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SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Income disparity is not enough

CSA reverses attorney fee award of $60K

By Beth Moszkowicz
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A state appellate court has granted a Baltimore man a legal victory in his ongoing divorce dispute, finding that the lower court abused its discretion in making child support calculations and made an "arbitrary and clearly wrong" decision by ordering him to pay his wife $60,000 in attorney's fees.

"It appears that the circuit court did not satisfactorily consider the financial status and needs of Jeffrey [W. Reichert]," the Court of Special Appeals held. "Certainly the [circuit] court's bald statement that Jeffrey earns 'a tremendous amount of money' compared to [his ex-wife Sarah H. Hornbeck] is insufficient."

The court, in an 87-page opinion by Judge Michele D. Hotten, also said Baltimore City Circuit Judge Videtta A. Brown should not have ordered Reichert to pay Hornbeck support on an "unrealized amount of income and a miscalculated $7,000 monetary award."

Hotten noted that when a party petitions for a monetary award, the trial court must follow a "three-step procedure."

"First, for each disputed item of property, the court must determine whether it is marital or non-marital," she explained. "Second, the court must

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PARENTAL RIGHTS

Deemed consent law passes muster, top court holds

By Steve Lash
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A man who was one day late in objecting to the proposed adoption of his son by the boy's stepfather was validly stripped of his parental rights, Maryland's highest court unanimously held.

The biological father, identified in court papers as William H., raised his objection 31 business days after receiving notice of the proposed adoption. State law sets the deadline at 30 days.

The Court of Appeals, in ruling against William H., said the 30-day limit comports with the due-process requirements of giving a parent notice and an opportunity to object to a proposed adoption.

Philip J. Sweitzer, William H.'s lawyer, criticized the opinion for favoring a rigid 30-day waiver rule over a father's fundamental right to raise his child.

"If you are going to constrain a fundamental right, you have to show a compelling governmental interest," such as protecting the child from a dangerous parent, said Sweitzer, of Philip J. Sweitzer LLC in Baltimore.

However, the top court noted that the best interest of the child, not the natural parent's right to raise the child, is a guiding principle in adoption law.

Therefore, "the state has a compelling interest in protecting the child's best interests in a disputed adoption case by establishing an effective and predictable (as much as possible) adoption process," Judge Glenn T. Harrell Jr. wrote for the court.

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Custody commission bill passes

The proposal to create a commission to study the factors involved in Maryland custody awards, and to report on ways to improve the system, has passed the General Assembly.

If signed by the governor, the custody commission bill will take effect on July 1. As we reported last month, the Commission on Child Custody and Decision Making is tasked with figuring out how to make the custody system more "uniform, fair and equitable," less prone to litigation and better able to minimize adverse affects when litigation does occur.

The commission will hold five public meetings across the state this year and report its findings and recommendations to the governor and the General Assembly by Dec. 31.

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

HB 687 passed the House of Delegates on March 19 and the Senate on April 8, the final day of the session.

Conforming to federal law

Lawmakers passed two bills designed to make Maryland's rules on CINA proceedings match federal standards and, in the process, safeguard access to federal money known as Title IV-E funding.

HB 277 and 278 were introduced at the request of the Maryland Judicial Conference. Under HB 277, CINA cases will get mandatory status hearings every six months, starting from the time of the initial CINA petition, for as long as the court has jurisdiction.

HB 278 (cross-filed as Senate Bill 265) conforms Maryland's rules to federal standards that require 10 days' written notice of all proceedings in a CINA case, and an opportunity to be heard, to the child's foster parents, pre-adoptive parents, caregivers and their attorneys. The law specifies that notice does not make the person receiving it a party to the proceeding.

Not their year

SB 503, the "separate bedrooms" bill, passed the Senate but died after an unfavorable report by the House Judiciary Committee on March 29. Under the bill, an estranged couple could have satisfied the requirement to live "separate and apart without cohabitation" by maintaining separate bedrooms within a shared home.

Along the same lines, SB 104 would have cut the required separation period in half, from one year to six months. That measure failed to make it out of committee.

A proposal to include a multi-family adjustment in the actual-income calculation for child support determinations also died in committee last month. The Senate Judicial Proceedings Committee gave an unfavorable report to SB 579, while HB 849 was withdrawn after an unfavorable report by the House Judiciary Committee.

Monthly Memo

• In a dispute over which of two wills was valid, a pre-trial ruling that denied motions to compel disclosure of the decedent's asset records, and to set aside a sum certain of the estate funds for litigation expenses, was not appealable under the collateral order doctrine, the Court of Special Appeals held. Doris Fisher had convinced the Orphans' Court that her husband's 2005 will should be probated; her stepson, Michael Fisher, appealed to the Anne Arundel County Circuit Court, claiming a 1993 will was valid. The circuit court rejected Michael's motions and he appealed. The Court of Special Appeals dismissed the appeal in an unpublished opinion on April 2. The case is CSA No. 0753, Sept. 2011 Term.

• There was only one official winner of the $338 million Powerball jackpot in late March, but three of Pedro Quezada's five children could also claim victory. On April 1, Quezada paid $30,000 to clear a warrant for unpaid child support dating back to 2009 and told New Jersey Family Court Judge Ernest Caposela that the children would live with him from now on. Caposela told Quezada that, of all the investment opportunities he would be offered, his best investment would be in his children.

• There's nothing like the real thing. A twice-married but still-looking South Carolina man may have learned that the hard way after he allegedly doctored the decree from his first divorce by adding his second wife's name and forging her signature in an attempt to deceive his current girlfriend. Arrested and charged with misdemeanor forgery, Edward Brown, 45, could get up to three years in prison and a fine if he's convicted, according to sources quoted by the ABA Journal online.

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Is the right to sibling visitation for children in foster care in jeopardy?

Rhonda H. Serrano
Guest columnist

Siblings who are separated as a result of being placed in the foster care system want to see and be a part of each other's lives. In Child In Need of Assistance cases, the lack of sibling visitation is a common problem. Maryland law, however, gives a child in foster care a mechanism by which he or she can enforce the right to sibling visitation.

The Family Law Article protects the rights of children residing in out-of-home placements to see their siblings. Md. Code Ann., Fam. Law §5-525.2. Specifically, section b(1) states, "Any siblings who are separated due to a foster care or adoptive placement may petition a court, including a juvenile court with jurisdiction over one or more of the siblings, for reasonable sibling visitation rights." Section b(2) provides the basis for the court's decision-making and grants it the authority to issue an appropriate order.

This statute clearly bestows the right to sibling visitation upon children placed in foster care or those who have been adopted out of foster care when the court finds that such visitation is in their best interest.

Recently, in the case of *In Re Victoria C.*, 208 Md.App. 87, 656 A.3d 338, (2012), however, the Maryland Court of Specials Appeals complicated the application of this right and left a plethora of questions. According to the facts presented in this case, Victoria C. lived with her father, stepmother and two younger brothers until March 2009, at which time, because of a sustained allegation of abuse against her father, she went to live with an aunt in Texas.

Upon her return to Maryland in 2010, Victoria was placed into foster care. While in care and still a minor, Victoria petitioned the circuit court in her CINA proceedings for visitation with siblings who still lived with her father. The circuit court granted supervised visitation.

During the exception process, however, Victoria turned 18 and exited foster care.

Her father and stepmother appealed the circuit court's decision. In its opinion, the Court of Special Appeals determined that because Victoria had turned 18, Family Law § 5-525.2 no longer applied. It reasoned that the standard of review to apply was that of a third party seeking visitation as set out in the case of *Koshko v. Haining*, 398 Md. 404 (2007) ("Koshko"). The Court of Appeals stated that § 5-525.2 applied only to minors still in foster care.

In Victoria's situation, since she had attained the age of 18, it determined that as an adult seeking visitation, she would have to prove either parental unfitness of her father and step mother or exceptional circumstances showing either current or future harm to her brothers if visitation with her were not allowed. The Court found that Victoria did not meet her burden and reversed the visitation order and remanded the case to the circuit court for an entry denying Victoria's petition for visitation.

> **"Of greatest concern is that the Court's decision appears to shift the burden of proving that sibling visitation should be ordered to the abused and neglected child who is in foster care due to parental unfitness.**

If left unchallenged, the impact of this decision is that Victoria will not be able to visit her siblings. This decision also creates a significant uncertainty in the future application of § 5-525.2 to sibling visitation. Of greatest concern is that the Court's decision appears to shift the burden of proving that sibling visitation should be ordered to the abused and neglected child who is in foster care due to parental unfitness.

Would the outcome have been different if Victoria had remained a minor in foster care? The direction of the Court as stated in its opinion, indicates yes. Although §5-525.2 does not state that it only applies to minor siblings, the ruling in *Victoria C.* suggests just that. The result, more than likely, would have been that the circuit court's ruling would have been upheld and Victoria would have been allowed supervised visitation with her brothers.

Would the outcome have been different if, after turning 18, Victoria would have decided to remain in the foster care system? The result in *Victoria C.* suggests not: that once a child turns 18 years of age, their right to sibling visitation is based on their ability to meet the Koshko standards. For a person who was in foster care due to parental unfitness, this seems patently unfair.

Especially in CINA cases, the bond between siblings is an important one. It is often the only tie to the family of origin that children in the foster care system are able to maintain. The *In Re Victoria C.* decision is concerning to child advocates in that it has potentially undermined the rights of siblings in foster care who were separated through no fault of their own and who want to stay connected with each other. The Court of Appeals has accepted Victoria's case for review on Petition for Certiorari, so the future of Victoria and similarly situated children in Maryland is still to be decided.

Rhonda H. Serrano is a Supervising Attorney in the Child Advocacy Unit in Baltimore City at Maryland Legal Aid.

Reichert

Continued from page 1

determine the value of all marital property …. Third, the court must decide if the division of marital property according to the title will be unfair; if so, the court may make a monetary award to rectify any inequity."

The appeals court found Brown abused her discretion in the valuation of the car, a VW Touareg, and that this resulted in an "inequitable monetary award."

Finally, the opinion faulted Brown for concluding that, because the couple shared custody of their son, they should share the right to claim the tax exemption of his dependency.

"The allocation of the tax dependency exemption may be allocated to a non-custodial parent only if it enhances the child's best interest," Hotten wrote for the appellate panel.

