one of Rolanda M.'s children. Jasmine A. was killed and Rolanda M. became hysterical.

On June 27, 2008, the Montgomery County Department of Health and Human Services ("the Department") interviewed Rolanda M. The Department indicated that Rolanda M. appeared disoriented and confused. Specifically, she was unable to spell her name, provide her date of birth, state the name of her employer, or provide the name and age of her children. The Department then interviewed Rolanda M.'s family and learned that she had been hospitalized for previous psychiatric issues. Subsequently, Rolanda M. informed the Department that she was taking antidepressant medication and was going to visit a grief counselor regarding Jasmine A.'s death.

On July 15, 2008, Rolanda M. signed a safety plan and agreed to meet with the Department. The Department thereafter made numerous attempts to contact her. Eventually, a home visit was scheduled for July 25, 2008. The visit was canceled because Rolanda M. felt harassed. However, on July 30, 2008, Rolanda M. indicated that she was willing to work with the Department, and a home visit was scheduled for August 1, 2008. That day, Rolanda M. canceled the visit and requested that it be rescheduled three or four days later. On August 5, 2008, the Department visited Rolanda M.'s home, but despite the fact that her vehicle was in the parking lot, nobody answered the door.

On August 8, 2008, Rolanda M. was sent a letter that requested she contact the Department by August 18, 2008. Rolanda M. called the Department and accused it of harassing her. Rolanda M. then indicated that she did not want to participate in the Department's services. Subsequently, the Department contacted Christine M., Rolanda M.'s sister. Christine M. alleged that the Department had unnecessarily threatened Rolanda M.; indicated that Rolanda M. was in therapy, receiving treatment; and noted that Rolanda M. was not taking medication. A CINA petition was filed on October 3, 2008, because Christine M. never confirmed that Rolanda M. was receiving treatment. In the petition, the Department alleged that Ishmail A. was

neglected and that his parents were unable or unwilling to care for his needs.

On December 15, 2008, the Department filed an amended petition, asserting that Ishmail A. and Lazarus A., Rolanda M.'s other minor child, should be removed from Rolanda M.'s care. The Department asserted that Rolanda M. had repeatedly inflicted Lazarus A. with corporal punishment, resulting in injury; was unable to protect Lazarus A. from others that inflicted abuse upon him; was unable to properly supervise her children the night Jasmine A. was killed; repeatedly failed to care for her children; was repeatedly hospitalized for mental health issues; failed to abide by the agreements entered into with the Department; evaded the Department; exhibited strange behavior in the presence of the Department's employees; and Ekuade A. had not offered himself as a resource for Ishmail A.

A second amended petition was filed, indicating that Ekuade A. was notified about the proceedings and failed to make himself available, or follow up, with the Department. The Department then requested that Ishmail A. be placed with Christine M.; Rolanda M. be given liberal visitation; the case regarding Lazarus A. be closed; Rolanda M. be ordered to participate in the Department's services; Rolanda M. receive a psychiatric evaluation and follow the treatment recommendations; and that Ekuade A. be precluded from visiting Ishmail A. until he presented himself to the Department. A third amended petition was filed, adding a few inconsequential facts.

In December of 2008, Rolanda M. placed Ishmail A. in the care and custody of Christine M. Subsequently, a fourth amended petition was filed. In that petition, the Department indicated that Ekuade A. was unable to care for Ishmail A. because he did not make himself available during the investigation of Jasmine A.'s death; Ekuade A. regularly abused drugs and the children when he resided with Rolanda M.; Ekuade A. did not request the Department's assistance with regard to visitation; Ekuade A. was not available during most of the proceedings; and Ekuade A. had recently tested positive for marijuana. A fifth amended petition was submitted, which advised the juvenile court that Ekuade A. had failed to appear for agreed upon drug tests.

On February 9, 2009, the Department submitted a sixth amended petition, noting that Rolanda M. and Ekuade A. were unable to properly care for Ishmail A. The Department, in particular, alleged that Rolanda M. was unable to care for Ishmail A. because she did not properly supervise Jasmine A. the night she was killed; she left Jasmine A. unattended following a court hearing; had a history of mental health issues and hospitalizations; and was uncooperative with the Department following the death of Jasmine A. The Department then asserted that Ekuade A. was unable to care for Ishmail A. because he did not make himself available to the Department, despite being available; was abusive to the children when he resided with Rolanda M.; engaged in illicit drug use while he resided with Rolanda M.; abandoned Jasmine A. at the courthouse; had not requested the Department's assistance with regard to visitation; did not appear for the majority of the proceedings; recently tested positive for marijuana; and did not appear for agreed upon drug tests.

On February 11, 2009, the juvenile court found that Ishmail A. was a CINA and ordered that he be placed in the care and custody of Christine M. The juvenile court then ordered Rolanda M. to undergo a psychological and psychiatric evaluation, consent to releases that would provide the Department access to reports from mental health providers, and undergo a substance abuse evaluation, and follow the recommendations. The court also ordered Ekuade A. to participate in weekly drug testing, undergo a psychological evaluation, and provide the Department verification of his residence and employment. Liberal visitation, under the supervision of Christine M., was awarded to Rolanda M., and supervised visitation, under the direction of the Department, was awarded to Ekuade A.

Following an emergency hearing on March 12, 2009, the Department was granted temporary care and custody of Ishmail A. in order to place him in foster care. The juvenile court permitted the foster care placement because Christine M. was unable to financially care for Ishmail A.; Rolanda M. was unable to care for Ishmail A.; and placing Ishmail A. with Ekuade A. was not appropriate. A permanency plan review hearing was subsequently held on March 20, 2009. There, the juvenile court ordered that Ishmail A. remain in foster care, and that Rolanda M. and Ekuade A. were entitled to a minimum of two hours of supervised visitation a week.

Another permanency plan review hearing was held on April 20, 2009. There, the juvenile court ordered the following: (1) Ishmail A. remain in foster care; (2) previously ordered visitation would continue; (3) Rolanda M. had to undergo a psychological and psychiatric evaluation and follow the recommendations for treatment; (4) Rolanda M. had to continue individual therapy and psychiatric medication management; (5) Ekuade A. had to undergo a psychological evaluation and follow the recommendations; and (6) Ekuade A. had to participate in bi-weekly drug testing.

On October 19, 2009, another permanency plan review hearing was held, affirming the plan of reunification. The court then ordered that Ishmail A. remain in foster care; Rolanda M. participate in the previously ordered psychological and psychiatric evaluations;

Ekuade A. participate in substance abuse evaluation and submit to urinalysis twice a week; Ekuade A. participate in a fathering program; and that Ishmail A. and Rolanda M. participate in an attachment bonding evaluation. Additionally, the court awarded Rolanda M. and Ekuade A. two hours of weekly supervised visitation. A nearly identical order was issued following the January 14, 2010 permanency plan review hearing.

On July 2, 2010, another permanency plan review hearing was held. There, the juvenile court affirmed reunification as the permanency plan, and concluded that Ishmail A. would remain in foster care. The court then ordered that Ekuade A. would have weekly unsupervised visitation with Ishmail A., and that Rolanda M. would have at least two hours of weekly supervised visitation. Furthermore, the juvenile court ordered that Rolanda M. participate in previously ordered services; Rolanda M. submit releases that would permit the Department to obtain records of the psychological and psychiatric evaluations; Rolanda M. participate in family therapy and sign the necessary releases to access those records; Ekuade A. participate in bi-weekly drug tests and sign all releases associated therewith; Ekuade A. continue participating in a fathering program; and that the Department investigate Ekuade A.'s home and conduct a background investigation on his girlfriend.

An additional permanency plan review hearing was held on December 1, 2010, affirming the permanency plan of reunification and the foster care placement. The court found that there was a strong bond between Ishmail A. and his parents, Ishmail A. was doing well in foster care, and that Rolanda M. and Ekuade A.'s inability to complete the court ordered services was having a negative impact on Ishmail A. The juvenile court then ordered that Ekuade A. continue to have weekly unsupervised visitation, as long as he participated in testing once a week. If the drug tests remained negative, the court suggested that Ekuade A. could be given overnight visitation. The court also ordered that Rolanda M.'s visitation would remain the same; previously ordered services must be completed; and that Rolanda M. sign the necessary releases to determine whether the services were being performed. Furthermore, the court ordered that Ekuade A. participate in weekly drug testing at Concerta and sign the necessary releases to determine whether the testing was being performed. Lastly, the juvenile court ordered family therapy for Ishmail A. and Ms. J., Ishmail A.'s foster mother.

On April 8, 2011, another permanency plan review hearing was held. There, the juvenile court found that Ishmail A. was thriving in his foster care placement; the Department recommended that the permanency plan be reunification with Ekuade A.; the Department recommended overnight visitation for Ekuade A.; Rolanda M. objected to the Department's permanency plan recommendation; Ekuade A.'s deception regarding his roommate was concerning; Ishmail A. had a strong bond with his parents; Ishmail A. enjoyed visitation with Ekuade A.; and that the Department recommended that Ekuade A. participate in two drug tests at the Department's facility. The juvenile court then affirmed the permanency plan of reunification and ordered that Ishmail A. remain in foster care. Additionally, the court ordered that Ekuade A. would have unsupervised visitation, possibly extended to overnight, once he completed two negative drug tests at the Department's facility. The court then ordered an expansion of Rolanda M.'s visitation once she made progress in individual therapy. Further, the court ordered Rolanda M. to sign consent orders, and that the Department needed to generate a referral for Ishmail A. and Rolanda M. to commence individual and family therapy.

On June 27, 2011, the juvenile court ordered that Ekuade A.'s visitation would revert to supervised visitation because he missed some drug tests. A permanency plan review hearing was subsequently held on August 5, 2011. There, the juvenile court, again, was concerned that Ekuade A. was being deceptive; hoped that Rolanda M. and Ishmail A. would continue to bond; articulated that the conduct from the parties undermined the notion that either placed the best interest of Ishmail A. before their own; found that Rolanda M. and Ekuade A. were notified that the Department may recommend adoption by non-relative; and reiterated that it was important for Rolanda M. to take the necessary steps to begin family therapy. The court then ordered that Ishmail A.'s permanency plan remain reunification, but that he continue in foster care; visitation for Ekuade A. and Rolanda M. remain a minimum of two-hours of supervised visitation a week; Ekuade A. participate in a weekly urinalysis that would be conducted under the direction of the Department; a missed test would be considered a positive result; Ekuade A. sign all necessary consent forms; Rolanda M. must participate in individual therapy; Ishmail A. and Rolanda M. participate in family therapy; Rolanda M. sign all necessary consent forms; Rolanda M.'s visitation could expand once family therapy commenced, and progress was demonstrated; and the Department must proceed with securing family therapy for Ishmail A. and Ms. J.

Starting January 3, 2012, the juvenile court presided over a contested permanency plan hearing, where the Department requested that Ishmail A.'s permanency plan be changed from reunification to adoption by non-relative. The Department asserted that Ishmail A. needed permanency and Ekuade A. was unable to provide that permanency because he could

not cease using marijuana, and refused to complete a substance abuse evaluation. Furthermore, the Department inferred that Rolanda M.'s inaction undermined the notion that she could provide permanency. The Department explained that Rolanda M. completed a psychiatric evaluation eighteen months after it was ordered, and a psychological evaluation more than two years after it was ordered.

Sharon Jordan ("Ms. Jordan"), the Department's assigned social worker, testified that Ekuade A. tested positive for marijuana following the last permanency plan review hearing. However, she believed that Ekuade A. had stopped using marijuana. Ms. Jordan explained that Ekuade A. had informed her that he had stopped using marijuana in November of 2011 because he wanted to do whatever was necessary to assure reunification. Additionally, Ms. Jordan indicated that Ekuade A. had attempted, but not completed, his substance abuse evaluation. Ms. Jordan then stated that Ekuade A. had informed her that he was unable to complete the evaluation sooner because he was unavailable.

Ms. Jordan next testified that Ishmail A. was always excited to visit Ekuade A. She explained that the two of them shared a close bond. Ms. Jordan then stated that Ekuade A.'s parenting skills had progressed from the beginning of visitation. Initially, Ekuade A. would allow Ishmail A. to do whatever he wanted to do. However, Ekuade A. started to institute discipline and establish boundaries. Ms. Jordan also noted that Ekuade A. had begun discussing the need to be respectful with Ishmail A. Generally speaking, Ms. Jordan believed that Ishmail A. was saddened when visitation ended, and that he preferred visiting with Ekuade A.

Ms. Jordan also discussed visitation with Rolanda M. First, she explained there were several good visits. Second, Ms. Jordan noted there were visits in which Rolanda M. allowed Ishmail A. to do whatever he wanted. Ms. Jordan believed that Rolanda M. needed to provide more structure and discipline. However, she acknowledged that Rolanda M. was making an effort to create such an atmosphere. Third, Ms. Jordan explained that Rolanda M. had been more consistent regarding visitation issues. Notwithstanding, Ms. Jordan believed that Rolanda M. needed to be more consistent. Ms. Jordan was also concerned that Rolanda M. was unwilling to discuss things when she became frustrated.

Ms. Jordan thereafler discussed some of the difficulties she had with Rolanda M. She described one situation in which Rolanda M. told Ishmail A. one thing one day and another thing another day. Ms. Jordan then testified that Rolanda M. had recently told Ishmail A. that he would be reunited with her soon, even though such statements were not appropriate. However, she noted that Ekuade A. used to make similar statements. Ms. Jordan further explained that Rolanda M. was unwilling to work with her. Specifically, she noted that Rolanda M. was unwilling to execute service agreements, consent forms that would permit the Department to determine whether required services were being completed, and was recently unwilling to provide an address that was necessary for a referral. Ms. Jordan also testified that it would be difficult to continue working with Rolanda M. because she was dishonest.

In conclusion, Ms. Jordan recommended that Ishmail A.'s permanency plan be changed because he needed stability. Ms. Jordan was aware that Ishmail A. had a strong relationship with Ekuade A; Ishmail A. never wanted to leave Ekuade A.; Rolanda M. and Ishmail A. had a good relationship; and that Rolanda M. was starting to complete the required services for reunification. Nevertheless, Ms. Jordan testified that reunification was not the best option for Ishmail A. because neither Ekuade A. nor Rolanda M. could provide a stable environment. It was not Ms. Jordan's preference to recommend termination of parental rights, but because Ishmail A. needed permanency, she was recommending that course of action.

Lynette Rivera ("Ms. Rivera"), a therapist for the Department, testified about her therapy sessions with Rolanda M. and Ishmail A. Ms. Rivera explained that the goal of therapy was to address bonding issues, strengthen family relationships, address transition issues, and prevent visitation problems. At first, it was difficult for Ishmail A. to leave Rolanda M., but Ms. Rivera explained that everyone worked together to resolve that issue. Ms. Rivera also testified that she noticed that Rolanda M. and Ishmail A. were establishing a close bond. She then noted that the two were very affectionate and Ishmail A. had fun with Rolanda M. However, there was one incident that concerned Ms. Rivera — Rolanda M. called Ekuade A. a bad person in front of Ishmail A. and Ishmail A. became upset.

Ms. Rivera then testified that it was difficult to reach Rolanda M. when therapy initially commenced. One time, Ms. Rivera called a number that Rolanda M. had provided, and the individual who answered the phone stated that Rolanda M. had borrowed the phone. Ms. Rivera subsequently notified the Department about the situation. Additionally, there were other situations in which Ms. Rivera was unable to regularly reach Rolanda M. However, at the time of the hearing, Ms. Rivera indicated that she was able to reach Rolanda M., and that she had a working telephone number.

Ms. Rivera next testified that Ishmail A. was progressing with differentiating the roles of different indi-

viduals in his life. At times, Ishmail A. used the terms "foster mother" and "foster father." Still, other times Ishmail A. referred to Ms. J. and Mr. J., Ishmail A.'s foster father, as "Auntie" and "Uncle." Ms. Rivera believed that Ishmail A. knew Rolanda M. was his mother and that Ekuade A. was his father, but when the term "parent" was used, Ishmail A. associated it with Mr. J. and Ms. J. Furthermore, Ms. Rivera testified about the sessions with Ishmail A. and Ms. J. According to Ms. Rivera, the two of them had a good relationship and spent a significant amount of time together. Ms. Rivera believed that Ishmail A. enjoyed his time with Ms. J., and that it was apparent that Ishmail A. "was connected to" Mr. J. Ms. Rivera also noted that Ishmail A. had structure with his foster parents and appeared to listen to them. Nevertheless, Ms. Rivera acknowledged that Ishmail A. was "more playful" with Rolanda M.

Mr. J. informed the juvenile court that Ishmail A. was having behavioral issues following visitations with Ekuade A. and Rolanda M. Specifically, Mr. J. explained that Ishmail A. was not responsive to instructions and that his behavior became more problematic as visitation increased. Mr. J. believed that Ishmail A. acted out because Rolanda M. and Ekuade A. made promises each was unable to keep. Mr. J. then explained that his family, the school psychiatrist, and Ishmail A.'s teachers had developed strategies to encourage good behavior. However, the strategies were not always successful.

Rolanda M. testified that Ishmail A. enjoyed spending time with her; he was affectionate with her; their visits were pleasant; and that he never wanted to leave her. Rolanda M. then discussed her relationship with Ms. Jordan. Rolanda M. explained that Ms. Jordan created problems because she would "gossip." She then highlighted a few reasons why she was unwilling to work with Ms. Jordan: (1) Ms. Jordan used her umbrella to cover herself, and not Ishmail A., during a rainstorm, and (2) Ms. Jordan smoked cigarettes around Ishmail A. Rolanda M. also testified that she complained to Ms. Jordan's supervisor, and according to her, another individual was assigned to supervise visitation.

At the conclusion of the permanency plan review hearing, the juvenile court changed Ishmail A.'s permanency plan from reunification to adoption by non-relative. First, the court articulated that Ishmail A. would not be safe and healthy in Ekuade A.'s home because of the most recent positive drug tests. The court, in particular, noted that Ekuade A. had not made significant progress regarding the use of marijuana. Then, acknowledging that some of the tests could have been false positives, the court articulated that Ekuade A. was unable to provide a specimen on at least one occasion, he was out of town and did not submit to a drug test on other occasions, and that the false positives could have been a result of recent use. Moreover, the court noted that Ekuade A. did not obtain a substance abuse evaluation for approximately three years, and that the previous test results were suspicious, considering that he began testing positive when the testing facility changed.

The juvenile court next concluded that Ishmail A. would not be safe and healthy in Rolanda M.'s home because she was unwilling to follow the court orders. Namely, the court indicated that Rolanda M. was unwilling to sign releases for the Department to monitor the consistency of her therapy, and disregarded orders to obtain psychological and psychiatric evaluations. Additionally, noting that Rolanda M. blamed the Department for problems completing services, the juvenile court articulated that Rolanda M. was unwilling to cooperate with the Department.

The juvenile court then recognized that Ishmail A. had a strong attachment to Ekuade A., and was bonding with Rolanda M., but did not have an attachment to siblings. The court then observed that Ishmail A. retained an emotional connection with Mr. J. and Ms. J. The court noted that Ishmail A. had resided with Mr. J. and Ms. J. for three years, and that his day-to-day needs were addressed by them. Furthermore, the juvenile court articulated that removing Ishmail A. from Mr. J. and Ms. J. could compound the issues occurring at school. Finally, noting that this was a "glaring" issue, the juvenile court reviewed the possibility of Ishmail A. remaining in the State's custody. The court indicated that Ishmail A. was "struggling to understand his place in the world, because he's lived between two worlds for three years, which . . . is far too long for this child." Ultimately, the juvenile court concluded that Ishmail A.'s permanency plan should be changed from reunification to adoption by non-relative.

An appeal was subsequently noted by Ishmail A., Rolanda M., and Ekuade A., which we have consolidated. Additional facts shall be added as required for our discussion of the issues.

STANDARD OF REVIEW

When reviewing a juvenile court's decision to change a permanency plan, we employ three related standards:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)][4] applies. [Secondly,] 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.

In re Yve S., 373 Md. 551, 586 (2003) (citations and emphasis omitted).

Abuse of discretion, in the context of reviewing a permanency plan order, was explained *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997):

> Judicial discretion was defined in *Saltzgaver v. Saltzgaver*, 182 Md. 624, 635, 35 A.2d 810, 815 (1944) (quoting Bowers' Judicial Discretion of Trial Courts at P 10) as "that power of decision exercised to the necessary end of awarding justice and based upon reason and law, but for which decision there is no special governing statute or rule." It has also been defined as a "reasoned decision based on the weighing of various alternatives." *Judge v. R and T Construction Co.*, 68 Md. App. 57, 60, 509 A.2d 1236, 1237 (1986), *cert. denied* 307 Md. 433, 514 A.2d 1211 (1986). There is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court," *North v. North*, 102 Md. App. 1, 13, 648 A.2d 1025, 1031, (1994) (quoting *In Re Marriage of Morse*, 240 Ill. App. 3d 296, 607 N.E.2d 632, 640, 180 Ill. Dec. 563 (Ill. App. 1993)) or when the court acts "without reference to any guiding rules or principles." North, 102 Md. App. at 13 (quoting *Long John Silver's, Inc. v. Martinez*, 850 S.W.2d 773, 775 (Tex. App. 1993)). 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.* (quoting *Shockley v. Williamson*, 594 N.E.2d 814, 815 (Ind. App. 1992), or when the ruling is "violative of fact and logic," *Id.* (quoting *Young v. Jangula*, 176 Mich. App. 478, 440 N.W.2d 642, 643 (1989)).
>
> Questions 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." *Northwestern National Insurance Co. v. Samuel Rosoff Ltd.*, 195 Md. 421, 436, 73 A.2d 461, 467 (1950). *See Hamilton v. Hamilton*, 242 Md. 240, 243, 218 A.2d 684, 686, *cert. denied,* 385 U.S. 924, 87 S.Ct. 239, 17 L.Ed. 2d 147 (1966); *Ryan v. Johnson*, 220 Md. 70, 150 A.2d 906 (1959); and *Clarke Baridon, Inc. v. Union Asbestos and Rubber Co.*, 218 Md. 480, 483, 147 A.2d 221, 223 (1958); *Cromwell v. Ripley*, 11 Md. App. 173, 177, 273 A.2d 218, 221 (1971), citing *Abrams v. Gay Investment Co.*, 253 Md. 121, 251 A.2d 876 (1969). 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. *North*, 102 Md. App. at 14, 648 A.2d at 1032.

DISCUSSION

"A parent's interest in raising a child is, no doubt, a fundamental right[;]" but that right is not absolute. *See In re Mark M.*, 365 Md. 687, 705 (2001); *see also in re Yve S.*, 373 Md. at 566-68. To be sure, a parent's right to raise a child can be revoked when justified. *See In re Adoption/Guardianship No. 10941,* 335 Md. 99, 112 (1994). If a "child has been abused, has been neglected, has a developmental disability, or has a mental disorder" and "[t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs . . . ," a court may intervene and declare that the child is a CINA. *See* C.J. § 3-801(f).

Once a child has been declared a CINA, as was the case here, a "court shall hold a permanency planning hearing to determine the permanency of a child. . . ." C.J. 3-823(b)(1). At a permanency plan hearing, a court, mindful of a child's best interests, must select a permanency plan from the following options:

> 1. Reunification with the parent or guardian;
>
> 2. Placement with a relative for:
>
> A. Adoption; or
>
> B. Custody and guardianship under § 3-819.2 of this subtitle;

> 3. Adoption by a nonrelative;
>
> 4. Custody and guardianship by a nonrelative under § 3-819.2 of this subtitle; or
>
> 5. Another planned permanent living arrangement that:
>
> A. Addresses the individualized needs of the child, including the child's educational plan, emotional stability, physical placement, and socialization needs; and
>
> B. Includes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life. . . .

C.J. § 3-823(e)(1).

In determining the appropriate permanency plan for a child, a 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.

F.L. § 5-525(f)(1).

A permanency plan is established "to set the direction in which the parent, agencies, and the court will work in terms of reaching a satisfactory conclusion to the situation." *In re Yve S.,* 373 Md. at 582. "Reunification with the parent is presumptively the [preferred] option, and, 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 [ ].'" *In re Adoption/Guardianship of Cadence B.*, 417 Md. 146, 157 (2010) (quoting *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 495 (2007)); *see also In re Yve S.*, 373 Md. at 582 ("[U]nless there are compelling circumstances to the contrary, the plan should be to work toward reunification, as it is presumed that it is in the best interest of a child to be returned to his or her natural parent."); *see generally In Re Adoption/Guardianship No. 10941*, 335 Md. at 106 ("The overriding theme of [relevant Maryland] legislation is that a child should have permanency in his or her life."). Nonetheless, a court must consider the best interest of a child and select a permanency plan that is most appropriate for the situation. *See In re Adoption/Guardianship of Cadence B.*, 417 Md. at 157.

In the case *sub judice*, the juvenile court ordered that Ishmail A.'s permanency plan be reunification. On several occasions, the permanency plan was reviewed "to determine progress and whether, due to historical and contemporary circumstances, that goal should be changed." *In re Yve S.*, 373 Md. at 582. At such hearings, the court was required to do the following:

> (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.

C.J. § 3-823(h)(2).

Ishmail A.'s permanency plan was changed to adoption by non-relative following several permanency plan review hearings in which reunification was affirmed. For the reasons that follow, we conclude that the juvenile court's findings were legally correct, and that it was not an abuse of discretion to change the permanency plan from reunification to adoption by non-relative.

Rolanda M.
A.

Rolanda M. argues that the juvenile court was clearly erroneous in concluding that she was resistant to services. Specifically, she contends that the court ignored that she completed two psychiatric evalua-

tions, 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 of 2010, and her psychological evaluation in March of 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, Ms. Jordan testified that Rolanda M. was uncooperative. Ms. Jordan explained that 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 that Rolanda M. was unwilling to complete the court ordered services. Thus, we believe that the juvenile court's determination that Rolanda M. was resistant to services and uncooperative was supported by the record.

B.

Rolanda M. asserts that the juvenile court abused its discretion in holding that it would be harmful to remove Ishmail A. from his current placement, and determining that Ishmail A.'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. then asserts that the court abused its discretion when it concluded that reunification was not possible because there was "discord" between herself and Ms. Jordan.[5] Rolanda M. infers that the juvenile court focused on her relationship with Ms. Jordan and ignored that she "substantially" complied with the court's orders.

