MARYLAND Family Law Monthly
THE DAILY RECORD

SUPPLEMENT
March 2013

INDEX
COURT OF SPECIAL APPEALS

Unreported opinions

(Continued on page 2)

INDEX (CONTINUED)

COURT OF SPECIAL APPEALS

Unreported opinions

Cite as 3 MFLM Supp. 3 (2013)

Custody and visitation: relocation of parent out of state: material change in circumstances

Philip Weed

v.

Carmen Ross f/k/a Carmen Weed

No. 324, September Term, 2012

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

Opinion by Woodward, J.

Filed: January 3, 2013. Unreported.

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.

Appellant, Philip Weed ("Father"), filed a petition for modification of child custody in the Circuit Court for Frederick County on April 27, 2011. On May 27, 2011, appellee, Carmen Ross ("Mother"), filed a counter-complaint seeking a modification of the current child access schedule to enable her to relocate with the parties' minor children to the State of Georgia. A two-day trial was held in the circuit court on February 1 and 2, 2012. At the conclusion of the trial, the circuit court denied Father's petition requesting primary physical and legal custody of the parties' minor children and granted Mother's counter-complaint for modification of the child access schedule. On appeal, Father presents two questions for our review, 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?

For the reasons stated herein, we answer the first question in the affirmative, and thus will remand this case to the circuit court for further proceedings. In light of our decision, we need not address the second question raised by Father.

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

BACKGROUND

On November 3, 2009, the circuit court entered a Judgment of Absolute Divorce, granting Mother "sole legal and physical custody" of the parties' minor children, Cali and Cassidy. The Judgment of Absolute Divorce also set forth an access schedule, allowing Father visitation with the children two evenings per week, every other weekend from Friday to Monday, alternating or split holiday periods, and four weeks of summer vacation. Mother and Father subsequently agreed to a Consent Order, entered by the court on April 23, 2010, that provided for joint legal custody of the children, with Mother having the final decision in the event of a stalemate, and altering Mother's sole physical custody to primary physical custody. The Consent Order did not modify the access schedule provided by the November 3, 2009 judgment.

After learning of Mother's intention to relocate to Georgia with the children, Father filed a Petition to Modify Child Custody, Child Support, for Injunctive Relief and for Expedited Hearing in the circuit court on April 27, 2011. Father's petition requested, *inter alia*, that the court enjoin Mother from relocating to Georgia with the children, or in the alternative, grant Father "primary legal and physical custody of the parties' minor children." In response, Mother filed a Counter-Complaint to Modify Custody and Other Relief on May 27, 2011, asserting that it was in the children's best interest to relocate with Mother to Georgia, and that the "access schedule be adjusted accordingly."

During a two-day trial on February 1 and 2, 2012, the circuit court heard witnesses and received evidence pertaining to Father's petition for modification of custody and Mother's counter-complaint for modification of the child access schedule.

Father testified that he was currently employed as an "Arabic linguist," earning an annual salary of $130,000. According to Father, he paid approximately $1,800 per month in alimony and $1,400 per month in child support, and was current on both obligations. Father also testified that he had visitation with the children every Tuesday and Thursday after school and every other weekend from Friday through Monday morning. According to Father, his work schedule was

flexible, allowing for consistent interaction with the children, including volunteering in the children's classrooms on a weekly basis and regularly eating lunch with the children in the school cafeteria.

Mother testified that she currently worked 40 hours per week as a supervisor at Way Station Incorporated, earning $17 per hour. Although Mother worked a standard 40-hour work week, for seven days out of every month, she was required to be "on call" and be available to work 24 hours per day during these periods. Mother testified that her mother and grandmother, who resided in the same house with Mother and the children, provided daycare for the children while she was working. Mother's mother and grandmother had plans to return to Georgia at the end of the 2011-2012 school year. Mother indicated that, upon the return of her mother and grandmother to Georgia, she would be burdened with an increase in "before and after school [daycare that] can be anywhere from 70 to $120 per child."

Mother also testified that, prior to moving to Maryland with Father, she was a certified teacher in Georgia, where she taught for eight years. Mother's teaching certificate expired in 2007. According to Mother, she would be required to take only one six-hour course to reinstate her Georgia teaching certificate, while for her Maryland teaching certificate, she "would need to take more than one class and [ ] would need to take the Praxis, the state exam." Mother testified that, in order for her to complete the required education to obtain her teaching certificate in Maryland, she also would need to change her work to part-time, which would have an adverse effect on her income.

After the divorce, according to Mother, her car was repossessed and the marital home was foreclosed upon. Mother and the children vacated the marital home in April of 2010 and moved into the basement of a friend's residence. In September 2010, after her mother moved to Maryland, Mother was able to successfully rent a duplex, because her mother co-signed the lease agreement. Mother stated that economic factors played a part in her desire to relocate to Georgia; although she did not know of a specific comparison, she claimed that "everything from renting a house to the toothpaste you buy" will be cheaper upon relocation. Mother concluded that, apart from economic motivations, a return to Georgia was desirable, because her family support system was located there and would provide her with a more "seamless [and] consistent" environment in which to rehabilitate.

On February 22, 2012, the circuit court issued an oral opinion from the bench, stating in relevant part:

> Since the parties have been divorced, the marital home, where [Mother] and the minor children were residing after the marriage, [] was finally foreclosed upon. [S]he voluntarily allowed her vehicle that she was using at the time to be repossessed. And I believe [Father] testified that the car that he had at the time of the divorce was repossessed also.
>
> [I]nitially when the parties divorced, [Father] was not compliant with the alimony and child support provisions of the decree. And that resulted in the new consent order modifying the terms of alimony, and decreasing the amount of support, but increasing the length of time alimony was to be paid, and converting the alimony from a modifiable to a non-modifiable alimony.
>
> At the present time [Mother] is now working. She is employed at the Way Station. She has a position, which requires her to be on call on a fairly regular basis. This requires her to have daycare assistance, and that daycare assistance is needed, as needed occasionally on evenings and weekends.
>
> [A]nd the testimony was, and the Court accepts, that providing paid daycare for, to cover those evenings and weekend hours, [ ] would be even more expensive than regular daycare ordinarily would be.
>
> [A]t the present time [Mother's] daycare is provided by her mother and her grandmother who moved from Georgia to reside with her and the children after the divorce of the parties.
>
> [T]he testimony was that, [ ] beginning this summer, [ ] [Mother's] mother and grandmother are planning to return to Georgia since the testimony is they have given up their lives there temporarily to come and assist [Mother] during the transition time. [T]hat means should [Mother] remain here in Maryland, keeping her employment, that, [ ] her monthly expenditures would increase significantly because she will have to provide paid daycare for the minor children.
>
> [T]here was also testimony at the trial that if [Mother] remains in

Maryland and wishes to become a Maryland certified teacher it would require, [ ] significantly longer time and training for her to do so, and at the present time not only is her money limited, but her time is limited since, [ ] with her job and needing to keep her job and taking care of the children. So, it's no surprise that [Mother] would like to return to Georgia, based on all of those factors.

[C]ustody is something that is always something that is subject to modification, but the Court generally favors stability over change. [T]he question is what is meant by stability [and] the cases make it clear that it really just depends on the facts and circumstances that are before the Court.

[I]f I do authorize the move the children will be subject to a new home, new school, new friends, and of most significant concern to the Court, the less consistent personal face to face contact with their father, which has occurred [ ] in the last year.

Stability, however, can also mean in the day to day care of the children getting up in the morning, going to school, and who is the, the primary physical custodian of the children. And in that case it's clearly [Mother], who has, as the primary custodial parent since the separation and divorce of the parties, has managed to raise [the] children, two children who are significantly grounded and well balanced so that, [ ]Dr. Gibian indicated that he really thought that the impact of a move or a stay on the children would not be traumatic one way or the other, because, despite all the contention between the parents, [ ] they've raised two marvelous children who are very well balanced.

If I don't authorize [Mother] to move, she's going to lose her daycare, her job is going to be affected, her finances are going to be [ ] affected. [A]nd the stability that she's been able to maintain in keeping a home and a roof over the children's head, despite the financial catastrophe the parties found themselves in, [ ] would be significantly affected.

Stability with the children is mom, is with mom as the primary caregiver. [T]hey've weathered the storm, [ ]they're doing very well. If I authorize the move, dad would not have the same daily access to the children unless, and until he finds a job in Georgia, which will take some time, would take some time, [ ] but is not impossible. [I] note that as Dr. Gibian testified there would be no major disruption to the children if I authorize the change.

Based on all of those circumstances, and with the best interest of the children being the primary consideration, the stability with mom and mom being the primary caregiver, [ ] to the Court's mind is the most significant factor in this case. And it also is the factor that dad will be able to maintain contact with the children, even if I authorize the move. [T]herefore, based on all of those circumstances, I will authorize mom to return to Georgia, but that would be at the conclusion of the school year. The kids should not be disrupted in the middle of the school year, and I think mom, mom would certainly agree with that.

[I] now need to set up an access schedule that will be appropriate, unless, and until, the time that [Father] is able to locate employment in Georgia, or closer down there.

The trial court's ruling was incorporated into a written order dated March 29, 2012, and entered April 3, 2012. On April 30, 2012, Father noted this timely appeal.

DISCUSSION

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

> (b) Custody, visitation, guardianship, or support of child. — In exercising its jurisdiction over the custody, guardianship, visitation, or support of a child, an equity court may:
>
> (1) direct who shall have the custody or guardianship of a child, pendente lite or permanently;

> (2) determine who shall have visitation rights to a child;
>
> (3) decide who shall be charged with the support of the child, pendente lite or permanently;
>
> (4) from time to time, set aside or modify its decree or order concerning the child; or
>
> (5) issue an injunction to protect a party to the action from physical harm or harassment.

Md. Code (1984, 2006 Repl. Vol.), § 1-201(b) of the Family Law Article ("F.L.").

"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) (citations omitted). When a change of custody or visitation is sought, the burden is on the party seeking modification to show why the court should take such action. *Levitt v. Levitt*, 79 Md. App. 394, 398, *cert. denied*, 316 Md. 549 (1989) (citation omitted). "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 determining whether the change was material we look to whether the changes related to the welfare of the child." *Braun v. Headley*, 131 Md. App. 588, 610, *cert. denied*, 359 Md. 669 (2000).

"Once a sufficient change in circumstances has been established . . . the threshold question has been reached. The question then becomes: whether, based on all the evidence, a change of custody will best accommodate the best interests of the child." *Goldmeier v. Lepselter*, 89 Md. App. 301, 309 (1991).

> The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender.

Mont. Cnty. Dep't of Soc. Servs. v. Sanders, 38 Md. App. 406, 420 (1978) (internal citations omitted).

During the two-day trial before the circuit court on February 1 and 2, 2012, the circuit court considered two motions:[1] (1) Father's motion to modify child custody, seeking primary legal and physical custody of the minor children if Mother relocated to Georgia, and (2) Mother's counter-motion to modify custody, asserting that it was in the children's best interest to relocate with her to Georgia and requesting that the court adjust Father's access schedule accordingly. The court's order, entered on April 3, 2012, granted Mother's motion, denied Father's motion, and specified a new access schedule for Father in order for Mother to relocate to Georgia with the children. 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 the Summer of 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."

In response, Mother "agrees that there was no showing of a material change in circumstances sufficient to change the physical custody of the children to the Father." In particular, Mother states that "[t]he move to Georgia was not a material change in circumstances." Unfortunately for Mother, the circuit court's denial of Father's motion to change physical custody of the children to him in the event of Mother's relocation to Georgia is not being challenged by Father in the instant appeal. Thus the lack of a showing of a material change in circumstances to warrant a change in the physical custody to Father is irrelevant.

Moreover, in her brief, 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 to support the granting of her motion by the trial court.

The problem facing both parties in the instant appeal 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.

Notwithstanding such omission, Mother asserted at oral argument that the trial court had, in effect, made a finding of material change in circumstances sufficient to warrant the granting of her motion. Mother pointed to the trial court's findings regarding the loss of financial support from Mother's mother and grandmother when they returned to Georgia, and the economic necessity of Mother relocating to Georgia. We disagree and shall explain.

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 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. § 12-204(g)(1) ("[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.[3] Of course, 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.[4] "In applying the best interests of the child standard to a custody award or grant of visitation, a court is to consider the factors stated [in *Sanders*] and then make findings of fact in the record stating the particular reasons for its decision." *Boswell v. Boswell*, 352 Md. 204, 223 (1998).

ORDER OF THE CIRCUIT COURT FOR FREDERICK COUNTY DATED MARCH 29, 2012 AND ENTERED APRIL 3, 2012 CONVERTED TO *PENDENTE LITE* ORDER; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.

FOOTNOTES

1. Because there is no substantive distinction between Father's "petition" and Mother's "counter-complaint," we will refer to each pleading as a "motion."

2. Indeed in his brief, Father points to evidence in the record that Mother has sufficient financial resources to pay for childcare, because she receives approximately $6,000 per month in income, alimony, and child support and incurs only modest expenses, including $1,450 per month in housing costs.

3. In light of the relocation of Mother and children to Georgia, we will not vacate the trial court's order granting Mother's motion to modify Father's access schedule, which would

have the effect of requiring Mother and children to return to Maryland pending further proceedings on remand. To prevent this disruption in the lives of the children, we will convert the trial court's order granting Mother's motion to a *pendente lite* order that will remain in effect until the court rules on Mother's motion after the remand hearing directed by this Court.

4. Mother goes to great length in her brief to summarize the evidence adduced at the hearing on each of the *Sanders* factors. Although such effort is commendable, it does not solve the problem of the lack of factual findings by the trial court.

Cite as 3 MFLM Supp. 9 (2013)

Child support: arrearages: enforcement of settlement agreement

Michelle Pindell

v.

Shawn Pindell

No. 699, September Term, 2010

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

Opinion by Berger, J.

Filed: January 3, 2013. Unreported.

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 for Howard County. On May 18, 2010, the circuit court ordered appellant Michelle Pindell ("appellant") to pay appellee Shawn Pindell ("appellee") the sum of $70,000.00 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. This timely appeal followed.

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

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

FACTS AND PROCEEDINGS

On August 20, 2007, the Circuit Court for Howard County awarded appellant sole physical custody, joint

legal custody, and unsupervised visitation of the minor children. The court further ordered appellee to pay child support and expenses related to the children's medical and dental care. On February 4, 2008, the court granted the parties an uncontested absolute divorce. At the uncontested divorce hearing, the parties agreed to divide the proceeds that arose from the sale of the marital home equally. In April 2009, the marital property was sold and the proceeds were placed in an account accessible to both parties.

Thereafter, appellee filed a petition for contempt alleging that appellant transferred $70,000.00 from appellee's personal account without his knowledge or permission. Appellant filed a cross-petition for contempt contending that appellee was not paying child support, was in arrears for several months, and requested a modification of support. On October 9, 2009, both parties appeared before the Circuit Court for Howard County for a contempt hearing. At the contempt hearing, both parties, through the assistance of counsel, reached an agreement on the cross-petitions for contempt. All parties, including counsel, contributed to arriving at the agreement and placed the agreement between the parties on the record.

As part of the agreement, both parties agreed to withdraw their cross-petitions for contempt. The parties further agreed that appellant would pay appellee $70,000.00 minus the amount owed to the appellant for child support arrears and the costs appellant incurred for medical and dental expenses on behalf of the children. Appellant agreed that she would sign a confessed judgment note if she did not qualify for a loan to repay appellee within 30 days. Additionally, the parties agreed to family counseling, and that appellee would have access to the school and medical records of the children. The parties further agreed that appellant would provide appellee with 90 days notice before relocating the children's residence. Before the parties were excused, the court questioned each party as to their understanding of the agreement. Critically, each party stated before the court that they understood the agreement and that they entered the agreement "freely and voluntarily."

Although the parties exchanged financial information after the hearing, they did not submit a consent order to the court for its approval, as instructed by the court. On November 18, 2009, appellant's counsel forwarded a letter to appellee's counsel including a calculation owed to the appellee of $56,470.18, after offsetting the monies owed for child support arrears and health insurance. Appellant's counsel also proposed that the monies owed to appellee be deducted from future child support payments over the next seven years. Appellee contested this proposal because it "was never agreed to at the time of the hearing and was not of record." On December 4, 2009, appellee's counsel sent a letter and a confessed judgment note to appellant, stating that appellant had agreed to execute a confessed judgment note if she were unable to obtain a loan within 30 days from the hearing date.

On December 16, 2009, appellee filed a petition for contempt for appellant's "failure to obtain a loan, her failure to sign a Confessed Judgment Note, her failure to abide by the Order of [the judge], and her attorney's failure to prepare a proper Consent Decree." In opposing the petition for contempt, appellant argued that the "matter should be scheduled for trial as there was not a 'meeting of the minds' when the Agreement was reached." After considering appellee's petition for contempt by a Master, the court denied appellee's petition on March 19, 2010.

On March 24, 2010, appellee filed a motion to enforce settlement on the record. On May 18, 2010, the circuit court granted appellee's motion. This timely appeal followed.

DISCUSSION

I.

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) ("It is now well established that the trial court has power to summarily enforce on motion a settlement agreement entered into by the litigants."). "The ultimate decision, assuming the application of correct principles of law in the balancing process, is a discretionary one with the trial court . . . , we look to see whether the court applied correct legal principles and, if so, whether its ruling constituted a fair exercise of its discretion." *Neustadter v. Holy Cross Hospital*, 418 Md. 231 (2011) (internal citations omitted) (quoting *Edwards v. State*, 350 Md. 433, 441-42 (1998)).

It is well settled that "[a]n abuse of discretion occurs where no reasonable person would take the view adopted by the court or if the court acts without reference to any guiding rules or principles." *Serio v. Baystate Props., LLC*, 203 Md. App. 581, 590 (2012) (internal quotations omitted) (quoting *North v. North*, 102 Md. App. 1, 13 (1994) (in banc)). Appellate courts do not defer to discretionary rulings of the trial judge, however, when the judge has resolved the issue on "unreasonable" or "untenable" grounds. The Court of Appeals has stated, however, that:

> 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) ("The abuse of discretion standard requires a trial judge to use his or her discretion soundly and the record must reflect the exercise of that discretion. Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.") (quoting *Jenkins v. State*, 375 Md. 284, 295-96 (2003)).

Neustadter, supra, 418 Md. at 242 (quoting *Touzeau v. Deffinbaugh,* 394 Md. 654, 669 (2006)).

In exercising discretion, the trial court must apply the correct legal standard in rendering its decision: "[W]here the record so reveals, a failure to consider the proper legal standard in reaching a decision constitutes an abuse of discretion." *Neustadter, supra*, 418 Md. at 242. The abuse of discretion standard of review is premised, at least in part, on the concept that matters within the discretion of the trial court are "much better decided by the trial judges than by appellate courts" and "so long as the Circuit Court applies the proper legal standards and reaches a reasonable conclusion based on the facts before it, an appellate court should not reverse a decision vested in the trial court's discretion merely because the appellate court reaches a different conclusion." *Id*. (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 433, 436 (2007)).

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.

Prior to the parties' respective counsel qualifying appellant and appellee as to their understanding of the agreement through voir dire, the following colloquy ensued:

> [PLAINTIFF COUNSEL]: The equation is 70,000 minus —
>
> THE COURT: Minus.
>
> [PLAINTIFF COUNSEL]: — what he owes for child support arrears, minus the health insurance cost that she has incurred from —
>
> [DEFENSE COUNSEL]: On behalf—
>
> [PLAINTIFF COUNSEL]: — the children.
>
> [DEFENSE COUNSEL]: — of the children.
>
> [PLAINTIFF COUNSEL]: Right.
>
> THE COURT: On behalf of the children.
>
> [PLAINTIFF COUNSEL]: That's the equation.
>
> THE COURT: Okay. Less whatever he can show that he's paid?
>
> [PLAINTIFF COUNSEL]: Correct.
>
> [DEFENSE COUNSEL]: And less what she can show that she paid for the child's — the children's health insurance.
>
> [PLAINTIFF]: Yeah.
>
> THE COURT: Okay. So, that's all a loan.
>
> * * *
>
> [DEFENSE COUNSEL]: It's not a definite figure, Your Honor.
>
> THE COURT: I know that. However, but you've got to put those figures together —
>
> [PLAINTIFF COUNSEL]: Right.
>
> THE COURT: — in order to make your subtractions.
>
> [DEFENSE COUNSEL]: Correct.
>
> [PLAINTIFF COUNSEL]: Right.
>
> * * *
>
> THE COURT: Alright. Now, prepare an order to this effect, send it to [appellee's counsel], and then once it's been agreed, signed by you and you, then send it to [the judge] and she'll send it to me, I'm over — I'm just filling in today and I'll sign that order.

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 $70,000.00 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 parties disputed this amount.

The draft consent order included all of the terms, findings, and recommendations agreed to by the parties at the hearing. In particular, the draft consent order provided that: (1) appellant owes appellee $56,470.18; (2) the child support order is not modified; (3) all child support arrears and medical/dental expenses have been satisfied; (4) appellant shall continue to pay health and dental insurance benefits for the minor children; (5) the parties shall participate in family counseling; (6) appellee shall have access to the school and medical records of the minor children; (7) appellee shall sign the necessary documents for the children to obtain passports; (8) appellant shall give appellee at least 90 days notice if she moves the children's residence; and (9) in the event that appellant seeks employment outside the United States, the parties shall petition the court for a review of the issuance of passports of the minor children. These terms are the exact terms that were discussed and agreed to by the parties at the October 9, 2009 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 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 along side 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. Thereafter, 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 (quoting *Jenkins, supra*, 375 Md. at 295-96). 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. *Id*. Accordingly, the trial court did not abuse its discretion in granting appellee's motion to enforce settlement on the record.

II.

In this case, we do not have a proper record with respect to the remaining issues raised by appellant.[1] In particular, the trial court did not consider whether appellee would be responsible for all court fees, including any and all fees associated with the Circuit Court for Howard County. The record before this court stems solely from the settlement agreement addressed at the October 9, 2009 hearing, which is what we are limited to review in this appeal.

Under Md. Rule 8-131(a), "the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Appellate courts "may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal," but this discretion is rarely exercised because it is preferred that there be a proper record with respect to the challenge, and that the parties and trial judge are given an opportunity to consider and respond to the challenge. *See Kelly v. State*, 195 Md. App. 403,431-32(2010), (quoting *Chaney v. State*, 397 Md. 460,468 (2007)), *cert. denied*, 417 Md. 502, *cert denied*, 131 S. Ct. 2119 (2011). Therefore, the remaining issues (questions 2-9) presented by the appellant are not preserved for appellate review. As such, those issues must be initiated at the trial level.

For the reasons set forth above, we affirm the judgment of the Circuit Court for Howard County.

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

FOOTNOTE

1. Appellee filed a Motion to Stay Proceedings in this Court. Appellee argues that there are pending cross petitions for contempt in the trial court, and therefore, this Court should stay the proceedings. Appellee's motion to stay is denied because this Court must address the enforcement of the settlement agreement before the remaining issues may be addressed by the trial court.

Cite as 3 MFLM Supp. 13 (2013)

Child support: modification: pending motion to alter or amend

Kristine D. Stevenson
v.
Christopher M. Stevenson

No. 1756, September Term, 2011

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

Opinion by Thieme, J.

Filed: January 4, 2013. Unreported.

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 two 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?

Appellee urges us to dismiss the appeal on the ground that it is untimely. For the reasons set forth more fully below, we shall remand the case to the circuit court for further proceedings.

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

BACKGROUND

On July 18, 2007, appellant filed a complaint seeking an absolute divorce from appellee. The parties appeared before a master, who issued a written report and recommendations, to which appellee filed exceptions. The exceptions were overruled and, on February 17, 2009, the circuit court entered a *pendente lite* order awarding sole legal and physical custody of the parties' two children to appellant, ordering child support to be paid by appellee, and ordering appellee to pay a set amount each month toward child support arrearages.

A hearing on the merits of the divorce action was held on May 13 and 14, 2009. At the conclusion of the hearing, the court announced that it would award appellant sole legal and primary physical custody of the children, visitation as agreed by the parties, and child support to be paid by appellee through an earnings withholding order in the amount of $1,287, effective June 1, 2009. The court also announced that it would make a marital property award, deny appellant's request for alimony, and award attorneys fees in favor of appellant. After the judge announced her decision, the following colloquy occurred:

> [Counsel for Appellant]: And then there is an existent, existing arrearage on the child support amount.
>
> THE COURT: No evidence of it was submitted before me. I had a blank here to put it in the Order, but since nobody gave me any evidence about it I have STRICKEN [sic] it out. There is nothing in the record before me at the moment.
>
> [Counsel for Appellant]: Your honor, I believe that there was testimony regarding what happened before Master Gilbert.
>
> THE COURT: All right, standing here what do you think the arrearages are? I heard no testimony about it?
>
> [Counsel for Appellant]: Ms. Stevenson testified that Mr. Stevenson paid her $500.00 from September —

> THE COURT: And was an Earnings Withholding Order in place?
>
> [Counsel for Appellant]: Yes, there is.
>
> THE COURT: Those calculations could have been made. They weren't. I, I don't know what the amount is. Nobody told me what it was. It wasn't added up and there was no testimony. All right. It seems to me that you agree with my recollection of the testimony. There was some testimony about what the amount was. That some payments were received. That you recently got a check. Oh, it wasn't covered, what the arrearage might be. I'm not going to guess.

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.

There is some confusion about what occurred next. Included in the record extract filed in the instant appeal, is a copy of an order denying appellant's motion to alter or amend that is signed by the trial judge and dated July 24, 2009. The order bears a stamp by the clerk of the court, the number "1095" in handwriting, and the words "FILED SEP 14 2011" stamped on the bottom of the page. The order does not appear in the docket entries and is not included, except as an exhibit, in the record that has been provided to us on appeal.[1] Appellant's motion to alter or amend appears in the docket entries, which show that the motion was filed on May 26, 2009, entered on June 12, 2009, and "[d]enied." In the docket entries contained in the record, which appear to have been printed on March 2, 2012, there is a notation that states, "Order signed 7/24/09," and under a column labeled "Closed," the date "9/14/11." In an appendix to his brief, appellee included a copy of the docket entries that appear to have been printed on March 2, 2011. That copy of the docket entries shows that appellant's motion to alter or amend was filed on May 26, 2009, entered on June 12, 2009, and, "Closed" on "7/14/09." Our review of the record has not revealed anything to indicate if or when an order denying appellant's motion to alter or amend was filed.

In various motions filed in this action, appellee argued that both parties were notified of the court's decision to deny the motion to alter or amend. Appellant does not deny that she received a copy of the order denying her motion to alter or amend. Rather, in pleadings filed below, she stated that "[d]ue to the flurry of post-judgment motions filed by [appellee] after the Judgment of Absolute Divorce was issued and entered," it became unclear from the docket entries which orders corresponded to which motions. *See* Appellant's Answer to Appellee's Motion to Dismiss Appeal filed in this Court on December 5, 2011. 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. *Id*. Counsel asserted that the order was finally entered on the docket on September 14, 2011. *Id*. 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.

Subsequent to the merits hearing and the filing of appellant's motion to alter or amend, appellee, on November 10, 2010, filed a motion to modify child support based on a change in his employment.[2] By order entered August 15, 2011, the circuit court granted his motion, ruling as follows:

> **ORDERED** that any and all previous orders regarding child support payable by father to mother are terminated.
>
> **ORDERED** that the father shall pay $824.00 per month to mother for child support effective July 1, 2011 thru [sic] an Earnings Withholding Order.
>
> **ORDERED** that the father owes no arrearage to the mother for child support effective July 1, 2011.

Neither the August 15, 2011 order, nor any other filing listed in the docket entries, indicates a ruling by the court on appellant's May 26, 2009 motion to alter or amend.

DISCUSSION

Appellant contends that because the court's August 15, 2011 order did not set a final amount of child support arrearages, it had the effect of overturning the court's prior determination "that retroactivity was appropriate and in the children's best interests." Appellant further asserts that her motion to alter or amend filed on May 26, 2009 was not denied until it was entered on the docket on September 14, 2011. 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 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. *Popham 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 shall remand this case to the circuit court for resolution of appellant's pending motion to alter or amend.

APPEAL NEITHER AFFIRMED NOR REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO ABIDE THE OUTCOME.

FOOTNOTES

1. The record provided on appeal includes three volumes. Volume I includes handwritten page numbers 1257 to 1274, Volume II includes handwritten page numbers 1276 to 1595, and Volume III includes handwritten page numbers 1596 to 1677.

2. On October 13, 2009, appellant filed a notice of appeal, but that matter was dismissed voluntarily on January 14, 2011.

NO TEXT

Cite as 3 MFLM Supp. 17 (2013)

Divorce: marital property: terms of conveyance

Richard S. Sternberg
v.
Sheryl Sternberg

No. 1612, September Term, 2011

Argued Before: Woodward, Graeff, Sharer, J. Frederick, (Ret'd, Specially Assigned), JJ.

Opinion by Graeff, J.

Filed: January 7, 2013. Unreported.

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, wife/appellee, against Richard S. Sternberg, husband/appellant, in the Circuit Court for Montgomery County. On appeal, Mr. Sternberg raises five challenges to the circuit court's September 26, 2011 judgment of absolute divorce:

1. Did the trial court violate Md. Code (2010 Supp.) § 8-205(A)(2)(iii)(1) of the Family Law Article ("FL") in requiring Mr. Sternberg to transfer title of the couple's marital home to Ms. Sternberg without first obtaining his release from the lien on the property?
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 for 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 in violation of Maryland discovery rules and the Rule of the Case?
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 five months after the close of discovery and mere weeks before trial in violation of the Rule of the Case?
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?"

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

Ms. Sternberg, in addition to responding to the issues on the merits, filed a motion to dismiss the appeal as it relates to the first issue, the order to transfer title to the marital home. She asserts that this issue is now moot because title to the marital home has been transferred to her and the parties otherwise have complied with the circuit court's order in that regard.

For the reasons set forth below, we shall dismiss the appeal as it relates to the issue regarding the marital home. We shall otherwise affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. and Ms. Sternberg were married on August 10, 1984. Three children were born of the marriage: Jennifer, Jonathan, and Justin. Only Justin was a minor at the time of the divorce proceedings. Mr. Sternberg is an attorney, and Ms. Sternberg is a self-employed physical therapist.

On February 22, 2010, Ms. Sternberg filed a complaint for absolute divorce. She alleged that Mr. Sternberg had committed adultery. She also alleged that Justin was in her care and custody, living with her at the marital home located at 9620 Trailridge Terrace in Rockville,[1] and that Mr. Sternberg had removed, without her consent, approximately $527,000 from a home equity line of credit. In addition to an award of

absolute divorce, Ms. Sternberg requested, *inter alia*, custody of Justin, child support, use and possession of the family home, transfer of the jointly titled family home to Ms. Sternberg alone, contributions toward family expenses, and a marital property determination and monetary award adjusting the rights and equities of the parties.

On May 7, 2010, Mr. Sternberg filed an answer and a counter-complaint. In his answer, he denied having committed adultery and demanded "strict proof thereof." In the counter-complaint, he alleged that, in 2002, Ms. Sternberg constructively deserted the marriage by terminating all marital relations with him. He asserted that, on March 31, 2010, he moved into the guest bedroom with the intention of ending the marriage, and since that date, the parties had lived separate and apart for the purpose of ending the marriage. Mr. Sternberg asserted that Justin was in his care and custody, was domiciled with him, and that he had been Justin's principal custodian since 2005. Mr. Sternberg sought a limited divorce on the grounds of constructive desertion and/or a voluntary one year separation. In addition, Mr. Sternberg sought, *inter alia*, joint custody of Justin, use and possession of the family home, contributions toward family expenses, and an equitable division of marital property.[2]

On April 28, 2010, the court issued a scheduling order, which provided that Ms. Sternberg's designation of experts was due by December 2, 2010, Mr. Sternberg's designation of experts was due by December 16, 2010, and discovery was to be completed by December 30, 2010. On December 2, 2010, Ms. Sternberg filed her designation of experts, listing Harold Gearhart, who was "expected to testify regarding the fair market value of the real property located at 9620 Trailridge Terrace." Mr. Sternberg did not file a designation of experts, stating in his Answers to Interrogatories that "[d]ecisions on experts have not yet been made."

On August 17, 2010, a *pendente lite* hearing was held. The parties reached an agreement regarding costs associated with the family home, as well as access and visitation with Justin, during the pendency of the proceedings. At the hearing, Ms. Sternberg testified that she hired Mr. Stern, a detective, and on the basis of Mr. Stern's investigation, she filed for divorce on adultery grounds.[3] In Mr. Sternberg's Answers to Interrogatories, in response to the question: "Have you, since the date of your marriage, committed adultery and/or had sexual relations/contact with any person," Mr. Sternberg responded: "Refuse to answer on the grounds of the Fifth Amendment."

On October 27, 2010, custody issues were resolved by consent agreement of the parties. The parties were to have joint legal custody, with physical custody to Ms. Sternberg.

On December 13, 2010, Mr. Sternberg filed a Motion *in Limine*, requesting that Mr. Gearhart be precluded from testifying. He asserted that, on December 10, 2010, he requested Ms. Sternberg's expert witness reports, and Ms. Sternberg responded: "[W]e have not yet engaged any experts, nor have reports been prepared." Thus, Mr. Sternberg asserted, "it appears that [Ms. Sternberg] made representations about her experts but has not really hired them."

On December 29, 2010, Ms. Sternberg filed an opposition to Mr. Sternberg's Motion *in Limine*. Ms. Sternberg asserted that Mr. Sternberg was on notice of the types of experts she had designated, that Mr. Sternberg had not designated any experts of his own, nor had he noted the depositions of any of Ms. Sternberg's experts. She stated that she had requested Mr. Sternberg's consent to extending the discovery deadline, which would provide Mr. Sternberg with the ability to depose any expert named by Ms. Sternberg, but Mr. Sternberg had refused to consent. Ms. Sternberg observed that the settlement/pretrial hearing was set for January 28, 2011, and that a merits trial had not yet been scheduled in the matter, arguing that Mr. Sternberg was not prejudiced in any way by her "properly designated experts in compliance with the . . . Scheduling Order." Ms. Sternberg also filed a motion to extend the discovery deadline, which Mr. Sternberg opposed. Both the motion to extend the discovery deadline and Mr. Sternberg's Motion *in Limine* were denied.

On January 14, 2011, Mr. Sternberg filed his pretrial statement, in which he stated: "After the close of discovery, [Ms. Sternberg] filed a designation of experts while admitting that the experts have not been consulted and no reports exist. No reports were provided. . . . [Mr. Sternberg] waived experts based on the lack of designation by [Ms. Sternberg], though Mr. Sternberg, as a licensed real estate broker, will be qualified as an expert to value the properties in question." Mr. Sternberg identified himself as a witness "as to valuation of the properties in question," and he stated that expert witnesses would be "named if and when [Ms. Sternberg] identifies and provides reports of expert witnesses [she] has not yet retained."

On January 28, 2011, Ms. Sternberg filed her pretrial statement, in which she again listed Mr. Gearhart as an expert witness, and again indicated that he was "expected to testify regarding the fair market value" of the marital property. She further indicated that she intended to call rebuttal witnesses. On the same date, the merits hearing was scheduled for June 21, 2011.

On May 19, 2011, Ms. Sternberg engaged Mr. Gearhart to perform appraisals of the family home, as

well as another property owned solely by Mr. Sternberg, which was located at 507 Crabb Avenue in Rockville. On May 31, 2011, following the appraisals, Ms. Sternberg supplemented her Answers to Interrogatories and Response to Production of Documents to include Mr. Gearhart's appraisals on both properties.[4] Ms. Sternberg's supplemental answers also designated Mr. Stern, a representative of Prudential Associates, as both a lay and an expert witness having information regarding Mr. Sternberg's adultery.

On June 20-23, 2011, a merits hearing was held. At the hearing, the following was adduced, relevant to this appeal.

Mr. Sternberg testified that he resided at the Crabb Avenue property with Sharon Betty. When asked if he had a sexual relationship with Ms. Betty, Mr. Sternberg "refuse[d] to answer the question on the grounds that it might incriminate" him. He stated that he had "renewed a form of relationship with [Ms. Betty] in the summer of 2009," but he refused, asserting his Fifth Amendment privilege, to answer questions about whether he and Ms. Betty had spent any overnights at a beach house in Delaware or to explain why he had denied committing adultery in his May 7, 2010, answer to the complaint. When asked about an email exchange with his friend, Marshall Walthau, regarding a trip to the beach with Ms. Betty in February 2010, Mr. Sternberg again asserted his Fifth Amendment privilege.

Subsequently, Ms. Sternberg sought to introduce the testimony of Mr. Stern regarding surveillance that he had done of Mr. Sternberg and Ms. Betty. Mr. Sternberg objected to Mr. Stern's testimony, stating that his name was not familiar. Counsel for Ms. Sternberg stated that Mr. Stern was not named in the initial answers to interrogatories due to an oversight, but "out of abundance of caution," they identified him in the supplemental answers to interrogatories as an expert "to testify regarding [Mr. Sternberg's] adultery in relationship with Sharon Betty under surveillance done regarding same." Counsel stated: "We're just going to call him on the adultery. So, I don't need him as an expert, but he was identified at that time." Also, counsel noted that, at the *pendente lite* hearing on August 17, 2010, Ms. Sternberg testified that she had hired a detective, Jared Stern. Finally, counsel asserted that "[t]he only reason I need to call him is because of the Fifth Amendment being asserted at this point," noting that "if Mr. Stern[berg] had simply admitted it, that wouldn't have been an issue to put Mr. Stern on the stand."

The court and counsel then reviewed the transcript of the *pendente lite* hearing. After it was confirmed that Ms. Sternberg had testified that she had hired a detective, and based on his observations, she filed for adultery, counsel for Mr. Sternberg stated: "Nevertheless, we have discovery rules for a good reason."

The court overruled Mr. Sternberg's objection to Mr. Stern's testimony, stating: "Well, it's not like it's a surprise. She's identified him in the pendente lite testimony. And [Ms. Sternberg's counsel] said it was an oversight, and he supplemented his Answers to interrogatories, as frequently happens after the close of discovery." Mr. Stern then testified that, in 2009, he observed Mr. Sternberg and Ms. Betty alone together for two nights at the parties' beach house. He observed Mr. Sternberg and Ms. Betty holding hands and kissing.

Ms. Sternberg also called Mr. Gearhart to testify. Mr. Sternberg again objected to the testimony. Counsel for Ms. Sternberg explained that Mr. Gearhart was designated as an expert on December 2, 2010, pursuant to the discovery deadline, and three weeks earlier, on May31, 2011, "[a]s soon as the report had been completed," Ms. Sternberg supplemented the answers to interrogatories and provided a written report. The following colloquy then ensued:

> THE COURT: Well, okay. So, [Mr. Sternberg] got a report three weeks ago. Did you make a phone call to see if you could take his deposition?
>
> [MR. STERNBERG'S COUNSEL]: No.
>
> THE COURT: And that's because?
>
> [MR. STERNBERG'S COUNSEL]: Close of discovery. And the denial of the extension. So, that's it.
>
> * * *
>
> THE COURT: Well, he's identified before the end of the discovery deadline, a generic version is in the pretrial statement. Report was gotten three weeks ago. I'm going to deny [Mr. Sternberg's] motion to preclude his testimony.

Mr. Gearhart then testified that the marital home had a fair market value of $635,000. He appraised the Crabb Avenue property at $325,000. He described in detail his methods for making those determinations. Mr. Sternberg, although represented by counsel, cross-examined Mr. Gearhart regarding his valuations.

Ms. Sternberg testified that, in May 2010, Mr. Sternberg, without her authorization or knowledge, took $527,076.92 out of a home equity line of credit, secured by a lien against the marital home, and paid off the $117,309.74 mortgage balance on the marital home. The home equity line of credit initially had been opened for the purpose of paying for college expenses

for Jennifer and Jonathan. When the line of credit was opened, Ms. Sternberg thought that it was titled jointly, but she later learned that it was titled solely in Mr. Sternberg's name. Ms. Sternberg testified that Justin had not been to Mr. Sternberg's home, or spent any time with him, since an incident occurred at Mr. Sternberg's home in December 2010. This incident precipitated the filing for, and issuance of, a protective order prohibiting Mr. Sternberg from abusing, threatening to abuse, and/or harassing Ms. Sternberg, Justin, or other family members.

Ms. Sternberg asked the court to transfer title of the marital home to her solely, explaining:

> [I]t's the only home that Justin has ever lived in . . . And Justin, [who suffers from ADHD] . . . knows where everything is. We have things set up in the family room for his homework. We have things he can put his different files in and he has friends in the neighborhood.

She stated that the home provides "some stability" for Justin.

Mr. Sternberg testified that in September 2009 he and Ms. Sternberg decided to "separate within the same home." He stated that he moved out of the marital home in May 2010, the separation was voluntary on the part of both parties, and there had been no cohabitation since that time. Mr. Sternberg lived in the Crabb Avenue property, which he had purchased in April 2010 for $280,000 using funds he obtained from the home equity line of credit. He requested, however, that the court award him the marital home. He asserted that he had been Justin's "predominant, custodial parent from at least 2005 to the present." According to Mr. Sternberg, the marital home was valued at 1.2 million dollars.

On September 26, 2011, the court issued its Judgment of Absolute Divorce and a comprehensive memorandum opinion. In the opinion, before discussing the various legal issues, the court stated that its "findings in this case are significantly based on the issue of credibility." The court explained:

> [T]he [c]ourt finds that [Ms. Sternberg] is far more credible than [Mr. Sternberg] about almost everything. In contrast, [Mr. Sternberg] was many times unworthy of any credibility, despite the fact that he is a practicing attorney. Just some of the examples are:
>
> 1. The parties were before a Domestic Relations Master on August 17, 2010 for a *pendente lite* hearing. At that time, counsel for [Mr. Sternberg] took a hard position that the parties were not yet separated and therefore there were no grounds for *pendente lite* relief. This position was articulated in the pleadings and discussed by the Master in his ruling. [Mr. Sternberg], an attorney and an officer of the Court, remained silent throughout that assertion. His June 23, 2010 Answers to Interrogatories asserted that he was living with his wife and two of his children at the marital home. . . . Yet, at the June 2011 trial, [Mr. Sternberg] testified that the separation date was Memorial Day weekend 2010. Even his adult daughter testified that [Mr. Sternberg] was still living in the marital home as of September 2010 and that she had an argument with him about moving out and he said he wouldn't move.

The court went on to give other examples of inconsistencies with Mr. Sternberg's trial testimony that he moved out of the marital home in May 2010. The court stated:

> This new position was presumably taken so as to give the [c]ourt a non fault ground for divorce as opposed to a finding of adultery. Yet the evidence of adultery was very strong. Despite the state of the evidence, [Mr. Sternberg] insisted on fighting [Ms. Sternberg] at every turn in her effort to establish his adultery. This was all the while he was living with his girlfriend and her family members in a house he bought with proceeds from a home equity line of credit that he accessed without [Ms. Sternberg's] knowledge. [Mr. Sternberg] claimed he was unaware of the existence of a private detective. Yet, [Ms. Sternberg] testified during the August 2010 *pendente lite* hearing that there was a private investigator and gave his name. Incredibly, [Mr. Sternberg] said he didn't recall hearing that.

The court continued:

> In general, [Mr. Sternberg] was overbearing, grandiose and had an excuse or comeback for everything. He was unable to answer a question with a straight answer. It seemed as if [he] made up his testimony as the case went on, always to favor his

position. For example, despite the fact that he was living in another house in Rockville, with his girlfriend and her family members, he requested that he be given the marital home, where his wife lives with Justin, the parties' minor son. Justin has ADHD, doesn't speak to [Mr. Sternberg] and has a protective order as to his father currently in place.

The court next considered the grounds for divorce:

> [Ms. Sternberg] requested an absolute divorce on the grounds of [Mr. Sternberg's] adultery with Sharon Betty. When questioned regarding their relationship, both [Mr. Sternberg] and Ms. Betty invoked their Fifth Amendment rights. Both [Mr. Sternberg] and Ms. Betty testified that they were currently living together and had stayed at the parties' beach house together. Jared Stern, a private detective, testified that he had witnessed Mr. Sternberg and Ms. Betty overnight in the parties' beach home on New Year's Eve 2009 and in January of 2010 and observed kissing and other signs of affection.
>
> * * *
>
> [Mr. Sternberg] requested an absolute divorce on the grounds of a mutual and voluntary one-year separation and asserted that the parties had separated on May 31, 2010. [Ms. Sternberg] and the parties' daughter, Jennifer Sternberg, both testified that [Mr. Sternberg] was still residing in the family home as of August/September of 2010. In June of 2010 [Mr. Sternberg] answered an interrogatory, stating that "I live at 9620 Trailridge Terrace . . . with my wife, Sheryl, my minor child, Justin Ronald, and my adult daughter, Jennifer Lauren."
>
> * * *
>
> At the August 17, 2010 *pendente lite* hearing, [Mr. Sternberg] was present when his attorney argued that he was residing in the family home and [Mr. Sternberg] entered into an agreement to pay certain expenses. When it benefited [sic] his theory of the case, [Mr. Sternberg] took a consistent position that he was residing in the family home. At the merits trial, when it was convenient for him to take the opposite position, he tried to deny the fact that he lived in the marital home until September of 2010. He cannot have it both ways.
>
> [Ms. Sternberg] has proven several ways that [Mr. Sternberg] committed adultery. Given that [Mr. Sternberg] had been living with Ms. Betty since December 1, 2010, it is curious why [he] insisted that [Ms. Sternberg] prove his adultery. Not only has this issue affected his credibility, it also shows the lengths to which he will go to make this litigation more costly and difficult to [Ms. Sternberg].

After determining that Ms. Sternberg had proven Mr. Sternberg's adultery, the court considered the issue of marital property and a monetary award. It determined that title to the marital home, which was owned as tenants by the entireties, should be transferred to Ms. Sternberg pursuant to FL § 8-205(a)(2)(iii), explaining:[5]

> [Ms. Sternberg's] expert, Harold Gearhart, testified the property had a fair market value of $635,000.00. [Mr. Sternberg] testified the property was worth $1200,000.00. However, his exhibits used properties Mr. Gearhart testified were not comparable, in better neighborhoods, etc. The pictures tell it all — the pictures produced by [Mr. Sternberg] show mansions, newer homes built in the heart of Potomac, — not comparable to the Trailridge property. [Mr. Sternberg] also introduced multiple Maryland State Tax Assessments on the property. However . . . a court may not use a tax assessed value to determine the fair market value of real property.
>
> The [c]ourt would characterize Mr. Gearhart as a "salt of the earth" witness. Mr. Gearhart testified that he made his appraisal independently, he developed his appraisals without interference from the husband or wife. His testimony was unshakeable and extremely credible.
>
> The marital home was refinanced several times. As of May 24, 2011, the mortgage owed was $117,309.74. On May 27, 2010, [Mr. Sternberg] paid off the mortgage with proceeds that he

unilaterally withdrew ($527,960.00) from the home equity line of credit. [Mr. Sternberg] created a summary "tracing" his use of funds from the home equity line of credit; however, he provided no backup documentation for the use of $30,000 for repairs/improvements to the property or the monies paid for "Legal Fees, Mortgage and Health Insurance payments, and Utilities per Order." The balance of the home equity line of credit [Mr. Sternberg] had unilaterally withdrawn and used on himself was $529,076.52 as of June 5, 2011. Of the total amounts withdrawn by [Mr. Sternberg], only $70,149.34 remained in [his] SunTrust account. . . .

Pursuant to [FL § 8-205(a)(2)(iii)], this [c]ourt may transfer title to the Trailridge property to [Ms. Sternberg, where [Ms. Sternberg] and the parties' minor child are residing and where the child has lived his entire life. There is no current mortgage on this property; however, there is the home equity loan of $529,076.52.

[Section 8-205(a)(2)(iii)(2)] states that "the court may authorize one party to purchase the interest of the other party in the real property, in accordance with the terms and conditions ordered by the court. . . ." Given the evidence in this case, the [c]ourt will authorize [Ms. Sternberg] to purchase [Mr. Sternberg's] interest in the family home. The [c]ourt will attribute the value of $635,000.00 (less the $117,309), to [Ms. Sternberg] as part of the calculation of marital property in this case. The [c]ourt will require [Mr. Sternberg] to pay off all but $117,309.74 of the home equity loan within 90 days of the [c]ourt's judgment. [Ms. Sternberg] will then assume the balance of the home equity loan and will refinance the property to remove the balance of the home equity loan from the home within 90 days thereafter to relieve [Mr. Sternberg] from any liability on said home.

In determining to award the family home to Ms. Sternberg, the court also considered the factors set forth in FL § 8-205(b),[6] as required, including that Ms. Sternberg had made monetary and non-monetary contributions to the marriage, the parties had been married for 26 years, both parties were in good health, and Mr. Sternberg had misrepresented his income and had significant assets. The court also noted that Mr. Sternberg had used $280,000 of the proceeds from the home equity line of credit on the marital home to purchase a home for himself, i.e., the Crabb Avenue property, which was valued at $325,000, and which he owned free and clear of a mortgage, that Mr. Sternberg owned a 20% interest in a holding company that owned property in Delaware, that Mr. Sternberg had $850,773 in retirement accounts, as well as more than $100,000 in other accounts titled in his name, and that he had dissipated $60,010 from the home equity line of credit. Furthermore, the court stated: "Since September of 2009, when [Mr. Sternberg] wanted the marriage to end, [he] was engaged in systematic efforts to financially hurt [Ms. Sternberg]. He announced his goal and attempted to make good on his threats." Based on Mr. Sternberg's tactics, the court found that "the equitable thing to do is to maintain [Ms. Sternberg's] and Justin's stability."

The court concluded:

> This did not have to be a complicated case. [Mr. Sternberg] was clearly committing adultery; he was living with his paramour for over 6 months before trial. The parties have significant retirement assets and two houses. They lived a very comfortable lifestyle before the blow-up of the marriage. They had a home . . . with significant equity. They have one minor child who is 16 years of age. [Ms. Sternberg] is not asking for alimony. This case could and should have settled without the need for a trial. Instead, [Mr. Sternberg] chose to utilize the most aggressive of efforts to make it extraordinarily difficult for [Ms. Sternberg] to obtain a divorce and obtain some sort of financial security.

The court's Judgment of Absolute Divorce provided in accordance with the foregoing, and it additionally provided: "[W]ith the exception of the two crystal candlesticks, all tangible personal property and household chattels presently located at [Trailridge Terrace] shall be remain the sole exclusive property of [Ms. Sternberg]."

DISCUSSION

I.
Standard of Review

Maryland Rule 8-131(c) provides:

> When an action has been tried without a jury, the appellate court will

> review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Md. Rule 8-131(c). "An appellate court should not substitute its judgment for that of the trial court on its findings of fact, but will only determine whether those findings are clearly erroneous in light of the total evidence." *Maryland Envt'l Trust v. Gaynor*, 140 Md. App. 433, 440 (2001), *rev'd on other grounds*, 370 Md. 89 (2002). *Accord Cannon v. Cannon*, 156 Md. App. 387, 404 (2004), *aff'd on other grounds*, 384 Md. 537 (2005) ("[I]f there is any competent, material evidence to support the factual findings below, we cannot hold those findings to be clearly erroneous.") (citation omitted). Where an order of the circuit court involves an interpretation of law, however, the appellate court "must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006).

II.
Distribution of Property

Mr. Sternberg's first contention involves a Lord Elgin pocket watch. At trial, Mr. Sternberg testified that the pocket watch, worth $5,000, was given to him by his grandfather. He asserted that the watch "was removed from [his] side table" by Ms. Sternberg.

