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COURT OF SPECIAL APPEALS

Unreported opinions

Cite as 2 MFLM Supp. 3 (2013)

Adoption/Guardianship: relatives' rights: no intervention after TPR

In Re: Malichi W.

No. 0688, September Term, 2011

Argued Before: Woodward, Zarnoch, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Zarnoch, J.

Filed: December 20, 2012. Reported.

Non-parental, non-custodial relative of a minor child could not intervene in the child's adoption proceeding commenced after the termination of parental rights, because no statute or rule affords such a relative the right or an opportunity to intervene in an adoption proceeding after parental rights have been terminated.

In this case, we must determine whether a non-parental, non-custodial relative of a child can intervene in the minor's adoption proceeding commenced after the termination of parental rights ("TPR"). Appellant, Kris Golden ("Golden"), who sought intervention in the Circuit Court for Baltimore City, is the maternal cousin of Malichi W. ("Malichi"), who is now eight-years old. The parental rights of Malichi's biological parents were terminated on August 10, 2010. Yolanda W. ("Ms. W.") filed a petition to adopt Malichi on March 24, 2011, which was granted on June 1, 2011. Golden filed two motions, one on April 8 and one on May 31, both entitled "Motion to Intervene and Appeal," in the adoption proceedings. The circuit court, sitting as a juvenile court, denied both motions. Because we find that no law or rule authorizes Golden to intervene in an adoption proceeding after termination of parental rights, we affirm the court's decision.

FACTS AND LEGAL PROCEEDINGS

Malichi was born on May 3, 2004 in Baltimore City. The juvenile court terminated the parental rights of Malichi's biological parents on August 10, 2010. Malichi's biological mother consented to the termination on the condition that Malichi be adopted by Ms. W., who was Malichi's pre-adoptive foster mother, and who had custody of the child since June 6, 2006.[1] Malichi's biological father did not object, and thus he consented by operation of law. On March 9, 2011, the Baltimore City Department of Social Services (the "Department"), the child's appointed guardian, consented to Mafichi's adoption by Ms. W. Ms. W. then petitioned the court to adopt Malichi on March 24, 2011. The following day, the court appointed an attorney to represent Malichi.

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

On April 8, Golden filed a motion in Malichi's adoption proceedings captioned "Motion to Intervene and Appeal." She wanted to be considered as an adoptive parent for Malichi. The juvenile court denied the motion on April 12, in a one-line order, stating that it lacked good cause. Golden did not appeal this decision. On May 31, 2011, Golden filed a second motion with the same caption as her first.[2] On June 1, 2011, the juvenile court granted Ms. W's petition for adoption of Malichi. The court then denied Golden's motion on June 10, 2011 in a brief order, finding that there was a lack of good cause and that the issue was moot because "the child was adopted on 6/1/11." Golden filed this appeal.

QUESTION PRESENTED

We review the following question:[3]

> Did the court legally err in denying Golden's second motion to intervene?[4]

For the following reasons, we find no error and affirm the circuit court's denial of Golden's motion to intervene.

DISCUSSION

In this case, the key issue is whether a non-parental, non-custodial relative of a child is authorized to intervene in an adoption proceeding after termination of parental rights. Because this is a purely legal issue involving interpretation of the Maryland Code and the Maryland Rules of Procedure, we review the juvenile court's decision under a *de nova* standard.[5] *Davis v. Slater*, 383 Md. 599, 604 (2004).

Golden argues that the juvenile court erred in denying her motion to intervene and appeal because she was Malichi's maternal cousin, and she had an interest in adopting him. She contends that the court should have considered her as a potential adoptive parent because she is a biological family member. The Department responds that the juvenile court properly denied Golden's motion because no statute or rule affords a person in Golden's situation either a right or an opportunity to intervene in an adoption proceeding after parental rights have been terminated.

We agree with the Department. In reaching this conclusion, we review the Maryland Code provisions and Maryland Rules of Procedure that could potentially relate to this case: Title 5, Subtitle 3 of the Family Law Article ("FL") of the Md. Code (1984, 2006 Repl. Vol.); Title 9 of the Maryland Rules; Md. Rule 2-214; and Title 11 of the Maryland Rules, particularly with respect to its interaction with Title 3, Subtitle 8 of the Courts and Judicial Proceedings Article ("CJP") of the Md. Code (1973, 2006 Repl. Vol.).

I. Family Law Article, Title 5, Subtitle 3

Title 5, Subtitle 3 of the FL Article which governs adoptions, and more specifically Part IV, which applies to adoptions after termination of parental rights, makes no mention of a right to intervene in an adoption proceeding. *See* FL § 5-301 *et seq*.

Under FL § 5-345(a), "[an]y adult" may petition a juvenile court for an adoption of the child post-TPR. However, the petitioner must include in his or her filing all written consents required by FL §5-350(a).[6] Because Ms. W. filed the consent of Malachi's guardian, the Department, Golden could not. This fact poses an insurmountable barrier to the relief she seeks — consideration as an adoptive parent. However, even if we were to assume that Golden's goal was to overturn Ms. W.'s adoption of Malachi, no mechanism exists for her intervention in a post-TPR adoption.[7]

11. Title 9 of the Maryland Rules

The Maryland Rules that concern adoption and guardianship cases, *viz.*, those in Title 9, do not give Golden the right to intervene in this adoption. Under Md. Rule 9-107(a), "[a]ny person having a right to participate in a proceeding for adoption or guardianship may file a notice of objection to the adoption or guardianship."[8] Section (b)(1) restricts when a person can file this objection, stating that the objector must file within 30 days after "the show cause order is served." Md. Rule 9-107(b)(1). A show cause order must include a "pre-captioned notice of objection form." Md. Rule 9-105(c)(3). Because a person must file his or her objection within 30 days after the court sends a show cause order, it would seem that the only persons permitted to object are those who receive a show cause order.

However, unlike other types of adoptions, in a post-TPR adoption proceeding, there is no requirement for issuance of a show cause order. Md. Rule 9-105(a).[9] Rather, the clerk of court sends notice to the local department of social services and the child's last attorney of record in the guardianship case. FL § 5-346. Nevertheless, Rule 9-105 contains blank Notice of Objection forms which apply to five different types of adoptions, including "a Public Agency Adoption after TPR."[10] Thus, we shall assume that Rule 9-107(a) applies in a post-TPR adoption case. Regardless, the rule still requires that the objectors have "a right to participate" in the adoption proceeding.

Under FL § 5-350, for a minor, the guardian must consent to the adoption and if the child is at least 10 years of age, he or she must also consent. These are the persons entitled to notice under FL § 5-346. They are the participants and potential objectors. Golden does not qualify as an intervenor under Rule 9-107(a).[11] The persons who have a "right to participate" in the proceeding under this rule and a right to object to the proposed adoption are very limited. *See* 2 Am. Jur. 2d *Adoptions* (2004) at § 121 ("The parties to adoption cases are strictly limited to those with legal rights at stake.") Because Golden is not within this class of persons with a right to participate in the adoption proceeding, she cannot rely on the Title 9 rules as a basis for intervention.

III. Maryland Rule 2-214

Md. Rule 2-214 governs intervention in certain civil cases but does not apply to adoption proceedings. Md. Rule 1-101(b) states that Title 2 "applies to civil matters in the circuit courts, except for Juvenile Causes under Title 11 of these Rules and. except as otherwise specifically provided or necessarily implied." It is necessarily implied that intervention under Title 2 is inapplicable to adoption proceedings because Title 9 has its own rules for "intervening" in adoption proceedings. Specifically, as discussed above, Md. Rule 9-107 allows for a person to object to an adoption in limited circumstances. Providing for an "objection" to the adoption proceeding necessarily implies that it is the exclusive way that one can intervene in such a proceeding. Thus, Md. R. 2-214 does not apply to adoption proceedings.

IV. Title 11 of the Maryland Rules

Finally, Md. Rule 11-122(b),[12] a rule concerning non-parental intervention, does not apply to post-TPR adoption proceedings. Rule 11-122(b) allows non-parental intervention at the discretion of the juvenile court, but for "dispositional" purposes only. The Rule does not specifically state what "dispositional purposes" means. However, it is apparent that the provisions of the Maryland Code concerning "juvenile causes" are in *pari materia* with the Title 11 Rules;[13] and the statutory provisions shed light on the meaning of "dispositional purposes." In CJP §§ 3-801 *et seq.*, which governs CINA proceedings, the term "[d]ispositional hearing" means a hearing to determine:

> (1) Whether a child is in need of assistance; and
>
> (2) If so, the nature of the court's intervention to protect the child's health, safety and well being.

CJP § 3-801(m).[14]

Section 3-819(b)(1) of the CJP Article describes the possible judicial "interventions":

> In making a disposition on a CINA petition under this subtitle,
>
> the court shall:
>
> (i) Find that the child is not in need of assistance and, except as provided in subsection (e) of this section, dismiss the case;
>
> (ii) Hold in abeyance a finding on whether a child with a developmental disability or a mental illness is a child in need of assistance and:
>
> 1. Order the local department to assess or reassess the family's and child's eligibility for placement of the child in accordance with a voluntary placement agreement under §5-525(b)(1)(i) of the Family Law Article;
>
> 2. Order the local department to report back to the court in writing within 30 days unless the court extends the time period for good cause shown;
>
> 3. If the local department does not find the child eligible for placement in accordance with a voluntary placement agreement, hold a hearing to determine whether the family and child are eligible for placement of the child in accordance with a voluntary placement agreement; and
>
> 4. After the hearing:
>
> A. Find that the child is not in need of assistance and order the local department to offer to place the child in accordance with a voluntary placement agreement under § 5-525(b)(1)(i) of the Family Law Article;
>
> B. Find that the child is in need of assistance; or
>
> C. Dismiss the case; or
>
> (iii) Subject to paragraph (2) of this subsection, find that the child is in need of assistance and:
>
> I. Not change the child's custody status; or
>
> 2. Commit the child on terms the court considers appropriate to the custody of:
>
> A. A parent;
>
> B. Subject to § 3-819.2 of this subtitle, a relative, or other individual; or
>
> C. A local department, the Department of Health and Mental Hygiene, or both, including designation of the type of facility where the child is to be placed.

Paragraph (b)(3) states: "Unless good cause is shown, a court shall give priority to the child's relatives over nonrelatives when committingthe child to the custody of an individual rather than a parent." Subsection (c) provides:

> In addition to any action under subsection (b)(1)(iii) of this section, the court may:
>
> (1) (i) Place a child under the protective supervision of the local department on terms the court considers appropriate;
>
> (ii) Grant limited guardianship to the department or an individual or both for specific purposes including medical and educational purposes or for other appropriate services if a parent is unavailable, unwilling, or unable to consent to services that are in the best interest of the child; or
>
> (iii) Order the child and the child's parent, guardian, or custodian to participate in rehabilitative services that are in the best interest of the child and family; and
>
> (2) Determine custody, visitation, support, or paternity of a child in accordance with § 3-803(b) of this subtitle.

Finally, CJP § 3-819.2(b) states that "the court may grant custody and guardianship to a relative or nonrelative under this subtitle."

This statute makes it clear that the term "dispositional purposes" in Rule 11-122(b) applies to proceedings that precede an adoption that follows a termination of parental rights. Moreover, the specificity and exclusivity of Rule 11-122(b) create the negative implication that no right of intervention exists beyond the dispositional stage — here, an adoption following termination of parental rights)[5] The rationale for such a construction is readily apparent. In *Palmisano v. Baltimore County*, 249 Md. 94, 103 (1968), the Court of Appeals noted the "need to surround" the final adoption decree "with a high degree of certainty" and that "anything which would undermine public confidence in adoption proceedings must be read by the courts in the gravest light."

With a review of the potentially applicable law, we find no statute or rule allows intervention in an adoption after termination of parental rights. Thus, Golden

had no right to intervene in the adoption. She was not a parent or guardian. Ms. W. had already filed her adoption petition. Malichi's biological mother had consented to the termination of her parental rights on the condition that Malichi be adopted by Ms. W., not Golden. The Department of Social Services, as guardian, had already consented to Ms. W.'s adoption petition. After these steps were taken, the only parties to the adoption proceeding were Ms. W. and Malichi. We find no legal error from the juvenile court's decision, and affirm the denial of Golden's motion to intervene.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY, SITTING AS A JUVENILE COURT, AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Malichi had previously been determined to be a child in need of assistance (CINA) although the record is unclear regarding the date of the court's order. Malichi's status as a CINA was terminated when adoption was ordered.

2. Golden was not entitled to a hearing on her motions under Md. R. 2-311 because she did not request one.

3. We have formulated this question from a review of Golden's brief. Under "Issues Presented," Golden states, in part, "Kris Golden was not afforded proper consideration in her attempt to adopt Malichi W. so that he could remain with his biological family." Because Golden was not a proper party to the adoption proceeding, she can only appeal the denial of her motion to intervene. The denial of a motion to intervene is an appealable final order. *Hiyab, Inc. v. Ocean Petroleum, LLC*, 183 Md. App. 1, 9 (2008).

4. Golden did not appeal the denial of her first motion and ordinarily, she would not be permitted to file the same motion more than 30 days after the denial of her first motion. Md. Rule 2-535. However, appellee Department has not raised an objection. In addition, the juvenile court entertained the second motion by finding lack of good cause. Thus, we will address whether Golden had a right to intervene. Because we affirm the circuit court's decision that she could not intervene, we need not decide the issue of mootness.

5. This review is different than our consideration of a circuit court's denial of a motion to intervene under Md. Rule 2-214. There, we employ an abuse of discretion standard when the circuit court denies the motion as untimely or when permissive intervention is rejected. *See Md. Capital Park &Planning Comm'n. v. Town of Washington Grove, Md*, 408 Md. 37, 65 n.20 (2009). Denials of a motion to intervene as a right are reviewed under a *de nova* standard. *Id*

6. Section 5-350(a) states:

> A juvenile court may enter an order for a child's adoption under this Part IV of this subtitle only if;
>
> (1) for an individual under the age of 18 years, the individual's guardian consents; and
>
> (2) for an individual who is at least 10 years old, the individual consents.

7. Golden has notfiled a petition to invalidate the adoption. Under FL § 5-353, if such a petition alleges a jurisdictional or procedural defect and is filed more than one year after entry of the adoption order a juvenile court must dismiss the petition. In light of our conclusion that Golden could not intervene in the adoption proceeding, we need not consider the impact of § 5-353 on her contentions.

8. The history of Rule 9-107(a) and its forbearers make it clear that if "intervention" exists in an adoption/guardianship proceeding, it is within the confines of this Rule. When this provision was embodied in former Rule 1176, it provided that if a person had "a right to contest a proceeding for adoption, or guardianship" he or she could file "a petition to intervene as a defendant in the proceeding." This "intervention" requirement was retained in former Rule D76. In the 1980s, this rule was amended to substitute "a notice of objection" for "a petition to intervene" and the "right to notice of a proceeding" was substituted for a "right to contest a proceeding." Finally, this latter provision became a "right to participate in a proceeding." Regardless of its verbage, the Rule has keyed intervention/objection to a pre-existing right to be part of the proceeding.

9. In a guardianship case, the court provides a show cause order to each of the child's living parents who has not consented to the guardianship, each living parent's last attorney of record in the CINA ease, and the child's last attorney of record in the CINA case. FL § 5-316. In an adoption without termination of parental rights, the court must send a show cause order to each of the child's living parents who has not consented to the adoption, each living parent's last attorney of record in the CINA case, and the child's last attorney of record in the CINA case. FL § 5-334.

10. This term may be a bit of a misnomer because Part IV of Title 5, Subtitle 3 of the FL Art. applies to a post-TPR adoption by an adult petitioner, not to an adoption by a public agency.

11. Notice of Objection form included in Rule 9-105 confirms this reading of Rule 9-107(a). It lists the only potential objector in this type of case as "the person to be adopted."

12. Md. Rule 11-122(b) provides:

> Upon timely application, any person, other than a parent, seeking custody or guardianship of the respondent child may be permitted to intervene *for dispositional purposes* only, including the filing of a petition to review, modify or vacate a disposition order. Any person permitted to intervene pursuant to this section shall not be deemed a "party" for the purposes of Rule 11-106, and for the purposes of Rule 11-105, counsel for the intervenor, upon request, shall only be entitled to be furnished copies of such studies and reports as directly relate to the intervenor' s petition for custody or guardianship of the respondent child.

(Emphasis added).

13. We note that Rule 11-501(a) which speaks to TPR and related adoptions in the juvenile court contains an erroneous citation to CJP §3-804(a)(2). That paragraph is no longer found in §3-804.

14. In CJP §§ 3-8A-01 *et seq.*, which applies to children other than CINAs and adults, a [d]ispositional hearing" is defined as a hearing to determine:

(1) Whether a child needs or requires guidance, treatment, or rehabilitation; and if so

(2) The nature of the guidance, treatment, or rehabilitation.

15. With great force, Golden argues that she should be considered for adoption because she is a relative of Malichi. This argument would carry greater weight if Golden had sought custody before adoption, where State law accords a preference to relatives over non-relatives for custodial purposes. *See e.g.*, CJP §§ 3-815(c)(5), 3-819(b)(3), 3-823(e)(1)(i)(2), and FL § 5-525(f)(2). No such priority appears in the post-TPR adoption provisions. It would appear that Golden may not have been able to seek custody at that time because she was a minor. However, this is no reason to depart from the statutory provisions and rules to grant a right to participate in post-TPR adoption proceedings.

NO TEXT

Cite as 2 MFLM Supp. 9 (2013)

Child support: termination of obligation: 'secondary school' defined

Donald L. Richardson

v.

Jacquelyn L. Boozer

No. 0774, September Term, 2011

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

Opinion by Hotten, J.

Filed: December 20, 2012. Reported.

In applying child support statute extending child support until the later of when child reaches age of 19 or graduates from high school, trial court properly found that 18-year-old who did not earn high school diploma but was enrolled in community college pursuant to program at his high school permitting students to substitute community college courses in order to obtain high school diploma was entitled to continued support until age of 19.

On August 16, 2010, appellant, Donald Richardson, filed a *pro se* motion to modify child support in the Circuit Court for Prince George's County, seeking to compel appellee, Jacquelyn Boozer, to pay child support commencing in December 2009 and to reimburse appellant for overpayment of child support. The court granted appellant's motion, but ordered that he pay appellee an outstanding child support balance of $7,101. Appellant filed for reconsideration of that order, alleging that (1) his child support obligation was legally terminated when the child failed to graduate from high school and that (2) the court erred in calculating his total child support obligations under the post-October 1, 2010 child support guidelines. The court denied appellant's motion, finding that appellant's obligation extended beyond the date of termination and that his contentions regarding the court's calculations, were unfounded. Appellant noted an appeal, and presents four questions for our consideration:

> 1. Did the trial court err in determining that appellant had an obligation to pay child support until the minor child of the parties reached the age of nineteen years old?
>
> 2. Did the trial court err in failing to properly assess the termination date of the parties' obligation to pay child support and thereby improperly calculate the number of months of support owed by the appellant?
>
> 3. Did the trial court err in not utilizing the pre-October 1, 2010 child support guidelines in calculating appellant's child support obligation?
>
> 4. Did the trial court abuse its discretion by refusing to address appellant's claim of overpayment of child support?
>
> For the reasons that follow, we affirm the judgment of the circuit court.

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FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of the parties' efforts to obtain a divorce is extensive, so we will present a brief overview for purposes of the instant appeal. The parties married on November 26, 1988, and are the parents of their then-minor child, Christian Taylor Richardson ("Christian"), whom they adopted as an infant shortly after his birth on February 7, 1992. The parties mutually and voluntarily separated on July 14, 2001, and the trial court granted a judgment of absolute divorce on May 9, 2005.

On December 20, 2007, appellant noted his first appeal, in which we affirmed the trial court's ruling.[1] Relevant to our review, however, is the court's judgment of absolute divorce. As part of the dissolution, the court awarded appellee sole legal and primary physical custody of Christian. Appellee was responsible for maintaining health insurance coverage for Christian, and appellant was ordered to pay appellee $1,456 per month for child support commencing from May 1, 2003.

On July 15, 2009, the parties reached an agreement regarding child support, and on August 15,2009, the court ordered that appellant pay child support to appellee in the amount of $1,062 on the first day of each and every month until the later of(1) Christian attaining the age of eighteen years or (2) Christian's graduation from high school.

On November 24, 2009, appellee informed Christian that he could no longer reside with her, since

he ignored her instructions. Christian began residing with appellant on November 29, 2009. Appellant ceased his child support payments, and filed a motion on December 9, 2009, requesting that the court (1) order appellee to pay child support in the amount of $895 per month until Christian attained the age of eighteen or graduated from high school; (2) order appellee to pay by check the amount of $3,369 for overpayment of child support; and (3) order appellee to file a statement of satisfaction of monetary judgment, reflecting appellant's payment of $43,975.75 with accrued interest.

On April 11, 2010, Christian returned to his mother's home. He was expected to graduate from Sidwell Friends School ("Sidwell"), a private educational institution, on June 12, 2010. However, he failed to meet the graduation requirements and earn his high school diploma. As a result, on August 16, 2010, appellant renewed the abovementioned motion regarding child support. Appellee alleged that Sidwell's administration permitted Christian to register for substitute courses at Prince George's Community College to obtain his diploma from Sidwell. Christian enrolled for the summer and fall 2010 semcsters, but failed the necessary courses.[2]

During the motion's hearing on January 31, 2011, the court stated, ". . . [U]nder Maryland law, child support extends to age 19 or high school graduation, whichever comes first. So as long as he is working towards his high school graduation, then child support continues to age 19." Because Christian would attain the age of nineteen on February 7, 2011, the court determined that appellant's support would be terminated seven days from the hearing. The court granted appellant's motion, finding that there was a material change in circumstances, but ordered that appellant pay appellee an outstanding child support balance of $7,101. The court used the post-October 1, 2010 child support guidelines, and computed appellant's obligation, less the five months that Christian resided with appellant and unreimbursed medical expenses of $419, resulting in a total of $7,101.

On February 10, 2011, appellant filed a motion for reconsideration, arguing that the court erred in (1) determining that his child support obligation was not legally terminated when Christian failed to graduate high school and (2) calculating his total child support obligations under the post-October 1, 2010 guidelines. The court denied appellant's motion, finding that appellant's obligation to pay the child support arrearages extended beyond the date of termination for ongoing child support. The court concluded that there was no merit to appellant's assertion that his child support obligation was calculated under the wrong criteria, since the court's calculations were effective until September 30, 2010. Thereafter, appellant filed a timely appeal.

DISCUSSION

I. Whether the Trial Court Erred in Determining That Appellant Had a Child Support Obligation Until Christian Reached Nineteen Years Old?

The circumstances under which child support may be terminated once a child attains the age of eighteen are governed by Md. Code (1957, 2011 Repl. Vol.), Article 1, § 24(a)(2) of the Rules of Interpretation, which provides in pertinent part:

> A person who has attained the age of 18 years and who is enrolled in secondary school has the right to receive support and maintenance from both of the person's parents until the first to occur of the following events:
>
> (i) The person dies;
>
> (ii) The person marries;
>
> (iii) The person is emancipated;
>
> (iv) The person graduates from or is no longer enrolled in secondary school; or
>
> (v) The person attains the age of 19 years.

The issue is whether Christian fell within the purview of Md. Code (1957, 2011 Repl. Vol.), Article 1, § 24(a)(2)(iv) of the Rules of Interpretation. It is undisputed that Christian did not graduate from Sidwell in June 2010, but was enrolled at Prince George's Community College in an effort to substitute the necessary courses required by his high school to secure his diploma. In appellant's motion for reconsideration, he acknowledged that " . . . [Christian] did enroll at the Prince George's Community College for [s]ummer and [f]all 2010 classes as a special student" and was enrolled in January 2011. Furthermore, appellant did not object during the hearing when appellee asserted that Christian was registered at the community college for the purpose of attaining his high school diploma.

Appellant asserts that his obligation to pay child support ended in June 2010 because Christian failed to attain his high school's graduation requirements, and was not enrolled at the high school or other secondary school. Appellee avows that Christian's pursuit of his high school diploma at Prince George's Community College was the legal equivalent of enrollment in a secondary school. She also avers that Md. Code (1957, 2011 Repl. Vol., 2012 Cum. Supp.), Article 1, § 24(a)(2) of the Rules of Interpretation would not suggest a narrow reading of the statutorily undefined phrase "enrolled in a secondary school." We agree and explain.

A question regarding statutory interpretation is a legal question, which we review *de novo. Harvey v. Marshall*, 389 Md. 243, 257 (2005) (citing *Mohan v. Norris*, 386 Md. 63, 66-67(2005)); *see also Davis v. Slater*, 383 Md. 599, 604(2004) (Maryland appellate courts review issues *de novo* to decide if the trial court was legally correct in its interpretations of the Maryland Code.).

The statute provides that a child, who has reached age eighteen, and is enrolled in secondary school, has the right to receive support and maintenance until the child (1) graduates from or is no longer enrolled in secondary school, (2) reaches the age of 19, (3) is emancipated, or (4) marries. Md. Code (1957, 2011 Repl. Vol., 2012 Cum. Supp.), Article 1, § 24(a)(2) of the Rules of Interpretation. The term "secondary school" is not defined in the statute. However, the lack of an expressed definition does not prevent us from analyzing the legislative intent. *Schreyer v. Chaplain*, 416 Md. 94, 101 (2010). To construe the intent, we start by observing the plain meaning of the statutory terminology. *Bornemann v. Bornemann*, 175 Md. App. 716, 724 (2007) (citing *Reier v. State Dept of Assessments and Taxation*, 397 Md. 2, 26 (2007)). "The fundamental goal of statutory construction is to ascertain and effectuate the intention of the [l]egislature." *Witt v. Ristaino*, 118 Md. App. 155, 162(1997) (citing *Oaks v. Connors*, 339 Md. 24, 35 (1995)). If the language is apparent and explicit, we end our search. *Bornemann*, 175 Md. App. at 724 (citing *Evans v. State*, 396 Md. 256, 341 (2006)). However, if the language is not clearly reflective of the legislature's intent, we examine "intent from the legislative history or other sources." *Id*. (citing *Allstate Ins. Co. v. Kim*, 376 Md. 276, 290 (2003)). "We may thus consider the consequences resulting from one meaning, rather than another, and adopt the construction which promotes the most reasonable result in light of" the General Assembly's purpose. *Wilt*, 118 Md. App. at 163 (internal quotation omitted) (citing *Rucker v. Comptroller of the Treasury*, 315 Md. 559, 565 (1989)).

The genesis of the amendment to Md. Code (1957, 2011 Repl. Vol., 2012 Cum. Supp.), Article 1, § 24(a)(2) of the Rules of Interpretation is found in the Age of Majority Bill,[3] which was passed and enacted in the 2002 session of the General Assembly. *Bornemann*, 175 Md. App. at 724. The amendment is silent concerning the meaning of secondary school; however, the Revised Fiscal Note of the Department of Legislative Services is not. Our appellate courts have generally considered fiscal notes in determining legislative intent. *See generally Gomez v. Jackson Hewitt*, Inc., 427 Md. 128, 177-78 (2012); *Anderson v. United States,* 427 Md. 99, 111 (2012); *Cosby v. Dep't of Human Res.*, 425 Md. 629, 648-49 (2012).

The Revised Fiscal Note to the Age of Majority Bill reads:

> According to the Office of Child Support Enforcement of the U.S. Department of Health and Human Services, 44 states require[d] child support until the child reache[d]. the age of 18. Thirty-three of those states allow[ed] continuation of child support past the age of 18, if the child [was] a high school student. States var[ied] the termination date of child support for high school students and . . . establish[ed] it at 19, 20, or 21. [In some states], enrollment in a high school equivalency, vocational, or technical course of education [met] the educational requirement. . . .

Dep't of Legis. Serv's., Revised Fiscal Note, S.B. 657 (2002).

Since the term "secondary school" was undefined in the statute, we consult those editions of the dictionary that were in close proximity to the statute's enactment. *See Harvey v. Marshall*, 389 Md. 243, 261, n.11 (2005) (citing *See Rossville Vending Mach Corp. v. Comptroller of Treasury*, 97 Md. App. 305, 316-18 (1993)) (stating "it seems logical, at least in a linear way, that a popular dictionary [around the time in which a statute was enacted] would be an informative resource in attempting to arrive at a determination of what the 1936 [l]egislature intended by the usage of 'gross receipts"'). In 2002, Article 1, § 24(a)(2) of the Rules of Interpretation was introduced for the first time. S.B. 657, 416th Gen. Assem., Reg. Sess. (Md. 2002). Therefore, we consult WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2051 (2002), defining secondary school as "a school more advanced in grade than an elementary school[4] and offering general, technical, vocational. or college-preparatory courses."

Post-secondary education is defined as "a school or other institution that offers an educational program within the State for persons 16 years of age or older who have graduated from or left elementary or secondary school." *McCarthy v. Bd. of Educ. Of Anne Arundel County,* 280 Md. 634, 644 (1977). However, post-secondary education excludes "an adult education, evening high school, or high school equivalency program. . . ." *Id.*

The Maryland Dream Act, Senate Bill 167 of the 2011 General Assembly, established requirements for individuals who desired in-state tuition. *See generally Doe et al. v. Md. State Bd. Of Elections*, No. 131, September Term, 2011, Slip op. 1, 4, (Ct. of App. September 25, 2012). In *Doe et al v. Md. State Bd. of Elections,* No. 131, September Term, 2011, Slip op. at

4, n.3, the Court of Appeals alluded to Md. Code (1978, Supp. 2011), § 15-106.4(b) of the Education Article, which read:

> . . . The individual must prove that he or she attended a Maryland secondary school for at least three years, and that he or she graduated from a Maryland secondary school or received a high school equivalency diploma.

Accordingly, we deduce that a secondary school education includes a high school equivalency program.

While this issue is one of first impression in Maryland, other jurisdictions have considered what constitutes enrollment in a secondary school, including Missouri, which we surmise is one of the leading jurisdictions in analyzing the issue at hand. In *In re Marriage of Copeland*, 850 S.W.2d 422, 423 (Mo. Ct. App. 1993) [hereinafter "*Copeland*"], the Missouri Court of Appeals determined whether a child's enrollment in an adult basic education program at a vocational-technical school was enrollment in a secondary school program of instruction. Upon divorce, the trial court awarded the mother primary custody of the child, and ordered the father to pay child support. *Id*. at 424. The child discontinued his high school attendance at the age of seventeen. *Id*. His principal recommended that he transfer to a General Educational Development (GED) program to prepare for the high school equivalency exam, which the child did. *Id*. The father argued that the child's GED program was not enrollment in a secondary school under the state's statute, which terminated his child support obligation. *Id*.

The Missouri statute read:

> . . . [W]hen a child reaches age eighteen, he is enrolled in and attending a secondary school program of instruction, the parental support obligation shall continue until the child completes such program or reaches age twenty-one, whichever first occurs. . . .

Id. at 425. The court concluded that "secondary school program of instruction" was a broad concept and could not be narrowly confined to a traditional high school. *Id*.

In the Missouri court's analysis, it noted that the child tested in reading, mathematics, language, social studies, and natural sciences to determine his areas of weakness. *Copeland*, 850 S.W.2d at 425. He was given assignments to improve his skills in those areas, he used computer disks and workbooks, and instructors were available to answer questions and give direction. *Id.* The program continued until the student was able to take and pass the GED exam. *Id*. The court held that there was sufficient evidence to support a finding that the child was enrolled in and attending a secondary school program of instruction. *Id*. at 426.

In *Thompson v. Dalton*, 914 S.W.2d 811, 813 (Mo. Ct. App. 1995), the father averred that the trial court erred in continuing his child support obligation because his child was not enrolled in high school, a GED program, or a secondary school by his eighteen birthday. The child discontinued high school, enrolled in a GED program, but did not pass the examination. *Id.* He re-registered for the program before his eighteenth birthday, as well as enrolled in a two-year aviation mechanical course of study at a community college. *Id*. The Missouri Court of Appeals concluded that the evidence displayed the child's intention to complete his secondary education, so the trial court did not err, as the child was not emancipated. *Id*.

In *Beeler v. Beeler*, 820 S.W.2d 657, 661 (Mo. Ct. App. 1991), the wife argued that the trial court erred in terminating the father's child support obligation. The child had not graduated from high school, and during the time he reached the age of eighteen, he was not enrolled in any secondary school program. *Id*. Thus, the trial court was correct in terminating the father's child support obligation. *Id*.

Louisiana's termination of child support statute operates in a similar fashion as our Maryland statute. *See Park v. Park*, 634 So.2d 83, 85 (La. App. 1 Cir. 1994). In *Park*, 634 So.2d at 86, the Louisiana Court of Appeals, First Circuit decided if a child's enrollment in a vocational-technical school was sufficient to satisfy the statute's secondary school requirement. The mother requested temporary and permanent child support, but the father argued that the mother was not entitled to child support because the parties' child was no longer enrolled in a secondary school. *Id.* at 84. The trial court agreed with the father, and denied the mother's request. *Id.*

Louisiana's statute provided:

> An order or judgment of child support shall continue with respect to any unmarried child who attains the age of majority as long as the child is a full-time student in good standing in a secondary school, has not attained the age of nineteen, and is dependent upon either parent. . . .

Park, 634 So.2d at 85. During a hearing, the child testified that he was enrolled in a vocational-technical school and that he was pursuing a GED or high school equivalency education, as well as learning automotive technology. *Id.* The Louisiana court found that the child satisfied the statute's requirement, holding that it gave due consideration not only to the type of educational facility in which the education was pursued, but also to the curriculum which was taught at the facility. *Id*. at 86.

In *In re Frost*, 815 S.W.2d 890, 891 (Tex. App. 1991), the father avowed that because his child was beyond eighteen years of age and was not enrolled in an accredited secondary school, his child support obligation should have been terminated. The Texas statute provided, in pertinent part:

> [T]he court . . . may render an original support order . . . past the 18th birthday of the child, whether the request for such an order is filed before or after the child's 18th birthday, *if the child is fully enrolled in an accredited secondary school in a program leading toward a high school diploma.*

Id. at 892 (quotations omitted) (emphasis in original).

The child had a learning disability and enrolled in an alternative and equivalent special needs program at a community college. *In re Frost,* 815 S.W.2d at 891. The program was approved by the Texas Education Agency and the child's high school principal, and upon completion of the program, the school would confer a diploma upon him. *Id*. at 893. The Texas Court of Appeals concluded that "the obvious intent of the legislature was to require a father to aid in the support of his child, even if that child [was] over eighteen years of age, so long as that child was actively participating in studies which would lead to a high school diploma." *Id*. at 892.

In *Howell v. Goode*, 674 S.E.2d 248, 249 (W. Va. 2009), the mother appealed the trial court's order, which terminated the father's child support obligation when the child was enrolled in high school until the age of twenty. Although the parties' child had completed the minimum requirements for his high school graduation, the administration recommended an additional year of schooling because of the child's special education needs. *Id*. at 250. The West Virginia statute read in relevant part, as follows:

> Upon a specific finding of good cause shown . . ., an order for child support may . . . continue beyond the date when the child reaches the age of eighteen, so long as the child is unmarried and residing with a parent, guardian or custodian and is enrolled as a full-time student in a secondary educational or vocational program *and making substantial progress towards a diploma*: Provided, That such payments may not extend past the date that the child reaches the age of twenty.

Id. at 251.

The West Virginia Supreme Court of Appeals concluded that "[t]he [l]egislature did not specify that child support would cease when the child became *eligible* to receive a diploma based upon satisfactory completion of minimum educational requirements." *Id*. at 252. There was good cause to continue child support since the child had a learning disability and he was "making substantial progress towards a diploma." *See id*. at 254.

Our consideration of the language of the Age of Majority Bill, including the Revised Fiscal Note, and Webster's Dictionary, leads us to reasonably conclude that the General Assembly intended that "enrolled in secondary school" encompassed a broader view of obtaining a high school diploma by the means of alternative, equivalency educational programs. Furthermore, other jurisdictions have accepted vocational-technical, GED programs, and equivalency courses as sufficient schooling to satisfy their statutes' secondary school requirements. We are not concerned with the structural facility, but rather, concerned with the course of education being taught. We do not deduce that the General Assembly intended to have child support automatically terminated because, a child did not graduate from high school in a timely manner, or because the child obtained his or her high school diploma via an alternative, non-traditional course of study. "A high school equivalency diploma is no less a secondary school education because it [was] pursued in a [community college setting] instead of a high school." *Park*, 634 So. 2d at 86.

Our research has revealed a Missouri case to which the court surmised that termination of the parent's child support obligation was proper. In *Jones v. Jones*, 924 S.W.2d 51, 52 (Mo. Ct. App. 1996), the father ceased his child support payments because his son, who reached the age of eighteen in May 1994, discontinued his high school attendance in April 1994, and was not enrolled in any secondary school program. The child reregistered for high school in September 1994, but again discontinued attendance. In March 2005, the child enrolled in a diploma equivalent program. *Id*. The Missouri Court of Appeals found that:

> [The child] . . . had clearly quit all study before graduation and before his 18th birthday. His studies were not ongoing and in a natural period of recess such as summer vacation. He did re-enroll in high school the next fall, but only to quit again after only a month of missing more classes than he attended. He did not undertake any vocational training. He waited until March 1995 to undertake GED studies — nearly a year after his 18th birthday.

Jones, 924 S.W.2d at 53. Thus, the father's child support obligation ended when the child reached age eighteen. *Id*.

Our case differs from *Jones* because Christian did not discontinue his attendance at Sidwell, and his studies were continuous. Christian was expected to graduate from Sidwell in June 2010. As indicated in the record, Sidwell's administration permitted him to enroll in Prince George's Community College's summer and fall 2010 semester to obtain his high school diploma. Although he failed the necessary equivalency courses during those periods, he re-registered for the spring 2011 semester, completed the necessary courses, and received his diploma from Sidwell in June 2011.

Although Christian was enrolled in Prince George's Community College, it was a limited, specific type of curriculum for the purposes of obtaining his Sidwell diploma. Thus, the trial court was legally correct when it found that, ". . . child support extend[ed] to age 19 or high school graduation, whichever [came] first. So long as Christian [was] working towards his high school graduation, then child support continue[d] to age 19." We agree that appellant had an obligation to pay child support from April 2010, the time when Christian returned to his mother's home, until February 2011, when Christian reached the age of nineteen.

II. Whether the Trial Court Erred in Utilizing the Post-October 1, 2010 Child Support Guidelines in Calculating Appellant's Obligation?

"Child support orders are generally within the sound discretion of the trial court." *Knott v. Knott*, 146 Md. App. 232, 246 (2002). Although the child support guidelines apply in most cases, in situations where the combined adjusted monthly income exceeds the statutory limit, the court may exercise discretion in setting the amount of child support. Md. Code (1984, 2006 Repl. Vol., 2012 Cum. Supp.), § 12-204(d) of the Family Law Article. Permitting judicial discretion promotes the public policy of the guidelines, that even at very high income levels, "a child's standard of living should be altered as little as possible by the dissolution of the family." *Chimes v. Michael*, 131 Md. App. 271, 289 (2000) (quoting *Voishan v. Palma*, 327 Md. 318, 328 (1992)).

Maryland's child support guidelines first require that the trial court determine each parent's monthly adjusted actual income. *Voishan*, 327 Md. at 323. Following this determination, the court then adds the two amounts to arrive at the parent's monthly combined adjusted actual income. *Id*. After calculating the combined adjusted actual income, the court then determines whether the figure falls within the range of incomes found in the schedule of § 12-204(e). *Id*.

Pursuant to Md. Code (1984, 2006 Repl. Vol., 2012 Cum. Supp.), § 12-204(d) of the Family Law Article, under the pre- and post- October 1, 2010 guidelines, it reads:

> Income above scheduled levels. — If the combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its discretion in setting the amount of child support.

Before October 1, 2010, if the parent's monthly income did not reach $10,000, the child support obligation was calculated using the guidelines. *Gladis v. Gladisova*, 382 Md. 654, 663 (2004). However, if the parent's monthly income exceeded $10,000, the court could exercise its discretion in setting the amount of child support. *Id*. After October 1, 2010, the General Assembly changed the highest level specified in the schedule from $10,000 to a $15,000 monthly income. *See* Md. Code (1984, 2006 Repl. Vol., 2012 Cum Supp.), § 12-204(e) of the Family Law Article.

In *Voishan*, 327 Md. at 321, the Court of Appeals granted certiorari to determine whether the trial court erred in determining a child support award. After the parties' divorce, the mother was awarded custody of the parties' two daughters, and the father was ordered to pay $1,550 per month for the minor daughter. *Id*. The father's annual income was $145,000, while the mother earned $30,000 annually. *Id*. at 324. The court found the parent's combined adjusted actual income totaled $175,000 annually or $14,583 per month, exceeding the $10,000 statutory amount. *Id*. The court examined expense sheets for each of the parties and concluded that the reasonable expenses of the child were $1,873 per month. *Id*. at 325. The court then calculated eight-three percent of that figure and rounded the father's share of the obligation down to $1,550 each month. *Id*. The father argued that the court should have used the maximum basic child support obligation listed in the schedule. *Id*. The Court held that it was not the intent of the General Assembly to cap the child support obligation, and ruled that the court did not abuse its discretion in determining the amount. *Id*. at 325-27.

In Chimes, 131 Md. App. at 275, the trial court disregarded the guidelines, and set child support by allocating the child's needs equally between the divorced parties. We agreed, as the trial court had broad discretion since the guidelines did not apply. *Id*. at 290. The trial court was aware of the income and resources available to each of the parties, including the father's nearly $1.5 million monetary award. *Id.* The court acknowledged that the mother earned $65,000 per year, and that the father had the proven ability to

earn more than $120,000 per year. *Id*. After it determined that the parties' income exceeded the maximum amount under the guidelines, the trial court determined the child's reasonable needs using the plaintiffs financial statement. *Id*. We concluded that from the record, it was clear that the court made the decision based on sufficient evidence, and that the court did not abuse its discretion. *Id*. at 291.

In the case *sub judice*, during the January 31, 2011 hearing, the trial court gave appellant and appellee the opportunity to "go downstairs to the ground floor" to the Prince George's County Circuit Court Family Division, so the personnel could give them a child support guidelines sheet and "help [them] calculate the child support as to what [appellee] would've owed [appellant] during the five months that [the] son was with his dad, and then [appellant could] recalculate the amount of child support that [he] would've owed from the time Christian went back to his mom. . . ." After a recess, the court asked the parties, "[d]id you go downstairs and run the guidelines?" to which appellant replied, "no." Eventually, the court phoned the division because it did not have a blank guidelines worksheet to calculate appellant's child support obligation.

(On the phone)

> THE COURT: (Indiscernible) under CADO2-06438, okay, Richardson versus Boozer. Okay, the child's name is Christian, date of birth is 02/07/1992. Okay (indiscernible) be [sic] trying to run the calculation (indiscernible).
>
> Okay, well, just do me a favor. No, because I need you to do this twice. I need you to (indiscernible) father's income, [$]108,400 annually (indiscernible) health insurance cost is 130 a month. And the mother's income is [$]192,000 (indiscernible).
>
> Then I need you to do it over again with mother as primary sole custody, and her health insurance is [$j410 a month. So we can drop dad's health insurance for those months. Follow me? I need you to calculate it in both directions, okay?
>
> And then send it down with the adjusted amount, with three copies, okay? All right, thanks, bye.

(End of phone call)

After a brief recess, the court gave each party a set of the worksheets, and predicated its findings on them. The court concluded that if appellee was the primary custodian, appellant's obligation was $1,391,and if appellant was the primary custodian, then appellee's obligation was $1,052.

> [THE COURT]: All right, so what I've got is $12,780 is dad's child support obligation for 10 months at the recalculated income. Mom's for 5 months at [$]1,052 is [$]5260. Adding the $419 of unreimbursed medical expenses makes that total $5,679. So dad's obligation is $7,101.

After adding appellant's income of$108,410 with appellee's income of $92,000, the parties' adjusted actual income totaled $200,410 annually, or approximately $16,700 monthly. This amount exceeds the highest levels specified in the pre- and post- October 1, 2010 schedules. As a result, we do not find that the court abused its discretion in calculating appellant's obligation, nor in utilizing the post-October 1, 2010 guidelines.

III. Whether the Trial Court Abused Its Discretion By Refusing to Address Appellant's Tuition Claims?

Regarding appellant's overpaid tuition claims, the following colloquy ensued at the motions hearing:

> [APPELLANT]: . . . The final total I believe, if I can get it from Mrs. Boozer, that needs to be adjusted because I have (indiscernible) additional tuition payments which are not reflected in those numbers.
>
> THE COURT: You didn't tell me anything about those.
>
> * * *
>
> [APPELLANT]: Well, Your Honor, my motion did include that.
>
> * * *
>
> THE COURT: No, actually, in your Motion to Modify Child Support, you wanted child support cut off on your son's 18th birthday, which wasn't correct. You wanted credit for an alleged overpayment of child support and you wanted the Statement of Satisfaction and Monetary Judgment about attorneys' fees which was in fact filed right after your motion was filed. There is nothing in here about tuition. . . .
>
> [APPELLANT]: Your Honor, it's my understanding that —
>
> THE COURT: But the tuition is clearly not in there. I'm sorry, it's not. I can't consider that. It's not something that was in the motion.

Appellate review of issues not previously raised

is discretionary. *Elliott v. State*, 417 Md. 413, 435 (2010). The trial court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court," or when the court does not refer to any guiding principles or rules. *In re Yve S.*, 373 Md. at 583 (quoting I*n re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997)). "Questions within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.'" *In re Caya B.*, 153 Md. App. 63, 74 (2003) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. At 312). Accordingly, we conclude that the trial court did not abuse its discretion by refusing to address appellant's claim.

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

FOOTNOTES

1. We found that the trial court did not err (1) in admitting evidence of appellee's inconsistent statements regarding adultery; (2) in failing to consider the parties' agreement regarding joint legal custody for Christian; and (3) in finding that the Alabama and North Carolina rental properties were marital property, in applying the source of funds rule, and in dividing the equity in the marital home 50/50. *Richardson v. Boozer*, No. 2401, September Term 2007, Slip op. 1 (Ct. of Spec. App. August 7, 2008).

2. Other than appellee's assertion, which was not challenged by appellant on the record below, there was nothing else that attested to Sidwell accepting course completion from Prince George's Community College. Moreover, appellee insisted before the trial court, that Christian had completed the necessary college courses, and that Christian received his diploma from Sidwell in June 2011, but there was no documentation in the record to reflect this. However, we perceive that appellee's statement was sufficient to establish this fact.

3. The Age of Majority Bill was composed of Senate Bill ("SB") 657 and House Bill ("HB") 993 of the 2002 General Assembly. SB 657 was signed, and HB 993 was vetoed.

4. Elementary school is "a school in which elementary subjects (as reading, writing, spelling, and arithmetic) are taught to children from about six to about twelve years of age which in the U.S. covers the first six or eight grades." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 735 (2002).

Cite as 2 MFLM Supp. 17 (2013)

Child support: adult destitute child: means of subsistence

Edmund A. Cutts, Jr.

v.

Nancy L. Trippe

No. 1029, September Term, 2011

*Argued Before: Matricciani Berger, Kenney, James A., III. (Ret'd, Specially Assigned), JJ.**

Opinion by Berger, J.

Filed: December 20, 2012. Reported.

** Judge Christopher B. Kehoe did not participate in the decision to report this opinion pursuant to Md. Rule 8-605.1.*

The trial court properly determined that the parties' eldest child, who was mildly retarded, was a destitute adult child within the meaning of FL §§13-101 and 13-102, and was therefore entitled to continuing support from her parents.

This case arises from an order of the Circuit Court for Talbot County modifing the amount of child support to be paid by appellant, Edmund A. Cutts, Jr. ("Father"), to appellee, Nancy L. Trippe ("Mother"). The court also found that the parties' eldest child was a destitute adult child, as defined by statute, and that the parties therefore had a continuing obligation to support her. This appeal followed.

Father presents two questions for our review, which we have rephrased as follows:

I. Whether the circuit court erred by finding that the parties' daughter is a destitute adult child under FL §§ 13-101 and 13-102.