In re Yve S., supra, 373 Md. at 551, is instructive to this discussion. There, Yve S. entered foster care in 1997. *Id.* at 561. Shortly thereafter, it was discovered that her mother, Yvonne S., had bipolar and schizoaffective disorder. *Id.* In June of 1998, the two were reunited because Yvonne S. completed mental health treatment and parenting classes. *Id.* The two then moved to North Carolina. *Id.* Yve S. was returned to foster care in Maryland soon thereafter. *Id.* at 562. Subsequently, Yvonne S. signed an agreement with the Montgomery County Department of Health and Human Services, agreeing to participate in mental illness treatment. *Id.* Yvonne S. also agreed that she would obtain stable housing and employment. *Id.* In March of 1999, Yvonne S. returned to Maryland and began receiving mental health treatment. *Id.*

In the summer of 2000, Yvonne S. had maintained stable employment and housing for more than a year and was regularly receiving mental health treatment. *Id.* Yvonne S. was also having weekend-long visitation. *Id.* Accordingly, the Montgomery County Department of Health and Human Services advocated that Yve S.'s permanency plan be changed from adoption to reunification. *Id.* at 562-63. However, Yve S.'s foster parents requested that the court reject the recommendation because Yvonne S.'s mental illness would preclude her from being able to appropriately care for Yve S. *Id.* at 563. The Montgomery County Department of Health and Human Services changed its recommendation once it learned the foster parent's position. *Id.*

Prior to the next permanency plan review hearing, Yvonne S. lost her job. *Id.* However, she had two part-time jobs and was volunteering. *Id.* Notwithstanding, she was nervous about the hearing. *Id.* Then, a couple days before the hearing, Yvonne S. and Yve S. visited a statue at the Bethesda Naval Hospital, and attended a church service with a woman Yvonne S. met at a homeless shelter. *Id.* The social worker assigned to the case believed that a manic episode was imminent because of Yvonne S.'s nervousness and her activities prior to the hearing. *Id.* Yvonne S.'s treating psychiatrist disagreed. *Id.* Nevertheless, the court reduced Yvonne S.'s visitation and ordered that Yve S.'s permanency plan would be long-term foster care. *Id.* at 564. Several months later, the permanency plan was affirmed, despite testimony that Yvonne S. never had a manic episode, Yvonne S. was employed, earning a higher income, and there were no visitation issues. *Id.* In relevant part, the court reasoned:

> I've been the judge that's seen Yve [S.] and watched her progress since she came back from North Carolina. I've seen Yve [S.] on many occasions. She's come in to see me. We usually don't have her sitting here. Sometimes we do, for the court hearings, if they weren't too controversial, we had her here. She's drawn me many pictures. She's written me many letters. We've had many conversations at foster care picnics. She's one of the first children that always comes up to me and says hi, Judge [ ], how are you, and tells me what's going on with her, and introduces me to all her friends. She's a lovely, delightful little girl.
>
> But, during all the years that I've known Yve [S.], I know that she's not what she appears on the surface. She

> also has many, many problems. Her mom is a wonderful person, and for the most times that she's been in the courtroom, she's been very, very appropriate, very polite, respectful, uh, trying to answer questions that were given to her, trying to give information and has never, ever shown anything but complete love and concern for Yve [S.]

And I think that [Counsel for Yve S.] is right, that Yve [S.] has always wanted to be with her mom. There's no question about it, and her mom has always wanted Yve [S.] with her. The problem has been that for a good portion of this case, [Yvonne S. has] not been capable of taking care of Yve [S.]. And for also a good portion of the case, even if [Yvonne S. was] capable, at certain times, [Yve S. has] had some real severe problems. I remember when she first went to live with [Yve S.'s first foster family]. She had some real acting-out problems. As a matter of fact, before she even came into care, the school [was] so concerned, her problems were such, she was acting out in school. They were very, very concerned about her, with what was going on, which is, I think what eventually brought the [Montgomery County Department of Health and Human Services] into the case, was the school's concern, because they saw her on an everyday basis, and her inability to conform her behavior, uh — brought her to the attention of, uh, the authorities.

> There's no doubt in my mind that [Yvonne S.] absolutely adores Yve [S.], and there's no doubt in my mind that Yve [S.] adores her mom. But, I cannot at this time return Yve [S.] to her mom. Although she's doing much better than at any time that I've ever seen her, just a few things stand out that are indicative of decisions that she made that put Yve [S.] at risk.
>
> One of the reasons that she lost her job, and who knows what the real reason is, but we've had a lot of people testify about it. [Yvonne S.] testified about it, Ms. Rose [the social services case worker] testified about it, the minister testified about it, uh — is that week she chose to go to Suburban Hospital rather, with a friend that was having a problem, rather than go to work. Now, I certainly admire her for doing that.
>
> She is a good friend and wants to help the person, but that was one of the straws that broke the camel's back, about why she lost her job.
>
> On Sunday, I think that it's wonderful that she works with women at the homeless center, because she herself was there for a while. She understands how important that it is to be involved there. But, she doesn't need to bring that woman around Yve [S.]. [Yve S. is] a child who needs constant care, attention, structure, as well as love.
>
> Uh — I'm very aware of [Yve S.'s] condition when she came back from North Carolina and all of the things that happened to her in North Carolina. Uh — that situation was very detrimental to her. She ended up being placed, by her mom, left in the care of some people who were pretty bad people. Hopefully nothing happened to her. We don't know for sure whether it did or it didn't, but she ended up having to go into foster care there, and then coming back here.
>
> As recently within the last two weeks, she says she wanted to kill herself. That's definitely a child with special needs. Most ten-year-olds do not go around saying they want to kill themselves. She says that she wants to be with her mom, because her mom needs her. She wants to make her mom happy. That's a very big burden for a ten-year-old girl. It's really hard for her to take care of herself, much less feel the responsibility of having to take care of her mom.
>
> I don't know, there's no way to ever know whether [Yvonne S.] will be able to take care of Yve. [S.] I hope so, but it is certainly not now. And Yve [S.] asked me to make a decision, and I'm not going to have that decision be that we'll work towards getting her home with her mom, because I don't see the realistic expectation of that. I honestly don't.
>
> Taking care of her on weekends, and I'm so glad that the visits have been successful, is one thing, but trying to manage a child like Yve [S.], with all of the, the special attention that she needs, and all the coordination that is involved with getting her to the therapist that she needs, working with the

school system. [Yvonne S.'s] tried, she really has tried, and I give her all kinds of credit for that. I think that she's done a wonderful job with that. But no one today says that she's able to do it, and I don't know when she'll ever be able to do it.

The job situation is certainly part of it, but that's not the whole thing. It's a judgment consideration. I understand what Ms. Rose talked about her concern about the escalation in behavior, and I also understand that Dr. Harold [Yvonne S.'s psychiatrist] sees that not as a problem. He talked about the lack of communication. I was struck not by the same things that Ms. Rose was struck by, with Ms. S.'s testimony, but her — inability sometimes to listen to what the question is, and answer it. She often answers questions that are asked. And Dr. Harold alluded that with — Ms. Rose testified that she tried to say to Ms. S., I can't read his writing, I don't understand what he means, you've got to tell me what the explanation was, and it became a big problem.

Somehow or another, that lack of communication, and I don't really know why, but it happens a lot. And today, when [Yvonne S.] was testifying, she often answered questions that were not the questions that were asked. The information was certainly beneficial and appropriate, but it was not the question that was asked.

My point in bringing that up is that Yve [S.] is a child who requires constant, vigilant attention, and she needs clear guidelines, structure. She needs to know, she has to act within something that she can anticipate. And the progress that she's made in the [current foster parent's] home, from the testimony has been, because of the structure that they've been able to provide for her.

I have extreme concerns about the mom ever being able to provide the structure that Yve [S.] needs. So, I know that it's taken me a long time to get here, but it's taken us a long time, and we've heard a lot of evidence. And, I don't think that any of it wasn't beneficial. I was very interested to hear from, us — [Yvonne S.'s] minister, and I'm so happy for her that she has him in her life, and that she has the extended church. I think that information was very, very beneficial, and I'm glad for her that she has that. And it's a real network that can help her.

I think that it's wonderful that she has Dr. Harold. Clearly, they have an excellent relationship, and she's made so much progress from where she's ever since the 50 — how many months, four, six, since we've been involved in this case, uh, she's made wonderful progress, and she's doing really, really well. But I just cannot make the decision that she's going to be able to take care of Yve [S.]

So, I am going to adopt the permanency plan of long-term foster care. I feel that it's appropriate that she remain, where she has been, for over thirty-some months, where she has done very well. She's blossomed there. On the other hand, I think that it's very appropriate that she continue to have visitation with her mom, and as frequent — certainly a minimum of once a week, and as long as both of them are able to maintain safety.

Again, my priority is Yve [S.] She is number one. It's my understanding from listening to Ms. Rose testify that she's hoping to get back to weekend visits, very, very soon, and I would certainly hope that's what happens. But, I am going to put the visitation minimum of once a week, under the direction of the [Montgomery County Department of Health and Human Services], because clearly, in this case, things change. Things change with Yve [S.], and things change with her mom.

Id. at 589-93 (emphasis omitted).

On appeal, the Court of Appeals explained that the record was devoid of evidence that Yvonne S. was terminated from her employment as a result of unsound judgment; *id.* at 594-600; it was unable to understand how Yvonne S.'s religious conviction and volunteering placed Yve S. at risk of future abuse or neglect; *id.* at 600; Yvonne S.'s "testimonial demeanor" did not indicate that she would be unable to provide structure for Yve S., or that there was a potential for

future abuse or neglect; *id*. at 600-03; and that there was insufficient support to conclude that Yvonne S. was unable to care for Yve S. *Id*. at 603-08. Ultimately, the Court of Appeals noted that 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." *Id*. at 618.

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. Ishmail A. was placed in foster care in March of 2009. Soon thereafter, Rolanda M. was ordered to participate in a psychological and psychiatric evaluation. The psychiatric evaluation was completed in December of 2010; the psychological evaluation was completed in March of 2011. Rolanda M. also repeatedly disregarded the court's orders to sign consent forms that would permit the Department to ascertain whether services were being completed. If a person neglects to complete a psychological or psychiatric evaluation when it is required for reunification, then it is not inconceivable that the same person would be neglectful in the day-to-day care of a child. Thus, we believe that the complete disregard for completing services to ensure reunification supports the notion that Ishmail A. would not be safe or healthy with Rolanda M. in the near future.

Furthermore, the juvenile court believed that it would be unsafe and unhealthy for Ishmail A. to be with Rolanda M. because she was unwilling to cooperate with the Department. We believe that 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 A. would be safe or healthy with Rolanda M. was impossible. Additionally, there were the following visitation issues that were disconcerting: (1) Rolanda M. left a visit following an outburst, (2) Rolanda M. missed part of a visit because of an errand, and (3) Rolanda M. fell asleep during a visit. If these issues occurred during limited visitation, it follows that Rolanda M. might neglect Ishmail A. in the near future.

Ekuade A.

A.

Ekuade A. argues that the juvenile court erred when it changed the permanency plan from reunification to adoption by non-relative. Ekuade A. posits that the court's factual findings suggest that the court's decision to change the permanency plan to adoption by non-relative was the "incorrect result." Ekuade A. then avers that it was inconsistent to order a permanency plan that requires the termination of parental rights, and yet, articulate that it is in the best interest of Ishmail A. to maintain contact with his parents.

Ekuade A. suggests that *In re Shirley B.*, 419 Md 1 (2011), is instructive. There, the Prince George's County Department of Social Services removed Shirley B., Davon B., Jordan B., and Cedric B. from the care and custody of Ms. B. *Id*. at 6. Ms. B. was subsequently offered services that were geared toward developing parenting and cognitive skills. *Id*. However, the Prince George's County Department of Social Services was unable to fund these services. *Id*. Following twenty-eight months of foster care, the assigned case worker was unsure that the children would be safe in the care of Ms. B., or that it was in their best interest to be returned to her. *Id*. Subsequently, the children's permanency plan was changed from reunification to adoption, because the court was concerned about the children's welfare and need for stability. *Id*.

On appeal, Ms. B., among other things, challenged the court's decision to change the permanency plan from reunification to adoption. *Id*. at 33. The Court of Appeals concluded that Ms. B. did not present evidence that the children would not, again, be neglected or exposed to physical and sexual violence. *Id*. Moreover, despite recognizing that Ms. B. had no control over the funding issue, the Court explained that the children had languished in foster care, "with no end in sight . . .," while Ms. B. was unable to improve her situation. *Id*. Even though Ms. B. was cooperative with the Prince George's County Department of Social Services, the Court of Appeals ultimately concluded that the court did not abuse its discretion in changing the permanency plan to adoption, because it had to balance her interests against the children's health and safety. *Id.* at 33-34. Furthermore, the Court noted that it was not error to change the permanency plan because the record suggested that the children could not be safely returned to Ms. B. in the near future. *Id*. at 35.

Almost everyone involved in the case *sub judice* recognized the strong bond between Ishmail A. and Ekuade A. Most people believed that reunification with Ekuade A. was the best option for Ishmail A. However, reunification was not possible until Ekuade A. stopped using marijuana. Throughout the case, Ekuade A. produced negative and positive test results. Some of those negative results, however, were questionable. Moreover, there were several instances in which there were inconclusive results, Ekuade A. was unable to provide a specimen, or Ekuade A. was absent for appointments. The juvenile court believed that Ekuade A.'s inability to cease using marijuana challenged his ability to keep Ishmail A. safe and healthy. We believe that Ekuade A.'s repeated unwillingness to cease using marijuana, or complete the substance abuse treatment, was sufficient to undermine the notion that Ishmail A. would be safe and healthy with Ekuade A. in

the near future.

In any event, *In re Shirley B*. suggests that it was not inconsistent for the juvenile court to change the permanency plan from reunification to adoption by non-relative — noting that an open adoption would be in Ishmail A.'s best interests — and recognizing that Ishmail A. had a close relationship with his parents. The record suggested that Ishmail A. 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 was the case in *In re Shirley B.*, we believe that it was not an error for the juvenile court to change the permanency plan from reunification to adoption by non-relative, and suggest that the child maintain contact with his natural parents. *See id*. at 33-35.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE SPLIT EVENLY BETWEEN APPELLANTS.

FOOTNOTES

1. Md. Code (2006 Repl. Vol.), § 3-801(f) of the Courts & Judicial Proceedings Article ("C.J."), defines a child in need of assistance as someone who requires intervention because:

> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

2. On September 14, 2012, Ishmail A. dismissed his appeal.

3. Rolanda M. presents the following questions:

> 1. Was the juvenile court clearly erroneous when it determined that [Rolanda M.] was resistant to services based upon her difficulty communicating with one social worker?
> 2. Did the juvenile court abuse its discretion in changing the permanency plan from reunification to adoption where [Rolanda M.] was substantially compliant with the court's orders?

Ekuade A., in his own words, articulates the following question:

> 1. Did the trial court err when it changed the permanency plan for Ishmail [A.] from one of reunification with a parent to one of adoption by a non-relative?

4. Md. Rule 8-131(c) provides:

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

5. Admittedly, Rolanda M.'s relationship with Ms. Jordan was a part of the circumstances that influenced the change in the permanency plan. However, we believe that the permanency plan was ultimately changed because Ishmail A. needed permanency. First, the juvenile court noted that it was concerned that Rolanda M. was inconsistent with regard to completing services. Second, the court articulated that it would not allow Ishmail A. to languish in foster care while Rolanda M. attempted to complete the court ordered services. Lastly, the court recognized that even though reunification was the permanency plan for more than two years, Rolanda M. was not sufficiently progressing towards reunification.

Cite as 12 MFLM Supp. 15 (2012)

Child custody and visitation: supervised visitation: fees

Lydia F. Leverenz
v.
Lance S. Leverenz

No. 250, September Term, 2011

Argued Before: Woodward, Zarnoch, Cahill, Robert E., Jr. (Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: October 10, 2012. Unreported.

In awarding or modifying custody and visitation, the trial court is under no obligation to fashion a schedule that gives the noncustodial 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 for Frederick County entered a judgment of absolute divorce between Lydia F. Leverenz, appellant, and Lance S. Leverenz, appellee. The court granted the parties joint legal and physical custody of the parties' minor children, Kathryn and Andrew, and awarded primary physical custody of the children to appellant.

On August 26, 2009, appellee filed an emergency ex parte motion alleging that appellant had removed their minor children from the State of Maryland. On August 27, 2009, the trial court issued an amended custody order, awarding custody of the minor 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 a trial on these motions, the court issued a written opinion and order on February 24, 2011. In its order, the court awarded appellant supervised visits with the minor children two times per month and one unmonitored telephone call each week, and ordered appellant to pay child support to appellee in the amount of $401 each month. The court also awarded attorney's fees to appellee in the amount of $3,000 and directed the parties to divide Dr. Snyder's fees equally.

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 presents three questions for our review, which we have rephrased:

1. Did the trial court err in not fashioning a visitation schedule that would permit appellant to prove to the trial court that greater access with the parties' minor 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?

For the reasons set forth herein, we shall answer each question in the negative and therefore afflim the February 24, 2011 order of the circuit court.

BACKGROUND

The parties were married on March 26, 1994. They had two children: Andrew, born on August 2, 1999, and Kathryn, born on October 1, 1996. The parties separated in October 2007, and on July 18, 2008, appellee filed in the circuit court a complaint for limited divorce, injunctive relief, and *pendente lite* relief.

On September 17, 2008, the court issued a *pendente lite* order granting, among other things, physical custody of the minor children to appellant with access to appellee on alternating weekends from Friday evening at 6:00 pm to Sunday evening at 7:00 pm. The court also ordered appellant to surrender the children's passports to the children's attorney within ten days of the attorney's appointment. On October 9, 2008, appellee filed an amended complaint for absolute divorce and other relief.

On November 6, 2008, appellee filed a motion for contempt, alleging, *inter alia*, that appellant denied appellee access to the children as required by the *pendente lite* order and refused to surrender the children's passports. In the motion, appellee stated that he was concerned that appellant would take the children to Nicaragua, which was appellant's country of origin, in order to remove the children from appellee

and from the jurisdiction of the circuit court.

At the hearing on the motion for contempt on December 1, 2008, appellant refused, in open court, to deliver the children's passports to the court after having been ordered to do so, and then, after the court recessed the hearing to allow appellant sufficient time to deliver the passports to the court, appellant failed to return to the court at the specified time to surrender the passports. On December 2, 2008, the trial court issued an order directing that a body attachment be issued for the arrest of appellant for failure to surrender the passports of the children and that appellant could purge the contempt and gain her release by surrendering those passports to the court. The court also ordered that appellee "shall have immediate *pendente lite* sole legal and physical custody of the minor children."

Appellant was taken into custody on the body attachment on December 3, 2008, and was released the same day when she surrendered the children's passports to the court.[1] After a further hearing on appellee's motion for contempt, held on December 15, 2008, the court ordered, among other things, that appellee continue to have *pendente lite* sole legal custody of the children and that the parties have shared physical custody of the children.

On June 4, 2009, the trial court entered a judgment of absolute divorce and awarded the parties joint legal custody of their minor children. The trial court further awarded primary physical custody to appellant and granted appellee access to the children every other weekend during the school year and eight weeks during the summer, with the exception of three weekends. On July 17, 2009, the trial court amended the judgment of absolute divorce to grant appellee access to the children between June 16, 2009 through August 23, 2009 and to prohibit appellant from having physical contact with the children during that period.

On August 23, 2009, appellee returned the children to appellant. On August 24, 2009, appellee called the children's respective schools inquiring into whether they had made it to their first day of classes. Appellee was informed that the children were absent from school without any notice from appellant. The children then did not report to their respective schools on August 25 or 26. On August 25, appellee requested that the Frederick County Sheriff conduct a welfare check at the home of appellant. Appellee was informed that the children and appellant were not home and that a moving company was removing furniture from the home. Appellee feared that appellant intended to take the children to Nicaragua by way of Mexico.

On August 26, 2009 appellee filed an emergency ex parte motion for sole custody of the children. On August 27, 2009, the circuit court issued an amended custody order granting custody of the children to appellee. On or about September 14, 2009, appellant was apprehended in Florida, and the children were returned to appellee. Appellant later pled guilty to two counts of child abduction under Maryland Code (1984, 2006 Repl. Vol.), § 9-305 of the Family Law Article ("F.L."). Appellant was placed on probation and was prohibited from contacting the children except as authorized by the court in the instant proceedings. Pursuant to a consent order, dated January 13, 2010, appellant was permitted monitored telephone access with the children on December 24,2009, and January 1, January 9, and January 16, 2010.[2]

On January 22, 2010, the trial court signed another consent order that provided for reunification therapy with Dr. Snyder. The consent order stated that

> each party shall make an initial deposit of $500.00, to be paid to Dr. Snyder, and the Court reserves jurisdiction to require additional deposits and to apportion the expenses related to Dr. Snyder between the parties.

On June 1, 2010, appellant filed a motion for visitation or custody. On June 21, 2010, appellee filed an opposition to appellant's motion for visitation or custody. On July 8, 2010, appellee filed a petition for child support. In both his opposition to the motion for visitation or custody and his petition for child support, appellee asked for an award of attorney's fees.

On February 9, 2011, the trial court held a hearing on appellant's motion for visitation or custody and appellee's motion for child support. At the hearing, the court heard testimony from Dr. Snyder regarding her meetings with the parties and the children. Dr. Snyder stated that appellant intended to "right the wrong that has been done by the Court" and "to have the children returned to her care." Dr. Snyder learned that appellant viewed the care provided by appellee as "inadequate or potentially neglectful." As Dr. Snyder explained, appellant would also interrogate the children on appellee's parenting decisions:

> [A]nything that the kids mention about their day to day life with dad mom is very quick to, [ ] query the appropriateness of the parenting decision. . . . It just kind of has the tone of quality, quality control inspector, [ ] in her questioning of the children.

Dr. Snyder also identified appellant's lack of support for appellee's custody of the children as the most pressing issue:

> [I]n this particular family the issues between mom and children have not been, [ ] needing to work at the children's bonding or attachment with

> their mom, rather[,] an acceptance [ ] of, for both the children and mother, [ ] that the Court has made the decision that father will be the primary custodial parent, [ ] and that [appellant], in particular, needs to voice support of that decision, [ ] to the children and that she needs to get on board, and, [ ] not only accept that that's reality, [ ] but wholeheartedly to the degree possible, endorse that this is how things are going to be.

Dr. Snyder was of the opinion that therapy could not improve appellant's attitude towards the court and appellee, saying that "the firmness of her convictions, [ ], are really immovable." Dr. Snyder concluded that appellant could not be trusted with unsupervised visitation:

> I can't recommend that at this time because I don't even hear in [appellant]'s testimony . . . acceptance of the circumstances of the vacation/abduction. So I, I think the risk that she would predictably, [ ] maintain and follow the boundaries that are in place, [ ] I don't have any confidence in that.

At the conclusion of the hearing, the trial court orally made findings of fact and rulings thereon. Thereafter, the court issued a written Opinion and Order dated February 24, 2011. In the written opinion, the court said:

> This case has a long and complex history. In June 2009, this Court granted a divorce and ordered that the parties share joint physical and legal custody of the minor children . . . and providing that the children live with their father during the summer vacation from school. [Appellant] refused to allow the children to go to [appellee]'s home when summer vacation commenced. In July, in response to an "emergency petition for contempt," the Court ordered that the children be transferred to their father immediately. At the end of the summer vacation, [appellee] returned the children to their mother pursuant to the terms of the divorce judgment. [Appellant] left town with the children the next day without notifying [appellee] about their departure or destination.
>
> Upon learning that [appellant] had absconded with the children, [appellee] sought and obtained an emergency order granting him custody and authorizing law enforcement agencies to assist in effectuating the return of the children to him. Within a few weeks [appellant] was apprehended and arrested in Florida on charges of kidnapping the children. The children were reunited with [appellee], and [appellant] was returned to Maryland on the open charges. She has since been found guilty and is on probation to this court. In September 2009, [appellant] was granted weekly telephone access with the children, to be monitored by [appellee]. After many delays and postponements the Court heard the case on the merits and makes the following findings.
>
> The parties are still far apart in their views of what is best for the children. [Appellee] believes that [appellant] will attempt to abscond with the children again if she is allowed to have unfettered access. [Appellant] has encouraged the children to believe that she will regain custody and that the three of them will live without [appellee] in the picture. Dr. Snyder, who was appointed by the Court to provide therapy, confirms that [appellant] has refused to accept [appellee]'s custody of the children and has attempted to persuade the children that the circumstances are only temporary.
>
> When parties cannot agree with each other about how best to care for their children, a judge must decide what is in the children's best interest. Ideally, the children will have meaningful time with both parents. Judges recognize how important it is for children to have close relationships with their mother and father.
>
> In 2009, [appellee] agreed that it was in the best interest of the children to live with their mother. He could still spend time with them regularly and be a part of their lives. The judge accepted the agreement of the parents and ordered that Kathryn and Andrew live with their mother while also seeing their father during the summer and on alternating weekends. Unfortunately,

[appellant] did not live up to the agreement and prevented the children from seeing their father after school ended in the spring of 2009. Because the parents were no longer in agreement, the judge had to decide what was best for the children. The judge ordered that the children spend the rest of the summer with their father without seeing their mother. The judge ordered that, at the end of the summer, the children would return to live with their mother during the school year while seeing their father on weekends.

When the children returned to their mother at the end of the summer vacation, she took them from the state without telling their father that they were leaving or about where they were going. In doing so, she committed a crime. The actions of the parents have proven that they cannot agree as to what is in the best interest of the children. Therefore, the judge must decide.

Because [appellant] has proven on two occasions that she will try to keep the children from their father, the Court cannot allow her to have custody. [Appellee] has proven during the past year and a half that he can take good care of the children. Therefore, the Court finds that it is in the best interest of the children that they live with their father.

It is important for children to have time with both parents. However, [appellant] has demonstrated that she cannot be trusted to give them time with [appellee]. Until [appellant] can demonstrate that she will act in the best interests by respecting their relationship with [appellee], her time with the children must be supervised.

At trial, the Court determined the gross incomes of the parties and the appropriate adjustments to calculate child support within the Maryland child support guidelines.

Accordingly, in its order, the circuit court awarded physical and legal custody of the children to appellee, with visitation to appellant in the form of one addition session with Dr. Snyder and the children, a weekly unmonitored telephone call, one supervised visit in March and April of 2011, and two supervised visits each month thereafter.[3] In addition, the court ordered appellant to pay $401 in child support each month[4] and $3,000 in attorney's fees to appellee's counsel. Finally, the court ordered the parties to be equally liable for the fees of Dr. Snyder.

