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COURT OF SPECIAL APPEALS

Unreported opinions

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Custody and child support: modification: child witness

Konstantinos Karanikas
v.
Rachel Karanikas Cartwright

No. 1314, September Term, 2012

Argued Before: Krauser, C.J., Berger, Thieme, Raymond G., Jr. (Ret'd, Specially Assigned), JJ.[1]

Opinion by Berger, J.

Filed: February 26, 2013. Reported.

1. Judge Alexander Wright, Jr., did not participate in the Court's decision to report this opinion pursuant to Md. Rule 8-605.1.

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

This case involves an appeal from orders entered in the Circuit Court for Anne Arundel County. The orders awarded sole legal and physical custody of the parties' nine-year-old child ("the child") to appellee, Rachel Karanikas Cartwright ("Mother"), and ordered Konstantinos Karanikas ("Father") to pay child support to Mother. This appeal followed.

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

1. Whether the circuit court abused its discretion by denying Father's motion to disqualify the trial judge.
2. Whether the trial judge abused his discretion due to the manner in which he conducted an interview with the parties' daughter.
3. Whether the circuit court abused its discretion in granting the award of child support.

For the reasons set forth below, we affirm the judgments of the Circuit Court for Anne Arundel County.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are the parents of a nine-year-old daughter ("the child"), born on July 7, 2003.

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

The parties are also the parents of a son, who is emancipated by reason of age, and is not a subject of the present litigation. Pursuant to the parties' consent order and judgment of divorce, they were awarded joint legal custody of the child. In the event of a conflict with regard to long-range decisions, the parties were required to participate in mediation. Mother was awarded primary physical custody of the child, and Father received a specific visitation schedule.

The consent order and judgment of divorce also awarded Mother use and possession of the marital home for a period of four years. During Mother's use and possession, she was ordered to pay the mortgage, taxes, and interest payment for the marital home. Mother's use and possession period expired on October 5, 2012.

The child had resided in Maryland her entire life. She attended Oak Hill Elementary School in Severna Park, Maryland. On March 1, 2012, Mother sent an e-mail to Father indicating that she intended to relocate to Pennsylvania with the child after the end of the school year. Father did not consent to the relocation. Thereafter, the parties participated in mediation, but were unable to reach an agreement regarding the relocation of the child.

Both parties filed pleadings with the circuit court requesting a modification of the consent order and judgment of divorce with regard to custody and visitation. The circuit court scheduled an expedited trial to address the relocation of the child. Both parties appeared at a pre-trial hearing, propounded and responded to written discovery requests, and participated in depositions. The relocation trial was scheduled for September 7, 2012.

On August 1, 2012, during the pendency of the litigation, Mother registered the child to attend a public school in Pennsylvania. Upon notification of the school registration, Father requested a temporary restraining order and other injunctive relief in the circuit court. The circuit court denied Father's request for a temporary restraining order. Further, the court entered a *pendente lite* order prohibiting the child's registration in school in Pennsylvania, and required the child to start the school year in Maryland until further order of the circuit court and completion of the relocation trial. Accordingly, the child began school at Oak Hill Elementary in Maryland in August 2012.

The trial began on September 7, 2012. Father's counsel alerted the trial court that he planned to have the child testify either in open court or in chambers. At the conclusion of the first day of trial, the trial judge met with the child in chambers. The trial was not completed on September 7, 2012, and was continued to September 12, 2012.

At the beginning of the second day of trial, Father presented an oral motion to disqualify the trial judge, accompanied by a written memorandum of law in support of his motion. Father alleged that the trial judge had demonstrated bias due to comments he made regarding testimony on the first day of trial. Additionally, Father alleged that the trial judge conducted the child interview inappropriately. Father argued that these actions required disqualification of the trial judge.

The trial judge initially entertained counsel's argument on the motion for disqualification. At the close of counsel's argument, the trial judge referred the motion to another judge for a ruling. As a result the parties and counsel went to the second judge's courtroom for a determination of the motion for disqualification. The second judge denied the motion for disqualification based upon her review of the written motion and memorandum of law.

The second day of trial proceeded before the original judge. Mother and Father testified regarding their financial resources and expenses. It was undisputed at the trial that the Maryland child support guidelines did not apply because the parties' combined gross monthly income exceeded the guidelines. At the conclusion of the trial, the trial judge held the case under advisement and indicated that his decision would be forthcoming. Father's counsel made an oral motion to stay any order to be issued by the trial judge in the event that the child was relocated to Pennsylvania. The trial judge did not rule on the motion to stay.

On September 13, 2012, the trial judge signed a Memorandum and Interim Custody Order relocating the child from Maryland to Pennsylvania. The order required the child to relocate to Pennsylvania on September 15, 2012. The trial judge faxed copies of the order to counsel the same day, but the order was not entered or docketed by the clerk.

Father's counsel called the trial judge's chambers to inquire when he could be heard on the motion to stay that had been made in open court at the conclusion of the trial. Subsequently, Father's counsel was informed that the trial judge decided to hold Father's oral motion to stay under advisement, that the trial judge would not hear counsel's argument on the motion to stay, and that a decision on any open issues in the case, including the motion to stay, would follow in a further written order.

On September 14, 2012, Father filed a Notice of Appeal and Emergency Motion for Injunction Pending Appeal. At this time, the interim custody order had not yet been entered on the docket. This Court granted Father's request in part, entering a temporary stay and setting a deadline for Mother to file any written response to Father's motion. On September 17, 2012, the custody order was released from chambers to the clerk's office for docketing.

On September 17, 2012, the trial judge signed and entered a Custody, Visitation, and Support Order and an Order for Sale of Property. This order modified custody, and awarded Mother sole legal and sole physical custody of the child, with a specific visitation schedule for Father. The order also required Father to pay child support to Mother in the amount of $2,883. The order further mandated that Father pay the mortgage and all associated expenses for the former marital home until it was sold.

That same day, Father filed his second notice of appeal, appealing the following orders: the interim custody order entered on September 17, 2012; the custody, visitation, and support order docketed on September 17, 2012; the presiding judge's refusal to disqualify himself from the case; and the second trial judge's denial of Father's motion for disqualification of the presiding trial judge. Subsequently, after the case concluded, the trial judge disqualified himself from the case.

DISCUSSION

I. Motion for Disqualification

Father's first argument on appeal is that the trial court abused its discretion by refusing to disqualify the presiding trial judge on the basis of comments the trial judge made during testimony, and his handling of the interview of the child. In Father's view, the behavior demonstrated bias, established the perception that the trial judge was not impartial, and constituted a failure to uphold and apply the law. Mother responds that the judge's conduct did not rise to the level that a reasonable person would perceive as improper or impartial. We agree that the trial court did not abuse its discretion in denying Father's motion for disqualification.

A Maryland judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . ." Md. Rule 16-813, Md. Code of Judicial Conduct Rule 2.11(a) (the "Rules"). Similarly, "[a] judge shall avoid conduct that would create in reasonable minds a perception of impropriety." Rule 1.2(b). Impartiality under the Rules means the "absence of bias or prejudice in favor of, or against, particular classes of parties, as well as maintenance of an open mind in considering issues that

may come before a judge." Rules, Section B.

Further, a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Rule 1.2(a). The Rules also require that judges "uphold and apply the law and shall perform all duties of the office impartially and fairly." Rule 2.2. Accordingly, "[a] judge shall not, in the performance of judicial duties, by words or conduct, manifest bias, prejudice or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Rule 2.3. "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, court staff, court officials, and others with whom the judge deals in an official capacity . . ." Rule 2.8.

"When bias, prejudice or lack of impartiality is alleged, the decision is a discretionary one . . ." *Surratt v. Prince George's County*, 320 Md. 439, 465 (1990). A "trial judge is presumed to know the law and apply it properly." *State v. Chancy*, 375 Md. 168, 180 (2003) (quotations omitted). The person seeking recusal bears a "heavy burden to overcome the presumption of impartiality." *Atty. Grievance Comm'n v. Blum,* 373 Md. 275, 297 (2003). *See also Reed v. Baltimore Ljfe Ins.* Co., 127 Md. App. 536, 556 (1999) (citing *Jefferson-El v. State*, 330 Md. 99, 107(1993)) ("Maryland adheres to a strong presumption that a trial judge is impartial, thereby requiring a party requesting recusal to prove that the judge has a bias or prejudice derived from an extrajudicial-personal-source."). We review a trial court's recusal decision pursuant to an objective standard; namely, "[w]hether a reasonable member of the public knowing all of the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." *In re Turney,* 311 Md. 246, 253 (1987).

A. Bias and Lack of Impartiality

Father cites several instances in which the trial judge allegedly demonstrated bias and lack of impartiality due to comments he made regarding the testimony of Father and Father's wife, Deanna Karanikas ("Step-Mother").

i. Father's Testimony

Father first alleges that he attempted to testify about a suggestion to Mother that the parties extend Mother's use and possession period in the former marital home and that Father would continue to pay the mortgage. Mother's counsel objected, characterizing the discussion as a settlement negotiation. Father's counsel responded to the objection. The trial judge replied: "It's either a settlement offer or nonsense."

Mother argues that this comment is taken out of context, and provides the following complete citation for reference:

> That is a negotiation of some kind. I think the relevant admissible and important part of that is that the Court has previously indicated that she would have exclusive use and possession of the house. Now, of course, the Court can't chain somebody to a house, but she was given that right through October, and she moved out in what would seem about June. Now, I'll let you explain to me at the end of the case why that's relevant, but the fact that he might have offered some — it sounds like a bit like a hyperbole to say, 'I'll pay you to be there 10 years from now.' It's either a settlement offer or nonsense, so in any event, it's stricken. And I'll admit, as I say, only discussions that he attempted to make it easier for her to stay for a longer period of time.

Mother contends that the trial judge's entire commentary makes clear that the trial judge was "merely acknowledging that the proffer contained some form of a negotiation, or settlement offer, and that he would take from it the relevant portions and strike those portions that he felt were irrelevant, or 'nonsense."

Next, when Father explained that he went to inspect the former marital home and brought someone with him to see the state of the home, the trial judge commented: "You brought a witness with you, huh?. . . Do you normally take witnesses around with you when you go places?" Mother contends that the trial court was "merely attempting to clarify and understand what happened when Father inspected the house." Mother provides the following citation to the entire exchange:

> THE COURT: Is this the U&O house, the formal marital home?
>
> [THE WITNESS]: Yes, the one —
>
> THE COURT: So no one had been living there for how long?
>
> [THE WITNESS]: Maybe a week to two weeks.
>
> THE COURT: Oh, just a — it was within a week?
>
> [THE WITNESS]: Yes, Your Honor.
>
> THE COURT: Okay. All right. Brought a witness with you, huh?
>
> [THE WITNESS]: Yes.
>
> THE COURT: Why'd you bring a witness with you?
>
> [THE WITNESS]: Because I didn't want anyone to think that I went in and did anything, and it was also

videotaped.

THE COURT: So you brought a videotape. You want me to watch your videotape?

[THE WITNESS]: No, Your Honor. No.

THE COURT: Okay. All right. Do you normally take witnesses around with you when you go places?

[THE WITNESS]: I normally don't, but for this situation, Your Honor, I felt it was necessary.

THE COURT: All right. Next question.

Mother contends that when reading the entire exchange, it is "unreasonable to interpret the trial judge's questions of the witness as 'improper' or 'hostile" and that there is "no evidence of partiality or bias within this exchange."

Third, when Father attempted to explain the distance between his home and the child's school, in both miles and driving time, the trial judge commented: "You better slow down. It's more than 60 miles an hour isn't it?" Mother contends that this was nothing more than "a mere observation" after Father testified that to get from his home to the school, "[i]t's approximately a 15-minute drive and maybe about 18 miles away." Mother asserts that it is "unreasonable for this comment to be perceived as partial or biased."

Additionally, the trial judge commented on Father's salary and his employer, Hewlett Packard. After Father testified that his gross monthly income is $22,275.11, the trial judge remarked:

> Now that I've heard that number I have to tell you — and that's a good number. I called Hewlett Packard last week to order a computer for my son who's down in college and they couldn't do it because their computers were down.

Mother posits that it "is a significant stretch of the imagination for a person to perceive the trial judge's comment as demonstrative of prejudice or bias based upon [Father's] socioeconomic status. To the contrary, the comment . . . shows that the judge was impressed with [Father's] earnings."

Finally, Father contends that during his cross-examination, Father's counsel "was required to repeatedly object to questions . . . by the judge himself, because the questions clearly mischaracterized the Father's testimony with respect to his occasional work-related travel." Mother argues that the trial judge merely "asked several questions of the witness in order to clarify the frequency of his travel." Further, Mother points out that, "it is not uncommon for a witness to be questioned, and for there to be objections to said questions. . . . a trial judge is vested with the responsibility of fact finding, and in order to do so, will often need to question a witness regarding his or her testimony. This, in and of itself, does not create a hostile and discourteous environment."

ii. Step-Mother's Testimony

Additionally, Father contends that the trial judge exhibited bias throughout Step-Mother's testimony. After Step-Mother testified about her various residences over the previous five years, the trial judge asked: "Why so many moves? Why have you live [sic] in four different houses in five years?" Mother asserts that this questioning was appropriate, because when making a custody determination, "the stability of the potential environment" is a relevant factor to be considered by the Court.

Next, Step-Mother explained that in order to drive into the neighborhood of their current home, she travels along Bywater Street. The following exchange ensued:

> [MOTHER'S COUNSEL]: The public housing sections, right?
>
> [STEP-MOTHER]: Yes.
>
> [MOTHER'S COUNSEL]: So you got Bywater right outside of Kingsport, is that correct?
>
> [STEP-MOTHER]: Yes, that's correct.
>
> THE COURT: Are you renting? Are you renting?
>
> [STEP-MOTHER]: Well, we have a delayed purchase date, but yes, essentially.
>
> THE COURT: All right. You may want to think about that neighborhood.

Father's counsel then tried to elicit further testimony from Step-Mother regarding the safety of her neighborhood. The trial judge interjected:

> I'm going to take judicial notice. It's a horrible, dangerous neighborhood. I mean, I don't know about yours, but unless there's a 40 foot wall between you and them, it's a very dangerous neighborhood, counsel.

Mother contends that it "is appropriate for a trial judge to consider the potential environment(s) in which a child may reside in making a determination regarding custody. The comment is focused on the safety of the neighboring community, not the socioeconomic status . . ."

iii. Discussion

Father contends that the trial judge's conduct and comments pertaining to Father' sand Step-Mother's testimony would create in any reasonable mind a per-

ception of impropriety. For this reason, Father maintains that the trial court abused its discretion by finding that disqualification was unwarranted. Alternatively, Father contends that the second trial judge failed to expressly analyze the recusal request, and therefore, the decision not to disqualify the trial judge must be reversed. In support, Father points out that we must "reverse a decision that is committed to the sound discretion of a trial judge" if we are "unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the exercise of discretion." *Maddox v. Stone*, 174 Md. App. 489, 502 (2007). Father contends that there was no such analysis here, and that reversal is, therefore, required. Mother argues that Father failed to overcome the strong presumption that the trial judge was impartial. We agree with Mother that the trial court adequately considered the recusal motion, and did not abuse its discretion in denying the motion.

In ruling on the motion for disqualification, the second trial judge stated:

> Counsel, I have reviewed independently the motion to recuse Judge Goetzke and the memorandum of the law in support of the disqualification of the trial judge. I am familiar with the case law. . .
>
> * * *
>
> . . . I had read in great detail your memorandum in support of the disqualification of the trial judge, as well as attached Exhibit B, and I am familiar, as I indicated, with the case law in the area.
>
> I find that in light of the allegations, erring on the side of caution, I independently reviewed all that was submitted. As I indicated, I read the memorandum, I'm very familiar with the Surat (phonetic) case, and I find that this does not rise to the level warranty [sic] disqualification of Judge Goetzke so I'm going to deny the motion.

As an initial matter, we hold that the second trial judge did not fail to conduct the requisite analysis in ruling on the motion for recusal. Rather, the second trial judge made it abundantly clear that she had carefully considered Father's motion and accompanying memorandum of law. The 16-page memorandum of law articulated each basis for Father's request for disqualification, provided a detailed account of the judge's specific instances of alleged misconduct (including a reproduction of the relevant parts of the trial transcript), and presented a discussion of the applicable law. Although the second trial judge did not discuss the basis for her decision at length, she clearly considered the applicable facts and law. Thus, we find no merit in Father's argument that there was an utter lack of analysis such that reversal is required.

Likewise, we hold that the second trial judge did not abuse her discretion in denying Father's motion for disqualification. We reiterate that a deferential standard of review applies on appeal, and there is a strong presumption that a trial judge acted impartially. Upon reviewing the context surrounding the comments at issue, we hold it was not an abuse of discretion to find that the trial judge's comments did not rise to a level warranting disqualification.

B. Failure to Uphold and Apply the Law[1]

Next, Father contends that the trial judge should have been disqualified due to his failure to uphold and apply the law with respect to interviewing the child. We disagree.

i. Initial Refusal to Conduct Child Interview

First, Father argues that the trial judge "flatly refused to uphold and apply the law when he initially refused to interview the child at all . . ." Our review of the record, however, demonstrates that the trial judge did not "flatly refuse" to conduct the child interview at any point. Rather, when the issue was raised at the start of trial, the trial judge decided to reserve on that issue, explaining that other witnesses might be able to provide the same information, thereby making an interview with the child unnecessary. The trial judge indicated his preference for the parties introducing sufficient evidence without the child's testimony, in order to avoid putting the child in the middle of the dispute between her parents. Thus, since the presiding trial judge never refused to interview the child, the second trial judge did not abuse her discretion in rejecting Father's argument.

ii. Unreasonableness in Conducting Child Interview

Next, Father contends that after the trial judge allegedly refused to initially conduct the child interview, he "then only agreed to do so in such an extremely limited and unreasonable fashion." Our review of the record shows that Father renewed his request for the trial judge to conduct an interview with the child near the end of the first day of trial. The trial judge agreed. He disclosed to counsel the general questions that he planned to ask the child, and noted that the questions would only take a few minutes. Father requested that the trial judge specifically ask the child about her custody preference. After hearing Father's argument, the trial judge stated: ". . . I'll just ask again very generally what do you do here, what do you do there, and do you enjoy — we'll see."

Upon completion of the interview in chambers, the trial judge explained to the parties that he asked

the child general questions about her interests and hobbies, as well as the following questions: "Do you like being with both parents?"; "Do you like being at one place a little more than the other?"; and "If you could live at one place — with your mom or your dad, which would you prefer?" The child stated that she enjoyed her time with both parents, and had no preference for living with either parent.

Thus, the trial judge not only conducted the child interview, but asked the very questions requested by Father's counsel. Accordingly, we hold that the second trial judge did not abuse her discretion in denying the motion for disqualification on this basis.

iii. Bias Against Conducting Interviews with Children

Third, Father contends that the trial judge did not uphold or apply the appropriate law in conducting the child interview, and "deprived counsel of appropriate time to present proper argument." This argument is premised on statements that the trial judge made about the implications of conducting child interviews. In particular, after the trial judge initially indicated his desire to reserve on the issue of the child's testimony, Mother's counsel interjected: "Your Honor, may I just say for the record that I would ask the Court not to interview [the child] because I think at nine years old, I just think that's not necessarily appropriate. I think it puts her — no matter how innocuous the questions or discussion may be, I think it still puts her in a position of — " The trial judge agreed, stating:

> Yeah, I — you know, you're right. I mean, if she were 14 or 15, maybe something else, but you have the other silly, silly, ridiculous part of this is when they're young, the law says the wisdom is, well, go into chambers with them and don't ask them about their presence [sic]. Well, why are they going into chambers talking? Well, talk about where they hang their clothes and what cars they like and get a sense, you know, so in 15 minutes, the judge is supposed to become a psychiatrist and divine from listening to the child about where her friends are and what she likes to do, what her preference is, and — anyway, somebody's going to take me to task because I said, so I'd better can it. . . .

In our view, the trial judge did nothing more than comment on Mother's view of the public policy implications of conducting child interviews. The trial judge made clear that the basis for his statements was his sensitivity and concern for young children. Father's counsel understood the exchange as such, commenting: "I understand you on a humanitarian basis — . . ." Father's counsel then went on to articulate the legal standards governing child interviews, and the trial judge listened and considered these arguments. Ultimately, the trial judge adopted Father's rationale, interviewed the child, and asked the child about her custody preference. Thus, the trial judge neither failed to apply the law, nor was counsel deprived of an opportunity to "fully argue the child's preference." Accordingly, the second trial judge did not abuse her discretion in this regard in denying the motion for disqualification.

Father also argues that a child's preference "cannot possibly be ascertained and properly considered with no interview of the child or a very limited interview of the child," and challenges the interview based on the length of time that the trial judge met with the child in chambers. The transcript reflects that the court recessed for twelve minutes, within which the trial judge conducted his interview of the child. As discussed in greater detail, *infra* the trial judge has discretion as to the length and content of a child interview. Whether an abuse of discretion exists is a case-by-case determination. Here, the trial judge adopted a flexible, "we'll see" approach as to the content and length of the interview. He asked a variety of questions related to the child's interests, pets, relationship with her parents, and custody preference. In our view, the trial judge did not abuse his discretion in handling the child interview. Accordingly, the second trial judge did not abuse her discretion in denying the motion for disqualification on this basis.

II. Interview of the Child[2]

Second, Father contends that the trial judge abused his discretion in the entire handling of the "intentionally limited chambers interview" of the child. In particular, Father argues that the trial judge abused his discretion because: (1) he only "grudgingly" agreed to interview the child; (2) he only "agreed to do so in an extremely limited way"; and (3) the trial judge "outright refused to inquire as to the child's preference, as required by *Montgomery County v. Sanders*."[3] Mother argues that the trial judge did not abuse his discretion in the handling of the child interview. We agree that there was no abuse of discretion.

"Where modification of a custody award is the subject under consideration, equity courts generally base their determinations upon the same factors as those upon which an original award was made, that is, the best interest of the child." *Montgomery County v. Sanders*, 38 Md. App. 406, 419 (1977). We have recognized, however, that "there is no litmus paper test that provides a quick and relatively easy answer to custody matters." *Id* "The best interest standard is an amor-

phous notion, varying with each individual case . . . [t]he fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future. At the bottom line, what is in the child's best interest equals the fact finder's best guess." *Id*

In particular, the court must examine "numerous factors" and weigh the advantages and disadvantages of the alternative environments. *Id.* at 420. "The criteria for judicial determination includes, but is not limited to, 1) fitness of the parents . . . 2) character and reputation of the parties . . . 3) desire of the natural parents and agreements between the parties . . . 4) potentiality of maintaining natural family relations . . . 5) preference of the child . . . 6) material opportunities affecting the future life of the child . . . 7) age, health, and sex of the child . . . 8) residences of parents and opportunity for visitation . . . 9) length of separation from the natural parents . . . ; and 10) prior voluntary abandonment or surrender. . . ." *Id* (internal citations omitted). "While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor . . ." *Id.* (internal citations omitted).

The trial court has the "discretion to interview a child." *Marshall v. Stefanides*, 17 Md. App. 364 (1973). "In disputed custody cases, the court has the discretion whether to speak to the child or children and, if so, the weight to be given the children's preference as to the custodian." *Leary v. Leary* 97 Md. App. 26, 36 (1993) (citing *Casey v. Casey*, 210 Md. 464, 474 (1956)). While the preference of the child "is a factor that *may* be considered in making a custody order, the court is not required to speak with the children." *Lemley v. Lemley*, 102 Md. App. 266, 288 (1994) (citations omitted).

We have explained that in determining whether to interview a child:

> [T]he child's own wishes may be consulted and given weight if he is of sufficient age and capacity to form a rational judgment . . . But we adopt a rule that there is no specific age of a child at which his wishes should be consulted and given weight by the court. The matter depends upon the extent of the child's mental development. The desires of the child are consulted, not because of any legal rights to decide the question of custody, but because the court should know them in order to be better able to exercise its discretion wisely. It is not the whim of the child that the court respects, but its feelings, attachments, reasonable preference and probable contentment.

Leary, 97 Md. App. at 30 (citing *Ross v. Pick*, 199 Md. 341, 353 (1952)). We review a trial court's decision relating to the competency of children to testify under an abuse of discretion standard. *Wagner v. Wagner*, 109 Md. App. 1, 24 (1992).

The following is an excerpt of the trial transcript regarding Father's initial request for the child's testimony:

> THE COURT: I am very reluctant to put kids in these disputes between their parents, whether on the stand, in chambers or anywhere else. If somebody believes there's an urgent need for me to talk to [the child], I will hear your argument, but I will tell you I'm very reluctant.
>
> * * *
>
> [FATHER' S COUNSEL]: I understand you on a humanitarian basis. . . . But that's not really the issue. The issue is that [the child] has factual information that would be helpful to the Court with respect to her school, her friends, and hearing that from the horse's mouth, so to speak, we say, would be very helpful to the Court.
>
> THE COURT: Well, let me see how far we go on the evidence having it testified to by the parents. She's got friends who can testify to that — the rest of it. You know, one day, somebody's going to take me to task in a published opinion, but I think the provision in the law that the judge can talk to a child in these situations is barbaric. I just — you know, 25 years from now, [the child]'s going to be looking back that one or other parent raised her primarily, and she's going to — may very well likely say that's because I testified against my other parent, and — anyway, I'll reserve on that.
>
> [MOTHER'S COUNSEL]: Your Honor, may I just say for the record that I would ask the Court not to interview [the child] because I think at nine years old, I just think that's not necessarily appropriate. I think it puts her — no matter how innocuous the questions or discussion may be, I think it

still puts her in a position of —

THE COURT: Yeah, I — you know, you're right. I mean, if she were 14 or 15, maybe something else, but you have the other silly, silly, ridiculous part of this is when they're young, the law says the wisdom is, well, go into chambers with them and don't ask them about their presence [sic]. Well, why are they going into chambers talking? Well, talk about where they hang their clothes and what cars they like and get a sense, you know, so in 15 minutes, the judge is supposed to become a psychiatrist and divine from listening to the child about where her friends are and what she likes to do, what her preference is, and — anyway, somebody's going to take me to task because I said, so I'd better can it. . . .

The trial judge then indicated that he was reserving on the issue of the child's testimony. Later, the trial judge agreed to conduct an interview with the child. After the trial judge was notified that the child had arrived at the courthouse, the trial court made the following statements:

THE COURT: All right. Well, why don't we take a break now, if you don't mind, and I'll talk with her in chambers for a couple minutes. Just to let you know, I'm going to ask a very general question about what she does when she's up with her mom and what does she do when she's down with her dad, and going to be one or two questions about what she enjoys doing in both places. All right.

[FATHER'S COUNSEL]: Sorry, Your Honor. I — just so the record's clear, I would object to that limitation because one of the factors —

THE COURT: What do you want me to ask her, counsel?

* * *

[FATHER'S COUNSEL]: I would like you to ask her about her school in Oak Hill, how she's doing and her social network. . . . Her friends, if she's comfortable here and pursuant to Montgomery County v. Saunders, if she has any preference —

THE COURT: No.

[FATHER'S COUNSEL]: — to continue —

THE COURT: Don't even ask that.

[FATHER'S COUNSEL]: Okay. Well —

THE COURT: Very specifically, a lawyer — a judge is specifically precluded from asking that question, and I'm surprised that I've been requested to ask it.

[FATHER'S COUNSEL]: Right. I need to make a record here, Your Honor. . . . And one of the factors is if the child has reached an age and degree of maturity where it's appropriate for her to express her views, then the Court may inquire of the preference.

THE COURT: Well, would you suggest that age nine is such an age?