II. Whether the circuit court erred by adhering strictly to the child support guidelines contained in FL § 12-202 to 12-204 in modifying the parties' support obligations.

For the reasons set forth below, we affirm the judgment of the Circuit Court for Talbot County.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother are the divorced parents of three children. Pursuant to the judgment of divorce, entered on February 3, 2005, the parties have joint legal custody of the children, subject to Father's specified visitation. The divorce decree, which incorporated the terms of a settlement agreement between the parties, required Father to pay $200 per week to Mother for the support of the children. Father was also ordered to provide health insurance coverage for the children.

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

Mother was required to pay all uninsured health expenses, co-pays, and deductibles up to $1,000 for a single illness or condition, without contribution from Father. Expenses over $1,000 would be paid one-third by Father and two-thirds by Mother. Mother was further ordered to pay the children's costs for private school, special education fees, book costs, room and board, and other private school expenses, without contribution from Father. Both parties' support obligations were set to terminate upon the first to occur for each child: (1) death of the child or parent; (2) marriage of the child; (3) the child becoming self- supporting; or (4) the child turning age 18, except if still in high school, in which case, support would continue until the child's graduation or the child's nineteenth birthday, whichever occurred first.

The oldest child, Sarah, was born on November 23, 1990. She was 19 years old at the time of the child support modification trial. Sarah was diagnosed with mild mental retardation at a young age. She has attended special schools her entire life and requires constant supervision. At the time of trial, Sarah attended a special school in New York for students who have an IQ below 70. When Sarah returns from school for weekends, holidays, and summer breaks, she resides at Mother's home, where she has her own room. Sarah is the beneficiary of a trust with a value of approximately $400,000 ("the trust"). Mother is the trustee of Sarah's trust, and has the sole power to disburse trust funds.

On January 26, 2010, Mother filed a motion to modify child support in the Circuit Court for Talbot County. The first count alleged that Father had failed and refused to provide reimbursements for certain medical and tutoring expenses incurred by the children. The second count sought modification of Father's child support obligations on the basis of material changes in circumstances, including: increases in the children's medical expenses, Mother's substantial loss of annual income, the inability of Sarah to support her-

self by reason of her disability, and Father's limited exercise of visitation, which placed the primary burden for the children's living expenses on Mother.

On March 8, 2010, Father filed a timely response to the motion to modify child support, and thereafter filed a counterclaim and amended counterclaim. The counterclaim alleged that there had been a material change in circumstances based on the children's attendance at boarding schools, and asked the court to establish a new custody and visitation schedule.

On February 1, 2011, a two day trial commenced. Mother filed a financial statement with the court detailing her monthly expenses for the three children. Mother testified that she pays 10 percent of the tuition for each child, and that her parents pay the balance. Aside from the tuition assistance provided by her parents, Mother testified that she pays for all of the children's other expenses, including food, transportation, clothes, summer camps, and tutors. In 2008, the children's health insurance provider initiated an $1,800 deductible, whereas there previously was no deductible. This deductible increased to $2,400 after December 2008. There was also a decrease in coverage for psychological care, from 80 percent to 20 percent, and increases in co-payment obligations. In the period between 2008 and 2009, Mother testified that she paid between $2,300 and $2,400 in deductibles on the health insurance policy. In the period between 2009 and 2010, Mother paid a similar amount.

As to Sarah in particular, Mother testified that she prepares Sarah's food and coordinates her medical appointments when Sarah is home. Mother partially paid $6,500 for Sarah's orthodontic bill, $603 for Sarah's oral surgery, and $200 to repair a broken orthodontic wire. Mother also introduced medical bills for Sarah totaling $4,520.95, which were related to Sarah's treatment for mild mental retardation.

Father testified that he was paying monthly insurance premiums of $1,112, which was an increase from the monthly premiums of between $500 and $600 charged at the time of the divorce. At trial, Father did not contest the amount of Sarah's orthodontic bills and agreed to be responsible for unpaid balances on those bills. Father, however, testified that he would not contribute to certain other medical expenses because, contrary to Mother's testimony, he had not been consulted about those expenses in advance.

The parties stipulated that Mother's income for the previous year was $72,601. The recent economic recession had affected Mother's income, resulting in a $90,000 to $100,000 reduction in income due to lost real estate commissions. Father's income for the prior year was $83,425.

The trial court issued a memorandum opinion on June 9, 2011. The trial judge found that Sarah was a destitute adult child within the meaning of Md. Code (1984, 2006 Repl. Vol.), §§ 13-101 and 13-102 of the Family Law Article ("FL"), and was therefore entitled to continuing support from Mother and Father. The court also found that there had been a material change in circumstances due to Mother's decreased salary, which warranted a modification to the parties' existing child support obligations. Accordingly, the trial court calculated the amount of child support for Sarah and for the youngest child using the parties' current incomes.[1] In calculating the amount of support, the trial court adhered strictly to the child support guidelines contained in FL §§ 12-202 to 12-204 ("the Guidelines"). This resulted in an increase in the amount of Father's child support obligations. The trial judge further determined that the increases in healthcare costs did not warrant any departure from the Guidelines, because the increased expenses to each party essentially cancelled each other out. Finally, the trial judge modified Father's visitation schedule and appointed a parent coordinator to orchestrate visitation arrangements.

STANDARD OF REVIEW

We apply the clearly erroneous standard in reviewing a trial court's determination as to whether a child is a "destitute adult child" under FL §§ 13-101 and 13-102. *Corby v. McCarthy*, 154 Md. App. 446 (2003) (applying clearly erroneous standard to destitute adult child determination); *Goshorn v. Goshorn*, 154 Md. App. 194 (2003). The clearly erroneous standard also applies to the review of modifications of child support. *Ley v. Forman*, 144 Md. App. 658 (2002) (applying clearly erroneous standard to review of a child support modification). However, "where an order [of the trial court] involves an interpretation and application of Maryland constitutional, statutory, or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." See *Schisler v. State*, 394 Md. 519, 535 (2006).

DISCUSSION

I. Destitute Adult Child Determination

Father argues that the trial court erred by determining that the parties' daughter, Sarah, is a "destitute adult child" within the meaning of FL §§ 13-101 and 13-102 for three reasons: (1) failure to consider evidence of Sarah's trust; (2) failure to make specific findings of fact regarding Sarah's reasonable living expenses; and (3) failure to weigh Sarah's expenses against her resources. Mother contends that the trial court did not err because the trust is not a currently available resource, and there was ample testimony regarding the daughter's reasonable expenses upon which to base a finding that she is a destitute adult

child. We agree that the trial judge did not err in finding that Sarah is a destitute adult child.

Parents have a statutory duty to support an adult destitute child. FL § 13-102 provides, in pertinent part:

> (b) Duty to support destitute adult child. — If a destitute adult child is in this State and has a parent who has or is able to earn sufficient means, the parent may not neglect or refuse to provide the destitute adult child with food, shelter, care, and clothing.
>
> (c) Penalties. — A person who violates any provision of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both.

A "destitute adult child" is defined as "an adult child who: (1) has no means of subsistence; and (2) cannot be self-supporting, due to mental or physical infirmity." FL § 13-101(b). The Guidelines apply to the establishment or modification of child support under this provision. *Goshorn*, 154 Md. App. at 219 (2003) (holding that the child support "guidelines are applicable to destitute adult children").

A. The Trust

We first consider whether a trust constitutes a "means of subsistence." No Maryland court has seemingly addressed this particular issue. We have, however, held that only resources that are currently available to a child should be considered in the destitute adult child analysis. In *Presley*, for example, we emphasized the focus on a child's "current situation," and cautioned that future resources should not be considered in the analysis. *Presley v. Presley*, 65 Md. App. 265, 278-79 (1985) (holding that the trial court should examine "the child's *available* assets" based on the child's "*current* situation. . . .") (emphasis added). We further explained:

> If, upon attaining tenure [at her job] at some future time, [the child] is relieved of some of her medical expenses by reason of an employer-provided insurance policy, her need for support (and thus appellant's obligation to provide it) may change; but that has nothing to do with whether appellant has any current obligation.

Id. at 279.

Here, the trial court considered the trust, but excluded it from the destitute adult child analysis on the basis that Sarah had no right to access the trust funds, nor had any funds ever been disbursed to Sarah. The trial judge explained:

> [No evidence was presented to establish that Sarah has the right to call on any of the trust principal or income for her support. Mother, who is the trustee, may legitimately exercise her discretion not to distribute trust funds in order to ensure that the financial means to support Sarah continue to exist when her parents are no longer able to provide support?[2]

This is analogous to the situation 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. Since the trial judge found that the trust is not currently available to Sarah, the trial court was legally correct in excluding the trust from its analysis. Further, our analysis is underscored by the Maryland Discretionary Trust Act. *See* Md. Code (1994, 2012 Repl. Vol.), § 14-401 *et seq.* of the Estates & Trusts Article ("ET"). ET § 14-402(a)(2) provides that:

> Trust property may not be considered property or an available resource of the beneficiary.

Accordingly, we hold that a trust may not be considered as an available resource in the destitute adult child analysis.

B. Expenses

Father next argues that Mother "utterly failed to produce evidence at trial" of Sarah's "reasonable living expenses," and that the trial judge erred by failing to make findings of fact regarding Sarah's expenses. We disagree.

First, we note that the concept of "reasonable expenses" does not appear in the language of the statute itself. Pursuant to FL § 13-102(b), a parent with sufficient means may not "refuse to provide the destitute child with food, shelter, care, and clothing." In interpreting this language, we explained in *Presley* that we were rejecting the notion that "food, shelter, care, and clothing" could be construed to mean *any* expenses, "no matter how extravagant those expenses might be." *Presley*, 65 Md. App. at 277-78. We noted that such an interpretation would not be consistent with the legislative intent because it is "inconsistent with the very concept of a 'destitute adult child." *Id.* Rather, we held that:

> The child need not be penniless, nor may he be profligate. The duty of support arises when the child has insufficient resources and, because of mental or physical infirmity, insufficient income capacity to enable him to meet his *reasonable living expenses*."

Id. (emphasis added).

In its memorandum opinion, the trial court summarized Sarah's expenses as established through the parties' testimony. Our review of the record shows that the trial judge also considered the reasonableness of these expenses. Mother filed a financial statement with the court listing her monthly expenses for Sarah and the other children. At trial, Father scrutinized each expense, item by item. Father's counsel questioned Sarah's medical expenses as well as the expenses incurred for a diagnostic evaluation performed on Sarah by a PhD, on the basis that a PhD "is not a medical doctor." Mother explained that although not a medical doctor, the PhD was a doctor specializing in children with learning disabilities. Mother further testified that the PhD performed educational testing, and diagnosed Sarah with attention deficit disorder. Father's counsel sought to undermine this explanation by questioning why Sarah was seemingly not put on medication for the disorder until three years later. Mother explained that Sarah was, in fact, put on medication right away, but that there were no prescription expenses submitted initially because Sarah first went through trials of medication and received samples from the doctor.

Next, Father's counsel questioned the transportation expenscs listed on Mother's financial statement. Mother explained that the expenses included gas, tolls, hotels, flights, etcetera for transportation for Sarah back to school. Mother testified that about two thirds of the total transportation costs were for Sarah because of the distance to her school in New York. Due to the distance, Mother was required to spend the night in a hotel when taking Sarah to school.

Additionally, Father's counsel questioned the educational expenses. Mother explained that "half of that [amount] was the initial deposit. I know the deposit for Sarah's school is $4,000. . . . There's also tuition insurance which is two percent of the total cost of tuition . . . plus the text books. . . . You've got, you know, there are other book store supplies, sports equipment, fees for clubs, photography course fees. That's what all these other expenses are."

The trial court also carefully considered the reasonableness of these expenses throughout the trial. For example, Father challenged the reasonableness of expenses for the children's shelter and utilities, arguing that such expenses "are greatly diminished by the fact that [the children are] in boarding school for the vast majority of the year." The trial judge interjected: "Well doesn't [Mother] need a home for [the children] to reside in on the weekends, and vacations[,] and in the summer? It's not like she can downsize to a[n] efficiency apartment." Similarly, the trial judge rejected Father's contention that Mother was not actually paying for Sarah's educational expenses. The court stated:

> Well I don't know that it's fair to say that she's not paying for the private school. It's true her parents are paying the bulk of it because that's the tuition. But she's paying the deposit for the tuition and she's paying a myriad of other expenses that come up[,] and having sent a couple kids myself to private school I know that once the tuition check is written that's not the end of it. There are the books and the clubs and the dues and the transportation and the insurance and all that adds up. So it's not like mom has a free ride.

We hold that there was ample evidence and testimony that Sarah is incurring reasonable expenses that trigger parental support under the destitute adult child statute. In our view, the trial court was not clearly erroneous in structuring its memorandum opinion with a summary of the reasonable expenses incurred based on testimony, rather than explicit findings of fact regarding the expenses.

C. Balancing Test

Finally, Father argues that the trial court erred in its application of the destitute adult child statute by failing to compare Sarah's expenses to her resources. We hold that the trial court applied the proper standard.

We begin our analysis by revisiting the applicable statutory language. A "destitute adult child" is defined as "an adult child who: (1) has *no means of subsistence*; and (2) cannot be self-supporting, due to mental or physical infirmity." FL § 13-101(b) (emphasis added). We have extended this definition to include not only individuals with no means of subsistence, but also those with expenses that exceed their resources. *See, e.g., Presley*, 65 Md. App. 265 (child with income of $14,200 qualified as a destitute adult child); *Corby*, 154 Md. App. 446 (2003) (child with income of $22,000 qualified as a destitute adult child). Thus, the mere fact that an adult with physical or mental infirmities has a job or other source of income is not an automatic bar to parental support. In cases where a child has financial resources, "the court must weigh [the child's] total reasonable living expenses against her existing available resources. If it finds a net deficit — a need for parental support — it may then order such support." *Presley*, 65 Md. App. at 279. Upon finding a deficit, the resulting order of support is to be calculated based upon the Guidelines. *Goshorn*, 154 Md. App. at 219.

In concluding that Sarah qualified for support as a destitute adult child, the trial court, in a memorandum opinion, addressed the statutory requirements of FL §§ 13-101 and 13-102, as well as our interpretation

of these provisions in Presley. The court first summarized the testimony regarding Sarah's medical, educational, and general living expenses. The court then addressed Sarah's resources and ability to provide for herself. The court determined that Sarah was unable to provide for herself, and that she had no available resources or capacity to work due to mental infirmity. Additionally, the court set out the parties' incomes, and found and that Mother's and Father's incomes were "sufficient to provide for Sarah's support." Accordingly, the court concluded that Sarah is a destitute adult child within the meaning of the statute, and therefore entitled to continuing child support. The court calculated the amount of support based on the Guidelines.

Father concedes on appeal that Sarah meets the requirement of the second prong of FL § 13-101(b); namely, the inability to be self-supporting due to mental infirmity. Thus, as Father points out, "this case turns on whether Sarah has 'no means of subsistence" under FL § 13-101(b).

In our view, Sarah fits the classic statutory definition of "destitute," and therefore a balancing analysis was unnecessary. 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." FL § 13-101(b). Accordingly, under these circumstances, there was no need for the trial judge to go any thrther and weigh Sarah's financial resources against her expenses, because there were simply no financial resources to consider. The purpose of establishing the balancing test in our prior decisions was not to impose a formulaic straightjacket on trial judges, but rather to extend support to those who otherwise would not qualify under the plain language of the destitute adult child statute. For that reason, *Presley* and *Corby* recognized that parents have a duty to support not only adult children with "no means of subsistence," but also those with insufficient financial resources. In sum, there are two types of individuals who qualify as destitute adult children under the statute. First, there are those with no financial resources or earning capacity, and thus by definition destitute. Second, there are individuals who have financial resources, but nevertheless are destitute due to a net deficit between reasonable living expenses and financial resources — a finding that can only be ascertained by conducting a balancing analysis.

Our rationale is bolstered by several important considerations. First, requiring courts to go through the motions of a balancing test in cases where a child has no source of income would be meaningless; if a child has no resources whatsoever, any showing of reasonable expenses will, by default, constitute a deficit. Second, our prior cases addressing this statute, such as *Presley* and *Corby*, involved children with jobs, and thus required a different analysis than the instant case. Accordingly, we hold that the trial judge applied the proper standard in determining that Sarah constituted a destitute adult child.

II. Child Support Modification

Father argues thatthe trial judge failed to find that the children's significantly reduced time at Mother's home was also a material change in circumstances that warranted a reduction in his child support obligations. Father also argues that the trial judge erred by failing to consider Sarah's trust, and, as a result, erred by adhering strictly to the Guidelines in determining Father's support obligation.

A trial court may modify a party's child support obligation if a material change in circumstances has occurred which justifies a modification. *Ley v. Forman*, 144 Md. App. 658, 665 (2002). "Once a material change in circumstances has occurred, the court must apply the guidelines in [Sections] 12-202 to 12-204 of the Family Law Article to determine the level of support to which the child is currently entitled." *Rivera v. Zysk* 136 Md. App. 607, 619 (2001). Under FL § 12-202(a)(2)(i), "[t]here is a rebuttable presumption that the amount of child support which would result from the application of the child support guidelines . . . is the correct amount of child support to be awarded." In order to rebut that presumption, a party must produce "evidence that the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(2)(ii). *See also Corby*, 154 Md. at 496 (the trial court "is vested with discretion that allows it to depart from the strict application of the Guidelines under certain circumstances."). On appeal, we recognize that the decision "[wjhether to grant a modification rests with the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong." *Ley*, 144 Md. App. at 665 (citing *Dunlap v. Fiorenza*, 128 Md. App. 357, 363 (1999)).

A. Boarding School Attendance

Father first contends that the fact that the children spent significant time at boarding schools amounted to a material change in circumstances. As such, Father argues that the court should have only awarded one third of the Guidelines support amount to reflect the amount of time that the children actually spend at Mother's home. The trial judge rejected this argument, observing that: "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." Additionally, the trial judge observed:

> [Mother is paying] a myriad of other

> expenses that come up[,] and having sent a couple kids myself to private school I know that once the tuition check is written that's not the end of it. There are the books and the clubs and the dues and the transportation and the insurance and all that adds up. So it's not like mom has a free ride.

Father does not dispute that the children reside at Mother's home on weekends, holidays, and summer breaks. We, therefore, hold that the trial court was not arbitrary in its decision, nor was it "clearly wrong" to decline to depart downward from the Guidelines in this situation.

B. The Trust

Finally, Father argues that the trial court should have considered Sarah's trust, and on that basis departed downward from the Guidelines. Although it is true that in "determining the amount of support, the court shall consider the financial circumstances of the individual," the trust was properly excluded from the analysis because it is not an asset currently available to Sarah.[3] If trust funds are made available to Sarah in the future, that would constitute a material change warranting a child support modification. At that point, it would be appropriate to consider the trust in determining child support obligations. Accordingly, the trial court did not err by excluding the trust from its analysis.

For the foregoing reasons, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The parties agreed that support would terminate as to the second eldest child during the same month that the memorandum opinion was issued due to the child's graduation from high school.

2. is noteworthy that there was almost no evidence presented regarding the trust. The trust was not introduced into evidence, and the trial court had no information regarding the trust other than that gleaned from the Mother's testimony.

3. *See supra*, Part 1(A), discussing the trust analysis in detail.

Cite as 2 MFLM Supp. 23 (2013)

CINA: change in permanency plan: 'suitability to parent' test

In Re: Andrew A., David A., And Jacob M.

No. 295, September Term, 2012

Argued Before: Woodward, Zarnoch, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Woodward, J.

Filed: November 19, 2012. Unreported.

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.

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

After a two-day permanency plan review hearing, the Circuit Court for Montgomery County, sitting as a 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 (CINA) in February 2009.[1] The children's mother, Sarah A., presents two questions for our review, which we have rephrased: [2]

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?

For the reasons outlined below, we answer each question in the negative and affirm the judgment of the juvenile court.

Facts and Proceedings

The three children in this case are brothers, all born of Ms. A., each having a different father. Andrew was born on May 14, 2002; David on August 4, 2003; and Jacob on September 14, 2006. The fathers of each of the children are not involved in these proceedings in any way.[3] Andrew was first declared CINA on February 28, 2003. He was returned to Ms. A. in March of 2004. In 2007, the Montgomery County Department of Health and Human Services (the "Department") found that Ms. A. had physically abused Andrew and referred the family for services through the Department, leaving the children at home. Despite the Department's intervention, Ms. A. continued to use physical discipline, curse at her children, and had difficulty understanding their needs.

In November 2008, the children and Ms. A. were in a car accident where Andrew, David and Jacob were not properly restrained in a child's booster seat. Ms. A. had been given funds by the Department for the purchase of booster seats. On the weekend of December 20, 2008, the three boys were left in the care of Isaac, an older brother, contrary to the safety plan then in place. Isaac is not part of the action before this Court. Isaac had been diagnosed with mental retardation, but Ms. A. denied this condition. An incident occurred while Isaac was in charge where he punched Jacob in the stomach and twisted Jacob's arm, severely injuring him. Ms. A. did not seek medical care for Jacob's injury for two days. The children, including Isaac, were put into shelter care on December 22, 2008, the day Ms. A. finally sought treatment for Jacob's injury.

Ms. A. has a history of psychiatric hospitalizations. She attended therapy in the past, but rebuffed offers to talk with therapists, insisting that her problems were with finance and housing, not with mental stability. Ms. A. revoked authorization to access her records so the current state of her mental health treatment was unknown.

The three boys, plus Isaac, were declared CINA on February 18, 2009. The juvenile court concluded that Ms. A. had physically and emotionally abused the children. The juvenile court found that Ms. A. had generally failed to understand the needs of each of her children. It also noted that Andrew was a prior CINA. Each child was committed to the care of the Department following this hearing. The juvenile court also ordered Ms. A. to undergo psychological and psychiatric evaluations and complete parenting classes.

Initially, the permanency plan in this case was

reunification with Ms. A. As of the date of the permanency plan review hearing, the plan had been in effect for over two and a half years. During that time period, Andrew was placed in several foster care homes, but eventually was admitted into St. Vincent's Residential Treatment Center on August 11, 2011, because of aggressive behavior. Jacob was placed in the care of Tuwana W. on August 21, 2009. Following several other foster placements, David was placed with Ms. W. in July 2011.

A permanency plan review hearing was held on February 23 and 24, 2012. On March 30, 2012, the juvenile court ruled that the permanency plan for all three children be changed from reunification with Ms. A. to adoption by a non-relative. The following is a summary of the evidence adduced at that hearing.

Dr. Carlton Munson, a professor at the University of Maryland at Baltimore's School of Social Work, was admitted as an expert in the field of clinical social work and clinical child welfare. Dr. Munson performed a parenting evaluation of Ms. A. and, based on that evaluation, opined that there was little evidence that would suggest Ms. A. would be able to reunite with the children in the next one to three years.

The evaluation performed by Dr. Munson examined 16 different factors: family history, motivation to reunify, financial resources, supportive networks, alcohol and substance abuse history, legal system involvement, medical status, hygiene, housing, parenting experience and skills, psychological and mental functioning, intellectual functioning, mental diagnoses, veracity, children's status, and ancillary considerations. Of these factors, Dr. Munson listed only four as positive: substance abuse, medical status, hygiene, and ancillary considerations. All of the other factors were designated as "areas of concern." Dr. Munson also noted that Ms. A. was not always completely honest in her answers to him, and would often "fak[e] good" in an effort to manipulate the outcome of the examination. Dr. Munson incorporated his findings regarding the 16 factors into a model, and assigned an overall score of 25% to Ms. A. He testified that a score of less than 50% is cause for concern that parent can provide proper care for children. Dr. Munson also testified to the importance of permanence to children, and that lack of permanence may cause children to exhibit anxiety, fear, aggression, and opposition.

Sandie Fowler, a community service aide for Child Welfare Services of Montgomery County, was accepted as an expert in early childhood development, parenting education, and training. Fowler testified that visits between Ms. A. and the children, which Fowler supervised, were excellent for the previous 6 months. This was because the tension and hostility between Ms. A. and Department employees that was there in prior months had dissipated. Such change corresponded to the time in which the Department filed for a change in permanency plan. Fowler also stated that there was still much inconsistency in the way Ms. A. interacted with her children. The children didn't always know when Ms. A. was going to visit, and Ms. A. did not always engage with her children during visits, often talking on her phone or leaving the room. Fowler testified further that Ms. A. did not always read the children's cues, an important skill when dealing with special needs children. Of grave concern to Fowler was the fact that Ms. A. did not put the needs of her children above her own. In Fowler's opinion, Ms. A. was not capable of taking care of the children.

Dr. James Venza is the executive director of the Reginald S. Lourie Center for Infants and Young Children where he also serves as director of the therapeutic nursery program. The juvenile court accepted him as an expert in clinical psychology and early childhood mental health. According to Dr. Venza, Jacob was enrolled at the Lourie Center's therapeutic nursery program, and had been since September of 2009. Dr. Venza observed that Jacob had difficulty with sudden changes to his routine. Dr. Venza testified that Jacob made improvements by March 2010, but that those improvements declined in April 2010. Between December 2010 and January 2011, the children had unsupervised overnight visits with Ms. A. During this period, Jacob became overwhelmed, was unable to sit still in class, was sobbing, and acting out aggressively. By April 2011, however, Jacob began to stabilize when he visited with Ms. A. once a week on a supervised basis.

Ms. A. had little interaction with the Lourie Center. Dr. Venza noted the importance of parent involvement in the therapeutic nursery program, but stated that Ms. A. was not involved. Ms. A. failed to attend Jacob's in-class birthday party. In addition, the Lourie Center attempted to contact Ms. A. multiple times, beginning in July of 2010. These efforts were unsuccessful, and Ms. A. later asked the Lourie Center to stop attempting to contact her.

Jessica Cheeks testified as a social worker who had worked with the A. family for two years. Andrew and David were first placed in a foster home together, while Jacob lived with Ms. W. Andrew and David then were moved from their initial placement, and joined Jacob at Ms. W's home. Andrew, however, became aggressive, and after four or five weeks with Ms. W. had to be moved to St. Vincent's.

Cheeks testified that David made a good adjustment to his foster home with Ms. W. He was connected to his foster family, calling the other children his brothers. Being separated from Andrew was initially difficult for David, although it proved to be a positive change

because Andrew's acting out drew so much of the family's attention away from David. David was now thriving, and Jacob was also currently doing well. Cheeks concluded that it was not in Jacob's best interest to be moved from his placement with Ms. W. and that David and Jacob had a close bond and should not be separated. Cheeks opined that adoption by non-relative was the best option for David and Jacob, particularly if that non-relative was Ms. W. Ms. W., however, was not currently able to adopt the two boys. In Cheeks's opinion, Ms. W. was not able to adopt the children because of financial concerns regarding services necessary for the children.

Conversely, according to Cheeks, Andrew was still aggressive, fearful and unable to regulate his emotions. Andrew claimed that he wanted to go home, but then also asked to live with David and Jacob. In Cheeks' opinion, Andrew was not close to being released from St. Vincent's; he still had much progress to go before discharge. Cheeks also noted Ms. A.'s inconsistency in her interaction with Andrew. Ms. A. was subject to frequent mood changes, which affected her interaction with Andrew, and she disengaged very quickly if her mood changed. According to Cheeks, Ms. A. visited with Andrew only six times over a period of seven months. Ms. A. would not visit Andrew unless Fowler provided transportation, even though Ms. A. had a car. Like the Lourie Center, Ms. A. told the officials at St. Vincent's not to call her. Cheeks believed that it would help Andrew to focus on permanency, but if there was a possibility of returning to Ms. A.'s care, Andrew could not focus on permanency because of Ms. A.'s inadequate parenting. Consequently, Cheeks recommended Andrew's permanency plan be changed to adoption by a non-relative.

In its oral opinion, rendered on March 30, 2012, the juvenile court discussed the law governing the determination of a permanency plan and then conducted an extensive review of the evidence adduced at the permanency plan hearing, including the testimonies of Dr. Munson, Fowler, Dr. Venza, and Cheeks. The court concluded by analyzing such evidence, as follows:

> As I indicated in the beginning, the permanency plan requires the Court to consider many factors in terms of the ability for the children to be safe and healthy in the home of the parent.
>
> The Court finds that there would be limited, perhaps minimal ability of these children to be safe and healthy in the home of the mother, based upon her cognitive and psychological deficiencies; based upon her inconsistency and inability to care for the needs of these children that have special needs, particularly in the emotional area.
>
> It would be an emotional — strike that. And further, as we've heard before, the mother does not put the children's needs above her own. And this is critical in any parent/child relationship, but more so where you have children who have emotional and behavioral challenges.
>
> The attachment and emotional ties to the natural parent, there is true, there is some residual attachment and feeling for the mother, love of the mother. Andrew has an idealized version of going home, yet he really looks to his brothers, and that's where he wants to be.
>
> There has not been the level of interaction with mother at visits. He is disconnected with the mother at the visits.
>
> With regard to Jacob and David, the interaction with their mother even at supervised visitations is limited. In fact, they go to the social worker and the supervisor for more interaction than with Mother.
>
> Jacob and David are very much attached to the current caregiver. There is no doubt of that. Their emotional health is improving with Ms. W[ ]. With Andrew, since he was only there four to five weeks, we cannot make that same statement with respect to him.
>
> So in terms of attachment with the current care giver, Andrew's attachment is just an issue that the Court cannot make findings about, since he is in a treatment facility right now, and it is unknown how long he will need to be there.
>
> In terms of the length of time with the care giver, Andrew was only four to five weeks with the mother. He's now been in the placement, I guess, since August of 2011. David has been with Ms. W[ ]. since August of 2011. Jacob has been there since August of 2009, which is the greater part of his life.
>
> Emotional development or educational harm to the child if moved

from the current placement. While the current placement is certainly very good for Jacob and David, Andrew is hopefully, well, he is receiving services, and hopefully there will be some beneficial effect on that.

Yes, it would be good for Jacob and David to stay at their current location. They need stability, and this home has provided stability, certainly for Jacob for over two and a half years, and for David for eight months. There is a strong bond between the two of them and they are both comfortable in Ms. W[ ]'s home.

But what is important is also permanency. And whether that permanency takes place with Ms. W[] or with some other arrangement as necessary, that of course is the goal.

It should be noted that it is a lack of structure and a lack of consistency that has a negative effect upon these children.

The harm by remaining in State custody for an excessive period of time, this goes to the need of permanency. The need for permanency is high, not only for Jacob and David, but also for Andrew who has to work on his issues. If the uncertainty can be resolved, the children can focus and work on their emotional and behavioral issues.

Now, it is true that there is some uncertainty, and it's been argued that there is some uncertainty, as to whether the foster parent in this case will adopt or not adopt. The Court does not consider the foster parent an[ ] adoptive resource at this time and for purposes of this analysis. But whether the foster parent will adopt or not adopt does not equal the uncertainty of returning to an unstructured home where the parent cannot meet the needs of these children.

The mother is not engaged in therapy, is resistant to share information, is not involved with the Lourie Center, and these are all having negative effects upon the children.

Although, yes, there has been some very recent progress in terms of the mother controlling her mood, it does not demonstrate that she will have the ability to adequately care for these children without substantial full-time services. Her focus and improvement has been on herself and not assisting her children.

For all the reasons cited, the Court finds that it is in the best interest of Andrew, David, and Jacob, that the permanency plan of reunification be changed to that of adoption with a non-relative.

Additional facts will be provided as necessary to address each issue.

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

In reviewing the decision of a juvenile court, we utilize three standards of review simultaneously:

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

In re Shirley B., 419 Md. 1, 18 (2011) (alterations in original) (citations omitted). Examination of the admis-

sion of evidence under *Frye-Reed* is subject to *de novo* review. *Clemons v. State*, 392 Md. 339, 359 (2006). Accordingly, we shall examine Ms. A.'s first issue *de novo*.

Maryland Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

In addition:

> Under the *Frye-Reed* test, a party must establish first that any novel scientific method is reliable and accepted generally in the scientific community before the court will admit expert testimony based upon the application of the questioned scientific technique. A trial court may take judicial notice of the reliability of scientific techniques and methodologies that are widely accepted within the scientific community. A trial court also may take notice that certain scientific theories are viewed as unreliable, bogus, or experimental. However, when it is unclear whether the scientific community accepts the validity of a novel scientific theory or methodology, we have noted that before testimony based on the questioned technique may be admitted into evidence, the reliability must be demonstrated. While the most common practice will include witness testimony, a court may take judicial notice of journal articles from reliable sources and other publications which may shed light on the degree of acceptance *vel non* by recognized experts of a particular process or view. The opinion of an expert witness should be admitted only if the court finds that the basis of the opinion is generally accepted as reliable within the experts particular scientific field.

Montgomery Mitt. Ins. Co. v. Chesson, 399 Md. 314, 327 (2007) (internal quotation marks and citations omitted). The purpose of the *Frye-Reed* test is to prevent "the unrestrained admission of evidence based on new scientific principles." *Id.* at 328 (citation omitted). As Judge Fidridge noted in *Reed*, where scientific techniques are broadly and generally accepted, the trial court may take judicial notice of their reliability. *Wilson v. State*, 370 Md. 191, 201 (2002) (citing *Reed*, 283 Md. at 380).

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:

> Basically what [Dr. Munson] did was he took factors based on research, as he indicated, and he used those factors in terms of coming up with his opinion. That, in his expertise, he is able to do.
>
> **It is not a question of [ ] scientific evidence that's being presented to the Court here. There is no certainty with respect to this. This is an opinion. This can be argued either way. We can take each one of these factors individually and he could testify to them based upon the interview.**
>
> **The only thing that he did was, he put this into a protocol, a way of compiling this information so that you can look at it in an overview and come to certain opinions regarding it.** Now he did say that many of the tests that he used to get information on the basis for each of these factors were, in fact, established scales, such as alcohol [or]

substance abuse.

* * *

[W]hat this protocol is is really a compilation of information as opposed to a scientific test with a scientific certainty, that if somebody scores between X and Y, that that means this or that.

He did testify that the way that he scored it, that certain numbers give indications to him based upon his past experience using this test. Once again, it's something that can be argued that maybe this has a certain value or it doesn't have a certain value. It is an indicator that he uses, but it is by no means two plus two equals four. It's not coming in for that kind of situation at all.

(Emphasis added).

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. "It is well settled in Maryland that a judgment in a civil case will not be reversed in the absence of a showing of error *and* prejudice to the appealing party." *In re Ashley E.*, 158 Md. App. 144, 164(2004) (emphasis in original). 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. The court explained:

Now, just a word about this testing protocol that was established by Dr. Munson. **Although Dr. Munson would use this protocol in a way where he assigned numbers and values to the various factors to be considered, the Court did not really apply much substance to the numbers that he used. It was rather the interest and the factors that were focused on that were more important.**

So for an example, whether you put a number on a history of domestic violence or a history of psychological disorder is not really as important to the Court as the fact of whether there was a history of domestic violence or a history of psychological disorder. No matter what we call it, those are appropriate factors for the Court to consider, and certainly appropriate for an expert in the field to consider in rendering an opinion as to the suitability of someone to parent children.

(Emphasis added). 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 Department counters that the juvenile court permissibly exercised its discretion when changing the permanency plan. Specifically, the Department argues that the juvenile court properly analyzed the factors that must be considered under Md. Code (1974, 2006 Repl. Vol.), Family Law Art. § 5-525(f)(1),[4] and from that analysis concluded that the permanency plan should be changed.

The juvenile court is required by statute to do the following when conducting a permanency plan hearing:

(i) Determine the child's permanency plan, which, to the extent consistent with the best interests of the child, may be, in descending order of priority:

1. Reunification with the parent or guardian;

2. Placement with a relative for:

A. Adoption; or

B. Custody and guardianship under § 3-819.2 of this subtitle;

3. Adoption by a nonrelative;

4. Custody and guardianship by a nonrelative under § 3-819.2 of this subtitle; or

5. Another planned permanent living arrangement that:

A. Addresses the individualized needs of the child, including the child's educational plan, emotional stability, physical placement, and socialization needs; and

B. Includes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life; and

(ii) For a child who has attained the age of 16 years, determine the services needed to assist the child to make the transition from placement to independent living.

Md. Code Ann. (1974, 2006 Repl. Vol.), § 3-823(e) of the Courts and Judicial Proceedings (I) Article ("CJP I"). "In determining the child's permanency plan, the court shall consider the factors specified in § 5-525(f)(1) of the Family Law Article." CJP I § 3-823(e)(2). The purpose of creating a permanency plan is to prevent "foster care drift," a situation where foster children remain out of their biological home for the majority of their childhood without being placed in a permanent home. I*n re Adoption/Guardianship No. 10941*, 335 Md. 99, 104 (1994).

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 in making that decision.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The Maryland Code defines "child in need of assistance" and "CINA" as follows:

(f.) "Child in need of assistance" means a child who requires court intervention because:

(1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and

(2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

(g) "CINA" means a child in need of assistance.

Md. Code (1974, 2006 Repl. Vol., 2010 Supp.), §§ 3-801(f), (g) of the Courts and Judicial Proceedings Article.

2. The original questions presented are:

1. Did the court err in refusing to strike the testimony of Dr. Munson, where his "suit-

> ability to parent test" was, by his own admission, not generally accepted in the field of social work psychology?
>
> 2. Did the court err in changing the permanency plan from reunification to nonrelative adoption, where the special needs children opposed the plan and they were not in a pre-adoptive home?

3. Andrew's father's name is Alhadji K whose whereabouts are unknown. David's father's name is Albert M., a resident of Frederick, Maryland who is not involved in David's life. Jacob's father's name is George M., whereabouts unknown.

4. These factors are:

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

Md. Code (1974, 2006 Repl. Vol.), § 5-525(f)(1) of the Family Law Article.

Cite as 2 MFLM Supp. 31 (2013)

Adoption/Guardianship: termination of parental rights: relationship to foster parents

In Re: Adoption/Guardianship Of Cheyanne H.-R.

No. 02693, September Term, 2011

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

Opinion by Salmon, J.

Filed: November 19, 2012. Unreported.

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.

Appellant, Christina B., appeals the judgment of the Circuit Court for Baltimore City, sitting as a juvenile court, terminating her parental rights to Cheyanne H-R.,[1] and granting guardianship of the minor child to the Baltimore City Department of Social Services ("BCDSS" or "the Department"). Appellant presents a single question on appeal, which we have simplified as follows:

Did the circuit court err in terminating appellant's parental rights?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

I.[2]

Cheyanne Marie H-R. is the biological child of appellant and Samuel H., Jr.,[3] Cheyanne was born prematurely at Johns Hopkins Hospital 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 her birth. Those symptoms included tremors, increased muscle tone, and poor weight gain. Cheyanne remained at Johns Hopkins Hospital until June 8, 2009.

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

Appellant has a history of substance abuse and legal problems that related to such abuse.[4] During her pregnancy with Cheyanne, appellant participated in the Center for Addiction and Pregnancy ("CAP"), a program at Johns Hopkins Hospital that offers addiction treatment and parenting classes to assist pregnant women with substance abuse problems.[5] Through CAP, appellant received methadone to treat her heroin addiction. She failed, however, to adhere to the program requirements by missing individual and group sessions and obstetric appointments. She tested positive for opiates, on January 9, 2009, and for cocaine on April 13, 2009, and she failed to to complete the required parenting classes. Appellant, however, did not test positive for drugs when she was admitted to the hospital at the time of Cheyanne's birth.

After Cheyanne's birth, appellant was diagnosed with bipolar and anxiety disorders.[6]

On June 9, 2009, BCDSS filed an emergency Petition for Shelter Care, citing Cheyanne's medical history and drug exposure, appellant's failure to comply with the CAP program and Mr. H.'s history of substance abuse coupled with the existence of pending legal matters against him. The Court granted the Department's Petition on the same day, ordering that temporary custody and guardianship of Cheyanne be granted to BCDSS.

Concurrently, BCDSS assigned Ms. Jennifer Francis, a Child Protective Services worker with special training in drug addiction, to investigate appellant's ability to care for Cheyanne. Following Ms. Francis's investigation, the Department concluded that the record "indicated" that the appellant had neglected Cheyanne,[7] and filed a petition alleging that Cheyanne was a child in need of assistance ("CINA").[8]

On the same day it granted the Department's Shelter Care Petition, the circuit court ordered appellant to participate in the Family Recovery Program ("FRP"), a comprehensive twelve-month program monitored by the Circuit Court for Baltimore City, that provides services such as drug treatment, mental health treatment, and parenting classes. Appellant initially complied with the court order, attending the FRP intake assessment and meeting with a BCDSS case

manager.

On September 3, 2009, the circuit court convened an adjudication and disposition hearing to consider the CINA Petition. The court bifurcated the hearing and delayed the disposition until a later date in order to allow appellant more time to progress with drug treatment. During the adjudication hearing, the Court accepted a stipulation of facts agreed upon by the parties. The parties stipulated, *inter alia*: 1) that appellant had received prenatal care and methadone treatment through the CAP program; 2) that appellant did not fully comply with CAP's attendance and abstinence requirements; 3) that appellant tested positive for cocaine on January 9, 2009; 4) that appellant had a legal history of substance abuse; and, 4) that appellant was participating in the court's FRP and was in full compliance with the program requirements. Based on the evidence presented, the Court continued Cheyanne in the care and custody of BCDSS and granted appellant supervised visitation. Subsequent to the court's June 2009 Order that appellant be referred to the FRP, BCDSS referred appellant to Daybreak, a drug treatment program, for the purposes of assessing and treating her substance abuse issues. Appellant participated in methadone treatment at Daybreak, but otherwise failed to comply with the requirements of the FRP — missing meetings with her case manager, neglecting to submit urinalysis results, and failing to attend the required 12-step program meetings. On June 7, 2010, the Court found appellant to be noncompliant with the FRP. Appellant was discharged from the program two days later. Appellant continued to ingest controlled substances, as demonstrated by subsequent positive tests for benzodiazepines on September 20, and October 4, 2010.[9]

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 had signed. Appellant signed a second service agreement on November 19, 2010. The first agreement's goal of reunifying Cheyanne with appellant or, secondarily, placement with another relative was modified in the second agreement to reflect a secondary plan of placement with a non-relative. Also, appellant's visitation rights in the second agreement were expanded to include unsupervised day visits, with a goal of progressing to overnight visits, in addition to the one hour of supervised visitation each week that appellant was permitted pursuant to the first service agreement. Otherwise, the provisions of the two service agreements were substantially the same, each required appellant to attend a drug treatment program, provide proof of compliance with drug treatment, and submit the results of monthly drug screening. The agreements also ordered appellant to participate in parenting classes, find stable housing, secure employment, maintain contact with BCDSS, and participate in regularly scheduled visitation with Cheyanne. BCDSS was obligated under the terms of the service agreement to make appropriate referrals to assist appellant in achieving the requirements of the agreement, and to facilitate appellant's regular visitation with Cheyanne. Despite BCDSS's efforts, appellant consistently failed to fulfill any of the requirements stated in the service agreements.

At the time of the TPR hearing, appellant continued to participate in methadone treatment for her heroin addiction. Despite testimony indicating that she has participated in three different drug treatment programs, there was no evidence or record showing that appellant has ever successfully completed any of them. Nor did appellant provide the results of monthly drug tests or any other evidence demonstrating that she has made any progress toward the requirement that she cease using illegal and illicit substances.

In addition to the parenting classes that were offered as part of the FRP program, on May 5, 2010, BCDSS referred appellant to the Moms program, a division of the CAP, for parenting classes. There is no evidence of record indicating that appellant ever attended any of the parenting classes to which she was referred.

Appellant has not secured stable housing that would be suitable for her and Cheyanne. Initially, appellant resided with her mother, Anna C. Upon inspection, however, BCDSS was unable to approve placement of Cheyanne in that home due to unresolved allegations of child abuse against Ms. C. and a mold infestation in the home.[10] Appellant later moved, and then moved several more times. Despite the persistent efforts of the Department to arrange a home inspection, BCDSS has not inspected any of appellant's other residences because appellant has either canceled or failed to confirm appointments with BCDSS.

At the time of the TPR hearing, appellant was residing in a three-bedroom house with her boyfriend, her cousin, her cousin's fiancee, and her boyfriend's child. Appellant is not contributing to the payment of household bills, but is relying on the financial support of her mother, boyfriend, and cousin's fiancee. Appellant's name is not on the lease of her current residence. As of the date of the TPR hearing, appellant's current residence had not been inspected because appellant never responded to BCDSS's requests to arrange a date for the inspection.

Based on the facts set forth above, the circuit court found that appellant was not currently able to provide an acceptable living environment for Cheyanne.

Appellant has also been unable to obtain employment.[11] She has not been employed at any time since Cheyanne's birth, and she has not provided any part of Cheyanne's care. Instead, as already mentioned, appellant is reliant upon the financial support of others to meet her own daily needs.

Appellant failed to maintain regular contact with BCDSS, failed to inform the Department when she was moving, and did not provide updated addresses or phone numbers to her case workers. Appellant's failure to maintain regular contact with BCDSS, as was required by her service agreements, made it very difficult for the Department to assess appellant's ongoing needs or to provide services to her. Letters sent to appellant by the Department were frequently returned. Phone calls were ineffective because appellant's cell phone was often disconnected. There were periods of months that appellant did not contact BCDSS at all.

Appellant has also consistently failed to participate in regular visitation with Cheyanne. BCDSS made numerous attempts to arrange frequent and regular visitation between appellant and her daughter, including providing transportation for appellant to attend visits. The case workers called and sent letters to appellant to remind her of appointments and to set up new ones. Between 2009 and 2010, appellant was scheduled to have sixty visits with Cheyanne, of which she attended approximately half. Appellant cancelled many visits without legitimate reasons, and went months without contacting BCDSS to schedule visitation or to check on Cheyanne's well-being.[12] When appellant did attend visitation, she was observed to be impaired or intoxicated, seemed lethargic, exhibited slurred speech, and appeared to be unsteady while holding Cheyanne.[13] Appellant has also threatened the physical safety of her BCDSS case worker, and left threatening messages on the cell phone of Cheyanne's foster mother.

BCDSS has been persistent in its efforts to fulfill its obligations under the service agreements. BCDSS has referred appellant to drug treatment programs and parenting classes. Though BCDSS did not provide appellant any referrals for mental health evaluation and treatment, their failure to do so may be excused by appellant's repeated denials that she experienced any mental health issues prior to her testimony at the TPR hearing.

The Department inspected the home in which appellant was initially residing, and has sought to conduct inspections of appellant's subsequent residences. The Department has also investigated other maternal relatives identified by appellant as potential placement options. Appellant's case workers have attempted to monitor appellant's compliance with drug treatment and parenting classes, as well as her progress toward obtaining stable housing and employment. BCDSS has also done everything in its power to facilitate appellant's regular visitation with Cheyanne, including subsidizing appellant's transportation to the visitation location, writing and calling appellant to remind her about pending visitation appointments, and advocating for the court to increase the length and number of appellant's visitations with Cheyanne.

In contrast with appellant's behavior, the conduct of Cheyanne's foster parents has been stellar. Upon her discharge from the hospital, BCDSS placed Cheyanne in the care of foster parents, Kevin K. and Jeanette K., where she has resided continuously, ever since.[14] BCDSS has provided medical, dental, and daily basic needs for Cheyanne, and has regularly monitored her progress to ensure that she is being well cared for by her foster family.

By all measures, Cheyanne's placement with the K. family has been successful. She is in a stable home with loving caretakers who she considers to be her mother and father. Cheyanne is enrolled in an Infants and Toddlers program, through which she receives weekly in-home physical therapy sessions. Cheyanne is up to date on all of her medical appointments and has had no unusual medical issues over the course of the last year. Cheyanne is too young to be active in her community or school, but she does attend church with Mr. and Mrs. K. Ms. K. testified, without contradiction, that she and Mr. K. regard Cheyanne with the same affection as they do their three biological children, that they have plans for her future, and that they wish to adopt her.

II.

On April 14, 2011, based upon appellant's continued inability to fulfill the requirements of the service agreements, the Court changed the goal of Cheyanne's permanency plan from reunification with a parent or guardian 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 of appellant's parental rights. Appellant filed an objection to the Department's petition.

