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SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Trust does not affect status of destitute adult child

A trust in favor of a mentally impaired 19-year-old cannot be considered a "means of subsistence" under the destitute adult child statute, as long as she has no access to the funds, the Court of Special Appeals has held.

The decision affirms a ruling by the Talbot County Circuit Court, which found that Edmund Cutts Jr.'s oldest daughter, Sarah, was a destitute adult child to whom he owed a duty of support under Family Law Article §§13-101 and 13-102.

Sarah was born in November 1990. She has attended special schools all her life and requires constant supervision. At the time of the modification of support hearing, she was 19 and attending a private school in New York for students who score below 70 on an IQ test.

Sarah is also the beneficiary of a $400,000 trust, of which her mother, Nancy Trippe, is the trustee. Trippe has never disbursed any of the funds to Sarah.

In 2010, Trippe sought to modify child support based, among other things, on a drastic reduction in her income. A real estate broker, Trippe had seen her annual commissions fall by more than half during the economic recession, to about $73,000 the prior year. Cutts earned about $83,000 that year.

Cutts, however, claimed his support obligation should be reduced. When the couple divorced in 2005, the parties agreed that support obligations for each of their three children would end, at the latest, as each child turned

See CUTTS V TRIPPE page 2

ESTATES & TRUSTS

New estate tax rules change lawyers' role

The year-end detour away from the "fiscal cliff" contains major changes for estate and gift tax rules that will affect not only the advice lawyers give to their clients, but the future landscape of estate planning law for years to come.

In an unexpected turn of events, the deal made permanent the lifetime tax-free exemption of $5 million (adjusted for inflation) – which began in 2011 – as well as portability of the spousal exemption. Almost everyone expected that the amount would be reduced to as little as $1 million and not made permanent.

Given that the new exemption is much higher than expected and appears to be a certainty for years to come, estate planning attorneys may see less work from clients, except for ultra-wealthy ones.

Under the bill that President Barack Obama signed into law on Jan. 3, the $5 million exemption, which began in 2011, is adjusted for inflation. The exemption for 2012 was $5.12 million and in 2013 will likely be about $5.25 million (although the IRS has not provided an exact figure yet). The measure also raises the top estate and gift tax rate from 35 percent to 40 percent.

The new law also makes permanent the portability rules for the spousal exemption, and therefore any part of the exemption that is not used by a spouse who dies can be used by the surviving spouse. However, the exemption must be claimed within 90 days of the spouse's death on a special form the IRS plans to create.

The law leaves open several other

See ESTATES & TRUSTS page 3

Cutts v Trippe

Continued from page 1

19. While that would not relieve him of his responsibility under the destitute adult child statute, he claimed the statute did not apply to Sarah because she had a "means of subsistence" – the trust.

The circuit court rejected that argument, and calculated the amount of support based on the child support guidelines in FL §§ 12-202 to 12-204. That resulted in an increase in the amount of Cutts' child support obligations.

On Cutts' appeal, the Court of Special Appeals noted that FL § 13-101(b) defines a "destitute adult child" as "an adult child who: (1) has no means of subsistence; and (2) cannot be self-supporting, due to mental or physical infirmity." Under prior case law, the child support Guidelines also apply to support for an adult destitute child.

Next, it turned to the question of whether a trust constitutes a "means of subsistence."

"No Maryland court has seemingly addressed this particular issue," Judge Stuart Berger wrote for the appellate panel. "We have, however, held that only resources that are currently available to a child should be considered in the destitute adult child analysis," citing the court's 1985 decision in Presley v. Presley.

Thus, once the trial court determined that Sarah could not access the trust at present, the judge was required to exclude it from consideration as a means of subsistence, Berger wrote.

As in *Presley*, "Sarah's need for support may change in the future due to the trust, but that has no bearing on Sarah's current need for support," the opinion says.

By the same reasoning, the trial judge did not err in comparing Sarah's expenses against her available resources – a calculation not called for in the statute, but established in cases, like *Presley*, where the adult child had some means of subsistence but not enough to be self-supporting.

"In our view, Sarah fits the classic statutory definition of 'destitute,' and therefore a balancing analysis was unnecessary," Berger wrote.

"The trial court determined, based on testimony, that Sarah had no job, received no disability benefits or other assistance, and had no other available financial resources. Thus, by definition, Sarah is destitute – she has 'no means of subsistence'," the appeals court concluded. "Accordingly, under these circumstances, there was no need for the trial judge to go any further and weigh Sarah's financial resources against her expenses, because there were simply no financial resources to consider."

The opinion also affirmed the trial judge's rulings regarding Trippe's expenses, specifically rejecting Cutts' claim that her expenses for the children's shelter and utilities "are greatly diminished by the fact that [all three children are] in boarding school for the vast majority of the year."

As the trial judge noted, "Well doesn't she need a home for them to reside in on the weekends, and vacations and in the summer? … It's not like she can downsize to a[n] efficiency apartment."

Monthly Memo

• Del. Doyle Niemann, D.-Pr. George's, is seeking to set a special surcharge of $70 on filing fees for divorce petitions, with $45 going to the Domestic Violence Program Fund and $25 going to Maryland Legal Services Corp. The bill, HB 535, comes as a sunset provision is about to take the surcharge on circuit court filing fees, currently set at $55, back down to $25. Currently, the entire amount is directed to MLSC, which has seen a perilous drop in IOLTA revenue as interest rates stay near zero.

• In addition to his proposal to halve the time for divorcing couples to live separate and apart without cohabitation to six months, Sen. Bobby Zirkin, D-Baltimore County, is also sponsoring a bill to liberalize the meaning of the term. SB 503 would allow parties to live separate and apart in the same house, so long as they maintain separate bedrooms, and eliminate the need for corroboration of the separate bedrooms.

• As the federal Family and Medical Leave Act turns 20 in February, President Barack Obama and other supporters are highlighting the estimated 100 million workers who have been able to take up to 12 weeks of unpaid leave annually without fear of losing their jobs. However, according to a recent survey by the U.S. Department of Labor, about 40 percent of the nation's workers are not covered by the law. Meanwhile, the Washington Post reports that according to a recent study of 177 nations by McGill and Harvard University researchers, Papua New Guinea, Swaziland and the U.S. were the only three that do not mandate paid parental leave.

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The fine print: Problems with college tuition waiver for youth in foster care

By Mark Stave, Esq.

Dashaun (not his real name) was back in Baltimore with his aunt for the winter break between semesters at Frostburg State University. He got the word to attend a meeting at the Department of Social Services to plan for his aging out of the foster care system.

He was in the middle of his third year, working towards his engineering degree. He would turn 21 in mid-May. It was at that meeting that he realized that he would have to leave school, transfer to a community college, and move back in with his aunt.

Maryland's college tuition waiver for youth in foster/kinship care does not waive the total cost of tuition. The waiver covers only that portion of the tuition that is not covered by grants and scholarships. Colleges and universities are allowed to take foster youth's Pell Grants and apply them to the tuition bill.

Anything left over can be applied to fees, room and board — all without the foster youth's knowledge or consent. After that, anything left over is then required to be paid to the foster youth to use for any other college related expense.

Frostburg's tuition charges completely wiped out Dashaun's Pell Grant and part of his Federal Education and Training Voucher. He was using the rest of the ETV and a DSS Semi-Independent Living Allowance to cover his dorm room and meal plan. His summer construction job covered the cost of his books and provided him with some spending money.

Once he aged out, Dashaun would lose the SILA stipend and there was no way he could stretch his ETV and summer job money to cover room and board. He faced a choice — go into debt (if he could not find anyone to loan him the thousands of dollars he would need for books, rent and food for at least 18 months) or transfer away from his college, live with his aunt, and attend community college. He was devastated.

Unlike Dashaun, who had lived with his aunt after being found to be a Child in Need of Assistance, Rashida (not her real name) bounced around from placement to placement after being found CINA. Already behind in school when she entered the system, each new placement resulted in even more lost school.

Finally, Rashida, at the age of 17, decided to get her GED. It was hard, and took more than seven months to master the material. In May she took the test, and six weeks later, in early July, she got the results — she passed and could go to college.

While waiting for the test date and the results, Rashida had signed up for and completed a course to be certified as a nurse's assistant. Then she decided to attend community college and work towards certification as a licensed nurse. She applied to the local community college, filled out her financial aid forms and registered for classes.

The ETV grant was declined. She was told she applied too late, but would get something next year. The community college used her Pell Grant for tuition, then sent her a bill for the balance.

Rashida knew this was a mistake. The balance should have been waived. She called the financial aid office and left a message for the person she was told to speak with about the error. She assumed the mistake was corrected — until she got the letter from the collection agency.

The community college had turned the bill over to the collection agency, and it was threatening to sue her and destroy her credit record. After repeated contacts with the financial aid office, Rashida was advised that it was the policy of the Maryland Commission on Higher Education to deny the tuition waiver to anyone not completing a financial aid form by March 1.

Ultimately, Rashida's problem was resolved by the DSS, which was forced to apply scarce dollars from discretionary funds to cover the debt. Apparently, this had happened to other students.

In October, 2012, the executive director of the Social Service Administration for Maryland issued a five-page policy directive providing complete information about both the Tuition Waiver and the ETV programs, including the MCHE imposed deadlines for applications.

The policy also provides specifically that the "ETV is not a grant or scholarship. Therefore, it *shall not* be applied to outstanding college or university balances prior to the application of the tuition waiver." (Emphasis in the original,)

Lessons learned: If you represent a college-bound youth in foster care, be sure to advise and assist them in filling out the FASFA form by March 1. Review the plans of any of clients who will likely age out before finishing their degrees and ask for an immediate Family Involvement Meeting/Case Planning Review.

The DSS case manager and supervisor, the client and any family and a Ready By 21 Staff specialist should all be invited so that your client can plan for and complete a successful college career.

Mark Stave is a staff attorney in the Child Advocacy Unit of Maryland Legal Aid in Baltimore. For more information or for the DHR policy URL, contact him at mstave@mdlab.org.

Estates & Trusts

Continued from page 1

estate planning techniques that affect high net-worth clients. Those techniques are likely to be affected as more fiscal cliff talks take place in the coming months.

Among the items on the chopping block are: valuation discounts in grantor trusts and other techniques that freeze the value of assets, such as short-term GRATs (Grantor Retained Annuity Trusts) and sales to defective grantor trusts.

For clients who are on the edge of the $5 million range or whose state estate tax does not mirror the federal estate tax, there will still be opportunities to provide tax-driven planning advice.

Adapted from Lawyers USA, a sister publication of The Daily Record.

UNREPORTED CASES IN BRIEF

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

*Lynita A. Dorsey v. Thomas Jefferson Wilson, Jr.**

CUSTODY AND VISITATION: MODIFICATION: CHANGE IN PARENT'S MENTAL HEALTH STATUS

CSA No. 267, September Term, 2012. Opinion by Watts, J. Filed December 17, 2012. RecordFax #12-1217-04, 23 pages. Appeal from Baltimore City. Affirmed.

Appellant failed to show a material change in circumstances that would justify granting her custody or visitation rights, where, although she claimed that she was in counseling and had overcome her mental health issues, the evidence established at most that she has been evaluated and intends to get help.

"Lynita A. Dorsey, appellant, and Thomas Jefferson Wilson, Jr., appellee, have a son together, Tyler, of whom appellee has sole custody pursuant to a 2007 Custody Order. Appellant appeals an April 3, 2012, Order denying her exceptions to a Master's Report and Recommendation, in which the Master proposed denying appellant's Petition to Modify Custody and Visitation and Child Support, based on the failure to prove a material change in circumstance.

DISCUSSION

Appellant contends the circuit court erred in concluding that her purported change in mental health status did not constitute a material change in circumstance sufficient to allow her custody of, or alternatively, visitation with, her son. Appellant argues that the circuit court failed to adequately consider Tyler's best interests in allowing appellee to retain sole custody.