Ms. Sternberg testified that, although she was familiar with Mr. Sternberg's Lord Elgin pocket watch, and she was aware that he had owned it during the marriage, she denied having "done anything" with the watch. She testified that she did not have the watch, and it was not located in the martial home.

Mr. Sternberg contends that the court erred in failing to award him the watch, an item of non-marital property. He asserts that the court made no finding as to the location of the watch and effectively awarded it to Ms. Sternberg under a "catch all" provision, which awarded Ms. Sternberg all of the tangible property remaining in the marital home. He requests that this Court vacate the court's "catch all" provision and remand the matter with "instructions to grant him possession of" the watch.

Ms. Sternberg contends that "the trial court did not err in refusing to order distribution of property not in existence at the time of the merits trial." She disputes the argument that the court's order granted her ownership of the watch, stating that Mr. Sternberg's argument "ignores that the testimony and evidence at trial did not establish that the watch existed at the time of the divorce merits trial, much less that it was located in the family home." She asserts that Mr. Sternberg relies on his own unsubstantiated allegation that Ms. Sternberg removed the watch and ignores Ms. Sternberg's "directly contradictory" testimony.

Initially, we note that it was undisputed below that the watch was non-marital property because it was a gift to Mr. Sternberg. The only dispute below 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." Mr. Sternberg's assertion that the court "de facto awarded [Ms. Sternberg] ownership of the watch," is without merit. 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.[7] There was no error in this regard.

III.
Transfer of Title to Marital Home

Mr. Sternberg next argues that the court erred in ordering the transfer of title 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, if he complied with the court's order, which required him to transfer title to Ms. Sternberg but then remain on the lien for a minimum of ninety-days following the title transfer, it "would have triggered the due-on-sale clause of the loan on the marital home" 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 the "house . . . enter[ing] foreclosure . . . and . . . the financial ruin of both parties."

Ms. Sternberg argues in her brief that the court's order was proper. Subsequently, however, she filed a motion to dismiss the appeal on this issue, arguing that it was moot because the parties had transferred title to the Trailridge Terrace residence to Ms. Sternberg and paid the home equity loan.[8] Because the parties had complied with the terms of the judgment, Ms. Sternberg asserts, appeal of this portion of the judgment is moot.

Mr. Sternberg disagrees, arguing that we should deny Ms. Sternberg's motion. Although he agrees that the terms of this portion of the judgment have been satisfied, he argues that "there remains in controversy the considerable additional expenses placed on [him] as a result of the improper order." Mr. Sternberg contends that the erroneous order "began a chain of events that has culminated in" Mr. Sternberg assuming additional attorney's fees and interest payments.

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. Because the parties have complied with the court's order regarding the transfer of the marital home, the issue is moot, and we will dismiss the appeal as to this issue.

IV.
Discovery Violation

The scheduling order in this case provided that Ms. Sternberg designate her experts by December 2, 2010, and that discovery be completed by December 30, 2010. Mr. Sternberg argues that the court abused its discretion in 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. According to Mr. Sternberg, he suffered significant prejudice as a result of the admission of the witnesses' testimony.

Ms. Sternberg contends that the court did not abuse its discretion in admitting the testimony of these witnesses. With regard to Mr. Stern, she argues that his lay testimony properly was offered as rebuttal testimony after Mr. Sternberg invoked his Fifth Amendment privilege regarding his relationship with Ms. Betty. With regard to Mr. Gearhart, Ms. Sternberg contends that she properly designated him as an expert prior to the close of discovery, and provided his appraisal report prior to trial, but Mr. Sternberg never attempted to depose Mr. Gearhart.

A.
Scheduling Orders

Maryland Rule 2-504(a) requires that the circuit court enter a scheduling order in every civil case. The scheduling order shall specify, among other things, the date by which the litigants must identify any expert witnesses who will testify at trial and the deadline for the completion of discovery. Md. Rule 2-504(b)(1)(A)-(H). "The purpose of the rule is two-fold: to maximize judicial efficiency and minimize judicial inefficiency." *Naughton v. Bankier*, 114 Md. App. 641, 653 (1997). A scheduling order does not "enlarge or constrict the scope of discovery," but rather, it sets "time limits on certain discovery events." *Rodriguez v. Clarke*, 400 Md. 39, 60 (2007).

In *Livingstone v. Greater Washington Anesthesiology & Pain Consultants*, 187 Md. App. 346 (2009), this Court stated:

> In looking at the propriety of a sanction for a violation of a scheduling order, the reasons given for noncompliance, and the need for an exemption from the time deadlines imposed, are significant. In *Maddox v. Stone*, this Court stated: "[W]hile absolute compliance with scheduling orders is not always feasible from a practical standpoint, we think it quite reasonable for Maryland courts to demand at least substantial compliance, or, at the barest minimum, a good faith and earnest effort toward compliance." 174 Md. App. 489, 499 (2007) (quoting *Naughton*, 114 Md. App. at 653). A party's "good faith substantial compliance with a scheduling order is ordinarily sufficient to forestay" the exclusion of "a key witness because of a party's failure to meet the deadlines in its scheduling order." *Id*. at 501. Ultimately, however, "the appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court." *Id*. (quoting *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 545 (2000)).

Id. at 388.

B.
Jared Stern

Mr. Sternberg's first contention involves the testimony of Mr. Stern regarding Ms. Sternberg's claim of adultery. We note that from the commencement of the proceedings in this case in 2010, Mr. Sternberg was on notice that an allegation of adultery had been plead. Mr. Sternberg denied Ms. Sternberg's allegation of adultery and demanded strict proof thereof. Mr. Sternberg first asserted his Fifth Amendment privilege regarding allegations of adultery in his Answers to Interrogatories.

On May 31, 2011, prior to trial, Ms. Sternberg supplemented her Answers to Interrogatories to include Mr. Stern, a representative of Prudential Associates, as both a lay and an expert witness having information regarding Mr. Sternberg's adultery. At trial, after Mr. Sternberg admitted living with Ms. Betty but asserted his Fifth Amendment privilege when he was questioned as to the nature of their relationship, Ms. Sternberg sought to introduce Mr. Stern's testimony regarding observations he made during surveillance of Mr. Sternberg and Ms. Betty. After Mr. Sternberg objected, asserting a discovery violation, Ms. Sternberg's counsel indicated to the court that the initial failure to designate Mr. Stern in the Answers to Interrogatories was due to an oversight, but he had

been identified three weeks earlier in supplemented answers and Ms. Sternberg had testified at the August 17, 2010, *pendente lite* hearing that she had hired Mr. Stern to conduct surveillance and investigate Mr. Sternberg's adulterous relationship.

These facts show that, contrary to Mr. Sternberg's assertion that Mr. Stern was "sprung" on him as a "'surprise witness' . . . giving [Ms. Sternberg] a significant advantage," Mr. Sternberg was, or at least should have been, aware that Mr. Stern was a potential witness in the case. Nevertheless, Mr. Sternberg never sought additional information regarding Mr. Stern, nor did he seek to depose him. Under these circumstances, the circuit court did not abuse its discretion in permitting Mr. Stern to testify.

Moreover, even assuming there was error, Mr. Sternberg has not shown prejudice. *See Crane v. Dunn*, 382 Md. 83, 92 (2004) ("To justify . . . reversal, an error below must have been both manifestly wrong and substantially injurious."). 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 to be drawn from Mr. Sternberg's invocation of his Fifth Amendment privilege, the evidence showed that Mr. Sternberg and Ms. Betty had been living together. And the court's opinion, which stated that the evidence of adultery was "very strong" and proven in "several ways," makes clear that the court would have found that Mr. Sternberg committed adultery even without Mr. Stern's testimony. Thus, even if the admission of Mr. Stern's testimony was error, Mr. Sternberg cannot demonstrate prejudice from the admission of this evidence.

C.
Harold Gearhart

Mr. Sternberg also argues that the admission of Mr. Gearhart's testimony was an abuse of discretion, as Mr. Gearhart's report was filed on May 31, 2011, "mere weeks before the beginning of trial, and long after close of discovery." According to Mr. Sternberg, for "this Court to condone such ambush tactics would be to send the message to future litigants that a reasonable trial strategy is to keep expert testimony a secret until such time as grave prejudice and burden has inevitably developed as a result of your eventual revelation of the information you were required to provide months ago." Ms. Sternberg replies that the trial court did not abuse its discretion, as Mr. Gearhart had been properly designated in discovery and his report produced in advance of trial.

The Court of Appeals has stated that sanctions for discovery violations "rarely come into play . . . when parties put forth good faith efforts to obtain and provide access to information needed to proceed to trial." *Rodriguez*, 400 Md. at 57. Here, Ms. Sternberg made good faith efforts to provide information.

As Ms. Sternberg notes, she identified Mr. Gearhart, a real property appraiser, as a potential expert witness on December 2, 2010, prior to the close of discovery, stating that he

> is expected to testify regarding the fair market value of the real property located at 9620 Trailridge Terrace . . . Mr. Gearhart may also testify regarding trends in the real estate market in Rockville, Maryland. Mr. Gearhart's testimony will be based upon the documents provided, relevant research, experience and his knowledge in the real estate market in the relevant geographic location. Mr. Gearhart's testimony may include rebuttal of the opinion of any expert called by [Mr. Sternberg].

In her pretrial statement, Ms. Sternberg again listed Mr. Gearhart as a potential witness, and she 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 the observation by counsel for Ms. Sternberg in oral argument, that, given fluctuations in the real estate market, an appraisal must be made close in time to the trial date. On May 31, 2011, shortly after Mr. Gearhart's appraisal report was prepared, Ms. Sternberg produced it and supplemented her Answers to Interrogatories. Ms. Sternberg put forth good faith efforts to provide access to the relevant information.[9] Under these circumstances, we hold that the court properly exercised its discretion not to impose the sanction of exclusion of the testimony.

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 for divorce 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).

APPELLEE'S MOTION TO DISMISS THE APPEAL WITH RESPECT TO THE MARITAL HOME LOCATED AT 9620 TRAILRIDGE TERRACE GRANTED. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. The record in some places indicates that the home is located in Rockville and in other places in Potomac. The distinction does not affect the outcome of the appeal.

2. On June 13, 2011, Mr. Sternberg amended his complaint to seek an absolute divorce on the ground of mutual and voluntary one-year separation.

3. We were not provided with, and could not locate in the record, a transcript of the *pendente lite* hearing. During trial, however, and as discussed, *infra,* Mr. Sternberg's counsel agreed that this occurred.

4. According to Ms. Sternberg, Mr. Sternberg produced his expert appraisals for the family home and the Crabb Avenue property, which he had prepared himself, on the weekend before trial.

5. We will omit the court's references to exhibit numbers in our quotation.

6 .That section provides:

> The court shall determine the . . . terms of the transfer of the interest in property . . . after considering each of the following factors:
>
> (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
>
> (2) the value of all property interests of each party;
>
> (3) the economic circumstances of each party at the time the award is to be made;
>
> (4) the circumstances that contributed to the estrangement of the parties;
>
> (5) the duration of the marriage;
>
> (6) the age of each party;
>
> (7) the physical and mental condition of each party;
>
> (8) how and when specific marital property or interest in property [i.e., in a pension, retirement, profit sharing, or deferred compensation plan, or family use personal property] was acquired, including the effort expended by each party in accumulating the marital property or the interest in [such property], or both;
>
> (9) the contribution by either party of [nonmarital property] to the acquisition of real property held by the parties as tenants by the entirety;
>
> (10) any award of alimony and any award or other provision the court has made with respect to family use personal property or the family home; and
>
> (11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

7. Indeed, counsel for Ms. Sternberg stipulated at oral argument on appeal that, if the watch was found, she would give it to Mr. Sternberg.

8. Ms. Sternberg paid approximately $118,729.94 and Mr. Sternberg paid approximately $253,065.78.

9. We note that Mr. Sternberg's appraisal was not completed until **after** Ms. Sternberg's appraisal. In fact, according to the parties, it was not disclosed until the weekend before trial.

Cite as 3 MFLM Supp. 27 (2013)

Divorce: monetary award: stale valuation data

John Philip Muth

v.

Jean Muth

No. 2021, September Term, 2011

Argued Before: Kehoe, Berger, Rubin, Ronald B., (Ret'd, Specially Assigned), JJ.

Opinion by Berger, J.

Filed: January 7, 2013. Unreported.

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.

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

This case arises from an Order of the Circuit Court for Howard County granting a monetary award, child support, and indefinite alimony to appellee, Jean Muth ("Wife"). Appellant, John Philip Muth ("Husband"), 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. This timely appeal followed.

On appeal, Husband presents two questions for our review, 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.

For the reasons set forth below, we vacate the judgment of the Circuit Court for Howard County and remand for further proceedings not inconsistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Husband and Wife were married on May 31, 1987. Husband graduated from the University of Maryland with a bachelor of science degree. Wife attended the University of Maryland and majored in general studies. She left school approximately 30 credits short of receiving her degree.

Wife began her career in 1985 working for ConAgra in Washington, D.C. She was a regulatory affairs administrator, and worked for the company for 10 years. She left ConAgra in 1994 after the couple's first child was born. Her salary at the time was $40,000 per year.

Husband began his career by working in the restaurant business in various capacities, including a cook, waiter, and restaurant manager. In 1989, Husband started his own company called Sunbelt

Produce Company. While starting his business, Husband continued to work at restaurants in the evenings. Husband would get up at 2:00 a.m. in order to buy produce at the markets. He would then deliver produce to restaurants in the morning, and go out and solicit new business in the afternoon. In 1991 or 1992, Husband merged his company with another company. The new entity was called Coastal Sunbelt (hereinafter "Sunbelt").

The parties had four children together between 1994 through 1999. In the meantime, Sunbelt grew from $5 million in annual sales in 1994 to approximately $95 million in sales in October 2006. The couple enjoyed a lavish lifestyle. They hired a nanny and a maid service, went on multiple vacations per year, dined at expensive restaurants, and sent their children to private school. The parties also purchased numerous expensive vehicles, several boats, One RV, and expensive clothes for themselves and the minor children. In 1998, the couple purchased a home on a 14 acre property, which was valued at $960,000 at the time of divorce.

In October 2006, Husband and his business partner sold Sunbelt for $22 million. Husband received $11 million gross from the sale, which amounted to $9 million after taxes. As part of the sale, Husband was bound by a non-compete agreement for the duration of five years. Husband was primarily in charge of the family's finances, and he used the proceeds from the sale of Sunbelt for various investments, including the purchase of real estate and 454 ounces of gold. He further invested $1,000,000 in a joint account with Ameritrade. In addition, Husband paid off various debts, including the mortgage on the marital home in the amount of $367,250.00. Part of the sale proceeds were donated to charity.

Most of the real estate purchased with the proceeds from the sale of Sunbelt was placed into an entity titled Muth Family, LLC (hereinafter "the LLC"). The LLC was comprised solely of real property, and did not have any liquid assets. The assets included a property with a house located next to the marital home property, a 150-acre farm, and five other lots, with a total value of $3,125,000 at the time of trial.

Husband also made investments in various start-up companies. He invested $25,000 in an entity called "Eggspectations" in 2003 or 2004, as well as $25,000 in Pinnacle Healthcare in 2004, and $50,000 in a company known as Collective X.[2] In 2007, Husband began an Internet start-up company called Paid Interviews, in which he invested $500,000 in capital contributions.

According to Wife, after the sale of Sunbelt, Husband was "able to spend more time at home, [and] the parties' marital difficulties became more acute." The parties separated and reconciled during the summer of 2008, and again separated in February or March 2009. In April 2009, Husband filed a complaint for divorce. Wife filed a counter complaint requesting alimony and a monetary award. In July 2010, the parties entered into a custody agreement, which specified that the parties would equally share joint legal and physical custody.[3]

Trial commenced on December 27, 2010. At the time of trial, both parties were forty-seven years old, and both were in good health. Wife was living in the marital home and Husband was living next door at a property owned by the LLC. Neither party was earning any income. Wife had not worked since 1994, and testified at trial that she planned to go back to school to receive a nursing degree. Husband had not been employed since 2006. Wife called an expert witness at trial who was hired to perform a vocational assessment on Husband. The expert testified that he believed Husband could earn between $99,000 to $172,000 by working as a high-level executive in a company, or that he could be a marketing manager and earn a median income of $103,600 per year, or a sales manager and cam a median income of $99,700.

At trial, the parties disagreed over the value of numerous items. The parties also disputed whether the parties' gold constituted marital or non-marital property. After the separation, Husband had given Wife 264 ounces of gold, and be retained 190 ounces of gold. At the time of trial, Husband had $7,000 in gold remaining in his possession, and Wife had $91,000 worth of gold. Husband testified that he had used the gold in his possession to pay for various expenses, including the children's tuition, family health insurance, LLC expenses, and the interest on a credit card advance taken by Wife post-separation. The trial court determined that the gold constituted marital property, and ordered that each party keep the amount of gold in his or her possession at the time of trial.

The trial court ultimately granted Wife's request for a monetary award. In determining the award, the court made findings of fact regarding the values of all marital property. In particular, the court determined that Husband had access to approximately $168,000 in cash, and Wife had access to approximately $500,000 in cash. The court further determined that Husband held $3,297,221 in marital property, and Wife held $2,671,787 in marital property. Additionally, the trial court assessed "penalties" against each party for various acts, including a post-separation cash advance taken by Wife on a credit card, and Husband's transfer of marital assets to fund various expenses of the LLC. The court then ordered various transfers of property to effectuate the grant of the monetary award.

The trial court next considered the issue of child support. The court found that by selling his business

and not working, Husband had voluntarily impoverished himself. The court further found that Husband had the ability to earn $103,600 per year, and assigned him a child support obligation of $2,061 per month. The court ordered that child support be retroactive to July 1, 2009.

Finally, regarding alimony, the trial court found that Wife had not voluntarily impoverished herself by not working. The trial judge found that Wife's testimony regarding her desire to go to nursing school was not credible, and that she, therefore, "failed to present sufficient evidence to support a rehabilitative alimony award." The trial court then determined that Wife was entitled to indefinite alimony in the amount of $1,700 per month because she had no capacity to ever become fully self-supporting. The amount of the award constituted "the very basic needs that are necessary for Wife's shelter, health and chance of success." Husband noted a timely appeal on November 18, 2011.

MOTION TO STRIKE

As an initial matter, we address a motion filed by Husband to strike the statement of facts contained in Wife's brief. In support of this motion, Husband identifies 18 alleged misstatements that are unsupported or contradicted by the record. We deny the motion because many of the misstatements are not material to our holding. As to the material misstatements, we adopt only the facts that are supported by the record. Nevertheless, there are several statements of fact identified in Wife's brief that we expressly reject.

First, Wife alleges that "Husband would loan marital funds in the LLC account *and would use LLC monies to pay his own expenses account"* (emphasis added). It is noteworthy that the record extract pages cited in Wife's brief and Wife's reply to the motion to strike do not support this contention. There is no testimony showing that Husband used LLC monies for his own personal benefit. The court did make a general finding that Husband had benefits available to him from the LLC that were not available to Wife, but this was based upon the court's misunderstanding of Husband's role as managing member of the LLC. There is no evidence in the record of any LLC funds being used to pay Husband's personal expenses.

Second, Wife states in her brief that Husband testified that he unilaterally gave himself a salary from the LLC. The record extract pages cited by Wife indicate only that a letter was introduced as evidence in which Husband notified Wife of an *intention* to take a salary from the LLC. Husband asserts in his motion that he never took a salary from the LLC. Based upon the citations submitted by the parties, there is no testimony demonstrating that Husband actually took a salary from the LLC, and we decline to comb through the more than 3,000 pages of the record extract to determine whether there is any testimony to the contrary.

Third, Wife's brief notes that Husband lived on a farm owned by the LLC, yet refused to pay rent to the LLC. The record demonstrates that Husband lived on a different property owned by the LLC and did ultimately pay rent. Wife does not dispute these facts in her reply to Husband's motion.

Fourth, Wife asserts that the value of Paid Interviews was determined based upon "Wife's credible assertions as to the values of Paid Interviews (which was corroborated by Husband's own financial statement of the company) . . ." The record shows that a balance sheet, not a financial statement, was introduced as evidence at trial. Wife did not testify as an expert witness at trial regarding the value of Paid Interviews. Rather, the trial court determined the value of Paid Interviews based upon the assets listed on the company's balance sheet.

Fifth, Wife indicates in her brief that "Wife's assumption that Husband would recklessly spend the marital assets to her detriment were not unfounded . . ." Wife does not cite to the record to support this contention. To the extent that this fact is material to our holding regarding Husband's transfer of funds to the LLC, the trial judge made clear that this transfer of funds was not reckless.

DISCUSSION

I. Monetary Award

"The function [of a monetary award] is to provide a means for the adjustment of inequities that may result from distribution of certain property in accordance with the dictates of title." *Alston v. Alston*, 331 Md. 496, 506 (1993) (citation omitted). We have recognized that a trial judge has "all the discretion and flexibility he needs to reach a truly equitable outcome . . . . Although an equal division of the marital property is not required, the division must nevertheless be fair and equitable. To do otherwise is an abuse of discretion." *Long v. Long*, 129 Md. App. 554, 579 (2000).

Before a court grants a monetary award it must follow a three step process:

> (I) if an equitable adjustment over and above the distribution of the spouse's property in accordance with its title is an issue, the court shall determine which property is marital property; (2) the court shall then determine the value of all marital property; and finally, (3) the court may make a monetary award as an adjustment of the parties' equities and rights concerning marital

property, whether or not alimony is awarded.

Hollander v. Hollander, 89 Md. App. 156, 162 (1991) (internal citations and quotations omitted). After completing this analysis, "[i]f an award is deemed appropriate, the court then must consider each of the factors enumerated in section 8-205." *Id*. (citing *Harper v. Harper*, 294 Md. 54, 79 (1982)). Those factors include:

> (1) the contributions, monetary and non-monetary, of each party to the well-being of the family;
>
> (2) the value of all property interests of each party;
>
> (3) the economic circumstances of each party at the time the award is to be made;
>
> (4) the circumstances that contributed to the estrangement of the parties;
>
> (5) the duration of the marriage;
>
> (6) the age of each party;
>
> (7) the physical and mental condition of each party;
>
> (8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;
>
> (9) the conthbution by either party of property described in § 8-201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;
>
> (10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and
>
> (11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

Md. Code Ann., Fam. Law § 8-205(b) (LexisNexis 2012) ("FL").

A. Standard of Review

We review a circuit court's decision to grant a monetary award under an abuse of discretion standard. *Gallagher v. Gallagher*, 118 Md. App. 567, 576(1997). A trial court's "decision whether to grant a monetary award is generally within the sound discretion of the trial court. Nevertheless, even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards." *Id*. "[A]n exercise of discretion based on an error of law is an abuse of discretion." *Brockington v. Grimstead*, 176 Md. App. 327, 359 (2007).

A trial court's factual findings will not be reversed unless they are clearly erroneous. *Noffsinger v. Noffsinger*, 95 Md. App. 265, 285 (1993); Md. Rule 8-131(c). If there is any competent evidence to support the factual findings, those findings cannot be held to be clearly erroneous. *Fantasy Valley Resort, Inc. v. Gaylord Fuel Corp.*, 92 Md. App. 267, 275 (1992).

B. Valuation of Investment Assets

Husband first argues that the trial court abused its discretion because the monetary award was based on erroneous findings of fact. In particular, 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. Wife contends that the trial court's findings were not erroneous because the trial court was entitled to adopt the values identified by Wife and to reject Husband's valuations. 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). "Under Maryland law, value means fair market value . . . which is defined as 'the amount at which property would change hands between a willing buyer and a willing seller. . . .'" *Rosenberg v. Rosenberg*, 64 Md. App. 487, 526 (1985) (internal citations omitted). 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. *Fox v. Fox*, 85 Md. App. 448 (1991). 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. *Id.* 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." *Id.*

In particular, regarding the company at issue in *Fox*, we explained:

> Five expert witnesses testified as to the value of the company; two of them testified as to the value of the real estate owned by [the company] . . . Three experts testified as to the value of the other tangible assets as well as the goodwill of [the company].
>
> * * *
>
> Mr. Capron, called as a witness by [the wife], qualified as an expert. He appraised the tangible and intangible assets of the corporation and, with but one exception relative to real estate, the chancellor accepted Mr. Capron's opinion. The witness explained in detail how he arrived at his opinion with respect to each asset. We do not find his ratiocination or his ultimate opinion based thereon totally devoid of reason or logic.

Id. at 457-460.

By contrast, regarding other investment assets at issue in *Fox*, the husband testified that he was unable to provide current financial information regarding profit sharing and retirement plans because the "values would not be updated until the end of the current fiscal year." *Id.* at 460. Thus, the trial court determined fair market value based on financial data from the previous year. Id. We observed that "equity requires that reasonable efforts be made to ensure that valuations of marital property approximate the date of judgment of divorce . . ." *Id.* at 460 (citation omitted). Further, we pointed out that "the court may reserve in the decree an additional 90 days to determine value." *Id.* at 461 (citation omitted). Accordingly, we held that "since the only information available to the court at the time of trial was obviously too stale to permit a proper evaluation, the court should have either permitted the taking of [the husband's] deposition or reserved disposition of the matter a little longer [until updated financial data could be obtained]." *Id.* Accordingly, in *Fox*, we remanded the case in order for the trial court to "redetermine the values of those [assets in question] as of the date of the divorce, or as close thereto as may reasonably be ascertained." *Id.*

In this case, Husband invested $25,000 in Eggspectations in 2003 or 2004; $25,000 in Pinnacle Healthcare in 2004; and $50,000 in Collective X.[4] Additionally, in 2007, Husband began the Internet start-up company called Paid Interviews, in which he invested $500,000 in capital contributions. At trial, Husband and Wife submitted a joint financial statement asserting values for these investment assets. Wife listed the fair market values of Eggspectations and Pinnacle Health as $25,000 each; Husband listed these values as "unknown." Wife and Husband listed the values of Collective X as $50,000 and $0, respectively. Finally, Wife listed the value of Paid Interviews as $500,000; Husband listed this value as $0.

At the trial, Wife asserted that the values of Eggspectations, Pinnacle Health, and Collective X were equal to the amounts that Husband originally invested. As to Paid Interviews, Wife's counsel submitted a balance sheet dated December 22, 2010, which showed total assets of $500,804.38 and total current liabilities of $86,284.12. In considering this evidence, the trial court asked: "Would the law permit me to say that [Paid Interviews] has a value of five hundred and seventy thousand dollars because there's evidence that he committed that much to it. . . ?" Husband's counsel replied that such a valuation method was not appropriate.

In its ruling, the court ultimately determined that the current fair market values of Eggspectations, Pinnacle Healthcare, and Collective X were equal to the amounts originally invested. In explaining its rationale, the trial court stated: "I find that those values still exist." Later in its opinion, however, the trial judge referred to these investment assets as "investments that may or may not be profitable . . ." Regarding Paid Interviews, the trial court held that, "balance sheets were presented, showing that there was still a 500-and- — over $500,000.00 in value to it. So I'm assessing a value of $670,000.00 to that." At the post-trial motions hearing, the trial court further explained its rationale in evaluating Paid Interviews:

> Defendant's exhibit 16 demonstrates Paid Interviews balance sheet and the total assets of Paid Interviews, $500,804.00 . . . . I took, that number, $500,000.00, I didn't round it off to $501,000, and then I added that money that was lent to it.[5] That's how I came up with that number . . . . I made the decision that [it] had a value of $670,000. These were investments that existed as far as organizations. I might be right and I might be wrong, but I'm not changing my mind on it. The Court of Special Appeals may find that I'm wrong, but I feel that I was correct, not only in taking the evi-

dence that was submitted, but exercising my discretion as to that evidence.

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. These amounts were invested 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, we are also mindful that "equity requires that reasonable efforts be made [by the court] to ensure that valuations of marital property approximate the date of judgment of divorce . . ." *Fox*, 85 Md. App. at 460. Thus, 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.

We reiterate that Wife has the burden of proof to produce evidence of the value of the assets. Indeed, 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. Accordingly, we remand for the purpose of reevaluating the fair market values of the Eggspectations, Pinnacle Healthcare, Collective X, and Paid Interviews investment assets, and adjusting the overall monetary award accordingly. These values should approximate the date of the divorce, or as close thereto as may reasonably be ascertained.

C. Gold

Next, Husband argues that the trial court abused its discretion in granting the distribution of gold between the parties because the ruling was based on a mistake of fact. Wife contends that although the division of gold was not equal, a division need not be equal in order to be equitable. We agree with Husband that the trial court abused its discretion.

Here, the parties agree that post-separation, Wife received 264 ounces of gold, and Husband received 190 ounces of gold.[6] This equates to a difference of 74 ounces of gold. The trial court found that this post-separation gold division was a good faith effort by Husband to share control over marital assets, and not an agreement to divide the property. Accordingly, the trial court determined that the gold was marital property, and ordered that each party "shall retain the gold . . . they have, currently in their possession." Husband challenged this ruling in his motion to alter or amend the judgment, asserting that the parties did not have equal amounts of gold in their possession at the time of trial. At the motions hearing, the trial court agreed that: "If in fact the evidence is that she got 73 ounces more than he, I'd have to agree with [Husband] that I'm not correct when I say it's equitable."

Based upon the trial court's conclusion at the motions hearing that a difference of 73 ounces would not constitute an equitable division of the gold, and the fact that the parties agree that there was, in fact, a 74 ounce discrepancy, we hold that the trial court abused its discretion in ordering the gold distribution. While it is true that the trial court was not bound to make an *equal* division, but rather an *equitable* division, *see Alston*, 331 Md. App. 496 (1993), the distribution was apparently made on the basis of a mistake of fact. Accordingly, we remand for the purpose of reevaluating the gold division, and adjusting the overall monetary award accordingly.

Husband also points out that at the time of trial, he had paid the LLC expenses, children's tuition, and health insurance for the children from all but five ounces of gold in his possession. Accordingly, 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.[7]

D. The LLC

Additionally, Husband argues that the trial court made erroneous findings of fact regarding his interest in the LLC, and abused its discretion in decreasing Husband's property distribution due to his use of mari-

tal funds to pay for operating expenses of the LLC. Wife contends that the trial court made appropriate findings of fact, and did not abuse its discretion because post-separation transfers that Husband made to the LLC constituted "reckless spending" under FL § 8-205(b)(11). We hold that the trial court's finding regarding Husband's interest in the LLC was clearly erroneous, and that it was also an abuse of discretion to assess penalties for Husband's transfer of marital funds to the LLC.

The parties owned the LLC equally and were the only two members of the LLC. The LLC was subject to an operating agreement that set forth the rights and obligations of the two members, Husband and Wife. The LLC was set up to protect the parties' marital assets. Husband was the managing member of the LLC. There was no dispute that the LLC was owned equally and was governed by the Operating Agreement Likewise, the parties agreed that any disposition of the asset would be dealt with in a separate proceeding.[8]

The LLC operating agreement provided that no disbursements could be made to LLC members without the unanimous consent of all members — *i.e.,* both Wife and Husband. The agreement also provided, in pertinent part, that: "No member shall be required or permitted to make any additional capital contributions or loans to the Company without the unanimous consent of the Members."

The trial court found that despite the terms of the operating agreement, Husband and Wife routinely contributed personal marital monies to the LLC bank account during the marriage. Husband continued to fund the LLC post-separation, and testified that he did this out of necessity.[9] Wife testified that on one occasion following the separation, money was owed by the LLC to a land developer, and she paid one-half of this LLC debt from her personal money.

At trial, in addressing Wife's contention that Husband had dissipated marital assets by funding the LLC,[10] the trial judge observed:

> It's not like he's taking the money out of the marital fund and putting it in a Vegas bank account or something like that. . . . If there was ultimately a 50/50 split, then it really doesn't matter because if the money is part of the marital pot or if the money is in the Muth pot, it really doesn't matter because there's still a 50/50 split.
>
> * * * *
>
> . . . there is only two people in Muth Family LLC that are members, that is Mr. and Mrs. Muth. And that if $100,000 or if $200,000 profits is made, and the corporation was to be dissipated immediately, in theory 100,000 would go to each person.
>
> * * * *
>
> There has been some testimony that I've heard over the course of the last three days to suggest to me that if there is no infusion of money, then the LLC may very well suffer in a significant way, for example, tax sale, things of that nature. None of which is in the best interest of either of the parties at this point in time.

Nevertheless, the trial court found that the post-separation transfers of money from marital accounts to the LLC warranted assessments against Husband because the transfers violated the LLC operating agreement. The trial court explained:

> While contributions made prior to the separation are arguably made with unanimous consent, it's clear that the contributions made after the separation were made in violation of the operating [agreement] . . . the Court finds that it's appropriate to assess one-half of the marital funds placed in the LLC post-separation as part of its determination of the marital award . . . The total then, the Court determines is $500,434.00. As such $250,721.00 will be assessed against Mr. Muth in determining the marital award.

We hold that the trial court abused its discretion in its monetary 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 not reckless or malicious. Rather, the transfers were deemed necessary to preserve the LLC, because otherwise the "LLC may very well suffer in a significant way, for example, tax sale, things of that nature. None of which is in the best interest of either of the parties at this point in time." Accordingly, we hold that it was an abuse of discretion to penalize Husband for making transfers of marital funds in order to preserve another marital asset.[11] Accordingly, we remand for the purpose of adjusting the monetary award by eliminating the "penalties" that were assessed against Husband.

Additionally, the trial court found that as "as the managing member, [Husband] is, in the practical

sense of the phrase, a sole beneficiary of the LLC." The court further determined that "[a]s managing member of Muth Family, LLC, Mr. Muth has opportunities to maintain his lifestyle available to him that Mrs. Muth does not have available to her. He can remain in the house in which he currently resides [rent-free] because it's owned by the LLC." We hold that these findings of fact were clearly erroneous. The parties each had a one-half interest in the LLC; thus, Husband was clearly not the sole member of the LLC. Likewise, Husband received no income as managing member of the LLC, nor was there any other evidence in the record indicating that Husband was entitled to special benefits from the LLC that were not available to Wife.[12] It is unclear precisely how these purported benefits factored into the trial court's overall monetary award determination. Accordingly, on remand, the trial court shall clarify, correct, or reconsider the monetary award as necessary on that basis.

E. Failure to Consider Statutory Factors

Finally, Husband contends that the trial court erred by failing to consider the requisite statutory factors in ordering the division of assets. Husband concedes that the trial court recited the factors, but that inequities in the division of assets suggests that the court did not actually make the required consideration. Wife contends that the trial court fully considered the requisite factors as evidenced by the 80 page transcript of the trial judge's oral ruling. Our review of the record shows that the trial court properly considered the relevant statutory factors, *see* FL § 8-205(b), and, therefore, aid not abuse its discretion on this basis.

II. Alimony

The award of alimony is governed by FL § 11-106. The purpose of alimony is to provide trial courts with the ability to ensure "an appropriate degree of spousal support. . . . after the dissolution of a marriage." *Tracey v. Tracey*, 328 Md. 380, 388 (1992).

It is well settled that the party seeking alimony bears the burden of proving the statutory requirements. *Simonds v. Simonds*, 165 Md. App. 591, 607 (2005); *Thomasian v. Thomasian*, 79 Md. App. 188, 195 (1989). Section 11-106(b) of the Family Law Article sets forth the factors that the trial court must review when issuing an award of alimony. Although the court is required to give consideration to each of the factors contained in the statute, it is not required to employ a formal checklist, mention specifically each factor, or announce each and every reason for its ultimate decision. *Doser*, 106 Md. App. at 356; *Hollander*, 89 Md. App. at 176. We may examine the record as a whole to see if the court's findings were based on the mandated factors. *Doser*, 106 Md. App. at 356.

A court may award alimony in one of two different forms. *Walter v. Walter*, 181 Md. App. 273, 281 (2008). The first type is alimony for a fixed period of time, also known as rehabilitative alimony. *Id*. The second is alimony for an indefinite period of time, also known as permanent alimony. *Id*. "When alimony is awarded, the law prefers that the award be for a fixed term." *Id.* Nevertheless, the court may use its discretion and award permanent alimony "in exceptional cases when one of the two circumstances described in subsection (c) of [Family Law Article] section 11-106 has been shown. . . ." *Id*. Family Law Article § 11-106(c) specifically provides:

> The court may award alimony for an indefinite period, if the court finds that:
>
> (1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or
>
> (2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

FL 11-106(c).

A. Standard of Review

An alimony award will not be disturbed on appeal unless the trial court abused its discretion or rendered a judgment that was clearly wrong. *Tracey*, 328 Md. at 385; *Crabill v. Crabill*, 119 Md. App. 249, 260 (1999). Moreover, "[a]ppellate discipline mandates that, absent a clear abuse of discretion, a [trial court's] decision that is grounded in law and based upon facts that are not clearly erroneous will not be disturbed." *Kierein v. Kierein*, 115 Md. App. 448, 452 (1997) (quoting *Bagley v. Bagley*, 98 Md. App. 18, 31-32 (1993)) (internal quotation omitted). Therefore, when reviewing an alimony award, we should accord great deference to the findings and judgments of the trial court. *Tracey*, 328 Md. at 385. The trial court's ruling will not be reversed simply because we would not have made the same ruling on the available evidence. *North v. North*, 102 Md. App. 1, 14 (1994). Only where the trial court's decision violates fact and logic, or where no reasonable person would take the view adopted by the trial court, will we disturb the circuit court's ruling. *Id.* at 13-14.

B. Indefinite Alimony

Husband argues that the alimony award should be reversed because Wife failed to meet her burden of showing that the parties' standards of living would be unconscionably disparate. Additionally, Husband argues the trial court erred by failing to consider Wife's

assets in making the monetary award, including the property, assets, and investments that Wife was to receive from the monetary award. Finally, Husband contends that the trial court failed to consider the relevant statutory factors in making the alimony determination. Wife posits that the trial court properly found that the standards of living would be unconscionably disparate, and that Wife's age also was a factor in awarding indefinite alimony. For the reasons set forth below, we vacate the indefinite alimony award and remand for reconsideration.

Here, the parties were married for 23 years. The trial court found that Husband was capable of earning a salary of $103,600, and that Wife's testimony regarding her desire to pursue a nursing career was not credible.[13] The trial court focused on Wife's former career as an administrative professional, and observed that she has "no immediate work experience or exceptional skill on which to call." The trial court further found that "[g]iven her age, and the amount of time that she has been out of the workforce, and the reasonable expenses that she faces, Mrs. Muth is not currently self-supporting and she is not capable of ever being self-supporting — fully self-supporting in the future." Accordingly, the trial court concluded that an unconscionable disparity would exist between the parties' standard of living.

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 to award indefinite alimony. 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, 140-43 (2010), a case that was decided shortly before the Muth trial:

> 'Unconscionably disparate' standards of living is the threshold test for awarding indefinite alimony under FL Section 11-106(c)(2) . . . . While the appellate decisions have provided guidance, no cohesive rubric has emerged in either appellate court to frame or add definition to the bare statutory term. We think this is so because the statute, at its core, relies on principles of equity, which are flexible and not conducive to black-letter restatement.

Finally, we reject Husband's argument that the trial court did not adequately discuss the disparity issue in granting the award of alimony. Our examination of the record as a whole demonstrates that the court's findings were based on the mandated factors. *See Doser, supra*, 106 Md. App. at 356.

For the foregoing reasons, we hold that the trial court abused its discretion in entering the monetary award. The monetary award was based on clearly erroneous factual findings regarding the fair market value of investment assets, Husband's interest in the LLC, and the quantities of gold in each party's possession at the time of trial. Additionally, it was an abuse of discretion to assess penalties against Husband. Accordingly, we remand for an adjustment of the monetary award consistent with this holding. We also vacate the award of indefinite alimony, and remand for determination of what effect, if any, the new monetary award has on the decision to award indefinite alimony.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED. COSTS TO BE PA BY APPELLEE.

FOOTNOTES

1. Additional facts are summarized in the argument sections below.

2. It is not clear what year the $50,000 was invested in Collective X.

3. "Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.* "Joint legal custody means that both parents have an equal voice in making those decisions and neither parent's rights are superior to the other. *Id.* at 296-97.

4. It is not clear what year the $50,000 was invested in Collective X.

5. The parties both listed a loan to Paid Interviews in the amount of $70,390 on the joint financial statement.

6. Although Wife's brief generalizes the division of gold as "approximately one-half," both Husband and Wife cite to the same testimony in the record regarding the division of gold. This testimony indicates that Wife and Husband received 264 ounces and 190 ounces of gold, respectively.

7. Husband's payment of LLC expenses is discussed *infra*, Part 1(D). Because we hold that it was an abuse of discretion to make assessments against husband for the payment of LLC expenses, Husband's gold distribution should likewise not be reduced due to his use of gold to pay the LLC expenses.

8. Wife filed a supplemental complaint requesting the court to

dissolve the LLC and exercise jurisdiction over matters pertaining to the management of the LLC. Husband objected, stating that the dissolution of the LLC was a separate matter controlled by the operating agreement. Husband further argued that a magistrate over the domestic issues had no authority over the operations of the LLC. The parties ultimately agreed that the LLC dissolution needed to be resolved in a separate action.

9. Husband indicates that he agreed not to seek repayment of these funds from the LLC absent an agreement or court order allowing him to do so.

10. Dissipation occurs where property is intentionally taken by one spouse in order to avoid inclusion of the property towards consideration of a monetary award. *Turner v. Turner*, 147 Md. App. 350, 409 (2002). The trial court found that Husband's transfers of marital assets to the LLC did not constitute dissipation.

11. The fact that Husband's transfers constituted a technical violation of the LLC operating agreement should not change this analysis. First, any violations of the operating agreement would seem to fall within the purview of the separate proceeding regarding dissolution of the LLC, not the domestic action. Regardless, the parties routinely transferred marital funds to the LLC during the marriage. There was no evidence that Wife objected to the post-separation transfers at the time they were made. Moreover, Wife testified that she also made at least one post-separation contribution to the LLC expenses from her personal monies, yet the court did not assess any penalty against Wife.

12. Indeed, it was determined at the post-trial hearing that Wife subsequently began collecting rent from Husband pursuant to the LLC operating agreement due to his residence on LLC property.

13. It is unclear from the record whether the trial judge's reference to the wife's testimony as "not credible" referred to her testimony as unbelievable or unrealistic.

Cite as 3 MFLM Supp. 37 (2013)

CINA: change in permanency plan: time in foster care

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

No. 1021, 1025, 1026, 1027, 1028, September Term, 2012

Consolidated Cases

Argued Before: Krauser, C.J., Zarnoch, Sharer, J. Frederick, (Ret'd, Specially Assigned), JJ.

Opinion by Zarnoch, J.

Filed: January 8, 2013. Unreported.

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 by the Circuit Court for Washington County 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.[1], were children in need of assistance ("CINA").[2] Prior to that time, the children had been living with Ms. H. and Jermaine F., the father of Nevaeh F.[3] 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 ("the Department"). Anthony H. and Marquell H. were returned to Ms. H.'s physical custody on April 7, 2010, but they returned to foster care just 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.

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

ISSUE PRESENTED

The sole issue presented for our consideration is whether the circuit court erred in changing the permanency plan for all five children to adoption. For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

This case has a long history. The Department began providing protective services to Ms. H. and her children in April 2009, after it received reports that the children were being neglected and that Ms. H. and Mr. F. had engaged in domestic violence, which included pushing, choking, and threats taking place in the presence of the children. There were also concerns that Mr. F. was not addressing his mental health issues and that Ms. H. had tested positive for marijuana while pregnant with Nevaeh. On July 8, 2009, the Department began a neglect investigation of an alleged lack of adult supervision where Marquell H. suffered a third-degree burn to his arm after he pulled a highchair to a stove to get a hotdog. The children had been left in the care of eleven-year-old Tara, another of Ms. H.'s children, who resided with a maternal aunt. At the time Marquell H. was burned, Tara was bathing the two-year-old twins.[4]

On July 29, 2009, the Department filed CINA petitions regarding all of the children except Tara, On September 3, 2009, the court sustained the facts in the CINA petitions, determined that the children were CINAs, and kept them in Ms. H.'s custody under an order of protective supervision. The court ordered, among other things, that Ms. H. and Mr. F. refrain from engaging in domestic violence and provide adult supervision for the children at all times.

Notwithstanding the court order, the domestic violence between Ms. H. and Mr. F. continued. On September 13, 2009, Ms. H. secured a temporary protective order requiring Mr. F. to vacate the family home, and reported to the Department's social worker that Mr. F. was not taking his psychotropic medications. Ms. H. failed to appear for a hearing on the protective

order, and her petition was dismissed. By that time, the Department had received additional reports that Ms. H. was leaving the children at home alone at night. On September 17, 2009, the Department requested an emergency CINA review hearing. Following the hearing, the court rescinded the order of protective supervision and committed the children to the care and custody of the Department for placement in foster care.

Between October 2009 and February 2011, there were numerous attempts at reunification efforts were made. On October 5, 2009, Ms. H. and Mr. F. were evicted from their home, and each moved in with separate relatives. By the time of a Family Involvement Meeting held on April 7, 2010, Ms. H. had secured housing, and she was granted temporary physical custody of Marquell and Anthony. Shortly thereafter, Mr. F. was charged with second degree assault. He was eventually convicted of that crime and sentenced to one year imprisonment followed by three years' probation.

By May 2010, Ms. H. was in arrears on her rent payments and eviction was imminent. To prevent the eviction, the Department made a rental payment of $980. The Department later learned that Ms. H.'s gas had been turned off for non-payment, and it paid $644.93 to have power restored. Ms. H. fell behind in her rent payments again and, by June 9, 2010, she was $320 in arrears. This situation was further complicated by the fact that in July 2010, Ms. H. was scheduled to lose a $275 rental stipend she was receiving due to non-compliance with program requirements. After a Family Involvement Meeting on July 20, 2010, Marquell and Anthony were returned to foster care.

Ms. H. was evicted from her home in the first week of August 2010 and, thereafter, she stayed in the homes of three friends, all of whom the Department asserts had extensive child protective services histories. In October 2010, Ms. H. gave birth to another child, Maurice, and the following July, the Department assisted Ms. H. in moving into her own apartment.

In an order dated October 24, 2011, the juvenile court reduced from weekly to bi-weekly Ms. H.'s visits with Anthony and Marquell after their therapist recommended limiting visits in order to reduce anxiety and behavioral problems that the children had been exhibiting after visits. Ms. H.'s visitation with the children was inconsistent and even after the reduction of visitation was ordered, she continued to miss visits. In January 2012, Ms. H. and Mr. F. moved to Pennsylvania, nearly four hours away from their children.

At a permanency planning review hearing that commenced on February 9, 2012, the Department recommended changing the children's permanency plans from reunification to adoption.[5] The children's foster care caseworker, Kevin Buckley, testified that the Department had not had contact with either Ms. H. or Mr. F. between the time they moved to Pennsylvania and the day before the hearing. On the day prior to the hearing, Ms. H. visited with the children for one hour and told Mr. Buckley that she was going to be working at a Subway in Pennsylvania, but that she had not yet started that job. According to Mr. Buckley, it would be very difficult for the Department to offer services to Ms. H. and Mr. F. while they resided in Pennsylvania, although visits could still be arranged if they were able to travel to Maryland.

Mr. Buckley stated that Ms. H. failed to attend therapy sessions with Anthony and Marquell. She also rarely attended speech therapy appointments with Nevaeh, and had not done so since March 2011. In addition, Ms. H. missed approximately half of her visits with the children in the prior year, and since the hearing in September 2011, she had attended only 8 visits out of the 16 or 17 that had been scheduled. Ms. H. expressed an interest in contacting the children by telephone, but did not call Mr. Buckley to arrange a time for those calls and did not provide him with a telephone number. Ms. H. had been referred to the Department's job center, but never went there.

Mr. Buckley was not sure what type of housing situation Ms. H. had in Pennsylvania. Although she said she was living in a three bedroom home, she did not provide the Department with any address other than a post office box number. Mr. F. had been attending therapy and addictions treatment prior to his move to Pennsylvania, but did not have adequate housing for Neveah. He had not provided the Department with any information about treatment he was receiving in Pennsylvania nor did he provide a pay stub.

Both Mr. Buckley and Mrs. S., the foster mother for the four oldest children, testified that all of the children were doing well in their placements. The four oldest children were placed together with Mr. and Mrs. S., and Nevaeh was in a separate foster home, although the foster parents arranged for all the children to visit each other. Both foster homes were licensed as pre-adoption homes. Mr. and Mrs. S. were willing to adopt the four oldest children, but Nevaeh's foster parent was not willing to adopt her. The Department was exploring the possibility that the foster parents of the four oldest children would also adopt Nevaeh.

Because Ms. H.'s visits with the children were inconsistent, the Department required her to call prior to noon on the day of a scheduled visit in order for the visit to occur. According to Mrs. S., the children experienced "a lot of behavior issues" following visits with their mother, but those issues decreased when visits did not occur. Ms. H. did not visit with the children between October 21, 2011 and December 2, 2011.

Marquell was most affected both when visits with his mother occurred and when those visits did not take place. According to Mr. Buckley, "[i]f he is expecting those visits to happen, he will be out of his normal character at that point." Nevaeh also experienced some behavioral problems after visits.

Marquell expressed an interest in returning to his mother's care and, according to Mr. Buckley, was "the one that I think holds out a belief that he can return home." Anthony was happy in his placement and "he understands that his mom hasn't been able to do what is required of her to have him return home. He's very comfortable where he is." Mrs. S. testified that the four oldest children were "doing very good right now," that they had friends at school and church and got along well with people in their neighborhood.

Ms. Caroline Cardwell, a licensed graduate social worker employed by Catholic Charities in Hagerstown, has been providing therapy for Marquell and Anthony since June 2011. Prior to that time, the boys received therapy from a student intern beginning in March 2010. Ms. Cardwell testified that Ms. H. failed to show up at one of the boys' monthly therapy sessions, but later attended a therapy session on November 21, 2011. The boys expressed to Ms. Cardwell that they missed Ms. H., but they were hesitant about wanting to return to her care because they were afraid "they won't have food." Initially, Ms. Cardwell worked on issues such as the boys' stealing, lying, destruction, and the aggression that followed visitations with Ms. H. According to Ms. Cardwell, those behaviors had "disappeared" by the time of the hearing, and the children were receiving positive notes from teachers and good grades. The review hearing was continued to May 24, 2012, at which time Ms. H. testified that she had moved to Pennsylvania in December 2011 and was living with her infant son, Maurice, and Mr. F. in her sister Angela's home. She planned to move with Maurice and Mr. F. to a three bedroom home on June 1, 2012. The rent for the three bedroom home was $400 per month plus electricity, and Ms. H. testified that she planned to pay the entire amount by herself, with no contribution from either her sister or Mr. F. Ms. H. was employed at a Subway restaurant where she worked 35 to 40 hours per week, and she anticipated starting a second job at a Pizza Hut from 10 a.m. to 2:30 p.m.

Ms. H. testified that she had attended all but two of her visits with the children, and that she only missed two because she had to work. She said that she tried calling the children and left messages, but no one returned her calls. She attended Nevaeh's physical therapy when she was living in Maryland and did not have to work, but she did not receive any information about appointments for the other children.

Ms. H. said that she had a social worker in Pennsylvania who had helped her obtain food stamps. That social worker told her that if the children were to return to her care in Pennsylvania, she would be able to help Ms. H. secure daycare for the children. The social worker also told Ms. H. about some summer camps for Anthony and Marquell.