Following hearings on October 24, November 7, and November 28-29, 2011, the circuit court granted the Department's petition, thereby 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 statutory factors set forth in FL § 5-323(d), "giving primary consideration to the health, safety and best interest of the child." The circuit court reviewed all of the

services BCDSS had provided in the instant case in order to meet its initial goal of facilitating appellant's reunification with Cheyanne, or, alternatively, of identifying a familial resource for placement instead of extending Cheyanne's time in the foster care system. The trial judge found, beyond a reasonable doubt, that the Department's efforts had been adequate. The court opined that:

> BCDSS did what was within its power to assist [appellant]. It was limited in what it could do by the lack of initiative and unwillingness of [appellant] to comply with service agreements and visit Cheyanne.

Based upon all the circumstances, the court also found that clear and convincing evidence demonstrated that appellant was unfit to parent Cheyanne. The court also found that "[d]espite assistance from BCDSS and other agencies, [appellant] has not been able to resolve the problems that were the core reasons Cheyanne was removed in the first place," and that "[a]dditional services would not likely bring about a sufficient parental adjustment to allow reunification within a reasonable time." Recognizing appellant's failure to demonstrate any significant progress toward becoming a responsible parent, the court concluded its determination of parental unfitness by stating:

> Although [appellant] has stated that she wants Cheyanne back, her actions and lack of motivation speak otherwise. . . . The evidence presented at trial suggests that despite [appellant's] stated desire of wanting Cheyanne back, she has not demonstrated the level of motivation, focus, and intensity of effort to change her life circumstances enough to allow return of the child.

Alternatively, the Court concluded that exceptional circumstances existed justifying the termination of appellant's parental rights in order to best serve Cheyanne's interests. Noting that Cheyanne had been out of appellant's custody since the time of her 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 the termination of appellant's parental rights would have any impact on Cheyanne's well being. On the other hand, the court concluded:

> If the child were to return to [appellant's] care, there would likely be a detrimental impact on the child's well being. She would cease to live in the stable and loving household in which she has lived her entire life, would no longer be with the people whom she views as her parents, would go to live in a chaotic household with no stability of housing or income, and potentially be living with multiple adults. She would be living with a person who, although her biological mother, is a virtual stranger with persistent substance abuse problems. The return of this child to her biological mother would be highly detrimental to the child's best interest.

Based upon its legal determinations that BCDSS had made reasonable efforts to reunify appellant with Cheyanne, that despite the efforts of BCDSS appellant was still unfit to assume custody of her daughter, and that exceptional circumstances existed justifying the termination of appellant's parental rights in order to serve the best interests of Cheyanne, the court granted BCDSS's Petition for Guardianship with the Right to Consent to Adoption or Long-Term Care Short of Adoption.

III.
STANDARD OF REVIEW

The role of this Court when undertaking a review of a juvenile court's TPR decision, is to "ascertain whether the [court] considered the statutory criteria, whether its factual determinations were clearly erroneous, whether the court properly applied the law, and whether it abused its discretion in making its determination." *In re Adoption/Guardianship/CAD No. 94339058*, 120 Md. App. 88, 101 (1998); *accord In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010); *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 297 (2005); *In re Yve S.*, 373 Md. 551, 586 (2003). As we explained in *In re Abiagail C.*, 138 Md. App. 570 (2001):

> On review, our function . . . is not to determine whether, on the evidence, we might have reached a different conclusion. Rather, it is to decide only whether there was sufficient evidence — by a clear and convincing standard — to support the [court's] determination that it would be in the best interest of [the child] to terminate the parental rights of the natural [parent]. In making this decision, we must assume the truth of all the evidence, and of all of the favorable inferences fairly deducible therefrom, tending to support the factual conclusion of the trial court.

Id. at 587 (citing *In re Adoption No. 09598*, 77 Md. App. 511, 518 (1989)). We are also "mindful that '[q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred."' *In re Shirley B.*, 419 Md. 1, 19 (2011) (quoting *In re Yve S.*, 373 Md. at 586).

IV.
DISCUSSION

The paramount concern of a court charged with reviewing a trial judge's 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. Md. Code (1984, 2006 repl. vol.), Family Law Article ("FL") § 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.[15]

It is generally presumed that, "it is in the best interest of the children to remain in the care and custody of their parents." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 495 (2007). In order to rebut this presumption, the court must expressly find either that the parent is unfit or that exceptional circumstances exist that would make a continued parental relationship detrimental to the best interests of the child, and, if so, how. *Id.* at 495, 501. If the circuit court articulates its conclusion regarding the best interest of the child in the proscribed manner, "the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance." *Id.* at 501.

In the instant case, the reasoning underlying the circuit court's decision to terminate appellant's parental rights was clearly stated in the court's written opinion, which addressed, in turn, each of the statutory factors set forth in FL § 5-323(d). As mentioned *supra*, 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 court's determination that Cheyanne's best interest would be served by assigning guardianship to BCDSS. Appellant maintains that 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. Therefore, appellant contends, the court should have weighed the possibility of "another planned permanent living arrangement," *i.e.* Cheyanne's placement for adoption or long-term foster care with a care giver other than Mr. and Mrs. K., against maintaining appellant's parental rights.

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. Fam. Law § 5-338. We acknowledge, as appellant contends, that there is no guarantee that Cheyanne will be adopted into the K. family. But few things in life can be guaranteed. In this, as in any TPR case, the trial judge must deal with what is likely, not what is certain. And, based on Mrs. K.'s testimony that she and her husband intended to adopt Cheyanne, and the strong evidence that they had provided excellent care for Cheyanne, the trial judge's opinion as to what was likely to happen was supported by substantial evidence. Thus, we disagree with appellant's assertion that the trial judge focused too much on what was likely to happen if a TPR Order was signed. Moreover, judges are presumed to know the law and to correctly apply it. *Hebb v. State*, 31 Md. App. 493, 499 (1976). Appellant can point to nothing in the record that would rebut that presumption. In our review of the memorandum opinion prepared by the circuit court in this case, 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 that would be necessary for her to assume custody of her daughter 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 the statute or when necessary to illustrate the court's determination that exceptional circumstances existed to justify termination of appellant's parental rights.

The record amply demonstrates both the genuine desire of the K. family to adopt Cheyanne, and the readiness of BCDSS to pursue such a permanent placement at the earliest possible opportunity. In fact, Mr. and Mrs. K. are referred to as the adoptive parents in the Agreement for Post-Adoption Contact signed by the K.s and Cheyanne's father in August 2011, which accompanied Samuel H.'s consent to termination of his parental rights. Moreover, it appears that BCDSS and the K. family both assume that Cheyanne's adoption by the K.s is a *fait accompli*. Such a result is favored by the statutory and regulatory provisions that dictate

BCDSS's actions as Cheyanne's guardian, which strongly favors adoption by foster parents who have cared for a child long enough to "establish positive relationships and family ties" with the child. *See* FL § 5-525(f)(2)(iii) (providing adoption priority to "a current foster parent with whom the child has resided continually for at least the 12 months prior to developing the permanency plan or for a sufficient length of time to have established positive relationships and family ties"); COMAR 07.02.12.03(E)(2)(b) (same). Cheyanne's adoption by the K.s would not be delayed by any additional certification or home study, because the K.s have previously been approved through a foster care home study that can be used to finalize the adoption.[16] COMAR 07.05.02.11(C) (providing that a properly updated application and home study used for foster parent certification, may be used in place of an adoption home study).

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

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The child's name is spelled alternately "Cheyanne," "Cheyenne," and "Chayanne" in the Record. For consistency, we shall adopt the spelling that appears on the child's birth certificate.

2. The facts set forth in Part I are copied almost verbatim from the Opinion and Order filed by the Honorable Stephen J. Sfekas on January 27, 2012. Appellant concedes in her brief that none of the facts set forth in Part I were clearly erroneous. The few modifications we have made were non-substantive. Where facts are from other sources, attribution is provided.

3. Samuel H. has been incarcerated for much of Cheyanne's life. He initially objected to the Department's TPR Petition, but consented to termination of his parental rights on October 4, 2011. He does not join in the instant appeal. We shall, therefore, include facts regarding Samuel H. in this opinion insofor as they are integral to the circuit court's determination of Cheyanne's best interest.

4. Appellant told a BCDSS investigator that she had been using intravenous heroin for the previous four years and had been consuming 13 pills daily.

5. *See*

http://www.hopkinsmedicine.org/psychiatry/bayview/substance_abuse/center_addiction_ pregnancy.html.

6. In Judge Sfekas's written opinion, he recognized appellant's substance abuse issues, as well as her more recently disclosed mental health problems as disabilities, but concluded that appellant was not disabled within the meaning of FL § 5-323(d)(B)(3), because her disabilities did not render her physically, mentally, or emotionally unable to care for Cheyanne.

7. "'Indicated' means a finding that there is credible evidence, which has not been satisfactorily refuted, that abuse, neglect, or sexual abuse did occur." Md. Code Ann., Fam. Law 5-701(m).

8. A CINA is a child who requires court intervention because the child has been abused or neglected, or has a developmental disability or mental disorder, and whose parents, guardian, or custodian cannot, or will not, give proper care and attention to the child and the child's needs. Md. Code (2006, 2009 Supp.) § 3-801(f) of the Courts and Judicial Proceedings ("CJP") Article.

9. Appellant initially told her case worker that the positive test results were caused by her use of prescription medication that she was taking pursuant to the direction of her dentist. Appellant, however, failed to submit any corroborating documentation concerning her dental treatment even after she was ordered to do so by the court. At the TPR hearing, appellant changed her story, testifying that her psychiatrist had prescribed the drugs to treat her bipolar disorder.

10. The Department explored the possibility of placing Cheyanne with other maternal relatives as well. After the child's maternal grandmother was ruled out as a viable option, appellant requested that Cheyanne be placed in the home of appellant's married sister. BCDSS conducted a home visit, but appellant's sister and her husband left the United States before the placement could be accomplished. Appellant also requested that the Department consider placing Cheyanne with appellant's 21-year-old brother who had recently been released from jail and was residing with his girlfriend and her baby. BCDSS did not feel that the placement would be in Cheyanne's best interest.

11. Appellant testified at the TPR hearing that she had filled out job applications; however, the court noted that most of the applications were completed in the two weeks preceding the TPR hearing.

12. For example, appellant was scheduled to meet with Cheyanne six times in December 2010, but only appeared for two visits; canceling twice due to illness, once due to inclement weather, and once failing to appear without explanation, and without returning the case worker's phone call regarding her absence. After not hearing from appellant for

approximately three weeks, the case worker, on January 6, 2011, sent appellant a letter concerning her missed visitation appointments with Cheyanne and the continuing need to schedule a home inspection. Appellant did not respond until February 5, 2011, when she left a phone message requesting a visit with Cheyanne. When the caseworker tried to return her call, however, it was discovered that appellant's number was disconnected. The next communication between appellant and BCDSS did not occur until March 24, 2011. On that date, appellant agreed to attend a Family Involvement Meeting the next day. Appellant, however, failed to appear at the scheduled meeting and did not contact BCDSS again until September 27, 2011, when she called to request a visit with Cheyanne the next day. The case worker on that occasion noted appellant's speech was very slurred and unclear. The case worker spoke to Cheyanne's foster mother, Mrs. K., and then left a message for appellant offering her visitation on October 4, 2011, but appellant never called to confirm that she could attend on that date. Appellant finally attended a visitation with Cheyanne on November 9, 2011.

13. Appellant also displayed behaviors indicating that she may have been intoxicated on the first day of trial. Also at one point, appellant's counsel expressed concern that, due to her mental state, she would not be able to assist counsel at trial.

14. After her placement in the K. home, Cheyanne continued to experience tremors and sleep disturbances, and needed to be held "constantly." Mrs. K. received special training to care for Cheyanne's complex medical needs. At the time of the TPR hearing, Cheyanne was described as a "completely healthy and happy" two-and-a-half-year-old child who has no behavior problems or special medical needs.

15 FL § 5-323(d) provides:

(d) Considerations. Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:

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

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

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

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

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

(1) the child; (2) the local department to which the child is committed; and (3) if feasible, the child's caregiver;

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

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

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

(3) whether:

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

(ii)(1)(A) on admission to a hospital for the child's delivery, the mother tested positive for a drug as evidenced by a positive toxicology test; or (B) upon the birth of the child, the child tested positive for a drug as evidenced by a positive toxicology test; and (2) the mother refused the level of drug treatment recommended by a qualified addictions specialist

as defined in § 5-1201 of this title, or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to: (1) chronic abuse; (2) chronic and life-threatening neglect; (3) sexual abuse; or (4) torture;

(iv) the parent has been convicted, in any state or any court of the United States, of: (1) a crime of violence against: (A) a minor offspring of the parent; (B) the child; or (C) another parent of the child; or (2) aiding or abetting, conspiring, or soliciting to commit a crime described in item (1) of this item; and

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

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

(ii) the child's adjustment to: (1) community; (2) home; (3) placement; (4) school;

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

(iv) the likely impact of terminating parental rights on the child's well-being.

16. The K.s are certified treatment foster parents under Title 7, Subtitle 5, Chapter 2 of the Code of Maryland Regulations.

NO TEXT

Cite as 2 MFLM Supp. 39 (2013)

Adoption/Guardianship: termination of parental rights: subsequent placement

In Re: Adoption/Guardianship of Isabella A.

No. 0774, September Term, 2012

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

Opinion by Hotten, J.

Filed: November 28, 2012. Unreported.

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.

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

In this case, we are asked to determine whether the Circuit Court for Charles County, sitting as a 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. On appeal, appellant presents one question[1] for our review:

1. 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?

For the reasons that follow, we answer appellant's question in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Isabella's Introduction to the Charles County Department of Social Services and CINA Proceedings.

Isabella A. was born prematurely on April 6, 2010 to appellant and Mr. D.[2] Due to her fragility, she was placed in the neonatal intensive care unit at Civista's Medical Center. On April 7, 2010, the day after Isabella's birth, appellant departed the hospital, leaving the newborn Isabella behind. Appellant returned for only an hour on April 8, 2010, to breast feed Isabella. She returned the following day, on April 9, 2010, for an additional hour. 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 ("CINA")[3] failure to thrive proceedings. Ultimately, Mr. and Ms. B. adopted Orianna following a voluntary termination of parental rights proceeding. 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.

As a consequence, CCDSS filed a shelter care petition on April 9, 2012, which sought an order from the juvenile court for Isabella as a CINA.[4] The court granted CCDSS' petition and placed Isabella in CCDSS' care and custody. In granting CCDSS 'petition, the juvenile Court noted that Isabella had been neglected and that she had never been in the care of her mother. The juvenile court additionally acknowledged appellant's prior dealings with CCDSS and the recent termination of her parental rights to her first daughter, Orianna.

After Isabella's foster care placement, CCDSS entered agreements designed to promote Isabella's reunification with appellant. Nevertheless, CCDSS later concluded it was in Isabella's interest to seek another order of the juvenile court granting it further care and custody of Isabella. During an April 13, 2012 pediatric appointment for Isabella, it was observed that appellant had only held Isabella for a moment before passing her off to the nurse for feeding and burping. Appellant's conduct had demonstrated to the Department that she placed her own needs before Isabella's.

As a result, the juvenile court authorized Isabella's continued placement in shelter care and committed her to the Department's custody for contin-

ued foster care placement with Mr. and Ms. Z., on May 19, 2010. Among its many directives, the juvenile court ordered appellant to attend and successfully complete a parenting class, obtain and maintain stable housing and employment, and to cooperate with CCDSS' requests. Further, the court ordered appellant to "follow through" with a mental health examination and to follow the recommendations of her evaluating therapist.

At that time, CCDSS provided appellant transport for visits with Isabella and for her psychological evaluation. Nevertheless, after CCDSS' permanency plan review hearing for September 10, 2010, the department concluded that appellant had yet to find stable housing and lacked a stable income in order to support Isabella and herself.[5] CCDSS additionally recommended that appellant obtain individual mental health counseling.

On October 25, 2010, the juvenile court considered the findings and recommendations of the Master of juvenile cases and CCDSS and, in large part, adopted their recommendations and findings. Although it noted the reunification of Isabella and appellant as its ordered permanency plan, it granted CCDSS continued custody and limited co-guardianship of Isabella. In addition, the court further ordered appellant to attend and successfully complete an infant parenting class, follow the recommendations of her therapist, and attend Isabella's pediatric doctor's appointments. Moreover, it ordered appellant's continued cooperation with CCDSS and that appellant maintain liberal and supervised visitation with her daughter.

Therefore, CCDSS arranged for regular supervised visitation, providing direct transportation and Van-Go (bus) vouchers. Appellant refused the vouchers, testifying at the termination proceeding that she "do[es]n't do buses." Appellant was additionally referred to maternal health programs and parenting classes. Further, when she was homeless, CCDSS referred her to two shelters, which she refused because they were too far away. Appellant also refused to pro-actively avail herself of CCDSS's guidance and failed to maintain a cooperative and ongoing relationship with CCDSS.

CCDSS' permanency plan review hearing indicated that the department was unable to verify that appellant was continuing mental health counseling, that she had been consistently visiting her daughter, that she attended and successfully completed an infant parenting class, or that she had obtained gainful employment. The juvenile court's order of March 18, 2011, adopted the department's findings, and further ordered that appellant comply with its prior orders and cooperate with CCDSS' requests.

Ultimately, however, CCDSS' and the juvenile court's efforts at reunification were of no consequence; and, on August 26, 2011, CCDSS altered its permanency plan to adoption. The juvenile court noted appellant's continued failures to comply with several court orders and her admission that adoption would be in the best interest of Isabella. It further considered and adopted the findings and recommendations of the master of juvenile cases, who found that appellant was not a fit parent pursuant to section 9-101 of the Family Law Article,[6] and denied appellant both visitation and custody.

The Guardianship Trial and Termination of Ms. A's Parental Rights.

CCDSS filed its petition for guardianship with right to consent to the adoption of Isabella on November, 16, 2011. In response, appellant filed her objection to CCDSS' petition for guardianship on December 19, 2011. Proceedings in CCDSS' effort to acquire the right to guardianship of Isabella began on April 25, 2012.

During trial, Ms. Margaret Campbell, a case manager with CCDSS, indicated that it was her understanding that "[appellant] had not had consistent contact with her daughter or visitation. She had not complied with all court orders. She had not obtained stable housing or stable employment."

In fact, appellant rarely took an opportunity to visit Isabella while she was in foster care. She visited the child approximately twenty times in two years. Appellant's own testimony at trial indicated that she had difficulty maintaining stable housing and that the income acquired from her independent animal rescue varied greatly from week-to-week. She indicated that she was running her business out of the room she shared with a man at the Relax Inn. She further testified that, prior to starting her animal rescue effort, she had been unemployed for several years. Appellant additionally admitted that she never had provided Isabella any child support.

Nonetheless, appellant asserted that she had complied with all of CCDSS's requests. She further stated with frustration her belief that "all the court stuff [she] had completed. [CCDSS] just kept coming up with more reasons to take, do more things for [the department]. And [she] wasn't doing that." Additionally, when asked whether she had been court ordered to obtain mental health treatment, she replied, "No, I don't recall that." When later asked whether she had followed the recommendations of a CCDSS therapist, she indicated that he was subsequently advised that she required no further counseling after one counseling visit. Moreover, she stated that her failure to maintain cooperative communication with CCDSS and to visit Isabella regularly was a consequence of her inoperable car. Nonetheless, appellant's conduct is best

summarized in her statement that "[she] never said that [she] wanted [her] kid back." As a consequence, Isabella remained within her foster care placement and CCDSS declined to further support reunification. The department subsequently suggested that Isabella's permanency plan change to adoption.

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. Dr. James E. Lewis, Ph.D., a clinical neuropsychologist, initially reported the relationship between Isabella and Mr. and Ms. Z. in his letter of May 20, 2011, as follows:

> During these various clinical[,] interview communications with [me], [Mr. and Ms. Z.] are observed to be very attentive to Isabella. Likewise, Isabella spontaneously approaches [Mr. and Ms. Z.] independently for affection, attention[,] and nurturance. It becomes quickly evident that [Mr. and Ms. Z.] have become the "psychological parents" of Isabella, who responds very positively to each of them.

In addition to Dr. Lewis' observations, Ms. Z. testified, at the guardianship hearing, that Isabella attended church with the Z. family every Sunday, where she maintained some interaction with other people. Ms. Z. would take Isabella to the library every week for its "Infants and Toddlers" program, and Isabella would interact with Mr. and Ms. Z.'s neighbors from time-to-time. Both 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. At the time of trial, Mr. and Ms. Z. were sixty-seven and sixty-two years of age, respectively, and their primary source of income was social security benefits. Further, Mr. and Ms. Z. continued the added responsibility of caring for their multi-handicapped, adult son who suffers from cerebral palsy and maintains the cognitive capacity of an eighteen-month-old child. Additionally, Mr. and Ms. Z. support and provide housing for their other son, aged forty-four, who only recently completed his B.S. Degree in Physics but, nonetheless, has remained unemployed for the preceding twenty years. Mr. and Ms. Z. initially proposed that their forty-four year-old, unemployed son would provide care for Isabella if something happened to both elder Zs. Alternatively, Mr. and Ms. Z offered Ms. Z.'s brother and sister as substitute caregivers. Ms. Z.'s brother and sister, however, were similarly in their sixties and had little previous interaction and exposure to Isabella.

Thus, CCDSS concluded that Mr. and Ms. Z. had no viable plan of substitute care in the event they became unable to care for Isabella. CCDSS additionally noted concerns regarding Isabella's isolation from other children of her age, indicating that she required more socialization than her placement with Mr. and Ms. Z. provided. The juvenile court's permanency plan order of August 26, 2011, further substantiates CCDSS' concern. There, the juvenile court adopted the master's recommendation to consider the importance of Dr. Lewis' evaluation of several competing interests in the case: the potential harm Isabella might suffer if removed from the Z.s' care juxtaposed to the potential benefit of placing Isabella with her sister, Oriarma. See additional discussion *infra*.

Further, CCDSS expressed concerns regarding the limitations that Mr. and Ms. Z. presented in addressing the immediate and continuing needs of Isabella as a medically fragile child, diagnosed with atrial septal defect[7] and pulmonary hypertension.[8] These medical conditions resulted in two cardiac catherizations. Isabella received the first cardiac catherizations during a month-long stay in the cardiac intensive care unit at Children's Hospital. She was only a year old. She had a second catherization between April 25, 2012 and May 8, 2012. Ms. Campbell characterized Isabella's condition as severe and creating several limitations to Isabella's enjoyment of life. When asked if Ms. Campbell was aware of Isabella's prognosis, Ms. Campbell replied:

> Well, the, she's gonna need constant care. She is in, and the prognosis for her condition is really, fairly unknown. They can be very, this particular condition they can lead a fairly normal life. Unfortunately she will never be able, its [sic] advised against that she have children. She, the doctor was more willing to give a better prognosis after the catherization[9] so that he could, you know, really see any progress that has been made and make sure that the ASD has not gotten any worse. But she will need care for the rest of her life. And she will need to be very aware of her condition.

Ms. Campbell further described some of the department's concerns regarding the Z.s' ability to verbalize Isabella's needs to medical practitioners and to advocate for the child in the following colloquy with counsel for CCDSS:

> [Campbell]: Oh geez. Okay. Well, with the [Z.s] the, just the health means there was the concern about the [Z.s]

actual understanding of the health needs and the ability to advocate for that child.

[CCDSS' counsel]: What raised that concern?

[Campbell]: The ability of th[e] foster parents to verbalize the child's needs in a manner that could be understood and communicate effectively to both practitioners, but also the people that needed to know around them.

[CCDSS' counsel]: Had you had the opportunity to observe any of these interactions which raised the concern?

[Campbell]: Some. Yes.

[CCDSS' counsel]: Can you describe for the Court what this was?

[Campbell]: Its [sic] more that the, its [sic] more the description of the symptoms tends to be very escalated, very dramatic in its presentation as opposed to a clinical, you know, that the child is having difficulty breathing or the child, increased stress will, could cause this, this and this. It tends to go to this child will die immediately.

[CCDSS' counsel]: Okay.

[Campbell]: So we go to a dramatic end of things.

[CCDSS' counsel]: Is there a specific conversation that you're referring to?

[Campbell]: Yes.

[CCDSS' counsel]: Can you recount that for the Court?

[Campbell]: When we've been talking about transitioning this child and looking into changing the placement of the child to that of the [B's] and placing her with her sibling. There was concern by the foster parent that the stressfulness would cause the child to die.

In addition to Ms. Campbell's concerns, Dr. Lewis maintained several concerns about the Z.s' capacity to maintain a cooperative line of communication with CCDSS. In his letter of April 20, 2012, Dr. Lewis noted Isabella's level of impairment and Ms. Z.'s ability to provide the requisite care for Isabella:

> The informal observation of Isabella is that her gross motor development appears generally normal, but that she may have a Moderate to Severe (DSM-IV) Receptive and Expressive Speech and Language Disorder.[10] As further discussed with both "sets" of foster parents [the Z. family and the B. family], Isabella is a "Special Needs" child by virtue of her multiple special medical needs, and also, because of her history of Fetal Alcohol and Drug Exposure as well as numerous incidents of "falling out, passing out, lips turning blue, etc." and notable medical records of Perioral Cyanosis.[11] Cyanotic children also have increased risk for mild cerebral hypoxia,[12] but this apparently has significantly improved since the child's "open heart surgery" as [Mrs. Z.] refers to it.
>
> Although [Ms. Z.] apparently has not reported the following information, there are additional incidents that have occurred post-surgically. Specifically, [Ms. Z.] describes that Isabella has had recurrences of some of these incidents as a result of transitioning Isabella to more visits in the [B.] home. Specifically, [Ms. Z.] states that Isabella continues to have episodes where she "falls out and becomes limp," and two incidents in the past thirty days where [Ms. Z.] has observed Isabella "turning blue around her face and mouth but not passing out."
>
> Again, none of these incidents are listed in the Department's summary on Isabella. [Mr. and Ms. Z.] admittedly have experienced damage to their relationship with the Department and do not appear to be spontaneously aware that these incidents need to be reported in a timely [manner], given the medical implications of Isabella's observed symptoms.

Isabella's continued medical impairment provided further reason for CCDSS' proactive efforts to transition permanency placement to Mr. and Ms. B. 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. At trial, Mr. Phillip

Thompson, Administrator of the Charles County Department of Social Services, described his recent observations regarding the unique connection between Isabella and Orianna:

> Yes. Most recently I had the opportunity of supervising a visit of which I requested to do so. In looking at the transition to the [B.s'] home one thing that was truly amazing to me, even with my years of experience, was to see the relationship between Isabella and her sister. It was something that I truly cannot put words to because it was not anything I have identified through the course of my training. These two little girls had a physical attraction to one another, in that their interactions and exchange was really, I'm gonna say unbelievable. Their touch, to be able to hold hands. And there was a level of energy and excitement that, again, was unexplainable. And if I had not seen it myself I probably wouldn't believe someone that was telling me. Isabella certainly was looking out or seeking her sister and following her around the room. And even though she was sitting on Ms. [B.'s} lap at one time that she would look around the room and want to just find her sister. And her, there was this glow about her. And she was, the word that comes to mind, mesmerized in just being able to focus on her. Again, that was something that I had never experienced in my professional career.

Further, Dr. Lewis characterized Orianna's unprompted loving and nurturing behavior with Isabella. In his letter of April 20, 2012, he additionally described Orianna's inclusive behavior, noting that she would involve Isabella in "types of interactive play activities, such as using crayons on the coloring books" and "playing with puzzles." Dr. Lewis further noted that "[w]ithin 30 minutes of these types of sibling contacts, it [was] then observed that Isabella spontaneously beg[an] to initiate affection and play interactions with her older sister." He further observed that Isabella maintained an equal level of comfort and affection with both Mr. and Ms. B., who Dr. Lewis described as "highly motivated to 'do whatever it takes' to effect [sic] the safest and healthiest transition" for Isabella. This description of the B.s was further echoed by Ms. Campbell, who noted that" [t]hey're starting to attend medical appointments" to become fully aware of Isabella's medical needs.

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. Specifically, the court found that Isabella had neither been in her mother's care nor could she be safely placed with her mother. Moreover, in the court's written judgment for guardianship with right to consent to adoption, it further indicated that "[t]here are no additional services which would be likely to bring about a lasting parental adjustment so that the child could be returned to [appellant] within an ascertainable amount of time, not to exceed the eighteen (18) months from the time of placement." Additionally, the court noted that Isabella had "been in placement for twenty-five (25) months." Based on these findings, the juvenile court awarded guardianship to CCDSS, thereby terminating appellant's parental rights.

Additional facts will be supplied as they bear on a discussion of the issues.

STANDARD OF REVIEW

As with the review of any judgment after a case tried without a jury, we review the juvenile court's adjudication under Md. Rule 8-131(c) "on both the law and the evidence." *See Davis v. Davis*, 280 Md. 119, 125-26 (1977) (applying predecessor to Md. Rule 8-131(c)). We review the juvenile court's findings of fact for clear error. *In re Shirley B.*, 419 Md. 1, 18 (2011) (citing *In re Yve S.*, 373 Md. 551, 583-84, 586 (2003)). We limit our task to a determination of whether substantial evidence exists in the record to support the trial court's finding. *In re Michael G.*, 107 Md. App. 257, 264 (1995). Thus, we must consider evidence "produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed." *Mills v. Mills*, 178 Md. App. 728, 734-35 (2008). The juvenile court's legal conclusions are reviewed *de novo*. *See In re Shirley B.*, 419 Md. at 18. We review the juvenile court's ultimate determination for an abuse of discretion:

> [T]here is some confusion in our cases with respect to the standard of review applicable to the chancellor's ultimate conclusion as to which party should be awarded custody. . . . [I]t is within the sound discretion of the chancellor to award custody according to the exigencies of each case, and as our decisions indicate, a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion.

In re Yve S., 373 Md. at 585-86 (quoting *Davis*, 280 Md. at 125-26 (1977) (footnote omitted)). *See In re Caya B.*, 153 Md. App. 63, 74-75 (2003). There is an abuse of discretion" 'where no reasonable person would take the view adopted by the [trial] court,'. . . or when the court acts 'without reference to any guiding rules of principles' . . . [or] where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court[.]'" *In re Yve S.*, 373 Md. at 583 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997)).

DISCUSSION

On appeal, appellant raises a sole contention. She 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 her "position at trial was that terminating parental rights was unnecessary because Isabella's current placement situation, with the [Z.]s, was suitable." In addition, appellant insists that she requested "the court to maintain" placement with the Z.s and to permit the Z.s to ultimately adopt Isabella. Thus, 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.

The United States Supreme Court has long recognized that a parent has a constitutionally protected fundamental right to raise his or her children. *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 299 (2005). *See In re Yve S.*, 373 Md. At 566-67; *In re Mark M.*, 365 Md. 687, 705 (2001); *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 112-13 (1994). The rights and protections afforded a parent as recognized by the United States Supreme Court, were gathered by this Court in *Wolinski v. Browneller*, 115 Md. App. 285 (1997). There, Judge Arrie W. Davis comprehensively traced the history of the fundamental rights of parents:

> Beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court, in a variety of contexts has recognized that freedom of personal choice in matters of marriage, family life, and the upbringing of children is a liberty interest protected by the Fourteenth Amendment. *See M.L.B. v. S.L.J*, 519 U.S. 102 (1996) (termination of parental rights); *Santosky v. Kramer*, 455 U.S. 745 (1982) (same); *Parham v. JR.*, 442 U.S. 584 (1979) (right to care for mental health of child); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right of extended family to live together); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (right to direct children's education coupled with right to freedom of religion); *Stanley v. Illinois*, 405 U.S. 645 (1972) (right to raise children); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (right to allow child to work); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to direct upbringing and education of children); *Myer*, 262 U.S. 390 (announcing the liberty interest "to engage in any of the common occupations of life, to acquire useful knowledge, to many, establish a home, and bring up children.").
>
> Within the narrower context of the parent-child relationship, the Supreme Court has deemed the right to rear a child "essential," *id.*, and encompassed within a parent's "basic civil rights." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Maryland has consistently echoed the Supreme Court, declaring a parent's liberty interest in raising a child as fundamental one that cannot be taken away unless clearly justified. *In re Adoption/Guardianship Nos. CAA92-108252 & CAA92-10853*, 103 Md. App. 1, 12 (1994) ("This right is in the nature of a liberty interest that has long be recognized and protected under the state and federal constitutions."). *In In re Adoption/-Guardianship No. 10941*, the Court of Appeals quoted with approval from Justice Blackmun's dissent in *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981):
>
> > At stake here is "the interest of a parent in the companionship, care, custody, and management of his or her children." This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[Far] more precious . . . than property rights," parental rights have been deemed to be among those "essential to the orderly pursuit of happiness in free men. . . ."

> *Id.* at 38 (citations omitted), *quoted in In re Adoption/Guardianship No. 10941*, 335 Md. at 113. See also *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 491 (1997); *In re: Matthew R.*, 113 Md. App. 701, 721 (1997); *Coffey v. Department of Social Services*, 41 Md. App. 340, 357 (1979).

Wolinksi, supra, 115 Md. App. at 298-99 (some internal citations omitted), *quoted in In re Yve S.*, 373 Md. at 566-67. *See also In re Adoption/Guardianship Victor A.*, 386 Md. at 298-300. In sum, the law embraces a strong presumption that the child is best served when the parent maintains his or her rights, *In re Yve S.*, 373 Md. at 571 (citing *In re Adoption J9610436,* 368 Md. 666, 692-93 (2002), and that when that relationship is separated, the general objective should begin with reunification of the child and parent. *In re Adoption/Guardianship of Cadence B.*, 417 Md. 146, 157 (2010) (quoting *In re Adoption/Guardianship of Rashawn H.*, 401 Md. at 495).

Nevertheless, the Court of Appeals has emphasized that "the parents' right is not absolute and 'must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect."' *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 103 (2010) (quoting *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007)). As a consequence, the presumption protecting a parent's right to rear his or her child "may be rebutted upon a showing either that the parent is 'unfit' or that 'exceptional circumstances' exists which would make continued custody with the parent detrimental to the best interest of the child." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. at 495, *quoted in In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. at 103. Thus, "where the fundamental right of parents to raise their children stands in starkest contrast to the State's efforts to protect those children from unacceptable neglect or abuse, the best interest of the child remains the ultimate governing standard." *Id.*

As a result, Maryland's General Assembly has enacted a comprehensive statutory scheme to address situations where a child is at risk because of his or her parents' inability or unwillingness to care for him or her. *In re Adoption/Guardianship No. 10941,* 335 Md. 99, 103 (1994). *Accord In re Adoption/Guardianship of Victor A.*, 386 Md. at 302.

The Court of Appeals provided a detailed characterization of Maryland's statutory scheme in *In re Adoption/Guardianship No. 10941*. Writing for the Court, Judge Karwacki explained that "Title 5 of the Family Law Article of the Maryland Code . . . governs the custody, guardianship, adoption and general protection of children who because of abuse or neglect come within the purview of the Department" of Social Services. *In re Adoption/Guardianship No. 10941*, 335 Md. at 103. Judge Karwacki continued with an explanation of how a child in need may find him or herself under the care and treatment of the State:

> Subtitle 7 of Title 5 of the Family Law Article concerns the protection of children who have been abused or neglected by their biological parents. Pursuant to this subtitle, certain authority figures, such as health practitioners, police officers, educators and human service workers, are required to report cases of suspected abuse or neglect. F.L. § 5-704.

In re Adoption/Guardianship of No. 10951, 335 Md. at 103.

In addition, he went on to describe the State's action in assuring the best interests of the child in question are protected:

> The local [D]epartment of social services is then required to investigate such reports. F.L. § 5-706. Thereafter, in accordance with its findings and treatment plan, the local department is required to render appropriate services in the best interest of the child, including, when indicated, petitioning the juvenile court to commit the child to its care and custody. F.L. § 5-710(a). If the juvenile court determines that the child is a child in need of assistance (CINA), it has discretion to order that the child be committed to the local department "on terms that the court considers appropriate . . . including designation of the type of facility where the child is to be accommodated, until custody . . . is terminated with approval of the court" or the child turns 21 years old. Md. Code (1974, 1989 Repl. Vol.) §§ 3-820(c)(1)(ii) and 3-825 of the Courts & Judicial Proceedings Article. Such out-of-home placement can include placement in a licensed foster home, F.L. § 5-525, or placement with relatives.

In re Adoption/Guardianship of No. 10941, 335 Md. at 103 (footnotes omitted). Put simply, Title 5 of the Family Law Article provides protections for the welfare of children by investigating allegations of abuse and neglect, and, when necessary, by permitting the State

to petition the juvenile court for care and custody rights to the child when the child is in need of assistance.

When a juvenile court designates a child removed from his or her parents' custody as CINA, the juvenile court is required to periodically conduct "a permanency planning hearing to determine the permanency plan for a child[.]" Md. Code (Repl. Vol. 2006), § 3-823(b) of the Courts and Judicial Proceedings Article. *See In re Adoption/Guardianship of Shirley B.*, 419 Md. at 19. Moreover, "[i]n developing the permanency plan, the department is required to consider a statutory hierarchy of placement options in descending order of priority." *In re Adoption/Guardianship No.10941*, 335 Md. at 105. Nonetheless, "[i]t is the court's 'responsibility [to] determin[e] the permanency plan, . . . and [to] justify[ ] the placement of children in out of home placements for a specified period or a long-term permanent basis. . . .'" *In re Adoption/Guardianship of Shirley B.*, 419 Md. at 19 (*quoting In re Yve S.*, 373 Md. at 577)).

At the hearing, the juvenile court must consider the department's evaluation of the following factors to determine a plan that is in the best interest of the child:

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

Md. Code (Repl. Vol. 2006 & Supp. 2012), § 5-525(f)(1) of the Family Law Article. In addition, to the extent consistent with the best interest of the child in an out-of-home placement, the Department shall present its findings to the juvenile court that have considered a statutory hierarchy of placement options in descending order of priority:

> (i) returning the child to the child's parent or guardian, unless the [ ] department is the guardian;
>
> (ii) placing the child with relatives to whom adoption, custody and guardianship, or care and custody, in descending order of priority, are planned to be granted;
>
> (iii) adoption in the following descending order of priority:
>
> 1. [B]y a current foster parent, with whom the child has resided continually for at least the 12 months prior to developing the permanency plan or for a sufficient length of time to have established positive relationships and family ties; or
>
> 2. [B]y another approved adoptive family; or
>
> (iv) another planned permanent living arrangement that:
>
> 1. addresses the individualized needs of the child, including the child's education plan, emotional stability, physical placement, and social needs; and
>
> 2. includes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life.

Md. Code (Repl. Vol. 2006 & Supp. 2012), § 5-525(f)(2) of the Family Law Article.

The "overriding theme" is to provide permanency and stability in the child's life. *In re Adoption/Guardianship No. 10941*, 335 Md. at 106. Therefore, "[t]he valid premise is that it is in the child's best interest to be placed in a permanent home and to spend as little time as possible in foster care." *Id.* Writing for this Court in *In re Adoption/Guardianship of Victor A.*, Judge Sally D. Adkins (now, of the Court of Appeals) recognized that "[f]or [a child currently] in foster care, both the local social services department and the court must consider whether the individual child's health and safety is being compromised by the long term effects of foster care." 157 Md. App. at 427. As a basis for this conclusion, Judge Adkins additionally noted:

> Federal and state governments have recognized that long periods of foster care may harm the very children whom the foster care system is designed to protect. They have undertaken reasonable steps to prevent childhoods spent in "foster care drift" — the legal, emotional, and physical limbo of temporary housing with temporary care givers. The federal "Adoption Assistance and Child

> Welfare Act of 1980," codified at 42 U.S.C. §§ 670-79, was enacted to redress the growing problem of children spending substantial amounts of their childhood in foster homes. *See* [*In re Yve S.,* 373 Md.] at 572; *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 104, 642 A.2d 201 (1994).

Id. at 427—28.

With this theme in mind, a court must consider the best interest of a child and select a permanency plan that is most appropriate for the circumstances. *See In re Adoption/Guardianship of Cadence B.*, 417 Md. at 157. Thus, "in cases where a child has [previously] been declared in need of the court's assistance, the decision leading to a termination of parental rights is necessarily part of a continuous process to determine the child's best interests and to place the child in a permanent and stable environment." *In re Adoption/Guardianship Victor A.*, 386 Md. at 309. Therefore, when reunification of the child and parent is impossible, and adoption is in the child's best interest, the Department is required to petition the juvenile court for guardianship. *In re Adoption/Guardianship No. 10941*, 335 Md. at 106. Only in exceptional circumstances may a child to be placed in long term foster care. Md. Code (Repl. Vol. 2006 & Supp. 2012), § 3-823(f) of the Court and Judicial Proceedings Article ("The court may not order a child to be continued in a [long-term foster care plan] unless the court finds that the person or agency to which the child is committed has documented a compelling reason for determining that it would not be in the best interest of the child to: (1) [r]eturn home; (2) [b]e referred for termination of parental rights; or (3) [b]e placed for adoption or guardianship with a specified and appropriate relative or legal guardian willing to care for the child."). *See In re Adoption/Guardianship No. 10941*, 335 Md. at 105-106 (citation omitted); *In re Yve S.*, 373 Md. at 586-87.

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. Md. Code (Repl. Vol. 2006 & Supp. 2012), § 5-323(b) of the Family Law Article)[13] *See in re Adoption/Guardianship of Ta'Niya C.*, 417 Md. at 100-101. This determination requires the juvenile court to consider the factors enumerated in Md. Code (Repl. Vol. 2006 & Supp. 2012), § 5-323(d) of the Family Law Article. *In re Cross H.*, 200 Md. App. 142, 152, *cert. granted on other grounds*, 422 Md. 352 (2011). Section 5-323(d) provides:

> (d) Considerations.— Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:
>
> (1) (i) all services offered to the parent before the child's placement, whether offered by a local department, another agency, or professional;
>
> (ii) the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent; and
>
> (iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any;
>
> (2) the results of the parent's effort to adjust to the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
>
> (i) the extent to which the parent has maintained regular contact with:
>
> 1. the child;
>
> 2. the local department to which the child is committed; and
>
> 3. if feasible, the child's caregiver;
>
> (ii) the parent's contribution to a reasonable part of the child's care and support, if the parent is financially able to do so;
>
> (iii) the existence of a parental disability that makes the parent consistently unable to care for the child's immediate and ongoing physical or psychological needs for long periods of time; and
>
> (iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the parent within an ascertainable time not to exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interest to extend the time for a specified period;
>
> (3) whether:

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

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

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

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist . . . or by a physician or psychologist . . . ;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

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

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

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

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

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

(ii) the child's adjustment to:

1. the community;

2. home;

3. placement; and

4. school;

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

(iv) the likely impact of terminating parental rights on the child's well-being.

Md. Code (Repl. Vol. 2006 & Supp. 2012), § 5-323(d) of the Family Law Article. *See In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. at 100-101; *In re Cross H.*, 200 Md. App. at 153-55.

In weighing these considerations within the juvenile court's "best interests" analysis, the juvenile court must be mindful that the child's health and safety is of "paramount importance." *In re Adoption/Guardianship of Victor A.*, 386 Md. at 309; *In re Adoption/Guardianship of Rashawn H.*, 402 Md. at 500 (clearly noting that "primary consideration must be given to the 'safety and health of the child."). Therefore, to justify a termination of parental rights judgment, "[t]he facts must demonstrate an unfitness to have a continued parental relationship with the child, or exceptional circumstances that would make a continued parental relationship detrimental to the best interest of the child." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. at 499.

Accordingly, when there is a proven history of neglect, "the proper issue before the hearing judge [is] whether there was sufficient evidence that further abuse or neglect [is] unlikely." *In re Yve S.*, 373 Md. at 593. *Accord In re Adoption/Guardianship of Shirley B.*, 419 Md. at 21 (additionally citing Md. Code (Repl. Vol. 2006), § 9-101(b) of the Family Law Article, which states, "[U]nless the court specifically finds that there is no likelihood of further child abuse or neglect by [the parent], the court shall deny custody or visitation rights to that party[.]"). The burden of proof rests upon the parent to show that the past neglect or abuse will not be repeated. *In re Adoption/Guardianship of Shirley B.*, 419 Md. at 21 (citing *In re Yve S.*, 373 Md. at 587). "What the statute appropriately looks to is whether the parent is, or within a reasonable time will be able to care for the child in a way that does not endanger the child's welfare." *In re Adoption/Guardianship of Rashawn H.*, 402 Md. at 500.

It is within this context that we now consider appellant's contention. Generally, the first step in our review of the appellant's case is to scrutinize the factual findings of the juvenile court under the clearly erroneous standard. *In re Yve S.*, 373 Md. at 588. The juvenile judge's findings presented in a written opinion in support of her May 14, 2012, order were as follows:

> This matter came for hearing before the Court on April, 25, 2012, and continued until May 8, 2012, upon consideration of the testimony and exhibits presented, the documents of record and, taking Judicial notice of, the underlying CINA Case, . . ., and cases . . . and . . . (Orianna A[.]), using the clear and convincing evidence stan-

dard, the Court finds as follows:

The biological mother, [appellant], was properly served by Sheriff, as shown by the Affidavit of Service dated November 29, 2011. She filed a timely notice of objection to these proceedings, and was represented by counsel for the duration of these proceedings.

The biological father . . . is deceased.

The child, through counsel, filed a Child's Notice of Non-Objection to Guardianship and Request for Appointment of Counsel, dated December 14, 201, and she does not object to the Court's granting the Petition.

Isabella [ ] A[.], born April 6, 2010, is the two year, one month old child of [appellant], age 35, who currently resides at the Relax Inn. . . . The child's father born November 6, 1962, is deceased, reportedly having been murdered. The parents were not married to each other; however, [appellant] was married to Charles P[.], with whom she had a child, Orianna [ ]. [A]ppellant and Mr. [P.] were divorced on February 29, 2012. The Charles County Department of Social Services was very acquainted with [appellant], due to her neglect of her other child . . . . Orianna came into care because [appellant] was not meeting her basic needs. That child was adopted by [Mrs. and Mr. B.] following a voluntary termination of parental rights proceeding.

At Isabella's birth, [appellant] did not have stable housing. The day after the child was born, April 7, 2010, [appellant] left the hospital, leaving the child behind. She returned for an hour the next day, April 8, 2010, and, again, on April 9, 2010, for an hour. This behavior constitutes neglect. [Appellant] demonstrated a total lack of understanding of the basic needs of a child. Isabella was placed in shelter care on April 9, 2010. She has resided in the [Z.] foster home since then.

[Appellant] testified that the child is happy in the [Z.] home and that she is loved, eared for financially and medically. *She would consent to the termination of her parental rights if the [Z.] family would adopt Isabella.*

[Appellant] is unfit to parent the child. She does not have a stable lifestyle, and she has no interest in meeting the child's needs. She has not demonstrated any ability to do so. She has neglected the child. She has failed to address her own mental health issues and parenting issues. [Appellant] does not want reunification.

Isabella is a medically fragile child, who has been hospitalized several times for a heart condition. The child requires continuous care, follow-up, and advocacy for her health needs. *If left unmanaged, the child would be at serious risk. [Appellant] has done nothing to educate herself about the child's medical condition, and she has no interest in doing so.*

Prior to Isabella's placement with Mr. and Mrs. [Z], the Charles County Department of Social Services offered abundant services to [appellant], courtesy of her involvement with the Department in connection with her other child, Orianna. Those services offered are recounted in detail in Orianna's CINA and guardianship files. The Charles County Department of Social Services attempted to engage [appellant] in services recommended by Dr. Lewis, and visitation was facilitated.

In Isabella's case, [appellant] chose to absent herself from the caretaking role, and her leaving the child at the hospital constituted an emergency, such that reasonable efforts to prevent her removal were not possible.

