THE DAILY RECORD Maryland
Family Law Monthly

MARCH 2013

TheDailyRecord.com/Maryland-Family-Law-Monthly

SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Lawmakers vote on custody commission bill

A proposal in the House of Delegates would create a commission to study the factors involved in Maryland custody awards and report on ways to improve the system.

The measure, introduced by Delegates Kathleen Dumais (D-Montgomery), Jill P. Carter (D-Baltimore), and 10 co-sponsors, is a compromise designed to avoid a recurring battle over legislation to require a presumption in favor of joint custody. A similar bill got no traction last year, but the current proposal, H.B. 687, was reported out of the Judiciary Committee on March 14 and, at this writing, is awaiting a third and final reading by the full House.

While it's possible the newly formed Commission on Child Custody and Decision Making would recommend a switch from the common-law *Sanders* factors to a statutory system, its first order of business will be to study and report on current practices and processes in Maryland and other states.

According to the fiscal and policy note prepared by the Department of Legislative Services, the commission would be part of the Judiciary's Department of Family Administration. Two contractual employees would be hired as commission staff, to gather the required information to complete the reports, at an estimated cost of $137,145 in fiscal 2014 and another $76,595 the following year.

The commission's to-do list includes no fewer than 20 bullet points, but in general, it is tasked with studying the current system in Maryland and else-

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CSA affirms modification of custody

The circuit court did not abuse its discretion in denying a motion to disqualify the trial judge, conducting an interview of the parties' daughter or granting an above-guidelines award of child support in the same amount the child's mother sought, the Court of Special Appeals has held.

The decision affirms a modification of a consent order that had called for joint legal custody of the parties' 9-year-old daughter.

The circuit court changed that to award sole legal and physical custody to Rachel Karanikas Cartwright, who sought to move with the child to Pennsylvania as the use-and-possession order on her Maryland home was about to expire.

Cartwright's ex-husband, Konstantinos Karanikas, did not consent to the modification and an attempt at mediation failed.

During the hearing on modification, Karanikas sought to have his daughter testify in open court or in chambers. The judge met with the child in chambers at the end of the first day.

The next day, Karanikas filed a motion to disqualify the trial judge. A second judge was assigned to hear the motion and denied it.

On appeal, Karanikas argued that the motion should have been granted, and that the trial judge's ruling on interviewing his daughter was an abuse of discretion.

The Court of Special Appeals found that Karanikas failed to rebut the "strong presumption that a trial

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Karanikas

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judge is impartial…." Citing its 1999 decision in Reed v. Baltimore Life Ins. Co., the court noted that to disqualify the trial judge, Karanikas would have to prove that the judge "has a bias or prejudice derived from an extrajudicial-personal-source." There was no such evidence in this case, the appellate court held.

Karanikas also faulted the judge for his handling of the interview with the child.

The Court of Special Appeals, however, said the trial judge had properly adopted a flexible, "we'll see" approach by hearing other testimony first in order to determine whether the child's testimony would be useful, and in determining the content and length of the interview. The trial judge also asked a variety of questions about the child's interests, pets, her relationship with her parents and her preferences about living with them.

Finally, Karanikas argued that the judge failed to exercise judicial discretion because he awarded Cartwright the exact amount of child support she had asked for.

He took issue with the fact that Cartwright's testimony indicated that the total expenses for herself and her two children (one from a prior relationship) were $4,400, and that dividing the amount by three would approximate the child's portion. By Karanikas's calculation, this equated to monthly expenses of approximately $1,466 for the child.

Cartwright's counsel, however, submitted an extrapolated child support guidelines worksheet requesting a monthly child support award in the amount of $2,883 per month. The trial judge awarded that amount.

Generally, a trial court's child support award in an "above-guidelines" case is reviewed under the abuse of discretion standard, the Court of Special Appeals noted.

In this case, the trial judge specifically recited his findings with respect to the parties' incomes, the child's best interests, the financial needs of the child, the parents' financial ability to meet the child's needs, the station in life of each parent, their respective ages and physical conditions, and the expenses associated with educating the child. The trial judge considered the requisite factors, and made a finding with regard to each factor. Thus, the trial judge did not abuse his discretion in his child support award, the Court of Special Appeals held.

The court's decision in this case will be reprinted in full in next month's supplement, and is available on the Court's website as http://mdcourts.gov/opinions/cosa/2013/1314s12.pdf .

— *Karanikas v. Cartwright*, No. 1314, Sept. Term, 2012 (filed Feb. 26, 2013) (Judges Krauser, BERGER & Thieme (retired, specially assigned)). RecordFax No. 13-0226-08, 31 pages.

Monthly Memo

'Family support' deductible

A taxpayer could treat family support payments made while his divorce was pending as deductible alimony, the U.S. Tax Court has ruled in reversing a $7,750 deficiency assessment. The Internal Revenue Code generally allows a taxpayer to deduct alimony, but not child support. The IRS contended that unallocated "family support payments" under California law did not qualify for the alimony deduction because they did not terminate upon the death of the payee spouse. But the Tax Court, analyzing California family law, concluded otherwise, according to our sister publication, Lawyers USA. *DeLong v. Commissioner,* U.S. Tax Court No. 18045-11, March 11, 2013.

Divorce deceipt draws discipline

An attorney in Iowa drew a 60-day suspension for failing to disclose two pending contingent fee cases as assets in his own divorce. While the family court declined to modify the property settlement of Deborah and Richard Scott Rhinehart's divorce based on his nondisclosures, it did specifically find he had committed extrinsic fraud. That ruling was given preclusive effect in the disciplinary proceeding concluded last month, Lawyers USA reports. The main issue, though, was whether the professional rules of conduct applied to this private matter. "An attorney who commits fraud responding to discovery and testifying in a court proceeding – even if the proceeding involves only a personal matter – necessarily damages his credibility as a professional," Justice Thomas D. Waterman wrote.

Coming up

The Divorce Roundtable of Montgomery County is presenting "A Paradigm Shift? Multidisciplinary Approaches to Separation and Divorce," a full-day workshop conference on April 19. For more information about the workshops or the Roundtable, a 501(c)(3) charitable organization, go to http://www.divorceroundtable.org/resources/conference.

THE DAILY RECORD Maryland Family Law Monthly

11 E. Saratoga Street, Baltimore, MD 21202
Vol. XXV, No. 3

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THE DOLAN COMPANY

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

Cite as 3 Md. Fam. L.M. ___ (2013)

No-contact order trumps victim's wishes

Reaction to an appellate decision that barred direct contact between a domestic violence victim and her abuser highlights a sharp divide on whether such intervention protects victims or deters them from reporting abuse.

The Court of Special Appeals upheld a judge's decision prohibiting direct contact between a Maryland man who abused his wife and his spouse, even though she expressed a desire to reconcile with him.

"The opinion could stop other women from coming forward, because they would see that they don't have the power to make decisions about the most intimate relationships in their lives," said Leigh Goodmark, a professor at the University of Baltimore School of Law and director of clinical education and the family law clinic.

In contrast, Dorothy J. Lennig, director of the legal clinic at the House of Ruth Maryland, said a judge has the right to take whatever steps necessary to protect victims of domestic violence.

"It seems like there was repeated violence in this case, and if the state doesn't try to protect her, then the state is accountable and the system fails," Lennig said.

L. Tracy Brown, executive director of the Women's Law Center of Maryland Inc. summed up the consensus that this "difficult" case raises many of the challenges inherent in domestic violence cases.

"It starkly demonstrates the need for a nuanced and sensitive approach that addresses all the competing priorities," Brown said in an email.

James Lambert Jr. and his wife had an argument in September 2009 over the contents of a lockbox. According to the published appellate opinion, Lambert pushed his wife and she fell over a railing and down the stairs, injuring her head and abdomen.

Lambert pleaded guilty to second-degree assault and was sentenced on April 15, 2010. At sentencing, the court said, Lambert admitted to assaulting his wife in the past.

In a letter to the court, though, Lambert's wife said she could not remember the details of the September assault. She said she did not fear her husband and hoped to go to counseling to resolve the problems in their marriage.

Judge Robert N. Dugan was not persuaded. He sentenced Lambert to a suspended three-year term and three years of supervised probation.

"[Dugan] noted the ongoing pattern of assaultive behavior between appellant and Mrs. Lambert," the court said. "The judge further explained that he had been involved, as an attorney, in a case of repeated domestic violence that resulted in the victim's death. Consequently, the judge imposed a special condition on appellant's probation that he 'have no contact' with Mrs. Lambert during his probation period."

The judge denied Lambert's motion for reconsideration in August 2010. Around that time, prosecutors learned that the couple had talked on the telephone almost every day from May 17 through May 25, 2010. As a result, Lambert was charged with violating his probation.

He then moved to correct his sentence as illegal, and filed an affidavit in which his wife said the no-contact provision was against her wishes and "grievously prejudiced and compromised" her marital relationship.

Dugan heard both the violation of probation charge and Lambert's motion on Nov. 22, 2010. The judge held Lambert in violation of probation, denied his motion to correct the sentence and reinstated his suspended sentence and probation, now scheduled to end on Nov. 22, 2013.

Upholding Dugan's decisions, the appellate court said it could not call the three-year ban on contact excessive, given "the state's compelling interest in securing [the wife's] safety from yet another incident of domestic violence at the hands of [the husband]."

Assistant Attorney General Susannah Prucka represented the state in the case. In an emailed statement, Prucka said the sentence was justified by the facts.

"As the Court of Special Appeals recognized, the state has a compelling interest in protecting the victims of domestic violence from further abuse, and the trial judge reasonably found the no-contact provision was necessary to achieve that goal," she said.

Howard R. Cheris, an attorney at Armstrong & Cheris in Rockville who represented Lambert, said that, generally speaking, marriage is a "sacred relationship that is privileged and entitled to special consideration."

"The absolute prohibition was wrong at the appellate level and at the trial level," he said.

Cheris said that, while the case seems "ripe for further consideration," his client does not have a plan to appeal to the Court of Appeals.

The decision is available on the Court's website.

— *James Lambert Jr. v. State of Maryland,* No. 2542, September Term 2010. Decided Feb. 27, 2012. Opinion by Matricciani, J. RecordFax # 13-0227-00, 7 pages.

— Beth Moszkowicz

Commission

Continued from page 1

where, and determining how to make Maryland's system for awarding and modifying custody more "uniform, fair and equitable," less prone to litigation and better able to minimize adverse affects when litigation does occur.

In particular, the commission would study the pros and cons of joint physical custody and its impact on the health and well-being of children and with studying whether the state should codify definitions and factors for consideration regarding child custody decision-making.

The courts would also come under the commission's microscope. H.B. 687 calls for a study of "the accountability of Maryland courts" when intervening with protective orders, and the impact of domestic violence proceedings on temporary and final custody determinations; a study and assessment of the judicial training programs currently available regarding child custody decision-making, including how to make such training more culturally sensitive and diverse; and a study of the language courts use in making custody determinations with the goal of making such language more clear and eliminating exclusionary or discriminatory terms.

All this and more would need to be accomplished in fairly short order. The bill anticipates a July 1 start date, with deliberations starting on Sept. 1 and five public meetings to be held this year at specified locations. An interim report of findings and recommendations is to be submitted to the governor and the General Assembly by Dec. 31.

The commission's final report would be submitted to the governor and the General Assembly 11 months later — by Dec. 1, 2014 — presumably in time to put its findings to use in the 2015 legislative session.

Delinquent behavior and the developing brain

By Andria Carter-Cole

Working as a child advocate in the child welfare system, one encounters numerous young people, ranging from 13 to 17 years of age, who enter the juvenile justice system due to behaviors that would be considered criminal in nature if committed by adults. The real question is, how responsible are these teens for the behaviors they display — and how can the system effectively intervene before the negative behaviors start?

For example, Michael is 15 years old and in foster care. Every day, he comes home to his foster home and has very little to do. He may have an hour or so of homework, but he spends the rest of the day playing video games.

When he tires of the video games, he goes out and hangs out with other youth in the neighborhood. The lack of structure when he comes home, the absence of any planned activities after school, and his contact with other similarly situated youth, compounded by the fact that he is in foster care, makes Michael particularly susceptible to delinquency.

Interestingly, the behaviors young people exhibit may be symptomatic of a lack of full brain development. Consider this passage from a February post on the Actforyouth blog:

Research now supports what [many] have long suspected [for some time now]—that the teenager's brain is different than the adult brain. … [It has been] found that the teen brain is not a finished product, but is a work in progress. Until recently most scientists believed that the major "wiring" of the brain was completed by as early as three years of age and that the brain was fully mature by the age of 10 or 12. New findings show that the greatest changes to the parts of the brain that are responsible for functions such as self-control, judgment, emotions, and organization occur between puberty and adulthood. [1]

Or this passage, a "Highlight" from a 2008 paper, "Adolescent Development and the Regulation of Youth Crime":

"Very recent research on adolescent brain development may explain some of these differences in teen thinking and behavior. An area of the brain, the pre-frontal lobes, undergoes important structural change during adolescence and young adulthood. Not surprisingly, the pre-frontal lobes are especially important in the development of advanced thinking processes such as planning ahead, controlling emotions and impulses, and weighing the risk and reward of a decision before acting." [2]

In short, as a result of the continued development of the brain, youth are more susceptible to poor decision making, not thinking about the future, giving in to peer pressure, risk-taking and impulsivity as they struggle with forming their identity.

The challenges are exacerbated when youth live in an environment that tempts them to engage in criminal behavior.

After-school programs, recreational centers, and sports leagues play a critical role in the prevention of delinquent activity, by reducing the amount of time that a youth might be tempted by a negative environment. Policy decisions, such as the closing of four recreational centers in Baltimore last summer, demonstrate that the effectiveness of this preventive approach is still underappreciated by decision-makers.

Once prevention has failed and a delinquent act has occurred, there is still the question of culpability. In other words, how developed was the brain of the individual who committed the delinquent act? In the absence of a system of accurate measures, courts are left to guess at the youth's developmental maturity and, therefore, culpability for his or her behaviors.

A foster youth like Michael, who does not have family to explain the basis for his negative behavior to the court, may be viewed as more responsible, despite the lack of objective criteria. He runs the risk of losing his foster-care placement even for minor delinquent behavior. As a result, he could descend deeper into the delinquency system than a youth who is not in foster care.

Clearly, the best outcome for Michael would have been to prevent his involvement with the delinquency system by enrolling him in an after-school program and providing more structure to his free time. Failing that, the next-best response would be the development of an accurate, objective evaluation of developmental maturity. Neither recommendation, however, will be implemented unless communities come together and demand it.

Understanding the developing brains of Maryland's youth should be a primary focus of those who want to help them achieve success. Ultimately, taking care of this upcoming generation will steer the state to a healthier, more positive future.

Notes

[1] Giedd, Jay. "Adolescent Brain Development." Weblog post. Actforyouth. N.P., 2002. 02 Feb. 2013.

[2] http://futureofchildren.org/futureofchildren/publications/highlights/18_02_Highlights_01.pdf.Adapted from "Adolescent Development and the Regulation of Youth Crime," by Elizabeth Scott and Laurence Steinberg, in The Future of Children: Juvenile Justice, Volume 18, Number 2, Fall 2008. www.futureofchildren.org. This "Highlight" was prepared by Hilary Hodgdon.

Andria Carter-Cole is a paralegal in the Baltimore City Child Advocacy Unit at Maryland Legal Aid.