In *Wagner v. Wagner*, 109 Md.App. 1, *cert. denied,* 343 Md. 334 (1996), this Court reviewed the "procedural steps required to be taken in child custody modification cases[,]" stating: "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 a child. . . If a material change of circumstance is found to exist, then the court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding.…[B]oth steps may be, and often are, resolved simultaneously." *Id.* at 28-29 (citations omitted).

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 in visitation disputes. The factors to be examined in determining what is in the best interests of the child were set forth in *Montgomery Cty. Dep't of Social Servs. v. Sanders,* 38 Md.App. 406, 420-21(1978).

Here, in short, appellant asked the circuit court and now this Court to credit her with total wellness and award custody and visitation where she has undertaken what will plainly be a lengthy path for her to reach the mental stability required for the care of a child. The Master made plain that, in her view, appellant was far from stable enough to be awarded unsupervised visits with Tyler, much less to obtain sole custody. We agree that, at the time of the hearing before the Master, appellant had failed to introduce evidence that a "material change" in her mental health status existed. On brief, appellant points out that she completed psychiatric and psychological evaluations and underwent counseling sessions in 2007 through 2009, and that she was in "current counseling and therapy in 2012."

As to the latter claim — that she was currently in counseling — on brief, appellant refers to the following evidence: (1) a February 2012 diagnostic evaluation by someone who appears to be a social worker in which it is suggested that appellant engage in weekly therapy sessions, learn how to manage depression, and avail herself of supportive talk therapy, and (2) a February 2012 diagnostic evaluation in which handwritten notes indicate appellant's "preoccupation about the injustice of the legal system and her son being abused while in father's custody." The evaluations failed to substantiate appellant's claim that she was currently in "counseling and therapy" or to provide any information as to her progress. The remaining psychiatric evaluations and reports, which appellant identified, date from 2010 and before. It is unclear whether the February 2012 evaluations offered here by appellant were before the circuit court at the time of the March 23, 2012, hearing.

In his December 2011 report, the circuit court observed that Dr. Levinson "expressed concern about [appellant]'s ability to behave appropriately with the minor child." The circuit court also pointed out that appellant had shown an "inability to respect boundaries when given access to Tyler[,]" stating:

> She appears to question [Tyler], in search of some accusation she can make to separate Tyler from [appellee]. Additionally, she has a history of making what turn out to be groundless accusations to Child Protective Services, thereby bringing [Tyler] into unhealthy investigations. [Appellant]' s behavior does not appear to be malicious; rather, it appears to be a manifestation of the mental health issues, which have yet to be addressed.

Viewed in the light most favorable to appellant, the February 2012 evaluations demonstrate only that appellant intends to get help for her problems — which, while this is a positive first step, in no way suffices to overcome the overwhelming evidence before the Master, and the circuit court's subsequent determination, regarding appellant's mental health and the obvious problems that a change in custody and visitation with Tyler would present.

The circuit court, and the Master, undertook a thorough analysis of appellant's condition and concluded that based on her continued denial of having any problems whatsoever, it was not in Tyler's best interests to allow her any access. Of great importance to the circuit court was not only appellant's aversion to supervised access, but also evidence suggesting that appellant devoted time with Tyler to uncovering perceived problems in his relationship with appellee, rather than developing a stable relationship between the two of them. The circuit court pointed out that the change that appellant alleges to have occurred is her move to Baltimore and taking up residence with her own mother, but that she overlooks that the improvement to her own mental health is a necessary precursor to the circuit court finding a "material change of circumstance." See *Wagner,* 109 Md.App. at 28-29.

Appellant's contention that the circuit court failed to consider Tyler's wishes is a nonissue. Appellant has not produced any evidence of Tyler's wishes other than appellee's statement that Tyler benefits from phone calls with her. Even if she had produced evidence that Tyler wanted more interaction with her, in this case, appellant's mental health issues would override any such expression on the part of a minor child. We are satisfied that the circuit court did not abuse its discretion in determining that no material change in circumstance occurred, and denying appel-

See UNREPORTED CASES IN BRIEF page 5

UNREPORTED CASES IN BRIEF *Continued from page 6*

lant's exceptions to the Master's Report and Recommendation."

Slip op at various pages, citations and footnotes omitted.

*John Harrison Frye, Sr. v. Melissa Lynn Mather**

CHILD SUPPORT: MODIFICATION: MEDICAL AND CHILD CARE EXPENSES

CSA No. 1861, September Term, 2011. Unreported. Opinion by Watts, J. Filed Dec. 18, 2012. RecordFax #12-1218-02, 34 pages. Appeal from Harford County. Affirmed in part, vacated in part.

Although the parties' special-needs child had been diagnosed with three conditions prior to his parent's divorce, his physical deterioration since then was a material change in circumstances warranting modification; however, the court vacated the awards for extraordinary medical expenses and work-related child care, and remanded them for recalculation and explanation of how the appropriate amounts were determined.

"This appeal concerns an order modifying child support. John Harrison Frye, Sr., raises three issues:

I. Did the trial court err in ordering child support?

II. Did the trial court err in ordering extraordinary medical expenses?

III. Did the trial court err in ordering child care expenses?

We answer question I in the negative and question II and III in the affirmative.

Appellee, Melissa Lynn Mather, noted a cross-appeal raising five issues, which we rephrase:

I. Whether the circuit court erred in calculating extraordinary medical expenses to be $500 a month?

II. Whether the court erred in calculating work-related child care expenses to be $300 a month?

III. Whether the court erred in making child support retroactive to January 1, 2011, rather than to May 21, 2010, the date on which the petition for modification was filed, and in awarding only $75 per month on the arrears?

IV. Whether the court abused its discretion in failing to award attorney's fees?

V. Whether the court erred in failing to order that child support extend beyond JJ's eighteenth birthday?

We answer questions I and II of the cross-appeal in the affirmative, and questions III, IV, and V in the negative, vacate the awards as to extraordinary medical expenses and child care expenses, and remand the case for further proceedings consistent with this opinion. We affirm all other judgments of the circuit court.

DISCUSSION

APPEAL

I. Order Modifying Child Support

Appellant contends that, because JJ's diagnoses of "hearing loss," "nystagmus," and "hypotonia" have not changed since the parties' divorce, "the trial court incorrectly determined that there was a [material] change in circumstance."

Demonstrating a material change in circumstance is the threshold requirement for any modification of a final order of child support. *Walsh v. Walsh*, 333 Md. 492, 497 (1994), FL §12-104(a).

In this case, the evidence demonstrates that JJ's condition has deteriorated significantly: (1) At the time of the divorce, JJ could stand and walk with leg braces and a walker, but is now unable to do either; (2) JJ had sufficient use of his hands at the time of the divorce to manipulate objects, but can no longer grasp anything and requires braces to hold his hands open; (3) JJ could sit up unassisted at the time of the divorce, but now requires a special chair with supports and restraints to prevent him from falling over; (4) JJ could feed himself at the time of the divorce, but can no longer grasp cups or utensils; and (6) although JJ was a small child at the time of the divorce, he now weighs 168 pounds and is difficult to move. We have no difficulty concluding that the circuit court did not abuse its discretion in modifying appellant's child support obligation based on a material change in circumstance.

II. Extraordinary Medical Expenses

Appellant contends the circuit court erred in ordering him to pay extraordinary medical expenses, as the award was not clearly explained or supported by documentation. Appellant argues that appellee testified only that one of the medications prescribed cost $225 and that the figure of $500 was never provided to the court.

Appellant's argument boils down to this: Because JJ has survived for two years without the medication after it was prescribed, it is unnecessary. We decline to accept this contention.

The circuit court gave no indication of how it reached the figure of $500. We are unable to determine that there is material evidence to support the factual findings that JJ's medication would cost $500 per month. Accordingly, we vacate the order of $500 and remand for a determination of extraordinary medical expenses, and an explanation of the basis for the determination.

III. Child Care Expenses

Appellant contends the circuit court erred in awarding $300 per month in child care expenses. On cross-appeal, appellee argues that the circuit court failed to base the award on the evidence at trial, which she contends totals in excess of $300 per month.

The circuit court stated it was "not convinced of all of the costs as put forth by [appellee]" and was "only willing to allot a maximum of $300 for work-related child care expenses." The court offered no explanation and we can discern no basis for this amount. Accordingly, the circuit court abused its discretion. We vacate the order and remand for a determination of the cost of the work-related child care expenses, and an explanation of the basis.

CROSS-APPEAL

I. Retroactivity and Arrears

Appellee contends the effective date for the child support order should be May 21, 2010, the date on which the petition to modify child support was filed. Appellant argues that the effective date selected by the circuit court "is arbitrary and not in the best interest of the child."

F.L. §12-104 provides that the trial court "may not retroactively modify a child support award prior to the date of the filing of the motion for modification." This does not, however, require the trial court to make an award retroactive. *Krikstan v. Krikstan*, 90 Md.App. 462,472 (1992).

As the Family Law article places no obligation upon the circuit court to make a child support modification retroactive to the date of filing, and the circuit court explained its reason for making the modification retroactive to January 2011, we perceive no abuse of discretion.

Absent any information or argument as to the manner in which the circuit court's order is arbitrary, we are unable to conclude that the circuit court erred or abused its discretion in ordering the $75 a month payment for arrears.

II. Attorney's Fees

See UNREPORTED CASES IN BRIEF page 6

UNREPORTED CASES IN BRIEF *Continued from page 5*

In denying appellee's request for attorney's fees, the circuit court noted that, although appellee was justified in filing the petition because she "has covered the cost of JJ's care for a significant period of time," appellant was justified in defending the case, as "his expectation not to have any additional child support" was reasonable based on the terms of the Separation Agreement and Judgment of Absolute Divorce. Although the circuit court did not reiterate its findings with regard to the parties' incomes and needs, the record reflects that the court had heard extensive evidence on those issues. The circuit court was well aware of the needs and resources of each party and determined that both parties were reasonably justified in their respective positions. We discern no abuse of discretion.

III. Continuation of Award Past Age 18

Appellee contends, on cross-appeal, that the circuit court erred in not extending child support past JJ's eighteenth birthday. JJ was sixteen at the time.

Appellee has pointed to no legal authority, and we know of none, requiring a circuit court to award child support for a disabled child beyond the age of eighteen prior to the child's eighteenth birthday. Again, absent any legal authority for the argument or information as to the manner in which the circuit court acted arbitrarily or contrary to law, we are unable to conclude that the circuit court abused its discretion."

Slip op at various pages, citations and footnotes omitted.

*Bruce G. Gillies v. Catherine Elizabeth Gillies**

CHILD SUPPORT: MODIFICATION: INCREASED INCOME

CSA No. 74, September Term, 2012. Unreported. Opinion by Matricciani, J. Filed Dec. 4, 2012. RecordFax #12-1204-00, 8 pages. Appeal from Anne Arundel County. Affirmed.

In ruling on a motion to modify child support in an above-guidelines case, the trial court can extrapolate from the Child Support Guidelines without considering whether the needs of the children have changed.

"Catherine Gillies brought a child custody suit against appellant Bruce Gillies on May 7, 2007. On April 25, 2008, the court ordered Father to pay child support of $2,637 per month. Mother moved to modify support on July 28, 2011. After a hearing, the court entered an order on March 20, 2012, increasing Father's child support obligation to $5,617 per month.

Father presents a single question: Did the trial judge commit reversible error by extrapolating the Maryland child support guidelines using the SASI CALC program?

HISTORY

Mother moved to modify the support order on the sole grounds that Father's monthly income had increased from $11,354 to $18,279, while Mother's monthly income had decreased from $10,131 to $5,890 due to her mandatory retirement from active duty with the U.S. Navy.

The court found Father's actual monthly pre-tax income was $19,583. The court also reviewed the evidence of Mother's finances and ability to earn, and attributed to her $6,667 in monthly income.

The parties' combined income exceeded the maximum value of the child support schedule in §12-204, and so the court extrapolated from the guidelines.