Following Isabella's removal, the Charles County Department of Social Services entered into service agreements with [appellant]. The agreements were designed to facilitate reunion. The Department complied with its obligations pursuant to the agreements. Referrals for mental health and substance abuse treatment were made following the evaluation and bonding assessment by Dr. Lewis, for which the Department

arranged and paid. The Department arranged for regular visitation, providing direct transportation and Van-Go (bus) vouchers, *which [appellant] refused, testifying that she does not ride buses. [Appellant] was referred to maternal health programs and parenting classes. When she was homeless, the Department referred her to a shelter, which she refused, stating it was located too far away.*

[Appellant] did not fulfill her obligations under the agreements. She rarely availed herself of the visitation available to her. She visited with the child only approximately 20 times in two years (20/730 days).

The child is only two years, one month old, with speech delays, and she is unable to express her feelings toward, and emotional ties with, [appellant], her sister, Orianna, or any other individuals. However, observations of the child indicate that she is very bonded to her foster family, and, more recently, to her sister Orianna. She is observed to be increasingly comfortable with the [B.] family. She had regular contact with her sister, Oriamia, and the [B.] family, and she is increasingly comfortable with the visits. The bond between Isabella and Orianna is strong.

The child is well-adjusted to her home and community. She is strongly bonded to the [Z.] family and, increasingly to the [B.s]. She attends church with the [Z.] family every Sunday, and she interacts with other people there. She interacts with neighbors of the [Z.] family, and Ms. [Z.] [sic] takes her to the library every week.

[Appellant] has made little effort to adjust her circumstances, conduct or conditions to make it in the best interest of Isabella to return to her home. She is continuing to live in a motel, supported by a current male friend. Two weeks ago, she was involved in an altercation with a neighbor, resulting in cross-charges for assault being filed.

She has not availed herself of the liberal visitation offered to her, thereby maintaining regular contact with the child. She has provided no support for the child, other than providing a gift. She claims to have had no means with which to provide any support, and she refers to the Department's failure to pursue her for child support. She testified to recent self-employment as a dog rescuer, generating, potentially, thousands of dollars per month.

[Appellant] has only recently begun to have more frequent contact with Ms. [Z.] [sic]. She has also begun to have visitation with the child at Ms. [Z.'s] home.

There are no additional services which would be likely to bring about a lasting parental adjustment so that the child could be returned to [appellant] within an ascertainable amount of time, not to exceed eighteen (18) months from the time of placement. This child has been in placement for twenty-five (25) months, well past the eighteen months referenced in the statute. [Appellant] does not want to child returned to her. She has stated further that she cannot take her back. There are no services available to alter that attitude.

As stated above, numerous services were offered to [appellant] toward reunification, to no avail. The Charles County Department of Social Services workers went to extraordinary lengths to attempt to engage [appellant] in services. One worker even traveled to [appellant's] home in Virginia to meet with her and transport her for visits. [Appellant's] expressed attitude is that she was not going to do the things the Department and the Court requested or ordered that she do.

[Appellant] has some serious, untreated mental health issues. She has refused to seek mental health treatment for the trauma she has suffered, as recommended by Dr. Lewis. Her issues render her unable to care for the immediate and ongoing physical or psychological needs of the child for long periods of time. She would be unable to meet those needs even on a short-term basis.

> [Appellant] has committed acts of neglect toward Isabella's sibling, Orianna, who suffered from "failure to thrive," a very serious condition due to [appellant's] inability to manage the feeding of the child.
>
> *Since the child was removed at three days old, [appellant] has failed repeatedly to give Isabella adequate food, clothing, shelter and education or any other care or control necessary for the child's physical, mental or emotional health.*
>
> There was no evidence that any of the remaining Family Law Article § 5-323(d)(3) factors exist, except that [appellant] refused to participate in a drug treatment program which she justified by the self-report "assessment" rendered by the Health Department.
>
> The evidence presented was clear and convincing that: the timeliness, nature and extent of the services offered by the Petitioner, the Charles County Department of Social Services were appropriate; reasonable efforts were made by Petitioner, prior to placement, to prevent or eliminate the need for removal of the child from the home; and reasonable efforts were made by Petitioner to finalize the permanency plan for the minor child. The Court further finds, by clear and convincing evidence, that terminating the parental rights of [appellant] is in Isabella [A.'s] best interests. *The child's safety and health will only be promoted by granting of guardianship. The child cannot be safely placed with her mother. She has never been in her mother's care. To do so would be contrary to her welfare.*

(emphasis added). Although appellant has not challenged the juvenile court's factual findings required pursuant to Md. Code (Repl. Vol. 2006 & Supp. 2012), § 5-323(d) of the Family Law Article, it is apparent to us from these findings and record 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 alterative to terminating parental rights." This assertion, however, is without merit.

As a preliminary matter, the juvenile court did, however, consider the 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 for the Circuit Court of Charles County. As a consequence, the juvenile court ordered, "that the [sic] Dr. Lewis provide further evaluation regarding the competing interests in the ease." These evaluations were 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, stating in footnote one:

> The [CCDSS] has indicated its desire to transition the child into the home of [Mr. and Mrs. B.]; who have adopted Isabella's sibling, Orianna. . . . [Appellant] consented to [termination of her parental rights] for Orianna with adoption by the [B.s].
>
> [Appellant) requests that the Court grant guardianship and order placement of the child with a specific individual, namely, [Mr. and Mrs. Z.], pursuant to Family Law Article, Section 5-324(b)(1)(ii)(B). When the matter was in Court in August, 2011, [appellant] expressed her desire that the child be placed with the [B.s]. The court will schedule a hearing in approximately thirty days to address the child's placement.

"While a CINA adjudication must precede a [termination of parental rights] determination, it is a separate legal proceeding. Moreover, the changing of the permanency plan from reunification, or adoption by a relative, to adoption by a non-relative, is not required before [CCDSS] can file for" a termination of parental rights petition. *In re Adoption/Guardianship of Cross H.*, 200 Md. App. at 150. Accordingly, we find no error in the juvenile court's scheduling of a permanency plan at a later date. *Id.*

More importantly, however, nowhere within the Family Law Article's Title 5 does "the *necessity* of terminating parental rights as a factor in determining whether it is the child's best interest to terminate a natural parent's rights to the child." *In re Adoption/Guardianship No. 10941*, 335 Md. at 120. "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. *Id*. A continuation in foster care lacks the permanent legal status required by state law. Md. Code Ann., Court and Judicial Proceedings Article § 3-823(f). See *In re Adoption/Guardianship of Shirley B.*, 419 Md. at 19; *In re Yve S.*, 373 Md. at 577; *In re Adoption/Guardianship Victor A.*, 157 Md. App. at 427. Isabella's continuation of long-term foster care subjects her to an administrative review every six months. She would also remain under the jurisdiction of the juvenile court and subject to periodic judicial review. "This constant administrative and judicial supervision is disruptive" to Isabella's life, and "is the very type of uncertainty the child welfare statutes were designed to avoid." *In re Adoption/Guardianship No. 1049*1, 335 Md. at 120. 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. *See Id*. "This possible 'foster care drift' is exactly what Congress and our General Assembly desire to avoid." *Id.*

Although appellant suggests that Isabella's placement with Mr. and Ms. Z. was suitable, the best interest standard, however, "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, *quoted in In re Adoption/Guardianship of Victor A.*, at 157 Md. App. at 444. Accordingly, we conclude that the juvenile court properly exercised its discretion and affirm its judgment.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO REPAID BY APPELLANT.

FOOTNOTES

1. In her brief, appellant posed the question as follows: "Did the circuit court err by failing to consider placing Isabella in [Mr. and Ms. Z.'s] custody?"

2. Isabella's parents were not married to one another. Appellant, however, was married to Mr. P., with whom she previously had a child, Oriarma. Isabella's biological father, Mr. D., had no contact with her. Further, Mr. D. was deceased at the time of the circuit court's Termination of Parental Rights proceeding. The record further indicates that the deceased was reportedly murdered.

3. A child in need of assistance or CINA is a child who requires court intervention because the child has been abused or neglected, or has a deveopmental disability or mental disorder, and whose parents, guardian, or custodian cannot, or will not, give proper care and attention to the child and the child's needs. *See* Md. Code (Repl. Vol. 2006), § 3-801(f) of the Courts and Judicial Proceedings Article; Md. Code (Supp. 2012), § 3-801(g).

4. Shelter care "means a temporary placement of a child outside of the home at any time before disposition." Md. Code (Supp. 2012), § 3-801(y) of the Courts and Judicial Proceedings Article. A shelter care hearing "means a hearing held before disposition to determine whether the temporary placement of the child outside of the home is warranted." Md. Code (Supp. 2012), 3-801(z) of the Courts and Judicial Proceedings Article.

5. *See* Part II, *infra,* for a detailed description of Md. Code (Repl. Vol. 2006 & Supp. 2012), § 5-525(f) of the Family Law Article entitled, "Development of a permanency plan."

6. Section 9-101, entitled, "denial of custody or visitation on basis of likely abuse or neglect," provides, "*Determination by court.* — In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party." Md. Code (Repl. Vol. 2006), § 9-101(a) of the Family Law Article.

7. A trial Septal Defect ("ASD") is a congenital defect of the heart that is characterized as "a 'hole' in the wall that separates the top two chambers of the heart." American Heart Association, Atrial Septal Defect (ASD), http://www.heart.org/HEARTORG/Conditions/CongenitalHeartDefects/AboutCongenital HeartDefects/Afrial-Septal-Defect-ASD_UCM_307021_Article.jsp (last visited November 1, 2012). It is a "defect allow[ing] oxygen-rich blood to leak into the oxygen-poor blood chambers of the heart."*Id*. Further, "[i]f the ASD is large, the extra blood being pumped into the lung arteries makes the heart and lungs work harder and the lung arteries can become gradually damaged" over time. *Id*. Signs and symptoms of a large or untreated ASD may include: frequent respiratory or lung infections; difficulty breathing; tiring when feeding (in infants); shortness of breath when being active or exercising; skipped heartbeats or a sense of feeling the heartbeat; a heart murmur, swelling of the legs, feet, or stomach area, or stroke. CDC Centers for Disease Control and Prevention, CDC - Congenital Heart Defects, Facts about Atrial Septal Defect-NCBDD, http://www.cdc.gov/ncbdd/heartdefects/atrialseptaldefect.html (last visited November 1, 2012).

8 "Pulmonary hypertension occurs when the blood pressure in the pulmonary arteries, which carry oxygen and blood from the heart to the lungs, is much higher than normal." CDC Centers for Disease Control and Prevention, Pulmonary Hypertension Fact Sheet, http://www.cdc.gov/DHDSP/data_statistics/fact_sheets/fs_pulmonary_hypertension.htm (last visited November 1, 2012). Symptoms of pulmonary hypertension include: frequest tiredness, shortness of breath, chest pain, irregular heartbeat, fainting, swollen ankles and legs, and fluid in the abdomen. *Id. See also* American Heart Association, What is Pulmonary Hypertension?, http://www.heart.org/HEARTORG/-Conditions/HighBloodPressure/AboutHighBloodPressure/Wh

at-is-Pulmonary-Hypertension_UCM_301792_Article.jsp (last visited November 1, 2012).

9. Subsequent to Ms. Campbell's testimony, but prior to the circuit court's disposition in this matter, Isabella underwent her second catherization, discussed .*supra*, to treat her ASD.

10. The Fourth Edition of the Diagnostic and Statistical manual of Mental Disorders ("DSM-IV") describes Receptive and Expressive Speech and Language Disorder an "interfere[nce] with academic or occupational achievement or with social communication. . . ." David Shaffer, M.D., et al., Diagnostics and Statistical Manual of Mental Disorders, 58 (Allen Frances, M.D., et al., eds, 4th ed. 1994). Individuals with this disorder have "difficulties associated with Expressive Language Disorder (e.g., a markedly limited vocabulary, errors in tense, difficulty recalling words or producing sentences with developmentally appropriate length or complexity, and general difficulty expressing ideas)." *Id*. Receptive Language impairment is also affected, and can manifest as "difficulty understanding words, sentences, or specific types of words." *Id*. In severe cases, "there may be multiple disabilities, including an inability to understand basic vocabulary or simple sentences, and deficits in various areas of auditory processing (e.g., discrimination of sounds, association of sounds and symbols, storage, recall, and sequencing)." *Id*. at 59. Generally, "[c]hildren with more severe forms are likely to develop Learning Disorders." *Id*. at 60.

11. Perioral cyanosis occurs when skin and mucous membrane around the mouth turns a dark bluish or purplish coloration due to the deficient oxygenation of the blood. *See* John V. Basmajian, M.D., et al., Illustrated Stedman's Medical Dictionary 348, 1057 (John V. Basmajian, M.D., et al. eds., 24th ed. 1982).

12. Cerebral hypoxia is a condition when the largest part of the brain suffers decreased, below normal levels of oxygen. *See* Basmajian, *supra*, note 11 at 255, 685.

13. Section 5-323(b) specifically provides, "If, after consideration of facts as required in this section, a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in the child's best interest, the juvenile court may grant guardianship of the child without consent otherwise required under this subtitle and over the child's objection."

NO TEXT

Cite as 2 MFLM Supp. 55 (2013)

Child support: modification: increased income

Bruce G. Gillies
v.
Catherine Elizabeth Gillies

No. 74, September Term, 2012

Argued Before: Meredith, Matricciani, Bair, Gary E. (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: December 4, 2012. Unreported.

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.

Appellee, Catherine Gillies ("Mother"), brought a child custody suit against appellant, Bruce Gillies ("Father"), on May 7, 2007, in the Circuit Court for Anne Arundel County. On April 25, 2008, the court entered an amended judgment that, *inter alia*, ordered Father to pay child support of $2,637.00 per month. Mother moved to modify support on July 28, 2011. After a hearing on December 21, 2011, the court entered an order on March 20, 2012, increasing Father's child support obligation to $5,617.00 per month. Father noted this appeal on March 26, 2012.

QUESTIONS PRESENTED

Father presents a single question for our review, which we quote:

> Did the trial judge in this case commit reversible error by extrapolating the Maryland child support guidelines using the SASI CALC program to produce a child support figure in excess of $5,600.00 a month?

For the reasons that follow, we hold that the trial court did not err and we affirm its judgment.

FACTUAL AND PROCEDURAL HISTORY

The parties were married in California on July 29, 2000, and separated on October 3, 2006, shortly before the birth of their third child. At all relevant times, the children resided with Mother and their maternal grandmother in Annapolis, while Father lived in California.

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

On May 7, 2007, Mother sued for custody and child support in the Circuit Court for Anne Arundel County. Using Mother and Father's combined monthly income of $21,485.00, and deducting $1,800.00 for work-related childcare expenses, the court determined that the parties' combined support obligation was $4,975.00. Father, at that time, earned fifty-three percent of the parties' combined income; consequently, the court ordered Father to pay child support of $2,637.00 per month in an amended judgment, entered April 25, 2008.

On July 28, 2011, Mother moved to modify the support order on the sole grounds that Father's monthly income had increased from $11,354.00 to $18,279.00, while Mother's monthly income had decreased from $10,131.00 to $5,890.00 due to her mandatory retirement from active duty with the U.S. Navy.

The circuit court convened a hearing on December 21, 2011. Neither party presented evidence of actual child care expenses or the family's standard of living.[1] The only evidence of Father's finances was income statements for the preceding three years. From that, the court found that Father's actual monthly pretax income was $19,583.00. The court also reviewed the evidence of Mother's finances and ability to earn, and it attributed to her $6,667.00 in monthly income.

The parties' combined income exceeded the maximum value of the child support schedule in Maryland Code (1984, 2012 Repl. Vol.), § 12-204 of the Family Law Article ("FL"), and so the court extrapolated from the guidelines to calculate a combined support obligation of $7,753 35,[2] of which Father's share was $5,784.00 because he earned approximately 74.6% of their combined income. The court then subtracted Father's visitation expenses of $167.00 per month and arrived at a final support obligation of $5,617.00 per month; the court entered a corresponding order on March 20, 2012, from which Father appealed on March 26, 2012.

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 $15,000.00), the statute confers discretion on the trial court to set the amount of child support. *Id*. at 324; FL § 12-204(d). We have said that the Legislature left the task of these awards to the Chancellor because they defy "any simple mathematical solution." *Chimes v. Michael*, 131 Md. App. 271, 289 (2000). That said, "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).

The chancellor's award "must balance the best interests and needs of the child with the parents' financial ability to meet those needs." *Unkle v. Unkle*, 305 Md. 587, 597 (1986); see *Collins v. Collins*, 144 Md. App. 395, 443 (2002) (citing *Voishan*, 327 Md. at 328-29).[3] Several factors are relevant to this determination, including the parties' financial resources, *Unkle*, 305 Md. at 597, reasonable education and childcare expenses, *Voishan*, 327 Md. at 332, and the parties' lifestyle, age, and physical condition, *id*. at 329. *See Smith v. Freeman*, 149 Md. App. 1, 18-20 (2002).

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. For the following reasons, we disagree with Father and uphold the circuit court's child support order.

Father's brief relies on our opinion in *Smith v. Freeman,* but he ignores the portion of it 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). There is no dispute over the parties' incomes, and those figures gave the court sufficient evidence to determine child support. It therefore fell to Father to demonstrate that the court's 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.

First, Father describes the court's award as "crushing," but he fails to demonstrate how or why this is so. There is no dispute that Father earns $235,000.00 per year, and even if we were to subtract a conservative forty percent of that income for federal and state taxes, the child support award leaves him with $73,596.00, annually.[4] The record gives us no reason to believe that this amount is not sufficient to sustain Father; furthermore, this remainder compares favorably to the $56,376.00 annually that Mother is left with after subtracting her support obligations.

Second, Father argues that the court's recent support order was not justified by the circumstances, but 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. Father repeatedly cites *Voishan v. Palma*, 327 Md. 318 (1992), but that case supports the opposite of his desired outcome. There, the Court of Appeals *upheld* an award that *exceeded* extrapolation. *Id*. at 326-29. The *Voishan* Court agreed with the Attorney General's opinion that awards could exceed extrapolation because, "at very high income levels, the percentage of income expended on children may not necessarily continue to decline or even remain constant because of the multitude of different options for income expenditure available to the affluent." *Id*. at 328. Father has failed to offer any reasons why the court should *not* have deemed thirty percent of the parties' combined income acceptable for the care of their three children, especially where the parties' combined income had increased approximately twenty-two percent.

In conclusion, the trial court acted within its discretion in this case when it extrapolated from the guidelines to calculate a combined support obligation. Father has failed to point out any evidence in the record that the court should have reviewed and that justified a deviation from the basic support obligation; he has thus failed to establish either error in, or harm from, the court's judgment, which we affirm.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The court incorporated $1,800.00 monthly for Mother's work-related childcare expenses, which the court had incorporated in the existing support award.

2. The court used "SASI-CALC," a software program often used by parties and courts in child support cases, both within and above the guidelines.

3. The child support guidelines supersede the holding in *Unkle*, *see Petrini v. Petrini*, 336 Md. 453, 460 n.5 (1994), but only in part. The balancing test still applies to cases above the guidelines. *Collins*, 144 Md. App. 443 (2002) (citing *Voishan*, 327 Md. at 328-29).

4. We note that Father failed to provide any other evidence of his financial resources, such as bank accounts, investments, real estate, or other holdings.

NO TEXT

Cite as 2 MFLM Supp. 59 (2013)

CINA: denial of motion to dismiss exceptions: nonappealable interlocutory order

In Re: Charlise C.

No. 425, September Term, 2012

Argued Before: Krauser, C.J., Woodward, Graeff, JJ.

Opinion by Graeff, J.

Filed: December 4, 2012. Unreported.

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.

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

In this Child in Need of Assistance ("CINA") case,[1] appellant, 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 it scheduled a *de novo* contested adjudication hearing. Appellees, the Baltimore City Department of Social Services ("BCDSS") 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.

For the reasons set forth below, we agree and shall dismiss the appeal.

FACTUAL & PROCEDURAL BACKGROUND

On January 28, 2012, Charlise was born to Ms. H. and Charlie C. ("Mr. C."). On February 13, 2012, the BCDSS filed a petition in the circuit court alleging that Charlise was a CINA and requesting shelter care. According to the petition, Charlise was born drug exposed, and Ms. H. failed to receive prenatal care. The petition further alleged that Ms. H. did not have income, stable housing, or appropriate provisions for Charlise.

On March 27, 2012, Charlise and Mr. C. appeared at an adjudication and disposition hearing before a juvenile court master. Ms. H., who had notice of the hearing, did not appear, and her attorney offered no explanation for her absence. In Ms. H.'s absence, Charlise and Mr. C. entered into a stipulated agreement that Charlise was not a CINA because Mr. C. was able and willing to give proper care and attention to Charlise and her needs. Based on that agreement, the master recommended that the juvenile court sustain the facts in the petition, find that Charlise is not a CINA, and, pursuant to Md. Code (2006) § 3-819(e) of the Courts & Judicial Proceedings Article ("CJP"), award sole legal and physical custody of Charlise to Mr. C.[2]

On March 30, 2012, Ms. H., through counsel, filed a notice of exception to the master's recommendation for adjudication and disposition, requesting a *de nova* hearing. On April 10, 2012, at a scheduling conference before the juvenile court, the BCDSS made an oral motion to dismiss Ms. H.'s exception, based on Ms. H.'s failure to attend the March 27 hearing before the master.[3] Counsel for Charlise and Mr. C. joined in the motion. BCDSS noted that there were "no emergent circumstances" that would explain Ms. H.'s absence from the initial adjudication hearing, and Ms. H.'s counsel had not requested a postponement of the hearing nor made any objection to the agreement. Counsel for Charlise further argued that Ms. H.'s notice of exception failed to meet the requirement set forth in Maryland Rule 11-111.[4]

Ms. H., through counsel, argued in response that her exception was timely filed. Counsel stated that she took no position at the master's hearing because she had been unable to reach Ms. H. by phone. Although acknowledging that Ms. H. had been served with notice of the hearing, counsel stated that Ms. H. had been confused about the date. Counsel had conferred with Ms. H. prior to filing the exception, and Ms. H. did not agree with the master's proposed findings or recommendation for disposition. Ms. H. desired reunification with Charlise. At the conclusion of the hearing, the juvenile court gave the parties an opportunity to submit legal memoranda in support of their positions.

On April 12, 2012, after considering the arguments of the parties, the juvenile court denied BCDSS's motion, finding that Ms. H.'s exception "is a permissible exception [that] will go forward." The court reset the case for a *de novo* adjudicatory and disposition hearing.[5] Charlise appealed to this Court from the juvenile court's April 12 order.

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 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. *See in re Ryan W.*, ___ Md. App. ___, No. 1503, Sept. Term, 2011, slip op. at 32-33 (filed Sept. 5, 2012). To be considered final, a trial court's ruling "must either determine and conclude the rights of the parties involved or deny a party the means to 'prosecut[e] or defend[ ] his or her rights and interest in the subject matter of the proceeding."' *In re Samone H.*, 385 Md. 282, 297-98 (2005) (quoting *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989). "In considering whether a particular court order or ruling constitutes an appealable judgment, [appellate courts] assess whether any further order was to be taken or whether any further action was to be taken in the case." *Id.* at 298.

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).

An interlocutory order is appealable only in limited circumstances, i.e., if it falls within a statutory exception set forth in CJP § 12-303(3) or it meets the requirements of the collateral order doctrine. *See In re Samone H.*, 385 Md. at 298, 317. Charlise acknowledges in her reply brief that this matter is not appealable under the collateral order doctrine.[6]

Charlise argues, however, that her interim appeal is appealable because it falls within the statutory 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 Anthony H.*, 394 Md. 402, 429 (2006) (If an order changes an antecedent custody order in a way that "could deprive a parent of the fundamental right to care and custody of his or her child, whether immediately or in the future, the order is an appealable interlocutory order."). *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 ("The court shall not direct the entry of an order . . . based upon the master's recommendations until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions."). Md. Rule 11-111(c) ("Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions."). Thus, 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 judgement). 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)).

APPEAL DISMISSED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. A CINA is a child who requires court intervention because the child has been abused or neglected, or has a developmental disability or mental disorder, and whose parents, guardian, or custodian cannot, or will not, give proper care and attention to the child and the child's needs. Md. Code (2006) § 3-801(f) of the Courts & Judicial Proceedings Article ("CJP"). An adjudicatory hearing is a hearing to determine whether the allegations in the CINA petition are true. CJP § 3-817.

2. CJP § 3-819(e) provides:

> *Allegations sustained against only one parent.* —
>
> If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.

3. Charlise asserts that, on April 4, 2012, the court accepted and signed the master's findings and recommendations. The record does contain a court order, but it does not have a date and it does not match the one appellant included in the record extract. As discussed *infra*, the record does not reflect the entry of this court order and neither the parties nor the court addressing the exceptions appeared to be aware of such an order.

4. That rule provides that "[e]xceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts."

5. Pursuant to the order, the adjudicatory hearing was scheduled for June 28, 2012. The parties have advised that this hearing was postponed pending this appeal.

6. An order is appealable under the collateral order doctrine only if it satisfies the following four requirements: (1) it conclusively determine the disputed question; (2) it resolves an important issue; (3) it resolves an issue that is completely separate from the merits of the action; and (4) the issue must be effectively unreviewable after entry of final judgment. *In re Samone H.*, 385 Md. 282, 317 (2005)

NO TEXT

Cite as 2 MFLM Supp. 63 (2013)

Divorce: alimony: unconscionable disparity

Andrew J. Marks
v.
Chandra Wright Marks

No. 410, September Term, 2012

Argued Before: Kehoe, Hotten, Moylan, Charles E., Jr. (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: December 6, 2012. Unreported.

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 Circuit Court for Montgomery County, the Honorable Gary E. Bair, presiding, granting an absolute divorce to Marks and appellee Chandra Wright Marks ("Wright"). Marks presents six issues, which we have re-worded and re-ordered for purposes of analysis:

> 1. Did the trial court have subject matter jurisdiction over the parties' divorce proceeding?
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> 2. Was the judgment of divorce deficient because it did not specify the grounds for divorce and there was insufficient corroborating evidence?
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> 3. Did the court err in concluding Marks voluntarily impoverished himself?
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> 4. Did the court err by awarding indefinite alimony in the amount of $3,500 per month to Wright?
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> 5. Did the court err in granting a $50,000 monetary award to Wright?
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> 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. We affirm the judgment of the trial court.

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

Background

In conjunction with entering its judgment of absolute divorce, the trial court filed an extremely thorough and well-considered memorandum opinion explaining the reasons for the various forms of relief it granted to the parties. 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.[1]

> Chandra Wright Marks and Andrew Marks, were married in Comptche, California, on September 12, 1999. The parties began their romantic relationship in 1993. Each party had been married once before.
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> The parties have one minor child together, namely Oliver Narada Muni Marks, born March 5, 2000. Wright had one child from a prior relationship that was adopted by another couple. Marks has four children of his first marriage.
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> The parties moved from California to Mexico in July 2006, where they began living in the marital home known as Ex-Hacienda La Petaca ("Hacienda"), Km. #67, Caraterra Dolores Hidalgo, San Miguel de Allende, Guanajuato, Mexico, with the parties' minor child and Marks's son from his first marriage, Christopher Krsna Keli Marks ("Keli"). At some point, Marks's other son from his first marriage, Jayarama Marks, also lived with the parties for a time.

> [T]he Hacienda, is a historic home and recently renovated hotel situated on over 50 acres of land in San Miguel de Allende, Mexico. The Hacienda has ten rooms, four bathrooms, two kitchens, and several gardens. The property includes such amenities as a swimming pool, horse stables, several smaller houses, or casitas, several out-buildings, and a thermal well.
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> The Hacienda is owned by the parties' Mexican limited liability corporation, Grupo Rio Laja, S.R.L. ("Grupo Rio Laja"), which in turn is owned by the parties' American limited liability corporation, Stone River, LLC, located in Texas. Grupo Rio Laja was initially structured as the nonprofit entity Cantos de los Santos, for which Wright served as the Director General. The parties are individually named as owners and managers of the restructured entity Grupo Rio Laja.
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> The fair market value of the Hacienda [$2,500,000] was agreed upon by the parties . . . . There is no outstanding mortgage on the property. In November 2011, [that is, after the parties' separation,] Marks placed a lien of $500,000.00 on the Hacienda property in the name of Keli Marks. Marks testified that he placed the lien on the property for the purpose of ensuring reimbursement of miscellaneous marital debt allegedly owed to him by Wright. Keli Marks testified that he has no intention of collecting on the lien, but that he was designated as the lien holder because Marks was unable to designate himself under Mexican law. The Court finds that the sole purpose of the lien is to reduce Wright's share of the proceeds from the eventual sale of the Hacienda.[2]
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> The parties are also co-owners of a second entity, Markswright, LLC ("Markswright"), which the parties fonned in 2000.
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> Until August 2011, Marks held a 4.582% interest in the Brandywine Apartments (the "Brandywine"), located at 4545 Connecticut Avenue; N.W.. Washington, D.C., 20008. Marks owns both personal shares and shares held in trusts created by his parents, Morris Marks and Veronique Marks. Marks inherited his interest upon the deaths of his father and mother in 1993 and 1997, respectively.
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> In 2002, Markswright began managing and doing construction management for the owners of the Brandywine. During Markswright's management of the Brandywine, the parties earned approximately $50,000.00 to $60,000.00 each per year. Marks served as chief of operations for Markswright from 2002 to 2008. Thereafter, Wright served as chief of operations for four months, and was then succeeded by Charles Adamavage.

The parties both agree that they originally intended the Hacienda to be a retreat for members of the Hare Krishna movement but that the concept proved to be economically unsustainable. In the summer of 2008, Wright and Oliver left the Hacienda and moved to Santa Cruz, California. The parties presented differing testimony as to the reasons for Wright's departure. In the words of the trial court:

> There was testimony that the parties' differing and often incompatible values were increasingly becoming a source of tension for the parties, particularly when it came to business decisions and decisions concerning the parties' minor child. The Court heard evidence that a significant source of tension between the parties was the Marks's habitual use of marijuana in the presence of the minor child. The Court also heard evidence that the Marks's expressed desire to lead a "polyamorous" relationship, and Wright's desire to remain monogamous, further contributed to the estrangement of the parties. Based on this evidence, the Court finds that the estrangement was primarily caused by Marks's drug use and lack of desire to remain in a monogamous relationship.
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> Wright initiated a divorce proceeding in the Superior Court of the State of California for the County of Santa Cruz, Case No. FL029549. No permanent orders concerning the custody of the minor child were issued.

Wright's counsel in California filed a Notice of Dismissal on Wright's behalf and the case was later dismissed.

In June 2010, Wright and the minor child moved from Santa Cruz, California, to Gaithersburg, Maryland, where they currently reside.

Marks currently continues to reside in the parties' marital home, the Hacienda, in San Miguel de Allende, Guanajuato, Mexico. Marks occupies the Hacienda with his girlfriend and his adult son, Keli.

The parties listed the Hacienda for sale at $3.5 million in late 2007. This was later lowered to the current listing price of $2.5 million. At present, the Hacienda remains on the market with Marks in sole control of the efforts being made to market and sell the property.

The parties have lived separate and apart without interruption or cohabitation since March 2009.

On October 8, 2010, Wright filed a complaint for absolute and limited divorce in Montgomery County. On June 16, 2011, after a two day hearing, Judge Ronald Rubin issued a *pendente lite* order awarding the parties joint legal custody of Oliver, with Wright having primary physical custody. Marks was also ordered to pay child support. Eventually, the case was tried before Judge Bair on February 21-23, 2012. After the conclusion of the trial, the court granted the parties an absolute divorce. The court also granted various forms of relief to the parties. Those relevant to this appeal were:

1. The court ordered that the Hacienda was to be sold and the proceeds thereof, free and clear of all liens, were to be equally divided between the parties and that all liens against the Hacienda was to be satisfied from Marks's share of the proceeds of sale.
2. The court ordered that title to the marital personal property in the Hacienda was to be transferred to Marks.
3. The court granted Wright a monetary award in the amount of $50,000 and awarded Wright indefinite alimony of $3,500 per month.
4. The court ordered Marks to pay child support in the amount of $1,106 per month.
5. The court ordered that parties were to share joint legal custody of Oliver, with Wright having primary physical custody and Marks having visitation rights.
6. The court awarded Wright $44,411.78 in attorney's fees.

Analysis

As we shall see, Marks's contentions to this Court trigger three modalities of appellate review. The first pertains to the factual findings made by the trial court; the second is concerned with the court's interpretation of legal principles and application of those principles to the facts as it found them; and the third focuses upon the trial court's exercise of its discretion in granting Wright a monetary award, indefinite alimony and an award for attorney's fees.

Findings of the trial court will not be set aside on the evidence unless clearly erroneous and we must give due regard to the trial court's ability to judge the credibility of witnesses. Maryland Rule 8-131(c). Moreover, "[t]he trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence." *Murphy v. 24th Street Cadillac Corp.*, 353 Md. 480, 497(1999) (quoting *Ryan v. Thurston*, 276 Md. 390, 392 (1975)).

Claims of legal error by the trial court as to matters of law are reviewed on a *de novo* basis and further proceedings in the trial court will ordinarily be required unless we conclude that the error is harmless. *In re Shirley B.*, 419 Md. 1, 18 (2011). Finally, we can reverse such a discretionary decision by a trial court only when it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Yve S.*, 373 Md. 551, 586 (2003) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)). We turn to the parties' contentions.

I Subject Matter Jurisdiction

Marks contends that the trial court lacked subject matter jurisdiction because Wright was not domiciled in Maryland for one year prior to the filing of her complaint. Specifically, he states:

> Whether the Circuit Court had subject matter jurisdiction in this divorce action turned on whether the ground for divorce occurred in Maryland. If the ground for divorce occurred outside of Maryland, then at least one spouse must have been domiciled in Maryland, for a minimum

> of one year, prior to the filing of the complaint.[ ] That was not the case herein.
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> Ms. Wright's alleged grounds all occurred in San Miguel de Allende, Mexico. These alleged grounds included adultery, desertion, constructive desertion, and voluntary separation. Ms. Wright left the marital property in 2008 and settled in Santa Cruz, California. . . . She then decided in June 2010 to move to Maryland. She filed for divorce prematurely in Maryland on October 10, 2010 (4 months after moving here). Since the purported events giving rise to this divorce occurred in Mexico, Ms. Wright, was required to wait until June, 2011 to file her complaint. Without subject matter jurisdiction over this domestic matter, the Circuit Court had no jurisdiction over the divorce.

(Citations, emphasis and footnote omitted.)

We agree with Marks's statement of the law but not with his application of the law to the facts of this case.

Md. Code Ann. Fam. Law § 7-101(a) (1984, 2006 Repl. Vol) ("F. L.") states

> If the grounds for the divorce occurred outside of this State, a party may not apply for a divorce unless 1 of the parties has resided in this State for at least 1 year before the application is filed.

During the trial, Wright testified without contradiction that she and Oliver moved to Gaithersburg on June 1, 2010. Wright filed a complaint seeking a limited or absolute divorce on October 8, 2010 and an amended complaint for absolute divorce on November 30, 2010. Marks filed motions to dismiss each complaint. The circuit court, per Judge Rubin, dismissed the amended complaint without prejudice at the conclusion of the parties' May 17, 2011 *pendente lite* hearing.

On June 10, 2011, Wright filed a new complaint, seeking absolute divorce on the sole ground of voluntary separation. In addition, on August 12, 2011 Marks filed a counterclaim seeking an absolute divorce on the grounds of desertion, construction desertion and two years' separation.[3] Because both Wright's complaint and Marks's counterclaim were more than one year after Wright began to reside in Maryland, the circuit court had subject matter jurisdiction over this case.[4]

II. 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. We address these arguments in turn.

A. The grounds for divorce

In his brief, Marks argues (footnote and citation omitted):

> The Circuit Court granted an absolute divorce, but the Circuit Court's Memorandum Opinion and Order fails to specify the grounds.[ ] The Circuit Court only concludes that "the estrangement was primarily caused by [Mr. Marks's] drug use and Jack of desire to remain in a monogamous relationship." This finding alone does not constitute any ground for divorce in Maryland.

This is not persuasive. Marks is correct that the judgment of divorce itself states that "the parties be, and they are hereby, granted an absolute divorce . . ." without articulating the grounds for the divorce. However, in the memorandum opinion, the trial court found that: "[t]he parties have lived separate and apart without interruption or cohabitation since March, 2009." The parties' two-year and eleven month separation without cohabitation satisfied F. L. § 7-103(a)(4)'s requirements for a divorce based upon a 12-month separation. (*See* footnote 3, *supra*.) 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.[5]

B. Corroborating Evidence

Marks asserts that the grant of divorce was not supported by corroborating evidence:

> The Circuit Court only concludes that "the estrangement was primarily caused by [Mr. Marks's] drug use and lack of desire to remain in a monogamous relationship." This finding alone does not constitute any ground for divorce in Maryland.[ ]
>
> Ms. Wright's testimony was also not corroborated. During a divorce proceeding, oral testimony by the plaintiff must be corroborated by another witness before the Circuit Court may grant a judgment of

> divorce.[ ] The Circuit Court beard testimony from Ms. Wright that Mr. Marks's marijuana use and desire to live a "polyamorous" lifestyle led to the separation. Not a single witness corroborated the allegation that the separation was caused by these reasons.[ ]

(Citations and footnotes omitted.)

This argument is unpersuasive. 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's counterclaim. F L. § 7-103(a)(4). Wright testified that the parties had lived separate and apart since her departure from Mexico in 2009. This was corroborated by Vilasini Wright, her sister, who testified to like effect. 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.

III. Voluntary Impoverishment

The trial court found that Marks, who had no earned income and claimed that taking care of the Hacienda was his full-time occupation, had voluntarily impoverished himself. The trial court attributed an annual earned income of $60,000 to Marks and used this figure as a factor in determining the amount of child support, alimony and the award of attorney's fees. Marks argues that the trial court erred by concluding he had voluntarily impoverished himself and by imputing his potential income when determining the amount of the alimony and child support awards. Specifically, he asserts:

> The record reflects that Mr. Marks did not choose to be "unemployed[,"] but rather he is obligated to manage and maintain the marital property which was thrust upon him by the failure of the parties' business, [i.e.] the Hacienda healing community. The record is devoid of any evidence of voluntary impoverishment.
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> Furthermore, the reduction of Mr. Marks' Brandywine shares was required to pay off the marital debts (as noted by Judge Rubin's admonishment at the *pendente lite* hearing) not to "reduce his income." [ ] Marks testified that he sold his non-marital Brandywine shares to pay off the marital debts. He did not do so to reduce his earning potential.
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> Even if this Court could make a finding a voluntary impoverishment, the [c]ircuit [c]ourt was and is statutorily required to consider a parent's potential income. Under [Md. Code Ann., Fam. L. § 12-201(b)(2)(f)],[6] Ms. Wright had the burden of proving [ ] Marks's job opportunities in San Miguel, Mexico (much less in the Washington, D.C. metropolitan area), and the earnings levels in the community No testimony or exhibits were offered by Mr. Wright to support or prove that the $60,000[ ] is an accurate figure of imputed income for Mr. Marks in San Miguel, Mexico.

We are not persuaded by these arguments. We begin with a review of the concept.

A party "is voluntarily impoverished 'whenever [he or she] made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources [to meet his or her support obligations]." *Durkee v. Durkee*, 144 Md. App. 161, 182 (2002) (quoting *Digges v Digges*, 126 Md. App. 361, 381 (1999). To be voluntary, '"the action [must] be both an exercise of unconstrained free will and that the act be intentional."' *Digges* at 381 (quoting *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993). Moreover, "[a] parent is not excused from support because of a tolerance of or a desire for a frugal lifestyle. Indeed, if need be, the parent must alter his or her previously chosen lifestyle to satisfy a support obligation." *Durkee*, 144 Md. App. at 182-83 (citing *Sczudlo v. Berry*, 129 Md. App. 529, 542(1999) and *Moore v. Tseronis*, 106 Md. App. 275, 282(1995)). The concept of voluntary impoverishment is applicable in child support, alimony and attorney's fee award cases. *Digges*, 126 Md. App. at 384-88.

Whether a party has voluntarily impoverished himself or herself is a question of fact. When reviewing a trial court's factual findings for clear error, we "assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the trial court." *See In Re Abiagail C.*, 138 Md. App. 570, 587 (2001). Moreover, we must defer to the trial court's ability to assess the credibility of witnesses. Md. Rule 8-131(e).

The landmark case in Maryland on the issue of voluntary impoverishment in Maryland is *John O. v. Jane O.*, 90 Md. App. 406 (1992). In that case, this Court set forth factors to be considered in determining whether a party is voluntarily impoverished, including:

> (1) his or her current physical condition; (2) his or her respective level of education; (3) the timing of any

> change in employment or other financial circumstances relative to the divorce proceedings; (4) the relationship between the parties prior to the initiation of divorce proceedings; (5) his or her efforts to find and retain employment; (6) his or her efforts to secure refraining if that is needed; (7) whether he or she has ever withheld support; (8) his or her past work history; (9) the area in which the parties live and the status of the job market there; and (10) any other considerations presented by either party.

90 Md. App. at 422.

In the memorandum opinion, Judge Bair correctly summarized the applicable legal principles. We find no error in the court's application of the law to the evidence before it. Taken in the light most favorable to Wright as the prevailing party, the evidence before the court was as follows:

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, including an overactive immune system, inflammation, arthritis, asthma, and psoriasis. Marks took prescription medications for those conditions and stated that he also used marijuana daily. 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 based on his refusal to accept [Wright's] offers to assume or share with [him] the responsibility of marketing and attempting to sell the Hacienda." 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. While the small Mexican city of San Miguel de Allende, Guanajuato may offer limited job opportunities, there was evidence that Marks's work history of non-traditional jobs in real estate development and investment management would allow him to work remotely, even though Markswright ceased operations in 2011.

In short, bearing in mind that it was the role of Judge Bair, not us, to assess the credibility of the witnesses, there is ample evidence from which the court could infer that Marks had "made the free and conscious choice, not compelled by factors beyond his or her control, to render himself . . . without adequate resources" to pay alimony and child support. The trial court's finding of voluntarily impoverishment was not clearly erroneous.

Turning to Marks's argument that the court also erred in concluding that he should be attributed with potential income of $60,000 per year, we again determine there was no clear error. As explained in *Goldberger v. Goldberger*, 96 Md. App. 313, 328(1993), a trial court should consider age, mental and physical health, assets, education background and skills, prior earnings, efforts to find and retain employment, status of the job market in the area where the parent lives, actual income from any source of the party, and any other relevant factors. The trial court thoroughly addressed each of these factors in its memorandum opinion. We can find no error, much less clear error, in the ways that the court resolved the relevant issues in light of the conflicting evidence.

Finally, Marks contends that it was Wright's burden to prove the viability of the San Miguel de Allende job market and to "prove that [ ]$ 60,000[ ] is an accurate figure of imputed income for Mr. Marks in San Miguel, Mexico." Assuming for the purposes of analysis that Marks's definition of the relevant job market is correct, Wright satisfied her burden by adducing evidence that, until Markswright ceased operations, Marks earned $60,000 annually from the property management business even though he lived in Mexico.

In conclusion, we explained in *Durkee* that:

> To be sure, any determination of potential income must necessarily involve a degree of speculation. A parent's potential income is not the type of fact which is capable of being verified, through documentation or otherwise. But, so long as the factual findings are not clearly erroneous, the amount calculated is realistic, and the figure is not so unreasonably high or

> low as to amount to abuse of discretion, the court's ruling may not be disturbed.

144 Md. App. at 187 (quotation marks and citations omitted). By this standard, there is no basis for us to disturb the trial court's conclusion that Marks has an annual earning potential of $60,000.

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 in any amount as well as ordering the alimony to be indefinite. Mark's arguments are not persuasive; before we explain why, we again will provide a brief overview.

The primary purpose of the alimony statute (F. L. 11 § 101 *et seq*.) is economic rehabilitation, i.e., to provide temporary support while the formerly economically dependant spouse becomes self-supporting:

> "It is well settled in Maryland that the statutory scheme generally favors fixed-term or so-called rehabilitative alimony, rather than indefinite alimony. Underlying Maryland's statutory preference is the conviction that the purpose of alimony is not to provide a lifetime pension, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently."

Boemio v. Boemio, 414 Md. 118, 140-43 (2010) (quoting *Solomon v. Solomon*, 383 Md. 176, 194-95 (2004)). Nonetheless, indefinite alimony is appropriate when fairness requires it:

> We have previously defined the purpose of the statute as providing for an appropriate degree of spousal support in the form of alimony after the dissolution of a marriage. In regard to the appropriateness of such support, the statute itself requires that the trial court weigh all factors relevant to "*a fair and equitable award." [F. L.] Section 11-106(b)*. The statute elsewhere invokes *the equitable concept of unconscionably disparate standards of living.* [F. L.] Section 11-1 06(c)(2). Its sister provision governing the extension of an alimony period permits the court to act to avoid "*a harsh and inequitable result.*" [F. L.] Section 11-107(a)(1). We conclude from these provisions that *the paramount goal of the legislature was to create a statutory mechanism leading to equitably sound alimony determinations by judges*.

Boemio, 414 Md. at 141 (quoting *Tracey v. Tracey*, 308 Md. 328, 388 (2010) (emphasis added in *Boemio*).

F. L. § 11-106 sets out the considerations which guide a court's decision whether to award alimony.[7] While § 11-106's criteria are extensive, it is a bedrock principle of Maryland family law that a trial court awards alimony in order to do equity between the parties. Thus,

> [a]n alimony award will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong. [A]ppellate courts will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings. Thus, absent evidence of an abuse of discretion, the trial court's judgment ordinarily will not be disturbed on appeal.

Boemio, 414 Md. at 124-25 (internal citations and quotation marks removed).

In its memorandum opinion, the trial court addressed each of the § 11-106(b) and (c) factors in detail. Marks focuses his challenges to the court's findings as to only two of the statutory criteria: 1) Marks's "ability to meet [his own] needs while meeting the needs of the party seeking alimony" (11-106(b)(9)); 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 (11-106(c)(2)).

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, as the trial court noted, Marks "currently 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, therefore, should not have been awarded permanent alimony; and 3) no disparity in

lifestyle will exist once the Hacienda is sold. We consider these arguments in turn.

A. Relative Incomes

Marks contends that "[a]ccording to Plaintiffs financial statement she is earning $3,000.00 in monthly wages while Mr. Marks receives $5,609.66 per month. Ms. Wright's income is 54% of Mr. 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, eg. Solomon v. Solomon*, 383 Md. 176, 198 (2004) (identifying case law where courts upheld indefinite alimony awards after finding unconscionable disparity in the parties' standard of living where alimony award recipient's income was 16-46% of the alimony payor's income). There are two difficulties with his argument.

First, relative income comparisons are *a* factor, not *the* factor in determining disparate lifestyles. While the Court in *Solomon* identified the utility of the percentage comparison method, it cautioned, "We hasten to note however, that each case must be evaluated on its facts and not on some fixed minimum or universal standard." *Id*.

Second, at the time of the trial, Marks annual earnings from his investment and trust income was approximately $67,000. Attributing the additional $60,000 in potential earned income to Marks, 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. Marks states (emphasis added):

> Given [that] Wright Management is a start-up company it is *unlikely* that she has reached the peak of her earning potential. She will see her income increase substantially in the coming years. Even her resume alone *suggests* that her earning potential in multiple fields of work is substantial.

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 the area of real estate management and has her real estate license in the three surrounding areas of Maryland, Virginia, and Washington, D.C. Wright works 60 hours per week, while also raising the parties' minor child.
>
> The Court finds that Wright has made as much progress toward becoming self-supporting as can reasonably be expected given her lack of work experience outside the parties' family businesses, and her lack of real estate management experience. Wright has already obtained real estate licensing in the metropolitan area. 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. Understanding that the court is not clairvoyant, the laws allows an obligor to request a modification of alimony should there be a substantial change in circumstances. *See Long v. Long*, 129 Md. App. 554, 585-86(2000) (providing that both rehabilitative and indefinite alimony are always subject to modification and/or termination with a qualifying change of circumstances).