UNREPORTED CASES IN BRIEF

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

*Sabrina L. Basht v. Stephen C. Basht III**

DIVORCE: INDEFINITE ALIMONY: VOLUNTARY IMPOVERISHMENT

CSA No. 1073, September Term, 2011. Unreported. Opinion by Zarnoch, J. Filed February 6, 2013. RecordFax #13-0207-10, 29 pages. Appeal from Cecil County. Vacated in part and remanded.

As there was insufficient evidence on the record to determine if the award of indefinite alimony to husband was clearly erroneous, or whether the parties' standards of living would be unconscionably disparate, the award was vacated; and, on remand, the court should also determine whether husband was voluntarily impoverished.

"Sabrina L. Basht appeals a decision of the Circuit Court in her divorce proceedings with Stephen C. Basht III. Specifically, Sabrina appeals the court's grant of indefinite alimony to Steven, its finding that she was voluntarily impoverished, and its failure to find that Stephen was voluntarily impoverished. We vacate the award of indefinite alimony and child support and the monetary award; and we affirm the finding that Sabrina voluntarily impoverished herself. We remand for further proceedings, where the circuit court may consider whether Stephen was voluntarily impoverished.

I. Indefinite Alimony

We review the decision to award alimony under an abuse of discretion standard. *Roginsky v. Blake-Roginsky,* 129 Md. App. 132, 143 (1999). But if the record lacks a definitive basis for appellate review, then we must vacate the award because we cannot determine whether the factual findings were clearly erroneous. See *Reuter v. Reuter,* 102 Md. App. 212, 236 (1994).

Analysis

Maryland law favors rehabilitative alimony over indefinite alimony to provide each party with an incentive to become fully self-supporting. *Turner v. Turner*, 147 Md. App. 350, 387 (2002). Indefinite alimony is only warranted in two situations: when a spouse cannot become self-supporting because of age, illness, infirmity, or disability; or when "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." FL §11-106(c).

To award indefinite alimony based on an unconscionable disparity, the court must determine whether the spouse will become self-supporting. *See Turner*, 147 Md. App. at 389-90. This determination coincides with the court's projection into the future of when the spouse will have made maximum progress, and assessment of whether the standards of living will be unconscionably disparate. Id. To reach these conclusions, the court must make specific findings regarding the incomes of the parties. *Simonds v. Simonds*, 165 Md. App. 591, 608 (2005). A comparison of projected incomes is necessary. In *Allison v. Allison*, 160 Md. App. 331, 343-44 (2004). The court must go beyond mere incomes, compare the post-divorce standards of living [and] determine if the standards would be unconscionably disparate. *Lee v. Andochick*, 182 Md. App. 268, 287-88 (2008).

Turning to the present case, the court did not determine whether Stephen would be self-supporting. Instead, it merely stated that "due to Husband being out of the workforce for the last 13 years, it will be difficult for Husband to be wholly self-supporting." The court never made a projection into the future to a time when Stephen might be expected to become self-supporting. Nor did it determine his income at that time. Thus, the court could not make a comparison of incomes, the starting point for a finding of unconscionable disparity.

We cannot determine from the record what the court found Stephen's current or future income to be. No expert testified as to his earning potential.

With so little evidence as to Stephen's potential income, we cannot determine if the court considered it. Thus, on this record the court's finding of unconscionable disparity was not supported. We must remand for a finding on this issue.

In addition the circuit court did not explain how there would be an unconscionable disparity in the parties' standards of living once Stephen became self-supporting. No evidence was presented regarding Stephen's standard of living without alimony, and no evidence of Sabrina's standard of living was presented.

Sabrina argues that we must find the evidence does not support a finding of indefinite alimony. However, we need not reach that issue because the proper evidence was not presented to the court. Instead, we vacate the award to allow such evidence to be presented. On remand, determining Stephen's future standard of living, the court should take into account his earning potential based on his undergraduate degree in finance, significant experience in finance, the fact that his skills had not become obsolete or unmarketable, his efforts in starting his own business, and master's degree in theology. In projecting income, the court should look to what Stephen could earn if he made reasonable efforts to obtain full-time employment. This is not a situation where the spouse requesting alimony does not have any higher education and is likely to only receive minimum wage.

[Footnote 4: In none of our cases have we upheld an indefinite alimony award where a spouse, like Stephen, was young, healthy and highly educated and possessed a presently marketable skill.]

Because we are vacating and remanding the alimony award, and the alimony and monetary and child support awards must be considered together, we also vacate those awards. See *Roginsky*, 129 Md. App. at 149.

II. Sabrina's Voluntary Impoverishment

In finding Sabrina voluntarily impoverished herself, the circuit court reasoned:

> The [c]ourt finds that Wife quit her employment with Barclays Bank approximately one (1) month prior to the original trial date. The [c]ourt further finds that Wife's 2010 income from Barclays Bank was $714,000.00 and that her current annual salary with Careerminds is $200,000.00.

The concept of voluntary impoverishment often arises in an analysis of child support obligations. We see no reason why the analysis should be any different in determining other financial awards in a divorce case.

When a circuit court considers the intent of a party in making a decision to voluntarily impoverish himself or herself, we will rarely

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find it clearly erroneous.

Because at least some evidence in the record supports the conclusion that Sabrina left her job to reduce her income, under a clearly erroneous standard, we cannot reverse.

III. Stephen's Voluntary Impoverishment

Sabrina argues that the circuit court erred in not finding that Stephen was voluntarily impoverished.

As explained in our discussion of alimony, the record is unclear on the issue of Stephen's current income. Since we are vacating the alimony award based on, in part, the failure to correctly calculate Stephen's current and future income, we will vacate the child support calculation for the court to determine Stephen's current income. On remand, Sabrina is free to argue voluntary impoverishment as it relates to current income."

Slip op. at various pages, citations and footnotes omitted.

*Michael Gary Butka v. Holly Lynn Williams**

CHILD SUPPORT: CONTEMPT: REASONBLE EFFORTS TO OBTAIN FUNDS

CSA No. 0362, September Term, 2012. Unreported. Opinion by Thieme, Raymond G., Jr. (Retired, Specially Assigned), J. Filed February 6, 2013. RecordFax #13-0207-05, 7 pages. Appeal from Baltimore City. Affirmed.

The defendant did not meet his burden of showing, by a preponderance of the evidence, that he should not be held in contempt because he was unable to pay more in support than he had actually paid, and that he had made reasonable efforts to become employed or lawfully obtain the funds necessary to make payment.

"This appeal follows the Circuit Court for Baltimore City's order finding appellant, Michael Butka, in constructive civil contempt for failure to pay child support for his minor child, Savannah Butka, to appellee, Holly Williams.

In this timely appeal, appellant presents the following questions for our review, which we have reworded for ease of discussion:

1. Did the trial court err in finding appellant in constructive civil contempt?

2. Did the trial court err in not determining the amount of arrearages as to which enforcement by contempt was not barred by limitations?

DISCUSSION

I.

Appellant first contends that the trial court erred when it failed to, in accordance with Maryland Rule 15-207(e)(3), find whether appellant had demonstrated by a preponderance of the evidence that: first, he was unable to pay more than the portion of child support payments that he indeed paid and, second, whether appellant made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make payment.

A finding of contempt in a child support case is proper "upon proof that the defendant did not pay the amount owed, accounting from the date of the support order through the date of the contempt hearing[.]" *Bryant v. Howard County Dep't. of Soc. Servs.*, 387 Md. 30,48 (2005). Such a finding is improper, however, if the defendant can prove by a preponderance of the evidence that. he or she "never had the ability to pay more than was actually paid and that he/she made reasonable efforts to become or remain employed or otherwise lawfully obtain the funds necessary to make additional payments." *Id.* Md. Rule 1 5-207(e)(3).

Here, there was ample evidence that appellant failed to pay his child support payments and only minimal evidence that he paid as much as possible and that he made reasonable efforts to obtain employment or otherwise legally obtain sufficient funds to make the proper child support payments. While appellant testified that he was terminated from his employment as an auto mechanic, in late 2008, he also testified that he has not been gainfully employed since that time. Appellant also testified that he had applied for work at fast-food restaurants and Jiffy Lube, but was not hired because he was over qualified for those positions. Additionally, he testified that he turned down employment offers to jobs that were inaccessible via public transportation. Appellant provided no documentation of his efforts.

Appellant admits that perhaps "[his] testimony may or may not have convinced a trier of fact applying the preponderance of evidence standard that [appellant] paid what he could and made reasonable efforts to find work." Appellant complains that the trial court's lack of explicit discussion addressing those issues or finding on those issues mandates a remand. However, a judge is presumed to know the law and is not required to set out every step of his/her thought process. *Chaney, supra,* 375 Md. at 180 n. 8.

Accordingly, we hold that the trial court did not err when it found appellant in constructive civil contempt for failure to pay child support.

II.

Appellant next contends that the trial court erred when it failed to determine the amount of arrearages not barred by limitations, in accordance with Maryland Rule 15- 207(e)(4)(A). The relevant portion provides, "(4) Order. Upon a finding of constructive civil contempt for failure to pay spousal or child support, the court shall issue a written order that specifies (A) the amount of the arrearage for which enforcement by contempt is not barred by limitations.

The relevant limitation statute for contempt actions concerning failure to pay child support is set out in Family Law §10-102: "A contempt proceeding for failure to make a payment of child or spousal support under a court order shall be brought within 3 years of the date that the payment of support became due." Here, respondent filed her petition for contempt in the trial court on April 4, 2011. Her claim, therefore, encompassed those payments due after April 4, 2008. FL §10-102.

The trial court's order indicated that the amount of arrears, as of the date of the contempt hearing, was $9,468.04. Appellant's monthly support obligation was $347. When 9,468.04 is divided by 347, the result is 27.28, indicating that the arrears were calculated for 27 months of payment, or two years and three months, clearly less than the statutory three-year limitation.

Because the evidence supports the trial court's calculation of arrearages, we hold that the trial court did not err."

Slip op. at various pages, citations and footnotes omitted.

*Thomas Chuckas, Jr. v. Kelly Chuckas**

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UNREPORTED CASES IN BRIEF *Continued from page 6*

DIVORCE: SETTLEMENT: MUTUAL ASSENT

CSA No. 0232, September Term, 2012. Unreported. Opinion by Davis, Arrie W. (retired, specially assigned), J. Filed: January 14, 2013. RecordFax #13-0114-00, 18 pages. Appeal from Anne Arundel County. Affirmed.

In seeking to enforce a settlement agreement, the appellant failed to show the required contractual element of mutual assent, as the appellee had never signed the document, both parties indicated that they were still open to negotiations, and appellant failed to fulfill a stated contingency calling for full and accurate disclosure of his financial situation.

"Thomas Chuckas, Jr., appeals from an order denying his Motion to Enforce Settlement. Appellant alleged that his wife, Kelly Chuckas, refused to abide by the terms and conditions of a settlement the parties agreed upon during mediation related to their divorce. Appellant raises questions which we have combined:

Did the circuit court err in denying appellant's Motion to Enforce Settlement based on its findings that the alleged agreement was not definite on all material points and that there had not been adequate disclosure of all relevant information?

DISCUSSION

Appellant argues that, after multiple mediation sessions, the parties agreed to terms on a number of issues and memorialized the same in the October 14, 2011, "agreement." He contends the terms were unambiguous and contingent upon the drafting of a Property and Settlement Agreement, a document appellant's counsel drew up and distributed to appellee and her counsel, which appellee then refused to sign. Appellant asserts that the finding that there was no "meeting of the minds" was clearly erroneous.

Appellee counters that whether there was a "meeting of the minds" was a factual issue and that the court was not clearly erroneous in finding that a "meeting of the minds" had not occurred. Appellee contends an agreement on the October 14th terms was contingent, not only upon the drafting of a written settlement agreement, but also the accuracy of the information provided by the parties, and that the latter condition was not met as appellant admitted there was evidence related to his income and assets which he did not disclose.

Settlement agreements are subject to the same general rules of construction that apply to other contracts. *Erie Ins. Exch. v. Estate ofReeside,* 200 Md. App. 453,460-61 (2011). Specifically, whether there has been the requisite "meeting of the minds" or mutual assent is a factual determination. So long as the court's finding is not clearly erroneous, we will not disturb its ruling on that ground. Md. Rule 8-131(c); *see Cochran v. Norkunas,* 398 Md. 1, 14 (2007).

The presence of the required element of mutual assent may be determined by evaluating the evidence speaking to two factors: (1) intent to be bound, and (2) definiteness of terms. *Cochran,* 398 Md. at 14 (citation omitted). In the case *sub judice,* the court's finding regarding the lack of mutual assent between the parties is based on evidence indicating the absence of an intent to be bound. As such, we first consider whether the court's finding in this regard is supported by the record.

The terms in question appear in two separate forms in the October 14th document; some in a formal contract style writing and others in a less formal chart which contained the heading "For Negotiation Purposes Only."

Appellee testified that, in negotiating terms on October 14th, it was not her impression that they would be the final binding conditions of settlement. The court assigned particularly great weight to the fact that the terms as drafted on October 14th featured a cover sheet which stated that the enclosed terms were "Contingent upon the parties' attorney [sic] drafting a Property and Settlement Agreement[.]" We view, as the motion court did, this stated condition requiring a later and more finalized draft as a showing that the parties did not intend to be immediately bound by the terms as outlined during the October 14th session. When the derivative October 19th settlement agreement draft was drawn up and appellee refused to sign it, the pertinent contingency went unsatisfied and thus the proposed settlement was not executed.

Similarly, the October 14th terms included an addendum which contained a contingency requiring "accuracy of the information disclosed by both parties of all relevant information." At trial, appellant admitted he had not timely disclosed information regarding an American Express credit card account, his position on the board of a company called Monarch Content Management and information related to significant withdrawals from his retirement accounts. Appellant's involvement with Monarch Content Management was discovered only through research by appellee and her counsel. Appellant's only clarification was that he received no income through Monarch; despite a request from appellee, appellant did not provide any documents which confirmed his assertion. The court found that a "complete agreement" had not been reached because appellant's omissions ran afoul of the disclosure contingency set out in the October 14th terms. Given that a settlement between the parties was meant to resolve issues related to debt, particularly credit card debt, income and retirement accounts, we conclude that the court did not err in its finding.

Regarding the second factor of mutual assent, we determine whether the facts indicate the parties were in agreement as to the essential terms outlined in the October 14th document. While some correspondence show appellant and his counsel referring to the October 14th document as the final expression of the settlement, the record also shows that appellee sent a counterproposal, as well as other modification suggestions, and that the parties attended subsequent mediation. Thus, the court's finding that the parties were still open to negotiation and that they had not decided on definite terms, was supported by the record.

Accordingly, we conclude that the court's ultimate finding, that the necessary element of mutual assent did not exist to render the October 14th "agreement" enforceable, was not clearly erroneous. As such, we hold that the court did not en in denying appellant's motion to enforce settlement."

Slip op. at various pages, citations and footnotes omitted.

*Robert Eugene Day Jr. v. Kim Michelle Sterrett-Day**

DIVORCE: ATTORNEYS' FEES: JUSTIFICATION

See UNREPORTED CASES IN BRIEF page 8

UNREPORTED CASES IN BRIEF *Continued from page 7*

CSA No. 1300, Sept. Term 2011. Unreported. Opinion by Wright, J. Filed February 7, 2013. RecordFax #13-0207-18, 18 pages. Appeal from Howard County. Affirmed.

An interim award of $20,000 in attorneys' fees to the wife was based on sufficient consideration of the parties' respective financial status, needs, substantial justification and the reasonableness of the amounts claimed; the court was not also required to determine that the husband lacked substantial justification for opposing the action.