[FATHER'S COUNSEL]: Right. So that's what I'm getting to, Your Honor, respectfully. As you know, the Court of Special Appeal [sic] has said a child as young as five. . . . At a minimum, the Court must do a competency test to determine if she is —

THE COURT: Minimum, find they're capable of taking an oath, but being asked for their preference?

[FATHER'S COUNSEL]: But you can't decide that until you meet with her and decide if she's competent or not to answer that question. She may have no preference. I don't know. I've never spoken to the child.

THE COURT: I mean, I — counsel, I've always been told you never ask a kid about a preference if they're at such an age. I mean, maybe I got it wrong.

[MOTHER'S COUNSEL]: I have a problem with that because I think it puts the child in a very untenable position.

THE COURT: I wouldn't ask it even if I could, but I just didn't think you could. . . . you ask general questions about "what do you do with mom," "what do you do with dad." Well, you know, kid might say, "well, when I'm with so-and-so, you know, I spend the whole time crying. With so-and-so-else, I spend the whole time playing," but oh my gosh, I wouldn't ask a nine-year-old who she wants to live with.

* * *

[FATHER'S COUNSEL]: . . . I asked if you could, first of all, determine whether or not you feel she's competent to address that question. . . . If you decide she's not competent to address that question, of course, I don't want you to ask it. . . . And if you feel she is competent, then to address it in such a way that's appropriate in your judgment and discretion for what you determine she's like. But the preference is not with respect to mom or dad. The preference is how is she doing in school, would she like to stay in this school with — that's already started.

* * *

THE COURT: . . . I'll just ask again very generally what do you do here, what do you do there, and do you enjoy — we'll see. It's going to be the first time I've done this in years, but — . . . . — whatever I do, I'll let you know.

* * *

THE COURT: I spoke with [the child] in chambers. Pretty much the way I expected it would come out. She indicated that she was told by stepmom that she might be talking to me, and she said just the kind of questions I'd be asking and she wasn't coached at all. She said that I might ask her, and she wasn't coached at all. She said that she was told to tell the truth. We moved on from that. I asked what she liked to do at both places, and the answer's pretty much the same. When she's with her mom, she likes to play with her friends and go swimming. When she's with her dad, she likes to go swimming and play with her friends. She has two dogs, a beagle and a redbone coon hound. One of them's named JT at her dad's house. I asked her if she could wave a wand, what would happen after, and understandably, she said, "What do you mean?" And I said, "Do you like being with both parents?" She said, "Yeah." And I said, "Do you like being at one place a little more than the other?" She said, "No." And I said, "If you could live at one place — with your mom or your dad, which would you prefer?" She said, "I don't have a preference."

Upon our review of the record, we see no basis to support the notion that the trial judge only "grudgingly" agreed to interview the child, or that the trial judge only "agreed to do so in an extremely limited way." The trial judge has discretion to decide whether to conduct a child interview. The trial judge exercised this discretion by electing to hear other testimony first in order to determine whether the child's testimony would be useful. The trial judge later considered Father's arguments and ultimately decided to interview the child in chambers. In our view, the trial judge's comment that it would not take long to conduct the interview was intended merely to give notice to the parties as to how long of a recess should be expected, not to express any sentiment about conducting the interview. Moreover, the trial judge adopted a flexible, "we'll see" approach as to the content and length of the interview. He asked a variety of questions related to the child's interests, pets, and her relationship with her parents. We hold that the trial judge did not abuse his discretion in handling the child interview.

Additionally, we find no merit in Father's argument that the trial court "outright refused to inquire as to the child's preference, as required by *Montgomery County v. Sanders*." As an initial matter, we note that *Montgomery County v. Sanders* does not require that a court expressly ask a child his or her custody preference. Although the preference of the child is a consideration for the court, interviewing the child is not the only method by which the trial judge may discern the preference of the child. *See Lemley supra* 102 Md. App. at 288 ("the court is not required to speak with children"). Regardless, Father's argument on this point is irrelevant because the record demonstrates that the trial court inquired as to the child's preference. Accordingly, we hold that the trial judge did not abuse his discretion in his handling of the interview of the child.

III. Child Support Award

Finally, Father argues that the trial court abused its discretion in entering a child support order "based solely on extrapolated guidelines without fully analyzing and balancing the child's best interests with the Father's ability to pay." Mother contends that it was undisputed that the parties' combined income is above the maximum amount set forth in the guidelines, and that the trial court therefore had discretion to set the amount of child support. Further, Mother posits that the trial court properly exercised its discretion in determining the amount of child support. We agree that the trial court did not abuse its discretion in entering its child support order.

Generally, "the amount to be awarded for child support is governed by the circumstances of the case

and is entrusted to the sound discretion of the [trial judge], whose determination should not be disturbed on appeal unless he arbitrarily used his discretion or was clearly wrong." *Gates v. Gates*, 83 Md. App. 661, 663 (1990) (citing *Kramer v. Kramer*, 26 Md. App. 620, 636 (1975)). A trial court's child support award in an "above-guidelines" case is reviewed under the abuse of discretion standard. *See Frankel v. Frankel*, 165 Md. App. 553, 587 (2005).

Section 12-202(a)(1) of the Family Law Article of the Maryland Code requires a court to use the child support guidelines "in any proceeding to establish or modify child support, whether *pendente lite* or permanent." Md. Code Ann., Fam. Law ("FL") § 12-202(a)(l) (LexisNexis 2012); *Beck v. Beck*, 165 Md. App. 445, 449 (2005). In *Petrini v. Pelrini*, 336 Md. 453, 460 (1994), the Court of Appeals explained that:

> The purpose of the guidelines was to limit the role of the trial courts in deciding the specific amount of child support to be awarded in different cases by limiting the necessity of factual findings that had been required under pre-guidelines case law. The legislature also intended the guidelines to remedy the unconscionably low levels of many child support awards when compared with the actual cost of raising children, to improve the consistency and equity of child support awards, and to increase the efficiency in the adjudication of child support awards.

(internal footnotes omitted). "There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines . . . is the correct amount of child support to be awarded," FL § 12-202(a)(2)(i), but that "presumption may be rebuffed by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." FL § 12-202(a)(2)(ii); *Knott v. Knott*, 146 Md. App. 232, 251 (2002).

In *Otley v. Otley*, 147 Md. App. 540, 561 (2002), we acknowledged that "if the combined adjusted actual income exceeds the highest level specified in the schedule . . . the court may use its discretion in setting the amount of child support." *See* FL § 12-204(d). In *Voishan v. Palma*, 327 Md. 318, 331-32 (1992), the Court of Appeals stated that:

> [T]he guidelines do establish a rebuttable presumption that the maximum support award under the schedule is the minimum which should be awarded in cases above the schedule. Beyond this, the trial judge should examine the needs of the child in light of the parents' resources and determine the amount of support necessary to ensure that the child's standard of living does not suffer because of the parents' separation.

In *Voishan*, a case in which the parents' incomes were above the guidelines, the husband appealed the court's child support decision on the basis that the amount of support could not exceed the maximum amount under the guidelines. *Id*. at 325. The Court of Appeals disagreed, holding that "had the legislature intended to make the highest award in the schedule the presumptive basic support obligation in all cases . . . it would have so stated and would not have granted the trial judge discretion in fixing those awards." *Id*. at 326.

The Court of Appeals in *Voishan* further explained that the legislature specifically declined to set guidelines above a certain amount because "the legislative judgment was that at such high income levels judicial discretion is better suited than a fixed formula to implement the guidelines' underlying principle that a child's standard of living should be altered as little as possible by the dissolution of the family." *Id*. at 328. The Court of Appeals stated that "extrapolation from the schedule may act as a guide, but the judge may also exercise his or her own independent discretion." *Id*. at 329 (internal quotations omitted).

In the case *sub judice*, Father first takes issue with the fact that Mother's testimony indicated that the total expenses for herself and her two children were $4,400, and that "if you divided that by [ ] three it would approximate that that would be [the child's] portion." By Father's calculation, this equated to monthly expenses of approximately $1,466.00 for the child. Mother's counsel then submitted an extrapolated child support guidelines worksheet requesting a monthly child support award in the amount of $2,883. The trial court ultimately awarded Mother child support in the amount of $2,883 per month.

Additionally, Father alleges that the child support order demonstrates that the trial judge performed no analysis in making the custody determination. Father contends that the order "merely states in a footnote that '[a]lthough this is an 'above guidelines' case, we apply [the guidelines'] formula in determining Father's obligation. *See* attached worksheet."

We first observe that the child support guidelines were not directly applicable because the parties' combined adjusted income exceeded the maximum level specified in the guidelines. The circuit court determined that the salaries of the parties were $22,275 per month for Father and $4,425 per month for Mother. This amounted to a total of $26,700 combined income,

which is $11,700 greater than the $15,000 maximum under the child support guidelines. A combined adjusted income of $15,000 for one child equates to a monthly child support payment of $1,942 under the guidelines. *See* FL § 12-204(e). Consequently, the amount of child support here rested in the sound discretion of the trial court. As such, the court exercised its discretion in ordering Father to pay monthly child support of $2,883, which is $941 more than the top end of the guidelines for one child.

In making the child support determination, the trial judge announced that he was "relying upon *Frankel versus Frankel*, 165 Md. App. 553, exercising my discretion . . ." There is simply nothing in the record to suggest, as Father urges, that the trial judge regarded the extrapolated guidelines amount as a rebuttable presumption, and awarded that amount without any examination of the requisite factors. The trial judge specifically recited his findings with respect to the parties' incomes, the child's best interests, the financial needs of the child, the parents' financial ability to meet the child's needs, the station in life of each parent, their respective ages and physical conditions, and the expenses associated with educating the child. It is evident that the trial judge considered the requisite factors, and made a finding with regard to each factor.

In the same vein, Father's allegation that "the lower court did not make any specific findings with respect to the child's needs and the parent's abilities to pay" is wholly unsupported by the record. To be sure, the trial judge expressly stated that: "It seems to me that the best interest of [the child] and her needs would be for her to be able to continue to maintain as much financial security as she has had in the past." Moreover, the trial judge stated: "with regard to the parent's financial ability to meet those needs, the financial ability is almost exclusively on the father's part. He makes substantially more money than mother on a reliable and monthly basis and mother's financial circumstances are significantly inferior to those of father." Further, the footnote in the order referring to the guidelines is not dispositive because the transcript makes clear that the trial judge conducted an analysis of the relevant factors and made findings of fact orally on the record.

For the foregoing reasons, we hold that the second trial judge did not abuse her discretion in denying the motion for disqualification. Additionally, we hold that the presiding trial judge did not abuse his discretion in the handling of the child interview, or in the granting of the award of child support. Accordingly, we affirm the judgments of the Circuit Court for Anne Arundel County.

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

FOOTNOTES

1. This section analyzes whether the second trial judge abused her discretion by failing to disqualify the presiding trial judge based upon his handling of the child interview. Section II addresses whether the presiding judge abused his discretion in his handling of the child interview. The relevant facts related to the child interview are summarized here, and described in greater detail in Section II.

2. For clarification, we note that in Part I, Father argues that the handling of the child interview warranted disqualification of the trial judge. In Part II, Father argues that the custody decision should be reversed due to the trial judge's handling of the child interview.

3. Father also discusses, at length, the capacity of the child to participate in the interview, and cases involving a trial court's refusal to conduct an interview with a child. We do not discuss these cases or analyze these issues because the record here is clear that the trial judge conducted an interview with the child.

NO TEXT

Cite as 4 MFLM Supp. 15 (2013)

Child support: modification: burden of proof

Pedro Salvador
v.
Dalila Salvador

No. 2154, September Term, 2011

Argued Before: Woodward, Graeff, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Graeff, J.

Filed: February 8, 2013. Unreported.

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 of the Circuit Court for Montgomery County 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."[1]

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

FACTUAL AND PROCEDURAL BACKGROUND

On October 16, 2008, Mr. Salvador was ordered to pay to Dalila Salvador, appellee, $1,800 per month in child support, plus $200 per month in child support arrearages, for the parties' two minor children, Edwin and Jefre. At the time of that order, 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.[2]

A master held a hearing on the motion to modify on May 23, 2011, June 15, 2011, and August 29, 2011. During the hearing, the master confirmed several times that Ms. Salvador was not making an allegation of voluntary impoverishment.

Mr. Salvador testified that he was employed full-time with Garden Gate Landscaping ("Garden Gate"), working 44-53 hours per week at a pay rate of $14 per hour. Prior to his employment at Garden Gate, Mr. Salvador was self-employed at PS Landscaping & Services ("PS") for approximately six years, and he earned $40,000 to $45,000 per year. At PS, Mr. Salvador employed four to five undocumented workers, and he had three or four trucks. That business stopped operations in 2010 for "quite a few reasons," including "that the economy [was] so bad and the bigger contracts that [PS had] . . . with big companies . . . would require [him] to have" documented workers and workers' compensation insurance. Furthermore, none of PS's trucks were operable at the end of 2010, and Mr. Salvador could not afford to repair them. In 2011, Mr. Salvador did not work for any employer other than Garden Gate and did not perform any "side jobs." He did not receive any other income in 2011, other than what was owed to him for work performed in 2010, approximately $3,000. Mr. Salvador testified that his health was suffering, and he could not handle the stress of operating PS any longer.

Prior to 2011, PS had large contracts for snow removal with Coopers Landing and McFall & Berry Landscape Management, Inc. ("McFall"). On cross-examination, Mr. Salvador agreed that he had not produced the Coopers Landing contract in discovery pursuant to a request for production of documents, that the contract was at his house, and that the contract did not state in writing that PS was required to have workers' compensation insurance. He stated that he did not have a written contract with McFall.

Ms. Salvador's counsel also inquired about Mr. Salvador's Answers to Interrogatories, specifically interrogatory numbers 14 and 26. Interrogatory number 14 and Mr. Salvador's response, provided as follows:

> **INTERROGATORY NO. 14.**
>
> If you contend there has been a change in circumstances with regard to your income, then detail all the facts upon which you rely to support said contention.
>
> **A14.** The company that I had, P.S. Landscaping Services failed due to

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

> the economy. The customers that I previously had either could no longer pay for landscaping services or chose not to pay for landscaping/lawn maintenance any longer. The competition became too great as other companies lowered their prices. My income dropped from roughly $40,000 to $20,000.

When cross-examined regarding Interrogatory number 14, Mr. Salvador agreed that his response did not make reference to any issues with PS employing undocumented workers, which was in conflict with his testimony on direct examination.

Interrogatory number 26 asked Mr. Salvador to

> [f]ully identify each and every person; entity; or business from whom you have received money since January 1, 2008 indicating as to each the (a) name and address of each person, entity or business; (b) the date of each payment received; (c) the amount of each payment received and (d) the reason for each payment of money.

Upon questioning with respect to Interrogatory number 26, Mr. Salvador agreed that his answer did not provide all of the requested information.

Mr. Salvador also failed to provide specific information in response to Interrogatory number 4, which requested that he list all of his income, as well as the amount and source, from 2008 through 2011, and he failed to provide the information requested in Interrogatory number 5, which requested that he list each bank account in which he had money on deposit within the four years prior to the hearing, and the balances of those accounts.

With regard to his bank accounts, Mr. Salvador agreed that he made deposits into both business and personal accounts in 2010. He agreed that he would deposit checks from the business account into his personal account, and he also would deposit checks from PS's clients into his personal account. He testified, however, that he did not provide any information regarding his personal bank account statements because that account was closed in 2010. Mr. Salvador testified that PS had not completed a 2010 tax return at the time of trial, and he had not yet provided his accountant with any information for the 2010 calendar year for the preparation of his 2010 business tax return. He agreed that, in previous years, he did not provide his business accountant with his personal bank statements for tax preparation purposes, and he did not maintain records of the business's money that he deposited into his personal account.

Due to Mr. Salvador's failure to produce bank statements in discovery, Ms. Salvador subpoenaed them from the bank. A bank statement for the business account reflected total deposits in January 2011 in the amount of $3,080. Mr. Salvador testified that the business account was still open at the time of the hearing, but it had a balance of only $45.

Ms. Salvador testified that she had been married to Mr. Salvador for fifteen years, during which time Mr. Salvador had operated PS. She stated that Mr. Salvador and PS were paid for their services mostly in cash and in personal checks. Mr. Salvador would keep the cash, sometimes $10,000 at a time, "and he would just spend it" for their expenses. The checks would be deposited either into his personal or business bank account.

Ms. Salvador testified that Mr. Salvador's sole source of income was from PS until he filed the motion to modify. She asserted that Mr. Salvador continued to operate PS even after he began working at Garden Gate. Ms. Salvador was familiar with PS's employees, including Johnny Pozo, Carlos Zelaya, Juan Garcia, and someone identified only as "Alfredo," and she had seen them working in the Potomac area with Mr. Salvador's equipment approximately a week and a half before the hearing. Mr. Pozo lived with Mr. Salvador, and Ms. Salvador had never known him to work for anyone other than Mr. Salvador.

On May 24, 2011, Ms. Salvador went to Mr. Salvador's home to try to take pictures of his work equipment. When Mr. Salvador saw her, he took the camera and broke it. Thereafter, the equipment was moved from Mr. Salvador's home to the homes of Mr. Zelaya and Alfredo. On May 26 at 5:30 a.m., she observed Mr. Salvador at a 7-Eleven store speaking on the telephone with Alfredo, telling him what time they would begin working that day. Ms. Salvador also followed Mr. Salvador on occasion and saw him working at residences with Mr. Pozo, particularly on the weekends. In May 2011, she observed Mr. Salvador at his home attaching equipment to his truck and leaving for work with Mr. Pozo. She had also seen Mr. Salvador in 2011 working with Juan Araujo, who had worked for Mr. Salvador for ten years, at PS's clients' properties.

For a year and a half, Mr. Salvador had paid his child support to Ms. Salvador with a personal check. At the end of 2010, however, he began paying her with money orders. Mr. Salvador never told Ms. Salvador that he was changing employment.

Ms. Salvador called several of PS's customers to testify. Peter Lee testified that Mr. Salvador had been doing landscaping work for him since 2004. Although he had not seen Mr. Salvador personally in a "very long time," most of the time nobody was home when his grass was cut. Mr. Lee would receive an invoice

once or twice a year, and he had last paid an invoice for $1,600 to $2,200 in December 2010. Mr. Lee was not familiar with the name of the landscaping company, and he wrote his checks for payment directly to Mr. Salvador. Mr. Lee was unaware, until June 2011, that Mr. Salvador was no longer cutting his grass. In July 2011, Mr. Salvador told Mr. Lee that somebody named Juan was cutting his grass. Mr. Lee had not received any invoices in 2011, and the frequency of his lawn maintenance had not changed. Mr. Lee did not owe Mr. Salvador any money at the end of 2010.

Edward Christovich testified that he began using Mr. Salvador for his lawn maintenance services in late 2005. He was not familiar with the company name. Mr. Christovich received invoices annually, near the end of the year. Mr. Salvador never told Mr. Christovich that he was discontinuing his lawn services, and Mr. Christovich never told Mr. Salvador that he was unable to continue to use his services because of the cost. Mr. Christovich's annual cost for landscaping was approximately $2,000. Mr. Christovich had not received any invoices in 2011. At some point in early 2011, Mr. Salvador told Mr. Christovich that he was "full-time employed, not working for himself any longer," and Juan would be cutting his lawn in the future. Mr. Christovich recognized Juan from having been on his property when Mr. Salvador was cutting his grass. Mr. Christovich did not owe Mr. Salvador any money at the end of 2010.

Lobat Mohajeri testified that Mr. Salvador had taken care of her lawn for approximately eight years. She was not familiar with the company name. Ms. Mohajeri paid Mr. Salvador by check approximately every three months according to their agreement. When Mr. Salvador would cut her grass, he would have different people with him. Before the season started in 2011, Mr. Salvador told Ms. Mohajeri that he would no longer be cutting her grass because he was working for a company. Ms. Mohajeri did not owe Mr. Salvador any money at the end of 2010.

On September 14, 2011, after restating on the record the evidence before the court, the master orally issued findings and recommendations. She found that Mr. Salvador was "currently employed on a full time basis at Garden Gate Landscaping where he has been so employed since early March of this year," and that previously, he had been "self-employed running a business known as PS Landscape and Servicing." The master found Mr. Salvador's testimony "that he does not have any income from any other source other than his current employment with Garden Gate. . . . to be of only limited credibility," stating that Mr. Salvador "was very inconsistent in his testimony as to what the true reasons were for ceasing the operation of PS Landscaping." The master explained:

> He told different stories to different people. He told some people that it was due to the economy. His clients could not pay or did not want to renew the service.
>
> He testified that several large clients, their contracts, renewable contracts, would require him to have Workers Compensation insurance and would require him to hire workers who were here legally but he couldn't afford to do so. So he lost those contracts.
>
> [Mr. Salvador] also testified that the business was too stressful for him. That he was losing his hair; he was suffering other medical health concerns as a result of the stress. However, [he] failed to produce any testimony or evidence in support of any such health claims.
>
> The [c]ourt believes that some of what [Mr. Salvador] testified to is true, to a limited extent. But even if the [c]ourt were to find that [Mr. Salvador's] assertions were absolutely true, the [c]ourt finds that [he] was not credible on the issue of the reasons why he gave up his business.
>
> The [c]ourt believes that [Mr. Salvador] did see an opportunity to have a more regular, consistent income with benefits and took the job with Garden Gate Landscaping. But the [c]ourt also believes that [Mr. Salvador], at least on a part time basis, continues to operate PS Landscaping.
>
> The fact that this gentleman by the name of Juan continues to service [Mr. Salvador's] former customers, that the customers really had no knowledge either of PS Landscaping to begin with, or did not have any knowledge that there was any change, but in any event all of the customers that testified continue to receive the lawn service.
>
> They all testified that [Mr. Salvador] sometimes performed the services at their residences, but sometimes other workers, and sometimes [Mr. Salvador] and other workers. And the fact of the matter is, is all of the customers testified that they

continue to receive the service.

The master then referred to Ms. Salvador's testimony regarding her observations of Mr. Salvador working at various locations on weekends. Although the master did not find credible Ms. Salvador's testimony with respect to what she allegedly overheard Mr. Salvador say on the telephone when she followed him to the 7-Eleven, the master stated that she found Ms. Salvador's testimony regarding her suspicions "at least in part accurate." The master stated:

> It is illogical to the [c]ourt that [Mr. Salvador] would operate a business for more than six years, the income which he used to help support his family, the income of which was used to determine his previous child support and alimony obligations, that he would simply stop and terminate operations of the business and not at least sell his interest, sell the business to one of his former employees, since it's, I think very clear to the [c]ourt, that his former, at least several of his former employees continue to do the landscaping work at the various customers' residences.
>
> Its also illogical to the [c]ourt that if [Mr. Salvador] did not at least sell the business to any of these former employees, that he was not at least getting some kind of financial remuneration from those employees who are now at least doing the work.
>
> The [c]ourt does believe that [Mr. Salvador] is, at least on a part time basis, continuing to operate PS Landscaping.
>
> The [c]ourt's view is in addition in reliance upon [Mr. Salvador's] own testimony where he was so inconsistent with who he told what, as to his reasons for terminating the business.
>
> * * *
>
> [W]hat was significant to the [c]ourt, is that [Ms. Salvador] did observe the PS Landscaping equipment at [Mr. Salvador's] property and it continued to be visible until after the May 24, 2011 incident where she attempted to take pictures of the equipment and [Mr. Salvador] at the residence.
>
> That testimony in the court's view does lend credence to [Ms. Salvador's] position that at least in some way [Mr. Salvador] continues to operate PS Landscaping.
>
> And again . . . the [c]ourt finds that [Mr. Salvador] is still operating and generating income from PS Landscaping, at least to some extent.
>
> Even if he's not reflecting the deposits or receipts of those monies through his business accounts, but he has that income in addition to his income from working at Garden Gate.
>
> The [c]ourt therefore finds that [Mr. Salvador] has failed to offer sufficient credible evidence to support his burden of proof that there has been a material change in circumstances which has taken place since the entry of the last order, particularly with respect to his assertion that he has suffered a reduction in income.

On September 21, 2011, Mr. Salvador filed exceptions to the master's report and recommendations.

On November 28, 2011, the circuit court held a hearing on Mr. Salvador's exceptions. After considering counsels' arguments, as well as the transcripts and exhibits admitted at the hearing before the master, and the findings and recommendations of the master, the court denied Mr. Salvador's motion. The court initially noted that there was no argument of voluntary impoverishment, and that was "not an issue here." The court then stated that Mr. Salvador had the burden to convince the court of a change in circumstances "as to what [his] current income is." Noting that Mr. Salvador's income in 2008 was $8,150 a month, and two pay stubs showed Mr. Salvador's income from Garden Gate Landscaping to be approximately $3,300 a month, the court stated that the question was whether Mr. Salvador's "sole and only income is from his job with Garden Gate." Although Mr. Salvador said that it was, the court stated that the master did not find him credible, and "the [c]ourt has to defer to the trier of fact in this case as to credibility."

The court further 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. It gave examples "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]."

The court noted that Mr. Salvador asserted that

he could not "prove a negative," that "he didn't get any income from this business." In response, the court stated:

> How about bringing in the people who were no longer contracting with [PS Landscaping]. Certainly they could testify and tell us that he was no longer receiving any money from them.
>
> Or what about providing all of his bank accounts for 2011. . . .

The court then explained the dilemma for the trier of fact, and its basis for the denial of Mr. Salvador's motion for modification:

> But in this case where there is justification for a belief that he is receiving additional income, other than what he shows, the question becomes what is the trier of fact supposed to do with that if you don't have a specific number, if you can't show the specific number of the amount that he received.
>
> If we can do that, there would have been a finding of income, and that would have been the end of the story.
>
> * * *
>
> 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 by introducing "credible probative" "evidence of his full time employment and testif[ying] through the introduction of exhibits and his oral testimony that his gross monthly income was substantially less than the monthly income determined" in the initial support order. At that point, he asserts, Ms. Salvador bore the burden of proving " by affirmative evidence the existence of undisclosed income and then quantifying it," but the only evidence Ms. Salvador produced was her own "suspicion and innuendo." Under these circumstances, Mr. Salvador asserts, the master (and thereafter 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.

I.
Standard of Review

The Court of Appeals has explained:

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

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

Where the circuit court is reviewing recommendations from a master, we have explained the court's role as follows:

> Exceptions to the recommendations of a master warrant an independent consideration by the trial court. The trial court may consider additional testimony or independently consider the report and recommendations of the master. The trial court "should defer to the fact-finding of the master where the fact-finding is supported by credible evidence, and is not, therefore, clearly erroneous." *Wenger v. Wenger*, 42 Md. App. 596, 602 (1979). In doing so, however, the trial court must always independently determine

> what to make of those facts. In other words, the trial court may not defer to the master as to the ultimate disposition of the case.
>
> The ultimate conclusions and recommendations of the master are not simply to be tested against the clearly erroneous standard, and if found to be supported by evidence of record, automatically accepted. That the conclusions and recommendations of the master are well supported by the evidence is not dispositive if the independent exercise of judgment by the chancellor on those issues would produce a difference result. *Domingues v. Johnson,* 323 Md. 486, 491-92 (1991).

Id. at 453 (parallel citations omitted).

II.
Denial of Motion for Modification of Child Support

Modification of child support is governed by Maryland Code (2010 Supp.) § 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." (Emphasis added). A decision regarding a modification of child support is left to the sound discretion of the trial court and will not be disturbed unless that discretion was arbitrarily used or the judgment was clearly wrong. *Moore v. Tseronis,* 106 Md. App. 275, 281 (1995).