C. The Parties' Standard of Living After the 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. In his brief, he states (citations omitted):

> [T]he Circuit Court awarded Ms. Wright indefinite alimony because "of the unequal distribution of assets." The Circuit Court, however, failed to note Ms. Wright's assets after the division of the marital property. If the Hacienda is sold at its appraised value, it will net approximately $2.5 million to be split by both parties . . . The concern of the Circuit Court that Ms. Wright will not "be able to achieve the standard of living that [Mr. Marks] enjoys, or accumulate sufficient sav-

> ings for the future" is not true once the marital property is sold and divided. . There is no unequal distribution of the assets here.

Marks's argument is based on one phrase in the trial court's opinion. After addressing each of the statutory factors, the court stated (citations omitted, emphasis added):

> In considering all of the foregoing factors, the Court is cognizant of the general preference for rehabilitative, rather than indefinite alimony. Notwithstanding this preference, the Court finds that the facts in this case mandate an award of indefinite alimony to Wright to insure an equitable resolution to the parties' divorce.
>
> An award of indefinite alimony is both necessary and appropriate here to ameliorate the unconscionable disparity that would otherwise exist between the parties' respective standards of living. Even after Wright has made as much progress toward becoming self-supporting as can reasonably be expected, the parties' respective standards of living would remain unconscionably disparate *due to the unequal distribution of assets between the parties*. It would be impractical to suggest that at 44 years of age, after nearly 13 years of marriage, and roughly 14 years out of the workforce outside of the family businesses, Wright will be able to achieve the standard of living that Marks enjoys, or accumulate sufficient savings for her future as she was able to do during the marriage. Therefore, the Court grants Wright an award of indefinite alimony in the sum of $3,500.00 per month to be paid by Marks.

When read in context it is clear that the trial court's reference 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 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.

III. The Monetary Award

Marks contends the court was clearly erroneous in its evaluation and application of the F. L. § 8-205(b) factors[8] and in determining whether Wright should have received a monetary award and, if so, its amount. Marks argues the court was clearly erroneous because it:

> (1) failed to consider Marks's payment of marital debts and management of the Hacienda as contributions to the well-being of the family;
>
> (2) failed to consider the potential success of Wright Management in evaluating the economic circumstances of the parties;
>
> (3) failed to consider that Wright caused Markswright to lose its contract with the Brandywine in evaluating the economic circumstances of the parties;
>
> (4) failed to consider that Wright will receive half of the Hacienda's sale price upon its sale in evaluating the economic circumstances of the parties;
>
> (5) found Marks was voluntarily unemployed given the magnitude of the tasks associated with managing the Hacienda without Wright and based on his poor health;
>
> (6) included rental income from the Hacienda as income to Marks given that the rents collected are negligible;
>
> (7) failed to adequately consider testimony indicating Wright deserted Marks and was the cause of the parties' estrangement; and
>
> (8) misinterpreted the purpose of the $500,000 lien placed on the Hacienda by Marks during the divorce proceeding.

Each of these contentions challenges a factual determination made by the trial court. As previously stated, when reviewing a trial court's factual findings for clear error, we "assume the truth of all the evidence, and of all the favorable inferences fairly deducible therefrom, tending to support the factual conclusions of the trial court." *See In Re Abiagail C.*, 138 Md. App. 570, 587 (2001). Moreover, we defer to

the trial court's ability to assess the credibility of witnesses. Md. Rule 8-131(c).

When applying § 8-205(b), both the amount and the manner of payment of a monetary award are committed to the trial court's discretion. As with its analysis of the alimony and voluntary impoverishment issues, the trial court considered the § 8-205(b) factors in exacting detail in its memorandum opinion. We will proceed through Marks's contentions in turn.

First, we find no clear error by the trial court because it concluded that Marks had not adequately proven his assertion that he used a substantial portion of the net proceeds of his sale of Brandywine interests to pay marital debts. Marks bore two evidentiary burdens on this issue: production and persuasion. He met his first burden through his own testimony; Wright countered with evidence of her own as well as asserting that Marks's version of events was not consistent with the relevant financial records. By arguing, in effect, that the trial court should have found Marks's evidence to be persuasive when the court concluded it was not, Marks has shouldered a particularly heavy burden:

> "Actually to be persuaded of something requires a requisite degree of certainty on the part of the fact finder (the use of a particular burden of persuasion) based on legally adequate evidentiary support (the satisfaction of a particular burden of production by the proponent). . . . Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard."

Byers v. State, 184 Md. App. 499, 531 (2009) (quoting *Starke v. Starke*, 134 Md. App. 663, 680-81 (2000)).

At trial, Marks contended the $500,000 lien reflected half of the 33 months of mortgage payments (33 months x $2,400), that he attributed to Wright; half of legal fees for the sale of the Brandywine shares; half of a debt owed to the Brandywine; half of the IRS debt; half of the legal fees attributed to another legal action; and half of the pay-off of the Hacienda balloon mortgage. The trial court made plain that it was not convinced of the existence of the debts in question:

> Testimony and other evidence were unclear, however, as to the amount of debt attributable to the Brandywine interest. Marks asserted outstanding debt in the amount of $594,000.00 on the Joint Marital and Non-Marital Property Statement. The Court heard testimony that Marks took out a loan from the Brandywine for $257,000.00, which he later satisfied for $235,000. Testimony regarding the accounting of the Brandywine, and Marks's K-1 Schedules for 2009 and 2010, failed to corroborate the existence of debt in the amount of $594,000.00. Based upon the evidence received, the Court finds that the debt of $594,000.00 was not proven and will not reduce the value of the Brandywine interest.

Moreover, the court concluded that mortgage payments were made on the Hacienda from the parties' joint account until the parties separated their finances in 2009. Illustrative of the problems created by murky nature of financial status of the Hacienda, the court stated (emphasis added):

> The Court finds of paramount importance the fact that Marks remains in sole control of the Hacienda and the efforts being made to sell the property. The Court also finds Marks controls the parties' corporation, Grupo Rio Laja, which owns the Hacienda. Given Marks's control of the asset, the likelihood that the eventual sale may lack transparency is also something the Court must consider, particularly in light of the facts surrounding the $500,000 lien Marks placed on the property. Marks testified that the purpose of the lien on the Hacienda is to ensure reimbursement of miscellaneous marital debt[s] allegedly owed to him by Wright. As previously discussed, the legitimacy of the lien was not substantiated by evidence and the Court finds the sole purpose of the lien is to reduce [Wright's] share of the proceeds from the eventual sale of the Hacienda.

Second, the court did not err by discounting the possibility of the future success of Wright Management as no evidence as to the possibility or probability of impending success. The only evidence before the court was that the entity was not generating a profit at the time of the trial.

Third, the court made a specific finding that Markswright's loss of the Brandywine contract was the result of the discord accompanying the parties' divorce and not any action by Ms. Wright. There was conflicting evidence on the issue. It is the role of the trial court, not us, to resolve such conflicts. Marks points to nothing that would lead us to conclude that the trial court's factual determination was clearly erroneous.

Reviewing the record, there is sufficient evidence offered that the Brandywine board was informed of the separation and expressed general dissatisfaction with Marks's living in Mexico and of general uncertainty about the future of Markswright. We see no clear error in this determination.

We have already discussed the fourth and fifth errors as argued by Marks, i.e., error in not accounting for the Hacienda's sale and for finding Marks voluntarily impoverished, respectively.

Sixth, there was no error by the court in considering the rental income from the Hacienda. Here, the evidence was that Marks did not charge rent for a number of persons residing at the Hacienda. He also elected to barter for use of the property's amenities, most notably the recording studio. From this, the court could have reasonably inferred that Marks could collect rental income, but elected not to do so. Otherwise, the Hacienda was constructed to accommodate guests and, as such, is capable of producing income. We see no error by the court in recognizing these facts in its analysis.

Seventh, Marks argues the court was clearly erroneous in not concluding that Wright deserted Marks. The parties gave conflicting versions of the events that preceded their separation and the reasons for Wright's departure from the Hacienda. The trial court did not commit error, much less clear error, by concluding that, in the final analysis, Wright was the more credible witness.

Eighth, and finally, Marks argues that the trial court "misunderstood" his motivation in placing the $500,000 lien against the Hacienda in November, 2011. Marks testified at trial that the lien was imposed to recover from Wright "her responsibility that had not been paid since 2008 when she left the business of paying for the Hacienda" when the property was sold. The secured party under the lien was Marks's son Keli, who testified that he has no intention of collecting on the lien, and that he was designated as the lien holder because Marks was unable to designate himself. From this evidence, the trial court found that the sole purpose of the lien was to reduce Wright's "share of the proceeds from the eventual sale of the Hacienda." The court's conclusion was not clearly erroneous.

IV. The Award of Attorney's Fees

Marks argues that the trial court erred by awarding attorney's fees to Wright without adequately examining the parties' respective financial resources and by performing insufficient review of the legal bills submitted into evidence. We are not persuaded.

After considering the financial resources of the parties and the justification in bringing their respective claims, a court may award reasonable and necessary attorney's fees and costs. This award is in the sound discretion of the trial court and we will not modify an award "unless it is arbitrary and clearly wrong." *Rosenberg v. Rosenberg*, 64 Md. App. 487, 538 (1985). In its opinion, the trial court provided:

> The Court finds that each party was justified in maintaining this action and pursuing the relief sought in this matter. Each party was represented by experienced counsel and the Court received evidence of each party's attorney's fees. Wright incurred total attorney's fees in the amount of $44,411.78. Marks incurred total attorney's fees in the amount of $79,756.10. The Court finds each party's attorney's fees to be reasonable.
>
> As set forth elsewhere in this Opinion, the evidence indicates that Wright's financial resources are quite limited, and that she is in much greater financial need than Marks. Wright testified that she liquidated her IRA and borrowed significant funds from her grandmother in order to pay her attorney's fees. Therefore, pursuant to these considerations and in light of the factors enumerated in Family Law 8-214, 11-110, and 12-103, Marks shall pay Wright the sum of $44,411.78, representing the amount of attorney's fees incurred by Wright since August 2010. The Court will enter judgment for Wright in that amount.

In reaching its decision, the court explicitly incorporated by reference the entirety of its detailed opinion. That this single paragraph does not re-hash the extensive analysis already performed by the court does not affect the substance of its determination.

We are also not convinced by Marks's second contention, *viz.*, that the court did not sufficiently consider the reasonableness of the legal bills presented. Specifically, Marks argues:

> The Circuit Court also performed no analysis of the legal bills submitted as evidence by [ ] Wright, other than to comment that each party was represented by experienced counsel. It accepted the statements without giving any consideration of the work performed by counsel, much less the factors that must be analyzed before any award of fees and costs may be

> assessed. The Court merely opined that the fees seemed reasonable. Such a cursory review, if fees could be found to be warranted, is unacceptable.

Here, the court expressly stated that it found "each party's attorney's fees to be reasonable." Nothing more is required; "a trial court does not have to follow a script." *Durkee*, 144 Md. App. at 187. As we stated in *Davidson v. Seneca Crossing Section II Homeowner's Ass'n*, 187 Md. App. 601, 628 n.4 (2009):

> The trial judge need not articulate each item or piece of evidence she or he has considered in reaching a decision. Unless it is clear that he or she did not, *we presume the trial judge knows and follows the law* The fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal.

(Quotation marks and citations omitted; emphasis in original.)

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.

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

FOOTNOTES

1. We have taken some liberties with the opinion by juxtaposing and combining certain paragraphs and omitting the paragraph numbering system used by the trial court. In addition, the trial court referred to Wright as "Plaintiff' and Marks as "Defendant." We have changed those references to the parties' last names to be consistent with our opinion.

2. The court noted elsewhere in its opinion that:

> Marks does not pay monthly rent as he currently continues to reside at the Hacienda, where he is able to generate additional income by renting rooms and casitas on the property to guests.

3. On October 1, 2011, Chapter 442 of the Acts of 2011 became law. Chapter 442 amended F. L. 7-103 by eliminating what was then subsection (a)(3) (voluntary separation) and amending and renumbering former subsection (a)(5) (2-year separation) to what is now subsection (a)(4) (1-year separation). Neither party amended their pleadings to reflect the change in the statute.

4. Because Marks's challenge to the circuit court's jurisdiction constituted an attack on the circuit court's authority to resolve the custody and visitation issues for Oliver, we have treated this case as an expedited appeal pursuant to Maryland Rule 8-207(a).

5. We also agree with Wright's observation that if the court erred, the error was harmless because the end result was to grant to the parties a divorce on one of the grounds that Marks himself asserted in his counterclaim. *See, e.g., Flanagan v. Flanagan*, 181 Md. App. 492, 516-18 (2007) (Trial court's error in finding granting a divorce on the grounds of voluntary separation was harmless because record established both desertion and constructive desertion and because "as appellee underscores, appellant clearly wanted a divorce, as evidenced by his counter-complaint, and he obtained the relief he sought, i.e., an absolute divorce.").

6. Examining the Family Law Article, no such provision is in existence. The Code does offer a definition of "potential income" at F. L. 12-201(1), defining the term as "income attributed to a parent determined by the parent's employment potential and probable earnings level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community."

7. The statute provides:

> § 11-106. **Award — Determination of amount and duration.**
>
> (a) *Court to make determination.* —
>
> (1) The court shall determine the amount of and the period for an award of alimony.
>
> (2) The court may award alimony for a period beginning from the filing of the pleading that requests alimony.
>
> (3) At the conclusion of the period of the award of alimony, no further alimony shall accrue.
>
> (*b) Required considerations* — In making the determination, the court shall consider all the factors necessary for a fair and equitable award, including:
>
> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (6) the circumstances that contributed

to the estrangement of the parties;

(7) the age of each party;

(8) the physical and mental condition of each party;

(9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;

(10) any agreement between the parties;

(11) the fmancial needs and financial resources of each party, including:

(i) all income and assets, including property that does not produce income;

(ii) any award made under §§ 8-205 and 8-208 of this article;

(iii) the nature and amount of the financial obligations of each party; and

(iv) the right of each party to receive retirement benefits; and

(12) whether the award would cause a spouse who is a resident of a related institution as defined in § 19-301 of the Health - General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

(c) *Award for indefinite period*. — The court may award alimony for an indefinite period, if the court finds that:

(1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or

(2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

8. Section 8-205 reads in pertinent part:

* * * *

(b) *Factors in determining amount and method of payment or terms of transfer*. — The court shall determine the amount and the method of payment of a monetary award, or the terms of the transfer of the interest in property described in subsection (a)(2) of this section, or both, after considering each of the following factors:

(1) the contributions, monetary and nonmonetary, of each party to the wellbeing of the family;

(2) the value of all property interests of each party;

(3) the economic circumstances of each party at the time the award is to be made;

(4) the circumstances that contributed to the estrangement of the parties; (5) the duration of the marriage;

(6) the age of each party;

(7) the physical and mental condition of each party;

(8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;

(9) the contribution by either party of property described in § 8-201 (e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;

(10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and

(11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both. . . .

NO TEXT

Cite as 2 MFLM Supp. 77 (2013)

CINA: clarification of paternity: exclusion by genetic testing

In Re: Adoption/Guardianship of Mishawn R. and Mykkell R.

No. 703, September Term, 2012

Argued Before: Woodward, Graeff, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Graeff, J.

Filed: December 6, 2012. Unreported.

The juvenile court properly determined that genetic testing was in the best interests of the children and required at the request of the Department, where, although the mother and the man she had listed on the children's birth certificate as the father 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.

In this appeal, we are asked to review an order by the Circuit Court for Baltimore City, sitting as a juvenile court, excluding Mickey Lee R. ("Mr. R."), appellant, as the father of appellees, Mishawn R. and Mykkell R., two children in need of assistance ("CINA").[1] The children are currently four and five years old, and they have been in the custody of the Department of Social Services of Baltimore City (the "Department"), appellee, since February 6, 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 ("TPR") to Mishawn and Mykkell. These TPR proceedings were considered together 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 the half-siblings of Mishawn and Mykkell.[2]

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 to determine biological paternity. 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.

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

On appeal, appellant raises the following question for our review:

> 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?

For the reasons explained below, we shall affirm the judgment of the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

On December 27, 2011, the Department filed separate Petitions for Guardianship with the Right to Consent to Adoption or Long Term Care Short of Adoption, seeking to terminate the parental rights of the parents of both Mishawn (DOB: 9/6/07) and Mykkell (DOB: 11/6/08). At the time they came into the Department's care in February 2009, the boys were seventeen-months and three-months-old, respectively. By the time the Department filed these TPR petitions in December 2011, the children had been in the Department's continuous custody for thirty-four months. The Departmental also filed separate TPR petitions with respect to three other CINA who were removed from the same household. The juvenile court consolidated all five TPR petitions for hearing purposes.

Both the initial TPR petition regarding Mishawn and his birth certificate indicate that his father is "not stated." With respect to Mykkell, however, the petition, as well as his birth certificate, lists appellant as the father. On March 6, 2012, the Department filed amended petitions identifying appellant as the father of both Mishawn and Mykkell.

On March 14, 2012, however, the Department filed a Motion for Clarification of Paternity, averring that, although Mother "has at various times identified Mickey Lee R. as the father of" all five CINA, she "has

a history of misidentifying men as the father of her children."[3] The motion, which is supported by copies of birth certificates for all five CINA, states that, although appellant is listed as the father on Mykkell's birth certificate, Mother "has also identified 'Jermaine' and 'Tremaine Lonnon' as the birth father of Mykkell R." Moreover, "[n]o father is named" on Mishawn's birth certificate, and Mother had "identified 'Ike,' 'Isiah Spriggs' and 'Isaiah Spriggs' as the father of Mishawn R." The Department requested that the court schedule a hearing, order Mother "to provide any identifying information about the Respondents' father(s), including identity and whereabouts, under oath," and "[o]rder the named father(s) to submit to a paternity test(s)[.]"

On April 4, 2012, the juvenile court held a hearing on the Department's request for genetic testing. Counsel for Mishawn and Mykkell joined with the Department in asking the court to clarify paternity by ordering genetic testing.

At the hearing, the Department questioned Mother under oath regarding the paternity of her children. She testified that appellant is the father of all five CINA. She admitted, however, that she had signed documents that were introduced in prior CINA proceedings, in which she identified Isaiah S. as Mykkell's father and Tremaine L. as Mishawn's father. When asked whether she was married to appellant at the time of the birth of any of the five CINA, Mother testified that she was married to appellant when Mickey R. was born. She testified, however, that she could not "remember the exact date" of her marriage, stating: "It's been awhile."

Over objections by appellant and Mother, the court ordered genetic testing of appellant, all five CINA, and the two men previously identified as the fathers of Mishawn and Mykkell. The court explained that a biological father has a constitutional right to notice of proceedings to terminate his parental rights, and it found that

> there is sufficient inconsistency. . . through the history of this case that . . . it's in the best interests of these children to have an answer to the [paternity] question, as well as in the interest of potentially unidentified, unnamed, or with regard to the two . . . that have been named, the rights of those individuals.

The court nevertheless advised appellant that the test results would not preclude consideration of his role in the children's lives.

Thereafter, the results of the genetic tests indicated that appellant is the biological father of Marcus, Marshelle, and Mickey, but not Mishawn or Mykkell. On April 26, 2012, the Department filed second Amended Petitions with respect to Mishawn and Mykkell, alleging that genetic testing excluded appellant as their biological father. At the same time, the Department filed a Motion to Determine Exclusion of Paternity.

On May 14, 2012, the juvenile court held a hearing on the Department's motion. At the outset, counsel for appellant and Mother advised that Mother and appellant were not married. Counsel for appellant insisted, however, that, until he was "excluded" by the court, appellant was the legal father of both boys because Mother named appellant as the father of the children, and he held himself out as their father. The juvenile court initially indicated that it would defer ruling on the motion for exclusion and grant leave for appellant to intervene in the TPR proceedings for Mishawn and Mykkell, but counsel for appellant insisted that, unless the court excluded appellant, he remained their father and a party to the TPR proceedings by "operation of law," so that he could not intervene.

At the conclusion of the hearing, the juvenile court found that, based on the results of the genetic tests, appellant is not the father of Mishawn or Mykkell, and it entered an order excluding him as such (the "exclusion order"). Noting that it had "not been able to find a juvenile case on point," the court explained that "it's absolutely required that there be notice to whoever the biological father is . . . . [a]nd since counsel have argued that I cannot order such a thing without exclusion, I don't see any option, but to exclude." The court then invited counsel for appellant "to file a motion now to intervene . . . because he's not now a party." Although the order precluded appellant from participating as a parent in the TPR proceedings relating to Mishawn and Mykkell, appellant remained a party to the TPR petitions concerning the other three CINA, who are his biological children.

In addition to the exclusion order, the juvenile court granted the Department's request for permission to notify, through publication, potential fathers of Mishawn and Mykkell about the TPR proceedings and hearing. According to counsel for the children, the Department thereafter "served two additional fathers named by [Mother] as possible biological fathers."

Appellant noted an appeal from the exclusion order.[4]

DISCUSSION

Appellant contends that the juvenile court erred in ordering genetic testing over his objection, and in excluding him as the father of Mishawn and Mykkell on the basis of those test results. He contends that he was the presumptive father of the children because Mother asserted that he was the father, he signed an affidavit of paternity, and he was listed on Mykkell's

birth certificate as the father. In appellant's view, "[t]he court erred in illegitimizing the boys," asserting that the court was not authorized to make a paternity declaration, and even if it was, such action was not in the children's best interests, given that no one else had claimed paternity.

The Department moves to dismiss this appeal on the ground that there has been no final appealable judgment. On the merits, the Department argues that "the juvenile court correctly excluded Mr. R. as the biological father of Mishawn and Mykkell after genetic testing revealed that he is not their biological parent."[5]

I.
STATUTES GOVERNING CINA AND PATERNITY PROCEEDINGS

Determining the appealability and the validity of the challenged order requires us to apply Maryland statutes governing CINA, TPR, and paternity proceedings. We will address these statutes generally before discussing the particular legal issues presented in this appeal.

Once a child has been judicially declared to be in need of assistance due to parental abuse or neglect, removed from a parent's custody and care, and placed into foster care, the Department must make reasonable efforts to reunify parent and CINA, by providing support services designed to ameliorate any conditions that preclude the child's safe return to the parent's care. *See* Md. Code (2011 Supp.) § 5-525(e)(1)(ii) of the Family Law Article ("FL") (the Department generally must make "reasonable efforts efforts . . . . to preserve and reunify families. . . . to make it possible for a child to safely return to the child's home."). When, after such reasonable efforts have been made, the child still cannot be safely returned to his or her parent after nearly two years in foster care, and the child has the opportunity to be permanently adopted by a person who, can meet the child's needs, the Department may petition a juvenile court for an order that terminates parental rights and authorizes the Department to consent to such adoption. FL § 5-525.1[6]

A child cannot be adopted without his natural parents' consent unless the parents' rights have been terminated in a judicial proceeding. *In re Adoption/Guardianship of Genara A.*, 152 Md. App. 725, 730-31 (2003). A court can grant a decree of adoption or guardianship without parental consent, however,

> [i]f, after consideration of [enumerated statutory] factors . . . a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in a child's best interests, the juvenile court may grant guardianship of the child without consent[.]

FL § 5-323(b).

The Court of Appeals has harmonized the statutory and constitutional rights implicated in such proceedings as follows:

> In TPR cases, a parent's right to custody of his or her children "must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect." Thus, this parental right is terminated "upon a showing either that the parent is 'unfit' or that 'exceptional circumstances' exist which would make continued custody with the parent detrimental to the best interest of the child."
>
> With this understanding, the General Assembly has set forth criteria to guide and limit the court in determining the child's best interest. *See* Md. Code, § 5-323 of the Family Law Article ("FL"). Section 5-323 enumerates a series of specific factors that a juvenile court must consider in any TPR proceeding. . . . The statute thus establishes that, in TPR proceedings, the court's main concern is the "child's best interests." Accordingly, the best interests of the child must "trump[ ] all other considerations."

Amber R., 417 Md. at 709-11 (citations omitted) (footnotes omitted).

Pursuant to the statutory scheme, parents of the CINA in question must be identified and notified of the CINA guardianship proceedings, so that meaningful reunification services may be offered, and the TPR proceedings, so that parents are afforded their constitutional right to be heard regarding their child.[7] In some instances, however, the Department may be unable to conclusively identify the father of a CINA due to inadequate or conflicting information. In that event, a hearing on the issue of paternity may be warranted to ensure identification, participation, and notification of the correct person. FL § 5-306(b)(2) ("After a request of a party or claimant and before ruling on a

[guardianship or adoption] petition under Part II or Part III of this subtitle, a juvenile court shall hold a hearing on the issue of paternity.").

As the Court of Appeals has explained, Maryland has two statutory schemes for establishing paternity. *Mulligan v. Corbett*, 426 Md. 670, 672 (2012); *Kamp v. Dep't of Human Servs.*, 410 Md. 645, 655 (2009). As discussed, each of these statutory schemes includes circumstances in which a man will be presumed to be the father of a child.

FL § 5-306(a) provides for a presumption that a man is the father, "[u]nless a court excludes a man as the father of a child," under the following circumstances:

> (1) the man was married to the child's mother at the time of the child's conception;
>
> (2) the man was married to the child's mother at the time of the child's birth;
>
> (3) the man is named as the father on the child's birth certificate and has not signed a denial of paternity;
>
> (4) the child's mother has named the man as the child's father and the man has not signed a denial of paternity; . . .
>
> (5) the man has been adjudicated to be the child's father;
>
> (6) the man has acknowledged himself, orally or in writing, to be the child's father and the mother agrees; or
>
> (7) on the basis of genetic testing, the man is indicated to be the child's biological father.

In CINA proceedings, the paternity provisions in the Family Law Article expressly apply. *See* Md. Code (2011 Supp.) § 3-822(e)(2) of the Courts & Judicial Proceedings Article ("CJP") (In CINA proceedings, the court may "[m]ake a finding of paternity in accordance with Title 5, Subtitle 10, Part VI of the Family Law Article").[8]

FL § 5-1029(b) provides

> (b) *In general.* — On the motion of the Administration . . . 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.**
>
> * * *
>
> (f) *Laboratory report as evidence.* — (1) Subject to the provisions of paragraph (3) of this subsection, the laboratory report of the blood or genetic test shall be received in evidence if:
>
> (i) definite exclusion is established; or
>
> (ii) the testing is sufficiently extensive to exclude 97.3% of alleged fathers who are not biological fathers, and the statistical probability of the alleged father's paternity is at least 97.3%.

(Emphasis added).

II.
MOTION TO DISMISS

The Department moves to dismiss this appeal on the ground that "the order appealed from is not a final judgment." In support, the Department points out that, although the juvenile court excluded appellant as the father of Mishawn and Mykkell, the "[g]enetic testing 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 exciuding 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. Moreover, in the Department's view, since appellant is still a party to the TPR proceedings concerning his biological children, he "will have the opportunity to appeal from the trial court's interlocutory order regarding the issue of his paternity rights to Mishawn and Mykkell following the entry of a final judgment in the case." Appellant did not file a response to the motion to dismiss the appeal.

"In Maryland, the right to seek appellate review is statutory; the Legislature can provide for, or preclude, the right of appeal." *Fuller v. State*, 397 Md. 372, 382 (2007). The legislature has expressly authorized by statute appeals from final judgments, *see* CJP § 12-301 (except in specified circumstances, "a party may appeal from a final judgment in a civil or criminal case by a circuit court"), and certain interlocutory rulings, *see* CJP § 12-303(3) (permitting appeals from enumerated types of interlocutory orders). In addition, appellate review is available for some other, non-final orders, including rulings that qualify for appellate review under the common law collateral order doctrine. *Shoemaker v. Smith*, 353 Md. 143, 165 (1999).

We agree with the Department that this appeal was not taken from a final judgment, albeit for reasons different from that set forth by the Department. The Court of Appeals summarized the finality rule as follows:

> For the trial court's ruling to be a final judgment it must either determine and conclude the rights of the parties involved or deny a party the means to 'prosecute or defend[ ] his or her rights and interests in the subject matter of the proceeding.' In considering whether a particular court order or ruling constitutes an appealable judgment, we assess whether any further order is to be issued or whether any further action is to be taken in the case.

In re Billy W., 386 Md. 675, 688-89 (2005) (citations omitted).

In this case, the Department filed five separate TPR petitions with respect to Mishawn, Mykkkell, and their three half-siblings. Even though appellant was still a participant in the joint TPR proceedings based on his status as the biological father of the three other children, the effect of the juvenile court's order excluding appellant as the father of Mishawn and Mykkell was to finally preclude appellant from exercising parental rights and remedies with respect to the individual TPR petitions concerning those two children. Thus, contrary to the Department's argument, unless appellant was permitted to intervene in this action, he could not appeal from the ultimate TPR ruling regarding Mishawn and Mykkell.

The exclusion order, however, did not constitute a final disposition of the TPR proceedings concerning Mishawn and Mykkell. After excluding appellant as their father, the juvenile court required the Department to make reasonable efforts to identify and locate the biological father of each boy and to provide them notice of the TPR and adoption proceedings. Pending the outcome of those efforts, the court held in abeyance its ultimate determination as to whether the parental rights of Mother and any newly identified father(s) should be terminated and whether the proposed adoption should be authorized. Because the exclusion order did not dispose of the Department's TPR petitions with respect to Mishawn and Mykkell, it is not a final appealable judgment.

Nevertheless, 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, as indicated, 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.

III.
EXCLUSION ORDER

Appellant contends that the court erred in excluding him as the father of Mishawn and Mykkell because, at the time of the filing 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) ("the child's mother has named the man as the child's father and the man has not signed a denial of paternity"); (2) he signed an affidavit of paternity, *see* FL § 5-306(a)(6) ("the man has acknowledged himself, orally or in writing, to be the child's father and the mother agrees"); and (3) he was listed on Mykkell's birth certificate as the father, *see* FL § 5-306(a)(3) ("the man is named as the father on the child's birth certificate and has not signed a denial of paternity").

Perhaps recognizing that FL § 5-306 addresses presumptions of paternity, which can be rebutted by genetic testing, appellant's primary argument is that the court's order for paternity testing, which established that he is not the biological father of Mishawn and Mykkell, was improper. Specifically, he argues that "the genetic test forced upon him," as well as the exclusion order, to which he and Mother objected, "serve no further purpose than to leave Mykkell and Mishawn fatherless." He contends that "the court failed to consider the children's best interests prior to declaring that their presumptive father was not their parent and then dismissing him as a party."

The Department argues that the court "correctly excluded Mr. R. as the biological father of Mishawn and Mykkell after genetic testing revealed that he is not their biological parent." It asserts that the court properly conducted a hearing after the Department, a party to a guardianship proceeding, requested clarification of Mishawn's and Mykkell's paternity.[9] It asserts that, because the children were born out of wedlock, the paternity provisions in the family law statute applied, and the court properly ordered genetic testing. Moreover, when the tests showed that appellant was not the biological father, the court properly excluded appellant from the TPR process.

"In child custody and termination of parental rights cases, this court utilizes three interrelated stan-

dards of review." *In re Adoption of Sean M.*, 204 Md. App. 724, 732, *cert. granted*, 426 Md. 606 (2012). First, '"[w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies."' Second, we review the juvenile court's conclusions on matters of law *de novo*. '"Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.* at 732-33 (citation omitted).

The stated purposes of the portion of the Family Law Article addressing CINA guardianship and adoption proceedings are to "timely provide permanent and safe homes for children consistent with their best interests," to "protect parents from making hurried or ill-considered agreements to terminate parental rights," and to "protect adoptive parents from future disturbances of their relationship with children by former parents." FL § 5-303(b)(1), (4), (6). The statutory scheme governing child welfare services, including out-of-home placement and foster care, is designed "to reunite the child with the child's parent or guardian after the child has been placed in foster care," but "if the child has been placed in foster care and cannot return to the child's parent or guardian, to develop and implement an alternative permanent plan for the child." FL § 5-524(2), (3). In light of these goals, the CINA's father must be identified in order to ensure that: (1) he has been given a reasonable opportunity to reunite with his child; and (2) when a juvenile court is presented with a petition to terminate parental rights, he has an opportunity to be heard.

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* CJP § 3-822(e)(2). (in CINA proceedings, a court may "make a finding of paternity in accordance with" FL Subtitle 10). 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 FL § 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 ("This Court has construed this section to mean that a trial judge has no discretion to deny a blood or genetic test request."); *Langston v. Riffe*, 359 Md. 396, 435 (2000) ("Given the mandatory statutory language of section 5-1029, and the history of that section, the 'best interests' analysis generally may not be conducted in determining whether to grant a motion for testing.").

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 (no presumption of legitimacy when a child is born out of wedlock and there is no family to protect). 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 such testing was warranted under these circumstances.[10]

On this record, the juvenile court did not err or abuse its discretion in ordering genetic testing under FL § 5-1029. Nor did the juvenile court err or abuse its discretion in excluding appellant as the father of Mishawn and Mykkell under FL § 5-306(a) on the basis of those test results. 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.[11]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. A "CINA" is a child whom a court has determined is in need of judicial intervention because he or she has been abused or neglected, and whose parents or guardian either cannot or will not adequately care for the child. *See* Md. Code (2011 Supp.) § 3-801(f) of the Courts & Judicial Proceedings Article ("CJP").

2. The other CINA are: Mickey R., Jr. (DOB December 16, 2003); Marshelle R. (DOB December 28, 2004); and Marcus R. (DOB December 5, 2005).

3. At a subsequent hearing, the court was advised that Mother had 11 children.

4 Mother did not appeal.

Counsel for the children filed a "Line" "adopting" the Department's brief.

6. Md. Code (2011 Supp.) § 5-525.1 of the Family Law Article ("FL") establishes standards for the Department to petition for termination of parental rights with respect to a CINA who has been placed in out-of-home foster care over an extended time period. It provides in pertinent part:

> (a) *Determination of child's best interest* — If a child placement agency to which a child is committed under § 5-525 of this subtitle determines that adoption of the child is in the best interest of the child, the child placement agency shall refer the case to the agency attorney. . . and the agency attorney shall file a petition for termination of the natural parent's rights . . . .
>
> (b) *Termination of parental rights*. — (1) Except as provided in paragraph (3) of this subsection, a local department to which a child is committed under § 5-525 of this subtitle shall file a petition for termination of parental rights . . . if:
>
> > (i) the child has been in an out-of-home placement for 15 of the most recent 22 months[.]

7. The juvenile court is required, at each CINA hearing, to "inquire into, and make findings of fact on the record as to, the identity and current address of each parent of each child before the court." CJP § 3-822(a)(1). In addition, the court must "[i]nform the parents present of available means to establish paternity, if not yet established; and . . . [i]f appropriate, refer the parents to the appropriate support enforcement agency to establish paternity and support." CJP § 3-822(a)(2)(iii)-(iv).

When the Department petitions to terminate parental rights and obtain consent to adoption for a CINA, the juvenile court must issue an order to show cause and give notice of that order to "each of the child's living parents who has not consented to the adoption." Md. Rule 9-105(a)(2); FL § 5-334(b)(1). In addition, "Maryland Rule 9-105(e) dictates the form that must be utilized for a show cause order, requiring the show cause order to advise the recipient, *inter alia*, that the consequence of the failure to file the objection with the court means that the recipient of the show cause order has 'agreed to a termination of [his or her] parental rights." *In re Adoption/Guardianship of Audrey B.*, 186 Md. App. 454, 463 (2009).

8. The paternity scheme established in Md. Code (2011 Supp.) § 1-208 of the Estates and Trusts Article (ET), although not applicable to a CINA proceeding, contains principles similar to FL § 5-306(a). It provides, in pertinent part:

> (b) *Child of his father*. — A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:
>
> (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;
>
> (2) Has acknowledged himself, in writing, to be the father;
>
> (3) Has openly and notoriously recognized the child to be his child; or
>
> (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

A request for blood testing to rebut the presumption of paternity in ET § 1-208 is assessed by considering the best interests of the child. *Mulligan v. Corbett*, 426 Md. 670, 672 (2012). This is in contrast to FL § 5-1029, which *requires* the court to grant a request by a party to a paternity proceeding for a genetic test. *Id*. at 695.

9. *See* FL § 5-306(b)(2) ("After a request of a party. . . and before ruling on a petition . . . a juvenile court shall hold a hearing on the issue of paternity."). *See also* FL § 5-301 (g)(1)(iii) ("Party" means: "(1) in a guardianship case under this subtitle: (i) the child; (ii) . . the child's parent; and (iii) the local department to which the child is committed.").

10. As counsel for the children point out, "if the parental rights are terminated and these children are adopted, their adoption could be invalidated if the biological father is not correctly identified." If there is conflicting information about the identity of the father of a CINA, the court may reasonably conclude that genetic testing is in the child's best interest.

11. We do not agree with appellant that the Court of Appeals's recent decision in *Mulligan v. Corbett*, 426 Md. 670 (2012), supports his claim that the circuit court here erred. *Mulligan* is factually and legally inapposite. In that case, because the child was conceived during a marriage, the Court held that FL § 5-1029 did not apply. Moreover, Mr. Corbett failed to establish that paternity testing was in Gracelyn's best interest given that Gracelyn was being raised by a stable and loving family who met her physical and emotional needs, *id*. at 684, unlike Mishawn and Mykkell, who have been living apart from appellant and in foster care for most of their lives.

NO TEXT

Cite as 2 MFLM Supp. 85 (2013)

Custody and vistation: contempt: refusal to call child to testify

David Jaray

v.

Roxana Jaray

No. 1123, September Term, 2011

Argued Before: Woodward, Zarnoch, Kenney, James A., III, (Ret'd, Specially Assigned), JJ.

Opinion by Kenney, J.

Filed: December 6, 2012. Unreported.

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 30, 2011 order of the Circuit Court for Montgomery County finding David Jaray, appellant ("the Father"), in constructive civil contempt of court for intentionally violating a custody order. In his timely appeal, the Father presents one question for our review,[1] which we have revised for our analysis 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?[2]

For the reasons stated below, we shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

The Father and Roxana Jaray, appellee ("the Mother"), who are now divorced, are the parents of two minor children, Daniella, age ten, and Naomi, age eight. The Father is Jewish and the Mother is Catholic. At a hearing in the 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 later incorporated into a March 31, 2011 custody order. Terms of the Agreement relevant to this appeal include the following:

> [The parties] will have joint legal custody of the minor children and David S. Goldberg, Esquire of Family Mediation Services, Inc. is appoint[ed] by agreement of the parties as the parties' parent coordinator.
>
> * * *
>
> The parties will attempt to jointly decide matters of major importance affecting the minor children. They shall consult with each other in an effort to mutually agree regarding the emotional, moral, educational, physical and general welfare of the minor children.
>
> * * *
>
> If they are unable to resolve a dispute relating to these matters, then the parties will consult with their agreed upon parent coordinator. If after consultation the parties are still unable to resolve the dispute, then by agreement of the parties, the parent coordinator will make the ultimate decision with respect to those issues in dispute after having consulted in good faith with both parties.
>
> . * * *
>
> [F]or all Saturday exchanges when the children are going to the mother, the exchange shall be at 10 a.m. . . . and the mother shall pick up the children at 10 a.m. or at another time agreed between the parties.[3]

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

The Father indicated on the record that he understood the terms of the Agreement and that he was entering into it "freely and voluntarily."

On April 12, 2011, the Mother filed a Motion for Enforcement of Agreement, for Contempt and for Other Relief. She contended that the 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 from his residence and the . . . children until after sundown," and "refus[ing] to take" any issues disputed between them to the parent coordinator. The Father filed an answer to that motion and a Complaint for Modification of Custody.

A hearing on the motion was held on June 24, 2011. The Mother testified that of the thirteen Saturdays since the December 20, 2010 hearing, only once was she able to pickup the children at 10 a.m. On December 24, 2010,[4] when she arrived to pick up the children, the Father "refused to let them go. He put them in front of him and he . . . asked them, 'Do you want to go with your mother?' and they say no." According to the Mother, the Father said "that he doesn't care about the court order and that the children are staying" because "he's celebrating Shabbat and he doesn't want the children to drive on Shabbat day."[5] She further testified that he "thr[e]w" her out of the house, but she was later able to pickup the children after sundown that evening.

On the following Saturdays when she was to have weekend custody, "[e]very time, it happened the same thing." The Mother testified:

> He's usually, he usually stand up in front of them, like a statute [sic], and he doesn't leave us a minute of privacy so I can talk to them or whatever. The children are very afraid, very nervous, and they are afraid that he will, you know, he's raising his voice and everything. . . .

The Mother denied that the children practice Judaism, and that, in her opinion, the Father's observation of the Jewish faith "didn't have anything to do with the children." She also testified that she had tried to contact the parent coordinator to resolve the Saturday exchange dispute, but that the Father had stated, that he didn't "want to do anything with a mediator."

The Father testified the children practice Judaism and that, on Saturdays when the Mother would come to his residence to pick up the children, she would speak to them for five to twenty minutes, but, once the children become "agitated" he would ask her to leave. He would, however, deliver the children to the Mother "[r]ight after sundown every evening[.]" The Father maintained 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 "respect[s] what [they] want [ ] to do" and "[i]t's their Sabbath."[6] He admitted, however, that he had an "obligation" to get them ready for the Mother's 10 a.m. arrival, and that sometimes they "wouldn't be ready" if they were sleeping or reading when the mother arrived, but otherwise "[t]hey are ready to go at any time." He denied stating that he "didn't care" about court orders, but contended "[t]here was no need" to meet with the parent coordinator.

The Father brought the children to the courthouse for the June 24, 2011 hearing. They were not present in the courtroom, but sat in an adjacent room with one of the Father's attorneys. According to the Father, he brought them to the courthouse because he thought they should "have the opportunity to speak before the Judge and let them say what they want."

When the Father's counsel advised the court that the Father wished to call Daniella to testify, "preferably in chambers," the Mother's counsel objected, and the following exchange ensued:

> THE COURT: I will not call the children in a contempt proceeding.
>
> [FATHER'S COUNSEL]: No, I understand that, Your Honor. I just want to put it on the record, and I hear what —
>
> THE COURT: Okay.
>
> [FATHER'S COUNSEL]: — Your Honor said. Just so it's on the record, [the Father] does want to call Daniella to testify, preferably in chambers. I understand the Court's ruling. I just want to make sure —
>
> THE COURT: Okay.
>
> [FATHER'S COUNSEL]: — that was on the record.
>
> THE COURT: The issue is contempt of the parents' actions, why would you want to put an 11-year-old on the stand?
>
> [FATHER'S COUNSEL]: If you're asking me, Your Honor, because children have a right to self-determination like anyone else, and if you're asking me as an attorney, there are many 11-year-olds, 10-year-olds, who testify in this courthouse all the time.[7]
>
> And I, the only way I can corroborate the lack of any willful disobedience is to have the child explain it,

because there's no way her words can get before the Court in any other way.

[MOTHER'S COUNSEL]: In my pleading, Your Honor, I talk about what [the Father] makes his children do, and that [he] has come here today to try to make sure that [Daniella] will parrot whatever he says . . . . [T]his is about parents' responsibilities pursuant to a court order.

* * *

THE COURT: It's, the charge is contempt but no jail was requested. If there was a request for jail, and a request made that [Daniella] testify, I think it would have a little more gravity.

But inasmuch as jail was never requested, to ask a 10-year-old to come and testify in a contempt proceeding — they're 10. They've been sitting out with counsel for the [Father]. I don't — it's not fair. I don't think it's going to provide me with any useful help, and I think it could possibly be damaging to [Daniella], so I will not hear from [her] at this time.

[FATHER'S COUNSEL]: Right. When you're ready, Your Honor, I need to put a proffer —

THE COURT: Okay.

[FATHER'S COUNSEL]: — as to what [the daughter] would say.

THE COURT: Go ahead.

* * *

[FATHER'S COUNSEL]: Daniella would say that her [F]ather doesn't obstruct her going in any way; that she chooses to practice the religion that she observes and participates with her [F]ather practicing; that she's always practiced as a Jewish girl; that [she] keeps kosher; that she chooses herself to observe the Sabbath; and that she has repeatedly told her [M]other that she will be over . . . at her [M]other's [residence] as soon as sundown occurs.

And that other than the 10:00 a.m. until sundown, there is no other period of time that this child has ever missed time with her [M]other.

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 which states, in pertinent part:

> **ORDERED**, that [the Father] is found to be in constructive contempt of Court for intentionally violating the March 22, 2011 Custody order, which requires that "for all the Saturday exchanges when the children are going to be with the Mother, the exchange shall be at 10:00 a.m.";[8] and it is further
>
> **ORDERED**, that [the Father] may purge the contempt by allowing [the Mother] to pick up the two children for her weekend visitation on Friday evenings to start 30 minutes before sundown . . . ; and it is further
>
> **ORDERED**, that [the Father] is found to be in constructive civil contempt of the March 22, 2011 Custody Order, by intentionally failing to consult with the agreed upon parent coordinator, David S. Goldberg, Esquire, on a matter of major importance affecting the children, i.e. access with [the Mother]; and it is further
>
> **ORDERED**, that [the Father] may purge the contempt finding by contacting the parent coordinator and consulting the coordinator with regards to the access issues. . . .

DISCUSSION

The Father, submitting that the circuit court abused its discretion by refusing to permit Daniella to testify and by "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.

Pointing to the court's observation that the children had been sitting with the Father's counsel during the hearing, which, according the court, was "not fair," the Mother responds that, "contrary to Father's implication, the record in this case makes manifestly clear that the lower court performed 'an analysis of the relevant facts and circumstances that resulted in the exercise of discretion.'"

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

347 Md. 332 (1997). In *Brandau*, which involved a hearing in a custody dispute, the father proffered a prepared statement as to what his daughter, Erika, who was five years old at that time, would testify to if she were called as a witness.[9] Objection to the proffer was sustained. The father then sought to call Erika to the witness stand for the purpose of determining her competency as a witness. The court refused the inquiry:

> I have never talked with Erika, but I have seen her, and in my judgment, she is not competent to testify. . . .
>
> The court believes it is in the sound discretion to exclude the testimony of a child of under six years of age on the basis that such testimony is essentially unreliable. The court has never talked with the child directly, but the court has observed the child and seen the type of child she is, and I believe I have the discretion to exclude her testimony without going further.

39 Md. App. at 103.

Noting that "the decision required to be made by the Chancellor regarding the determination of the competency of Erika to testify was material to the ultimate outcome of the case," *id.* at 103-04, a fact to which both parties agreed, and that "[t]he trial court is required to make judicial inquiry in determining the competency of a child of tender years," *id*. at 104, this Court held:

> it was error for the Chancellor to refuse to conduct the examination of the proposed witness, Erika, either in court or in chambers in order to determine whether she was, in fact, a competent witness. It is true that the decision as to the competency of a witness is within the sound discretion of the trial court but the court must at least conduct such an examination as will disclose the factual basis on which his conclusion as to competency rests.

Id. at 105-06.

Gunning involved two consolidated cases, and

> [i]n both cases the defendant was convicted based on the uncorroborated identification of a single eyewitness and in both cases the defense was mistaken identification. Each case involves the same circuit court judge whose refusal to read [an eyewitness identification] instruction was based on his conclusion that "identification is a question of fact" that, unlike a question of law, requires no instruction to the jury. The judge indicated on the record that he, in fact, "never .give[s] that instruction."

347 Md. at 335. The Court of Appeals held:

> the judge's denial of the requested eyewitness identification instructions was not grounded on the exercise of judicial discretion; rather, the . . . denial was based on the application of a uniform policy, a policy which arose from the judge's personal opinion that identification instructions are not "appropriate." We reject the trial judge's assertion that identification instructions are always inappropriate, and we hold that the judge's unyielding adherence to this predetermined position amounts to a misunderstanding of the law and a failure to properly exercise discretion.

Id. at 351.

"The capacity of children of tender years to testify is a matter ordinarily within the sound discretion of the trial court," *Brandau*, 39 Md. App. at 104 (citations omitted), as is the decision to permit a witness to testify, *see, e.g., Kelly v. State*, 392 Md. 511, 532 (2006), and a finding of contemptuous behavior. *See, e.g., Gertz v. Md. Dep't of the Env't,* 199 Md. App. 413, 424 (2011). Abuse of discretion "occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Kelly*, 392 Md. at 531 (quoting *Cooley v. State*, 385 Md. 165, 175-76 (2005)).