Based on the specific circumstances of this case, Hotten wrote, the circuit court must allocate the exemption to the parent with the highest adjusted gross income.

"However, when the circuit court does so, it must additionally consider whether any increase in after-tax spendable income should be channeled into an increase in child support payments … in order to further the best interest of the child," the opinion says.

The Court of Special Appeals did, however, affirm the award of joint physical and legal custody of the child, with tie-breaking authority, to the mother.

On that point, Brown's decision was not 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable,'" Hotten wrote.

The case was remanded to Baltimore City Circuit Court for further proceedings.

N. Evelyn Spurgin, of Hillman, Brown & Darrow P.A. in Annapolis, represented Reichert in the case, which was argued on Feb. 5 and decided March 20.

Spurgin said her client was "pleased with the decision," but declined to comment further.

Sarah Hornbeck represented herself before the Court of Special Appeals. Hornbeck said she was "somewhat surprised" by the appellate court's opinion, but said she has no plans to appeal.

"I had hoped for a different outcome, and am disappointed, especially with the court's decision regarding attorney's fees," she said.

Hornbeck acknowledged, however, that the opinion provides "guidance on the alternating tax exemption where there really wasn't guidance before in Maryland case law."

WHAT THE COURT HELD

Case: *Jeffrey W. Reichert v. Sarah H. Hornbeck*, CSA No. 0213, September Term 2012, Argued Feb. 5, 2013. Decided March 20, 2013. Opinion by Hotten, J.

Issues: Did the circuit court abuse its discretion when it ordered joint legal custody of the minor child with tie-breaking authority to the mother and when it ordered joint physical custody of the child? Did the circuit court err in its findings when it calculated the child support owed to the parties' child? Did the circuit court abuse it discretion regarding the tax exemption for the parties' child? Did the circuit court err in granting Hornbeck a $7,000 monetary award? Did the trial court abuse its discretion in awarding Hornbeck $60,000 in attorney's fees?

Holding: The court affirmed the lower court's grant of joint physical and legal custody, with tie-breaking authority to the mother. The court, however, concluded that the lower court erred in ordering the father to pay an unrealized amount of income, in ordering alternating years to the tax dependency exemption without the appropriate consideration, in the granting of a monetary award, and in ordering $60,000 in attorney's fees.

Counsel: N. Evelyn Spurgin for Reichert; Sarah Hornbeck pro se.

RecordFax #13-0320-01 (87 pages).

Consent

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"One method by which the state may create an adoption procedure consistent with a child's best interest (after providing the natural parent the opportunity to object) is by rendering the parent's untimely objection to the adoption as an irrevocable consent to the adoption, thereby enabling the adoption process to proceed in a timely and orderly manner."

Sweitzer declined to discuss whether he plans to seek review of the constitutional issue by the U.S. Supreme Court.

By contrast, the attorney for the mother and stepfather praised the Court of Appeals for recognizing the need for finality in adoption proceedings.

"It is important to tie down the rules and regulations for adoption," said Thomas F. Ellis III. "It's important to handle adoptions in a prompt and certain way. Children need stable homes."

Ellis said the mother and stepfather have endured "a long process" as the case wound its way to the Court of Appeals.

"All this time the child is living with them, but they don't know how it is going to turn out," said Ellis, of the Law Office of Thomas F. Ellis III, J.D. LLC in Annapolis. "My clients want the adoption to be final."

At issue before the high court was the scope of Section 5-3B-20 of Maryland's Family Law Article, which enables courts to enter adoption orders if "each of the prospective adoptee's living parents consents [either] in writing or … by failure to timely file notice of objection after being served with a show cause order."

Receipt rule

The Maryland Judiciary's procedural Rule 9-105 sets the time limit at 30 days. The rule also requires that all show-cause orders state that "if you do not make sure that the court receives your notice of objection on or before the stated deadline, you have agreed to a termination of your parental rights."

Harrell stated that the Family Law Article's language shows the General Assembly "intended for a late filing of notice of adoption to become a consent to that adoption arising under operation of law." The "failure to adhere to the rule's deadline constitutes a deemed consent in the context of guardianship cases and inde-

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Consent

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pendent adoption cases," Harrell added.

According to the opinion, William H. did not dispute that he missed the 30-day deadline, nor did he claim any disability or act of God prevented him from filing on time.

In addition, William H. was an attorney who "should have understood the importance of complying with court-ordered deadlines," Harrell wrote.

From April to November 2008, William H. had a romantic relationship with Moira M., as the mother is identified in court papers. That relationship resulted in the boy's birth in June 2009.

Moira married the stepfather, Jeffrey K., in October 2011.

The boy, Sean M., has lived with his mother and stepfather since November 2009, according to the high court's opinion.

The legal proceedings began on March 30, 2011, when the stepfather filed a petition to adopt Sean in Queen Anne's County Circuit Court.

William H. was personally served with a show-cause order on April 29, 2011, which gave him 30 days to enter an objection. Not counting the final Sunday and the Memorial Day holiday, the written objection was due on May 31, 2011. The circuit court received the objection on June 1, 2011, the opinion stated.

Sweitzer said William H. believed he had complied with the time limit because he mailed his response within the 30 days. The circuit court, however, held that a written objection must actually be received by the court within the 30 days to be considered, Sweitzer added.

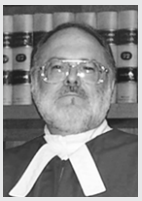
On Aug. 8, 2011, Circuit Judge J. Frederick Price granted the stepfather's motion that the adoption proceed as uncontested due to the late objection.

The intermediate Court of Special Appeals upheld Price's decision in a reported opinion on April 27, saying the late filing amounted to the father's consent to termination of his parental rights.

William H. then sought review by the Court of Appeals, focusing on his due process argument.

William H. is described in the high court's opinion as the "putative" father. However, neither Moira M. nor Sweitzer has denied that William H. is Sean's father.

Sean's birth certificate does not identify a father, according to the opinion.



HARRELL

WHAT THE COURT HELD

Case: *In re Adoption of Sean M.,* CA No. 54, Sept. Term 2012. Reported. Opinion by Harrell J. Argued Feb. 8, 2013. Filed March 22, 2013.

Issue: Does Family Law 5-3B-20, which provides that a natural parent's failure to file a timely objection to a proposed adoption constitutes consent to that adoption, satisfy the due process rights of a natural parent who objects one day late?

Holding: Yes; the law provides notice and an opportunity to be heard, and serves the state's compelling interest in protecting the child's best interests by establishing an effective and predictable (as much as possible) adoption process.

Counsel: Philip J. Sweitzer for petitioner; Thomas F. Ellis III for respondents.

RecordFax # 13-0322-22 (22 pages).

UNREPORTED CASES IN BRIEF

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

*Margaret Kemunto Campbell v. David Ruffin Campbell**

CUSTODY: POST-JUDGMENT RELIEF: LACK OF NOTICE OF HEARING

CSA No. 0494, Sept. Term 2012. Unreported. Opinion by Rodowsky, Lawrence F. (retired, specially assigned), J. Filed Feb. 19, 2013. RecordFax #13-0219-05, 19 pages. Appeal from Montgomery County. Reversed/vacated and remanded for new trial.

The circuit court abused its discretion in denying a motion for reconsideration of its custody determination, where the official notice of hearing was sent to the wrong address and was returned to the court as undeliverable, and where the actual notice — sent by regular mail to an address overseas, less than 10 days before the hearing — was legally insufficient to support a finding of a lack of due diligence.

"In this appeal in a child custody case, the ultimate issue is whether the court furnished the mother with notice of the merits hearing.

Margaret Campbell, appellant, and David Campbell, appellee, respectively seek sole physical and legal custody of their daughter, Bethany, who is now seven years old. Bethany was born in Maryland but has resided with Margaret in Nairobi, Kenya, since 2008. On March 22, 2012, the Circuit Court held a hearing and awarded sole physical and legal custody to David. Margaret did not appear at or otherwise participate in the hearing. She filed a motion for reconsideration on April 9, 2012, claiming she had no notice of the hearing. After the motion was denied on May 1, 2012, Margaret noted this appeal from the circuit court's denial of her motion for Reconsideration.

Because the record clearly shows that the court clerk sent the notice of the hearing to the wrong address, we shall vacate the judgment and remand for a new trial.

Discussion

Margaret's primary contention is that she was deprived of due process of law because she had no notice of the custody hearing. In her view, the record "makes clear" that she received no notice of the hearing from the court, David, or David's attorney, and "there is no evidence that [she] had any awareness" of the hearing.

David asserts that documents he and his attorney sent to Margaret by mail on March 8, 2012, and by e-mail on March 13, 2012 – which she

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acknowledged by return e-mail – show that she did have actual notice of the hearing date.

David also relies on Margaret's November 18, 2011 answer to his amended complaint, in which she acknowledged that custody was at issue. David takes the position, regardless of whether Margaret had actual notice, that she had a duty to keep herself informed of what was occurring in the case, and thus should be charged with constructive notice of the hearing.

In *Burdick v. Brooks*, 160 Md. App. 519, 864 A.2d 300 (2004), this Court held that a parent was denied due process by the trial court's modification of a previous custody award at a status conference when the court's letter giving notice of the conference gave no indication that a change in custody would be considered at the hearing.

Similarly, in *Van Schaik v. Van Schaik*, 90 Md. App. 725, 603 A.2d 908 (1992), we held that a trial court erred in awarding a mother sole custody at a hearing requested by the child's attorney and described in a notice generated by the court as a hearing on "visitation and child's possessions."

In the instant case, the record manifests that the clerk mailed the December 1, 2011 scheduling order to an incorrect P.O. Box, rather than to the [P.O. Box] Margaret had provided on her most recent pleading or paper. The scheduling order and other court generated papers, were returned to the court as "undeliverable." This error by the clerk prevented Margaret from having official notice of the March 22, 2012 custody hearing.

Every litigant has the obligation to keep the court informed of her current mailing address. *See Gruss v. Gruss*, 123 Md. App. 311, 320, (1998). The clerk of court has an obligation to mail written orders to litigants at "the address most recently stated in a pleading or paper filed by the attorney or party, or if not stated, to the last known address." *See id.*; *see also* Rules 1-324, 1-321. In *Estime v. King*, 196 Md. App. 296, 9 A.3d 148 (2010), we held that a clerk of court's failure to mail an order of dismissal to the most recent address properly supplied by a litigant constituted an "irregularity" allowing the court to revise an enrolled judgment.