In making a determination as to whether a party has met the criteria for modification, the court below must consider the circumstances that were in effect when the challenged support order was issued, as well as any new evidence on which the parties rely to justify the modification. *Corby v. McCarthy*, 154 Md. App. 446, 477-78 (2003). *Accord Walsh v. Walsh*, 333 Md. 492, 501 (1994) ("In determining if there is a material change of circumstances, a court must first look to the circumstances at the time of the original support order."). A finding of material change in circumstances is a threshold question before modifying a party's child support. *Wills v. Jones*, 340 Md. 480, 489 (1995).

The material change of circumstance requirement limits the circumstances under which a court may modify a child support award in two ways: (1) "the 'change of circumstance' must be relevant to the level of support a child is actually receiving or entitled to receive"; and (2) "the requirement that the change be 'material' limits a court's authority to situations where a change is of sufficient magnitude to justify judicial modification of the support order." *Drummond v. State*, 350 Md. 502, 509 (1998). A change in the income pool, such as one parent losing his or her job, is a common change in circumstance relevant to a modification of child support. *Id.* at 510-11.

In making the threshold determination whether a material change of circumstance has occurred, a court must specifically focus on the alleged changes in income or support that have occurred since the previous child support award. Unlike in cases where voluntary impoverishment is alleged, "it should generally be unnecessary to inquire into a parent's motivations, intentions, or income-earning capacity, because the court can focus on the specific alleged changes to the income sustained by each parent." *Wills*, 340 Md. at 489.

The party seeking modification bears the burden of production and the burden of persuasion. *Bornemann v. Bornemann*, 175 Md. App. 716, 734 (2007). *Accord Haught v. Grieashamer*, 64 Md. App. 605, 611 (1999) ("The burden is on the person seeking modification to demonstrate a sufficient change of circumstances since the order was entered to justify the modification."). Here, 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 two Maryland cases, *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.

Long, 141 Md. App. at 349, dealt with a finding of voluntary impoverishment, based solely on an inference from the appellant's exercise of his Fifth Amendment privilege. We held that, although a court is entitled to draw an adverse inference based upon a person's invocation of the Fifth Amendment privilege, a court may not find voluntary impoverishment based solely on such an inference, and it may not find a specific amount of imputed or undisclosed actual income without supporting evidence. *Id.*

Moustafa, 166 Md. App. at 399, dealt with an award of indefinite alimony. Mr. Moustafa argued that

the evidence was insufficient to support the court's finding that he had a monthly income of $16,000. *Id.* We cited *Long* for the proposition that disbelief of a party's testimony does not constitute affirmative evidence to the contrary, and a court "may not find a specific amount of imputed or undisclosed actual income without supporting evidence," but we noted that a court was entitled to draw reasonable inferences from the evidence accepted as true. *Id*. We upheld the circuit court's calculation of Mr. Moustafa's income after concluding that it was not based solely upon the court's disbelief of a party's testimony as to his or her actual income. *Id*. at 400.

Neither *Long nor Moustafa* presented a situation similar to the one before us. As indicated, 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.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Mr. Salvador presents three questions for our review, which we have distilled into one. As phrased by Mr. Salvador, the questions presented are:

> 1. Did the trial court err by denying the Defendant's Motion for Modification where the Defendant provided credible probative evidence in his prima facie case that he was employed as a full time employee earning a wage substantially less then [sic] he had earned when he was self-employed in October, 2008?
>
> 2. Did the trial court err in holding that the Defendant had failed to meet his burden of proof to establish a modification where the Plaintiff did not move at the close at [sic] the Defendant's prima facie case to dismiss and the Plaintiff subsequently alleged but did not prove by affirmative evidence that the Defendant was receiving additional unspecified income from his former employment, the Master failed to make any finding of the Defendant's present income and neither the Plaintiff nor the court asserted that the Defendant was voluntarily impoverished[?]
>
> 3. Did the trial court err by denying the Defendant's Motion for Modification by denying the motion, in effect, because the Defendant did not prove a negative and by requiring the *Defendant* to produce affirmative evidence to rebut the unsubstantiated allegations of the Plaintiff that he was receiving additional undisclosed income from his former employment in addition to the income received from his regular full time employment?

2. The docket entries reflect that "defendant's financial statement" was filed on January 3, 2011. Ms. Salvador provided a copy of the financial statement filed in the circuit court in her supplemental record extract. Mr. Salvador's answers to interrogatories indicate that, in addition to his wages, he received $1,500 in rent.

NO TEXT

Cite as 4 MFLM Supp. 23 (2013)

Adoption/Guardianship: termination of parental rights: abandonment

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

No. 0560, September Term, 2012

Argued Before: Eyler, Deborah S., Meredith, Watts, JJ.

Opinion by Meredith, J.

Filed: February 12, 2013. Unreported.

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.

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

The Circuit Court for Montgomery County, sitting as a juvenile court, conducted a termination of parental rights ("TPR") hearing on March 27-30, April 9-13, and April 23-25, 2012, in the cases of five children: Chelsea O., Savanna O., Shianne O., Katelyn O., and Kyle O., collectively "the children."[1] On May 1, 2012, the court entered an order terminating the parental rights of Rose C. ("the mother") and Reginald O. ("the father"), collectively the appellants, with respect to all five of the children. Appellants noted this appeal.

QUESTION PRESENTED

Appellants present two questions for review, which we have consolidated and re-worded:[2]

Did the court err in terminating the parental rights of appellants with respect to the children?

For the reasons below, we answer this question in the negative and affirm the judgments of the circuit court.

FACTS AND PROCEDURAL HISTORY

Appellants are the biological parents of the children. At the time of the TPR hearing in this case, the children ranged in age as follows: Chelsea was seven years old; Savanna was six years old; Shianne was four years old; Katelyn was three years old; and Kyle was two years old.

In January 2010, the Montgomery County Department of Health and Human Services ("MCDHHS"), appellee, began an investigation into possible neglect of the four older children in this case. The children had poor hygiene, inadequate food, and insufficient sleeping facilities. Additionally, the children were behind on their immunizations. Appellants told MCDHHS that they had lived in seven places in the last five years. Social workers testified that they were concerned by a lack of parental supervision of the children and the parents' substance abuse.

Social workers entered into safety plans with appellants. Appellants agreed to inform MCDHHS of the children's medical care, address the housing situation, and refrain from drug use. In February 2010, without any warning or explanation, appellants took the children to North Carolina for six weeks. Social workers in that state attempted to help appellants and their children, but appellants refused all services. During this time, Kyle was born.

Appellants and the children subsequently returned to Maryland. MCDHHS determined that appellants had neglected the children and asked the court to place the children in shelter care. In April 2010, following an emergency hearing, the court placed the children in shelter care. Shortly thereafter, the court determined that all five children were children in need of assistance ("CINA") and committed the children to the custody of MCDHHS. MCDHHS put the children into foster care, initially with hopes of reuniting the children with appellants.

MCDHHS facilitated supervised visits between appellants and the children, beginning in April 2010. Social workers developed concerns over Ms. C's lack of responsiveness to the children. Additionally, at one visit, Savanna had a burn mark on her thigh. Mr. O. told social workers that Savanna had backed into a space heater, but Savanna said that Ms. C. had burned her with a pancake turner.

More alarming to social workers, Chelsea and Savanna began making disclosures of sexual abuse to their foster parents and social workers. For example, Savanna stated that "it hurts in my butt when I have to hump." At one point, Chelsea told social workers that

Ms. C. and another person hurt her "kitty," which she identified as her vaginal region. Both girls also said they knew how to hump.

Chelsea and Savanna displayed hypersexualized behaviors, including dancing in a sexual manner, masturbating, "humping" various objects, touching each others' vaginas, and using sexual language. In October 2010, MCDHHS found indications of child sexual abuse against both parents and immediately suspended parental visits for Chelsea, Savanna, and Shianne. Supervised visits with Katelyn and Kyle continued. In an effort to reunite the children with appellants, however, the court ordered supervised visits with the three older children to resume in February 2011.

The court ordered appellants to complete psychological evaluations, parenting classes, and smoking cessation classes.[3] Additionally, the court ordered appellants to keep MCDHHS informed of their contact information. MCDHHS also directed Ms. C. to take classes so that she could obtain her GED. In January 2011, MCDHHS entered into a service agreement with Ms. C.; Mr. O. did not sign an agreement.

Faith Weidler, a social worker assigned for the three older children, testified that Ms. C. initially attended two of four scheduled monthly meetings, but she did not attend individual therapy. Ms. Weidler also stated that Mr. O. did not attend any meetings, but he 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. Social workers testified that Ms. C. attended only two of twelve parenting classes, and she did not attend any smoking cessation classes. Appellants did not appear for any of the four scheduled appointments to conduct court-ordered psychological evaluations. Ms. C. failed to attend any of the GED classes. Appellants also failed to attend any of their children's medical appointments, even though MCDHHS provided them with advance notice. 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. On many occasions, appellants would arrive late and leave early, if they appeared at all. 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 eventually found appellants with their new baby in a motel room in August 2011. MCDHHS removed Ryan from appellants' custody because of their previous interactions with appellants and the presence in the motel room of prescription medications that were not prescribed to either Ms. C. or Mr. O., as well as syringes, and a pill crusher. Kenyetta Taylor, a social worker assigned to Katelyn and Kyle, opined that appellants had attempted to hide Ryan from MCDHHS and had neglected their other children.

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 from the proceedings 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 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. For example, Katelyn had nightmares. In one incident following a visit with appellants, Savanna banged snow globes together until the glass broke; Savanna then took the glass and threatened to cut herself. Numerous social workers expressed concern about the lack of stability in appellants' lives and the detrimental effect this would have on the children. For example, Dr. Todd Christiansen, a child psychiatrist who treated Chelsea, recommended a cessation of attempts at reunification between appellants and Chelsea. He opined:

> If she hasn't had any contact with her parents, and her parents have shown no degree of stability up until this point, I would view this as a risk benefit equation. The risks of her starting the reunification process with her biological parents, and have that disrupted, are, in my opinion, too high to consider it being worth the risk.

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 of the 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." (Emphasis added.) 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.'"** (Emphasis added.) The court explained:

> To underscore their abandonment and put it beyond any question, the parents have failed to appear in Court on the 11 days of trial, save a 90 minute period on the first day of trial. Their refusal to visit their children says "we abandon you." Their failure to appear at the trial in which their parental rights were at stake adds five exclamation points to that declaration, one for each of the children: Chelsea, Savanna, Shianne, Katelyn and Kyle!!!!! On the first day of trial the parents told the social worker, Kenyetta Taylor, that they would return on the second day. They did not. They have not since. When one's inconsistency becomes consistent it emerges as a hallmark of behavior. This inconsistency breeds the chaos which every mental health professional who testified in this case said undermines any positive prognosis for these children in recovering from the damage done while in the custody of their parents.
>
> * * *
>
> 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. How could one care so little for one's lovable children as to not visit them in nearly a year — by one's own choice? How can one be so cruel as to offer to send Christmas gifts to one's children — as these parents did — while these children had been deprived of the presence of their parents for so long? These parents were kept advised of the status of each of their children throughout. **The court finds that a continued parental relationship with the mother and father of these children w ould be detrimental to the best interests of those children.**

(Emphasis added, internal citations omitted.)

STANDARD OF REVIEW

The Court of Appeals explained the standard of review for a TPR hearing as follows in *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 100 (2010) (quoting *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 297 (2005)):

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

In this case, appellants are challenging the ultimate conclusion of the court. Accordingly, we review the court's decision under the abuse of discretion standard. A court abuses its discretion when "'the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Miller v. Mathias,* 428 Md. 419, 454 (2012) (quoting *In re Yve S.*, 373 Md. 551, 583-84 (2003)).

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. *See In re Adoption of Victor A., supra*, 386 Md. at 298-300. Accordingly, a court will terminate parental rights over a child "'upon a showing either that the par-

ent is unfit or that exceptional circumstances exist which would make continued custody with the parent detrimental to the best interest of the child.'" *In re Adoption of Amber R., supra*, 417 Md. at 709 (quoting *In re Adoption of Rashawn H., supra*, 402 Md. at 495). *See also In re Adoption of Victor A., supra*, 386 Md. at 300 (citing *McDermott v. Dougherty*, 385 Md. 320, 354 (2005); *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 112 (1994)).

To that end, the General Assembly has enacted legislation to guide the courts in the determination of the best interests of the child. *See In re Adoption of Amber R., supra*, 417 Md. at 709-10. Maryland Code (1984, 2006 Repl. Vol, 2011 Suppl.), Family Law Article ("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. *See id.* § 5-323(d).

A. Chelsea and Savanna

Appellants contend that the circuit court erred in terminating their parental rights over the children. For Chelsea and Savanna, appellants argue that terminating their parental rights does not advance the interests of these children. See Appellants' Br. at 19. Appellants concede that present contact between Chelsea and Savanna and appellants would be detrimental, but appellants believe that "the facts do not show a relationship that is hopeless forever." *Id.* at 20. Appellants contend that Chelsea and Savanna face poor adoption prospects, and terminating appellants' parental rights merely turns the girls into orphans. *Id.* at 20-21.

Appellants fail to recognize, however, that a TPR hearing is entirely separate from considerations of adoption. The Court of Appeals has explained: "We have held, heretofore, that a child's prospects for adoption must be a consideration independent from the termination of parental rights . . . ." *In re Adoption of Victor A., supra*, 386 Md. at 317 (citing *Cecil Cnty. Dept. of Soc. Servs. v. Goodyear*, 263 Md. 611, 615 (1971)). *See also In re Adoption/Guardianship of Cross H.*, 200 Md. App. 142, 151-52 (2011) (noting that fitness of parents at issue in TPR hearing), *cert. granted,* 422 Md. 352 (2011). 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.

B. Terminating Parental Rights in the Children

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." Appellant's Br. at 23. The court, however, found otherwise: "These parents have abandoned their five children." 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 in a child. Appellants have failed to persuade this Court that the circuit court abused its discretion in a consideration of the statutory factors. The circuit court explained its findings regarding each factor, including those that were inapplicable to this case. We quote selectively from the circuit court's analysis to demonstrate the thoroughness of its opinion:

> [(d)(1)](iii) the extent to which a local department and parent have fulfilled their obligations under a social services agreement, if any:
>
> The parents did not do the smoking cessation classes, the parenting classes, psychological evaluations or drug evaluation for Mom. There was one drug test result in evidence.
>
> The parents missed 8 sessions of Infants & Toddlers counseling.
>
> The parents missed many scheduled visitations to which the children were transported and waited and waited to be returned to their foster homes because the parents did not show up and made no effort to contact or contacted with a last minute excuse. The parents have made no visitations since June, 2011. They had only go complete a few uncomplicated and low effort requirements in order to have visits resume.
>
> * * *
>
> (2) the results of the parent's effort to adjust the parent's circumstances, condition, or conduct to make it in the child's best interests for the child to be returned to the parent's home, including:
>
> * * *
>
> These parents have not visited with their children since June, 2011. [MC]DHHS made it clear that to have visitations resume, the parents had only to attend 3 meetings with [MC]DHHS, one of which was the meeting at which this offer was made, go to smoking cessation classes and parent education classes. They not

only did not resist doing so, they spoke enthusiastically of doing so. They did not, regrettably, complete any of these requested measures. These were not long term nor burdensome requirements. They were appropriate and measured remedial measures.

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

(1) the child:

The father has not had a visit since May 17, 2011. The mother has not had a visit since June 17, 2011. Parents came to court for 90 minutes on the first day. They have not been in court since then. In fact on Day 9, April 23, though members of the [] family came to court, neither parent came. A family member . . . testified that [appellants] had left work at 9 am that day. They did not call or come to court.

The father pledged to take off from work to be at child visits. He did not. They both agreed to go to parenting instruction, smoking cessation classes and a psychological evaluation. These reasonable remediative measures were not done. There was no argument by the parents. There was no follow-through. These parents have abandoned their five children.

* * *

(2) the local department to which the child is committed; and

The parents did not maintain contact with [MC]DHHS in any consistent fashion. They did not respond to phone calls, did not maintain a current phone number with [MC]DHHS so they could be contacted. The[y] evaded [MC]DHHS when the mother was pregnant with Ryan. They failed to make meetings, often with no excuse given. They just did not show up. As [mother]'s sister . . . testified: "they don't tell us nothing". So, they don't even communicate with their own family members.

* * *

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

> Chelsea, Savanna, Shianne, Katelyn, and Kyle each needs to have a stable home, with a consistent, loving family, committed to their well-being. Nearly every mental health expert, whether psychiatrist, psychologist or social worker gave opinion that safety and stability in the futures of these children are essential for a good prognosis. They did not and would not have those qualities in the home of their biological parents. Each of these children will be better off, though it would be expected that Chelsea will and Savanna may have behavior difficulties.

(Emphases omitted).

We perceive no abuse of discretion in the circuit court's judgments terminating the parental rights of appellants. The court determined: "[I]t is in the best interests of each of these children that the parental rights of [appellants] be terminated as to [the children]." Accordingly, we affirm the judgments of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT F OR MONTGOMERY COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

FOOTNOTES

1 Ryan O., a younger sibling of the children, is the subject of a different proceeding.

See *In re Ryan O.,* No. 2602, Sept. Term 2011 (Md. Ct. Spec. App. May 9, 2012).

2. Appellants separated the children in the questions presented, which read:

> 1. Did the court err in terminating the parental rights of [the parents over] Chelsea O. and Savanna O. when there was no reasonable likelihood that this would further their permanency?
> 2. Did the court err in terminating the parental rights of [the parents over] Shianne O., Katelyn O., and Kyle O.?

3. MCDHHS and the court felt that smoking cessation classes were a necessity for appellants because of the children's respiratory problems. For example, Katelyn has allergies, and Kyle has tracheomalacia, meaning his trachea is smaller than his body requires.

NO TEXT

Cite as 4 MFLM Supp. 29 (2013)

CINA: parental fitness: loss of presumption

In Re: Christopher C. and James C.

No. 0800, September Term, 2012

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

Opinion by Woodward, J.

Filed: February 12, 2013. Unreported.

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 and had made no attempt at reunification deprived her of the presumption that she was a fit parent.

Petitions filed in the Circuit Court for Cecil County alleged that Christopher C. and James C. were children in need of assistance ("CINA").[1] Following an adjudicatory hearing held on June 6, 2012, the circuit court, sitting as a juvenile court, sustained the allegations in the petitions and 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 re-phrased:[2]

> 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?

For the reasons outlined below, we shall hold that 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 severely underweight at birth and continue to struggle with developmental delays, including limited verbal skills. They receive special education services and still wear diapers at four years of age.

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

The children were removed from Ms. F.'s and Mr. C.'s care and put into foster care in May 2008. The allegations in the 2008 CINA petition were that the parents exhibited a lack of motivation, negative behaviors towards the children, and had mental health issues. Mr. C. also struggled with drug addiction and was incarcerated at the time of the children's removal. Mr. C.'s mother, Imogene C., was granted guardianship of the children in February 2010. A principal condition of Imogene C.'s guardianship was that Mr. C. not be permitted to live with her. The Department sent a letter to Imogene C. on July 22, 2010 informing her that it had been notified that Mr. C. was residing with her. The letter threatened to terminate the subsidy the Department provided her if he continued to do so.

On May 10, 2012, the Department received a referral from Bay View Elementary School indicating that James had suspicious bruising on his buttocks. James' stepmother, Loni C., who was residing with her husband, Mr. C., Imogene C., and the children, sent a note to his teacher indicating that James had a rash on his bottom, but that diaper rash ointment seemed to clear it up. When James' teacher changed his diaper, she noticed suspicious red and blue bruising on his bottom that the school nurse confirmed was linear bruising across both buttocks. James was not able to provide an explanation because he had not yet become verbal. A physician conducted an examination and determined that the marks on James' buttocks were not accidental; rather they were consistent with physical abuse and "appeared to be caused by blunt impact to the buttocks with a broader object."

The children's family provided several inconsistent explanations for James' injuries. These explanations included: James' bus driver slamming him into his seat; falling off of an outdoor play set and landing in a wood pile; Loni C. hitting him on the bottom with her open hand; Loni C. hitting him on the bottom with her sandal. Loni C. was eventually charged with second degree assault and second degree child abuse.

Loni C. also accused Mr. C. and Imogene C. of abusing the children. She reported that the children were kept home from school following physical abuse so as to avoid drawing attention to their injuries. On

one occasion she claimed that Mr. C. kicked James in his lower-back as if he were kicking a field goal. In another incident, Imogene C. allegedly flung Christopher out the door like a frisbee, and told Mr. C. "here is your fucking kid."

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. Imogene C. and Mr. C. refused to provide the Department contact information for Ms. F. The Department attempted to locate Ms. F. via several different means and eventually succeeded in finding her telephone number though the CARES database. The Department left Ms. F. a message on May 14, 2012, and she returned the call, indicating that she was interested in caring for the children, and setting up a meeting for May 15, 2012. On May 16, 2012, a hearing was held on the Department's petition for continued shelter care. At that hearing, Ms. F. requested that, if the court granted the petition, the children be placed in her care under an order of protective supervision. The Department and counsel for the children opposed this proposal, stating that the court had already deemed Ms. F. incapable of caring for the children based on the 2008 CINA petition and had not subsequently attempted reunification. Following the hearing, the juvenile court authorized the children's continued placement in shelter care, pending an investigation of Ms. F.'s fitness.

On May 23, 2012, the Department conducted a safety check on Ms. F.'s home and found the home to be appropriate. Another son of Ms. F., Aaron, lived at the residence and was determined to be safe there. On May 24, 2012, Ms. F. participated in a supervised visitation with Christopher and James. She arrived early and brought them toys. When the children arrived, she introduced herself, called each of them by their correct name, and corrected them properly, when necessary. Both Christopher and James embraced their mother and played with her throughout the visit.

On June 6, 2012, the juvenile court conducted a CINA adjudication hearing. At that 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. also highlighted that she was the sole care provider for her son, Aaron, who was in the third grade at Perryville Elementary and was doing well there. 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.

Mr. C. admitted his continued struggle with substance abuse, and requested that there be no CINA finding, and that custody be awarded to Ms. F.

The Department pointed out that the juvenile court had previously found that Ms. F. was not able to care for the children and that she had no contact with the children since 2008. The Department also argued that it was in the best interests of Christopher and James that they be declared CINA.

Following a review of the Department's reports, proffers, and argument, the juvenile court sustained the factual allegations in the CINA petition and made the following findings:

> a. Respondents were previously in care from May 7, 2008 through February 2, 2010, when custody was granted to the paternal grandmother, Imogene C[.]
>
> b. Respondents were removed recently due to a report from the school regarding substantial bruising on the buttocks of Respondent James. The primary person responsible for the injuries has not been determined.
>
> c. During the current investigation, it was determined that the natural father had been living in the home of the grandmother. This was in violation of the agreed upon terms at the time custody was granted to the grandmother in 2010. The wife of the natural father was also residing in the home.
>
> d. The stepmother has admitted to the use of some physical discipline on Respondent James related to an incident on the school bus, but denies causing the level of bruising that was observed by the school. The stepmother has been arrested for child abuse.
>
> e. Stepmother indicates that both father and grandmother have used excessive physical discipline on the children in the past year.

Christopher and James were declared CINA and placed in the Department's care for foster care placement. In so finding, the juvenile court stated:

> [B]ased on the fact that the child was seriously injured while in the custody

> of a custodian or the grandmother it is clear that by clear and convincing evidence that the best interest of the child mandates a finding that there is no parent or guardian able to properly care for the child at the present time, and there is a finding of child in need of assistance with commitment to the Department of Social Services for appropriate placement.

Whereupon Ms. F. requested the juvenile court reconsider its decision and place the children in her custody. The juvenile court responded:

> I have no argument with the fact that she is not at fault, but because of the position that she is in, that being that she was not a custodial parent at the time speaks for itself, and that she is not a parent able or willing to properly care for the child at the time when this all occurred, because she wasn't the custodian, period.

This appeal followed.

Additional facts will be provided as necessary to address the issue presented.

DISCUSSION

Ms. F. argues that Christopher and James should not have been judged CINA by the juvenile court. Specifically, Ms. F. asserts 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 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., because a court had previously determined that she was not willing or able to care for her children and that the allegations of neglect and mental health issues in the 2008 CINA petition were sustained against her. Moreover, according to the Department, since the removal of the children from her care in 2008, Ms. F. did not comply with reunification services and did not maintain a relationship with the children.

The children's counsel echoes the Department in noting that Christopher and James had previously been removed from their mother's care because of her mental health issues and neglect. Children's counsel argues that this case is different than *In re Russell G.,* because the parent in Ms. F.'s position in that case had not previously been judged unfit to parent, whereas in the case before us, the juvenile court had previously determined Ms. F. to be an unfit parent.

In reviewing the decision of a juvenile court, we simultaneously employ three levels of review:

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

"Maryland has long recognized the rights of parents to raise their children. . . ." *In re Blessen H.*, 392 Md. 684, 693 (2006); *In re Adoption / Guardianship of Darjal C.*, 191 Md. App. 505, 530 (2010). Nevertheless, there are instances in which state interference with parental rights is justified. "The purpose of the [CINA] act is to protect children. . . ." *In re Nathaniel A.*, 160 Md. App. 581, 596, *cert denied* 386 Md. 181(2005). By its terms, the Act authorized the juvenile court to act if"(1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder, and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." C.J. § 3-801(f). 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. The child's mother in that case was a relapsed alcoholic whose conduct had given rise to the CINA petition. *Id*. According to a prior consent agreement between the parents, the child's father was non-custodial. *Id.* at 371. The juvenile court denied the father's

request for the petition to be dismissed and for the child to be placed in his custody. *Id*. at 370. The juvenile court found that the father was unable to care for the child because he did not have legal custody. Id. at 372. Upon review, we reversed the juvenile court's decision because the father had not been accused of wrongdoing and was willing and able to care for the child. *Id*. at 380.

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[.]" C.J. § 3-801(f)(1); *see In re Andrew A.,* 149 Md. App. 412, 423 (2002) (holding that a court may declare a child CINA based on neglect or abuse of siblings). 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.

As noted above, a child may not be found to be CINA if the allegations of abuse or neglect are sustained only against one parent and the other parent is able and willing to care for the child. C.J. § 3-819(e). 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. In the instant case, Ms. F.'s lack of legal custody did not stand alone, because she lost custody of the children as a result of the 2008 CINA proceedings where allegations of neglect, negative behavior towards the children, and mental health concerns were sustained against her.

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 Maryland Code Annotated, 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 regarding her ability to care for the children did not address her failure to engage in any reunification services from 2008 to 2010. Nor did her proffer explain why, after the court granted custody and guardianship of the children to Imogene C. in 2010, Ms. F. did not see the children from 2010 until May of 2012. Finally, Ms. F.'s proffer did not mention whether her mental health issues, which had been found in 2008 to exist and to contribute to the neglect of the children, had been resolved or were being addressed appropriately in current mental health treatment. Under all of these circumstances, we conclude that the trial court was not clearly erroneous in finding that "at the present time" Ms. F. was unable to properly care for the children under C.J. § 3-801(f)(2). Therefore, we hold that the court did not abuse its discretion in ruling that Christopher and James were CINA.

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

FOOTNOTES

1. Md. Code (1974, 2006 Repl. Vol., 2012 Supp.), § 3-801(f) and(g) of the Courts and Judicial Proceedings ("C.J.") Article respectively define "Child in Need of Assistance" and "CINA":

> **§ 3-801 Definitions.**
>
> (a) *In general*. — In this subtitle the following words have the meanings indicated.
>
> * * *
>
> (f) *Child In Need of Assistance*. — "Child in Need of Assistance" means a child who requires court intervention because:
>
> (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and
>
> (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs.
>
> (g) *CINA*. — "CINA" means a child in need of assistance.