This timely appeal followed. Additional facts will be set forth below as necessary to resolve the questions presented.

DISCUSSION

A,
The Visitation Schedule
1.
The Parties' Contentions

Appellant claims that the circuit court found that "the best interest[ ] of the children would be served by the [a]ppellant having unfettered and uncontrolled access to the parties' minor children." Appellant therefore contends that the court erred by failing to establish a mechanism for her to demonstrate her ability to act in the best interest of the children, and thereby gain unfettered access to the children.

Appellee counters that the trial court did not find that appellant's unfettered access was in the best interest of the children, but rather that, but for appellant's defiant conduct towards the court and appellee, the court "would say" that appellant's unfettered access was in their best interest. Instead, appellee contends that the court found that appellant could not be trusted, that her actions had traumatized her children, that she had abducted the children without any plan to return them, and that her influence on the children was negative. Appellee also claims that the court was under no obligation to fashion the kind of remedy that appellant seeks. Appellee asserts not only that appellant failed to offer any legal support for her position, but that Maryland law on private custody issues discourages the micromanagement that appellant requests.

2.
Standard of Review

"Orders related to visitation or custody are generally within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion." *Barrett v. Ayres*, 186 Md. App. 1, 10, *cert. denied*, 410 Md. 560 (2009). In *In re Yve S.,* 373 Md. 551, 586 (2003), the Court of Appeals explained that

> [s]uch broad discretion is vested in the [trial judge] because only he [or she] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he [or she] 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.

(Citation omitted).

3.
Analysis

At the outset, appellant claims that the trial court found that the best interest of the children would be served by appellant having unfettered and uncontrolled access. Appellant is mistaken.

In its oral findings at the conclusion of the February 9, 2011 hearing, the court said, in relevant part:

> Now, [appellant], you can present it any way you like, but this Court has found beyond a reasonable doubt that you abducted the children without any plan to bring them back. That's all I need. And that has been, that, still today, is the biggest problem in this case, you've heard it, I know you don't listen, but you've heard it over and over again. So we're here today trying to somehow to solve a problem that you're making us, making difficult to solve.
>
> * * *
>
> By resisting the authority of the Court you're just making the children's lives miserable. **You're preventing the Court, me, from being able to say sure they ought to be spending unlimited time with you, [appellant], because you proved to me that you'll run off, you'll do everything you can to thwart [appellee]'s influence. So I'm really left without many options. You're not entitled to have time with those children.** I wish you would have time with those children, but if you're going to try to thwart whatever order the Court enters you're going to make it almost impossible. . . .
>
> One of your comments to me in argument was trust me. You see I can't trust you. I don't trust you. It's not what people say it's what they do. And the saddest thing and I track what Ms. R (sic), [ ], Raymond said, the saddest thing is that you could have contact and, and free exchange with your children if you do it within the guidelines of the Court's requirements, but you can't be trusted.
>
> * * *
>
> **There's no question that [appellee] should continue to have the custody, physical and legal custody of the children.** [ ][H]e is certainly, it's in their best interest and there's no question about that. [ ] [I]t's in their best interest that they reside with him, that he make the decisions in their lives. [ ] [H]e's fit and proper for that to occur.
>
> **I would say, [appellant], it would be in their best interest for them to have time with you that's [ ] unfettered and uncontrolled, but you haven't demonstrated the fitness to allow that to happen.**

(Emphasis added).

When the last sentence in the above quote is placed in context, it is clear that the trial court did not find that the best interest of the children would be served by appellant having "unfettered and uncontrolled" access. 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 that 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. In sum, there simply was no finding by the court as claimed by appellant.

Next, appellant focuses on the circuit court's written opinion and, in particular, the court's statement that "[u]ntil [appellant] can demonstrate that she will act in the best interest of the children by respecting their relationship with [appellee], her time with the children must be supervised." Appellant complains that the court's order regarding visitation failed to provide a mechanism for her to demonstrate her ability to act in accordance with the court's requirements. Thus, according to appellant, the court's ruling is "inherently unreasonable."

In our view, the sentence in the trial court's written opinion relied upon by appellant is merely a reference to her right as a non-custodial parent under Maryland law to obtain a modification of an existing custody or visitation order provided that she can prove a material change in circumstances and a modification that is in the best interest of the children. In *Wagner v. Wagner*, 109 Md. App. 1, 28-29, *cert. denied*, 343 Md. 334 (1996), we described the process of custody modification:

> A change of custody resolution is most often a chronological two-step process. 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 [the] child[ren]. . . . If a material change of circumstance[s] is found to exist, then the court, in resolving the custody issue, considers the best interest of the child[ren] as if it were an original custody proceeding.
>
> * * *
>
> The guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interest[ ] of the child[ren]. **Indeed, a noncustodial parent is never foreclosed [from] seeking a change in custody**. . . .

(Quotations and citations omitted) (emphasis added).

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 that 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. *See id.* at 28-29. In other words, if the trial court in the instant case had placed such mechanism in its order, the order could be construed as improperly restricting appellant's right to adduce evidence of circumstances demonstrating her ability to act in the best interest of the children. Further, nowhere in appellant's brief does she state specifically what mechanism the trial court should have included in its order.[5] Therefore, we conclude that the trial court did not err or abuse its discretion by not including in its order a mechanism whereby appellant could demonstrate to the satisfaction of the court that she could act in the best interests of the children sufficient to allow unsupervised visitation, or even custody.

B.
Attorney's Fees
1.
The Parties' Contentions

Appellant contends that the circuit court erred in awarding attorney's fees to appellee. Specifically, appellant points to the court's failure to articulate its consideration of the required statutory factors under F.L. § 12-103(b). Appellant further claims that, in contravention of our holding in *Sczudlo v. Berry*, 129 Md. App. 529 (1999), the court failed to evaluate the reasonableness of the attorney's fees, and appellee failed to present evidence to support the reasonableness of the fees claimed. Appellant finally contends that, based on the disparity of income between the parties and their respective needs, the statutory factors do not weigh in favor of awarding attorney's fees to appellee.

Appellee counters that, although the trial court could have articulated more clearly the statutory basis for the attorney's fee award, there were adequate facts in the record on each of the statutory factors under F.L. § 12-103(b) to support the court's award. Appellee also argues that appellant waived the right to object to the reasonableness of the award, because she did not object to the admission of appellee's Exhibit No. 12, which set forth the legal services rendered and charges therefor claimed by appellee. Finally, appellee asserts that there was ample evidence of the reasonableness of the fees awarded by the court.[6]

2.
Consideration of F.L. § 12-103 Factors

In *Sczudlo v. Berry*, 129 Md. App. 529, 549-550 (1999), we said:

> The decision to award counsel fees rests solely in the discretion of the trial judge. However, in making that decision, the trial judge is bound to consider and balance the considerations contained in F.L. § 12-103(b).

(Citations omitted).

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. It provides:

> (*b) Required considerations*. — 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.

"[T]rial judges are presumed to know the law and to apply it properly." *State v. Chaney*, 375 Md. 168, 179 (2003) (citation omitted). "Since a trial judge is presumed to know the law, the judge is not required to set out in detail each and every step of

his thought process." *Id.* at 180 n.8. "Even though the trial court does not have to recite any magical words, it must be clear on appeal that the court considered the statutory factors." *Walker v. Grow*, 170 Md. App. 255, 291-92, *cert. denied*, 396 Md. 13 (2006) (quotations and internal citations omitted). A trial judge need not articulate the reasoning behind each and every decision made, "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). "[W]e will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion." *Livingstone v. Greater Wash. Anesthes. & Pain Consultants, P.C.*, 187 Md. App. 346, 389 (2009) (citation and emphasis omitted).

From our review of the record, we conclude that the trial court properly considered all three factors required by F.L. § 12-103(b). First, specific to the "financial status" factor, the court made detailed findings as to the financial status of both parties:

> Now, as far as the [ ] dollars issues go, [ ] the evidence tells me as follows. [Appellee], [ ], has gross monthly income $7,874, [ ], and that's, he doesn't have another source of income, that's [ ], standard, that hasn't changed with the new year. [ ] [H]e spends $133 a month, for the, that part of his health insurance, which applies for the children. He's paying, he says, $351 a month toward the orthodontia.
>
> [ ] [N]ow he's paying $300 a month toward, [ ] tutoring as well. I'm going to be a little rigid there and as far as that goes, I'll find on his side of the, [ ] matrix, the gross seven — and, [appellee's counsel], I'm going to ask you to submit a child support worksheet with these numbers, $7,874 a month less the 133, less the 351, but not the tutoring amount.
>
> I'm going to find on the side of [appellant] that [ ], her, [ ] gross monthly income is $1700. That takes into account the, [ ] her average, I averaged that up I think over four months from, [ ] Fitzgerald, plus additional money she makes, particularly from the Costco demonstrations. I'm satisfied 1700 is an appropriate figure.
>
> And, and if I've erred a little bit on the low side in calculating her income, [ ], I've taken, and I've also taken into account that she has paid $10,000 toward the car, [ ], leaving her with a $271 a month in car payments. I know I'm not taking it into account, but I just want to say, [ ], she doesn't have $10,000 to bank, she has $10,000 in the car. She's had the benefit of the car and the benefit of that money to pay for it. She has a small amount of money coming in, apparently, from the, [ ], from an annuity she got through the marital property, [ ] adjustment. . . . [S]he's received some funds from the sale of the house, but she's also paid [children counsel]'s judgment as well. So I've taken those into account in concluding that the proper figure for her income is $1700 a month. So those are the figures to use for that calculation.

Next, regarding the "needs of the parties" factor, the court demonstrated its cognizance of the parties' needs in articulating why it ordered the parties to split evenly Dr. Snyder's fees:

> As to Dr. Snyder's fees, having already required [appellant] to pay that amount and taking into account the other, what I consider, equities, if you will, or adjustments, [ ], I'll order that both parties [are] equally responsible for Dr. Snyder's fees, [ ], which are $5,867. I think that probably leaves, I have no doubt that leaves the greater burden on [appellee], and I'm not trying to punish him, but I understand that, [ ], his income is pretty inflexible, but he's still in a better position than [appellant] on those matters.

Here, the court specifically explained that 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 consideration of "equities" illustrates its awareness of the parties' needs, especially in light of the costs it had already assigned to appellant. Furthermore, the court's intent to "err on the low side" in calculating appellant's income illustrates its consideration of her needs and her weaker financial position.

Lastly, with regard to the "substantial justification" factor, 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 addition, once he gained full custody and became solely financially responsible for the children's well-being, appellee was substantially justified in seeking child support from appellant.

Appellant contends that, because appellee had a substantial portion of his income available for other expenses and appellant had just enough money to pay her rent and put food on the table, the factors under F.L. § 12-103(b) did not weigh in favor of an attorney's fee award. Appellant claims that, according to appellee's amended financial statement, he spent only $784 per month for the benefit of the parties' children. As appellee correctly points out, the figure of $784 represents only the additional expenses related to the children that are recognized by the Child Support Guidelines. *See* F.L. § 12-204. These expenses do not include the expenses incurred by appellee for housing, food, clothing, transportation, activities, and other necessities. Nor do they include appellee's trips to Florida to recover the children after appellant had abducted them.

Even if appellee's greater financial condition is weighed as heavily as suggested by appellant, the court must still take into consideration the justification for defending against appellant's motion for visitation or custody and for seeking child support. The egregious facts of this case compelled appellee to defend against any increased visitation or custody for appellant. As appellee aptly argues in his brief:

> This is itself the greatest justification for the award of attorney's fees. This is not simply a case in which the parties come before the Court equally justified in their positions. The Appellant time after time violated the Court's rulings, sought to abduct the children and deny the Appellee all access to the children. The Appellant thrust this entire suit upon the Appellee, and the Appellee was forced to defend to protect the children.

In sum, the record fully supports the conclusion that the trial court considered all of the required factors under F.L. § 12-103(b) and thus did not abuse its discretion in awarding attorney's fees to appellee.

3.
Reasonableness of the Attorney's Fees

Appellant argues that the award of $3,000 in attorney's fees was unreasonable and that 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. In *Sczudlo*, we said:

> [T]he court, as an experienced trial judge and former lawyer of longstanding, is qualified to opine as to reasonableness of attorney's fees based on its familiarity with the time and effort of counsel as evidenced by the presentations in the proceedings before the court. The trial judge, however, must affirmatively state, for the record, that he has drawn on his experiences as a judge and former litigator in assessing the reasonableness of attorney's fees.

Id. at 552 n.3. "The trial court enjoys a large measure of discretion in fixing the reasonable value of legal services. That amount will not be disturbed unless it is clearly an abuse of discretion." *Head v. Head*, 66 Md. App. 655, 669 (1986).

In the case *sub judice*, on direct examination of appellee, appellee's counsel showed appellee plaintiff's Exhibit No. 12, which was "the bill for [counsel's] services in this case." Appellee testified that he had seen the bill and that it was fair and reasonable. The following colloquy then ensued:

> [APPELLEE'S
>
> COUNSEL]: Offer Number 12 for services.
>
> THE COURT: Any objection, [Appellant]?
>
> [APPELLANT]: No, Your Honor.
>
> THE COURT: It will be received.

Also, at no time during closing argument did appellant challenge the reasonableness of the fees or the necessity of the services set forth in Exhibit No. 12. Therefore, we conclude that appellant has waived her right to challenge the reasonableness of the attorney's fee award on appeal. *See Tretick v. Layman*, 95 Md. App. 62, 75 (1993) ("When a party has the option either to object or not . . . his failure to exercise the option [to object] while it is still within the power of the trial court to correct . . . is regarded as a waiver.") (quoting *Basoff v. State*, 208 Md. 643, 650 (1956)).

Even if there had been no waiver, we hold that

the trial court's award of $3,000 in attorney's fees was reasonable in this case, because the record fully supports such a finding. First, plaintiff's Exhibit No. 12 sets forth a detailed record of appellee's attorney's fees, dating from June 2, 2010 to February 1, 2011, including the specific services rendered, the dates of such services, the time expended, and the charges therefor. Furthermore, the court expressly found that the bill submitted by appellee's counsel was "quite reasonable for the services provided." Of particular significance, we note that, although the court found the entire bill, which totaled $6,725.98, to be "quite reasonable," the court ordered appellant to pay only $3,000, less than one-half of the amount found to be reasonable.

Sczudlo, which is relied on by appellant, is factually distinguishable from the case *sub judice*. In that case, following Sczudlo's motion to modify child support and his subsequent refusal to pay child support, the trial court ordered Sczudlo to pay one-half of the attorney's fees of his ex-wife, Berry. *Sczudlo*, 129 Md. App. at 535, 549. We noted that the trial court had "little proof before it as to the amount of the fees, or their reasonableness." *Id.* at 550. The only evidence of the fees at trial was Berry's testimony that she had incurred $2,500, plus whatever fees were incurred on that trial day. *Id*. at 551. Berry's testimony, however, failed to address "the reasonableness of the fees, or how they relate to the services rendered. Without such proof, the court could not sufficiently evaluate the reasonableness of the fees. . . ." *Id*. at 551-52.

In the case *sub judice*, plaintiff's Exhibit No. 12, which detailed all of appellee's attorney's fees, including time expended and services rendered, represents far greater evidence of the fees and their reasonableness than that which is found in *Sczudlo*. Furthermore, not only did the court make an explicit finding as to the reasonableness of the fees, but appellant did not challenge the reasonableness of the fees sought by appellee, nor did she object to the admission of the document evidencing such fees. Although the law articulated in *Sczudlo* controls our analysis, the facts of the instant case are sufficiently distinguishable to warrant a different outcome. Accordingly, the trial court did not abuse its discretion in awarding attorney's fees of $3,000 to appellee.

C.
Dr. Snyder's Fees
1.
The Parties' Contentions

Appellant contends that the trial court erred in ordering appellant to pay an equal share of the fees incurred in connection with Dr. Snyder because the equal split was not justified in light of the disparity in the parties' income. Appellant also contends that the court failed to analyze the required considerations on the record for such order. Finally, appellant contends that, according to F.L. § 12-201(g) and 12-204(h), Dr. Snyder's fees qualify as medical expenses and, therefore, must be apportioned according to the parties' income levels.

Appellee counters that appellant consented to the court's reservation of authority to apportion expenses related to Dr. Snyder between the parties at the conclusion of the case. Appellee further claims that both F.L. § 9-105 and § 12-103(b) provide the statutory authority for the court's apportionment of Dr. Snyder's fees. Finally, appellee asserts that Dr. Snyder's fees do not qualify as medical expenses within the meaning of F.L. § 12-201(g).

2.
Statement of Law

In *Sutter v. Stuckey*, 402 Md. 211, 222, 224-25 (2007), the Court of Appeals explained the legal implications of a consent order:

> It is a well-settled principle of the common law that no appeal lies from a consent [order][7]. . . .
>
> * * *
>
> 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. 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." 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."
>
> The nature of a consent [order] precludes appeal. Consent [orders] "are essentially agreements entered into by the parties which must be endorsed by the court. They have attributes of both contracts and judicial decrees." Like contracts, the parties bargain and provide consideration. Consideration is not always tangible. In the case of a consent [order],

> the fact that "the parties give up any meritorious claims or defenses they may have had in order to avoid further litigation" may serve as consideration.

(Citations omitted).

3.
Analysis

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 to apportion Dr. Snyder's fees, appellant acquiesced to such apportionment by the court. Accordingly, appellant's objection to the apportionment of those fees on appeal is waived.

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

FOOTNOTES

1. By order dated December 4, 2008, the circuit court directed that the children's passports be held in the vault of the Clerk of the Circuit Court and "not be released to anyone except by Order of this Court."

2. The agreement of the parties was reached on December 18, 2009 before the Domestic Relations Master.

3. Subsequently, the court amended the order to provide appellant, among other things, one supervised visit per month commencing in March 2011, and two supervised visits per month beginning in July 2011.

4. The court ordered appellant to pay an additional amount of $40 per month toward the child support arrears.

5. When asked at oral argument before this Court to identify the mechanism that appellant claimed should have been in the court's order, appellant's counsel stated that the trial court should have allowed some short unsupervised visits. This proposal, however, does not ensure the safety of the children, given appellant's past history of child abduction. The proposal also employs the logical fallacy of asking the trial court to trust appellant with unsupervised visitation in order for her to prove that she can be trusted with unsupervised visitation.

6. Appellee also argues that the trial court did not have to consider the statutory factors under F.L. § 12-103(b), because F.L. § 9-105 "specifically authorizes the Court to assess costs and counsel fees against a party who unjustifiably denied or interfered with the visitation rights of the other party." Appellee explains that the statutory factors set forth in F.L. § 12-103(b) are not present in F.L. § 9-105. F.L. § 9-105, however, is not applicable to the instant case. Although F.L. § 9-105 does authorize a trial court to "assess costs or counsel fees against a party who has unjustifiably denied or interfered with visitation rights" without consideration of the factors under F.L. § 12-103(b), *see Van Schaik v. Van Schaik*, 200 Md. App. 126, 139-41 (2011), the trial court in this case made an attorney's fee award to appellee for those fees incurred by appellee in defending against appellant's June 1, 2010 motion for visitation or custody and in prosecuting his petition for child support filed on July 8, 2010. There is nothing in the record indicating that the attorney's fee award was for those fees incurred by appellee for in prosecuting his motion for contempt filed on November 6, 2008, or his emergency ex parte motion filed on August 26, 2009.

7. In *Suter v. Stuckey*, 402 Md. 211, 222 n.8 (2007), the Court of Appeals treated the terms "judgment," "order," and "decree" as "functionally interchangeable." Where the Court of Appeals used the term "judgment" or "decree," we have inserted the word "order" to comport with the facts of the instant case. *See, e.g., Dubin v. Mobile Land Corp.*, 250 Md. 349, 353 (1968) ("It is well settled in Maryland . . . that if a party, knowing the facts, voluntarily accepts the benefits accruing to him under a *judgment, order or decree*, such acceptance operates as a waiver of any errors in the *judgment, order or decree* and estops that party from maintaining an appeal therefrom.") (emphasis added).

Cite as 12 MFLM Supp. 25 (2012)

Child support: downward deviation from guidelines: required findings

John Gary Seymour
v.
Ann Marie Seymour

No. 1677, September Term, 2010

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

Opinion by Davis, J.

Filed: October 10, 2012. Unreported.

Although the circuit court's award of rehabilitative alimony was within its discretion, the court's complete failure to make the required findings 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.

Appellant, John Gary Seymour (Husband), timely appeals the award of alimony, by the Circuit Court for Talbot County, to his ex-wife, appellee, Ann Marie Allen Seymour (Wife), and the failure of the circuit court to award him child support for the couple's two minor 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?

For the reasons that follow, we answer Husband's second question in the negative, but because we answer his first question 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 to Husband pursuant to the Maryland child support guidelines.

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 LEGAL PROCEEDINGS

With certain additions gleaned from the record documents, we accept the findings of fact made by the circuit court in its August 27, 2010 divorce order and opinion, as follows.[1] Husband and Wife were married in a civil ceremony in Talbot County, Maryland on September 7, 2001. Two children were born to the couple prior to their marriage, Linda (DOB 6/13/93) and John Jr. (DOB 2/12/98).[2]

Husband and Wife separated no later than July 2009 and, thereafter, lived separate and apart without cohabitation or the expectation of reconciliation.[3] On August 3, 2009, Wife filed a complaint, later amended, seeking absolute divorce from Husband on fault-based grounds, sole physical and joint legal custody of the children, child support, alimony, a marital award and the provision of medical insurance. On September 10, 2009, Husband filed a counter-complaint, later amended, seeking limited divorce, sole custody of the children with reasonable visitation with Wife, and the use and possession of certain marital property.

On January 6, 2010, a standing master on domestic relations issued his report and recommendations regarding *pendente lite* alimony, custody and child support. The master noted that, as Linda was scheduled to graduate from high school in June 2010 and was involved in numerous extra-curricular activities, Husband and Wife had agreed it would not be in Linda's best interest to relocate to Virginia to live with Wife.

The custody issues thus centered on John Jr., with the testimony indicating that it would be detrimental to separate him from his sister, friends, then-current school and doctors, all located in Maryland. The master found that it would not be in John Jr.'s best interest to move him four hours away from his support system, but neither would it be in his best interest to separate him entirely from his mother. *Pendente lite* visitation of two weekends per month was recommended, but Wife's demonstrated refusal to speak with Husband about John Jr.'s medical care made joint legal custody *pendente lite* impractical. The master thus recommended sole legal and primary physical custody to Husband.

Using the child support guidelines, the master determined Wife's child support obligation to be $146 per month, but he recommended a downward deviation from that amount 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 therefore suggested that Wife pay child support, beginning on February 1, 2010, in the amount of $100 per month.

Wife excepted to the master's recommendations and requested that the circuit court grant her sole legal and physical custody of the children, temporary alimony and child support. By amended exception, she further asked the court to order visitation with Husband in a reasonable and equitable manner.

Following a July 21-22, 2010 contested hearing on the merits, the circuit court issued a written opinion and order on August 27, 2010. Therein, it granted Husband an absolute divorce from Wife on the ground of voluntary separation for more than one year, along with sole physical custody of the children. Wife was entitled to liberal visitation, including specifically enumerated visitation with John Jr. every other weekend, as well as during alternating holidays and two weeks in the summer. The parties were granted joint legal custody of the children.

In addition, the court ordered Husband to pay Wife $400 per month for three years as rehabilitative alimony.[4] No child support was awarded to either party.

Additional facts will be set forth as relevant to our determination of this matter.

DISCUSSION

I

Husband first alleges that the circuit court erred in failing to award him child support for the children by applying the child support guidelines. As the circuit court awarded him custody of the children, he continues, we should remand this matter to that court for a determination of suitable child support.

Wife counters that the circuit court "substantially complied with the required findings for deviating from the child support guidelines in awarding no child support to Husband." As such, the deviation from the child support guidelines awarding Husband no child support was not clearly erroneous.

Generally, in setting child support obligations between a minor child's parents, the circuit court is required to utilize the child support guidelines.[5] *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 is rebuttable and it is not indulged in all circumstances. *Id.* at 511-12.

A circuit court may deviate from the guidelines if their application would be unjust or inappropriate. *Id.* at 512. See also FL § 12-202(a)(2)(ii)("The presumption may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case."). 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, although the domestic relations master referred to the child support guidelines and recommended a downward deviation of Wife's support obligation thereunder from $146 to $100 per month to Husband, the circuit court made no mention of the master's recommendation or a child support award, either during the July 21-22, 2010 hearing or in its written opinion and order, despite the fact that Husband's attorney raised the issue of child support in his closing argument at the hearing.[6]

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 set forth by FL § 12-202(a)(2)(v) before deviating from a child support award under the guidelines. It did not state the amount of child support that would have been required under the guidelines, how its order would deviate from the guidelines or how the deviation from the guidelines would serve the children's best interests.

Therefore, we will remand the matter to the circuit court to make a determination regarding the propriety of child support to Husband. If the court deviates from the child support guidelines, it is directed to place the findings required by FL § 12-202(a)(2)(v) on the record.[7]

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 presented at the hearing showed that Husband was "operating with a negative balance per month" and would be responsible for the $3,000 college costs for Linda not covered by the scholarship she had received. The circuit court, Husband says, decided, without explanation, that he had the financial ability to pay alimony to Wife, despite the deficit in his budget, as shown on his financial statement, which was admitted into evidence at the hearing.

Wife counters that the circuit court made its fac-

tual determination regarding an alimony award based on its ability to weigh the credibility of the parties. In setting forth its opinion, she continues, the court did not make any factual finding that Husband operates with a monthly deficit. Instead, the court found that his claims of financial obligations were questionable. As such, there is nothing to indicate an abuse of discretion on the part of the circuit court in awarding rehabilitative alimony to Wife.

In reviewing an award of alimony, we defer to the findings and judgment of the circuit court. *Brewer v. Brewer*, 156 Md. App. 77, 98 (2004). An alimony award will not be disturbed on appeal "unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Boemio v. Boemio*, 414 Md. 118, 124 (2010) (quoting *Solomon v. Solomon*, 383 Md. 176, 196 (2004)). Thus, absent evidence of an abuse of discretion, we will not ordinarily disturb the circuit court's judgment on appeal. *Solomon*, 383 Md. at 196.