Furthermore, Maryland law has a clear preference for making child custody and support determinations after a full evidentiary hearing. *See, e.g., Flynn v. May*, 157 Md. App. 389, 410-11, (2004); *Rolley v. Sanford*, 126 Md. App. 124, 130-32, 727 (1999)

In this case, the policy considerations weigh even more heavily in favor of allowing a full evidentiary hearing with the participation of both parents because Margaret's lack of direct, official notice of the hearing was due to an error by the clerk of court.

We hold that the circuit court abused its discretion in denying Margaret's motion for reconsideration. When presented with Margaret's explanation that she had not received notice of the hearing, the court should have reviewed the record at least to satisfy itself that the court's staff had notified Margaret in accordance with the Rules. That review would have revealed the irregularity.

The facts in the record are legally insufficient to support a discretionary denial of post judgment relief based on (1) actual notice to Margaret (2) resulting in a lack of diligence on her part. Margaret had no official notice of the hearing from the court, and some of what David argues as actual notice is not in the record.

In any event, the certificate of service attached to David's motion to compel indicates that the motion was sent by ordinary, first-class mail to Margaret at the ten digit box and to a Silver Spring address, on March 13, 2012. This was nine calendar days and seven business days before the custody hearing. This presumed actual notice is legally insufficient to support a finding of a lack of due diligence. The notice in the motion is not official. It calls on Margaret to defend her interest in Bethany's custody, nearly half-way around the world, at personal expense, within a few days. This is not an opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Burdick v. Brooks*, 160 Md. App. at 525, 864 A.2d at 303."

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

*In re: Adoption/Guardianship of Chelsea O., Savanna O., Shianne O., Katelyn O., and Kyle O.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: ABANDONMENT

CSA No. 0560, Sept. Term 2012. Unreported. Opinion by Meredith, J. Filed Feb. 12, 2013. RecordFax #13-0212-00, 14 pages. Appeal from Montgomery County. Affirmed.

Where the uncontroverted evidence indicated that the parents had effectively abandoned their five children, causing significant mental trauma to the children, the circuit court did not abuse its discretion in terminating their parental rights.

"The juvenile court conducted a termination of parental rights hearing in the cases of five children. Rose C. ("mother") and Reginald O. ("father") noted this appeal.

At the time of the TPR hearing, Chelsea was seven years old; Savanna was six; Shianne was four; Katelyn was three; and Kyle was two.

Faith Weidler, a social worker assigned for the three older children, testified that Ms.C. initially attended two of four scheduled monthly meetings, but did not attend individual therapy. Ms. Weidler also stated that Mr. O. did not attend any meetings, but was in phone contact with MCDHHS.

Appellants subsequently failed to follow through fully with respect to any of the services provided by MCDHHS, some of which were court-ordered. Appellants continued to live a transient lifestyle, and, as a consequence, MCDHHS was unable to conduct a home visit.

Appellants also fell short in visiting their children. Between October 2010 and August 2011, MCDHHS offered appellants opportunities for 46 visits, totaling approximately 122 hours. Ms. C. attended 35 of the visits, for a total of 67 hours, or 55% of the offered hours. Mr. O. attended 25 of the visits, for a total of 52 hours, or 42% of the offered hours. Appellants failed to attend any visits after June 2011. Ms. Weidler testified that appellants provided no explanation to MCDHHS for their absences or the cessation of visits.

Additionally, appellants attempted to conceal Ms. C's pregnancy (with Ryan) from MCDHHS, even though social workers offered Ms. C. prenatal care.

MCDHHS altered the children's permanency plans from reunification to adoption by a non-relative. This Court recently affirmed that change in an unpublished decision. *See In re Chelsea O., Savanna O., Shianne O., Katelyn O., and Kyle O.*, No. 2063, Sept. Term 2011 (Md. Ct. Spec. App. May 9, 2012).

At the TPR hearing, social workers testified that appellants had essentially abandoned their children. Appellants were absent for most of the trial. Appellants appeared for only 90 minutes on the first day of trial and never entered the courtroom again. The trial proceeded without them.

Social workers described the psychological trauma inflicted on the

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children, including diagnoses of post-traumatic stress disorder and reactive attachment disorder for Chelsea, Savanna, and Shianne. Social workers also described the children's changed behaviors following visits with appellants.

At the conclusion of the TPR hearing, the court declined to find that any sexual abuse had occurred. The court, however, terminated appellants' parental rights with respect to all five children, stating: "[T]he Court has before it an overwhelming amount of evidence of pain, of chaos and of an inhuman lack of caring by these parents." Ultimately, the court concluded that appellants had abandoned their children: "Abandonment by these parents… is shown in this evidence above the standard of 'clear and convincing['] to 'beyond a reasonable doubt.'" The court explained:

"…These parents have smashed the bonds that persons who observed the children and biological parents say clearly existed between them and their children. They have, themselves, severed the relationship with those children. Clearly, at least in the older children, there has been a pining for the return of their parents, who have shown a cold indifference to the serious mental health and emotional problems generated from their neglect and likely abuse. …The court finds that a continued parental relationship with the mother and father of these children would be detrimental to the best interests of those children."

DISCUSSION

The Court of Appeals has noted: "In TPR cases, a parent's right to custody of his or her children 'must be balanced against the fundamental right and responsibility of the State to protect children, who cannot protect themselves, from abuse and neglect.'" *In re Adoption/Guardianship of Amber R.*, 417 Md. 701, 709 (2011) (quoting *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 497 (2007)). Additionally, courts must balance the State's interest in protecting children against the parents' fundamental right to parent.

The General Assembly has enacted legislation to guide the courts in the determination of the best interests of the child. FL §5-323(b) provides courts with the authority to terminate parental rights in a child. The statute requires courts to examine and consider a series of factors in making this determination.

Appellants contend that the circuit court erred in terminating their parental rights.

For Chelsea and Savanna, appellants argue that terminating their parental rights does not advance the interests of the children. Appellants contend that Chelsea and Savanna face poor adoption prospects, and terminating parental rights merely turns the girls into orphans.

Appellants fail to recognize, however, that a TPR hearing is entirely separate from considerations of adoption. Accordingly, the adoption prospects for Chelsea and Savanna was not a circumstance that the court was required to give overriding consideration at the TPR stage.

Appellants contend that the circuit court erred in terminating their parental rights in the three younger children because Shianne, Katelyn, and Kyle "had never suffered actual harm in their parents' care." Appellants are correct in arguing that they did not *physically* harm Shianne, Katelyn, or Kyle. Appellants' argument, however, does not account for the children's *mental* trauma.

FL §5-323(d) lists a set of factors that courts must consider in a determination of whether or not to terminate parental rights. The circuit court explained its findings regarding each factor, including those that were inapplicable to this case. We perceive no abuse of discretion."

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

*In re: Adoption/Guardianship of Rhianna D.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: PARENTAL UNFITNESS

CSA No 0432, Sept. Term 2012. Unreported. Opinion by Salmon, James P. (retired, specially assigned). Filed March 5, 2013. RecordFax #13-0305-00, 20 pages. Appeal from Prince George's County. Affirmed.

The circuit court properly considered the statutory factors and the best interest of the child in terminating the parental rights of a mother who failed to take advantage of the services offered to her, was unaware of her child's mental and emotional needs and therapeutic challenges, and whose goal was continuation of a relationship without having the child returned to her care.

"Rhianna D. was born on February 11, 2008. Her mother, Wartonia D. ("Ms. D."), is the appellant. For most of the time since Rhianna's birth, Ms. D. has lived with her cousin, Tawanna W.

Rhianna has, since June 2009, lived with her foster parents, Mr. and Mrs. M., who want to adopt her.

The juvenile court found Rhianna to be a CINA. On November 1, 2010, Rhianna's permanency plan was changed to adoption by a non-relative. Ms. D. did not appeal the change nor did Rhianna's putative father, Timothy S.

The Department of Social Services filed a petition for guardianship with the right to consent to adoption. On March 20, 2012, the Court filed a written opinion and order in which it terminated the parental rights of both parents and granted guardianship to the Department with the right to consent to adoption.

As to Ms. D., the Court based its decision on evidence that Rhianna had been out of her mother's care or in an out-of-home placement for almost four years, during which time Ms. D. had taken no steps toward reunification. In the Court's view, allowing Rhianna to be placed with Ms. D. would present an "unacceptable risk to … [Rhianna's] future safety." The Court found that neither Ms. D. nor Mr. S. were fit parents.

Ms. D. first contends the Court erred when it found that Ms. D. could only parent with the assistance of her cousin, Ms. W. Second, according to appellant, the determination that Rhianna's best interest would not be served by being returned to her biological family because her mother relied on assistance from Ms. W. in raising her children was in error.

The trial judge wrote a seventeen page opinion and order. In a commendably thorough fashion, the Court made numerous findings of facts based on evidence presented at the eight day hearing. None of the facts are disputed by Ms. D. or by appellees, Rhianna and the Department.

As mentioned, the trial judge found Ms. D. was "not fit to have a continuing relationship with Rhianna." Appellant does not directly attack that finding. She does, however, at least implicitly, take issue with it. But her only argument is as follows:

'In the present case, Rhianna had never suffered harm in her mother's care. At the onset of the case, the Department had no concerns about the mother's ability to care for Rhianna. The Department had no intention of separating mother-and-daughter until Rhianna was removed from the Nelsons' care at six-months old. The Department did not view her as unfit to have Rhianna living in her home until the mother disclosed that she had substance abuse problems and began receiving treatment for them.

'The court erred in forever severing Rhianna's ties to her biological family. In its ruling, the court determined that the mother was not fit to

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parent alone and that she would remain that way because she "struggles to care for the child in her care and would falter if "[Ms. W.] were not available.'