DISCUSSION

The Maryland child support guidelines establish "obligations based on estimates of the percentage of income that parents in an intact household typically spend on their children." *Voishan v. Palma,* 327 Md. 318, 322-23 (1992). If parental monthly income exceeds the statutory maximum (presently $15,000), the statute confers discretion on the trial court to set the amount of child support. FL §12-204(d). "The conceptual underpinning" of the guidelines applies to these cases, which is that "a child should receive the same proportion of parental income, and thereby enjoy the same standard of living, he or she would have experienced had the child's parents remained together." *Voishan,* 327 Md. at 322. We will not disturb the trial court's discretionary determination as to an appropriate award of child support absent legal error or abuse of discretion. *Ware v. Ware,* 131 Md.App. 207, 240 (2000).

Father argues that the trial court erred in setting his support obligation because, in the words of his attorney, "There is no room for doubt that the trial judge relied entirely on the SASI CALC program to [extrapolate] child support rather than to consider [sic] the parties' children's actual needs." Importantly, Father does *not* argue that extrapolation is *prohibited,* nor could he, for in his closing argument counsel (correctly) noted, "the case law clearly says that [the court] is not required to extrapolate, but it is okay." Instead, Father argues that the circuit court's award is generally excessive and that it was Mother's burden to prove the children's increased needs. Father concludes that because Mother failed to do so, there was no evidence on which the court could increase his child support obligation. We disagree and uphold the order.

Father relies on *Smith v. Freeman,* but he ignores the portion in which we held that "an increase in *parental income alone* may justify an increase in child support, even when there is no change in a child's needs." 149 Md.App. at 24, 21-30 (emphasis added). It fell to Father to demonstrate that the award did *not* give his children the same standard of living they would have experienced had the parties remained together, *see Voishan,* 327 Md. at 322, or that it did *not* balance the best interests and needs of the children with the parents' financial ability to meet those needs, *Unkle,* 305 Md. at *597.* Father failed to do either.

Father describes the court's award as "crushing," but he fails to demonstrate how or why. Even if we were to subtract a conservative forty percent of [his] income for federal and state taxes, the child support award leaves him with $73,596, annually. The record gives us no reason to believe that this amount is not sufficient to sustain Father; furthermore, this remainder compares favorably to the $56,376 annually that Mother is left with after subtracting her support obligations.

Second, at thirty percent of the parties' combined income, it does not mark a drastic departure from the existing award, which was approximately twenty-three percent of the parties' combined income.

Voishan supports the opposite of [Father's] desired outcome. There, the Court of Appeals *upheld* an award that *exceeded* extrapolation.

The trial court acted within its discretion when it extrapolated from the guidelines to calculate a combined support obligation."

Slip op at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of Cheyanne H.-R**.

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: RELATIONSHIP TO FOSTER PARENTS

CSA No. 2693, September Term, 2011. Unreported. Opinion by Salmon, James P. (Retired, Specially Assigned). Filed November 19, 2012. RecordFax #12-1119-01, 22 pages. Appeal from Baltimore City. Affirmed.

See UNREPORTED CASES IN BRIEF page 7

UNREPORTED CASES IN BRIEF *Continued from page 6*

In granting a petition to terminate parental rights, the circuit court properly considered all the statutory factors and did not focus unduly on the child's relationship with her foster parents; even if they do not ultimately adopt the child as planned, there was clear and convincing evidence to support the finding that termination of parental rights was in the child's best interest.

"Christina B. appeals the judgment of the juvenile court, terminating her parental rights to Cheyanne H-R., and granting guardianship of to the Baltimore City Department of Social Services.

Cheyanne Marie H-R. is the biological child of appellant and Samuel H. Jr., Cheyanne was born prematurely on May 5, 2009. The child was admitted shortly after birth to the John's Hopkins neonatal intensive care unit for treatment of prematurity and neonatal abstinence syndrome. Although Cheyanne tested negative for illegal substances at birth, she was known to have been exposed to heroin and cocaine *in utero*, and experienced severe withdrawal symptoms after birth. Those symptoms included tremors, increased muscle tone, and poor weight gain. Cheyanne remained at Johns Hopkins Hospital until June 8, 2009.

Appellant signed an initial service agreement with BCDSS on December 5, 2009. Following a hearing on October 13, 2010, the Court concluded that Cheyanne was a CINA, due to appellant's lack of progress toward achieving the goals stated in the service agreement. Appellant signed a second service agreement on November 19, 2010.

On April 14, 2011, based upon appellant's continued inability to fulfill the requirements of the service agreements, the Court changed Cheyanne's permanency plan from reunification to adoption by a non-relative. BCDSS filed a Petition for Guardianship with the Right to Consent to Adoption or Long-Term Care Short of Adoption on April 20, 2011. Through counsel, Cheyanne consented to the termination. Appellant filed an objection.

Following hearings, the circuit court granted the Department's petition, terminating appellant's parental rights. In its Opinion, the court made detailed findings regarding appellant's non-compliance with the service agreements, addressing each of the requirements of the agreements in the context of the factors in FL §5-323(d), "giving primary consideration to the health, safety and best interest of the child." The court reviewed all the services BCDSS had provided to meet its initial goal of reunification, or, alternatively, of identifying a familial resource for placement instead of extending Cheyanne's time in foster care. The trial judge found, beyond a reasonable doubt, that the Department's efforts had been adequate.

Alternatively, the Court concluded that exceptional circumstances existed justifying termination of appellant's parental rights. Noting that Cheyanne had been out of appellant's custody since birth, had never received any support from appellant, had never engaged in sustained regular visitation with appellant, and had formed no significant emotional bonds with appellant, the Court opined that it was unlikely that termination of appellant's parental rights would have any impact on Cheyanne's well being.

The court granted BCDSS's Petition for Guardianship with the Right to Consent to Adoption or Long-Term Care Short of Adoption.

III.

DISCUSSION

The paramount concern of a court charged with reviewing a termination of the rights of a child's natural parent is whether there is clear and convincing evidence that termination of the parent's rights is in the best interests of the child. Family Law Article §5-323, *In re Cross H.*, 200 Md.App. 142, 152, cert. granted, 422 Md. 352 (2011). To determine the child's best interest, the circuit court is statutorily obliged to consider each of the factors enumerated in FL §5-323(d), and to make specific factual findings based on the evidence presented addressing the relevant factors.

In the instant case, the circuit court's written opinion addressed, in turn, each of the factors in FL §5-323(d). Based upon its factual findings, the court concluded that appellant was unfit, and that exceptional circumstances existed to justify termination of appellant's parental rights.

Appellant concedes that the circuit court's factual findings are not clearly erroneous, and that the court made the required findings to support its legal determinations of unfitness and exceptional circumstances. Appellant challenges, however, the determination that Cheyanne's best interest would be served by assigning guardianship to BCDSS. Appellant maintains the court improperly focused on the possibility of Cheyanne's adoption by the K. family, while in reality, neither the K. family nor BCDSS was bound to consent to Cheyanne's adoption. Moreover, the Department had evidenced no official intentions to seek such a permanent placement.

Statutorily, public adoptions are required to proceed under a two-tiered system, whereby the existing parental rights of the birth parents are terminated prior to beginning a subsequent proceeding to formalize an adoption. FL §5-338. We acknowledge that there is no *guarantee* Cheyanne will be adopted into the K. family. But few things in life can be guaranteed. In any TPR case, the judge must deal with what is likely, not what is certain. Based on Mrs. K.'s testimony that she and her husband intended to adopt Cheyanne, and the strong evidence they had provided excellent care for Cheyanne, the judge's opinion as to what was likely to happen was supported by substantial evidence.

We discern no inappropriate emphasis on Cheyanne's success in her foster home placement; instead, the court remained appropriately focused on appellant's inability over the last three years to demonstrate the adjustments and progress necessary for her to assume custody at any point in the foreseeable future. The court considered Cheyanne's healthy relationship with her foster family only where such considerations were required by statute or when necessary to illustrate the court's determination that exceptional circumstances existed to justify termination of appellant's parental rights.

Even if Cheyanne was not adopted by the K.s, under all the circumstances, it would not have been an abuse of discretion to conclude it would still be in Cheyanne's best interest to terminate appellant's parental rights and allow Cheyanne to be adopted or placed in long-term custody with another family. The court's determinations that appellant was currently unfit to independently care for Cheyanne, and that no services BCDSS could offer were likely to improve appellant's situation to a point where she might make significant enough improvements to allow her to assume custody within a reasonably foreseeable time, were clearly supported by very strong evidence."

Slip op at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of Isabella A.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: SUBSEQUENT PLACEMENT

CSA No. 0774, September Term, 2012. Unreported. Opinion by Hotten, J.

See UNREPORTED CASES IN BRIEF page 8

UNREPORTED CASES IN BRIEF *Continued from page 7*

Filed November 28, 2012. RecordFax No. 12-1128-03, 36 pages. Appeal from Charles County. Affirmed.

Where a child had been in foster care for two years with one family, but was also strongly bonded with a sister who had been adopted into another family, the circuit court was not required to honor the mother's preference that the current placement continue, nor to choose between the two families before terminating the mother's parental rights.

"In this case, we are asked to determine whether the Juvenile Court abused its discretion in terminating the parental rights of appellant, Ms. A., and choosing adoption by a nonrelative as a permanency plan for Isabella A. Appellant presents one question: Did the circuit court abuse its discretion in concluding that it is within Isabella's best interest to terminate appellant's parental rights by placing her in a home not of appellant's choosing?

HISTORY

Isabella A. was born prematurely on April 6, 2010. Due to her fragility, she was placed in the neonatal intensive care unit. Appellant exhibited an unwillingness to and lack of appreciation for the basic needs of her child and additionally admitted to consuming alcohol during pregnancy, which prompted the attention of the Charles County Department of Social Services ("CCDSS").

CCDSS was no stranger to appellant. Ms. A. had prior interactions with the CCDSS resulting from her neglect of Isabella's sister, Orianna, and Orianna's subsequent Child In Need of Assistance failure to thrive proceedings. Ultimately, Mr. and Ms. B. adopted Orianna following a voluntary termination of parental rights. Subsequent to Orianna's adoption, appellant became pregnant with Isabella. Therefore, CCDSS's prior experience with appellant, its rising concern regarding the stability of appellant's housing, and appellant's incapacity to understand the needs of her newborn child, prompted CCDSS' immediate involvement.

Throughout Isabella's foster placement, Isabella resided with Mr. and Ms. Z. Because of her biological mother's absence, Isabella had, in essence, only known Mr. and Ms. Z. as her family. As a result, Isabella developed strong bonds to Mr. and Ms. Z.

Mr. and Ms. Z. have a lengthy and positive history with the Child Welfare System and Family Court, raising a number of prior foster children. Nevertheless, CCDSS expressed concerns regarding Mr. and Ms. Z.'s long-term ability to care for Isabella [and] the immediate and continuing needs of Isabella as a medically fragile child, diagnosed with atrial septal defect and pulmonary hypertension.

CCDSS reasoned that it was within Isabella's best interest to be better socialized and removed from the fairly isolated life she maintained with the Z.'s. The planned transition to the B.s' household would additionally ensure a viable plan to ensure Isabella's required intensive medical care and treatment. Moreover, the plan would unite Isabella and Orianna, who increasingly had grown attached to one another.

Following the two-day trial of April 25, 2012, and May 8, 2012, the juvenile court concluded that termination of appellant's parental rights would be in Isabella's best interest. The juvenile court awarded guardianship to CCDSS, terminating appellant's parental rights.

DISCUSSION

Appellant argues that the juvenile court abused its discretion by not considering an order of custody and guardianship to the Z. family. Specifically, she asserts that "terminating parental rights was unnecessary because Isabella's current placement situation, with the [Z.]s, was suitable." She contends the juvenile court acted outside the scope of Isabella's best interest, because its alleged failure to make such a consideration resulted in the improper termination of appellant's parental rights. We disagree.

Section 5-323 of the Family Law Article authorizes a juvenile court to terminate the parental relationship if the court finds by clear and convincing evidence that termination is in the child's best interest. Generally, the first step in our review is to scrutinize the factual findings of the juvenile court under the clearly erroneous standard. *In re Yve S.*, 373 Md. at 588.