The review hearing was again continued to June 7, 2012, to allow the judge to interview the four oldest children, which he did. At the conclusion of the hearing, the court changed the permanency plan to adoption for all of the children, ruling as follows:

> Well the children were adjudicated on September the 3rd, 2009. They have been in care since September 16, 2009 and u'm quite frankly that's two years, eight months. So that's uh 32 months that these children have been in care. That, in itself, would uh set off alarm bells at least with the Federal Adoption Safe Families Act as to why there hadn't been a change in the permanency plan long before now. And the record speaks for itself. Last September, I think it was September the 1st Judge McDowell uh there was a review of the permanency plan. The department at that time was attempting to change the plan from reunification to adoption and Judge McDowell denied that request. I guess to err on the side of caution. I don't know. Give mom some more time. She relocated to Pennsylvania. Kind of through [*sic*] everything into a (unintelligible for one word) hat. And here we are.
>
> I think that, and I'm — I don't pat myself on the back because I shouldn't be patting myself on the back, but I think I've gone the extra mile to comply with the requests of the mother, primarily, uh in having, this is the third day on this hearing. And so she has certainly had her day in court. And uh yes I think her heart is in the right place and not like, unlike a lot of other parents that come in here. But we've got children that are 10, eight, five and five, they [sic] are no relative resources. That has to be stated.
>
> The father, excuse me, the father of Nevaeh, is disabled. He has uh no income. He apparently receives assistance of a hundred and eighty-five dollars a month. And of course he's just got one child in the fight.

It's interesting because counsel for the mother brings out the fact that well we now have stable housing and we [sic] now we're going to have two jobs and when the testimony at the last hearing on May the 24th, we, we weren't in stable housing. We were going to move into stable housing on June 1st and I think it was a three bedroom situation. And if the mother were to have her way there would be six children and two adults living in that house. Plus she's indicated she's going to take a second job. And that's interesting because that means she will be out of the house working two jobs and I'm not sure what the status is with these children. Two of these children, the older ones, are kind of, I don't want to say special needs, but they you know they had issues and that was testified to by the counselor and apparently they have, they have come a long way. So it isn't as if we've got four normal kids living in a household.

And I'm no sure what the financial status is. I do note at the last hearing the mother testified that there are services available in Pennsylvania. Now she didn't sign up for them. But I guess uh she says, "Oh I can get food stamps and I can get a medical card and I can get daycare and uh and the other sibling is going to come home too, who is age 14, Tara, she can help out." That all sounds well and good.

The children are doing well in their present placement. They are doing well in school. They are obviously in a stable environment. They have been in care a long time. In chambers, and I think with counsel present, the Court didn't beat on them to say you know tell me what you want to tell me, the oldest child just said yes he wanted to stay with [the foster family] and he wanted to be adopted. The other one wasn't quite as affirmative of it, but he wanted to stay with the [foster family]. And of course the two young ones want to be with their brothers. So that makes sense. I mean all four children should be together regardless of where they are going to live.

So I feel at this time uh I think that the mother has been given ample opportunity to try and straighten out her situation and she's doing, she's making progress now. But you know the, the road to Hell is paved with the best of intentions and I think after 32 months I have, really I think this is a slam dunk, I have to change the permanency plan to adoption as to all four children with the understanding that assuming — I almost didn't terminate — I almost didn't change the permanency plan for the youngest child for reasons that were stated by counsel, however the Department is saying that that child is going to be transitioning into a pre-adopt home with the other four children. Now if that happens, then fine the permanency plan should be changed to adoption and I will change it. But if for some reason it doesn't happen and [counsel] wants to come in and file a motion, I'll reconsider it and say no not for that child, not now. That will be for another dày. So the permanency plan I think there is ample evidence to change the permanency plan to adoption.

DISCUSSION

Ms. H. contends that the juvenile court erred in concluding that the permanency plan should be changed to adoption because it failed to consider the factors required by Md. Code (1984, 2012 Repl. Vol.), Family Law ("FL") Article § 5-525(f)(1), which provides:

> In developing a permanency plan for a child in an out-of-home placement, the local department shall give primary consideration to the best interests of the child, including consideration of both in-State and out-of-state placements. The local department shall consider the following factors in determining the permanency plan that is in the best interest of the child:
>
> (i) the child's ability to be safe and healthy in the home of the child's parent;
>
> (ii) the child's attachment and emotional ties to the child's natural parents and siblings;
>
> (iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;

(iv) the length of time the child has resided with the current caregiver;

(v) the potential emotional, developmental, and educational harm to the child if moved from the child's current placement; and

(vi) the potential harm to the child by remaining in State custody for an excessive period of time.

In particular, Ms. H. argues that the court placed undue emphasis 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."[6] 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. H. 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.

In an appeal from a change in a permanency plan, we will not disturb the juvenile court's factual findings unless they are clearly erroneous. *In re: Jessica M.*, 312 Md. 93, 110-111 (1988). The juvenile court's ultimate conclusion that a permanency plan should be changed in the best interests of the child, will not be disturbed absent an abuse of discretion. *Id.* An abuse of discretion exists only where the trial court's decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *In re: Yve S.*, 373 Md. 551, 583-84 (2003)(quoting *In re: Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997)). For the reasons set forth below, we conclude that the juvenile court did not abuse its discretion in changing the permanency plan to adoption.

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. The length of time that the children were in foster care is an important factor for the juvenile court to consider when determining whether to continue a plan of reunification or change the plan to one that will achieve permanence. FL § 5-525(f)(1)(iv) and (vi). Pursuant to CJP § 3-823(h), the juvenile court is directed to review a child's permanency plan at each CINA review hearing, determine the extent of progress that has been made toward alleviating the causes necessitating commitment, and make "[e]very reasonable effort . . . to effectuate a permanent placement for a child within 24 months after the date of initial placement." CJ § 3-823(h)(2) and (3). The record before us demonstrates that the juvenile court properly focused on the fact that the children had been in foster care for 32 months, a time period that far exceeded the statutory time lines.

To support her argument, 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 Court of Appeals held that the juvenile court abused its discretion by relying on the length of time the children had been in foster care as sufficient to terminate parental rights without finding that a continued relationship with the parent would be detrimental to the children. *Id.* at 460-61.

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. She failed to disclose her street address to the Department until the second day of the hearing, and testified that she would be moving to yet another residence on June 1, 2012. 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. Indeed, as the Department points out, because Ms. H. resided in Pennsylvania, the children could not have been returned to her custody until her local jurisdiction authorized the move following a home study under the Interstate Compact on the Placement of Children ("ICPC"). *See* FL §§ 5-601 to 5-611. There is nothing in the record to suggest that Ms. H. requested initiation of that process.

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 he commented on the number of children and adults Ms. H. planned to have in her three bedroom house, and the fact that she planned to work two jobs while also caring for children, some of whom require special care. The judge also commented on the lack of evidence concerning Ms. H.'s financial status. As for the second and third factors, which require consideration of the children's attachment and emotional ties to their natural parents and siblings, and their emotional attachment to their current caregiver and the caregiver's family, the court considered the attachment between all of the siblings, and recognized that all of them should remain together, if possible. He also considered his interviews with the children, including statements made by the two oldest children that they wanted to stay with their foster family, and noted that Marquell was not as committed to that idea as Anthony. 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, the length of time the children have resided with their current caregiver, we have already 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 required factor. The judge clearly placed weight on Ms. H.'s plans to care for six children, who she planned to have live with two adults in her three bedroom house while she worked two jobs. Moreover, the judge considered the fact that Ms. H. had not signed up for social services for the children in Pennsylvania. Finally, with respect to the sixth required 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. A "trial judge is not required to 'articulate every step in his thought processes.'" *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. We conclude that the juvenile court did not abuse its discretion in determining that it was in the children's best interests to change their permanency plans to adoption.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Anthony H. was born in 2001; Marquell H. was born in 2003; Mariah H. was born in 2006, as was her twin brother Michael H.; and, Nevaeh F. was born in 2008.

2. A child in need of assistance ("CINA") is:

> [A] child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disability; and
>
> (2). The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.

Md. Code (1973, 2006 Vol.), § 3-801(f) and (g) of the Courts & Judicial Proceedings Article ("CJP").

3. Jermaine F. participated in the permanency plan hearings, but is not a party to this appeal.

4. According to the juvenile petition, "[t]here was an 'Uncle James H.' . . . that was in the home during the incident but he was not assisting with the children."

5. After a hearing on September 1, 2011, the circuit court rejected an earlier request by the Department to change the permanency plan to adoption.

6. Ms. H. emphasizes CJP § 3-823(h)(2)(vi), which provides that, at a review hearing, the court shall "[c]hange the permanency plan if a change in the permanency plan would be in the child's best interest."

Cite as 3 MFLM Supp. 43 (2013)

Child support: health insurance: allocation of flat-rate premium

Anthony Monk
v.
Debra Monk

No. 2424, September Term, 2011

Argued Before: Eyler, Deborah S., Graeff, Berger, JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 9, 2013. Unreported.

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, the appellant, and Debra Monk, the appellee, were divorced in the Circuit Court for Calvert County.[1] In the divorce judgment, 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 a period of 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 a period of 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 from the judgment, presenting eight questions for review, which we have condensed and rephrased as six:

I. Did the circuit court abuse its discretion in awarding rehabilitative alimony or in determining the amount and duration of the alimony?

II. Did the circuit court err or abuse its discretion in calculating child support?

III. Did the circuit court abuse its discretion in awarding attorneys' fees?

IV. Did the circuit court abuse its discretion in denying Anthony's motions for sanctions, contempt, and to reopen the record?

V. Did the circuit court err or abuse its discretion in finding Anthony in contempt for failure to make timely child support payments?

VI. Did the circuit court abuse its discretion in awarding Debra sole legal and physical custody of the minor children?

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

For the reasons to follow, we shall reverse the order of contempt against Anthony, vacate a portion of the child support judgment, and otherwise affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

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

The parties separated on October 11, 2008. Twelve days later, Debra filed a complaint for absolute divorce, asserting as grounds cruelty and excessively vicious conduct. She sought, *inter alia*, sole legal and physical custody of Jessie and Carlie; alimony; use and possession of the marital home; and a monetary award. In February of 2010, Anthony filed a counter-complaint asserting grounds of constructive desertion and adultery. Debra twice amended her complaint, adding as grounds desertion and a two-year separation.

In April of 2010, the parties appeared for a *pendente lite* hearing and reached an agreement about custody, visitation, and child support. On May 28, 2010, the court entered a "*Pendente Lite* Consent Order" ("P.L. Order") awarding the parties joint legal custody of Jessie and Carlie with tie-breaking authority to Debra; awarding Debra primary physical custody; awarding Anthony visitation every weekend from Friday evening until Sunday evening, and an additional two weeks each summer; directing Anthony to pay

$300 per month in child support, due on the first day of each month; and awarding Debra exclusive use and possession of the marital home and a truck owned by the parties. Anthony agreed to continue making mortgage payments on the marital home, as well as monthly loan and automobile insurance payments on the truck.

A merits trial commenced on January 18, 2011, and continued for four days. Debra testified and called two witnesses: her next-door neighbor and friend, Samantha Lilly, and her father, Robert Cofod. Anthony testified and called Megan and Heather as witnesses.

The pertinent evidence adduced at trial is as follows. The parties both were 46 years old. Throughout the marriage, Debra was a stay-at-home mother. She cared for the children and performed the majority of the household tasks. Since the parties' separation in 2008, Debra had been working part-time cleaning houses, earning approximately $600 per month. Debra expressed an interest in training to become a nurse, but stated that she could not afford the tuition. She hoped to earn her degree in a part-time program to allow her to continue to care for Jessie and Carlie before and after school. She expected that, upon earning her degree, she would be capable of earning between $30,000 and $35,000 annually in an entry level nursing job.

Anthony supported the family financially throughout the marriage. He has worked at Koon's Ford in the service division for more than 20 years. During the marriage, he worked long hours, leaving the house at 6:15 a.m. and returning at 8:30 p.m. At the time of the merits trial, Anthony was the service manager, earning $100,000 annually in salary and commissions. He had a 401(k) retirement account valued at just under $20,000, but had stopped contributing to it because he could not afford to do so.

Around 2000, the parties purchased a three-bedroom, single family house in Lusby. The house was titled as tenants by the entireties. At the time of the divorce hearing, the house was encumbered by a mortgage in Anthony's name in the amount of $287,000. The house was valued at just $200,000, however. Since 2010, the marital home has been vacant. Anthony was renting a house in Lothian, which he shared with Megan and Heather. Debra was living with one Roger Burroughs, at his house in Hollywood, in St. Mary's County. Jessie and Carlie were living with Debra and Burroughs.

The remaining marital property, most of which was titled in Anthony's name, included nine vehicles; furniture and other tangible property; guns; tools; jewelry; two bank accounts; and Anthony's 401(k) retirement account. Anthony asserted that this property was valued at approximately $90,000, while Debra asserted it was valued at approximately $172,000.

In addition to the mortgage loan, Anthony also had six credit cards in his name, with balances ranging from $25 to over $600, and a home equity line of credit ("HELOC"), also in his name, with a balance of more than $17,000. Anthony testified that the charges on these accounts were made during the marriage. He continued to make minimum payments on his credit cards, but had not made a payment on the HELOC for more than seven months.

The parties vigorously disputed the circumstances leading to their separation. Debra testified that Anthony physically and emotionally abused her throughout the marriage. She characterized him as jealous and controlling. She asserted that much of the physical abuse occurred at night in their bedroom. According to Debra, Anthony routinely smothered her with a pillow and pressed his forearm into her neck to choke her. She further testified that on one occasion he threatened her with a knife; and that on at least two occasions he threatened her with a gun.

Lilly, the parties' next-door neighbor for nine years, corroborated Debra's testimony that Anthony was controlling and verbally abusive. She testified to witnessing numerous incidents in which Anthony telephoned Debra during the day from his office and berated her. She described Debra as being visibly shaken following these phone calls and fearful of Anthony. She testified that Debra is a warm and loving mother and the primary caregiver for the children.

Anthony denied that he ever was abusive to Debra. He maintained that the parties separated because Debra began an adulterous affair with Burroughs, the man with whom she now lives. Anthony claimed he discovered the affair during a family vacation in June of 2008, when he saw text messages Debra had sent to Burroughs. He confronted her, but she refused to discuss the matter.

Heather and Megan, who are estranged from Debra, testified that Anthony told them about the affair before the separation. Heather also testified that she caught Debra in bed with Burroughs shortly before the parties separated. She did not tell Anthony about this incident, however. Heather and Megan characterized Debra as deceitful and manipulative. Megan testified that Debra had opened several credit card accounts in her (Megan's) name and had incurred significant debt. A criminal fraud investigation was pending in relation to those allegations. Heather and Megan also described incidents during which Debra behaved inappropriately with their male friends.

Debra admitted to having had an extramarital affair with Burroughs, but claimed that it did not begin until after the parties separated in October of 2008.

Debra testified that on October 11, 2008,

Anthony flew into a jealous rage when he saw her speaking to a male friend (not Burroughs) at their gym. After they returned home, Anthony told her he was leaving her. Heather was home at the time. After Anthony went upstairs to pack his things, Debra and Heather both heard the sound of a gun being cocked. They ran upstairs and Anthony pointed the gun at Debra. Heather managed to wrest the gun out of Anthony's hands. Anthony left the home and Debra was successful in obtaining an order of protection against him.

Anthony acknowledged that on the day of the separation he became angry after he saw Debra flirting with a man at the gym. He also acknowledged that he retrieved a gun at their home that day. He denied threatening Debra or Heather with it, asserting instead that he had retrieved the gun because he was planning to commit suicide. Heather supported Anthony's version of the events of that day.

At the close of all the evidence, the court continued the case until March 24, 2011, for closing argument. Before that date, the court conducted *in camera* interviews of Jessie and Carlie and provided the parties with a report of the interviews. During the interviews, Jessie and Carlie expressed some fear of their father and described incidents in which he had lost his temper with them.

On February 11, 2011, Debra filed a petition for contempt, asserting that Anthony had willfully failed to make the child support payments that were due on January 1, 2011, and February 1, 2011. She alleged that Anthony had admitted his failure to make the January 2011 payment during the merits trial. On February 15, 2011, the court issued a show cause order directing that the contempt petition would be heard on the final day of the merits trial.

The merits trial recommenced as scheduled on March 24, 2011. After hearing argument on the contempt petition, and with respect to the divorce and custody matters, the court made certain preliminary findings and rulings, explaining that it would include additional findings in a written judgment to follow. The court opined that it had found both parties to be credible on some points and lacking credibility on other points. The court decided to award both parties an absolute divorce on the ground of a two-year separation.

With respect to marital property, the court found that the marital home was valued at $200,000, which was less than the amount of the outstanding mortgage loan of $287,000. Exercising its authority under Md. Code (2006 Repl. Vol.), section 8-205(a)(2)(iii) of the Family Law Article ("FL"), the court directed Debra to transfer to Anthony her interest in the marital home. As mentioned, the mortgage was in Anthony's name and he would thus be solely liable for that debt. The court valued the remaining marital property at $85,022. Of that amount, $70,672 was titled in Anthony's name; $3,050 was titled in Debra's name; and the remaining $11,300 was titled jointly. The court awarded Debra use and possession of the truck, a 2004 Ford Sport Trac titled in Anthony's name, for a period of three years.

After considering the factors set forth at FL section 8-205(b), the court decided not to make a monetary award. The court stated that it would be awarding alimony and analyzed the alimony factors set forth at FL section 11-106(b), but indicated that it had not yet determined the amount or duration of the award.

With respect to attorneys' fees, the court outlined the applicable statutory factors, found as a fact that both parties were substantially justified in prosecuting the matter, and stated that any award would be addressed in its written judgment.

The court found that it would be in the best interests of Jessie and Carlie to remain in the primary physical custody of Debra. The court concluded that joint legal custody was not appropriate given that the parties lacked the ability to communicate. It thus awarded Debra sole legal and physical custody of Jessie and Carlie. Anthony was granted visitation three weekends per month and for two weeks each summer. The court also devised an alternating holiday visitation schedule. It directed that the modified custody order would take effect immediately.

Finally, the court found that Anthony was in constructive civil contempt of the P.L. Order. It stated that the "only sanction w[ould] be that he pay his child support obligation as it's due and owing."

Eight months passed between the court's oral findings and its issuance of a judgment of absolute divorce. During that time, Anthony moved to reopen the record or, alternatively, to modify the custody decision. He later supplemented this motion.

On November 30, 2011, the court entered a judgment of absolute divorce. The judgment incorporated the court's oral findings made on the record on March 24, 2011, and supplemented those findings. The court imputed a monthly income of $1,500 to Debra based upon a finding that she was capable of earning more than her current income of $600 per month. The court found that Anthony was earning $8,374 per month. The court ordered Anthony to pay Debra $1,500 per month in alimony, commencing on January 1, 2012, for five years. It ordered Anthony to pay Debra $1,527 in child support from June 1, 2011, through December 31, 2011, prior to the commencement of alimony, and $1,253 per month in child support after the commencement of alimony. It also ordered Anthony to pay an additional $200 per month in arrears until the arrearage was paid in full. The court reserved on the

claim for indefinite alimony.

Any jointly owned tangible personal property that the parties did not divide by mutual agreement was ordered sold, with the proceeds to be divided equally.

Although the court declined to make a monetary award, it exercised its authority to assign Debra a 50% interest in Anthony's 401(k) retirement account, as of the date of the divorce. The account had a value of $19,430 as of March 24, 2011.

"[A]fter considering the statutory factors," the court awarded Debra $15,000 in attorneys' fees.

Finally, 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 in the Calvert County Detention Center, 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, including Anthony's motion to reopen the record, were denied.

Anthony noted a timely appeal. We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

> Pursuant to Maryland Rule 8-131(c), where, as here, an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. "It will not set aside the judgment of the trial court on the evidence unless clearly erroneous[.]" Md. Rule 8-131(c). "The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party[.]" *Ryan v. Thurston*, 276 Md. 390, 392, 347 A.2d 834, 835 (1975). "If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Solomon v. Solomon*, 383 Md. 176, 202, 857 A.2d 1109, 1123 (2004) (citation omitted). The trial court's conclusions of law, however, are not entitled to the deference of the clearly erroneous standard. *See Clancy v. King*, 405 Md. 541, 554, 954 A.2d 1092, 1099 (2008).

Friedman v. Hannan, 412 Md. 328, 335-36 (2010).

DISCUSSION

I.

Alimony

Anthony contends the circuit court abused its discretion in awarding Debra rehabilitative alimony and in setting the amount and duration of the award. Specifically, he argues that the evidence adduced at trial showed that Debra had made insufficient efforts to find work; that she could be self-supporting with a much lesser award; that Debra "was the source of estrangement between the parties"; and that Anthony was unable to meet his own needs and pay the alimony award.

Debra responds that the court's decision to award rehabilitative alimony was amply supported by the evidence at trial that she had been out of the work force for more than 20 years while raising the parties' four children and had virtually no marketable skills. She further maintains that the court appropriately balanced the alimony factors and did not abuse its discretion in determining the amount and duration of the award.

"An alimony award will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Solomon*, 383 Md. at 196 (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)). Alimony awards are governed by Title 11 of the Family Law Article. FL section 11-106(b) sets forth 12 factors that, if applicable, are relevant to the determination whether alimony is appropriate and, if so, its amount and duration. The court must consider "all the factors necessary for a fair and equitable award." *Id*. "Trial court judges are vested 'with a great deal of liberty to weigh the relevant factors and arrive at fair and appropriate results." *Goshorn v. Goshorn*, 154 Md. App. 194, 209 (2003)(quoting *Blaine v. Blaine*, 97 Md. App. 689, 699 (1993)).

In the instant case, the court made the following relevant findings in its oral remarks and in the judgment of divorce. It found that although Debra was "under-utilizing her skills," even if she were to maximize her current earning potential — which it concluded would result in a monthly income of $1 ,500[2] — she would not be wholly self-supporting. With respect to the time it would take for her to become self-supporting, the court referenced Debra's testimony that she could earn $30,000 to $35,000 annually as a nurse. She had testified that a part-time nursing program would take approximately five to six years to complete.

The court found that the parties, who were both 46 years old and in good physical and mental health, had lived "comfortabl[y]," but not "outlandish[ly]" during their 26-year marriage. They took modest family vacations and lived in a three-bedroom home. During that time, Anthony was the sole financial contributor and Debra was the primary caregiver for the children and ran the household.

The court found that both parties contributed equally to their estrangement, crediting testimony that

Anthony was controlling and jealous and that Debra had had an affair. The court disbelieved much of Debra's testimony regarding Anthony's alleged physical abuse, however.

The court further found that Anthony was earning $8,374 per month and had the ability "to be able to meet his needs as well as meet the . . . requirements of any alimony award." While it recognized that neither party had significant assets, it noted that Anthony had tools in his possession valued at $30,000. The court also took into account that Anthony was obligated to pay the mortgage on the marital home, child support of $1,527 per month through December 31, 2011, and $1,253 per month thereafter, and other debts, while Debra did not have "any significant financial obligations."

Anthony takes issue with numerous of these findings. We shall discuss his arguments *seriatim*. He first argues that Debra should have taken steps to find employment or to seek job training after the parties' separation in 2008. Debra testified, however, that while she had investigated job training programs, she was unable to afford any education or training. Her financial statement revealed a more than $2,000 monthly deficit. This evidence amply supported the court's finding with respect to Debra's ability to be self-supporting, even if she were earning the additional $900 per month imputed to her by the court.

Anthony also argues that Debra was the source of the parties' estrangement. As noted above, the court disagreed, finding that the parties contributed equally to their estrangement. This finding rested largely on credibility assessments. It is not the province of this Court to second-guess these findings. *See* Md. Rule 8-131(c).

Finally, Anthony argues that his financial statement, which was admitted into evidence, revealed the following monthly expenses: $2,516 for the mortgage on the marital home and other household related expenses; $700 for food; $879 in car and transportation related expenses; $1,083 in health insurance premiums; and a $1,128 monthly payment on the home equity line of credit on the marital home, for a total of $6,306. While Anthony does not dispute the court's finding that he earns a gross monthly income of $8,374, he asserts that the court failed to take into account his tax burden in finding that he could afford to pay $1,500 per month in alimony, in addition to the child support award of $1,527 per month through December 31, 2011, and $1,253 per month after that.

Debra responds that certain of Anthony's expenses, such as his claimed $700 monthly food expenses, are unreasonably high and that others are completely fabricated.[3] She further maintains that the court was permitted to take into account that alimony payments are entirely tax deductible and that, in any event, Anthony overstated the extent of his tax burden.[4]

We perceive no abuse of discretion in the court's decision to award Debra $1,500 per month in alimony for a term of five years. The court analyzed all of the pertinent factors in reaching its determination. While Anthony presented evidence of significant monthly expenses, the court was free to reject certain of his expenses as unreasonable and to expect that Anthony could use the marital property titled in his name, valued at more than $70,000, to pay down his debt and reduce his monthly expenses. The evidence amply supported Debra's need for rehabilitative alimony given the length of time she had been out of the work force and her lack of marketable skills. Moreover, the five-year term was tailored to permit Debra to begin training toward a nursing degree or another career to allow her to become self-supporting. For all of these reasons, we affirm the alimony award.[5]

II.
Child Support

Anthony contends the circuit court erred in calculating child support for two reasons. First; the court failed to include Anthony's health insurance expenses for the minor children in calculating child support and, second, the court failed to impute sufficient income to Debra.

Debra responds that Anthony failed to meet his burden of establishing the cost of health insurance for the minor children and therefore it was not error for the court to fail to include that amount in its calculations. With respect to the imputation of income, she maintains that it would have been error for the court to impute any additional income to her absent a finding that she had voluntarily impoverished herself and thus the court could not have abused its discretion by failing to impute more income to her.[6]

Pursuant to FL section 12-202(a) the court "shall use the child support guidelines" in calculating each parents' child support obligation. There is a "rebuttable presumption that the amount of child support which would result from the application of the child support guidelines" is correct. FL § 12-202(a)(2)(i). This presumption may be rebutted "by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(2)(ii). If the Court determines that a deviation from the guidelines figure is appropriate, it "shall make a written finding or specific finding on the record stating the reasons for departing from the guidelines." FL § 12-202(a)(2)(v)(1). Its findings must include the child support obligation that would have resulted by application of the guidelines, the amount of the departure from that figure, and

the reasons justifying such a deviation. FL § 12-202(a)(2)(v)(2).

With respect to health insurance, FL section 12-204(h)(1) provides that "[a]ny actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible shall be added to the basic child support obligation and shall be divided by the parents in proportion to their adjusted actual incomes." Then, in cases other than shared custody, "each parent's child support obligation shall be determined by adding each parent's respective share of the basic child support obligation, work-related child care expenses, *health insurance expenses*, extraordinary medical expenses, and additional expenses under subsection [12-204(i)]"; the person receiving child support ("the obligee") "shall be presumed to spend that parent's total child support obligation directly on the child or children"; and the person paying child support ("the obligor") "shall owe that parent's total child support obligation as child support to the obligee *minus any ordered payments included in the calculations made directly on be ha If of the child or children* for work-related child care expenses, *health insurance expenses,* extraordinary medical expenses, or additional expenses under subsection [12-204(i)]." FL § 12-204(1). (Emphasis added.)

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 she reaches the age of 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. For this reason, the trial judge declined to include any cost of health insurance for Jessie and Carlie in the calculation of child support.

We conclude that the court's finding regarding the health insurance expense was clearly erroneous. The approximately $155 per week for health insurance Anthony was paying for his children equals approximately $670 per month (rounded off). 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, for an actual payment of $670 per month, 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 12-204(h)(1), this amount should have been added to the $1,800 basic child support obligation of the parties. After each parent's child support obligation was calculated, which resulted in Anthony's having a child support obligation to Debra of $1,527 per month before the commencement to of alimony (*i.e.*, through December 31, 2011), and $1,253 per month thereafter, the court should have included a requirement in its judgment 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(1)(3). Thus, Anthony's correct child support obligation should have been $1,192 per month through December 31, 2011, and $918 per month thereafter.

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. Thus, we shall vacate $335 of the monthly child support award imposed by the court against Anthony.

III.
Attorneys' Fees

Anthony contends the circuit court abused its discretion in ordering him to contribute $15,000 toward Debra's attorneys' fees. FL section 12-103, governing awards of attorneys' fees in custody and child support cases, provides:

> a) In general. — The court may award to either party the costs and counsel fees that are just and proper under all the circumstances in any case in which a person:
>
> (1) applies for a decree or modification of a decree concerning the custody, support, or visitation of a child of the parties; or
>
> (2) files any form of proceeding:
>
> (i) to recover arrearages of child support;
>
> (ii) to enforce a decree of child support; or
>
> (iii) to enforce a decree of custody or visitation.
>
> (b) Required considerations. — Before a court may award costs and counsel

> fees under this section, the court shall consider:
>
> (1) the financial status of each party;
>
> (2) the needs of each party; and
>
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.
>
> (c) Absence of substantial justification. — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

See also FL §§ 7-107 (permitting the award of reasonable attorneys' fees in divorce actions); 11-110 (permitting the award of reasonable attorneys' fees in actions seeking alimony). The court must consider "the parties' financial status, needs and whether there was a substantial justification for bringing, maintaining or defending a proceeding" in deciding whether a fee award is appropriate. *Davis v. Petito*, 425 Md. 191, 200 (2012).

Here the court found that both parties had substantial justification for prosecuting the action, but, after balancing the parties' financial statuses and needs, concluded that Anthony should contribute $15,000 towards the nearly $42,000 in fees incurred by Debra. We perceive no abuse of discretion in this award given the court's findings, discussed *supra*, regarding the disparities between the parties' incomes and assets; and the fact that there was evidence before the court that Anthony already had paid the majority of his attorneys' fees, while Debra owed more than $40,000.

IV.
Denial of Anthony's Motions

Anthony next contends that the court erred and/or abused its discretion in denying a petition for contempt he had filed against Debra; in denying his motion to reopen the record to take additional evidence; and in failing to rule upon his motion for sanctions. We shall address each contention in turn.

A. Motion for Contempt

On September 2, 2010, Anthony filed a petition for contempt in which he alleged that Debra had violated the P.L. Order by enrolling Jessie and Carlie in a new school in St. Mary's County without consulting him. As discussed, in June of 2010 Debra moved in with Burroughs in St. Mary's County. At that time, the parties shared joint legal custody, with Debra having final tie-breaking authority. At the merits hearing, Debra acknowledged that she did not consult with Anthony before transferring the children to a new school, explaining that she couldn't "talk to him."

In the divorce judgment, the court denied Anthony's motion for contempt. We agree with Debra that, under the authority of *The Pack Shack, Inc. v. Howard County*, 371 Md. 243, 254 (2002), the denial of a motion for civil contempt is not reviewable on appeal.

B. Motion to Reopen

On August 12, 2011, in the interim between the last day of the merits hearing, March 24, 2011, and the date of entry of the judgment, November 30, 2011, Anthony moved to reopen the record to receive additional evidence or, in the alternative, for modification of custody. He later filed a supplemental motion to reopen. He argued that four "significant developments" had occurred that were relevant to the court's preliminary determination to award Debra sole legal and physical custody of Jessie and Carlie. First, he alleged that Debra had sent Jessie to school without her inhaler and she had suffered a severe asthma attack. Second, he alleged that he recently had returned to the marital home and had discovered it in a state of disrepair. While Debra and the minor children had vacated the home more than a year prior, in June of 2010, Anthony asserted that the condition of the house would have predated the move and demonstrated that Debra had permitted the children to live in unsanitary conditions. Third, and "[m]ost importantly," Anthony alleged that, in July of 2011, Debra had pleaded guilty in the District Court for Calvert County to felony theft of an amount less than $500. The charge to which she pleaded guilty related to Megan's testimony at the merits trial that Debra had opened credit cards in Megan's name. Debra had testified at the merits trial that she had opened the credit cards with Megan's full knowledge and had used them to pay Megan's extracurricular sports expenses. Anthony asserted that Debra's guilty plea demonstrated that she had perjured herself during the merits trial. Finally, he alleged that Jessie had contracted a severe staph infection in a wound over the summer and that, contrary to Anthony's express wishes, Debra had permitted Jessie to go swimming while her wound was still healing. He asserted that this caused a delay in the healing process.

In his supplemental motion, Anthony alleged that Debra had opened an account with QVC in Jessie's name in order to purchase a flat screen television and that that account was now past due and in collection. He asserted that a collection notice addressed to Jessie had been sent to the marital home.

Debra opposed both motions, challenging many

of the factual assertions. She acknowledged that she had plead guilty to the felony theft charge, but denied that she had perjured herself at the divorce hearing. She also noted that the credit card fraud allegations were the subject of extensive testimony at the merits trial.

In its judgment of divorce, the court denied the motion to reopen or, in the alternative, to modify custody. The circuit court, having heard three days of testimony, including extensive testimony concerning Debra's parenting and allegations of fraud, was plainly in the best position to determine whether any of this "new evidence" would have a bearing on the final decision. We perceive no abuse of discretion by the circuit court in denying the motion.

C. Motion for Sanctions

Last, Anthony argues that the trial court erred in failing to rule upon a motion for sanctions filed prior to the merits trial. On May 27, 2010, Anthony moved for sanctions, alleging that Debra's responses to his request for production were "severely deficient" because she had failed to provide any bank account records, credit card records, or receipts as requested. His motion, which is not included in the record extract, failed to comply with the Rule 2-431 certificate requirement.[7]

On June 4, 2010, Debra opposed the motion, asserting that she had fulfilled her discovery obligations because she provided all of the documents in her possession that were responsive to the discovery requests. Specifically, she asserted that she did not have a bank account.

On September 2, 2010, Anthony filed a "Line" with the court requested a ruling on his motion for sanctions. He filed a second "Line" requesting a ruling on November 5, 2010.

The motion remained outstanding when the merits trial commenced and the court heard argument at the start of the first day. At the conclusion of argument, the court stated, "Let's start. Everything is fair game." Anthony's counsel inquired as to whether the court would decide his motion for sanctions at a later point and the court responded, "[i]t will be dealt with, and we can take testimony on that issue."

Anthony's attorney cross-examined Debra with respect to certain of her discovery responses. He asked her whether she had provided him with requested bank statements. She explained that she did not use a bank account, instead paying in cash. She stated that when she received her child support check from Anthony each month, she would deposit the check into a Bank of America checking account she owned jointly with Heather and then immediately withdraw the entire amount. She also was asked whether she had provided any documentation in the form of receipts verifying her asserted monthly expenses. She stated that she did not recall being asked for any receipts and that she had not provided any. Anthony's counsel did not raise the issue of the motion for sanctions following this testimony.

The court did not address the motion for sanctions in its oral findings at the conclusion of the merits trial or in the judgment for absolute divorce. Given that the court did not sanction Debra, we conclude that the motion was implicitly denied. We perceive no abuse of discretion in the denial of the motion given that Debra's testimony was that she did not possess any documents responsive to the discovery requests and because the motion was facially deficient for failure to comply with Rule 2-431.

V.
Contempt Finding Against Anthony

Anthony contends the court abused its discretion by sentencing him to 30 days' incarceration for constructive civil contempt. The court suspended the entire sentence on the condition that Anthony continue to pay his child support in a timely manner.

We conclude that it was error for the court to find Anthony in constructive civil contempt of the P.L. Order. As discussed above, that order directed Anthony to pay Debra $300 per month for child support, with that amount coming due 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.[8]

Anthony's counsel responded that because the contempt petition only had addressed the payments for the months of January and February of 2011, he was not prepared to address any payments prior to that date. He acknowledged that Anthony's payments for January and February had been late, but explained that Anthony was struggling financially because he was paying rent, paying the mortgage on the marital home, and paying attorneys' fees.

At the conclusion of the hearing, the court found that Anthony had "by his own admission" failed to make the child support payments when due and found him in contempt. The court stated that the "only sanction will be that he pay his child support obligation as it is due and owing." In the judgment of absolute divorce entered eight months later, however, the court

imposed a sentence of thirty days' incarceration, with that sentence to be suspended so long as Anthony paid his child support on time.

Rule 15-207(e) governs constructive civil contempt[9] 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." *Id*. This is so because the purpose of constructive civil contempt is to coerce compliance with a court order, not to punish the contemnor for past disobedience. *See Arrington*, 402 Md. At 93. 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. For this reason, we shall reverse the finding of contempt.

VI.
Custody

In all contested custody matters, the governing standard is the best interest of the child. *McCready v. McCready*, 323 Md. 476, 481 (1991). On appeal from a custody determination, we apply three interrelated standards of review:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Gillespie v. Gillespie, 206 Md. App. 146, 170 (2012) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003). In *Montgomery County Dep't of Social Services v. Sanders,* 38 Md. App. 406, 420 (1978), this Court set forth a nonexclusive list of factors relevant to the best interest inquiry:

> (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health and sex of the child; (8) residences of parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender.

(Citations omitted.)

In the instant case, the court's ultimate custody determination was that Debra should have sole legal and physical custody of Jessie and Carlie, with Anthony to have regular visitation. In reaching this conclusion, the court thoroughly addressed the *Sanders* best interest factors. It found that the majority of the best interest factors were neutral or inapplicable: both parties wanted custody of the minor children; both parties would permit Jessie and Carlie to maintain family relations; both parties could offer the children equal material opportunities in light of the court ordered alimony and child support awards; the parties lived fairly close to one another; the children had not been separated from either parent during the pendency of the divorce proceedings; and there had been no prior abandonment. The court declined to consider Jessie's and Carlie's custody preferences, made known to the court during the *in camera* interviews, because it concluded that at ages 10 and 8 respectively, they were too young "to form a rationale judgment" as to their best interests.

Turning to the fitness of the parties and their character and reputation, the court found that there was "no question [Anthony] has a temper." It expressed "a great deal of concern about [Anthony] and his temperament and his relationship with the children." The court opined that Anthony was under the mistaken impression that he had a perfect relationship with Jessie and Carlie, but that the court's own impression was that Jessie and Carlie loved Anthony, but were "intimidated by him."

The court found that Debra's conduct had not been "spotless" either, noting that her estrangement from Megan and Heather was troubling since there was evidence that she was making no effort to communicate with her adult children. The court rejected testimony suggesting that Jessie and Carlie would be better off returning to their prior elementary school in Calvert County, opining that the girls were "happy. . . where they are now" and had both expressed to the court that they had "more friends" at their new school than they had had at their old school.

The court also considered the possibility of maintaining joint legal custody, as set forth in the P.L. Order. Ultimately, it concluded that the parties could

not communicate to the degree necessary to make mutual decisions in the best interests of Jessie and Carlie.

Anthony contends that the court clearly erred in its assessment of the best interest factors and abused its discretion in its ultimate determination.[10] He maintains that it was "clear" that Anthony was "in all respects, more fit to care for the parties' minor children." He relies on the testimony of Heather and Megan as to Debra's past conduct, including allegations that she slapped them and called them names. He argues that the evidence showed that he was a hard working family man and that Debra was an adulterer and a liar. As the above stated facts make clear, however, there was conflicting evidence presented concerning the character of the parties and their relative fitness as parents. It was the province of the circuit court to assess the credibility of all of the witnesses before it and the court was free to accept or reject the testimony and evidence relied upon by Anthony.[11] It also was the sole province of the circuit court to weigh the evidence before it. We perceive no clear error or abuse of discretion by the court and shall affirm the custody order.[12]

CONTEMPT ORDER AGAINST THE APPELLANT REVERSED. $335 PER MONTH JUDGMENT FOR CHILD SUPPORT VACATED. CIRCUIT COURT FOR CALVERT COUNTY DIRECTED TO AMEND ITS JUDGMENT TO REQUIRE THE APPELLANT TO PAY FOR HEALTH INSURANCE FOR MINOR CHILDREN. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY THE APPELLANT AND ONE-HALF BY THE APPELLEE.

FOOTNOTES

1. For case of discussion, we shall refer to the parties by their first names.

2. The court likely derived that figure from testimony that Debra earned $18,000 annually in 1985 working as an executive assistant at a credit union. Her job largely involved typing. While Anthony complains that the court failed to make any adjustment to this figure to account for the passage of time, the court quite reasonably could have concluded that Debra's typing skills would be less marketable now and that her 26-year absence from the work force also would decrease her marketability.

3. For example, she suggests that Anthony misrepresented the amount of an HOA fee, stating that it was $233 per month when, in actuality, it was only $33 per month.

She also notes that Anthony reported expenses related to his rental property, which he will no longer need now that he can return to the marital home. In his brief in this Court, however, Anthony does not include any rental expenses.

4. She points to her trial testimony that the parties received a tax refund of between $13,000 and $15,000 in 2009. That amount would exceed the amount of income taxes Anthony claims are withheld from his pay.

5. We note as well that, based on our analysis of the next (child support) issue, we calculate that Anthony's monthly child support obligation should be $335 less than the amounts ordered.

6. Debra did not file a cross-appeal with respect to this issue.

7. Rule 2-431 provides that

> [a] dispute pertaining to discovery n*eed not be considered by the court* unless the attorney seeking action by the court has filed a certificate describing the good faith attempts to discuss with the opposing attorney the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion.

(Emphasis added.)

8. She provided the court with the dates of each payment from July 2010 through March 2011. Anthony's payments were typically made between 30-45 days after each came due. Prior to July of 2010, the child support payments had been made through an earnings withholding order.

9. Debra argued in her motion for contempt that Anthony was in constructive civil contempt of the P.L. Order *and* in direct civil contempt. As the Court of Appeals has explained, however, direct contempt, whether civil or criminal, is conduct that "interrupt[s] the order of the courtroom and interfere[s] with the conduct of business and is within the sensory perception of a presiding judge." *Arrington v. Dep't of Human Resources*, 402 Md. 79, 92-93 (2007) (internal quotation and citation omitted). It is plain that Anthony was not in direct civil contempt.

10. While Anthony mistakenly states in his brief that the "clearly erroneous standard does not apply," he is plainly arguing that the court committed clear error in assessing certain of the factors.

11. Anthony also argues that events occurring since the entry of the judgment of the divorce involving Burroughs and Carlie are relevant to our inquiry. As this evidence was not before the circuit court, we may not consider it in deciding this appeal.

12, In this Court, Debra filed a motion for sanctions against Anthony and a motion for attorneys' fees, both of which have been opposed. We exercise our discretion to deny these motions.

Cite as 3 MFLM Supp. 53 (2013)

Divorce: settlement: mutual assent

Thomas Chuckas, Jr.

v.

Kelly Chuckas

No. 232, September Term, 2012

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

Opinion by Davis, J.

Filed: January 14, 2013. Unreported.

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.

Appellant, Thomas Chuckas, Jr., appeals from an order of the Circuit Court for Anne Arundel County denying his Motion to Enforce Settlement. In his motion, appellant alleged that his wife, Kelly Chuckas, appellee, refused to abide by the terms and conditions of a settlement the parties agreed upon during mediation which they attended in an effort to resolve issues related to their divorce. Appellant raises two questions on appeal,[1] which we have combined into one:

> 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?

For the reasons which follow, we shall affirm the court's ruling.

FACTS AND PROCEEDINGS

Prior to the action which is the subject of this appeal, the parties had been married since May 17, 1981, a marriage to which three children were born.[2] On March 16, 2011, appellee filed a Complaint for Absolute Divorce, Custody and Other Relief. In the complaint, appellee alleged that appellant had committed adultery; appellee also requested the following: sole custody of the couple's minor child, child support, permanent alimony, title and possession of the marital home, payment by appellant of the mortgage and associated expenses, payment by appellant of health insurance for appellee and the minor child, an appropriate monetary award, her marital share of appellant's pension, Social Security benefits, a 401-K account prior to its dissipation,[3] and reasonable attorney fees. On May 2, 2011, appellant filed his Answer and Counter-Complaint requesting that the court award him an absolute divorce from appellee, joint custody of the minor child, and for the court to determine ownership and allocation of the marital property.

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

On July 7, 2011, the parties were ordered to attend mediation regarding the issues of custody, visitation and property. The parties participated in several mediation sessions which resulted in the drafting of a document captioned "Terms and Conditions of Settlement" at the October 14, 2011 mediation session. The cover sheet, signed by the parties and their respective counsel, stated in pertinent part:

> Contingent upon the parties' attorney drafting a Property and Settlement Agreement, the parties agree to the attached Terms and Conditions of Settlement, dated October 14, 2011. Any dispute over the language of the Property and Settlement Agreement will be resolved by the Mediator[.]

The terms outlined in the document, agreed upon and initialed by the parties, were laid out partly in paragraph form and partly in a chart which featured a heading stating "For Negotiation Purposes Only." With respect to alimony, the document provided:

> Husband's obligation to pay alimony and medical support shall be indefinite in duration but modifiable in amount. . . . The parties agree that the provisions . . . with respect to the duration of Husband's obligation to make, and Wife's entitlement to receive, alimony, spousal support and/or maintenance are not and shall not be subject to any court modification, and the parties waive the right to ever request any court to change or

> make a different provision regarding the duration of Husband's alimony and support payments.
>
> In the event of a material change in Husband's financial circumstances, he may request a modification of the amount of alimony and medical support. The process shall be initiated by the Husband notifying Wife . . . of his intent to pursue a modification of the alimony and support amounts[.]

The document also included terms regarding the pensions of the parties, appellant's 401-K, credit card debt, high school and college tuition for the minor child, the student loans of the couple's other children, conditions related to the sale of the marital home, a life insurance policy on appellant with appellee as beneficiary, the couple's furniture and appellee's attorney fees. The final page of the document was captioned "Addendum" and included the following pertinent provision:

> This Agreement is condingent[sic] upon the accuracy of the information disclosed by both parties of all relevant information.

Subsequently, appellant's counsel drafted a "Separation and Property Settlement Agreement" and submitted it to appellee's counsel on October 19, 2011.[4] The draft incorporated terms from the October 14th document as well as a general waiver stating that the provisions, as outlined, would be in "full satisfaction of all obligations for support and maintenance or otherwise arising out of the marital relationship of the parties" and that each party would be released from any further obligations. Also set forth in the October 19th draft, although not in the terms outlined on October 14th, was a provision stipulating that, if appellee incurred expenses in excess of the set alimony amount, such sum would be deducted from a subsequent support payment to appellee or other amounts due to appellee from appellant. Appellee did not sign the document.

On November 14, 2011, appellee's counsel sent a revised copy of the October 19th draft agreement, featuring her client's proposed changes, to appellant's counsel. Significantly, appellee, in the revised draft, proposed changes to the terms related to the sale of the marital home and alimony modification, namely that either party (not just appellant) would be able to request modification of the alimony amount and that appellant would not be able to make deductions from the amount set forth for alimony in the event that appellee's expenses exceeded the amount of support she was to receive. On November 23, 2012, appellee's counsel e-mailed appellant's counsel suggesting that the parties return to mediation in order to address the revisions with which appellant took exception. The parties attended a mediation session on December 12, 2011 in an attempt to resolve their disagreement over the terms of settlement.[5]

On January 17, 2012, appellant filed a Motion to Enforce Settlement, alleging that the terms agreed to at the October 14th mediation session resolved all issues as to custody, visitation and property, as ordered by the court, and that the terms agreed to that day constituted an enforceable settlement.

On February 2, 2012, appellee filed her Response to appellant's motion in which she asserted that the terms agreed to by the parties were mere "notes from the mediation" which "although signed by both parties, [did] not constitute a binding agreement" and, therefore, were not enforceable. Moreover, appellee argued, the October 14th terms were contingent upon the accuracy of information provided by the parties and, to that end, appellant had failed to disclose information related to an American Express credit account and associated debt, as well as his withdrawals of considerable funds from his retirement accounts without appellee's knowledge or consent. Appellee's response also stated that she had learned, despite appellant's non-disclosure, of a "marker" in the amount of $50,000 which appellant took from his employer. Appellee believed appellant had used the funds from the "marker" to support his girlfriend and their child, subsequently using the funds withdrawn from his retirement accounts to pay back the "marker." Appellee further contended that the draft of the settlement agreement appellant sent her included provisions regarding issues which were not discussed at the October 14th mediation session and that the parties had continued to negotiate terms in the months which followed, agreeing to modified terms on December 12, 2011.

On February 15, 2012, appellant filed his Reply to appellee's response to his motion. Appellant stated that he had disclosed information related to the "marker" and the American Express credit card in the financial spreadsheet that he re-sent to appellee on October 4, 2011, current to August 2009. Thus, he contended that appellee was equipped with the relevant information to allow the parties to negotiate the terms of settlement in good faith, the terms agreed to on October 14th were reduced to writing in the settlement agreement draft sent to appellee on October 19th, "there were no contingencies to the settlement" and no changes to the terms agreed upon on October 14th were incorporated into the settlement agreement draft sent on October 19th.

On February 28, 2012, a hearing was held on appellant's motion to enforce settlement.[6] Appellant

testified that he and appellee, accompanied by their respective counsel, attended mediation "five or six" times attempting to resolve issues related to their divorce. He stated that his aim in mediation was to settle all the relevant issues fairly and that, while he wished to meet his obligation to support appellee, he was concerned that he would need the flexibility to modify that obligation because his salary had gone down and he owed money to the IRS which created a tax lien on the marital home. Appellant explained that, while there had been discussions between the parties regarding appellee's desire to have the ability to modify the amount of alimony, the parties eventually agreed to the corresponding term as it appeared in the terms and conditions outlined on October 14th. He testified that he believed the document drafted at the October 14th mediation session was a final expression of the terms of the settlement between the parties:

> [APPELLANT]: I believed naively that we were done, and was contingent upon the draft documents being finalized. But I thought all the terms and the conditions were done.
>
> * * *
>
> [THE COURT]: So, is that what you thought, sir?
>
> [APPELLANT]: Yes.
>
> [THE COURT]: That basically Ms. Chuckas had agreed to all of that?
> [APPELLANT]: Yes, sir.

During cross-examination of appellee the following colloquy occurred:

> [APPELLEE'S COUNSEL]: And the last page of Exhibit A [the October 14th terms and conditions] . . . further sets forth that the agreement is contingent upon the accuracy of the information provided by both parties, correct?
>
> [APPELLANT]: Correct.
>
> [APPELLEE'S COUNSEL]: And at that point, discovery had been propounded and answered by you . . . and Ms. Chuckas, correct?
>
> [APPELLANT]: Correct.
>
> [APPELLEE'S COUNSEL]: And at that point, you hadn't disclosed your position with a company called Monarch as an officer; had you?
>
> [APPELLANT]: That's correct.
>
> [APPELLEE'S COUNSEL]: And you hadn't disclosed statements from your American Express card; isn't that correct?
>
> [APPELLANT]: That's correct.
>
> * * *
>
> [APPELLEE'S COUNSEL]: Let me ask you this way: You never provided documentation showing that you had withdrawn your full amount of your retirement account pension until we're with [the Mediator]; is that correct?
>
> [APPELLANT]: That's correct.
>
> * * *
>
> [APPELLEE'S COUNSEL]: You agree with me that at the mediation in October Ms. Chuckas expressed her desire to be able to modify alimony based on her having an income of $11,000 a year, correct?
>
> [APPELLANT]: She expressed that opinion.
>
> * * *
>
> [APPELLEE'S COUNSEL]: But you never added to Exhibit A [the October 14th terms and conditions] a specific line that says she is precluded from modifying, did you?
>
> [APPELLANT'S COUNSEL]: Objection. The document speaks for itself here, Judge.
>
> [THE COURT]: I'm going to overrule the objection since it's cross and say, sir, did you ask for language like that[?]
>
> [APPELLANT]: No, in reading the document, I assumed it said husband could modify it.