Ms. D.'s partial quote from the judge's opinion is, at least potentially, misleading. When the court made the "struggles to care for" remark, it was referring to Ms. D.'s other daughter, Michelle. More important, contrary to Ms. D.'s argument, the court never found Ms. D.'s parental rights should be terminated "because she could only parent with the assistance of Ms. W." Instead, the court found it was in Rhianna's best interest to terminate parental rights because:

'Ms. D. has demonstrated an inability to "complete and participate in free treatment, parenting, and transportation services" offered by the Department, which indicated to the court that Ms. D. "is not willing to parent and/or nurture her minor child."

'Ms. D. appears to be "unaware of the mental and emotional needs or the therapeutic challenges that Rhianna might face" if custody were awarded to her.

'Since June, 2009, when Rhianna was placed in foster care, Ms. D. has never indicated a sustained interest in caring for Rhianna. Instead, her primary purpose "seems to be to have [Ms.] W." adopt the child, yet Ms. W. "has never followed up on any of the opportunities [provided to her by the Department] to do so.

'Rhianna has no emotional bonds with her biological family.'

Ms. D. does not take issue with any of those findings.

Ms. D. makes a second argument based on the erroneous assumption that the court found Rhianna could safely return to Ms. D.'s care with the assistance of Ms. W.

Ms. D. argues: "Assuming arguendo that Rhianna could only be safely returned to Ms. D.'s care with the assistance of Ms. W., such an arrangement would serve Rhianna's best interest, which must presumed to be served in the care of her biological family. From the inception of this case, Ms. D. and Ms. W. resided together and Ms. W. was always willing to have Rhianna live in her home. Ms. W. testified that she would serve as a permanent resource for Rhianna, regardless of the mother's intention. The determination that Rhianna's best interest would not be served by being returned to her biological family because her mother relied on assistance from her cousin [Ms. W.] was in error."

This argument ignores the trial judge's findings that:

Ms. D. had a "long standing alcohol dependency" that prevented her from even wanting to parent Rhianna.

Once Rhianna was in foster care, instead of attempting to regain custody of her child, Ms. D. was satisfied to watch television and "going on [her] binges."

It is true, as appellant points out, that Ms. D. and Ms. W. lived together for almost the entire time since the Department became interested in the welfare of Rhianna. It is also true that Ms. W. testified that she was willing to have Rhianna live in her home and would serve as a permanent resource. But Ms. W. had been rejected as a placement resource because Ms. W. would not cooperate with the Department. In 2011, Rhianna's caseworker tried to meet with Ms. W. to discuss a possible placement of Rhianna with her. Ms. W. canceled both meetings the social worker had scheduled. Ms. W. did not request any visits with Rhianna. Except for providing her fingerprints for criminal background check, which she passed, the evidence showed Ms. W. had done nothing whatsoever to obtain custody of Rhianna. Moreover, a termination of parental rights hearing is not a placement hearing.

In conclusion, the trial court properly considered Rhianna's best interest and the factors in section 5-323(d). Appellant has failed to show that any of the findings of facts or conclusions of law were in any way erroneous."

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

*In re: Christopher C. and James C.**

CINA: PARENTAL FITNESS: LOSS OF PRESUMPTION

CSA No. 0800, September Term 2012. Unreported. Opinion by Woodward, J. Filed Feb. 12, 2013. RecordFax # 13-0212-03, 12 pages. Appeal from Cecil County. Affirmed.

Although there were no allegations of wrongdoing by the children's mother, who claimed she was ready, willing and able to care for them after they were removed from their paternal grandmother's home, the fact that the mother had been deemed unfit four years earlier and had made no attempt at reunification deprived her of the presumption that she was a fit parent.

"Following an adjudicatory hearing, the juvenile court declared Christopher and James CINA and placed the children in the care of the Cecil County Department of Social Services ("the Department"). Joanne F., the children's biological mother, appealed.

Ms. F. presents one question for our review, which we have rephrased: Did the juvenile court abuse its discretion when it found Christopher and James to be CINA where the children's mother was not accused of any wrongdoing and represented that she was ready, willing, and able to care for the children?

The juvenile court did not abuse its discretion and accordingly, we affirm.

FACTS AND PROCEEDINGS

Christopher and James are twins, born February 2, 2008, to Ms. F. and Mr. C. The children were put into foster care in May 2008. Mr. C.'s mother, Imogene C., was granted guardianship of the children in February 2010.

On May 11, 2012, the Department determined the children were in immediate danger and removed them from Imogene C.'s care, placed them in shelter care and initiated a new CINA petition.

On June 6, 2012, the juvenile court conducted a CINA adjudication hearing. Ms. F. asserted that she was ready, willing and able to care for Christopher and James. She proffered that she attended Cecil Community College where she was a graphic design and general studies major and expected to graduate in one to two years. She held a ninety hour certificate in child development and education. She worked at school and did some extra work catering, when possible. Ms. F. highlighted that she was the sole care provider for her son, Aaron, who was in the third grade and doing well. She acknowledged that she received home and energy assistance. Ms. F. argued that, because there were no allegations of wrongdoing on her part and because she was ready, willing, and able to care for the children, the children should not be declared CINA.

Following a review of the Department's reports, proffers, and argument, Christopher and James were declared CINA and placed in the Department's care for foster care placement.

This appeal followed.

DISCUSSION

Ms. F. argues that, according to section 3-819 of the Courts and Judicial Proceedings Article, the juvenile court could not have found the children CINA because she was not accused of any wrongdoing in the

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2012 CINA petition and was able and willing to care for them. Ms. F. relies upon *In re Russell G.*, 108 Md. App. 366 (1996) in support of her position.

The Department asserts that section 3-819 does not properly apply to Ms. F. Children's counsel argues that this case is different than *In re Russell G.*, because the parent in that case had not previously been judged unfit.

Pursuant to section 3-819(e) of the Courts and Judicial Proceedings Article: If the allegations in the [CINA] petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.

The question we addressed in *In re Russell G.*, 108 Md. App. at 369, which preceded the enactment of C.J. §3-819(e), was whether a juvenile court erred in finding a child CINA where there was evidence that at least one parent was able and willing to care for him.

Ms. F.'s reliance on *In re Russell G.* is misplaced. Principally, the father in *In re Russell G.* was never accused of, nor adjudicated to be an unfit parent. Although he was noncustodial, he did have clean hands. Ms. F. does not. In 2008, a juvenile court found Ms. F. to have neglected the children due to a lack of motivation to care for the children, negative behaviors towards the children, and mental health issues. The father in *In re Russell G.* had no such issues in his past. Accordingly, *In re Russell G.* is inapposite here.

The trial court found that in May 2012, James suffered physical abuse at the hands of one of his caretakers, Mr. C., Ms. C., or Imogene C., and bore the marks of that abuse. Such findings, which are not clearly erroneous, satisfied for both children the first prong of C.J. § 3-801(f) that "[t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder[.]" Under the second prong of C.J. § 3-801 (f), the court found that neither the children's parents, Mr. C. and Ms. F., nor the guardian, Imogene C., were able "to give proper care and attention" to the children. C.J. §3-801(f)(2). Such finding, as to Mr. C. and Imogene C., is not being challenged in the instant appeal.

Ms. F., however, claims that she is ready, willing and able to care for the children. The trial court here found that Ms. F. was unable to care for the children, because she was not a custodial parent "at the time when this all occurred." Under *In re Russell G.*, 108 Md. App. at 380, the lack of legal custody cannot, standing alone, serve as a basis for finding the inability of a parent to care for a child.

The Department correctly points out that, because of her proven past neglect of the children, Ms. F. was no longer entitled to a presumption of parental fitness, and under Fam. Law. §9-101, it was her burden to demonstrate that she was not likely to further neglect or abuse James and Christopher. Although the parties acknowledge that it appeared as though Ms. F. had made progress, Ms. F.'s proffer of facts did not address her failure to engage in any reunification services from 2008 to 2010. Nor did her proffer explain why Ms. F. did not see the children from 2010 until May 2012. Finally, Ms. F.'s proffer did not mention whether her mental health issues, which had been found in 2008 to contribute to the neglect of the children, had been resolved or were being addressed appropriately in current treatment. Under these circumstances, the trial court was not clearly erroneous in finding that "at the present time" Ms. F. was unable to properly care for the children."

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

*In re: Lucas P.**

CINA: CHANGE IN PERMANENCY PLAN: EXPERT TESTIMONY

CSA No. 0729, Sept. Term 2012. Unreported. Opinion by Graeff, J. Filed March 5, 2013. RecordFax #13-0305-02, 15 pages. Appeal from Kent County. Affirmed.

A licensed graduate social worker was qualified to testify as an expert in a CINA permanency plan review hearing about one parent's unresolved substance abuse issues and the other parent's unaddressed mental health issues, since the Health & Occupations article allows practicing social workers to assess, formulate diagnostic impressions and evaluate intervention plans.

"This case arises from an order of the juvenile court to change the permanency plan for Lucas P. from reunification with his parents, Carrie and Peter P., to adoption. On appeal, Carrie P. presents two questions:

1. Did the juvenile court rely on inadmissible evidence in rendering its opinion?

2. Did the juvenile court err in changing Lucas' permanency plan to adoption where it was no longer contrary to his welfare to return home?

DISCUSSION

Carrie P. first contends that the juvenile court erred in admitting testimony by Bartlett-Kliever that fell outside the scope of her expertise. Specifically, she argues that Bartlett-Kliever rendered a "diagnostic opinion with respect to both parents," including impressions of their mental health and substance abuse recovery status when "such testimony fell outside her area of expertise and the permissible realm of practice for a social worker without clinical licensure." She states that "[a] licensed social work associate may not make a clinical diagnosis of mental and emotional disorders or engage in the practice of psychotherapy." 360 Md. 634, 644 (2000).

The Department argues that the juvenile court properly exercised its discretion in admitting Bartlett-Kliever's testimony because she "never rendered a diagnosis of either parent, and only rendered opinions within the scope of her expertise as a licensed graduate social worker." In any event, it argues, even if it was error to admit Bartlett-Kliever's testimony, any error was harmless because her testimony, which "was entirely consistent with the observations and recommendations that were included in the Department's court report, which was signed by Bartlett-Kliever and her supervisor, Nikki Strong, LCSWC, and which was admitted as substantive evidence without objection or redaction at the outset of the hearing," was merely cumulative.