"This appeal results from an order entered July 21, 2011, awarding Kim Michelle Sterrett-Day attorneys' fees and suit costs of $20,000 in her divorce action against appellant, Robert Eugene Day, Jr. On April 13, 2011, the circuit court held a hearing regarding Wife's motion for attorneys' fees, but stayed ruling pending Wife's submission of documentation justifying the amount. On May 12, 2011, Wife submitted documentation and the court granted her motion by order entered May 18, 2011. Husband filed a motion to vacate that award on the grounds that the court had failed to provide him with an opportunity to respond. On July 15, 2011, the circuit court granted Husband's motion to vacate the May 18 order but issued a new order the same day awarding Wife $20,000. This appeal followed.

Discussion

Husband argues that the circuit court failed to follow the statute and abused its discretion because the court made the award absent "legal justification for the demand." Husband avers that Wife's request for attorneys' fees included no proof of reasonableness, that the court "failed to conduct the mandatory fact-finding contemplated by the statute" and only considered the arguments made by counsel during the April 13, 2011 hearing. Further, Husband contends he has "been systematically denied an opportunity to effectively challenge the decision."

We agree with Wife that the trial court correctly applied the law as stated in FL §7-107 and conducted the necessary factual examination prior to making the award. The trial court stated it had reviewed the record and our review of the record reveals that the trial court had access to extensive evidence about the parties' dispute, respective financial situations, and needs.

Contrary to Husband's contention — that, in order to award attorneys' fees under FL §7-107, the court must have found a lack of substantial justification — the statute requires no such finding. As the court correctly explained, pursuant to FL §7-107(b), it is permitted in its discretion "[a]t any point in a proceeding" to "order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding[.]" If a court finds a lack of substantial justification, then it is required, unless it finds good cause for the lack of substantial justification, to award the other party attorneys' fees. The trial judge made no finding of a lack of substantial justification and, therefore, FL §7-107(d) does not apply.

Husband's reliance on *Davis v. Petito, 425* Md. 191 (2012) is misplaced. *Davis* states that "substantial justification is but one consideration in the triad, the others being financial status and needs[.]" *Id.* at 201. Contrary to Husband's present position, the circuit court sufficiently considered those factors.

In its review of the record, the trial court could discern, from the financial statements of both parties, the inherent income disparities between them. His earnings statement dated December 2010 reveals that he was paid $140,089 in net salary, $104,466 in restricted stock, $91,898 in commission, $1,875 in bonus, and $40,783 in tax gross-up for that year to date. Wife made approximately $70,000 annually working full-time. The parties' financial statements indicate that both have similar assets and liabilities, and the trial court found that Wife had assets but that those assets may not have been readily accessible.

On April 13, 2011, the circuit court expressly stated that it "reviewed the financial statements, has in fact reviewed the entire file" and reiterated its finding in the July 21, 2011 order vacating the May 18, 2011 order by stating that "the Court determined that [Wife] was entitled to relief." The circuit court was not required to reiterate its findings in the order of July 15, 2011.

The remainder of Husband's argument relates to reasonableness of Wife's attorneys' fees. Wife provided a detailed accounting of how she was billed by her attorneys, her counsel provided an affidavit attesting to the fees charged by associates and partners handling the case, and an estimate was prepared of the time involved in litigating the remainder of the case. In addition, after the April 13, 2011 hearing and before the trial court ruled on Wife's Motion, Wife filed her second motion to compel discovery which included an explanation of the costs involved in preparing and filing that motion. Therefore, unlike in *Collins,* we cannot say that the trial court failed to consider detailed information, as it had requested, before ruling in Wife's favor. Accord *Richards v. Richards,* 166 Md. App. 263 (2005).

Husband argues that the "value" of the services rendered by Wife's attorneys was not proven, that no comparison of fees paid for similar efforts was proffered, and that "more than one-half of the award requested involved payments for undocumented and unspecified pre-trial preparation services." As the trial court explained on April 13, 2011, it was familiar with domestic cases and we agree that the court was able to adduce whether the hourly rates charged by Wife's counsel were reasonable, and that the court understands what is included in the scope of preparing for a trial without minute descriptions of an attorneys' actions.

Husband goes on to contend that the circuit court "should …conduct its own independent and thorough examination of the request to ensure that an appropriate award, if ordered was legally and factually sound.". Husband argues that the standard "was clearly outlined in *Heger v. Heger,"* 184 Md. App. 83 (2009). The only standard discussed in *Heger* is the statutory factors found in FL §7-107, §8-214, §11-110, and §12-103. We are unable to discern how *Heger* requires a court to look outside the record in its consideration of the FL §7-107 factors, if that is what Husband suggests. Moreover, if Husband wanted the circuit court to independently assess reasonableness of Wife's attorneys' fees, it appears the court did exactly as he requested; the circuit court stated that, based on its experience adjudicating many domestic cases, such a "figure, in and of itself, is certainly not extraordinary or startling." We find no error.

Lastly, Husband asserts that the trial court intended to give him an opportunity to respond to Wife's additional documentation. Wife produced documentary evidence and Husband was allowed to do the same and to rebut Wife's documentation. On April 13, 2011, Husband was put on notice that the court found Wife's request for fees reasonable but wanted more information regarding the amount.

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Husband was afforded the opportunity to respond to Wife's submissions substantiating the amount. The circuit court, realizing its error in failing to afford Husband the opportunity to respond to Wife's evidence, granted Husband's Motion and vacated its original order, which corrected its earlier procedural error. The order of July 15, granting Wife's Motion based on a determination that Wife's documentation sufficiently explained her needs and that her evidence was not overcome by Husband's Response, does not amount to error or an abuse of discretion."

Slip op. at various pages, citations and footnotes omitted.

*Mary Katherine Goldsborough v. Leslie B. Goldsborough III**

CUSTODY: MOTION TO REVISE JUDGMENT: JUSTIFICATION FOR ABSENCE FROM TRIAL

CSA No. 1539, September Term, 2011. Unreported. Opinion by Eyler, James R., J. Filed January 28, 2013. RecordFax #13-0128-02, 11 pages. Appeal from Baltimore City. Affirmed

The trial court did not abuse its discretion in denying a post-trial motion to revise the judgment awarding Husband sole legal and physical custody of the parties' children, because Wife failed to provide adequate evidence to justify her absence from trial; furthermore, the record supports the court's decision on the merits, which relied substantially on neutral, court-ordered medical reports to determine that Wife was not fit to regain custody of the children.

"This appeal arises from the denial of Mary Katherine Goldsborough's motion for new trial following the entry of judgment granting appellee, Leslie B. Goldsborough III, an absolute divorce, sole legal and physical custody of the parties' children, and use and possession of the marital home when appellant failed to appear at the scheduled May 12, 2011 trial on the merits. In her brief, appellant presents two related issues:

1. Whether the trial court erred in proceeding with a trial and awarding physical and legal custody of the minor children to Leslie Goldsborough when it was informed that Mary Katherine Goldsborough was admitted to a hospital on the day of trial and unable to attend.

2. Whether the trial court erred in denying Mary Katherine Goldsborough's Verified Motion for a New Trial.

We shall affirm.

DISCUSSION

The judgment of absolute divorce was entered on May 17, 2011, but Wife did not file her motion for new trial until May 31, 2011, 14 days after the entry of judgment. Thus, Wife's Rule 2-533 motion was untimely, and it did not toll the running of the 30-day period within which she was required to file her notice of appeal from the court's judgment.

Wife did file her motion within 30 days after entry of the judgment and a notice of appeal within 30 days after denial of her motion. We shall treat her motion as a motion to revise a judgment, pursuant to Rule 2-535(a), and briefly review whether the court abused its discretion in denying the motion.

Distilling Wife's argument to its essence, the trial court erred in failing to continue the May 12, 2011 trial and then abused its discretion in denying her motion based on that failure.

Wife phoned the judge's chambers on the morning of trial and explained that she could not attend court because she was then being treated at GBMC for a serious illness. The judge's law clerk, however, asked her repeatedly to offer some corroboration of the hospital visit, and she declined to do so. Neither did she provide an affidavit regarding the reason for her absence, as required by Rule 2-508(c) when a party seeks to continue a trial based on the absence of a necessary witness. Without any corroborating evidence that Wife received medical treatment on the day in question, even in support of her later motion, we cannot say that the trial court abused its discretion in determining that she had failed to prove sufficiently her inability to attend the trial.

With the filing of her post-trial motion, Wife included medical records relating to hospital visits to the Johns Hopkins Hospital emergency room on May 10, 2011 and Sheppard Pratt Health System on May 13, 2011, but none was from GBMC, the hospital to which she alleged she had been admitted on May 12, 2011, and none specified a visit, much less an admission, on May 12, 2011. Thus, regardless of whether the trial court "should have stayed the proceeding," in light of Wife's apparent mental health issues, we cannot say that it abused its discretion in denying her post-trial motion when she failed to provide adequate evidence as proof of the validity of her absence from trial.

In addition, the record supports the court's decision on the merits. In its ruling, the trial court relied substantially on neutral, court-ordered medical reports to determine that Wife was unfit to re-gain custody of the children. With regard to alimony, the court found that Wife had filed no response to Husband's pleadings and had not requested alimony, so an award of alimony would not have been a foregone conclusion even had a new trial had been ordered, especially in light of Husband's continued unemployment and continued lack of income."

Slip op. at various pages, citations and footnotes omitted.

*Chas Venus Gordon v. Bernard M. Gordon, Jr.**

VISITATION: MODIFICATION SUA SPONTE: CONTEMPT

CSA No. 0334, September Term, 2012. Unreported. Opinion by Kehoe, J. Filed January 18, 2013.
RecordFax #13-0118-02, 12 pages. Appeal from Charles County. Order of contempt vacated.

Where a custody and visitation order provided that the child's father would make sure his daughter attended activities scheduled by her mother if they occurred while the father had the child, the lower court abused its discretion in finding the visitation order was not sufficiently specific and, on that ground, modifying the order sua sponte to prevent the mother from scheduling any activities during the father's visitation times without his consent, and in holding the mother in contempt for contumaciously violating the newly modified terms.

"Chas Venus Gordon appeals a judgment finding her in contempt of a child custody and visitation order that was modified *sua*

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sponte by the court during the contempt hearing. We will vacate the modified order to the extent that it holds Ms. Gordon in contempt.

BACKGROUND

On November 15, 2003, Ms. Gordon and Bernard Gordon Jr. were married in Charles County. The marriage produced one child, Liliana, born on April 6, 2004.

In August 2005, when Liliana was approximately eighteen months old, the parties separated. On January 25, 2007, the circuit court issued an order of divorce ("the January 2007 Order"). Pertinent to this appeal, this order granted Ms. Gordon sole legal and physical custody of Liliana, and established a graduated visitation schedule for Mr. Gordon. The order also provided that: "The Father must ensure that the minor child attends scheduled extra-curricular activities in which her mother has enrolled her... ."

On October 22, 2011, Mr. Gordon filed a third Petition for Contempt (the petition at issue in this appeal), asserting, in large part, that Ms. Gordon had violated the April 2011 Order by scheduling Liliana's extra-curricular activities on Saturdays during Mr. Gordon's visitation hours, thereby thwarting Mr. Gordon's ability to visit with Liliana.

The circuit court held a hearing on January 19, 2012. At the close of the hearing, the trial judge issued oral findings, concluding, in pertinent part, that, although neither Mr. nor Ms. Gordon fully understood the provisions of the April 2011 Order because the order was, in relevant part, "a little less specific than it might have been," Ms. Gordon still had been "disingenuous" in scheduling Liliana's activities on Saturdays. Highlighting the April 2011 Order's lack of specificity, the trial judge then *sua sponte* modified the April 2011 Order to provide that the "alternate Saturday visits by Mr. Gordon will take precedence over any other activity in which the child might be involved, unless Mr. Gordon agrees that the activity will go forward on the day when a visit with him is scheduled."

Finding that Ms. Gordon had "contumaciously prevented implementation of the visit arrangement here," the judge then found Ms. Gordon in contempt. A written order embodying the oral ruling was filed on March 26, 2012. Ms. Gordon's motion to alter or amend was denied. This appeal followed.

DISCUSSION

The trial court found Ms. Gordon in constructive civil contempt for "contumaciously prevent[ing] implementation of the [child] visit arrangement here." We conclude that the trial court abused its discretion.

Constructive civil contempt may be punished when a party proves by a preponderance of the evidence, see *Bethena*, 164 Md. App. at 286, that the opposing party has violated the terms of a court order, *Droney,* 102 Md. App. at 684. Such a showing could not have been made on these facts. The trial court did not find that Ms. Gordon violated the terms of the April 2011 Order; rather, it found that she violated the judge's subjective conception of the spirit and/or intent of that order. Mr. Gordon cites to no — and, indeed, there is no—mechanism in Maryland law that permits a party to satisfy its burden of proof in a contempt proceeding by presenting evidence that the opposing party violated an order that did not exist at the time of the complained of action.

Second, "[b]efore a party may be held in contempt of a court order, the order must be sufficiently definite, certain, and specific in its terms so that the party may understand precisely what conduct the order requires." *Droney*, 102 Md. App. at 684. Our review of the April 2011 Order, read in light of the January 2007 Order incorporated therein, establishes, not that the order was ambiguous, but rather that it was quite clear. The January 2007 Order clearly contemplates that Ms. Gordon might schedule activities that might overlap with Mr. Gordon's scheduled visitation, providing that, "The Father must ensure that the minor child attends scheduled extra-curricular activities in which her mother has enrolled her." The April 2011 Order explicitly incorporates this requirement. No provision in either order prohibits Ms. Gordon from scheduling activities for Liliana on Saturdays.

In short, Ms. Gordon was entirely within her rights to schedule activities for Liliana on Saturdays as she did. That the court may have intended a different result, but, for whatever reason, failed to articulate its intentions clearly in the order, is not grounds for a finding of contempt.

Lastly, Mr. Gordon asserts that Ms. Gordon "repeatedly refused to provide [Mr. Gordon] with access to Liliana until after the 10:00 a.m. time ordered for the commencement of Saturday visitation." As no provision in any order entered in this case establishes which party was to take Liliana to activities that began at (or around) 10 a.m., Ms. Gordon's conduct in this regard was not contumacious. The court erred in holding Ms. Gordon in contempt."

Slip op. at various pages, citations and footnotes omitted.

*Brenton Grant v. Deborah Grant**

CUSTODY AND CHILD SUPPORT: SOLE CUSTODY PENDENTE LITE: PATERNITY

CSA No. 0280, September Term, 2012. Unreported. Opinion by Berger, J. Filed February 6, 2013. RecordFax #13-0207-02, 15 pages. Appeal from Frederick County. Affirmed.

An award of sole custody pendente lite to the mother was not an abuse of discretion, where she was the primary caretaker and the father had relocated to New York; nor did the court err in finding that a paternity test would not be in the children's best interest, given the tender ages of the children, their bond to their father, and his open and public acknowledgment of them in the past.

"On April 4, 2012, the Circuit Court issued *a pendente lite* order, granting Deborah Grant sole legal and physical custody of the children. Pursuant to the order, appellant, Brenton Grant was ordered to pay child support and granted access and visitation to the children. The order denied Father's request for paternity testing of the children. We affirm the judgments.

DISCUSSION

I.

A circuit court has the authority to award custody of children *pendente lite*. Fam. Law ("FL") §1-201. Further, a dispute involving the custody of children *pendente lite* may be referred to a master for a hearing and for a report and recommendations concerning custody. Md. Rule 2-541(b)(2). Ordinarily, *a pendente lite* order depriving a parent of the care and custody of his or her child is immediately

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appealable as an interlocutory order pursuant to CJP §12-303(3)(x).