Appellee testified that, at some point during the mediation session of October 14th, appellant's counsel made a remark which upset her greatly, *i.e.*, "My husband's attorney . . . made what I thought was an inflammatory remark saying that [appellant] was only legally obliged to pay for his [daughter with his girlfriend] and not our 18-year-old son . . . who had not [yet] finished [high school]." She stated that, after that remark was made, she was "fed up" and left the mediation session before being coaxed back by her attorney. Appellee explained that, for the remainder of the mediation session, she was angry and was not following the conversation between the lawyers. She stated, "I did not understand that when I signed that agreement . . . I thought that was a draft that [appellant's counsel] was going to type up and [appellee's counsel] and I were going to be able to review it when I calmed down and go over it again and make changes." She asserted that she never believed that the discussion of terms that day would prevent her from initiating modifi-

cation of alimony. Moreover, she testified that "[a]nything that we mediated from the first — from what happened at the mediation session we — this document dated 10-14, was mediated at another session and it was modified." Appellee stated that the parties had come to agreement on a number of modified terms at a subsequent mediation session in December 2011.[7]

At the conclusion of the hearing, the court ruled in pertinent part:

> The oldest case law we have I think, can be summarized in the words of Yogi Berra, which is, "It ain't over until it's over." That only when you know, all of the issues are resolved and everyone agreed on all the issues, then there is an agreement. But if you were still negotiating, it's not over, and there was no agreement.
>
> * * *
>
> . . . [*Barranco v. Barranco*] was a case which muddied the Yogi Berra Principle, and it said in essence that sometimes it could be over if there are a few loose ends. When the jest[sic] of it being that if all of the material points are agreed between the parties, that the Court could say okay, there is a complete agreement on everything that was a material point and these little loose end type details should be sufficient, or should be sufficiently resolved by the Court. . . .
>
> * * *
>
> In this instance, it appears that in . . . the mediator's office, that he . . . actually got a bunch of points written down and had the parties initial it and sign what has become our Exhibit A, which contains three parts. And part 1 is the cover sheet I'd call it, which has two sentences and then signatures of the parties and attorneys, saying, "Contingent upon the parties attorney drafting a Property Settlement Agreement, the parties agree to the attached terms and conditions. Any dispute over the language of the Property Settlement Agreement will be resolved by the mediator."
>
> So that was a Borancoish[sic] try by the mediator to say if you agree all the material points, and I think that perhaps you have, that I'll help you work out the immaterial loose ends, those little details.
>
> However, there was a slight loophole there when the said, "Contingent upon the parties drafting." Contingent sounds like there is something still to be resolved which is not resolved. Perhaps more than language. Further, throwing a little confusion on the matter is the — I said three parts. There's actually four parts. The next part is the Terms and Conditions, which is one, two, three, four, five, six paragraphs of text on a single page. Then there is the two pages of issues headed "For negotiation purposes only," which the parties initialed. And the fourth and last part of Exhibit A is . . . headed Addendum, and it says "One, this agreement is contingent upon the accuracy of the information disclosed by both parties of all relevant information." And later talks about some other details as to life insurance policies, and another detail about how the parties are going to handle tax issues.
>
> . . . So it's a contingency, requires accuracy, it requires all relevant information.
>
> So yet another contingency. In the Court's mind, each of those contingencies, especially the second one, are points upon . . . which if a party is not satisfied by definition, means the party could pull out or could say, wait a minute, I'm not accepting these terms.
>
> There was cross-examination of Mr. Chuckas on the witness stand, in which he was asked by [appellee's counsel] "Did you disclose your position with the corporation Monarch," . . . And he said, "That's correct," he did not. "Did you disclose the information about your American Express credit card account?" He said, "He did not." Asked if he disclosed his tax lien, he said, "Yes, I did disclose that." Asked if he had disclosed his withdrawal of money from the pension, a particular pension, and I believe the answer to that was right, he did not disclose that.
>
> * * *
>
> Nevertheless, when the e-mails go back and forth between the attorneys

. . . between February, I think it's the 24 and February 28, again, the morning of the hearing beginning, the February 24 e-mail from [appcllee's counsel] is saying, second sentence, "The issues of alimony modification is once again blown up as we discovered your client has a position as an officer with Monarch [Content] Management. He has additional income he is not disclosing. I do not have his 2010 full tax return." And the response to that by [appellant's counsel] is not you're not entitled to the 2010 tax return. It is saying eventually, I'm going to get you the 2010 tax return, I think. "I will see if the 2011 taxes have been filed," etc. And [appellee's counsel] is saying, "We will settle upon receiving his 2010 taxes and 2011 W-2." She will not accept his word on his income.

In other words, she is saying, [appellee's counsel] is saying, on behalf of Mrs. Chuckas, that she doesn't trust Mr. Chuckas to just tell her, without producing documentation of what his financial situation is, implicitly, including the Monarch [Content] Management position.

* * *

I don't think that is an unreasonable position by Mrs. Chuckas and her attorney to say that they need all of the financial disclosure before reaching a final agreement to settle the case. And whether it's material or not material, might depend on what was disclosed. And in this case, it's still — the Court would find that [a]ll relevant information potentially has not been disclosed[.] Because while we have the word of Mr. Chuckas that through his attorney proffering that there is no income associated with Monarch [Content] Management, I think that the agreement, especially the Addendum, contemplates disclosure of documents, not just take my word for it.

So for that reason, for that main reason, the Court is going to deny the motion to enforce. I also think, however, that the history of the backing and forthing[sic] with some other modifications, a couple of modifications were requested by — or in effect, engrafted by [appellant's counsel] in his draft of October 19 . . . And then another three or more were requested by Mrs. Chuckas through her attorney in the follow-up draft. That whole exchange suggests that the parties as still being open, as still being in negotiation. Notwithstanding the language.

So I think that . . . implies that there was not quite a meeting of the minds. So for all of those reasons, I think that by preponderance of the evidence, the Court would find that it was not a complete agreement on all material points, particularly in light of the failure prior to filing this motion to enforce, of there having been disclosure of all relevant information that had been requested. So again, the Court denies the motion for that reason.

Additional facts will be provided below as warranted.

DISCUSSION

Appellant argues that, after multiple mediation sessions, the parties agreed to terms on a number of the issues to be decided in their divorce and memorialized the same in the October 14, 2011, "agreement." He contends that the terms in the "agreement" were unambiguous and contingent upon the drafting of a Property and Settlement Agreement, a document that appellant's counsel drew up and distributed to appellee and her counsel, which appellee then refused to sign. Appellant asserts that the court's finding that there was no "meeting of the minds" between the parties, rendering the October 14th "agreement" unenforceable, was clearly erroneous. As such, appellant argues that the court's denial of his Motion to Enforce Settlement should be reversed and remanded with instructions that the October 14th "agreement" is valid and enforceable.

Appellee counters that, whether there was a "meeting of the minds" between the parties regarding the terms outlined on October 14th was a factual issue and that the court was not clearly erroneous in finding that a "meeting of the minds" had not occurred to make the "agreement" in question enforceable. She asserts that this finding was supported by the evidence that negotiations between the parties continued long after October 14th and that the subject terms were modified in that time. Appellee contends that 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 that there was evidence related to his income and assets which he did not disclose. Appellee argues that the record contained ample evidence to establish that there was not mutual assent between the parties with respect to the terms outlined on October 14th and, therefore, the court did not err in denying appellant's motion to enforce settlement.

Regarding our review of disputes as to the validity of settlement agreements, we have explained:

> Settlement agreements are enforceable as independent contracts subject to the same general rules of construction that apply to other contracts. As long as the basic requirements to form a contract are present, there is no reason to treat such a settlement differently than other contracts which are binding.

Erie Ins. Exch. v. Estate of Reeside, 200 Md. App. 453, 460-61 (2011) (internal citation and quotation omitted).

Specifically, whether there has been the requisite "meeting of the minds" or mutual assent is a factual determination. Therefore, so long as the court's finding with respect to mutual assent is not clearly erroneous, we will not disturb its ruling on that ground. Md. Rule 8-131(c) (stating that we "will not set aside the judgment of the trial court on the evidence unless clearly erroneous[.]"); *see Cochran v. Norkunas*, 398 Md. 1, 14 (2007) ("It is universally accepted that a manifestation of mutual assent is an essential prerequisite to the creation or formation of a contract.") (citation omitted); *Lohman v. Wagner*, 160 Md. App. 122, 136 (2004) (applying the clearly erroneous standard to the trial court's finding that there was no "meeting of the minds" between the parties involved, and thus no enforceable contract).

The presence of the required element of mutual assent in an allegedly valid agreement 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, as they were initially outlined, 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. Moreover, she stated that the partial heading of the October 14th outline of terms, referring to the document's purpose as a negotiation tool, contributed to that belief. 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 of the relevant terms as a showing that the parties did not intend to be immediately bound by the terms as they were outlined during the October 14th mediation session. *Id.* ("If the parties do not intend to be bound until a final agreement is executed, there is no contract.") (citation omitted). When the derivative October 19th settlement agreement draft was drawn up and distributed to appellee and she 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 that 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. Appellee requested information regarding the noted credit and retirement accounts in a letter to appellant's counsel prior to the October 14th mediation session. Appellant, however, did not disclose the desired information before drawing up the October 19th settlement agreement draft. Appellant's involvement with Monarch Content Management was discovered only through research by appellee and her counsel. Appellant's only clarification on the issue was his statement that he received no income through his position with 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 applicable factor of mutual assent, we determine whether the facts indicate that the parties were in agreement as to the essential terms of the settlement as they were outlined in the October 14th document. *Id.* While some correspon-

dence between the parties show appellant and his counsel referring to the October 14th document as the final expression of the terms of settlement, the record also shows that appellee sent a counter-proposal, as well as other modification suggestions, and that the parties attended subsequent mediation. Later correspondence between the parties reflects that some modified terms seem to have been agreed to as both parties refer to the incorporation of terms approved during a December mediation session. The newly agreed upon terms were not reduced to writing and included in the record, but their existence is clearly acknowledged by both parties. *See Berringer v. Steele*, 133 Md. App. 442, 504 (2000) (stating that a written agreement may be modified by subsequent oral agreement but that such modification amounts to the creation of a new contract) (citations omitted). 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 err in denying appellant's motion to enforce settlement.

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

FOOTNOTES

1. The questions, as posed by appellant are:

> 1. Did the trial court err in holding that the written settlement agreement signed by the parties at mediation on October 14, 2011, was unenforceable by Husband?
>
> 2. Did the trial court err in denying Husband's Motion to Enforce the October 14 Agreement?

2. At the time of the parties' divorce, their youngest child was eighteen years old, but had yet to graduate from high school; he was referred to as the couple's "minor child" throughout the proceedings.

3. Appellee alleged, specifically, that appellant had intentionally withdrawn significant amounts from his 401-K account since the couple's separation, in approximately April of 2008, and requested that the court enjoin appellant from "dissipating any further marital assets."

4. Each page of the October 19th document was stamped with the word "DRAFT."

5. Although both parties mention the December 12, 2011 mediation session in their briefs, there is no evidence in the record which establishes the specifics of what was discussed or resolved at that meeting.

6. Although the hearing commenced on February 28, 2012, it required a second day of proceedings which took place on March 22, 2012. To avoid confusion, we shall refer to the hearing as though it were a single continuous event.

7. Appellee admitted into evidence e-mail correspondence, dated February 9, 2011, between the parties' respective counsel in which appellee's counsel referenced the December mediation session:

> [Appellee] will settle the case for the agreement made in [the Mediator's] office in December and will accept the original terms relating to modification of alimony. If I may suggest that [the Mediator] incorporate the changes from December into the [October 19th draft], then we can get our clients to sign it and use the motion hearing date as the uncontested divorce date.

Additional correspondence between the parties showed that appellee's counsel, on February 24, 2012, requested that terms, related to alimony modification, from an outline drafted by the Mediator be incorporated into the potential settlement agreement. A subsequent e-mail from appellant's counsel, to appellee's counsel, stated "I will try and incorporate the changes. I am not certain why we did not receive [the Mediator's] memo but, no matter."

NO TEXT

Cite as 3 MFLM Supp. 61 (2013)

Adoption/Guardianship: termination of parental rights: insufficient progress

In Re: Adoption/Guardianship of Matteo B.

No. 1029, September Term, 2012

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

Opinion by Hotten, J.

Filed: January 14, 2013. Unreported.

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.

This appeal arises from a decision of the Circuit Court for Washington County, sitting as a juvenile court, which terminated the parental rights of appellant–father, Daniel B., Sr. ("Father") for minor child, Matteo B. ("Matteo"). The Washington County Department of Social Services ("Department") received a child protective services ("CPS") report of neglect, based on drug exposure to the newborn. The Department thereafter filed a shelter care petition, which the court granted. After his release from the hospital, Matteo was placed in foster care. Following a hearing, the court determined that Matteo was a Child in Need of Assistance ("CINA"), and ordered that he be placed in the Department's temporary custody for continued foster care placement. The Department filed a Petition for Guardianship, and Father filed an objection. Matteo's mother, Kaylyn M. ("Mother"), voluntarily terminated her parental rights. Following a hearing on the petition, the court entered judgment terminating Father's parental rights. Father noted an appeal, and presents the following question for our consideration:

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

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

FACTUAL AND PROCEDURAL BACKGROUND

Matteo was born on March 4, 2010 to Mother and Father 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. As a result of exposure to drugs, he tested positive at birth for marijuana, and was diagnosed with gastroschisis.[1] 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, and Mother agreed to substance abuse evaluation and testing, and Father assented to random drug testing. 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 that they were homeless.

On June 2, 2010, the Department filed a shelter care petition. After a hearing on June 3, 2010,[2] 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 during an adjudication hearing on July 15, 2010, the court found that the "allegations in the CINA petition ha[d] been proven by a preponderance of the evidence. . . .," and Matteo was to remain in the Department's temporary custody. During a disposition hearing on August 12, 2010, the court found "[t]hat the child [was] a child in need of assistance" and should be placed in licensed foster care. Furthermore, the court adopted the Department's recommendations, that the parents (1) complete a drug and alcohol evaluation and testing; (2) complete a mental health evaluation; (3) complete parenting classes; (4) obtain lawful employment and suitable housing; and that (5) upon good cause, supervised visitation would transition to unsupervised for Father.[3]

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

During a review hearing on September 23, 2010, the court stated that the permanency plan would continue as reunification with a concurrent plan of relative placement. On December 14, 2010 Father indicated that he would not participate in further drug screens until a paternity test confirmed that he was Matteo's father. After rescheduled dates, on March 30, 2011, DNA results determined that appellant was Matteo's father.

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 outlined in the service agreements. On March 6, 2012, the Department filed a Petition for Guardianship. Mother voluntarily terminated her parental rights since "she never responded to the Petition for Guardianship plus she . . . had no contact with the Department, [and] no contact with the child for well over a year." However, on April 2, 2012, Father noted his objection, stating "I want to maintain my relationship with my son, and believe I am in a position to reunify with my son." On April 26, 2012, the court determined that the matter was a contested guardianship, and ordered a hearing on the merits.

On May 31, 2012, the court conducted a termination of parental rights hearing, during which, the Department sought guardianship of Matteo for the purpose of having him placed for adoption. During the hearing, the court considered all the factors enumerated in Md. Code (1984, 2012 Repl. Vol.), § 5-323(d) of the Family Law Article.

After the hearing, the court made the following findings in an order issued on June 14, 2012 (emphasis in original):

> After all hearings are held, on the merits and all other [p]leadings and [e]xhibits having been read and considered and it appearing that the granting of this [d]ecree is in the best interest of the minor child who is the subject of these proceedings, it is this 14th day of June 2012, by the Circuit Court for Washington County, Maryland.
>
> ORDERED, that David A. Engle, Director of the Washington County Department of Social Services, or his successors, be and is hereby appointed guardian of *Matteo* [*B.*] who is the subject of these proceedings, and that the said David A. Engle as Director of the Washington County Department of Social Services, or his successors, shall henceforth have the care and custody of *Matteo* [ ] with the right to consent to adoption and/or right to arrange for long-term care short of adoption in accordance with Family Law Article, Section 3-501, et seq., Annotated Code of Maryland, and the applicable Maryland Rules of Procedure, as amended from time to time. This right of guardianship with the right to consent to the adoption and/or to arrange for long-term care short of adoption shall terminate on the eighteenth birthday of said minor child; and it is further,
>
> ORDERED, that any and all rights of the legal and natural parents of the said minor child, *Matteo* [*B.*], namely the mother; *Kaylyn [M.]* and the father, *Daniel [B.] Sr*. be and the same are hereby terminated and that no further notice need to be given to said parents of any further extension of this decree of placement for adoption or arrangement for long-term care except as provided in Family Law Article, Section 5-319, Annotated Code of Maryland, as amended from time to time.
>
> Thereafter, Father filed his timely appeal.

STANDARD OF REVIEW

In *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010), the Court of Appeals outlined the standard for reviewing a juvenile court's decision to terminate parental rights:

> Namely, [w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies.[4] [Second,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Id. (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (citations omitted).

Therefore, we review the court's factual findings

under a clearly erroneous standard, *In re Adoption/Guardianship of Amber R. and Mark R.*, 417 Md. 701, 709 (2011), and will reverse "where no reasonable person would take the view adopted by the [trial] court," or when the court does not refer to any guiding principles or rules. *In re Yve S.*, 373 Md. at 583 (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312-13 (1997)). "Questions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." *In re Caya B.*, 153 Md. App. 63, 74 (2003) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. at 312) (internal quotation omitted).

DISCUSSION

I. Whether The Court Erred In Terminating Father's Parental Rights?

The United States Constitution protects a parent's fundamental right to raise and care for his or her child without state interference. *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 299-300 (2005). *See In re Yve S.*, 373 Md. at 565; *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 666, 692 (2002); *In re Mark M.,* 365 Md. 687, 705 (2001). Similar to the U.S. Supreme Court, Maryland recognizes that a parent's interest "'occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility." *In re Adoption/Guardianship of Victor A.*, 386 Md. at 299 (citing *In re Yve S.*, 373 Md. at 567, quoting *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 113 (1994); in turn quoting *Lassiter v. Dep't. of Social Services*, 452 U.S. 18, 38 (1981); *In re Mark M.*, 365 Md. at 705). Although protection of one's property is of utmost importance in American history, "parental rights have been deemed to be among those essential to the orderly pursuit of happiness by free men. . . ."' *Id.*

The Court of Appeals has indicated that in termination of parental rights ("TPR") proceedings, "a parent's right to custody of his or her children "'must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect."' *In re Adoption/Guardianship of Amber R. and Mark R.*, 417 Md. at 709 (quoting *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007)). Therefore, when the State decides to terminate a parent's rights, we employ the "best interests of the child" standard. *In re Adoption/Guardianship of Cross H.*, 200 Md. App. 142, 152, *cert. granted* 432 Md. 352 (2011) (citing Md. Code (1984, 2012 Repl. Vol.), § 5-323 (b) of the Family Law Article. *See also Washington County Dep't of Social Services v. Clark*, 296 Md. 190, 198 (1983)). To ascertain the best interests of a child, the court must consider all the factors enumerated in Md. Code (1984, 2012 Repl. Vol.), § 5-323(d) of the Family Law Article, which reads:

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

exceed 18 months from the date of placement unless the juvenile court makes a specific finding that it is in the child's best interest to extend the time for a specified period;

(3) whether:

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

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

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

2. the mother refused the level of drug treatment recommended by a qualified addictions specialist . . . or by a physician or psychologist, as defined in the Health Occupations Article;

(iii) the parent subjected the child to:

1. chronic abuse;

2. chronic and life-threatening neglect;

3. sexual abuse; or

4. torture;

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

1. a crime of violence against:

A. a minor offspring of the parent;

B. the child; or

C. another parent of the child; or

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

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

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

(ii) the child's adjustment to:

1. community;

2. home;

3. placement; and

4. school;

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

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

After considering these factors, if the court "finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child," then the court should terminate the mother and/or father's parental rights. Md. Code (1984, 2012 Repl. Vol.), § 5-323 (b) of the Family Law Article.

In *In re Adoption/Guardianship of Amber R. and Mark R.*, 417 Md. at 705-06, the plaintiff-mother was evicted from her home, and Social Services placed the plaintiff's toddlers in shelter care. The children were deemed CINAs, and placed in foster care. *Id.* at 706. Social Services established service agreements, to which the plaintiff would "attend substance abuse treatment and parenting classes, apply for employment, and secure stable housing." *Id.* However, the plaintiff failed to attend any of the classes, breaching the service agreements. *See id.* During the TPR proceeding, the trial court found clear and convincing evidence that the plaintiff was an unfit parent, and that it was in her children's best interests to terminate her parental rights. *Id.* at 708. Our Court affirmed. *Id.* at 705.

On appeal to the Court of Appeals, the plaintiff requested that the Court ignore the statutory criteria for TPR proceedings, and instead, utilize her four-factor test, which provided:

> 1). . . after being provided with appropriately tailored reunification services, the parent is unable to provide a safe and stable home for the child and that the delay in securing permanency continues or adds to the child's harm; or 2) [if] the parent has consistently failed to comply with an appropriately structured service agreement offered by the Department for a period of longer than one year; and 3). . . all alternatives to termination have been exhausted, and 4). . . termination will not do more harm than good.

Id. at 711. The Court ultimately disregarded the plaintiff's recommendation, reasoning that "it [was] clear that the General Assembly's extensive list of factors, when considered in light of the standing presumption favoring parental rights, reflect[ed] the spirit that termination [was] an alternative of last resort, and [was] not

to be taken lightly." *Id.* at 715. The Court analyzed the plaintiff's case pursuant to the statutory factors, stating:

> o [Social Services] had "adequately presented the referrals" to [the plaintiff], who did not adequately respond to the referrals. [The plaintiff] provided "conflicting" testimony as to how long she bad been clean from drugs, and had not provided [Social Services], or the court, with any proof that she had completed drug treatment. Regarding housing, the only documentation that she provided to the court was "an unsigned copy of a settlement statement, which [did] not contain her name on it." Moreover, with respect to [the plaintiffs] cleaning business . . . the only documentary evidence was one typewritten invoice from October 2008 "'that ha[d] no verification except for [the plaintiff's] testimony that [it was] a bill she submitted.'" Finally, [the plaintiff] ha[d] "made a stab at participating [in parenting classes], but she ha[d] not since completed one."
>
> o [The plaintiff] had made positive efforts to maintain contact with the [c]bildren, adjust her circumstances to facilitate the [c]hildren's return, and communicate with the Department. Yet, [the plaintiff] had "failed to live up to her commitments under the . . . service agreements" and there had been "limited to no contact" between [t]he plaintiff and [the foster family].
>
> o [T]he plaintiff had been paying $150 per month in child support, as required by court order.
>
> o There was insufficient evidence to show that extending the eighteen month period allowed for "parental adjustment" would be in the best interests of the [c]hildren.
>
> o There was no evidence that [the plaintiff] had abused the [c]hildren, chronically or otherwise, nor that she had subjected the children to sexual abuse or torture; there was, however, evidence of neglect, including life threatening neglect. Some of this neglect had served as the basis for the [c]hildren's original CINA adjudications.
>
> o There was no specific evidence that [the plaintiff] had refused drug treatment, but she had failed to carry out her commitments under the service agreements.to enter drug treatment and drug screening.
>
> o There was no evidence of the following: that either of the [c]hildren or [the plaintiff] tested positive for drugs at either [of the childrens'] birth; that [the plaintiff] had committed, aided, or abetted relevant crimes; or that [the plaintiff] had involuntarily lost parental rights to any of the [c]hildren's siblings.
>
> o With regard to the [c]hildren's emotional state, the court examined the state of their ties with [the plaintiff], the [foster family], and each other, as well as how termination of parental rights would affect those connections and the [c]hildren's well-being. On the whole, the evidence suggested that the [c]hildren's visitation with [the plaintiff] had been positive, yet the [c]hildren experience[d] some anxiety as a result of continued visitation with [the plaintiff]. Additionally, the [c]hildren had adjusted well to their new placement, which the court described as a "warm and loving home in which [the [c]hildren] refer to the foster parents as Mom and Dad or Mommy and Daddy.'" [The daughter's] level of performance in kindergarten was additional evidence of a "good adjustment to the placement. . . ."

Id. at 715-17 (internal citations omitted).

Predicated on the above factors, the Court affirmed, concluding that the trial court did not err in ruling that the plaintiff was an unfit parent, or that the best interests of the child standard resulted in a termination of the plaintiff's parental rights. *Id.* at 723-24.

In *In re Adoption/Guardianship of Cross H.*, 200 Md. App. at 145, *cert. granted* 432 Md. 352 (2011), the plaintiff-mother birthed a pre-mature, drug-infested newborn, who was exposed to HIV and hepatitis-C. The minor child was diagnosed with several medical conditions, and remained in the hospital for approximately one month. *Id.* The court determined that the child was a CINA, and placed him in foster care. *Id.* at 146. While the plaintiff's appeal to the CINA proceedings was pending, social services filed a petition to terminate the plaintiffs parental rights, which was granted. *Id.* at 148.

The plaintiff argued that the court erred in termi-

nating her rights. *Id.* at 152. The trial court utilized the statutory factors, and rendered the following factual findings: (1) Regarding the child's well-being, he was premature, underweight, exposed to HIV and hepatitis-C, and diagnosed with countless medical issues because of the plaintiffs failure to obtain prenatal care and her drugs and alcohol abuse; (2) Concerning services offered, the plaintiff completed her mental health evaluations and parenting classes. However, additional services would not result in a change to the plaintiffs circumstances; (3) Regarding the existence of a disability, the plaintiff was bipolar and would not undergo treatment, which made her unable to care for her child; (4) Concerning maintaining contact, regular visitation occurred; (5) Regarding the child's emotional ties, the social worker testified that there was no strong bond or attachment between the child and the plaintiff. However, the child possessed emotional ties with his foster parents. The court also noted that the child illustrated "behavior occurring at the times of visitation that suggest[ed] transition . . . was stressful for him." *Id.* at 156-57.

The trial court concluded that "exceptional circumstances existed that would make the continuation of the parental relationship detrimental to" the child's best interests, and our Court affirmed. *Id.* at 157-58.

In the case at bar, during th hearing, the court considered all the factors pursuant to Md. Code (1984. 2012 Repl. Vol.), § 5-323(d) of the Family Law Article as follows: (1) Regarding § 5-323(d)(1), the court stated that there were over 360 notations concerning contact and efforts made by the Department, as well as a plethora of services offered to Father. The Department remained flexible in rescheduling visitations when Father cancelled or failed to show, and it financed taxi fares for Father's transportation to his classes and meetings; (2) Concerning § 5-323(d)(2), Father did not maintain stable housing nor did he provide current addresses and phone numbers to the Department regularly. His employment was not consistent, and when Father was allegedly employed, he failed to submit verification to the Department. He also either yielded positive results to drug testing or did not complete random urinalysis. He did not complete a mental health evaluation. However, the court determined that Father reentered in the addictions treatment, attended Alternative Drug and Alcohol Counseling ("ADAC"), and underwent random urinalysis. Thus, there were no breaches of service agreements. Although there were many "no shows" and cancellations, Father had been fairly consistent with his visitation. Since June 11, 2010 through April 17, 2012, there were approximately forty-five visits. Father did not maintain regular contact, but he substantially complied with maintaining contact with the Department. On April 24, 2010, Father began paying child support in April 2010, but his arrears totaled $724.80. Father was not disabled, so no illness or condition would render him unable to care for Matteo. The services were offered beyond twenty-two months, so the court surmised that there were no additional services that could be offered to yield a lasting reunification; (3) Regarding § 5-323(d)(3), the court evaluated the CDS reports of neglect, relating to Matteo, as well as the parents' other child, Daniel Jr. The court could not find that Father was unwilling to provide adequate food, clothing, shelter, and education to Matteo since he was hospitalized for three months after birth, and then placed in foster care. The court did not find a failure to provide medical care predicated on a religious belief. Matteo was tested for drugs after birth, which yielded a positive result for marijuana. Father did not subject Matteo to chronic abuse, life threatening neglect, sexual abuse, or torture, and Father had no convictions of crimes of violence against Matteo or any other child. Although Father's parental rights regarding Daniel Jr. were not terminated, the child resided with Father's mother and stepfather; (4) Concerning § 5-323(d)(4), the court stated that Matteo was too young to possess those emotions or feelings towards Father or severance of the parent/child relationship. However, Matteo was no longer afraid of being in Father's presence. Matteo and Daniel Jr. interacted fairly well regarding the sibling visitation. Matteo was doing very well at his pre-adopt foster home. He established a significant attachment to the foster parents and referred to them as "mom" and "dad." He was in daycare, and interacted well with his classmates. Regarding the likely impact of terminating Father's parents rights on Matteo's well-being, the court evaluated the witnesses' testimonies. Deanna Bailey, the ADAC senior clinician and program director, verified that Father reentered into the program for evaluation and testing. Father's nineteen year old girlfriend testified that Father had stability issues, and did not possess a driver's license, but she would support him and provide transportation. Father testified that he changed his lifestyle, and that he would "do anything" to obtain custody of his son. Father's mother and stepfather stated that Father was constantly in Daniel Jr.'s life, and opined that Father could obtain custody of Matteo, but it would take approximately six months to a year for him to establish stable housing and employment.

During the hearing, the court stated:

> 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. I have to consider all the factors of 5-323 Family Law and I must find that there is clear and convincing evidence of the following

— That a parent is unfit to remain in a potential relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in the child's best interest. . . .

* * *

As far as the father is concerned, is he unfit? Well he definitely has problems. I'm not sure about the stable-housing. I'm not sure about his employment. I'm not sure where he is with his treatment. There may be some mental health issues. But does all of that, based on what I've already put on the record, and certainly he's got — he's had difficulties. His history isn't good. But does that render him unfit to remain a in a [sic] parental relationship with the child? Let's — To give him the benefit of the doubt I'll say no it doesn't. He's not unfit to that extent. However at this time, he certainly isn't a resource. . . .

* * *

Are there exceptional circumstances that exists that would make a continuation of the parental relationship detrimental to the best interest of the child? . . .

* * *

. . . Well the child's been in care since birth. Uh so the child — Even though the father has had visitation, there has been there is no real bond at this time because there hasn't really been a chance to do any bonding other than, other than through visitation. . . . We have the best of intentions and we keep delaying things, delaying things, delaying things, such as stable employment, having a job, mental health treatment, addictions counseling. And for the 2010 and 2011 there really wasn't much going on. If anything it was noncompliance. It's only been since January that he has gotten involved with his drug treatment. Up until today, we still have — we don't have stable housing and we don't have stable employment. Even though he says he working, he's got another job so he does have income. So those situations are still there.

Now he's not totally unfit but there are exceptional circumstances in this case and the exceptional circumstances are the history of the case. The child is doing very well in foster home. He has bonded with his foster parents. They are a pre-adopt home. He is receiving the necessary care for his special needs and that I think are exceptional circumstances. If we are going to argue there aren't sufficient circumstances and that the parent is fit to a certain extent, if you combine the unfitness with the exceptional circumstances, that shows to this court that, having considered all the factors, that the parental rights of the father should be terminated subject to appeal. And therefore it's in the best interest of the child to grant the Department's petition and uh I'll sign the appropriate order for the department, the right to consent to adoption and/or guardianship and I'll terminate the parental right for reasons stated as based in the Guardianship Case Outline and the opinion. I'm sorry it took so long but that's about what it works out to.

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 com-

pleted 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 pnrsuant to Md. Code (1984, 2012 Repl. Vol.), § 5-323 of the Family Law Article. Furthenhore, 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 tbe 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.

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

FOOTNOTES

1. Gastroschisis is defined as "a congenital muscular defect in the abdominal wall, not at the umbilical ring, usually with protrusion of the viscera." STEDMAN'S MEDICAL DICTIONARY 578 (24th ed. 1982). A viscus, singular of viscera, is "[a]n organ of the digestive, respiratory, urogenital, and endocrine systems as well as the spleen, the heart, and great vessels; hollow and multilayered walled organs studied in splanchnology." *Id.* at 1566.

2. Shelter care is defined as 'a temporary placement of a child outside of the home at any time before disposition." Md. Code (1974, 2006 Repl. Vol.), § 3-801(y) of thc Courts and Judicial Proceedings Article. A shelter care hearing is "a hearing held before disposition to determine whether the temporary placement of the child outside of the home is warranted." Md. Code (1974, 2006 Repl. Vol.), § 3-801(z) of the Courts and Judicial Proceedings Article.

3. During a review hearing on February 7, 2011, the court amended its previous visitation clause, and stated, "Supervised visitation weekly to transition to [Father's] home in 60 days to increase to unsupervised based on clean urines."

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

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

Cite as 3 MFLM Supp. 69 (2013)

Visitation: modification *sua sponte*: contempt

Chas Venus Gordon

v.

Bernard M. Gordon, Jr.

No. 0334, September Term, 2012

Argued Before: Eyler, Deborah S., Kehoe, Sharer, J. Frederick, (Ret'd, Specially Assigned), JJ.

Opinion by Kehoe, J.

Filed: January 18, 2013. Unreported.

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.

Appellant Chas Venus Gordon ("Ms. Gordon") appeals a judgment of the Circuit Court for Charles County finding her in contempt of a child custody and visitation order that was modified *sua sponte* by the court during the contempt hearing. Ms. Gordon presents two questions for our review, which we have consolidated and reworded:[1]

> Did the circuit court abuse its discretion in holding Ms. Gordon in contempt of the child visitation order as modified by the court during the contempt hearing?

Because we conclude that the circuit court abused its discretion in so holding, we will vacate the court's modified order to the extent that it holds Ms. Gordon in contempt.

BACKGROUND AND PROCEDURAL HISTORY

On November 15, 2003, Ms. Gordon and appellee Bernard Gordon, Jr. ("Mr. Gordon") were married in a civil ceremony in Charles County, Maryland. The marriage produced one child, Liliana Gordon ("Liliana"), born on April 6, 2004.

In August 2005, when Liliana was approximately eighteen months old, the parties separated. Liliana thereafter resided solely with Ms. Gordon, and did not have overnight visits with Mr. Gordon. For reasons not contained in the Record Extract, Mr. Gordon had limited visitation with and access to Liliana during the separation period.

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

On January 25, 2007, after a two-day hearing, 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. This schedule permitted Mr. Gordon to visit with Liliana for two hours on alternate Saturdays, to increase after a few months to five and then eight hour visits. Eventually, Liliana was to spend every other weekend with Mr. Gordon, including overnights, plus a two hour visit on Wednesday evenings. The order also provided that:

> The Father must ensure that the minor child attends scheduled extracurricular activities in which her mother has enrolled her. . . .

Full implementation of the visitation schedule envisioned by the January 2007 Order was thwarted by the parties. On May 10, 2007, Mr. Gordon filed a Motion for Contempt, asserting that Ms. Gordon was denying him the visitation awarded in the divorce order. Soon thereafter, Ms. Gordon filed a Request for Emergency Court Order Suspending Visitation, alleging that Mr. Gordon had sexually abused Liliana during at least one visit. After holding a hearing on these motions, the circuit court modified Mr. Gordon's visitation from unsupervised to supervised, permitting five hour visits on alternate Saturdays and two hour visits on Wednesdays, and further ordered that a forensic evaluation of Liliana be conducted in an effort to determine if she had been sexually abused, and if so, the identity of the perpetrator. The matter was set in for a review hearing on the merits of Ms. Gordon's allegations, to be held upon the completion of the forensic evaluation, which the court and the parties anticipated would occur in about three months.

However, for reasons not clear from the record, a determination on the merits was not made for nearly a year, and Mr. Gordon's supervised visitation continued

during the interim. Finally, in May 2008, Mr. Gordon filed a Counter-Complaint for Custody and Visitation, asserting that Ms. Gordon had fabricated her allegations of child abuse in order to alienate Liliana from Mr. Gordon, and requested that he be awarded sole legal and physical custody of Liliana. In response, Ms. Gordon filed a Motion for Modification and Termination of Visitation, repeating her previous allegations of child abuse.

A six-day hearing on these (and other) issues was held before the circuit court on March 30-31, 2009, May 4-5, 2010, and March 24-25, 2011.[2] At the end of the hearing, the trial judge issued an oral ruling (followed by a written order issued on April 26, 2011, the "April 2011 Order"), finding the evidence insufficient to prove that Mr. Gordon had abused Liliana but indicating that the evidence was sufficient to show that she had been sexually abused by someone. The April 2011 Order maintained, in large part, the custody/visitation schedule already in place, permitting Ms. Gordon to retain sole legal and physical custody of Liliana, and continuing Mr. Gordon's Saturday supervised visitation (but permitting the visits to be longer). This arrangement was to remain in effect for a period of one year, at which time the schedule was to be reviewed by the court.[3] The April 2011 Order also provided, in pertinent part:

> that all other provisions [of the January 2007 Order] which are not inconsistent with the provisions of this Order, shall remain in full force and effect, including but not limited to those regarding . . . child's attendance at scheduled extra-curricular activities. . . .

Mr. Gordon's motion to alter or amend the April 2011 Order was denied on June 1, 2011.

On six occasions beginning in June 2011, Mr. Gordon visited with Liliana under the visitation schedule set forth in the April 2011 Order. Some visits, however, were skipped or shortened on many occasions because Mr. Gordon was unwilling to attend Liliana's Saturday extra-curricular activities;[4] on two occasions, because Liliana was ill; and on one other occasion, on December 24, 2011, due to a combination of reasons (which we explore in greater detail in the discussion *infra*).

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. As relief, Mr. Gordon requested that Ms. Gordon be ordered to make up missed visits, pay Mr. Gordon's counsel fees, and serve a suspended jail sentence.

The circuit court held a hearing on the contempt petition 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* modif[ied] 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. The court imposed a jail sentence on Ms. Gordon of 179 days, which would be suspended upon Ms. Gordon's posting of a $6,000 bond to the clerk of the court and payment of $1,000 towards Mr. Gordon's counsel fees. The court ordered that Ms. Gordon could purge herself of the contempt by complying with the visitation arrangement as *sua sponte* modified, and by paying the above amounts. A written order embodying the oral ruling was issued on March 1, 2012, and actually filed on March 26, 2012. Ms. Gordon's motion to alter or amend was denied.

This appeal followed.[5]

Discussion

"One weapon in the court's arsenal useful in defending its dignity is the power to punish for contempt," a "power [that] has stood as a sentry at the citadel of justice for a very long time". *State v. Roll and Scholl,* 267 Md. 714, 717 (1973). Maryland courts "may exercise the power to punish for contempt of court or to compel compliance with its commands in the manner prescribed by Title 15, Chapter 200 of the Maryland Rules." Md. Code Ann., Cts. & Jud. Proc. § 1-202(a) (1973, 2006 Repl. Vol.). *See Pearson v. State*, 28 Md. App. 464, 480 (1975) ("It is manifest that Courts Art. § 1-202(a) merely recognizes the inherent power of a court to punish for contempt and to compel compliance with its commands.").

Title 15, Chapter 200 of the Maryland Rules divides findings of contempt into four categories: criminal direct contempt, criminal constructive contempt, civil direct contempt, and civil constructive contempt. Md. Rules 15-201 *et seq*; *Roll and Scholl*, 267 Md. at 728-30 (discussing the requirements for and differences between categories of contempt); *Bahena v.*

Foster, 164 Md. App. 275, 286-87 (2005) (same). Here, the trial court found Ms. Gordon in constructive civil contempt for "contumaciously prevent[ing] implementation of the [child] visit arrangement here." We "will only reverse such a decision upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous." *Droney v. Droney*, 102 Md. App. 672, 683-84 (1995). For the following reasons, we conclude that the trial court abused its discretion in finding Ms. Gordon in contempt.

First, while constructive civil contempt may be punished when a party proves by a preponderance of the evidence, *see Bahena*, 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 was not, and 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, when read in light of the provisions 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 other provision in either order otherwise prohibits Ms. Gordon from scheduling activities for Liliana on Saturdays. In short, Ms. Gordon was entirely within her rights under the order 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. *See Bahena*, 164 Md. App. at 287 (quoting *Lynch v. Lynch*, 342 Md. 509, 519 (1996) ("[T]he 'conduct which precipitates the initiation of the contempt proceedings is the alleged failure, in contravention of a court order, to do that which has been ordered or the doing of that which is prohibited.'")).

Mr. Gordon argues that there are other factual considerations that could support the trial judge's finding of contempt. Specifically, Mr. Gordon points to three primary occasions where he claims his visitation was interrupted by Ms. Gordon. On two of these occasions, Mr. Gordon did not visit with Liliana at all because Liliana was sick with the flu. On the third occasion, Christmas Eve, 2011, Mr. Gordon visited Liliana briefly, but not for the entire time allotted, and asserts that Ms. Gordon had no justification for denying him the full extent of his scheduled visitation. There are multiple problems with Mr. Gordon's assertions. First, the trial court did not rely on these factual assertions in rendering its contempt finding. Instead, the focus of the court's ruling was on the apparent conflict between Mr. Gordon's Saturday visitations and Liliana's extra-curricular activities.

Secondly, Mr. Gordon testified during the contempt hearing that:

> On December 8th Mrs. Gordon had informed me that Liliana was not available December the 24th. On December 20th I emailed Ms. Hinds and indicated that I had Christmas presents for Liliana and would like to give it to her beforehand. On December 23rd Ms. Hinds indicated that Ms. Gordon would meet me at the Sheriff's Office at ten a.m. At, that morning I indicated to Ms. Gordon I would be late and could it be later. She said that Liliana had appointment[s] all day until five and that I could meet her at five fifteen. So, I met Ms. Gordon at five fifteen at the Sheriff's Office parking lot; exchanged presents with my daughter for ten minutes in the accompaniment of the competent adult and my mother.

This evidence failed to establish that Ms. Gordon violated the April 2011 Order. Both parties agree that Ms. Gordon offered to drop Liliana off at 10 a.m. on Christmas Eve at the Sheriff's Office, as set forth in the order. Mr. Gordon was unable to make this time for reasons not explained in the record. Thereafter, Ms. Gordon offered to bring Liliana to the drop-off spot at 5:15 p.m., after an appointment, and Mr. Gordon acquiesced to this time without objection. These facts establish, not that Ms. Gordon had "contumaciously prevented" the visit, but that a combination of events, including Mr. Gordon's inability to meet Ms. Gordon at the appointed hour, resulted in a shortened visit. These facts are not sufficient to support the trial judge's contempt finding.

Mr. Gordon also asserts that Ms. Gordon under-

stood the April 2011 Order to mean that Mr. Gordon's visitation trumped Liliana's participation in extra-curricular activities on Saturdays. In support of this, he cites to testimony by Ms. Gordon where she explained:

> I did not believe that any of [Liliana's] activities superseded [Mr. Gordon's] visits. I . . . that . . . at no point did I think that the activities outweighed the visits. I would provide Mr. Gordon all of the information as to her activities so that he could facilitate participation in her activities.

This testimony does not support Mr. Gordon's assertions, and is, instead, quite to the contrary. Summarized, and as previously proffered to the court by Ms. Gordon's trial counsel, Ms. Gordon's testimony established that she believed that Mr. Gordon had a right to visit with Liliana on Saturdays during his allotted time, which included attending and participating with Liliana in extra-curricular activities, but that she also had a right, under the April 2011 Order, to schedule Liliana's extra-curricular activities on Saturdays. Far from supporting the court's finding of contempt, Ms. Gordon's interpretation of her rights under the April 2011 Order is in accord with the terms of the order.

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." The record reflects that, in some instances, Ms. Gordon took Liliana to such activities, and in other instances, offered to Mr. Gordon the opportunity to pick Liliana up prior to 10 a.m. and take her himself. Mr. Gordon was not willing to consent to these sorts of arrangements. 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.

The circuit court's March 1, 2012 order holding Ms. Gordon in contempt also addressed visitation arrangements for Liliana. Ms. Gordon has not challenged those portions of the order in this appeal. We reverse the court's order finding Ms. Gordon in contempt and vacate paragraphs 3 through 8 of the March 1 order. We leave intact paragraphs 1 and 2 of the order, which pertain to on-going visitation. The court order imposed financial obligations upon Ms. Gordon as part of the contempt sanctions. The record is unclear as to whether Ms. Gordon paid $6,000 to the clerk of court or $1,000 to Mr. Gordon's counsel, as ordered by the court. If she did, the clerk shall return the money to her and Mr. Gordon must pay Ms. Gordon $1,000.

THE JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY HOLDING APPELLANT IN CONTEMPT IS REVERSED.

APPELLEE TO PAY COSTS.

FOOTNOTES

1. Ms. Gordon phrases her appellate questions as follows:

> I. Whether a visitation and custody order contained "sufficiently definite, certain, and specific terms" to hold a custodial parent in contempt because she did not cancel the child's activities that the non-custodial parent did not wish to attend during his visitations, where the order required the parties to ensure the child's attendance at such activities until the court *sua sponte* modified it?
>
> II. Whether the judge's findings of fact that Ms. Gordon was disingenuous in scheduling her child's activities, and that Ms. Gordon had contumaciously prevented implementation of the visitation arrangements, were clearly erroneous?

2. In the middle of these hearing dates, Mr. Gordon filed a second Petition for Contempt, again asserting that Ms. Gordon was interfering with his visitation with Liliana. The circuit court denied this petition in its April 2011 order.

3. Specifically, the April 2011 Order provided, "that the Court shall retain jurisdiction over this matter to make a further determination as to appropriate access to the minor child to be exercised by [Mr. Gordon] subsequent to the child's 8th birthday on April 6, 2012."

4. Mr. Gordon testified that he does not "show up at events with Ms. Gordon present."

5. The circuit court's order provided that Ms. Gordon would purge herself of the contempt by complying with the court's order through January 20, 2013. This case was argued and decided on January 9, 2013. Thus, the appeal is not moot. *See Arrington v. Dept. of Human Res.*, 402 Md. 79, 101-04 (2008) and *Chase v. Chase*, 287 Md. 472,473 (1980) (both holding that, as a general proposition, an appeal of an order of contempt is moot if the contempt is purged.).

Cite as 3 MFLM Supp. 73 (2013)

Alimony: modification: calculation of income

Janice R. Wilhelm
v.
John C. Wilhelm

No. 0997, September Term, 2011

On Motion For Reconsideration

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

Opinion by Matricciani, J.

Filed: January 25, 2013. Unreported.

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

By order dated December 24, 1991, the Circuit Court for Charles County granted to Janice R. Wilhelm, appellant, an absolute divorce from John C. Wilhelm, appellee. Pursuant to that order, appellant became entitled to permanent alimony. On October 12, 2010, appellee filed a complaint to reduce alimony and on June 9, 2011, the court ordered an alimony reduction. Appellant noted a timely appeal on July 5, 2011.

QUESTIONS PRESENTED

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

> (1) Did the circuit court err by modifying the alimony payments from appellee to appellant?
>
> (2) Did the circuit court err by failing to award attorney's fees to appellant?

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

FACTUAL AND PROCEDURAL HISTORY

The complaint giving rise to this appeal was filed by appellee on October 12, 2010. Appellee has twice previously requested that the court modify his alimony obligations, once successfully.[2] In the third and most recent complaint, appellee asked that his alimony payments be reduced further. The court granted appellee's request, and in appellant's words, "without discussion, reduced [a]ppellant's alimony by $500.00 per month to now $1700.00 per month and denied Mrs. Wilhelm contribution to her attorney fee expenses from [a]ppellee."

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

DISCUSSION

Standard of Review

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

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

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

Appellee's Alleged Voluntary Reduction in Wage Income

Appellant alleges that appellee intentionally reduced his wages, thereby artificially creating a mate-

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

As a result of transitioning from a full-time dental practice to a part-time one, appellee identified, and the circuit court found, a 64% reduction in wage income (from $6,875 to $2,500 per month). Appellee used his wage reduction as the basis for claiming a material change in circumstances. To this Court, appellant argues that the work reduction by appellee is insufficient to order an alimony reduction because "the trial court refused in it's [sic] opinion to impute to Dr. Wilhelm any income from his current wife and also failed to attribute all the interest, dividend, capital gains and non-taxable interest to Dr. Wilhelm from his most recent tax returns. . . .".[3]

In reviewing the trial court's determinations, we are mindful of several important principles: "[i]t is patent that of its nature alimony is in amount subject to variations from time to time as the circumstances, needs, and pecuniary condition of the parties change." *Sugarman v. Sugarman*, 197 Md. 182, 188 (1951) (quoting *Winkel v. Winkel*, 178 Md. 489, 499 (1940)). Because of its malleability, "[t]he trial court must balance the interests and fairness to both the payor and the spouse receiving alimony, in exercising its discretion to modify the alimony award." *Langston*, 366 Md. at 516. Here, the court found that "Dr. Wilhelm's significant salary reduction is a material change in circumstances and that a reduction in alimony is appropriate." But we are unable to concur on the record before us. Considering all the circumstances, although appellee reduced his wage-income, his aggregate finances may well preclude his semi-retirement from constituting a material change in circumstances.

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

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

Income Sources Imputed to Appellee

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

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

Appellee's most recent *joint* income tax return shows $17,311 in interest and dividends. The tax return also shows $8,619 in IRA distributions. The circuit court considered the full amount of the IRA distributions, and imputed $8,500 of the interest and dividends to appellee in calculating his monthly income. Appellant alleges, however, that the court failed to consider the following while calculating appellee's monthly income: "taxable interest of $2134.00 or $177.83 per month, [ordinary] dividend income of $5990.00 or $499.17 per month, capital gains of $3985.00 or $332.00 per month, [ ], [and] taxable refund of $4706.00 or $392.00 per month." Without specific testimony attributing all, part, or none of the above to appellee, it is impossible to discern what percentage of

the above reported income is assignable to him. Although the circuit court's order included some of appellee's reported unearned income, the court's arbitrary exclusion of additional income amounts to an abuse of discretion.

The court concluded that "Dr. Wilhelm is financially comfortable" and that his estimated monthly income is $6,500. The court also found that "Ms. Wilhelm receives $2,200 per month in alimony. She receives a gross amount of $1,090 per month in social security benefits. She has an annuity that. . . pays $740.00 per month. Therefore, her total monthly income is estimated by the court at $4,030." But appellant's monthly income *after* the alimony adjustment is only $3,530. That represents a significant disparity.

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

Judge Eyler concurs in the result only.

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

FOOTNOTES:

1. The questions as originally presented by appellant are:

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

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

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

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

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

NO TEXT

Cite as 3 MFLM Supp. 77 (2013)

Adoption/Guardianship: revocation of consent: untimely attempt

In Re: Adoption of Jonathan S.

No. 0088, September Term, 2012

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

Opinion by Zarnoch, J.

Filed: January 28, 2013. Unreported.

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.

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

STATEMENT OF THE CASE

In this case, 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 for Anne Arundel County, the Parents filed a Motion to Alter or Amend the Judgment of Adoption, which was denied. Here, 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.

FACTS AND LEGAL PROCEEDINGS

Jonathan S. was born on August 12, 2011. Michelle and James are Jonathan's biological parents. They asked for adoption assistance the day Jonathan was born and had already been through an adoption with their first child. After taking Jonathan home, they contacted an adoption agency, Adoptions from the Heart, on September 7. The agency discussed potential matches with the Parents and they chose their son's adoptive parents.

On September 29, Michelle and James both signed consents to adoption. The law allows the parents to revoke consent within 30 days after signing the consents. Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL"), § 5-3B-2l(b)(1)(i). The adoptive parents petitioned for adoption on September 30, and they were granted temporary legal and physical custody on the same day.