Counsel for Lucas similarly argues that the court did not err in allowing Bartlett-Kliever's expert opinion, asserting that Bartlett-Kliever did not give a diagnostic opinion, but rather, she gave her "diagnostic impression," which is permissible. Counsel also argues that, given the court's "very limited reliance" on Bartlett-Kliever's expert opinion testimony, the admission of the testimony, even if error, was harmless.

We agree with appellees that the circuit court properly exercised its discretion in allowing Bartlett-Kliever's testimony. The testimony to which Carrie P. objects, and which she characterizes as a "diagnostic opinion," was based on Bartlett-Kliever's answer to the question whether, based on her assessment of the parents and their household, she had formulated any diagnostic impressions. Bartlett-Kliever answered the question as follows:

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I believe that [Ms. P.'s] mental illness and substance abuse are still very active, even though she is working on it. I believe that [Mr. P.] has not addressed his mental health issues, …his work being the barrier to that.

Pursuant to HO §19-101(m)(1), Bartlett-Kliever, as a practicing social worker, was permitted to "[a]ssess," 19-101(m)(1)(i), "[f]ormulat[e] diagnostic impressions," 19-101(m)(l)(ii), and "[e]valuat[e] intervention plans," §19-101(m)(1)(v). The court properly accepted Bartlett-Kliever as an expert in this regard, and her testimony that Carrie P.'s substance abuse issues had not been resolved and that Peter P. had failed to address his mental health issues was properly admitted.

In any event, even if Bartlett-Kliever' s testimony was admitted erroneously, Carrie P. cannot establish prejudice. See *Flores v. Bell*, 398 Md. 27, 34 (2007). Bartlett-Kliever's observations were consistent with the evidence presented in the Department's report, which was admitted into evidence without objection. Thus, even if the admission of Ms.Bartlett-Kliever's testimony was error, it was cumulative and constituted harmless error.

II.

Carrie P. next contends that the juvenile court erred in changing Lucas' permanency plan from reunification with his parents to adoption. She asserts that the evidence "demonstrated that [she] was fully capable of being reunited with her son," and the court's order was based erroneously on Lucas' progress in foster care and not whether there was a likelihood of abuse or neglect if he were reunified with his mother.

When determining the permanency plan, a juvenile court considers the factors in §5-525(f)(1) of the Family Law Article. Regarding Lucas' ability to be safe and healthy in his parents' home, the court found it would not be safe to permit Lucas to "go back" with his parents. The evidence showed that Carrie and Peter P. had problems with substance abuse and mental health issues, and that they were struggling to manage their household and provide adequate care for Stephanie. Carrie P. admitted she was overwhelmed with the care of Stephanie, taking care of her own needs, and working on reunification. She was pregnant with twins, and had failed to obtain prenatal care until her second trimester and allowed her medical insurance to lapse. Although Peter P. was employed, the couple was struggling financially, and Peter P. had failed to address his mental health issues and was unaware that he and Stephanie did not have medical assistance in place, having relied on Carrie P. to make the arrangements.

With respect to Lucas' attachment and emotional ties to Carrie and Peter P., there was ample evidence that visitation had been sporadic and provided little opportunity for Lucas to bond with them. On the other hand, Lucas had lived in the same foster home since he was five days old, where he lived with his sister, Ashley, to whom he was very attached. Lucas viewed his foster parents as his parents, and he was well nourished, content, and developing at a normal rate.

As for the potential harm to Lucas by remaining in State custody for an excessive period of time, the court noted that he had been in foster care for more than a year. The issue, ultimately, was whether Carrie and Peter P. should be granted additional time to work toward reunification. That decision rested in the sound discretion of the juvenile judge, who clearly considered and weighed the factors set out in FL § 5-525(f), including Carrie and Peter P.'s efforts to achieve reunification. There is nothing in the record to suggest that the juvenile judge abused his discretion in concluding that it would be in Lucas' best interest to change his permanency plan to adoption with a non-relative."

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

*Leroy Scott Love v. Patricia Ann Love**

ALIMONY: EVIDENCE: LACK OF WAIVER

CSA No. 2213 Sept. Term 2011. Unreported. Opinion by Meredith, J. Filed February 22, 2013. RecordFax #13-0222-07, 27 pages. Appeal from Talbot County. Affirmed.

In awarding rehabilitative alimony, it was within the trial court's discretion to consider a financial statement that was technically not formally offered as evidence; nor did the wife implicitly waive her right to claim alimony by failing to mention it in her pre-trial statement.

"In this appeal, Leroy Scott Love presented questions which we have reworded:

1) Was it an abuse of discretion for the court to award alimony in this case?

2) Did the court abuse its discretion in denying Husband's mid-trial continuance request?

3) Did the court abuse its discretion in denying Husband's motion for new trial?

We affirm.

HISTORY

The parties were married on September 10, 1988, and separated on November 20, 2008. On January 25, 2010, Husband filed a complaint for absolute divorce. On April 29, 2010, Wife filed a counterclaim. Among the relief she requested was "alimony, pendente lite and permanently, rehabilitative and indefinite."

The scheduling order setting the settlement conference ordered the parties to prepare and file a [financial] statement in accordance with Rule 2-504.2 no less than ten days prior to the settlement conference. Both parties did so. Trial commenced on May 9, 2011.

On May 10, 2011, after both parties presented their cases-in-chief, as it appeared Wife was about to rest her case, Wife's attorney began discussing alimony. Husband's attorney objected, insisting that, because Wife had failed to mention alimony in her pretrial statement, "[t]here is no request for alimony in this case."

The court rejected Husband's arguments, and awarded Wife two years of rehabilitative alimony, at $350 per month, dating from May 1, 2010, *i.e.*, a total of $8,400. Husband challenges the alimony award, as well as the child support award.

DISCUSSION

When making an alimony award, the court is required, pursuant to Family Law Article §11-106(b), to consider [12] factors. Husband does not contend that the court failed to consider the required factors. Rather, Husband attacks the trial court for "relying upon [Wife's] Financial Statement which was not even introduced into evidence in [Wife's] case in chief." Husband argues that the court therefore had before it "insufficient substantive evidence of Appellee's income and expenses." This contention has no merit.

Rule 9-202(e) provides as follows: "If spousal support is claimed by a party and either party alleges that no agreement regarding support exists, each party shall file a current financial statement in substantially the form set forth in Rule 9-203(a). The statement shall be filed with the party's pleading making or responding to the claim. If the claim or the denial of an agreement is made in an answer, the other party shall file a financial statement within 15 days after service of the answer."

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Wife asserted a claim for alimony in her counterclaim, which was filed on April 29, 2010, and accompanied by a financial statement in "the form set forth in Rule 9-203(a)." This was followed by the filing of an amended financial statement on June 21, 2010. The amended statement was used at trial, discussed by the parties, and used by Husband's attorney to cross-examine the Wife, but Husband contends that, because it was not introduced into evidence, it could not be considered by the court. We disagree.

In *Beck v. Beck*, 112 Md. App. 197 (1996), this Court, in discussing financial statements under the predecessors to current Rules 9-202 and 9-207, held: "[T]he facts and averments as to the properties made in the statements required to be filed by Maryland Rules S72 [from which current Rule 9-202 was derived] and S74 [from which current Rule 9-207 was derived] constitute judicial admissions and may be considered as evidence without the necessity for the formal introduction at trial of these documents." Id. at 205. Later in Beck, we reiterated the point, *id.* at 208.

In the case at bar, when Husband's counsel pointed out — during trial, before the close of evidence — that Wife had not formally introduced her financial statement into evidence, the trial court responded that the document was already in the court file, and the court would "take judicial notice of it." Under such circumstances — in which the technical failure of Wife to formally offer the statement would have clearly been remedied if the court had not indicated it considered the document already "in the case" — we perceive no abuse of discretion in the court's consideration of the document. Wife's financial statement(s) and her testimony provided sufficient evidence upon which the court could base an alimony award. See also *Wilen v. Wilen*, 61 Md. App. 337, 347 (1985).

Husband also argued that the court should not consider alimony because of implicit waiver. Husband asserts that Wife's failure to mention "alimony" in her pretrial statement was tantamount to a "judicial admission" that "bound" Wife not to pursue an alimony claim. Neither party cites any case holding one way or the other. We decline to rule in this case that, as a matter of law, a party waives a claim by failing to mention it in a pre-trial statement.

Wife requested alimony in her counterclaim and never formally withdrew that claim in any manner. There was never an express waiver, and no pretrial order was entered limiting the issues to those set forth in the pre-trial statements. The court did not abuse its discretion in considering the claim.

We also do not find any abuse of discretion by the trial court in its denial of Husband's mid-trial request for a continuance. Excerpts of the trial proceedings persuade us that the trial court granted Husband's counsel great leeway after alimony was mentioned by Wife's counsel. Witnesses were recalled. Additional documents were reviewed. Although Husband's counsel asked for a continuance to help her "do this cross examination [of Wife] in an efficient manner," there was no specific proffer of what additional evidence might be offered. Even when the motion for new trial was filed, there was no specific proffer of additional information.

We turn now to the child support issue. Husband argues that the trial court "abused its discretion in the amount of child support awarded and the court found no facts in support of its child support determination." This assertion is belied by the record, which reveals that the court awarded "the current guidelines amount" of $714 per month. See FL § 12-202. The numbers the court used were derived from the parties' testimony and financial statements.

The guidelines amount applicable to the facts of this case, is $715. The difference (in Husband's favor) is *de minimus*, and we find no abuse of discretion."

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

*Mohammad Esmail Memarsadeghi v. Pamela Jeanne Tucciarone**

CUSTODY AND VISITATION: ATTORNEYS' FEES: REQUIRED FACTORS

CSA No. 2515, Sept. Term 2011. Unreported. Opinion by Nazarian, J. Filed Feb. 22, 2013. RecordFax #13-0222-10, 12 pages. Appeal from Montgomery County. Affirmed in part, vacated in part and remanded.

Where a custody and visitation agreement specified that the children would travel abroad with their mother each January, the circuit court did not abuse its discretion in ordering their father to sign their passport applications; however, in awarding attorneys' fees the court failed to balance (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.