Awards of alimony are governed by Title 11 of the Family Law Article. *See* FL §§ 11-101 through 11-112. In particular, FL § 11-106 guides courts in determining the amount and duration of an alimony award. In making its determination of a fair and equitable award, a circuit court must consider the twelve factors enumerated in FL § 11-106(b).[8]

In this matter, the circuit court specifically considered the twelve factors as set forth in FL § 11-106(b). In its written order, the court discussed each factor in detail, as based on the evidence and testimony presented by the parties at the hearing. As pertinent to the issue Husband raises, the circuit court determined that Husband and Wife began dating while Wife was still in high school and that Wife had resided with Husband nearly her entire adult life. Husband had been employed for nearly twenty years by a local well company, primarily supporting the family with the income derived from that position. After the birth of the children, Wife had stayed in the marital home and was primarily responsible for the children's care and household duties. While Wife had worked intermittently during the marriage, her work was always on a part-time basis and earned only 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 that such problems were evident during the course of the hearing. Wife was found to have clearly struggled during the hearing to understand straightforward questions and to remember events and information, and she demonstrated serious short-term memory deficits.

Husband's adjusted gross income was found to be $58,136 in 2009. Husband had also testified about the opportunity to supplement his income with overtime, although that opportunity had diminished during the recent economic downturn. Husband had estimated that his monthly expenses totaled $1,794, which, together with his children's monthly expenses of $1,311, totaled $3,105, an amount $251 in excess of his monthly net income of $2,854.[9] Husband had also testified at the hearing, however, that he works seven days a week and does "side jobs," such as crabbing on the weekends, to earn extra money to manage his deficit. He had also received a $3,319 tax refund from the federal government the previous year and was permitted to use his company credit card for emergencies if he paid the balance at the end of the month.

On the other hand, Wife earned only $245.55 every other week, with monthly expenses of $1,600, "an amount 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." Based on all the evidence, the court found that Husband has the ability to provide alimony to Wife in the monthly amount of $400. Although the circuit court did not specifically enumerate how it arrived at its award of $400 per month in rehabilitative alimony, the court clearly engaged in the required considerations under FL § 11-106(b). We cannot say that the court's determination depended on clearly erroneous factual findings, nor that the court did not act within its discretion in determining the amount of rehabilitative alimony to be awarded to Wife, based on the evidence as presented at the July 2010 hearing.

APPELLEE'S MOTION TO DISMISS DENIED; JUDGMENT VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR TALBOT COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID FIFTY PERCENT [50%] BY APPELLANT AND FIFTY PERCENT [50%] BY APPELLEE.

FOOTNOTES

1. Wife, in her brief, moves to dismiss Husband's appeal on the ground that he "made no effort whatsoever to comply with Md. Rule 8-501(d)," which requires the parties to agree on the parts of the record to be included in the record extract. We note that, although the record extract prepared by Husband was scanty, at best, and although it is not our duty to search the record for pertinent information omitted from the record extract, *Mitchell v. AARP Life Ins. Program, N.Y Life Ins. Co.*, 140 Md. App. 102, 107 n. 3 (2001), because this matter involves issues pertaining to the parties' minor children and their support, we will not, in the exercise of our dis-

cretion, dismiss the appeal. *See In re Joshua W.*, 94 Md. App. 486, 491 (1993) (Dismissal of appeal for nonconformity of Md. Rule 8-501 is discretionary).

2. John Jr. was born with diplegic cerebral palsy and, consequently, has special needs. Linda reached the age of eighteen on June 13, 2011.

3. In his counter-complaint for divorce, Husband alleged that Wife "left the marital home unexpectedly and moved to" Virginia. Wife countered that Husband, prior to and during the marriage, physically, verbally and emotionally abused her, and she left the marital home to "stop the eighteen-year cycle of violence perpetrated by" Husband.

4. The court also divided the parties' marital property and made a determination as to the percentage of Husband's profit sharing plan to be paid to each party if, as, and when payments are made. As those provisions of the court's order arc not pertinent to this appeal, we do not discuss them further.

5. In calculating a child support award, a court must first determine the adjusted actual income of each parent, as defined by Md. Code (2006 Repl. Vol), §12-201(b) of the Family Law Article ("FL"). It then adds the income of each parent to arrive at their combined actual income, pursuant to FL § 12-201(f). The basic child support award is determined by use of the schedule of basic child support obligations contained in FL § 12-204(e), and that amount is divided between the parents in proportion to their adjusted actual incomes. FL § 12-204(a).

6. In his closing argument, Husband's attorney noted that, if Husband were "granted sole custody like he says, like he wants, child support would then become an issue that she's never paid. That she would begin owing child support . . . I would ask that sole custody be awarded to Mr. Seymour. Child support pursuant to the guidelines based on her income and his."

7. As Linda reached the age of eighteen on June 13, 2011, Husband is no longer entitled to child support for Linda's care. Depending on the circuit court's ruling on the issue of child support, however, he may be entitled to back child support for Linda. *See* FL §12- 101(a)(1) ("Unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading that requests child support *pendente lite*, the court shall award child support for a period of time from the filing of the pleading that requests child support."). *See also Moustafa v. Moustafa*, 166 Md. App. 391, 399 (2005) (FL § 12-101(a) provides that child support obligations may be "back dated" to the date on which complaint was filed).

8. The 12 factors are: (1) the ability of the party seeking alimony to be wholly or partly self-supporting; (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment; (3) the standard of living that the parties established during their marriage; (4) the duration of the marriage; (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family; (6) the circumstances that contributed to the estrangement of the parties; (7) the age of each party; (8) the physical and mental condition of each party; (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony; (10) any agreement between the parties; (11) the financial need and financial resources of each party, and; (12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health-General Article and from whom alimony is sought to become eligible for medial assistance earlier than would otherwise occur.

9. The court gleaned these figures from Husband's July 21, 2010 financial statement.

Cite as 12 MFLM Supp. 29 (2012)

Administrative law: indicated child abuse: evidence

B. H.

v.

Anne Arundel County Department of Social Services

No. 01835, September Term, 2011

Argued Before: Zarnoch, Matricciani, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: October 16, 2012. Unreported.

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 23, 2010, the Anne Arundel County Department of Social Services ("DSS") received a report of alleged child abuse by B. H. ("B. H." or "Appellant") against his minor child, Brayden. Police officers responded, and B. H. was charged with Child Abuse in the Second Degree, Assault in the Second Degree, and Reckless Endangerment. All charges were placed on the STET docket[1] on September 3, 2010.

On April 27, 2010, DSS began a civil investigation. The investigation concluded on July 30, 2010, finding that child abuse was indicated as defined in the Family Law Article and by its corresponding COMAR sections. B. H. appealed from that finding and on December 21, 2010, a hearing took place before an Administrative Law judge ("ALJ"). The ALJ found that DSS met its burden in proving indicated child abuse. B. H. appealed that decision to the Circuit Court for Anne Arundel County. In a memorandum opinion docketed October 4, 2011, the circuit court upheld the ALJ's decision. B. H. noted timely an appeal to this Court on October 25, 2011.

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

B. H. presents three questions for our review which we have rephrased and combined for clarity as:[2]

> 1. Did the Administrative Law judge draw an erroneous conclusion of law or fail to base her decision on substantial evidence when upholding a DSS finding of indicated child abuse?

For the reasons that follow, we answer no and uphold the decision of the Administrative Law judge.

FACTUAL AND PROCEDURAL HISTORY

On the evening of April 22, 2010, B. H. prepared a meal for himself and his two minor children. B. H. made 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 he would be unable to go outside to play with his friends. Brayden then left the table. B. H. returned Brayden to his seat and told him that his presence at dinner was required while B. H. and his eleven-year-old daughter, Brianna, finished eating. Brayden resisted and B. H. held Brayden by the arm to ensure his attendance at the dinner table.

Because B. H. and Mrs. H.[3] shared custody of the children, she picked them up from school on the afternoon of April 23, 2010. Once home, Mrs. H. found several bruises on Brayden's neck and a scratch under his chin. That day, Mrs. H. brought Brayden to his pediatrician. The pediatrician documented the injuries discovered by Mrs. H. The pediatrician's office referred the matter to DSS on the evening of April 23, 2010. DSS contacted the 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 the claim. Although Officer Ingerebretson was present, Officer Witherspoon conducted the investigation and completed the Application for Statement of Charges.[4]

In the presence of Mrs. H., Officer Witherspoon questioned Brayden about his injuries. Officer

Witherspoon testified that Brayden informed her "his father had grabbed him by — around his neck and had pulled him down and that he had also somehow bruised his arm in the process of — of either falling or hitting it on something." Officer Witherspoon charged B. H. with three offenses: Child Abuse in the Second Degree, Assault in the Second Degree, and Reckless Endangerment. All charges were placed on the STET docket on September 3, 2010.

DSS assigned social worker Lauren Askew to conduct a civil investigation into the incident on its behalf.[5] On April 27, 2010, Ms. Askew interviewed Brayden, Mrs. H., and Brianna. The investigation resulted in Ms. Askew finding indicated child abuse. B. H. appealed that finding to an ALJ and a hearing was held on December 21, 2010. At the hearing, Ms. Askew testified to the contents of her interviews. She testified that Brayden told her "his dad tried to make him eat the mushrooms that was [sic] in the spaghetti sauce and that he did not like them." Further, she testified "[s]o he tried to run away from the table. Brayden said that he hurt his elbow by hitting it on the wall while he was running away from dad, at which point dad grabbed him by his neck and brought him back to the table."

Mrs. H. confirmed this account. Ms. Askew testified to her conversation with Mrs. H., saying "she said that Brayden said that the incident happened, because he refused to eat his mushrooms and that he had hit his elbow on the table, and his dad had held him down to force him to eat the mushrooms." Brayden told Mrs. H. that, in the words of Ms. Askew, "his dad [ ] held him down to force him to eat the mushrooms."

Brianna provided the following account, testified to by Ms. Askew:

> Brianna told me that they were at dad's house eating spaghetti and that her brother did not want to eat the mushrooms and that dad had told him that he had to eat the mushrooms or that he would not go outside and play if he did not eat them. At which point, Brayden got up from the table and tried to run, but dad grabbed him and picked him up by the arm and place [sic] him back at the table.

Brianna went on, as Ms. Askew testified, "[d]ad had put the mushrooms in Brayden's mouth, and Brayden spit the mushrooms out on the floor, because he did not like them and started to cry."

Ms. Askew interviewed B. H. on April 29, 2010. He provided a substantially similar narrative. Ms. Askew testified "[h]e stated that Brayden did try to exit the table, but he picked Brayden up from under his arm and carried him back to the table and told him to sit there." B. H. testified directly that after dinner "we watched TV downstairs . . . then we went upstairs, and [the kids] wanted to snuggle on daddy's bed, so I let them . . . I read Brayden a book . . . and then I took them both to their beds." When asked about whether B. H. intended to injure Brayden, Ms. Askew agreed that "the intention of Mr. H[ ] at that point was to have his son eat mushrooms."[6]

Ms. Askew's investigation resulted in a finding of indicated child abuse as defined in the Family Law Article and by its corresponding regulations. Abuse means:

> 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

MD. CODE ANN., FAM. LAW § 5-701(b)(1). Indicated Child Abuse means:

> (1) Physical Abuse Other than Mental Injury. Except as provided in § A(3) of this regulation, a finding of indicated child physical abuse is appropriate if there is credible evidence, which has not been satisfactorily refuted, that it is more likely than not that the following four elements are present:
>
> (a) A current or prior physical injury;
>
> (b) The injury was caused by a parent, caretaker, or household or family member;
>
> (c) The alleged victim was a child at the time of the incident; and
>
> (d) 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.

COMAR § 07.02.07.12(A) (2012). In support of her finding, Ms. Askew testified that it was based on "[t]he statements that were presented to myself, the pictures[7] and, of course, talking to Mr. — the appellant and the kids." Ms. Askew testified to each of the regulation 07.02.07.12 (A) factors. She testified that there was a current injury,[8] that Brayden was under the age of 18 at the time of the incident, and that the injury was caused allegedly by his father. To satisfy part (d) of the regulation, Ms. Askew said:

> The nature of the incident in regards to when Mr. H[ ] was shoving the mushrooms down Brayden's neck — I

> mean, down his mouth — Bray — as I reported, Brayden could have choked on the mushrooms, which had — could have caused him to die by blocking the airways. So that's how — he was placed — his harm and welfare — his welfare was placed in substantial risk.

Finally, Ms. Askew was asked "during the course of your investigation, was the appellant able to satisfactorily refute the — this — this matter to — your satisfaction, so that you could, you know, change your disposition?" She responded, "no."

The ALJ issued an order dated January 21, 2011.[9] The ALJ found that in this case, "[a]ppellant's actions rise to abuse." The ALJ "accept[ed] Bianna's and Brayden's hearsay statements to the CPS investigator over the [a]ppellant's testimony and believe[d] that the [a]ppellant chased Brayden and forced food into his mouth." The ALJ "found Brayden's statement that the [a]ppellant grabbed him on the neck persuasive because [the ALJ] [did] not believe, and there [was anything] in the record to convince [the ALJ] that the child would lie and carry on the lie. . . ."

The opinion concluded that Appellant injured Brayden's neck. 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 considered 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.

Applying the COMAR factors, the ALJ found that:

> [a]ppellant did not satisfactorily refute, that: Brayden was injured; the [a]ppellant, his father, caused the injury; Brandon [sic] was four years old and a child; and Brayden's health or welfare were harmed by the scratches and bruises on his neck, and at substantial risk of harm given the comparative size and strength of Brayden and the [a]ppellant.[10]

B. H. appealed the ALJ's decision to the Circuit Court for Anne Arundel County. The circuit court heard argument on September 6, 2011. By memorandum opinion docketed October 4, 2011, the circuit court upheld the ALJ's decision. As previously indicated, on October 25, 2011, B. H. noted timely his appeal to this Court.

Discussion

Standard of Review

Generally, "in an appeal from judicial review of an agency action, we review the agency action directly, not the decision of the trial court." *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 244 (2007) (citing *Watkins v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 377 Md. 34, 45-46 (2003)); *accord MVA v. Shea*, 415 Md. 1, 17 (2010) ("[O]ur role is not to review the [c]ircuit [c]ourt's judgment, but rather to review the decision of the ALJ. . . ."). "Our review of the agency's factual findings consists solely of an appraisal and evaluation of the agency's fact finding and not an independent decision on the evidence." *Doe v. Allegany County Dep't of Soc. Servs.*, 205 Md. App. 47, 54 (2012).

"The Court of Appeals has consistently stated that an adjudicatory agency's decision can only be reviewed on grounds identical to those relied upon by the agency." *Id.* at 55 (citing *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 112 n.12 (2001). We do not "substitute [our] judgment for the expertise of those persons who constitute the administrative agency."[11] *United Parcel Serv. v. People's Counsel*, 336 Md. 569, 576-77 (1994). "Nonetheless, if an agency has made an erroneous conclusion of law, it is our duty to correct that conclusion." *Anderson*, 402 Md. 236, 245 (2007). Although we are constrained to reverse if the agency has made an erroneous conclusion of law, "[t]he substantiality of the evidence is the common denominator of the scope of judicial review with respect to all administrative agencies." *Baltimore Lutheran High School Asso. v. Employment Sec. Admin.*, 302 Md. 649, 661 (1985).

As the Court of Appeals said in the case of *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." *Id.* at 296-97. In *Vann*, The Court of Appeals was called upon to decide whether or not a finding of indicated child abuse was "solely" a legal issue for the purposes of applying the correct standard of review. The *Vann* Court noted:

> We disagree that the issue is solely a legal one. Whether a finding of "indicated child abuse" is permitted by FL § 5-701 when, in the course of administering corporal punishment, the child disobeys the parent and consequently is injured is patently a mixed question of law and fact. When the ALJ con-

> cluded that a substantial risk was "imminent," it did so by applying the law, which requires a substantial risk of harm for a finding of indicated child abuse, FL § 5-701(b); C.O.M.A.R. 07.02.07.12, to the facts of the case, the possibility of a swinging metal buckle causing severe injury to a six-year old child.

Id. at 297. Although the case before us does not involve a finding that corporal punishment was administered, it does parallel the facts of *Vann* sufficiently for us to adopt its reasoning. Although the ALJ thought it "improbable" that Brayden could choke on the mushrooms forced into his mouth by B. H., the ALJ made the determination that "the [a]ppellant injured Brayden." 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." *Id*. at 298. Such is the case here where an application of law to facts was required to find that "[a]ppellant's actions placed Brayden's health and welfare at substantial risk of harm." 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). An administrative decision is based on substantial evidence when a reviewing court determines that "a reasoning mind reasonably could have reached the factual conclusion that the agency reached." *Eberle v. Baltimore County*, 103 Md. App. 160, 166 (1995) (quoting *Hill v. Baltimore County*, 86 Md. App. 642, 659 (1990). The ALJ's decision is "entitled to deferential review, that is, substantial evidence review, and the court should [ ] consider[ ] whether the ALJ's application of law to the facts was fairly debatable or whether a reasoning mind could have reached the same conclusions reached by the agency on the record before it." *Vann*, 382 Md. at 298.

Admission of Hearsay Statements

B. H. first argues that admission of the children's out of court statements constitutes reversible error. Citing *Jones v. State*, 68 Md. App. 162 (1986), B. H. contends that "Maryland law requires that prior to the admissibility of testimony from a child [,] the finder of fact must determine whether the child possesses the capacity to observe, understand, recall and relate the events that occurred and that the child also possesses the duty to tell the truth."[12] B. H. draws guidance from criminal cases, arguing that the ALJ "committed reversible error by admitting the statements of the four-year-old child at the hearing without requiring DSS to lay the proper evidentiary foundation and by failing to conduct the requisite examination to determine the child's competency."[13] B. H. urges this Court to apply the factors set in Section 11-304(e) of the Criminal Procedure Article to "determin[e] the admissibility of hearsay statements by child abuse victims under the age of twelve. . . .".[14]

In support of upholding the admission of the hearsay statements here, DSS claims that "under traditional principles of administrative law, an ALJ is encouraged to err on the side of admitting hearsay evidence, trusting the process of judicial review to weed out decisions that are not based on "reliable" evidence." Because the testimony of Officer Witherspoon, Mrs. H., and Ms. Askew was subject to cross-examination by B. H., DSS argues that the legal standard for admitting the testimony was satisfied.[15]

B. H. points to the factors of Section 11-304(e) of the Criminal Procedure Article, arguing that the ALJ failed to apply them, thereby committing reversible error. The factors are restricted facially to hearsay statements offered "in a juvenile court proceeding or in a criminal proceeding." Md. Code Ann., Crim. Proc. § 11-304(b). This was a civil investigation and not a criminal case. In a contested case administrative proceeding, such as this one, hearsay "may not be excluded solely on the basis that it is hearsay." Md. Code Ann., State Gov't § 10-213(c). Although the factors of Section 11-304(e) do not apply strictly, they 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) (reciting the factors and using them as guidelines in an administrative proceeding.).

In the case of *Montgomery County Health & Human Servs. v. P.F*., 137 Md. App. 243 (2001), the administrative law judge used the Section 11-304(e) factors to assess whether the hearsay statements of a three year old were sufficiently reliable to be "considered credible evidence" because hearsay statements "inherently raise[ ] concerns about trustworthiness and reliability." *Id*. at 27 1-72. On review, the Court of Appeals recognized that the statutory factors "address[ ] the inherent questions of trustworthiness raised by such a young child's out of court statement and balance[ ] the need to protect child victims from the trauma of court proceedings with the fundamental right of the accused to test the reliability of evidence proffered against him or her." *Id*. at 272.

Like *P.F*., application of the statutory factors was not compulsory here because "the proceedings did not involve a proceeding in court." *Id*. at 273. In that case and in this one, the statements were admissible under Section 10-213(c) of the State Government Article.[17] B.

H. argues that the *P.F.* case requires application of the Section 11-304(e) factors as a predicate to the admission of hearsay testimony in this case. The *P.F.* Court thought it was "appropriate for the ALJ to question whether the hearsay statement by this three year old was sufficiently reliable to be considered credible evidence." The fact that something is "appropriate" in one case does not make it obligatory in another. Although the *P.F.* Court found that "the ALJ was legally correct to make a threshold determination of trustworthiness by considering the factors identified in section [11-304(e)]" the converse of that statement does not follow necessarily.[18]

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). "Even though hearsay is admissible, there are limits on its use." *Kade v. Charles H. Hickey School,* 80 Md. App. 721, 725 (1989). "The hearsay must be competent and have probative force." *Id*. "One important consideration for a hearing body is the nature of the hearsay evidence." *Travers*, 115 Md. App. at 413. "For instance, statements that are sworn under oath, or made close in time to the incident, or corroborated [ ] ordinarily [are] presumed to posses a greater caliber of reliability." *Id*. "[M]ere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938).

As the record of the hearing reflects, Ms. Askew testified "having first been duly sworn." Ms. Askew's interviews followed in close temporal proximity from the alleged events. Brayden and Brianna were with B. H. on the evening of April 22, 2010. Ms. Askew interviewed them only five days later. Finally, the statements made to Ms. Askew by Mrs. H., Brayden, and Brianna are self-referential and corroborate each other. They are neither contradictory in a material[19] respect, nor are they internally inconsistent.

In the case of *Maryland Dep't of Human Resources v. Bo Peep Day Nursery*, 317 Md. 573 (1989), the Court of Appeals identified four main dangers associated with statements made by a child testified to by a third person:

> First, the content of the declarant's statement may be false. Secondly, an adult witness, either intentionally or unintentionally, may have inaccurately conveyed the declarant's statement to the decision maker. Third, the adult witness may have drawn an erroneous conclusion from the declarant's accurately reported statement. Fourth, the adult witness may have accurately communicated the declarant's statement, as far as it goes, but may have omitted other matter never explored, or deemed by the witness to be insignificant, but which would be significant to some other evaluator.

Id. at 599. In *Bo Peep*, because "those who testified concerning statements made by the children were subject to cross-examination concerning the accuracy of their communication," the danger in admitting the statements was cured and they were properly considered by the hearing officer. *Id*. at 600. In this case, B. H. had the opportunity to, and did, subject the testimony of Officer Witherspoon, Ms. Askew, and Mrs. H. to cross examination.

B.H. emphasizes that "the determination of whether a child is competent to testify is left to the sound discretion of the trial court." *Jones*, 68 Md. App. at 165. Before such testimony is admitted, B. H. argues, "the court must at least conduct such an examination as will disclose the factual basis on which his conclusion as to competency rests." *Brandau v. Webster*, 39 Md. App. 99, 105-06 (1978). But this case does not involve the admission of direct testimony from a child. In this case, the question is whether or not hearsay statements by children were admissible through a third party adult witness. We conclude that they were.[20] Because B. H. subjected the hearsay statements to cross examination, they were rendered "sufficiently reliable to be admissible in this administrative proceeding, whether or not some or all of the hearsay declarations of the children embodied within that testimony would have been admissible in a judicial proceeding." *Bo Peep*, 317 Md. at 589.

Additional Fact Finding

B. H. next contends that 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 the child or placed the child at a substantial risk of harm. . . .". This Court, based on the administrative record, "must assess whether a reasoning mind could have reached" the same decision as the ALJ did. *Vann*, 382 Md. at 299. B. H. submits that the ALJ made fact findings insufficient to "support a finding of indicated child abuse." B. H. argues that because the ALJ made insufficient findings of fact, and because the decision "can only be reviewed on grounds identical to those relied upon by the agency," we are constrained to reverse. *Doe*, 205 Md. App. at 55.

B. H. identifies three findings that he alleges cannot support a finding of indicated child abuse:[21]

> 3. At dinner, Brayden refused to eat his spaghetti because there were

> mushrooms in the sauce. Brayden left the table without permission. The [a]ppellant chased after him, grabbed him, and brought him back to the table. The [a]ppellant then tried to force the child to eat.
>
> 4. While running, Brayden hit his elbow on a table or a wall and sustained a scratch. The [a]ppellant caused three bruises on Brayden's neck and a scratch under his chin when he grabbed the boy.
> 6. On April 23, 2010, [Mrs. H.] took Brayden to his pediatrician who documented a right elbow bruise, a scratch under his chin, and three superficial bruises in a row on Brayden's neck.

B. H. stresses that "[i]t is a necessary element of the act of child abuse for DSS to demonstrate, and the ALJ to find as a matter of fact, exactly *how* the nature, extent and location of the injury demonstrates that [Brayden] was harmed or placed at a substantial risk of harm." (emphasis added). A *how* clause is not explicit in the rule; regardless, DSS must show 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." COMAR § 07.02.07.12(1)(d) (emphasis added). Although DSS places greater emphasis on the fact that B. H. force fed mushrooms to his son, the ALJ found satisfactorily that the "[a]ppellant caused three bruises on Brayden's neck and a scratch under his chin when he grabbed the boy." From the three cited findings of fact, the ALJ found that DSS met its burden. Brayden's three bruises and the scratch under his chin satisfy both 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." In *Turner v. Hammond*, Turner attempted to secure a special use exception from a Salisbury zoning ordinance. The zoning board denied the exception by using a pre-printed check off form. The form listed a series of conclusions and then provided a box in which the preparer could check "will or will not," thereby indicating if the proposed development either would or would not have a certain impact on the community.

The zoning board was empowered "to judge whether the neighboring properties and the general neighborhood would be adversely affected" by the development project. *Montgomery County v. Merlands Club, Inc.*, 202 Md. 279, 287 (1953). The Court of Appeals found the "reasons given by the Board for denying the application suggest a rather cavalier attitude in respect of its duties and responsibilities. It made no findings of fact worthy of the name and we think citizens are entitled to something more than a boiler-plate resolution." *Turner*, 270 Md. at 55-56. The *Turner* Court recognized that the "record [was] utterly devoid of any evidence." *Id.* at 56. In conclusion, the court stated:

> We have said that substantial evidence is required to support the findings of the Board and that substantial evidence is more than a scintilla of evidence. All definitions of scintilla, at least in this context, are imprecise but if we assume it takes ten gossamers to make a scintilla then the appellees' evidence before the Board falls well short of five gossamers.

Id. at 60 (internal citations omitted).