In the instant case, the matter was before the circuit court to decide *pendente lite* custody, child support, and access.

It is clear from the record that the circuit court considered the appropriate factors in determining a custody arrangement that would be in the best interests of the children. The record demonstrates that Mother appeared to be the primary parent responsible for the care and upbringing of the children. The children currently live with Mother while Father resides in the state of New York. Mother assumes most of the children's expenses, at least since the separation of the parties, and ensures that the children's day-to-day needs are met. Furthermore, Father failed to present additional documentation to the court and Mother to substantiate his claim of financial hardship, which in turn, affected Father's credibility.

It is worth noting that both parties are dedicated and devoted parents who sincerely love their children. Trial courts frequently comment that where two parents are fit and all other factors balance, granting custody is one of the most difficult aspects of their judicial duties. Nevertheless, the *pendente lite* hearing transcript clearly demonstrates that the trial court reviewed the testimony, determined the credibility of the parties, and properly weighed the evidence. As such, granting Mother *pendente lite* custody of the children was not an abuse of discretion.

II.

Father's second contention is that the circuit court erred in denying his request for paternity testing of the minor children.

When paternity is disputed for a child born during a marriage, the court is required to look to the best interests standard to determine the extent of the court's inquiry into paternity. *Turner v. Whisted,* 327 Md. 106 (1992).

The Family Law Article presumes that the mother's husband at the time of conception is the father of that child. FL §5-1027(c)(l).

The Court of Appeals has interpreted ET §1-206(a) and 1-208 as providing the framework through which the court, in equity, may adjudicate paternity. *Mulligan v. Corbelt,* 426 Md. 670, 678 (2012) (citing *Thomas v. Solis,* 263 Md. 536, 544 (1971)). A request for blood testing to rebut that presumption is analyzed as a motion pursuant to Md. Rule 2-4235 and invokes the trial court's discretion in deciding whether ordering such testing would be in the best interests of the children.

For the reasons that follow, we hold that, under the facts of this case, the circuit court did not err or abuse its discretion in denying Father's request for paternity testing.

Here, Father's request for paternity testing was presented in the form of exceptions from the family law master's report and recommendations. Nevertheless, Father was afforded a hearing to determine whether ordering blood tests would be in the children's best interests. According to the record, Father repeatedly acknowledged himself, orally and in writing, as the father of the children. Furthermore, father has "openly and notoriously" recognized the children as his children. After hearing testimony and considering relevant evidence, the trial court found that the children were born as a result of the marriage of the parties. Additionally, given the children's ages [10, 6 and 4] and the bond that they have with Father, the court determined that it would be contrary to the children's best interests to grant Father's request. Accordingly, the trial court did not err in denying Father's request for paternity testing."

Slip op. at various pages, citations and footnotes omitted.

*Andrea Hanes v. Bryce Lee Hanes**

CHILD SUPPORT: DETERMINATION OF ACTUAL INCOME: PRE-TAX CONTRIBUTIONS

CSA No. 0541, September Term, 2012. Unreported. Opinion by Meredith, J. Filed Jan. 31, 2013. RecordFax #13-0131-09, 16 pages. Appeal from Queen Anne's County. Reversed and remanded.

In calculating a father's actual income for purposes of child support, the lower court should have included his pre-tax contributions to a 401(k) plan and a "cafeteria plan" benefit, and then made an appropriate adjustment for the actual cost of the child's health insurance coverage; however, the court did not err by adjusting the father's income downward to reflect for the uncertainty of continued receipt of a bonus that fluctuated from year to year, if it was paid at all.

"On April 27, 2012, the Circuit Court entered an order granting Andrea Hanes an absolute divorce from Bryce Lee Hanes. The court ordered Husband to pay child support for the benefit of the couple's minor daughter, who would reside primarily with Wife. Wife filed a motion to alter or amend, contending that the court erred in calculating Husband's child support obligation. On May 10, 2012, the court amended its order to reflect an error in the calculation concerning health insurance provided to the child, but declined to alter its finding as to Husband's income. The court's amended child support order ordered Husband to pay $619.17 per month. Wife subsequently noted this appeal.

Wife presents a single question: Did the trial court err in its determination of appellee's actual income for child support guideline purposes?

We answer Wife's question in the affirmative, and reverse and remand for further proceedings.

DISCUSSION

Wife contends that, in its calculation of Husband's actual income, the court should have considered Husband's bonuses, 401(k) contribution, cafeteria plan benefit, and the value of having use of the company vehicle.

The Company Vehicle

Wife contends that the court erred in failing to conclude, as the master did, that Husband derived imputed income from his use of the employer's vehicle for commuting to and from work.

Wife asserted that FL §12-201 (b)(3)(xvi) applies because Husband does not have to pay his own commuting expenses, as many other parents have to do. Accordingly, Wife argues, because Husband received a personal benefit from his employer's coverage of the commuting costs, the court should account for that in-kind payment as part of his actual income.

The statute, however, does not provide for the court to impute to a parent's actual income the value of the *business* use of a company car. This Court's holding from *Tanis* is clear that only the value of a parent's *personal* use of a company car may be factored into a cal-

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culation of actual income. 110 Md. App. at 58 1-82. In the present case, the court's determination that Husband did not derive a financial benefit from personal use of the company vehicle was not clearly erroneous.

C. The Pension and Health Insurance Benefits

As we noted in *Maim v. Mininberg,* 153 Md. App. 358, 411(2003): "The Guidelines are founded on the premise "that a child should receive the same proportion of parental income, and thereby enjoy the standard of living, [that] he or she would have experienced had the child's parents remained together."

Accordingly, pre-tax compensation which enhances a parent's standard of living by reducing personal living expenses is income which is to be shared with the child. That includes contributions to a retirement fund and an employer's direct payment of health insurance premiums.

The trial court should have started with Husband's "Gross Pay" as shown on the 2011 Earnings Statement. Gross Pay included: (1) a 401(k) contribution and (2) cafeteria plan pre-tax compensation. Under our cases, both of these amounts should have been included in Husband's actual income for determining child support.

Under the child support guidelines set forth in Sections 12-201 through 12-204, a judge is not permitted to deduct from a parent's gross income the amount voluntarily contributed to a pension plan.

Similarly, in *Walker v. Grow,* we noted, 170 Md. App. at 284:

"[E]xpense reimbursements or in-kind payments" received from an employer "that reduce the parent's personal living expenses" are required by statute to be included in the actual income calculation. Fam. Law 12-201(b)(3)(xvi). Sometimes that determination is an easy one, but not always.

On remand, the court should include the cafeteria plan benefit in the Husband's actual income, and then make the appropriate adjustment for the actual cost of the child's health insurance coverage. The court should also include in Husband's actual income the pre-tax contribution to the Husband's 401(k) plan.

D. Bonus Income

This Court has held: "[B]onuses already paid to a parent should be used to calculate child support even though it is unknown whether such a bonus will be paid in the future." *Johnson v. Johnson,* 152 Md. App. 609, 622 (2003). Indeed, FL §12-201(b)(3)(iv) includes bonuses in the definition of actual income. Nevertheless, we are unconvinced by Wife's argument that the court abused its discretion by estimating the likely average future bonus income.

In explaining that the court was going to assume Husband would receive an annual bonus of $750, the court observed that Husband had not received bonuses on "a regular basis. He's received them 5 out of 11 years."

The court rounded off the most recent year's bonus and multiplied $1,700 by 5/11 to account for the fact that Husband was not guaranteed a bonus, and, historically, bonuses had been paid only five out of eleven years. That number was then further adjusted to $750 per year, or $62 per month. We perceive no abuse of discretion in the court's calculation.

CONCLUSION

Because the court did not include Husband's pre-tax income in its calculation of his actual income, we remand the case with instructions for the court to conduct further proceedings to determine Husband's actual income and make a new determination of child support."

Slip op. at various pages, citations and footnotes omitted.

*In re: Adoption/Guardianship of Matteo B.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: INSUFFICIENT PROGRESS

CSA No. 1029, September Term, 2012. Unreported. Opinion by Hotten, J. Filed January 14, 2013. RecordFax 13-0114-03, 20 pages. Appeal from Washington County. Affirmed.

Although the biological father had taken positive steps toward reunification with his special-needs son, his continued inability to provide a stable home for the child after two years, combined with the boy's special needs and his adjustment to his pre-adoptive placement, supported the lower court's finding that termination of parental rights would be in the best interest of the child.

"The juvenile court terminated the parental rights of Daniel B., Sr. ("Father") for minor child, Matteo B. Matteo's mother, Kaylyn M., voluntarily terminated her parental rights. Father noted an appeal. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Matteo was born on March 4, 2010 at Washington County Hospital. On March 5, 2010, due to his special needs and chronic medical conditions, Matteo was transferred to the University of Maryland's Pediatric Unit. He tested positive at birth for marijuana, and was diagnosed with gastroschisis. As a result, Matteo required a restricted diet to prevent vomiting and acid reflux. He received early intervention services to address his lack of gross motor and social skills until he improved. He continues to receive speech therapy twice per week, as he speaks minimally, but communicates via sign language, and undergoes occasional urgent medical care for his asthma, as well as regular treatment for other medical issues.

At the time of Matteo's birth, Mother and Father were active drug users. The Department developed a safety plan with the parents. Neither parent could care for Matteo, who, after birth, was hospitalized for three months. During this time, the medical staff expressed concern regarding the parents' lack of contact with Matteo. After the Department attempted several times to contact the parents, it discovered they were homeless.

On June 2, 2010, the Department filed a shelter care petition. After a hearing, the court granted the petition, ordering that Matteo be placed in the Department's temporary care and custody. Thereafter, the Department filed a CINA petition, and on July 15, 2010, the court found that the "allegations in the CINA petition ha[d] been proven by a preponderance of the evidence."

During a review hearing on November 10, 2011, the court changed the permanency plan of reunification to adoption, after the Department reported that both parents failed to meet some of the conditions in the service agreements. The Department filed a Petition for Guardianship. Father noted his objection, stating "I want to maintain my relationship with my son, and believe I am in a position

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to reunify with my son." The court determined that the matter was a contested guardianship.

On May 31, 2012, the court conducted a termination of parental rights hearing, during which the court considered all the factors enumerated in §5-323(d) of the Family Law Article. The court made findings in an order issued June 14, 2012.

On appeal, Father maintains that the court erred in terminating his parental rights because he made efforts to establish a relationship with Matteo "by maintaining contact with the Department, completing more than one parenting program, and demonstrating his determination to keep the bond with his son intact." The trial court recognized that Father reentered the addictions treatment, attended ADAC, and underwent random urinalysis in January 2012. However, from August 2010 through approximately March 2012, Father did not complete addictions assessment, did not complete random urinalysis, did not complete a mental health evaluation, and continued to test positive for drugs.

Furthermore, the court referenced that Father, despite "no shows" and cancellations, was fairly consistent with his visitations and maintaining contact with the Department. However, analogous to the parent in *In re Adoption/Guardianship of Amber R. and Mark R.,* 417 Md. at 723-24, who also made positive efforts to maintain contact with her children and the Department, the Court of Appeals still upheld the termination of the parental rights because the parent was unfit, or it was in the best interests of the children. There was a similar result in *In re Adoption/Guardianship of Cross H.,* 200 Md. App. at 156, *cert. granted* 432 Md. 352 (2011), where the parent completed mental health evaluations and parenting classes, and maintained regular visitation with the child. Our Court nevertheless concluded that exceptional circumstances existed, and terminated the parental rights. *Id.* at 157-58. Thus, even though a parent performs a few positive acts, such as maintaining contact with social services, completing a parenting program, or keeping a bond with the child, this does not ensure that a mother and/or father's parental rights cannot be terminated, for this may contradict the best interests of the child.

Predicated on the evidence in the record, we conclude that the court properly considered the factors pursuant §5-323 of the Family Law Article. Furthermore, the court did not abuse its discretion, as the trial judge recognized that evaluating each factor was time-consuming, stating "I'm sorry it took so long but that's about what it works out to" and "All right it's what's in the best interest of the minor child and in order to make a decision, and I know this is taking some time but that's what these cases are all about," but because of the importance of Father's rights and the best interests of Matteo, the court continued to meticulously analyze the statutory provisions.

The court's findings provided clear and convincing evidence that Father's parental unfitness coupled with the existence of Matteo's exceptional circumstances resulted in a conclusion that it would be to his detriment to continue the parental relationship, and in Matteo's best interest to terminate Father's parental rights."

Slip op. at various pages, citations and footnotes omitted.

*In re: Adoption of Jonathan S.**

ADOPTION/GUARDIANSHIP: REVOCATION OF CONSENT: UNTIMELY ATTEMPT

CSA No. 0088, September Term, 2012. Unreported. Opinion by Zarnoch, J. Filed January 28, 2013. RecordFax #13-0128-05, 21 pages. Appeal from Anne Arundel County. Affirmed

The biological parents were not entitled to a hearing on their motion to revoke consent to adoption, because their motion was filed after the 30-day revocation period had passed.

"The primary issue we have been asked to address is whether appellants, Michelle and James S. (the "Parents"), should have been afforded a hearing on their attempt to revoke their consent to the adoption of their son, Jonathan, 11 days after the 30-day statutory revocation period had expired. After adoption was ordered by the Circuit Court, the Parents filed a Motion to Alter or Amend the Judgment of Adoption, which was denied. The Parents argue that they should have been provided a hearing on whether they revoked their consent and on whether the court committed errors during the adoption hearing. For the following reasons, we reject the Parents' arguments and affirm the circuit court's rulings.

DISCUSSION

Hearing on Revocation of Consent - Md. Rules 2-311 and 9-102

The Parents' main challenge is to the court's grant of the adoptive parents' motion to reject the Parents' attempted revocation without holding a hearing. In making this challenge they rely on Md. Rule 2-311(f), Md. Rule 9-102, and the Due Process Clause of the 14th Amendment.

These authorities do not require a hearing because the revocations were not valid. Md. Rule 2-311(f) requires that a court hold a hearing on a motion, if one is requested, before rendering a decision that is dispositive of a claim or defense.11 Md. Rule 9-102(c)(2)(D) mandates a hearing when a parent revokes consent pursuant to the rule. Both rules operate under the premise that the person filing the motion has a right to file the motion. Here, the Parents did not have a right to file a motion to revoke consent because the 30-day revocation period had passed. Thus, we reject the argument that their claim and defense were disposed of because, under the statutory scheme, the Parents no longer had a valid claim or defense that could be resolved. *Cf Palmisano,* 249 Md. at 103 (Upon issuance of the final decree of adoption, "the parents of the child were no longer interested parties, and therefore lack the standing to challenge the Welfare Board's procedures subsequent to the final decree.")

The Parents point out that Md. Rule 9-102 does not specifically contain the words "30 days." Also, FL §5-3B-2l(b)(1)(i), provides that a parent "may revoke consent at anytime within 30 days after the parents signs the consent," but does not state that the parent *may only* revoke within the 30 days. Therefore, they argue, a parent is not limited to 30 days.

We reject these contentions. First, the statute does specifically limit the revocation time to 30 days. The word "within" is a word of limitation. In this context, it means "not longer in time than." *Webster's Third New International Dictionary of the English Language Unabridged,* 2627 (2002). As to 9-102(c)(2)(D), it explains, "if consent is revoked pursuant to this Rule, the court shall schedule an immediate hearing …" Thus, the hearing under Rule 9-

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102 is conditioned on compliance with the 30-day deadline.