"Mohammad Memarsadeghi (Father) appeals from an Order of the Circuit Court for Montgomery County that directed him to execute passport renewal documents for his daughters and to pay his ex-wife's attorneys' fees and the costs of expedited passports. We agree with the circuit court that the Father agreed in the parties' visitation agreement to execute the passport documents, and we affirm that portion of the circuit court's order. Because, however, the record below does not support the portions of the order directing him to pay attorneys' fees and expedited passport costs, we vacate those portions and remand for further proceedings.

BACKGROUND

Mr. Memarsadeghi and the appellee, Pamela Jeanne Tucciarone (Mother) divorced in 2004, and have two minor daughters. The parties reached an agreement regarding custody and visitation, and entered that agreement on the record. Among its terms, the agreement recognized that the children traveled to Aruba with Mother and her family every year during the first week in January, and that trip formed an express part of a detailed, month-by-month visitation schedule.

The agreement is silent as to either party's responsibility for attorneys' fees or costs flowing from future disputes.

As Mother prepared for the 2012 Aruba trip, she asked Father to execute documents to renew the daughters' passports, which require signatures from both parents in a joint custody situation. Father refused, and after unsuccessful negotiations, Mother filed a Motion to Authorize Application for Passport and Request for Hearing. Father opposed the motion.

The circuit court decided that the parties had specifically agreed that the children would travel to Aruba every year with Mother and ordered [Father] to sign the documents before leaving the courthouse. The circuit court also ordered Father to pay attorneys' fees of $2,600 and the costs associated with expediting the daughters' passports within thirty days. Father noted a timely appeal.

DISCUSSION

Father argues first that the circuit court wrongly compelled him to forfeit his rights under the Two Parent Signature Law, see 22 C.F.R. § 51.28 (2012), which provides that the United States Passport Office cannot issue or renew a passport for a minor child whose parents have joint custody without the consent of both. At argument, however, counsel conceded that the Two Parent Signature Law did not create any federal right that superseded or preempted the visitation agreement.

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The circuit court found, based on the structure and language of the visitation agreement, that Father had consented to the trip and that his consent to the trip bound him to take reasonable steps to effectuate that agreement.

The circuit court acted well within its discretion. To hold otherwise would allow Father to frustrate Mother's obligation to take the daughters to Aruba, *see Blondell*, 413 Md. at 114, and the parties' collective intention that the daughters make the trip as part of the broader visitation plan.

Next, Father argues that the circuit court failed to follow the required procedures when it ordered him to pay Mother's attorneys' fees and the costs for expedited passports.

First, the circuit court undoubtedly had the authority to consider and award "to either party the costs and counsel fees that [were] just and proper under all the circumstances" because Mother sought in this proceeding "to enforce a decree of custody or visitation." Fam. Law §12-103(a)(2)(iii).

But trial courts, in awarding attorneys' fees and costs, *must* consider and balance three factors – "(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" – when exercising that discretion. *Id.*, § 12-103(b). And "[e]ven though the trial court does not have to recite any magical words ... it must be clear on appeal that the court considered the statutory factors." *Walker v. Grow*, 170 Md. App. 255, 291-92 (2006). We have held repeatedly, and reiterated recently, that a trial court's failure to consider these factors and explain the bases for its decision creates grounds for reversal. *See, e.g., Gillespie*, 206 Md. App. at 178-79; *Walker*, 170 Md. App. at 291-92.

The attorneys' fee award here fails this test. Although we perhaps could divine in the transcript a finding that the motion was substantially justified, the circuit court neither considered nor balanced the financial status of each party or their relative needs. Moreover, there was no record on which the circuit court could have assessed whether the requested fees were "just and proper under all the circumstances," §12-103(a), because Mother neither filed nor offered any evidentiary support for her fee demand. It may be that the circuit court had a sense of the parties' relative financial means and needs from prior proceedings. But because the circuit court did not evaluate those factors on an appropriate record in the context of this motion, we are compelled to vacate the attorneys' fee award and remand for further proceedings.

Second, to the extent that the circuit court imposed the $355.44 in expedited passport costs as damages for breaching the visitation contract, it did so in an evidentiary vacuum. Mother neither attached nor offered any evidence of actual costs she sustained or would sustain in connection with the expedited passports. So although the record contains no basis to doubt the ultimate figure, the total absence of evidence means that Mother failed to sustain her burden to prove the likelihood of the damages and their probable amount. *Thomas v. Capital Med. Management Assocs., LLC*, 189 Md. App. 439, 464 (2009) (citing *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594 (2007)). We therefore vacate the portion of the circuit court's order awarding expedited passport costs, and remand for further proceedings as well.

We express no views on whether either award was justified by the facts or, if so, the amount – those issues are for the circuit court to consider and decide on remand. In light of our holdings here, however, Mother should not be permitted to recover the attorneys' fees she incurs in re-trying her requests for attorneys' fees and passport costs on remand."

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

*Anthony Monk v. Debra Monk**

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

CSA No. 2424, Sept. Term 2011. Unreported. Opinion by Eyler, Deborah S., J. On motion for reconsideration. Filed March 5, 2013. RecordFax #13-0305-01, 32 pages. Appeal from Calvert County. Affirmed in part and reversed in part.

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

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

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

FACTS AND PROCEEDINGS

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

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

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

DISCUSSION

Child Support

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

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

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

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number of children on the plan. If one child is covered, or all four children are covered, the premium is approximately $155 per week.

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

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

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

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

V.

Contempt Finding

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

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

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

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

*Pedro Salvador v. Dalila Salvador**

CHILD SUPPORT: MODIFICATION: BURDEN OF PROOF

CSA No. 2154, Sept. Term 2011. Unreported. Opinion by Graeff, J. Filed Feb. 8, 2013. RecordFax #13-0208-06, 19 pages. Appeal from Montgomery County. Affirmed.

Given the evidence that appellant's landscaping company had not, as he asserted, gone out of business, the circuit court was not clearly erroneous in finding he failed to meet his burden of proving that a material change in circumstances had occurred.

"Pedro Salvador, appellant, appeals from an order denying his Motion for Modification of Child Support. He contends that the court's denial of his motion was "clearly erroneous and incorrect as a matter of law."

BACKGROUND

On October 16, 2008, Mr. Salvador was ordered to pay to Dalila Salvador, appellee, child support plus arrearages. At the time, the court established Mr. Salvador's monthly income to be $8,150.

On November 10, 2010, Mr. Salvador filed a Motion for Modification of Child Support, in which he alleged that he had "suffered a material decrease in his income." Mr. Salvador filed with the court a sworn financial statement, dated December 23, 2010, in which he claimed gross monthly wages of $358.26, and a total monthly income of $1,858.26.

A master held a hearing on the motion to modify.

Mr. Salvador testified that he was employed full-time with Garden Gate Landscaping, working 44-53 hours per week at a rate of $14 per hour.

The master found that Mr. Salvador was "currently employed on a full time basis at Garden Gate Landscaping." The master found Mr. Salvador's testimony "that he does not have any income from any other source …to be of only limited credibility."

On November 28, 2011, the circuit court held a hearing on Mr. Salvador's exceptions. The court noted that "there were other indications that the master could reasonably rely upon" to support a finding that Mr. Salvador was still earning income from PS "such as the fact that [Ms. Salvador] made observations of [Mr. Salvador] working on the weekends when supposedly he was no longer working on the weekends," that customers "continued to receive lawn services," and the "unique situation as to the billing, where invoices were given to those customers not even with the name of the … company, and that they would pay [Mr. Salvador]."

"In this case, the burden is upon [Mr. Salvador] in order to show that change of circumstances resulted in a specific income to him. And not only based upon his lack of credibility, but on lack of evidence to sustain the fact, or to support his central assertion that he was no longer receiving income from his business was inadequate."

DISCUSSION

Mr. Salvador makes several interrelated arguments on appeal. In essence, Mr. Salvador contends that he presented a prima facie case of a material change in circumstances. At that point, he asserts, Ms. Salvador bore the burden of proving "by affirmative evidence the existence of undisclosed income and then quantifying it." Mr. Salvador asserts, the master and the circuit court erred in requiring him to "prove a negative," that he was not receiving the alleged undisclosed income.

Ms. Salvador contends that Mr. Salvador failed to show a material change in circumstances, and this Court should affirm the circuit court's decision to deny Mr. Salvador's motion to modify child support. We agree.

Modification of child support is governed by §12-104(a) of the Family Law Article, which provides that the "court may modify a child support award subsequent to the filing of a motion for modification and upon a showing of a material change of circumstance." A decision regarding a modification is left to the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judg-

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ment was clearly wrong. *Moore v. Tseronis,* 106 Md. App. 275, 281 (1995).

The party seeking modification bears the burden of production and the burden of persuasion. *Bornemann v. Bornemann,* 175 Md. App. 716, 734 (2007).

Mr. Salvador's testimony that his sole monthly income was what he earned from Garden Gate, if believed, would have demonstrated a material change of circumstances from his $8,150 monthly income at the time of the original support order. The master, however, did not find Mr. Salvador's testimony credible. And given the evidence introduced by Ms. Salvador indicating that Mr. Salvador was, in fact, still operating his landscaping business, the circuit court properly found that Mr. Salvador failed to meet his burden to prove that a material change in circumstances had occurred.

Mr. Salvador cites *Long v. Long,* 141 Md. App. 341 (2001), and *Moustafa v. Moustafa,* 166 Md. App. 391 (2005), for the proposition that "once the moving party introduces evidence to establish a material modification the burden then shifts to the adverse party to introduce *affirmative evidence* that contradicts the evidence introduced by the moving party." *Long* and *Moustafa,* however, are inapposite here.

Neither *Long* nor *Moustafa* presented a situation similar to the one before us. The issue here is whether Mr. Salvador met his burden to show a material change in circumstances to justify modifying the award. The master did not find credible Mr. Salvador's assertion that he was no longer operating his landscaping business, and Mr. Salvador did not present any other testimony or evidence to support that assertion. Accordingly, Mr. Salvador failed to carry his burden of proving a material change in circumstances. *See Byers v. State,* 189 Md. App. 499, 530-3 1 (2009) (it is "virtually, albeit perhaps not totally, impossible to find reversible error" on the ground that the fact-finder was not persuaded of something) (quoting *Starke v. Starke,* 134 Md. App. 663, 680-81 (2000)). The circuit court did not err in denying Mr. Salvador's motion to modify child support."