2. In her brief, appellant asks:

> Did the court err in finding the children to be in need of assistance where their mother was willing and able to provide care for them?

Cite as 4 MFLM Supp. 33 (2013)

Child support: consent judgment: miscalculation of monthly income

Alain Selenou-Tema
v.
Rosalie Chantal Tchidjou Kamga

No. 1695, September Term, 2011

Argued Before: Woodward, Graeff, Salmon, James P. (Ret'd, Specially Assigned), JJ.

Opinion by Salmon, J.

Filed: February 15, 2013. Unreported.

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 [hereinafter "Father"] and Rosalie Chantal Tchidjou Kamga [hereinafter "Mother"] appeared in the Circuit Court for Prince George's County before the Honorable Sherrie L. Krauser. At the outset of the proceedings, counsel for Father, Dontrice P. Hamilton, Esquire, said: "we're settled, your Honor." Counsel for Mother, Rosalyn W. Otieno, Esquire, then reiterated; "We have an agreement." Ms. Otieno next 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 included the following paragraph:

> **ORDERED**, that pursuant to the agreement of the parties, the Plaintiff shall pay child support in the amount of $4,963.00 per month, commencing on June 1, 2011 to the defendant via wage lien through the Office of Child Support Enforcement.

Ms. Hamilton called Father to the witness stand and asked her client a series of questions that were necessary to establish that the parties had been living separate and apart, without any hope or expectation of reconciliation, since January, 2009.

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On cross-examination, counsel for Mother asked Father the following questions:

> Q. Sir, as part of your agreement with your wife to settle your case today, are you also waiving your retirement benefits and pension rights?
>
> THE COURT: In her pension?
> MS. OTIENO: In her pension.
>
> THE COURT: Okay.
>
> BY MS. OTIENO:
>
> A. Yes, I do.
>
> Q. And she's doing the same in yours, correct?
>
> A. Yes.
>
> Q. And you understand that that also includes any survivor's benefits that may be a part of your retirement plans?
>
> A. Yes, I understand.
>
> Q. Okay. And, in addition to that, are you also waiving attorney's fees for whatever it is that you've paid your lawyer to date?
>
> A. Yes.

After counsel called a witness to corroborate Father's testimony as to the length of the separation and the lack of any likelihood of reconciliation, counsel for Mother *voir dired* her client in regard to certain provisions of the separation agreement. The following colloquy ensued:

> Q. And you've reached an agreement that has been put together in a Judgment of Absolute Divorce which has been handed to the Judge for signature today. And in that Absolute, Judgment of Absolute Divorce, you've agreed that you will have primary residential and sole legal custody of the minor children, correct?
>
> A. Yes.

Q. And do you believe that you are a fit and proper person to have sole residential custody and sole legal custody of your children?

A. Yes.

Q. And do you understand that the Judgment of Absolute Divorce also outlines a reasonable visitation schedule for your husband?

A. Yes.

Q. And the issue of child support has already also been taken care of in the Judgment of Absolute Divorce to your satisfaction, correct?

A. Yes.

Q. On the issue of alimony, you've agreed with your husband that you waive your right to ask for alimony under Maryland Law, is that correct?

A. Yes.

Q. And do you understand from your conversations with me that once the Judge grants a divorce today, you will no longer be able to come back to Court to seek alimony in this situation?

A. Yes.

Q. In addition to that, ma'am, you've waived your pension rights as far as your husband's retirement plan is concerned, correct?

A. Yes.

Q. And as part of that waiver, you, are you also agreeing to waive any survivor's benefits that may be part of his retirement plan?

A. Yes.

Q. And you're doing that knowingly and voluntarily?

A. Yes.

Q. And you've also agreed that you will pay your own attorney's fees that you've incurred with my office for this action, correct?

A. Yes.

Q. And your husband will not make any contribution towards that amount, correct?

A. Yes.

Q. Now, have I explained to you all your rights and obligations under Maryland law to your satisfaction?

A. Yes.

Q. And have you entered into the agreement that has been given to the Judge for signature of your own free will after talking to me?

A. Yes.

Q. Has anyone coerced you in any way or threatened you into entering this agreement?

A. No.

Q. And in light of the fact that you are a French speaking African, is there any language barrier to you understanding what you agreed to today?

A. No.

The document presented to Judge Krauser for her signature was titled "Judgment of Absolute Divorce." The introductory paragraph stated that "[t]he parties having voluntarily reached an agreement . . .". On the last page of the proposed Judgment of Absolute Divorce was a page titled: "REVIEWED AND APPROVED BY:." Underneath that caption, both Mother, Father and their respective counsel affixed their signatures.

Although not made a part of the Judgment of Absolute Divorce, 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 monthly gross income was $16,980.

This was not a case where child support was governed by the child support guidelines because the combined income of the parties was more than $15,000 per month. The $4,963 per month child support figure shown as Father's obligation on the worksheet, was arrived at by extrapolating from the guideline figures that are set forth in Md. Code (2012 Repl. Vol.) Family Law Article, §12-204(e).

Judge Krauser signed the proposed Judgment of Absolute Divorce, which provided, *inter alia*, that:

1) Father was granted an absolute divorce from Mother;

2) Mother was granted sole legal and residential custody of the four minor children born of the marriage;

3) Father was granted visitation rights with the children that were spelled out in the judgment;

4) Both parties waived any claim for alimony of any type;

5) Both parties waived their right to a monetary award or to thereafter claim any property in the possession of the other;

6) Both parties waived their right to any pension, retirement plan or retirement account in the name of the other party;

7) Mother would continue paying health insurance for the minor children so long as it was available to her through her employer, at a "reasonable cost;"

8) Father would pay Mother $4,963 per month in child support commencing January 1, 2011;

9) Mother would be entitled to claim the "income tax dependency deduction each year for the four minor children;

10) Father's child support arrearage as of February 25, 2011 was $11,889;

11) Father would pay Mother $250 per month toward his child support arrearage until the arrears were paid in full.

The Judgment signed by both parties and their attorneys, as well as Judge Krauser, was docketed on June 21, 2011. That judgment will hereafter be referred to as "the Consent Judgment."

On the same day that 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, prior to consenting to the judgment, Father had miscalculated his monthly income and mistakenly thought that it was $16,980. In fact, his average monthly income, according to movant, was $13,684 per month. Counsel for Father explained that the miscalculation of income 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 the figure by five. Attached to the motion was an amended guideline worksheet showing that, as of April 30, 2011, Father's average monthly income was $13,584 per month and, according to the worksheet, using the extrapolation method, the child support amount that he should have been required to pay was $3,995 per month.

In Father's post judgment motion, he asked for the following relief:

1. Enter the Judgment of Absolute Divorce with the amended guidelines; or in the alternative.

2. Set a short hearing to determine the child support guidelines.

3. Recalculate the arrearages.

4. Award reasonable and necessary attorney's fees.

5. For such other and further relief as the nature of his cause may require.

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 to both of Father's post-judgment motions and argued that there had been no mutual mistake or any other valid reason to set aside the Consent Judgment. Father filed supplements to his post-judgment motions but, on August 11, 2011, Judge Krauser denied Father's Motion for Appropriate Relief and his Motion to Alter or Amend Judgment. Those orders were docketed on September 6, 2011. Father then filed a timely appeal to this court in which he raises two questions that he phrases as follows:

I. Did the trial court err in signing the proposed Judgment of Absolute Divorce without first evaluating whether there was actual consent by the Appellant to its provisions?

II. Did the trial court err in denying Appellant's Motion for Appropriate Relief?

Discussion.

A. Issue One.

A consent order has been defined as "an agreement of the parties with respect to the resolution of the issues in the case or in settlement of the case, that has been embodied in a court order and entered by the court, thus evidencing its acceptance by the Court." *Long v. State*, 371 Md. 72, 82 (2002). A consent order differs from a settlement agreement between the parties because a consent order "adds a critical element to the contractual act — judicial conclusiveness." *Dorsey v. Worten*, 35 Md. App. 359, 361 (1971). In *Dorsey*, we noted that "[a] consent decree is entered under the eye and with the sanction of the court and should be considered a judicial act not open to question or controversy in a collateral proceeding." The *Dorsey* Court, held:

> The entry of a judgment by consent implies that the terms and conditions have been agreed upon and consent thereto given in open court *or by filed* stipulation.

Id. at 363. (emphasis added).

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 to Judge Krauser. 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 to the judgment of absolute divorce 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 affixed to the last page of the consent judgment under the heading "REVIEWED AND APPROVED" does not amount to a stipulation. There is no merit to this implied argument. Black's Law Dictionary, Sixth Edition (1990) page 1415, defines "stipulation," in relevant part, as follows:

> "An agreement, admission or confession made in a judicial proceeding by the parties thereto or their attorneys." Citing *Bourne v. Atchison*, T. & S. F. Ry. Co., 497 F. 2d 110, 114.

Under argument one, Father also asserts that Judge Krauser erred by failing to personally *voir dire* Father to make sure that he was consenting to <u>all</u> of the terms in the proposed judgment of absolute divorce. At oral argument before this panel, Father's counsel also argued that the *voir dire* by the court should have been similar to the type of *voir dire* asked of criminal defendants before a guilty plea is accepted. Father cites no authority for the proposition that a trial judge must *voir dire* a party in this manner, 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 face that there exists an agreement by the parties as to the terms of the judgment. Thus, Judge Krauser did not err in failing to conduct the *voir dire* that the Father suggests was needed.

Moreover, even if Father were correct, and the law required that the judge, prior to signing a consent order, was required to interrogate the parties to make sure they consented to each of the terms of the judgment, appellant would still not succeed in this appeal. We say this because it is a basic principle of law that in a civil case the appellant, in order to prevail on appeal, 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. In fact, prejudice is not even mentioned in Father's brief and, when asked at oral argument what her client would have said if the court had inquired as to whether Father fully understood and consented to all the matters mentioned in the judgment of absolute divorce, counsel for Father said that she did not know what her client's answer would have been.[1]

B. Second issue.

Appellant also argues:

> As stated in Appellant's Motion for Appropriate Relief, 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). Appellant in his Motion for Appropriate Relief brought to the Court's attention the defect in the Judgment of Absolute Divorce. Specifically, that the Appellant's income for purposes of the child support guidelines was not accurate. The Court at that time had the authority to amend the Judgment of Absolute Divorce to correct the defect.

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." *Knott v. Knott*, 146 Md. App. 232, 258-59 (2001). In the circuit court, 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." The sole ground upon which appellant bases his argument that the consent judgment should have been reformed is that, purportedly, appellant demonstrated in the trial court that the consent judgment was based upon "mutual mistake."

At oral argument before this panel, appellant's counsel made it clear that the arithmetic error [dividing Father's total income earned between December 1, 2010 and April 30, 2011 by 4 instead of 5] was not made by either appellee or her counsel. The $16,980 monthly income figure was given to Mother's counsel by counsel for Father and Mother's counsel simply put

that figure in the guideline worksheet in order to make an extrapolation that was used in reaching an agreement as to what Father would pay.

There was no showing in appellant's post judgment filings that the $4,963 figure was based on a mistake by Mother. As appellee's counsel stresses, Mother gave up many of her rights when she signed the Consent Judgment and there was no showing that she would have agreed to an extrapolation method of calculating child support or would have taken a lower child support figure, if appellant and/or his counsel had not made the claimed error. Thus, the mistake was not "mutual."

In his brief, Father also contends that counsel for Mother conceded, in an e-mail to appellant's counsel dated June 16, 2011 [eight days after the hearing before Judge Krauser], that there had been a "mutual mistake as to [Father's] income in calculating the child support guidelines." Mother's counsel never conceded that there had been a mutual mistake. The e-mail in question[2] read, in material part, as follows:

> "[a]s an aside, I also disagree with your proposed calculation of the [Father's] income. I will propose [to Mother] a different way to resolve this situation" that will more accurately reflect the monthly income (assuming she even agrees to anything different)."

Appellant also asserts that "[t]he mutual mistake in this instance is that both parties believed that the figure of $16,980 accurately reflected the Appellant's monthly income. However, it did not. Both parties have conceded that point." In Mother's response to Father's post consent judgment motions, she never conceded that the $16,980 figure was inaccurate nor was there any evidence what Mother "believed" appellant's income to have been prior to the date she signed the consent judgment. All that was shown was that appellant's counsel gave the $16,980 figure to counsel for Mother, and counsel for Mother used that figure in calculating child support, using an extrapolation method. As Mother's counsel pointed out in oral argument, 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. Nothing suggests that she would have agreed to lower child support if Father had provided her with a different income figure.

Aside from what has already been said, even if appellant had proven that there was a mutual mistake, the reformation of the Consent Judgment that Father espouses would not have been warranted because appellant did not prove "the exact and precise form and impact that the instrument ought to be made to assume, in order that it [might] express and effectuate 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). See also, *Moyer v. Title Guarantee Company*, 227 Md. 409, 504 (1962).

As Judge Prescott said for the Court of Appeals in *Moyer*, 227 Md. at 504,

> The request for the reformation of a written instrument is one for unusual relief, and when granted, it differs from rescission, cancellation or annulment of the document. Unlike these, the instrument remains in force and effect, but in a modified, or changed form; hence, before granting the high remedy of reformation, the proof must not only establish that the written agreement was not the agreement intended by the parties, but also what was the agreement contemplated by them at the time it was executed. . . . Before performing the difficult and delicate task of reforming an agreement after the parties have solemnized it by reducing it to writing and executing the same, *this Court has consistently required proof of the highest order. In Keedy v. Nally*, 63 Md. 311, 316 [1885], Judge Alvey, for the Court, said that the plaintiff, "must not only show clearly and beyond doubt that there has been a mistake, but he must also be able to show with equal clearness and certainty the *exact* and *precise* form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties." . . . Again, in *White v. Shafer*, 130 Md 351, 360, 99 A. 66 [1917], it was stated: "'Not only must a mutual mistake be shown, but the precise agreement which the parties intended but failed to express must be proven beyond a reasonable doubt. *Second Nat'l Bank v. Wrightson*, 63 Md. 81 [1885]; *Bouldin [Boulden] v. Wood*, 96 Md. 336 [332] (53 A. 911) [1903]. And the *evidence required for this purpose must be of the strongest character and the proof must be convincing*.'"

(Emphasis added).

See also Higgins, supra., 310 Md. at 316 and *Flester v. Ohio Cas. Ins. Co.*, 269 Md. 544, 555-57 (1973).

In Father's post-judgment filings, he failed to show what amount of child support that the parties intended that he pay but failed to express in the consent judgment. All Father proved was that: 1) if he had supplied Mother with the correct income figures and; 2) if Mother had accepted those figures as accurate and; 3) if Mother had still agreed to use the extrapolation method of determining child support, then his monthly child support obligation figure would have been $13,995. Unfortunately for appellant, the record is devoid of any evidence as to what child support figure Mother would have accepted under such circumstances.

For all of the above reasons, we affirm Judge Krauser's decision to deny appellant's motion for appropriate relief and motion to alter or amend judgment.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Father's counsel advised this panel at oral argument that the "error" concerning how much he earned per month was not discovered by Father until approximately one week after the hearing before Judge Krauser. From that answer, we infer that if Father had been interrogated by the trial judge — as he claims he should have been — Father would have indicated that he consented to the proposed judgment of absolute divorce — just as he had when he signed his name to the consent judgment under the heading "REVIEWED AND APPROVED."

2. Appellant relies on no other e-mail response in support of his argument that an admission had been made by Mother's counsel.

Cite as 4 MFLM Supp. 39 (2013)

Custody: post-judgment relief: lack of notice of hearing

Margaret Kemunto Campbell
v.
David Ruffin Campbell

No. 0494, September Term, 2012

Argued Before: Eyler, Deborah S., Watts, Rodowsky, Lawrence F. (Ret'd, Specially Assigned), JJ.

Opinion by Rodowsky, J.

Filed: February 19, 2013. Unreported.

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, the appellant, and David Campbell, the appellee, respectively seek sole physical and legal custody of their minor daughter, Bethany, who is now seven years old. Bethany was born in Maryland but has resided with her mother, Margaret, in Nairobi, Kenya, since 2008. On March 22, 2012, the Circuit Court for Montgomery County held a hearing to consider the merits of the custody dispute and awarded sole physical and legal custody of Bethany to her father, David. A written custody order was entered on March 30, 2012. Margaret did not appear at or otherwise participate in the hearing. She filed a motion for reconsideration on April 9, 2012, claiming that she had no notice of the hearing. After the motion was denied on May 1, 2012, Margaret noted this appeal on May 18, 2012.

Margaret has appealed only from the circuit court's denial of her motion for reconsideration.[1] As such, our review is limited to whether the court abused its discretion in denying the motion. Because the court's record clearly shows that the court clerk sent the notice of the hearing to Margaret at the wrong address, we shall vacate the judgment adverse to Margaret and remand for a new trial.

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

Facts and Proceedings

Margaret and David Campbell were married in Arlington, Virginia, on February 2, 2002. They had one child, Bethany, who was born in Montgomery County on October 2, 2005. Margaret and David separated in January 2006. Margaret had quit her job shortly before Bethany was born and was unable to find employment in Maryland thereafter. In September 2008, she and Bethany went to Kenya to live with relatives, with David's knowledge and consent. They visited David in Maryland three times per year during school holidays. According to Margaret, David and Bethany communicated by telephone "almost daily."

Margaret and Bethany returned to Maryland for a visit on June 29, 2011. On July 27, 2011, acting *pro se,* David filed a complaint for absolute divorce in the Circuit Court for Montgomery County, alleging that he and Margaret had lived separate and apart, without cohabitation, since January of 2006. David requested sole physical and legal custody of Bethany. The record does not reflect that Margaret was ever served with this complaint. At a hearing on August 5, 2011, Margaret stated that she had not received the complaint but that she "found out about it" the day before.

On August 2, 2011, David filed a "Motion for Prohibition of Travel for Bethany Campbell," requesting that the court prohibit Margaret from taking Bethany outside of the United States. David informed the court that he "refused to renew Bethany's passport, thus making it impossible for her to return to Kenya." On August 4, 2011, Margaret, also acting *pro se*, filed an "Emergency Request for Permission to Travel with Minor Child." Margaret confirmed that Bethany's passport had expired on July 17, 2011, and that David had refused to cooperate in renewing it. Margaret requested an order allowing her to renew the passport without David's permission, granting her temporary physical and legal custody, and allowing her to take Bethany back to Kenya so that Bethany could resume school on August 9, 2011. She filed a second motion for an emergency hearing on August 5, 2011.

The court held an emergency hearing on August 5, 2011. David did not appear in person, but participated by telephone. David claimed that he and Margaret had agreed when Margaret took Bethany to Kenya in

2008 that Bethany would return after two years. Margaret denied the existence of any such agreement. The court found that there was no basis for an emergency hearing or emergency decision, and scheduled a hearing for August 8, 2011.

On August 8, 2011, both Margaret and David appeared in person before the court (Rupp, J.). David argued that it would be difficult for him to obtain access to Bethany if she went to Kenya with Margaret and Margaret subsequently refused to allow her to return to Maryland. The court found that there had not been any "difficulty" regarding visitation in the past, and that there was no reason why Margaret should not be allowed to take Bethany back to Kenya. The court issued an order that day allowing Bethany to travel outside of the United States, granted temporary legal and physical custody to Margaret, and allowed Margaret to renew Bethany's passport without David's consent.

On September 29, 2011, acting through counsel, David filed an amended complaint for absolute divorce. Margaret, still acting *pro se*, on November 18, 2011, answered the amended complaint. The address provided in this answer is critical.

The first paper that Margaret had filed in court was her August 4, 2011 emergency motion for permission to take Bethany outside of the United States, on which she listed her address as 14904 McKisson Court #E, Silver Spring, Md. 20906. When David filed his amended complaint on September 29, 2011, he gave Margaret's address as P.O. Box 5856858-00200, Nairobi, Kenya (sometimes hereinafter, "the twelve digit box"). On November 18, 2011, when Margaret answered David's amended complaint, she listed her address as P.O. Box 56858-00200, Nairobi, Kenya ("the ten digit box"). By a scheduling order entered on December 1, 2011, the court set the hearing on "CUSTODY-MERITS" for March 22, 2012. Attached to that order is an "Addressee Check Sheet" that lists Margaret's address as the twelve digit box, which is not the address that Margaret had provided in her November 18, 2011 answer to David's amended complaint.

A December 12, 2011 docket entry states that the scheduling order had been returned to the court as "undeliverable." Per the docket entry, other papers that the court had mailed to Margaret also were returned as "undeliverable." These other papers included a "Line," filed by David on October 17, 2011, advising that, because Margaret had "already filed an answer in this case," personal service was unnecessary.[2] The docket entry also advises that orders filed December 1, 2011, for co-parenting skills enhancement and directing the filing of a pretrial statement on custody, had been returned to the court as undeliverable. All of these other papers similarly had been sent by the court clerk to the twelve digit box, which the docket entry parenthetically states is the "only address in file."

In her answer to the amended complaint, Margaret alleged that David was "not a fit and proper person to be awarded custody" because of his "impulsive and erratic behavior," that David had not provided "any monetary child support," that David had not provided financial support for Bethany's education as he had agreed, and that David had "seriously limited" her access to Bethany during their month-long visits to Maryland. Margaret requested sole physical and legal custody of Bethany. Margaret cited the fact that she had been Bethany's primary caregiver since birth, that Bethany had enjoyed a stable life in Kenya for three years, with "competent and established healthcare providers, . . . close relatives and friends with whom she interacts on a daily basis[,] . . . a nanny[,] . . . and two dogs," and that she had provided David with "almost daily telephone communication" with Bethany and kept him abreast of Bethany's development "through emails, phone calls, pictures and videos." Margaret also requested, on the fourth page of her single-spaced pleading, "[t]hat she be granted an alternative to attend court hearings other than by physical appearance. ([Margaret] will not be able to meet the financial burden of traveling from Kenya to Maryland for the court hearings.)."

The scheduling order sent to the twelve digit box also had set a *pendente lite* hearing for January 6, 2012. Margaret did not appear or otherwise participate at the hearing. David testified that Bethany was supposed to come to Maryland for the Christmas holiday but that Margaret had decided in November that "she would not bring [Bethany] back to the United States until the court case had been settled." David stated his intention to go to Kenya in February and find Bethany, even though Margaret had refused to provide him with any address more specific than a post office box. David requested a court order granting him access to the child for two weeks either in Kenya or the United States. On January 11, 2012, the master recommended that such an order be issued. The court granted the order on February 3, 2012. Nevertheless, David did not travel to Kenya.

The master's report refers to the March 22, 2012 trial date, but Margaret's copy was mailed to the twelve digit box only. There is no address sheet in the file for the mailing of Margaret's copy of the court's order adopting the master's recommendation.

David's pretrial statement, filed March 8, 2012, certifies service on Margaret by mail to the ten digit box, but the statement does not mention the trial date. Likewise, on March 8, 2012, David mailed a letter to Margaret, at the ten digit box, advising that sanctions

would be sought on March 13, 2012, for failure to grant discovery. The letter does not refer to the trial date.

On March 13, 2012, David moved to compel discovery and for sanctions. The motion stated that Margaret had not responded to interrogatories and requests for production of documents propounded in January 2012. David requested, in the event Margaret did not respond by March 16, 2012, that she be precluded "from testifying or introducing exhibits in support or defense of her position on the issue of custody, access and child support at the trial scheduled on March 22, 2012." David's attorney certified that the motion had been mailed to the ten digit box and to the Silver Spring address that Margaret had listed on her August 4, 2011 emergency motion.

The March 22, 2012 hearing on the merits of the custody dispute proceeded without Margaret's presence or other participation. Regarding Margaret's notice of the hearing and previous participation in the case, the court (Dugan, J.) found:

> "In this case, Mrs. Campbell certainly knows how to avail herself of the courts, because she has filed an answer in this case and filed pleadings. She's filed a request that she not be present in court, but somehow or the other she be allowed, I guess, to testify or present her case some other way other than appearing under oath and being cross-examined. Yet, she's filed no motion requesting that. She's retained no counsel to protect her interest in this case.
>
> "But when she wanted to get her way, she had no trouble appearing before the Honorable Nelson Rupp, and asking Judge Rupp to compel Mr. Campbell to sign the necessary documents, or give her the child so that she could get the passport and take the child back to Nairobi."

The court continued:

> "[T]he fact of the matter is, that Mrs. Campbell did, indeed, subject herself to the jurisdiction of this court, and, in fact, in [an e-mail to David], she suggests exactly what's happening here today. . . .
>
> ". . . 'I want her back, and like you suggested, we can go back to court and have them decide the way forward for our daughter.' Now, she couldn't be plainer with respect to that statement. Let the court decide it. The court is here to do that. And she, in fact, has filed an answer and subjected herself to the jurisdiction of this court. *Satisfied by [David's attorney]'s representations that she's well aware of this court date, that she's chosen not to be here, and she's chosen not to put what, if any, other side of this case she may have.*"

(Emphasis added). In a written custody order entered on March 30, 2012, the court found:

> "[Margaret] filed her response to the amended complaint and requested in her prayer for relief, along with full physical and legal custody of the minor child, that she also be granted some alternative to attend [c]ourt hearings other than by physical appearance. Her request was never ruled on by the [c]ourt, nor did she take any further action with respect to her request. Subsequently, she attended no further scheduled events, to include trial of this matter. *The [c]ourt is satisfied she was well aware of the merits date of March 22, 2012.*
>
> "Although she complains that she has insufficient funds to come to the United States for these proceedings, she clearly has subjected herself to the jurisdiction of the [c]ourt and evidence presented at trial indicates as of November 2011, she was present in the United States for a visit, without the child.
>
> "Nonetheless, although [David] appeared, represented by counsel, . . . and despite the fact that she was well aware of the hearing, [Margaret] failed to appear.
>
> "[David] presented extensive testimonial evidence from [himself] and two corroborating witnesses as well [as] numerous exhibits, to include a number of emails between the parties. The emails reflected both the parties' agreement that the child be returned to the United States for school, as well as [Margaret]'s statement to [David] when he was refusing to return the child to her in August 2011, that he should 'let the [c]ourt decide the issue of custody.'"

(Emphasis added).

At the hearing, David's employer, Heinan Landa, and his sister, Angela Morgan, testified on his behalf.

David also testified. Based upon David's presentation, the circuit court awarded David sole physical and legal custody. The court found that both Margaret and David were fit parents, but also found that "[Margaret] does not understand and appreciate the importance of a father's attachment, bond, and interaction with his daughter," and that Margaret was not acting in Bethany's best interests "[t]o the extent that she's seen fit to keep [Bethany] in Kenya, as opposed to honoring her commitment to come back and enroll the child in school [in Maryland]," where Bethany would find "much better" material opportunities. The court ordered Margaret to surrender custody of Bethany to David on May 21, 2012, at the end of the school year, and reserved on the issue of visitation.

The order awarding custody to David was entered on March 30, 2012. The docket entries reflect that copies of the order were mailed, but the file does not contain an address sheet for that mailing. Presumably Margaret's copy was mailed to the address shown for her in the parties' identification section of the docket entries that were transmitted with the record on appeal for this case, namely, the ten digit box. Margaret, using the ten digit box as her address, moved for reconsideration of the custody order on April 9, 2012.

Affirming under the penalties of perjury, Margaret averred that she had not been notified of the hearing date. She said that on April 4, 2012, she "was shocked to receive an email," attached to the motion, from David, advising of the March 22, 2012 trial and resulting custody order.