Turner is low tide on the high seas of administrative decision making. In the order here, the ALJ stated:

> In sum, Brianna's and Brayden's statements, the photographs, and the medical report are credible evidence, which the Appellant did not satisfactorily refute, that: Brayden was injured; the Appellant, his father, caused the injury; Brandon [sic] was four years old and a child; and Brayden's health or welfare were harmed by the scratches and bruises on his neck, and at substantial risk of harm given the comparative size and strength of Brayden and the Appellant.

While this language tracks the regulatory requirements for a finding of indicated child abuse, *see* COMAR § 07.02.07.12 (2012), the case here distinguishes itself factually from *Turner*. 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. The pre-printed check off form used by the zoning board rigidly framed the issues and, metaphorically at least, usurped the board's duty as fact finder. Ultimately, by following the form in rote, the board made "no findings of fact." *Id.* at 55-56.

We cannot conclude that this record is one "utterly devoid of any evidence." *Id.* 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.

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

Section 4-501(b)(2) of the Family Law Article 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." B. H. argues that 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 — for the betterment of the child or promotion of the child's welfare — and [is] not [ ] a gratuitous attack." *Id*. at 444. "[C]hild abuse and reasonable corporal punishment are mutually exclusive; if the punishment is one, it cannot be the other." *Vann*, 382 Md. at 303. "When a court is deciding whether a particular parental discipline is child abuse, whether it be under CL § 3-601 or FL § 5-701 or 4-501, the court always determines whether the corporal punishment was reasonable." *Id*.

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."[22] B. H. claims that he acted as "any responsible parent would have done in that situation and acted in a way to ensure his child returned to the dinner table." Although B. H. testified to the contrary, the ALJ found "that the Appellant's contact with Brayden was not accidental or unintentional." Instead, the ALJ found that "[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 corporeal [sic] punishment."[23]

A reviewing court "should defer to the agency's fact-finding and drawing of inferences if they are supported by the record." *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 14 (2010). Reviewing an agency decision in the light most favorable to it, "the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence." *Id*. The ALJ determined that B. H.'s actions in disciplining Brayden were unreasonable. That fact finding and the inferences therefrom are entitled to deference; such deference is warranted here.

"Generally, when the entire record shows that the findings of fact and conclusions of law are supported by competent, material and substantial evidence taken before the agency . . . it is the function of the court to affirm the order of the agency." *Bernstein v. Real Estate Com.*, 221 Md. 221, 230 (1959). 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.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. "A stet in Maryland is a method of placing an indictment or criminal information in a state of suspended animation into which new vitality may be breathed through either prosecutorial or defense resuscitation." *State v. Weaver*, 52 Md. App. 728, 729 (1982). "The entry of a stet in a criminal case simply means that the State will not proceed against an accused on that indictment at that time." *Smith v. State*, 16 Md. App. 317, 323 (1972).

2. The questions as presented by B. H. are:

(1) Maryland law requires that prior to the admissibility of statements from a young child, the finder of fact must conduct an examination and determine whether the child possesses the capacity to observe, understand, recall and relate the events that occurred and that the child also possesses the duty to tell the truth. Did the Administrative Law Judge err by admitting into evidence statements of a four-year-old child without conducting the requisite examination and when DSS failed to establish the necessary foundation required to admit such statements?

(2) Maryland law requires that the Administrative Law Judge make specific findings of fact to justify a finding of indicated child abuse and to ensure that those findings of fact are supported by credible evidence. Did the Administrative Law Judge err 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 the child or placed the child at a substantial risk of harm and by accepting the version of events as set forth by a four-year-old witness over the events set forth by his eleven-year-old sister and the in-person testimony of the Appellant?

(3) Maryland law allows a parent to use reasonable physical discipline, so long as it is a moderate exercise of domestic authority. Did the Administrative Law Judge err in upholding the finding of indicated child abuse when the Appellant utilized reasonable physical force to ensure that his four-year-old child returned to the dinner table to eat dinner?

3. B. H. and Mrs. H. were going through a divorce during the course of these events. The divorce was granted ultimately, but we shall continue to refer to Brayden and Brianna's mother as Mrs. H for the sake of clarity.

4. The actual charging document is not part of the record on appeal. Case Search revealed charges of Child Abuse in the

Second Degree, Assault in the Second Degree, and Reckless Endangerment.

5. The investigation culminated in a finding of indicated child abuse. B. H. appealed from that finding, resulting in a hearing before an ALJ on December 21, 2010. Ms. Askew testified at that hearing to the statements made to her by the persons she interviewed during the investigation. The references to Ms. Askew's testimony are to that given during the December 21, 2010 hearing. The minor children did not testify at the hearing.

6. It appears that B. H. raised the issue of intent as a defense to the finding of indicated child abuse. Intention is relevant in a finding of ruled out child abuse, but is not a necessary element of DSS's case here. For a finding of ruled out child abuse, it must be proven that "[t]he contact with the child was accidental and unintended and under the circumstances, the injury was not foreseeable." COMAR § 07.02.07.12(c)(2)(a)(i).

7. Ms. Askew considered the cell phone pictures taken by Mrs. H. and the documentation made by Brayden's pediatrician.

8. Ms. Askew testified about the current injury, "[i]t was physical abuse — or the marks on Brayden's neck and the elbow."

9. The order framed the procedural posture, saying: "appellant challenges [DSS's] finding that he is responsible for *indicated* child abuse. The [DSS] bears the burden of establishing, by a preponderance of the evidence, that this finding is consistent with the law and supported by credible evidence. . . ." (emphasis added).

10. The ALJ concluded by saying: "[b]ased upon the above Findings of Fact and Discussion, I conclude as a matter of law that [DSS] has established by a preponderance of the evidence that the finding of indicated child abuse is supported by credible evidence and is consistent with the law. I further conclude, as a matter of law, that [DSS] has established by a preponderance of the evidence that the [a]ppellant is an individual responsible for indicated child abuse. I further conclude, as a matter of law, that [DSS] may identify the [a]ppellant in a central registry as an individual responsible for indicated child abuse."

11. "If an agency's decision is predicated solely on an error of law, including errors in statutory interpretation, we may substitute our judgment for that of the administrative agency." *McLaughlin v. Gill Simpson Elec.*, 206 Md. App. 242, 251 (2012) (citing *Charles Cnty. Dept. of Soc. Servs. v. Vann*, 382 Md. 286, 295 (2004)). *See also Total Audio-Visual Sys. v. DOL, Licensing & Regulation*, 360 Md. 387, 394 (2000) ("[Q]uestions of law, however, are completely subject to review by the courts, . . . although the agency's interpretation of a statute may be entitled to some deference . . . [t]hat deference, however, is by no means dispositive, nor otherwise as great as that applicable to factual findings or mixed questions of law and fact.") (internal quotations and citations omitted).

12. The *Jones* Court held that "the test of a child's competency is not age but the reasonable capacity to observe, understand, recall, and relate happenings while conscious of a duty to speak the truth." *Jones v. State*, 68 Md. App. 162, 166-67 (1986). B.H. highlights that "Ms. Askew confirmed that there was a reliability issue with the four-year-old child as she acknowledged that Mrs. H. believed that the four-year-old child is too young to fully express himself or to fully understand certain things." Despite this testimony, the ALJ "found Brayden's statement[s] . . . persuasive." It was the ALJ's charge to sift through the evidence; a failure to explain each incremental step she took before crediting Brayden's testimony does not warrant reversal. *See* John O. v. Jane O., 90 Md. App. 406, 429 (1992) ("The trial judge need not articulate each item or piece of evidence she or he has considered in reaching a decision . . . The fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal.").

13. B. H. concurrently argues that the admission of Brayden's hearsay statements "placed the burden of proof on the wrong party." B. H. contends that the ALJ "impermissibly shifted the burden of proof to Mr. H. to prove that the four-year-old child was not reliable." This argument is without merit. As discussed *infra*, it was neither impermissible for the ALJ to admit the hearsay statements, nor did such admission constitute a shift in the applicable burden of proof. B. H.'s argument is belied by the fact that at the hearing the ALJ stated on the record that "the [DSS] has the burden of proof to show by a preponderance of the evidence that the finding of indicated child abuse is correct." Also, in her order, the ALJ said "the [DSS] bears the burden of establishing, by a preponderance of the evidence, that [the finding of indicated child abuse] is consistent with the law and supported by credible evidence."

14. Md. Code Ann., Crim. Proc. § 11-304(e) says:

(1) A child victim's out of court statement is admissible under this section only if the statement has particularized guarantees of trustworthiness.

(2) To determine whether the statement has particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:

(i) the child victim's personal knowledge of the event;

(ii) the certainty that the statement was made;

(iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion;

(iv) whether the statement was spontaneous or directly responsive to questions;

(v) the timing of the statement;

(vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience;

(vii) the appropriateness of the terminology of the statement to the child victim's age;

(viii) the nature and duration of the abuse or neglect;

(ix) the inner consistency and coherence of the statement;

(x) whether the child victim was suffering pain or distress when making the statement;

(xi) whether extrinsic evidence exists to show the defendant or child respondent had an opportunity to commit the act complained of in the child victim's statement;

(xii) whether the statement was suggested by the use of leading questions; and

(xiii) the credibility of the person testifying about the statement.

15. B. H.'s counsel was at liberty to challenge the witnesses on any or all of the enumerated factors. "Control over the scope of cross-examination has traditionally been left to the discretion of the trial court unless there is a showing of prejudicial abuse of discretion. The rule may properly be applied in administrative hearings." *Commission on Medical Discipline v. Stillman*, 291 Md. 390, 422 (1981) (internal quotation and citation omitted).

16. The ALJ was not obligated to apply the rules of criminal procedure in this hearing. Similarly, "[w]hile administrative agencies are not bound to observe the technical common law rules of evidence, they are not prevented from doing so as long as the evidentiary rules are not applied in an arbitrary or oppressive manner that deprives a party of his right to a fair hearing." *Stillman*, 291 Md. at 422 (1981); *accord Fairchild Hiller Corp. v. Supervisor of Assessments*, 267 Md. 519, 524 (1973) (quoting *Dal Maso v. Bd. of Co. Comm'rs*, 238 Md. 333, 337 (1965)) ("In general, administrative agencies are not bound by the technical common law rules of evidence, but they must observe the basic rules of fairness as to parties appearing before them.").

17. Section 10-213(c) says "[e]vidence may not be excluded solely on the basis that it is hearsay." *Accord Maryland Dep't of Human Resources v. Bo Peep Day Nursery*, 317 Md. 573, 595 (1989) ("Hearsay which is inadmissible in a judicial proceeding is not per se inadmissible in an administrative proceeding.").

18. B.H argues that the ALJ completely failed to apply any of the factors. As proof, B. H. places emphasis in his brief on the statement of the ALJ that "if — if the [DSS] fails to establish that the child knows the difference between right and wrong, then that will go into my — decision on what weight to give any hearsay testimony. But it is admissible in these proceedings, and — and so I will allow it." Allowing the evidence was not error. The ALJ acted as empowered by Section 10-213(c) of the State Government Article. Further, in its memorandum opinion and order, the circuit court found that the ALJ correctly applied the factors in rendering her opinion. The factors noted by the circuit court include: factor (iii) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion; factor (vi) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience; factor (ix) the inner consistency and coherence of the statement; and factor (xiii) the credibility of the person testifying about the statement. *See* MD. CODE ANN., CRIM. PROC. § 11-304(e).

19. B.H. raises a factual question about precisely how Brayden injured his arm. The ALJ resolved the testimony on this issue by finding, as fact, that "[w]hile running, Brayden hit his elbow on a table or a wall. . . .". Whether Brayden ran into a table or a wall neither renders unreliable the balance of the ALJ's findings nor precludes the legality of the finding of indicated child abuse.

20. Here, the ALJ "accept[ed] Biana's [sic] and Brayden's hearsay statements to the CPS investigator over the [a]ppellant's testimony and believe[d] that the [a]ppellant chased Brayden and forced food into his mouth." The Court of Appeals has held that such evidence "is admissible before an administrative body in contested cases and, indeed, if credible and of sufficient probative force, may be the sole basis for the decision of the administrative body." *Redding v. Board of County Comm'rs*, 263 Md. 94, 110-11 (1971).

21. In total the ALJ made eight findings of fact. Findings #3, #4, and #6 deal with Brayden's physical injuries.

22. Even if B. H. succeeded initially in proving the use of corporal punishment, "[a] finding of indicated child abuse may be appropriate when the evidence establishes that the child's parent imposed corporal punishment that left the child with an injury the nature, extent, and location of [which] indicate that the child's health or welfare was harmed or was at substantial risk of harm." *Dep't of Human Res. v. Howard*, 168 Md. App. 621, 643 (2006) (internal quotations omitted).

23. B. H. raises the issue of intent as a defense to the finding of indicated child abuse. Intent would be probative of a defense only after a finding that corporal punishment was administered. *See Dep't of Human Res. v. Howard*, 168 Md. App. 621, 642 (2006) (noting that "[a] finding of 'indicated child abuse' is not 'appropriate' when the evidence establishes that the child's parent imposed *corporal punishment* that left the child with an injury unless 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" (emphasis added) (internal quotation omitted). Here, intent is irrelevant because the ALJ failed to make the predicate finding that B. H. used corporal punishment.

NO TEXT

Cite as 12 MFLM Supp. 39 (2012)

Custody and support: legal custody: ability to communicate

Thomas M. Lawrence Jr.

v.

Nachelsea Williams

No. 2382, September Term, 2011

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

Opinion by Watts, J.

Filed: October 19, 2012. Unreported.

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.

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.

Thomas M. Lawrence, Jr., appellant, *pro se*, appeals an order issued by the Circuit Court for Prince George's County awarding Nachelsea Williams, appellee,[1] 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 on appeal, which we quote:

> I. Is the total award of Child Support of $915.00 that was granted to [a]ppellee correctly calculated on Worksheet A-Child Support Obligation?
>
> II. Is it justified in all aspects to award Sole Legal Custody to [a]ppellee [ ]?
>
> III. Are the Physical Custody dates assigned to [a]ppellant[ ] affected by the Legal Custody ruling, and compatible with [a]ppellant's working schedule?

Because we answer all three of these questions in the negative, we affirm.

FACTUAL AND PROCEDURAL 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.[2]

On April 1, 2011, appellant filed a Complaint for Custody in the Circuit Court for Prince George's County. 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.[3]

At the hearing, appellant testified that he was employed full-time as an electrician earning $65,000 a year. He was also in the Navy reserves earning approximately $5,200 per year. At the time of the hearing, appellant was responsible for keeping the children during much of the school week. He testified that he would pick up the children from school on Mondays, Tuesdays, and Wednesdays, and that appellee would take the children on her day off — Thursdays — and he would take the children back on weekends. According to appellant, on the days that appellee was scheduled to have the children overnight, he would meet appellee at a mutually agreed upon location at approximately 9:30 at night. Appellant testified that, in his opinion, this arrangement was not in the best interest of the children.

Appellant testified that he had emergency medical and dental insurance for the children, but that he was not aware of the exact amount of the monthly cost of health care benefits through his employer. At the hearing, appellant's counsel introduced a number of records of doctor's visits for the boys, but no documentation relating to health insurance.

In describing his relationship with appellee, appellant testified that he had difficulty communicating with her and that "[n]o matter what type of communication [he tried] to bring to [appellee, he] would never receive any feedback[.]" Appellant testified that he and appellee were not able to make joint decisions "regard-

ing the important aspect[s] of [his] children's lives" and that "as far as communication, the only ways of communication that [he received were] through a text message or through a message from [his] seven[-]year[ ]old son."

When asked what he believed the ideal schedule would be for the children, appellant testified as follows:

> A. I'm thinking as far as the schedule Monday through Friday, to eliminate that, to have the kids where I can get them to school every day during the week and three weekends out of the month [appellee] can get them including her day off through the week and pretty much during the school, I'm concerned with during the school week. I can get the kids after school after the daycare after school and I can take care of it from there.
>
> Q. So is it your testimony that you would, that you think it's in the best interest of the children that you have the children Monday through Friday overnights?
>
> A. Yes.
>
> Q. And that you also have one week, just one weekend per month and that the other three weekends of the month you believe it would be appropriate for [appellee] to have the children three weekends of the month?
>
> A. Absolutely.

Nida Arrabi, an assistant director and school teacher at a day care center where the children were enrolled for approximately six months, testified as a witness for appellant. Arrabi testified that appellant was involved in the children's activities, and that appellee had "[v]ery little" involvement at the daycare. According to Arrabi, the day care center had difficulties getting appellee to make payments and to follow-up on agreements regarding late payments. Arrabi testified that, in her opinion, it would be appropriate for appellant to have "primary custody" of the children.

Reverend Dr. John Adekunjo, whose ministry ran an afterschool homework tutorial program in which Azariah participated for approximately two years, testified as a witness for appellant. According to Reverend Adekunjo, he knew appellant from his coming to pick up the children, and he met appellee only on occasion. Reverend Adekunjo testified that appellant was the parent who routinely picked up Azariah, that his encounters with the parents were almost exclusively with appellant, and that appellant frequently involved himself in Azariah's tutorial work. Reverend Adekunjo testified that he could not recall appellee inquiring about Azariah's progress at the program, and that he had at least one disagreement with appellee in which he thought he recalled telling her she needed to provide Azariah with warmer clothing, and that appellee "took offense to that."

Redeat Berhanu, who was acquainted with appellant for approximately ten years and was dating him at the time of the hearing, testified as a witness for appellant. Berhanu testified that on the day of the alleged abuse, she did not see appellant physically discipline the children at any time. Berhanu testified about the living arrangements of the children within the house, specifically that Isaiah usually slept with her and appellant, and that Azariah slept in a bunk bed in his own room. She described a routine in which the boys would spend the evening with her and appellant, and then be taken to a gas station for appellee to pick them up at approximately 9:30 p.m., and that the pattern had been going on for "[s]everal months now[.]" Berhanu testified that appellant participated in extracurricular activities with Azariah, and helped Azariah with his homework.

On her own behalf, appellee testified that she worked at Capital One Bank and earned between $30,000 and $32,000 annually. According to appellee, she understood the importance of the children being picked up at a reasonable hour. Appellee testified that she had obtained a work shift change, as of December 1, 2011, that would allow her to work from 8:00 a.m. until 4:30 p.m. Monday through Friday, and have weekends off, impliedly to accommodate the children's schedule.

As appellee appeared *pro se* at the hearing, the circuit court informed her of the factors the court considers in determining custody, such as the fitness of the parents, character and reputation of the parties, desire of the natural parents and any agreements between them, material opportunities affecting the child's future, age and health of the child, length of separation, and capacity of the parents to communicate. Appellee testified about Azariah's personality, his grades, and his interests. When asked by the circuit court what type of access appellant should have, appellee testified that "[f]rom here the schedule [she] definitely believe[d] Monday through Friday and even the weekends knowing that it's safe with [her, she] would rather the children just be with [her]. If the court rules differently, of course [she] would have to abide by it and keep them Monday through Friday [she] believe[d] would be best" Appellee informed the circuit court, upon inquiry, that she did not have evidence of the change in her work schedule at the hearing. Accordingly, the circuit court recessed the hearing until

December 15, 2011, pending production of appellee's new work schedule.[4]

At the second hearing on December 15, 2011, appellee produced information relating to her work schedule change. Upon reviewing the documentation submitted by appellee, the circuit court ruled from the bench, finding, in pertinent part, as follows:

> Those things being said, the first issue the Court is going to address is the question as to whether or not joint legal custody is appropriate. Joint legal custody is not appropriate because the parties are not at a state where their communication is sufficient to cause the Court to have any confidence that they'd be able to sit down together and they would be able to communicate together for the purpose of maldng joint decisions, regarding the matters of the best interest of Azar[i]a[h] and Isaiah, in terms of major decisions. Okay.
>
> The Court finds that each parent is a fit and proper person to become primary legal custodian of the two children.

With respect to the factors relating to the best interests of the child, the circuit court ruled as follows:

> The Court looking at the character and reputation of the parties, the Court doesn't find that this factor favors one or the other. It would appear to be to the Court that [Arrabi] . . . was called for . . . multiple purpose[s], one of which would have been to demonstrate the involvement of [appellee] and [appellant], with regard to taking care of certain daycare expenses.
>
> The Court has a bit of hesitation in accepting [Arrabi] as establishing that [appellee] is not a good person, and it seems as though there was some animosity between the two of them that came through in the exuberance, so to speak, of [Arrabi]'s testimony. Yes there were differences. There were business disputes and quite probably the two people don't like each other, but we can't force people to like each other.
>
> And I don't think that [Arrabi] has an interest in the outcome of the case, in terms of necessarily — but she has a favor from [appellant] that's just out of the — it would appear to the Court to be out of accepting him as an easier person to deal with than [appellee]. And she's also someone who may have been lied to, but or she thinks she was lied to. She didn't believe [appellee] on certain things, because [appellee] hadn't come through and, when the money, when it comes down to the money, she can rely upon [appellant] and not [appellee] and that's the situation.
>
> The Court — so I don't find one person to [ ]be of better reputation and character than the other, and none of the other evidence would establish that there is a favor of one as a factor.
>
> There is no agreement between the parties. The Court does not question the sincerity of either parties' request for primary legal custody, but there is clearly an underlying agreement that each parent believes that it's in the best interest of the children that the other parent be involved in their lives.
>
> Potential for maintaining natural family relations. That is a strange factor in this case. It seems clear from the evidence that [appellee] came to this area with [appellant] and she came to an area where he has family; she left California. But both parties apparently deemed it to be in the best interest of their children that they would pursue opportunities here in this area and, geographically, the potential for maintaining family relations, natural family relations favors [appellant]. That's geographically, but it doesn't necessarily mean that it's not possible to have family relations with [appellee]'s California family. If we're looking at factors, that factor would favor [appellant] I guess.
>
> Preference of the children when the child or children is of sufficient age and capacity to form a rational judgment. The Court does not deem either of the children to be of a sufficient age to form a rational judgment. And whatever may have caused the children to communicate what they communicated to their mother, the

Court doesn't know the circumstances under which that might have happened, given their ages, and there could have been some dispute at home or something just didn't go right.

The Court is not convinced that [appellant] did the things that the children asserted with — and what — the part of that is that the picture of the children as presented with other caretakers and everything is inconsistent with [appellant] doing something harmful to the children in that picture, to the extent that it would be abusive or unreasonable corporal punishment that occurred.

I'm not concerned about language. You know, we learn English because our parents speak English. We swear because our parents swear, okay? And we look at the world because our parents look at the world a certain type of way no matter how we may try to shake it. When you're 50 or 55 years old, we're still treating people the way our parents taught us to treat people. So I always have concerns about language in the presence of the children of disparaging nature about a parent. That's a little different, because it doesn't take the swearing words, curse words or anything like that. It can be the most acceptable word in the world, in terms of usage.

Material opportunities affecting the future life of the children. You know, the father makes more money. Age, heath and gender of the children. The Court doesn't find that to be of a factor, except that it is a factor with regard to if [appellee] had the same schedule right now, the age would be of tremendous weight. If the children were 14 years old, I wouldn't have as much trouble with an exchange at 10:00. But and if the situation was the same, the Court would have much trouble with a maintenance of the situation as it was prior to the change of schedule.

Residence of the parents and opportunity to visitation. Both parents live here in Prince George's County. The[re] are plenty of opportunities for that.

And as to separation between the parties, I don't know that that's of critical importance here. The circumstances of the separation are suggestive or it's informative of the level of communication between the parties. While it can be suggested that [appellee] does not communicate with [appellant], she doesn't respond when he asks questions of her and expectations, it becomes a little raw and the wound can last for quite a while, given the circumstances of — it should have been obvious to her that we were separating, since the letter, whatever information was right there on the table for her to see. You know, if you need to leave, you can stay for a moment or we're going to terminate the lease.

So I — and in terms of communication, we can't make people talk to us, and I know that was one of [appellant's] concerns. And the Court will not try to make the parties talk to each other, but the Court has something in mind, in terms of something that might prompt them to talk to each other from time to time. Each child, I mean the Court, there appears to be a strong relationship between each child and each parent.

While we have information from third-parties with regard to observation of the relationship between — more information between [appellant], by virtue of his involvement in certain activities, I really don't have anything that suggests that there is not as strong a relationship between the children and their mother.

Potential disruption of a child's social and school life. Children are, particularly over when it's involved with activities, notwithstanding the separation and the school life that's been going on with the arrangements that there have been. I don't find this to be persuasive or a great way to favor one party or the other.

The matters of the parental employment, those have been addressed by the change of [appellee's] employment hours.

> The Court finds the case to be a very close one, in terms of the Court would have felt comfortable with the children being in the primary care and custody of either of the parents. This is not a case where the Court says that it's — oh, boy, I can't believe that either one is going to get the child or but you know, I can't do anything because it doesn't come to the level of calling [the Department of Social Services] and saying come and get the children and spare them their parents.
>
> There is the Court is most impressed by the continued decision of the parents that the children needed to at least spend nights primarily with their mother, and the Court finds that it's in the best interest of the children that legal custody be granted to [appellee].
>
> The Court finds that it's in the best interest of the children that there be a physical access or what some people call "visitation," but for [appellant] it would be the first, second and fourth full weekend of each month, beginning on the Thursday with pick up at the conclusion of school or daycare, through drop off at school or daycare the following Monday, except any weekend when [appellant] is required to attend drills.

The circuit court set forth a specific schedule under which appellant would have primary physical custody each summer with appellee receiving fourteen elected days with the children in summer, to be either a consecutive fourteen day period or two consecutive seven day periods. The circuit court enumerated in detail, both from the bench and in a subsequent Child Parenting and Access Order issued on December 21, 2011, the schedule to be followed on holidays and in other instances affecting the children's schedule, such as Spring Break. In the Child Parenting and Access Order, the circuit provided specific guidelines under which the parents were to communicate with one another and the children, and directed appellant to pay appellee $840 per month in child support plus $75 per month in arrears, for a total of $915 per month in child support. On January 17, 2012, appellant filed a Notice of Appeal.[5]

STANDARD OF REVIEW

In In re Shirley B., Jordan B.. Davon B., & Cedric B., 419 Md. 1, 18 (2011), the Court of Appeals enumerated the varying levels of review that appellate courts must apply in custody disputes:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Second,] if 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 fmdings that are not clearly erroneous, the [[trial] court's] decision should be disturbed only if there has been a clear abuse of discretion.

(Citing In re Yve S., 373 Md. 551, 586 (2003)) (citations omitted) (some alterations in original).

DISCUSSION

I.