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

*Alain Selenou-Tema v. Rosalie Chantal Tchidjou Kamga**

CHILD SUPPORT: CONSENT JUDGMENT: MISCALCULATION OF MONTHLY INCOME

CSA No. 1695, Sept. Term 2011. Unreported. Opinion by Salmon, James P. (retired, specially assigned). Filed Feb. 15, 2013. RecordFax #13-0215-07, 15 pages. Appeal from Prince George's County. Affirmed.

In approving a consent judgment of absolute divorce, the trial judge had no obligation to voir dire the parties as to each of its terms; nor did the judge err in denying a motion for reformation of child support, where appellant failed to show that the mistake in calculating his income was mutual and what amount of child support the parties intended.

"On June 8, 2011, Alain Selenou-Tema ["Father"] and Rosalie Chantal Tchidjou Kamga [hereinafter "Mother"] appeared before the Honorable Sherrie L. Krauser. Counsel for Father, Dontrice P. Hamilton, said: "we're settled, your Honor." Counsel for Mother, Rosalyn W. Otieno, reiterated; "We have an agreement." Ms. Otieno handed Judge Krauser a proposed judgment of absolute divorce. Counsel for Father assured Judge Krauser that the agreement had been "signed by everybody."

That consent judgment "ORDERED, that pursuant to the agreement of the parties, the Plaintiff shall pay child support in the amount of $4,963 per month…"

The last page of the proposed Judgment was titled: "REVIEWED AND APPROVED BY:…" Mother, Father and their respective counsel affixed their signatures.

Although not made a part of the Judgment, counsel for Mother handed Judge Krauser a copy of a child support guidelines worksheet when she handed her the proposed Judgment of Absolute Divorce. The worksheet indicated that Mother's monthly gross income was $7,429 and Father's was $16,980.

Because the combined income of the parties was more than $15,000 per month, child support was arrived at by extrapolating from the guideline figures in Family Law §12-204(e).

The Judgment, docketed on June 21, 2011, will hereafter be referred to as "the Consent Judgment."

On the same day the Consent Judgment was docketed, Father, by counsel, filed a "Motion for Appropriate Relief," in which he asked the court to set aside the Consent Judgment because Father had miscalculated his monthly income. In fact, his average monthly income, according to movant, was $13,684 per month. Counsel for Father explained that the miscalculation had come about when the gross amounts Father had earned as a dentist between December 1, 2010 and April 30, 2011 were added together and that sum was divided by four when he should have divided by five; and using the extrapolation method, he should have been required to pay $3,995 per month.

On July 1, 2011, Father filed a Motion to Alter or Amend Judgment which was, in substance, exactly the same as his motion for appropriate relief. Mother filed a timely opposition

Judge Krauser denied Father's Motion for Appropriate Relief and his Motion to Alter or Amend Judgment. Father filed a timely appeal.

Discussion

Father argues that in this case "no consent was given by …[him] in open court, nor was any stipulation filed with the Clerk's Office." Therefore, according to Father, there was no consent on his part to the terms of the Judgment of Absolute Divorce.

The foregoing argument is without merit. Consent by Father to the judgment was manifested in several ways. Immediately after attorneys for both parties told Judge Krauser that the case had been settled, a proposed judgment of absolute divorce was submitted. Lawyers for both parties signed the consent judgment under the caption "REVIEWED AND APPROVED." With exceptions not here relevant, clients are bound by representations made to the court by their counsel. More important, both parties affixed their signatures, indicating that the judgment had been "reviewed and approved" by them. Also, both parties were *voir dired*, in open court, about at least some of the provisions in the Consent Judgment. Under these circumstances, consent was given "in open court."

Although Father does not say so explicitly, he impliedly argues that his signature under the heading "REVIEWED AND APPROVED" does not amount to a stipulation. There is no merit to this implied argument.

Father also asserts that Judge Krauser erred by failing to personally voir dire Father as to all the terms in the proposed judgment. At oral argument before this panel, Father's counsel argued that the voir dire should have been similar to the type asked of criminal defendants before a guilty plea is accepted. Father cites no authority for the proposition and we know of none. We hold that a trial judge has no obligation to voir dire a party in a civil action where the proposed judgment clearly shows on its

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face that there exists an agreement by the parties as to the terms of the judgment.

Moreover, it is a basic principle of law that in a civil case the appellant, in order to prevail, must not only show that the trial judge committed error, the appellant must also demonstrate that he or she was prejudiced by that error. *See Flores v. Bell,* 398 Md. 27, 33 (2007) and cases therein cited. Here, Father failed to demonstrate any prejudice.

Appellant also argues: "the trial court has the authority to amend the Judgment of Absolute Divorce if there exists a defect. See *Knott v. Knott,* 146 Md. App. 232, 259 (2001)."

The *Knott* case does not stand for the broad proposition for which Father cites it. Instead, *Knott* stands for a far narrower proposition, viz: a court has the power to modify a consent judgment dealing with child support if to do so would be "in the best interest of the child." Appellant never argued that a modification of his child support obligation downward would be in the best interest of his children.

Appellant's second argument is that the trial judge abused her discretion by failing "to reform" the consent judgment so that it would "conform to the real intention of the parties."

At oral argument before this panel, appellant's counsel made it clear that the arithmetic error was not made by either appellee or her counsel. The $16,980 figure was given to Mother's counsel by counsel for Father and Mother's counsel simply put that figure in the guideline worksheet.

Mother's counsel never conceded that there had been a mutual mistake, nor was there any evidence what Mother "believed" appellant's income to have been. Mother had no way of knowing exactly what her husband earned as a dentist as of the time of the divorce. Father lived in the State of Washington; Mother lived in Maryland. She simply accepted his figures.

Even if appellant had proven a mutual mistake, reformation would not have been warranted because appellant did not prove what was really intended by the parties. *Higgins v. Barnes*, 310 Md. 532, 538-39 (1987) quoting *Keedy v. Nally*, 63 Md. 311, 316 (1885). Unfortunately for appellant, the record is devoid of any evidence as to what child support figure Mother would have accepted under such circumstances."

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

*Lisa M. Siske v. Andrew G. Siske, Jr.**

DIVORCE: ALIMONY: DISSIPATION OF ASSETS

CSA No. 1969, Sept. Term 2011. Unreported. Opinion by Hotten, J. Filed Feb. 19, 2013. RecordFax # 13-0219-03, 40 pages.

The circuit court clearly erred in denying indefinite alimony without discussing the disparity in the parties' income and standard of living, in ignoring substantial evidence of the husband's dissipation of marital income, and in awarding retroactive child support without engaging in the balancing of equities required in an above-guidelines case.

"In this divorce action between Lisa M. Siske, the appellant-cross-appellee, and Andrew G. Siske, the appellee-cross-appellant, the Circuit Court granted a divorce and granted Lisa rehabilitative alimony, an interest in the marital portion of Andy's pension, an equal division of Andy's two retirement accounts, retroactive child support, and attorneys' fees.

Both parties presented questions for our review. We have consolidated, rephrased, and reorganized them:

(1) Whether the circuit court was clearly erroneous in denying Lisa's request for indefinite alimony, abused its discretion in awarding rehabilitative alimony, and erred in signing a judgment of divorce that provides for rehabilitative alimony to begin in October 2011 and not October 2010?

(2) Whether the circuit court applied the wrong legal standard and erroneously denied Lisa's request for a finding of dissipation of marital property?

(3) Whether the circuit court was clearly erroneous in awarding retroactive child support to Lisa, and were its calculations in error?

(4) Whether the circuit court abused its discretion in awarding Lisa attorneys' fees of $15,000, and whether it was error to provide a date by which the child support arrears and award of counsel fees must be satisfied?

We affirm the judgment of divorce, but otherwise vacate the judgment and remand for further proceedings.

DISCUSSION

ALIMONY

Lisa contends the circuit court committed legal error by denying her request for indefinite alimony and awarding rehabilitative alimony. She asserts that the court failed to consider the circumstances in §11-106(c) of the Family Law Article, and "failed to analyze these specific facts and make a prediction as to when [Lisa] would reach her maximum earning capacity and what her income [and standard of living] would be at that future time."

Andy insists that the alimony determination requires only that the circuit court "demonstrate consideration of the required factors" in section 11-106(b). In addition, he argues that the court is neither required to specifically mention every factor nor must it "announce each and every reason for its ultimate decision."

We find Lisa's argument more persuasive.

Title 11 governs alimony. *See also Boemio v. Boemio*, 414 Md. 118, 125 (2010). When crafting the amount and duration of an alimony award, a trial court must consider the twelve factors enumerated in 11-106(b). The twelve factors are non-exclusive, and "[a]lthough the court is not required to use a formal checklist, the court must demonstrate consideration of all necessary factors." *Roginsky v. Blake-Roginsky*, 129 Md. App. 132, 143 (1999).

Maryland's "statutory scheme generally favors a fixed-term or so-called rehabilitative alimony." *Tracey*, 328 Md. at 391. Nonetheless, Section 11-106(c) permits a court to award indefinite alimony, if it 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.

Therefore, to make a determination of whether a party's request for spousal support merits an award of rehabilitative or indefinite alimony, the court must first consider all twelve factors under Section 11-106(b) and then consider whether the party seeking spousal support falls into one of the two provisions of Section 11-106(c). Pursuant to 11-106(c)(2), "unconscionable disparate" standards of living is the threshold test for an award of indefinite alimony.

We hold that when the divorce court sits in equity, it must address the merits of each particular case by considering Sections 11-106(b) and

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11-106(c) provisions with thoughtful sensitivity. It is simply not enough to list findings of facts and impart a conclusory statement without engaging in any actual analysis of the factors. We find this to be particularly true upon an inquiry of indefinite alimony, for in the presence of a gross disparity of incomes, "it is error to deny [indefinite alimony] without *explicitly* discussing the disparity issue." *Kelly v. Kelly*, 153 Md. App. 260, 279 (2003).

In the instant case, the circuit court found that there are at present "certainly disparate incomes" between the parties. Nevertheless, the court curiously failed to address whether the "certainly disparate" incomes would continue once Lisa maximizes her earning potential. A finding of "certainly disparate" incomes stands in stark, contradictory contrast to the court's earlier conclusion that Lisa had already acquired suitable employment that would permit her to "become self-supporting in the not-too-distant future." Moreover, the court provided no explanation regarding its selection of rehabilitative alimony for six years. Such a determination is unsupported by the record.