Although appellant has not challenged the juvenile court's factual findings required pursuant to §5-323(d), it is apparent to us that the juvenile court carefully considered all of the evidence and made detailed, specific, and thorough findings premised on the best interest of the child standard. These findings provided clear and convincing evidence of appellant's parental unfitness.

Nevertheless, appellant contends that the juvenile court abused its discretion when it did not "consider custody and guardianship to the Z.s as an alternative to terminating parental rights." This assertion is without merit.

As a preliminary matter, the juvenile court did consider placement of Isabella with Mr. and Ms. Z. On August 26, 2011, the court considered and subsequently adopted the findings and recommendations of the master of juvenile causes. The juvenile court ordered "that Dr. Lewis provide further evaluation regarding the competing interests in the case," to "includ[e Isabella's] bond with the [Z.s], and the benefits of a placement with her sibling, Orianna, who had been adopted by the [B.s]." The circuit court made further consideration within its May 14, 2012, judgment for guardianship, [scheduling] a hearing in approximately thirty days to address the child's placement.

More importantly, only termination of parental rights and a subsequent permanent placement, such as adoption, can provide Isabella with the permanency she needs and the General Assembly mandated. An evaluation of the record clearly demonstrates that Mr. and Ms. Z. are incapable of providing for Isabella in the event something were to happen to either of them. If the Z.s were incapable of caring for Isabella any longer, the court would have no other alternative than to place her back in the foster care system.

Although appellant suggests that Isabella's placement with Mr. and Ms. Z. was suitable, the best interest standard "does not require simply that a determination be made that one environment or set of circumstances is superior to another. If that were the case, child custody matters would involve relatively simple choices." *In re Yve S.*, 373 Md. at 565. We conclude that the juvenile court properly exercised its discretion and affirm its judgment."

Slip op at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of Mishawn R. and Mykkell R.**

CINA: CLARIFICATION OF PATERNITY: EXCLUSION BY GENETIC TESTING

CSA No. 703, September Term, 2012. Unreported. Opinion by Graeff, J. Filed Dec. 6, 2012. RecordFax #12-1206-01, 20 pages. Appeal from Baltimore City. Affirmed.

The juvenile court properly determined that genetic testing was in the best interests of the children and required at the request of the

See UNREPORTED CASES IN BRIEF page 9

UNREPORTED CASES IN BRIEF *Continued from page 8*

Department, where, although the mother and the man she had listed as the father on the children's birth certificate both claimed he was the father, other factors called that into question; nor did the court err in excluding him as the biological father based on the results of the genetic testing.

"We are asked to review an order by the juvenile court excluding Mickey Lee R., appellant, as the father of appellees, Mishawn R. and Mykkell R. The children are currently four and five years old, and have been in the custody of the Department of Social Services of Baltimore City, appellee, since February 2009. They were declared CINA on December 15, 2009.

The challenged order was issued during the course of proceedings initiated by the Department to terminate parental rights to Mishawn and Mykkell. These TPR proceedings were considered with separate TPR petitions relating to three other children of Annette F. ("Mother"). These three children were removed from the same household and later determined to be half-siblings of Mishawn and Mykkell.

Appellant and Mother are not married, but throughout the CINA proceedings, appellant has claimed to be the father of all five children. Nevertheless, the Department and court-appointed counsel for all five CINA, citing Mother's inconsistent paternity identifications regarding Mishawn and Mykkell, asked the juvenile court to order genetic testing. The court granted that request, and the test results indicated that appellant is not the biological father of either Mishawn or Mykkell. Based on those results, the court granted the Department's motion for an order excluding appellant as their father and precluding appellant from participating as their parent in the TPR proceedings relating to them.

On appeal, appellant raises the following question: Did the trial court err in ordering Mr. R. to submit to a genetic test and did the court further err by excluding him as Mishawn's and Mykkell's father?

DISCUSSION

MOTION TO DISMISS

The Department moves to dismiss this appeal. The Department points out that, although the juvenile court excluded appellant as the father of Mishawn and Mykkell, the results also proved that Mr. R. is the biological father of their three half-siblings. Because the TPR proceedings relate to all five children, the Department maintains that the order excluding appellant as the father of Mishawn and Mykkell "adjudicate[d] the rights and liabilities of fewer than all the parties to the action," so that it "is not a final judgment." Md. Rule 2-602.

We conclude that the exclusion order is appealable under the collateral order doctrine, which permits review of interlocutory orders that "conclusively determine the disputed question; resolve an important issue; [are] completely separate from the merits of the action; and [are] effectively unreviewable on appeal from a final judgment." *Jackson v. State*, 358 Md. 259, 267 (2000). Here, the challenged exclusion order conclusively determined an important issue, appellant's right to participate as a parent in TPR proceedings regarding two CINA. The exclusion order involved an issue separate from that involved on the merits of the TPR proceedings. And it was effectively unreviewable on appeal from the final judgment because appellant could no longer challenge the TPR petitions for Mishawn and Mykkell as a parent.

EXCLUSION ORDER

Appellant contends the court erred in excluding him as the father of Mishawn and Mykkell because, at the time of the initial petition for guardianship, he was a presumptive father of the children pursuant to FL §5-306. Specifically, he asserts that there had been no prior declaration excluding him as the father, and he was presumed to be the father because: (1) Mother indicated that he was the father, *see* FL §5-306(a)(4); (2) he signed an affidavit of paternity, *see* FL §5-306(a)(6); and (3) he was listed on Mykkell's birth certificate as the father, *see* §5-306(a)(3).

Appellant's primary argument is that the court's order for paternity testing was improper. Specifically, he argues that "the genetic test forced upon him," as well as the exclusion order, to which he and Mother objected, leave Mykkell and Mishawn fatherless. He contends that the court failed to consider the children's best interests.

Although the CINA subtitle does not contain express authorization for genetic testing, such testing is authorized in Subtitle 10 of the Family Law Article, which applies to paternity determinations made during CINA proceedings. *See* §3-822(e)(2). As indicated, FL §5-1029 provides that, on the motion of "a party to the proceeding, or on its own motion, the court shall order the mother, child, and alleged father to submit to blood or genetic tests to determine whether the alleged father can be excluded as being the father of the child."

Pursuant to §5-1029, when a party files a motion for genetic testing, a court has no discretion to deny the request. *See Kamp*, 410 Md. at 657; *Langston v. Riffe, 359* Md. 396, 435 (2000).

Even if, as appellant contends, the court was required to consider the best interests of the children before ordering testing, the court did so here. The juvenile court expressly determined that genetic testing was in the best interests of Mishawn and Mykkell, and the record supports that determination. Because Mother was not married at the conception or birth of either child, there was no statutory presumption of legitimacy. *Mulligan*, 426 Md. at 693-98. Mother made conflicting statements to the Department about who fathered each boy. In previous CINA proceedings relating to Mother's other children, paternity testing had excluded several men whom Mother had named as fathers. In light of uncertainty regarding the paternity of Mishawn and Mykkell, the Department requested genetic testing, so that it could determine whether appellant biologically fathered the boys, and if not, to undertake the process of identifying, locating, and notifying their biological father(s) of the CINA and TPR proceedings. Counsel for Mishawn and Mykkell concurred that testing was warranted under these circumstances.

On this record, the juvenile court did not err or abuse its discretion in ordering genetic testing under §5-1029. Nor did the juvenile court err or abuse its discretion in excluding appellant as the father of Mishawn and Mykkell under §5-306(a). This is a CINA case involving a TPR petition in which identifying the biological father(s) of Mishawn and Mykkell was necessary to validly terminate parental rights so that, after nearly three years in out-of-home foster care, the boys could be adopted into a permanent family."

Slip op at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of William T. Jr. and Isaiah T.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: UNTREATED BIPOLAR CONDITION

CSA No. 895, September Term, 2012. Unreported. Opinion by Eyler, James R., J. (retired, specially assigned). Filed Dec. 14, 2012. RecordFax #12-1214-04, 19 pages. Appeal from Baltimore City. Affirmed.

See UNREPORTED CASES IN BRIEF page 10

UNREPORTED CASES IN BRIEF *Continued from page 9*

The finding that appellant was an unfit parent was supported by clear and convincing evidence that she failed to avail herself of mental health and housing services, had a history of abandoning her children and had no relationship with them, and that they had bonded with their present caretakers.

"This appeal follows a June 13, 2012, evidentiary hearing in the juvenile court, resulting in the termination of appellant, Jessica W.'s, parental rights to two of her children, William T., Jr., born April 3, 2008, and Isaiah T., born April 3, 2009. The juvenile court also granted guardianship to the Baltimore City Department of Social Serviceswith the right to consent to adoption or long-term care. The court terminated the father's parental rights to William and Isaiah by virtue of his implied consent after he failed to appear. Father is not a party to this appeal.

We affirm the judgment of the circuit court.

DISCUSSION

Appellant contends the juvenile court abused its discretion when it granted the petition to terminate her parental rights to William and Isaiah because she was never given the chance to be a mother. She maintains that the Department should have given her more assistance to obtain housing and a chance to obtain medication for her bipolar disorder.

The State counters that it was not that appellant was never given the chance to parent her children, but that she made no attempt to do so. The State maintains that it offered appellant numerous opportunities to form a relationship with her children, receive services, and to obtain housing, but appellant did not oblige the Department's efforts.

Counsel for the children contends the juvenile court was correct when it found by clear and convincing evidence that appellant was unfit to parent the children because the evidence demonstrated that appellant had a history of abandoning her children, that she failed to avail herself of mental health and housing services, that she had no relationship with her children, and that her children had bonded with their present caretakers.

Family Law §5-323 governs nonconsensual grants of guardianship of a child. Subsection (b) provides the juvenile court with authority to terminate a parent's parental rights. The principal focus should be the child's best interests. *In re: Cross H.*, 200 Md.App. 142, 152 (2011).

Subsection 5-323(d) lays out the factors a juvenile court must consider when making a best interest determination in termination of parental rights proceedings; *In re: Rashawn H.*, 402 Md. 477, 501 (2007).

Here, the juvenile court made the following findings with respect to each applicable provision in §5-323(d):

With respect to the services provided to appellant before the children's placement, the court found the Department offered her services, but appellant refused to cooperate. The court concluded that appellant's mental health was the root of the problem. She admitted to having bipolar disorder and needing medication. Appellant, however, had not seen a psychiatrist since after William's birth, and would not undergo an evaluation.

Additionally, the Department twice provided appellant with HUD information so that she could locate appropriate housing for herself and the children. At the beginning of the Department's involvement, the Department provided appellant and William with housing at a shelter. It was appellant's alleged acts of aggression and failure to properly care for William that led her to lose housing at the shelter.

With regard to the extent to which the parties have fulfilled their obligations under a social services agreement, there was no agreement. Appellant admittedly refused to sign them.

With regard to appellant's efforts to adjust to her circumstances, the court noted that there was no evidence that appellant did anything with the HUD information or attempted to find appropriate housing locally. Instead, there was testimony that she traveled out-of-state for months at a time, unbeknownst to the Department or her children, supposedly in search of housing.

With regard to regular contact with the children, the court found her "sporadic, at best." Moreover, appellant missed several visits with the children, and requested less frequent visits than permitted. She explained at the hearing that she had transportation issues, but did not make that known to the Department at the time she was missing visits and scheduling infrequent visits.

With regard to her contribution to a reasonable part of the children's care and support, appellant had not contributed other than bringing Easter baskets for them on one occasion. Of concern to the court was appellant's implied lack of "sense of what that responsibility even is."

With regard to a parental disability, the court acknowledged appellant's bipolar disorder, but explained that there was no evidence that the disorder hindered her ability to care for the children. Indeed, there was no way for the Department to ascertain the severity of the condition, as appellant refused a mental health evaluation.

With regard to whether additional services could bring about a lasting parental adjustment, the court reiterated that appellant refused services and would not allow the Department to evaluate her in order to determine what services were appropriate. All the while, the children were in foster care and away from appellant without much contact.