Appellant contends that the circuit court erred in awarding child support of $840 per month plus arrears of $75 per month to appellee. Appellant argues that 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 that appellee submitted inaccurate receipts to the circuit court that were relied upon by the circuit court in calculating Worksheet A.[6] Simply put, we disagree.

Preliminarily, we observe that appellant had ample opportunity to raise below the issues he now contends relating to the child support payments, but that he failed to do so before the circuit court calculated child support and issued an Order detailing the award. Appellant appeared before the circuit court on two separate occasions, both times represented by counsel at the hearings of December 5, 2011, and December 15, 2011. The record reflects that on neither occasion did appellant argue that the child support guidelines worksheet contained incorrect calculations, that appellee submitted inaccurate receipts, or that his financial statements were not before the court. As such, appellant now raises issues relating to child support payments that were never addressed in the circuit court prior to the determination of the child support award. See Md. Rule 8-131(a) ("Ordinarily, 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[.]").

Nonetheless, we conclude that a review of the

record reveals no such discrepancies, nor has appellant identified any specific alleged errors in the circuit court's child support calculations. The exhibits that appellee introduced at trial were: (1) a school registration form, (2) photographs, and (3) a lease agreement. Appellant has attached as an exhibit to his brief appellee's Answers to Interrogatories, in which she lists insurance payments of "approximately $107.00/month" as a "liability." Yet, nowhere has appellant directed this Court to any alleged false or inaccurate information upon which the circuit court relied, or much less explained the relevance of appellee's response to the Interrogatories. Absent a finding that the circuit court's determination with respect to the child support findings was clearly erroneous or that the circuit court miscalculated the child support award under the guidelines based on the information before it, we will not disturb the child support award. See In re Shirley B., 419 Md. at 18.

II.

Appellant contends that the circuit court abused its discretion in awarding sole legal custody to appellee. Appellant appears to argue that the circuit court abused its discretion in failing to award joint legal custody, and that the circuit court improperly concluded that the parties do not communicate in a manner that would allow joint custody to function smoothly on a day to day basis. Appellant points to the testimony of his witnesses along with his prior history of caring for the children as evidence of the circuit court's abuse of discretion.

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, 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.").

In Boswell v. Boswell, 352 Md. 204, 219-20 (1998), the Court of Appeals explained that the child's best interest is the primary factor to be considered in visitation and custody disputes, stating:

> In Maryland, the State's interest in disputes over visitation, custody, and adoption is to protect the "best interests of the child" who is the subject matter of the controversy.
>
> [W]hile a parent has a fundamental right to raise his or her own child . . . the best interests of the child may take precedence over the parent's liberty interest in the course of a custody, visitation, or adoption dispute. . . . The best interests standard does not ignore the interests of the parents and their importance to the child. We recognize that in almost all cases, it is in the best interests of the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent.

(Citations and internal quotation marks omitted).

In Montgomery Cty. Dep't of Social Serv's. v. Sanders, 38 Md. App. 406, 420-21 (1978), this Court described the factors to be used in determining the best interests of the child, stating:

> 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.
>
> While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation, or the length of separation.

(Citations omitted).

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 . . . [on] June 30, 2011 for a scheduling conference" and (2) on "October 12, 2011 [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 that the circuit court properly determined that the parties did not communicate well enough to make major decisions jointly. For example, at the hearing, appellant testified that Azariah told him appellee was consider-

ing moving the boys to California, and that she never informed him (appellant) of such plans or discussed the matter with him. Appellant also testified that, without his knowledge or approval, appellee changed Azariah's school and that appellee informed him of the change after the fact. According to appellant, the only methods of communication he had with appellee were through short cellular telephone conversations and text messages.

At the second hearing, in ruling from the bench, the circuit court discussed each of the factors set forth in Sanders. During the hearings, the circuit court ensured that both parties had an opportunity to provide evidence regarding the children and their interactions with them. In ruling from the bench, the circuit court specifically noted that, notwithstanding Arrabi's testimony regarding appellant's good character and her suggestion that appellee was a less than suitable parent, there was reason to discount Arrabi's testimony based on "some animosity between [Arrabi and appellee] that came through in the exuberance, so to speak, of [Arrabi's] testimony."

> As this Court stated in Sanders, id at 418-19, 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. . . . There can be very little constructive or useful precedent on the subject of custody determinations, because each case must depend on its unique fact pattern. That is why we must afford great weight to the [fact-finder's] opportunity to see and hear the witnesses, . . . inasmuch as we are supplied with only the transcribed testimony. 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.

(Citations and some internal quotation marks omitted) (omissions in original). 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.

In evaluating the best interests of the children, the circuit court observed it was the "continued decision" of the parents that the children needed to "at least spend nights primarily with their mother." Although appellant highlights several facts that he believes weighed heavily in his favor, such as the size of his house, his consistent involvement in the children's schooling, and his witnesses' testimony, these are each but individual factors to be weighed in considering the best interests of the children. After evaluating these factors along with all of the other 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 that it was "in the best interests of the children that legal custody be granted to [appellee]." For all of the reasons above, we are satisfied that the circuit court did not abuse its discretion in awarding appellee sole legal custody.

III.

Appellant seeks reversal of the circuit court's order as to physical custody on the grounds that the shared custody order requires that he pick up the children on Thursdays and drop them off on Mondays, and argues that "transportation will be an issue" because he is employed. On brief, appellant offers specific options as to schooling and activities that he could provide for the children that, in his view, appellee cannot.

The record reflects that 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 that he would have been responsible for them had his complaint met with success.

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

FOOTNOTES

1. Appellee is referred to in the record alternately as "Nachelsea Renee Williams" and "Nachel C. Williams." Appellee has not filed a brief.

2. On brief before this Court, appellant's sole contention relating to paternity is as follows: "From the time of separation to the birth date, [a]ppellant [h]ad very little knowledge about the pregnancy periods that totaled 5 months until birth. A Motion to Disestablish Paternity was filed on February 6, 2012 to prove that [a]ppellee does have pre[ ]meditation to deceive [a]ppellant and [c]ourts that [appellant] is the biological Father of Isaiah Lawrence for personal child support gains. This train of thought stemmed from sudden miscommunication of [a]ppellee to [a]ppellant dating back from

October 2009 until present day." The record demonstrates that the Motion to Disestablish Paternity was filed after the hearing and issuance of the Order at issue in this appeal. The record does not reflect whether the circuit court has ruled on the motion, although in appellant's brief, which he signed on June 12, 2012, appellant states that Isaiah is "currently" his natural born child "pending a paternity test."

3. Appellee filed a petition seeking a protective order in which she alleged that Azariah had been punished by appellant after disagreeing with his father. According to appellee, she took Azariah to the emergency room where she testified that it was suggested she file a protective order. She further testified that prior to this incident, Azariah had come home very upset on another occasion, causing her to contact the police, seemingly about abuse by appellant. Appellant denied the allegations of abuse.

4. Prior to the conclusion of the initial hearing, the circuit court denied appellee's request for a protective order on the basis that appellee had not shown sufficient proof of abuse. The circuit court noted, however, that it did not question appellee's motivation in filing the petition nor, as explained further at the second hearing, did it "question the sincerity of the effort at intervention by [appellee]." The circuit court's refusal of the grant of a protective order is not a subject of the instant appeal.

5. This appeal followed, but not without further action by appellant in the circuit court. The day after the Order was dated, there appears in the record a hand-written letter from appellant in which he sought reconsideration of the initial Order. This letter was followed by a Motion to Strike Appearance by appellant's counsel filed January 12, 2012, which was granted on January 19, 2012. On that same day, appellant filed a Motion to Reconsider, Alter and Amend Judgment, appearing *pro se*. On March 16, 2011, the circuit court denied the motion.

6. Appellant also raises here the issue of appellee's prior schedule, in which she worked into the evenings on weeknights and picked up the children at 9:30 p.m. from appellant. Appellant appears to feel aggrieved that appellee changed her work hours and produced evidence of that change at the circuit court's second hearing, which it scheduled specifically to review such documentation. Given that neither appellant's nor appellee's specific work hours affected the child support calculation, this Court sees no need to address the contention.

Cite as 12 MFLM Supp. 47 (2012)

Divorce: exceptions to Master's report: appeal

Sandra Lee Fazenbaker

v.

Webster Bradley Fazenbaker

No. 2676, September Term, 2011

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

Opinion by Salmon, J.

Filed: October 19, 2012. Unreported.

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 (hereinafter "Mother") and Webster Bradley Fazenbaker (hereinafter "Father" or "Webster, Sr.") were married on July 23, 1999. A son, Webster Lee Fazenbaker (hereinafter "the Child"), was born to the marriage on August 25, 2006. In March, 2009, the parties separated.

Mother, on July 28, 2010, filed, in the Circuit Court for Garrett County, Maryland, a complaint for custody of the Child. Father filed an answer to the complaint and a counter-complaint in which he asked that he be granted legal and physical custody. Additionally, on April 11, 2011, Father, by counsel, filed an amended counter-complaint in which he asked, among other things, that he be granted a divorce from Mother on the grounds of adultery. He also asked, once again, that he be granted sole physical and legal custody of the Child.

The assignment office for Garrett County scheduled a merits hearing before the "Standing Master for Domestic Relations" for September 20, 2011. On that date, both parties appeared and agreed, on the record, that the only contested issues would be custody and visitation. Mother, who represented herself at the hearing, agreed that she was guilty of adultery. Both parties waived alimony and gave up their right to a marital property award. The Master who heard the case was the Honorable Daryl T. Walters.

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.

At the hearing, Mother testified that Webster, Sr. was not the father of the Child. Mother conceded, however, that when she filled out the Child's birth certificate she swore, under oath, that Webster, Sr. was the Child's father.

Testimony at the hearing showed that from the time the parties separated in March, 2009, until the September 20, 2011 hearing, the Child had been in the sole physical custody of the Father for approximately two-thirds of the time and with the Mother for the remaining period.

Evidence introduced at the hearing also showed that although Father had lived at the same address for the past 20 years, Mother had lived at five different addresses since the parties separated. At the time of the hearing, Mother lived with Jerry Schrider, her boyfriend, on Kent Island, which is on the Eastern Shore of Maryland. Evidence produced by Father proved that after the Child visited with Mother and her boyfriend, the Child reported to Father that he had seen Mother in bed with her boyfriend and that the two were on top of one another.

At the conclusion of the hearing, the Master announced that he was going to recommend to the Circuit Court: 1) that Father be granted a divorce from Mother on the grounds of adultery; 2) that Father be granted sole physical and legal custody of the Child, and; 3) that Mother be granted supervised visitation rights with the Child, no less frequently than every other weekend but that the visitation take place in Garrett County at the home of the child's maternal grandmother.

In the Master's oral opinion, he explained his reasons for his recommendation. First, he analyzed all of the factors set forth in *Montgomery County v. Sanders*, 38 Md. App. 406, 420 (1978), to the extent that they were relevant. One of the *Sanders* factors that the Master thought relevant was the fact that the Child had many family relations who lived in the Garrett County area but none of his relatives lived near Mother's current address on Kent Island.

The Master also expressed the view that Father had been an excellent caregiver to the Child since the date of separation. On the other hand, the Master had

"a lot of questions" about Mother's fitness as a parent. Particularly important to the Master was the fact that Mother had, without giving Father any warning, taken the Child out of school and transported him to the Eastern Shore to live with her and Mr. Schrider. Also, in regard to Mother's fitness as a parent, the Master found that Mother's credibility "was suspect."

Near the end of his oral opinion, the Master said:

> [One] other factor, the adultery plays a factor in this [award of custody]. You [Mother] cheated on your husband possibly numerous times. But while you were married, you moved in with another guy. You exposed your son to that.[1] And that's another reason I find that you are unfit to have custody of the minor Child.

(Emphasis added).

The Master made his recommendations on September 20, 2011. On September 30, 2011, Mother filed a pleading titled "Exceptions Letter" in the Circuit Court for Garrett County. The letter, which was signed by Mother, read in its entirety as follows:

Plaintiff: Sandra Lee Fazenbaker

Defendant: Webster Bradley Fazenbaker

"Master did not follow the law, abuse with his discretion to the facts."

The Exceptions Letter was filed, even though the letter had no certificate of service. Compare, Md. Rule 1-323.[2] The clerk, however, typed on the bottom of the letter the following words: "No Certificate of Service. As a courtesy, Clerk's office placed copy in Defendant's Attorney box."

On October 7, 2011, Garrett County Circuit Court Judge James E. Sherbin signed a "Final Order of Divorce and Custody" (hereinafter "the final order"), which read:

> This case was heard on September 20, 2011. Based on the testimony presented and the pleadings, the Court has determined the defendant-counter plaintiff has met his burden on his Amended Counter Complaint. It is therefore this 7th day of October, 2011,
>
> ORDERED, that the Defendant-Counter-Plaintiff, Webster B. Fazenbaker, is hereby divorced absolutely from the Plaintiff-Counter Defendant, Sandra Lee Fazenbaker, on the grounds of adultery; and it is further,
>
> ORDERED, that the sole legal and primary physical custody of Webster Lee Fazenbaker, DOB 8/25/06, is awarded to Defendant-Counter-Plaintiff, Webster B. Fazenbaker; and it is further,
>
> ORDERED, that the Plaintiff-Counter-Defendant, Sandra Lee Fazenbaker, is granted reasonable visitation rights with Webster Lee Fazenbaker on two alternate weekends a month at the maternal grandmother's, Earldeen Guthrie's home, who will supervise the visit; provided, however, that Plaintiff-Counter Defendant, Sandra Lee Fazenbaker, shall not allow William Schrider to be present at any time; the parties may vary the location and supervisor by agreement between them; and it is further,
>
> ORDERED, that there is no personal property or alimony to be awarded.
>
> It is so ORDERED

The final order was docketed on October 11, 2011.

Mother, by counsel, filed a pleading entitled "Motion to Set Aside Order and Set Matter for Exceptions Hearings and Reconsideration" (hereinafter "First Motion to Revise Judgment"). The First Motion to Revise Judgment was filed on November 7, 2011 and read as follows:

1. That on September 20, 2011, the Master heard the above matter and issued recommendations. (See attached Exhibit A)
2. That on September 30, 2011, Plaintiff [Mother] filed Exceptions to the Master's Findings and Recommendations. (See attached Exhibit B)
3. That said Exceptions were filed within the ten (10) day time prescribed by Maryland Rules of Court 9-208(f).
4. Despite Plaintiff's having noted her exceptions in a timely manner, the Honorable Court mistakenly executed a Final Order of Divorce on October 7, 2011. (See attached Exhibit C)
5. That once Plaintiff filed her Notice of Exception, this matter should have been set for an Exceptions Hearing and no final order should have been executed.

WHEREFORE, Plaintiff respectfully requests the Honorable Court:

> a. Set aside the final order of custody and set this matter for an Exceptions hearing.
>
> b. For such further relief as the cause of justice requires.

On December 12, 2011, an Opinion and Order denying the First Motion to Revise Judgment was docketed. Judge Sherbin expressed his reasons for the denial as follows:

> 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)(1)(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). The only law Plaintiff cites in support of her motion, Rule 9-208(f), fails to support her position. The rule 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.
>
> For the above reasons, it is this 12th day of December, 2011 ORDERED by the Circuit Court for Garrett County, Maryland that Plaintiff's Motion to Set Aside Order and Set Matter for Exceptions Hearing and Reconsideration is DENIED.

Mother's counsel waited until Wednesday, December 28, 2011, which was sixteen (16) days after Judge Sherbin's decision and order was docketed, before filing a pleading entitled "Motion to Reconsider and Grant Additional Time to Amend Exceptions." (hereafter "Second Motion to Revise Judgment"). That motion stated:

> 1. That on December 12, 2011, this Honorable Court issued an order denying Plaintiff's Exceptions and Motion to Set Aside Order and outlined three reasons, namely: (a) That Exceptions were not served on opposing party; (b) That no transcript had been requested; and (c) That the Exceptions did not have enough specificity.
>
> 2. Service - That at the time of the Master's hearing, and indeed the filing of Exceptions form that a copy of her Exceptions was served on opposing party's attorney, Thomas Dabney, contemporaneously with the filing of the Exceptions. (See Attached Exhibit A)
>
> 3. Transcript - That in fact moving party had requested a transcript be prepared in conjunction with her Exceptions and in fact, the Court Reporter had completed said transcript on December 1, 2011, eleven days before this court concluded that no transcript had been requested or completed. (See Attached Exhibit B)
>
> 4. Lack of Specificity - Since moving party was unrepresented at the time of the hearing, no subsequent attorney could properly amend her Exceptions until after the transcript was completed, since said attorney was not present for the testimony at the Merits trial. Only after an attorney had a copy of the transcript could the attorney then amend the Exceptions in this matter Now that the Court Reporter has completed the transcript, a more detailed amended Exceptions may be filed.
>
> 5. Maryland Rule 9-208(f) allows the Court to allow Exceptions without undue specificity when justice so requires it. In the instant case, to expect a pro-se party with a ten day

exceptions hearing (including mail time to and from Chester, Maryland) to file detailed Exceptions without a transcript is unreasonable and no attorney whom is not present could have completed Amended Exceptions prior to having obtained a copy of the transcript.

WHEREFORE, moving party respectfully requests this Honorable Court:

a. Set aside the Order dated the 12th day of December, 2011;

b. Grant moving party twenty (20) additional days to file Amended Exceptions in this matter;

c. For such further relief as the cause of justice requires.

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

On February 24, 2012, which was approximately three and one-half months after Judge Sherbin's "final order" was docketed, Mother filed an appeal in which she raises four questions:

(1) Did the Court err in having the Master hear the matter of final divorce and custody without the consent of the parties?

(2) Did the Court err in refusing to even consider or address Appellant's Exceptions and Motion to Reconsider?

(3) Was the trial Court clearly erroneous in applying both the fact and the law to granting Appellee custody and ordering Appellant's visitation to be severely truncated by having it supervised and limited to Garrett County?

(4) Did the trial Court err in concluding that a material reason it granted custody to Appellee was Appellant's adultery?

Father elected to not file a brief.

I.

Before addressing any of the questions raised by appellant, we must first decide what Order, if any, signed by Judge Sherbin has been timely appealed.

The order docketed on October 11, 2011 was a final order. Ordinarily, a dissatisfied litigant must file an appeal to this Court within thirty days of such an order. See Md. Rule 8-202(a). Md. Rule 8-202(c), however, provides for exceptions to the thirty-day rule. Subsection (c) of Rule 8-202 reads, in material part, as follows:

> (c) **Civil action. - Post judgment motions**. In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be filed within 30 days after entry of (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534. . . .

Moreover, if a motion to revise judgment is filed [pursuant to Md. Rule 2-535(a)] within ten days of the final judgment, that motion stays the time for filing the appeal. *See Unnamed Atty. v. Attorney Grievance Committee*, 303 Md. 113, 486 (1985); *See also Pickett v. Noba*, 114 Md. App. 552, 597 (1997).

In summary, under the Maryland Rules, there are only four motions that a party can file that will toll the thirty-day time limit for filing an appeal. They are:

(1) Motion for Judgment notwithstanding the verdict (Md. Rule 2-532);

(2) Motion for New Trial (Md. Rule 2-533);

(3) Motion to Alter or Amend a Judgment (Md. Rule 2-534); and

(4) Motion to Revise Judgment (Md. Rule 2-535).

As to all four of those motions, if the movant wants to stop the thirty-day appeal period from running, the movant must file his or her motion within ten days of the entry of the final judgment. *Pickett, supra*, 114 Md. App. at 556-57.

Mother filed two post judgment motions. Her counsel did not indicate in his post judgment motions what rule [or rules] he relied upon. Nevertheless, the pleading entitled "Motion to Set Aside Order and Set Matter for Exceptions Hearing and Reconsideration" was, in substance, a motion to revise judgment under Md. Rule 2-535(a), which reads:

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

> same day as, but after, the entry on the docket.

Because appellant's first post-judgment motion was filed on November 7, 2011, which was 27 days after the final order of divorce and custody was docketed, appellant's First Motion to Revise Judgment did not stop the thirty-day clock from running in regards to the court's final order. That order became final on November 10, 2011.

As already mentioned, the trial judge, on December 12, 2011, denied appellant's First Motion to Revise Judgment. The order denying the motion was docketed on December 12, 2011. Appellant had 30 days from December 12, 2011 to file an appeal from the denial of that motion, but no appeal was filed within that period. And, because no motion was filed within 10 days of December 12, 2011, 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 his First Motion to Revise judgment or any allegation that error was committed when the court entered the final order of divorce and custody.

This leaves, for consideration, appellant's Second Motion to Revise Judgment, which appellant called a "Motion to Reconsider and Grant Additional Time to Amend Exceptions." As already mentioned, that second motion asked the court, *inter alia*, to grant appellant additional time to file exceptions. The court did not err in denying appellant's request for additional time. Judge Sherbin's final Judgment of Divorce became enrolled prior to December 28, 2011, which is the date that the Second Motion to Revise Judgment was filed. A judge has no power to grant additional time to amend exceptions once a final judgment of divorce becomes enrolled.

The second post-judgment motion filed by appellant also asked the court to "reconsider" and to "set aside" the December 12, 2011 order in which the court denied appellant's First Motion to Revise Judgment. What was said in *Casey v. Grossman*, 123 Md. App. 751, 760 (1998), in a similar situation is instructive, viz:

> "We are aware of no Rule governing post-trial motions specifically captioned 'motion for reconsideration.' A motion under Rule 2-535 is, however, sometimes called a motion for reconsideration. *Alitalia Linee Aeree Italiane v. Tornillo*, 320 Md. 192, 199 (1990). Appellant's motion was filed twenty-nine days after the entry of summary judgment, within the thirty days required by Rule 2-535. Thus, we will consider it to be a motion under Md. Rule 2-535, even if it was not labeled as such. . . ."

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). In the *People's Counsel* case, we said:

> In the case at bar, Advance did not file an order for appeal within 30 days from the date of judgment. *See* Md. Rule 1012 (now Md. Rule 8-202). Instead, Advance sought further review by the circuit court when it submitted the motion under Rule 2-535(a). Once Advance's motion for revision of judgment was denied more than 30 days after judgment, the Intervenors were not entitled to rehash the merits of the zoning appeal by filing a second motion to revise the judgment, raising a new theory as to why the judgment was erroneous. At that point, the original judgment could be revised only upon a showing of fraud, mistake or irregularity.

Id. at 47.

This Court, in *Pickett, supra*, reached a similar conclusion. The facts in *Pickett*, insofar as here relevant, were as follows. On October 24, 1995, the Circuit Court for Frederick County, Maryland, enrolled a judgment of an Ohio court pursuant to the Uniform Enforcement of Foreign Judgment Act. The judgment was in favor of Noba, Inc. and against Allen Pickett. *Id*. at 554-55. Thirty-one days after the entry of judgment, Pickett, *pro se*, filed a "Motion to Remove and Not Enforce Lien," which we treated as a Motion to Revise Judgment, pursuant to Md. Rule 2-535(b). The Motion was based on allegations of fraud, mistake, or irregularity. *Id*. at 557. The motion to revise judgment was denied by the circuit court on December 15, 1995. Pickett did not file an appeal from the denial of his motion to revise judgment within 30 days. *Id*. at 558. Pickett, however, on January 5, 1996 filed a "Motion to Reconsider Motion to Remove and Not Enforce Lien." *Id*. at 555.

In *Pickett*, we said:

> Pickett filed his second post-trial motion, a "Motion to Reconsider the Motion to Remove and Not Enforce Lien," on 5 January 1996. Although not titled as such, it effectively was a second motion to revise. The denial of

> this second motion to revise is not appealable because it is not a final judgment. A second motion to revise filed more than thirty days after the entry of judgment, even though within thirty days after denial of the first motion, cannot be granted. *See Office of People's Counsel v. Advance Mobilehome Corp.*, 75 Md. App. 39, 540 A.2d 151, *cert. denied*, 313 Md. 30, 542 A.2d 857 (1988). *See also*, P. Niemeyer & L. Schuett, *Maryland Rules Commentary* at 417. For this reason, Pickett's 29 January 1996 notice of appeal was not timely. Accordingly, we shall affirm the judgment of the trial court.

Id. at 560. (Emphasis added.)

For the reasons stated above, we shall affirm the judgment of the trial court.[3]

Other Matters

During oral argument before us, counsel for appellant stated that his client was particularly concerned about the provision in the October 11, 2011 judgment that concerned where Mother could exercise her visitation rights. Mother's counsel pointed out that as things now stand, unless the parties otherwise agree, she must travel from Kent Island — where she lives — to her mother's house in Garrett County to exercise visitation rights. Moreover, the visitations are all to be supervised by the child's maternal grandmother. Mother argues that this visitation arrangement is both unreasonable and harsh. This may be so, but we have no jurisdiction to entertain the merits of that contention. We stress, however, that nothing in this opinion should be construed as discouraging Mother from filing a petition in the circuit court asking for a change in the visitation provisions set forth in the court's final order. To succeed, Mother would have to allege and show that there has been a material change in circumstances since October 11, 2011.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The "you exposed your son to that," finding was an apparent reference to the report by the Child, who at the time of the hearing was only five years old, that he had seen his Mother and her boyfriend in bed on top of one another.

2. Maryland Rule 1-323 reads as follows: The clerk shall not accept for filing any pleading or other paper requiring service, other than an original pleading, unless it is accompanied by an admission or waiver of service or a signed certificate showing the date and manner of making service. A certificate of service is prima facie proof of service.

3. Even if we had the right to review the trial judge's denial of the Second Motion to Revise Judgment, appellant would not benefit. The first issue raised in this appeal (did the court err in having the Master hear the matter of a contested final divorce and custody without the consent of the parties) was neither raised nor decided below. Regardless as to whether the parties consented to the Master hearing the divorce and custody matter, the circuit court indisputably had subject matter jurisdiction to sign the final order that was docketed on October 11, 2011. Thus, the issue is not preserved for appellate review. *See* Md. Rule 8-131(a).

The second and third issues raised by the appellant in this appeal have nothing to do with the question of whether the court erred in denying appellant's Second Motion to Revise Judgment. Those issues concern whether the trial judge erred in signing the final order of divorce that was docketed on October 11, 2011.