We conclude that the denial of indefinite alimony – without any explicit discussion of the existent disparity in income and the standards of living between Lisa and Andy – was clearly erroneous. On remand, the court must make specific findings regarding the ability of the alimony recipient to become self-supporting. The court must further consider the length of the marriage as a key factor in its Section 11-106(b) analysis, as it "outweigh[s] several of the other factors listed." *Boemio*, 414 Md. at 143.

The circuit court's failure to appropriately consider the percentages of the spouses' respective incomes is inconsistent with settled law. At the time of trial, Lisa was earning twenty-one percent of Andrew's earned income.

More importantly, the circuit court did not comparatively consider the comfortable lifestyle the parties enjoyed during marriage to the hardships faced by Lisa post-separation. Accordingly, we conclude that the circuit court abused its discretion.

DISSIPATION

Lisa contends the circuit court erred in denying her request for a finding of dissipation of marital assets and "plac[ing] the entire burden of proving dissipation upon" Lisa. Andy argues that Lisa failed to make a *prima facie* case of dissipation.

The Court of Appeals specifically addressed specific burdens of persuasion and production in *Omayaka v. Omayaka*, 417 Md. 643 (2011). The Court concluded, "It is clear that the ultimate burden of persuasion remains on the party who claims that the other party has dissipated marital assets."

The general principles are applicable, but the facts of *Omayaka* are inapposite. Unlike *Omayaka*, Lisa presented substantial evidence that Andy had dissipated marital funds in anticipation of an award of alimony. The record demonstrates that Andy withheld marital funds post-separation. Lisa was required to open a bank account post separation in which, at the time of trial, she had an approximate two hundred dollars. In the event Lisa suffered any financial distress, her use of marital funds was subject to the discretion of Andy.

Notwithstanding Andy's testimony that he had used a large portion of his retirement account to pay off his credit card bills, he also indicated he had placed $1,500 down on a 2005 BMW convertible for his new companion's use. He attested that he alone was responsible for paying off the balance on the vehicle. Andy did acquire a condominium post-separation. Nevertheless, he was living with his romantic companion rent-free and permitted a third party to dwell in his condominium at no cost. Moreover, he had placed the cost of his two-week trip to the British Virgin Islands on his credit cards. We note the trial court's total disregard of this evidence. We conclude the trial court's disposition of Lisa's claim of wrongful dissipation [was] clear error.

CHILD SUPPORT

Lisa's third assignment of error relates to the award of $5,090 in retroactive child support.

"When the [trial court] exercises discretion with respect to child support in an above [g]uidelines case, he or she 'must balance the best interests and needs of the child with the parents' financial ability to meet those needs.'" *Smith v. Freeman*, 149 Md. App. 1, 20 (2002). After reading the oral opinion, it is unclear whether the judge engaged in the requisite balancing of equities. We therefore conclude that the circuit court improperly exercised its discretion. Because we are remanding for reconsideration of alimony, we will also ask the circuit court to clarify the calculation and apportionment of child support.

ATTORNEYS' FEES.

Because we are remanding this case for a reconsideration of alimony, we shall not specifically decide the issue of attorney's fees. Upon remand, the circuit court should consider whether Lisa is entitled to contribution toward her attorney's fees subsequent to its judgment on alimony and specify a date by which Andy must satisfy his obligations."

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

*Thomas R. Skowron v. Diana L. Skowron**

DIVORCE: ALIMONY AND CHILD SUPPORT: CALCULATION OF INCOME

CSA No. 2201, Sept. Term, 2011. Unreported. Opinion by Matricciani, J. Filed March 1, 2013. RecordFax # 13-0301-00, 19 pages. Appeal from Frederick County. Affirmed.

In determining the parties' incomes for purposes of indefinite alimony and child support, the trial judge did not err in including reimbursements that appellant's company made to him for the costs of health insurance, car insurance and car payments, even though the express authority to do so is found only in the child support provisions of the Family Law Article.

"The parties wed on June 7, 1997, having three children over the course of the marriage. In its opinion and order docketed October 20, 2011, the circuit court granted the divorce, awarded appellee indefinite alimony of $5,000 per month, ordered appellant to pay child support of $2,871 per month, transferred the marital home to appellee, granted appellee a monetary award of $50,000,and awarded appellee $15,000 in attorney's fees. Appellant noted this timely appeal.

QUESTIONS PRESENTED

I. Did the circuit court err or abuse its discretion in arriving at its grant of indefinite alimony?

II. Did the circuit court err or abuse its discretion in arriving at its grant of child support?

DISCUSSION

Calculation of Appellant's Income

Appellant alleges that the circuit court improperly considered as income reimbursements that appellant's company made to him for the costs of health and car insurance, as well as car payments. Under FL §12-

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201(b)(3)(xvi), actual income includes "expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business to the extent the reimbursements or payments reduce the parent's personal living expenses." While there is no equivalent provision in the alimony statutory scheme, the trial court was determining Mr. Skowron's income for both child support and alimony purposes. The circuit court made a factual determination that the reimbursements appellant received reduced his personal living expenses. That factual finding is not clearly erroneous.

Appellant complains that the circuit court erred by calculating his income on a gross rather than net basis. Because of his tax liability, appellant argues that "the amount of alimony clearly has a negative effect on his ability to meet his own needs while meeting the payee's needs." But appellant directs us to no case requiring the calculation of income on a net, after-tax, basis as opposed to making calculations based on gross income.

Although the Family Law article deals with gross income in the context of child support, see §12-201(b)(2) ("actual income" means gross receipts minus ordinary and necessary expenses required to produce income") we are aware of no corresponding restriction for the determination of alimony. In the alimony context, the court must consider "the financial needs and financial resources of each party, including: (i) all income and assets," §11-106(b)(11). There is sufficient evidence in the record to support the calculations and we perceive no error.

In order to escape that conclusion, and to support his position that the court erred in awarding alimony and child support awards in excess of his income, appellant relies on *Lee v. Andochick*, 182 Md. App. 268 (2008). We found in *Lee* that the alimony award reflected the trial judge's failure "to do the math;" we cannot say the same in this case. Here, appellant has not produced evidence that either his living expenses or personal debts are so great that he could not reduce his living expenses to meet the court's order. In the *Lee* court's words, "while Mr. Lee cannot afford to pay $27,200.00 monthly in combined alimony, child support, and school tuition if he expends $190,914 per year for his personal living expenses, he could afford to pay alimony and child support in those amounts if he reduced his personal living expenses to $83,012 annually (approx. $6,918.00 per month.) This certainly is not impossible." *Id.* at 284. Instead of holding that an alimony award which results in expenses exceeding income is impermissible, Lee endorses the position that parents, if capable, ought to reduce their expenditures in order to satisfy court ordered alimony.

The Alimony Award

To the extent that appellant wishes to complain about the $50,000 monetary award, and the award of $15,000 in attorney's fees, we conclude that appellant has waived this right by not briefing these issues. See Maryland Rule 8-504(a)(6)

Appellant contends that the court improperly awarded indefinite alimony under the second prong of section 11-106(c) — that an unconscionable disparity would exist between the parties' respective standards of living, even after appellee made a reasonable effort to become self-supporting.

We said in *Francz v. Francz* that "deciding a request for indefinite alimony under FL section 11- 106(c)(2) entails projecting forward in time to the point when the requesting spouse will have made maximum financial progress, and comparing the relative standards of living of the parties at that future time."157 Md. App. 676,692 (2004) (internal quotations and citations omitted).

Before concluding that indefinite alimony was appropriate, the trial court found that: "According to [appellant's] expert, [appellee] will be earning approximately $45,000 per year at her maximum earning capacity. [Appellant] will be earning a minimum of $200,000 per year. At best, [appellee] will own a single family home and the unencumbered value of that home. Projected expenses on a monthly basis will leave [appellee] unlikely to save for retirement or be able to afford significant investments. [Appellant] will have the ongoing income from his primary business; the added interest in his percentage ownership of Skowron Brothers, Inc.; two single family homes; and other assets." [Appellant] has a sailboat, sails weekly with customers and travels. Some of these expenses are reimbursed by the business. Clearly, a disparity exists. Even considering the relatively short marriage, the [c]ourt finds this disparity unconscionable considering all of the statutory factors, and finds indefinite alimony appropriate."

These are benchmarks of economic disparity that transcend "a mere difference in earnings of spouses." Further, although there is disagreement between the parties about what income appellee could reasonably be expected to generate, appellant's own expert offered a figure of $45,000 per year. The court credited that testimony. We note that appellee's potential income (21.21% of appellant's income) creates a proportion of income to income within the boundaries of what has been upheld previously. We conclude, therefore, that the court did not abuse its discretion in awarding indefinite alimony.

The Child Support Award

Because this is an above guidelines case, the amount of child support is committed to the trial court's discretion. See §12-204(d).

Appellant contends that the court's errors transcend the alimony award and reach the grant of child support as well. As discussed *supra*, we conclude that the court did not err in calculating appellant's income when considering the propriety of indefinite alimony. That determination leads us to conclude that the court was within its discretion to grant child support in the amount of $2,781 per month, as well.

Additionally, appellant argues that appellee was voluntarily impoverished. Appellant reasons that the circuit court should have attributed potential income to her for the purpose of setting the amount of child support.

Imputation of income arises only after the court *finds* voluntary impoverishment. §12-204(b)(l).

During their marriage, the parties agreed that appellee would remain in the home. Appellant, although he contests the validity of their agreement, relies primarily on the time period between separation and trial — in which appellee continued to be unemployed — as evidence of her voluntary impoverishment.

The circuit court heard evidence pertaining to the steps appellee took to become employed after the parties separated. Evidence was presented about appellee's age, education, training, past work experience, and reasonably foreseeable future income. Given the considerations the court undertook for the purpose of awarding alimony and the additional testimony specifically pertaining to appellee's education and experience, we conclude that the trial court did not err in implicitly finding that appellant had not established appellee's voluntarily impoverishment. As we recognized in *Durkee v. Durkee*, "a trial court does not have to follow a script." Based on the record here, the court did not abuse its discretion by finding implicitly that appellee was not voluntarily impoverished."

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

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