The Parents and the adoptive parents disagree about what transpired during the revocation period. They agree that early in October, the couples met. The adoptive parents believe this meeting went well, while the Parents state that they had misgivings about the adoption, and the meeting increased their apprehension. The adoptive parents assert that a social worker from the adoption agency spoke with the Parents and that the Parents said that adoption was the best decision.

On October 12, Michelle contacted the agency and asked about revoking her consent. The Parents' understanding is that during this call, the agency told Michelle that adoption was the best choice and that she should think about the decision more before revoking consent. Michelle complains that the agency never told her to seek counseling before making the decision. The adoptive parents' view of the facts is that after Michelle asked about revoking consent, the Parents were told how to revoke, but the Parents then stated that Michelle had overreacted and they did not want to revoke consent.

On October 24 or 25, the agency again talked with the Parents. The Parents believe that the agency did not try to help Michelle with the revocation decision, even though she told them she was depressed. Instead, they told her that she had done the right thing. According to the adoptive parents, the Parents told the agency that they had discussed parenting many times and decided that adoption was best. Michelle then called the adoptive parents and told the agency that the call went well.

Between October 21 and 28, James was on military duty. When he came home, the Parents contend that they were unable to discuss the issue of revocation because Michelle was in a "state of profound depression and confusion." The adoptive parents contend that the Parents called the agency on October 28 and told the agency they went over everything again and wanted to continue with the adoption.

Eleven days after the revocation period had lapsed, the Parents, through their attorney, Jennifer Fairfax, filed a revocation of their consents in the cir-

cuit court on November 10. On November 16, Fairfax also made a request for a heating on the revocations and, if consent could not be revoked, that the post-adoption contract be incorporated into the final adoption decree. The Parents and Fairfax had some disagreements, and on November 21, Lee Ashmore entered his appearance as the Parents' lawyer. Fairfax withdrew her appearance on November 28.

The Parents assert that the day after they filed the revocations, November 11, Michelle went to the emergency room and was diagnosed with severe depression. She refused inpatient treatment and was referred to a therapist. Michelle was also referred to Sheppard Pratt Psychiatric Hospital and consented to inpatient treatment on December 8 and was there for a week.

On December 2, the adoptive parents moved to reject the attempted revocations of consents as untimely. They argued that the consents were signed on September 29 and FL § 5-3b-21(b)(1)(i) provides that the birth parent has only 30 days to revoke consent after the consent is signed.[1] Because the revocations of consent were delivered on November 10 — 42 days after the consents were signed — the adoptive parents contended that the attempted revocations were untimely and of no legal force or effect.

On December 13, the Parents responded to the adoptive parents' motion. They stated that "Michelle was suffering from postpartum depression and/or postpartum psychosis" during the revocation period "and probably even at the time of the signing of the consent itself[.]" Further, she had been diagnosed with depression and was then receiving inpatient treatment at Sheppard Pratt and Enoch Pratt Psychiatric Hospital. It also stated that she was "being treated by Lt. Steele at the Annapolis Navy Medical Center." As to James, the response asserted that he "was unable to make a unilateral decision to revoke his consent to the adoption during the revocation period." James signed an affidavit attached to the response, swearing under the penalties of perjury, that the statements in the response were true and correct to the best of his knowledge, information, and belief. The response also requested a hearing on the adoptive parents' motion. On December 20, without holding a hearing, the circuit court granted the adoptive parents' motion to reject the attempted revocations as untimely.

The adoption decree was entered on December 29. Eight days later, January 6, 2012, the Parents filed a motion to alter or amend the judgment and requested a hearing. In the motion, they argued that they were entitled to a hearing on their revocations of consent. They said that they should have been given the opportunity to prove their assertions that Michelle did not have the capacity to revoke her consent during the revocation period. Further, they noted that they had retained a psychological expert who was evaluating Michelle and who would render an opinion about her capacity to revoke her consent during the revocation period. They also claimed that their response to the motion to reject their revocation constituted an objection to the adoption under Maryland Rule 9-107, which required the court to hold a hearing.[2]

The Parents made two additional contentions: first, that they did not receive notice of the adoption hearing until several days after the hearing had been held; and second, that the judgment of adoption did not incorporate the parties' post-adoption contract as provided for in that agreement, and which the Parents sought in an earlier motion.[3] The Parents' attorney signed an affidavit attached to the motion, asserting under the penalties of perjury, that the information in the motion was true and correct to the best of her knowledge, information, and belief. A hearing was also requested. In their response to the motion to alter or amend, the adoptive parents argued that the motion was without merit and was an attempt to reargue matters already considered by the circuit court.

On February 22, 2012, the court sent a notice of hearing to the parties on the motion to alter or amend, and the hearing was scheduled for March 27. However, on March 6 before the hearing was held, the circuit court denied the lion's share of the motion. The hearing was still held and the court clarified at the beginning that it would address only the post-adoption contract issue. The court explained that its ruling on the revocation of consent was not at issue because the 30-day revocation period was a "black-line rule" and the Parents tried to revoke after the 30 days.

Despite this caveat, the court still permitted Michelle to discuss the entire adoption process and the revocation of consent. Michelle explained to the court that she felt that she was pushed into the adoption because the hospital mistakenly believed her to be a battered wife that had cheated on her husband, and the adoption agencies "worked together to prevent [the] bonding process" between her and her son. She felt the agency committed fraud because she and her husband told the agency they wanted an open adoption and the agency showed them the profile of the current adoptive parents, who, according to her, did not want to have an open adoption.

Specifically as to the revocation of consent, she believed that the agency and her former lawyer were acting to prevent her and her husband from revoking consent. It was her belief that the lawyer had a conflict of interest because she was paid by the adoption agency. Michelle stated that she wanted to revoke consent, but that the agency and her attorney convinced her not to revoke. She said they never provided her

with the form to revoke consent. She also explained that she now knows she was suffering from postpartum depression and had to be hospitalized, but the agency never explained to her that she needed help. She felt that the whole adoption was "not honorable" and said "I'm not the first to call it slavery; I won't be the last."

The circuit court responded by first explaining that the attorney paid for by the agency is there to independently talk to and advise the birth parents. As to the consents, the circuit court judge stated that she reviewed the consents and they were in accordance with the law. She explained that the consent form states very clearly, "if you sign the consent form and then change your mind and no longer want to consent, you have the right to revoke (cancel) the consent within 30 days after the date that you signed the consent form." The judge also indicated that before determining that the Parents could not revoke their consents, she had reviewed the case carefully and there was nothing out of order.[4]

The court then explained to the Parents:

> . . . you went far beyond arguing what I was clear this hearing was to be for, but I wanted to give you an opportunity to say what you had to say. But at this point, the [c]ourt is satisfied that this adoption, that the law was followed in terms of obtaining consents for the adoption in the first place, that there is nothing that indicates that these were not properly done or were in any way fraudulent. The [c]ourt is going to take no further action on this matter.

The court issued a "Civil Hearing Sheet" on March 27, 2012 stating that the court would take no further action and that the case was closed. The Parents filed this appeal on the same day.[5] For the following reasons, we affirm the court's denial of the motion to alter or amend.[6]

QUESTIONS PRESENTED

The Parents raise the following questions for our review:[7]

1. Did the circuit court err in not verifying that the Parents had notice of the adoption, not ensuring that consent had not been revoked, and not making any findings on the record as to Jonathan's best interests?
2. Did the circuit court err in denying the Parents' motion to alter or amend without holding a hearing?
3. Did the circuit court violate Md. Rule 2-311(f) and/or Md. Rule 9-102 when it denied the parents' attempt to revoke consent without holding a hearing?
4. Did due process require a hearing be held on whether the Parents could revoke their consents?

Although the issues in the first question were argued in the Parents' brief, they were not preserved in the circuit court. Thus, we decline to address them and we answer the other three in the negative and will affirm the denial of the Motion to Alter or Amend.

DISCUSSION

I. Standard of Review

When asked to decide whether the circuit court complied with the Maryland Code, Maryland Rules, and constitutional due process, our standard of review is non-deferential and we must determine whether the court was legally correct. *See Schisler v. State*, 394 Md. 519, 535 (2006).

II. The Adoption Hearing

The Parents argue in theft brief that the circuit court made several mistakes on the day of the adoption hearing. The believe the court should have asked why the Parents were not present. Second, they contend the court did not inquire about whether the issue regarding the revocation of consent had been resolved. Finally, they are concerned that the court did not make any findings regarding the best interests of Jonathan as required by FL § 5-3B-19 and Md. Rule 9-109.[8] We decline to address these contentions. "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131. These issues have not been preserved for appeal because the Parents raise them for the first time here and not in their motion to alter or amend, the denial of which they are appealing.[9] In fact, if raised in that motion, the court could have corrected any errors that the Parents found. *See* Md. Rule 2-534 ("[T]he court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment"). Thus, we will not address these contentions of factual errors for the first time on appeal.

III. A Hearing on the Motion to Alter or Amend

The Parents contend that their motion to alter or amend should not have been denied because of the myriad problems that they feel occurred during the adoption hearing. They understand that a hearing on the motion to alter or amend was held, but argue it did

not address the important errors that occurred during the adoption hearing, discussed above. However, as referenced above, their motion to alter or amend never suggested the judge committed any errors during the adoption hearing. Because the Parents did not allege any errors in the adoption hearing until this appeal, the circuit court cannot be faulted for not holding a hearing on issues never brought to its attention.

The Parents also take issue with the circuit court's misstatement about the date of a hearing. We agree that this was a factual error, but it was harmless. *In Re Adoption/Guardianship No. 11137*, 106 Md. App. 308, 314 (1995) (If an error of law is harmless, we do not require further proceedings). This error was harmless because the court is not required to hold a hearing on a motion to alter or amend if it denies the motion, Md. Rule 2-311(e). Additionally, the court did hold a hearing, at least in part, on the motion.

Finally, the Parents are concerned that the hearing on the motion to alter or amend did not allow them to address whether they should have been permitted to revoke their consent. This begs the question of whether the Parents were entitled to be heard on their revocations, which we will address in the next two sections of this opinion.

IV. A 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.[10] In making this challenge they rely on Md. Rule 2-31 1(f), Md. Rule 9-102, and the Due Process Clause of the 14th Amendment of the U.S. Constitution. As to Rule 2-311(f), the Parents argue that this rule protects their due process right to a hearing and denying them a hearing disposed of their defense to the petition for adoption and their claim to their son. The Parents also contend that Md. Rule 9-102 requires a hearing on a revocation of consent regardless of when the revocation is filed.

The adoptive parents respond that these authorities do not require a hearing because the revocations were not valid. We agree. 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.[12] Both of these 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.")

Our conclusion assumes that the revocation period is 30 days, so we address the Parents' challenge to this assumption. The Parents point out that Md. Rule 9-102 does not specifically contain the words "30 days." They also believe the statute that Md. Rule 9-102 incorporates 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). Thus, this language was clearly meant to limit a parent's revocation period to "not longer than" 30 days. As to 9-1 02(c)(2)(D), it explains, "if consent is revoked *pursuant to this Rule*, the court shall schedule an immediate hearing . . ." (Emphasis added). "Pursuant to this rule" includes the time period the rule specifies and the rule states that the time for the parent's revocation in an independent adoption is as provided in FL § 5-313-21. Md. Rule 9-1 02(c)(1)(A). Thus, the hearing under Rule 9-102 is conditioned on compliance with the 30-day revocation deadline. For these reasons, the circuit court did not violate Md. Rules 2-311(f) or 9-102 in not holding a hearing on the Parents' revocation of consent.

V. A Hearing on Revocation of Consent Due Process

Interwoven in their discussion of these rules, and also in a separate portion of the brief, the Parents argue that the denial of a hearing was a violation of their due process rights. They 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.[13]

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).[14] Another purpose of the adoption statutes is to "timely provide permanent and safe homes for children con-

sistent with their 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.

Although the time may come when we must permit a hearing on a revocation that was filed 30 days after the consent, today is not that time. This issue was discussed 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). There, the Court of Appeals discussed whether a 30-day limitation on filing an objection to a guardianship petition violated a parent's due process rights. 344 Md. at 492-93. The court found that it did not violate due process on its face, but 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. *Id*. The Parents contend that they should have been given a hearing to prove that their case is similar to this extreme case of a mother lapsing into a coma.

We conclude that the court did not err in failing to hold a hearing on the Parents' revocation of consent. In requesting a hearing on theft 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 and therefore could not rationally determine if she wanted to revoke consent. But the Parents provided no support, medical or otherwise, for these contentions. With mere statements, not claiming to be based on personal knowledge, the court did not err in failing to hold a hearing to consider disregarding the 30-day revocation limitation. Additionally, although the Parents note in their brief that their first attorney and the adoption agency pushed them into adoption, they provided no support for this argument to the circuit court or to this Court.

Although we sympathize with the Parents who now feel they may have made an unwise decision, that does not change the outcome of this case. We know that the Parents believe that they could have shown that this is an extreme case where they should be allowed to revoke consent in spite of the statutory time period. It is understandable that the Parents, like any other parents who would fry 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, it would lead to undesirable results. A court would be required to hold a hearing any time a similar, unsupported statement was made after the revocation period has passed. 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 ("[T]he foundation underlying all adoptions [is] the need to surround the final decree with a high degree of certainty. Society looks upon adoption as a salutary and uplifting humane act. The general welfare of the State is enriched by its use. It provides countless foundlings with an opportunity for a normal childhood which otherwise they might not have. Anything which would undermine public confidence in adoption procedures must be viewed by the courts in the gravest light.").

We simply note that the record and the briefs in this case do not indicate that this was an "extreme case." The Parents seem to have gone through what parents would likely encounter in these situations. They appear to have gone back and forth with their decision: sometimes they thought that they might want to raise their child; other times they were sure that adoption was their best option. We understand that Michelle did feel depressed as a result of the situation, but her recollection of the events that occurred during the revocation period (which she discussed at the hearing on the motion to amend and in her brief) indicates that she was aware of her surroundings, knew the gravity of the decision she was making, and was not in a coma-like state. Moreover, according to the Parents, 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. It is true that the judge initially stated that the parties could only discuss the incorporation of the post-adoption contract into the adoption decree. But, the judge permitted the Parents to fully explain why they believed they could revoke consent. In her ruling, the judge responded to their arguments and explained why they could not take such action. Indeed, the judge ruled:

> I wanted to give you an opportunity to say what you had to say. But at this point, that [c]ourt is satisfied that this adoption, that the law was followed in terms of obtaining consents for the adoption in the first place, that there is nothing that indicates that these were not properly done or were in any way fraudulent.

This indicates that the Parents had their opportunity to be heard on the revocation issue and the circuit court considered and specifically ruled on the issue.

In addition to the motion to alter or amend, 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 § 5-3B-26. 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. This does not mean that the petition would be granted, but merely that a hearing would be possible, which is all the Parents requested. In *Falck v. Chadwick*, 190 Md. 461 (1948), four months after their child was adopted, the parents filed a petition to revoke the decree based, in part, on an assertion that the husband was induced to consent because of "coercive representations." *Id*. at 465. The Court of Appeals concluded that such a suit was permitted. The Court said it was "permitting the case to be reopened" so that the chancellor could be given an opportunity after defendants have answered, to determine whether the consent of the parents relied on in the proceeding was intelligent and voluntarily given. *Id*. at 467-68. *See also In re: Adoption of S.K.L.H., a minor child*, 204 P.3d 320, 323 (Alaska 2009) (In Alaska, where a statute provides that "a person may move to set aside the [adoption] decree by filing a motion stating the grounds for challenging the validity of the decree . . . ," an evidentiary hearing was held after a mother filed a petition to set aside the adoption based on invalid consent.).

In conclusion, we affirm the circuit court's denial of the Parents' motion to alter or amend because the Parents did not raise any errors with the adoption hearing in their motion, the court was not required to hold a hearing on the motion, and the court did not violate any Maryland Rule or due process in not holding a hearing on the Parents' revocation of consent.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

FOONOTES

1. Section 5-3b-21(b) states:

> (1)(i) Subject to subparagraph (ii) of this paragraph, a parent may revoke consent at any time within 30 days afler the parent signs the consent.
>
> (ii) A parent may not revoke consent for adoption of a prospective adoptee if:
>
> (1) in the preceding year, the parent has revoked consent for or filed a notice of objection to adoption of the prospective adoptee; and
>
> (2) the child is at least 30 days old and consent is given before a judge on the record.
>
> (2) A prospective adoptee may revoke consent at any time before a court enters an order of adoption under this subtitle.

2. The Parents do not argue on appeal that their revocation was an "objection" under Md. Rule 9-107.

3. The Parents have not raised these two contentions to this court except as they relate to the adoption hearing judge's failure to ask why the Parents were not present at the hearing.

4. The remainder of the hearing focused on the post-adoption contract. The adoptive parents pointed out that the agreement had already been filed with the court, was enforceable, and nothing more was required under FL § 5-3B-07 and Md. Rule 9-103. In the alternative, the adoptive parents argued that the contract should no longer be enforced because the birth parents fundamentally breached the contract by violating a clause that prohibited posting information about the case on the internet. The Parents put several blog posts on the internet about the case, including a letter they wrote to the adoptive parents.

The Parents expressed their feeling that the adoptive parents were not complying with the contract because they were refusing to meet in person, they were sending letters with little information, and not answering the Parents' questions. The court declined to discuss the respective parties' breaches of the agreement, and instead found that the agreement did not need to be incorporated because it was already filed with the court.

5. We assume that the Parents are appealing both the original denial of the motion to alter or amend on March 6, 2012 and the court's subsequent action after the hearing on March 27, 2012.

6. The Parents state that they are also appealing the granting of the motion to reject revocation and the adoption decree. The motion to reject revocation was granted on December 20, 2011. The adoption decree was entered December 29, 2011. The Parents appealed on March 27, 2012. We discuss the timeliness of this appeal, *infra* at n.10.

7. The Parents' questions presented were phrased as:

> 1. Did the trial court violate Md. Rule 2-311(f) and Md. Rule 9-102 by rejecting the natural parents' attempted revocation of their consent to adoption without affording them the hearing they had requested?
> 2. Were the natural parents' due process rights violated when their son was

taken from them without a due process hearing?

3. Did the trial court violate the family law article and Md. Rule 9-109 when it denied the motion to alter or amend without holding a hearing and stating that in that order that a hearing had been held?

8. The Parents did not include these contentions in their questions presented.

9. In their motion to alter or amend, the Parents did argue that they did not receive notice of the adoption hearing until after the proceeding. However, the Parents were not entitled to notice because they had waived their right to be notified of the adoption hearing. The consent form contains a section entitled "Notice." It then permits the consenting parent to check that they wished to waive their right to any further notice of the adoption case or that they wanted to be notified when the adoption case is filed, of any hearing and if and when the child is adopted. Both James and Michelle checked the first box.

10. Whether this issue is properly before the court is questionable because this motion was granted on December 20, 2011, and this appeal was taken on March 27, 2012. Because the resolution of this motion essentially removed the Parents from the adoption proceeding, *see Palmisano v. Baltimore County*, 249 Md. 94, 103 (1968), much like a denial of a request to intervene, *Citizens Coordinating Comm. v. TKU,* 276 Md. 705, 710 (1976), it bears some characteristics of a final decision. Nevertheless, we assume without deciding that the motion was not a final decision but an interlocutory order and the Parents had to wait until their Motion to Alter or Amend was denied before appealing this issue.

11. Md. Rule 2-311(f) reads:

> A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

12. More exactly, Md. Rule 9-102(c)(2)(D) reads:

> If a consent is revoked pursuant to this Rule, the court shall schedule an immediate hearing to determine the status of the petition and, if necessary, temporary custody of the child.

13. The Court of Appeals found a similar 30-day time limit (failure to object to a petition for guardianship within 30 days results in irrevocable deemed consent) did not violate due process on its face. But the Court left open the possibility of an "as applied" challenge. *See In Re: Adoption/Guardianship No. 93321055*, 344 Md. 458, 491-494 (1997), *rev'd on other grounds, In re Adoption/Guardianship Nos. 11387 & 11388,* 354 Md. 574 (1999).

14. In fact, Maryland's revocation period is longer than most states. In many states consent is irrevocable immediately after signing. Many other states permit revocation for only a few days after signing the consent. And some states permit revocation until the parental rights are terminated or the adoption is final. *See* *http://www.theadoptionguide.com/files/StateAdoptionLaws.pdf*

NO TEXT

Cite as 3 MFLM Supp. 85 (2013)

CINA: Evidence: permanency plan hearing report

In Re: Kayla M.

No. 0804, September Term, 2012

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

Opinion by Kenney, J.

Filed: January 28, 2013. Unreported.

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.

On August 3, 2011, Kayla M., the child of Kevin M. and Jennifer B., was found to be a Child in Need of Assistance ("CINA") and placed in the custody of the Cecil County Department of Social Services ("DSS"). On June 20, 2012, following the permanency planning hearing, the Circuit Court for Cecil County, sitting as a juvenile court, issued an Order changing the permanency plan for Kayla from reunification with her parents to adoption by a non-relative.

In her timely appeal, Jennifer B., appellant,[1] 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 of the juvenile court.

FACTS & BACKGROUND

At the June 20, 2012 permanency planning hearing, appellant's attorney objected to the DSS Permanency Plan Hearing Report being entered into evidence. When the report was first offered into evidence, the following exchange occurred:

> [DSS ATTORNEY]: You have a copy of the report, which I would ask be admitted into evidence as usual; and I would ask Mary Klesius, who is the supervisor of this matter to take the stand.
>
> [APPELLANT'S ATTORNEY]: Your Honor, pending the conclusion of the testimony please note the objection of [appellant] to the admission of the report until it's been properly authenticated and admitted into evidence.
>
> COURT: Very well.
>
> [FATHER'S ATTORNEY]: And I join in the objection.

Mary Klesius 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. After this testimony, the DSS attorney again sought admission of the DSS report into evidence:

> [DSS ATTORNEY]: Okay. I'd renew my request that this be admitted into evidence, your Honor.
>
> COURT: Very well.
>
> [APPELLANT'S ATTORNEY]: Objection.
>
> COURT: Overruled. It is admitted.

After hearing all the testimony in the case, the juvenile court changed Kayla's permanency plan from reunification with her parents to guardianship / adoption. Further, the court encouraged DSS to "initiate termination of the parental rights proceedings as soon as they deem appropriate. I think the track record has been established."

STANDARD OF REVIEW

We have recently said:

> A ruling on the admissibility of evidence ordinarily is within the trial court's discretion. This Court generally reviews such rulings for an abuse of discretion. An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles.

Hajireen v. State, 203 Md. App. 537, 552 (2012) (internal citations and quotations omitted). The exclusion of hearsay evidence,[2] however, is treated differently. Maryland rule 5-802 provides that "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Therefore, "a circuit court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is

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

hearsay is an issue of law reviewed *de novo*." *Dulyx v. State,* 425 Md. 273, 285 (2012) (quoting *Parker v. State,* 408 Md. 428, 436 (2009)).

DISCUSSION

Appellant argues that the court committed prejudicial error by admitting the DSS report into evidence because it was not authenticated and included multiple levels of hearsay. Appellees, DSS and the minor child, respond that the report was properly authenticated by Ms. Klesius 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.[3]

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).

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* 5-901(a). A document may be authenticated through "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be." *Id.* 5-901(b)(1).

In *Faith H.,* at the permanency planning hearing, DSS submitted the permanency plan hearing report along with another report in lieu of live testimony, but did not call any witnesses to testify. The father of the child objected, arguing that he would be at a disadvantage if DSS did not call the authors of the reports as witnesses on direct examination because he would be forced to call them as adverse witnesses. The juvenile court overruled the objection and indicated that the authors of the reports could be cross-examined, and the parties went on to do that.

The Court of Appeals held that there was no error in admitting the reports into evidence:

> [The father] has no cause to complain for many reasons: he never challenged the reliability of the reports for authenticity, hearsay, or inadmissible opinions; [he] had the reports for at least two months prior to the hearing; and he was offered the opportunity to cross-examine the reports' authors, which he took.

409 Md. at 647. "[T]here is no authority that requires the Department to present its case-in-chief through live testimony or to augment its documentary evidence with live testimony, after admission." *Id.* at 648.

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 by confirming that the report being entered into evidence was in fact the document that she and her staff prepared. The record does not indicate that appellant challenged her testimony that the report to which she referred 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.

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

FOOTNOTES

1. Kevin M. participated in the proceedings below, but he has not participated in this appeal.

2. Hearsay is defined as, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c).

3. The record reflects that appellant initially made an objection expressly based on authentication but later made a general objection to the report when it was admitted into evidence. For that reason, we shall address both the authentication and the hearsay arguments. *See Deleon v. State*, 407 Md. 16, 24-25 (2008) ("[A] party basing an appeal on a 'general' objection to admission of certain evidence, may argue *any* ground against its inadmissibility."). That said, however, we note that it would be a better practice in fairness to the trial court to indicate the grounds for a second objection to the same evidence for which an express grounds for an objection has previously been given if the grounds for the second objection are different.

NO TEXT

Cite as 3 MFLM Supp. 89 (2013)

Custody: motion to revise judgment: justification for absence from trial

Mary Katherine Goldsborough

v.

Leslie E. Goldsborough, III

No. 1539, September Term, 2011

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

Opinion by Eyler, James R., J.

Filed: January 28, 2013. Unreported.

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, by the Circuit Court for Baltimore City, of appellant, Mary Katherine Goldsborough's, motion for new trial following the entry of judgment granting appellee, Leslie E. Goldsborough, III, an absolute divorce from appellant, sole legal and physical custody of the parties' three minor 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.

For the reasons that follow, we shall affirm.

FACTS and PROCEEDINGS

The issues appellant presents obviate the need for a full recitation of the torturous history of the parties' failed marriage. Therefore, we present only the events germane to our analysis.

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

On April 5, 2010, appellee, Leslie Goldsborough, III (hereinafter "Husband"), filed a complaint for limited divorce against Mary Katherine Goldsborough (hereinafter "Wife") on the ground of constructive abandonment.[1] Therein, he sought primary physical and sole legal custody of the couple's three minor children,[2] use and possession of the family home and personal property, attorneys' fees, and other relief as his cause required.

Following an emergency hearing on May 20, 2010,[3] the circuit court entered an order granting: 1) Husband and Wife temporary joint legal custody of the children, with Husband to have temporary primary physical custody and Wife to have liberal visitation; 2) Husband use and possession of the marital home, and; 3) Wife $350 per week in *pendente lite* alimony and child support.[4] Wife filed her answer to Husband's complaint for limited divorce on July 20, 2010.

On April 8, 2011, Husband filed a complaint for absolute divorce, alleging a one-year voluntary separation. Wife was served with the complaint on April 29, 2011. There is no indication in the record that she filed any responsive pleading to Husband's complaint. The court's docket entries show that hearing notices scheduling trial dates of May 12, 2011 and May 19, 2011 were mailed to both parties on more than one occasion.[5]

On May 12, 2011, Husband appeared in court, with counsel, ready to proceed to trial. Wife did not appear. Instead, a person identifying herself as Wife phoned the presiding judge's chambers that morning and spoke with the judge's law clerk, Justin Wilde, with Judge John Addison Howard listening to Mr. Wilde's side of the conversation.

Prior to trial, Judge Howard called upon Mr. Wilde to relay, on the record, Wife's side of the phone conversation. Mr. Wilde stated that Wife had informed him she was unable to attend court on that date because she had been admitted to the Greater Baltimore Medical Center ("GBMC") and insisted that if she left, "her veins would collapse and she was a fool if she decided to leave."

When Mr. Wilde repeatedly asked Wife to have hospital personnel contact the judge's chambers to verify her admittance, Wife stated that such contact was impossible because the hospital staff's only concern was stabilizing her condition. Mr. Wilde further inquired how, given her alleged condition and circumstances, she was able to engage in a 20-minute phone call, to which Wife responded she was hiding in a hospital rest room and speaking on her cell phone without anyone's knowledge. Wife did not, on May 12, 2011, provide the court with her treating doctor's identity or any medical records to verify a hospital visit.

In light of "that somewhat strange conversation," and Wife's failure to have anyone from the hospital communicate with the court by phone or fax regarding an admittance, the court ruled "there would appear to be no real basis why she could not physically be present." As such, the court announced its intention to proceed with the trial in Wife's absence, with no objection from Husband.

Following Husband's unrebutted trial testimony, the court granted him a judgment of absolute divorce. The court noted that as a result of Husband's and his father's testimony regarding Wife's erratic behavior, coupled with the medical reports before the Court, "there seems to be almost no factor which would support custody in any manner being given to Mrs. Goldsborough." Given Wife's unfitness to care for the children, the court awarded sole legal and physical custody of the children to Husband, with liberal visitation to Wife at Husband's discretion.

Husband was also granted use and occupancy of the marital home for the statutory maximum of three years. Pointing out that Wife had not filed responses to Husband's pleadings, nor requested alimony, the court denied her any alimony. The court's judgment was entered on May 17, 2011.

On May 31, 2011, Wife filed a motion for new trial in which she alleged, first, that she had not known that trial was scheduled for May 12, 2011, instead believing it was set for May 19, 2011, and, second, that she had been unable to be present in court on May 12, 2011 as a result of back-to-back hospitalizations beginning on May 10 and ending on May 17, 2011, including treatment at GBMC for "internal bleeding, possible bone disease, severe illness associated with other issues including her histrionic personality disorder." Were she permitted to present evidence, she averred, "a very different outcome by any court would have resulted at least as to physical custody, access and alimony." Appended to her motion were two exhibits, one a consent for treatment from the emergency room at Johns Hopkins Hospital dated May 10, 2011, and one a "documents review report" from Sheppard Pratt Health System showing an admission date of May 13, 2011 and a discharge date of May 17, 2011.

Husband moved to strike Wife's motion for new trial on June 15, 2011, on the grounds of late filing and failure to comply with Maryland Rule 2-311(d). That Rule requires that a motion "based on facts not contained in the record be supported by affidavit and accompanied by any papers on which it is based."

The trial court denied Wife's motion for new trial on June 30, 2011, pointing out that Wife knew or should have known of the May 12, 2011 trial date by virtue of the trial notices sent to her. Moreover, she, in fact, called on May 12, and during her conversation with Justin Wilde, she had referenced no confusion as to the fact that trial was scheduled that day.

With regard to her claims of medical incapacity to attend trial, the court ruled that "other than the bald assertion by [Wife] that she was not medically able to participate, there is no documentation by any expert as to what her condition actually was on May 12, 2011 or that whatever her condition was, it was of such a nature that she could not be in court." The court further found that the exhibits provided with Wife's motion did not document any medical event on May 12, 2011. Therefore, the court concluded, the "only reasonable conclusion which can be drawn . . . is that if [Wife] went to GBMC on May 12, it was not to receive treatment for any condition which affected or would have prevented her appearance in court May 12, 2011."

Wife filed her notice of appeal on July 15, 2011.

DISCUSSION

If a litigant is aggrieved by a judgment entered in a court trial, that party may file several post-trial motions: a motion for a new trial under Md. Rule 2-533; a motion to alter or amend the judgment under Md. Rule 2-534; and/or a motion for the court to exercise its revisory power under Md. Rule 2-535. A party *must* file a motion under Rule 2-533 and 2-534 within 10 days after the entry of the judgment.[6] *Pickett v. Noba, Inc.*, 114 Md. App. 552, 556 (1997).

If a motion under Rule 2-533 or 2-534 is timely filed within 10 days of the entry of the judgment, the time the parties have to note an appeal is suspended until after the motion is decided. *Id. See also* Md. Rule 8-202.[7] If, however, a party files a motion for new trial or a motion to alter or amend more than 10 days after judgment, the time for filing an appeal will not be stayed. *Pickett*, 114 Md. App. at 556.

In this matter, 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. For the motion to have been timely, filing was required by May 27, 2011.[8] *See* Md. Rule 1-203(a) which provides:

Computation of time after an

> **act, event, or default.** In computing any period of time prescribed by these rules, by rule or order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. If the period of time allowed is more than seven days, intermediate Saturdays, Sundays, and holidays are counted; but if the period of time allowed is seven days or less, intermediate Saturdays, Sundays, and holidays are not counted. The last day of the period so computed is included unless:
>
> (1) it is a Saturday, Sunday, or holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or holiday; or
>
> (2) the act to be done is the filing of a paper in court and the office of the clerk of that court on the last day of the period is not open, or is closed for a part of the day, in which event the period runs until the end of the next day that is not a Saturday, Sunday, holiday, or a day on which the office is not open during its regular hours.

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.

The decision to grant or deny a motion for continuance lies within the sound discretion of the trial court. An abuse of discretion can be found only when a judge exercises that discretion in an arbitrary or capricious manner or when the action is beyond the letter or reason of the law. *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006) (citing *Garg v. Garg*, 393 Md. 225,238 (2006)). Absent an abuse of discretion, we historically have not disturbed a circuit court's decision to deny a motion for continuance. *Id*.

Here, 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, pointing out that "there seems to be almost no factor which would support custody in any manner being given to Mrs. Goldsborough." 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.

JUDGMENT AFFIRMED.
COSTS ASSESSED AGAINST APPELLANT.

FOOTNOTES

1. Husband alleged that he and Wife had not shared their marital bed since approximately 2004, with the relationship between the pair being "extremely strained." They separated on approximately April 6, 2010, following the trial court's issuance of a final protective order authorizing Wife to remain in the marital home and directing Husband to move to an apartment he had rented.

2. Husband also alleged that Wife had suffered numerous physical and mental ailments during the course of the marriage, which led to her self-professed inability to participate fully in the care of the parties' three children, two of whom had been diagnosed with significant developmental and learning issues.

3. The emergency hearing stemmed from a May 16, 2010 incident in which Wife's enraged stepfather drove his truck into the front of the marital home causing extensive damage to the house and frightening the children.

4. Following periodic review hearings, Wife's *pendente lite* alimony award was first increased to $800 per week and then decreased to $450 per week after Husband lost his job on or about September 1, 2010. An October 28, 2010 review hearing resulted in Husband being granted sole legal custody of the children pending the final hearing on the merits.

5. At the start of the trial, the judge explained that the matter had originally been scheduled for trial on May 12, 2011. The additional date of May 19, 2011 was added to accommodate the expected lengthy testimony, but the "May 12th date has never been changed or advanced."

6. A motion to have the court exercise its revisory power pursuant to Rule 2-535 must be filed within 30 days after the entry of judgment.

7. Rule 8-202(a) generally requires a notice of appeal to be filed within 30 days after entry of the judgment or order from which the appeal is taken. Rule 8-202(c) states that if a *timely* motion is filed pursuant to Rule 2-532 (judgment not withstanding the verdict), 2-533 (motion for new trial), or 2-534 (motion to alter or amend a judgment), the notice of appeal must be filed within 30 days after entry of (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534.

8. Although the courts were closed on Monday, May 30, 2011 for the observance of Memorial Day, we are aware of no holiday or other reason the court clerk would not have been available to file a motion on Friday, May 27, 2011.

Cite as 3 MFLM Supp. 93 (2013)

Divorce: use and possession order: enforcement

John D. Wilkins
v.
Yolanda E. Person

No. 2111, September Term, 2009

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

Opinion by Wright, J.

Filed: January 30, 2013. Unreported.

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.

Before this Court are appellant, John D. Wilkins ("Wilkins"), and appellee, Yolanda E. Person ("Person"), both of whom are self-represented. This appeal arises from the Circuit Court for Prince George's County's 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, so long as Person abided by her physician's treatment and medication for her psychiatric condition, she was entitled to supervised day visits with the minor child in the Washington Metropolitan Area. The order required that the marital home be sold and the proceeds divided equally between the parties. In addition, Wilkins was to pay to Person a marital award of $2,500.00.

On February 17, 2005, subsequent to the judgment of absolute divorce, Person filed an Emergency Petition for Enforcement of Visitation and Request for Contempt Show Cause Order. A Second Emergency Petition for Enforcement of Visitation and Request for Arrest Order ("Second Emergency Petition") was filed by Person on March 15, 2005. On July 1,2005, an order was issued granting Person specific summer visitation hours.

On July 14, 2009, the court held a hearing on Person's Motion for Modification of Visitation and Determination of Property Matters. Wilkins failed to appear. On October 22, 2009, the court granted Person's motion. Wilkins timely appealed, asking us to consider whether the court erred when it issued the October 22, 2009 order, which in effect, enforced the provisions of a previous court order dated December 21, 2004.[1]

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

Facts and Procedural History

An extensive recitation of the facts and procedural history is necessary to resolve the issues raised in this appeal. The initial judgment of absolute divorce dated December 21, 2004, granted to Wilkins and Person ordered, in pertinent part:

> That [Wilkins] be and is hereby granted an absolute divorce from [Person], and it is further,
>
> ORDERED, that [Wilkins] be awarded sole legal and physical custody of the parties' minor child, John D. Wilkins, II, and it is further,
>
> ORDERED that [Person] will have supervised visitation with the minor child upon the following terms and conditions:
>
> 1. Provided that the Defendant [Person] is compliant with her physician's treatment and medications for her psychiatric condition she shall be entitled to day visits with the minor child in the Washington Metropolitan Area provided further that she is supervised during said visitation by the Plaintiff, the Defendant's mother, or such individual acceptable to the parties. The child will be returned to the Plaintiff's home each evening. If the day visitations are successful with the child being comfortable with time spent with the Defendant, visitation will be expanded to include overnight visitation in the Washington area. Upon demonstration that the child is adjusting to the time spent with the

Defendant, the parties will arrange appropriate transportation for the child to visit with the Defendant at her home outside of the Washington Metropolitan Area for periods of 7 to 10 days. The costs of transportation and responsibility for supervision during the transportation of the child shall be left to the discretion of the parties with the goal being an equal distribution of cost and responsibility. The visitation provided herein is intentionally fluid in anticipation that an exact framework for visitation will be difficult to implement. The goal of this visitation is to re-establish the bond between the Defendant and her child with the recognition that given the Defendant's prior psychiatric history, the child's safety will always be the paramount factor. During visitation outside of the Washington Metropolitan Area, the Defendant's mother will provide personal supervision during the times of said visitation, and it is further,

ORDERED, that this Court will review the issue of unsupervised visitation at such time as the graduated scheduled provided herein is successfully implemented, and it further,

ORDERED, that the minor child shall have telephone contact on a regular basis with the Defendant at approximately 7:00 p.m. or at such time as the parties may agree with the call to be made by the Defendant to the Plaintiff's primary home phone number which may be his personal cell phone and during visitation with the Defendant outside the Washington Metropolitan Area Plaintiff will have similar telephone contact with the minor child, and it further,

ORDERED, that the Court will review the issue of child support at such time as the Defendant regains employment. The Defendant and child are currently receiving Social Security benefits. The benefits received by the child will be considered as reasonable contribution in lieu of child support payments by the Defendant, and it is further,

ORDERED, that the Plaintiff is granted three (3) years use and possession of the marital home at 4411 Van Buren St., University Park, Maryland 20782, 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 negotiate to attempt to have the Plaintiff purchase the Defendant's interest in the property, and it is further,

ORDERED, that the Plaintiff is granted three (3) years use and possession of the Toyota Land Cruiser motor vehicle, it is further,

ORDERED, that the Court reserve ruling on the issue of alimony for the Defendant, and it is further,

ORDERED, that the each party shall be responsible for his or her individual attorney's fees and costs of this action, and it is further,

ORDERED, that each party shall retain, for their personal use, and without claim by the other, all financial assets including retirement benefits of any kind or nature which either may have * **provided that Plaintiff pays Defendant $2,500,*** and it is further,

ORDERED, that each party shall retain, as his or her individual property, all personalty within their control including, but not limited to, contents of the property known as 4411 Van Buren St., University Park, Maryland 20782, and it is further,

ORDERED, that this Court shall retain jurisdiction in this case for the submission, entry, alteration, and amendment of any appropriate Qualified Domestic Relations Order, in order to accomplish the division of the parties Civil Service or similar benefits. . . .

(Emphasis added).

Use and possession of the home was to expire after three years and sixty days, from the December 21, 2004 judgment of absolute divorce. Person's Emergency Petition for Enforcement of Visitation and Request for Contempt Show Cause Order asserted:

> 5. That the Petitioner, Yolanda E. Wilkins, attempted to obtain visitation in Maryland in accordance with the Court decision in August 2004, during which time, R. David Adelberg, Attorney for Petitioner, sent a facsimile to William Howard, Esquire, Attorney for Plaintiff, requesting visitation. Further letters were written by Yolanda E. Wilkins and her mother Carolyn Person, to Judge Nichols, dated August 16, 2004, requesting the right of visitation. However, the Plaintiff, John D. Wilkins, failed to provide or agree to visitation.
>
> 6. That is an effort to set up visitation during Thanksgiving, R. David Adelberg sent letters to William Howard, Esquire, on September 13, October 19, and October 27, 2004, requesting that his client provide visitation during the Thanksgiving holiday, for which there was no response.
>
> * * *
>
> 9. That an emergency hearing was set and held before his Honor, C. Phillip Nichols, on December 21, 2004, at which time an emergency order was signed granting supervised visitation to Yolanda E. Wilkins from 9:00 a.m. on December 27, 2004 to 9:00 a.m. on December 30, 2004, for service. The Sheriff did not effectuate service of said Order and no visitation took place.
>
> * * *
>
> 12. That the Plaintiff has steadfastly objected and refused to permit visitation unless coerced by Order of Court, and the Petitioner avers that unless the Court enters an Order granting her visitation with her minor child, no visitation will take place in the future.

For these actions, Person prayed:

> A. That an Order requiring the Defendant, John D. Wilkins, to show cause why he is not in contempt of court be entered for his refusal to permit ordered visitation.
>
> * * *
>
> D. That the Court shorten the time for response to this Petition to five (5) days after the Petition and Order are served, and the Plaintiff be required to show cause why the visitation should not be granted.

Person's petition was granted resulting in a Show Cause Order being issued against Wilkins to show cause as to why he should not be held in contempt of court for failure to comply with the court's decision and orders, thereby granting Person visitation, with her mother, Carolyn Person, as the supervisor for those visits. On March 7, 2005, the case was resolved in chambers. However, on March 15, 2005, Person filed a Second Emergency Petition asserting that in addition to the actions complained of in the initial Emergency Petition for Enforcement of Visitation and Request for Arrest Order:

> 15. On Monday, March 14, 2005, Yolanda E. Wilkins, together with her mother, Carolyn Person, and her stepfather, Jabex Reeves, all of whom had traveled from Natchez, Mississippi, arrived at the residence of John D. Wilkins at 4411 Van Buren Street, University Park, Maryland 20782, and there was no one home. Neighbors advised Ms. Wilkins and Ms. Person that neither the child, John D. Wilkins II, nor his father, John D. Wilkins, had been seen at their home since Friday, March 11, 2005.

Person prayed that "[t]he Defendant, John D. Wilkins, be held in contempt of Court and that an arrest warrant be ordered and he be brought before the Court to show cause why he should not be incarcerated for contempt of court." Person's Second Emergency Petition was denied without prejudice at the conclusion of the hearing. Wilkins, on March 9, 2005, filed his Response to Request for Show Cause Order. In that response, Wilkins asserted:

> 2. No attempts to establish visitation between Yolanda E. Wilkins, Defendant and estranged mother, and minor child, John D. Wilkins, II, have ever been hindered or prevented by John D. Wilkins, Plaintiff, and Sole Custodial Parent of minor child John D. Wilkins, since his birth, January 25, 2000.
>
> * * *
>
> 4. I, John D. Wilkins, Plaintiff, respectfully request enough time to obtain new counsel to represent me in any

future legal proceedings.

On March 21, 2005, Wilkins filed a Response to Second Emergency Petition. Wilkins added to the assertions in his first response:

> 3. I, John D. Wilkins, Plaintiff, contend that the statements submitted as evidence of my contempt are based solely and purely upon conjecture.
>
> * * *
>
> 6. That from November 7, 2001 until present date, Yolanda E. Person, defendant and estranged mother has averaged 3 to 5 telephone calls per annum for approximately 2 to 10 minutes each. During the aforementioned telephone contacts Yolanda E. Person did not inquire about the health and/or developmental progress.
>
> * * *
>
> 8. That for visitation in state of Maryland on March 14, 15, 16, 17, 18, 19, 20 and 21, 2005, Yolanda E. Person, never contacted John D. Wilkins to set up a time for visitation. A note, letter or voice mail message was never created for purposes of implementing a successful visitation following the Court Ordered prescribed visitation framework.

A series of letters were transmitted from both Wilkins and Person to counsel, and to Judge Nichols regarding the custody agreement and visitation arrangements for the couple's minor child. On June 22, 2005, Wilkins requested that his counsel withdraw as counsel of record through a Motion to Strike Appearance. On June 28, 2005, Person filed a request for issuance of a subpoena to be served upon Wilkins. On July 1, 2005, a hearing on the second emergency petition was held, resulting in the granting of an Order for supervised visitation with the minor child during the Summer of 2005. Wilkins's motion to remove his counsel, filed on June 22, 2005, was granted and Wilkins was instructed to employ new counsel.

Person filed a Motion for Modification of Visitation and Determination of Property Matters on July 30, 2008. In pertinent part, she alleged:

> 4. That the Plaintiff has refused to allow the graduated visitation schedule to move forward and the Defendant is an appropriate person to exercise her visitation within the parameters of the Judgment of Divorce.

Person continued by praying:

> a. That the Court grant the Modification of Visitation.
>
> b. That the Court appoint a Trustee to sell the marital home.
>
> * * *
>
> d. That the Court grant a judgment in favor of the Defendant and against the Plaintiff for $2,500 and enforce the retirement provisions in the Judgment.
>
> e. That the Court order the Plaintiff to pay the Defendant's attorney's fees.

On the 1st day of August, 2008, a writ of summons was issued to be served upon Wilkins which advised:

> 1. PERSONAL ATTENDANCE IN COURT ON THE DAY NAMED IS NOT REQUIRED.
>
> 2. FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGMENT BY DEFAULT OR THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

On November 5, 2008, Wilkins filed a Motion to Strike And/Or Dismiss Person's Motion for Modification of Visitation and Determination of Property Matters for Failure to Plead Grounds Upon Which Relief may be Granted or Alternatively, Opposition Thereto, wherein Wilkins denied allegations set forth in Person's Motion. On December 1, 2008, Wilkins filed a Motion to Strike Defendant's Motion for Modification of Visitation and Determination of Property Matters and Specifically Her Request to Determine Alimony for Failure to Provide Financial Statement. Of note, Wilkins prayed:

> 1. That this Honorable Court strike and/or dismiss Defendant's Motion for Modification of Visitation and Determination of Property Matters for failure to provide a financial statement in accordance with the Rules and to set forth any basis for modification.
>
> 2. That this Court Order that the Defendant is precluded from pursuing a claim for alimony and/or spousal support.

An order issued on December 22, 2008, stated that because Person had satisfied Maryland Rule 9-202 by filing a financial statement and because the Judgment of Absolute Divorce reserved issues for future determination by the court, Wilkins's Motion to Dismiss was denied.

On February 19, 2009, Wilkins's counsel filed a notice of her intent to strike her appearance and Notice to Obtain Other Counsel, alleging:

> 2. That during the course of counsel's

> representation differences arose between the Plaintiff and counsel regarding the handling of the case. In addition, Plaintiff has refused to communicate with counsel since January 7, 2009. Counsel has sent the Plaintiff three letters regarding the case and her representation since the parties' last communication, one dated January 7, 2009, January 14, 2009 and February 4, 2009. In the last letter, counsel advised the Plaintiff of her intent to withdraw her appearance and a copy of the Scheduling Order. Counsel also e-mailed the Plaintiff and received no response.
>
> 3. It is evident that the counsel is unable to zealously represent the Plaintiff in light of his refusal to communicate with counsel or to comply with procedures necessary to the litigation.

The court granted counsel's request by order on March 9, 2009. Person initiated the discovery process by filing Person's Notice of Discovery on March 10, 2009. To accommodate the change in representation, Person filed a Notice of Discovery on April 2, 2009, and mailed it to the marital home address of 4411 Van Buren Street, University Park, Maryland 20782 and P.O. Box 5493, Hyattsville, Maryland 20872. On March 15, 2009, Person filed a Notice of Service that a copy of Interrogatories and Request for Production of Documents were sent to Wilkins at both addresses.

On April 1, 2009, a subpoena was issued for Wilkins at Person's request to appear in court to testify and to produce all requested documents. On April 2, 2009, a subpoena was issued to Wilkins ordering him to appear in court to attend and testify at a deposition. Person filed a Motion to Continue on April 24, 2009, in part because:

> 2. That on or about April 26, 2009, the Defendant was hospitalized at Doctor's Community Hospital and admitted through the Emergency Room.
>
> 3. That the Defendant became ill on her way here from Mississippi and the ambulance has to take her to the Emergency Room. A copy of Defendant's General Conditions of Admission and Treatment dated April 26, 2009 from Doctor's Community Hospital located in Lanham, MD.

After her motion to continue was granted, Person moved to compel discovery, asking the court to issue an order requiring Wilkins to comply with Person's Request for Production of Documents and Interrogatories and to award reasonable attorney's fees and costs incurred. Person asserted:

> 2. That on April 2, 2009, after the Plaintiff failed to attend a scheduled deposition, the undersigned counsel forwarded a letter to Plaintiff at two addresses that the Plaintiff regularly uses. Such correspondence notified the Plaintiff that he failed to comply with a deposition subpoena as well as reminded the Plaintiff that his discovery due date was fast approaching. A copy of said letter is attached hereto and incorporated herein by reference. Further, the undersigned called the Plaintiff at his residence and left a message regarding the same.
>
> * * *
>
> 8. The Plaintiff has been acting in bad faith since the onset of this case.
>
> 9. The process server had to go to his residence 17 times to serve the initial Motion.
>
> 10. That the Plaintiff has failed to appear at two depositions.
>
> * * *
>
> 14. That the Defendant has incurred attorney's fees associated with the Plaintiff refusing to comply with discovery by not answering the Interrogatories and Request for Production of Documents and failing to appear at two scheduled depositions.

On May 22, 2009, the court ordered Wilkins to produce all documents requested and to file answers to the interrogatories. Wilkins was also ordered to pay Person $500.00 in attorney's fees and $428.00 in court reporter fees.

A July 14, 2009 hearing, where Wilkins failed to appear, ultimately resulted in a default judgment being issued against Wilkins. The default judgment included a monetary award for Person, a custody agreement, and an order for the sale of the marital home after the 3-year period provided in the judgment of absolute divorce. During the hearing, the court stated:

> We're set for today for a five-hour hearing, as I understand it. And Mr. Wilkins has not appeared. His case was set for nine a.m. It's now, by the courtroom clock, about 9:35. The court has not heard from him since

this letter. I know we haven't heard from him this morning.

The court then read a letter which was the last form of contact that the court received from Wilkins. In the letter, Wilkins claimed that the couple had come to an "amicable agreement" concerning the custody agreement, monetary award, and dissolution of the marital property. Person's counsel rejected this assertion and explained to the court:

> I've contacted Mr. Wilkins on several occasions trying to get information about the family home to see if we could work out an agreement as far as buy-out. Mr. Wilkins was difficult to serve. It took 17 times from my process server to get him served for a deposition and two depositions to appear for. He still hasn't responded to any of my discovery requests. So we weren't able to come to an agreement as far as marital home is concerned. So at this point, since the use and possession periods, actually has exceed by almost two years, the 2007 use and possession period, we're going to — we're requesting that the Court appoint a trustee to have the home sold at this point in time.