In his response to the motion for reconsideration, David made the following representations to the court:

> "Plaintiff, through his counsel, mailed all pleadings to the Defendant to her Kenya address[3] and the Maryland address that she has also used in her pleadings, 14904 McKisson Court, Unit E, Silver Spring, Maryland. Further, at the scheduling conference, Plaintiff informed the [c]ourt that the Defendant was using two addresses, one in Africa and the one in Maryland for notification purposes. None of the mail that was sent to Africa came back as undeliverable, with the exception of the Amended Complaint. (Attached hereto are copies of the registered return mail for the Amended Complaint sent on 9/29 using the P.O. Box information provided to the Plaintiff;[4] a copy of the postal receipt for the discovery mailed to Defendant on January 17, 2012;[5] the March 8, 2012 good faith letter and copy of the envelope[6][)] In addition, Plaintiff has attached hereto, copies of the envelopes for the Defendant's Answer and Motion for Reconsideration, in which she uses the Silver Spring, MD return address attached hereto as Exhibit A.[7]"

By order entered on May 1, 2012, the court denied reconsideration.

Discussion

As we have noted, the issue before us is whether the circuit court abused its discretion in denying Margaret's motion for reconsideration of the custody determination. Margaret's primary contention is that she was deprived of due process of law because she had no notice of the March 22, 2012 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 that "there is no evidence that [she] had any awareness" of the custody hearing.

David disagrees with Margaret's assessment of the record and 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 acknowledged by return e-mail — show that she did have actual notice of the hearing date.[8] 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 of the hearing, that she had a duty to keep herself informed of what was occurring in the case, and thus she should be charged with constructive notice of the hearing.

In *Burdick v. Brooks*, 160 Md. App. 519, 864 A.2d 300 (2004), this Court explained that a natural parent

> "has a constitutionally protected liberty interest in the care and custody of her children. *See Wagner v. Wagner*, 109 Md. App. 1, 25, 674 A.2d 1, *cert. denied*, 343 Md. 334, 681 A.2d 69 (1996) (citing *Weller v. [Department] of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990)). 'Once it is determined that an interest is entitled to due process protection, the pertinent inquiry then becomes what process is due.' *Pitsenberger v. Pitsenberger*, 287 Md. 20, 30, 410 A.2d 1052, *appeal dismissed,* 449 U.S. 807, 101 S. Ct. 52, 66 L. Ed. 2d 10 (1980) (citation omitted). In describing due process requirements, the Court of Appeals stated in *Pitsenberger*:

> "'Determining what process is due requires consideration and accommodation of both the government and private interests. This essentially involves balancing the various interests at stake[.] . . . Fundamentally, due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner."

"*Id*. (citations omitted).

> "Yet, due process 'does not require procedures so comprehensive as to preclude any possibility of error.' *Wagner*, 109 Md. App. at 24 (citing *Int'l Caucus of Labor Comm. v. [Maryland] Dep't of Transport.*, 745 F. Supp. 323, 329-30 (D. Md. 1990)). Instead, 'due process merely assures *reasonable* procedural protections, appropriate to the fair determination of the particular issues presented in a given case.' *Id*. (citations omitted). Therefore, a denial of due process claim is tested by analyzing the totality of the facts in the given case. *Id*. (citing *Betts v. Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942))."

Id. at 524-25, 864 A.2d at 303-04. We 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. *Id*. at 523-27, 864 A.2d at 303-05. The letter informed the parents that the conference would last only fifteen minutes and that it was "not a hearing or trial" and there would "not be time for witnesses to speak." *Id*. at 523, 864 A.2d at 303.

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." *Id*. at 729-30, 603 A.2d at 910. In light of this notice, both parents appeared at the hearing without their retained counsel. The parents had submitted an agreement to the court requesting joint custody; neither parent had requested sole custody.

We explained:

> "It is clear that if a court is contemplating holding a hearing at which it will, or may, determine custody issues, a parent with custodial rights, or one who has the right to claim custody, must be notified that such an issue may be the subject of the hearing. The notice in the case at bar did not notify either parent that the court was contemplating making a custody decision. Neither parent had asked for a change in custody or for a custody determination. Neither parent was represented by counsel and the record reflects that, until the court made its ruling on custody at the conclusion of the hearing, neither parent was aware that the hearing was in any way concerned with the matter of custody."

Id. at 738-39, 603 A.2d at 915.

The Maryland Rules of Procedure inform us of the process that is ordinarily due when a court undertakes to give notice of an order scheduling a trial date. Maryland Rule 1-324 provides that "[u]pon entry on the docket of any order or ruling of the court not made in the course of a hearing or trial, the clerk shall send a copy of the order or ruling to all parties entitled to service under Rule 1-321." Rule 1-321(a) requires, in relevant part, that "[s]ervice upon . . . a party shall be made by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by the . . . party, or if not stated, to the last known address." *Rule* 1-321(a) is complemented by Rule 1-311, requiring, in relevant part, that "[e]very pleading or paper filed shall contain the signer's address." *See also J.T. Masonry Co. v. Oxford Constr. Servs., Inc.*, 314 Md. 498, 505-06 n.3, 551 A.2d 869, 873 n.3 (1989) ("Under ordinary circumstances a party complies with Rule 1-321(a) by mailing the service copy of a paper, which originated with that party and was intended for an attorney who had relocated, to the address shown on that attorney's most recent pleading or paper.").

In the instant case, the record manifests that the clerk mailed the December 1, 2011 scheduling order to an incorrect address. It was sent to P.O. Box 5856858-00200, rather than to P.O. Box 56858-00200, the address Margaret had provided on her most recent pleading or paper, namely, the November 18, 2011 answer to David's amended complaint. 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, 718 A.2d 622, 626-27 (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 considered, within the context of Rule 2-535(b), the convergence of these two obligations. 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. The trial court was thus "required to exercise its discretion in determining whether appellant had acted with the good faith and due diligence necessary for him to be entitled to a revision of the [judgment]," and we remanded for the trial court to make that determination. *Estime*, 196 Md. App. at 309, 9 A.3d at 155. *See also Gruss*, 123 Md. App. at 320, 718 A.2d at 627.

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, 852 A.2d 963, 975-76 (2004) (explaining that child's "indefeasible right to have any custody determination concerning him made, after a full evidentiary hearing, in his best interest" could not be forfeited by mother who failed to file a responsive pleading); *Rolley v. Sanford,* 126 Md. App. 124, 130-32, 727 A.2d 444, 447-48 (1999) ("We shall not suffer the obdurate conduct of a recalcitrant parent, stepparent, or custodian to deprive children of their right to adequate support."). 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.

Under the circumstances here, 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 of the hearing in accordance with the Rules. That review would have revealed the irregularity.

An irregularity in the context of a Rule 2-535(b) motion, filed more than thirty days after judgment has been entered, requires a court to determine that "the moving party 'acted in good faith, with due diligence, and had a meritorious defense,'" *see Gruss*, 123 Md. App. at 320, 718 A.2d at 627, in order to revise a judgment. Surely, the requirements for exercising full revisory power over a judgment pursuant to Rules 2-534 and 2-535(a) are not more stringent. In *Wells v. Wells*, 168 Md. App. 382, 896 A.2d 1082 (2006), for example, a contested custody and divorce case, the trial court declined to set aside a default judgment where the wife filed a revisory motion eight days after judgment was entered. The wife alleged facts that would support a finding that the divorce had been obtained by fraud, within the meaning of Rule 2-535(b). We held that the court abused its discretion, and we remanded for an evidentiary hearing on the issue of fraud with respect to the judgment of divorce and for a new trial on child custody and all other issues.

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. A March 13, 2012 e-mail from David's counsel to Margaret, to which Margaret responded on March 14, 2012, contains no mention of the March 22 hearing. David's counsel claims that there was a file attached to the March 13 e-mail that contained the motion to compel that mentions the hearing. As we have explained, *see* note 8, the version of the March 13 e-mail showing that a document was attached is not part of the record before us. Also, there is no indication that the motion to compel was indeed the file attached to the e-mail.

In any event, the certificate of service that was attached to David's motion to compel and that indicates that the motion was sent by ordinary, first-class mail to Margaret at the ten digit box and to a Silver Spring address, was mailed on March 13, 2012. This mailing was nine calendar days and seven business days before the custody hearing.[9] 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.

Accordingly, we shall reverse the court's May 1, 2012 order denying Margaret's motion for reconsideration, vacate the order awarding custody of Bethany to David, and remand the case for a new trial. It is thus not necessary for us to address Margaret's remaining contentions.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY DENYING APPELLANT'S MOTION FOR RECONSIDERATION REVERSED, CUSTODY ORDER VACATED, AND CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY THE APPELLEE.

FOOTNOTES

1. Margaret filed her motion for reconsideration on the tenth day after the written custody order was entered. Thus, her motion operated as a Rule 2-534 motion to alter or amend the judgment and, pursuant to Rule 8-202, stayed the time for noting an appeal from the custody decision until thirty days after the court reached a decision on the motion or the motion was withdrawn. *See Pickett v. Noba, Inc.*, 122 Md. App. 566, 570-71, 714 A.2d 212, 214, *cert. denied*, 351 Md. 663, 719 A.2d 212 (1998). As Margaret noted her appeal within thirty days after the court denied her motion for reconsideration, the merits of the custody decision would be properly before us in this appeal.

Nevertheless, Margaret stated in her May 18, 2012 notice of appeal that she wished to appeal "from the Order of the Honorable Joseph A. Dugan, Jr. denying Defendant's Motion for Reconsideration which was docketed on May 1, 2012." When Margaret failed to timely file a brief in this Court, David moved on July 2, 2012, to dismiss this appeal or, in the alternative, to limit the issues on appeal. In her August 31, 2012 response to that motion, Margaret stated, through counsel:

> "2. Appellant clarifies and confirms that she is appealing from the Order of the Honorable Joseph A. Dugan, Jr., denying Defendant's Motion for Reconsideration, docketed on May 1, 2012, as stated in her Notice of Appeal, and apologizes for any confusion she may have created."

Thus, the Chief Judge of this Court ordered on October 23, 2012, "that the issues on appeal are limited to whether the circuit court abused its discretion in denying Appellant's Motion for Reconsideration."

2. The court file does not contain any answer to the original complaint. Margaret's answer to the amended complaint was not filed until November 18, 2011. The reference to an answer is apparently to the August 4, 2011 motion filed by Margaret for an order permitting her to take Bethany to Kenya.

The "Line" filed on October 17, 2011, also included a certificate of service for the amended complaint. It reflects that the amended complaint was mailed to the twelve digit box and to 8313 Garland Avenue, Apt. 5, Takoma Park, Md. 20912. The latter was the address used by David to direct service on Margaret of the original complaint.

3. As reviewed above, some mailings were sent to the ten digit box and others to the twelve digit box.

4. Sent to the twelve digit box. The return reads "Undeliverable as addressed, unable to forward."

5. The receipt reads "Kenya — First-Class Mail Int'l Large Env," but does not give a specific address.

6. Sent to the ten digit box, but the letter does not mention the trial date.

7. The appendix contains the envelope used for mailing Margaret's service copy of the answer to the amended complaint.

8. In her reply brief, Margaret argues that these e-mails are not part of the record in this case. She is correct that a reconstructed version of a March 13, 2012 e-mail from David's attorney to Margaret showing a document attachment, which was purportedly submitted as an exhibit to David's response to Margaret's motion for reconsideration, and which appears on page 8 of David's appendix, was not included in the original record of the circuit court that was transmitted to this Court on appeal. Accordingly, it does not enter into our analysis. The record does include, however, another copy of this e-mail, without the attachment, and Margaret's March 14, 2012 response.

9. The presumption under Rule 1-203(c) of three days from mailing to receipt would reduce the notice period to four business days. The record is silent on the average time for delivery to Nairobi.

NO TEXT

Cite as 4 MFLM Supp. 47 (2013)

Divorce: alimony: dissipation of assets

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

No. 1969, September Term, 2011

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

Opinion by Hotten, J.

Filed: February 19, 2013. Unreported.

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 ("Lisa"), the appellant-cross-appellee, and Andrew G. Siske ("Andy"), the appellee-cross-appellant, the Circuit Court for Anne Arundel County granted the parties 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. The circuit court additionally ordered Andy to maintain a survivor benefit for Lisa, if available, and that he and Lisa would split the cost of its maintenance. The circuit court withheld its judgment after reviewing the factors set forth in Md. Code Ann., Family Law Article § 8-205(b)[1] and declined to further grant any monetary award.

Lisa noted an appeal to this Court. In response, Andy filed a timely cross-appeal. In sum, both parties presented eight questions for our review. We have consolidated, rephrased, and reorganized them as follows:[2]

> 1. Whether the circuit court was clearly erroneous in denying Lisa's request for indefinite alimony, abused its discretion in awarding rehabilitative alimony in the amount of $2,500 per month, and erred in signing a judgement 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 in the amount 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?

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

For the following reasons, we shall affirm the circuit court's judgment of divorce, but otherwise vacate the judgment and remand the case for further proceedings not inconsistent with this opinion.

I.
FACTUAL AND PROCEDURAL HISTORY

Lisa and Andy were married on March 19, 1988. "Back then[, Lisa and Andy] didn't have a lot of money[.]" Nonetheless, the couple bought a modest home in 1989 and enjoyed the regular visits of Andy's two sons from a previous marriage: Brian Michael and Bradley. In addition, Andy and Lisa later welcomed the birth of their joint child, Andrew G. Siske, III, ("Andrew") on February 12, 1993.

At the beginning of their marriage, Andy, who had maintained employment with the Anne Arundel Police Department since 1978, continued working for the department, earning roughly $30,000 a year in income. Andy continued working for the police department until his retirement of November 30, 1999, to take a position with Computer Science Corporation ("CSC"). He remained an employee of CSC until he transitioned his employment to General Dynamics. With both CSC and General Dynamics, Andy worked in the Department of Cyber Crimes as a forensic computer consultant.

As the primary financial provider, Andy repeatedly sought to acquire more financial stability for the family. As a consequence, he left his job with General Dynamics, where he was earning approximately $95,000 a year, for an opportunity with Deloitte, an auditing and consulting firm in the District of Columbia. Thereafter, his income increased an approximate $23,000 to earnings of $118,000. Andy continued his employ with Deloitte until June of 2008. At which point, Andy took a position with Thomson Reuters, where he remained until February of 2009. Unfortunately, Andy suffered a layoff at Thomson Reuters, but subsequently took a position with Navigant shortly thereafter, initially earning roughly $165,000 a year.

Both Lisa and Andy had agreed prior to Andrew's birth that neither party had any desire to place Andrew in a daycare program. Therefore, Lisa, who had initially worked while Andy was attending classes at Anne Arundel Community College, resigned from her employment to assume the role of caretaker and homemaker.[3]

After their first ten years of marriage, the Siskes enjoyed a comfortable standard of living. Lisa characterized it by recognizing that "[they] always had what [they] needed[,] and[,] sometimes[,] [they] had what [they] wanted." The family would travel to Ocean City, Maryland; Myrtle Beach, South Carolina; and Key West, Florida for vacations. Lisa and Andy also traveled to Las Vegas, Nevada, and, for their seventeenth wedding anniversary, they vacationed in Mexico.

In addition, the family moved into a larger home in Glen Burnie, Maryland, costing $237,000, in 2001. Lisa and Andy placed a down payment on the property with the proceeds from the sale of their prior marital home. The remainder of the purchase price was financed with a purchase money mortgage. While at home, however, they continued to maintain their comfortable way of life, dining out two or three times a week.

Once Andrew turned five years old and was able to attend a primary parochial school, Lisa acquired employment as a part-time teacher's assistant at the parochial school until 2010. Lisa's position at the school enabled her to remain close to Andrew until he completed his primary education and subsequently matriculated to an all-male Catholic high school in Baltimore, Maryland. In addition, Lisa worked a variety of other part-time jobs — primarily as restaurant and bar staff — until Andrew began high school. Lisa stated, however, that Andy never demanded that she financially contribute to the marital home. In fact, whatever money Lisa did earn was used toward her visits to the nail, hair, and tanning salons and as play money for their son:

> [LISA'S COUNSEL]: During the time that you had this part-time job, did Mr. Siske ever ask you to contribute to the family financially?
>
> [LISA]: No. I think when I first went back to work part time when he was still in the police department, I would put money in the bank account for the first couple of years. But most of what I earned was just like spending cash. It was mine and Andrew's kind of play money, I guess. We did play group. We did, you know, Discovery Zone. We did all sorts of trips, you know, little things. And that was kind of our play money.

Lisa did, however, seek out more gainful employment when Andrew reached high school. Nonetheless, she alleged her inability to attain more lucrative employment because Andy was unamenable to assisting her with the caretaking responsibilities of Andrew and the marital home. Lisa described her search for employment and Andy's attitude towards her earnings in the following colloquy at trial:

> [LISA'S COUNSEL]: I was asking you a minute ago about where you had worked and when you had worked. What job opportunities, if any, had presented themselves to you during the course of your marriage?
>
> [LISA]: Well, like I said, I had worked at part-time jobs. And then right before Andrew started high school, I applied for a job. I was just really kind of looking to see, you know, what was out there, if I was ready to go back to work. And I actually got offered a job with Simon & Company at Marley Station Mall as the assistant to the marketing director.
>
> [LISA'S COUNSEL]: What happened to that job offer?
>
> [LISA]: Well, I really wanted to take it, but I was very concerned because Andrew went to private school, so there was no busing, no anything like that. But it was a really good salary. I was very excited —
>
> * * *
>
> [LISA]: I was not able to take it because Andy said he would not change his work schedule to help me with Andrew.

Conversely, Andy recalled a different arrangement to which he and Lisa agreed. According to Andy,

it was mutually understood that Lisa would only remain at home with Andrew until he reached the first grade:

> [ANDY'S COUNSEL]: Now she said you agreed that she would not work while Andrew was in school at all. Was that your agreement?
>
> [ANDY]: No. The goal was to stay with him through until [sic] school started, until the first grade.
>
> [ANDY'S COUNSEL]: And when the first grade started, did you discuss with your wife and ask her to get a full-time job?
>
> [ANDY]: Well, she wound up getting a job at [Andrew's school], which[,] at the time[,] was better than nothing. . . .
>
> [ANDY'S COUNSEL]: And did you want her to work?
>
> [ANDY]: Yes.
>
> [ANDY's COUNSEL]: Why?
>
> [ANDY]: Well, to help. I wouldn't mind taking a little edge off, you know, working two of my three days off, you know, from the police department.

Andy further asserted that he encouraged Lisa to go back to school and complete her education so as to become an educator. According to Andy, his discussions with Lisa led him to conclude that Lisa, however, had difficulty maintaining her educational and employment aspirations.

Andy additionally alleged that the marriage began experiencing difficulty prior to the birth of their son Andrew. At trial, he indicated that he and Lisa sought out a marriage counselor to instruct them how to address any marital discord with civility. It appears, however, that the primary conflict arose out of the parties' use of alcohol. Both Lisa and Andy recognized Lisa's struggles with alcohol. Andy would observe Lisa binge drinking to the point of passing out in the driveway of their home. Additionally, Andy also appeared to take issue with what he described as Lisa's sub-par cleaning and maintenance of their marital home. Despite Andy's complaints about Lisa's consumption of alcohol and her hygienics, he, nevertheless, participated in Lisa's consumption of alcohol and did not assist Lisa in the maintenance of the marital home. He admitted that, even after the couple's separation of August 1, 2008, he continued to provide Lisa alcohol. Lisa described the ultimate contentions that led to the parties' separation in the following dialogue:

> [LISA]: Well, as [Andy's attorney] had said, we had quite a few problems through our marriage. It wasn't always bad. In 2008, after our twentieth anniversary, we were not talking. It was about May. And were not talking. I don't remember why. And then June, [Andy's attorney] makes reference to when I was flailing and hit Andy. That night Andy had been out drinking, and he came home. And frequently Andy, if you'll excuse my language, Your Honor, he would call me a fat, fucking pig or a fat, fucking cow. For about two to three years that was a frequent, frequent event that he would do that.
>
> And he came in. And I was angry with him, because I didn't know where he was. He had been drinking. I[,] in fact[,] was not drinking that night. But he got in my face, and he called me a fat, fucking pig again. And I jumped up to push him away from me. And I was just done. And he grabbed my wrists. And that was the end of that episode. And after that, we stopped talking completely.

In the aftermath of that episode, Andy left to recollect his thoughts in Fort Lauderdale, Florida. Upon his return, Lisa found Andy a townhome to rent, and he subsequently moved into the townhome prior to purchasing a condominium that he maintained through the course of their separation.

Lisa and Andrew, however, continued to reside in the marital home after the separation. Andy continued to pay the mortgage and utilities on the marital home in addition to the mortgage on the condominium. In addition, Andy continued providing Lisa support with the additional expense of the lease payments on her motor-vehicle as well as the monthly fees for Lisa and Andrew's cellular phone service. Initially, Andy further provided Lisa a monthly stipend of $1,000, which he subsequently reduced gradually over the course of their separation.

After learning about the development of Andy's post-separation relationship with another woman, Lisa filed a complaint for absolute divorce on October 13, 2010, on grounds of adultery. She requested alimony, custody of Andrew (a minor at the time), child support, a monetary award, and attorneys' fees. On June 28, 2011, Andy filed a counter-claim, requesting that an absolute divorce be granted on grounds of constructive desertion. He requested that alimony be denied, that retroactive child support be denied (Andrew had reached the age of majority and was emancipated at the time), and that the circuit court grant a monetary award in his favor and order the sale of the parties' marital home.

On September 2, 2011, Lisa and Andy appeared before the Circuit Court for Anne Arundel County for a trial. Lisa presented evidence of the financial struggle she suffered subsequent to the dissolution of her marital home. While she had attained hourly employment as an administrative assistant with a local septic tank company, she indicated an inability to be self-supporting and that her job offered no future advancement due to her meager computer fluency. As a consequence, she constantly sought opportunities for more gainful employment while additionally maintaining a desire to complete her associate's degree in business administration. Although she did attest to visiting her stepson's family in Colorado with Andy and additionally visiting her sister's property in Curry Beach, North Carolina, she indicated that she no longer had the financial capacity to take the vacations that she and Andy enjoyed during their marriage.

Contrastingly, Andy enjoyed a lifestyle substantially comparable to that which was enjoyed by both he and Lisa during their marriage. Andy placed a down payment on a 2005 convertible BMW for his new companion's use. In addition, Andy, along with his new companion, vacationed to the British Virgin Islands for two weeks.

After reviewing the evidence of trial and hearing argument of counsel, the circuit court placed its oral opinion on record on September 16, 2011. The court (1) granted the parties' an absolute divorce based on voluntary separation, (2) denied Lisa's claim for indefinite alimony, (3) awarded Lisa $2,500 per month in alimony for a period of six years, and (4) ordered that the marital home be sold with the proceeds to be divided equally. Additionally, the court (5) ordered retroactive child support for Andrew in the amount of $5,090, (6) denied Lisa's claim for a dissipation of the parties' marital assets, and (7) declined to order any award of marital property aside from an award to Lisa of 27.7 percent interest in Andy's police pension and fifty percent of Andy's other marital retirement interests. Lastly, the circuit court granted Lisa attorney's fees in the amount of $15,000.

Additional pertinent facts with be provided *infra*.

II.
DISCUSSION

(A) Alimony.

After granting the parties' request for divorce on grounds of voluntary separation, the court first addressed Lisa's request for alimony and acknowledged that it "must consider the factors provided in Maryland Family Law Article 11-106(b)[4]." Specifically, the court discussed the Lisa's request for alimony as follows:

> The next issue before the [c]ourt is certainly more complicated. That is the issue of alimony. The plaintiff, the wife in this matter, has requested alimony. The [c]ourt must find an amount of and a period of any alimony that is awarded. The [c]ourt must consider the factors provided in the Maryland Family Law Article 11-106(b).[5]
>
> The first factor that the [c]ourt has to consider is the ability of the parties seeking alimony to be wholly or partly self-supporting. The plaintiff, the wife in this matter, is presently employed . . . as an administrative assistant. She is presently — she recently got a raise and is making $15.00 an hour working full[-]time. Her employment does include health coverage at the full-time status.
>
> She has a high school education and 55 college credits. I did carefully review her financial statemen[t, a]nd I find that the financial statement, quite candidly is somewhat inflated. That is not particularly unusual in this world, but I do find that to be the case here. And some examples that I would give is there was $1,000 listed for food. She did testify very candidly that that [sic] did include when her son was at home. And I do find, though, $1,000 a month for one person would be excessive.
>
> Certainly in terms of her financial statement, once the divorce is granted and the house is sold, the parties have agreed, there will not be a mortgage payment and the related household expenses. However, she will incur some other expense in that regard in setting up, in locating a new household and setting that.
>
> Other items that I found to be at least somewhat inflated were the drugstore items, the vacation, the video and theater. There was — I also took note of an issue regarding the credit cards. It was unclear to the [c]ourt whether or not the $500 a month that she listed in credit card expenses were to pay for other things that were listed on the financial statement.
>
> In addition, she did speak about,

for example, paying for a group of friends to have dinner and then taking the cash back from her friends. Not an uncommon practice, but just simply something that she indicated that she had done, which I think makes some of the credit card amount just simply unclear to the [c]ourt.

So looking at her financial statement carefully, I know she testified that she would need $5,000 a month to live at the same — in the same manner that she has been living, or consistent with the same manner. And the [c]ourt finds that she would really need $3,700 a month or less to accomplish that.

I also did take note of the fact, because it was raised, that the plaintiff does receive a $5,000 gift from an uncle that she expects to continue to receive. However, it has been the practice of the parties to use that gift from the education of their son. And the plaintiff testified that she intends to continue that practice. And there was nothing to suggest to the [c]ourt that this is not the case. So that is just something that the [c]ourt made note of but understands that the parties will continue to use, or that the wife will continue to use those funds for the education of the child, which has been the practice of both parties during the course of the marriage.

The wife, the plaintiff, did testify that she believes that the most she can earn is $35,000 a year. She did testify that she is routinely looking for better employment at a higher salary. And the [c]ourt did take note of that.

She is also working on her associate's degree and in fact is apparently quite close to attaining that goal. The [c]ourt finds and found her to be very articulate, appears to be an intelligent person. And the [c]ourt finds that it is likely that she will become — and that she is young at 45 years old. And that it is likely that she will become self-supporting in the not-too-distant future.

The second factor to consider is the time necessary for the party seeking alimony to gain sufficient education or training to enable the party to find suitable employment. I do in fact find that she has found suitable employment at this point in time. However, she does continue to attempt to improve her prospect and improve herself and improve her education, which is certainly an admirable thing to do. As I indicated, she is close to her associate's degree and is always looking for a better job.

And in the [c]ourt's review of everything, I find that she is likely to advance in her field or in another field, if she chooses to enter another field.

The next factor is the standard of living of the parties, that the parties established during the marriage. And the plaintiff suggested that she always had what she needed and sometimes had what she wanted, which I, quite candidly, thought was a great way to describe life in general. But I find that the parties had a comfortable standard of living during the course of their marriage.

Factor four is the duration of the marriage. It was 23 years, although the [c]ourt does take note that the parties have been separated for 3 years.

Factor number five are [sic] the contributions, monetary and non-monetary, of each party to the well-being of the family. I find that both parties did contribute to the well-being of the family, that the husband, the defendant, provided the primary financial support to the family and also certainly acted as a husband and a father to the parties' son. There was some mention of him coaching the child when he was younger and things of that nature.

Certainly the wife, the plaintiff, stayed at home. And her primary role was in caring for the child. By all accounts, she has done an excellent job in that regard. He sounds like a delightful young man. And both parties appear to be very proud of him. And that certainly is a tribute to both of them.