In *Brandau*, we said:

> There is no rule which excludes an insane person as such or a child of any specified age from testifying, but in each case the traditional test is whether the witness has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth.
>
> As there is no precise age which determines the question of competency, the court must resort to a determination of the capacity and intelligence of the child and its appreciation of the difference between truth and falsehood. The competency of a witness is established when it is determined that the witness has sufficient understanding to comprehend the obligation of

> an oath and to be capable of giving a correct account of the matters which he has seen or heard relevant to the question at issue.

39 Md. App. at 104 (internal citations omitted). 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.

Therefore, even assuming that the competency issue presented on appeal was preserved for our review, we are not persuaded that the court's failure to conduct a competency inquiry was error or an abuse of discretion. While "*Brandau* states that it would be error to automatically refuse to allow a child to testify merely because of her age, without conducting an inquiry into her competency," *Perry v. State*, 381 Md. 138, 152 (2004), such an inquiry is only necessary "*if* a substantial question regarding competency is raised[.]" *Id.* at 151 (emphasis added & removed). *See also Weeks v. State*, 126 Md. 223, 228 (1915) (Competency is to "be disposed of *as soon as it arises* . . . .") (emphasis added); *United States v. Gerry*, 515 F.2d 130, 137 (2d Cir. 1975) ("*When competency is questioned* . . . [t]here must be such an inquiry as will satisfy the Court that the witness is competent to testify. . . .") (emphasis added); *Evans v. State*, 304 Md. 487, 508 (1985) ("*When a substantial question is presented* concerning the competency of a witness, the trial judge should ordinarily conduct a voir dire examination of the witness out of the presence of the jury.") (emphasis added).

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, rather than parsed, 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. The lack of such a policy is evidenced by the court's comments that "[i]f there was a request for jail, and a request made that [Daniella] testify, *I think it would have a little more gravity*," and, later, that "I will not hear from [her] *at this time*." (Emphasis added).

Nor are we persuaded that the court erred or abused its discretion in not permitting Daniella to testify. '"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. "In adopting the Maryland Rules of Evidence," although the concepts of relevance and materiality were "collapsed . . . into one," both "remain viable[.]" *Smith v. State*, 371 Md. 496, 505 n. 1 (2002). Therefore, to be admissible, evidence must be relevant to a material issue. *Id.* at 504. In *Myers v. Celotex Corp.*, 88 Md. App. 442 (1991), we explained:

> Evidence is material if it tends to establish a proposition that has legal significance to the litigation; it is relevant if it is sufficiently probative of a proposition that, if established, would have legal significance to the litigation. Evidence is relevant, therefore, if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence, and a fact is material if it is of legal consequence to the determination of the issues in the case, which are dependent upon the pleadings and the substantive law.

Id. at 454 (internal citations omitted).

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). In attempting "to balance the right of the parents to present evidence . . . against possible severe psychological damage to the child," *Marshall*, 17 Md. App. at 369, and having "show[n] reasonable consideration of the specific circumstances of the subject case in reviewing a request to have a child testify," 4 Child Custody and Visitation Law and Practice § 20-99, we see neither error nor abuse of discretion in the court's decision to not permit Daniella to testify.

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

FOOTNOTES

1. As stated in the Father's brief, the question presented is:

> Did the circuit court abuse its discretion by refusing to permit the parties' ten-year-old daughter to testify in chambers when the court failed to conduct any inquiry into the child's competency to testify?

2. We note that the Father does not challenge on appeal the other prong of the contempt order: that he "intentionally fail[ed] to consult with the agreed upon parent coordinator, David S. Goldberg, Esquire, on a matter of major importance affecting the children, i.e. access with their mother[.]"

3. An attached access schedule indicates that, subject to certain holidays listed in the Agreement, the children spend alternating weekends with the parents, with a weekend beginning at 10 a.m. on Saturday.

4. Friday, December 24, 2010, was Christmas Eve, which, according to the Agreement, is one of the holidays that "trump[s] the regular schedule." The Agreement states that the Mother "shall have the minor children with her overnight" on Christmas Eve, but it does not state a precise exchange time.

5. The Agreement says nothing about celebrating Shabbat, which is the traditional Jewish day of rest observed from sundown Friday evening to sundown Saturday evening, or the children being raised in the Jewish faith. If the Mother had arrived at 10 a.m. on Friday, December 24 to pickup the children, that would be before Shabbat began.

6. The Mother testified that she "wasn't going to *force* [the children] to come with [her]. . . ." Emphasis added).

7. Later, the Father's counsel stated: "These are not 2- and 4-year olds. These are 8- and 10-year-olds. They have a mind of their own. You cannot always say they do what parents say. That is not what 8- and 10-year-olds do."

8. During the hearing, the court stated that "the [F]ather could be more of a part in this, and he hasn't, so I find him in contempt for failing to allow the exchange to occur at 10 o'clock on Saturday morning."

9. This Court's opinion did not include the contents of the proffer.

Cite as 2 MFLM Supp. 91 (2013)

Alimony: modification: calculation of income

Janice R. Wilhelm
v.
John C. Wilhelm

No. 997, September Term, 2011

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

Opinion by Matricciani, J.

Filed: December 10, 2012. Unreported.

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 for Charles County granted to 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 on June 9, 2011, the court ordered an alimony reduction. Appellant noted a timely appeal on July 5, 2011.

Questions Presented

Appellant presents three questions for our review, which we rephrase and combine for clarity as:[1]

> (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?

For the reasons that follow, we answer yes to the first question and reverse the decision of the circuit court. We do not reach the second question because it is better addressed to the circuit court on remand.

Factual And Procedural 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.[2] 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 $500.00 per month to now $1700.00 per month and denied Mrs. Wilhelm contribution to her attorney fee expenses from [a]ppellee."

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

Discussion

Standard of Review

Appellee's complaint was heard by the court sitting without a jury. As such, we apply Maryland Rule 8-131© to our review. That rule states:

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

Id. "The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the court's determination, it is not clearly erroneous and cannot be disturbed." *Clickner v. Magothy River Ass'n*, 424 Md. 253, 266 (2012) (citing *Ryan v. Thurston*, 276 Md. 390, 392 (1975)). "The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence." *Knowles v. Binford*, 268 Md. 2, 11 (1973). "It is thus plain that the appellate court should not substitute its judgment for that of the trial court on its findings of fact but will only determine whether those findings are clearly erroneous in light of the total evidence." *Ryan v. Thurston*, 276 Md. 390, 392 (1975). "Questions of law, however, require our non-deferential review." *Clickner*, 424 Md. at 266.

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 reduc-

ing his alimony liability. Under section 11-107(b) of the Family Law Article, "on the petition of either party, the court may modify the amount of alimony awarded as circumstances and justice require." "Upon a proper petition, the court may modify a decree for alimony at any time if there has been shown a material change in circumstances that justif[ies] the action." *Ridgeway v. Ridgeway*, 171 Md. App. 373, 384 (2006). "A party requesting modification of an alimony award must demonstrate through evidence presented to the trial court that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification." *Langston v. Langston*, 366 Md. 490, 516 (2001).

As a result of transitioning from a full-time dental practice to a part-time one, appellee identified, and the circuit court found, 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. . . .".[3]

In reviewing the trial court's determinations, we are mindful of several important principles: "[i]t is patent that of its nature alimony is in amount subject to variations from time to time as the circumstances, needs, and pecuniary condition of the parties change." *Sugarman v. Sugarman*, 197 Md. 182, 188 (1951) (quoting *Winkel v. Winkel*, 178 Md. 489, 499 (1940)). Because of its malleability, "[t]he trial court must balance the interests and fairness to both the payor and the spouse receiving alimony, in exercising its discretion to modify the alimony award." *Langston*, 366 Md. at 516. Here, 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:

We note that the circuit court reflected that it "must strive to be fair to both sides" and that "Ms. Wilhelm remains to have a need for alimony in order to maintain a reasonable life style and have a degree of economic security." The court said "[in balancing the ability to pay spousal support versus the need for continued support, the [c]ourt has decided to reduce the alimony. . . ." The court was satisfied that 'Ms. Wilhelm has been able to maintain a comfortable life style, attributable in *material* part to the continuing receipt of her spousal support." (emphasis added). The court added that "[a]ny adjustment should not create a hardship on her."

But the court found that 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.[4] This case, however, is not about how the court arnved at an appropriate alimony figure in 1991. It is about whether or not the court legally *modified* the alimony award in 2011).[5] Therefore, appellant's reliance on cases highlighting the statutory factors, such as *Blaine v. Blaine*, 336 Md. 49, 65 (1994) (reviewing the statutory factors), and *Freeden burg v. Freedenburg*, 123 Md. App. 729, 749 (1998) (where "[w]e disapproved of t[he] mere 'lip service' the trial judge gave to the statutory factors"), is misplaced.

The circuit court noted that 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 $17,311 in interest and dividends. The tax return also shows $8,619 in IRA distributions. The circuit court considered the full amount of the IRA distributions, and imputed $8,500 of the interest and dividends to appellee in calculating his monthly income. Appellant alleges, however, that the court failed to consider the following while calculating appellee's monthly income: "taxable interest of $2134.00 or $177.83 per month, [ordinary] dividend income of $5990.00 or $499.17 per month, capital gains of $3985.00 or $332.00 per month, [ ], [and] taxable refund of $4706.00 or $392.00 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 that his estimated monthly income is $6,500. The court also found that "Ms. Wilhelm receives $2,200 per month in alimony. She receives a gross amount of $1,900 per month in social security benefits. She has an annuity that . . . pays $740.00 per month. Therefore, her total monthly income is estimated by the court 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 the case of *Moustafa v. Moustafa*, we said that "a court may not find a specific amount of imputed or undisclosed actual income without supporting evidence." 166 Md. App. 391, 399 (2005) (internal quotation omitted). Conversely, we conclude here that 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.

Judge Eyler concurs in the result only.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. The questions as originally presented by appellant are:

> (1) Did the voluntary reduction by Dr. Wilhelm of his wage income affect his ability to pay spousal support while still meeting his own needs under FLA 11-106(b)(9) constitute a significant change of circumstances under FLA 11-107(b) to allow the trial court's action?
>
> (2) Was the court arbitrary and therefore prejudicial to appellant in it's calculation of all the income sources received by appellee, or in failing to impute income received by appellee, concluding Dr. Wilhelm's present monthly income was $6500.00?
>
> (3) Was the trial court justified in failing to award appellant contribution to her attorney fee expense in defending appellee's third petition to terminate/reduce her needed spousal support?

2. By the original order divorcing the parties, appellee was obligated to pay to appellant the sum of $2,500 monthly, as well as to purchase health insurance on her behalf. Appellee's first complaint to modify the alimony award was denied. On January 15, 2002, appellee filed another complaint to reduce alimony. This time, he was successful and the court reduced his obligation to $2,200 monthly and relieved him of the duty to provide health insurance.

3. Appellant argues that appellee did not actually suffer a material change in circumstances and that the circuit court failed to impute non-wage income to appellee either in determining appellant's need for alimony or in considering appellee's ability to pay. Imputation of income is discussed further, *infra*.

4. Certain of these factors were deemed so crucial to computing the original award of alimony that they were codified. *See* Md. Code Ann., Fam. Law § 11-106(b). "Although the court is required to give consideration to each of the factors stated in the statute, it is not required to employ a formal checklist, mention specifically each factor, or announce each and every reason for its ultimate decision." *Crabill v. Crabill*, 119 Md. App. 249, 261 (1998).

5. In the case of *Langrall v. Langrall*, 145 Md. 340 (1924) the Court of Appeals foresaw the task of the circuit court, saying: "[o]ur inquiry is not directed to a review of the original award, but is solely concerned with any difference between the present circumstances of the parties and those which existed when the decree for alimony was passed." *Id.* at 345.

NO TEXT

Cite as 2 MFLM Supp. 95 (2013)

CINA: unsupervised visitation: likelihood of future abuse or neglect

In Re: Alijah Q.

No. 428, September Term, 2012

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

Opinion by Berger, J.

Filed: December 11, 2012. Unreported.

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

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

Alijah Q. ("Alijah") was found to be a Child In Need of Assistance ("CINA")[1] on March 5, 2009. The Circuit Court for Prince George's County, sitting as a juvenile court, issued two orders, the second of which forms the basis of this appeal. The first order overruled Lisa Q.'s ("mother" or "Ms. Q.") 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 Prince George's County Department of Social Services ("the Department") followed.

The Department presents one question, which we have rephrased for review:[2]

> Did the juvenile court err when it approved unsupervised visitation by Ms. Q. beginning January 12, 2013 without making the required finding under Maryland Code § 9-101 of the Family Law Article that there is no likelihood of future abuse or neglect of Alijah by Ms. Q.?

For the reasons outlined below, we answer affirmatively to the question presented. As a result, we vacate the decision of the juvenile court, and remand this case for further proceedings.

FACTS AND PROCEEDINGS

I. Procedural Posture

Alijah was born on December 14, 2007, the child of mother Lisa Q. and father Antoine A. Alijah was declared CINA on March 5, 2009 because he was born addicted to drugs and his mother was addicted to drugs. Further, his mother would not care for Alijah, and his father failed to protect him from his mother. An Order of Protective Supervision was instituted. On April 20, 2009, an emergency review hearing was held and, as a result, the juvenile court ordered mother to have weekly supervised visits with Alijah. On May 11, 2009, a permanency plan review hearing was held before a domestic relations master. The master recommended rescission of the Order of Protective Supervision, closure of the case, and continued weekly supervised visits between mother and Alijah. Mother filed exceptions to the master's recommendations. The juvenile court held a *de novo* hearing on mother's exceptions. Mother represented herself at this hearing, having dismissed her attorney.

On December 23, 2009, the juvenile court awarded custody to father, mandated weekly supervised visits for mother, rescinded the Order of Protective Supervision, and closed the case. Father had maintained custody of Alijah since the issuance of the December 23, 2009 order. Upon mother's appeal to this Court, we vacated the circuit court's order and remanded the case for further proceedings.[3] Thereafter, the juvenile court held a hearing on July 28, 2011 in which mother expressed that she did not want her counsel to represent her. The juvenile court postponed that hearing.

The juvenile court next convened a hearing in this matter on September 14, 2011 with mother's counsel still representing her. After again stating that she did not want counsel to represent her, mother's counsel was dismissed from the case and the hearing was again rescheduled. The juvenile court held a two-day evidentiary hearing on February 10, 2012 and March 6, 2012. Mother represented herself at these hearings. It is from the juvenile court's order following the hearing that this appeal arises.

II. Family Dynamics

The family initially resided in Washington, D.C. The District of Columbia Child and Family Services referred mother to a drug treatment program, which

she abandoned before completing. She admits to "going away" from time to time to do drugs. The District of Columbia's Child and Family Services indicated that mother had neglected Alijah. Mother has eight other children, each of whom was removed from her custody.[4]

When the family moved from Washington, D.C. to Prince George's County in 2008, the Department requested that mother enter a drug treatment program, which she did. Mother, however, left the program before completion, and continued to abuse drugs. There is a history of domestic violence between mother and father. Father claims that he has been assaulted by mother on numerous occasions, and has had to leave mother's company in order to avoid physical injury to himself or Alijah. On one particular occasion, mother threw a knife at father while father was holding Alijah.

In October 2008, Mother left Alijah alone, without providing for a babysitter to care for Alijah. Mother did not return for two to three weeks. Alijah was declared CINA because he was born addicted to drugs and mother was still addicted to drugs. Further, the CINA adjudication was based on mother's failure to care for Alijah, and father's failure to protect him from mother.[5] The Court's order directed mother to enter a drug treatment facility, and permitted Alijah to reside with either parent. Nevertheless, the court's order gave father custody of the child. As a practical matter, Alijah could only reside with father because mother never received permission from her drug treatment facility to have Alijah live with her. The March 5, 2009 order placed Alijah with father under an order of protective supervision. Following a visitation hearing, the juvenile court ordered weekly supervised visits between mother and Alijah.[6]

Father completed court-ordered domestic violence classes and provided proof to the juvenile court. In its March 5, 2009 order, the juvenile court ordered mother to take part in substance abuse treatment. Nevertheless, mother refused to enter treatment for two years. Additionally, mother refused to provide the Department with her contact information. Despite mother's refusal to attend drug rehabilitation, the Department has repeatedly offered to help her obtain treatment. On May 23, 2011, Mother attended a substance abuse evaluation. At this evaluation, she informed the Department that she had attended an outpatient drug treatment program and mental health counseling through "So Others Might Eat" (SOME) in 2009. Based on the substance abuse evaluation, the Department recommended that mother participate in Narcotics Anonymous and submit to random drug screening. Mother has repeatedly threatened to file a false report with police in order to get her son back, stating that she would do whatever it takes to get custody of Alijah.

III. Mother's Actions

Mother participated in a court-ordered psychiatric evaluation on August 22, 2011. Mother was diagnosed with post-traumatic stress disorder, bipolar disorder, and cognitive and emotional learning disabilities. The evaluator recommended that mother not have custody or responsibility for Alijah, and that she have supervised, structured weekly visitation with her son. The examining physician also recommended that mother be monitored and treated with a psychotropic mood stabilizer. Mother has acknowledged that she is currently taking medication, but refused to testify as to what medication she is taking and what diagnosis it is meant to treat. Mother has also failed to enter into a domestic violence treatment course, despite being ordered to do so on March 5, 2009.

During an unsupervised visit, mother became hostile toward father. When father requested help from the Department, the caseworker could hear mother in the background kicking and screaming. This incident caused the juvenile court to mandate supervised visitation between mother and Alijah. The Department agreed to arrange a visit for April 22, 2009. The visitations between mother and Alijah have been difficult to schedule because mother had not provided the Department with her contact information. Despite an arrangement between the juvenile court, the Department, and mother, mother failed to show for the supervised visit on April 22, 2009. During a supervised visit on July 31, 2009, mother shook Alijah "so hard that the worker immediately ended the visit." *In Re: Alijah Q.*, 195 Md. App. 491, 502 (2010).

On October 2, 2009, mother threatened to harm a Department worker, and was subsequently informed that the Department would refuse to supervise visits in the future and that she would have to schedule visits at a visitation center. In April 2010, visits at the visitation center were terminated because mother used offensive language in front of center staff and children, and acted in an "intrusive, confrontational, and disrespectful manner." Mother disrupted operations at the center which prevented successful visitation for her family, as well as for others using the center.

On August 9, 2011, visits were renewed at the Department's offices. Tristen Marsh, a Department caseworker, testified that visitation is a "work in progress." Disputes still arose during visitation between mother and father, and it became necessary for the Department to intervene. Nevertheless, communication between parents has improved as visitations have progressed. Father expressed concern because mother has allegedly broken into his house three times. In addition, mother has threatened to take

Alijah away to another country. Indeed, the record reflects that mother wrote an email that states: "SEE ME IN ANOTHER COUNTRY CAUSE THATS WHERE YOULL HAVE TO GO TO FIND . . . GUESS WHO[.]"

Mother has used heroin, crack cocaine, and alcohol at various times in her life, including while she was pregnant with Alijah. Mother has disappeared for weeks at a time to smoke crack cocaine, even going as far as abandoning Alijah in order to feed her addiction. In addition, mother pled guilty to distribution of heroin in 2005. Mother has a twenty-year history of addiction to crack cocaine, and has also been diagnosed with bipolar disorder and chronic post traumatic stress disorder. Psychiatrists have also noted a pattern of chaotic high risk behavior, homelessness, unemployment, and psychiatric hospitalizations in mother's life. Indeed, mother was arrested for making threats against an unidentified man in Washington D.C.

IV. Juvenile Court's Visitation Order

Following the hearing on March 3, 2012, the juvenile court issued two written orders. The first order overruled mother's exceptions to the master's proposed visitation order and closed the case for statistical purposes. The second order addressed access to Alijah. In the second order, the juvenile court directed supervised visitation between mother and Alijah to begin March 31, 2012 and continue through January 6, 2013. Thereafter, effective January 12, 2013, the court ordered visitation between mother and Alijah to be unsupervised. During the hearing, the juvenile court discussed the visitation arrangement:

> The Court's ordering that mother shall be entitled to have physical custody of Alijah in accordance with the following schedule. It's not going to be a perfect order but the Court thinks that the parties may need a substantial amount of time away from the court, and to — and I want to give enough time that maybe after a number of months, I can't say what's going to happen one way or the other, Ms. Q., you can file a motion to modify something to say all things are different from whatever, material changes, circumstances or whatever, but the balance is I do step a little widely with regard to providing unsupervised — and this is one of the things I was fighting about, because I had things — I had unsupervised occurring a little earlier, and then I laid it back, and now I'm at a later point, but now I have to make a decision.
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> * * *
>
> Now, beginning January 12th, 2013, and I'm trying to just leave a period of time, beginning Saturday, January 12th, 2013, mother shall be entitled to have unsupervised physical custody of Alijah from Saturday at noon until Sunday at 5:00 p.m. If she has a place that will accommodate Alijah for the overnight. If mother does not have such an accommodation, mother's entitlement to physical custody shall continue as provided above for Saturdays and Sundays until mother has the accommodations for overnight, except that the hours to which she is entitled to physical custody of Alijah shall be noon from 12 noon until 7:30 p.m. on Saturday and Sunday, and it is not required that the physical custody would be supervised.

Additional facts will be provided as necessary to address the argument.

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.[7] Md. Code Ann., Fam. Law § 9-101 (LexisNexis 2012) ("FL").

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). The child argues that the juvenile court erred as a matter of law when it ordered Ms. Q. to have unsupervised visitation beginning in January 2013 without specifically finding that there was no further likelihood of abuse or neglect.

In examining the decision of a juvenile court, reviewing courts simultaneously apply three different standards of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly,] if it appears that the [juvenile court] erred as to matters of law, further proceed-

> ings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Shirley B., 419 Md. 1, 18 (2011) (citation omitted). "[T]he child's welfare is a consideration of 'transcendent importance' when the child might otherwise be in jeopardy. Therefore, visitation may be restricted or even denied when the child's health or welfare is threatened." *In re Mark M.,* 365 Md. 687, 706 (2001).

Abuse is defined as an act that causes serious bodily harm, places one in fear of imminent serious bodily harm, assault, rape, false imprisonment, or stalking. FL § 4-501(b). Significantly, courts are required to deny custody or unsupervised visitation absent a finding that there is no likelihood of abuse or neglect. *In re Mark M.,* 365 Md. at 706. The statute requires an explicit finding on the record that there is no longer a threat to the child; disparate statements made by the juvenile court will not suffice. *In re Adoption No. 12612*, 353 Md. 209, 239 (1999).

Here, there was ample evidence before the circuit court 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 to complete the program. 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 when it heard this case.

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.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, SITTING AS A JUVENILE COURT, VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.

FOOTNOTES

1. Sections 3-801(f) and (g) of the Courts and Judicial Proceedings Article respectively define "Child in Need of Assistance" and "CINA":

> (a) In this subtitle the following words have the meanings indicated.
>
> * * *
>
> (f) "Child in Need of Assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.
>
> (g) "CINA" means a child in need of assistance.

Md. Code Ann., Cts. & Jud. Proc. § 3-801(f) (LexisNexis 2012) ("CJP"). *See In re: Adriana T.*, ___ Md. App. ___, No. 0433, Sept. Term, 2012, slip op. 3 n.6 (filed Nov. 29, 2012).

2. The Department frames the issue as follows:

> Did the juvenile court commit reversible error when it approved unsupervised visitation with Alijah by Ms. Q. beginning January 12, 2013, without making the required finding that there is no likelihood of further abuse or neglect of Alijah by Ms. Q.?

3. We held that the juvenile court had not properly verified that mother was electing self representation over professional representation when she dismissed her counsel. *In re Alijah Q.*, 195 Md. App. 491, 521-22 (2010).

4. The record indicates that at one point, mother allegedly threw a child across the room while residing in Washington, D.C.

5. The CINA adjudication provides that "[t]he child was born exposed to drugs . . . She [mother] is not currently in drug treatment program and continues to use drugs. The parents have a history of domestic violence and a domestic violence assessment needs to be completed. The mother's continued drug use interferes with her ability to safely and properly care for the child. The parents continue to live in the home together. The father has been encouraged to file for sole legal custody of the child but has failed to do so. Both parents are in need of services in order to have the child remain safely in the home."

6. The order for weekly supervised visits between mother and Alijah was a result of the continued conflict between father and mother.

7. That section, entitled "Denial of Custody or visitation on basis of likely abuse or neglect," provides:

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

NO TEXT

Cite as 2 MFLM Supp. 101 (2013)

Adoption/Guardianship: termination of parental rights: untreated bipolar condition

In Re: Adoption/Guardianship of William T., Jr. And Isaiah T.

No. 895, September Term, 2012

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

Opinion by Eyler, J.

Filed: December 14, 2012. Unreported.

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.

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

This appeal follows a June 13, 2012, evidentiary hearing in the Circuit Court for Baltimore City, sitting as a 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.[1] The juvenile court also granted guardianship to the Baltimore City Department of Social Services ("Department") with 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 for the hearing, despite having been properly served. Father is not a party to this appeal.

Appellant filed a timely appeal, presenting the following question for our review:

> Did the court below err or abuse its discretion in granting the petition to terminate the parental rights of the appellant mother?

For the reasons that follow, we shall answer the question in the negative and affirm the judgment of the circuit court.

FACTUAL BACKGROUND

William was first placed in the Department's custody on January 9, 2009, after William's father assaulted appellant, was incarcerated, and left appellant homeless and hospitalized for her injuries. On January 16, 2009, the juvenile court returned William to appellant's care, and the Department provided shelter for them. In February of 2009, the Department took William from appellant's care for the second time, after receiving reports that while in the shelter, appellant shook and grabbed William, changed his diaper only once every twelve hours, and would leave the shelter with William but fail to bring bottles for him. Since that occasion, William has never returned to appellant's care. Isaiah was removed from appellant's care at birth, when the hospital reported to the Department that appellant was homeless and was not treating her bipolar disorder.

On June 16, 2009, when the boys' father was releaed from incarceration, the juvenile court placed both boys in his care. The boys returned to the Department's care on April 16, 2010, however, after their father decided that he was not able to provide for them. On that day, the juvenile court found that the boys were children in need of assistance ("CINA") and granted the Department limited guardianship of the boys for medical, dental, educational, psychiatric/psychological and out-of-state travel purposes.[2]

At the termination of parental rights hearing, Annette Nedell, a social worker at the Department, testified that she was first assigned to William and Isaiah's case in April of 2010. At that time, appellant was living out-of-state, and Ms. Nedell had no way of contacting her in regards to the children. It was not until late 2010 that appellant called Ms. Nedell asking about the boys and whether she could have them back in her custody. Ms. Nedell told appellant that they could set up a meeting, and appellant, refusing to leave a phone number, told Ms. Nedell that she would follow up with her to schedule a meeting. About one month later, appellant called Ms. Nedell asking for her boys; Ms. Nedell again informed her that she would need to come to the Department and meet with Ms. Nedell. Appellant called back on January 14, 2011, after returning to Baltimore, and scheduled a visit with the boys for February 14th.

According to Ms. Nedell, appellant arrived an hour late to the February 14th visit and brought her father along. At the time, appellant was living with her father. Ms. Nedell asked appellant how she planned on

caring for the children if they were returned to her, and she responded that she receives Social Security Income and Food Stamps and that she would be eligible for additional Food Stamps if she were caring for the boys. Additionally, Ms. Nedell offered to provide appellant with weekly visits with her children, but appellant expressed that she would rather visit on a bi-weekly basis.

The next visit occurred on March 1, 2011. During that visit, Ms. Nedell supplied appellant with a service agreement and offered her a mental health evaluation, a drug addiction evaluation, and a plan to engage her with her children with hopes of ultimate reunification. Appellant refused to sign the service agreement. Ms. Nedell testified that she believed that the mental health and drug addiction evaluations were necessary based on reports from Harbor Hospital and Mountain Manor, that appellant had a mental health problem and was using drugs and alcohol. The alleged drug and alcohol use was never verified, however. Also during the March 1st visit, Ms. Nedell and appellant scheduled another visit for March 31st, but appellant did not show up. When it was apparent that appellant was not coming, Ms. Nedell called her, and they rescheduled the visit for April 13th.

Appellant did not come to the April 13th visit either, and according to Ms. Nedell, appellant did not have any further contact with the Department until December 1st of that year when appellant called Ms. Nedell and explained that for the previous eight or nine months, she had moved out-of-state, but was now back in Baltimore and living with her friend, Marnae Lewis. Appellant also informed Ms. Nedell that she was pregnant with a new baby, that Ms. Lewis was planning to care for that baby, and that appellant wanted Ms. Lewis to care for William and Isaiah as well.

On October 28, 2011, the juvenile court held a hearing and ordered that the permanency plan in place for the children be changed from reunification with appellant to adoption by a non-relative.[3]

Appellant's next visit with the boys occurred on February 3, 2012, eleven months after her previous visit. Appellant did not have any contact with the boys in between the two visits. During the February 3rd visit, appellant requested information from Ms. Nedell concerning obtaining housing assistance from HUD, which Ms. Nedell provided. Ms. Nedell again offered appellant mental health and drug addiction evaluations, which she refused. Ms. Nedell also offered appellant another visit with the boys shortly after that visit, but appellant insisted that she would not be available until February 24th. Ms. Nedell also learned that appellant was no longer staying with Ms. Lewis and would not have a place to live with the boys should she be reunited with them.

The Department had to reschedule the February 24th visit, and appellant chose March 2nd and April 3rd for her next two visits. Appellant was only entitled to one visit per month. The Department, however, offered her more visits for ease of re-engagement with the boys after her long absence and in hopes that she would sign a service agreement. Appellant did not take advantage of the Department's offers, however, and visited less often.

Ms. Nedell testified that she supervised all of appellant's visits with the boys and that appellant did not know how to interact with them. The boys interacted with each other and played with their toys, rather than interacting with appellant. Ms. Nedell also testified that since her first visit with the boys, appellant's ability to interact with them and engage them has not improved; the boys do not know her very well, and do not respond to her attempts to engage them. According to Ms. Nedell, on one visit, appellant brought Easter baskets for the boys and let them play with them, but other than that, did not provide for the boys.

Ms. Nedell further testified that the boys do not refer to appellant as "Mommy;" rather, they refer to their guardian, Keisha Gaither, as "Mommy." Ms. Gaither has been caring for the children since August of 2010. Ms. Gaither has since been married, and the four interact like a family, in Ms. Nedell's opinion. The boys call Ms. Gaither's husband, "Dad." According to Ms. Nedell, Ms. Gaither takes the boys to regular medical and dental appointments and takes care of them when they are sick. Ms. Gaither has also taken the boys to speech therapy. The boys are very comfortable with Ms. Gaither and her husband, and have grown very close to Ms. Gaither's mother. According to Ms. Nedell, the boys are now in daycare, and their behavior has significantly improved since living with Ms. Gaither and going to daycare where they receive a structured environment in which to learn and play.

As a result, Ms. Nedell testified that the Department believes that it is best for the children to stay with Ms. Gaither, and therefore, the best permanency plan for the boys would be adoption by Ms. Gaither. Ms. Nedel also testified that her primary concern about appellant having the children is her untreated mental health issues, her inability to interact with the children, and her lack of means to care for them.

Isaiah has been out of appellant's care since he was born, and William since February of 2009 at ten months old. Appellant testified that she does not want her children to be adopted, but wants to care for them herself. In an effort to get her children back, she has been attempting to find "affordable housing." She testified that her only source of income is Social Security, which she receives on account of her bipolar disorder.

Appellant further testified that she needs medication to treat her bipolar disorder, but has not received medication and has not seen a psychiatrist since just after William was born.

Appellant offered the following explanation for her absences. She testified that, at the end of 2009, she went to Detroit, Michigan in an attempt to find housing and returned two months later. From April of 2011 until September of 2011, appellant traveled to Tennessee in hopes of finding what she referred to as "cheap housing."

Appellant testified that she believes that she is capable of caring for the children, is willing to see a psychiatrist, and that she failed to attend regular visits with the children or take the Department up on their offer for weekly visits because she had transportation issues. Ms. Nedell responded that she was unaware of appellant's transportation problems, but had she been aware, she could have assisted appellant with getting to and from the visits with the boys.

With regard to the service agreement, according to appellant, she refused to sign the agreement because she believed that by doing so, she would be consenting to termination of her parental rights.

The Juvenile Court's Findings

Ultimately, the juvenile court found that it was in both William and Isaiah's best interests to terminate appellant's parental rights to William and Isaiah and enable the Department to consent to adoption or long-term care of the boys for the following reasons:

The court found that "the root problem is [appellant's] mental health." The court elaborated: "I think the most compelling testimony of the entire morning is [appellant's] testimony that she needs help with her bipolar disorder, whether it be medication or counseling or anything else. She testified that she's very clear that she needs that help and she has not sought it."

The court also found that the Department continuously attempted to provide appellant with services, but was unsuccessful because appellant refused to take a mental health evaluation, which would determine the severity of her bipolar disorder, or to sign a service agreement. The court concluded that appellant "played a large role in the Department's, almost, inability to assist her."

The court deemed appellant's visitation with the children "sporadic at best." It also noted that, "there's a big, sort of, black hole of information about, sort of, Mom's whereabouts and her attentiveness to the children."

With regard to adequate housing for the children, the court also noted that, although there was uncontested testimony that the Department twice gave appellant HUD information in order to assist her in obtaining housing, there was no testimony as to what appellant did with that information. Instead, there was uncontested evidence that appellant left the state for long intervals of time, leaving the children behind and the Department without her contact information. There was no explanation as to why appellant believed that she needed to seek housing out-of-state, rather than housing in close proximity to her children or whether and how she utilized the HUD information.

The court further found that appellant had not contributed to the children's well-being, with the exception of one occasion, when she brought them Easter baskets during a visit. Yet, there was "not much evidence of a disability that makes her unable to care for the children." There was no evidence, due to her lack of compliance with a mental health evaluation, that appellant's bipolar disorder impeded upon her ability to care for the children. The court explained that, the bipolar disorder "doesn't necessarily render her unable, per se, but that's the evidence we [have.] We have evidence that it's just untreated. We don't even know, sort of, how it's affecting her at this point."

Also due to appellant's refusal to engage in services with the Department, the court found that there was a very low likelihood that additional services would bring a lasting parental relationship with the children. Indeed, the court concluded that it would be detrimental to the children to uproot them from their foster home after they had been living there for two years and had adjusted very well. The court also concluded that appellant was an unfit mother who is unable to interact with her children. As a result of her inability to interact with the children, they have no emotional tie to her.

The court further noted appellant's inability to care for the children. When asked what her plan to care for them was, she responded that she has Social Security Income and would apply for Food Stamps, but otherwise had no plan for their care or housing. Based on this response, the court specifically concluded:

> When she testified I think the Court was most compelled by her own testimony, which was on . . . [the] question, you know, what's your plan. She said, . . . "I'd go apply for Food Stamps and do whatever," which says to the Court, uh, that despite the fact that she has given birth to children, uh, that the mother in this case is not fit to care for or raise the children. I don't think she has a full, um, sense of what that responsibility even is. I honestly don't think she even knows where to start, based on what I've heard today.

The court continued:

> I note that one of the factors is sort of the period of time which elapsed before the parent sought to reclaim the children. Sometimes it was six months. Sometimes it was five months. Sometimes it was two months. But, there were these windows of disappearing and then [appellant] would come back.
>
> There is, obviously, strong ties between the caretaker and the children believe the caretakers to be their parents and respect them in that way.
>
> The genuineness and intensity of the parents desire to have the children, you know, the Court is not particularly persuaded. With all due respect to [appellant], I think that — I think that she really thinks that she's genuine. Her actions don't speak [ ] to that. I think there was one point in this situation where she called and said I want the boys to go to Ms. Lewis. So, she didn't want the boys back, she just wanted them to be somewhere else other than where the Department had placed them. The Department has offered her more visits and she says, no, just this many visits, or something to that effect, when she was on a visit and the Department said well you can come back this time and this time. She said no, I just want to come back on this time. Even when offered the opportunity to become even more involved, um, [appellant] has shown that she has often declined.

The Court also found that because of appellant's instability, it would be detrimental to the best interests of the children for there to be a continued parental relationship. Of particular concern to the court was how appellant was utterly unable to engage the children; when she would come visit with them, they would acknowledge her, but then just play by themselves.

DISCUSSION

Appellant contends that 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 that 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.

When reviewing the juvenile court's decision to terminate parental rights, we apply three different levels of review simultaneously:

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting, *In re Yve S.*, 323 Md. 551, 586 (2003)); *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010).

Maryland Code (1957, 2012 Repl. Vol.), Family Law Article ("FL"), § 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 as follows:

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

> sent otherwise required under this subtitle and over the child's objection.

When the State seeks to terminate parental rights without a parent's consent, the principal focus of the juvenile court should be the child's or children's best interests. *In re Cross H.*, 200 Md. App. 142, 152 (2011).

Subsection 5-323(d) lays out the required factors that a juvenile court must consider when making a best interest determination in termination of parental rights proceedings.[4] Moreover, the Court of Appeals explained a juvenile court's role in TPR cases as follows:

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

In re Rashawn H., 402 Md. 477, 501 (2007).

Here, the juvenile court made the following findings with respect to each of the applicable statutory provisions articulated in FL § 5-323(d):

With respect to the services provided to appellant before the children's placement, the court found that 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. Refusal to accept services offered to appellant should not weigh against the Department. *See In re Rashawn H., supra*, 402 Md. at 500-501 (noting that there is a limit to what the State is required to do to assist a parent in caring for his/her child and that limit does not exceed what the parent is unable or unwilling to do); *In re: Abigail C.*, 138 Md. App. 570, 588 (2001) (considering a parent's refusal to comply with services to support a juvenile court's decision to terminate the parent's parental rights).

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 in the case, 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 the service agreements that the Department provided.

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. The court emphasized that there was no rationale or explanation as to why appellant searched for housing out-of-state as opposed to searching locally.

With regard to the extent that appellant maintained regular contact with the children, the court found her contact with the children to be "sporadic, at best." It also noted that, "there's a big, sort of, black hole of information about, sort of, Mom's whereabouts and her attentiveness to the children." 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 admittedly did not make that known to the Department at the time that 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." The court found that appellant does not know "where to start, based on what [the court] heard." Appellant's plans to care for the children, should she be given further opportunity to do so, were to apply for Food Stamps and use her Social Security Income. She had no plans for schooling, housing, or any other necessity.

With regard to the existence of a parental disability that would make appellant unable to care for the children, the court acknowledged appellant's bipolar disorder, but explained that there was no evidence that the disorder hindered her ability to care for the chil-

dren. 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 so that the children could be returned to the parent, 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 that there were 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 and feelings toward 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.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellant had a third child during the course of these proceedings. That child, however, is not a party to this proceeding, and appellant voluntarily relinquished her rights to that child.

2. Appellant was not present at the CINA hearing.

3. Appellant was not present at this hearing.

4. (d) Considerations. — Except as provided in subsection (c) of this section, in ruling on a petition for guardianship of a child, a juvenile court shall give primary consideration to the health and safety of the child and consideration to all other factors needed to determine whether terminating a parent's rights is in the child's best interests, including:

(1)

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

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

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

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

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

1. the child;

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

3. if feasible, the child's caregiver;

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

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

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

(3) whether:

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

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

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

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

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or.

4. torture;

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

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

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

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

(4)

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

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

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

relationship; and

(iv) the likely impact of terminating parental rights on the child's well-being.

NO TEXT

Cite as 2 MFLM Supp. 109 (2013)

Custody and visitation: modification: change in parent's mental health status

Lynita A. Dorsey

v.

Thomas Jefferson Wilson, Jr.

No. 267, September Term, 2012

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

Opinion by Watts, J.

Filed: December 17, 2012. Unreported.

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

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

Lynita A. Dorsey, appellant, and Thomas Jefferson Wilson, Jr., appellee,[1] have a son together, Tyler, of whom appellee has sole custody pursuant to a September 17, 2007, Custody Order. Appellant appeals an April 3, 2012, Order of the Circuit Court for Baltimore City 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 her Motion to Modify Child Support, based on the failure to prove a material change in circumstance. The Master recommended that appellee continue to have sole legal and physical custody of Tyler, and ordered that access between appellant and Tyler remain suspended pursuant to a prior court order. Appellant noted an appeal raising seven issues,[2] which we rephrase and consolidate as follows:

I. Did the circuit court err in determining that the issue of child support was moot?

II. Did the circuit court err in concluding that appellant's alleged change in mental health status and change in residence did not constitute a material change in circumstance sufficient to allow her custody of, or alternatively visitation with, her son, and that it continued to be in Tyler's best interests that sole custody remain with appellee?

III. Did the circuit court err in failing to consider appellant's allegations of child abuse on the part of appellee?

For the reasons set forth below, we answer these questions in the negative, and, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Tyler was born April 2, 2002. Beginning with a complaint for child support filed by appellant in August of 2002 under Case No. 24-P-02-05-7243 in the Circuit Court for Baltimore City ("the -7243 case"), less than a year after his birth, the parties have sought the assistance of the legal system in determining various rights and responsibilities with respect to Tyler. The -7243 case proceeded with various motions and orders, culminating with an Order entered on September 17, 2007, granting sole legal and physical custody to appellee (the "September 2007 Order"). At that time, appellant was also "prohibited from prodding or questioning Tyler about incidents that occur in his father's home." In the -7243 case, on January 13, 2009, it was ordered that appellant would have supervised access to Tyler through the Supervised Visitation Program of the Medical Services Office for the Circuit Court for Baltimore City. On May 13, 2009, however, it was ordered that all access between appellant and Tyler be suspended because she had failed to participate in that court-ordered supervised visitation. There was little activity in the case from that point until April 12, 2011, when the -7243 case was consolidated with the case that forms the basis of the instant appeal — Case No. 24-P-08-0872, also in the Circuit Court for Baltimore City ("the -0872 case").

The -0872 case originated with the filing of a Complaint for Child Support by appellee on April 16, 2008. On March 30, 2009, the circuit court entered a Child Support Order in which appellant was ordered to pay $551 monthly in child support and an additional $50 per month toward over $5,000 in arrears for child support; On May 4, 2009, appellant filed a Petition to

Modify Child Support. On May 17, 2011, appellant petitioned the court by way of a handwritten letter in which she sought custody of Tyler or unsupervised visitation, arguing that Tyler's lack of contact with her put him at risk and that she was "concerned about his welfare." She also sought to undergo a new psychological evaluation.[3]

On August 18, 2011, the Master conducted a hearing which resulted in the issuance of a Temporary Consent Order providing: (1) regular weekly phone calls between appellant and Tyler; (2) use of a COZI calendar[4] to facilitate access and scheduling of telephone calls; (3) referral of appellant for a psychological evaluation; and (4) a rescheduled hearing date of December 16, 2011. A Visitation Evaluation of appellant was provided to the Court on December 1, 2011. At the hearing on December 16, 2011, additional testimony was taken and evidence introduced, with an attorney appearing on Tyler's behalf.

In her Report and Recommendation issued January 31, 2012, the Master made the following findings of fact:

> [ ] At the hearing on August 18, 2011, [appellee] testified that he believed [Tyler] was suffering by not having a relationship with [appellant] in that he was displaying depressed behavior for which he had sought counseling for [Tyler]. However, [appellee] wants to ensure that [Tyler] is safe when having any contact with [appellant] whether it be personal visits or telephone visits due to [appellant]'s past behavior and mental state resulting in the suspension of her access to [Tyler].
>
> * * *
>
> [ ] [Appellant] complied with the Court's referral to the Medical Services Division of the Circuit Court for Baltimore City, and a Visitation Evaluation was provided to the Court on December 1, 2011. Both parties and [Tyler]'s Best Interests Attorney . . . were given an opportunity to review the report at the hearing on December 16, 2011.
>
> [ ] At the time of the hearing on August 18, 2011, [appellant] was residing in Charlotte, North Carolina, but stated that she and the maternal grandmother were attempting to relocate back to Baltimore. By the time of the December 16, 2011, hearing, [appellant] and the maternal grandmother had moved back to Baltimore, Maryland.
>
> [ ] [Appellant] now resides in a three (3) bedroom apartment in Baltimore with the maternal grandmother and [appellant]'s sister.
>
> [ ] [Appellee] believes that the phone calls between [appellant] and [Tyler] pursuant to the Temporary Consent Order are going well and that they have benefit[t]ed [Tyler] in that [Tyler] is no longer displaying depressed behavior, however, he still believes any contact between [appellant] and [Tyler] needs to be monitored.
>
> [ ] [Appellant]'s version of the success of the phone calls with [Tyler], and the Temporary Consent Order in general, differed greatly from [that of appellee]. [Appellant] testified she never received the Temporary Consent Order, that she is not receiving phone calls from [Tyler] as ordered, and that the passwords have been changed as to not allow her access to the COZI calendar[ ].
>
> [ ] [Appellant] is unemployed, and being supported by [Tyler's] maternal grandmother. Beginning October, 2011, [appellant] began collecting social security disability benefits and receives One Thousand Four Hundred Ten Dollars ($1410.00) per month. [Appellant] does not know if [Tyler] is eligible to receive benefits as a result of her receipt of SSDI. [Appellant] did not disclose that she has a child. [Appellant] testified that although her gross monthly benefit is $1410.00, she only receives $1,198.00 per month. No documents were introduced into evidence regarding said benefits.
>
> [ ] [Appellant] was diagnosed by the Medical Services Division of the Circuit Court for Baltimore City with AXIS I - Delusional Disorder and AXIS II - Personality Disorder, NOS. She is not currently seeing a psychologist or taking any medications in regards to that disorder. [Appellant] does not believe she needs to be on medication or needs to see a therapist.
>
> [ ][Appellee] does not believe visitation can be unsupervised unless

[appellant] takes responsibility for her actions and obtains help for her mental illness.

[ ] [Tyler] is now in the fourth grade at Deer Crossing Elementary School and is doing very well in school. [Tyler] also plays football and is leaning how to swim at the YMCA.

[ ] [Appellee] currently resides in a three (3) bedroom townhome in Frederick County, Maryland with [Tyler] and [appellee]'s 21 year old daughter. [Appellee] relocated to Frederick County in the Spring of 2011 to be closer to his employment.

* * *

[ ] [Tyler] is healthy and is taken to the doctor regularly. [Appellee] also took [Tyler] to a therapist for a period of time to help [Tyler] address some issues of depression.

[ ] [Appellee] is a fit and proper person to have custody of [Tyler].

(Footnotes omitted). The Master concluded as follows:

> [Appellant] has not demonstrated the existence of a material change in circumstances affecting [Tyler] as to warrant a modification of custody and visitation, nor does the Court find that a modification would be in [Tyler]'s best interests.
>
> In making its decision as to what is in the best interests of [Tyler], the Court considered the evidence presented, the Visitation Evaluation prepared by the Medical Services Division of the Circuit Court for Baltimore City dated December 1, 2011, and the following factors: Fitness of each parent, which is a primary consideration; Character and reputation of each parent; Desire of parents and any agreement between them; Maintaining natural family relations; Preference of the child, if old enough to make a rational choice; Material opportunities affecting the child's future life; Age, sex, and health of the child; Residences of the parents and opportunity for visitation; Impending relocation of a parent; Environment and surroundings in which the child will be reared;
>
> Influences likely to be exerted on the child; Physical, spiritual, and moral wellbeing of the child; and contact and bonding between child and parents. Based upon all of these factors and evidence, the Court concludes that it is in the best interests of [Tyler] that [appellee] continue to have sole legal and physical custody of [Tyler] and that [appellant]'s visitation be suspended until reinstated by this Court.