Person's counsel asked for a modification to the visitation order because Person had relocated from Mississippi to the Washington, D.C. Metropolitan Area. The court granted by default the requests by Person's counsel for modification of the visitation order and had the following exchange:

> THE COURT: All right. So what are you going to request, then, this morning?
>
> [Person's Counsel]: The request, your Honor, is that the Court appoint a trustee to have the marital home sold.
>
> * * *
>
> [Person's Counsel]: And that the net proceeds of the home be divided equally between the parties as set forth in the judgment of absolute divorce.
>
> THE COURT: All right.
>
> [Person's Counsel]: There was the other financial issue, Your Honor, on page four of the judgment of divorce that there was supposed to be a payment of $2,500 as a monetary award. Mr. Wilkins has not paid that money, either. And I'm requesting that that be entered into a judgment against Mr. Wilkins.
>
> THE COURT: All right.
>
> [Person's Counsel]: And if that — and I guess what will happen, Your Honor, we'll just do whatever we need to do to, hopefully, get that $2,500 out of the proceeds from the home from his portion.
>
> The other request, Your Honor, is that the visitation schedule be moved to weekend time in the Washington, D.C. Metropolitan Area since Ms. Person is here and have Mr. Wilkins as a supervisor, since that's what the order calls for, or any other party the parties can come to an agreement with.
>
> THE COURT: Okay. All right.

The court granted Person's counsel's request for attorney's fees and deposition costs because Wilkins had failed to respond to discovery requests:

> [Person's Counsel]: There was one last request, Your Honor. There was a motion to compel that was granted ordering Mr. Wilkins to respond to my discovery requests, also ordering him to pay deposition costs as well as the attorney's fees for the time of the depositions as well as the motion to compel. And I would like to request that that be entered into a judgment as well, since Mr. Wilkins —
>
> THE COURT: How much were the costs, please?
>
> [Person's Counsel]: $500 for the attorney's fees and $428 for the deposition costs.

The court concluded by awarding the court reporter fees and directing Person's counsel to craft an order:

> THE COURT: I want you to craft the order, forward it by mail to me with a copy for Mr. Wilkins explaining what occurred this morning and telling him that you have submitted, you know, the order to this Court in accordance with the Court's instructions since he failed to appear or answer any of the requests that you've made. I think that's the best way to do.
>
> [Person's Counsel]: And one last question, Your Honor. As far as the order appointing the trustee, is that

> just going to go down to Family Services, and then they'll —
>
> THE COURT: If you send it to me, I'll appoint a trustee. I'm not sure who. If you want to nominate somebody, or I'll — it shouldn't be that hard to find someone.

On October 22, 2009, the court issued a written order. It directed that the parties' marital home be immediately listed for sale, the parties divide the net proceeds from the sale of the marital home in equal shares, and Benjamin Woolery, Esquire, be appointed as Trustee for the purposes of selling the marital home. Both parties were to be responsible for half of the Trustee's attorney fees. The order also required Wilkins to pay to Person the sum of $2,500.00 as a marital award and $200.00 for Person's attorney's fees. The order reaffirmed the $500.00 in attorney's fees and $428.00 in deposition costs previously announced. The order concluded by granting Person visitation with the minor child on three weekends per month, both Saturday and Sunday from 9:00 a.m. to 7:00 p.m. On November 18, 2009, Wilkins filed this appeal.

Discussion

The December 21, 2004 ruling that 4421 Van Buren Street 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 Md. Code (1984, 2006 Repl. Vol.) §§ 8-201, 8-205 & 8-210 of the Family Law Article ("FL") 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,[2] 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 at 4411 Van Buren St., University Park, Maryland 20782, 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[3] 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) (right to appeal is activated after final judgment is entered).

Next, Wilkins argues that the ruling announced by the court on July 14, 2009 fails to adhere to FL § 8-205, governing marital property, or to the original divorce decree. In Wilkins's second question, he concedes that he is attaching the December 21, 2004 Judgment of Absolute Divorce. Wilkins, however, is incorrect when he asserts that the trial court's order of October 22, 2009, does not "reflect" the original divorce decree. To put it simply, we cannot discern any material difference in the two orders and, therefore, the court did not err in enforcing its original judgment.

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

FOOTNOTES

1. Wilkins's issues presented are as follows:

> I. Judge C. Phillip Nichols of the Circuit Court of Maryland for Prince George's County issued an order forcing the sale of the appellant's real property and equally dividing the proceeds between

the appellant and the appellee without applying the Maryland Family Law and considering an equitable distribution between the parties as set forth in the Marital Property Act. FL § 8-201; § 8-205; and § 8-210[.] Also, the appellee did not meet time limits when filing the motion for determining marital property matters. (FL § 8-203)[.]

II. Judge C. Phillip Nichols of the Circuit Court of Maryland for Prince George's County issued orders which fails [sic] to adhere to FL § 8-205 or to the original divorce decree issued by Judge C. Phillip Nichols. Both issues presented are orders that serve to effectively destabilize both financially and socially the appellant and the appellant's family which includes the custodial child.

2. **§ 8-213. Enforcement.**

(a) *Enforcement under Maryland Rules*. — Any order, award, or decree entered under this subtitle may be enforced under the Maryland Rules.

(b) *Appeal*. — Any decree of annulment or of limited or absolute divorce in which the court reserves any power under this subtitle is final and subject to appeal in all other respects.

3. Rule 8-202, entitled "Notice of appeal — Times for filing," states, in pertinent part:

(a) *Generally*. Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken. In this Rule, "judgment" includes a verdict or decision of a circuit court to which issues have been sent from an Orphans' Court.

Cite as 3 MFLM Supp. 101 (2013)

Child support: determination of actual income: pre-tax contributions

Andrea Hanes

v.

Bryce Lee Hanes

No. 0541, September Term, 2012

Argued Before: Krauser, C.J., Meredith, Kehoe, JJ.

Opinion by Meredith, J.

Filed: January 31, 2013. Unreported.

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 for Queen Anne's County entered an order granting Andrea Hanes (appellant or "Wife") an absolute divorce from Bryce Lee Hanes (appellee or "Husband"). The court ordered Husband to pay $591.89 per month in 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 April 27 order to reflect an error in the calculation concerning health insurance provided to the child, but the court 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.

QUESTION PRESENTED

Wife presents a single question for our review:

> Did the trial court err in it's [sic] determination of appellee's actual income for child support guideline purposes?

For the reasons below, we answer Wife's question in the affirmative, and we reverse and remand for further proceedings.

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

FACTS AND PROCEDURAL HISTORY

Husband and Wife married on August 5, 2000. The marriage produced one child, born in 2006. The couple separated on November 5, 2010. Wife moved to West Virginia with the child. Husband visited the child regularly, and the couple eventually worked out a schedule by which Husband had visitation on alternating weekends and holidays. The couple entered into a parenting agreement which reflected this arrangement.

On December 21, 2010, Wife filed a complaint in the circuit court seeking child custody and support. A master conducted a *pendente lite* hearing on April 27, 2011, and issued a report recommending that Husband pay child support. As part of this determination, the master found the value of a company vehicle used by Husband to be $800.00 per month. The court subsequently issued an order requiring, *inter alia*, that Husband pay $1,098.00 per month in child support until a trial could be held.

On December 5, 2011, Wife filed a supplemental complaint for absolute divorce, based on voluntary separation since November 5, 2010. With the exception of child support, the couple settled all of their disputed issues prior to trial. Accordingly, on April 12, 2012, the court held a trial to determine child support.

At all times relevant to these proceedings, Wife was unemployed and received a social security disability payment and a private disability payment, totaling $1,408.00 per month.

Husband lived on the Eastern Shore of Maryland, and commuted daily to work in Silver Spring, Maryland. Husband worked as a branch manager and a service technician for a glass installation company. As part of the proceedings, Husband provided his pay stubs for the first few weeks in 2012, as well as his W-2s and earnings statements for 20l0 and 2011. Husband's 2010 "earnings summary" reflected that his "gross pay" was $54,002.51, inclusive of a bonus of $1,128.35. But the earnings statement also listed two pre-tax deductions: a 401(k) contribution of $4,260.18, and a cafeteria plan deduction of $5,428.68. The W-2 form made no mention of either the "gross pay" figure [*i.e.*, $54,002.51] or the cafeteria plan deduction [*i.e.*, $5,428.68]. Instead, the W-2 listed

the Line 1 "Wages, tips, other compensation" as $44,313.85. The 401(k) amount was shown on Line 12 of the form. And the "Social Security" wages were listed as the $48,573.83 (which is the sum of Lines 1 and 12). The "Medicare wages and tips" was similarly listed as $48,573.83.

The 2011 earnings summary displayed similar categories. For 2011, the amount labeled "gross pay" was $54,819.30, and pre-tax deductions were, listed for a 401(k) contribution of $647.60, and a cafeteria plan contribution of $4,496.12. The 2011 W-2 showed Line I "Wages, tips, other comp." as $49,675.58. The 401(k) contribution of $647.60 was listed in Line 12. And the Line 3 "Social Security wages" was $50,323.18, the same amount as shown for the Line 5 "Medical wages and tips."

The pay stubs issued to Husband during early 2012 reflected that Husband's "gross" bi-weekly pay was $2,003.25, for which the "taxable wages" was listed as $1,815.81. If these amounts remained constant for 26 pay periods and no bonus was paid, the annual gross pay for 2012 would be $52,084.50, and the "taxable wages" would be $47,211.06. Accordingly, his monthly gross income for 2012 was projected to be $4,340.38 (($2,003.25 x 26) ÷ 12), and the taxable portion was $3,934.25 (($1,815.81 x 26) ÷ 12).

Husband also acknowledged that he was allowed to use a company vehicle — which he described as a 2010 Ford minivan — to commute to and from work. He noted, however, that others also used the vehicle during work days, and he did not use the vehicle for personal errands, such as going to the grocery store. Additionally, Husband stated that he sometimes deviated from his direct commute for business purposes. He testified that he owned a 2004 Ford F-150 pickup truck which he used for all personal travel.

Wife argued that the court should find Husband's actual income to be $5,368 per month. She arrived at this figure by aggregating $4,568 (Husband's monthly "gross pay" as shown on his 2011 earnings summary) and the $800 per month value of the car which the master had found to be in kind income at the *pendente lite* hearing.

Husband contended that his actual income for child support purposes was $3,800.00 per month. This figure was derived from Husband's final pay stub from 2011, which described his "year to date" "regular" earnings as $45,608.24. (We note that this same pay stub described the "year to date" "Gross Pay" as $54,819.30.)

The court found that, although Husband had received bonus income in 2010 and 2011, he had received bonuses in only five of the eleven years before trial. The court found that the likely average annual bonus was $750 (*i.e.*, $62.50 per month). The court further accepted Husband's contention that the pre-tax compensation — *i.e.*, the 401(k) contribution and the cafeteria plan deduction — should not be considered, and that Husband's normal earnings were therefore $3,800 per month.

The circuit court determined that Husband's monthly actual income was $3,862. Using this figure, the court calculated Husband's monthly child support obligation to be $591.89.

Wife filed a motion to alter or amend, contending that the court erred in determining Husband's actual income. She argued that the court should have considered Husband's pretax benefits, recent bonuses, and the value of the company car as factors to be included in the calculation of Husband's actual income. Additionally, Wife argued that the court did not properly calculate the actual cost of health insurance that Husband provided to the child.

On May 10, 2012, the court issued an order granting Wife's motion with respect to the health insurance payments, but the court rejected Wife's arguments as to the amount of Husband's actual income. After correcting an error in health insurance contributions that Wife identified, the court recalculated the child support payments, and the court set Husband's child support obligation at $619.17 per month. The court denied the other requests in Wife's motion.

Wife noted this appeal, and contends that the court erred in its finding as to Husband's actual income which was used to calculate child support.

STANDARD OF REVIEW

This Court has explained the standard of review for child support orders as follows:

> While child support orders are generally within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion, where the order involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are "legally correct" under a *de novo* standard of review.

Child Support Enforcement Admin. v. Shehan, 148 Md. App. 550, 556 (2002) (internal citations omitted) (quoting *Walter v. Gunther*, 367 Md. 386, 391-92 (2002)).

DISCUSSION

Wife contends that there is an interpretation and application of statutory and case law involved in this case, namely Maryland Code (1984, 2006 Repl. Vol., 2011 Suppl.), Family Law Article ("FL"), § 12-201(b). This statute defines "actual income" to include

"salaries," "wages," "bonuses," "pension income," and "expense reimbursements or in-kind payments received by a parent in the course of employment . . . to the extent the reimbursements or payments reduce the parent's personal living expenses." *Id*. § 12-201 (b)(3)(i)-(ii), (iv), (vi), (xvi). 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.

A. The *Pendente Lite Order* and *Res Judicata*

As a preliminary matter, Wife contends that the court erred in failing to accord deference to the findings of fact of the master as found at the *pendente lite* hearing. Wife contends that because Husband failed to file exceptions to the master's report, the master's finding has *res judicata* effect. A *pendente lite* order, however, is subject to modification upon the court's entry of a final order. This Court has held: "A *pendente lite* award . . . may also be modified in accordance with the guidelines at the time that a final award is made. In that situation, a showing of material change is not required, but *only* because the order granting a divorce terminates the *pendente lite* award." *Reuter v. Reuter*, 102 Md. App. 212, 241 (1994) (citing *Payne v. Payne*, 73 Md. App. 473,481-82 (1988)).

Furthermore, this Court has held: "Chancellors — as judicial officers — may *never* delegate away a part of the decision-making function to a master — a non-judicial officer." *Wenger v. Wenger*, 42 Md. App. 596, 602 (1979) (emphasis added). The findings made at the conclusion of the *pendente lite* hearing did not preclude the chancellor from making a different finding at the conclusion of the merits hearing.

B. 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 argues that FL § 12-201(b)(3)(xvi) and this Court's holding in *Tanis v. Crocker,* 110 Md. App. 559 (1996), required the court to include the value of the use of the company vehicle in the court's computation of Husband's actual income. As noted above, FL § 12-201 (b)(3)(xvi) defines "actual income" to include "expense reimbursements or in-kind payments received by a parent in the course of employment . . . to the extent the reimbursements or payments reduce the parent's personal living expenses." In *Tanis*, we indicated that courts could include the value of a parent's personal use of a company car in the calculation of actual income, 110 Md. App. at 581-82, although we declined to do so in that case because there was no evidence of the value of the personal use of the car to that parent. *Id*.

In this case, Husband testified that he commuted to work five times a week and on every other Saturday. Husband's commute requires him to travel 140 miles roundtrip, but sometimes he deviates for business purposes. Husband also admitted that his employer provides a credit card to be used for fuel for that vehicle. The court heard the following exchange regarding Husband's use of the company vehicle:

> [COUNSEL FOR MR. HANES]: Okay. And it's — this is vehicle is used to go on service calls?
>
> [MR. HANES]: Yes. It's not — it's not always necessarily used by myself. There's other times when other technicians or personnel within the building need to use it to go pick up parts, give [a] customer a ride to Metro station, so forth, during the course of the day. It's not always necessarily in my possession or my use.
>
> [Q]: Okay. And the service vehicle, is it a vehicle that you use to go to the grocery store, the dry cleaners, take your daughter to the doctors, things like that?
>
> [A]: No, the vehicle is used to go to work, make service calls if necessary along the way, use it at work to make service calls, run parts to other technicians, pick up parts —
>
> [THE COURT]: I think I understand completely how this is working. [COUNSEL FOR MR. HANES]: Okay.
>
> [THE COURT]: He's got one vehicle that he uses for work and another vehicle that he uses to — for the transportation of himself.

Wife argued that the court should consider Husband's use of the company vehicle for commuting to constitute income of $800 per month, as the master had found *pendente lite*. Wife also pointed out that Husband's paycheck listed an amount attributed to the vehicle use. Indeed, one line of Husband's paycheck identifies a $28.85 biweekly "commuter" benefit, which Husband noted was a federal tax for the use of the automobile: The pay stub, however, also shows a "commuter" deduction, which subtracts the same amount, resulting in a wash to Husband.

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 calculation 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, and therefore, the court did not commit reversible error by declining to include in the calculation of Husband's actual income any value attributable to the use of the company vehicle.

C. The Pension and Health Insurance Benefits

Wife argues that the court should have considered employer-provided benefits in a pension plan and a cafeteria-style health insurance plan as part of Husband's actual income. As a preliminary matter, Husband contends, pursuant to Maryland Rule 8-131(a), that Wife did not make these arguments below, and therefore waived these issues. ("Ordinarily, the appellate court will not decide any other issue [except for subject matter jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court. . . .").

In our view, the argument that these amounts should have been deemed part of Husband's actual income was adequately raised by Wife in the circuit court. Wife attempted to ask Husband about the cafeteria-style health insurance plan at trial, but Husband professed ignorance, even though a line on his earnings summary noted its existence. Further, Wife was clearly urging the trial court to use the "gross pay" figure from Husband's earnings statements, which differed from the "taxable" income only because of the employer's deductions for 401(k) contribution and cafeteria plan. Husband's 2010 and 2011 earnings summaries and W-2s were in evidence, along with several of his 2012 pay stubs, all documenting these deductions from Husband's gross pay. *See Cohen v. Cohen*, 162 Md. App. 599, 614-15 (2005); *Collins v. Collins*, 144 Md. App. 395, 448 (2002). Consequently, Wife's argument was preserved.

The trial court erred in excluding undisputed income from the $3,862 figure the trial court used as Husband's monthly actual income in applying the child support guidelines. The earnings statement for 2011 and pay stubs for 2012 would have both dictated a higher number even if the court had excluded the pre-tax benefits for the 401(k) contribution and cafeteria plan expenses. Further, as explained below, the court erred in excluding the pre-tax income. Because the income calculation was clearly erroneous, we shall reverse that portion of the court's order and remand the case for further proceedings, which may include the taking of further evidence to bring the court's information up to date.

As we noted in *Malin 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.

In our view, the trial court should have started with Husband's "Gross Pay" as shown on the 2011 Earnings Statement, $54,819.30.[1] This figure was greater than the W-2's Line 1 amount because the Gross Pay included: (1) a 401(k) contribution of $647.60; and (2) cafeteria plan pre-tax compensation of $4,496.12. Under our cases, both of these amounts should have been included in Husband's actual income for determining child support.

In *Cohen v. Cohen*, 162 Md. App. 599, 613-14, we held that the trial judge there had correctly included in the computation of actual income a pre-tax contribution a parent had made to a 401(k) plan.[2] We stated that "a contribution to one's personal retirement account plainly is not a necessary business expense. It is simply the result of a decision to make an investment and get a tax break." 162 Md. App. at 614. *Accord Walker v. Grow*, 170 Md. App. 255, 282 n.4 (2006). Consequently, we held in *Cohen*, 162 Md. App. at 6 13-14:

> Under the child support guidelines set forth in Sections 12-201 through 12-204 of the Family Law Article, 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.

The father's employer in *Walker* had paid the parent's health insurance premiums — similar to the direct payment by Husband's employer in the present case. We held in *Walker* that such pre-tax payment of health insurance premiums should be included in the parent's "actual income" as an "in-kind payment" under FL § 12-201(b)(3)(xvi). We explained in *Walker*, 170 Md. App. at 285-86:

> As to the health insurance payments, Grow [the father] concedes that the circuit court did not include the health insurance payments made by Aliron [the father's employer] in its actual income calculation, but contends any error was harmless. It was harmless, he contends, because the children are covered on the policy, so it would ultimately be subtracted from his actual income.
>
> In calculating a party's actual income, health insurance payments made by an employer are to be included "to the extent [the payments] reduce the parent's personal living expenses." Fam. Law § 12-201(b)(3)(xvi). The court then determines "adjusted actual income" by subtracting "the actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible." Fam. Law § 12-201(c)(3). On remand, the court should consider the health insurance provided to Grow by Aliron in its calculation of his actual income, but subtract "the actual cost of providing health insurance coverage" for the children.

Likewise, in the present case, 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. As we explain below, the court did not err by making a deduction to adjust for the uncertainty of continued receipt of bonus income at the level enjoyed in 2011.

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 at $62 per month.

Husband testified that he does not always receive a bonus. He recalled "four or five different bonuses" of varying amounts in the previous ten years. The court stated that it was accounting for this bonus income by adding $750 to Husband's annual salary.[3] Wife asserts that the court failed to properly apply this finding in its determination of Husband's actual 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 said: "I gave — basically gave him — imputed to him half . . . — of those at the highest amount, which was $1,700." 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. "In child support cases, it is oftentimes necessary to calculate child support based on currently existing circumstances, even though the Court and the parties are fully aware that there is a significant possibility that in the future conditions might change." *Johnson, supra*, 152 Md. App. at 621. We perceive no abuse of discretion in the court's calculation of the prospective bonus income.

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.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY REVERSED IN PART AND AFFIRMED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANT AND APPELLEE.

FOOTNOTES

1. We note that this figure included bonus income paid during 2011. As we explain below, the court's conclusion that there

was uncertainty as to the amount of future bonuses was not clearly erroneous, and an adjustment to account for that uncertainty was appropriate.

2. We made the following observation about 40 1(k) retirement plans in *Dzaimko v. Chuhaj*, 193 Md. App. 98, 114 n.15 (2010):

> In contrast [to a defined benefit retirement plan], a defined contribution plan, like a 401(k), is an individual account that is portable. The employee contributes pre-tax dollars to the plan (often with the employer matching) at a rate of his or her choice, with certain limitations. Upon retirement, the "employee receives whatever level of benefits the amount contributed on his behalf will provide." *Hughes Aircraft Co.* [v. *Jacobson*], 525 U.S. [432,] at 439 [1999)] (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 364 n.5, 100 5. Ct. 1723, 64 L. Ed. 2d 354 (1980)).

3. The court indicated that it was using the most recent bonus figure, $1,747, which Husband received in 2011. The court arrived at the $750 figure because it determined that Husband had received five bonuses in the last eleven years. The court's figure of $750 is approximately 5..5% less than the eleven-year average of five bonuses of $1747; the math would produce an average bonus of $794.

Cite as 3 MFLM Supp. 107 (2013)

CINA: change in permanency plan: insufficient progress toward reunification

In Re: Ayden N.

No. 1024, September Term, 2012

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

Opinion by Matricciani, J.

Filed: January 31, 2013. Unreported.

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.

Appellant, Glenda N., appeals the decision of the Circuit Court for Montgomery County, sitting as a juvenile court, to change her son, Ayden N.'s, permanency plan from reunification with appellant to adoption by a non-relative. She asks, simply:

> Did the juvenile court err in changing Ayden's permanency plan from reunification to non-relative adoption?

For the reasons that follow, we answer no and affirm the judgment of the circuit court.

FACTUAL BACKGROUND

Ayden was born on February 25, 2011, to appellant and an unknown father. Ayden came into the care of the Montgomery County Department of Health and Human Services ("the Department") in July of 2011, when appellant admitted that she could not care for him and requested that the Department remove him from her care.[1] Appellant has another child who lives in Arkansas and who was adopted by appellant's maternal grandmother, who had adopted appellant when she was a child, as well.

On August 2, 2011, the juvenile court declared Ayden to be a child in need of assistance ("CINA") due to appellant's apparent unwillingness or inability to care for him, and it ordered that Ayden be placed in a foster home. The court also ordered appellant to submit to two urinalyses per week for four weeks, participate in "hands[-]on parenting education," complete a psychological evaluation, and comply with all treatment recommendations that might result from the psychological evaluation. The court conducted review hearings on December 15, 2011, and February 17, 2012. On both occasions, the permanency plan in place was reunification.

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

Since July, 2011, Ayden has been living with his foster mother, Amy Seidel, and her son, Luis. Ayden and Luis play together frequently; they wrestle and go swimming, and Ms. Seidel takes them both to parks. According to Ms. Seidel, Ayden has an "engaging personality" and is "happy and active and into everything." Ms. Seidel's parents live in Calvert County, and her son Luis has three cousins who live locally and play with Luis and Ayden almost every weekend. Ayden attends daycare and is social with the other children while there. Risa Boswell, the social worker assigned to Ayden's case, testified that Ayden is smart and that the teachers at the daycare speak Spanish to him and he understands. She also testified that Ayden really likes books and is a "happy-go-lucky kid." She further stated that Ayden is bonded to his foster mother, Ms. Seidel. Ms. Seidel testified that she is willing and able to adopt Ayden should that be necessary.

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." Appellant first came to Maryland from her home state, Arkansas, in December of 2009, with a man she knew only as "Cristo." After living in Maryland with Cristo for a few weeks, appellant left Cristo's home on December 18, 2009, claiming that he "beat the crap out of [her]."

Appellant remained in Maryland, despite the violence against her, because she had gained employment at a Goodwill store in Gaithersburg and was able to stay with a woman from her workplace.

While working at Goodwill, appellant met a man named Jose Ramiro, whom she began dating almost immediately. Appellant moved into an apartment in Gaithersburg with Mr. Ramiro after a few months. According to appellant, Mr. Ramiro also was violent towards her, and in May 2010, appellant left him and moved back to Arkansas.

Within a month of her return to Arkansas, appellant became pregnant with Ayden. In Arkansas, appellant lived with the father of her older child. She later claimed that this man, to whom she referred as "Nanis," could be Ayden's biological father and that Nanis considered himself Ayden's father. Appellant said that she and Nanis were "just messing around" and that their relations ended after about three months, when Nanis was deported to Mexico in approximately August, 2010.

Later in August, after Nanis was deported, appellant began dating and living with Alejandro Hernandez ("Alejandro"), whom she had met a few months earlier. She gave birth to Ayden on February 25, 2011, and lived with Alejandro until May of 2011, when she moved with Ayden back to Maryland.

Once in Maryland, appellant lived with Mr. Ramiro again, in Gaithersburg. In July of 2011, appellant surrendered Ayden to the Department's care and custody, and she moved to a friend's apartment across the street and stayed on his couch. Appellant testified that the man with whom she lived in Gaithersburg after leaving Mr. Ramiro was only a friend. According to Ms. Boswell, however, appellant reported that this man was her boyfriend and that he abused her.[2] Appellant lived in that apartment until November of 2011, after reporting the abuse to Ms. Boswell. Ms. Boswell referred appellant to an Abused Persons Program, but she refused to go.

Appellant left Gaithersburg and moved to Wheaton to live with Nelson Hernandez ("Nelson"). Appellant had met Nelson during her visits with Ayden at the Wheaton Mall, where Nelson worked as a janitor. Ms. Boswell testified that Nelson was friendly, had no criminal record, was good with Ayden, and would give appellant money to buy Ayden toys. Nelson was renting a bedroom in an apartment in Wheaton when appellant lived with him. According to Ms. Boswell, Nelson's living situation was not suitable for appellant and Ayden.

On January 6, 2012, appellant moved out of Nelson's apartment and went to a community shelter with the hope that it would qualify her and Ayden for family shelter. Ms. Boswell made phone calls and attempted to obtain family shelter for appellant, but there was none available due to overcrowding, and appellant needed to be an official resident of Montgomery County in order to be put on the waiting list for entry. According to Ms. Boswell, appellant did well at the shelter and cooperated with their services. She left the shelter on February 24, however, because she wanted an overnight pass to stay with Nelson, which she was denied. Despite her departure from the shelter, appellant was permitted to return after three days. Instead of returning to the shelter, however, appellant stayed with Nelson and told Ms. Boswell that she and Nelson were searching for an apartment so that their living situation would be suitable for Ayden. Ms. Boswell approved of Nelson and believed that he and appellant could have a stable relationship and make a suitable home for Ayden.

From March 8, 2012, until March 15, 2012, appellant traveled to Arkansas to visit her older son. Upon her return, appellant was scheduled to begin a program called Families Foremost that would provide her with life skill classes, computer classes, employment readiness, health education, and activities with Ayden four days per week. Additionally, Ms. Boswell applied on appellant's behalf to the Department of Rehabilitation Services ("DORS"), an organization that provides job skill training and placement. Ms. Boswell also provided appellant with contact information for a clinic where should could get vision and gynecological exams at no charge.

Appellant did not participate in either program or contact the clinic because, while in Arkansas visiting her son, she decided to marry a man named Kristin Alvarenga, a high school friend. Shocked by this decision, Ms. Boswell asked appellant why she would marry someone whom she barely knew, and appellant responded, "Well, he's really nice to me and he said he won't hurt me." Ms. Boswell testified that she was disappointed in appellant and that appellant's impulsive decision to marry a man she barely knew demonstrated that she lacked good judgment and did not consider what was best for Ayden. Ms. Boswell also testified that in the year that she has had this case, appellant's impulsive decision-making and her inability to consider Ayden's well-being when making decisions had not improved.

Appellant offered no explanation for her decision but was angered by Ms. Boswell's reaction to the marriage and said that she was going to live with Mr. Alvarenga in Arkansas. She told Ms. Boswell that she was leaving on March 29, 2012, that Mr. Alvarenga had a job as a manager at Taco Bell, and that the two would get a two-bedroom apartment so that the Department could do a home-study in the hope that Ayden could return to her custody in Arkansas. Appellant was further 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.

Ms. Boswell asked appellant why she had given up on finding an apartment with Nelson and decided to move to Arkansas. Appellant responded that Nelson was mean to her and treated her like a child. Appellant also explained that Nelson choked her on March 19, 2011, after she had returned from her trip to Arkansas during which she was married. Appellant called the

police, but Nelson was not arrested. Instead, appellant was arrested on an outstanding bench warrant for failing to appear for a Maryland court date in September of 2010, while she was living in Arkansas. Appellant had a court date because she had received a ticket for driving without a license.

According to Ms. Boswell, Nelson reported that his relationship with appellant was good and that they were going to move in together and hopefully have Ayden live with them. Nelson indicated that he was unaware that appellant had married, and he thought that she was moving to Arkansas at the Department's instruction. Appellant, however, testified that she had informed Nelson of her marriage and plan to relocate.

Appellant moved to Arkansas on March 29, 2012 to live with her new husband, Mr. Alvarenga. Her last visit with Ayden was on March 28, 2012. While in Arkansas, appellant obtained employment at a chicken stocking facility on an as-needed basis, and she worked part-time at a restaurant.

On May 11, 2012, Ms. Boswell called appellant to let her know that the Department was planning to recommend that the permanency plan be changed to adoption. Ms. Boswell testified that the decisive factor was appellant's recent move. While speaking with appellant, Ms. Boswell learned that appellant's marriage was not going well; her husband was angry, would yell at appellant, and would often demand that she have sexual intercourse with him. According to appellant, Mr. Alvarenga would engage in fistfights with her and would hit and push her. On one occasion, appellant called the police about Mr. Alvarenga, but because he had bruises and marks on him while appellant was apparently unharmed, she was arrested and charged with battery; Mr. Alvarenga was neither arrested nor charged for abusing appellant. Appellant left Mr. Alvarenga the following week, and according to conflicting testimony, she either went to a shelter or to live with a man named Miguel Mancie, whom she had met while working at the chicken stocking facility in Arkansas.

In late June 2012, appellant obtained a job at a Dollar General in Syracuse, Kansas, where she continued to reside as of the date of the permanency hearing. She testified that she was living with a female coworker in a three bedroom trailer, from which she would walk to work.

Ms. Boswell searched for other members of appellant's family who could be sources of support or who could care for Ayden. The Department conducted a study of appellant's biological mother's home, but it was deemed unsuitable. Ms. Boswell inquired about appellant's grandmother and grandfather — her adoptive parents — as possible foster parents for Ayden. Appellant's grandmother declined due to financial challenges, and Ms. Boswell was not able to contact appellant's grandfather despite several attempts. Also, Ms. Boswell was unable to locate any other family member for possible foster placement.

During the permanency hearing, Dr. Richard Ruth testified regarding appellant's psychological evaluation, conducted at the Department's request. The juvenile court received Dr. Ruth as an expert clinical psychologist. Dr. Ruth's report explained that appellant had "borderline to average" functioning, with few average functioning areas. Her speed of mental processing was average, but she exhibited deficits in areas that would compromise her ability to parent and function independently as an adult living in a community. He also determined that appellant had abandonment issues from her childhood, a personality disorder, borderline intellectual functioning, and possible brain damage from intense substance abuse during her teenage years. As Dr. Ruth testified,

> [Appellant] didn't believe she had a need for supports and in the course of this case has declined to make use of many of the supports that were arranged for her. Under those conditions, given both the weakness, and vulnerabilities, and deficits, and the lack of supports, and the lack of willingness to use supports, the prediction would be the capacity to parent would be very compromised, very challenged.

When informed that appellant left for Arkansas just days before beginning the Families Foremost program, Dr. Ruth responded, "If services were offered to her and she didn't avail herself of them, it underscores the concerns elaborated . . . in my evaluation. And the implication of that is that without those services, her extremely problematic potential to parent effectively would plummet even further."

Despite all that had occurred in this case, the permanency plan for Ayden had always remained reunification. Ms. Boswell explained:

> If she would have shown stability in everything that we had planned, she was going to get a two-bedroom with [Nelson], she was going to be at Families Foremost, she was going to be participating in therapy, she was going to also be working with DORS and that would have helped her to get stable because that — at the time, we were headed towards reunification, I felt. I felt the services were going to really help her get stable and that's what I was — you know, I know she's

> had a hard life, moving around and going from relationship to relationship, and I was hoping that we were going to work with her to change that.

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 she interacted well with him. According to Ms. Boswell, who supervised about half of the visits, Ayden was bonded to appellant, and appellant demonstrated skills such as diaper changing and providing appropriate care for Ayden during the visits. 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 recommend a change in the permanency plan because of appellant's move, and her disregard for Ayden's best interest when making decisions (such when she married Mr. Alvarenga).

After reviewing all the evidence and carefully considering the applicable statutory factors in Maryland Code (1957, 2012 Repl. Vol.), Family Law Article ("FL"), § 5-525(f), the juvenile court made the requisite findings set forth in Maryland Code (1957, 2012 Repl. Vol.), Courts & Judicial Proceedings ("CJP") § 3-823(h)(2). The court found that: (1) Ayden's current placement is appropriate and that it is also necessary because there are no other family members to care for him; (2) the Department made more than reasonable efforts to finalize the permanency plan that was in effect, reunification; (3) there has been no progress in alleviating or mitigating the causes for the Department's care and custody of Ayden; (4) Ayden is currently living in a preadoptive home; (5) Ayden is safe in the home in which he lives now; (6) it is in Ayden's best interest to change the permanency plan to adoption by a non-relative.

DISCUSSION

Appellant contends that the juvenile court erred in changing Ayden's permanency plan from reunification to adoption because appellant had made substantial progress toward reunification with Ayden, 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 reviewing child placement determinations, Maryland courts utilize three different standards simultaneously:

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

In re Shirley B., 419 Md. 1, 18 (2010) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). Accordingly, the juvenile court's ultimate determination in this case that it was in Ayden's best interest to change the permanency plan will be disturbed only if doing so constituted an abuse of discretion. *Id.*

A juvenile court must conduct a hearing to determine the permanency plan for a child within eleven months of a child's commitment to the Department's care. CJP § 3-823(b). Maryland Code, CJP § 3-823(e) provides, possible permanency plans listed in descending order of priority and according to the child's best interests: 1) reunification with the parent or guardian; 2) placement with a relative; 3) adoption by a nonrelative; 4) custody and guardianship by a nonrelative; or 5) another planned permanent living arrangement. CJP § 3-823(h)(2) instructs a juvenile court conducting a review hearing to:

> (i) Determine the continuing necessity for and appropriateness of the commitment;
>
> (ii) Determine and document in its order whether reasonable efforts have been made to finalize the permanency plan that is in effect;
>
> (iii) Determine the extent of progress that has been made toward alleviating or mitigating the causes necessitating commitment;
>
> (iv) Project a reasonable date by which a child in a placement maybe returned home, placed in a preadoptive home, or placed under a legal guardianship;
>
> (v) Evaluate the safety of the child and take necessary measures to protect the child; and
>
> (vi) Change the permanency plan if a change in the permanency plan would be in the child's best interest.

Pursuant to CJP § 3-823(e)(2), when determining a permanency plan, a juvenile court must consider the factors articulated in FL § 5-525(f)(1). Those factors are:

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

Turning to the relevant factors and findings of the juvenile court, we accept the juvenile court's factual findings unless demonstrated to be clearly erroneous. *See re Shirley B.*, 419 Md. at 18.

With regard to the first factor, the court explained that there was no evidence that 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. Ms. Boswell testified that housing was an issue and that appellant's housing situations usually were not suitable for Ayden.

With regard to the second factor, there was evidence that Ayden had an emotional attachment to appellant when she visited twice per week. The visits were a positive experience for them both. Appellant, however, had not seen Ayden in the several months since her move to Arkansas. The court emphasized that it had no persuasive evidence that Ayden was bonded to his mother as of the date of the hearing. It was not clear whether Ayden would remember appellant, 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 he 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 local extended family. Ayden has resided with Ms. Seidel since July of 2011. He is enrolled in daycare and thriving in that social and structured environment. There was no discrete evidence of potential emotional, developmental, or educational harm if Ayden were removed from his present environment. However, all evidence indicated that Ayden was doing well with Ms. Seidel's family, which contrasted sharply with the evidence of appellant's living situation.

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 — and thus remove him from State custody — should the Department proceed in that fashion, thereby mooting that concern.

The above findings under FL § 5-525(f)(1) were supported by the record and were not clearly erroneous. As we now explain, 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 Department offered appellant numerous services, including the Families Foremost program, a parenting class, a psychological examination, referrals to a clinic where she could get vision and gynecological exams free of charge, an abused persons program, and job placement through DORS. Appellant refused the abused persons program and moved to Arkansas just before the Families Foremost and DORS programs commenced. 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. *See Shirley B.*, 419 Md. at 26 (the State must make reasonable efforts to assist a parent in achieving reunification with his or her children, "but its duty to protect the health and safety of the children is not lessened and cannot be cast aside if the parent, despite that assistance, remains unable or unwilling to provide appropriate care" (quoting *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 500-01 (2007))). The court's finding that the Department's efforts were reasonable was not clearly erroneous.

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. Prior to appellant's move to Arkansas, she visited Ayden twice per week and bonded with him, and the Department and the court believed that appellant was on track for reunification. Since the move, appellant has not seen Ayden. This evidence demonstrated that the conditions rendering commitment necessary worsened when appellant relocated. As such, the court's finding that there was no alleviation of the circumstances rendering commitment necessary was not clearly erroneous.

There was no evidence that Ayden could return to his mother's care now that she has moved, not only from Maryland to Arkansas, but then from 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 and her son for over a year, and she testified that she was willing to adopt Ayden. The record evidence gave the court no reason to conclude that Ayden was unsafe with the foster family. The court's decision to change Ayden's plan to adoption by a non-relative was supported by sufficient factual findings, none of which were clearly erroneous. Based on the evidence available, the juvenile court's ultimate decision to change the permanency plan was not an abuse of discretion, and we shall affirm.

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

FOOTNOTES

1. Appellant first claimed to be Ayden's babysitter and that she could not reach his mother. After the Department concluded that appellant was Ayden' smother and confronted her, she admitted to it.

2. Ms. Boswell testified that she saw appellant's bruised arms during their meeting on November 22, 2011.

Cite as 3 MFLM Supp. 113 (2013)

Divorce: annulment: fraudulent inducement to marry

Kirk Daniel Matelyan
v.
Alejandra Michelle Silvestre Cordon f/k/a Alejandra Michelle Matelyan

No. 0423, September Term, 2009

Argued Before: Eyler, Deborah S., Meredith, Kenney, James A., III (Ret'd, Specially Assigned), JJ.

Opinion by Meredith, J.

Filed: February 5, 2013. Unreported.

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.

By order dated March 20, 2009, the Circuit Court for Prince George's County granted Alejandra Michelle Silvestre-Cordon ("Wife"), appellee, an absolute divorce. Kirk Daniel Matelyan ("Husband"), appellant, *pro se*, appeals from the judgment of the circuit court granting an absolute divorce and presents the following questions for our review, which we rephrased as follows:[1]

I. Did the trial court have subject matter jurisdiction over the proceedings?[2]

II. Did the trial court commit legal error or abuse its discretion by denying Husband's request for an annulment?[3]

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?[4]

IV. Did Husband actually consent to the terms contained within the consent agreement?[5]

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?[6]

We will affirm the circuit court's judgment.

FACTS AND PROCEDURAL BACKGROUND

On April 16, 2007, the parties went to the courthouse in Arlington Virginia, received a marriage license, and were married through a civil ceremony. The circumstances under which this marriage occurred are contested by both parties. The marriage lasted seven months.

On November 17, 2007, there was a violent altercation between the parties. That same day, Husband obtained an interim protective order. Two days later, on November 19, 2007, at the hearing for a temporary protective order, Wife expressed her desire to keep Husband away and also sought a protective order. The court issued a temporary protective order, and scheduled a hearing to consider a final protective order. On December 6, 2007, the parties agreed to mutual final protective orders. The parties have remained separate and apart since November 17, 2007— the date of the violent altercation.

On December 24, 2007, Husband filed a complaint for absolute divorce, stating that he had lived in Maryland since May 8, 2006; Wife had lived in Maryland since June 18, 2007; and the grounds for divorce were constructive desertion and cruelty/excessively vicious conduct, which occurred in Maryland. On February 25, 2008, Wife filed a counter-complaint for absolute divorce on the grounds of cruelty, and excessively vicious conduct; the counter-complaint alternatively sought a limited divorce based upon constructive desertion or voluntary separation; and the counter-complaint asserted several tort claims.

On March 24, 2008, responding to Wife's counter-complaint, Husband filed an answer in which Husband stated: "I admit in part the statements in Paragraph 5: Plaintiff Mr. Matelyan and Defendant Mrs. Matelyan made there [sic] marital home in Prince

George's County, Maryland between June 16, 2007 to November 17, 2007 (5 out of 7 months total)." Additionally, in March 2008, Husband filed two motions to seeking to withdraw the complaint for absolute divorce and replace it with an amendment requesting an annulment. In the amendment, Husband claimed that Husband was mentally incapacitated prior to, and at the time of, the marriage, and that the marriage resulted from duress. In addition, Husband claimed that Wife deceptively entered into the marriage for purposes of receiving a green card. Husband subsequently amended the complaint on several occasions to include additional factual allegations and several counts for tortious actions.[7]

On April 25, 2008, the master held a *pendente lite* hearing regarding alimony. Prior to the master filing his recommendation, Husband filed, on May 6, 2008, exceptions to the master's anticipated recommendation that Husband pay $300.00 per month for *pendente lite* alimony. On May 9, 2008, Husband again filed exceptions to the master's anticipated recommendations, along with a notice of appeal. On May 14, 2008, the circuit court docketed the notice of master's recommendations, which stated: "[T]he parties are advised that if written exceptions are not filed on or before May 8, 2008, the attached Order will be submitted to the Court for approval. . . . A copy of the Proposed Order ratifying the Recommendations of the master for the Family Division dated April 25, 2008, was handed to Plaintiff, . . . and Defendant on this 28th day of April 2008." On May 16, 2008, the circuit court filed an order signed by a circuit courtjudge, accepting the master's recommendations.[8]

On November 26, 2008, Wife amended her counter-complaint to seek an absolute divorce based upon voluntary separation.

On December 15, 2008, the trial commenced. Husband testified regarding the turbulent relationship between the parties, and detailed the events leading up to and on the day of the marriage:

> [HUSBAND]: Okay. That's the middle of March, beginning of April [2007]. I'm going to my doctor and telling them I'm not feeling good. I'm feeling ill. I need to go to school. I'm having problems like I was where they had me on (inaudible) narcotics.
>
> They had me on double doses and triple doses from the broken nose. So, I'm feeling nauseating, sick. I don't remember much in between — that's the unfortunate part — for several months. I remember bits and pieces, up and down. That's about it.
>
> April 15th - I buy a ring. [Wife] tells me, you know, I understand I've been abusive. I haven't been very nice. I haven't been a good person with you. I won't be so violent with you if you buy me a set of rings. I only act out, not because I want to but because I'm insecure. She said, if you buy me a ring it's going to make me feel more confident that you're in a relationship with me and, you know, I won't be so physical with you.
>
> I buy the ring. I don't know how the heck it happened but I spent every dime I had in my bank account, even though I'm on unemployment, on these two sets of rings. I don't know how I got to the store. However, I did buy the rings.
>
> April 16th, the following day, a marriage commenced. That also happened in Arlington. The rings were purchased in Silver Spring, from the receipt. That's 3 1/2 hours from my residence in Maryland. The wedding the following day, occurred in Arlington, Virginia, right down the street from [Wife's] house or apartment.
>
> THE COURT: Did you have a marriage license?
>
> [HUSBAND]: Apparently, we had to have because the counselor wasn't going to give us a marriage unless we had it.
>
> That was the other thing. I'm looking at the marriage license, I guess you call it, and I'm looking at the information on it. You've got her address out of place. She doesn't even live where it says.
>
> * * *
>
> THE COURT: What kind of medications were you on, sir, and why?
>
> [HUSBAND]: Narcotics. I was on codeine, Percocet, Oxycotin.
>
> THE COURT: Why?
>
> [HUSBAND]: For my disability from the military. That's what the doctor prescribed for me from the VA hospital.
>
> * * *
>
> [HUSBAND]: . . . So the day of the wedding, as I had already referred back, I don't recall where I went from

the time of apparently purchasing the rings. I did find out that I used a check, and that's all I'm aware of. . . .

So the wedding commenced in Arlington, Virginia. . . . I do recall the — who I found out later to be was the lawyer that was there, because I remember he had a beard, and he asked me if the children that were there were mine, you know.

* * *

[HUSBAND]: — of course I'm going to respond and say no, I don't have children. So that stuck with me. So I recall the gentlemen because of the scraggly beard. And the only reason I know that is because I went back there at a later date. I remember the bearded guy, him asking me if the children were mine.

And I know there was her mother present, but I don't know if she was present on that day. However, she was a witness so when I recall seeing her I'm not exactly sure at what point. However, there was a third party or a second witness at that wedding and I don't know who the individual is.

Apparently it is a friend of [Wife] and [Wife's] mother.

So, first of all, what bothered me about that was the fact that it was a wedding and it was outside the church.

* * *

[HUSBAND]: . . . See, I'm trying to recall a lot of it. It would — I'm at least telling you what I do remember to the best of my ability, **but there [are] a lot of gaps and a lot of the gaps are associated with the trauma**, so it is very difficult. I don't want to add to it and say this happened and that happened.

* * *

THE COURT: Did you spend any period of time after the marriage living together as husband and wife?

[HUSBAND]: No, ma'am, and I intentionally made that point with my landlord. . . . I told the landlord if she comes by or if she knows where to find me, don't let her in, put my name on the contract itself, I don't want anything to do with her, and I had told her that I had just gotten into a marriage and I'm trying to figure out what I need to do to get out of it.

THE COURT: Is that landlord coming to court?

[HUSBAND]: She was supposed to be here today and yesterday and unfortunately. . . [s]he's out of work sick.

* * *

[HUSBAND]: . . . I had no reason to get married. I had too many changes going on in my life at once. I didn't need to add to it. . . . No anniversary. I kept myself separate from [Wife] as much as possible.

It wasn't until June — it was around the first week of June, I would have to say around June 1st that she had taken my keys and she informed me that she had made copies, because from April to June she would actually be sitting outside my apartment until I got there, and that was only because my landlord wouldn't let her in.

* * *

[HUSBAND]: I'm living separate and apart. She lives in Arlington, Virginia. She comes over on her own. I asked her to leave, she doesn't leave. What am I going to do.

* * *

[HUSBAND]: . . . There is no reason why I wanted to get involved with her or stay involved with her. She was already sleeping with people before we got married, she's already sleeping with people during the marriage.

* * *

THE COURT: Sir, if you knew all this stuff, why did you marry her?

[HUSBAND]: Exactly. I had no reason, Your Honor.

THE COURT: But you did.

[HUSBAND]: I know. And that's the thing I'll never live down for the rest of my life and that's been the hardest thing for me.

* * *

[HUSBAND]: . . . It's not until I

got up on my own feet that **I got off narcotics around May, the middle of May**. . . .I started to try and do a web search to find an attorney to help me, but everybody I talked to wanted two to five thousand dollars, and I'm sitting there unemployed.

* * *

[HUSBAND]: . . . [S]he held herself out like a citizen throughout the whole relationship. She had the vehicle, she had the school, she had the medical, she had the bank accounts, she had the full-time employment, she had the storage unit, she had the auto insurance. I have hired people in the past —

THE COURT: When did you find out that she didn't have papers?

[HUSBAND]: What papers? I thought she was a resident. I never thought she had papers.

THE COURT: What I asked you was when did you find out that she did not have papers?

[HUSBAND]: After the marriage.

* * *

[HUSBAND]: . . . She had me put her on my insurance, because she said she wasn't going to be covered. So I had to incur that debt. She had me — she had me —

THE COURT: But you were married, right?

[HUSBAND]: This was like the same week.

THE COURT: All right.

[HUSBAND]: If you are married and you agree with that's going on, no problem, but I didn't agree and **the only reason I did it was because I'm already under a lot of stress with the fact that I have to contend with not being able to separate, but for the same reason I got the ring, was because, as she stated to me, I'll stop being so abusive and controlling if you just buy me the ring. So more or less it carries that weight, but it also carries the weight — just like I was saying two days ago, I have this weakness for tears. If I see a girl cry, you know, I'll give in too easy, okay**.

* * *

[COUNSEL FOR WIFE]: You admit you signed the marriage certificate?

[HUSBAND]: No, I didn't, I didn't admit to it, no.

[COUNSEL FOR WIFE]:. . . [I]n your complaint for absolute divorce dated April 10, 2008, did you admit you signed the marriage certificate?

[HUSBAND]: What was the date again?

[COUNSEL FOR WIFE]: April 10, 2008. I can read to you from your complaint. It says the, Plaintiff, Mr. Matelyan, was medicated and made an unsound decision by signing the marriage certificate the same week that the rings were bought.

[HUSBAND]: On the day of the marriage, yes.

[COUNSEL FOR WIFE]: So you do remember signing the marriage certificate?

[HUSBAND]: No. What I'm saying —

[COUNSEL FOR WIFE]: But you admitted that you did in your complaint for divorce?

[HUSBAND] No, I didn't sign any certificate. What I'm saying is I admit there was a marriage, I admit that there was a marriage.

* * *

[COUNSEL FOR WIFE]: You had an appointment with Reverend Bankhead on April 13, 2007?

[HUSBAND]: Yes, if my records show that, yes, I would.

[COUNSEL FOR WIFE]: For premarital counseling?

[HUSBAND]: No. . . .

[COUNSEL FOR WIFE]: I am showing you a record that you provided to me.

[HUSBAND]: Yes. Like I said —

[COUNSEL FOR WIFE]: Is this an appointment sheet for April 13, 2007?

* * *

[COUNSEL FOR WIFE]: It says it is for an initial interview, premarital counseling?

[HUSBAND]: . . . [S]o I don't know who set that appointment up. Obviously it would be her, because —

THE COURT: But you don't have the reverend coming in to tell you who set it up, right?

[HUSBAND]: Correct.

Wife characterized the events surrounding the wedding in a different light:

[COUNSEL FOR WIFE]: What happened on April 15, 2007?

[WIFE]: We went over to the Springfield Mall.

[COUNSEL FOR WIFE]: Who went there?

[WIFE]: Me, my mother, Kirk and I.

[COUNSEL FOR WIFE]: What did you do when you got to the Springfield Mall?

[WIFE]: We were looking at wedding dresses and rings.