The wife also took care of the

household and all the household-related activities. There was some discussion about how neat the house was or wasn't. And quite candidly, the [c]ourt gives little merit to that one way or another. Some people like things neater. Some people don't like things neater. And it was a long-term marriage, and that is apparently how the parties functioned.

Factor number six are the circumstances that attributed to the estrangement of the parties. The husband, the defendant, says that the circumstances were the wife's drinking. And clearly, clearly, the plaintiff had a drinking problem. And she was very candid about that when she testified.

But equally clearly to the [c]ourt, while the defendant didn't like it and sometimes complained about it, he also participated in the drinking with the wife. And that is how the parties functioned as a marital couple. There was complaining about it, but then there was enabling of the drinking, if you will.

So, in that regard, while the wife's drinking was certainly a problem, the husband's enabling of the drinking was also a problem in the marriage. So those are the things that the [c]ourt considered in considering the factor.

Factor number seven is the age of each party. The wife is 45. And the testimony was that the husband is 51.

Factor number eight is the physical and mental condition of each party. The wife testified that she has endometriosis and depression that is treated, adult ADD, and a stomach issue. And there was also some testimony that the husband has a prostate issue. But no other major physical or mental conditions for each party.

Factor number nine is the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony. The husband has income of $150,000 a year plus the pension that he is receiving from Anne Arundel County. In this regard, I reviewed his financial statement, as well, and noted that he, too, has items on the financial statement that will no longer — that he will no longer be responsible for once the divorce is final and the house is sold, particularly relating to the house and the plaintiff's vehicle. Those expenses will be gone from his financial statement.[6]

* * *

Factor number 11 is the financial needs and financial resources of each party, including one, all income and assets, including property that does not produce income; two, any award made under 8-205 and 8-208 of this article; and, three, the nature and amount of financial obligations of each party. I have in fact reviewed most of this already is going through the other factors. And I am not going to go back through everything that I have already said. I have indicated what the salaries are in terms of each party. And I am not sure that I already indicated, so I will at this time indicate that the parties jointly own a marital home, and that there is a pension that the husband receives, that the wife will be entitled to half of the marital share of that pension. And I don't believe I have referenced that.

* * *

As to the marital property and monetary award, I will get to that in a moment. But I did consider it for the purposes of alimony. The [c]ourt has thoroughly considered the financial statements and those items that will change after the divorce.[7]

The [c]ourt has considered the wife's request for indefinite alimony. The wife has the burden of proving the statutory requirements. The [c]ourt may award indefinite alimony, if the [c]ourt finds that, number one, due to age, illness, or infirmity or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting or, two, even after the party seeking alimony will have made as much as progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be uncon-

scionably disparate.

> Indefinite alimony should be awarded only in exceptional circumstances. The law favors awards that are definite for transitional rehabilitative purposes. And it is clear in the law that alimony is not designed to be a lifetime pension.
>
> The [c]ourt finds that while there are certainly disparate incomes, the wife's is likely to increase at an — in fact, will increase at the time of the divorce with the pension and the division of the marital property.
>
> Additionally, as I indicated previously, she is only 45 years old, still receiving an education, and capable of increasing her income. The husband's income, while it has decreased, the [c]ourt finds it is unlikely to decrease further. At least I heard no evidence suggesting that it is likely to decrease further.
>
> The [c]ourt is not convinced at this point that this is an indefinite alimony case. However, the [c]ourt finds that alimony is clearly appropriate. I did calculate the Kaufman guidelines in this matter. I calculated them, I will tell you, at least three or four different ways. I put in every different conceivable makeup of numbers just to try to be as fair as possible as I could to everybody. And I did not get any of the numbers that either attorney got in their calculation of the proposed guidelines, but I don't think [that is] particularly unusual.
>
> I have considered all the factors and several other things that I will go into as I go through my opinion in determining what is the appropriate alimony this case. And I am going to award $2,500 per month for a period of six years to the plaintiff in alimony.

On appeal, Lisa contends that the circuit court committed legal error by denying her request for indefinite alimony and by awarding, alternatively, rehabilitative alimony. She asserts that the circuit court erred because it failed to consider the circumstances set forth in Md. Code (1957, Repl. Vol. 2012), § 11-106(c) of the Family Law Article,[8] and further argues that the circuit court "failed to analyze these specific facts (that the appellant is young and has the ability to increase her income) 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."

Conversely, Andy insists that the alimony determination requires only that the circuit court "demonstrate consideration of the required factors" set forth in section 11-106(b)[9] of the Family Law Article. In addition, he argues that the circuit court is neither required to specifically mention every factor nor must it "announce each and every reason for its ultimate decision." Although we find the principles within Andy's argument generally correct, we find Lisa's argument more persuasive.

Preliminarily, we recognized that "[a]n alimony award will not be disturbed upon appellate review unless the trial judge's discretion was arbitrarily used or the judgment below was clearly wrong." *Solomon v. Solomon*, 383 Md. 176, 196 (2004) (quoting *Tracey v. Tracey*, 328 Md. 380, 385 (1992)). "[A]ppellate courts will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Tracey*, 328 Md. at 385. "Thus, absent evidence of an abuse of discretion, the trial court's judgment ordinarily will not be disturbed on appeal." *Solomon*, 383 Md. at 196. "Although in reviewing an award of alimony we 'defer[ ] to the findings and judgments of the trial court', we may disturb an award of alimony if we conclude that in making the award 'the trial court abused its discretion or rendered a judgment that is clearly wrong.'" *Brewer v. Brewer*, 156 Md. App. 77, 98 (2004) (quoting *Innerbichler v. Innerbichler*, 132 Md. App. 207, 246 (2000)). It is with this standard that we review, therefore, Lisa's first assignment of error.

Title 11 of the Family Law Article governs alimony. *See* Md. Code (1957, Repl. Vol. 2012), §§ 11-101 through 11-112. *See also Boemio v. Boemio*, 414 Md. 118, 125 (2010). "In particular, [ ] Section 11-106 guides courts when crafting the amount and duration of an alimony award. In making this determination, a trial court must consider the twelve factors enumerated in [ ] Section 11-106(b)."[10] *Boemio*, 414 Md. at 125. The twelve factors included in the test 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) (emphasis added).

To be sure, it is well established that Maryland's "statutory scheme generally favors a fixed-term or so-called rehabilitative alimony." *Tracey*, 328 Md. at 391. *Accord Solomon*, 383 Md. at 194; *Whittington v. Whittington*, 172 Md. App. 317, 335-36 (2007); *Simonds v. Simonds*, 165 Md. App. 591, 605 (2005). An award of alimony "is not to provide a lifetime pen-

sion, but where practicable to ease the transition for the parties from the joint married state to their new status as single people living apart and independently." *Tracey*, 328 Md. at 391 (citing the 1980 Report of the Governor's Commission on Domestic Relations Law, at 4), *quoted in Solomon*, 383 Md. at 195.

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.

Md. Code (1957, Repl. Vol. 2012), § 11-106(c) of the Family Law Article. As evident from the section 11-106(c)'s language, however, "[t]he statute places strict limits on a trial court's ability to grant indefinite alimony and requires *a comprehensive* case-by-case analysis." *Solomon*, 383 Md. at 196 (emphasis added). 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 said spousal support falls into one of the two provisions of Section 11-106(c).

Pursuant to Section 11-106(c)(2), "unconscionable disparate" standards of living is the threshold test for an award of indefinite alimony. *Boemio*, 414 Md. at 140. Whether unconscionable disparity does or does not exist presents a question of fact, and the circuit court's finding of fact is reviewed under the clearly erroneous standard. *Solomon*, 383 Md. at 196. *Accord Simons*, 165 Md. App. at 607. The term "unconscionably disparate," however, is — albeit — cryptic at best. *Cf. Boemio*, 414 Md. at 140 ("While appellate decisions have provided guidance, no cohesive rubric has emerged in either appellate court to frame or add definition to the bare statutory term."). The face value of the term maintains only a minimal logical boundary to the extent that it "shocks to conscience" of the presiding court. "We think this is so because the statute, at its core, relies on principles of equity, which are flexible and not conducive to black-letter restatement." *Id.* (footnote omitted).

Indeed, the Court of Appeals has specifically observed recently that, standing alone, the concept of "[a]limony itself is fundamentally equitable[,]" in *Boemio v. Boemio*, 414 Md. 118, 140 (2010). There, Judge Sally D. Adkins, writing for the Court, went on to note that

> [g]enerally speaking, alimony awards though authorized by statute, are founded upon notions of equity, **equity requires sensitivity to the merits of each individual case without the imposition of bright-line tests.** The 1980 [Governor's Commission] Report[, which proposed Maryland's alimony statute,] specifically stated its belief that "different ills call for different remedies"; and that "the matter of relative standards of living [is] to be resolved, as it seems to us it must be, on a case-by-case basis.

Id. at 141 (quoting *Tracey*, 328 Md. at 393) (footnote omitted) (emphasis added). As a consequence, 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 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 statutes' factors. We find this to be particularly true upon an inquiry of indefinite alimony, for when it is denied in the presence of a gross disparity of incomes, "it is error to deny the request [for indefinite alimony] without *explicitly* discussing the disparity issue." *Kelly v. Kelly*, 153 Md. App. 260, 279 (2003) (citing *Caccamise v. Caccamise*, 130 Md. App. 505, 522 (2000)) (emphasis added). The Court of Appeals opinion in *Tracey v. Tracey* further supports these conclusions, where the Court stated:

> We have previously defined the purpose of the statute as providing for an appropriate degree of spousal support in the form of alimony after the dissolution of a marriage. *Turrisi v. Sanzaro*, 308 Md. 515, 527, 520 A.2d 1080 (1987) (quoting *McAlear[v. McAlear*, 298 Md. 320, 348], 469 A.2d 1256 [1984]). In regard to the appropriateness of such support, the statute itself **requires that the trial court weigh all factors relevant to "a fair and equitable award."** Section 11-106(b). The statute elsewhere **invokes the equitable concept of unconscionably disparate standards of living.** Section 11-106(c)(2). Its sister provision governing the extension of an alimony period permits the court to act to avoid "a

> harsh and inequitable result." Section 11-107(a)(1).
>
> We conclude from these provisions that **the paramount goal of the legislature was to create a statutory mechanism leading to equitably sound alimony determinations by judges.**

328 Md. at 388 (emphasis added).

While keeping these explanations in mind, we now turn to Lisa's specific arguments. In the instant case, the circuit court found that there are — at the present time — "certainly disparate incomes" between the parties. A finding to the contrary would have been clearly erroneous. Based on that finding, however, the circuit court proceeded to award rehabilitative alimony for six years, explaining that "the wife's [income] is likely to increase at an — in fact, will increase at the time of the divorce with the pension and the division of the marital property." In addition, the circuit court further indicated that Lisa "is only 45 years old, still receiving an education, and capable of increasing her income." Nevertheless, the circuit court curiously failed to address the issue of whether the "certainly disparate" incomes would continue to exist once Lisa is employed in a position that maximizes her earning potential. A finding of "certainly disparate" incomes stands in stark, contradictory contrast to the circuit 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 circuit court provided no explanation regarding its selection of rehabilitative alimony for a period of six years. Such a determination is, at best, unsupported by the record and is, in fact, arbitrary.

We accordingly conclude that the circuit court's denial of indefinite alimony — without any explicit discussion of the existent disparity in income and the standard of living between Lisa and Andy — was clearly erroneous. *See Kelly*, 153 Md. App. at 279. On remand, the circuit court must make specific findings regarding the incomes of the parties — meaning "the wages or salary from regular, full-time employment, i.e., money earned during the normal work week as is appropriate to a given occupation," *Tracey*, 328 Md. at 389 — and the ability of the alimony recipient to become self-supporting. *Brewer v. Brewer*, 156 Md. App. 77, 100 (2004). *Accord Simonds*, 165 Md. App. 591. In addition, the circuit 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 (responding to the defendant's claim that twenty years of marriage should not have been accorded as much weight by the circuit court and noting that "[i]t is obvious . . . that the legislature decided that a long marriage called for more alimony than a short one.").[11] We find the Court of Appeals' opinions in *Solomon v. Solomon*, 383 Md. 176 (2004), and *Boemio v. Boemio*, 414 Md. 118 (2010), instructive.

Writing for the Court in *Solomon*, Judge Glenn T. Harrell, Jr., noted, in the Court's analysis of an indefinite alimony award, that the husband argued as sufficient at the dissolution of a fourteen year marriage, that

> [t]here are very few reported Maryland cases in which a challenge to adequacy of the amount of an indefinite alimony award was mounted. Usually the attack has been on the threshold determination of whether an unconscionable disparity existed at all. There are several cases in which Maryland appellate courts found unconscionable disparity based on the relative percentage the defendant spouse's income was of the other spouse's income. *See Tracey*, 328 Md. at 393, 614 A.2d at 597 (28 percent); *Caldwell v. Caldwell*, 103 Md. App. 452, 464, 653 A.2d 994, 999 (1995) (43 percent); *Blaine v. Blaine*, 97 Md. App. 689, 708, 632 A.2d 191, 201 (1993), *aff'd on other grounds*, 336 Md. 49, 646 A.2d 413 (1994) (23 percent); *Rock v. Rock*, 86 Md. App. 598, 613, 587 A.2d 113, 1140 (1991) (20-30 percent); *Broseus v. Broseus*, 82 Md. App. 183, 186, 570 A.2d 874, 880 (1990) (46 percent); *Bricker v. Bricker*, 78 Md. App. 570, 577, 554 A.2d 444, 447 (1989) (35 percent); *Benkin v. Benkin*, 71 Md. App. 191, 199, 524 A.2d 789, 793 (1987) (16 percent); *Zorich v. Zorich*, 63 Md. App. 710, 717, 493 A.2d 1096, 1099 (1985) (20 percent); *Kennedy v. Kennedy*, 55 Md. App. 299, 307, 462 A.2d 1208, 1214 (1983) (33 percent). Although we do not adopt a standard that unconscionable disparity exists based on a particular percentage comparison of gross or net income, **the relative percentages in these cases offer some guidance in assessing whether the amount of the indefinite alimony award alleviated adequately the unconscionably disparate situation found to exist in the present case.**

383 Md. at 198 (emphasis added). Indeed, the circuit

court "must be pragmatic in recognizing that a disparity in income is necessarily going to play a highly significant role in making a finding that 'the respective standards of living of the parties will be unconscionably disparate.'" *Boemio*, 414 Md. at 144 (quoting Md. Code (1957, Repl. Vol. 2012), § 11-106(c) of the Family Law Article).

The circuit court's failure to appropriately weigh the length of the marriage in addition to considering the relative percentages of the spouse's respective incomes based on its initial finding of "certainly disparate incomes," is inconsistent with settled law. At the time of trial, Andrew was earning $150,000 a year. Conversely, Lisa was earning $34,240 a year — twenty-one percent of Andrew's earned income. As discussed above, Maryland cases have awarded indefinite alimony where the income disparity has been considerably less drastic. *See, e.g., Caldwell*, 103 Md. App. at 464 (43 percent); *Broseus*, 82 Md. App. at 186 (46 percent); *Bricker*, 71 Md. App. at 577 (35 percent); *Kennedy*, 55 Md. App. at 307 (33 percent). More importantly, however, the circuit court did not comparatively consider the comfortable lifestyle the parties enjoyed during their marriage to the hardships faced by Lisa post-separation. *Contra Boemio*, 414 Md. at 145-46. Accordingly, we conclude that the circuit court abused its discretion for its failure to exercise the appropriate discretion.

(B) Dissipation.

Following the circuit court's conclusions on the issues of rehabilitative and indefinite alimony as well as awarding Lisa a portion of Andy's retirement pension, the court addressed Lisa's request for a finding of wrongful dissipation on Andy's part:

> Which I believe leaves me with the issue of approximately $50,000 that was taken from the IRA retirement account. The husband testified that that [sic] was used to pay attorney's fees, as well as credit cards. I reviewed the *Jeffcoat* case, which [Lisa's counsel] cited to me. And that, of course, led me to the case that I was already familiar with, which is *Allison versus Allison*, which I think makes it clear that attorney's fees — that marital funds used for reasonable attorney's fees are not to be construed as a dissipation of an asset.
>
> As to the remainder, the [c]ourt finds that it was not then proven that those assets have been dissipated in terms of what is required by the case law. So at this point in time, the [c]ourt is — as to the issue of the monetary award, the [c]ourt was asked only to address this in terms of that $50,000 and, I would like to note, the $5,000 that was used by the husband to pay the wife's attorney's fees that was ordered by Judge Jaklitsch. And I do not find that this is a dissipation of assets.

Notwithstanding these conclusions, however, Lisa contends that the circuit court erred in denying her request for a finding of a dissipation of the marital assets and attests that the court applied the wrong legal standard by "plac[ing] the entire burden of proving dissipation upon" Lisa. In response, Andy insists that the circuit court properly exercised its discretion in finding that he had not dissipated marital assets. Specifically, he argues that Lisa failed to make a *prima facie* case of dissipation. Further Andy argues that Maryland's law "has established that payment of a pre-existing debt during a divorce proceeding does not amount to dissipation."

It is well established that "[d]issipation [occurs] where one spouse uses marital property for his or her own benefit for a purpose unrelated to the marriage at a time where the marriage is undergoing an irreconcilable breakdown." *Sharp v. Sharp*, 58 Md. App. 386, 401 (1984). Stated more simply, it occurs when "marital assets [are] taken by one spouse without agreement by the other spouse." John F. Fader, II & Richard J. Gilbert, *Maryland Family Law*, § 15-10 (4th ed. 2006). Therefore, "a conveyance made by a husband before and in anticipation of his wife's suit for alimony, or pending such suit, or after decree has been entered therein in the wife's favor, to prevent her from obtaining alimony, is fraudulent and may be set aside, unless the grantee took [the marital property] in good faith, without notice and for value." *Oles Envelope Corp. v. Oles*, 193 Md. 79, 89 (1949) (holding that a spouse's sale of marital property stock for $42,000 over book value adequate consideration to defeat fraudulent dissipation claim), *quoted in Solomon*, 383 Md. at 202.

In *Jeffcoat v. Jeffcoat*, this Court discussed the appropriate burdens of persuasion and production, stating:

> The burden of persuasion and the initial burden of production in showing dissipation is on the party making the allegation. *Choate v. Choate*, 97 Md. App. 347, 366, 629 A.2d 1304 (1993). That party retains throughout the burden of persuading the court that funds have been dissipated, but after the party establishes a prima facie case that the monies have been dissipated, i.e. expended for the principal purpose

> of reducing the funds available for equitable distribution, the burden shifts to the party who spend the money to produce evidence sufficient to show that the expenditures were appropriate.

102 Md. App. 301, 311 — 12 (1994) (concluding that dissipation was clearly demonstrated by the record when, notwithstanding the family's prior "hard work, frugality, and sound fiscal management," the husband spent almost $300,000 in the year following the parties' separation), *quoted in Simonds*, 165 Md. App. at 614 — 15.

More recently, the Court of Appeals specifically addressed a dissipation argument's specific burdens of persuasion and production in *Omayaka v. Omayaka*, 417 Md. 643 (2011). There, the plaintiff ("the wife") filed a complaint for divorce on grounds of voluntary separation. *Id*. at 647. In response, the defendant ("the husband") denied that he and his wife had ever resolved to voluntarily live apart for the statutory period required for a divorce by voluntary separation and further submitted a counterclaim for absolute divorce alleging in "count II" of his counter-complaint that his wife had dissipated the parties' marital assets. *Id.* Specifically, the husband, in part, asserted:

> COUNT II DISSIPATION OF MARITAL ASSETS 11. [The husband] did refinance the marital home. Pursuant to an agreement between the parties, [the wife]'s counsel was to place her share of the proceeds in an escrow account until she had accounted for the transfer of marital funds in the amount of $80,000[ ]. By a June 13th 2006 communication, the parties understood that [the wife]'s counsel was to release all but $40,000[ ] to her and would provide an accounting of what, if anything, was taken and how the marital money was spent. To date[,] no such accounting has been provided.
>
> 12. [The wife] has clearly dissipated the marital funds, the funds were transferred during the pendency of litigation and not spent for any family use purposes. Indeed some of these funds were wired to an overseas bank account and/or [to] persons that [the husband] is not aware of or was privy to.

Id. at 647-48.

Thereafter and during the trial before the Circuit Court for Prince George's County, the defendant called his wife as his first witness on his counterclaim of divorce. *Id*. at 648. The wife's testimony included two concessions: "that (1) while married to [her husband], she opened two bank accounts in her name only, and (2) from March of 2005 through December of that year, she made 'over the counter' withdrawals of approximately $80,000[ ] from those accounts." *Id*. at 648-49. The wife, however, denied the allegations of dissipation, attesting that when she and the defendant lived together "each one of [them] had [their] own account[s]. So the way [she] spent [her] money, [she] spent [her] money, and he just spent his own money." *Id*. at 649. She further explained that "[t]he only joint account that [they] had [was] where [they] used to pay [their] bills." *Id*.

At the conclusion of the trial, the circuit court granted the wife an absolute divorce and denied the husband's counterclaim for dissipation, noting that he had failed to meet his burdens of production and persuasion. *Id*. 649-51. As a consequence, the husband noted an appeal to this Court. *Id*. at 646. The Court of Appeals, however, issued a writ of certiorari on its own initiative to address the parties' contentions regarding a dissipation arguments' burden of persuasion and production. *Id*.

After reviewing the parties' contentions on appeal, the Court acknowledged with approval the "cookbook method" to resolve a dissipation allegation of Judge John F. Fader, II, and Judge Richard J. Gilbert's *Maryland Family Law* treatise, and noted:

> ° If property does not exist at the time of divorce, it cannot usually be included as marital property.
>
> ° Well, that is so unless one spouse proves [by a preponderance of the evidence] tht the other spouse dissipated assets acquired during the marriage to avoid inclusion of those assets toward consideration of the monetary award.
>
> ° [A prima facie case] of dissipation occurs when evidence is produced that marital assets were taken by one spouse without agreement by the other spouse.
>
> ° Then, the burden of going forward with evidence shifts to the party who [allegedly] took the assets without permission to [produce evidence that generates a genuine question of fact on the issue of (1) whether the assets were taken without agreement, and/or (2)] where the funds are [and/or (3) whether the funds] were used for marital or family expenses.

> ° If that proof of use for marital or family purposes is not produced, then the property taken is "extant" marital property, titled in or owned by the individual who took the marital property without permission.
>
> ° From that "extant" property in the name of one spouse, the other spouse may be given a monetary award to make things equitable.

Omayaka, 417 Md. at 655-66 (quoting John F. Fader, II & Richard J. Gilbert, *supra*, at § 15-10) (additions and modifications in *Omayaka*). Thereafter, 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.**" *Id*. at 656 (emphasis added).

Following the Court of Appeals' legal conclusion, the Court recognized that, although the husband was entitled to argue that the wife's explanation of the dissipated marital funds was unreasonable, the circuit court maintained no requirement to accept the husband's argument because it was within the circuit court's discretion to determine which evidence offered was the "better" evidence. *Id*. at 657 & n.4. Specifically, the Court reasoned that

> [w]hen a party attempts to prove a particular point by presenting evidence that is less clear, less direct, less reliable and/or less satisfactory than other evidence available to that party, the trier of fact is permitted — but not required — to find that the "better" evidence "would have been detrimental to [that party] and would have laid open deficiencies in, and objections to [that party's] case which the more obscure and uncertain evidence did not disclose."

Omayaka, 417 Md. at 657 n.4 (quoting *Loyal Protective Ins. Co. v. Shoemaker*, 63 P.2d 960, 963 (Okla. 1936)) (additional citations omitted) (textual addition in *Omayaka, supra*, 417 Md. at 657 n.4). Thus, because an accusation of dissipation is a clear question of fact, the circuit court was entitled to accept or reject any portion of the testimony of a witness. *Id*. at 658. "The finding that [the wife] had testified truthfully was therefore not erroneous — clearly or otherwise — merely because the [c]ircuit [c]ourt could have drawn different 'permissible inferences which might have been drawn from the evidence by another trier of facts.'" *Id*. (quoting *Hous. Opportunities Comm'n of Montgomery Cnty v. Lacey*, 322 Md. 56, 61 (1991) (emphasis in *Omayaka, supra*, 417 Md. at 658). Clearly, therefore, the appellate court must consider evidence produced at trial in a light most favorable to the prevailing party, and, if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed. *Housing Opportunities Comm'n v. Lacey*, 322 Md. 56, 60 (1991) (quoting *Ryan v. Thurston*, 276 Md. 390, 391-92 (1975)).

Indeed the general principles of law imparted by the Court of Appeals are applicable, but the facts of *Omayaka* are inapposite to the case at bar. The circuit court's conclusion regarding Lisa's claim of wrongful dissipation was based on an interpretation of statutory and case law. As a consequence, we need not defer to the sound discretion of the trial court and "determine whether the trial court's conclusions are 'legally correct under a *de novo* standard of review."' *See Shenk v. Shenk*, 159 Md. App. 548, 554 (2004) (citing *Walter v. Gunter*, 367 Md. 386, 392 (2002)).

Unlike *Omayaka*, where the husband presented a general allegation of dissipation, Lisa presented substantial evidence that Andy had dissipated marital funds in anticipation of an award of alimony. *Contra Omayaka*, 417 Md. at 647-48, 657. An evaluation of the record demonstrates that Andy withheld marital funds from Lisa post-separation. As a result, Lisa was required to open a separate bank account post separation in which, at the time of trial, she had no more than an approximate two hundred dollars. In the event Lisa suffered any financial distress, her use of any marital funds was subject to the discretion of Andy, who would only release funds to her in small increments.

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

(C) Child Support.

Lisa's third assignment of error relates to the circuit court's award of $5,090 in retroactive child support, where the court stated:

> All right. that brings me to the

> issue of child support. As to the issue of child support, the plaintiff has asked that child support be backdated to the date of filing. And I believe that she is entitled to that until the child has turned 18. That gives me four months of child support.
>
> Of course, as fate would have it, the husband's salary changed right in the middle of that. So it is two months at one salary and two months at another salary. So, I calculated both. And I used for the wife's income the $14.50 an hour that she was making at that point in time. So I did her lower income. And I did make reference to the alimony that I have awarded in this matter. And I did use the two different numbers, the $165,000 that the husband was making in the one year, and then the lesser salary of $150,000 in the second year.
>
> And I also considered the pension when I was calculating the child support guidelines. So for the first two months, when the defendant was at the higher salary, $1,353 per month. And for the second two months, when the defendant was at the lower salary, it is $1,192 per month. And that is a grand total of $5,090 in child support that will be awarded to the wife.

Before this Court, Lisa contends that the circuit court was clearly erroneous in calculating an award of retroactive child support. Specifically, she argues the circuit court erred because "during the time in which the child support arrearages were being accrued, there was no alimony award to consider."

In his cross-appeal, Andy argues that the circuit court erred in awarding any child support because a parent has no obligation to provide support for an adult child. Additionally, he insists that "there was no dispute that the parties' child had reached the statutory age of majority in advance of trial," and that Lisa provided no evidence "as to the amount or the nature of any expenses for the parties' child incurred during the limited period of time he was still under the age of majority."