In recommending that appellant have no access to Tyler, the Master stated as follows:

> It is a rare occasion that this Court recommends no access to a child by a biological parent, but this Master firmly believes this is in the best interests of [Tyler]. Most concerning to the Court was [appellant]'s complete denial of any wrong-doing in the past and her current mental state. [Appellant] was diagnosed by the Medical Services Division of the Circuit Court for Baltimore City with AXIS I - Delusional Disorder and AXIS II — Personality Disorder, NOS. [Appellant] is not currently in therapy and denies ever having any mental disorders. [Appellant] testified that she does not take any medications for any mental disorders, nor does she need them. Similar to Dr. Levinson of the Medical Services Division, this Court is very concerned about [appellant]'s ability to act appropriately with [Tyler] given her complete denial of her symptoms and lack of treatment for them. [Appellee], too, expressed concern, testifying that he had really hoped the results of the updated evaluation would have been different, because he believes [Tyler] has benefitted recently from his contact with [appellant]. But without [appellant] getting help and recognizing that something is wrong, he does not feel access with [Tyler] can go any further. This Court concurs. The same behavior that was documented in past reports in the court file is still present, specifically, [appellant]'s conspiracy beliefs and her misperceptions of reality. Not only did this Court find [appellant]'s version of past events inaccurate, but the Court found [appellant]'s perceptions of what happened at the 2011 hearings before

this Master to be inaccurate. This is very concerning. The Court does not find [appellant] to be mentally stable.

The Court appreciates that [appellee] thinks [Tyler] has benefitted from the phone calls with [appellant] as instituted by the Temporary Consent Order, but given all of the evidence, this Court will not order those phone calls to continue. If [appellee] wants to initiate phone calls on his own between [appellant] and [Tyler], he is free to do so, but it is this Court's opinion that it is not in the best interests of [Tyler] at this time, and this Master will not order it. Until [appellant] accepts and addresses her mental illness, this Court believes [appellant]'s access should continue to be suspended pursuant to the Order Suspending Access dated May 13, 2009 until such time as [appellant] can prove to the Court that she has accepted responsibility for her past actions, is mentally stable, and is receiving medical treatment for her mental disorders.

The Master discussed the issue of child support as follows:

At the December 16, 2011, hearing, [appellant] testified that she is now receiving Social Security Disability Income in the gross amount of $1,410.00 per month which commenced in October of 2011. As of the December 16, 2011 hearing, neither party knew if [Tyler] was eligible to receive benefits as a result of [appellant]'s disability. The parties were encouraged to investigate the matter as it was this Court's belief that [Tyler] might be entitled to benefits and that said benefits could potentially exceed any child support obligation of [appellant]. Following the hearing, but before this Report and Recommendation was finalized, an Order for Modification of Child Support was submitted to the clerk's office for signature by the Baltimore City Office of Child Support Enforcement suspending [appellant]'s child support obligation for [Tyler] as a result of [Tyler]'s receipt of benefits from the Social Security Administration due to [appellant]'s receipt of SSDI. . . . [Tyler] received his first benefit of $601.00 on January 3, 2012, with that amount increasing to $730.00 per month in February 2012. [Tyler] was also slated to receive $9,895.00 around January 15, 2012 as a lump sum payment retroactive to November 2010. It is important to note that none of this information was provided to the Court at the time of either the August 18, 2011 hearing or the hearing on December 16, 2011, but was made a part of the Court file following the hearing by the Office of Child Support Enforcement. What is very telling to the Court, however, is that [appellant] made no mention of receipt of a retroactive lump sum payment when arguing to reduce her child support. It is the Court's opinion that [appellant] deliberately withheld information from the Court for her own benefit as receipt of said benefits would have been considered by the Court as income for child support purposes pursuant to Md. Ann. Code, Fam. Law Art. § 12-201(b)(3).

Entry of the last child support Order in this matter was March 30, 2009. There was no evidence presented to indicate how [appellant]'s income differed from her income in March of 2009. [Appellant] stated she was unemployed in 2009, and she was still unemployed at the time of the hearing in 2011, although now receiving SSDI. By review of the 2009 and 2010 tax returns introduced by [appellant] and admitted as Plaintiff's Exhibits 6 and 7[ ], [appellant]'s income actually increased slightly. In 2009, [appellant]'s income pursuant to Plaintiff's Exhibit 7 was $11,839.00, and, according to Plaintiff's Exhibit 6, [appellant]'s income was $13,999.00. No income information for [appellee] was provided to the Court by either party. Accordingly, this Court finds that [appellant] did not meet her burden and prove that a material change in circumstances exists to warrant a modification of her child support obligation since March 30, 2009, and recommends that her Motion to Modify Child Support filed September 27, 2010 be denied, although the Court

> notes that [appellant]'s child support obligation is now suspended due to the fact that [Tyler] now receives benefits from the Social Security Administration.

In light of the above conclusions and recommendations, the Master recommended denying appellant's Petition to Modify Custody and Visitation based on her failure to prove a material change in circumstances. The Master recommended denying appellant's Motion to Modify Child Support, also based on her failure to prove a material change in circumstances. Thus, appellee continued to have sole legal and physical custody of Tyler pursuant to the September 2007 Order, and all access between appellant and Tyler continued to be suspended pursuant to the May 13, 2009, Order Suspending Access.

On February 1, 2012, appellant filed exceptions to the Master's Report and Recommendations. Among her exceptions, appellant claimed that: (1) her income had changed since the hearing, necessitating a change in the child support payments; (2) she had obtained insurance that would allow her to receive counseling; (3) it was not in Tyler's best interests to continue living with appellee; and (4) she should be awarded custody because she lived in Baltimore and could care for him. In effect, appellant argued that the Master erred or abused her discretion in not finding a material change in circumstance that necessitated modification of child support and transfer of legal and physical custody to her.

On February 13, 2012, the circuit court issued an Order for Modification of Child Support, effective as of January 6, 2012, based upon Tyler's increased benefits from the Social Security Administration. Because Tyler received increased payments of $730 a month beginning in February 2012, along with a lump sum of $9,895.00 credited toward her arrears, appellant's obligation to pay child support was suspended.

On March 23, 2012, the circuit court held a hearing on appellant's exceptions to the Master's report. At the hearing, appellant attempted to "address the Court about the parental alienation syndrome[,]" and the court explained that the purpose of the hearing was for appellant to inform the court why the exceptions "should result in a change in the Master's ruling." Thereafter, appellant addressed the exceptions. The circuit court also heard from appellee and the attorney representing Tyler (whom appellant had sought to remove, in motions that were denied on November 29, 2011, and January 27, 2012). The attorney for Tyler pointed out her frustration with how appellant handled her own inability to access the COZI calendar, stating: "[P]eople's efforts to include [appellant] ended up with those very people being blamed for denying access. So the same concerns about [appellant] not accepting responsibility, blaming others, seeing conspiracies remained in full force and effect as recently as August and December."

On April 3, 2012, the circuit court issued an Order and a memorandum in support thereof overruling the exceptions. As to the exceptions relating to child support, the circuit court ruled that the exceptions were moot in light of the February 13, 2012, Order modifying child support. The court examined at length appellant's exceptions relating to her purported change in mental health status, and concluded that "[t]he record before the Master more than substantiate[d] the findings set forth in the [ ] Report and Recommendation." The court observed that appellant was not in counseling at the time of the hearing, was dependent on her own mother for "housing, economic and emotional support[,]" and, at the time of the hearing, would have required assistance from her mother in caring for Tyler. The court noted that appellant's mother had testified to this effect before the Master, and that her mother "did not appear to be the most stable person[.]" The court pointed out that appellant's mother had been admonished for speaking out during testimony before the Master and ultimately

> was asked to leave the courtroom due to a lack of self-control. (This Court notes, anecdotally, that [appellant's mother] objected to revelation of the amount of her own disability income and other income as being "none of your business.") Clearly, based on her own impulse control issues alone, [appellant's mother] is in no position to assist in rearing [Tyler]. Additionally, when testifying at that August 2011 hearing, [she] underplayed the serious nature of [appellant]'s mental health condition, the condition that led this Court to transfer [Tyler] to appellee.

The circuit court noted that, at the time custody was transferred, Tyler was mirroring the symptoms displayed by his mother: "For instance, [Tyler) believed that people were watching him in his home and believed that someone was trying to kidnap him, facts that were clearly untrue." The circuit court discussed the report completed by Dr. Levinson in December 2011, based on his examination of appellant, stating:

> In his December 2011 report, Dr. Levinson expressed concern about [appellant]'s ability to behave appropriately with [Tyler]. The Court also has serious concerns about Tyler's safety and mental stability; conse-

quently, it must not permit unsupervised visitation unless and until [appellant]'s mental health concerns are addressed. Although [appellant] is now on the right track - having obtained health insurance, the fact that she now has insurance does not make the Master's findings erroneous, and does not become an amulet for instant access to [Tyler].

(Footnote omitted). The circuit court addressed appellant's contention that it was not in Tyler's best interests to have no access to her, and that she was now in a stable environment where she could ostensibly handle the obligations of sole custody, explaining:

> While it is true that [appellee] asserts that his child is happier when he has opportunities to speak with [appellant], this Court can only allow access **if such access would not be harmful to [Tyler].** [Appellant] has an aversion to any type of supervised access. While this Court recognizes that [appellant] decries supervised access, this Court also recognizes that it is [Tyler]'s best interests, not [appellant]'s desires, that must drive the Court's decisions. While the Court appreciates [appellant]'s frustration, the Court must keep its trained eye upon [Tyler]'s best interests. Right now, it is not in [Tyler]'s best interests for [appellant] to have unfettered access to [Tyler.)
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> * * *
>
> [Appellant's next] challenge to the Master's recommendation is that she now has income and a stable residence to which to bring the child should custody be transferred. [This a]ssertion [ ] is indicative of [appellant]'s inability to accept that her mental health issues are at the root of this Court's decisions concerning [Tyler] and that she must demonstrate that she is mentally stable before she can have unfettered access to the child. She still does not accept the fact that mental instability led this Court to transfer [Tyler) to [appellee] initially and that the material change of circumstance must begin with confirmation that she is mentally stable.
>
> This Court does not and will not deprive a parent of access to a child based solely on difficult economic circumstances. However, where, as here, a parent refuses to accept that she is compromised, and either is unable to accept that she has mental health issues or refuses to address her mental health issues and/or refuses to adhere to steps and procedures established by the Court to ensure safe access to the minor child (Md. Fam. Law Code Ann. § 9-101), unsupervised access must be denied.
>
> * * *
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> [Appellant's] penultimate challenge is that she completed counseling in 2008. That she completed counseling four years ago does not mean that she is currently stable, particularly given the findings reported in the December 2011 Court Medical report. For reasons already stated, this Court does not yet find [appellant] to be mentally stable and fit to have unsupervised access to [Tyler].

(Emphasis added).

Appellant took exception to the Master's conclusion that appellee was the appropriate person to raise Tyler, claiming that the Master did not consider her allegations that appellee had abused Tyler in 2008, and that his work, schedule left him little time to be with Tyler. As to these claims, the circuit court determined as follows:

> [Appellant's next) complaint stems from her belief that the Master failed to consider her concerns that [appellee] verbally and physically abused [Tyler]. [Appellant) is simply mistaken. The fact that the Master did not "side with" [appellant] on this issue does not mean that the Master did not consider [appellant]'s assertion. As has been noted, [appellant] has a history of making unsubstantiated abuse claims that require investigation. [Appellant]'s decision to wrest information from [Tyler), place upon that information her negative spin, and seek to disrupt [Tyler]'s current situation through means other than those set by the Court likely led the Master, and leads this reviewing Court to believe that the abuse allegations lack credibility. Repeatedly interrupting [Tyler]'s life with completely untenable DSS investigations is not in [Tyler]'s best interests.

* * *

> [Appellant] next asserts that [appellee]'s work schedule is such that he should not have custody of [Tyler]. In addition to failing to produce legally sufficient evidence that [appellee]'s work schedule is detrimental to [Tyler]'s health, [appellant] failed to demonstrate that [appellee]'s work schedule, whatever it may be, differs materially from what his work schedule was when this Court entered its last custody order. [Appellee] testified that [Tyler] fares well in school, has his health care needs met, and is engaged in appropriate extracurricular activities. That evidence is unrefuted. Thus, there is no evidence that [appellee]'s work schedule presents a barrier to continued custody being awarded to [appellee].

After entry of the circuit court's April 3, 2012, Order Denying Exceptions, on April 10, 2012, appellant filed a timely notice of appeal. On April 30, 2012, the circuit court entered an order denying a motion for reconsideration of the Master's Order, which appellant had filed on February 15, 2012.

STANDARD OF REVIEW

In In re Shirley B., Jordan B., Davon B., & Cedric B.,419 Md. 1,18 (2011), the Court of Appeals discussed the three different levels of review in family law disputes, stating:

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

Id. (citing In re Yve S., 373 Md. 551, 586 (2003)) (some alterations in original and some alterations added).

When a trial court, in turn, has reviewed the report and recommendation of a master, as a general rule:

> [A] master's findings of fact are given deference under the clearly erroneous rule. Where a party argues that facts found by the master have no foundation in the record, however, deference under the clearly erroneous rule recedes. The [trial court] must carefully consider the allegations and decide each such question. The [trial court] should, in an oral or written opinion, state how he resolved those challenges. Having determined which facts are properly before him, and utilizing accepted principles of law, the chancellor must exercise independent judgment to determine the proper result.

Bagley v. Bagley, 98 Md. App 18, 30(1993), cert. denied, 334 Md. 18 (1994) (citations and internal quotation marks omitted).

DISCUSSION

I.

Appellant contends that the circuit court erred in declining to rule on her exceptions relating to the request to modify child support. Appellant claims that her "request for review and modification of the Child Support Case was denied in December 2011 by the Baltimore City Office of Child Support and again in May 2012." Appellant asserts that she is presently paying in excess of $180 in support (presumably per month), and $50 per month in arrears, and that she has not received "all proper credits[.]" Appellant maintains that the circuit court erred in finding the issue of child support to be moot.

"A case is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy." Coburn v. Coburn, 342 Md. 244, 250 (1996) (citation omitted). If an issue is moot, it will generally be dismissed without "deciding the merits of the controversy." Id. (citation omitted).

In this case, the circuit court concluded that any issues relating to child support payments were moot, explaining:

> The issue of child support was addressed in a contempt hearing held on January 30, 2012. At that time, [the] Master [ ] addressed the change in income and modified the child support order based on the fact that [appellant] now receives disability income and based on the fact that [Tyler] is receiving benefits through [appellant]'s disability income. No additional hearing is necessary

> because the issue has been fully and finally resolved and the Baltimore City Office of Child Support has been instructed to give to [appellant] all credit she is due based on payments made and a lump sum payment applied as a result of [appellant] having received a lump-sum disability payment.

Ruling that child support issues were addressed at the January 30, 2012, hearing, the circuit court pointed out to appellant at the March 23, 2012, hearing that the issue of child support had been addressed by the February 13, 2012, Order. In the February 13, 2012, Order, appellant's obligation to pay child support was suspended and credited $9,895.00 against the arrearage. As a result, there was no longer an existing controversy concerning child support between the parties, and the circuit court properly determined the matter to be moot.

II.

Appellant contends that 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, stating:

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

Id. at 220 (citation omitted) (emphasis and alterations added).

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), in which this Court explained:

> The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents, 2) character and reputation of the parties, 3) desire of the natural parents and agreements between the parties, 4) potentiality of maintaining natural family relations, 5) preference of the child, 6) material opportunities affecting the future life of the child, 7) age, health and sex of the child, 8) residences of parents and opportunity for visitation, 9) length of separation from the natural parents, and 10) prior voluntary abandonment or surrender.
>
> While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor such as the financial situation, or the length of the separation.

(Citations omitted).

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 appellant's exceptions to the Master's Report and Recommendation.

III.

Appellant contends that the circuit court erred in failing to consider her allegations of child abuse on the part of appellee, and that the Master likewise did not consider her concerns about appellee's behavior toward Tyler, or the effect appellee's work schedule had on his ability to care for Tyler.[5]

The circuit court pointed out that appellant's complaint is, in effect, that "the Master did not 'side with' [appellant] on this issue[.]" As to the allegations of abuse, the circuit court found:

> [Appellant] has a history of making unsubstantiated abuse claims that require investigation. [Appellant]'s decision to wrest information from [Tyler], place upon that information her negative spin, and seek to disrupt [Tyler]'s current situation through means other than those set by the Court likely led the Master, and leads this reviewing Court to believe, that the abuse allegations lack credibility. Repeatedly interrupting [Tyler]'s life with completely untenable DSS investigations is not in [Tyler]'s best interests.

With respect to her claims about appellee's work schedule, the circuit court pointed out that appellee testified that Tyler was doing well in school, his needs were met, and he was engaged in appropriate extracurricular activities. For all of the reasons above, the circuit court properly concluded that appellant failed to produce evidence sufficient to establish a material change in circumstance that would justify modification of the child custody order.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOONOTES

1. Appellee did not file a brief with this Court.

2. Appellant phrased the issues thus:

> 1. Has the Circuit Court [ ] erred in making a decision to adopt the Master's recommendation, without full consideration of the case facts?
> 2. Why has the [circuit] court failed to acknowledge[ ] that the minor child was taken from [ ] Appellant [ ] without proper notice, under Maryland Laws in any hearing prior to May 2, 2007?
> 3. The Circuit Court has the responsibility to fully investigate all allegations of child abuse, domestic violence, and review police reports of abuse to the minor child[ ] since in the care of [appellee].
> 4. Under Maryland law, all consideration must be given to the character, past history of child abuse and crime before determining or granting custody to the parent. Why has the [circuit] court failed to investigate the full complete past of [appellee] currently the custodial parent of the said minor child?
> 5. Has the [circuit] court abused its privilege[ ] in considering the minor child's wishes throughout the hearing of the case under Maryland Law?
> 6. Subsequently, the "Prejudice" decision to deny all exceptions and custody modifications filed by [ ] appellant [ ] to the [circuit] court has resulted in the minor child as reported by [appellee] on the record [ ] as being "very depressed and not doing well" without [appellant] in his life. Is the detriment mental health of the minor child, in the best interest of the court?
> 7. Why has the [circuit] court failed to inquire or investigate fully, the material change in circumstance of [appellant] for full cognition of compliance[ ] and demonstrating continued attentiveness to her mental health needs[ ] for unfettered access to her child and or custody modification?

3. The lengthy delay between the filing of these motions may be accounted for by the circumstance that, for a time, appellant lived in North Carolina. That parallel cases were ongoing did not come to the attention of the circuit court until consolidation of the cases in April of 2011.

4. A COZI calendar is an online family calendar accessible by the parties and the court.

5. Within this discussion, appellant argues that she is entitled to medical and other records of Tyler. Md. Code Ann., Fam. Law Art. § 9-104 provides: "Unless otherwise ordered by a court, access to medical, dental, and educational records concerning the child may not be denied to a parent because the parent does not have physical custody of the child." The circuit court determined that appellant "has as much information as she needs regarding [Tyler]'s living situation[.]" The circuit court, in effect, allowed that appellant, as a noncustodial parent who had been denied access to her child for failure to participate in court-ordered supervised visitation, was not entitled to the records she sought. We discern no error or abuse of discretion in the circuit court's determination.

Appellant further contends that the circuit court "failed to acknowledge" her allegation that Tyler was taken from her in 2007. We interpret appellant's contention to take issue with the initial award of custody to appellee in the September 2007 Order — a decision not before us in the present appeal.

Cite as 2 MFLM Supp. 119 (2013)

Child support: modification: medical and child care expenses

John Harrison Frye, Sr.

v.

Melissa Lynn Mather

No. 1861, September Term, 2011

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

Opinion by Watts, J.

Filed: December 18, 2012. Unreported.

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 of the Circuit Court for Harford County modifying child support. Appellant, John Harrison Frye, Sr., noted an appeal raising three issues, which we quote:

> 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[1] raising five issues, which we rephrase:[2]

> I. Whether the circuit court erred in calculating extraordinary medical expenses to be $500 a month?
>
> II. Whether the circuit court erred in calculating work-related child care expenses to be $300 a month?
>
> III. Whether the circuit 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 of child support was filed, and in awarding only $75 per month payable on the arrears?
>
> IV. Whether the circuit court abused its discretion in failing to award attorney's fees to appellee?
>
> V. Whether the circuit court erred in failing to order that child support extend beyond JJ's eighteenth birthday?

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

For the reasons set forth below, we answer questions I and II of the cross-appeal in the affirmative, and questions III, IV, and V in the negative. Accordingly, we 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.

FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 1984, appellant and appellee were married in Aberdeen, Maryland. During the course of their marriage, the parties had three children — Nathan, born January 3, 1985, Britney,[3] born May 12, 1987, and John, Jr., ("JJ") born July 8, 1995. On February 28, 2000, the Circuit Court for Harford County granted the parties an absolute divorce. The Judgment of Absolute Divorce provided, in pertinent part, as follows:

> ORDERED, that [appellant] shall have the sole care and custody of Nathan . . . and Britney . . . and that [appellee] shall [have] reasonable rights of visitation with said minor children in accordance with said minor children['s] wishes; and it is further
>
> ORDERED, that [appellee] shall have the sole care and custody of [JJ] . . . and that [appellant] shall have reasonable rights of visitation with said minor child; and it is further
>
> ORDERED, that both parties shall be charged generally with the support and maintenance of their chil-

dren, it being understood that this is a deviation from the Maryland Child Support Guidelines and that said guidelines would require [appellee] to pa[y] unto [appellant] approximately One Hundred Dollars ($100.00) a month in child support, but that it is in the best interest of the children to deviate from said guidelines in light of the total settlement reached between the parties; and it is further

ORDERED, that the Voluntary Separation Agreement between the parties dated January 31, 2000 shall be incorporated, but not merged, into this Judgment of Absolute Divorce[.]

The Voluntary Separation Agreement, which was signed by both parties, provided, in pertinent part, as follows:

IX. CUSTODY AND VISITATION

1. [Appellant] shall have the care and custody of Nathan . . . and Britney . . . . [Appellee] shall have reasonable rights of visitation with the minor children of the Parties in accordance with the children['s] wishes.

2. [Appellee] shall have the care and custody of [JJ]. . . . [Appellant] shall have reasonable rights of visitation with the minor child of the Parties.

X. CHILD SUPPORT

1. The parties shall be charged generally with the support and maintenance of their children.

On May 21, 2010, appellee filed, through the State's Attorney's Office for Harford County, a petition for child support. In the petition, appellee asserted that, although appellant is gainfully employed and able to do so, he failed or refused to provide adequate support and maintenance for JJ. Appellee requested that the circuit court order appellant to show cause why he should not be ordered to pay child support "through the Maryland Child Support Account. . . . , and . . . the costs of this proceeding."

On July 22, 2010, appellant filed a answer to the petition.[4] In the answer, appellant denied that he failed or refused to provide child support, stating as follows:

> [T]he parties have two other children, both of whom are now adults, however, at the time of the parties['] divorce, the parties agreed that [appellant] would be solely responsible for all expenses regarding the two older children, then ages [fifteen and twelve], and that [appellee], in exchange would be responsible for all expenses regarding the part[ies]' youngest child. [Appellant] has complied with this agreement and has paid all expenses for two children and now that they are both adults and [appellant] has fully complied with his portion of the agreement, [appellee] wants to rescind that Agreement and have [appellant] contribute to her obligation.

Appellant also asserted that he has carried JJ on his health insurance since his birth, "even though the part[ies'] Separation Agreement incorporated into the Judgment of Divorce[ ] obligates [appellee] to cover this expense which she has failed to do."

On October 19, 2010, the Harford County Department of Social Services, Office of Child Support Enforcement, filed a request for a hearing to establish child support. The hearing was scheduled for January 28, 2011, but was postponed after the parties met informally with the circuit court. On February 7, 2011, the circuit court issued a letter to the parties confirming that the hearing scheduled for January 28, 2011, had been postponed. In the letter, the circuit court stated as follows:

> As per our discussion on January 28th, it would appear to me that the child support could not begin any sooner than May 21, 2010, which is when the Petition for Child Support was filed. To the extent that it may be helpful for the parties continuing discussions, [appellant] has to understand that the court is never bound by any agreement of the parties to waive child support.

On March 25, 2011, appellee filed an Amended Petition (for Modification) of Child Support alleging, in pertinent part, as follows:

> 1. That the parties have one (1) minor child between them . . . JJ[ ], born July 8, 1995.
>
> 2. That at the time of the divorce on February 28, 2000, the minor child JJ was placed in his mother's custody, and two (2) other children of the parties, who were minors at that time, were placed with [appellant], their father. The parties were each charged generally with the support of the children.
>
> 3. That at the time the parties separated and ultimately divorced, JJ was 4 ½ years old, and had not been

diagnosed with the problems that have developed over the last ten years.

4. That since JJ's birth, and throughout the parties' separation and divorce, he has been in the sole custody of [appellee], and has developed severe disabilities requiring him to be under continuous care of professionals and/or [appellee]. Such a schedule makes it difficult for [appellee] to maintain full-time employment, and causes her to incur substantial extraordinary medical expenses.

5. That by virtue of the minor child JJ's current need for extraordinary medical care and the expenses related to such care, in combination with the ever increasing demands on [appellee's] time, there has been a material change in the circumstances since the Court last considered child support, and a modification is warranted.

* * *

7. That in[ ]spite of these long-standing needs for the support of the minor child, [appellant] has failed and refused, and has unjustifiably defended [appellee's] request for child support, therefore justifying an award of costs and attorney's fees to [appellee] from [appellant] pursuant to Family Law Article 12-103 and Maryland Rule 1-341.

On May 19, 2011, and September 28, 2011, the circuit court held a hearing on the Amended Petition. At the hearing, Michael Mather, appellee's new husband, testified on appellee's behalf that in 1998, JJ could walk, see, and hear, and that in 2000, around the time of the parties' divorce, JJ could utilize his hands to play with small toy cars. As to JJ's current condition, Mather testified that JJ "is completely unable to walk now. [He h]as no muscle tone from his waist down. So basically his legs are like rubber bands; they just fold underneath him . . . and he's unable to support himself at all. He has to be lifted from everything that he does. He has to be lifted out of the wheelchair and into his bed or onto the toilet or into the tub and out of the tub." Mather testified that JJ has poor vision and can no longer distinguish between colors. According to Mather, JJ "can distinguish between voices, but not well enough to learn speech[,]" and he communicates by sign language. Mather testified that "for the average person that did sign language, they would have difficulty [understanding JJ's signs] because his hands have contracted to where he can't open his fingers anymore." As a result, JJ "can't hold onto anything," and "somebody has to help him do pretty much any daily function." Mather testified that he and appellee have a movable lift "on little wheels" to assist in moving JJ, which is "very cumbersome to use[.] . . . [I]t's very hard to get [JJ] in it because you actually have to lift him up to get the sling [in the lift] underneath of him."

On cross-examination, Mather responded to a question about whether the family's previous home, from which they moved a year prior to the hearing, "was a hundred percent handicapped accessible," by testifying that the only handicap amenity was "an oversized bathroom. . . . There was no handicapped sink, toilet or tub in that house."

Appellee testified on her own behalf that, at the time of the parties' divorce, JJ had "three major diagnoses[:]" "[H]e had significant hearing loss, he had an eye condition which was called nystagmus, and he had a general diagnosis of hypotonia, which is low muscle tone." Appellee testified that, at the time of the parties' divorce, JJ could walk with a walker and leg braces, could feed himself and hold a cup to drink, and could sit up in a chair unsupported. Appellee described her understanding of JJ's future condition at the time of the parties' divorce as follows: "My understanding was that he would be a deaf child that would have some low muscle tone. So, of course, he wouldn't be a sports star, so to speak, but my understanding was that he could still lead a normal and productive life."

According to appellee, JJ's current diagnosis is mitochondrial depletion disorder. Appellee testified that JJ can no longer walk or stand, he can no longer eat or drink on his own, as he cannot grip utensils or cups, his food must be cut into small pieces that do not have to be chewed extensively, and he needs a special chair with supports and restraints to prevent him from falling over. Appellee testified that JJ requires treatments for his breathing, including "[c]hest physical therapy[,]" "nebulizer treatment[,]" "a coughalater that [ ] reproduces a cough[,]" "suctioning that brings up mucous[,]" and a "CPAP [machine to] help[ ] with [sleep] apnea[and] expanding his lungs[.]" Appellee testified that "[b]ecause [JJ] is wheelchair bound and has no physical movement of his body, he suffers from severe constipation, and, unfortunately, [she] do[es] anything from giving enemas to disimpacting him, along with lots of stool softeners, laxatives, and this can happen twice a week or once or twice a month." Appellee testified that "[t]he. other situation is that his bladder doesn't relieve itself all the time, so [she has had] to learn to cath[eterize] him[.] . . . [She] tr[ies] to [do so] only when it gets to the point where [she] know[s] that his

bladder is so full that then [they] are getting into that danger zone, because [they] monitor how much he drinks and then how much he relieves himself."

Appellee testified that JJ attends the Maryland School for the Blind, and that he returns home on the school bus between 4:15 and 4:30 p.m. Appellee testified that she began a full-time job in January of 2011, from which she does not return until 5:00 p.m. Appellee pays a neighbor to meet JJ at the bus and stay with him until she gets home. Appellee testified that JJ is often too ill to go to school and that the school has several vacations during the year; on days that JJ does not attend school, appellee must pay for all day care for him. Appellee testified that she pays all caretakers $15 per hour; for full time care, appellee testified that she pays $142.50 dollars per day and $712.50 per week. Appellee testified that if she did not pay for in-home care for JJ, she could pay for care at Treasure Island Therapeutic Day Care, which, at $70 per day or $295 per week, would be less expensive than full-time, in-home care.[5] Appellee testified that, if JJ needed care overnight, she would pay for "respite care" at Charge House for $165 per day.

Appellee testified that JJ's physician prescribed "a [medication] cocktail which consists of . . . a mix of various things" in 2009, but that she had not filled the prescription because "the insurance does not pay for it, and it's very costly." According to appellee, the most expensive of the eight medications costs $225 per month, and it is unclear what the total cost would be. Appellee introduced as evidence a packet including five prescriptions made out to JJ, a scholarly article explaining how the medications are used to treat JJ's condition, and a printout from an online pharmacy listing the price of the medication identified by appellee as the most expensive as $225 for a 28-day supply.

Appellee testified that there is a hydraulic lift to move JJ in and out of the bathtub in the Mathers' new home so that she does not have to lift him. Appellee testified that she currently uses a "crane" to move JJ, which requires her to "manually pump" in order to lift him, and then "push [JJ] and th[e] lift across carpet[.]" Appellee testified that this was causing bulging disks in her neck and lower back and "trouble with [her] sciatic nerve." According to appellee, the Mathers' new home was modified to accommodate a "ceiling track lift system[,]" which would "eliminate [her] having to push, forcibly push [JJ] and a lift." On May 19, 2011, appellee testified that the lift would cost $6,185 to install. On September 28, 2011, appellee introduced as evidence updated quotes for installation of a ceiling track lift system, in the amounts of $8,998 and $10,370.

Appellee testified that her wheelchair-equipped van has over 115,000 miles on it, and that it has "transmission issues because the gears are slipping." Appellee testified that a replacement van would cost "[a]nywhere from [$]40[,000] to $60,000." On September 28, 2011, appellee introduced as evidence a quote from Ride-Away Corporation for a handicapped-accessible 2011 Toyota Sienna for $69,247.60.

On cross-examination, appellee testified that JJ had previously been denied Social Security disability benefits, and that any award would be based on his parents' income until he turned eighteen. Appellee conceded that she had agreed in the separation agreement that she would be responsible for JJ's care while appellant would be responsible for the care of the parties' two older children. Appellee testified that she did not contribute any child support to the care of Britney and Nathan.

Britney testified on behalf of appellant that, although she lived with appellant subsequent to the parties' divorce, she has had constant contact with JJ and that JJ's condition has not changed. Britney testified that, in the Mathers' previous home, JJ's room was close to a large bathroom, in which his wheelchair easily fit, with a high toilet and a bathtub with "a lift that raised him up and in and out of the [bath]tub." According to Britney, in the Mathers' new house, there were no "accommodations for a handicapped child[.]" Britney testified that the bathtub lift was moved from the old home to the new, but that she has not seen the rolling lift which the Mathers used to have. Britney testified that the Mathers have improved their home since moving in with "a big brand new deck[,] . . . a brand new grill, [and] brand new TVs."

On cross-examination, Britney testified that she did not know whether JJ suffered from sleep apnea at the time of her parents' divorce. She testified that she has never seen her mother disimpact JJ's bowel. Britney conceded that, although JJ cannot now sit up unassisted, he could support himself at the time of the parties' divorce.

Appellant testified on his own behalf that, although in the parties' separation agreement appellee waived any contribution from appellant to JJ's care, appellant has carried JJ on his health insurance since his birth. Appellant testified that JJ "has never walked freely[,]" and "[t]he most he has ever done was stand up, maybe hold onto something." On cross-examination, appellant testified that JJ now wears braces on his hands to keep them open, which he did not previously need. Appellant testified that he pays $167.41 for health insurance and $11.01 for dental insurance for himself and JJ, and that, if he alone were covered by the insurance, he would pay $102.90 for health insurance and $4.45 for dental insurance.

The circuit court ruled from the bench as follows:

> If there's a material change in circumstances, it doesn't matter that the par-

ties made an agreement; the Court can change that agreement.

* * *

JJ has mitochondrial depletion disorder charactered by hearing loss. He has been wearing hearing aids since the age of two. He [h]as low vision. He can only see things up close clearly. He has hypotonia. He's got low muscle tone. He's got sleep apnea, and he uses a CPA[P]. He has been hospitalized three times in his life, as far as I've heard, in terms of the testimony here, which is remarkable given his condition. He has severe constipation which requires enemas, stool softeners or laxatives. It also requires disimpacting. And he needs a catheter to urinate. He has to have a breathing tube at times; chest physical therapy. He can't sit, walk or stand without support. Considerable support. His hands, the muscles in his hands are very constricted. He can't hold an object, and even needs braces to open his hands.

He can't feed himself. He has to drink through a straw in order to swallow. He needs to have his food cut into very small pieces.

These are significant issues. He was much younger when the parties divorced and much smaller, so, sure, the physical toll that that would take on any one individual might not be that great, but he's 16 years of age now. He's grown considerably, which then makes his physical limitations even more severe.

It doesn't require expert testimony for me to look at the pictures of JJ to understand what his medical condition is, to see what medical costs have been incurred. There's not a great leap, if any leap, to then understand as he gets bigger, one person can't lift him alone. It takes some device, some physical contraption, if you will, in order to lift him to get him from point A to point B, regardless of how short in proximity point A to point B might be.

* * *

[Caring for JJ] is expensive. It is an expensive cost. Now while I appreciate the arguments that [appellee's counsel] has made with respect to an adult destitute child . . . we're not at that point yet.

As I indicated from the outset, the Court always retains jurisdiction to modify a support order where there is a material change in circumstances. So upon reaching the age of 18, it's clear to me that JJ's needs aren't going to suddenly and miraculously improve where there won't be a need for the kind of financial and physical support that he'll need, but we're not at that point where I have to make a decision.

I can't order indefinite child support. There has to be some filing that requires support to continue beyond the age of 18, so I'm not going to be able to do that, although [appellee] has asked the Court to decide that he needs it.

* * *

Now I have heard a great deal about the costs that it will take to care for JJ, and I do believe that these are reasonable and necessary costs, which is what the law requires me to do.

Now, I know that there has been testimony about [the] Mather[s] hav[ing] bought a home, and that if they put a [ ] deck on it, why couldn't they use the money to pay for a lift, for example, or any of these other costs? I have also heard testimony about JJ's costs are covered by insurance. Nobody saw, really, the benefit of providing me with the actual documentation of any of those things. That's what it requires. It doesn't require that I just accept at face value, even if it's under oath, that those things are true. So this is what I am going to do at this point. I am going to impose a temporary order for support at this point, and you all have homework to do. . . .

. . . [Y]ou've got to do the research, and you've got to get the information. Not just come in and say, [JJ] needs this and he needs that, and he needs to have this covered, and we both should pay for it.

There may be programs out

there to address those costs, but you've got to do the homework out there. So telling me that the vendor may have called — the vendor for the lift may have called the insurance company and that they told you that it's not covered — not good enough. That's not really competent evidence that I need to satisfy — that satisfies your burden of proof on that issue. It could be true, but somebody, and the [parties] should be working together to call these folks, divvy up the work, call these folks and figure out what can be covered by what programs.

* * *

So at this point, what I am going to do, I think I have sufficient information regarding the parties' incomes at this point.

Now, here are the things that I am going to require be included as the reasonable and necessary costs. Of course the parties' incomes are what they are. I think [appellee's counsel] accurately figured out the health insurance expenses[.] . . . So those numbers are plugged in in this case.

Now, the fact that neither [of the specialized caretakers paid by appellee to care for JJ] showed up in court doesn't mean that there aren't these work-related child care expenses. Of course there are work-related child care expenses in this case. He's not a child who can be left at home. The next-door neighbor sometimes watches him before [appellee] can get home.

So I'm just not convinced of all of these costs as put forth by [appellee] in this matter. So at this point, I am only willing to allot a maximum of $300 for those work-related child care expenses, which I believe you have at $802, so that figure becomes $300.

The extraordinary medical expenses, I am satisfied. That is pretty clear. He has to have the cocktail in this case to assist him with his breathing and other day-to-day just basic functioning in order to get oxygen into his system at this point, and there is sufficient documentation regarding those costs are $500. So those are the numbers I am plugging in at this point.

. . . I am putting the burden on [the parties] to come up with something more; otherwise, at . . . the end of February 2012, then at that point, barring any additional — lack of any additional information, this Order is the Order that becomes the final child support order, unless somebody files something to modify that and to show me otherwise there is another material change of circumstances.

* * *

In terms of the effective date, you know, I recognize that [appellee] has covered these costs for a significant period of time, and also that [appellant], his expectation was not to have any additional child support, but I also do know that the Petition was filed back on . . . May 21, 2010, and an amended petition filed March 25, 2011.

I do think that at this point in terms of the best interest of the child that I will make it retroactive to some degree, but not to the date of the filing of the Original Petition that was filed by [appellee]. I am going to backdate this to January of 2011. So January 1, 2011, is when this became effective.

So I know that there are some arrears that are occasioned by the entry of an Order, but I would also at this point only add an additional $75 a month in addition to cover the arrears in addition to any current support that the Order requires.

* * *

I am not going to award either side attorney's fees at this point. Each party will be responsible for their own attorney's fees.

On October 12, 2011, the circuit court entered a temporary child support order, prepared and submitted by appellee's counsel, as follows:

> **ORDERED**, that, effective January 1, 2011, [appellant] shall pay [appellee] child support for the benefit of the parties' minor child, [JJ], in the amount of One Thousand Five Hundred Seventy-Seven Dollars ($1,577.00).

> A Child Support Guidelines Worksheet is attached hereto as **Exhibit A**[6]; and it is further
>
> **ORDERED**, that payment on the arrearage shall be made by [appellant] at the rate of Seventy Five Dollars ([$]75.00) per month until said arrearage is paid in full and/or further Order of the Court, whichever first occurs; and it is further
>
> * * *
>
> ORDERED, that child support . . . shall terminate on July 8, 2013, unless it is determined that the child is entitled to support by the parties beyond his eighteenth (18th) birthday . . . in which case child support may be extended . . . ; and it is further
>
> **ORDERED**, that [appellant] shall continue to provide health insurance for the benefit of the minor child[.]

On October 21, 2011, appellant filed a notice of appeal. On November 10, 2011, appellee filed a notice of cross-appeal. On February 27, 2012, with no further pleading having been filed by either party as to child support, the circuit court finalized the child support order without changing any material terms. On March 6, 2012, appellant filed a supplemental notice of appeal. On March 23, 2012, appellee filed a supplemental notice of appeal.

DISCUSSION

APPEAL

Standard of Review

In In re Shirley B., Jordan B., Daron B., & Cedric B.,419 Md. 1, 18 (2011), the Court of Appeals discussed the three different levels of review in family law disputes, stating:

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

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

I.
Order Modifying Child Support

Appellant contends that the circuit court erred in ordering him to pay child support in the absence of a material change of circumstances. Appellant asserts 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[.]"

Appellee responds that the circuit court did not err in modifying child support because, since the Judgment of Divorce, "JJ's health [has] deteriorated so much . . . that it materially changed both his needs and [appellee]'s ability to pay for the care of his needs." Appellee contends that, although at the time of the divorce JJ could "sit up in a chair and stand on his own, walk with a walker and leg braces," "use[ ] utensils to feed himself[and] dr[i]nk from a cup," he has since lost the ability to do these and other activities.

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) (citations omitted). Maryland Code Ann., Family Law Art. ("F.L.") § 12-104(a) provides: "The court may modify a child support award subsequent to the filing of a motion for modification and **upon a showing of a material change of circumstance**." (Emphasis added). In Kierein v. Kierein, 115 Md. App. 448, 456 (1997), this Court held that FL. § 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." (Citation omitted) (emphasis added).

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) (footnote omitted). "[I]n making this threshold determination that a material change of circumstance has occurred[, a trial court] must specifically focus on the alleged changes in income or support that have occurred since the previous child support award." Drummond v. State, 350 Md. 502, 511 (1998) (citation, emphasis, and internal quotation marks omitted). "[T]he requirement that the change be 'material' limits a [trial] court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order." Wills, 340 Md. at 488-89 (citing Walsh, 333 Md. at 503).

In this case, the circuit court was asked to determine whether JJ's physical condition had changed suf-

ficiently since the parties' divorce, when the original child support order was entered, to constitute a material change of circumstance. The evidence adduced at trial demonstrates that JJ's condition has deteriorated significantly since the entry of the original child support award in the Judgment of Absolute Divorce, as follows: (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 now he 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 has lost that ability as he 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. Based on this evidence, we have no difficulty in concluding that the circuit court did not abuse its discretion in modifying appellant's child support obligation based on a material change in circumstance.[7]

II.
Extraordinary Medical Expenses

Appellant contends that 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,[8] and that the figure of $500 was never provided to the court. Appellant asserts that JJ does not require the medication, as he has, up to this point, never received it.

Appellee responds that the circuit court properly ordered appellant to pay extraordinary medical expenses based on its finding that JJ requires the medication cocktail to breath. Appellee argues that the "fact that JJ never received the medication does not mean that he does not need it[,]" as "JJ clearly has trouble breathing." On cross-appeal, appellee asserts that, although the circuit court "recognized the necessity" of the van and the lift, the amount awarded for extraordinary medical expenses is insufficient to cover those costs.

FL. § 12-204(h)(2) provides that "[a]ny extraordinary medical expenses incurred on behalf of a child shall be added to the basic child support obligation and shall be divided between the parents in proportion to their adjusted actual incomes." Extraordinary medical expenses are defined as "uninsured expenses over $100 for a single illness or condition[,]" and specifically include "uninsured, reasonable, and necessary costs for . . . treatment for any chronic health problem[ ]" F.L. § 12-201(g).

In this case, the circuit court awarded $500 in extraordinary medical expenses for the medication prescribed for JJ's breathing. The circuit court made this award based upon appellee's testimony that a medication cocktail had been prescribed to JJ, and her submission of five unfilled prescriptions written by JJ's physician, along with an article from a medical journal explaining the treatment of mitochondrial disease. Appellant provided no testimony from any expert that the medication was not medically indicated. Rather, 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. Appellee provided evidence of medical necessity to the circuit court in the form of: (1) prescriptions signed by a medical doctor — who, by definition, is trained to determine whether a patient requires a specific medication — and (2) an article from Current Treatment Options in Neurology, a medical journal, explaining the necessity of each medication for the condition with which JJ has been diagnosed. Appellee testified that the most expensive medication would cost $225. As the cost of the medications is, therefore, an "expense[ ] over $100 for a single illness or condition" "necessary [ ] for . . . treatment for a[ ] chronic health problem," the cost constitutes an extraordinary medical expense. F.L. § 12-201(g).

Four of the five medications prescribed to JJ are identified in the article provided by appellee as having the following approximate prices: (1) Coenzyme Q10 — about $200 per month (included in the exhibit is a printout from an online pharmacy listing the price of this medication as $225 for a 28 day supply); (2) Riboflavin-$5; (3) L — Creatine-$20; and (4) L — Carnitine-$70 for tablets and $30 for liquid. No price was provided as to lipoic acid, the final medication prescribed. The total cost of the medications listed above is, therefore, at most between $295 per month and $320 per month. Thus, the evidence introduced at trial documented a figure lower than $500. Given that the price of one medication is unknown, the total cost could be higher than these subtotals. Beyond stating that there was "sufficient documentation regarding th[e] costs[,]" the circuit court gave no indication of how it reached the figure of $500. As a result, we are unable to determine that there is material evidence to support the factual findings of the trial court that JJ's medication would cost $500 per month. As such, we conclude that the circuit court abused its discretion in awarding as an extraordinary medical expense the amount of $500 for JJ's medication.[9] Accordingly, we vacate the order of $500 and remand for a determination of extraordinary medical expenses, and an expla-

nation of the basis for the determination.

III.
Child Care Expenses

Appellant contends that the circuit court erred in awarding $300 per month in child care expenses. Appellant argues that "[i]t is evident that the [circuit] court did not accept [a]ppellee's testimony with respect to the necessity of child care expenses of $802 dollars per month. However, the [circuit] court offered absolutely no explanation as to why it awarded the particular number of $300 for child care expenses." Appellant asserts that where, as here, child care expenses are speculative, such an award is improper.

Appellee responds that the circuit court did not err in awarding child care expenses. Appellee contends that an award of child care expenses in addition to the basic child support obligation is mandatory, and that, as she has a full-time job requiring her to pay for child care, the circuit court correctly added the cost to appellant's basic child support obligation. On cross-appeal, appellee argues that the circuit court failed to base the award on the evidence introduced at trial, consisting of a list of child care payments from May 2010, which she contends totals in excess of $300 per month. Appellee asserts that, as such, the circuit court erred in failing to award more than $300 per month in child care expenses.

F.L. § 12-204(g) provides as follows:

(g) Child care expenses. —

(1) Subject to paragraphs (2) and (3) of this subsection, actual child care expenses incurred on behalf of a child due to employment or job search of either parent shall be added to the basic obligation and shall be divided between the parents in proportion to their adjusted actual incomes.

(2) Child care expenses shall be:

(i) determined by actual family experience, unless the court determines that the actual family experience is not in the best interest of the child; or

(ii) if there is no actual family experience or if the court determines that actual family experience is not in the best interest of the child:

1. the level required to provide quality care from a licensed source; or

2. if the obligee chooses quality child care with an actual cost of an amount less than the level required to provide quality care from a licensed source, the actual cost of the child care expense.

(3) Additional child care expenses may be considered if a child has special needs.

Of the two child care options available to appellee, in-home care or out-of-home care at Treasure Island, the out-of-home care was the less expensive option. Based on Treasure Island's fee schedule, rates for 2011 were as follows:

Full Time:	$295.00 [per week]
Part Time:	
Full Day:	$70.00
½ Day:	$40.00
Before/After:	$155.00 [per week]
After School Only:	$130.00 [per week]

Appellee testified that JJ has roughly three-and-a-half months of school vacation over the course of a year, during which appellee must pay for full-time care. For those three-and-a-half months (fifteen weeks), appellee would, therefore, pay approximately a total of $4,425 for child care at Treasure Island. Appellee testified that she requires after-school care for JJ for the remaining eight-and-a-half months of the year. The cost for after school care for those eight-and-a-half months (thirty-seven weeks) would be approximately $4,810 at Treasure Island. The total yearly cost would be approximately $9,235, or $769.58 per month. The circuit court stated that it was "not convinced of all of the[ ] costs as put forth by [appellee]" and that it was "only willing to allot a maximum of $300 for [ ] work-related child care expenses[.]" The circuit court offered no explanation of the grounds for its determination of $300 per month, and, based on the record before us, we can discern no basis for a determination of child care costs in this amount. Accordingly, we conclude that the circuit court abused its discretion in awarding child care expenses in the amount of $300 per month. We vacate the order of $300 and remand for a determination of the cost of the work-related child care expenses, and an explanation of the basis for the determination.

CROSS-APPEAL[10]

I.
Retroactivity of Award and Payment of Arrears

Appellee contends that 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 "child support is required to be retroactive to the date of the petition[,]" and that the effective date of the child support order selected by the circuit court "is arbitrary and not in the best interest

of the child." Appellant asserts that the circuit court's order that appellant pay $75 per month in arrears is arbitrary and should be increased.