With regard to abuse, neglect, and criminal history, the court found CINA findings of which it took notice, but no evidence of chronic abuse, sexual abuse, torture and no evidence of criminal history. The court noted the evidence of domestic violence that triggered the Department's involvement with the family initially, but determined that that was no longer an issue for the family.

With regard to the children's emotional ties with appellant, there was evidence that appellant did not engage the children when visiting and did not know how to interact with the children. On the contrary, the children call their current caretakers "Mommy" and "Daddy," are doing well at their current day-care, and respect their caretakers as parents. They have adjusted well and bonded with their current caretakers. The court found that it would be detrimental to the best interests of the children to uproot them from their foster home. Isaiah has never lived with appellant, and William has not lived with her since early 2009, when he was only ten months old. They have both been with their current caretakers for two years.

After considering the statutory factors, the juvenile court specifically found that appellant is unfit to parent the children. She does not have a plan to financially care for them and demonstrated during her sporadic visits that she does not know how to interact with them.

The juvenile court considered the statutory factors and made the requisite findings based on clear and convincing evidence. We hold, therefore, that the court did not abuse its discretion when it ultimately decided to terminate appellant's parental rights to William and Isaiah and to grant the Department the ability to consent to adoption or long-term care of the children."

Slip op at various pages, citations and footnotes omitted.

See UNREPORTED CASES IN BRIEF page 11

UNREPORTED CASES IN BRIEF *Continued from page 10*

*In re: Alijah Q.**

CINA: UNSUPERVISED VISITATION: LIKELIHOOD OF FUTURE ABUSE OR NEGLECT

CSA No. 428, September Term, 2012. Unreported. Opinion by Berger, J. Filed Dec. 11, 2012. RecordFax #12-1211-05, 14 pages. Appeal from Prince George's County. Vacated and remanded.

Where there was ample evidence that the child's mother had neglected and abandoned him in the past, the juvenile court erred in ordering unsupervised visitation without first finding that there was no likelihood of further abuse or neglect.

"Alijah Q. was found to be a Child In Need of Assistance on March 5, 2009. The juvenile court issued two orders, the second of which forms the basis of this appeal. The first order overruled Lisa Q.'s exceptions and granted custody of Alijah to his father, Antoine A. The first order further rescinded an order of protective supervision and terminated the court's jurisdiction. The second order required supervised visits between mother and Alijah through January 6, 2013. The second order further provided for unsupervised visits between mother and Alijah beginning on January 12, 2013, and continuing thereafter. This appeal from the Department of Social Services followed.

The Department presents one question, which we have rephrased: Did the juvenile court err when it approved unsupervised visitation by Ms. Q. beginning January 12, 2013 without making the required finding under §9-101 of the Family Law Article that there is no likelihood of future abuse or neglect of Alijah by Ms. Q.?

We vacate the decision of the juvenile court, and remand for further proceedings.

DISCUSSION

The Department alleges that the juvenile court erred when it permitted Alijah to visit with Ms. Q. on an unsupervised basis beginning on January 12, 2013. Specifically, the Department argues that, in cases where the juvenile court has reasonable grounds to believe a child has been abused or neglected, section 9-101 of the Family Law Article requires the juvenile court to make a specific finding that there is no likelihood of further abuse or neglect by a party seeking visitation rights.

The child echoes the Department's argument, contending that "when there is a proven history of abuse or neglect," "the 'proper issue before the hearing judge [is] whether there was sufficient evidence that further abuse or neglect [is] unlikely." *In re Adoption/Guardianship of Cadence B.*, 417 Md. 146, 157 (2010) (citation omitted).

In examining the decision of a juvenile court, there was ample evidence to indicate that Alijah had been abused or neglected. Protective Services of Washington, D.C. indicated that mother had neglected Alijah at the time they lived in that jurisdiction. Alijah was born with drugs in his system. Mother continued to abuse illicit drugs, including, but not limited to crack cocaine and heroin. This addiction prompted her to abandon Alijah for weeks at a time, often without notifying father or Alijah's babysitter. Although mother completed a drug rehabilitation program, it took her two years. Critically, the rehabilitation program was not a long-term substance abuse treatment program as ordered by the juvenile court on March 5, 2009.

It is noteworthy that mother still has yet to complete a domestic violence treatment program more than three-and-a-half years after being ordered to do so. Mother has also repeatedly become angry and physically aggressive in Alijah's presence, even going as far as throwing a knife at father while he held Alijah. Mother was evasive when questioned regarding her mental health. Taken together, these factors demonstrate that there was evidence of abuse or neglect of Alijah before the juvenile court.

The above-mentioned incidents certainly come within the ambit of FL §4-501(b)'s definition of abuse. According to FL §9-101, the juvenile court was required to make a finding on the record that there was no likelihood of further child abuse or neglect by mother if she were to visit with Alijah on an unsupervised basis. In the absence of such a finding, the juvenile court erred as a matter of law when it granted mother unsupervised visitation with Alijah. Accordingly, this Court vacates the circuit court's order dated March 3, 2012. The case is further remanded for the purpose of determining whether there is a likelihood of further child abuse or neglect by mother if she were permitted unsupervised visitation with Alijah."

Slip op at various pages, citations and footnotes omitted.

*In re: Andrew A., David A. and Jacob M.**

CINA: CHANGE IN PERMANENCY PLAN: 'SUITABILITY TO PARENT' TEST

CSA No. 295, September Term, 2012. Unreported. Opinion by Woodward, J. Filed November 19, 2012. RecordFax No. 12-1119-03, 20 pages. Appeal from Montgomery County. Affirmed.

At a permanency plan review hearing, expert's testimony about the mother's score on a "suitability to parent" protocol he had developed was admissible because it was not the product of novel scientific methodology or theory; rather, it represented an assessment of commonly used factors as well as the use of a scale to effectively express the disparate sources used to formulate his opinion.

"After a two-day permanency plan review hearing, the juvenile court changed the permanency plan in this case from reunification with the mother to adoption by a non-relative. The children, Andrew A., David A., and Jacob M., were found to be children in need of assistance in February 2009. The children's mother, Sarah A., presents two questions for our review, which we have rephrased:

1. Did the juvenile court err when it admitted the testimony of Dr. Munson?

2. Did the juvenile court err or abuse its discretion in changing the permanency plan from reunification with Ms. A. to adoption by a non-relative?

We answer each question in the negative and affirm the judgment.

DISCUSSION

I.

Ms. A.'s first contention is that the juvenile court erred in permitting Dr. Munson to testify regarding his "suitability to parent test" or protocol, when that test was not generally accepted in the fields of social work and psychology. Ms. A. argues that, under the *Frye- Reed* test, Dr. Munson's scientific methodology is, by his own admission, not accepted by the American Psychological Association (APA) and consequently, should not have been accepted into evidence. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *Reed v. State*, 283 Md. 374, 389 (1978) (adopting the standard set out in *Frye* into Maryland law). The Department counters that Dr. Munson's report was not the product of novel scientific methodology or theory. Rather, it utilized a myriad of standardized tests, a clinical interview and evaluation, input from social workers, court doc-

See UNREPORTED CASES IN BRIEF page 12

uments, and prior psychiatric evaluations, none of which was novel to the field.

Examination of the admission of evidence under *Frye-Reed* is subject to *de novo* review. *Clemons v. State,* 392 Md. 339, 359 (2006).

Ms. A. would have us vacate the juvenile court's decision, because the protocol employed by Dr. Munson was not approved by the APA. Dr. Munson acknowledged that the APA did not approve his protocol. Dr. Munson, however, based his opinion on a battery of standardized tests, a clinical interview, review of other medical records and opinions, court documents, and interviews with social workers. Among other things, Dr. Munson considered Ms. A.' s impaired intellectual functioning, her mental health history and non-compliance with treatment, her history of anger issues and past history of parenting, her own family history, and her lack of emotional or financial support. None of these bases for analysis are novel to the field of child welfare.

The only potentially novel portion of Dr. Munson's analysis is the point values that he assigned to the 16 factors upon which he analyzed Ms. A.'s suitability to parent the children. In denying Ms. A.'s motion to strike Dr. Munson's testimony, the juvenile court correctly analyzed this issue.

Dr. Munson was accepted by the juvenile court as an expert in the areas of clinical social work and clinical child welfare. His expertise on these subjects was appropriate to the proceeding, and there was a sufficient factual basis upon which he based his opinion. Md. Rule 5-702. Ms. A.'s *Frye-Reed* challenge fails because Dr. Munson's opinion was not based on novel scientific principles not generally accepted by mental health experts. Rather, Dr. Munson's testimony involved an assessment of factors recognized as relevant to measuring the suitability of Ms. A. to parent the children, as well as the use of a scale to effectively express the disparate sources used to formulate his opinion. Therefore, the juvenile court did not err in refusing to strike Dr. Munson's testimony.

Even if the juvenile court erred by failing to strike the testimony of Dr. Munson, such error was not prejudicial to Ms. A. The gravamen of Ms. A.'s challenge to Dr. Munson's testimony was his use of a protocol whereby the 16 factors analyzed by him were weighed and scored, with a composite score of below 50 percent indicating a lack of suitability to parent children. The juvenile court, however, stated in its ruling that it did not consider the "numbers and values" that Dr. Munson assigned to the various factors; instead, the court focused on the factors themselves and how they related to Ms. A.'s suitability to parent the children.

Because, as the juvenile court noted, many of the factors considered by Dr. Munson are typically contained in an evaluation of an individual's parenting ability, the failure of the court to strike Dr. Munson's testimony was not prejudicial, and thus not reversible error.

II.

Ms. A.'s second contention is that the juvenile court erred or abused its discretion when it changed the permanency plan from reunification with Ms. A. to adoption by nonrelative. Specifically, Ms. A. argues that the change was not in the children's best interests and would result in the children becoming legal orphans, having no legal mother and unlikely to be adopted.

The juvenile court conducted a thorough analysis of the six factors specified in Fam. Law Art. §5-525(f)(1). The court found: (1) The children would not be safe and healthy in the house of Ms. A., because her cognitive and psychological deficiencies rendered her unable or inconsistent in meeting the special needs of the children; moreover, Ms. A. did not put the children's needs above her own, which is critical where children have emotional and behavioral challenges. (2) There is little attachment of the children for Ms. A; Andrew was disconnected with Ms. A. during their visits, and Jacob and David went to the social worker and supervisor for more interaction than with Ms. A. (3) Jacob and David are very much attached to Ms. W., their current caregiver; Andrew has no attachment to a current caregiver, because he is in a treatment facility. (4) Andrew was with Ms. A. for only four to five weeks before going to the treatment facility; David has been with Ms. W. since August of 2011; and Jacob has been with Ms. W. since August of 2009. (5) The current placement is very good for Jacob and David, because of the stability it provides and their bond with Ms. W.; Andrew is also doing well at the treatment facility. (6) The need for permanency is high so that the children can focus and work on their emotional and behavioral issues.

The juvenile court also recognized that there was some uncertainty as to whether Ms. W. would or would not adopt Jacob and David. Such uncertainty, according to the court, was not equal to "the uncertainty of returning to an unstructured home where the parent cannot meet the needs of these children."

In sum, the juvenile court carefully, thoughtfully, and thoroughly analyzed the evidence presented in the case *sub judice* in accordance with the statutory provisions governing the determination of an appropriate permanency plan. Based on that analysis, the court decided that the best interests of Andrew, Jacob, and David would be served by changing the permanency plan from reunification with Ms. A. to adoption by a non-relative.

We cannot conclude that the juvenile court erred or abused its discretion."

Slip op at various pages, citations and footnotes omitted.

*In re: Charlise C.**

CINA: DENIAL OF MOTION TO DISMISS EXCEPTIONS: NONAPPEALABLE INTERLOCUTORY ORDER.

CSA No. 425, September Term, 2012. Unreported. Opinion by Graeff, J. Filed Dec. 4, 2012. RecordFax #12-1204-02, 8 pages. Appeal from Anne Arundel County. Appeal dismissed.