Preliminarily, we note that "[a]s a general rule, the amount of child support awarded is governed by the circumstances of the case and is entrusted to the sound discretion of the trial judge, whose determination should not be disturbed unless [he or she] acted arbitrarily in administering [the court's] discretion or was clearly wrong." *Caccamise v. Caccamise*, 130 Md. App. 505, 518 (2000) (quoting *John O. v. Jane. O.*, 90 Md. App. 406 (1992)). Consequently, the circuit court may retroactively award child support for a period from the filing of the pleading that requested the child support. *See* Md. Code (1984, Repl. Vol. 2012), § 12-101 of the Family Law Article.[12] *See also Hoffman v. Hoffman*, 93 Md. App. 704, 723 (1992) (concluding that the circuit court properly exercised its discretion in back-dating the child support award to the date on which the petition was filed). Thus, the circuit court is permitted to order a parent to pay child support arrears from the date of filing until the time at which the child reaches the age of majority. Nevertheless, in addressing Lisa's contentions, we are compelled to further evaluate the requisite body of law determining the appropriate means by which the court may make such an award. *Cf. Jackson v. Proctor*, 145 Md. App. 76, 89 (2002).

It is well established that the circuit court must ahere to the child support guidelines outlined in Section 12-204 of the Family Law Article. *Lacy v. Arvin*, 140 Md. App. 412, 419 (2001). *See also Maness v. Sawyer*, 180 Md. App. 295, 318-19 (2008). "The law recognizes a rebuttable presumption that the amount of child support resulting from the application of the guidelines 'is the correct amount of child support to be awarded.'" *Lacy*, 140 Md. App. at 419 (quoting Md. Code (1984, Repl. Vol. 2012), § 12-202(a)(2)(i) of the Family Law Article). There are some instances, however, when the specific provisions provided within Section 12-204(e) only *inform* an award of child support. Specifically, when the combined adjusted actual monthly income is over $15,000, "the court may use its discretion in setting the amount of child support." Md. Code (1989, Repl. Vol. 2012), § 12-204(d). *See Walker v. Grow*, 170 Md. App. 255, 266 (2006) (discussing the court's use of discretion in "above guideline" cases). "Several factors are relevant in setting child support in an above [g]uidelines case. They include the parties' financial circumstances, the 'reasonable expenses of the child,' and the parties' 'station in life, their age and physical condition, and expenses in educating the child[ ].'" *Walker*, 170 Md. App. at 266 (citations omitted).

Undergirding these many factors is the general principle of equity, requiring that "[w]hen 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) (quoting *Unkle v. Unkle*, 305 Md. 587, 597 (1986), *quoted in Walker*, 170 Md. App. at 267. After reading the circuit court's oral opinion on record, however, it is unclear whether the judge engaged in the requisite balancing of equities. We therefore conclude that the circuit court improperly exer-

cised its discretion in awarding retroactive child support. Because we are remanding the case for reconsideration of alimony, we will also ask the circuit court to clarify the calculation and apportionment of child support.

(D) Attorneys' Fees.

Both parties argue — admittedly for different reasons — that the circuit court erred in its award of attorney's fees to Lisa. Lisa contends that the circuit court "erred in failing to order a date by which the child support arrears and counsel fees award must be satisfied" by Andy. Conversely, Andy responds by asserting that "there was no error in the courts [sic] declining to set a date by which attorney's fees and retroactive child support should be paid." In addition, he attests that it was error to award Lisa $15,000 in attorney's fees because the circuit court "failed to make any findings as to the reasonableness or necessity for the $15,000 in fees owed to [Lisa's] attorney, nor did [the court] consider [Andy's] prior payment of $5,000 in attorney's fees to [Lisa] as the result of a prior hearing."

In *Doser v. Doser*, 106 Md. App. 329 (1995), we noted that

> [t]he factors underlying awards of alimony, monetary award, and counsel fees are so interrelated that, when a trial court considers a claim for any one of them, it must weigh the award of any other. Accordingly, when this Court vacates one such award, we often vacate the remaining awards for re-evaluation.

106 Md. App. at 335-36 n.1 (internal citations omitted), *quoted in Kelly*, 153 Md. App. at 279-80 (2003).

Because we are remanding this case for a reconsideration of alimony, we shall not specifically decide upon the parties' 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 should specify a date by which Andy must satisfy his obligations.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED IN PART, REVERSED IN PART. CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

FOOTNOTES

1. Section 8-205(b) provides that "the court shall determine the amount and method of payment of a monetary award, or the terms of the transfer of the interest in property described in subsection [8-205](a)(2) [ ], or both, after considering each of the following factors:"

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

Md. Code (1984, Repl. Vol. 2012), § 8-205(b) of the Family Law Article.

2. Lisa framed the issues as follows:

> 1. Whether the trial court was clearly erroneous in denying Appellant's request for indefinite alimony, [sic] and by awarding rehabilitative alimony?
>
> 2. Whether the trial court was clearly erroneous in its calculation of retroactive child support awarded to Appellant?
>
> 3. In denying Appellant's request for a finding of dissipation of marital property, did the trial court apply the wrong legal standard and base its denial upon an incorrect application of the law?
>
> 4. Did the trial court err in failing to order a date by which the child support arrears and counsel fees award must be satisfied by Appellee?

In addition, Andy presented these additional questions for

our review:

> 1. Did the Trial Court abuse its discretion in setting rehabilitative alimony at $2,500 per month?
>
> 2. Did the Trial Court err in awarding Appellant child support?
>
> 3. Did the Trial Court abuse its discretion in awarding Appellant's attorney's fees of $15,000 in attorney's fees?
>
> 4. Did the Trial Court err in signing a Judgement of Divorce that provided for the six year period for rehabilitative alimony to begin on October 1, 2011 and not October, 2010, as stated in the opinion[?]

3. The record indicates that, at the time Lisa left her employment to care for Andrew and the marital home, she was only earning a meager $10,000.

4. Section 11-106(b) requires the reviewing court to considering all the following factors when making a determination as to the amount and duration of alimony:

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and non-monetary, of each party to the well-being of the family;
>
> (6) the circumstances that contributed to the estrangement of the parties;
>
> (7) the age of each party;
>
> (8) the physical and mental condition of each party;
>
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
>
> (10) any agreement between the parties;
>
> (11) the financial needs and financial resources of each party, including:
>
> (i) all income and assets, including property that does not produce income;
>
> (ii) any award made under §§ 8-205 and 8-208 of this article;
>
> (iii) the nature and amount of the financial obligations of each party; and
>
> (iv) the right of each party to receive retirement benefits; and
>
> (12) whether the award would cause a spouse who is a resident of a related institution as defined in §19-301 of the Health — General Article and from whom alimony is sought to become eligible for medical assistance earlier than would otherwise occur.

Md. Code (1984, Repl. Vol. 2012), § 11-106(b) of the Family Law Article.

5. *See id*.

6. The circuit court found that there had been no agreement between the parties regarding the distribution of spousal support, and, as a result, concluded that there was no need to consider factor number ten.

7. The circuit court found that neither party was resident of a related institution. As a consequence, it concluded that factor twelve was inapplicable to its alimony analysis.

8. *See* discussion of Section 11-106(c), *infra*.

9. *See* note 4, *supra*.

10. *See id.*

11. *See, e.g., Tracey*, 328 Md. at 382 (26 years); *Turner v. Turner,* 147 Md. App. 350 (2002) (30 years); *Innerbichler*, 132 Md. App. at 213 (14 years); *Digges v. Digges*, 126 Md. App. 361, 363 (1999) (26 years); *Crabill v. Crabill*, 119 Md. App. 249, 258 (1998) (18 years); *Caldwell*, 103 Md. App. 452, 455 (1995) (26 years); *Blaine v. Blaine*, 97 Md. App. 689, 693 (1993) (18 years); *Broseus v. Broseus*, 82 Md. App. 183, 189-90 (1990) (19 years); *Bricker v. Bricker*, 78 Md. App. 570, 576 (1989) (25 years); *Zorich v. Zorich*, 63 Md. App. 710, 718 (1985) (30 years); *Kennedy v. Kennedy*, 55 Md. App. 299, 300-01 (1983) (22 years).

12. Section 12-101, entitled "Award by court — Authorized," in relevant part, states:

> (a) *Awarded from time of filing of pleading.* — (1) Unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading that request child support pendente lite, the court shall award child support for a period from the filing of the pleading that requests child support.
>
> (2) Notwithstanding paragraph (1) of this subsection, unless the court finds from the evidence that the amount of the award will produce an inequitable result, for an initial pleading filed by a child support agency that requests child support, the court shall award child support for a period from the filing of the pleading that requests child support.
>
> (3) for any other pleading that requests child support, the court may award child support for a period from the filing of the pleading that request child support.
>
> (b) *Credit for payments*. — The court shall give credit for payments that the court finds have been made during the period beginning from the filing of the pleading that requests child support.

Md. Code (1984, Repl. Vol. 2012), §§ 12-101(a) & (b) of the Family Law Article (emphasis in original).

In addition, Section 12-204 states, in relevant part:

(a) *Schedule to be used*; *division among parents; maintenance and alimony awards.* — (1) The basic child support obligation shall be determined in accordance with the schedule of basic child support obligations in subsection (e) of this section. The basic child support obligation shall be divided between the parents in proportion to their adjusted actual incomes [meaning, the actual income minus preexisting reasonable child support obligations actually paid, alimony or maintenance actually paid. *See* Md. Code (1984, Repl. Vol. 2012) § 12-201(c) of the Family Law Article].

Cite as 4 MFLM Supp. 63 (2013)

Alimony: evidence: lack of waiver

Leroy Scott Love
v.
Patricia Ann Love

No. 2213, September Term, 2011

Argued Before: Meredith, Woodward, Matricciani, JJ.

Opinion by Meredith, J.

Filed: February 22, 2013. Unreported.

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.

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

In this appeal, Leroy Scott Love ("Husband" or "appellant") contends that the Circuit Court for Talbot County abused its discretion, in various ways, during his divorce trial and in its post-trial denial of his motion for new trial on the issue of alimony to be paid to Patricia Ann Love ("Wife" or "appellee").

QUESTIONS PRESENTED

Appellant presented four questions for our consideration, which we have reworded for organization of discussion:[1]

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 answer all of these questions "no," and affirm.[2]

FACTS AND PROCEDURAL HISTORY

The parties to this case were married on September 10, 1988, and separated on November 20, 2008. There were two children born to the marriage, one of whom was still a minor at the time of the proceedings herein. On January 25, 2010, Husband filed a complaint for absolute divorce, based on a mutual and voluntary separation. Wife was served, but she did not respond to Husband's complaint, and an order of default was entered against her on March 16, 2010. On March 31, 2010, Wife's newly-retained attorney filed an appearance and a motion to vacate the order of default, which was opposed by Husband, but nonetheless granted on April 16, 2010. On April 29, 2010, Wife filed a counterclaim for absolute divorce, alleging that Husband's adultery was the reason for the parties' estrangement. Among the relief she requested was "alimony, pendente lite and permanently, rehabilitative and indefinite."

On July 6, 2010, trial counsel entered his appearance for Wife, replacing the Wife's original attorney. As relevant to this appeal, a settlement conference was held December 16, 2010. The scheduling order setting the settlement conference ordered the parties to prepare and file a statement in accordance with Rule 2-504.2 no less than ten days prior to the settlement conference. Both parties did so. Trial was scheduled for two days, and commenced on May 9, 2011.

On May 10, 2011, after both parties had presented their respective 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 transcript reflects that the following occurred at trial with respect to Wife's claim for alimony:

> [WIFE'S COUNSEL]: That's all the witness I have, Your Honor. I do have these calculations, child support calculations. And from the SASI Calc, Your Honor, we have also done, they have now, got an alimony calculator that they put out there. So I did one of those as well. It has to be marked and received.
>
> [HUSBAND'S COUNSEL]: Your Honor, I'm going to object that they come into evidence at this juncture. I think they come in as argument.

THE COURT: Well I'm inclined to think they are. [HUSBAND'S COUNSEL]: They are evidence or aren't they?

THE COURT: They are in support of argument, are they not, as opposed to substantive . . .

[WIFE'S COUNSEL]: They are in support of arguments, Your Honor, but I have been in cases where we didn't introduce them and then we tried to argue them and then we were told they were exhibits, so.

THE COURT: We'll mark them for identification, how's that? What number are we giving these?

[WIFE'S COUNSEL]: 12 and 13 I think.

(Wife's Exhibit No. 12, Child Support Calculator and No. 13, Alimony Calculator, was marked for identification.)

[HUSBAND'S COUNSEL]: And it would be a courtesy, Your Honor, if I could be provided with a copy.

[WIFE'S COUNSEL]: You may have a copy right now.

[HUSBAND'S COUNSEL]: What's this?

[WIFE'S COUNSEL]: That's the alimony calculator.

[HUSBAND'S COUNSEL]: Is he submitting an alimony calculation?

[WIFE'S COUNSEL]: I am, Your Honor.

THE COURT: That's what he just said.

[HUSBAND'S COUNSEL]: There is no request for alimony in this case.

[WIFE'S COUNSEL]: Yes, there was, Your Honor.

[HUSBAND'S COUNSEL]: No testimony given.

[WIFE'S COUNSEL]: No there has been testimony given.

[HUSBAND'S COUNSEL]: **Well I object to that.**

THE COURT: What's the basis of your objection? We haven't gotten to that argument yet so why don't we just wait until we get there. So we mark these as Exhibits . . .

[WIFE'S COUNSEL]: 12 and 13.

THE COURT: 12 and 13 for identification?

THE CLERK: Yes.

[WIFE'S COUNSEL]: Yes, Your Honor.

THE COURT: Which is which?

THE CLERK: Child support guidelines is 12. The alimony calculation by SASI is 13.

THE COURT: Do you have any further evidence?

[WIFE'S COUNSEL]: No, Your Honor.

THE COURT: Do you have any further?

[HUSBAND'S COUNSEL]: I do. **Before I proceed to that I would like to move for a dismissal of the request for the alimony. There's been no financial statement filed in the proceedings. There's been insufficient testimony on the point.** The only document that was provided was some copies of documents with respect to unemployment.

THE COURT: I have a financial statement filed.

[WIFE'S COUNSEL]: Yes, Your Honor.

[HUSBAND'S COUNSEL]: It wasn't entered into evidence.

THE COURT: I can take judicial notice of it can't I? It doesn't have to be entered into evidence. Anyhow **if that's the basis of your motion I'll deny it.**

[HUSBAND'S COUNSEL]: Then I'll recall Ms. Love to talk about her expenses if the Court is going to take judicial notice. And it wasn't in the usual course of things introduced by counsel.

THE COURT: You can recall.

[HUSBAND'S COUNSEL]: Court's indulgence a moment while I get myself in order.

PATRICIA LOVE

the [wife], produced on behalf of the [husband] in rebuttal, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY [HUSBAND'S COUNSEL]:

Q. Now as I understand it you are not paying the $2,221 a month mortgage payment, is that correct?

A. Not at this time.

Q. And you haven't paid the taxes either on the property?

A. I believe they were paid for '09 but not for 2010, I was unable.

Q. Do you have any receipts with you here today to indicate that your expenses for the gas stove, because you have on your financial statement pending, so you don't' have any amount for that, is that correct?

THE COURT: Expenses for the gas stove?

[HUSBAND'S COUNSEL]: Gas, it says gas, gas stove.

BY [HUSBAND'S COUNSEL]:

Q. You don't have any receipts for that?

A. I'm sorry I don't understand. We don't have a gas stove.

Q. The question is on your financial statement filed in this proceeding . . .

THE COURT: There's an amended one. Are you looking at the amended one?

[HUSBAND'S COUNSEL]: I'm sorry I was looking at the original one, Your Honor.

THE COURT: Well why don't you work from the amended one.

[HUSBAND'S COUNSEL]: What document number would that be? Or approximate date?

THE COURT: I don't know. I just, I pulled it out of the file before the case started but it was filed on June 21 of 2010.

[HUSBAND'S COUNSEL]: Thank you, Your Honor. BY [HUSBAND'S COUNSEL]:

Q. Now the homeowners insurance is included in your mortgage payment, correct?

A. I believe so, yes.

Q. And the taxes are also included in the mortgage payment?

A. Yes, we are also given additional vouchers that have to be sent in but it's included in the mortgage payments?

Q. Now your electric do you have bills to reflect what your actual electric bill was each month?

A. I believe those were all supplied when I was still under Denis Casey's counsel.

Q. Supplied to him?

A. That's correct. As part of the interrogatories.

Q. Not supplied in discovery.

[WIFE'S COUNSEL]: Your Honor, all those documents were supplied in discovery.

THE COURT: Well we've been through this.

[HUSBAND'S COUNSEL]: All right. But I can't cross examine.

THE COURT: I told you both I can't resolve which one of you is being accurate and which one isn't, so you're going to have to find some other way to make your point about . . .

[HUSBAND'S COUNSEL]: Well it's hard for me to prove a negative that I didn't get something. And I filed the motion . . .

THE COURT: Ms. [Husband's counsel] well all I can tell you is that there is a dispute between you and Mr. [Wife's counsel] and I have said several times I have no basis to resolve that based on what the two of you have told me.

[WIFE'S COUNSEL]: Your Honor, at the appropriate time I would like to orally respond to the motion and I can respond to it later in writing but . . .

THE COURT: At the moment there isn't a motion as such as I understand it.

[HUSBAND'S COUNSEL]: Can I continue with this witness? THE COURT: Please do so.

BY [HUSBAND'S COUNSEL]:

Q. You indicated that you have household supplies. What household supplies do you purchase on a monthly basis?

A. There's laundry detergent. There's toilet paper, paper towels, tampons for my daughter and myself and the other toiletries, soap, lotions, toothpaste.

Q. And that cost you $420 a month?

A. Everything can be accounted for. I have receipts for everything.

Q. Can you produce them?

A. Oh, when asked to yeah, I should have everything. Absolutely.

Q. Will you produce them?

A. If they are here I will.

THE COURT: Well you know before we recessed for lunch I asked the parties to make an effort to identify exhibits so we wouldn't have to be hunting for them during cross examination.

[HUSBAND'S COUNSEL]: **Your Honor, this came as a surprise to me that we were going to use her financial statement** because it was not introduced into evidence and you know, I can only reiterate that in April I asked them to produce documents and they did not do so.

THE COURT: That's got nothing to do with the point I'm making.

[HUSBAND'S COUNSEL]: Yes, it does because I wouldn't have . . .

THE COURT: The point I'm making is that I asked you to try to identify these documents during the luncheon recess. We're going to finish this case today. And you know we'll see how long it take[s] her to find this. But I am disappointed that that hasn't been done. Now what are you asking her to look for?

[HUSBAND'S COUNSEL]: Your Honor, this is my point, **counsel did not introduce the financial statement.** Nor . . .

THE COURT: I don't think he has to Ms. [Husband's counsel]: **It's filed in the case. The Court can take judicial notice of it**.

[HUSBAND'S COUNSEL]: Yes, he does. I believe he does, Your Honor. You can take it as a stipulation but **I don't think you can take it as judicial notice**.

THE COURT: **Well I think I can so I disagree with you**. What are you asking her to produce?

[HUSBAND'S COUNSEL]: I'm asking her to produce the documents that she used to say that she spends $420 a month on toilet paper, paper towels and other household supplies.

THE COURT: All right, do you know where to look for those, ma'am? You can step down and look for them if you know where.

THE WITNESS: Not off of the top of my head. I'd have to view the documents and what files that they've been put away in.

[WIFE'S COUNSEL]: We've got them.

UNIDENTIFIED: I have the index.

[WIFE'S COUNSEL]: We have an index. There were 68 . . .

THE COURT: Well why don't you hand her the index and see if she can figure it out from that.

[WIFE'S COUNSEL]: And here's the index that we provided of the documents. If you can tell us which of those folders you think that will be in we'll pull them out.

(Witness reviews index.)

BY THE WITNESS:

A. If I may say so I do not see that I have a recording as requested in the 81, I'm sorry, 83 things I had to come up with but I use a debit card to make my payments and I have every check ledger in there and that will show everything that has been purchased on there. And I have all my Visa credit card statements that I use to purchase materials with. And it will have every document on there.

[WIFE'S COUNSEL]: Your Honor, the Visa cards are here, the bank statements are here.

BY THE WITNESS:

A. I've supplied them as far back as I could lay hands on them back to 2005.

[WIFE'S COUNSEL]: Right, we have all the checks, Your Honor.

THE COURT: All right, why don't you hand them to her and see where we're going with this.

[HUSBAND'S COUNSEL]: **Your Honor, if I could to expedite this I would like an opportunity to listen to opening arguments because I don't believe that there was a request for alimony**. I'm willing to stand corrected on that.

THE COURT: Well I don't know that it needs to be mentioned in opening arguments if it's in the pleadings. Is it in the pleadings, Mr. [Wife's counsel]?

[WIFE'S COUNSEL]: Yes, Your Honor, it is.

[HUSBAND'S COUNSEL]: Your Honor, I think that's only fair because we were never talking about this being . . .

THE COURT: Well I disagree with you people don't even have to make opening statements if they don't want to. They don't necessarily have to cover everything in an opening statement that they are going to ask the Court to do. So let's move on. We have documents here. Do you wish her to look through them or what are you asking her to do with these things? We have some credit card statements as I understand.

[HUSBAND'S COUNSEL]: Your Honor, I have to request that the Court continue this case so that I can have an opportunity to look through those documents to do this cross examination in an efficient manner.

THE COURT: Well Mr. [Wife's counsel] has represented that all these documents have been made available prior to trial for months and months. Now I don't know whether that's true or not. I have said every time this has come up now about 10 or 20 times that I can't resolve that. I've also told you we're going to conclude this trial today. And I'm going to stick by that. So proceed in any way you want.

[WIFE'S COUNSEL]: Okay, I have one set of documents, Your Honor, which was in the documents, Casey's stuff that came originally which says see financial statement, it's document 16. I believe those are probably going to be the supporting documents for the financial statement. So I think that's the first place to look.

THE COURT: All right, why don't you ask her a question.

BY [HUSBAND'S COUNSEL]:

Q. What documents do you have in that folder that support your contention that you spend $420.88 a month on household supplies?

* * *

[HUSBAND'S COUNSEL]: Court's indulgence. I have no further questions.

THE COURT: Anything further Mr. [Wife's counsel]?

CROSS-EXAMINATION

BY [WIFE'S COUNSEL]:

Q. Ma'am, these expenses that you did on the amended financial statement, done in June of 2010. Were they accurate at the time of completely . . .

[HUSBAND'S COUNSEL]: Objection.

THE COURT: Overruled.

BY THE WITNESS:

A. Yes, sir.

BY [WIFE'S COUNSEL]:

Q. And your financial situation since then has gotten better or gotten worse?

[HUSBAND'S COUNSEL]: Objection.

THE COURT: Overruled.

BY THE WITNESS:

A. It's gotten worse.

BY [WIFE'S COUNSEL]:

Q. So to the extent that you're unable to continue that lifestyle it's because your financial condition has gotten progressively worse?

A. Yes.

[HUSBAND'S COUNSEL]: Objection.

THE COURT: Overruled.

[WIFE'S COUNSEL]: That's all the questions I have, Your Honor.

THE COURT: Any further examination?

[HUSBAND'S COUNSEL]: No, Your Honor.

THE COURT: You may step down.

(Witness off the stand.)

[HUSBAND'S COUNSEL]: I would renew my motion to strike the alimony calculation, because as I look at it here it states that this is based on Arizona or Texas, his recommendations.

THE COURT: Well I haven't even seen it yet so why don't we save that for argument. **It's not in evidence it's just an aid in argument.**

[HUSBAND'S COUNSEL]: I'd like to recall Mr. Love.

LEROY LOVE

the Plaintiff, having been previously duly sworn, in rebuttal, was examined and testified on his own behalf as follows:

After rebuttal witnesses testified, the court inquired of Husband's counsel:

THE COURT: Do you have any other witnesses?

[HUSBAND'S COUNSEL]: No, that would be Plaintiff's case.

THE COURT: Any other witnesses?

[WIFE'S COUNSEL]: Just a moment, Your Honor. Yes, Your Honor, I would recall my client.

PATRICIA LOVE

the Defendant, having been previously duly sworn, in rebuttal, was examined and testified on her own behalf as follows:

* * *

THE COURT: Any other witnesses Mr. [Wife's counsel]

[WIFE'S COUNSEL]: No, Your Honor.

THE COURT: Any other witnesses?

[HUSBAND'S COUNSEL]: No sir.

THE COURT: All right are we ready for, well before we get to closing argument, Ms. [Husband's counsel] I've been handed a motion in limine and for sanctions and other relief that you apparently filed during the luncheon recess because it was filed at 1:30. I've been on the Bench since I got it and it looks like it's about 20 or 30 pages. What is it you want? Do you want to be heard on this because it's ten minutes after three and we need to conclude this case but what do you wish to be heard at this time?

* * *

[HUSBAND'S COUNSEL]: . . . Also **having read what was in the pretrial statement and what were issues I read to the Court indicate my surprise when the alimony calculations came in, when it was clearly all along that counsel were preparing for a case on the issue of child support, on the issue of equitable division of marital property. And I believe that for the record in terms of being blind sided saying well everything was on the table**, as Ms. [Wife's counsel] has represented, and I should have been prepared for that because it was not represented to the Court that that would be issues at the time otherwise pretrial statements have no meaning if they don't bind the parties to the issues. That being the case we fortunately have an agreement with respect to the custody of the children, or the remaining minor child which I've recited into the record and which is not contested. The issue then becomes what would be the appropriate child support. I would like to present my child support guideline calculation for argument. A copy for counsel. And I have used for child support purposes Mr. Love's income for 2010 W-2. And I used Ms. Love's income from her last employment. **We believe that she is voluntarily under employed** and that she has training and a sufficient background in physician's assistant. And that any excuses that she gives are not sufficient and that under the child support guidelines **she is voluntary impoverishing herself and therefore income should be imputed to her based on her last job**. The Court has in the record the paystubs from Dr. Whittaker and it is

based on her employment with Dr. Whittaker. As testified there are . . .

THE COURT: Well let me ask you this. [HUSBAND'S COUNSEL]: Yes.

THE COURT: I mean she has given sworn testimony as you know that she was fired because she came in late, she didn't fill out some medical records and she says that because of that state of affairs that she's been unable to find work. What testimony are you relying on when, to rebut that?

* * *

[HUSBAND'S COUNSEL: . . . **As far as the alimony is concerned again I won't address that but I don't think she's made out an alimony case here for the reasons that she's voluntarily impoverished. And for the reason that I think she should be prohibited from doing so having represented to this Court that she wasn't pursuing it in her pretrial statement**.

* * *

[WIFE'S COUNSEL]: Your Honor just so it's clear in the pretrial we did not indicate that we were giving up any of the issues that have been plead in the pleading. In fact under the simple (inaudible) limitations of issues, all that we talked about was that we hope that they would be able to stipulate as to records and things of that variety. I don't think that there is anything in there that indicates there was giving up of any of the things that had been plead in this case. So I don't think that that's really a viable argument for why they think that alimony should not be considered by this Court. Now you know the fact of the matter is, there are a couple of things. First of all it all goes back to when that pleading was originally filed, so I want to make that clear. The implication that is drawn that she was not uncomfortable during this time period admittedly she was not as uncomfortable prior to Mr. Love cutting back on the amount of money that he paid and then subsequent to that losing the job. She wasn't as uncomfortable prior to that. And she got that bonus that year which allowed her to do something with her children that this was going to be in her mind the last time that she would be able to do that with those children. And I think that's an understandable thing.

* * *

. . . And my client is probably not even interested in having it permanently but she needs it to back date for the periods of time that she's been out of work during this whole debacle. And she needs some leeway to get her through to a clean space if you understand what I mean. And I would say Your Honor that the Court should not enter it for more than two years. And in going forward I think that that's fair under the circumstances.