* * *

[WIFE]: Well, we were looking for the wedding dress but we didn't find it, because that particular dress we were supposed to buy was for the religious ceremony. So he wanted to marry — well, he wanted us to marry through the church in August. That's why we were looking for that particular dress. And then because I had told them that in Guatemala it is customary to get married through the civil ceremony first and then through church. So that's why we decided to do it that way.

Also on that particular day I took care of my nails in the mall, manicure, and then he was there waiting with my mother all the time.

[COUNSEL FOR WIFE]: Why were you getting a manicure that day?

[WIFE]: Because I was getting married the following day through the civil ceremony.

[COUNSEL FOR WIFE]: Did Mr. Matelyan speak to you about premarital counseling?

[WIFE]: Yes, through the priest of the church where he was going at the veterans hospital.

* * *

[COUNSEL FOR WIFE]: Who made the appointment or who made the arrangement for premarital counseling?

[WIFE]: Kirk.

* * *

[WIFE]: Nobody could get into the veterans hospital without Id. He took me there to see the father.

* * *

[COUNSEL FOR WIFE]: When did he take you there to see the father?

[WIFE]: After we got married — before and after we got married through the civil ceremony.

* * *

[COUNSEL FOR WIFE]: Ms. Matelyan, we were talking about what happened on April 16, 2007.

[WIFE]: Yes.

[COUNSEL FOR WIFE]: Can you describe the plaintiff's behavior on that day.

[WIFE]: He was very happy.

[COUNSEL FOR WIFE]: Did he appear to be intoxicated?

[WIFE]: No.

* * *

[COUNSEL FOR WIFE]: Ms. Matelyan, what are these that I'm showing you?

[WIFE]: This is pictures of the day we were married.

[COUNSEL FOR WIFE]: Who is in this picture here that I'm showing you?

[WIFE]: Kirk and me and my mother.

[COUNSEL FOR WIFE]: What is Mr. Matelyan doing in this photograph?

[WIFE]: Here he is putting the ring on me.

* * *

[COUNSEL FOR WIFE]: After you lived at the address in Virginia where did you move to?

[WIFE]: 5000 Eutaw Street, College Park, Maryland.

[COUNSEL FOR WIFE]: Did you

reside there with the plaintiff? [WIFE]: Yes.

[COUNSEL FOR WIFE]: How long did you reside at that address for? [WIFE]: From June to the 17th of November of 2007.

[COUNSEL FOR WIFE]: Were you living there as husband and wife? [WIFE]: Yes.

As part of her case in chief, Wife called Richard H. Webb, a friend, to testify:

[COUNSEL FOR WIFE]: Did there come a time that you knew that the parties became married?

[WEBB]: Yes.

[COUNSEL FOR WIFE]: Was that on or about April 16, 2007?

[WEBB]: Yes.

[COUNSEL FOR WIFE]: Did they hold themselves out as man and wife after that date?

[WEBB]: Yes.

[COUNSEL FOR WIFE]: Did Mr. Matelyan live in Maryland at least one year before filing this complaint for divorce?

[WEBB]: Yes.

[COUNSEL FOR WIFE]: Did [Husband] and [Wife] live together in the State of Maryland?

[WEBB]: Yes.

On December 16, 2008, the following colloquy regarding a proposed consent agreement occurred between the parties:

[HUSBAND]: . . . Based on our conversations just momentarily concerning any claims for torts on either the defendant or plaintiff's end, I do move forward on an agreement with that.

THE COURT: So you agree to waive your tort and alimony claim?

[HUSBAND]: My alimony also?

[THE COURT]: Yes.

[HUSBAND]: Yes.

THE COURT: What about the property

[HUSBAND]: I still have property that I would like to recover.

* * *

[HUSBAND]: One was a fourteen karat gold ankle bracelet.

THE COURT: You know anything about that?

[WIFE]: No. I never wore one.

THE COURT: That's not what I asked you. Did he ever give you one? [WIFE]: Never.

[HUSBAND]: The second one. The reason I bought the second one was because the first one got broken. . . . There's a half karat set of diamond earrings.

* * *

THE COURT: What did he give you?

[WIFE]: He didn't give me any earrings. He gave me a bracelet, that I broke the same day he gave me. . . .Then he gave me another one that I broke and threw away. I don't have it any more.

[HUSBAND]: There are two bracelets also for the wrist and there was an 18 inch gold necklace.

[WIFE]: He gave one for our anniversary. The day I took my things out I left it there. So I have no idea what he did with it.

* * *

[HUSBAND]: Then there is the wedding ring.

[WIFE]: I sold it.

THE COURT: You sold it?

[WIFE] Yes, because I didn't have any money.

THE COURT: How much did you sell it for?

[WIFE]: Two hundred.

[HUSBAND]: Sixteen hundred dollar ring for two hundred?

THE COURT: Well, that's certainly something the Court can really address or you all can just agree that amount can come of the balance of what is due from the Court's previous order.

* * *

THE COURT: You were ordered to make some payments pendente lite. We still have to address that.

[HUSBAND]: Absolutely. I

believe I already submitted those documents with the Clerk's Office.

THE COURT: You submitted copies of money orders. I don't have anything to tell me you gave them to her.

* * *

[HUSBAND]: Your Honor, respectfully —

THE COURT: I'm listening.

[HUSBAND]: I don't know if I could leave it open for a final ruling. When I spoke to Attorney Hunt he informed me that the money orders I did send off were not a final order until the final hearing itself, so if they were obtained during the process go ahead and submit them but the judge would make a final ruling on whether or not the funds would be returned.

THE COURT: They were ordered pendente lite. It would be one thing if you made the payments timely. I might have, I don't know that I would have, considered taking it into consideration, but you didn't make the payments timely, number one, and they were ordered pendente lite. I generally don't mess with stuff that was ordered, you know. So technically he is right, but that depends on which judge is trying the case. I generally, you know — it was ordered and I'm trying to settle the case. **Certainly if we don't settle it, that's another issue, but if we settle it, then we settle it**. And that was what was ordered and that was what was paid.

* * *

THE COURT: Let me make sure what we are agreeing to. I'm getting ready to go over this again. In fact, I am going to write it down as I'm going over it.

[HUSBAND]: Yes, Your Honor. And respectfully my biggest concern with the defendant obtaining that order, it wasn't under the best of decisions.

THE COURT: What are you talking about?

[HUSBAND): Due to perjury on the stand.

THE COURT: What are you talking about right now?

[HUSBAND]: The pendente lite alimony checks.

THE COURT: You know what, sir. Here's the thing. They are saying based on their records you are in arrears of $950. I am saying I got $800 worth of money orders that are still kind of up in the air. What I had suggested was that you get the — stop payment, get the money back from these, take $200 from it, which would mean $600 you would just hand over to her as part of the prior order.

[COUNSEL FOR WIFE]: $750.

THE COURT: That is not what I said. A hundred fifty dollars I am not going to really lose sleep over.

[COUNSEL FOR WIFE] I understand that. I wouldn't either, but if I could give my client the money I would.

THE COURT: I am trying to settle the case. If you don't want to settle it he may very well get what he is asking for. He is saying he gave her all this jewelry. She already admitted she broke something and threw it away. I'm just saying meet in the middle. She gets $600.

* * *

THE COURT: So it would be the $600 that gets turned over right away as soon as it is available to Western Union.

[HUSBAND]: Yes, Your Honor.

* * *

THE COURT: What I am suggesting is two ofthese money orders, each for $300, that he authorize them to make the payment to her or to you all. I don't know if that takes an extra step.

[COUNSEL FOR WIFE]: I don't know, but I'm assuming if they reissue the check back to him, 30 days is a fair amount of time to get either one of those things done.

THE COURT: All right. That's a little bit more reasonable, but 30 days is January 16th, which is a Friday, give or take. You got some days in between when banking institutions are closed.

Is that acceptable to you, sir?

[HUSBAND]: Yes, Your Honor.

THE COURT: So what we are talking about is each side waiving their respective tort claims.

[COUNSEL FOR WIFE]: With prejudice?

THE COURT: With prejudice, yes, which means you can't bring them back anywhere, okay. Their requests for alimony -

[HUSBAND]: If I may, Your Honor?

THE COURT: Sure.

[HUSBAND]: Because Iam a little in the dark on that. You can't bring up a tort claim, I understand that, but you can still bring up the issues within the pleadings, the information?

THE COURT: No, no. The only way the information can be brought up is if it relates to the issues or one of the factors that the court has to consider in granting an annulment or divorce, but that would be the only way.

* * *

As it relates to whether you are entitled to an annulment of whether she is entitled to a divorce, yes, you can talk about them, but in terms of whether you are going to be any kind of relief under your, quote/unquote, tort claim, your alleged abuse or battery, assault and battery or — your complaint for — your complaint for annulment, fraud, assault and battery, intentional infliction of emotional distress, false imprisonment, negligence and related damages, that part is gone. **Everybody is waiving, because she has got similar claims. You waive yours, she waives hers. Neither can bring them back for damages.**

[HUSBAND]: In this court?

THE COURT: In any court. They are gone.

[HUSBAND]: In Maryland?

THE COURT: In any court.

* * *

THE COURT: . . . All that stuff is gone. She is not going to ask any court anywhere for compensatory damages on her claims for abuse, intentional infliction of emotional distress, negligence or assault and battery, and you are not going to bring up any of your claims for any of these things in any court, because today or this week or whatever we get it resolved will be the time to resolve it.

So anything that could have been raised or resolved in litigation today, if each side waives them you cannot bring them up later. That means that neither one can bring them up ever again. If something new happens, that's different.

[HUSBAND]: Just so I share with you, there are some immigration issues, as I already related to the Court. Some of the Immigration attorneys have asked me for the information. Now, I'm not moving for damages. I'm just reporting the documentation. And that's possible?

* * *

THE COURT: Everything other than the issue of whether you get your annulment or she gets her divorce is settled, resolved, dismissed with prejudice. Don't bring it up again in this court or in any court.

It's one thing if Immigration calls you and says we need some information from you. You are probably almost compelled to answer their questions.

* * *

[HUSBAND]: Just for the record, if Immigration says go ahead and submit documents, just go ahead and do it, but that's outside of this issue?

THE COURT: If they come to you and request specific information, I would think you would have to comply with their request. I don't know how they work, to be honest.

[HUSBAND]: I'll submit it accordingly, yes, ma'am.

THE COURT: The idea is that you all go your separate ways and just don't have any contact with each other and call it a day.

[HUSBAND]: Yes, Your Honor. That's why I am here.

THE COURT: It sounds like you still want to pursue things, and I want to make sure that if we settle this, that's it, you are all through, done, go your separate ways, call it a day. Right? Right? I am not hearing you.

[HUSBAND]: Yes, Your Honor.

THE COURT: All right. Is that how we are going to proceed, you agree with what we just said?

[HUSBAND]: Yes.

THE COURT: And you ma'am?

[WIFE]: Yes.

* * *

THE COURT: . . . I am operating with the absolute assurance that this case is settled other than the grounds for dissolving their marriage by either annulment or divorce. So don't go home and come back tomorrow and say I don't want to do this agreement, because I will not permit you to do that. Do you understand that? **That's why we spent almost two hours this afternoon going over what the terms of the settlement are.** It is done, it is agreed upon and that's it. Do you understand that? I can't hear you? Do you understand that, sir?

[HUSBAND]: That I can't rescind?

THE COURT: Correct, you cannot rescind. I want to make sure that that is clear right now, because I don't have time for the back and forth. I am going to ask her the same thing. We have reached the agreement and we have resolved the issues. I have asked counsel to prepare an order that is going to be a consent order as to the things we agreed upon. **I want to make sure you understand that that agreement is effective today. . . . Do you understand that? I can't hear you.**

[HUSBANDj: Yes, your Honor.

THE COURT: Do you agree with the terms of the agreement that we put on the record?

[HUSBAND]: Yes, Your Honor.

* * *

THE COURT: So the only thing left is the grounds for resolving or dissolving the relationship. All right. Okay.

(Emphasis added.)

The next day, counsel for Wife presented the drafted consent order to Husband, and the following exchange occurred:

THE COURT: . . . The only issue remaining as between the two of you now based on the agreement we struck yesterday —

[HUSBAND]: Is annulment or absolute divorce?

THE COURT: Exactly.

[HUSBAND]: That's what I had agreed upon . . . But what I'm addressing is I still have to go to Immigration and address some of these issues.

* * *

THE COURT: You wanted to add a line that says however the parties must cooperate with any outstanding claims through — investigation, I should say, through Immigrations. You can add that but you can't file anything new. You need to understand that.

[HUSBAND]: Yes.

* * *

[HUSBAND]: . . . I would like to ask a question of the Court. I know there is no final ruling in place right now, but is this waiving my rights to an appeal, whatever that ruling may be?

THE COURT: It would not prevent you from appealing any decision I make when I make it, whenever that happens to be. It does preclude you from appealing anything that we settled.

[HUSBAND]: Yes, Your Honor, including new allegations. I understand, Your Honor.

(Emphasis added.)

On December 17, 2008, both parties, and the circuit court judge, signed the consent agreement, and the court docketed it. The agreement stated:

[T]he parties having reached an agreement on certain issues and having placed their agreement on the

record, it is

ORDERED and AGREED that the parties are continuing to seek dissolution of their marriage and related no-contact orders, however the parties have knowingly and voluntarily waived all other claims they may have against one another in any court or jurisdiction including claims for compensatory or punitive damages, tort, infliction of emotional distress, assault, battery, negligence, and any other claims, **wherefore all such claims (whether specifically pled or not) are hereby DISMISSED WITH PREJUDICE**; and it is further

ORDERED and AGREED that either party may respond to any requests for information from the US Department of Homeland Security;

ORDERED and AGREED that the Plaintiff, Kirk Matelyan, shall pay the Defendant, Alejandra Silvestre Cordon Matelyan six-hundred dollars as *pendente lite* alimony on or before January 15, 2009, **as a full resolution of the *pendente lite* alimony arrearage**.

ORDERED and AGREED that the parties have knowingly and voluntarily waived all other claims for alimony, all such claims are DENIED; and it is further

ORDERED and AGREED that the parties have knowingly and voluntarily **waived any property claims** they may have against one another, including any claim to a monetary award or transfer of property, all such claims are hereby DENIED

(Emphasis added.)

On December 22, 2008, the testimony e oncluded. On March 20, 2009, in an oral ruling, the circuit court granted an absolute divorce based on one year of mutual and voluntary separation. **[E.790]** When rendering its decision the trial court stated:

> **[T]he parties mutually agreed to waive. . . any . . . claims, except for the respective arguments pertaining to resolving the relationship marriage. . . .**
>
> The only thing the court had to look at in the case is whether or not [Husband] met his burden for an annulment, and then whether or not [Wife] met her burden on any of the alternate grounds for divorce, which were cruelty, excessive vicious conduct, constructive desertion, and voluntary separation.
>
> * * *
>
> First of all [Husband) alleged that he because of being on medication during the time period in which he got engaged in the marriage, that he was on medication and also was under severe pain and that, thus, when he got married he was intoxicated and did not, was not capable of entering into the relationship and the marriage.
>
> Also he alleges that there was excessive, vicious conduct by [Wife] prior to them getting engaged and getting married. So that supported his argument that the marriage was wrongfully entered into and, therefore should be annulled.
>
> One of his other allegations is that [Wife] misrepresented her legal status in this country and that he thought she was a citizen. . . . that was his allegation.
>
> So considering all the evidence on that issue, the court is not persuaded by [Husband's] arguments. I think that there were certainly plenty of times during the premarriage relationship when he was lucid and understood what was going on. I do think the parties had a somewhat volatile relationship.
>
> The court is persuaded that [Husband] did buy the rings. He did go to [Wife's] mother's home where she was staying after their last big blow-up before they got married, persuaded her to go with him. They picked out a ring together.
>
> What appears to be his signature is on the marriage license, although he claims he doesn't know how it got there, allegedly forged, but he didn't bring forth any witnesses to support that allegation.
>
> The Parties got married in a civil ceremony in Virginia and there are photographs taken the day they got married. Whether the marriage from

the [Husband's] perspective was in fact based on love, the court can't answer that. All I can say is they did get married, the court is persuaded they did get married on April 16, 2007.

Now, turning to [Wife's] allegations and basis for the requested grounds for divorce, the cruelty, excessive vicious conduct and constructive desertion.

One of the problems that I have with this case is I think both of the parties have some serious credibility issues. [Husband], he was all over the place with a lot of his testimony. There were several contradictions.

[Wife] takes the stand and pleads the Fifth on some of the questions.

* * *

However, the court is persuaded that the parties did separate on or about November 17, 2007, and that that was as a result of an incident. The court got two different versions of what happened that particular day. What is clear is that the parties did separate on that day.

The court is persuaded that **at some point soon after that that the separation was mutual and voluntary**, and clearly the parties intended to end the relationship that they had. The reason I use that word is because [Husband] claimed that it should be annulled, but it is clear that he does not want to be married to her and she does not want to be married to him.

I do think that the separation did become mutual and voluntary and that it has been for more than one year uninterrupted without any sexual relations since that date, that there is no hope or expectation that the parties will reconcile.

* * *

The court will grant the divorce based on the one year voluntary separation under the counter-complaint.

On April 10, 2009, the circuit court docketed the judgment of absolute divorce.

Subsequent to the announcement of that judgment, Husband filed several motions attempting to revive his tort claims against wife, seeking an annulment, and challenging the settlement of the *pendente lite* alimony, all of which the circuit court denied.[9] On April 30, 2009, Husband appealed to this Court.

DISCUSSION

I. JURISDICTION

Husband contends that 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 contract framed to defraud Government." Pursuant to Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL") § 1-201(a)(3) and (4), courts of equity have jurisdiction over annulments and divorces. "Today the courts of the State derive their authority to grant an annulment from the general jurisdiction of the equity courts." *Ledvinka v. Ledvinka*, 154 Md. App. 420, 434 (2003). This is 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 I 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 of 2007, Husband asserted that he had lived in Maryland since May of 2006. Upon the circuit court's inquiry in response to Husband's assertions of lack of jurisdiction, Husband confinned that he had been living in Maryland since 2006. Accordingly, we need not look to see if the grounds for divorce arose outside of Maryland, because, regardless, Maryland has proper subject matter jurisdiction over this matter as a result of Husband's admission of residency in this State for more than a year prior to filing.

II. ANNULMENT

Husband requests that this Court reverse the circuit court's decision to deny Husband's request for an annulment. Before the circuit court, Husband contended that 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.

A. Background

"The law does not favor annulments of marriages, and it has long been a settled judicial policy to annul marriages only under circumstances and for causes clearly warranting such relief." *Hall v. Hall*, 32 Md. App. 363, 381-382 (1976) (quoting 3 W. NELSON, DIVORCE AND ANNULMENT § 31.05 (2d ed. 1945)), *superseded by statute*. "The general rule is that 'marriages

shall stand and not be nullified except with caution, and only upon clear, satisfactory proof of recognized grounds of nullification. The courts are not authorized to annul them merely because it may seem well for the particular parties before them."' *Picarella v. Picarella*, 20 Md. App. 499, 504 (1974) (quoting *Samuelson v. Samuelson*, 155 Md. 639, 643. n. 5(1928)). Accordingly: "Public policy requires that marriage should not be lightly set aside." *Id*. (quoting *Oswald v. Oswald*,146 Md. 313, 315 (1924)).

Because Husband sought the annulment, the burden of proof in the circuit court rested with him. *Montgomery v. U'Nertle*, 143 Md. 200, 207 (1923) ("The burden of proof, of course, rests upon a plaintiff to make out his case sufficiently to satisfy the chancellor of the truth of his allegations as set out in the pleadings."). On appeal, because Wife prevailed in the circuit court, we will review all facts in the light most favorable to Wife. *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 676 (2007).

B. Intoxication/Lack of Capacity

"For a valid marriage to exist, 'there must be certain conduct engaged in by competent parties under circumstances whereby they intend matrimony and both understandingly and freely consent to acquiring that status." *Ledvinka, supra*, 154 Md. App. at 433-434 (quoting John S. Strahorn, Jr., *Void and Voidable Marriages in Maryland and Their Annulment*, 2 Md. L. Rev. 211, 216 (1938)). "If the party entering the marriage relation has sufficient capacity to understand the nature of the contract and the duties and responsibilities which it creates, the marriage will be val*Id.*" *Elfont v. Elfont*, 161 Md. 458,471(1932); *see also Montgomery, supra,* 143 Md. at 207 ("Some things are perfectly clear, namely, that to constitute a valid marriage under the laws of this State, there must be an understanding and appreciation of what the ceremony was which was being gone through with, and what were the legal consequences naturally deducible therefrom.").

Here, 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, and made the following findings:

> First of all [Husband] alleged that he because of being on medication during the time period in which he got engaged in the marriage, that he was on medication and also was under severe pain and that, thus, when he got married he was intoxicated and did not, was not capable of entering into the relationship and the marriage.
>
> * * *
>
> **So considering all the evidence on that issue, the court is not persuaded by [Husband's] arguments**. I think that there were certainly plenty of times during the premarriage relationship when he was lucid and understood what was going on. I do think the parties had a somewhat volatile relationship. . . .
>
> The court is persuaded that [Husband] did buy the rings. He did go to [Wife's] mother's home where she was staying after their last big blow-up before they got married, persuaded her to go with him. They picked out a ring together.
>
> What appears to be his signature is on the marriage license, although he claims he doesn't know how it got there, allegedly forged, but he didn't bring forth any witnesses to support that allegation.

(Emphasis added.)

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 that a wedding was occurring:

> So the wedding commenced in Arlington, Virginia . . . I do recall the — who I found out later to be was the lawyer that was there, because I remember he had a beard, and he asked me if the children that were there were mine, you know.
>
> * * *
>
> [HUSBAND]: — of course I'm going to respond and say no, I don't have children. So that stuck with me. So I recall the gentlemen because of the scraggly beard. And the only reason I know that is because I went back there at a later date. I remember the bearded guy, him asking me if the children were mine.
>
> And I know there was her mother present, but I don't know if she was present on that day. However, she was a witness so when I recall seeing her I'm not exactly sure at what point. However, there was a third party or a second witness at that wedding and I don't know who the individual is. . . . Apparently it is a friend of [Wife] and [Wife's] mother.

> **So, first of all, what bothered me about that was the fact that it was a wedding and it was outside the church.**

(Emphasis added.)

Although Husband testified that there were "gaps" in his memories from that day, he did not testify that he did not understand that a wedding was occurring. Wife testified that, on the day of the marriage, Husband did not appear to be intoxicated, and entered into evidence pictures of Husband placing the ring on Wife's finger. Accordingly, because competent evidence in the record supports the circuit court's conclusion, the circuit court's factual determination regarding Husband's capacity to marry is not clearly erroneous. *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455-56 (2004) ("A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the courts conclusion.").

C. Duress

As the circuit court noted: "[Husband] allege[d] that there was excessive, vicious conduct by [Wife] prior to them getting engaged and getting married. So that supported his argument that the marriage was wrongfully entered into and, therefore should be annulled." The circuit court stated that it was not persuaded by Husband's argument.

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). "The force or duress must be also the directly inducing cause of entering into the marriage." *Id.* In addition: "The violence or threats must be of such a character as to inspire ajust fear of great bodily harm." *Id.*

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.[10] Accordingly, because Husband failed to present evidence which compelled the court to accept Husband's allegation that he was acting under duress, the circuit court did not commit legal error in declining to issue an annulment on that ground.

D. Fraud

Husband cited Wife's purported misrepresentation about her legal status in this country as grounds for an annulment. The circuit court found this argument unpersuasive.

> [F]or the court to decree annulment because of fraud, the representations made or the acts charged must not only amount to fraud but must be such as induced the other party to enter into the contract or be such as relate to essential matters affecting the health or well being of the parties themselves.

Picarella, supra, 20 Md. App. at 506.

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." *Id.*

On appeal, for the first time, Husband contends that it is against public policy to recognize the marriage because it was entered into forpurposes of evading immigration laws, and in violation of federal statutes. Husband did not raise this public policy argument before the circuit court, and the circuit court made no factual finding that Wife entered into the marriage solely for purposes of evading immigration laws. Accordingly, we decline to address Husband's contention. Rule 8-131(a); *see also Md. State Bd. of Elections v. Libertarian Party*, 426 Md. 488, 517 (2012) ("An appellate court ordinarily will not consider any point or question 'unless it plainly appears by the record to have been raised in or decided by the trial court.").

For reasons stated above, because Husband failed to establish the requisite factual grounds for an annulment, the circuit court did not commit legal error in refusing to grant Husband's requested annulment. Even if Husband had provided a factual basis that could have theoretically served as grounds for an annulment, the circuit court would not have been required by law to grant an annulment. When presented with the option of either annulling the marriage or granting a divorce, it is within the circuit court's discretion to proceed with the divorce rather than the annulment. *See Hall, supra*, 32 Md. App. at 382-83 ("Moreover, by pursuing the divorce route rather than the annulment route, the chancellor avoided some of the pitfalls inherent in an annulment action.").[11]

III. VOLUNTARY SEPARATION

For the first time on appeal, 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. Rule 8-131(a). In any event, the circuit court heard ample evidence for it to find: "The court is persuaded that **at some point soon after (November 17, 2007] that the separation was mutual and voluntary.**" (Emphasis added.)

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.

Preliminarily, we note that, to be binding and enforceable, a consent agreement, like other contracts, must be supported by consideration. "Forbearance to exercise a right or pursue a claim, or an agreement to forbear, constitutes sufficient consideration to support a promise or agreement." *Chernick v. Chernick*, 327 Md. 470, 480 (1992). In this case, 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 portions of which we have set forth above — reflects that the circuit court went over the terms of the consent agreement thoroughly with Husband. At several points during the discussion, Husband acknowledged his willingness to consent. For example:

> THE COURT: It sounds like you still want to pursue things, and I want to make sure that if we settle this, that's it, you are all through, done, go your separate ways, call it a day. Right? Right? I am not hearing you.
>
> MR. MATELYAN: Yes, Your Honor.
>
> * * *
>
> THE COURT: Do you agree with the terms of the agreement that we put on the record?
>
> MR. MATELYAN: Yes, Your Honor.
>
> * * *
>
> THE COURT: . . . The only issue remaining as between the two of you now based on the agreement we struck yesterday —
>
> MR. MATELYAN: Is annulment or absolute divorce?
>
> THE COURT: Exactly.
>
> MR. MATELYAN: That's what I had agreed upon... But what I'm addressing is I still have to go to Immigration and address some of these issues.
>
> * * *
>
> THE COURT: You wanted to add a line that says however the parties must cooperate with any outstanding claims through — investigation, I should say, through Immigrations. You can add that but you can't file anything new. You need to understand that.
>
> MR. MATELYAN: Yes.

Such exchanges reflect that, not only did Husband agree to the terms of the agreement, but, as Wife's counsel points out, Husband also negotiated changes to terms which were incorporated into the final agreement. Therefore, Husband's contention that he did not actually consent lacks merit.

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

> THE COURT: So what we are talking about is each side waiving their respective tort claims.
>
> [COUNSEL FOR WIFE]: With prejudice?
>
> THE COURT: With prejudice, yes, which means you can't bring them back anywhere, okay. Theft requests for alimony —
>
> MR. MATELYAN: If I may, Your Honor?
>
> THE COURT: Sure.
>
> MR. MATELYAN: Because I am a little in the dark on that. You can't bring up a tort claim, I understand that, but you can still bring up the issues within the pleadings, the information?
>
> THE COURT: No, no. The only way the information can be brought up

is if it relates to the issues or onç of the factors that the court has to consider in granting an annulment or divorce, but that would be the only way.

* * *

As it relates to whether you are entitled to an annulment of whether she is entitled to a divorce, yes, youcan talk about them, but in terms of whether you are going to be any kind of relief under your, quote/unquote, tort claim, your alleged abuse or battery, assault and battery or — your complaint for — your complaint for annulment, fraud, assault and battery, intentional infliction of emotional distress, false imprisonment, negligence and related damages, that part is gone. Everybody is waiving, because she has got similar claims. You waive yours, she waives hers. Neither can bring them back for damages.

MR. MATELYAN: In this court?

THE COURT: In any court. They are gone.

MR. MATELYAN: In Maryland?

THE COURT: In any court.

MR. MATELYAN: . . . I would like to ask a question of the Court. I know there is no final ruling in place right now, but is this waiving my rights to an appeal, whatever that ruling may be?

THE COURT: It would not prevent you from appealing any decision I make when I make it, whenever that happens to be. It does preclude you from appealing anything that we settled.

MR. MATELYAN: Yes, Your Honor, including new allegations. I understand, Your Honor.

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 that the trial court erred by failing to "revisit his request for the return of the [pendentc 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 on December 16, 2008, reflects that the circuit court addressed the pendente lite alimony and property issues as part of the consent order:

THE COURT: You were ordered to make some payments *pendente lite*. We still have to address that.

MR. MATELYAN: Absolutely. I believe I already submitted those documents with the Clerk's Office.

THE COURT: You submitted copies of money orders. I don't have anything to tell me you gave them to her.

* * *

MR. MATELYAN: Your Honor, respectfully —

THE COURT: I'm listening.

MR. MATELYAN: I don't know if I could leave it open for a final ruling. When I spoke to Attorney Hunt he informed me that the money orders I did send off were not a final order until the final hearing itself, so if they were obtained during the process go ahead and submit them but the judge would make a final ruling on whether or not the finds would be returned.

THE COURT: They were ordered pendente lite. It would be one thing if you made the payments timely. I might have, I don't know that I would have, considered taking it into consideration, but you didn't make the payments timely, number one, and they were ordered pendente lite. I generally don't mess with stuff that was ordered, you know. So technically he is right, but that depends on which judge is trying the case. I generally, you know — it was ordered and I'm trying to settle the case. **Certainly if we don't settle it, that's another issue, but if we settle it, then we settle it**. And that was what was ordered and that was what was paid.

* * *

THE COURT: Let me make sure what we are agreeing to. I'm getting ready to go over this again. In fact, I am going to write it down as I'm going over it. —

MR. MATELYAN: Yes, Your Honor. And respectfully my biggest concern with the defendant obtaining

that order, it wasn't under the best of decisions.

THE COURT: What are you talking about?

MR. MATELYAN: Due to perjury on the stand.

THE COURT: What are you talking about right now?

MR. MATELYAN: The pendente lite alimony checks.

THE COURT: You know what, sir. Here's the thing. They are saying based on their records you are in arrears of $950. Jam saying I got $800 worth of money orders that are still kind of up in the air. What I had suggested was that you get the — stop payment, get the money back from these, take $200 from it, which would mean $600 you would just hand over to her as part of the prior order.

[COUNSEL FOR WIFE]: $750.

THE COURT: That is not what I said. A hundred fifty dollars I am not going to really lose sleep over.

[COUNSEL FOR WIFE] I understand that. I wouldn't either, but if I could give my client the money I would.

THE COURT: I am trying to settle the case. If you don't want to settle it he may very well get what he is asking for. He is saying he gave her all this jewelry. She already admitted she broke something and threw it away. I'm just saying meet in the middle. She gets $600.

* * *

THE COURT: So it would be the $600 that gets turned over right away as soon as it is available to Western Union.

MR. MATELYAN: Yes, Your Honor.

This exchange reflects the circuit court's attempt to facilitate a settlement of both the property and *pendente lite* alimony claims. In addition to a $200 deduction (the amount resulting from the sale of the ring) from the $850 *pendente lite* alimony arrearage, Husband received an additional $150 deduction. Therefore, the *pendente lite* alimony arrearage and property claims were both disposed of by Husband agreeing to pay $600 to Wife.

The plain terms of the consent order cover the *pendente lite* alimony payments as well as the property claims:

> ORDERED and AGREED that the Plaintiff, Kirk Matelyan, shall pay the Defendant, Alejandra Silvestre Cordon Matelyan six-hundred dollars as *pendente lite* alimony on or before January 15, 2009, **as a full resolution of the *pendente lite* alimony arrearage**.
>
> * * *
>
> ORDERED and AGREED that the parties have knowingly and voluntarily **waived any property claims** they may have against one another, including any claim to a monetary award or transfer of property, all such claims are hereby DENIED . . .
>
> (Emphasis added.)

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 that the circuit court should have revisited the *pendente lite* alimony issue, and that the court erred in resolving the property claims along with the *pendente lite* alimony arrearage.

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

FOOTNOTES

1. These are Husband's questions quoted verbatim:

[I]. Did the trial court err in affording recognition of a marriage contract fraudulently framed outside its jurisdiction as to evade Maryland Marriage laws?

A. Did the trial court err in setting aside facts within a marriage contract showing perjured testimony?

B. Did the trial court err in upholding that it held jurisdiction over a contract framed cross boundaries?

[II]. Did the tr[ia]l court err in dismissing appellant's state of mind at the time a fraudulent contract was framed?

[III]. Did the trial court err in dismissing evidence of plaintiff's November 17, 2007, protective order for purposes of an absolute divorce pursuant to a voluntary separation?

A. A voluntary separation vs. protective order.

[IV]. Did the trial court err in denying the plaintiff's request to rehear testimony concerning *pendente lite* funds procured?

A. Did the trial court err in enjoining appellant's property claims into a pendente lite order?

[V]. Did the court err in stating the plaintiff could not rescind

on an ambiguous consent agreement further forcing his hand in signing it on its face?

2. In addressing this question, we will answer Husband's question I.B: "Did the trial court err in upholding that it held jurisdiction over a contract framed cross boundaries?"

3. In addressing this question, we will answer Husband's questions I: "Did the trial court err in affording recognition of a marriage contract fraudulently framed outside its jurisdiction as to evade Maryland Marriage laws?," I.A: "Did the trial court err in setting aside facts within a marriage contract showing perjured testimony?," and II:"Did the tr[ia]l court err in dismissing appellant's state of mind at the time a fraudulent contract was framed?"

4. In addressing this question, we will answer Husband's question III: "Did the trial court err in dismissing evidence of plaintiff's November 17, 2007, protective order for purposes of an absolute divorce pursuant to a voluntary separation?," and III.A: "A voluntary separation vs. protective order."

5. In addressing this question, we will answer Husband's question V: "Did the court err in stating the plaintiff could not rescind on an ambiguous consent agreement further forcing his hand in signing it on its face?"

6. In addressing this question, we will answer Husband's question IV: "Did the trial court err in denying the plaintiffs request to rehear testimony concerning pendente lite funds procured?," and IV.A: "Did the trial court err in enjoining appellant's property claims into a pendente lite order?"

7. On December 3, 2008, Husband filed a second amended complaint. On April 11, 2008, Husband filed an additional amended complaint, which set forth a recitation of the events of April 17, 2007, including: "I told her I wanted a divorce." Husband again filed an amendment on May, 17, 2008, and again on July 11, 2008.

8 The order made no mention of the exceptions filed by Husband. Because the *pendente lite* alimony issues were resolved in the consent agreement, this Court will not further address whether the circuit court considered the exceptions.

9. On April 9, 2009, Husband filed a "Motion to Amend Judgment, Complaint for Annulment, Fraud, Assault, Battery, Intentional Infliction of Emotional Distress, False Imprisonment, Negligence and Related Damages." On April 20, 2009, Husband filed an "Objection to the Order of Temporary Alimony Settlement or Alternitivly [sic] any Notation Made as to a Settlement to the Order of Funds Procured as Temporary Alimony Through Perjury." On April 20, 2009, Husband also filed an "Amended Heading to Plaintiffs Exceptions or Alternatively Opposition to Judgment of Absolute Divorce, Plaintiff's Objection to Judgment of Absolute Divorce."

On May 6, 2009, the court docketed the circuit court's order that Husband's exceptions to the judgment were overruled. On June 24, 2009, the circuit court denied Husband's objection to the temporary alimony settlement.

10. It is noteworthy that, in one of the amended complaints filed by Husband, Husband asserted: "**Toward the end of January 2007**, [Wife] suggested that [Husband], Mr. Matelyan marry her to avoid deportation afterresiding within the States illegally. He refused the offer because he did not want to marry for the wrong reasons and could not see himself being with someone that was abusive." (Emphasis added.) The parties married on April 16, 2007.

11. We need not reach Wife's alternative contention that this Court could also affirm the circuit court's decision not to grant the request for annulment because of Husband's ratification of the marriage.

NO TEXT

Cite as 3 MFLM Supp. 131 (2013)

Custody and child support: sole custody *pendente lite*: paternity

Brenton Grant
v.
Deborah Grant

No. 0280, September Term, 2012

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

Opinion by Berger, J.

Filed: February 6, 2013. Unreported.

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.

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

On April 4, 2012, the Circuit Court for Frederick County issued a *pendente lite* order, granting appellee, Deborah Grant ("Mother"), sole legal and physical custody of the minor children of the parties.[1] Pursuant to the order, appellant, Brenton Grant ("Father") was ordered to pay child support and granted access and visitation to the minor children. The order further denied Father's request for paternity testing of the children.

Father filed a timely appeal and presents seven issues for our review, which we have consolidated and rephrased as follows:

1. Whether the circuit court erred in granting Mother *pendente lite* sole legal and physical custody of the minor children.
2. Whether the circuit court erred in denying Father's request for paternity testing of the minor children.[2]

For the reasons set forth below, we affirm the judgments of the Circuit Court for Frederick County.

FACTS AND PROCEEDINGS

Mother and Father were married on November 18, 2000 in New York. As a result of their marriage, Mother and Father had three children. The children are currently ten-years-old, six-years-old, and four-years-old. On September 19, 2009, Mother moved from Georgia to Maryland after the parties separated. During the separation, Mother lived with friends while she searched for employment. When Mother relocated to Maryland, the children were sent to live with family in Jamaica until June 2010, at which point they moved to Maryland to live with Mother. Father is currently a resident of the state of New York.

On July 1, 2011, Mother filed a "complaint for absolute divorce or in the alternative limited divorce" in the Circuit Court for Frederick County. On August 11, 2011, Father filed a counter-complaint for absolute divorce in the same jurisdiction. Both parties requested sole legal and physical custody of the three minor children.

On December 19, 2011, a hearing was held before a family law master in the Circuit Court for Frederick County pursuant to a request for an order determining *pendente lite* custody, access, and child support. As a result of the hearing, the master determined that Mother is the primary caretaker of the children. The master found that although Father has contributed miscellaneous food items to the household, Father has not made any direct monetary payment to Mother for support of the children since the separation of the parties. The master further calculated a gross monthly income of $2,500.00 for Mother and $7,500.00 for Father. Additional evidence suggested that the work-related child care expenses totals $1,623.00 per month for all three children.

Father requested paternity testing of the children because of suspicions that Mother was not faithful during their marriage. Nevertheless, the master did not recommend Father's request for paternity testing because of the children's tender ages and the bond they share with Father. The master concluded that the best interests of the children would be for Mother to have sole legal and physical custody, and Father have access to the children subject to a visitation schedule. Moreover, the master recommended that Father pay child support in the amount of $2,793.00 per month.

On January 11, 2012, the circuit court held a *pendente lite* hearing on custody, child support, and

access. On January 20, 2012, Father filed exceptions to the master's report and recommendations. Father claimed that his request for paternity testing should not be denied because he "had strong feelings and reservation that [his] wife was not faithful while she was pregnant with one of [their] children." Father further argued that with regard to child support, the master "came up with an imaginary, unreasonable, extraordinary figure of over $2700.00 per month." Lastly, Father contended that the master's recommendation "to award sole legal and physical custody of the children is just very wrong and without consideration and merit." Father maintained that "shared legal and physical custody would have been the right decision by the courts."

On April 4, 2012, the circuit court issued a *pendente lite* order. After considering the master's report and recommendations, as well as the testimony and evidence set forth at the hearing, the circuit court denied all of Father's exceptions, except Father's gross income as applied to the child support guidelines. The court ordered Father to pay *pendente lite* child support in the amount of $1,200.00 per month. Additionally, the court granted Mother *pendente lite* sole legal and physical custody of the children. Father was granted access to the children pursuant to a visitation schedule, but leaving open "other, additional, or alternative visitation." The court further denied Father's request for paternity testing. This timely appeal followed.

DISCUSSION

I.

Father's first contention is that the trial court erred in granting Mother sole legal and physical custody. Father claims that "[he] is the best parent for [the] children" and that the "fairest solution" is to grant joint legal and physical custody of the children.[3] Although we recognize Father's efforts in ensuring the "fairest solution" for the children, we disagree that the trial court erred in granting Mother custody of the children *pendente lite*.

A circuit court has the authority to award custody of children *pendente lite*. Md. Code Ann., Fam. Law ("FL") § 1-201 (LexisNexis 2012). 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, though not a final judgment under Md. Code Ann., Cts. & Jud. Proc. ("CJP") § 12-301 (LexisNexis 2012), is immediately appealable as an interlocutory order pursuant to CJP § 12-303(3)(x).[4] *Bussell v. Bussell*, 194 Md. App. 137, 147 (2010); *Stach v. Stach*, 83 Md. App. 36, 38 (1990).

When an appellate court reviews a child custody decision, it applies one of the three following methods of review:

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (citations omitted). When reviewing the custody determination in this case, we are not reviewing the circuit court's factual findings. Further, it is clear that the circuit court did not err as a matter of law. As we will discuss below, the circuit court based its reasoning on well settled principles of law. Therefore, we review the circuit court's custody decision for abuse of discretion.

A trial court judge is empowered with broad discretion in determining child custody:

> [B]ecause only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

Maness v. Sawyer, 180 Md. App. 295, 312-13 (2009) (quoting *Jordan v. Jordan*, 50 Md. App. 437, 442 (1982)). A trial court is required to evaluate each child custody case on an individual basis in order to determine what is in the best interests of the child. *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996) (citing *Bienenfeld v. Bennett-White*, 91 Md. App. 488, 503 (1992)). Factors the trial court may use in this determination include:

> [A]mong other things, the fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in

> which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.

Id. (internal citations omitted). These factors make it clear that the best interests of the child is not a factor of its own. Instead, it is the goal that all other factors seek to reach. *Id*.

"Courts are not limited or bound to consideration of any exhaustive list of factors in applying the best interests standard." *Montgomery County Dep't of Social Services v. Sanders*, 38 Md. App. 406, 420 (1978). Trial court judges "possess a wide discretion concomitant with their plenary authority to determine any question concerning the welfare of children within their jurisdiction[.]" *Kennedy v. Kennedy*, 55 Md. App. 299, 310 (1983) (internal quotations omitted). "This authority clearly empowers courts applying the best interests standard to consider any evidence which bears on a child's physical or emotional well-being." *Bienenfeld, supra*, 91 Md. App. at 504. Further, the Court of Appeals has explained that:

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

Boswell v. Boswell, 352 Md. 204, 219-20 (1998).

In the instant case, the matter was before the circuit court to decide *pendente lite* custody, child support, and access. After taking into consideration the testimony of the parties and witnesses, evidence of the parties' finances, and the report and recommendations of the master, the circuit court concluded that granting Mother *pendente lite* custody would best serve the interests of the children. In reaching that determination, the circuit court found that:

> [T]he parties were married on November 18, 2000. The parties separated on November 19, 2009. I find that the parties are the parents of the minor children are the subjects of these proceedings . . . I find that [Mother has] been the primary caretaker of the children chill [sic] out their life and the children have been primarily in her care and custody since the parties excuse me. Since June of 2010, am let me back up and find that the parties separated with the intention of ending their marriage in May of 2011, and change that prior finding.
>
> I find that [Father] has made no direct monetary payments to [Mother] for support of the minor children. Since the inception of this matter, I find that [Father] has contributed miscellaneous food items to the household . . . I find that [Mother's] gross monthly income is $2500. I find that childcare for the three minor children work related childcare [i]s $1623 per month.
>
> Now let me say aside is my understanding based on the testimony that up until approximately the beginning of this month, [Mother] was working full-time. She stopped her job at Howard University is working temp jobs pending a full-time position hopefully by the end of this month so I recognized at this month there is not $1623 in daycare . . . but I accept her testimony that she does intend to return to work full-time which is why I am using the $1623 as a daycare expense.
>
> I find that the children are currently receiving medical assistance and therefore there is no direct health insurance costs. In determining [Father's] income that's a little bit tricky, the testimony is that he is 46 years old he had some jobs in Georgia, [Mother] testified that while they were living in Georgia he was earning approximately $90,000 per year or that worked out to $7500 per month. [Father] testified that he is bankrupt, use also provide testimony that he's a senior master automotive technician and said this is in equivalent to a PhD.
>
> * * *
>
> [Father] also testified that he is just started a security business and that this is some sort of retail thing. And he specifically denied recalling what he is made in 2010 and 2011. So I in considering all of those facts am or

> that information, and I'm particularly concerned that [Father] is unable to recall is 2010 and 2011 income that's a fact that's pretty much readily available to most anybody who cares to share it.
>
> * * *
>
> Also [Mother's counsel] indicated that the outset today that she had file subpoenas for him to bring with him this documentation and I apologize. I do not recall there is a financial statement in the file I don't know if it's the long form, let me just take a look. [Father] in his financial statement indicate[s] an income of $1500 per month. I think clearly given [Father's] age, prior experience, training [in] the automotive industry so on and so forth he is am [sic] capable of earning more than $1500 per month.
>
> * * .*
>
> . . . I am going to go ahead and find. . . [Father's] gross monthly income to be $7500.
>
> * * *
>
> I'm going to find that it is in the best interests of the minor children that [Mother] be granted sole legal and physical custody of the minor children. . . .

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. Father maintains that "if [he] [is] going to be brought to trial, if [he] [is] going to be forced, to partake in a child support and so on so forth, [Father] [is] pretty sure that, no human being under this sun would pay for something that they are not certain about." We disagree.

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). Questions regarding the best interests of a child fall generally within the sound discretion of the trial court and ordinarily will not be disturbed absent a clear abuse of discretion. *Evans v. Wilson*, 382 Md. 614, 623 (2004) (citing *Walter v. Gunter*, 367 Md. 386, 391-92 (2002).

The Family Law Article of the Maryland Code presumes that the mother's husband at the time of conception is the father of that child. FL § 5-1027(c)(1). Upon motion of any party to the complaint, "the court shall order the mother, child, and alleged father to submit to blood or genetic test" to determine whether the alleged father can be excluded as being the father of the child. FL § 5-1029(a) and (b). Alternatively, the Estates and Trusts Article provides independent authority by which the court may make a paternity determination. Md. Code Ann., Est. & Trusts ("ET") § 1-206(a) (LexisNexis 2012) (presumes that a child born or conceived during the mother and her husband's marriage is the legitimate child of each spouse).

The Court of Appeals has interpreted ET §§ 1-206(a) and 1-208 as providing the framework through which the court, inequity, 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 2-423[5] and invokes the trial court's discretion in deciding whether ordering such testing would be in the best interests of the children. *Turner, supra*, 327 Md. at 113-14. Section 1-208(b) provides for four methods by which to establish the father-child relationship recognized by law: (1) a judicial determination under the "statutes relating to paternity proceedings"; (2) if the father acknowledges himself as the father, in writing; (3) if the father has "openly and notoriously recognized the child to be his child"; or (4) if the father "has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father." 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.

The criteria for determining the child's best interests in cases of disputed paternity include "consideration of the stability of the child's current home environment, whether there is an ongoing family unit, and the child's physical, mental, and emotional needs." *Turner*, *supra*, 327 Md. at 116. Moreover, "an important consideration is the child's past relationship with the putative father." *Id*. "[O]ther factors might even include the child's ability to ascertain genetic information for the purpose of medical treatment and genealogical history." *Id*.

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 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.

For the reasons set forth above, we affirm the judgments of the Circuit Court for Frederick County.

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

FOONOTES

1. "Physical custody . . . means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). "Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id*. "Sole legal and physical custody" means one parent makes all the key or legal decisions such as health, education, general welfare, and religion affecting the child, and that the child only lives with one parent. *Id.*

2. Father phrases the questions for review, which we repeat verbatim, as follows:

> I. Should a father loose his parental and constitutional rights and be considered ineligible for parental custody due to employment.
>
> 2. Should a father loose his children because of parental role reversal where he is now the stay at home parent after being the sole provider for his family for ovçr 12 years.
>
> 3. Should a father be denied a DNA paternal test when there is probable cause of infidelity by his spouse.
>
> 4. Should a father loose is children for defending them from bad treatment by their mother.
>
> 5. Should a father loose his children base on unsubstantiated erroneous allegations that still cannot be proven by plaintiff in any courts.
>
> 6. Why are this Caring Father / Defendant / Appellants Constitutional, Equal and Civil Rights not taken into consideration by the lower courts?
>
> 7. Why are fathers only granted custody of their children only 17.8% of the times. Yet they are equally responsible for their development. A 1 in 6 ratio.

3. "Joint legal custody means that both parents have an equal voice in making those decisions and neither parent's rights are superior to the other." *Taylor, supra*, 306 Md. at 296. "Joint physical custody is in reality 'shared' or 'divided' custody. Shared physical custody may, but need not, be on a 50/50 basis." *Id*. at 296-97. "The parent not granted legal custody will, under ordinary circumstances, retain authority to make necessary day-to-day decisions concerning the child's welfare during the time the child is in that parent's physical custody. Therefore, a parent exercising physical custody over a child . . . necessarily possesses the authority to control and discipline the child during the period of physical custody." *Id*. at 296 n.4.

4. Section 12-303(3) provides in pertinent part:

> A party may appeal from any of the following interlocutory orders entered by a cfrcuit court in a civil ease:
>
> * * *
>
> (3) An Order:
>
> * * *
>
> (x) Depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order.

5. Maryland Rule 2-423, mental or physical examination of persons, provides that:

> When the mental or physical condition or characteristic of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a suitably licensed or certified examiner or to produce for examination the person in the custody or under the

legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties. It shall specify the time and place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The order may regulate the filing and distribution of a report of findings and conclusions and the testimony at trial by the examiner, the payment of expenses, and any other relevant matters.

Cite as 3 MFLM Supp. 137 (2013)

Child support: contempt: reasonable efforts to obtain funds

Michael Gary Butka
v.
Holly Lynn Williams

No. 0362, September Term, 2012

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

Opinion by Thieme, J.

Filed: February 6, 2013. Unreported.

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?

For the reasons that follow, we answer the above questions in the negative and affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL

Appellant and appellee are the biological parents of Savannah Butka, born May 10, 2001. By previous court order, appellant was required to pay respondent $347 in monthly support payments for their daughter. At a hearing held on appellee's petition for contempt, appellee presented evidence in the form of testimony and exhibits that appellant owed $8,427.04 in outstanding child support payments as of January 19, 2012.

BACKGROUND

Appellant testified that, although he had no documentation to establish that he "at least . . . attempted" to make support payments, he was doing the best he could after being terminated from his position as an auto mechanic, and also that he had unsuccessfully applied for several positions since that time. Appellant has not worked since late 2008, aside from a few side jobs.

Appellant further testified that he has been attempting to find employment in the automotive industry and at fast-food places, but that he was not hired because he was too qualified for the jobs available and had to refuse some employment offers because he did not have transportation to and from work, as the jobs sites were inaccessible via public transportation. Appellant also indicated that he had no disabilities or impairments that caused him to be unable to work or find work and that he had not been incarcerated.

Ultimately, the trial court found appellant in contempt and ordered him to pay his monthly child support payments of $347 and to produce at the next hearing written verification of ten attempts per week to find employment. The court found that appellant's arrears totaled $9,468.04.

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.

"An appellate court may reverse a finding of civil contempt only 'upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in

finding particular behavior to be contemptuous.'" *Gertz v. Md. Dep't. of the Environment*, 199 Md. App. 413, 424-25 (2011) (quoting *Royal Inv. Group, LLC v. Wang*, 183 Md. App. 406, 448 (2008)). An abuse of discretion occurs when "no reasonable person would take the view adopted by the [trial] court [ ] . . . or when the court acts without reference to any guiding rules or principles. An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court[ ]' or when the ruling is violative of fact and logic." *Mitchell v. Hous. Auth. of Balt. City*, 200 Md. App. 176, 205 (2011) (internal quotation marks and citations omitted).