V. Hearing on Revocation of Consent - Due Process

The Parents do not make a facial challenge to the 30-day statutory rule, but argue that strictly limiting the right to revoke to 30 days violates due process when applied to this case.

The Parents are correct in noting that the State has a compelling interest in protecting the welfare of children and also the rights of the natural and adoptive parents. Accordingly, one of the purposes of the statutory scheme at issue is to "protect parents from making hurried or ill-considered agreements to terminate their parental rights." FL §5-3B-03(b)(4). This is why parents have 30 days to contemplate their decision.

Another purpose of the adoption statutes is to "timely provide permanent and safe homes for children consistent with theft best interest." FL §5-3B-03(b)(1). This is why parents do not have *more than* 30 days to withdraw their consent to an independent adoption. It is also why the court cannot freely disregard the 30 day revocation period.

In *In Re: Adoption/Guardianship No. 93321055,* 344 Md. *458* (1997), *rev'd on other grounds, In re Adoption/Guardianship Nos. 11387 & 11388, 354* Md. 574 (1999), the Court of Appeals left open the possibility that due process may require the court to ignore the time limit in an "extreme" case and hypothesized that perhaps a mother who lapsed into a coma during the entire period would be permitted to argue her objection in defiance of the 30-day period. The Parents contend that they should have been given a hearing to prove that their case is similar to a mother lapsing into a coma.

In requesting a hearing on their revocation, James and the couple's attorney provided affidavits based only on their knowledge, information, and belief that Michelle was suffering from some form of depression during the entire revocation period. But the Parents provided no support, medical or otherwise, for these contentions.

It is understandable that the Parents, like any other parents who would try to revoke after 30 days, want to explain why their case is different. However, finality — for the child, for the biological parents and family, and for the adoptive parents and family — is at the heart of Maryland's adoption laws. If we required a hearing in this case, where the parties merely stated that one of the parents was depressed during the revocation period, a court would be required to hold a hearing any time a similar, unsupported statement was made. This would create uncertainty for all parties, especially the child who may be establishing emotional bonds with his or her adoptive parents. *See Palmisano,* 249 Md. At 103.

The record and the briefs in this case do not indicate that this was an "extreme case." We understand that Michelle did feel depressed as a result of the situation, but her recollection of the events during the revocation period indicates she was aware of her surroundings, knew the gravity of the decision she was making, and was not in a coma-like state. Moreover, Michelle did not enter the hospital until after the revocation period had passed.

Even if we were persuaded that due process required a hearing on the Parents' argument for revoking consent, we do not believe that a remand for a hearing would be appropriate because the circuit court allowed the Parents to press their revocation issues at the hearing on their motion to alter or amend. The Parents had their opportunity to be heard on the revocation issue and the circuit court considered and specifically ruled on the issue.

There may also have been an alternative route to a hearing in this situation. The statutory scheme permits the filing of a petition to invalidate an adoption on the basis of a jurisdictional or procedural defect within one year after the entry of the adoption order. FL §5-353. In addition, a petition to invalidate could be premised on fraud or mistake. *See Venable v. Ames,* 54 Md. App. 520, 530 (1983). Admittedly, we can find no statute or case law that mandates that the court hold a hearing when a petition to invalidate is filed. But filing a petition suggests an original action and, therefore, could likely result in a trial."

Slip op. at various pages, citations and footnotes omitted.

*In re: Ayden N.**

CINA: CHANGE IN PERMANENCY PLAN: INSUFFICIENT PROGRESS

CSA No. 1024, September Term, 2012. Unreported. Opinion by Matricciani, J. Filed Jan. 31, 2013. RecordFax #13-0131-06, 18 pages. Appeal from Montgomery County. Affirmed.

The lower court did not abuse its discretion in changing a permanency plan from reunification to adoption by a non-relative, where the child had been declared CINA at the age of four months and had been in the same foster family for more than a year, during which time his mother's actions demonstrated that she was likely to relocate at any time and introduce him to a new and potentially unsafe environment, and there were no other family members with whom he could live.

"Glenda N. appeals the decision of the juvenile court to change her son, Ayden N.'s, permanency plan from reunification with appellant to adoption by a non-relative.

Ayden was born on February 25, 2011, to appellant and an unknown father. Since July 2011, Ayden has been living with his foster mother, Amy Seidel.

Since the Department first became involved with Ayden and appellant, their housing has been an issue; Ms. Boswell described appellant's relocations and living arrangements as "random."

From March 8 until March 15, 2012, appellant traveled to Arkansas to visit her older son. While in Arkansas, she decided to marry a high school friend. Appellant offered no explanation but was angered when Ms. Boswell stated that the Department would not recommend that Ayden move to Arkansas and that this would likely affect the permanency plan.

Appellant moved to Arkansas on March 29, 2012 to live with her new husband, Mr. Alvarenga. Appellant left Mr. Alvarenga [in May 2012]. In late June, appellant obtained a job at a Dollar General in Syracuse, Kansas, where she continued to reside. She testified that she was living with a female co-worker in a three bedroom trailer.

Despite all that had occurred in this case, the permanency plan for Ayden had always remained reunification. Prior to appellant's move, she had completed a psychological evaluation and a six-week parenting course. While living in Maryland, appellant visited Ayden twice per week for two hours and interacted well with him.

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Appellant's move, however, stifled appellant's ability to visit Ayden. She was living hundreds of miles away in a home about which the Department knew nothing. Ms. Boswell indicated that the Department recommended a change in the permanency plan because of appellant's move, and her disregard for Ayden's best interest when making decisions.

The juvenile court found it in Ayden's best interest to change the permanency plan to adoption by a non-relative.

DISCUSSION

Appellant contends the juvenile court erred in changing Ayden's permanency plan because appellant had made substantial progress toward reunification, and because the court based its decision on "speculative fears" concerning appellant's instability. Appellant maintains that although she might not have demonstrated stability in her romantic relationships, she did demonstrate stability in her relationship with Ayden.

When determining a permanency plan, a juvenile court must consider the factors in FL §5-525(f)(l).

With regard to the first factor, there was no evidence the child could safely return to his mother's care. The court noted that with appellant now living in Kansas, in a trailer with a co-worker about whom the court knew nothing, it was impossible to say whether Ayden would be safe there. There was evidence that appellant lived with various men in the past, most of whom were violent, and that she moved around frequently.

With regard to the second factor, there was evidence that Ayden had an emotional attachment to appellant when she visited twice per week. Appellant, however, had not seen Ayden in the several months since her move to Arkansas. The court had no persuasive evidence that Ayden was bonded to his mother as of the date of the hearing, and as time progressed, Ayden was becoming more bonded with his foster mother. The court also noted that there was no evidence as to what, if any, attachment Ayden has to his brother (appellant's older son). The two were both in Arkansas for a matter of months, but Ayden was only a few months old at the time and has not since returned.

With regard to Ayden's attachment to his current caregiver, Ms. Seidel, both she and Ms. Boswell testified that Ayden was bonded to Ms. Seidel, her son, and her extended family.

The last factor is the potential harm of remaining in state custody for an excessive period of time. Ms. Seidel testified that she was willing to adopt Ayden should the Department proceed in that fashion.

The findings under FL §5-525(f)(1) were supported by the record and were not clearly erroneous. They led the juvenile court to conclude, under CJP §3-823(h)(2), that Ayden's present placement was necessary and appropriate, and that it is in Ayden's best interest to change the permanency plan to adoption by a nonrelative — preferably Ms. Seidel.

With regard to the Department's efforts to reunite appellant with Ayden, the court found them to be more than reasonable. The fact that appellant moved half-way across the country, preventing her from participating in services that could lead to her reunification with Ayden, did not render the Department's extensive efforts unreasonable.

With regard to alleviating or mitigating the circumstances that rendered commitment necessary in the first place, Ms. Boswell testified that appellant's decision-making has not improved since the inception of the case. Appellant moved hundreds of miles away from Ayden on a whim, denying herself services that the Department believed would enable Ayden to return to her care, and without considering what effect the move would have on Ayden. Since the move, appellant has not seen Ayden.

There was no evidence that Ayden could return to his mother's care now that she has moved from Maryland, to Arkansas, to Kansas. The court had no evidence concerning appellant's living situation in Kansas, other than appellant's testimony that she lived with a female co-worker in a three-bedroom trailer. The court had no evidence from which to find that the trailer or appellant's roommate were safe. Notably, there was evidence that appellant had made disastrous living decisions in the past, and she had only been living in Kansas for three weeks as of the date of the permanency hearing. The court's finding that Ayden could not be returned home safely was not clearly erroneous.

The court ultimately concluded that Ayden's current placement with Ms. Seidel is appropriate and necessary, and that a change to permanent adoption by a non-relative was in Ayden's best interests. The evidence demonstrated that Ayden would likely not fare well living with appellant at her new residence in Kansas, that appellant is likely to move with Ayden at any time and introduce him to a new and potentially unsafe environment, and that there were no family members with whom Ayden could live. Ayden has lived with Ms. Seidel for over a year, and she was willing to adopt Ayden. Based on the evidence, the ultimate decision to change the permanency plan was not an abuse of discretion."

Slip op. at various pages, citations and footnotes omitted.

*In re: Kayla M.**

CINA: EVIDENCE: PERMANENCY PLAN HEARING REPORT

CSA No. 0804, September Term, 2012. Unreported. Opinion by Kenney, James A. III, (Retired, Specially Assigned), Filed January 28, 2013. RecordFax #13-0128-06, 8 pages. Appeal from Cecil County. Affirmed

A DSS Permanency Plan Hearing Report was admissible at the CINA permanency placement hearing under CJP §3-816(c), and under the public records exception to the hearsay rule.

"Jennifer B., appellant, presents one question for review: "Did the [juvenile] court err in admitting into evidence a purported 'court report?'" Finding no error, we affirm the judgment.

At the June 20, 2012 permanency planning hearing, appellant's attorney objected to the DSS Permanency Plan Hearing Report being entered into evidence.

Mary Kiesius testified that she is employed as a cross-functional team supervisor for the Cecil County Department of Social Services. She was personally involved in Kayla's case and was "one of the authors" of the DSS report at issue and had the report with her.

Appellant argues that the court committed prejudicial error by admitting the DSS report into evidence because it was not authenti-

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cated and included multiple levels of hearsay. Appellees, DSS and the minor child, respond that the report was properly authenticated by Ms. Kiesius and that hearsay is admissible at permanency planning hearings. DSS also contends that appellant did not object on the grounds of hearsay at trial, so the hearsay portion of appellant's argument is not preserved for our review.

We begin by pointing out that, during permanency planning hearings, "the court, in the interest of justice, may decline to require strict application of the rules [of evidence] other than those relating to the competency of witnesses[.]" Md. Rule 5-101 (c)(6). In other words, "the application of the various rules of evidence in a proceeding listed in subsection (c)," of which permanency planning hearings are one, "is entrusted to the discretion of the court." *In re Ashley R.*, 387 Md. 260, 280 *(2005)*.

When a CINA petition is filed by DSS, the Courts and Judicial Proceedings Article gives the court authority to "order the local department or another qualified agency to make or arrange for a study concerning the child, the child's family, the child's environment, and other matters relevant to the disposition of the case." Md. Code Ann., Cts. & Jud. Proc., §3-816(a). The "local department shall provide all parties with [such] a written report at least 10 days before any scheduled disposition, permanency planning, or review hearing. . . ." *Id.* §3-826(a)(1). "The statutory scheme governing dispositional and review hearings in CINA cases envisions that the juvenile court will rely on reports submitted by the Department and other entities," *In re Faith H.,* 409 Md. *625,* 641-42 (2009), and "[t]he report of a study under [3-816] is admissible as evidence at a disposition hearing. . . ." Md. Code Ann., Cts. & Jud. Proc., §3-816(c)(1). The Court of Appeals has characterized permanency planning hearings as "disposition review hearings." *Ashley E.,* 387 Md. at 293-94.

As stated above, hearsay is, in the absence of an exception, inadmissible. Md. Rule 5-802. The public records exception, subject to authentication, allows for a report made by a public agency that sets forth "factual findings resulting from an investigation made pursuant to authority granted by law" to be admitted into evidence in civil actions, even though it is hearsay. Md. Rule 5-803(b)(8)(A)(iii). A public record, however, may be excluded as evidence "if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness." *Id.* 5-803(b)(8)(B).

In this case, the court's February 1, 2012 Review Hearing Order directed DSS to "submit a written progress report to the Court and all parties no later than ten (10) days prior to the next hearing." We are persuaded that the progress report was admissible at the permanency placement hearing under §3-816(c) of the Courts and Judicial Proceedings Article. The DSS report was also admissible under the public records exception to the rule against hearsay because the Department of Social Services is a public agency and was ordered by the court to submit a written progress report detailing their investigation of the family in this case. Any attack on the trustworthiness of the report would appear to be one of appellate afterthought.

In contrast to *Faith H.,* here, the issue of authenticity was raised before the court. Even so, Ms. Klesius testified that she was employed by DSS as a cross-functional team supervisor, was personally involved with Kayla, and was one of the authors of the report. Ms. Klesius adequately authenticated the report. The record does not indicate that appellant challenged her testimony that the report was what it was purported to be. In addition, Sarah Reynolds, Natural Parent worker, who, along with Stacy Graf, the Foster Care child's worker, submitted the report to Ms. Klesius for approval, also testified at trial, and no questions on cross-examination regarding authentication were asked of her.

Therefore, we hold, that the juvenile court neither erred nor abused its discretion by admitting the report into evidence. Once the report was properly admitted into evidence it could be considered for "any purpose and could be accorded any weight by the court." *Id.* at 646.

Slip op. at various pages, citations and footnotes omitted.

*In re: Michael H., Marquell H., Anthony H., Mariah H. and Neveah F.**

CINA: CHANGE IN PERMANENCY PLAN: TIME IN FOSTER CARE

CSA Nos. 1021, 1025, 1026, 1027, 1028, Sept. Term 2012 (Consolidated Cases). Unreported. Opinion by Zarnoch, J. Filed: January 8, 2013. Appeals from Washington County. Affirmed. RecordFax #13-0108-04, 17 pages.

In deciding to change the permanency plan for five children from reunification to adoption, the circuit court considered all the statutory factors and did not give undue weight to the length of time the children had been in foster care, which is an important consideration — especially where, as here, there was evidence to suggest that the extended length of time in foster care was, in fact, harming the children.

This case arises out of a decision to change the permanency plan for five children from reunification to adoption. On September 3, 2009, the court determined that five of Donna H.'s children, Marquell H., Anthony H., Mariah H., Michael H., and Nevaeh F., were children in need of assistance. Prior to that time, the children had been living with Ms. H. and Jermaine F., the father of Nevaeh F. Initially, the children were placed in the physical custody of their mother under an order of protective supervision, but following an emergency CINA review hearing on September 17, 2009, the children were placed in foster care and the court granted care and custody of them to the Washington County Department of Social Services. Anthony K. and Marquell H. were returned to Ms. H.'s physical custody on April 7, 2010, but returned to foster care a few months later when Ms. H. was evicted from her home.

At a permanency plan review hearing on September 1, 2011, the Department sought to have the permanency plan changed from reunification/relative placement to adoption, but the court denied that request. Subsequently, after a three-day hearing, the court, on June 7, 2012, changed the children's permanency plan from reunification to adoption. This appeal followed.

DISCUSSION

Ms. H. contends that the juvenile court failed to consider the factors required by Family Law Article §5-525(f)(1).