Under the fourth issue presented, portions of appellant's brief can be interpreted to mean that, in appellant's view, Judge Sherbin committed reversible error in denying the Second Motion to Revise. In this regard, appellant raises two points. First, given appellant's *pro-se* status, it would [purportedly] have been impossible for her to abide by the Md. Rules of Procedure and state the reasons for her exceptions with particularity within ten days. This contention is frivolous. *Pro se* parties are required to abide by the same rules of procedure as parties who are represented. The other substantive issue raised by appellant under the fourth question presented is whether the trial judge "further erred in concluding that appellant had not requested a transcript in a timely manner." As Judge Sherbin pointed out in his Opinion and Order denying the first Motion to Revise Judgment, the Rules require that a transcript be ordered contemporaneously with the filing of the exceptions. Nothing in the record shows that appellant abided by this Rule — contrary to appellant's bald assertion in her brief to the contrary.

Cite as 12 MFLM Supp. 53 (2012)

Discovery sanctions: evidence preclusion: attorneys' fees

Aminata Camara
v.
Macky Silimana

No. 1464, September Term, 2011

Argued Before: Meredith Berger, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Meredith, J.

Filed: October 23, 2012. Unreported.

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 pursuit of discovery and discovery sanctions.

Aminata Camara, appellant, moved for a modification of child custody and alimony in the Circuit Court for Montgomery County in January 2011. During the course of discovery, Macky Silimana, appellee, propounded interrogatories and sought the production of several documents, including Ms. Camara's tax returns, cancelled checks, and W2s, among other items. Because Ms. Camara did not respond to this discovery request within the period of time prescribed by the Maryland Rules, Mr. Silimana filed a motion for sanctions, which was later supplemented by two additional motions for sanctions. The circuit court sanctioned Ms. Camara by restricting her from presenting evidence or testifying at the subsequent hearing for modification. The court also ordered Ms. Camara to pay $820.00 in attorney's fees to Mr. Silimana as part of the discovery sanctions. Ms. Camara filed a motion for reconsideration, which the circuit court denied. Ms. Camara timely noted this appeal.

QUESTIONS PRESENTED

Ms. Camara presents two issues on appeal:

> I. Whether the Circuit Court's Order dated June 13, 2011 abused its discretion and violated the Appellant's Constitutional Right by sanctioning and precluding her from presenting any evidence or testifying in her August 1, 2011 Trial for Modification of Custody and Support even though full compliance of discovery was produced prior to the discovery deadline?
>
> II. Whether the circuit court erred in awarding attorneys' fees to the Appellee's Counsel?

We are not persuaded that there was an abuse of discretion on either issue. Accordingly, we 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.

FACTS AND PROCEDURAL HISTORY

Ms. Camara and Mr. Silimana were once married. The marriage produced two daughters, both of whom are currently minors. On March 6, 2007, Mr. Silimana petitioned for absolute divorce, or, in the alternative, limited divorce with an order for child custody and support. On December 28, 2007, the court ordered that Mr. Silimana would have primary physical and sole legal custody of the children. The court also ordered Ms. Camara to pay child support in the amount of $800.00/month. This order also contained a detailed child visitation agreement.

On March 19, 2008, the court dismissed the case without prejudice, but the December 28, 2007, order continued in full effect.

Ms. Camara filed a motion for modification of custody on February 17, 2009. The parties subsequently entered into a consent agreement on May 26, 2009, and the court entered an order on October 29, 2010, reflecting this agreement. This agreement modified the child visitation arrangement, but Mr. Silimana retained primary physical and sole legal custody of the children.

Shortly after the court entered this order, the court held a hearing on Mr. Silimana's supplemental complaint for absolute divorce. On December 15, 2010, the court granted an absolute divorce and retained the parties' child visitation agreement, reflected by the December 28, 2007, and October 29, 2010, orders.

Approximately three weeks later, Ms. Camara filed a complaint for modification of child custody and

child support. Mr. Silimana opposed this complaint and also filed a motion for contempt. Mr. Silimana sought judgment for child support arrearages as well.

On February 7, 2011, Mr. Silimana propounded several interrogatories and a request for documents, including Ms. Camara's tax returns, W2s, cancelled checks, and other financial documents. Ms. Camara did not respond to these discovery requests within the time allotted by the Maryland Rules. Accordingly, Mr. Silimana filed a motion for discovery sanctions on March 23, 2011. Mr. Silimana sought to restrict Ms. Camara from testifying or presenting evidence; alternatively, Mr. Silimana sought to compel discovery. Ms. Camara did not file any opposition to this motion.

On April 11, 2011, the court ordered Ms. Camara to produce discovery responses within ten days. This order also stated that Ms. Camara should pay Mr. Silimana's costs associated with pursuing discovery sanctions in an amount to be determined by the trial judge.

Ms. Camara failed to comply with the court's order, and Mr. Silimana filed a supplemental motion for sanctions on April 22, 2011.

On April 28, 2011, Mr. Silimana received some discovery responses from Ms. Camara. Mr. Silimana believed that these responses were incomplete, especially because Ms. Camara had failed to produce or object to many of the requested documents. Mr. Silimana's counsel sent a detailed letter to Ms. Camara's counsel, pointing out the inadequacies of the discovery responses and discussing ways for Ms. Camara to remedy these problems. Ms. Camara did not respond to this letter, nor did Ms. Camara provide any other discovery responses. Mr. Silimana filed a second supplemental motion for sanctions on May 16, 2011. Ms. Camara did not oppose this motion.

On June 13, 2011, the court entered an order for sanctions. This order prohibited Ms. Camara from testifying or presenting evidence at the modification hearing.

On June 20, 2011, Ms. Camara filed a motion to reconsider which Mr. Silimana opposed. The motion to reconsider represented that Ms. Camara did not comply with the discovery requests and orders because her counsel experienced a problematic pregnancy in early March 2011. Ms. Camara's counsel sought medical treatment out-of-state and had surgery in May. Compounding the problem, Ms. Camara, herself, lost her job and had to move. As a result, Ms. Camara either lost or could not find several of the requested documents. Ms. Camara asserted that she had provided discovery responses and that Mr. Silimana was exploiting the situation to her detriment.

On July 28, 2011, the court denied Ms. Camara's motion for reconsideration. At the subsequent merits hearing on August 1, Ms. Camara could not testify or present evidence. At the conclusion of the hearing, the court denied Ms. Camara's motion for modification. The court granted Mr. Silimana's motion for contempt and found that Ms. Camara owed $7,692.00 in child support. Additionally, the court ordered Ms. Camara to pay $820.00 to Mr. Silimana for his pursuit of discovery sanctions. Ms. Camara timely noted this appeal.

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) (citing *N. River Ins. Co. v. Balt.*, 343 Md. 34, 47 (1996)). This Court has explained: "[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. Accordingly, we will not reverse the judgment of the circuit court unless we find an abuse of discretion. *Id.* "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)).

Discovery in Maryland is governed by Chapter 400 of Title 2 of the Maryland Rules. *Rodriguez, supra*, 400 Md. at 57. Specifically at issue in this case is Rule 2-433, which provides for sanctions following failures in discovery. The rule expressly provides that the trial court may sanction a party for failing to comply with discovery, and sanctions may include "[a]n order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." Md. Rule 2-433(a)(2). *See also* Md. Rule 2-433(c) (noting same sanctions for failure to comply with orders compelling discovery).

This Court has cautioned: "[S]anctions must be proportionate to the misconduct." *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 135 (2009) (citing *Rodriguez, supra*, 400 Md. at 68-70; *Atty. Grievance Comm'n v. James*, 385 Md. 637, 661 (2005)). Although an order precluding a party from testifying or presenting evidence is a stiff sanction, *see Thomas v. State*, 397 Md. 557, 572-73 (2007) ("Exclusion of evidence for a discovery violation is not a favored sanction and is one of the most drastic measures that can be imposed.") (internal citations omitted), such a sanction is sometimes appropriate to fulfill the "fundamental objective of discovery," which "is to

advance 'the sound and expeditious administration of justice' by 'eliminat[ing] . . . the necessity of any party to litigation going to trial in a confused or muddled state of mind. . . .'" *Rodriguez, supra*, 400 Md. at 57 (quoting *Balt. Transit Co. v. Mezzanotti*, 227 Md. 8, 13 (1961)). Notably, "the decision to grant sanctions is not limited to cases in which the trial judge has found the discovery violations to be willful or contumacious." *Id.* (citing *N. River Ins. Co., supra,* 343 Md. at 46-48).

We are mindful that, "[w]here there exists a discovery violation in a child support matter, as always, the best interest of the child is paramount and a trial court must exhaust every available remedial step to enforce discovery before" ordering harsh sanctions, such as dismissal or evidence preclusion. *Rolley, supra*, 126 Md. App. at 131. "[I]n the areas of child custody and support, even further scrutiny will be given to dismissals and default judgments for discovery abuse." *Klupt v. Krongard*, 126 Md. App. 179, 202 (1999). Although evidence preclusion may not automatically lead to dismissal or default in other contexts, in a child custody or support case, it must be administered with caution because these cases often involve only the parents or guardians presenting evidence and testifying. *See Fisher, supra*, 186 Md. App. at 134 (noting that evidence preclusion for discovery violation may lead to default judgment).

Ms. Camara cites this Court's decision in *Rolley* for the proposition that extreme discovery sanctions should not be ordered in cases involving child support or child custody because these cases involve not just the parents, but also the welfare of minor children. 126 Md. App. at 131. In *Rolley*, a couple divorced, and the initial child support order mandated that Mr. Sanford should pay child support. *Id.* at 126. Five years later, Ms. Rolley filed a motion for modification of child support. Mr. Sanford propounded interrogatories and sought the production of several financial documents from Ms. Rolley. *Id.* at 126-28. Ms. Rolley refused to produce the documents and failed to answer the interrogatories. *Id.* at 128. Mr. Sanford filed a motion for sanctions, and the circuit court ordered Ms. Rolley to comply with discovery. *Id.* She failed to do so, and, at a subsequent hearing, the court granted Mr. Sanford's motion to dismiss Ms. Rolley's petition. *Id.* This Court reversed the circuit court's order of dismissal, holding that the outright dismissal of Ms. Rolley's petition was "beyond the fringe of what we deem minimally acceptable." *Id.* at 131 (citing *Early v. Early*, 338 Md. 639, 659-61 (1995)).

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

Failing to respond to interrogatories and requests for production is quite serious. *See* Md. Rule 2-432(a) (allowing for sanctions without first obtaining an order compelling discovery for failure to respond to interrogatories and/or requests for production); *Rolley, supra*, 126 Md. App. at 131. In this case, Ms. Camara asserts that she did not respond to Mr. Silimana's discovery requests because her counsel experienced a medical emergency, and she moved and lost or misplaced several of the requested documents. But these conditions were not placed before the court for consideration — even after the court issued 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 Ms. Camara brought her counsel's medical emergency to the court's attention was in the motion to reconsider the discovery sanctions. Had Ms. 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 court's 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 Ms. Camara an opportunity to comply with Mr. Silimana's discovery requests. Before imposing sanctions, the court issued an order compelling discovery, and Mr. Silimana's counsel communicated with Ms. Camara's counsel in an attempt to resolve this discovery dispute. Under such circumstances, we are not persuaded that the circuit court abused its discretion in sanctioning Ms. 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

Appellate review of a trial court's award of attorney's fees is for abuse of discretion. *See Monmouth*

Meadows Homeowners Ass'n v. Hamilton, 416 Md. 325, 332-33 (2010) (citing *Myers v. Kayhoe*, 391 Md. 188, 207 (2006)). This Court has noted that the award of attorney's fees in the context of domestic disputes is limited, but attorney's fees are available for discovery sanctions. *See Steinhoff v. Sommerfelt*, 144 Md. App. 463, 488 (2002). Specifically, 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).

In this case the circuit court's initial order compelling discovery warned Ms. Camara that, for noncompliance with discovery requests, she would be ordered to pay Mr. Silimana's attorney's fees in the amount of "a sum to be determined by the trial judge. . . . Accordingly, at the August 1 hearing, Mr. Silimana presented evidence of hours worked in pursuit of discovery and discovery sanctions. The bill for services indicated that Mr. 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 in either the decision to award attorney's fees or the calculation of those fees. Accordingly, we affirm the judgment of the circuit court.

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

Cite as 12 MFLM Supp. 57 (2012)

Adoption/Guardianship: termination of parental rights: incarcerated parent

In Re: Adoption/Guardianship of Damien D.

No. 2912, September Term, 2011

Argued Before: Krauser, C.J., Kehoe, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: October 23, 2012. Unreported.

Exceptional circumstances warranting termination of parental rights 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.

Appellant, Walter D. ("Mr. D."), appeals from a decision of the Circuit Court for Baltimore County, sitting as a juvenile court, granting the petition of the Baltimore County Department of Social Services ("BCDSS" or "the Department") to terminate his parental rights in Damien D. ("Damien"), his biological son, pursuant to MD. CODE ANN., FAM. LAW ("FL") § 5-323 (1984, 2006 Repl. Vol., 2011 Supp). Mr. D. presents one question for our review, which we have reworded:[1]

> 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. We will, therefore, affirm the decision of the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

This is the second time this case has reached this Court; and, at this stage, the relevant facts are largely undisputed. Damien was born on January 21, 2008. At the time of his birth, both he and his biological mother, Tabitha C. ("Ms. C."), tested positive for cocaine and marijuana. Ms. C. and Damien initially resided together for three weeks with Ms. C.'s father and step-mother, Damien's grandfather and step-grandmother. Ms. C. subsequently abandoned Damien to the care of his grandparents, and expressed her desire that Damien be adopted. On February 15, 2008, at approximately three weeks of age, Damien was placed by the Department in the care of his maternal great aunt and uncle, the P.'s.

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 March 13, 2008, the Circuit Court for Baltimore County declared Damien to be a Child in Need of Assistance ("CINA"), and committed him to the custody of BCDSS.[2] As Judge Woodward explained for a panel of this Court 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] (3) Ms. C. was unable to provide adequate care due to the use of drugs, and (4) paternity [has] not yet been determined."[4]

Mr. D. did not know that he was Damien's father until a paternity test was conducted in April of 2008.[5] Since Damien's birth, Mr. D. has been incarcerated, serving a seven year sentence for a second degree assault committed on November 28, 2007.[6] While incarcerated, Mr. D. has participated in parenting classes, substance abuse classes, and victim awareness classes. His mandatory release date is sometime in 2013.[7]

On November 4, 2009, BCDSS filed an action to terminate both Ms. C. and Mr. D.'s parental rights in Damien. Ms. C. consented to the termination on the condition that Damien was adopted by the P.'s. Mr. D., however, opposed the petition. The juvenile court held an evidentiary hearing on the petition on May 4, 2010. At the close of the Department's case, Mr. D. moved to dismiss the petition on the grounds that BCDSS had failed to offer him any reunification services.[8] The juvenile court granted the motion, and the petition was denied and dismissed.

Damien appealed, and, in *Damien I*, a panel of this Court reversed and remanded the matter to the juvenile court for further proceedings. The panel

explained, in relevant part, 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 by the court under F.L. §5-323(d).

Slip Op. at 17 (emphasis in original).

The panel further noted that "it is undisputed that reunification with Mr D. did not take place within 18 months of the date of placement, nor is reunification possible for more than three years from the date of the TPR hearing, which leaves Damien in suspended 'foster care drift." The panel also determined that there was sufficient evidence in the record to support a finding of "exceptional circumstances," highlighting that:

> Mr. D. has been incarcerated for Damien's entire life, without any visitation with Damien, and, in fact, Mr. D. has never met Damien. Mr. D. essentially has no relationship with Damien. Moreover, with Mr. D. currently scheduled to be released from incarceration in 2013, it will be *at least* another three years before Mr. D. and Damien can even begin to move toward true reunification. When Mr. D. is released from prison, it is uncertain how much longer it will take for Mr. D. and Damien to be reunified, given the lack of relationship currently between Mr. D. and Damien. In contrast, Damien has lived with his great aunt and great uncle for all but one month of his life and has developed a close relationship with them.

Slip Op. at 28 (emphasis in original). Because the juvenile court had treated the failure of BCDSS to provide services to Mr. D. as dispositive, as opposed to a factor for the court's consideration, the panel remanded the case to the juvenile court for further proceedings. Slip Op. at 30.

The circumstances described by the *Damien I* panel have since changed to some degree. During the pendency of that appeal, BCDSS began arranging for Damien to meet Mr. D. in prison.[9] These meetings took place between six and eight times prior to the TPR hearing. During these visits, Mr. D. was not permitted to identify himself as Damien's father, because Damien refers to his great uncle as his father, and, instead, Mr. D. was identified as a friend of Damien's named Frank.[10] Mr. D. also began writing letters to Damien and telephoning him once a month.

Further TPR proceedings were held before the juvenile court on November 29-30th, 2011, and January 4, 2012. At these hearings, Mr. D. expressed his intention, upon his release, to pursue a career in carpentry, and to live with relatives in Glen Burnie, Maryland. He expressed his desire to identify himself as Damien's father, and explained his plan with Damien to be as follows:

> At this stage, I wish for him to recognize me as his dad, not a friend. I want to make that bond first and then work on, you know, him coming to live with me or closely visitation, stay with me, get that bond so he feels—feels as though this isn't just a friend. This is my dad so that, you know, sooner or later, he can come to live with myself.

Mr. D. estimated that it would take between six and nine months once he is released from prison for there to be measurable results in this plan. Until then, Mr. D. was comfortable with Damien remaining in the P.'s care, and acknowledged that the P.'s are fit and proper custodians and "wonderful people." It was undisputed that BCDSS could do little else to further reunification efforts between Damien and Mr. D. while Mr. D. remained incarcerated. There was also no dispute that Damien had bonded with the P.'s, and was thriving in their care.

At the hearing on January 4, 2012, the juvenile court issued findings of fact and conclusions of law from the bench, which we will summarize in relevant part. As an initial point, the juvenile court judge found that Mr. D. was not unfit as a parent, noting "the intensity and genuineness of [Mr. D.'s] desire to have the child. . . ." However, the court also noted that, because Mr. D. has been incarcerated for Damien's entire life, "99.9 percent of [Damien's] life has been with these foster care folks 99.9 percent, so there was obviously no opportunity to offer any services to the father before the placement, and they couldn't have been offered anyway." The juvenile court also found that Mr. D. had made great efforts toward reunification with Damien but that these efforts have been, for the most part, thwarted by Mr. D.'s incarceration.

The judge highlighted that Damien had lived the majority of his life with the P.'s, and that he was emotionally attached and bonded with them:

> I heard the DSS workers testify how well [Damien's] doing and how marvelous his relationship is with the [P.'s]. I heard Miss Sandruck . . . describe the risk that she felt he could be in [if he was removed from the P's], may very well destroy him . . . taken out of the only home he has ever known, questioning what he did wrong.

> And obviously that's an opinion that I can accept, not accept, accept some of, place some weight on, no weight on, a lot of weight on, and I choose to accept it to some extent. We are all looking into the future. I have to ensure, if I can, some permanency in this child's life, for heaven sake. It has been impermanent for this long primarily because [Mr. D.] has been incarcerated. . . . [Mr. D.'s counsel] convinced me I can't just say [sic] been in there that long, the child's been in foster care that long, ipso facto the child goes and rights are terminated.
>
> It's not just that, but when [Ms. Sandruck] says that [Damien's] very bonded, very attached and in her opinion would be very difficult for him a year and a half from now or two years from now to somehow be changed, I accept that. That's as much common sense as the next [sic] opinion.

The juvenile court judge examined Mr. D.'s relationship with Damien, and whether Mr. D. could provide for and take care of Damien now or in the perceivable future:

> [Mr. D.] is certainly incapable of taking care of Damien now, we know that. He's not. He's still in prison. He has been unable to care for Damien throughout his life. He has been in prison. His future to this Court is still an unknown question mark as we speak.
>
> I don't know when he'll be released or under what circumstances of parole. I don't know what his housing will be or what efforts he can do other than trying to help himself get squared away, so its very amorphous and unknown and speculative. . . .
>
> What is [Mr D.'s] relationship [with Damien]? He would want it to be more, but there really is none and there's never been one.
>
> * * *
>
> And the stability and certainty as to the child's future in the custody of the parent, I don't know how stable it would be or how certain it would be given [Mr. D.'s] history. It's enough to scare me. It's enough to make me wonder or worry. I can speculate there would be more problems in [Mr. D.'s] life perhaps.
>
> I can speculate of all that trouble reemerging in the world, and then [Mr. D.] has a child to take care of to whom he's a stranger. These are not — I don't miss these facts.

The court then considered whether these observations constituted exceptional circumstances. Finding that exceptional circumstances did, in fact, exist, the court also explained the basis for its finding:

> . . . when determining whether exceptional circumstances exist, the length of time the child has been away from the biological parent, all his life, the age of the child when care was assumed, three weeks old — he's now almost four— the possible emotion effect on the child of a change of custody, I heard some expert opinion that said it would be deleterious, bad, not good.
>
> That's not a real stretch for me to believe that or accept it. The period of time which elapsed before the parent sought to reclaim the child, as soon as he knew he was a father, he acted on it. Kudos to him and I appreciate that. And the nature and strength of ties between a child and the third party custodian, enormous ties, an enormous bond.
>
> * * *
>
> The Court has further observed that a child may be so long in the custody of the non-parent even though there has been no abandonment or persistent neglect, the psychological trauma of removal is grave enough to be detrimental to the best interests.
>
> Does that mean I need an expert to say that he will be psychologically traumatized or can I use my common sense given the number of years he'll be with this family, the bonds he's established, how well he is doing that there will be obviously some psychological trauma?
>
> I am going to go out on a limb on the record and say I can understand that there would be [psychological trauma]. . . . The ultimate focus must be on Damien's best interests. So at the end of the day, I do not want

> to suspend the permanency of this child's life any longer. I don't think it's fair to him at all.

Based upon these findings, the juvenile court terminated Mr. D.'s parental rights in Damien on the basis of exceptional circumstances:

> It is a crushing blow to [Mr. D.], and I feel bad for him as a result of that; but focusing on young Damien, I believe that exceptional circumstances exist. I'm going to sign an order terminating the parental rights of [Mr. D.] and allowing [sic] the adoption to go through.

By orders entered on January 24, and February 8, 2012, the juvenile court granted the TPR petition and terminated Mr. D.'s parental rights in Damien. The juvenile court additionally ordered that Mr. D. be permitted to visit with Damien during the guardianship period pursuant to FL § 5-324(b)(ii)(5).[11]

This appeal followed.

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)). When reviewing a juvenile court's factual findings, we "assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the trial court." *See In Re Abiagail C.*, 138 Md. App. 570, 587 (2001) (citing *In Re Adoption No. 09598*, 77 Md. App. 551, 518 (1989)).

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 R*, 417 Md. 701, 709 (2011) (quoting *In Re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007)). Thus, this parental right is terminated 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." *Id.* (citations omitted). The applicable rule is codified at FL § 5-323 and subsection (d) of that statute sets out factors which "though couched as considerations in determining whether termination is in the child's best interest, serve also as criteria for determining the kinds of exceptional circumstances that would suffice to rebut the presumption favoring a continued parental relationship. . . . *Rashawn H*, 402 Md. at 499. When applying § 5-323, the child's best interest is the "transcendent standard." *Ta'Niya C.*, 417 Md. at 112.

Here, after considering the § 5-323(d) factors,[12] the juvenile court determined that exceptional circumstances existed that justified the termination of Mr. D.'s parental rights. It is clear that the juvenile court based its ultimate conclusion primarily on three considerations. First, the court emphasized that Damien had lived nearly all of his life with the P's and was bonded to them, that disrupting this custody arrangement could, and most likely would, cause Damien psychological trauma. Second, the court noted that it was in Damien's best interests to have a permanent custody arrangement. Finally, the court concluded that Mr. D.'s future plans were too uncertain and speculative to determine whether Mr. D. could ever provide a permanent and stable living situation for Damien.

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

We note at the outset that in *Damien I* the panel determined that the facts presented by the BCDSS were sufficient to support a finding of exceptional circumstances, although the panel left the ultimate decision as to whether to grant the petition up to the juvenile court on remand. However, as mentioned *supra*, the facts upon which our previous decision was based have changed to some degree. Damien has now met with and interacted with Mr. D., and will continue to do so. Because the *Damien I* panel previously determined that the evidence was sufficient to support a finding of exceptional circumstances prior to this interaction between Damien and Mr. D., we will focus our analysis

primarily on whether this change in circumstances alters our earlier determination. We now turn to Mr. D.'s contentions.

I. Exceptional Circumstances

The factual bases for the juvenile court's decision are as follows: Damien (who at the time of this writing is approximately four-and-a-half years old) has lived with the P.'s for all but three weeks of his life. There was no dispute at trial that Damien is emotionally attached to and has bonded with the P.'s, and that he refers to Mr. P. as his father. Mr. D. acknowledges that Damien "had thrived in his placement," and there is additionally no dispute that Damien is in good health, and has been well cared for by the P.'s.

The testimony at trial also established that, 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 that Damien is emotionally attached to or bonded with Mr. D. Mr. D. blames this, in part, on BCDSS. He argues that BCDSS did not provide him with the reunification and visitation services necessary for he and Damien to have developed a parent-child bond until August 2010, and that, once these services were finally provided, BCDSS further impeded the development of he and Damien's relationship by prohibiting him from identifying himself as Damien's father. As Mr. D. asserts, "Damien has no reason to have any attachment to his father, when he is introduced as a 'friend' and not provided any real opportunity to form an attachment."

At oral argument, Mr. D.'s counsel stated that Damien's residence was a 90 minute one way trip from the facility in which Mr. D. was incarcerated. 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. Mr. D. appears to concede that BCDSS has done all it could be reasonably expected to do, other than allowing him to identify himself as Damien's father, since August 2010, when reunification services began being offered. Nonetheless, the fact remains that Damien has never lived with and does not know Mr. D. as his parent. Moreover, Mr. D.'s difficulties reunifying with Damien are, clearly, the result of his incarceration. BCDSS had sound reasons for asking — or requiring — Mr. D. not to tell Damien that he was his biological father. But even if we were to accept Mr. D.'s contention that BCDSS was wrong in taking this step, the fact remains that, as the *Damien I* panel emphasized, while the adequacy of reunification services offered by BCDSS is a factor to be considered in determining whether exceptional circumstances exist, the adequacy or inadequacy of reunification services is not dispositive. Thus, 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 vestigal relationship.