(a) Retroactivity

"The decision to make a child support award retroactive to the filing of [a motion for modification] is a matter reserved to the discretion of the trial court." Petitto v. Petitto, 147 Md. App. 280, 310 (2002) (citations omitted). "A trial court's decision to modify a child support award 'will not be disturbed on appeal unless the court acted arbitrarily or its judgment was clearly erroneous.'" Id. at 307 (citation omitted).

F.L. § 12-104 provides that "[t]he [trial]court may not retroactively modify a child support award prior to the date of the filing of the motion for modification." This section of the Family Law article does not, however, require the trial court to make an award retroactive. Krikstan v. Krikstan, 90 Md. App. 462,472 (1992) ("We comment to make clear that the law does not require that awards be retroactive."). Rather, "it is within the trial court's discretion whether and how far retroactively to apply a modification of a party's child support obligation up to the date of the filing of the petition for said modification." Tanis v. Crocker, 110 Md. App. 559, 570 (1996).

In this case, the circuit court found that it was in JJ's best interest to "make [the modification] retroactive to some degree." The circuit court noted, however, that, although appellee had been carrying the costs for JJ's care since the parties' divorce, appellant's expectation that he would not be ordered to pay child support for JJ was reasonable. As a result, the circuit court made the modification retroactive to January 1, 2011, roughly the mid-point between appellee's filing of the petition and the circuit court's ruling.[11] 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 in the circuit court's order.

(b) Payment of Arrears

As to her contention that the circuit court erred or abused its discretion in ordering that appellant pay $75 per month toward the arrears, and that the court decided the award arbitrarily, appellant makes no additional arguments in support of this claim. The circuit court ordered appellant to pay $75, a more than nominal amount each month, which will, in the future, eliminate the arrearage. 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

On cross-appeal, appellee contends that the circuit court erred in failing to award attorney's fees. Appellee argues that the circuit court should have awarded attorney's fees based on appellant's relatively higher income and appellee's justification in filing the petition to modify child support.

"The award of counsel fees is reviewed under the abuse of discretion standard. A [trial] court's decision in this regard will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." Meyr v. Meyr, 195 Md. App. 524, 552 (2010) (citations and internal quotation marks omitted).

F.L. § 12-103 provides, in pertinent part, as follows:

> (a) In general. —The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
>
> (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; . . .
>
> (b) Required considerations. — Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

In Walker v. Grow, 170 Md. App. 255, 291, cert. denied, 396 Md. 13 (2006), this Court stated: "Notwithstanding the language of [F.L.] § 12-103(b) requiring the [trial] court to consider the factors '[b]efore' it 'may award costs and counsel fees,' we have determined that the [trial] court must also consider the factors before it may deny counsel fees." (Third alteration in original). "Failure on the part of the court to consider the statutory criteria constitutes legal error. But, the trial court does not have to recite any 'magical' words so long as its opinion, however phrased, does that which the statute requires." Horsley v. Radisi, 132 Md. App. 1, 31 (2000) (citations and some internal quotation marks omitted).

In this case, in denying appellee's request for attorney's fees, the circuit court ruled as follows: "I am not going to award either side attorney's fees at this point. Each party will be responsible for their own 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 parties' Separation Agreement and the Judgment of Absolute Divorce.[12] 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 parties provided the circuit court with proof of income[13] and appellee provided information regarding the costs she incurred with regard to JJ's care[14] — all of which the circuit court reviewed in awarding child support, extraordinary medical expenses, and child care expenses. As a result of the circumstances of the hearing, 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 in the circuit court's denial of appellee's request for attorney's fees.

III.
Continuation of Award Past Age 18

Appellee contends, on cross-appeal, that the circuit court erred in not extending the child support order past JJ's eighteenth birthday. Appellee argues that Maryland imposes a duty on the parents of adult disabled children to support those children. As JJ was sixteen at the time the child support order was entered, appellee asserts that "[i]t would unquestionably be in the best interest of equity to decide how much child support JJ will need both now and after he turns eighteen."

In general, 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) ("[A] court cannot require a parent to support a child after the child reaches the age of eighteen."); Quarles v. Quarles, 62 Md. App. 394, 403 (1985) ("A [parent] may not be compelled to support a child after [the child] reaches majority."). F.L. § 13-102(b), however, provides that "[i]f a destitute adult child is in this State and has a parent who has or is able to earn sufficient means, the parent may not neglect or refuse to provide the destitute adult child with food, shelter, care, and clothing." A "destitute adult child" is defined as "an adult child who[ ] has no means of subsistence [ ] and [ ] cannot be self-supporting, due to mental or physical infirmity." F.L. § 13-101(b). A parent, therefore, "has a duty to support an incapacitated adult child[.]" Sininger v. Sininger, 300 Md. 604, 608 (1984). "[S]uch an adult child is to be treated on equal footing with a minor child" under the provisions of the Family Law article. Id.

In this case, the circuit court noted that neither of appellee's petitions for modification requested that child support be effective beyond JJ's eighteenth birthday, stating "I can't order indefinite child support.[15] There has to be some filing that requires support to continue beyond the age of 18, so I'm not going to be able to do that, although [appellee] has asked the Court to decide that he needs it." 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.[16] 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.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED IN PART AND REVERSED IN PART AS STATED IN THE OPINION; COSTS TO BE PAID 1/2 BY APPELLANT AND 1/2 BY APPELLEE.

FOOTNOTES

1. Appellant failed to submit a brief to this Court in response to appellee's cross-appeal.

2. Appellee phrased the issues on cross-appeal as follows:

> I. Should the extraordinary medical expenses award be more than $500 to cover all [ ] costs?
>
> II. Did the trial [court] . . . err when [it] did not base the award [for child care expenses] on actual family experiences?
>
> III. Did [the trial court] err when [it] only made the support retroactive to January 1, 2011, rather than to the date of the petition for review (May 21, 2010), and when [it] only awarded $75 per month payable on the arrears?
>
> IV. Should the trial [court] have awarded attorney's fees to [appellee]?
>
> V. Should the [trial] court make JJ and his family go through trial again in one year, or should the [trial court] now rule on a child support award that covers JJ both before and after he turns 18?

3. Britney's name appears in the record as both "Brittany" and "Britney." For consistency, we shall use "Britney."

4. Although the summons to file a response was issued on May 24, 2010, appellant was not served with the petition and summons until June 29, 2010. Pursuant to Maryland Rule 2-321(a), appellant had thirty days from the date of service to

file his response.

5. Appellee later introduced as evidence the fee schedule for Treasure Island Therapeutic Day Care, confirming the costs to which she testified.

6. The Child Support Guidelines Worksheet, prepared by appellee's counsel, provides as follows:

	Mother	Father	Combined
1. Monthly Actual Income-Before Taxes	2083	7619	9702
. . .			
2. Monthly Adjusted Actual Income	2083	7619	9702
3. Percentage of Shared Income	21.5%	78.5%	
. . .			
4. Basic Child Support Obligation [Pursuant to Maryland Code Ann., Family Law § 12-204(e)]			1252
a. Work-Related Child [C]are [E]xpenses . . .	300		300
b. Health Insurance Expenses . . .		156	156
c. Extraordinary Medical Expenses . . .	500		500
5. Total Child Support Obligation			2208
6. Each Parents Child Support Obligation	475	1733	
. . .			
7. Recommended Child Support Obligation	0	1733	
a. Income apportioned credit/debit from line 4	0	-156	
8. Recommended Child Support Order		1577	

The worksheet contains footnotes stating that the work-related child care expenses consist of "Treasure Island" and the extraordinary medical expenses consist of "[r]espite [c]are, [medication c]ocktail, [and 1]ift[.]"

7. We are unpersuaded by appellant's argument that there had been no material change in circumstances because JJ's diagnoses have not changed. We note that appellee testified that JJ's diagnoses at the time of the parties.divorce were "hearing loss," "nystagmus," and "hypotonia[.]" The May 11, 2011, medical records introduced as evidence by appellee list his current diagnoses as "Mitochondrial Disorder[,]" "[p]rofound bilateral sensorineural hearing loss[,]" "[g]astrointestinal hypomobility/constipation[,]" "[c]entral and obstructive sleep apnea[,] "[s]pastic equinovarus/clubfoot bilaterally[,]" "[s]evere sensory-motor axonal polyneuropathy with length-dependant features[,]" and "[b]ilateral optic atrophy[.]" Even if no change in JJ's medical diagnoses had occurred, as discussed above, it is evident that JJ's needs have changed since entry of the Judgment of Absolute Divorce.

8. Appellant's brief lists the cost of the most expensive medication as $228. As all evidence and testimony presented by appellee clearly lists the cost as $225, we attribute the "$228" to a typographical error.

9. Although appellee introduced into evidence quotes for installation of a ceiling track lift system in the amounts of $8,998 and $10,370, and a quote for a handicapped accessible van for $69,247.60, the circuit court stated that the award for extraordinary medical expenses was based solely on the cost of JJ's medication. As to the lift system and the van, the circuit court noted that appellee had not researched whether the costs could be covered by insurance or aid from charitable agencies, but did not explain further why it declined to include in the award the costs asserted by appellee.

10. Questions I and II of the cross-appeal, involving child care expenses and extraordinary medical expenses, concern the same subjects raised on appeal by appellant and are resolved *supra* in Sections II and III.

11. From May 2010, to September 2011, is sixteen months. January 2011, is eight months after appellee's filing of the petition, half of the sixteen month total.

12. Appellee argued on brief and at oral argument that appellant opposed the child support obligation in bad faith, stating "we wouldn't have to be here . . . if [appellant] would have willingly paid some child support to [appellee] to help with the dire circumstances that have developed with JJ, and that wasn't done." Appellee offers no evidence of appellant's bad faith or purposeful delay other than his opposition to the motion for modification. The circuit court addressed this contention in finding that appellant argued against the motion based on his reasonable belief that he was not obligated to support JJ as a result of the parties' Separation Agreement. We discern no error in the circuit court's finding that appellant did not act in bad faith in challenging appellee's motion.

13. Appellee submitted to the circuit court appellant's 2010 W-2 Wage and Tax Statement form, listing his income as $91,428.11, and her pay statement from March 4, 2011, listing her pay rate as $13.50 per hour (approximately $28,000 yearly for full-time employment).

14. Appellee introduced evidence showing the cost of JJ's care as follows: (1) $8,998 or $10,370 for installation of a ceiling track lift system; (2) $69,247.60 for a new handicapped accessible van; (3) between $295 and $320 per month for medications not covered by insurance; and (4) approximately $9,235 per year, or $769.58 per month, in child care expenses.

15. At oral argument, appellee contended that FL. § 1-201(b) (which provides that "[i]n exercising its jurisdiction over the custody, guardianship, visitation, or support of a child, an equity court may . . . decide who shall be charged with the support of the child, pendente lite or permanently[and] from time to time, set aside or modify its decree or order concerning the child[,]") grants the circuit court general equity jurisdiction to award continuing child support past the eighteenth birthday of a disabled child. It is clear from the case law, however, that a parent's child support obligation under § 12-204 ceases upon the eighteenth birthday of the child. Nothing in §1-201(b) alters this principle.

16. Appellee's reliance on Sininger v. Sininger, 300 Md. 604 (1984) and Presley v. Presley, 65 Md. App. 265 (1985) for the contention that the circuit court erred in not determining the amount of child support JJ will require after he reaches age eighteen — prior to his eighteenth birthday — is misplaced. In Sininger, 300 Md. at 606, 608, a case where the mother filed a complaint for support after the disabled child had reached the age of majority, the Court of Appeals held that a parent has a duty to support an incapacitated adult child. In Presley, 65 Md. App. at 270, 276, a case where the mother filed a petition claiming child support arrearage after the disabled child had reached the age of majority, this Court held that the father could "be made to provide support for [the child] notwithstanding that she is both over 18 and emancipated, and his obligation to provide that support can be enforced in equity." In both Sininger and Preston, the mothers sought support for their adult disabled children after the children had reached the age of majority. Here, appellee sought

to obtain a continuation of support for JJ beyond his eighteenth birthday before he has turned eighteen. Appellee does not identify any case law supporting such a proposition. Nothing in this opinion would prevent appellee, however, from filing a petition under F.L. § 13-101 and 13-102 to obtain support for JJ as an adult destitute child after JJ reaches age eighteen.

NO TEXT

Cite as 2 MFLM Supp. 133 (2013)

Child support: modification: emancipation of child

Fran Rae Moskowitz
v.
Marc S. Moskowitz

No. 1935, September Term, 2011

Argued Before: Krauser, C.J., Watts, Raker, Irma S. (Ret'd, Specially Assigned), JJ.

Opinion by Watts, J.

Filed: December 18, 2012. Unreported.

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, appellant, appeals an order of an *in banc* panel in the Circuit Court for Montgomery County reversing the trial court's dismissal of appellee Mark Moskowitz's Motion for Modification of Child Support Obligation. Appellant noted an appeal raising one issue, which we quote:

> Did the *In Banc* Panel err in concluding that the trial court erred as a matter of law in dismissing [appellee]'s Motion for Modification of Child Support, pursuant to Maryland Rule 2-519, when one of two minor children subject to the existing support order became emancipated, and the trial court found this to be the only change in circumstance proven by [appellee]?

For the reasons set forth below, we answer the question in the negative. We shall, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 23, 2000, the Circuit Court for Montgomery County granted appellant and appellee an absolute divorce.[1] In the divorce decree, the trial court[2] awarded sole physical custody of the three then minor children — Ilana Joy Moskowitz, born, on May 11, 1991, Shira Ban Moskowitz, born on May 14, 1992, and Ayla Miriam Moskowitz, born on May 1, 1996 — to appellant and ordered appellee to pay child support in the amount of $2,447 per month. Moskowitz v. Moskowitz, Case No. 2315, September Term 2009, slip op. at 1 (Md. Ct. Spec. App. April 20, 2011) (unreported) ("Moskowitz I"). On April 5, 2006, upon a motion by appellant, the trial court ordered that appellee's child support obligation be increased to $2,900 per month. Id. at 2. After the parties' oldest child, Ilana, reached the age of majority in May 2009, pursuant to a motion by appellee and by order entered in December 2009, his child support obligation was reduced to $2,703.69 per month "based on the needs of the parties' remaining minor children[.]" Id. at 2-3.

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

On May 17, 2010, appellee filed a Motion for Modification of Child Support Obligation, requesting a decrease in child support obligation as a result of: (1) the parties' second daughter, Shira, reaching eighteen years of age; and (2) a decrease in his monthly income from $14,126 in 2009 to $9,253 in 2010. On June 4, 2010, appellee filed a financial statement listing his monthly income as $7,000 and his monthly expenses as $9,182.84. On September 13, 2010, appellant filed an answer to the motion for modification. The same day, appellant filed a financial statement listing her monthly income as $3,644.89 and her monthly expenses as $9,767.29.

On October 20, 2010, the trial court held a hearing on the motion for modification of child support. At the conclusion of testimony, appellant moved to dismiss the motion for modification on the ground that appellee had not met the burden of proof as to demonstrating a material change in circumstances. Appellee responded as follows:

> [A]s far as the burden, Your Honor, there are two elements that I've proved, I would respectfully suggest. Number one, there is only one child to support, and pursuant to the guidelines, the support for one child should be in accordance with our combined incomes.
>
> * * *
>
> And I believe, Your Honor, combined with the fact that there's only one child to support, not two, and combined with the fact that my income has precipitously declined — if the

> Court does not want to accept my representations, and I would suggest that would be in error, of my current income for 2010, at the very least, my income from 2009 was not as the Court determined. It's $60- some thousand dollars less. That is a material change. A material decrease [in] income, which would be in accordance [with] the many decisions from the Court of Appeals, significant and sufficient to support the motion.

Ruling from the bench, the trial court denied the motion for modification of child support and granted the motion to dismiss. As to the effect of one child's emancipation on appellee's support obligation, the trial court found only that "[t]he one child now that remains and the fact that there were two children before is not a material change by operation of law by itself[ ]" The trial court made the following observation as to appellee's income:

> Yes, I do find there's a component of self impoverishment here. It's either he's self-impoverishing or he's making more money, we just don't have the proof of it.
>
> * * *
>
> I'm going to grant the motion to dismiss for lack of a showing to this of what [appellee] earn[s], what [his] expenses are.

On November 3, 2010, appellee filed a notice pursuant to Maryland Rule 2-551, seeking review of the trial court's ruling denying the motion for modification by an *in banc* panel. On November 10, 2010, consistent with its oral ruling, the trial court issued an order granting appellant's motion to dismiss the motion for modification and dismissing the motion *nunc pro tunc* to October 20, 2010. On November 22, 2010, the Administrative Judge of the Circuit Court for Montgomery County issued an order appointing an *in banc* panel and scheduling a hearing for January 7, 2011.

On January 7, 2011, the *in banc* panel held a hearing to review the trial court's order. After hearing argument from both parties, the chairperson of the review panel ruled from the bench as follows:

> We've had a chance to discuss the matter and review, again, the findings of facts and conclusions of law of [the trial court]. And the panel unanimously is concerned about a couple of things.
>
> The first is that although at some point [the trial court] did seem to indicate that [it] simply found no material change in circumstances, throughout [its] comments and [its] remarks to the parties [it] made continual reference to this issue of voluntary impoverishment.
>
> * * *
>
> [The trial court] knew what [it] was saying. We only have the cold record, but it just seems to us that there is some ambiguity there as to what exactly it was [the trial court] was basing [its] findings on.
>
> So what we are going to do is remand the case to [the trial court] for [it] to make specific findings on the issue of material change in circumstances, providing [its] reasons therefor. And if [it] reaches the same conclusion, [it] can then proceed to give [its] reasons for voluntary impoverishment if that becomes relevant.

On January 14, 2011, the *in banc* panel issued an order vacating the dismissal of the motion for modification and remanding the case to the trial court. The *in banc* panel ordered that, "on remand, [the trial court] shall make specific findings on the record or by written opinion on the issue of whether there was a material change in circumstances sufficient to justify a child support modification[.]"

On May 31, 2011, the trial court held a second hearing on the merits of the motion for modification. At the hearing, appellee testified that he filed the motion for modification because "[his] income had significantly declined, coupled with the fact that [the parties'] second daughter, Sh[i]ra, had turned 18 and was no longer a subject to child support obligation." At the close of evidence, the trial court ruled as follows:

> But clearly from the petition that you filed and clearly from the evidence, the huge — the only thing that you allege is different and that would classify under a material change [from the December 2009 child support order] is the fact that there's one child that's under 18 now and the other child is emancipated. And I will say this, I will certainly at any time that I have jurisdiction, reconsider my decision if you can find me a case that indicates that that by itself is a ground for modification of child support.
>
> Now, what I think really doesn't matter on that. I think it should, because clearly two mouths to feed

> are more expensive than one mouth[.] . . . But I can't get to that point unless I find that there is a material change in circumstances. I would love to, and I'll just be up front with it. Take [appellee's] original income found [in December 2009] of the $200,000, take [appellant's] income, whatever else there is and plug in one kid and go with that, but I don't believe I can do that under the law and if you can show me some reason why I can, I'll do it.
>
> Now for where we are, a material change in circumstances I find based on the case law where, and there's cases on point where there have been three kids down to two and the Court of Appeals and Special Appeals has said no you can't do that. It's a one child support amount.
>
> * * *
>
> So, I'm going to . . . deny the motion to modify.

On June 10, 2010, appellee filed a notice seeking *in banc* review of the trial court's second denial of the motion to modify. On July 18, 2011, the Administrative Judge of the Circuit Court of Montgomery County issued an order appointing an *in banc* panel and scheduling a hearing for September 2, 2011.

On September 2, 2011, the *in banc* panel held a hearing to review the trial court's order. After hearing argument from both parties, the panel "voted two to one to reverse the decision of the" trial court. On September 20, 2011, the *in banc* panel ordered that the dismissal of the motion for modification be reversed, finding the trial court's conclusions "erroneous as a matter of law[.]" In an opinion accompanying the order, the *in banc* panel stated, in pertinent part:

> The trial court erroneously dismissed [appellee]'s Motion for Modification of Child Support Obligation, stating that the law did not permit the [trial] court to find that emancipation constituted a material change in circumstances. Although the [trial court] was correct in asserting that Maryland case law does not specifically hold that emancipation automatically constitutes a material change, and therefore refused to consider such, Maryland case law does establish that emancipation is a valid consideration and is not simply to be disregarded.
>
> * * *
>
> The [*in banc*] Panel finds the trial court's ruling to be in error for refusal, as a matter of law, to consider emancipation in [ ] modifying a unitary child support order. The uncontroverted facts of this case established that one of the parties' two Minor Children, for whom child support is paid, has become emancipated. Such facts alone *per se* contribute a material change in circumstances, but at a minimum, emancipation of one of two supported children must be considered in making a determination regarding a material change in circumstances. Therefore, upon remand, the trial court shall consider as a factor emancipation of the parties' child in its determination of any material change in circumstances so as to establish a proper level for the remaining dependent child.

(Internal transcript citation omitted).

On November 4, 2011, appellant filed an appeal of the *in banc* panel's decision reversing the denial of the motion for modification.[3]

DISCUSSION

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 of the minors 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.[4]

Appellee contends that the trial court improperly concluded that it did not have the authority to find a material change in circumstance based solely upon the emancipation of one child. Appellee argues that "there is nothing in the law that prohibits a court from finding a material change in circumstance" based upon the emancipation of one child subject to a child support order affecting siblings. Although appellee concedes that "a parent's child support obligation is not to be automatical-

ly reduced on a pro rata basis" when one child reaches the age of majority, he asserts that "the current case law . . . implicate[s] . . . 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."

In Langston v. Langston, 136 Md. App. 203, 221-22 (2000), aff'd, 366 Md. 490 (2001),[5] this Court addressed the proper standard of review in appeals taken from the decision of an *in banc* panel of the circuit court, as follows:

> [T]he in banc panel functions like an intermediate appellate court. This means that it must review the [trial court]'s factual findings and discretionary rulings. But, it may not set aside factual findings of the trial court unless clearly erroneous, nor disturb the trial judge's discretionary rulings absent a finding of abuse of discretion. The in banc panel does not make *de novo* factual findings, however. Moreover, like any appellate court, the in banc panel does not defer to the [trial] court with respect to questions of law, just as we do not defer to a lower tribunals resolution of a legal question.
>
> . . . If the in banc panel functions like an intermediate appellate court, then [the] role [of the Court of Special Appeals] is akin to the Court of Appeals, in the sense that we provide an additional level of appellate review. We reason by analogy to those cases that are tried in the [trial] court and then reviewed by this Court and later by the Court of Appeals. When issues are raised on appeal concerning a trial court's factual findings, which are first considered by this Court and then by the Court of Appeals, the Court of Appeals essentially reviews our review of the factual findings made by the [trial] court as the original tribunal. (Peeling the layers of an onion seems like an apt description here.) In the process, the Court of Appeals must also examine the trial court's decision. Similarly, in our review of the in banc panel's opinion addressing an issue about the factual findings of the [trial court], we assess the correctness of the in banc panel's ruling by analyzing the factual findings of the [trial court] in light of the record. In the same way, when an appeal from an in banc panel concerns an issue regarding a discretionary ruling of the trial [court], we must consider the in banc panel's review of the trial [court]'s discretionary ruling. But, this necessarily requires us to consider the trial [court]'s exercise of discretion, for we must be satisfied that the trial court properly exercised its discretion and did not abuse its discretion.

Maryland Rule 8-131(c) provides that "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." We have held, however, that this standard does not apply to the trial court's determination of legal questions. L.W. Wolfe Enters. v. Md. Nat'l Golf, L.P., 165 Md. App. 339, 344 (2005), cert. denied, 391 Md. 579 (2006). "Instead, . . . where the order involves an interpretation and application of Maryland statutory and case law, [the appellate c]ourt must determine whether the [trial] court's conclusions are 'legally correct' under a *de novo* standard of review." Id. (citation and internal quotation marks omitted) (omission in original). Applying the logic of *Langston*, where this Court reviews the decision of an *in banc* panel regarding a trial court's ruling on a question of law, "we assess the correctness of the *in banc* panel's ruling by analyzing the [ ] findings of the [trial court] in light of" Maryland statutory and case law *de novo*, as "we must be satisfied that the trial court properly" interpreted the applicable law. 136 Md. App. at 221-22.

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) (citations omitted). Maryland Code Ann., Family Law Art. ("FL.") § 12-104(a) provides: "The court may modify a child support award subsequent to the filing of a motion for modification and **upon a showing of a material change of circumstance**." (Emphasis added). 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." (Citations omitted) (emphasis added).

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) (footnote omitted) (emphasis added). "[I]n making this threshold determination that a material change of circumstance has occurred[, a trial court] must specifically focus on the alleged changes in income or support that have occurred since the previous child support award." Drummond v. State, 350 Md. 502, 511 (1998) (citation, emphasis, and internal quotation marks omitted) (omission in original). A material change in circumstance "may be limited to a change in the general needs of one child or more than one child, or in a specific need of a child." Lieberman v. Lieberman, 81 Md. App. 575, 596 (1990) (citation omitted). "[T]he requirement that the change be 'material' limits a [trial] court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order." Wills, 340 Md. at 488-89 (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) ("[A] court cannot require a parent to support a child after the child reaches the age of eighteen."); Quarles v. Quarles, 62 Md. App. 394, 403 (1985) ("A [parent] may not be compelled to support a child after [the child] reaches majority."). As a result, where an order was entered regarding the support of a minor child, as in this case, the subsequent 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 due to the child — from the ordered amount to zero — is "of sufficient magnitude to justify judicial modification of the support order." Wills, 340 Md. at 489 (citation omitted). Thus, the emancipation of the child constitutes a material change in circumstance.

Our analysis of the materiality of Shira's emancipation is bolstered by the structure of the Maryland Child Support Guidelines contained in F.L. § 12-204(e). Although the support order in this case was not determined under the Guidelines,[6] we nonetheless 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. At the highest combined adjusted actual income level included therein, $15,000 per month, the basic child support obligation is $1,942 per month for one child, but $2,847 per month for two children. We view this statutory scheme to be a clear indication of legislative intent to impose a higher child support burden on the non-custodial parent of two minor children than the non-custodial parent of one minor child. 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.[7]

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.[8] Were we to accept appellant's contention that "there was not a material change in the 'needs of the child(ren)' as a result of one child reaching the age of majority [because t]he remaining minor child is a child who has had special needs for many years," 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.

Given that the trial court denied appellee's motion to modify his child support obligation based on its erroneous conclusion that Shira's emancipation did not constitute 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.

APPELLEE'S MOTION TO DISMISS DENIED. JUDGMENT OF THE *IN BANC* PANEL OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. CASE REMANDED TO THE TRIAL COURT FOR FURTHER FINDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Since the grant of absolute divorce, the parties have been engaged in ongoing litigation involving a variety of matters. For the sake of clarity, we will discuss only the issues affect-

ing this appeal.

2. Because appellee later requested review by a panel of circuit court judges, we will refer to any evidentiary hearings conducted before a single judge of the Montgomery County Circuit Court as "the trial court" to avoid confusion.

3. On brief before this Court, appellee brought a Motion to Dismiss Appeal. In the motion, appellee contends that "dismissal of this matter is warranted as this Court lacks the authority to review the issue raised in this appeal[p]ursuant to *Bienkowski v. Brooks*, 386 Md. 516 . . . (2005)[.]" Appellant responds that Bienkowski is not controlling because Maryland Constitution Article IV, § 22 has been amended to specifically allow appeals from decisions of *in banc* panels to this Court. We agree.

In Bienkowski, id. at 547, the Court of Appeals, held "that the Court of Special Appeals may not exercise jurisdiction over the merits of an appeal from a court in banc." At that time, § 22 provided, in pertinent part, that a decision by an *in banc* panel did "not preclude the right of Appeal, or writ of error to the adverse party, in those cases, civil or criminal, in which appeal, or writ of error **to the Court of Appeals** may be allowed by Law." Id. at 523 n. 1. In 2006, § 22 was amended to provide that a decision by an *in banc* panel does "not preclude the right of Appeal by an adverse party who did not seek in bane review, in those cases, civil or criminal, in which appeal **to the Court of Special Appeals** may be allowed by Law." As a result of the amendment, § 22 no longer limits appeals from *in banc* panels to the Court of Appeals, but, rather, allows appeals from *in banc* panels to the Court of Special Appeals. Accordingly, appellee's motion to dismiss is denied.

4. We are aware that appellant contends the *in banc* panel erred in findings related to the status of appellee's income. Although the *in banc* panel mentions in the Background section of its opinion evidence presented at the hearing relating to the parties' income, it specifically states that "[i]t is not necessary to reach such issues for [the] purpose of this Review and the Panel declines to do so." Thus, the decision of the *in banc* panel is based solely on the trial court's ruling that the emancipation of a minor child does not constitute a material change in circumstances. As such, we need not address the issue of appellee's income on appeal.

5. Langston is a case from 2000, predating the Court of Appeals's opinion in Bienkowski. In Langston, 136 Md. App. at 218-19, this Court found that Maryland Rule 2-551(h) authorized appeals from *in banc* panels to the Court of Special Appeals. In finding that the Court of Special Appeals lacked authority under the Maryland Constitution to hear appeals from *in banc* panels in Bienkowski, the Court effectively overruled the holding in Langston. 386 Md. at 523-24, 523 n.2. As a result of the amendment to § 22 discussed in Footnote 3, *supra*, however, the analysis in Langston of the proper standard of review for an appeal from an *in banc* panel to this Court is instructive.

6. At the time of the December 2009, child support order, the trial court found the combined adjusted actual income of the parties to be $18,019.67 per month, which exceeds the highest income level specified in the Guidelines. Moskowitz I, slip op. at 7. Pursuant to F.L. § 12-204(d), "[i]f the combined adjusted actual income exceeds the highest level specified in the [Guidelines], the [trial] court may use its discretion in setting the amount of child support."

7. Appellant's argument that this Court's opinion in Moskowitz I forecloses appellee's argument — that Shira's emancipation constitutes a material change in circumstance — is unpersuasive. Appellee's March 2009, motion to modify his child support obligation (the subject of the appeal in Moskowitz I) was based on multiple factors, including the emancipation of the parties' oldest child, as well as appellee's allegedly reduced income. Moskowitz I, slip op. at 2. The trial court found that appellee had failed to prove a change in income sufficient to warrant a modification of his child support obligation, but reduced the obligation "based on the needs of the parties' remaining minor children." Id. at 5. In Moskowitz I, we stated that "[i]n [it]s Finding of Facts preceding the Order, [the trial court] did not find that the emancipation of one child out of three was not a material change in circumstances." Id. As such, we reject appellant's assertion that the trial court' order in Moskowitz I, or our affirmance, supports the conclusion that the emancipation of a child subject to a child support order does not constitute a material change in circumstance.

8. Appellant mistakenly relies on Becker v. Becker, 39 Md. App. 630 (1978). In Becker, id. at 630, we considered "whether a father who has been ordered [in] a divorce decree to pay an undivided sum [ ] for the support and maintenance of the two minor children of the parties, may unilaterally reduce by one-half the amount of such payments when the first child attains his majority." We held that, "unless the father obtains a court order modifying the amount of support awarded by the divorce decree, he must pay the full amount of the award until such time as the younger child has attained his majority." Id. Unlike the father in Becker, appellee in this case applied for a modification of the support order with the trial court, thus seeking the "court order" referenced in Becker. As a result, the trial court had an opportunity to determine what support the remaining minor child actually requires and what appellee is able to pay. Although factually similar to the instant case, Becker is distinguishable and not dispositive of the issue before us.

Cite as 2 MFLM Supp. 139 (2013)

Child support: shared medical expenses: contempt

William Thomas Ross
v.
Marianne Phelan Ross

No. 2200, September Term, 2011

Argued Before: Eyler, Deborah S., Graeff, Berger, JJ.

Opinion by Berger, J.

Filed: December 18, 2012. Unreported

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

This is an appeal from a final judgment and order entered by the Circuit Court for Howard County. The parties, formerly married, were granted an absolute divorce by an order of the Circuit Court for Howard County. The parties' separation agreement, which was incorporated in the divorce decree, provides, in pertinent part, that the parties agree to equally share all uninsured medical, dental, and vision expenses for their minor children.

On January 20, 2011, appellant William T. Ross ("appellant") filed a motion for modification of child support. On March 10, 2011, appellee Marianne P. Ross ("appellee") filed a petition for contempt, asserting that appellant failed to reimburse her, in part, for medical, dental, and vision expenses which she had incurred on behalf of their children. On November 3, 2011, the circuit court issued an order for contempt against the appellant.

Appellant filed a timely appeal and presents four issues for our review, which we have consolidated and rephrased as follows:

1. Did the circuit court abuse its discretion in granting appellee's petition for contempt which asserted that appellant violated the court's order by failing to reimburse appellee for uninsured medical expenses she incurred on behalf of their minor children?

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

2. Did the circuit court abuse its discretion in awarding appellee attorney's fees?[1]

For the reasons set forth below, we affirm the judgment of the Circuit Court for Howard County.

FACTS AND PROCEEDINGS

Appellant and appellee were married on August 30, 1997 and are the parents of two minor children.[2] After filing for divorce, the Circuit Court for Howard County granted the parties an absolute divorce on December 29, 2004. The trial court's order granted appellee sole legal and physical custody of both children, and ordered appellant to pay child support in the amount of $ 1,076.48 per month. Pursuant to their "Voluntary Separation and Property Settlement Agreement," the parties agreed to:

> [S]hare equally all medical, dental, and vision expenses, including the cost of all prescription medications for the minor children which are not covered by the medical insurance program in which they are participating at the time. The Wife shall provide the Husband with copies of bills for medical services, or receipts for medical services she has already paid for, for the minor children. The Husband agrees to pay his one-half share of any such bill or receipt within Fifteen (15) days of receipt.

On January 20, 2011, appellant filed a motion for a modification of child support. A Master in Chancery ("Master") for domestic relations for the Circuit Court for Howard County recommended that appellant's motion be dismissed. Thereafter, the circuit court entered an order dismissing the motion for modification.[3] On March 10, 2011, appellee filed a petition for contempt against appellant. The petition alleged that the parties' judgment for absolute divorce (incorporating pertinent provisions of their separation agreement) required appellant to reimburse appellee for medical costs incurred on behalf of their children, not covered by insurance. The petition further maintained that

appellee incurred medical expenses on behalf of their children, and that she provided documentation of the expenses to appellant. The petition further alleged that appellant had refused to reimburse appellee for his portion of the medical expenses. As a result, appellee requested that appellant make payment to appellee as required by the parties' agreement incorporated in the judgment for absolute divorce.

On May 16, 2011, a hearing was held on the petition for contempt before a Master for the Circuit Court for Howard County; The Master issued a written report and recommendations on May 18, 2011. Appellant filed his exceptions to the Master's report and recommendations on May 26, 2011. On July 25, 2011, cross-exceptions were filed by appellee. On October 24, 2011, the circuit court held a hearing on the exceptions and cross-exceptions to the Master's report and recommendations. The circuit court denied both appellant's exceptions and appellee's cross-exceptions.

On November 14, 2011, the circuit court found appellant in contempt of court for violating the court's order dated December 27, 2004 because of his failure to reimburse appellee for fifty percent (50%) of uninsured medical expenses for their minor children. The order also provided that appellant "shall purge the contempt by paying [appellee] $2,496.00 within thirty days of the order," and that failure to do so would result in a judgment entered upon appellee's request. The court further ordered that appellant contribute $3,356.00 to appellee's counsel fees within thirty days of the date of the order. This timely appeal followed.

DISCUSSION

I.

The contempt power is defined by the common law and the rules of procedure established by the Court of Appeals. *See* Md. Code Ann., Cts. Jud. Proc. § 1-202 (LexisNexis 2012). Moreover, contempt proceedings are governed by the Maryland Rules. *See* Md. Rules 15-201 through 15-208. In *Smith v. State*, 382 Md. 329, 337 (2004), the Court of Appeals held that:

> It is . . . in the trial judge's sound discretion whether to hold an individual in contempt, and his Or her decision generally will not be overturned on appellate review absent an abuse of that discretion or a clearly erroneous dependent finding of fact.

See State v. Roll and Scholl, 267 Md. 714, 717 (1973) (stating further that exercise of the contempt power, "demands care and discretion in its use . . .").

We recognize two types of each form of contempt: "A contempt may be direct and civil, or direct and criminal, or constructive and civil, or constructive and criminal." *County Comm'rs v. Forty West Builders, Inc.*, 178 Md. App. 328, 392 (2008) (citing *Pearson v. State*, 28 Md. App. 464, 481 (1975)); *see Bahena v. Foster*, 164 Md. App. 275, 286 (2005). Accordingly, "the universe of contempt proceedings is divided into four quadrants." *Bradford v. State*, 199 Md. App. 175, 193 (2011); *see also Ashford v. State*, 358 Md. 552, 563 (2000). A "[d]irect contempt means a contempt committed in the presence of the judge presiding in court or so near to the judge as to interrupt the court's proceedings." Md. Rule 15-202(b); *see King v. State*, 400 Md. 419, 431 (2007) (internal quotations omitted). Constructive contempt is "any contempt other than a direct contempt." *Id.* (citing Md. Rule 15-202(a)); *see Arrington v. Dept. of Human Resources*, 402 Md. 79, 93 (2007) ("A constructive contempt is . . . conduct that does not interrupt the order of the courtroom or interfere with the conduct of business and is not within the sensory perception of the judge.").

"Civil contempt proceedings [are] intended to preserve and enforce the right of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties." *Archer v. State*, 383 Md. 329, 345 (2004) (quoting *Roll and Scholl, supra*, 267 Md. at 728). "Because civil contempt proceedings are generally remedial in nature and are intended to coerce future compliance . . . a penalty in a civil contempt must provide for purging." *Bahena, supra*, 164 Md. App. at 286 (internal citation and quotations omitted). Civil contempt "need be proved only by a preponderance of the, evidence." *Marquis v. Marquis*, 175 Md. App. 734, 746 (2007).

In the case *sub judice*, appellant asserts three grounds in support of his argument that the trial court erred in granting appellee's petition for contempt. First, appellant argues that appellee's petition for contempt "did not delineate the amount of money for appellee and for .which appellant was alleged not to have paid." Second, appellant maintains that appellee's petition for contempt "failed 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 due appellee from appellant." Third, appellant claims that the bills that were 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 and for the purpose of determining whether the appellant was in contempt of the December 27, 2004 court order." We review each contention in turn.

A.

A review of the record, as well as applicable law,

demonstrates that appellee's petition initiated a proceeding for constructive civil contempt.[4] Maryland Rule 15-206 governs constructive civil contempt and provides, in pertinent part, that a petition for constructive civil contempt initiated by a party to an action shall comply with Md. Rule 2-303. *See* Md. Rule 15-206(c). Maryland Rule 2-303(b) provides, in pertinent part, that:

> Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required. A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief . . . It shall not include argument, unnecessary recitals of law, evidence, or documents.

Here, appellee's petition for contempt set forth the following: (1) that the parties are the parents of two children; (2) that the parties were divorced pursuant to a judgment of absolute divorce; (3) that the judgment incorporated a separation agreement which included a provision that the parties would equally share their children's medical expenses; (4) that appellee has incurred medical expenses; (5) that she notified appellant and provided him with bills and documentation; and (6) that appellant failed to contribute to the medical expenses upon notice and pursuant to the court's order. Accordingly, appellee requested that the court "find [appellant] in contempt" and that appellant "be ordered to comply and make payment to [appellee]." It is clear that appellee's petition is "simple, concise, and direct."

Although the divorce decree did not adopt the parties' entire separation agreement, it incorporated provisions relating to how the parties would pay for the children's uninsured medical expenses. Appellant claims that 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.

Appellee's petition for contempt contained a broad allegation that appellant violated the court's order. Nevertheless, 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.

Moreover, appellant fails to provide this Court with any authority suggesting that a petition for constructive civil contempt must contain a precise dollar amount owed to a petitioner. Further, appellant presents no authority that suggests that a circuit court abuses its discretion in granting a petition for constructive civil contempt that does not specify a specific 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 to petitioner. Critically, neither *Kemp* nor *Boucher* address the content or substance necessary in a petition for contempt.

In *Kemp, supra*, 287 Md. at 176, the Court of Appeals held that "because the provision requiring the payment of all 'reasonable medical and dental expenses' was not a decree to pay a specified sum, the trial court could not, without more, utilize its contempt powers in enforcing this provision." *Kemp* does not address a list of requirements necessary to be set forth in a petition for contempt. Critically, *Kemp* involved a case concerning direct criminal contempt as opposed to the constructive civil contempt proceeding in this case. Further, although *Kemp,* 287 Md. at 175, provides a four-step procedure that courts must engage in before finding contempt, *Kemp* does not address or support appellant's bald contention that the petition did not allege a specific amount owed.

In *Boucher, supra*, a father argued on appeal that the circuit court could not have found him in contempt for failure to pay an indefinite sum. We held that the circuit court properly followed the four-step process before contempt could be found by determining: (1) there was a separation agreement; (2) it was incorporated into the divorce decree; (3) there was a proceeding in which the equity court had jurisdiction and set the amount owed; and (4) if payment was not made, the equity court could made a finding of contempt. *Boucher*, 65 Md. App. at 479. In *Boucher*, the circuit court properly determined the relative rights and obligations of the parties pursuant to step three of the four-step process. *Id*. Consequently, the chancellor did not hold the father in contempt for failure to pay an indefinite sum, but instead, determined the amount he owed for his daughter's college expenses. *Id*.

Here, appellant was not held in contempt for failure to pay an undetermined amount. The Master thoroughly reviewed the evidence presented and determined a dollar amount owed consistent with the agreement between the parties incorporated by their divorce decree. In her report and recommendations, the Master included a list of qualified uninsured medical expenses incurred by appellee on behalf of their children and for which appellee was entitled to partial reimbursement by appellant.[5] The expenses amounted to $4,992.01. The circuit court adopted the Master's report and recommendations, and ordered appellant to reimburse appellee $2,496.00, or one-half of the expenses determined by the Master.[6] Accordingly, the

fact that appellee's petition "did not delineate the amount of money for appellee and for which appellant was alleged not to have paid" is of no consequence.

B.

Appellant also contends that the circuit court abused its discretion because the petition "failed 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 due appellee from appellant." For similar reasons stated above, we disagree.

We acknowledge that appellee's petition lacked specificity concerning the amount owed by appellant, as well as other relevant 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. In determining the expenses which qualified for reimbursement, 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 needed to make her recommendation in her report for the circuit court's review. Further, the Master did not consider any documentation which was illegible or incomplete. Therefore, appellee's failure in her petition 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.

According to the record, 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, appellee testified that she would mail receipts and expenses to the appellant via both regular U.S. mail and certified U.S. mail.[7] During the hearing, appellee submitted copies of the cover letter and medical expenses that were previously mailed to appellant. The cover letter and receipts outlined the medical costs appellee incurred on behalf of their children and requested payment from appellant for his share. Appellant objected to the introduction into evidence of these documents on the grounds that he "never had an opportunity to question the witness, receipt, by receipt, to come up with a sum total." Nevertheless, the evidence was admitted because the Master determined that the documentation was already provided to appellant by appellee. As a result, 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. The record further reflects that some of the documentation submitted to the Master qualified for reimbursement and other expenditures did not fall within the scope of the agreement. Nevertheless, appellant had the opportunity to cross-examine appellee as well as to pose questions to appellee based on the evidence she submitted. Indeed, appellant questioned appellee about specific expenses and costs, including some of the exhibits she submitted. Accordingly, appellant was afforded 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."

Upon a thorough review of the record, 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 against appellant. 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 trial court's decision that he rcimburse appellee for $3,356.00, or twenty-five percent (25%) of her attorney's fees. It is well settled that "[t]he standard of review for the award of counsel fees and costs in a domestic case is that of whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002) (citing *Lemley v. Lemley*, 109 Md. App. 620 (1996)) (internal citations omitted). A court is authorized to award attorney's fees in domestic prodeedings pursuant to Md. Code Ann., Family Law ("FL") § 12-103 (LexisNexis 2012). Family Law

Article § 12-103 authorizes a trial judge to make an award of counsel fees to one party from the other under certain conditions. The section provides, in pertinent part:

> (a) In general. - The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
>
> * * *
>
> (b) Required considerations. Before a court may award costs and counsel fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.
>
> (c) Absence of substantial justification. — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

Here, appellee requested reimbursement of a portion of legal fees which the Master recommended and which the circuit court granted. Appellee incurred counsel fees in the amount of $13,423.00, of which appellant was ordered to reimburse her for $3,356.00, or twenty-five percent (25%). Appellant claims that the circuit court abused its discretion in "awarding attorney's fees; both as to the award itself and the amount of the award." We disagree.

The record reflects that the Master sufficiently considered all three factors pursuant to FL § 12-103(b) in recommending to the circuit court an award of counsel fees. According to her report and recommendations, the Master addressed appellant's work history, including his prior and current income. 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."

We agree with the Master and circuit court that "[u]nder the circumstances it seems appropriate that [appellant] should bear some of the burden for [appellee's) fees, since it was in part his conduct in failing to make reimbursement that made this ease necessary."[8] The circuit court further noted that:

> From a review of the file by the Court, it is clear that Plaintiff [Appellee] had to undertake considerable expense to resist the effort to lower the child support amount and also to obtain the contribution to the medical expenses that were clearly owed. In such a situation, the attorneys fees awarded are clearly justified under the law and appropriate.

We also acknowledge that under the circumstances a contribution of twenty-five (25%) of appellee's attorney's fees is reasonable. It is simply unfounded to assert that the Master did not engage in sufficient analysis to justify the award. Indeed, the attorney's fees awarded are justified and the specific circumstances presented in this proceeding. Accordingly, the circuit court did not abuse its discretion in awarding appellee attorney's fees.

For the reasons set forth above, we affirm the judgment of the Circuit Court for Howard County.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Appellant phrases the questions for review as follows:

> 1. Did the Judge err in adopting the Master's findings in finding that the appellant was in contempt of court for violation of the order of court in the premises dated December 27, 2004 and for failure to reimburse plaintiff [appellee] fifty percent (50%) of medical expenses she incurred for the minor children when appellee's petition for contempt did not delineate the amount of money for appellee and for which appellant was alleged not to have paid?

2. Did the Judge err in adopting the Master's findings and not finding that the initial petition for contempt was fatally defective in that it failed to state precisely what, if any, dollar amount was claimed to be due from the appellant to the

appellee and that the petition failed to state with any specificity what bills were attendant to which child, who was the prescriber or the various "medications," services or other items claimed to be reimbursements due appellee from appellant?

3. Did the Judge en in adopting the Master's findings in ordering the appellant to pay attorney's fees to appellee even though the amount of the attorney's fees awarded was not based upon any objective criteria and was not determined through the use of any disclosed formula whatsoever?

4. Did the court err in adopting the Master's finding that it was appropriate for the Master to review the bills submitted without giving 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 and for the purpose of determining whether the appellant was in contempt of the December 27, 2004 court order; all without giving appellant an opportunity to pose questions related to the bills?

2. Both parties agree that their two minor children require substantial care and attention as a result of their respective health issues.

3. Appellant raises no issues in this appeal regarding the dismissal of his motion for modification of child support.

4. The record reflects that the conduct in question was not committed in the presence of the court and did not interrupt judicial proceedings.

5. The Master found that "Mother has presented the documentation for the listed expenses to Father, and has made a demand for payment more than 15 days ago. According to the language of the agreement, the parties were to share these expenses equally."

6. On the other hand, according to the Master's report and recommendations, "[e]xpenses for mattress, baby wipes, Medic Alert items, laxatives, vitamins, supplements and insurance were not considered."

7. On occasions when appellee sent mail to appellant via certified mail, the mail would be returned as unclaimed.

8. Consistent with the circuit court's opinion, we recognize that "[r]equiring [appellee] to engage in the unnecessary exercise of going to court to obtain relief is not warranted particularly when it appears that [appellant] does not seriously contest many of the expenses incurred or that he did in fact make payment."

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