In particular, Ms. H. argues that the court placed undue empha-

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sis on the length of time the children were in foster care, and that "at no time did the juvenile court use the term 'best interests' of the children, as required by statute and case law, in rendering his decision." Ms. H. further asserts that court failed to consider the children's emotional attachment to her, the fact that Marquell and the twins were not committed to remaining in foster care, and the potential harm if moved from their current placement. Finally, Ms. U. contends that the court failed to acknowledge her accomplishments, including that she had secured a lease for a three bedroom house, that she had secured employment and had a second job lined up, and that she had relocated to a place where she would have the assistance of her sisters.

Ms. H.'s contention that the juvenile court unduly emphasized the length of time during which the children had been in foster care is without merit.

Ms. H. directs our attention to *In re Adoption/Guardianship of Alonza D., Jr. and Shaydon S.,* 412 Md. 442 (2010). That case involved a termination of parental rights action in which the juvenile judge focused primarily on the length of time Alonza D. and his brother Shaydon S. had been in foster care and the bond that had developed between them and their foster mother, to support a finding of exceptional circumstances. *Id.* at 468.

The instant case does not involve a finding of exceptional circumstances or the termination of parental rights. Rather, it involves a change in the permanency plan. In deciding to change the permanency plan, the passage of time was only one factor considered by the juvenile court. It was, however, an important consideration because the court had to determine whether, after 32 months, Ms. H. should be granted additional time to work toward reunification. On that point, it is important to note that the juvenile court was not presented with the option of immediately returning the children to their mother's home. Ms. H. moved from the jurisdiction where her children were placed to a distance requiring a nearly four- hour drive, thus complicating her ability to visit with the children and receive services from the Department.

While the juvenile court recognized that Ms. H. had made some recent progress, it also recognized that she was not immediately ready to resume custody.

Furthermore, unlike *Alonza D.,* there was evidence presented below to suggest that the extended length of time in foster care was, in fact, harming the children. Mr. Buckley testified that the children experienced disappointment when Ms. H. missed visits, and Ms. Caldwell, Anthony and Marquell's therapist, testified that the boys experienced repeated disappointments when Ms. H. made promises that she failed to keep.

We also reject Ms. H.'s contention that the juvenile court failed to consider all of the required statutory factors. Although the circuit judge did not use the term "best interests" or specifically refer to the applicable Code sections, his oral ruling demonstrates that he considered the children's best interests and applied the statutory factors. The court was clearly concerned about the children's ability to be safe and healthy in Ms. H.'s home. As for the second and third factors, the court considered the attachment between all of the siblings, and recognized that all of them should remain together, if possible. The court recognized that the children were doing well in their foster care placement and were "obviously in a stable environment."

As for the fourth factor, we already have noted that the court recognized the lengthy time the children had spent in foster care. The court's consideration of the fifth factor, the potential emotional, developmental, and educational harm to the children if moved from their current placement, was similar to its consideration of the first factor. Finally, with respect to the sixth factor, the judge commented that the children had been in care for 32 months and, although Ms. H.'s "heart is in the right place," he had to consider "children that are 10, eight, five and five," and the youngest, Nevaeh, who, it was anticipated, would be transitioned into "a pre-adopt home with the other four children."

The judge's failure specifically to reference each statutory factor is not grounds for reversal. *Quinn v. Quinn,* 83 Md. App. 460, 466 (quoting *Bangs v. Bangs,* 59 Md. App. 350, 370 (1984)). The judge "is presumed to know the law and to apply it correctly." *Id.* The record clearly indicates that the juvenile judge considered the children's best interests and applied the statutory factors."

Slip op. at various pages, citations and footnotes omitted.

*Kirk Daniel Matelyan v. Alejandra Michelle Silvestre Cordon**

DIVORCE: ANNULMENT: FRAUDULENT INDUCEMENT TO MARRY

CSA No. 0423, September Term 2009. Unreported. Opinion by Meredith, J. Filed February 5, 2013. RecordFax #13-0207-11, 43 pages. Appeal from Prince Geroge's County. Affirmed.

In the face of conflicting evidence, husband failed to carry his burden of persuading the lower court that his marriage should be annulled on the grounds of lack of capacity, duress or fraud; nor did he show how wife's purported intent to commit immigration fraud induced him to marry her; nor would such an intent, if proven, deprive the Maryland state court of jurisdiction it otherwise had over the divorce action.

"The Circuit Court granted Alejandra Michelle Silvestre-Cordon an absolute divorce. Kirk Daniel Matelyan, appellant, *pro se,* presents questions which we rephrased:

I. Did the trial court have subject matter jurisdiction?

II. Did the trial court commit legal error or abuse its discretion by denying Husband's request for an annulment?

III. Did the trial court have a factual basis to grant a divorce on the grounds of the parties' voluntary separation for more than a year?

IV. Did Husband actually consent to the terms within the consent agreement?

V. Did the trial court err in denying Husband's request to rehear testimony concerning the pendente lite alimony award, or in incorporating the property issue along with the pendente lite alimony arrearage in the consent order?

I. JURISDICTION

Husband contends the circuit court did not possess jurisdiction to decide the divorce action because the parties married in Virginia, and that: "The Virginia Federal court held proper jurisdiction over a

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contract framed to defraud Government."

Pursuant to FL §l-20l(a)(3) and (4), courts of equity have jurisdiction over annulments and divorces, subject to the restriction in FL §7-101(a) that, "[i]f the grounds for 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."

In his original complaint seeking absolute divorce, filed in December 2007, Husband asserted that he had lived in Maryland since May 2006. Upon the circuit court's inquiry, Husband confirmed that he had been living in Maryland since 2006. Accordingly, we need not look to see if the grounds arose outside Maryland, because, regardless, Maryland has subject matter jurisdiction as a result of Husband's residency in this State for more than a year prior to filing.

II. ANNULMENT

Husband contended the marriage should be annulled because Husband lacked capacity at the time of the marriage ceremony. Husband also argued that Husband entered into the marriage as a result of duress. Finally, Husband contended that Wife fraudulently concealed her status as an illegal immigrant.

Due to the inconsistencies in the accounts of the events on the day of the marriage, the circuit court had to make a credibility determination. Facts in the record support the circuit court's finding that Husband did not lack capacity to marry due to intoxication or medication. Husband's own testimony indicated that he understood a wedding was occurring.

C. Duress

When a party seeks to procure an annulment on grounds of duress, "[t]he cases hold that the duress must exist at the time of the actual ceremony, so as to disable the one interested from acting as a free agent, and protest must be made at that time." *Owings v. Owings,* 141 Md. 416, 419 (1922).

Although Husband testified regarding incidents of domestic violence both before and after the marriage, we note that Husband never testified that, at the time of the marriage ceremony, he agreed to marry Wife only because of impending violence from Wife. Accordingly, Husband failed to present evidence which compelled the court to accept Husband's allegation that he was acting under duress.

D. Fraud

Husband cited Wife's purported misrepresentation about her legal status as grounds for an annulment.

Again, Husband did not testify that he only married Wife as a result of her representation that she was a citizen, or even that, had he known that she was not a citizen, he would not have married her. Accordingly, Husband did not provide dispositive evidence that Wife's purported fraud induced him to enter into the marriage contract. And, in any event, misrepresentation about citizenship is not fraud of the nature that would "relate to essential matters affecting the health or well being of the parties themselves." *[Ficarella, supra,* 20 Md. App. at 506.]

On appeal, for the first time, Husband contends that it is against public policy to recognize the marriage because it was entered into for purposes of evading immigration laws, and in violation of federal statutes. Husband did not raise this argument before the circuit court. We decline to address Husband's contention.

III. VOLUNTARY SEPARATION

Husband contends that "a court may not consider compliance with an order as grounds for granting a decree of absolute divorce." His theory is that Husband's and Wife's separation after the November 17, 2007, protective order was issued — in compliance with that order — cannot be the basis for the finding that there was voluntarily separation for more than a year. We decline to address Husband's contentions because Husband never made this argument before the circuit court.

IV. VALIDITY OF THE CONSENT AGREEMENT

Ordinarily, no appeal will lie from a consent judgment. *Long v. State,* 371 Md. 72, 85 (2002). "The only question that can be raised concerning a consent decree is whether in fact the decree was entered by consent." *Dorsey v. Wroten,* 35 Md. App. 359, 361 (1977). Husband argues that the consent agreement is invalid because 1) it lacks consideration; 2) the circuit court forced him to sign it under duress; 3) at no time did Husband "consent or agree to Wife's request and the court's order to drop all claims of tort "with prejudice"; and 4) the consent agreement he signed does not express the actual terms to which he had agreed.

The consent order was supported by adequate legal consideration because both parties chose to forbear from exercising their rights to pursue the pending tort, alimony, and property claims.

Regarding the existence of actual consent, Husband cited no portions of the record that support Husband's contentions that the circuit court forced Husband to sign the consent order. The transcript reflects that the court went over the terms thoroughly with Husband. At several points during the discussion, Husband acknowledged his willingness to consent.

In addition, the record demonstrates that the court went to great lengths to explain the meaning and ramifications of the consent order, including the term "with prejudice."

We conclude that the consent order accurately reflects the terms agreed to on the record. Husband explicitly consented to the order, and, therefore, it is valid and binding.

V. PENDENTE LITE ALIMONY AND PROPERTY

Husband contends the trial court erred by failing to "revisit his request for the return of the [pendente lite] funds procured by [Wife] through fraud, perjury, and judicial misconduct," and by "setting forth an erroneous settlement in the return of his property." The transcript from the merits hearing reflects that the circuit court addressed the pendente lite alimony and property issues as part of the consent order. The pendente lite alimony arrearage and property claims were both disposed of by Husband agreeing to pay $600 to Wife.

Because, as stated above, the consent order is valid and binding, and discharges of both the pendente lite alimony claims and property claims, we do not need to further address Husband's contentions."

Slip op. at various pages, citations and footnotes omitted.

*Anthony Monk v. Debra Monk**

CHILD SUPPORT: HEALTH INSURANCE: ALLOCATION OF FLAT-RATE PREMIUM

See UNREPORTED CASES IN BRIEF page 19

UNREPORTED CASES IN BRIEF *Continued from page 18*

CSA No. 2424, Sept. Term 2011. Unreported. Opinion by Eyler, Deborah S., J. Filed January 9, 2013. Appeal from Calvert County. Affirmed in part and reversed in part. RecordFax # 13-0109-07, 32 pages.

The circuit court erred in concluding that, because a father obtained health insurance through his employer for a flat rate that included all four of his children, including his two adult daughters, he was not paying any actual health insurance expense for his two minor daughters; rather, the total monthly premium for the children should have been divided by the number of children, and the resulting expense for the two minor children factored into the child support calculation.

"Anthony Monk and Debra Monk were divorced in the Circuit Court for Calvert County. The court granted Debra sole legal and physical custody of the parties' two minor children and established a visitation schedule; directed Anthony to pay Debra rehabilitative alimony for five years; directed Anthony to pay child support; directed Debra to transfer her interest in the marital home to Anthony; awarded Debra use and possession of a truck for three years; awarded Debra 50% of the value of Anthony's 401(k) account as of the date of the divorce; awarded Debra attorneys' fees; and found Anthony in contempt of a prior child support order.

Anthony appeals. We shall reverse the order of contempt against Anthony, vacate a portion of the child support judgment, and otherwise affirm the judgments.

FACTS AND PROCEEDINGS

The parties were married on January 19, 1985. They have four daughters: Megan, 24; Heather, 22; Jessie, 12; and Carlie, 10.

On February 11, 2011, Debra filed a petition for contempt, asserting that Anthony had willfully failed to make child support payments that were due on January 1 and February 1, 2011.

On November 30, 2011, the court entered a judgment of absolute divorce. "[A]fter considering the statutory factors," the court awarded Debra $15,000 in attorneys' fees. The court reiterated its finding that Anthony was in contempt of the P.L. Order for failure to make timely child support payments. It sentenced Anthony to a 30-day term of incarceration but suspended that sentence "on the condition that he make all future child support payments as ordered and in a timely manner." All other outstanding motions were denied.

DISCUSSION

Child Support

Anthony contends the court erred in calculating child support for two reasons.

Pursuant to FL section 12-202(a) the court "shall use the child support guidelines" in calculating each parents' child support obligation.

Anthony testified that all four of his daughters are insured under his employer-provided health insurance plan, which he pays for. Each child can remain on the plan until age 26. He pays $254.71 per week for health insurance, approximately $100 of which covers him. The remaining amount — approximately $155 — covers his four children. Anthony explained that the premium for the children does not change based on the number of children on the plan. If one child is covered, or all four children are covered, the premium is approximately $155 per week.

In the judgment of divorce, the court found that, because Anthony was voluntarily insuring Megan and Heather, his emancipated daughters, and because under his insurance plan there was "no additional cost to cover the two minor children," there was no actual health insurance expense being paid by him for Jessie and Carlie. The trial judge declined to include any cost of health insurance for Jessie and Carlie in the calculation of child support.

The court's finding was clearly erroneous. The approximately $155 per week for health insurance Anthony was paying for his children equals approximately $670 per month. Although that cost would be the same even if only one child were covered, that is not the reality: four children are covered, and all are benefiting equally. Thus, Anthony obtains identical health insurance coverage for each of his four children, which equals $167.50 per child. For Jessie and Carlie, therefore, the actual cost paid by Anthony for their health insurance totals $335 per month.

Pursuant to FL section l2-204(h)(l), this amount should have been added to the $1,800 basic child support obligation of the parties. After each parent's obligation was calculated, the court should have included a requirement that Anthony continue making that monthly insurance payment for Jessie and Carlie, and then subtracted that amount ($335) from his monthly child support obligation to Debra under FL section l2-204(l)(3).

On remand, the trial court shall amend its judgment to include an obligation by Anthony to continue to pay $335 per month in health insurance premiums for Jessie and Carlie, and accordingly shall revise Anthony's monthly child support obligation as we have described above. We shall vacate $335 of the monthly child support award imposed by the court against Anthony.

V.

Contempt Finding

We conclude that it was error for the court to find Anthony in constructive civil contempt of the P.L. Order that directed Anthony to pay Debra $300 per month for child support on the first of each month. Debra filed her petition for contempt on February 11, 2011, following the evidentiary portion of the merits hearing. Debra alleged that Anthony had failed to pay child support in January and February of 2011. The contempt petition was heard on March 24, 2011, prior to closing arguments. Debra's counsel stipulated that Anthony had since made the delinquent payments and was in fact up to date on his child support obligation. She argued that Anthony's child support payments had been late every month for the past nine months.

Rule 15-207(e) governs constructive civil contempt for failure to pay child support. In relevant part, it provides that the moving party has the burden of proving by clear and convincing evidence that "the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing."

In the instant case, Debra's counsel stipulated that Anthony had made all of his outstanding child support payments prior to the date of the contempt hearing. Thus, the evidence stipulated to before the court precluded a finding that Anthony was in constructive civil contempt."

See UNREPORTED CASES IN BRIEF page 20

UNREPORTED CASES IN BRIEF *Continued from page 19*

Slip op. at various pages, citations and footnotes omitted.

*John Philip Muth v. Jean Muth**

DIVORCE: MONETARY AWARD: STALE VALUATION DATA

CSA No. 2021, Sept. Term 2011. Unreported. Opinion by Berger, J. Filed January 7, 2013. Appeal from Howard County. Vacated and remanded for further proceedings. RecordFax #13-0107-04, 30 pages.