"The most fundamental principle of appellant review [ ] is that the action of a trial court is presumed to have been correct and the burden of rebutting that presumption is on the party claiming error first to allege some error and then to persuade us that that error occurred." *State v. Chaney*, 375 Md. 168, 183-84 (2003) (quoting *Fisher v. State*, 128 Md. App. 79, 104-05 (1999). "Since a trial judge is presumed to know the law, the judge is not required to set out in detail each and every step of his thought process." *Id.* at 180 n. 8.

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 15-207(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. As noted above, 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 of the provision 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 Maryland Code (1957, 2012 Repl. Vol.), Family Law ("FL"), § 10-102, and reads: "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.

Appellant maintains that the trial court's calculation of arrears surpassed the limitations date and included payments due before April 4, 2008. 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. Additionally, respondent presented evidence that as of January, 2012, appellant owed $8,427.04. Three months later, at the contempt hearing, the court determined that he owed $9,468.04, a difference of $1,041, or three months worth of child support payments.

Appellant further maintains that he presented evidence that he paid a $2,000 purge when found in contempt in the past and that he paid $160 biweekly for intermittent periods of time. The purge, however, was paid in 2006 and by statute is not contemplated when calculating arrearages within the limitation period, which in this case was April of 2008. FL § 10-102. The payments that appellant made were two payments

of $160 in June of 2009, two payments of $160 in December 2009 and January 2010, totaling $960. The $960 that appellant paid, therefore, was less than three months of payments ($1,041). Again, this does not support appellant's contention that the trial court's calculation of arrearages included debt owed prior to the limitations period.

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

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

NO TEXT

Cite as 3 MFLM Supp. 141 (2013)

Divorce: indefinite alimony: voluntary impoverishment

Sabrina L. Basht

v.

Stephen C. Basht, III

No. 1073, September Term, 2011

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

Opinion by Zarnoch, J.

Filed: February 6, 2013. Unreported.

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 at that point would be unconscionably disparate, the award was vacated; and, on remand, the court should also determine whether husband was voluntarily impoverished.

Appellant Sabrina L. Basht ("Sabrina") appeals a decision of the Circuit Court for Cecil County in her divorce proceedings with Appellee Stephen C. Basht, III ("Stephen"). 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. For the reasons that follow, we vacate the award of indefinite alimony and child support and the monetary award; and we affirm the finding that Sabrina voluntarily impoverished herself. In addition, we remand for further proceedings, where the circuit court may consider the issue of whether Stephen was voluntarily impoverished.

FACTS AND LEGAL PROCEEDINGS

Sabrina and Stephen met while working at the same college credit card company in Philadelphia. Sabrina had obtained an undergraduate degree in communications from West Chester University and Stephen had graduated from the University of Pittsburgh with a degree in finance. Around a year after meeting, the two were married on May 15, 1993.

Sabrina and Stephen left their jobs at the credit card company around the same time. Stephen went to work for Pep Boys as a financial analyst and later

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

became a senior budget analyst, making around $45,000 a year. Sabrina started working for First USA Bank. In 1996, Sabrina was offered a job in Atlanta at Wachovia Bank. Pep Boys wanted Stephen to stay and offered him a higher salary, around $50,000. But the parties moved to Atlanta. There, Stephen obtained a job at Columbia DBS Management, LLC for $35,000 to $40,000 a year.

In 1997, Sabrina and Stephen had their first child. Soon after, another company bought the business that employed Stephen and he lost his job. At that time, the parties decided that Stephen would stay home to take care of their child, who was having chronic ear infections. In 2000, the parties had a second child.

The family moved to a 53.4 acre farm in Rising Sun, Maryland in 2001. Sabrina started working for Chase Bank earning $170,000 to $175,000 a year. In November of 2004, Sabrina took a position at Barclays Bank for $210,000 a year plus commission. Sabrina received raises at Barclays and eventually her base salary was around $300,000. But with benefits, incentives, and other non-taxable items, her reported income was over $600,000 in 2009 and over $700,000 in 2010. Sabrina testified that in November 2009, she thought her job was in danger because of uncertainties over the mobile payment division she was running. But she did not lose her job.

While Sabrina was working at Barclays, Stephen started a dog training business and a woodworking enterprise on the family farm. In 2009 these businesses made $17,702. It is unclear what they made in 2010: one document admitted at trial said $0, another trial exhibit said $109 a month ($1,317.96 a year), and the circuit court found Stephen's current income was $18,000. While running these companies, Stephen also volunteered as a financial advisor at his church. In 2009, Stephen decided to attend theology school at Liberty University. He planned to graduate in 2012 with a master's degree in theological studies.[11]

In November 2009, Sabrina told Stephen that she had a "more than friendly relationship" with a coworker. She decided to leave the marital home on February 9, 2010. Stephen stayed in the home with the children. In April 2010, Sabrina told Stephen she was

going to quit her job. Stephen filed for limited or absolute divorce on May 18, 2010.

On November 10, 2010, the circuit court entered a *pendente lite* Consent Order. Based on the order, Stephen and the children continued to reside in the martial home; and Sabrina paid certain household expenses (around $3,800 a month), and $3,500 monthly child support.

At the same time, Stephen began looking for another job. He had two interviews in the financial sector, but he turned down one because he thought he could make more money building furniture, and the other firm did not hire him because he was overqualified.

In April 2011, just after the vesting of incentives at Barclays, Sabrina quit her job there and began a new job at Careerminds. She worked there at the time of trial. Her salary was $200,000 plus sales commissions.

The original divorce hearing was scheduled for May 2011, but was postponed until June. At the time of the trial, Sabrina was 43 years old, and Stephen was 44. For purposes of alimony and child support determinations, Stephen and Sabrina both provided financial statements. Stephen's stated that his monthly expenses were $10,608 and his income was around $109 a month. Stephen testified that the only debt he had incurred since the separation was $12,000 on his credit card and that was mostly legal fees. Sabrina's financial statement indicated that her monthly expenses were $12,175 and her monthly net income was $11,599.74. In addition, Stephen testified that with the award of *pendente lite* alimony, he and the kids went out to eat less, and that he could not work on fixing the driveway or the septic tank.

As evidence of the standard of living established during the marriage, the parties testified that they had redecorated many parts of their home, were debt-free except for their mortgage and went on many vacations, including a trip to France and to the Super Bowl. Additionally, the parties testified that they arranged for a farmer to maintain and farm 40 acres of the 53.4 acre farm and for a housekeeper to do laundry and cleaning three days a week for fifteen hours a week.

The circuit court granted Stephen a judgment of absolute divorce on June 30, 2011. The court gave the couple joint legal custody of their two children, physical custody to Stephen, and visitation to Sabrina. Stephen received a monetary award of $250,459.17. The court also granted Stephen use and possession of the marital home and of property within the home for three years. For purposes of calculating child support, a monetary award, and alimony, the court found that Stephen's current income was $18,000. Regarding Sabrina's income, the court found she had voluntarily impoverished herself, and her potential income was $350,000.[2] For alimony, the court awarded Stephen indefinite alimony of $4,000 per month based on an unconscionable disparity in the parties' standards of living.

Sabrina timely appealed the award of indefinite alimony, the finding that she was voluntarily impoverished, and the court's failure to find that Stephen was voluntarily impoverished.

QUESTIONS PRESENTED

Sabrina presents the follow questions for our review:

1. Did the Circuit Court err or abuse its discretion in awarding indefinite alimony to Appellee Mr. Basht on the basis of an unconscionable disparity in the standards of living between Appellant Ms. Basht and Appellee Mr. Basht, and in the amount of alimony awarded?
2. Did the Circuit Court err or abuse its discretion in determining that Appellant Ms. Basht is voluntarily impoverished, and in the amount of income imputed to her for purposes of calculating alimony and child support?
3. Did the Circuit Court err or abuse its discretion in failing to find that Appellee Mr. Basht is voluntarily impoverished, and in the amount of income or lack thereof imputed to him for purposes of calculating alimony and child support?

For reasons set forth below, we vacate the indefinite alimony award as well as the monetary and child support award that is necessarily affected. We remand the case to the circuit court for further proceedings, where the court is free to determine whether Stephen voluntarily impoverished himself. Finally, we affirm the circuit court's finding of Sabrina's voluntary impoverishment.

DISCUSSION

I. Indefinite Alimony

A. Circuit Court's Opinion on Indefinite Alimony

In its award of indefinite alimony, the circuit court relied on Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL"), § 11-106(b), which contains the following nonexclusive twelve factors a court must consider when awarding alimony:

> (1) the ability of the party seeking alimony to be wholly or partly self-

supporting;

(2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;

(3) the standard of living that the parties established during their marriage;

(4) the duration of the marriage;

(5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

(6) the circumstances that contributed to the estrangement of the parties;

(7) the age of each party;

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

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

(10) any agreement between the parties;

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

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

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

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

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

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

The court then noted the two situations where it could award indefinite alimony under FL § 11-106(c). These are:

> (1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or
>
> (2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

The circuit court made the following findings:

> In considering the factors [en]unciated by these sections, the court finds that due to Husband being out of the workforce for the last thirteen (13) years, it will be difficult for Husband to be wholly self-supporting. The court also finds that Husband is currently enrolled in Theological studies at Liberty College with an anticipated graduation date of 2012 and it is anticipated that Husband will require additional time after graduation to become employed. The court finds that the parties' standard of living during the marriage was very comfortable. The family enjoyed numerous vacations and with the exception of the encumbrance against the marital home, the parties are debt free. The court further finds that the duration of the marriage was eighteen (18) years and that both parties contributed substantially to the well-being of the family, albeit in different ways. By agreement of the parties, the Husband sacrificed his professional career and employment and stayed home and became the primary care provider for the children. In addition[,] husband also maintained the marital home consisting of 53 acres. Wife pursued her professional career and her ambition and hard work allowed the family to enjoy the financial benefits from her employment and allowed the family to enjoy their comfortable lifestyle.
>
> The court also finds that the estrangement of the parties was due to the parties growing apart resulting in Wife's leaving the marital home. The relationship terminated upon Wife's reluctance to terminate her relationship with her supervisor. The court finds that Husband is 44 and Wife 43 years of age and both parties are in good physical and mental condition. The court finds that Wife currently earns $200,000 plus commissions. As discussed in detail previously, the court finds that Wife voluntarily impoverished herself by leaving her employ-

ment with Barclays Bank approximately one month prior to the original hearing date when her 2010 income was $714,000. The court finds that Wife's termination from her employment with Barclays was voluntary. The [c]ourt also finds that even if Wife's incentives and bonuses were reduced or eliminated, Wife could earn a salary of at least $350,000 annually. This potential income, and Wife's current income, provides her with the ability to meet her needs while also meeting the needs of the Husband and the parties' children[.]

The court further finds that the parties agreed that it was in the children's best interest that Husband stay home and be the primary care provider for their children. Both parties agree their children have benefit[t]ed from this agreement. Subsequent to the parties' separation they also entered into a Consent [*pendente lite*] Order whereby Wife continued to pay all household obligations and child support. The court also finds the financial needs and resources of the parties are quite different. Husband has very little resources while Wife has substantial resources, both economic and her many contacts through years of employment. As noted above, with the exception of the mortgage against the marital home the parties are debt free. Husband has continuing tuition obligations for his education. The court further finds that even after Husband completes his education and has had time establishing himself in the workforce that his potential income and standard of living will be unconscionabl[y] disparate to that of the Wife.

Based upon the [c]ourt's consideration of the evidence and the above findings the [c]ourt awards indefinite alimony to the Husband in the amount of $4,000.00 per month.

(Footnote omitted).

B. Parties' Contentions

Sabrina argues that the court erroneously awarded indefinite alimony to Stephen. She contends that the court found an unconscionable disparity in the parties' standards of living without projecting a time when Stephen would reach maximum progress, attributing income to him at that time, or assessing *how* the parties' incomes or standards of living would be unconscionably disparate. She also argues that the court never made a determination of whether Stephen could be wholly or partly self-supporting and did not consider Stephen's income and assets, his monetary award, right to use and possession of the marital home, and right to receive retirement benefits. Further, she asserts that the court made factual errors in finding that Stephen had been out of the workforce for thirteen years, that Stephen maintained fifty-three acres of the farm, and that Stephen had continuing tuition obligations. Finally, Sabrina contends that even if the court had made the above findings, this Court should still reverse because Stephen did not meet his burden of proof to produce evidence of an unconscionable disparity.

Stephen contends that the circuit court set forth all the factors that must be considered in awarding alimony and indicated its consideration of each of the factors. Relying on *Bangs v. Bangs*, 59 Md. App. 350, 370 (1984), Stephen argues that the court did not need to articulate every step in its thought process. As to the potential income, he argues that it can be inferred that the circuit court did not believe he could earn more than his highest past income: $40,000.[3] He also argues that although the court did not indicate that it considered the monetary award, it was not required to do so. As to unconscionable disparity, Stephen contends that the record supports a finding of unconscionable disparity because if he earned $40,000 a year, and $48,000 of alimony is subtracted from Sabrina's income and added to Stephen's, he would have an income of $88,000 and Sabrina would have $302,000. Accordingly, Stephen asserts that his income would only be thirty-nine percent of Sabrina's, thus creating an unconscionable disparity in their standards of living. Stephen also points out that he allowed Sabrina to dedicate herself to work because he stayed home with the children.

C. Standard of Review

We review the circuit court's decision to award alimony under an abuse of discretion standard. *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143 (1999). An unconscionable disparity between standards of living is a factual finding, reviewed under a clearly erroneous standard. *Id.* 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).

D. Analysis

Maryland law favors rehabilitative alimony over indefinite alimony to provide each party with an incen-

tive to become fully self-supporting. *Turner v. Turner*, 147 Md. App. 350, 387 (2002). Indeed, "the purpose of alimony is not to provide a lifetime pension, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently." *Tracey v. Tracey*, 328 Md. 380, 391 (1992). The dependant spouse is not necessarily entitled to maintain the accustomed standard of living. *Id.* In fact, the General Assembly rejected this concept when it passed the 1980 Alimony Act. *Francz v. Francz*, 157 Md. App. 676, 690-91 (2004). The dependant spouse is required to become self-supporting, if able, "even though that might result in a reduced standard of living." *Tracey*, 328 Md. at 391 (Citation omitted).

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 exercise its discretion to award indefinite alimony based on the second situation — 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). And, "[t]he spouse seeking indefinite alimony bears the burden of proof as to the existence of the prerequisites to entitlement to such an award." *Francz*, 157 Md. App. at 692 (Citation omitted).

In making the above findings, the court starts with a mathematical comparison of incomes. *Id.* at 702. In fact, "[t]here are several cases in which Maryland appellate courts found unconscionable disparity based on the relative percentage the dependant spouse's income was of the other spouse's income." *Solomon v. Solomon*, 383 Md. 176, 198 (2004) (collecting cases). For example, in *Solomon*, a court appointed expert found that the recipient spouse, although she had not yet obtained employment, had an earning capacity between $25,000 and $28,000. *Id.* at 183. The supporting spouse's salary was $1,050,000. *Id.* Comparing the two incomes, the Court affirmed a finding of an unconscionable disparity in the standards of living. *Id.* at 200-01.

A comparison of projected incomes is necessary. In *Allison v. Allison*, 160 Md. App. 331, 343-44 (2004), the circuit court did not make a finding of projected income for the recipient spouse and this Court remanded the case, directing the circuit court to project what future income the recipient spouse would earn. However, this analysis of income is not the only consideration. To award indefinite alimony, the court must go beyond mere incomes, and compare the post-divorce standards of living. It must determine if the standards would be unconscionably disparate absent an award of indefinite alimony. *Lee v. Andochick*, 182 Md. App. 268, 287-88 (2008). Indeed, it is error to grant an award of indefinite alimony "without explicitly discussing the disparity issue." *Hart v. Hart*, 169 Md. App. 151, 170 (2006). In *Hart*, we vacated an award of indefinite alimony because the court failed to discuss the "respective standards of living would be after [the recipient spouse] obtain[ed] a certified teaching position[.]" *Id.*

Lee demonstrates an example of when a large difference in income did not translate to an unconscionable disparity in standards of living. In that case, the circuit court awarded indefinite alimony when the requesting spouse earned $267,000 a year and her former husband would earn $1,760,282 in the upcoming year. 182 Md. App. at 272. The requesting spouse submitted a financial statement showing that her actual expenses were $27,709.50 for her and her children and her aspirational budget was $39,528. *Id* at 288. However, the recipient spouse did not testify that anything would be missing from her prior lifestyle without indefinite alimony. *Id.* at 289. Instead, the evidence showed that her former husband's current lifestyle was not superior to his former wife's aspirational budget. *Id.* As a result, this Court reversed the award of indefinite alimony because the requesting spouse could not show that an unconscionable disparity in standards of living would exist without indefinite alimony. *Id.* at 288-90.

Turning to the present case, we agree with Sabrina that 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 thirteen (13) years, it will be difficult for Husband to be wholly self-supporting." In the same vein, 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.

Although Stephen contends that the evidence supports the conclusion that he would not make more than $40,000, we disagree. We cannot determine from the record what the court found Stephen's current or

future income to be. As for current income, his woodworking business made $17,702 in 2009. It is unclear what he made in 2010 because one document Stephen submitted into evidence says $0, another says he makes $1,317.96 a year, and the court found his current income was $18,000. As for future income, no expert testified as to his earning potential. The evidence presented on future income was that before he opened his own business, Stephen had made $45,000 as a financial analyst. He was offered more money (he testified about $50,000) but decided to move to Atlanta with Sabrina. Subsequently, he started his own business. Additionally, he was close to obtaining a master's degree in theology (which he subsequently obtained).

Without a finding of future income, the circuit court did not, and we cannot, compare incomes like the courts in *Turner* and *Solomon* did. Instead, 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. Like the court in *Allison*, where the court made no finding of future income, 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. The court merely stated, "even after Husband completes his education and has had time establishing himself in the workforce . . . his potential income and standard of living will be unconscionably disparate to that of the Wife."

Stephen contends that the record supports such a finding because if he earned $40,000 a year, and $48,000 of alimony is subtracted from Sabrina's income and added to Stephen's, he would have an income of $88,000 and Sabrina would have $302,000. Accordingly, Stephen argues, his income would only be thirty nine-percent of Sabrina's, thus creating an unconscionable disparity in the standards of living. We cannot agree because, as noted above, Stephen's maximum future income is not necessarily $40,000. Moreover, a comparison of incomes alone is not enough to find an unconscionable disparity; the court must compare standards of living without the alimony award. Indeed, in *Lee*, the requesting party's income was only fifteen percent of her former spouse's income, but we reversed the award of indefinite alimony because there was no evidence of an unconscionable disparity between standards of living. *See* 182 Md. App. at 285, 288-90. Here, no evidence was presented regarding Stephen's standard of living without alimony, and no evidence of Sabrina's standard of living was presented. The only testimony provided regarding standard of living was Stephen's meager testimony regarding his *pendente lite* alimony. He said that with the alimony, he and the children went out to eat less, and that he could not work on fixing the driveway or the septic tank.

Without any evidence that would allow us to compare standards of living absent an award of alimony, we cannot compare standards of living like the court did in *Lee*. Accordingly, we cannot determine if the court was clearly erroneous in its finding that an unconscionable disparity would exist after Stephen became self-supporting. Thus, like this Court did in *Hart* when the circuit court failed to make findings regarding the standards of living after the recipient spouse obtained a teaching certificate, we must remand for the court to discuss respective standards of living after Stephen obtains maximum progress.

Sabrina argues with much force that we must find that 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.[4]

The court should compare Stephen's *projected* future income with Sabrina's income, and future standards of living to determine whether an unconscionable disparity will exist between the parties. The disparity in standards of living must be "gross, so as to offend the conscience of the court if not ameliorated." *Whittington v. Whittington*, 172 Md. App. 317, 340 (2007). In addition, "a significant disparity in the parties' standards of living will not warrant an award of indefinite alimony[.]" *Francz*, 157 Md. App. at 703-04 (Citation omitted). Indeed, even if Stephen's standard of living is reduced, that does not necessarily mean his standard of living is unconscionably disparate to that of Sabrina. Instead, the court must apply equitable considerations on a case-by-case basis to determine whether the difference in the standards of living is unconscionable. *Id.* at 704. In engaging in this analysis, "[h]ow the parties have come to occupy their respective standards of living, including whether they have made reasonable efforts to achieve financial self-sufficiency, is such a consideration." *Id.* Additionally, with regard to Sabrina's contention that the court failed

to consider Stephen's monetary award and grant and use of the marital property, the court should take these factors into account when considering Stephen's income and standard of living.[5]

We also address Sabrina's remaining challenges to the court's findings. She argues that the court did not consider the parties' agreement that Stephen would make a financial contribution to the family. She also contends that the court erroneously found that Stephen had been out of the workforce for 13 years, that Stephen was responsible for taking care of 53 acres and the couples' two children, and that Stephen had continuing tuition obligations. We review these factual findings under the clearly erroneous standard, and "[a] finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Painter v. Painter*, 113 Md. App. 504, 517 (1997).

As to the agreement, although some witnesses may have testified that Stephen was to make a financial contribution, it was unclear what that meant to the parties. Additionally, there was evidence in the record that the parties agreed Stephen would stay home with the children. No formal agreement existed either way. As such, the circuit court was free to disregard this testimony and was not required to spell out its reasons for not placing more emphasis on discussions that Stephen may go back to work.

Sabrina also argues that a farmer maintains most of the acres, and that a housekeeper cleans the house, does laundry, and occasionally helps with the children three days a week. Yet, the record also revealed that Stephen did maintain at least some of the acres and took care of the children more than a majority of the time. Moreover as part-owner and the adult on the scene most of the time, he was "responsible" for all 53 acres. The housekeeper also testified that Stephen cuts the grass and weeds and he has complete responsibility for the upkeep of the farm. Thus, we cannot find the circuit court's finding that Stephen was responsible for 53 acres and the children to be clearly erroneous.

Finally, Sabrina contends that the court acted as if Stephen's tuition obligations would continue in perpetuity. We cannot agree. The court determined that Stephen "has continuing obligations for his education." Because the evidence at the time supported a finding that Stephen's graduation was at least another semester away, we cannot find the court was clearly erroneous in finding Stephen had continuing tuition obligations.[6]

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

A. Circuit Court's Findings

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.
>
> Upon consideration of the factors outlined in *Durkee v. Durkee*, 144 Md. App. 161 [(2002)], the court finds that the Wife's current physical condition is good and her level of education consists of college and post college degrees. The court further finds that Wife changed her employment approximately one (1) month prior to the original divorce hearing and left the marital home in February, 2010. The [c]ourt finds, based on Wife's comments to the housekeeper, that the Wife voluntarily left the marital home and that this desertion was planned. The court also notes the evidence of infidelity on the part of the wife. The court finds that the Wife voluntarily left her employment with Barclays Bank and negotiated new employment with Careerminds with a base salary of approximately 100,00[0].00 less than her previous employment and an annual income of approximately $500,000.00 less than her total compensation in 2010. The court further finds that the Wife never left any prior employment for a job with less income. Granted, the parties were never separated before, however, Wife did not choose to leave her employment with Barclays until one (1) year after the parties' separation.
>
> From the evidence presented the [c]ourt is not convinced that Wife was in jeopardy of losing her employment. In fact no testimony was offered that anyone within Wife's department at Barclay[s] Bank lost their job after the mobile payment project folded. In view of the testimony, the [c]ourt finds that Wife did voluntarily impoverish herself by quitting her job with Barclays Bank

> and taking her job with Careerminds making a base annual salary of $200,000.00. The [c]ourt further finds that Wife could make at least $350,000.00 annually, which is slightly more than her 2010 base salary.

(Footnotes omitted).

B. Parties' Contentions

Sabrina contends that the court erred in finding she was voluntarily impoverished. She argues that she testified that she wanted to change positions because she feared losing her job as she had recently lost an important deal, the banking industry was under scrutiny, and she was working and traveling frequently to the detriment of her time with her children. She testified that her new job allowed less travel and provided her with a change in industry. Sabrina also contends that she still earns enough to provide for her children. Further, she states that she discussed changing jobs with Stephen and the two agreed that she would stay until her incentives vested in April 2011. She argues that the court ignored this evidence and placed undue emphasis on the timing of her employment change. Sabrina also asserts that the court erroneously found that she had a post-college degree when she does not. Finally, she contends that the court erred in imputing $350,000 to her because, she argues, the court based this decision on her wholly speculative testimony that she hoped to make $350,000 a year.

Stephen argues that the court did not err because it outlined the factors required in making a finding of voluntary impoverishment. Stephen contends that the trial court was free to disregard Sabrina's testimony that she was in danger of losing her job. For support, he cites the record where Sabrina testified that she received a "B" rating in 2009, but then received an "A" rating in 2010. And she admitted that her supervisor was planning to nominate her for Barclays' Woman of the Year in 2010. As for the amount of income imputed to Sabrina, Stephen contends that it was not an abuse of discretion since it was less than half of her income from 2010.

C. Standard of Review

A circuit court's determination of voluntary impoverishment is reviewed under a clearly erroneous standard. *Long v. Long*, 141 Md. App. 341, 352 (2001). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Painter*, 113 Md. App. at 517. The amount of income imputed to the spouse involuntarily impoverished is reviewed under an abuse of discretion standard. *See Long*, 141 Md. App. at 352.

D. Analysis

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. If a parent is voluntarily impoverished, the court may calculate child support based on the parent's potential income. FL § 12-204(b)(1). A parent is "voluntarily impoverished whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." *Malin v. Mininberg*, 153 Md. App. 358, 395 (2003) (Citations and internal quotations omitted). Intent is the controlling factor. The intent and purpose in making a change in employment must be to lower the level of income. *Lorincz v. Lorincz*, 183 Md. App. 312, 340 (2008). "The court must then examine the reason behind that intent or purpose." *Id.* Whether the lowering of income "is for the purpose of avoiding child support or for some other purpose, such as because the parent simply has chosen a frugal lifestyle for another reason, doesn't affect that parent's obligation to the child." *Petitto v. Petitto*, 147 Md. App. 280, 312 (2002). In determining intent, the circuit court has discretion as the fact finder.

In *Moore v. Tseronis*, 106 Md. App. 275 (1995), a spouse relocated to a less affluent area with his new wife. *Id.* at 279-80. The master found that the spouse was voluntarily impoverished because he "knowingly and voluntarily elected a life-style that would make it difficult, if not impossible, to meet his support obligations." *Id.* at 280. This Court reversed, explaining that "[w]hile a parent must take into consideration his or her child support obligation when making job and location choices, such considerations should not be immobilizing." *Id.* at 283. We further stated that "it certainly does not appear that appellant was attempting to shirk his child support obligations, only that he was attempting to move to a more rural environment and to abide by his second wife's wishes . . . when he first moved to [the less affluent area] he took a job eight miles from his home . . . to work as many hours as possible at the kind of job he was trained to do." *Id*; *see also Malin*, 153 Md. App. at 402-03 (holding that the circuit court erred in finding voluntary impoverishment where the spouse left a career in medicine because of his struggle with substance abuse because, in part, "there was not a shred of evidence that [the spouse] gave up his medical career to avoid his duty of parental support . . . [and] there was never any suggestion that he relapsed or committed a crime with the intention of becoming incarcerated or otherwise impoverished.") (citation and internal quotations omitted); *Lorincz*, 183 Md. App. at 335-38, 342 (holding that the circuit court erred in making a finding of voluntary impoverishment where the spouse had decided to attend law school to obtain a higher income and provide more for her family because the spouse's intention was not to impoverish

herself: she did not make the change as a "mean-spirited tactic designed to place the Father at a disadvantage in terms of his share of child support," and she made the change in career to enhance her salary, not depress it).

When a circuit court considers the intent of a party in making a decision to voluntarily impoverish himself or herself, we will rarely find it clearly erroneous. For example, in *Gordon v. Gordon*, 174 Md. App. 583, 646 (2007), we determined that a court's finding that a spouse had not voluntarily impoverished herself was not clearly erroneous. There, the spouse had left a job where she was expected to earn $120,000 the following year, for a job making $25,000 plus commission right before the parties separated. *Id.* at 643. She testified that she had been reprimanded for poor performance and chose to look for a job with more flexibility closer to home. *Id.* In our review of the record, we determined that the circuit court had considered the evidence and the voluntary impoverishment factors. *Id.* at 645. The court made a finding that the spouse made legitimate choices under the circumstances. *Id.* at 646. It determined that she did not leave her job for the purpose of the litigation. *Id.* Additionally, the court found "it may be that there were other motivations other than the best career move, or the best monetary career move, for her, but I don't think [that] amounts to voluntary impoverishment. . . ." *Id.* (Internal quotation marks omitted).

In light of these authorities, we turn to the decision in this case. The court's opinion suggested that Sabrina left her job to reduce her income: it said she did not leave her job for a year after the parties separated, but then left only a month before the divorce hearing was scheduled, and she had never left a job for a lesser paying one. We do not agree with Sabrina's argument that the court only looked at whether Sabrina was in jeopardy of losing her employment. Sabrina testified that she left her job because she was afraid of being fired. The court merely rejected this testimony because other evidence suggested she was not in danger of losing her job.

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. Unlike *Moore, Malin*, and *Lorincz*, where the circuit courts found no evidence that the spouse was trying to reduce income, here there was testimony that suggested Sabrina quit her job specifically to reduce her income for the divorce proceedings. Sabrina testified that she left her job because she was afraid of being fired, she wanted more flexibility to be around her children, and she wanted out of the financial sector. But she also testified that she received a top rating in 2010. As to flexibility, she testified that once she moved to a new department in 2009, she did not travel as much as she did before. Further, she admitted on cross examination that while at her new job, she went to an investor meeting on the weekend instead of spending time with her children. Stephen confirmed this with his testimony that even at her new job Sabrina still had meetings on weekends.

Stephen also testified "it was kind of suspicious that [ ] we're in the middle of [ ] divorce proceedings, and [ ] she would take another position . . . it was quite a different amount of income. It kind of struck me as maybe she was trying to avoid something." He also testified and Sabrina confirmed that the individuals investing in Sabrina's new company were the founding members of an old bank where Sabrina had worked. Stephen went on to say that Sabrina had opportunities to stay in the same field and did not think Sabrina would leave her job if she did not think she could make similar money. With this evidence in the record, we find, like the court in *Gordon*, that the court considered intent in its finding of voluntary impoverishment, at least some evidence supports its finding of intent, and therefore its finding was not clearly erroneous.

Turning to Sabrina's contention that the court erroneously found that she had a post-college degree, we conclude that the error was harmless. We will not reverse a judgment when the error was harmless. *Flores v. Bell*, 398 Md. 27, 33 (2007). And, in a civil case, the appellant must show prejudice in addition to error. *Harris v. Harris*, 310 Md. 310, 319 (1987). Prejudice is error that influenced the outcome of the case. *State Rds. Comm'n. v. Kuenne*, 240 Md. 232, 235 (1965). Here, Sabrina has not explained how the court's error in finding that she had a "post-college degree" influenced the outcome of the case. Regardless, we see no prejudice. The court was more focused on past work experience and income than degrees when determining Sabrina's potential income. Moreover, there was testimony that Sabrina did attend some post-college classes.

As to the amount of potential income, Sabrina contends that the court erred in imputing $350,000 to her because, she argues, the court based this decision on her wholly speculative testimony that she hoped to make that much a year. Potential income under FL § 12-201(1) is "income attributed to a parent determined by the parent's employment potential and probable earning level based on, but not limited to, recent work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." In *Malin*, we stated that potential income does involve some degree of speculation, but as long as "the amount calculated is realistic, and the figure is not so unreasonably high or low as to amount to abuse of dis-

cretion, the court's ruling may not be disturbed." 153 Md. App. at 407 (Internal citation and quotation marks omitted).

Here, $350,000 is not so unreasonably high as to be abuse of discretion: it is around $400,000 less than Sabrina made in 2010, and $150,000 more then her base salary without commission. In addition, the court explained that it calculated this figure by eliminating Sabrina's incentives and bonuses at Barclays. For these reasons, we affirm the circuit court's finding that Sabrina was voluntarily impoverished and the court's calculation of her potential income.

III. Stephen's Voluntary Impoverishment

Sabrina argues that the circuit court erred in not finding that Stephen was voluntarily impoverished. She argues that the circuit court should have imputed more than $18,000 to Stephen because the evidence revealed he could earn more. She further contends that the record does not support the $18,000 imputed to Stephen. Stephen argued that Sabrina did not preserve this issue for our review. He also argues that he was not voluntarily impoverished since he was looking for a job, and the parties had decided he would stay home with the children.

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.

JUDGMENT AFFIRMED IN PART AND VACATED IN PART; CASE REMANDED TO THE CIRCUIT COURT FOR CECIL COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE EVENLY DIVIDED BETWEEN THE PARTIES.

FOOTNOTES

1. At the present time, Stephen has his master's degree.

2. The issue of whether Stephen had voluntarily impoverished himself was mentioned at the hearing. However, the court made no finding on the question.

3. Actually, Stephen testified that his highest income was $45,000 at Pep Boys

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.

5. A court that makes a rehabilitative alimony award can later extend the award to indefinite alimony if the recipient spouse shows a change in circumstances that would lead to a harsh and inequitable result without an extension. *See generally Blaine v. Blaine*, 336 Md. 49 (1994).

6. On remand, this issue may be affected by Stephen's graduation.

Cite as 3 MFLM Supp. 151 (2013)

Divorce: attorneys' fees: justification

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

No. 1300, September Term, 2011

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

Opinion by Wright, J.

Filed: February 7, 2013. Unreported.

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 of the Circuit Court of Howard County entered July 21, 2011, awarding appellee, Kim Michelle Sterrett-Day ("Wife"), attorneys' fees and suit costs in the amount of $20,000.00 in her divorce action against appellant, Robert Eugene Day, Jr. ("Husband"). On April 13, 2011, the circuit court held a hearing regarding Wife's motion for attorneys' fees, but stayed ruling on the motion pending Wife's submission of documentation justifying the amount of the award requested. On May 12, 2011, Wife submitted documentation and the court granted her motion by an 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, as was indicated during the April 13, 2011 hearing. On July 15, 2011, the circuit court granted Husband's motion to vacate the May 18, 2011 order but then issued a new order the same day awarding Wife $20,000.00. This timely appeal followed.

Husband presented three questions for our review, which we have consolidated and reworded as follows:[1]

> Did the trial court err or abuse its discretion in its July 15, 2011 Order awarding attorneys' fees to Wife pursuant to Maryland Code (1984, 2006 Repl. Vol), Family Law Article § 7-107?

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

For the reasons discussed below, we find no error or abuse of discretion and affirm the circuit court's judgment.

Facts and Procedural History

The parties were married on December 30, 1990. Three children were born of the marriage: Ryan, born in 1992; Rachel, born in 1996; and Andrew, born in 1998. All three children attended private school. Wife worked part-time as a software engineer, earning approximately $60,000.00 per year, solely in order to pay for the children's private school tuition. The parties agree that the "cost of the children's private education has been a source of tension and conflict throughout the parties' marriage." Husband worked full-time for Smith Micro, a California-based software company, earning in excess of $200,000.00.[2]

On August 26, 2010, the parties separated and Wife moved out of the marital home. On October 20, 2010, Wife filed a Complaint for Limited Divorce, which included a request for both *pendente lite* and permanent alimony as well as attorneys' fees and suit costs. The parties' two minor children initially lived with Wife, but Rachel returned to the marital home to live with Husband three months after the parties separated. After Rachel moved back into the marital home and before a *pendente lite* agreement for child and marital support was reached on April 13, 2011, Husband paid $530.00 per month in child support to Wife.

On April 13, 2011, the circuit court held a hearing on Wife's Motion for Suit Money, Counsel Fees and Costs ("Wife's Motion"). Wife's counsel directed the court to the contentious relationship between the parties during the marriage and the beginning of the divorce proceeding; to Husband's W-2 statement; the lack of child support paid during the proceedings; numerous unsuccessful attempts of the parties to settle; the parties' financial statements; a fee affidavit; and other documentation. Husband's counsel drew the court's attention to disparities in Wife's financial statements; payments made by Husband to Wife since the beginning of divorce proceedings; and Wife's ability to pay her attorneys. After hearing argument from both parties, and summarizing each side's arguments based on the hearing and prior submissions in the

record, the court explained that pursuant to Maryland Code (1984, 2006 Repl. Vol.), § 7-107 of the Family Law Article ("FL"):

> [B]efore ordering any payment . . . the Court has to consider the financial resources and needs of the parties, and whether they are significant — or substantial, I guess the wording is, justification for prosecuting or defending the litigation; and that upon a finding by the Court that there was an absence of substantial justification of a party for prosecuting or defending, and absent a finding of good cause to the contrary, the Court shall award to the other party reasonable and necessary expense.
>
> * * *
>
> The record indicates the [Husband] earns more than $300,000[.00] a year, and that the [Wife] earns approximately $71,600[.00] a year.
>
> Additionally, [Husband] claims that he has been maintaining the children's private education. There is no indication that either party lacks substantial justification. Both parties, I think, do have substantial justification for prosecuting and defending the action.
>
> The Court finds that the [Wife] certainly has assets. The issue is, can they be liquidated. You know, generally speaking, regardless what the numbers are, regardless whether somebody makes $100,000[.00] or $300,000[.00], 750 [sic] plus bonuses, whatever, and obviously in Howard County we see the entire realm, and the issue is whether or not the other party is going to be effectively precluded from prosecuting or defending his or her action.
>
> We have cases all the time where one or both parties, whether it's the man or the woman, making six or seven-figure income, but not all of it is necessarily liquid. So the issue then becomes, do the parties borrow money, or do the parties just wait till the end of the litigation to ante up as it were, and what the [Wife] is asking for is $20,000[.00] and $5,000[.00] for costs. That figure, in and of itself is certainly not extraordinary or startling, but it's just not supported. I don't have anything in the record to say why she needs that particular amount of money either for fees or in terms of what the costs are.
>
> And in fact, today it's put forth that there may be experts that were contemplated to be called, but aren't going to be called. So I don't know what the $5,000[.00] costs or expenses are.
>
> So I will allow you [Wife] to augment the motion. I'll give you thirty days in which to do it. But, at this time, I simply can't accede to your request as to the amount. It's not an unreasonable request; it's just that I don't have any basis as to the number that you're asking for.

The circuit court found that Wife was eligible for relief but required Wife to submit additional documentation justifying the requested amount of relief. The circuit court stayed its ruling on Wife's Motion and gave Wife thirty days to provide documentation substantiating the amount requested in Wife's Motion. The circuit court also explained that it would give Husband "a few days after to respond to that. . . . And then the Court will make its determination."

On May 12, 2011, Wife provided the circuit court with a Fee Summary Chart, a Projected Fee Summary Chart, and an invoice for fees incurred by Wife between April 1, 2011, and May 3, 2011. Six days later, on May 18, 2011, before receiving Husband's response, the circuit court entered an Order granting Wife's Motion and ordering Husband to pay $20,000.00. The Order explained that Wife had supplied documentation demonstrating she had incurred fees totaling $12,420.00 between April 1 and May 3, 2011, and estimating that the "total cost of a settlement conference, preparation for a merits trial, and a two-day merits trial would be $17,850.00." The court noted that combined, Wife's documentation amounted to $10,270.00 more than was requested in Wife's Motion.

On May 27, 2011, Husband filed a Motion to Vacate, Alter or Amend Order, or in the Alternative, Motion for Reconsideration of Court Order Entered on May 18, 2011 ("Husband's Motion"), as well as a Response and Opposition to Fee Summary Chart and Projected Fee Summary Chart ("Husband's Response"). Husband's Response included a "Chart of Payments/Funds Given to or Taken by [Wife] from August 2010 through March 2011 and Verification" as an attachment to rebut Wife's allegation that Husband had "cut her off financially." This attachment detailed

$34,531.15 that Husband claimed to have paid Wife.

On July 15, 2011, the circuit court issued an order granting Husband's Motion, stating:

> After an April 13, 2011 hearing on, *inter alia*, [Wife's] Motion for Suit Money, Counsel Fees and Costs (D.E. #29,000), the Court determined that [Wife] was entitled to relief. However, the Court was not satisfied that [Wife] had provided sufficient documentation for her contentions to the amount requested. In that vein, the Court stayed its ruling on [Wife's] Motion and permitted [Wife] to file supplemental information concerning the projected amount of fees.
>
> * * *
>
> [Husband] is correct that, per the Court's explanation, the Court's determination of the amount of counsel fees should have been postponed until after having received a response from [Husband]. However, now that the Court has received said response, it may properly reconsider the issue. The Court's decision with respect to [Husband's Response] will be addressed in a separate Order of even date.

In a separate Order dated July 15, 2011, and entered July 21, 2011, the circuit court denied Husband's Response and addressed his argument that FL § 7-107 "does not permit the Court to 'award a blanket amount of projected attorneys' fees." The circuit court stated:

> The language of § 7-107 does not support Defendant's argument. Section 7-107(b) expressly provides that the Court may order a party to pay the other reasonable and necessary counsel fees and suit costs "[a]t any point in the proceeding." Whenever the Court makes an award of interim counsel fees and suit costs, it must necessarily estimate what the reasonable and necessary expenses will be *in futuro*. The Court must find that the fees and costs are "reasonable and necessary," but the Court is not barred from ordering an award prior to the fees having been incurred.

The court denied Wife's request for expert fees but awarded Wife $20,000.00 "for interim suit money and attorneys' fees."

Discussion

"The standard of review for the award of counsel fees and costs in a domestic case is that of whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002) (citations omitted); *see also Gillespie v. Gillespie*, 206 Md. App. 146, 176 (2012); *Meyr v. Meyr,* 195 Md. App. 524, 552 (2010) ("award of counsel fees is reviewed under the abuse of discretion standard"); *Frankel v. Frankel*, 165 Md. App. 553, 590 (2005); *Ledvinka v. Ledvinka*, 154 Md. App. 420, 432 (2003); *Lemley v. Lemley*, 109 Md. App. 620, 633 (1996). Thus, "[a]n award of attorneys' fees will not be reversed unless a court's discretion was exercised arbitrarily or the judgment was clearly wrong." *Petrini v. Petrini*, 336 Md. 453, 468 (1994) (citations omitted).

Husband argues that the circuit court failed to follow the requirements of 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 prior to issuing its award," and only considered the arguments made by counsel during the April 13, 2011 hearing. Further, Husband contends that he has "been systematically denied an opportunity to effectively challenge the Court's decision."

Wife responds that the circuit court "thoroughly and deliberately reviewed the factors that it considered before reaching its conclusion," which includes the statutory factors found in FL § 7-107 and applicable case law. Wife argues that the court's "detailed summation of the parties' arguments leaves no question that the trial court considered both the financial resources and needs of both parties before reaching its decision." According to Wife, the court explained how it determined that substantial justification existed for prosecuting or defending the proceeding when it highlighted major issues between the parties in its ruling. Wife avers that the court's ruling on April 13, 2011, demonstrates that the court was satisfied that Wife had "met the threshold considerations under § 7-107(c), but that the trial court required a basis as to the necessity of Appellee's request [for fees and costs]." Wife argues that Husband did not preserve the issue of a lack of factual predicate for awarding attorneys' fees for appellate review by failing to make an objection during the court's ruling on April 13, 2011. Further, Wife contends that Husband's Response failed to challenge that her request was necessary and instead reiterated arguments that the court had rejected during the April 13, 2011 hearing.

In rebuttal, Husband argues that Wife's demand "failed to define or explain the services rendered or

associated with the request for an award of counsel fees" and that such "omission" meant that the court could not assess the "propriety of the award," resulting in the court abusing its discretion. Husband reiterates that the court did not "entertain[ ] the necessary examination of [Wife's] finances." Husband avers that the court's recitation of "the position of the parties" did not constitute the requisite fact-finding under FL § 7-107. Husband asserts that he "raised lengthy objections" to Wife's request, including a lack of evidence before the court, in his Response and therefore preserved the issue for appellate review.

It is well settled that "[t]he exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly." *Stern v. Stern*, 58 Md. App. 280, 300-01 (1984) (quoting *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981)). 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 that 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.

FL § 7-107 states:

> a) "*Reasonable and necessary expense" defined*. — In this section, "reasonable and necessary expense" includes:
>
> (1) suit money;
>
> (2) counsel fees; and
>
> (3) costs.
>
> (b) *Award authorized*. — At any point in a proceeding under this title, the court **may** order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.
>
> (c) *Considerations by court*. — Before ordering the payment, the court shall consider:
>
> (1) the financial resources and financial needs of both parties; and
>
> (2) whether there was substantial justification for prosecuting or defending the proceeding.
>
> *(d) Lack of substantial justification and good cause.* — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party the reasonable and necessary expense of prosecuting or defending the proceeding.
>
> (e) *Reimbursement*. — The court may award reimbursement for any reasonable and necessary expense that has previously been paid.
>
> (f) *Counsel fees*. — As to any amount awarded for counsel fees, the court may:
>
> (1) order that the amount awarded be paid directly to the lawyer; and
>
> (2) enter judgment in favor of the lawyer.

(Emphasis added).

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[.]" The discretionary term "may" in the above cited statute is unambiguous. Before exercising its discretion, the court is then required to consider the "financial resources and financial needs of both parties" and whether there was "substantial justification." 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.

This Court had previously stated that "[o]nce substantial justification is found, the amount [of an award] is left to the discretion of the chancellor." *Reese v. Huebschman*, 50 Md. App. 709, 715 (1982). We disagree with Husband that the trial court lacked a basis for its finding of substantial justification. The court was familiar with the litigation history and discovery disputes between the parties. The record reflects that the Husband's Ex Parte Complaint for Custody contained the case number for the divorce action, contradicting Husband's assertion that he was unaware of Wife's Complaint for Limited Divorce at the time he filed it. The record demonstrates that the parties engaged in continuous discovery disputes, with Husband failing to adequately respond to Wife's discovery requests and allegedly filing "exceptions to interrogatories,"[3] resulting in two motions to compel filed by Wife. The trial

court did not err or abuse its discretion in finding that Wife had substantial justification.

Husband's reliance on *Davis v. Petito*, 425 Md. 191 (2012) is misplaced. *Davis* states that "[a] judge, after finding substantial justification, then must proceed to review the reasonableness of the attorneys' fees, and the financial status and needs of each party before ordering an award[.]" *Id*. at 204. This is consistent with our reading of the statute. Moreover, *Davis* stands for the proposition that *pro bono* counsel services cannot be valued at zero when evaluating a party's needs and financial situation and that the cost of services used is not a factor in whether that party has substantial justification in pursuing an action. *Id*. at 201-02. Such is not the case before us.

As Husband correctly points out, *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. While Husband claimed to make less than $300,000.00 per year in his financial statements and affidavit included with his Ex Parte Complaint for Custody, his earnings statement dated December 23, 2010, reveals that he was paid $140,089.64 in net salary, $104,466.18 in restricted stock, $91,898.00 in commission, $1875.00 in bonus, and $40,783.00 in tax gross-up for that year to date. Husband's earning statement dated February 10, 2011, indicated that he was paid $12,246.34 in net salary, $16,915.00 in commission, $25,800.85 in restricted stock, and $10,072.68 in tax gross-up for that year to date. Wife, however, made only approximately $70,000.00 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.[4]

After moving out of the marital home, Wife continued to pay for the tuition and daily needs of at least one minor child in addition to incurring the new expenses of a residence. Husband, on the other hand, after paying a portion of Rachel's 2010 school year tuition, enrolled her in public school and thus reduced his financial obligations. The circuit court was provided with Husband's records in support of his argument that since their separation, he has paid over $34,000.00 to Wife. However, the circuit court was permitted to weigh this evidence against Wife's assertions that Husband's contributions were for the children and the court was allowed to compare the respective obligations of each party.

Wife is correct that "[t]he trial court does not have to recite any 'magical' words so long as its opinion, however phrased, does that which the statute [ ] requires." *Collins v. Collins*, 144 Md. App. 395, 447 (2002) (citation omitted); *cf Gillespie*, 206 Md. App. at 178-79 (finding an abuse of discretion where the record contained "no indication that the court expressly considered any of the factors" despite having received "significant information regarding the financial status of the parties"). On April 13, 2011, the circuit court expressly stated that it "reviewed the financial statements, has in fact reviewed the entire file" and then 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 the reasonableness of Wife's attorneys' fees. In *Collins*, the trial court made no specific findings and this Court remanded for "some express discussion regarding the reasonableness of the fees." *Id*. at 449; *see also Petrini*, 336 Md. at 467 (attorneys' fees "must be reasonable, taking into account such factors as labor, skill, time and benefit afforded to the client [by the attorney], as well as the financial resources and needs of each party"). In the case *sub judice*, the trial court explained that it did not find the fees request unreasonable but merely wanted a more detailed explanation of them before making a ruling.

The record indicates that 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) (finding no abuse of discretion when the trial court stated only that it had considered the requisite statutory provisions).

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 not have relied solely on the invoices submitted by counsel and or the responsive pleadings of the parties, but instead should conduct its own independent and thorough examination of the request to ensure that an appropriate award, if ordered was legally and factually sound." (Emphasis omitted). Husband argues that "the standard for this review 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. *Id*. at 105. Husband fails to articulate how *Heger* supports his argument, and it is unclear what Husband means by "its own independent and thorough examination" or on what evidence Husband believes the court should have relied. We are unable to discern how *Heger* requires a court to look outside of evidence in the record in its consideration of the FL § 7-107 factors, if that is indeed what Husband suggests. Moreover, if Husband wanted the circuit court to independently assess the reasonableness of Wife's attorneys' fees, it appears that the circuit 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." Accordingly, we find no error.

Lastly, Husband asserts that the trial court intended to give him an opportunity to respond to Wife's additional documentation so that he could "present evidence and offer testimony concerning his financial resources, ability to pay and question whether the request was justified." We are unsure what Husband is challenging — Wife produced documentary evidence and Husband was allowed to do the same and to rebut Wife's documentation. In fact, Husband admits that the trial court "reviewed the financial statements of the parties." Husband argues that the court's statement that it "fully intended, to award fees once the supplemental information was received" violated his constitutional right to challenge the court's award of fees. We disagree.

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 of the fees. Husband did not object that his constitutional rights were violated. Husband was afforded the opportunity to respond to Wife's submissions substantiating the amount of her request. Due process does not guarantee a hearing for every action. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *State v. Cates*, 417 Md. 678, 699 (2011) ("It is sufficient if there is at some stage an opportunity to be heard suitable to the occasion and an opportunity for judicial review[.]") (Citations omitted). 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 circuit court's order of July 15, 2011, 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.

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

FOOTNOTES

1. Husband presented the following questions in his brief:

   I. Did the trial court abuse its discretion in its July 15, 2011 Order awarding attorneys['] fees to appellee?

   II. Did the trial court err in granting an award for suit money fees and costs [sic] without complying with the provisions of Family Law Article § 7-101?

   III. Did the trial court err when it vacated it[s] previous order then re-affirmed that decision without legal justification?

2. The exact of amount of Husband's income is disputed.

3. Wife's counsel notes that no such exceptions are found in the case history and Husband's counsel failed to respond to correspondence requesting clarification of what was meant by "exceptions."

4. Both parties claimed the marital residence and vacation home mortgages as assets and liabilities on their financial statements.

INDEX