The lower court's order denying a CINA's motion to dismiss exceptions to the master's findings and recommendations, and setting the case for a de novo contested adjudication hearing, was not an appealable interlocutory order.

"In this CINA case, Charlise C., the child, appeals from an order of the Circuit Court for Baltimore City. The court denied Charlise's motion to dismiss her mother's exceptions to the master's recommendation to place her in the custody of her father, and scheduled a de novo contested adjudication hearing. Appellees, the Baltimore City Department of Social Services and Garnette H. ("Ms. H."), Charlise's mother, assert that Charlise's appeal should be dismissed because it is taken from a non-appealable interlocutory order.

We agree and shall dismiss the appeal.

DISCUSSION

Charlise contends that the court erred in denying the motion to dismiss Ms. H's exception on two grounds. First, she argues that, because Ms. H. failed to appear at the hearing and her counsel did not object to the agreement reached by the other parties, Ms. H. did not preserve her right to take an exception. Second, Charlise contends that Ms. H.'s notice of exception should have been dismissed because it did not meet the

See UNREPORTED CASES IN BRIEF page 13

UNREPORTED CASES IN BRIEF *Continued from page 12*

specificity requirement of Md. Rule 11-111.

BCDSS and Ms. H. contend that we need not reach the merits of Charlise's arguments. Instead, they argue, this appeal should be dismissed because it arises from a non-appealable interlocutory order. We agree.

As a general rule, appeals may be taken only from final judgments. CJP §12-301.

The April 12 order from which Charlise appeals is an interlocutory order denying a motion to dismiss Ms. H.'s exceptions and scheduling the case for an adjudicatory hearing. The order was not a final judgment because it did not conclude the rights of the parties or prevent the parties from prosecuting or defending their rights in the CINA case. Indeed, by its terms, the order was interim and contemplated that a further order was to be issued and that something more was to be done. *See In re Ryan W.,* slip op. at 33 (quoting *Rohrbeck,* 318 Md. at 41-42).

Charlise acknowledges in her reply brief that this matter is not appealable under the collateral order doctrine.

Charlise argues, however, that her interim appeal it falls within the exception set forth in CJP §12-303(3)(x), which provides that a party may appeal from an interlocutory order that "[d]epriv[es] a parent. . . of the care and custody of his child, or chang[es] the terms of such an order." To be appealable within this statutory exception, an order must adversely affect the parent's rights. *In re Joseph N.,* 407 Md. 278, 288 (2009). *Accord In re Karl H. and AnthonyH.,* 394 Md. 402, 429 (2006). *See also In re Samone H.,* 385 Md. at 298.

Here, there was no such order. The order appealed from, the order denying the motion to dismiss Ms. H's exceptions, did not adversely affect Ms. H's rights, or Mr. C's rights.

The master's March 27, 2012 recommendation that the court find that Charlise was not a CINA and award sole legal and physical custody of Charlise to Mr. C. was not a court order. *See* Md. Rule 11-111 (a)(2) ("The findings, conclusions and recommendations of a master do not constitute orders or final action of the court."). Thus, Ms. H. noted an exception to the recommendations, which required the court to hold a hearing. Rule 11-111(c). The April 12, 2012 order, remanding for an adjudicative hearing did not constitute an order that deprived either parent of their right to care or custody of Charlise.

Charlise contends, however, that on April 4, 2012, a circuit court judge signed the master's proposed findings and recommendations, and this order was subsequently nullified by the court order on April 12. This simply is not the case. Initially, any such court order was not valid because Ms. H. filed a timely exception, which the court had not yet reviewed; thus, the court could not enter an order based the master's recommendation. *See* Md. Rule 2-541; Md. Rule 11-111(e). Even if the court did sign an order on April 4, 2012, it was improper because there had been no hearing on the exceptions.

Moreover, this order is somewhat of a mystery. Neither the parties nor the court conducting the exceptions hearing on April 12 mentioned any prior order and they appeared to be unaware of such an order. In any event, the record does not reflect the entry of an such an order. *See Rohrbeck v. Rohrbeck,* 318 Md. 28, 41 (1989) (court order must be entered in the record to be a final judgment). Because there was no final custody order in effect on April 12, the order dismissing the exceptions did not change a prior order, and an appeal is not authorized by CJP §12-303(3)(x).

Charlise's appeal arises from a non-reviewable interlocutory order. Accordingly, we will dismiss the appeal. *See, Johnson v. Johnson,* 423 Md. 602, 605 (2011) (where appellate jurisdiction is lacking, the appellate court will dismiss the appeal)."

Slip op at various pages, citations and footnotes omitted.

*David Jaray v. Roxana Jaray**

CUSTODY AND VISTATION: CONTEMPT: REFUSAL TO CALL CHILD TO TESTIFY

CSA No. 1123, September Term, 2011. Unreported. Opinion by Kenney, J. retired, spec. assigned. Filed Dec. 6, 2012. RecordFax #12-1206-00, 16 pages. Appeal from Montgomery County. Affirmed.

The lower court's conclusion that a 10-year-old child's testimony would not be material in a contempt proceeding was not beyond the letter or reason of law, as the girl's reasons for wanting to spend Saturdays with her father had little to no bearing on the father's admitted obligations under the custody, visitation and support agreement to facilitate the transfer of the child on Saturdays.

"This appeal arises out of a June 2011 order finding David Jaray, appellant, in constructive civil contempt of court for intentionally violating a custody order. Father presents one question which we have revised into the following three questions:

• Did the circuit court err or abuse its discretion in failing to conduct an inquiry into Daniella Jaray's competency to testify?

• Did the circuit court err or abuse its discretion in refusing to permit, based on its predetermined position, Daniella Jaray to testify?

• Did the circuit court err or abuse its discretion in finding the Father in contempt of court based on his failure to facilitate the Saturday custody exchanges of the Jaray children?

BACKGROUND

Father and Roxana Jaray, appellee ("Mother"), now divorced, are the parents of two minor children, Danlella, age ten, and Naomi, age eight. Father is Jewish and Mother is Catholic. At a hearing in circuit court on December 20, 2010, the parties came to an agreement regarding custody of the children, visitation, and child support ("the Agreement"), which was incorporated into a March 2011 custody order.

On April 12, 2011, Mother filed a Motion for Enforcement of Agreement, for Contempt and for Other Relief. She contended that Father had violated the Agreement in several ways, including repeatedly "obstruct[ing]" her Saturday 10 a.m. pickup of the children, "demanding that [she] stay away until after sundown." Father filed an answer and a Complaint for Modification of Custody.

A hearing was held on June 24, 2011. Mother testified that of the thirteen Saturdays since the December 2010 hearing, only once was she able to pick up the children at 10a.m. According to the Mother, the Father said "he's celebrating Shabbat and he doesn't want the children to drive on Shabbat."

The Father testified the children practice Judaism and that he had never "resisted them from going" or "stopped her from taking the children," but that he was not going to "push them out of the house" or physically place them in the Mother's car against their wishes, because he "respects what [they] want to do" and "it's their Sabbath."

The Father brought the children to the courthouse for the hearing. [Father's counsel proffered that] Daniella would say that her father doesn't obstruct her going in any way; that she chooses herself to observe the Sabbath and has repeatedly told her mother that she will be over as soon as sundown occurs.

See UNREPORTED CASES IN BRIEF *page 14*

UNREPORTED CASES IN BRIEF *Continued from page 13*

The court responded that it did not believe that the children's testimony could be given "a lot of weight because they're little," "not that reliable," and "impressionable."

On June 27, 2011, the court entered a Contempt Order.

DISCUSSION

Father, submitting that the circuit court abused its discretion by refusing to permit Daniella to testify and "utterly fail[ing] to conduct any inquiry into [her] competency to testify," argues that the "ultimate decision finding the Father in contempt must therefore be reversed." He also contends that the court "incorrectly applied [its] predetermined position that [it] would not hear from the children in a contempt proceeding," and allowed the proffer *after* it had already made that decision.

Father analogizes this case to *Brandau v. Webster,* 39 Md.App. 99 (1978) and *Gunning v. State,* 347 Md. 332 (1997).

Here, unlike Erika in *Brandau,* Daniella's competency to testify was *not* raised before the circuit court, and, based on the record as a whole, we *are* not persuaded that the refusal to hear Daniella's testimony was based on competency. Rather, the court, after hearing the proffer of Daniella's testimony and commenting on the reliability and weight to be given such testimony when children are asked to testify in a dispute between parents, stated that "[t]hey're impressionable." In our view, the court's refusal to permit Daniella to testify was based on several factors, including: (1) that she and her sister had "been sitting out with counsel for the [Father]," which the court observed was "not fair," (2) that her testimony would not be of "any useful help" on the issue of the Father's responsibilities under the Agreement, and (3) that her testimony would be "possibly damaging" to her. The court's comments, in light of the issues before it, go more to weight, materiality and relevance than to competency.

Nor do we view *Gunning* to be persuasive. There, the court had a "predetermined" and "uniform policy" of not giving identification instructions, regardless of the circumstances. Here, when the court's statements are read in context, we do not perceive any predetermined policy of refusing to hear the testimony of children of tender years generally or in contempt cases in particular.

Nor are we persuaded that the court erred or abused its discretion in not permitting Daniella to testify.

The court found that Daniella's testimony would not be of "any useful help" in the contempt hearing, which we interpret to be commentary on the materiality of her testimony. That conclusion was not, in our view, "beyond the letter or reason of the law" because Daniella's testimony that she chose to practice Judaism and not go with the Mother on Shabbat had little to no bearing on the Father's admitted obligation under the Agreement to prepare the children for the Saturday morning exchanges. He had agreed to the day and even to the time of the exchange. Clearly, he had an obligation to facilitate the exchange or, at the very least, to work toward an acceptable alternative with the parent coordinator.

Moreover, the court expressed concern for Daniella's well-being. This Court has recognized that "a child, particularly of young and tender years, could be subjected to severe psychological trauma because of a custody case," *Marshall v. Stefanides,* 17 Md.App. 364, 369(1973), and we see no reason why that would not be true in a contempt case arising from a custody or visitation dispute. There is, generally speaking, a "widespread general policy favoring protection of children from entanglement in these types of cases." 4 Child Custody and Visitation Law and Practice §20-99 (Bender 2010). We see neither error nor abuse of discretion in the court's decision to not permit Daniella to testify."

Slip op at various pages, citations and footnotes omitted.

*Andrew J. Marks v. Chandra Wright Marks**

DIVORCE: ALIMONY: UNCONSCIONABLE DISPARITY

CSA No. 410, September Term, 2012. Unreported. Opinion by Kehoe, J. Filed Dec. 6, 2012. RecordFax #12-1206-02, 32 pages. Appeal from Montgomery County. Affirmed.

An award of indefinite alimony to appellee was not clearly erroneous where, although her income was 54 percent of her ex-husband's actual income, the trial court also found that he had voluntarily impoverished himself; adjusted for appellant's potential income, appellee's annual income was just 28 percent of appellant's, and he also benefited from an unequal distribution of assets.

"Andrew J. Marks appeals a judgment of the Honorable Gary E. Bair, granting an absolute divorce to Marks and Chandra Wright Marks ("Wright"). Marks presents issues which we have re-worded and re-ordered:

1. Did the trial court have subject matter jurisdiction over the parties' divorce proceeding?

2. Was the judgment of divorce deficient because it did not specify the grounds for divorce and there was insufficient corroborating evidence?

3. Did the court err in concluding Marks voluntarily impoverished himself?

4. Did the court err by awarding indefinite alimony in the amount of $3,500 per month to Wright?

5. Did the court err in granting a $50,000 monetary award to Wright?

6. Did the court err by awarding $44,411.78 in attorney's fees to Wright?

We conclude that the trial court had subject matter jurisdiction and that the court's judgment of divorce, when read in conjunction with the memorandum opinion which accompanied it, is clear as to the grounds. There was sufficient corroborating evidence to support the judgment of divorce. We perceive neither error nor abuse of discretion in Judge Bair's resolution of the remaining issues.