The trial court abused its discretion in entering a monetary award based on investment valuations that were clearly erroneous, in that they were three to eight years old; and, in light of the remand for recalculation of the monetary award, the award of indefinite alimony was also vacated and remanded for a determination of what effect, if any, the revised monetary award would have on it.

"This case arises from an Order granting a monetary award, child support, and indefinite alimony to appellee, Jean Muth. Appellant John Philip Muth filed a motion to alter or amend the judgment of divorce and a motion for new trial, requesting that the circuit court reconsider its child support calculation, the valuation of certain assets, and the indefinite alimony award. The circuit court held a hearing on the motion and modified the child support arrearage, but denied all other relief.

On appeal, Husband presents questions which we have rephrased as follows:

I. Whether the trial court abused its discretion in granting the monetary award because:

A. It erred in determining the value of certain investment assets;

B. It erred by ordering a distribution of gold between the parties that was based upon a mistake of fact;

C. It made erroneous findings of fact regarding a company owned by the parties, and abused its discretion in assessing penalties against Husband for funding the company post-separation; and

D. It failed to consider the requisite statutory factors in determining the monetary award.

II. Whether the trial court abused its discretion in its award of indefinite alimony to Wife because:

A. It abused its discretion in finding that the parties' standards of living would be unconscionably disparate absent an award of alimony;

B. It failed to consider Wife's assets and investments in determining the amount of alimony; and

C. It failed to consider the requisite statutory factors in granting the award.

DISCUSSION

I. Monetary Award

Husband challenges the trial judge's conclusion that the fair market values of the parties' investments in Eggspectations, Collective X, Pinnacle Health, and Paid Interviews were equal to the initial amounts invested in these companies between three to eight years prior to the date of the divorce. We hold that the trial court's findings of fact regarding the monetary award were clearly erroneous.

Generally, each property must be analyzed and valued separately by the court. *Goldberger v. Goldberger, 96* Md. App. 771(1993). A trial court must make reasonable efforts to ensure that the valuation of marital assets approximates the date of the judgment of divorce …" *Fox v. Fox,* 85 Md. App. *448,457-460* (1991). Likewise, "[i]nvestment assets acquired by either or both spouses during marriage, regardless of title, constitute marital property, and … are to be valued as of the date of the decree of absolute divorce." *Dobbyn v. Dobbyn,* 57 Md. App. 662, 675-76 (1984). The spouse asserting the marital property interest has the burden of proof to produce evidence as to the identity and value of marital property. *Green v Green, 64* Md. App. 122 (1985).

In *Fox,* we considered the valuation of various investment assets. We held that the trial court's fair market value assessment as to a company — in which the husband was the sole shareholder — was not erroneous where five experts testified regarding the fair market value, and the trial court adopted one of the expert's appraisals. We also, however, vacated the court's factual findings regarding other investment assets because the findings were based on one-year-old financial data, which was "too stale to permit a proper evaluation."

We begin our analysis by observing that Wife requested the monetary award, and therefore had the burden of establishing evidence of the fair market value of the investment assets in question. The trial court was required to determine fair market values as of April 21, 2011, which was the date of the divorce decree. The only evidence before the trial court as to Eggspectations, Pinnacle Healthcare, and Collective X was the amounts of the parties' investments in these companies, between three to eight years prior to the date of the divorce decree. In light of *Fox,* where we held that one year old financial data was "too stale" to suffice for a fair market value analysis, the original investment data here was inadequate to provide legally sufficient evidence of fair market value. Accordingly, the trial court's findings of fact regarding the values of Eggspectations, Pinnacle Healthcare, and Collective X were clearly erroneous.

We likewise hold that the finding of fact regarding the fair market value of Paid Interviews was clearly erroneous because the finding was based solely upon the book value of the company's assets plus a loan amount. It is clear from *Fox* that assessing the fair market value of a company is an involved process. Five experts in that case discussed tangible and intangible assets of a company, and provided detailed rationales for their evaluations. Here, Wife offered no expert testimony or appraisals. Wife had no involvement in Paid Interviews or expert knowledge about the business. It was clearly erroneous for the trial court to determine fair market value based upon the book value of the company's assets and a loan made to the company, without considering any other financial data.

We recognize the trial judge's dilemma; he had little or no evidence from which to ascertain the fair market values of the investment assets at issue. However, as in *Fox,* the appropriate course of action was to decline to determine the fair market values of these assets until competent evidence could be presented. If the trial judge is unable to determine the fair market value of any of the assets on remand, Wife will have failed to meet her burden of proof.

On remand, the trial court should take into account the additional disparities in the gold distribution resulting from the Husband's use of gold for marital expenses.

Additionally, the trial court abused its discretion in its monetary

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award due to Husband's post-separation transfers of marital funds to the LLC. The LLC was a marital asset in which each party had an equal interest. Thus, whether the funds were in a marital bank account or the LLC bank account is of no consequence; the funds were simply transferred from one marital account to another marital account. Moreover, contrary to Wife's contention, the trial court found that these transfers were necessary to preserve the LLC. Accordingly, we remand for the purpose of adjusting the monetary award by eliminating the "penalties" assessed against Husband.

II. Alimony

Because we vacate the monetary award, we also vacate the award of indefinite alimony, and remand for a determination of what effect, if any, the new monetary award has on the trial court's decision. At that point, the trial judge can better assess whether an award of indefinite alimony is appropriate given the property, assets, and investments that Wife will receive from the monetary award and the resulting ramifications on her ability to sustain her standard of living. On remand, the trial court may wish to consider the effect, if any, of the Court of Appeals' decision in *Boemio v. Boemio*, 414 Md. 118 (2010), a case that was decided shortly before the Muth trial."

Slip op. at various pages, citations and footnotes omitted.

*Michelle Pindell v. Shawn Pindell**

CHILD SUPPORT: ARREARAGES: ENFORCEMENT OF SETTLEMENT AGREEEMENT

CSA No. 0699, September Term, 2010. Unreported. Opinion by Berger, J. Filed January 3, 2013. RecordFax #13-0103-07, 13 pages. Appeal from Howard County. Affirmed.

Although a consent order had been drafted but not yet been signed and executed by the trial judge, the court properly relied on the draft order, which included all the findings and recommendations from the hearing and outlined the precise terms the parties had agreed upon, in granting a motion to enforce the settlement agreement.

"This appeal arises from an order to enforce a settlement agreement placed on the record in the Circuit Court.

On May 18, 2010, the circuit court ordered appellant Michelle Pindell to pay appellee Shawn Pindell $70,000, less $10,456.00 in child support arrears and $3,073.82 for appellee's one-half share of medical and dental expenses. In total, the court ordered appellant to pay appellee $56,470.18.

Appellant presents nine issues for our review, which we repeat verbatim:

1. Was the order placed on the record by Honorable Judge Lenore Gelfman reflective of the entire terms and understanding of both parties with Honorable Judge Alfred Brennan?

2. Should Mr. Pindell, Appellee, continue to pay the health and dental expenses based on the August 16, 2007 Order and his deceit of the Circuit Court for Howard County?

3. Did the Consent Dec Order allow for the modification and enforcement of the financial terms due to the longstanding efforts to finalize the Consent order and the appeal process?

4. Were the dates considered in the Confessed Judgment Note fair and reasonable?

5. Did the Confessed Judgment Note include the changes to the reimbursement order placed on the record based on the longstanding effort to come to a mutual agreement to the Consent Decree Order?

6. If modified, should the Confessed Judgment Notes include a new commencement date that coincides with the agrced upon Consent Decree Order on record and allow the Appellant thirty (30) days to arrange compliance?

7. Were the childcare guidelines administered to change the existing child care order dated August 16, 2007?

8. Based on the inconsistencies, omissions, and conflicting testimonies, should this ease be scheduled for a trial hearing with the Circuit Court for Howard County so a new Consent Decree Order can be placed on the record?

9. Should Appellee, Shawn Pindell, be responsible for all court fees, including any and all fees associated with the Circuit Court for Howard County?

We conclude that only the first issue was preserved for appellate review.

DISCUSSION

Appellant's first contention is that the circuit court erred in granting appellee's motion to enforce the settlement agreement because it did not include all of the findings and recommendations from the hearing held on October 9, 2009. We disagree.

We review a trial court's decision to grant a motion to enforce settlement on the record under an abuse of discretion standard. *Pearlstein v. Maryland Deposit ins. Fund*, 78 Md. App. 8, 15 (1989). We have defined abuse of discretion as "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Jenkins v. City of College Park*, 379 Md. 142, 165 (2003) (emphasis not included); *see also Garg v. Garg*, 393 Md. 225, 238 (2006).

In the instant case, at the time the trial court granted appellee's motion, a consent order (requested by the trial judge) had been drafted, but not signed and executed by the court. Nevertheless, the draft consent order outlined the precise terms that were agreed upon during the settlement agreement reached on October 9, 2009. Further, upon a review of the trial transcript from the October 9, 2009 hearing, as well as the order dated May 18, 2010, the trial court exercised appropriate discretion in granting appellee's motion to enforce settlement on the record. Indeed, the findings and terms agreed to by the parties are identical.

It is clear from the record that the only issue left to be decided between the parties was the exact figure to be deducted from the $70,000 owed to appellee. Following the hearing, the parties agreed that appellee owed $10,456.00 in child support arrears and $3,073.82 for his one-half share of medical and dental expenses. Indeed, appellant's counsel included the exact amount in the draft consent order. As a result, the parties agreed that appellant owed appellee a net amount of $56,470.18. The record demonstrates that neither party disputed this amount.

The draft consent order included all of the terms, findings, and recommendations agreed to by the parties at the hearing. Similarly, the order granting appellee's motion to enforce settlement on the record is identical to the terms agreed upon at the October 9, 2009 hearing. Further, the order reflects all of the terms in the consent

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decree drafted by appellant's counsel.

Although the trial court included a paragraph ordering appellant to pay appellee $1,500.00 in attorney's fees, it is of no consequence to the validity of the order enforcing the settlement agreement. Under the circumstances, it seems appropriate that appellant should bear some of the burden for appellee's fees, since it was, in part, her failure to adhere to the trial judge's order not only to acquire a loan to repay appellee, but also her failure to sign a confessed judgment note if she was unable to acquire such loan within 30 days of the date of the hearing that necessitated the fees.

Further, "summary enforcement of settlement agreements is most appropriate where there is no factual dispute and no legal defense to enforcement." *Pearlstein, supra,* 78 Md. App. at 16 (internal quotations omitted).

Here, both parties were represented by legal counsel at the October 9, 2009 hearing. Upon a thorough review of the record, both parties clearly agreed that they understood the agreement and that they were entering the agreement "freely and voluntarily." According to the transcript, both parties were active alongside their legal counsel in setting forth the agreement on the record, further suggesting that they entered the agreement "freely and voluntarily." The transcript from the hearing also demonstrates that there was no factual or legal dispute remaining between the parties, except for the exact dollar amount to be subtracted from the $70,000.00 owed to appellee. The final amount owed to appellee has since been resolved.

The record further reflects that the trial judge used her discretion soundly in granting appellee's motion. *Garg, supra,* 393 Md. at 238. Moreover, the record is devoid of any evidence that the trial judge's discretion was exercised in an arbitrary or capricious manner, or beyond the letter or reason of the law. Accordingly, the trial court did not abuse its discretion in granting appellee's motion to enforce settlement on the record."

Slip op. at various pages, citations and footnotes omitted.

*Richard S. Sternberg v. Sheryl Sternberg**

DIVORCE: MARITAL PROPERTY: TERMS OF CONVEYANCE

CSA No. 1612, Sept. Term 2011. Unreported. Opinion by Graeff, J. Filed January 7, 2013. RecordFax #13-0107-01, 27 pages. Appeal from Montgomery County. Appeal dismissed in part as moot; judgment of absolute divorce otherwise affirmed.

An appeal from the Judgment of Absolute Divorce's terms of transfer of the parties' marital home became moot once title was transferred; and the other rulings appellant challenged, including the admissibility of witness testimony and the trial court's refusal to recognize "separation under the same roof" as the equivalent of remaining "separate and apart without cohabitation" under FL §7-103(a)(4), were within the trial court's discretion.

"This appeal arises out of divorce proceedings initiated by Sheryl Sternberg against Richard S. Sternberg. On appeal, Mr. Sternberg raises five challenges to the judgment of absolute divorce:

1. Did the trial court violate §8-205(A)(2)(iii)(l) of the Family Law Article in requiring Mr. Sternberg to transfer title of the couple's marital home to Ms. Sternberg without first obtaining his release from the lien?

2. Did the trial court err in awarding pre-marital property, in the form of Mr. Sternberg's watch, to Ms. Sternberg via the catch-all provision of the Judgment of Absolute Divorce?

3. Did the trial court err in admitting the testimony of Ms. Sternberg's real estate expert, Harold Gearhart, when Ms. Sternberg failed to provide a report prior to the close of discovery?

4. Did the trial court err in admitting the testimony of Ms. Sternberg's private investigator, Jared Stern, after Ms. Sternberg failed to disclose his existence, and the nature of his testimony, until after the close of discovery and mere weeks before trial?

5. Should Maryland permit "separation under the same roof' to fulfill the requirement of FL §7-103(a)(4), to remain "separate and apart without cohabitation?"

We shall dismiss the appeal as it relates to the marital home. We shall otherwise affirm the judgment.

DISCUSSION

Distribution of Property

Mr. Sternberg's first contention involves a Lord Elgin pocket watch, worth $5,000, given to him by his grandfather.

It was undisputed that the watch was non-marital property. The only dispute was whether Ms. Sternberg had the watch. Ms. Sternberg testified that the watch was not in the home, and she did not know where it was. The court appeared to credit this testimony over the testimony of Mr. Sternberg, who the court found to be "unworthy of any credibility." The court's order did not award the watch, an item that the parties agreed was not marital property, and which the court appeared to find was lost, to Ms. Sternberg. There was no error in this regard.

Transfer of Title to Marital Home

Mr. Sternberg argues that the court erred in ordering the transfer of the marital home to Ms. Sternberg without first requiring Ms. Sternberg to obtain a release of the lien on the property from Mr. Sternberg. He asserts that the order, which required him to transfer title but remain on the lien for ninety days following the transfer, "would have triggered the due-on-sale clause" and required "immediate payment in full of the outstanding [home equity line of credit] balance," which neither party had the resources to do. Thus, he contends, compliance with the court's order would have resulted in "foreclosure … and … financial ruin of both parties."

Ms. Sternberg filed a motion to dismiss the appeal on this issue, arguing it was moot because the parties had transferred title to Ms. Sternberg and paid the home equity loan.

Mr. Sternberg, although he agrees that the terms of this portion of the judgment have been satisfied, argues that "there remains in controversy the considerable additional expenses placed on [him] as a result of the improper order."

Maryland Rule 8-602(a)(1) provides that an appeal may be dismissed by this Court if it has become moot. A question is deemed moot "when there is no longer an existing controversy when the case comes before the Court or when there is no longer an effective remedy the Court could grant." *Sister v. Stuckey,* 402 Md. 211, 219-20 (2007). That is the situation here. The issue is moot.

Discovery

Mr. Sternberg argues that the court abused its discretion in

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admitting the testimony of Mr. Stern and Mr. Gearhart, as Ms. Sternberg failed to timely disclose the witnesses, or their reports, pursuant to the scheduling order.

Mr. Sternberg's first contention involves the testimony of Stern regarding Ms. Sternberg's claim of adultery. The facts show that, contrary to Mr. Sternberg's assertion that Stern was "sprung" on him as a "surprise witness'" Mr. Sternberg was, or at least should have been, aware that Stern was a potential witness. Nevertheless, Mr. Sternberg never sought additional information regarding Stern, nor did he seek to depose him. The circuit court did not abuse its discretion in permitting Stern to testify.