In reaching these conclusions, the juvenile court accepted, to some extent, the testimony of Ms. Sandruck, the BCDSS adoptions services unit social worker who has been assigned to Damien's case since November, 2009. Ms. Sandruck was admitted as an expert in the field of "social work," including issues of "attachment, placement, adjustment, bonding, safety issues, things like that." She testified that she visits Damien monthly and is in regular contact with the P's. She testified that Damien and the P.'s are attached and bonded, that Damien turns to the P's for comfort, and that removing Damien from the custody and care of the P.'s would "absolutely destroy him."

On cross-examination, Ms. Sandruck conceded that her opinion was not based on a formal bonding assessment, that she did not have a therapeutic relationship with Damien, and that no licensed therapists, psychologists, or psychiatrists were consulted with respect to Damien's bonding and emotional attachment with the P's. Instead, she suggested that her opinions rested primarily on her personal observations that Damien was bonded with the P's and the fact that Damien had been in the P.'s care for the majority of his life. Specifically, Ms. Sandruck testified that the basis for her opinions was, in relevant part, as follows:

> Well, I guess the basis of the first part of my opinion is the fact that Damien has been with Mr. and Mrs. [P] since he was three weeks old. They are the only parents that he knows. To remove Damien from them — and frankly, Damien would question why he was being removed — I think it would absolutely destroy him.
>
> I think it would be detrimental to his well-being to all of a sudden being [sic] taken out of the only home that he knows, and it's not only Mr. and Mrs. [P]; but it's their extended family and family and friends. I just don't think it would be in his best interest. I think he would always question what he did wrong to be taken away.

As noted above, the juvenile court relied, "to some extent," on Ms. Sandruck's opinion that Damien was emotionally attached and bonded to the P's, and that removing Damien from their care would have a detrimental impact on Damien.

Mr. D. argues that Ms. Sandrucks' testimony is legally insufficient to support the juvenile court's findings of exceptional circumstances. He cites to *In Re Adoption/Guardianship of Alonza D.*, 412 Md. 442

(2010) and argues that this case stands for the proposition that exceptional circumstances cannotbe demonstrated merely by the fact that a child has been in foster care for a long period and has established an attachment and bond with the care givers. He maintains that Ms. Sandrucks' assessment of Damien concentrated solely on these two factors. 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 from the case before us.

In *Alonza D.*, the father ("Father") of two brothers, Alonza and Shaydon, contested a termination of parental rights proceeding brought by the Department. Father lived with the brothers for the first sixteen months of their lives, but the group was separated when the mother left the home and brought the boys with her. Some time thereafter, the brothers were declared CINA, and placed in a foster home, where they remained for six years. At the TPR proceeding, the juvenile court found Father to be a fit and capable parent; but, observing that the brothers were bonded with their foster care giver, and had been separated from their father for approximately eight years, the court determined that it was in the boys' best interests to remain with the care giver and granted the TPR petition.

The Court of Appeals reversed the juvenile court, in relevant part, for two primary reasons. First, the Court held that mere passage of time, without more, was not a sufficient basis for an otherwise fit and capable parent to be deprived of his parental rights: "Passage of time, without explicit findings that the continued relationship with [Father] would prove detrimental to the best interests of the children, is not sufficient to constitute exceptional circumstances." *Id.* at 463.

Secondly, the Court observed that the juvenile court had focused on the brothers' emotional ties with their foster caretakers, but had not considered the brothers' emotional feelings toward their father or how a continuation of the parent-child relationship would be detrimental to the brothers. To this end, the Court noted that: "a successful foster care placement has as its foundation a level of bonding by the children with the caretaker. Were bonding to be the dispositive factor, without consideration of whether a continued relationship with the biological parent would be detrimental to the best interests of the children, then reunification with a parent would be a mere chimera. Certainly, such a result represents a violation of [the statutory requirement] that a court consider the child's feelings toward and emotional ties with the child's natural parents. . . . *Id.* at 463-64 (citations omitted).

Returning to the case before us, unlike the father in *Alonza D.*, who, at the time of the TPR hearing, had acquired appropriate housing, earned a steady income, and was living with and providing for the care of other children (those of his girlfriend), at the time of the TPR hearing in the instant case, Mr. D. was incarcerated and did not yet have a stable living situation, a permanent job, or steady income. As the juvenile court noted, although Mr. D. had commendable plans, it could only speculate as to if, when, and how these plans would play out in the perceivable future. The brothers in *Alonza D.* had also lived with Father for a period of 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 juvenile court analyzed and weighed Mr. D.'s desire and efforts to reunify with Damien, Damien's bond (or lack thereof) with Mr. D., the effects of Mr. D.'s incarceration, the uncertain ability of Mr. D. to provide a safe, stable living arrangement for Damien now and in the future, as well as the interests of Damien to have a permanent and stable living situation. It is the final factor that is the most significant; 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 that "an analysis of all of the relevant factors [set out in FL § 5-323(d)] indicate that Mr. D. prevails on most." Specifically, he argues that:

> — Subsection (d)(2)(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") "is inapplicable as Mr. D. has not been financially able to pay support and nobody has requested that he do so."
>
> — Subsection (d) (2)(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") "is also easily resolved. Evidence was undisputed that Mr. D. maintained regular contact with the DSS, the caregivers and with Damien to the extent possible since he was identified as Damien' s father."
>
> — Subsection (d)(1)(ii) ("the extent, nature, and timeliness of services

offered by a local department to facilitate reunion of the child and parent") "is admittedly more difficult, as BCDSS offered no services for over 2 years, and since has simply provided visits as court-ordered, met with Mr. D in connection with visits, monitored his programs (largely through his efforts) and made suggestions in one letter sent to him one month before the most recent trial as to things he might be able to do once released. Mr. D. also recognizes that BCDSS could do little more than this, but is disappointed in the manner in which visits occurred, i.e., that he was discouraged from telling Damien that he was his father. . . . Appellant does not believe that this factor weighs heavily either way, but since BCDSS occasioned the delay in the services which were provided, should weigh somewhat in Mr. D.'s favor."

— Subsection (d)(2)(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") "should also be resolved in [his] favor. . . . He has pursued every program which has been made available to him, has a definite plan upon release, and his release will be no later than 6 months from now. He has stated that he will accept whatever services he is offered, complete all programs which BCDSS feels are appropriate and will willingly pay child support once he is employed. An ascertainable time frame may be easily determined within which father should be able to adjust his circumstances."

— Mr. D.admits that subsection (d)(4)(ii) ("the child's adjustment to: 1. community; 2. home; 3. placement; and 4. school") "is undisputed: Damien has made a good adjustment to his home, community and placement and is well cared for."

— Mr. D. concedes that the remaining subsection (d)(4) factors weigh against him but "not nearly [as] heavily as the trial court determined." As for subsection (d)(4)(i)(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"), Mr. D. argues, in effect, that no valid conclusion can be drawn because BCDSS has prevented him from identifying himself as Damien's father. He makes much the same contentions as to subsection (d)(4)(iii) ("the child's feelings about severance of the parent-child relationship") and (d)(4)(iv)("the likely impact of terminating parental rights on the child's well-being").

There are flaws in these contentions. First, as previously explained, 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. We do this by considering the evidence produced at trial in a light most favorable to the prevailing party and determining whether there was any competent, material evidence to support the factual findings at issue. If we find such evidence, we cannot hold those findings to be clearly erroneous. As our summary of the evidence adduced at trial indicates, there was such evidence to support each of the juvenile court's findings.

Moreover, and 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. The Court continued:

> Rather, it just means that in deciding the "best interest" of the child, the court should always keep in mind the presumption that a child is better off with his parent. So, in examining all of the parent's and the child's circumstances, *if the court fails to find "exceptional circumstances, "then the presumption will resolve the issue*. The "no further inquiry" phrase simply means that after a court does this analysis, and finds no exceptional circumstances showing that it is in the child's best interest to be in the custody of someone other than the parent, it should not then undo that decision by re-examining the child's best

> interest without also keeping in mind the constitutionally based parental presumption.

Id. (emphasis added).

In the case before us, the juvenile court examined Damien's circumstances and concluded that exceptional circumstances were present in the form ofthe 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 that 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.

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

FOOTNOTES

1. Mr. D. frames the issue as follows:

Did the trial court err in granting the Termination of Parental Rights action where the evidence presented by Baltimore County Department of Social Services (BCDSS) and respondent was legally insufficient to permit a finding of exceptional circumstances, Where the movants failed to demonstrate that reunification efforts with Mr. D. would be futile or could be waived based solely on his incarceration, and where analysis of the factors enumerated in Md. Code Family Law Art. Sec. 5-323 demonstrate that Mr. D. would prevail on those factors or where, in some instances, BCDSS had created the facts on which he would not prevail?

2. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-801(f) (1973, 2006 Repl. Vol., 2011 Supp.) ('Child in need of assistance' means a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable to unwilling to give proper care and attention to the child and the child's needs.").

3. The record before this Court does not identify the abuser. Appellees do not contend that the abuser was Mr. D.

4. We also noted that Ms. C. and Damien had both tested positive for cocaine *and* marijuana.

5. Mr. D. had previously learned of Ms. C.'s pregnancy, but was told by Ms. C. that her new boyfriend was the father.

6. His sentence began on November 11, 2008. Mr. D. has received prior assault convictions in 2001, 2002, and 2003, among other convictions. None of these convictions involved or were against children.

7. The record is unclear as to the exact date Mr. D. will be released. At oral argument, Mr. D. 's counsel represented that Mr. D. had been transferred to a home detention program sometime in September, 2012. Appellees did not dispute this representation.

8. On appeal, the panel interpreted this motion to be a motion for judgment.

9. Damien was approximately two-and-a-half years old when these meetings commenced.

10. Mr. D. has, however, referred to himself as "daddy" on a few occasions. Damien's last name has also been changed to that of Mr. D. Damien refers to Ms. C. as his mother.

11. Section 5-324(b)(ii)(5) permits a court to "allow visitation for the child with a specific individual," if such visits are consistent with the child's best interests. Also, neither Damien, the P.'s, nor the Department objected to this order.

12. In its bench opinion, the juvenile court stated that it had considered the statutory factors laid out in FL § 5-323(d) and the court's ruling directly touches on the relevant factors. We conclude that the factors have been sufficiently addressed and referenced so as to satisfy FL § 5-323. No party to this appeal contends otherwise.

Cite as 12 MFLM Supp. 65 (2012)

Custody and visitation: UCCJEA: inconvenient forum

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

No. 1524, September Term, 2011

Argued Before: Wright, Matricciani, Rodowsky, Lawrence F. (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: November 5, 2012. Unreported.

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, Circuit Court for Talbot County granted appellee, 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 that it was no longer a convenient forum and lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Maryland Code (1984, 2006 Repl. Vol.), § § 9.5-101 to 9.5-318 of the Family Law Article ("FL"). On June 20, 2011, appellant filed a second petition in the circuit court to hold appellee in contempt for denial of visitation. On June 28, 2011, appellant filed a third petition in the circuit court to hold appellee in contempt for violation of joint legal custody and requested, *inter alia*, a modification hearing. Appellant simultaneously filed a petition for "Enforcement Under Uniform Child Custody Jurisdiction Enforcement Act and Parental Kidnapping Prevention Act Pending Transfer to Pennsylvania." On September 8, 2011, the circuit court dismissed appellant's pending matters for lack of jurisdiction. On September 13, 2011, appellant filed "exceptions" to the circuit court's judgment, which the court treated as a motion to revise and denied on September 15, 2011. Appellant noted this timely appeal on September 27, 2011.

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

Appellant's brief presents seven questions for our review, which we have consolidated and rephrased, as follows:

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

For the reasons that follow, we answer no and affirm the judgments of the Circuit Court for Talbot County.

FACTUAL AND PROCEDURAL HISTORY

The parties were married in 1995 and have three children, born in 1997, 1999, and 2001. The parties separated in May, 2005, and the Circuit Court for Talbot County granted appellee a limited divorce from appellant in April, 2006. The court's judgment awarded the parties joint legal custody, granted appellee primary physical custody, and specified appellant's visitation rights.

In November 2006, appellee informed appellant that she intended to relocate to Massachusetts. Appellant then filed for emergency custody on December 6, 2006. A master issued recommendations on February 9, 2007, which the court adopted *pendente lite* on May 8, 2007, permitting appellee to relocate with the children and remain their primary physical custodian.

On April 7, 2008, the court granted appellee an absolute divorce from appellant. The court made appellee the children's primary physical custodian, with appellant to have specified visitation and joint legal custody. The circuit court modified its existing order and increased appellant's legal and physical custody rights on August 1, 2008.

On December 16, 2009, appellant — now proceeding *pro se* — filed a petition to hold appellee in

contempt for denial of visitation. On June 14, 2010, the circuit court adopted the master's recommendations that it lacked jurisdiction under the UCCJEA, and that jurisdiction lay with Massachusetts.

At some point in the summer of 2011, appellee relocated to Monterey, California and initiated custody proceedings, there.

On May 16, 2011, appellant requested an emergency hearing in the circuit court on the issues of custody, visitation, child support, and attorney's fees and costs. This was followed shortly by another petition to hold appellee in contempt for denial of visitation, filed June 20, 2011. One week later, appellant moved to hold appellee in contempt for violation of joint *legal* custody and requested, among other relief, a "modification hearing." Appellant simultaneously filed a petition for "Enforcement Under Uniform Child Custody Jurisdiction Enforcement Act and Parental Kidnapping Prevention Act Pending Transfer to Pennsylvania." In it, appellant argued that unspecified evidence was available only in Pennsylvania, and that the children had significant contact with the state because it is his extended family's state of residence and the children spent "most of their visitation and lives in Pennsylvania." Appellant averred that he "maintains employment in Pennsylvania and intends to accept full custody there," and that he had, to date, spent more than $175,000 pursuing custody. The motion concludes by arguing that the proper venue for custody proceedings was Dauphin County, Pennsylvania, or in the alternative, Talbot County, Maryland.[1]

The circuit court conferred with courts in California, where appellee had commenced an action, and in Pennsylvania. On September 8, 2011, the circuit court dismissed appellant's pending matters for lack of jurisdiction under the UCCJEA. The court based its ruling on the following findings:

> 1) It is appropriate for the Superior Court of California, County of Monterey, to exercise jurisdiction in this matter. The children and Ms. Garzino currently reside in Monterey, California, and have resided in California for approximately one year. A proceeding on these same issues is currently ongoing in the Superior Court in Monterey.
>
> 2) There is no domestic violence at issue in this proceeding. There is no indication that domestic violence is likely to occur or continue in the future.
>
> 3) The children have resided outside of the State of Maryland since approximately November of 2006. They resided in Massachusetts for approximately four years, and have most recently lived in California for approximately one year.
>
> 4) There is significant distance between the children's current home in Monterey, California and Talbot County, Maryland. This Court believes that such distance would cause disruption and hardship in the lives of the children.
>
> 5) Neither party has asserted financial difficulty in this matter. However, the Court acknowledges its awareness that the cost of transporting the children from California to Maryland in order to resolve this proceeding would be significant.
>
> 6) There are no agreements between the parties as to which state should assume jurisdiction.
>
> 7) Witnesses and other evidence are located outside of Maryland. The majority of witnesses and evidence are located in California. The children and Ms. Garzino currently reside in California. The children attend school in California. Ms. Garzino's family resides in California. Some potential witnesses, namely Mr. Meehan's extended family, live in Pennsylvania. Additionally, since the children have resided outside of Maryland for such a significant period of time, this Court feels that it cannot best accommodate the needs of the children in this proceeding. For example, this Court is unable to appoint a California attorney on behalf of the children in this matter, or to order Social Services to inspect the children's home and living conditions. The court in California has such necessary authority, and therefore this Court finds that Monterey is the more appropriate forum in which to determine proper custody of the children. This Court also finds that it would create substantial hardship and disruption to require the children to travel from California to Maryland to testify in this proceeding.
>
> 8) There is a possibility of delay in attempting to resolve a matter where the children at issue live at such a significant distance from this

> Court, and where substantial evidence is located at such a significant distance from this Court.
>
> 9) Although this court did grant Mr. Meehan and Mrs. Meehan a divorce in April of 2006, the children have since lived in Massachusetts for almost four years, and in California for approximately one year. Therefore, this Court feels that California is more familiar, or has a greater potential to gain familiarity, with the facts and issues in this litigation than does this Court.
>
> 10) The state of Pennsylvania has dismissed the nearly identical action filed there for lack of jurisdiction.
>
> 11) Commissioner Wilden of California has advised this Court that she believes the Monterey Court does, indeed, have jurisdiction over this matter, and is in agreement with this Court that the California Court is [ ] a more convenient forum to resolve this matter.

On September 13, 2011, appellant filed "exceptions" to the circuit court's judgment, which the court treated as a motion to revise and denied on September 15, 2011. Appellant filed notice of this appeal on September 27, 2011. In his filings with this Court, appellant lists his address as Harrisburg, Pennsylvania.

Discussion

Appellant argues that the circuit court violated the UCCJEA as well as his — and his children's — due process rights under the Fourteenth Amendment to the U.S. Constitution "[b]y issuing a Memorandum that modifies custody retroactively without a proper filing by Appellee, and without a hearing on the matter[.]" The court's order dismissing appellant's petitions did not "modify custody," and for the following reasons, the circuit 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. *See Codd v. Velger*, 429 U.S. 624, 627 (1977); *United States v. Glass*, 361 F.3d 580, 588 (9th Cir. Cal. 2004) (citing *Codd*, 429 U.S. at 627). And even if the UCCJEA seems to call for a hearing where there is no such dispute,[2] an appellant must establish that the court's decision prejudiced him. *See Bland v. Larsen*, 97 Md. App. 125, 131 (1993). Where, as here, an appellant argues that the court should have conducted a hearing on jurisdiction but fails to allege any facts that would have altered the court's decision, any error is harmless.

The UCCJEA governs Maryland's jurisdiction over child custody and enforcement proceedings. *Toland v. Futagi*, 425 Md. 365, 370 (2012) ("Whenever a child custody dispute in Maryland involves another state or another country, the Maryland Uniform Child Custody Jurisdiction and Enforcement Act is implicated."). Here, the Circuit Court had entered the original custody decree as part of the parties' divorce on April 7, 2008, and modified custody on August 1, 2008. As such, it could exercise "exclusive, continuing jurisdiction" to modify custody until either of the following occurred:

> (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 circuit court no longer had "exclusive, continuing jurisdiction" to modify custody under UCCJEA § 202(a), then any further action required jurisdiction under § 201. UCCJEA § 202(b). We shall not delve into the complex jurisdictional scheme set forth in UCCJEA § 201,[3] because all that matters here is whether the circuit court could *decline* to exercise whatever jurisdiction it may have had, 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* UCCJEA § 207(a)(2), and the court must weigh all relevant facts, including the following enumerated factors:

> (i) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (ii) the length of time the child has resided outside this State;
>
> (iii) the distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (iv) the relative financial circumstances of the parties;

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

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

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

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

UCCJEA § 207(b)(2).

Appellant argues that the court erred when it did not hear his arguments or evidence, but each of his specific contentions is unavailing.

First, appellant argues that the court excluded evidence of domestic violence; specifically, appellee argues that there was evidence of 'misconduct' through false 'abuse or harassment' filings, and harassment by Appellee at drop-offs," where appellee would threaten "such filings" if appellant did not consent to her relocation with the children. This, however, is not domestic violence. *See, e.g.*, FL § 4-513 ("[V]ictim of domestic violence' means an individual who has received deliberate, severe, and demonstrable physical injury, or is in fear of imminent deliberate, severe, and demonstrable physical injury from a current or former spouse, or a current or former cohabitant . . .").

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 the court's finding 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 that neither party had the opportunity to "assert financial difficulty." Appellant further argues that if a hearing had been granted, "the analysis would weigh much different evidence," to wit, that "Appellee has now abandoned a home purchased for $179,000 in 2007 in Massachusetts, now valued at $130,000, and has caused $57,000/year travel expense for airfare costs for visitation alone." These *past* costs make no difference to a *prospective* analysis of the parties' "relative financial circumstances" under UCCJEA § 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.[4] Appellant's limited, proffered evidence establishes neither these facts nor, consequently, any error in the trial court's findings and judgment.

Fourth, appellant argues that "[t]here was indeed 'agreement of the parties' as to the jurisdiction on transcript from Massachusetts, which has been readily apparent in the transcript provided by Appellant to all courts." Our review of the transcripts attached to appellant's "petition for enforcement" revealed no such agreement.

Fifth, appellant argues that the circuit court erred when it weighed the possibility of delay under § 207(a)(2)(vii), because the court "fail[ed] to allow Appellant to request a Temporary Visitation Order." Appellant then argues, vaguely, that the circuit 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 either [appellant] as a parent or [his] children's right to have continued involvement of their father in their life." 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 finding 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 a proceeding for custody enforcement. Specifically, appellant argues: 1) that the Pennsylvania court's decision should not have been considered because appellant sought in the circuit court only "enforcement . . . under the UCCJEA;" 2) that witnesses would be different depending on the proceedings; and 3) that California courts do not have jurisdiction over contempt proceedings "simply because the children reside there." 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 enforcement 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.

For these reasons, the circuit court did not err when it dismissed appellants' motions to enforce or modify the existing custody order.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellant's motion concludes with the following passage:

> Therefore the father, and his branch of the family in Pennsylvania, request a transfer of jurisdiction to Dauphin County Pennsylvania, and in any case, strenuously objecting to transfer of venue to Monterey California as an inconvenient forum, argue they have been deprived the protections afforded under the Uniform Child Custody Jurisdiction Enforcement Act by the involuntary transfer of the Case to Talbot County, MD, Berkshire County Ma, and from Washington County Maryland Legal Contempt and Enforcement flings [sic] to Talbot County, MD, where no parties reside.
>
> The father seeks attorneys fees, court and travel costs defending the parental rights given him by God, "full faith and credit" under the Constitution, in the best interests of the children, and provided Under the Uniform Child Custody Jurisdiction Enforcement and Parental Kidnapping Prevention Acts "full faith and credit" clause[.]
>
> The Father seeks to establish legal precedent whereby serial child re-locators, parental alienators, and parties interfering with parental relationships are not rewarded in being able to repeatedly relocate and exhaust left behind families.
>
> The father seeks priority on the Court Docket as provided under the UCCJEA and PKPA, a Writ of Warrant, immediately as the children have not been delivered to Maryland for seven months now as Ordered, with ongoing contempt filings, where he is a shared parenting advocate, with a parenting plan that allows the children to share their childhoods with both parents, with accommodations and school plans for the children.

We note that a "writ of warrant" is ordinarily called a "warrant." *See* BLACK'S LAW DICTIONARY 1722 (9th ed. 2009) (defining "warrant" as a "writ directing or authorizing someone to do an act, esp. one directing a law enforcer to make an arrest, a search, or a seizure.").

2. Appellant relies on the circuit court's communications with Pennsylvania and California courts to argue that he should have been afforded a hearing. The UCCJEA provides that when deciding jurisdiction, a Maryland court "may communicate with a court in another state[.]" UCCJEA § 109(b). Further, the court "may allow the parties to participate in the communication," UCCJEA § l09(c)(1), and "[i]f the parties are not able to participate in the communication, they shall be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made," § 109(c)(2). The UCCJEA's drafters' official comments note that § 109(c)(2)

> . . . protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not [ ] be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

For the reasons explained, *infra*, these provisions are limited by harmless error analysis, and failure to abide by them may nevertheless satisfy due process.

3. Section 201(a) sets forth the grounds for jurisdiction, as follows:

> . . . Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State has jurisdiction to make an initial child custody determination only if:
>
> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a

parent or person acting as a parent continues to live in this State;

(2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and

(ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

(3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or

(4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

4. We note that if appellee has, in fact, abandoned a $130,000 home in Massachusetts, this would indicate that she *lacks* funds.

Cite as 12 MFLM Supp. 71 (2012)

Custody and visitation: legal custody: inability to communicate

On Motion For Reconsideration

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: November 5, 2012. Unreported.

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 said was not in the best interest of their daughter; and (3) failing to address the master's recommendation to end weekend visitations on Sunday evening, rather than overnight.

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, and Ms. Zembower filed a cross-appeal.

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.

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 to the Circuit Court for Allegany county for further proceedings.

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 visitation.

[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. The court granted two of Mr. Zembower's exceptions. First, the court awarded the parties joint legal custody. The court found that although "on . . . matters such as summer vacations, attendance at dance and gymnastic classes[,] the parties' communication has been less than pleasant and could be greatly improved," neither party had shown a change in circumstance justifying sole custody because "the parties have not had reason to make long range decisions for the child." Second, the court found that because the child had been late to school on some Thursdays after visitation, it should curtail overnight visitation on Wednesdays. The court therefore rejected the master's recommendation to eliminate overnight visitation, nor did it continue overnight visitation under the divorce decree; instead, the court awarded visitation on Wednesday from 4:00 p.m. to 8:00 p.m.

The court noted that neither party had excepted to the master's recommendation eliminating Columbus Day and Veteran's Day from the parties' visitation schedule, and it adopted that recommendation.[3] The court did not address the master's recommendation to end Sunday visitation at 6:00 p.m., rather than continue overnight visitations with Mr. Zembower.

Mr. Zembower appealed to this Court on November 14, 2011, and Ms. Zembower filed her cross-appeal shortly thereafter. We filed an unreported opinion on September 19, 2012, affirming the circuit court's judgment. Both parties have filed motions to reconsider. For the following reasons, we grant Ms. Zembower's motion to reconsider and deny Mr. Zembower's motion.[4]

Discussion

Standard of Review

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 ordinari-

> ly 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).

1. Mr. Zembower's Appeal

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. 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 modifying the judgment of divorce.

II. Ms. Zembower's Cross-Appeal

Ms. Zembower first argues that 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" decision. 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 that 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 circuit court.[5]

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 court's custody order. On remand, the circuit court also should address the matter of Sunday visitation and amend its judgment to award Ms. Zembower sole legal custody.

APPELLANT'S MOTION FOR RECONSIDERATION DENIED. APPELLEE'S MOTION FOR RECONSIDERATION GRANTED. JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. 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).

3. 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.

4. Continuing the trend established by his appeal, Mr. Zembower's motion for reconsideration sets forth no legal arguments bearing directly on the judgments rendered below. We therefore deny Mr. Zembower's motion.

5. The master's report did not provide a discrete list of recommended changes; rather, it set forth a new, comprehensive custody and visitation scheme. The circuit court thus appears to have overlooked this last change when comparing the master's recommendations to the divorce decree.

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NO TEXT