Background

We will adopt portions of the court's opinion as our own and we begin with Judge Bair's description of the background to the divorce proceeding.

Wright and Marks were married in California on September 12, 1999. Each party had been married once before.

In July 2006, they began living in the marital home known as Ex-Hacienda La Petaca ("Hacienda"), a historic home and recently renovated hotel on over 50 acres of land in San Miguel de Allende, Mexico. The parties are also co-owners of a second entity, Markswright, LLC ("Markswright"), formed in 2000.

The parties originally intended the Hacienda to be a retreat for members of the Hare Krishna movement but the concept proved to be economically unsustainable. In 2008, Wright and [their minor child] left the Hacienda and moved to California. In the words of the trial court the estrangement was primarily caused by Marks's drug use and lack of desire to remain in a monogamous relationship.

In June 2010, Wright and the minor child moved to Gaithersburg,

See UNREPORTED CASES IN BRIEF page 15

UNREPORTED CASES IN BRIEF *Continued from page 14*

where they currently reside. Marks continues to reside in the Hacienda with his girlfriend and his adult son, Keli. The Hacienda remains on the market.

Analysis

Grounds for the Divorce

Marks presents a two-fold argument contending the court erred in granting the parties a divorce because: (A) the court did not state the grounds on which the absolute divorce could be granted and (B) in the event that there were sufficient grounds stated, that there was no corroborating testimony.

When the judgment of divorce and the memorandum opinion are read together (as they are clearly meant to be), both the factual basis and the legal grounds of the trial court's decision are clear.

What must be corroborated is legal basis for the divorce, namely, that "the parties lived separate and apart without cohabitation for 12 months without interruption," before the filing of Marks' counterclaim. FL §7-1 03(a)(4). Wright testified that the parties had lived separate and apart since her departure from Mexico. This was corroborated by her sister. To be sure, the circumstances surrounding Wright's decision to move out of the martial home were relevant to her requests for a monetary award, alimony and an award of attorney's fees, but they were irrelevant as to the ground upon which the divorce was granted.

Voluntary Impoverishment

Taken in the light most favorable to Wright as the prevailing party, the evidence before the court was:

Marks holds a bachelor's of arts in liberal education, an advanced degree in psychology, and has been trained in counseling, but made his career working in real estate, including residential, commercial, and renovation projects in Virginia, Maryland, and the District of Columbia. At the time of the trial, he was 59 years old and appeared to be in good health, despite testimony indicating he suffered from a number of genetically predisposed conditions. During the marriage, Marks and Wright had combined salaries of approximately $120,000 from their property management business, in addition to the considerable income derived from his non-marital assets. While the divorce proceeding was pending, Marks elected to sell a portion of his shares in the Brandywine apartment building for $715,000, which reduced his annual income from that asset from approximately $105,873 to $67,316. After Markswright ceased operations in 2011, Marks supported himself with the $5,609.66 monthly passive income earned from his non-marital real estate assets and trust fund income, while living rent-free at the Hacienda in Mexico.

While Marks asserted that his efforts at marketing and maintaining the Hacienda left him no time to seek gainful employment, the trial court found his testimony on this point to be disingenuous. No evidence was introduced to establish Marks' efforts to obtain further employment because he had undertaken no such efforts. Evidence was presented as to Marks's experience and years of employment investing and managing real estate and of his relative successes in the field.

The finding of voluntarily impoverishment was not clearly erroneous.

III. The Alimony Award

The trial court awarded Wright $3,500 per month in indefinite alimony. Marks argues that the trial court abused its discretion in awarding Wright any alimony as well as ordering the alimony to be indefinite. Mark's arguments are not persuasive.

FL §11-106 sets out the considerations which guide a court's decision whether to award alimony. Marks focuses his challenges to two of the criteria: 1) Marks's "ability to meet [his own] needs while meeting the needs of the party seeking alimony" and 2) whether the standards of living of the parties will be unconscionably disparate, even after Wright makes as much progress towards self- sufficiency as can reasonably be expected.

As to the first issue, Marks asserts that the Hacienda yields no profits and he receives $5,609.66 per month in passive income, a sum out of which Marks must pay child support and meet his own monthly expenses. We have already affirmed the trial court's conclusions that Marks voluntarily impoverished himself and that he has a reasonable earned income potential of $60,000. Moreover, Marks continues to reside at the Hacienda, where he is able to generate additional income by renting rooms and casitas on the property to guests. In light of these facts, we see no error in the court's conclusion that Marks has the ability to pay alimony while meeting his own needs.

Marks argues that the trial court erred in awarding indefinite alimony because 1) the relative percentages of the parties' incomes are not indicative of an unconscionable disparity; 2) Wright has significant earning potential; and 3) no disparity will exist once the Hacienda is sold. We consider these arguments in turn.

A. Relative Incomes

Marks contends that "Plaintiff is earning $3,000 monthly while Marks receives $5,609.66 per month. Wright's income is 54% of Marks' income." Marks then points to cases in which courts have used relative income comparisons as a factor to determine whether an unconscionable disparity exists between spouses' following indefinite alimony awards. See, e.g. Solomon v. Solomon, 383 Md. 176, 198 (2004).

First, relative income comparisons are a factor, not the factor in determining disparate lifestyles. Second, at the time of the trial, Marks annual earnings from investment and trust income was approximately $67,000. Attributing the additional $60,000 in potential earned income, his income for comparison purposes is $127,000 per year. Wright's annual income of $36,000 is 28% of Marks's when his is adjusted for his potential income. This ratio falls well within the range identified in Solomon.

B. Wright's Unrealized Earning Potential

Second, we are not persuaded that the court erred in awarding permanent alimony because Wright's start-up real estate management company may, at some point, become successful.

The trial court directly addressed these contentions:

Wright has a Bachelor's Degree in Behavior and Social Sciences and a Masters in Counseling. Immediately after receiving her Masters in 1997, Wright worked in the counseling field for approximately one year. Wright has not held a job in counseling since that time. At present, Wright is employed in real estate management and has her real estate license in Maryland, Virginia, and Washington. Given that Wright works a 60 hour week and is raising the parties' child, it is not reasonable to expect Wright to be able to devote more time toward becoming self-supporting.

We see no error by the court in its determination of the facts as they stood at the time of trial, as opposed to the more optimistic — but very vague — scenario presented by Marks.

C. Parties' Standard of Living After Sale of the Hacienda

Finally, we turn to Marks's argument that the court abused its discretion by awarding permanent alimony because it also ordered the sale of the marital property. Marks's argument is based on one phrase in the trial court's opinion. When read in context it is clear that the trial court's ref-

See UNREPORTED CASES IN BRIEF page 16

UNREPORTED CASES IN BRIEF *Continued from page 15*

erence to "the unequal distribution of assets between the parties," was not only to the Hacienda, whose proceeds are to be divided equally upon sale, but also to the other, non-marital assets owned by Marks that supported the parties lifestyle during their marriage.

In addition, as the trial court noted elsewhere in its opinion, Marks had complete control over the marketing and sale of the Hacienda and had imposed a fictitious $500,000 lien on the property to the benefit of [his adult son] Keli in order to reduce Wright's share of the proceeds upon sale. Moreover, while Marks has investments valued at $2.6 million, Wright's savings and IRA account had been exhausted by the time of trial. Given these factors, we cannot say that the trial court abused its discretion in awarding indefinite alimony.

In closing, our review of the record leads us to conclude that, while much of the evidence presented in this case was conflicting, the trial court's factual determinations were not clearly erroneous. The court correctly applied the law to the facts as it found them and it did not abuse its discretion it making its ultimate decisions as to alimony, the monetary award and the award of attorney's fees."

Slip op at various pages, citations and footnotes omitted.

*Fran Rae Moskowitz v. Marc S. Moskowitz**

CHILD SUPPORT: MODIFICATION: EMANCIPATION OF CHILD

CSA No. 1935, Sept. Term 2011. Unreported. Opinion by Watts, J. Filed Dec. 18, 2012. RecordFax #12-1218-00, 16 pages. Appeal from Montgomery County. Affirmed.

When child support has been ordered for more than one child, the emancipation of one of those children necessarily constitutes a material change in circumstances whether or not a remaining minor child has special needs.

"Fran Rae Moskowitz appeals an order of an in banc panel in the Circuit Court. Appellant contends that the in banc panel erroneously concluded that the trial court "erred as a matter of law in dismissing [appellee's] Motion for Modification of Child Support . . . when one of two minor children subject to the existing support order became emancipated[.]"

Appellant argues that no Maryland case law exists supporting the conclusion that where a child support order affects multiple minors, the emancipation of one minor constitutes a material change in circumstances. Appellant asserts that, because Ayla, the parties' remaining minor child, has special needs "which require significant financial resources[,]" Shira's emancipation did not impact the factors upon which the 2009 child support order was based.

Appellee argues that nothing in the law prohibits a court from finding a material change in circumstance based upon the emancipation of one child. Although appellee concedes that "a parent's child support obligation is not to be automatically reduced on a pro rata basis" when one child reaches the age of majority, he asserts that "a child's emancipation not only constitutes a material change in circumstances, but requires that a court modify a parent's child support obligation [because] a court cannot compel a parent to support a child after he reaches majority."

Demonstrating a material change in circumstance is the threshold requirement for any modification of a final order of child support. *Walsh v. Walsh,* 333 Md. 492, 497 (1994). In *Kierein v. Kierein,* 115 Md.App. 448, 456 (1997), this Court held that F.L. §12-104(a) "provides that a trial court may modify child support only upon a 'material' change in circumstances, needs, and pecuniary condition of the parties from the time the court last had an opportunity to consider the issue."

To support a modification of a final order for child support, "the 'change of circumstance' must be relevant to the level of support a child is actually receiving or entitled to receive." *Wills v. Jones,* 340 Md. 480, 488 (1995) (citing *Walsh,* 333 Md. at 503).

In this case, we are concerned only with the *in banc* panel's ruling that the trial court erred as a matter of law in finding that Shira's emancipation does not, by itself, constitute a material change in circumstance. As this is a purely legal question, we give no deference to the trial court's reasoning, and review the issue *de novo*. It is undisputed that, on May 14, 2010, Shira Moskowitz reached the age of majority. We conclude, based on applicable case law, that Shira's emancipation was a material change in circumstance sufficient to trigger a review of the child support order upon appellee's motion.

A child is no longer legally entitled to the support of a parent upon reaching the age of majority. See *Kirby v. Kirby,* 129 Md.App. 212, 215 (1999); *Quarles v. Quarles,* 62 Md.App. 394,403 (1985). As a result, emancipation of the child is a change in circumstance affecting the level of support to which the child is entitled. The reduction in the amount of support — from the ordered amount to zero — is "of sufficient magnitude to justify judicial modification of the support order." *Wills,* 340 Md. at 489. Thus, the emancipation of the child constitutes a material change in circumstance.

Although the support order in this case was not determined under the Guidelines, we find them instructive. At each income level specified in the Guidelines, the basic child support obligation differs based on the number of children to be supported. We view this statutory scheme to be a clear indication of legislative intent. Accordingly, we conclude that the emancipation of a single child subject to a multi-child support order is a change in circumstance affecting the level of support to which the child is entitled of sufficient magnitude to constitute a material change.

Appellant incorrectly contends that Ayla's special needs preclude Shira's emancipation from constituting a material change in circumstance. Ayla's needs and Shira's entitlement to support are two distinct matters. Were we to accept appellant's contention we would be required to conclude that, prior to Shira's eighteenth birthday, none of the support paid by appellee was used for Shira's care. In the December 2009, support order, however, the trial court specifically stated that the award was "based on the needs of the parties' remaining minor children" — i.e., Ayla and Shira. *Moskowitz I,* slip op. at 3. As part of the award was for Shira's support, her emancipation necessarily constitutes a material change in circumstance.

We remand this case for recalculation of appellee's child support obligation as to the parties' sole remaining minor child, Ayla."