Even assuming there was error, Mr. Sternberg has not shown prejudice. Where a party alleged to have committed adultery invokes his or her Fifth Amendment privilege, the court may draw an adverse inference against that party. *Robinson v. Robinson,* 328 Md. 507, 515 (1992). Here, in addition to the inference, the court's opinion makes clear that the court would have found Mr. Sternberg committed adultery even without Stern's testimony.

Mr. Sternberg also argues that the admission of Gearhart's testimony was an abuse of discretion, as Gearhart's report was filed on May 31, 2011, "mere weeks before the beginning of trial, and long after close of discovery."

Ms. Sternberg identified Gearhart, a real property appraiser, as a potential expert witness on December 2, 2010, prior to the close of discovery. In her pretrial statement, Ms. Sternberg again listed Gearhart as a potential witness, and again stated the subject matter on which he would testify. Although his written report was not disclosed until three weeks before trial, we agree with counsel for Ms. Sternberg that, given fluctuations in the real estate market, an appraisal must be made close in time to the trial date.

V.

Separation Under the Same Roof

Finally, and seemingly in an attempt to remove the stigma of a divorce based on adultery rather than on the no-fault ground he sought, Mr. Sternberg suggests that Maryland should "recognize, validate, and adopt the 'separated under the same roof' doctrine as applied by several sister jurisdictions." We decline Mr. Sternberg's invitation.

The court had ample evidence before it to grant Ms. Sternberg an absolute divorce on the ground of adultery, one of the grounds recognized by the General Assembly. *See* FL §7-103. If the General Assembly wishes to modify the statutory grounds for divorce, it will do so. Under the doctrine of separation of powers, our role is to interpret statutory law; "we will not invade the province of the General Assembly and rewrite the law for them." *See, e.g., Stearman v. State Farm Mutual Automobile Ins. Co.,* 381 Md. 436, *454* (2004)."

Slip op. at various pages, citations and footnotes omitted.

*Kristine D. Stevenson v. Christopher M. Stevenson**

CHILD SUPPORT: MODIFICATION: PENDING MOTION TO ALTER OR AMEND

CSA No. No. 1756, September Term, 2011. Unreported. Opinion by Thieme, Raymond G., Jr. (retired, specially assigned), J. Filed January 4, 2013. RecordFax #13-0104-08. Appeal from Baltimore County. Remanded for further proceedings, without affirming or reversing.

Where a motion to alter or amend is filed after the judgment of absolute divorce has been signed and announced but before the judgment is entered on the docket, the trial court must rule on the motion before the judgment can be considered final and appealable.

"This appeal arises out of a divorce action filed in the Circuit Court for Baltimore County on July 18, 2007 by Kristine D. Stevenson, appellant, against Christopher M. Stevenson, appellee.

On June 1, 2009, the court entered a judgment of absolute divorce. More than two years later, on August 15, 2011, the court granted a motion to modify child support filed by appellee. On September 14, 2011, appellant filed a notice of appeal from both the judgment of absolute divorce entered on June 1, 2009 and the August 15, 2011 order modifying child support.

ISSUES PRESENTED

Appellant presents the following questions for our consideration:

I. Did the trial court err in failing to exercise its discretion to determine whether retroactive child support was in the children's best interest prior to denying same?

II. Did the trial court err in entering an order assessing appellee's child support arrears to be zero?

For the reasons set forth more fully below, we shall remand the case to the circuit court for further proceedings.

On May 26, 2009, prior to the filing of a written order or entry of judgment, appellant filed a motion to alter or amend the judgment pursuant to Md. Rule 2-534, requesting the court to amend its judgment for the purpose of ordering payment on appellee's child support arrearages. On June 1, 2009, the court entered a written judgment of absolute divorce, which was consistent with the decision announced orally at the merits hearing. The written order did not address appellee's child support arrearages or appellant's motion to alter or amend.

Appellant does not deny that she received a copy of the order denying her motion to alter or amend. After appellant's counsel had a chance to review the record, she concluded that the order denying the May 26, 2009 motion to alter or amend had never been entered on the docket by the court clerk. Counsel asserted that the order was finally entered on the docket on September 14, 2011. Our review of the record, however, does not reveal any entry on September 14, 2011, or on any other date, pertaining to an order denying appellant's May 26, 2009 motion to alter or amend.

According to appellant, because the final order granting appellee's motion to modify his child support obligation was entered on August 15, 2011, and because the order denying her motion to alter or amend was not filed until September 14, 2011, the notice of appeal she filed on September 14, 2011 was timely. We disagree and explain.

The motion to alter or amend that is the subject of this appeal was filed within ten days after the circuit court's decision was announced orally, but prior to the entry of a written order on the docket. Maryland Rule 2-534, which governs motions to alter or

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amend, provides, in relevant part:

A motion to alter or amend a judgment filed after the announcement of signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

The docket entries show that after the circuit court entered its written order granting judgment of absolute divorce, there was no further action taken to address the pending motion to alter or amend. Certainly, the copy of the order denying appellant's motion to alter or amend that was included by the parties in the record extract appears to have been signed by the trial judge on July 24, 2009, and, although it is stamped with the words "FILED SEP 14, 2011," there is no indication in the docket entries that that order was ever filed with the clerk's office. It is well established in Maryland that when a party timely files a motion pursuant to Rule 2-534, the judgment loses its finality for purposes of appeal. *Pophani v. State Farm Mut. Ins. Co.,* 333 Md. 136, 144 (1994); *Heger v. Heger,* 184 Md. App. 83, 114 (2009); *Stephenson v. Goins,* 99 Md. App. 220, 225 (1993).

Nevertheless, a notice of appeal filed prior to the disposition of a pending motion timely filed under Rule 2-534 is effective, although processing of that appeal must be delayed until the motion is disposed of. *Edsall v. Anne Arundel County,* 332 Md. 502, 506 (1993). The trial court retains jurisdiction to decide the pending motion notwithstanding the filing of the notice of appeal. *Id.*

In the case at hand, there is no indication in the docket entries that the circuit court ruled on appellant's motion to alter or amend. As a result, the judgment of absolute divorce is not yet final. We decline to address, at this time, the propriety of the circuit court's consideration of appellee's motion to modify child support prior to the entry of a final judgment on the issue of child support. Without either affirming or reversing, we remand this case to the circuit court for resolution of appellant's pending motion to alter or amend."

Slip op. at various pages, citations and footnotes omitted.

*Philip Weed v. Carmen Ross F/K/A Carmen Weed**

CUSTODY AND VISITATION: RELOCATION OF PARENT OUT OF STATE: MATERIAL CHANGE IN CIRCUMSTANCES

CSA No. 324, September Term, 2012. Unreported. Opinion by Woodward, J. Filed January 3, 2013. RecordFax #13-0103-06, 14 pages. Appeal from Frederick County. Order converted to *pendente lite*; case remanded for further proceedings.

The lower court erred in granting mother's petition for modification of child custody and access to allow her to relocate out of state with the parties' minor children, without addressing whether there was a material change in circumstances.

Philip Weed ("Father") filed a petition for modification of child custody on April 27, 2011. On May 27, 2011, Carmen Ross ("Mother") filed a counter-complaint seeking a modification of the current child access schedule to enable her to relocate with the children to Georgia. Trial was held on February 1 and 2, 2012. At the conclusion of the trial, the circuit court denied Father's petition and granted Mother's counter-complaint for modification of the child access schedule. On appeal, Father presents questions which we have slightly rephrased:

I. Did the trial court err in granting Mother's motion to relocate to Georgia with the minor children?

II. Did the trial court abuse its discretion regarding the visitation schedule it ordered?

We answer the first question in the affirmative, and thus remand this case for further proceedings. In light of our decision, we need not address the second question.

DISCUSSION

Section 1-201(b) of Maryland's Family Law Article governs custody, visitation, guardianship, and support of a child.

"Once a court has exercised its decretal powers to determine custody and visitation matters, the final judgment is res judicata of the best interest[s] of the minor child as to the conditions then existing, and in order to escape the bar of res judicata, there must be a showing of materially changed conditions." *McMahon v. Piazze,* 162 Md. App. 588, 595 (2005). "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." *Wagner v. Wagner,* 109 Md. App. 1, 28 (1996).

In the instant appeal, Father challenges only the trial court's grant of Mother's motion for modification of the access schedule.

The essence of Father's argument is that no material change in circumstances existed to warrant the circuit court's modification of his access schedule so that Mother could relocate to Georgia with the children. Specifically, Father contends that Mother's desire to relocate to Georgia was not a material change in circumstances, nor was the additional child care expense to be incurred by Mother when her mother and grandmother returned to Georgia. Father also claims that at the time of the February 2012 hearing, Mother's mother and grandmother had not returned to Georgia, despite their plans to do so in Summer 2011, and thus, even if their leaving was a material change in circumstances, "no such change existed at the time of the hearing." Father concludes that Mother's "desire to relocate to Georgia, uprooting the children from a place they are thriving in, just to make things easier on herself is not a material change in circumstances."

Mother fails to respond to Father's argument that no material change in circumstances existed to justify the granting of Mother's motion to adjust his access schedule to permit Mother's relocation to Georgia. At oral argument before this Court, Mother asserted that a sufficient showing of a material change in circumstances had been made.

The problem facing both parties is that in neither its oral opinion nor its written order granting Mother's motion does the trial court address the issue of a material change in circumstances. Nowhere in the opinion or order do the words "material change in circumstances" or their functional equivalent appear.

Our review of the trial court's oral opinion reveals the following findings of fact that could relate to a finding of material change in circumstances: (1) Mother's "monthly expenditures would increase significantly because she will have to provide paid daycare for the minor children;" (2) "if [Mother] remains in Maryland and wishes to

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become a Maryland certified teacher it would require [ ] significantly longer time and training for her to do so;" (3) Mother's "job is going to be affected;" and (4) "the stability that [Mother's] been able to maintain in keeping a home and a roof over the children's head . . . would be significantly affected." In our view, each of these findings lack sufficient detail to determine whether the requirement of "materiality" in the change in circumstances was satisfied. For example, as to the first finding, the trial court does not explain how the significant increase in the cost of childcare would affect Mother's financial well-being, or why Father would not be required, under the child support guidelines, to pay a major portion of the increased cost of child care. *See* F.L. §l2-204(g)(l) ("[A]ctual 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 More importantly, the trial court does not explain how the above factual findings affect the welfare of the minor children. *See Shunk v. Walker,* 87 Md. App. 389,398(1991) (stating that, "[t]o justify a change in custody [or visitation], a change in conditions must have occurred which affects the welfare of the child and not of the parents") (citation omitted).

Nevertheless, we are convinced that the trial court simply did not decide whether a material change in circumstances existed when it granted Mother's motion to modify Father's access schedule. Accordingly, we will remand this case to the circuit court to make such determination. Ordinarily, we would leave to the discretion of the trial court whether to accept additional evidence on remand. However, because we were advised at oral argument that, subsequent to the February 2012 hearing, Mother relocated to Georgia with the children, the trial court will need to receive relevant evidence relating to the events that occurred after the February hearing. Nothing in this opinion should be construed as representing our view on the ultimate outcome of this case on remand.

Finally, if, on remand, the circuit court finds that there has been a material change in circumstances affecting the welfare of the minor children, the court must then determine whether it is in the best interests of the children to order an access schedule for Father that will permit Mother and the children to remain in Georgia. In this regard, the trial court is required to consider the factors set forth in *Montgomery County Department of Social Services v. Sanders,* 38 Md. App. 406 (1978), to make findings of fact where necessary or appropriate, and to analyze such findings and other evidence to determine the best interests of the children. Unfortunately, in the court's oral opinion, no findings of fact were made under the *Sanders* factors."

Slip op. at various pages, citations and footnotes omitted.

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

ALIMONY: MODIFICATION: CALCULATION OF INCOME

CSA No. 0997, September Term, 2011. Unreported. Opinion by Matricciani, J. On Motion for Reconsideration. Filed Jan. 25, 2013. Appeal from Charles County. Reversed, remanded. RecordFax #13-0125-01, 9 pages.

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

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

QUESTIONS PRESENTED

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

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

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

HISTORY

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

DISCUSSION

Appellee's Alleged Voluntary Reduction in Wage Income

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

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

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

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

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Income Sources Imputed to Appellee

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

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

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

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

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

Slip op. at various pages, citations and footnotes omitted.

*John D. Wilkins v. Yolanda E. Person**

DIVORCE: USE AND POSSESSION ORDER: ENFORCEMENT

CSA No. 2111, September Term, 2009. Unreported. Opinion by Wright, J. Filed Jan. 30, 2013. RecordFax #13-0130-05, 18 pages. Appeal from Prince George's County.

The time to appeal a use and possession order, under which the marital home was to be listed for sale after three years and 60 days from the entry of the Judgment of Absolute Divorce, was within 30 days after the entry of that judgment — not five years later, after a motion to enforce the judgment was filed.

"Appellant John D. Wilkins and appellee Yolanda E. Person are self-represented. This appeal arises from the grant of Person's Motion for Modification of Visitation and Determination of Property Matters.

On December 21, 2004, the circuit court granted the parties a judgment of absolute divorce, wherein Wilkins was awarded sole physical and legal custody of the couple's minor child, John D. Wilkins II. The court further ordered that the marital home be sold and the proceeds divided equally between the parties.

Discussion

The December 21, 2004 ruling that [the home] was marital property and that, upon sale, the proceeds shall be equally divided between the parties is not reviewable on this appeal. To reiterate, this is an appeal from the granting of Person's Motion for Modification of Visitation and Determination of Property Matters and not the Judgment of Absolute Divorce of December 21, 2004.

Wilkins argues that the court erred when it issued an order forcing the sale of Wilkins's real estate property and equally divided the proceeds between Wilkins and Person without applying §§8-201, -205 & -210 of the Family Law Article and considering an equitable distribution between the parties as set forth in the Marital Property Act. Citing FL §8-203, Wilkins further argues that Person did not meet time limits "when filing the motion for determining property matters." The three-year use and possession period ordered by the court on December 21, 2004, had been exceeded by almost two years at the time of the July 14, 2009 hearing.

Rather than making a determination of what was marital property and its proper distribution, the July 14, 2009 hearing was an enforcement action, pursuant to FL §8-213, whereby "any order, award, or decree entered" as to property disposition in divorce "may be enforced" under the Maryland Rules. The provisions of the judgment for absolute divorce in pertinent part provided:

> the Plaintiff is granted three (3) years use and possession of [the marital home] accounting from the date of this Order. Within sixty (60) days of the expiration of this period, the property shall be listed for sale with a real estate broker, and upon sale the net proceeds shall be equally divided between the parties, subject to appropriate credits for payments made by the Plaintiff. During the period that Plaintiff resides in the marital home, he shall be responsible for all mortgage payments and costs involved for repairs and/or maintenance of the real property. The parties may, if they should agree, sell the property earlier, and/or negotiate to attempt to have the Plaintiff purchase the Defendant's interest in the property

If Wilkins wanted to appeal the judgment he now attacks, he was required to do so within 30 days of the December 21, 2004 order. Maryland Rule 8-202 requires that the notice of appeal is to be filed within 30 days after entry of judgment or order from which an appeal is taken. *See Wash. Suburban Sanitary Comm'n v. Ross*, 62 Md. App. 418, 423 n. 1 (1985)."

Slip op. at various pages, citations and footnotes omitted.

TOPIC INDEX

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

CASE INDEX

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