Slip op at various pages, citations and footnotes omitted.

*William Thomas Ross v. Marianne Phelan Ross**

CHILD SUPPORT: SHARED MEDICAL EXPENSES: CONTEMPT

CSA No. 2200, September Term, 2011. Unreported. Opinion by Berger, J. Filed Dec. 18, 2012. RecordFax #12-1218-03, 17 pages. Appeal from Howard County. Affirmed.

Although appellee's petition for contempt did not specifically delineate the amount of appellant's past-due obligations for the children's

See UNREPORTED CASES IN BRIEF page 17

UNREPORTED CASES IN BRIEF *Continued from page 16*

shared medical expenses, that was of no consequence because the master, after a hearing at which both sides could present evidence, was able to determine what expenses were properly allocated to appellant.

"Appellant William T. Ross filed a motion for modification of child support. Appellee Marianne P. Ross filed a petition for contempt, asserting that appellant failed to reimburse her, in part, for medical, dental, and vision expenses incurred on behalf of their children. The circuit court issued an order for contempt against the appellant.

Issues for review:

1. Did the circuit court abuse its discretion in granting appellee's petition for contempt?

2. Did the circuit court abuse its discretion in awarding appellee attorney's fees?

DISCUSSION

I. A.

Appellant claims appellee's petition was deficient partly because it did not specify an amount she was owed for the children's medical expenses. We agree that appellee omitted a specific amount in her petition, but we disagree over its significance.

The Master was able to conclude that appellant was clearly obligated to equally share with appellee the children's uninsured medical expenses. Further, the bills, receipts, and documentation submitted to the Master were sufficient for her to discern a specific amount owed.

Appellant fails to provide any authority suggesting that a petition for constructive civil contempt must contain a precise dollar amount. Appellant presents no authority that suggests a circuit court abuses its discretion in granting a petition for constructive civil contempt that does not specify a dollar amount. Appellant relies upon *Kemp v. Kemp,* 287 Md. 165 (1980) and *Boucher v. Shomber,* 65 Md.App. 470 (1985), in support of the proposition that a petition for contempt must set forth an assertion of the specific amount due. Critically, neither *Kemp* nor *Boucher* address the content or substance necessary in a petition for contempt.

Here, appellant was not held in contempt for failure to pay an undetermined amount. The Master thoroughly reviewed the evidence and determined a dollar amount consistent with the agreement between the parties. In her report and recommendations, the Master included a list of qualified uninsured medical expenses for which appellee was entitled to partial reimbursement by appellant. The expenses amounted to $4,992. The circuit court adopted the Master's report and recommendations, and ordered appellant to reimburse appellee $2,496, or one-half of the expenses determined by the Master. Accordingly, the fact that appellee's petition "did not delineate the amount of money … appellant was alleged not to have paid" is of no consequence.

B.

Appellant also contends the circuit court abused its discretion because the petition "failed to state with any specificity what bills were attendant to which child, and who was the prescriber of the various 'medications,' services or other items claimed to be reimbursements due appellee from appellant."

We acknowledge that appellee's petition lacked specificity concerning the amount owed, as well as information such as on behalf of which child each respective expense was incurred. Nevertheless, appellant has not provided this Court with any authority suggesting that the petition here prejudiced the appellant in any way. Appellee's lack of specificity in her petition created additional work for the Master, who diligently reviewed bills and receipts. The Master considered only those costs in which appellee identified the date, amount, identity of the provider, and the child for whose benefit the cost was incurred. The Master also attached a list of the information in her report for the circuit court's review. The Master did not consider any documentation which was illegible or incomplete. Therefore, appellee's failure to "state with any specificity what bills were attendant to which child, who was the prescriber of the various 'medications,' services or other items claimed to be reimbursements" is of no consequence.

C.

Lastly, appellant argues that the bills and receipts submitted to the court were introduced without affording appellant "an opportunity to pose questions regarding bills and make conclusions as to what was and what was not an appropriate medical expense, of what was payable pursuant to the agreement." We disagree.

Appellee testified that she would "leave [the incurred medical expenses] for [appellant] when he [would come] on Tuesdays . . . [to] the house." Appellee had done this for "several years." More recently, she would mail receipts and expenses to the appellant via both regular and certified U.S. mail. The Master reviewed the documentation, and determined which receipts were eligible for reimbursement pursuant to the separation agreement incorporated in the court's order. Further, the Master disregarded "anything that [fell] outside of the statute of limitations."

The record demonstrates that appellant noted several objections to the submission of appellee's documentation. Appellant had the opportunity to cross-examine appellee and make conclusions as to what was and what was not an appropriate medical expense, of what was payable pursuant to the agreement.

There is substantial evidence to support the Master's findings and the circuit court's adoption of those findings, resulting in an order of contempt. Further, both parties had an opportunity to submit evidence to the court regarding the appropriateness of various medical expenses pursuant to the separation agreement. The Master was not only diligent in determining what expenses were properly allocated to appellant, but determined the amount only after a hearing was held in compliance with the four-step procedure articulated in *Kemp, supra.* Accordingly, the circuit court did not abuse its discretion in granting appellee's petition for contempt.

II.

Appellant also appeals the decision that he reimburse appellee for $3,356, or 25% of her attorney's fees.

The Master sufficiently considered all three factors pursuant to FL §12-103(b) in recommending an award of counsel fees. In particular, the Master noted that: "It is known that [appellant's] income has declined, as he left a job for the port position which pays far less. In addition he is continuing to pay his full child support by accessing savings. The extent of his savings are unknown." Nevertheless, "[i]t is clear that [appellee] had no choice but to file for contempt, as [appellant] has not been consistent in his compliance with the terms of the agreement as incorporated into the court order. Her fees were necessary. Due to the voluminous amount of medical bills and receipts, it is reasonable that the document reviews were lengthy."

Under the circumstances a contribution of 25% is reasonable. It is simply unfounded to assert that the Master did not engage in sufficient analysis to justify the award. The circuit court did not abuse its discretion."

Slip op at various pages, citations and footnotes omitted.

See UNREPORTED CASES IN BRIEF *page 18*

UNREPORTED CASES IN BRIEF *Continued from page 17*

*Janice R. Wilhelm v. John C. Wilhelm**

ALIMONY: MODIFICATION: CALCULATION OF INCOME

CSA No. 997, September Term, 2011. Unreported. Opinion by Matricciani, J. Filed Dec. 10, 2012. RecordFax #12-1210-01, 16 pages. Appeal from Charles County. Reversed, remanded.

In finding that a reduction of appellee's income was a material change of circumstances warranting a reduction in alimony, the circuit court abused its discretion by arbitrarily selecting the income on which to base its calculation without articulating a rational basis for making those distinctions.

"By order dated December 24, 1991, the Circuit Court granted Janice R. Wilhelm, appellant, an absolute divorce from John C. Wilhelm, appellee. Pursuant to that order, appellant became entitled to permanent alimony. On October 12, 2010, appellee filed a complaint to reduce alimony and the court ordered an alimony reduction.

QUESTIONS PRESENTED

(1) Did the circuit court err by modifying the alimony payments from appellee to appellant?

(2) Did the circuit court err by failing to award attorney's fees to appellant?

We answer yes to the first question. The second question is better addressed on remand.

HISTORY

The complaint giving rise to this appeal was filed by appellee on October 12, 2010. Appellee has twice previously requested that the court modify his alimony obligations, once successfully. In the third and most recent complaint, appellee asked that his alimony payments be reduced further. The court granted appellee's request, and in appellant's words, "without discussion, reduced [a]ppellant's alimony by $500 per month to now $1700 per month and denied Mrs. Wilhelm contribution to her attorney fee expenses from [a]ppellee."

DISCUSSION

Appellee's Alleged Voluntary Reduction in Wage Income

Appellant alleges that appellee intentionally reduced his wages, thereby artificially creating a material change in circumstances for the purpose of reducing his alimony liability.

As a result of transitioning from a full-time dental practice to a part-time one, appellee identified a 64% reduction in wage income (from $6,875 to $2,500 per month). Appellee used his wage reduction as the basis for claiming a material change in circumstances. To this Court, appellant argues that the work reduction by appellee is insufficient to order an alimony reduction because "the trial court refused in it's [sic] opinion to impute to Dr. Wilhelm any income from his current wife and also failed to attribute all the interest, dividend, capital gains and non-taxable interest to Dr. Wilhelm from his most recent tax returns… ."

The court found that "Dr. Wilhelm's significant salary reduction is a material change in circumstances and that a reduction in alimony is appropriate." But we are unable to concur on the record before us. Considering all the circumstances, although appellee reduced his wage-income, his aggregate finances may well preclude his semi-retirement from constituting a material change in circumstances.

But the court found appellant depends in material part on the current level of alimony. Her dependence cannot be reconciled reasonably with a $500 reduction. Comparing the parties' relative financial positions further supports this conclusion. Although appellee experienced a loss in wages, appellant does not earn wages at all, and is completely reliant on a combination of alimony, investment, and social security entitlement. Even after considering appellee's partial retirement, the continuing economic disparity between the parties demonstrates that the circuit court's discretion to reduce alimony "was arbitrarily used." *Brodak v. Brodak*, 294 Md. 10, 28-29 (1982).

Income Sources Imputed to Appellee

Appellant cites a litany of cases that obligate a judge to consider special factors while deriving the amount of alimony. This case, however, is not about how the court arrived at an appropriate alimony figure in 1991. It is about whether or not the court legally *modified* the alimony award in 2011. Therefore, appellant's reliance on cases highlighting the statutory factors, such as *Blaine v. Blaine*, 336 Md. 49 (1994) and *Freedenburg v. Freedenburg*, 123 Md.App. 729 (1998) is misplaced.

The circuit court noted it would consider the "entire economic circumstances of the parties" before deciding whether a reduction in appellee's alimony obligation was required by his partial retirement. Appellant argues that the court disregarded appellee's significant non-wage income and therefore failed to undertake a holistic analysis.

Appellee's most recent joint income tax return shows interest and dividends. The tax return also shows IRA distributions. The circuit court considered the full amount of the IRA distributions, and imputed the interest and dividends to appellee in calculating his monthly income. Appellant alleges, however, that the court failed to consider "taxable interest of $2134 or $177.83 per month, [ordinary] dividend income of $5990 or $499.17 per month, capital gains of $3985 or $332 per month, [and] taxable refund of $4706 or $392 per month." Without specific testimony attributing all, part, or none of the above to appellee, it is impossible to discern what percentage of the above reported income is assignable to him. Although the circuit court's order included some of appellee's reported unearned income, the court's arbitrary exclusion of additional income amounts to an abuse of discretion.

The court concluded that "Dr. Wilhelm is financially comfortable" and his estimated monthly income is $6,500. The court found Ms. Wilhelm receives $2,200 per month in alimony, a gross amount of $1,900 per month in social security benefits, an annuity that pays $740 per month [for] total monthly income estimated at $4,030. But appellant's monthly income *after* the alimony adjustment is only $3,530. That represents a significant disparity.

Although there "is no special statute or rule governing discretion" on how the court should decide a complaint to modify alimony, it must adjust the level of alimony according to the economic realities of the situation. *Burton v. Burton*, 253 Md. 233, 237 (1969). In *Moustafa v. Moustafa*, we said "a court may not find a specific amount of imputed or undisclosed actual income without supporting evidence." 166 Md.App. 391, 399 (2005). Conversely, we conclude the circuit court abused its discretion by failing to include elements of appellee's income or to calculate his income accurately. The court failed to consider appellee's total finances by arbitrarily selecting the income on which to base its calculations. The court included the IRA distributions and some interest income while concurrently excluding appellee's tax refund, taxable interest, ordinary dividend income, and capital gains. The court's failure to articulate a rational basis for making these distinctions led it to make clearly erroneous fact findings — the calculation of appellee's monthly income especially — which cannot support its decision to further reduce appellant's alimony."

Slip op at various pages, citations and footnotes omitted.

TOPIC INDEX

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

CASE INDEX

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