* * *

[HUSBAND'S COUNSEL]: Second of all with respect to the items, well I won't go into that right now. **As far as the alimony is concerned, again we were blind sided. It was clear from the, from the pretrial statement that they were not going to pursue it. I don't think that that burden has been met**. And even if it has been met it hasn't been met for back dating it to . . .

THE COURT: What's the language of the pretrial statement that you're relying on for your argument that they said they weren't going to pursue it.

[HUSBAND'S COUNSEL]: Court's indulgence. On page 3, paragraph 8, damages and relief. Spelled wrong. Defendant will be asking the Court for continuation of child support for the parties minor child and an equitable division of the parties marital property. I don't think it could be any clearer . . .

THE COURT: So you're saying by inference they said they meant to say we aren't going to pursue alimony.

[HUSBAND'S COUNSEL]: I don't think they meant to say I think they were in fact saying that those were going to be the issues. That's what they were requesting, damages

and relief. A monetary award and child support.

THE COURT: All right. Go ahead.

[HUSBAND'S COUNSEL]: **And I don't think this is an alimony case even if the Court were to not hold that they are bound by what they put in the pretrial statement for these reasons:** Throughout this time and we're only talking about the period of January 25th of 2010 when my client filed the complaint for absolute divorce. She was receiving unemployment, and then she had a job. And I don't have . . .

THE COURT: Excuse me one second. This is not related to your case. But the Clerk popped in the door and is looking for something.

(Court and clerk confer off record.)

THE COURT: Go ahead.

[HUSBAND'S COUNSEL]: The suit was initiated, well, strike that . . .

THE COURT: Complaint filed January 25th.

[HUSBAND'S COUNSEL]: She filed her counter-complaint in April which would be when she made her request for alimony child support. So that would be the tolling date if this Court were inclined to believe that good cause has been shown why it should be made retroactive.

THE COURT: All right.

[HUSBAND'S COUNSEL]: She was and I don't have the dates because you have my own copy but she was employed for a considerable period of time, for several months. I believe four months in 2010. She was receiving unemployment so I don't think that this is an alimony case. It's certainly it's not a retroactive alimony case.

(Emphasis added.)

The court rejected Husband's arguments as to alimony, and, in its opinion and order of October 12, 2011, awarded Wife two years of rehabilitative alimony, at $350 per month, dating from May 1, 2010, *i.e.*, a total of $8,400. As noted above, Husband appealed and challenges the alimony award, as well as the court's child support award.

STANDARD OF REVIEW

Because this was an action tried without a jury, our review is subject to Maryland Rule 8-131(c), which provides:

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

"When the trial court's findings are supported by substantial evidence, the findings are not clearly erroneous." *Ryan v. Thurston*, 276 Md. 390, 392 (1975). The decision to grant alimony is committed to the sound discretion of the trial court. "An alimony determination may not be disturbed unless the court's judgment is clearly wrong or an arbitrary use of discretion." *Brodak v. Brodak*, 294 Md. 10, 28-29 (1982). Child support is also subject to an abuse of discretion standard of review. *Jackson v. Proctor*, 145 Md. App. 76, 90 (2002).

The court's denial of a mid-trial request for continuance, as well as its denial of a motion for new trial, are likewise both reviewed for an abuse of discretion. *Cruis Along Boats, Inc. v. Langley*, 255 Md. 139, 142, (1969) ("the granting or withholding of a continuance is discretionary with the trial court, and . . . [the judge's] action in this respect, unless arbitrary, will not be reviewed on appeal"); *Atty. Griev. Comm'n. v. Alston*, 428 Md. 650, 671 (2012) ("The decision to deny [a motion for new trial] lay within the sound discretion of the court deciding the motion, and such decision is not disturbed by the reviewing court, absent a showing of an abuse of discretion.").

DISCUSSION

When making an alimony award, the court is required, pursuant to Md. Code (1984, 2006 Repl. Vol.), Family Law Article ("FL"), § 11-106(b), to consider the following factors:

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting;
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment;
>
> (3) the standard of living that the parties established during their marriage;

(4) the duration of the marriage;

(5) the contributions, monetary and nonmonetary, of each party to the well-being of the family;

(6) the circumstances that contributed to the estrangement of the parties;

(7) the age of each party;

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

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

(10) any agreement between the parties;

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

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

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

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

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

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

Although the court is required to give consideration to each of the factors stated in the statute, it is not required to employ a formal checklist, mention specifically each factor, or announce each and every reason for its ultimate decision. *Doser v. Doser*, 106 Md. App. 329, 356, 664 A.2d 453 (1995); *Hollander v. Hollander*, 89 Md. App. 156, 176, 597 A.2d 1012 (1991). We may examine the record as a whole to see if the court's findings were based on the mandated factors. *Doser,* 106 Md. App. at 356. "Appellate courts will accord great deference to the findings and judgments of trial judges, sitting in their equitable capacity, when conducting divorce proceedings." *Tracey v. Tracey*, 328 Md. 380, 385 (1992).

In this case, the court found that Wife was entitled to rehabilitative alimony for a period of two years. Wife is a college graduate and had been employed as a physician's assistant during the marriage, earning as much as $72,000 in 2008. Wife testified that, in January 2010, she lost her job due to the stress of the marital separation. She secured another job as a physician's assistant in Pocomoke City, Maryland, in August 2010, but was fired in December 2010. Wife testified that her separation-related depression, her long daily commute, and her need to care for the parties' minor child who resided with Wife, all contributed to the loss of that job. At the time of trial, Wife was collecting a biweekly unemployment benefit of approximately $714, and expressed that it was her plan to look for employment in her field on the Western Shore of Maryland.

The court analyzed the evidence in light of the FL § 11-106(b) factors, and concluded that Wife was entitled to a brief period of rehabilitative alimony. Husband does not contend that the court failed to consider the required factors; and it is plain from reviewing the court's opinion that it did consider the 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.

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 filed under the predecessors to current Rules 9-202 and 9-207,

held as follows:

> We hold that the 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: "We reiterate that the admissions and stipulations contained in Maryland Rule S72 and S74 Statements, when filed in a case as required, may be considered as evidence by trial courts without the necessity of a formal introduction of such statements at trial." *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." Despite Husband's protestation that the statement was not in evidence, the court clearly advised Husband that the statement was something the court could consider as evidence in the case. 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 trial 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) (recognizing that one of the "functions" of the Rule S72 financial statement was "to furnish the court with information upon which an award of support can be made.").

Husband also argued that the court should not consider alimony because of Wife's implicit waiver. Because Wife did not mention her alimony request in her pretrial statement, Husband argued that alimony was no longer at issue at the trial. 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 whether representations made by counsel in pretrial statements constitute a binding limitation of issues and claims for relief even in the absence of an order entered by the court. 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, among other relief, 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. Trial judges are vested with very broad discretion with regard to the management of trial proceedings, and when a trial judge is confronted with a mid-trial request for continuance, we will not substitute our view for that of the trial judge unless there is a very clear abuse of judicial discretion. We have set out at length above excerpts of the trial proceedings that persuades us that the trial court granted Husband's counsel great leeway after the alimony issue 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 on the issue of alimony if the case were continued. Even when the motion for new trial was filed, there was no specific proffer of additional information. Under such circumstances, we decline to second guess the trial judge's denial of the motion for continuance and the motion for new trial.

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 it's [sic] child support determination." This assertion is belied by the record, which reveals that the court awarded child support in "the current guidelines amount" of $714 per month. See also FL § 12-202. The numbers the court used were derived from the parties' testimony and financial statements. Husband reported a gross adjusted annual income in 2010 of $65,492.92. Divided by twelve, Husband's gross monthly income would be $5457.74. Subtracting from that number $350.00, to account for Husband's monthly alimony payment, leaves Husband with $5107.74 in gross monthly income. Wife submitted a guidelines worksheet at trial, attributing to Husband $5102.00 of monthly gross income. The guidelines amount, as applicable to the facts of this case, for the support of one child, where one party has a monthly gross income of $5102.00, is $715.00. The five-dollar difference between the two monthly income figures for Husband, and the one-dollar difference (in Husband's favor) in the child support award is *de minimus*, and we find no abuse of discretion in the child

support award on this record.

Husband also complains that the court abused its discretion in declining to accept his argument that Wife was voluntarily impoverished. In *Durkee v. Durkee*, 144 Md. App. 161, 182-83 (2002), we said:

> A parent is voluntarily impoverished "'whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources.'" *Digges* [*v. Digges*], 126 Md. App.[361] at 381 [(1999)] (quoting *Goldberger* [*v. Goldberger*], 96 Md. App.[313] at 327 [(1993)]. In *Wills v. Jones*, 340 Md. 480, 494 (1995), the Court of Appeals said that "voluntary" means that "the action [must] be both an exercise of unconstrained free will and that the act be intentional." A parent is not excused from support because of a tolerance of or a desire for a frugal lifestyle. *Moore v. Tseronis*, 106 Md. App. 275, 282 (1995). Indeed, if need be, the parent must alter his or her previously chosen lifestyle to satisfy a support obligation. *Sczudlo* [*v. Berry*], 129 Md. App. [529] at 542 [(1999)].

Here, the court found that there was "no evidence . . . presented to establish that Ms. Love's conduct leading to discharge was committed with the intention of becoming unemployed or otherwise impoverished." The court's factual finding was not clearly erroneous, and the court's conclusion that Wife was not voluntarily impoverished was not reversible error.

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

FOOTNOTE

1. Husband's questions presented, verbatim, are:

> "1. Do statements contained in a Pretrial Statement filed pursuant to Rule 2-504.2 constitute a stipulation or judicial admission by a party as to limitation of issues?
> 2. In the alternative, if the Court did not abuse its discretion in proceeding to hear the alimony request, did [it] abuse its discretion in failing to grant Appellant's request for a continuance?
> 3. Did the Trial Court err and abuse its discretion in awarding alimony to Appellee?
> 4. Was Appellant denied due process as a result of the Trial Court denying his request for a continuance and his Motion for New Trial on the issue of alimony?"

2. As set forth above, Husband's brief contained four "questions presented." The body of the brief, however, purports to add a fifth issue for our review. Captioned as "V," and beginning on page 17, Husband begins an entirely new argument, and asserts: "The trial court abused its discretion in the amount of child support awarded and the court found no facts in support of it's [sic] child support determination." Although the failure to identify this issue as a question presented is in contravention of Rule 8-504(a)(3), we will nevertheless address this issue, and affirm the judgment.

NO TEXT

Cite as 4 MFLM Supp. 75 (2013)

Custody and visitation: attorneys' fees: required factors

Mohammad Esmail Memarsadeghi v. Pamela Jeanne Tucciarone

No. 2515, September Term, 2011

Argued Before: Meredith, Matricciani, Nazarian, JJ.

Opinion by Nazarian, J.

Filed: February 22, 2013. Unreported.

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"), married in 1997, divorced in 2004, and have two minor daughters. The circuit court docket sheet reveals a contentious post-marital relationship. Amidst the battles, the parties reached an agreement defining their respective rights and obligations regarding custody and visitation, and they entered that agreement on the record in the circuit court on October 9, 2009.[1] 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:

> And the parties have acknowledged that wife's family always goes to Aruba the first week in January. There's testimony about that and the children are included. So if January 1 – and they go on the first Sunday in January. So if they have to leave to go to Aruba on January 1st, 2nd, or 3rd, [Father] agreed that he will return the children to their mother the day before such departure day and then she in return will give him the additional days earlier in the Christmas vacation because we don't want the children to miss out on that opportunity.

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

As Mother prepared in 2011 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. In its prayer for relief, the motion asked the circuit court to "[p]ass an Order granting [Mother] sole legal custody for the sole purpose of applying for and/or renewing the children's passports," to schedule a hearing, and to order Father to pay $750 for "attorney's fees associated with the filing of this motion." The motion did not attach any documentation or evidence supporting the attorneys' fees request.

Father opposed the motion. Before the hearing, Mother filed an amended motion that increased her request for attorneys' fees to $875 and added demands for "any and all attorney's fees incurred by [Mother] at the hearing scheduled on this matter on December 9, 2011, as well as trial prep for said hearing" and for $120, "the costs of having to obtain the

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

children's passports expeditiously." [2] Like the original motion, the amended motion attached no evidence supporting the requests for attorneys' fees, nor any documentation of the passport costs.

At the hearing, counsel repeated Mother's request for "sole legal custody for the sole purpose of getting and renewing passports for these children so they can go" to Aruba and stated that "my client has incurred about $2,600 in attorney's fees for us to go through yet another hearing with [Father]." Counsel did not offer any evidentiary support at the hearing for the new attorneys' fee or passport costs figures, nor was she asked for any.[3]

The circuit court ruled from the bench and framed the motion as raising the question of "whether or not [Father] has the right to withhold consent to the children going on the trip to Aruba and doing that which is necessary to effectuate that in terms of cooperating in the obtaining of any passports so that they can go [to] Aruba unless and until [Mother] agrees that they could go on some trip to Italy."[4] After hearing argument and analyzing the custody agreement, the circuit court decided that the parties had specifically agreed in their custody and visitation agreement that the children would travel to Aruba every year with Mother and her family. *Id.* As such, the court found that Father's "refusal to sign the documents necessary to get the passport is unwarranted and unreasonable under the terms of this order" and ordered him to sign the documents before leaving the courthouse. The circuit court also ordered Father to pay attorneys' fees in the amount of $2,600 and the costs associated with expediting the daughters' passports within thirty days.[5] The court entered a written order memorializing these rulings on December 29, 2011,[6] and Father noted a timely appeal.

DISCUSSION

On appeal, Father challenges both of the circuit court's rulings:

1. Did the Circuit Court err when it ordered [Father] to sign a State Department passport form in order to circumvent the requirements of the Two Parent Signature rule?
2. Did the Circuit Court err when it ordered [Father] to pay for the passport fees and [Mother]'s attorneys' fees?

We review the portions of the order compelling Father to execute passport documents and to pay attorneys' fees for abuse of discretion. *Gillespie v. Gillespie*, 206 Md. App. 146, 170-71 (2012); *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002). Because the portion of the order directing Father to pay the cost of expedited passports ultimately sounds in contract, we defer to the circuit court's findings of fact unless they are clearly erroneous, *Gillespie*, 206 Md. App. at 170, and review legal and procedural questions *de novo*. *Cutts v. Trippe*, No. 1029, Sept. Term 2011, 2012 Md. App. LEXIS 153, at *8 (Md. App. December 20, 2012).

A. Father Agreed To Execute The Passport Documents.

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),[7] by ordering him to execute the passport documents. In his view, these federal regulations — which provide 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, *see id.*, § 51.28(a)(3)(ii)(G)[8] — create in him an independent right to give or withhold consent to renew his daughters' passports. As such, he contends, the circuit court lacked the authority to order him to execute the passport renewal forms. At argument, however, counsel conceded that the Two Parent Signature Law did not create any federal right that superseded or preempted the visitation agreement, and that Father simply disagreed with the circuit court's interpretation of that agreement.

With or without that concession, we would not need to decide the contours of the Two Parent Signature Law. At most, the Two Parent Signature Law vested in Father the opportunity to grant or withhold consent to renew his daughters' passports Whether or not that opportunity rises to the level of a right, the circuit court did not trample it, nor, as Father argues in his brief, did the court order him to perjure himself to the State Department or coerce his consent at the hearing under threat of incarceration. To the contrary, 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. Although the on-the-record ruling does not use these precise words, the circuit court correctly applied to the visitation agreement the duty of good faith and fair dealing implied in all Maryland contracts, *Blondell v. Littlepage*, 413 Md. 96, 113 (2010), including post-divorce custody and visitation agreements. *See* Md. Code Ann., Fam. Law § 8-105(a)(2) (2012); *see also Fultz v. Shaffer*, 111 Md. App. 278, 298 (1996); *Rauch v. McCall*, 134 Md. App. 624, 637-38 (2000); *Blum v. Blum*, 59 Md. App. 584, 593 (1984); *Eigenbrode v. Eigenbrode*, 36 Md. App. 557, 560 (1977). And as such, the circuit court acted well within its discretion in holding that Father had agreed to execute documents reasonably necessary to effectuate

the intention of the visitation agreement. 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.

Accordingly, we affirm the circuit court's order directing Father to execute the passport renewal documents.

B. The Record Does Not Support The Decisions To Award Attorneys' Fees And Passport Costs.

Next, Father argues that the circuit court failed to follow the required procedures when it ordered him to pay Mother's attorneys' fees and to pay the costs for expedited passports. We hold that the procedural and factual record below does not support the portions of the circuit court's order awarding attorneys' fees and passport costs, and we vacate those rulings and remand for further proceedings.

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." Md. Code Ann., Fam. Law § 12-103(a)(2)(iii).[9] But although trial courts have broad discretion in awarding attorneys' fees and costs, they 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) (citations and internal quotation marks omitted). 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; *Barton v. Hirshberg*, 137 Md. App. 1, 33 (2001); *compare Meyr v. Meyr*, 195 Md. App. 524, 554 (2010) (attorneys' fee award affirmed where the trial court, despite not reciting the § 12-103(b) factors, clearly considered the parties' financial situation and needs).

The attorneys' fee award here fails this test. Although we perhaps could divine in the transcript a finding that the motion was substantially justified,[10] the circuit court neither considered nor balanced the financial status of each party or their relative needs when it ordered Father to pay attorneys' fees in connection with this motion. 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," as § 12-103(a) requires, because Mother neither filed nor offered any evidentiary support for her fee demand, either in her papers or at the hearing. 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, we agree with Father that "the cost of obtaining passports is not something within the contemplation of" § 12-203. But that doesn't end the inquiry: the circuit court did not rely on § 12-203 on that point, and where a trial court does not articulate a specific basis for its ruling, we normally presume that it acted for the right reasons. *See, e.g., Whittlesey v. State*, 340 Md. 30, 48 (1995); *Fox v. Fox*, 85 Md. App. 448, 463 (1990). In this instance, we presume that the circuit court knew that custody and visitation agreements can be breached (and those breaches remedied) like any other contract, *see* Md. Code Ann. Fam. Law § 8- 105(a)(2); *Blum v. Blum*, 59 Md. App. 584, 593 (1984); *Eckstein v. Eckstein*, 38 Md. App. 506, 511-19 (1979) and awarded Mother costs for expedited passports as damages for Father's breach of the visitation agreement.

We already have affirmed the circuit court's finding that Father agreed in the visitation agreement to permit the children to accompany Mother on a yearly trip to Aruba, and we find no clear error in the circuit court's finding that "[h]is refusal to sign the documents necessary to get the passport is unwarranted and unreasonable under the terms of" that agreement. To the extent, though, 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. As with her attorneys' fee demand, Mother neither attached nor offered any evidence of the actual costs she had 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 she incurred as a consequence of the breach, 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 must, therefore, vacate the portion of the circuit court's order awarding expedited passport costs, and remand this ruling 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.

JUDGMENT OF THE CIRCU IT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED AND REMANDED IN PART FOR FURTHER PROCEEDINGS. COSTS TO BE DIVIDED EVENLY BETWEEN APPELLANT AND APPELLEE.

FOOTNOTES

1. The children were represented by counsel in connection with this agreement, which the circuit court later incorporated (but did not merge) into an Order entered on May 6, 2010.

2. The motion sought alternative relief in the event the passports could not be renewed in time for the trip.

3. The exchange between the circuit court with regard to attorneys' fees and passport costs was limited to the following:

> THE COURT: So before leaving the courthouse today, my secretary is a notary, he'll sign the documents necessary for the [Mother] to obtain the passport and he'll pay — what were the attorney's fees incurred?
>
> MS. UPTON: Your honor, the attorney's fees are $2,600, and there is an additional $355.44, which are the costs for having to do the expedited passports because we've had to wait so long.
>
> THE COURT: He'll pay the $2,600 in attorney's fees plus the $345 in expedited costs. He'll pay within 30 days of today's date.

4. The transcript does not contain any discussion in so man y words of Mother's request for limited purpose "sole legal custody." But as we read it, the circuit court (appropriately) rephrased the "sole legal custody" question, then resolved it in the rephrased manner, much as we often do with parties' statements of issues on appeal.

5. According to the transcript, Father left the courthouse without executing the documents, and the circuit court record does not reflect whether or not he ultimately signed them or whether the Aruba trip went forward as planned.

At argument, however, counsel stated that Father had executed the documents at the courthouse that day, which led us to question whether his appeal from the portion of the Order compelling him to execute those documents might have become moot. The answer is not obvious, though —counsel offered scenarios under which we could grant forward- looking relief (he argued, for example, that we could reverse the order below and order the daughters' passports surrendered), and the situation also could qualify as capable of repetition but evading review. *See State v. Parker*, 334 Md. 576, 584 (1994). Because these questions were neither raised nor briefed, and given the uncertainty of the outcome under the specific circumstances of this case, we will proceed to the merits.

6. The written Order set the passport costs at $355.44.

7. In his brief, Father cites to 22 C.F.R. § 51.27 (2007), the predecessor to the current version of the regulation, 22 C.F.R. § 51.28 (2008), which became effective as of February 1, 2008. The relevant provisions are substantively identical.

8. "An order of a court of competent jurisdiction providing for joint legal custody or requiring the permission of both parents or the court for important decisions will be interpreted as requiring the permission of both parents or the court, as appropriate." 22 C.F.R. § 51.28(a)(3)(ii)(G).

9. Father also cited § 7-107 of the Family Law Article, but that provision deals with attorneys' fees and costs in divorce proceedings and does not apply here.

10. During the hearing, the court stated that "[Father's] refusal to sign the documents necessary to get the passport is unwarranted and unreasonable under the terms of this order. . . ."

Cite as 4 MFLM Supp. 79 (2013)

Divorce: alimony and child support: calculation of income

Thomas R. Skowron
v.
Diana L. Skowron

No. 2201, September Term, 2011

Argued Before: Meredith, Woodward, Matricciani, (Ret'd, Specially Assigned), JJ.

Opinion by Matricciani, J.

Filed: March 1, 2013. Unreported.

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. Since the fall of 2007, appellant Thomas R. Skowron and appellee Diana L. Skowron lived separate and apart with the intention of ending their marriage. On June 28, 2010, appellant filed a complaint for absolute divorce in the Circuit Court for Frederick County. Appellee responded on August 4, 2010, both by answering the appellant's complaint and by filing a counter-complaint. The circuit court held a merits trial on July 6 and 7, 2011. The trial was continued to, and culminated on, August 1, 2011. 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 in the amount of $2,871 per month, transferred title in the marital home to appellee, granted appellee a monetary award of $50,000, and awarded appellee $15,000 in attorney's fees. Appellant filed a motion to alter or amend the judgment, and, after it was denied, he noted this timely appeal.

QUESTIONS PRESENTED

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

> 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?

For the reasons that follow, we answer no to both questions and, accordingly, affirm the court's grant of alimony and child support.

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

FACTUAL AND PROCEDURAL HISTORY

Following the parties' marriage, they conceived and raised three children. Initially, appellant and appellee worked outside the home. As the marriage progressed, and while pregnant with their third child, appellee ceased working and committed herself entirely to the home and children. Appellant continued with his employment and through a combination of earned and unearned income, generated between $75,000 and $212,000 per year depending on bonuses and the amount of personal expenses reimbursed by his company.

As noted previously, in the fall of 2007, the parties separated with the intention of ending their marriage. Appellant filed a complaint for absolute divorce in the circuit court for Frederick County and appellee responded in kind. After a three day merits trial the circuit court issued its opinion and order. The circuit court ordered appellant to pay indefinite alimony to appellee, to pay child support, to transfer title of the marital home, to make a monetary payment, and to contribute to appellee's attorney's fees. Appellant moved to alter or amend the judgment. The circuit court denied the motion, prompting appellant to note this timely appeal.

DISCUSSION

Standard of Review

The parties came before the court sitting without ajury. As such, we apply Maryland Rule 8-131(c) to our review. That rule states:

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

of the trial court to judge the credibility of the witnesses.

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

Calculation of Appellant's Income

Appellant takes the position that the court incorrectly calculated his income, resulting in a joint alimony/child support obligation that he lacks the ability to satisfy. The circuit court calculated appellant's income at $213,068 per year. Both parties agree to a de minimis arithmetic error — the accurate value is $212,068 per year.[2] To determine his actual income, the circuit court aggregated appellant's $78,000 in wages, $101,000 of bonus pay, $7,200 in rental income, $2,400 worth of inspection fees, $14,948 insurance reimbursement, $1,056 in car insurance paid by his company, and a $7,464 car payment.[3] The record reflects that the court made *downward* adjustments to certain of these measures. For example, the court found that appellant earned between $600 and $800 per month in inspection fees, yet the court attributed only $200 per month to appellant. Based upon the evidence, the court also attributed $600 per month in rental income to appellant. Moreover, appellant testified that a certain amount of his business results in cash payments.[4] On the basis of that testimony, the judge would have been justified in *adding* to appellant's wage income. Although there was no principled way to make the *upward* adjustment, the circuit court did not abuse its discretion in accepting the $78,000 in wages that were verifiable.[5] The court also conservatively estimated appellant's bonuses. Appellee contends that the court would have been within its discretion to award an additional $13,000 in bonus pay. The record seems to support appellee's position.

Appellant also 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 Md. Code Ann., Fam. Law §12-201(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. On this record, 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. He claims that "[t]his error resulted in a total financial obligation in excess of [his] ability to pay." 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* Md. Code Ann., Fam. Law § 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 detennination 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," Md. Code Ann., Fam. Law § 11-106 (b)(11) in addition to eleven other factors discussed *infra*. Here, there is sufficient evidence in the record to support the court's calculations and we perceive no error with them.

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 the case of *Lee v. Andochick*, 182 Md. App. 268 (2008). In *Lee*, both parties earned high incomes. The appellee-wife was awarded $10,000 per month in indefinite alimony. On appeal, we concluded that the circuit court erred by granting indefinite alimony because appellee failed to demonstrate that an unconscionable disparity would exist between the parties without it. Also, 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. *Id.* at 282. The impermissible alimony to income ratio in *Lee* was, in our view, the result of appellant's substantial debt service and not predicated on a judgment in excess of income alone. 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 $190,914.00 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 $83,012.00 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.

In addition to complaining about the calculation of his income and the excessiveness of the alimony award, appellant contends that the court improperly treated his 70% ownership interest in a business called Atlas Floors, Inc. as a marital asset. The evidence demonstrated that appellant began one business, Atlas Hardwood Floors, Inc., before the marriage. He then closed that business in 2003, opening a new business called Atlas Floors, Inc. during the marriage. Appellant cites the case of *Long v. Long*, 129 Md. App. 554 (2000) to support his argument that his new business is merely a continuation of his old one, therefore requiring its classification as a personal asset. In *Long*, the husband renamed and reincorporated a business he began before the marriage. The *Long* court treated the accrual of value in the company over the time-span of the parties' marriage as marital property but did not count the company's entire, or pre-marital, value. In refusing to apply *Long* to the case here, the circuit court found that it is "factually different." We agree. Appellant's 70% interest in Atlas Floors, Inc. was correctly considered marital property, notwithstanding appellant's argument that Atlas Floors, Inc. made use of assets, machinery, and customer lists that once belonged to Atlas Hardwood Floors, Inc. The circuit court remarked that "while [appellant] testified that all of the assets from Atlas Hardwood Floors, Inc. were used to create Atlas Floors, Inc. no method was offered to trace those assets, their replacements, or the value thereof." We conclude, therefore, that the circuit court properly designated appellant's interest in Atlas Floors, Inc. as marital property. *See Alston v. Alston*, 331 Md. 496, 505 n. 7 (1993) ("Marital property is property, however titled, acquired by 1 or both parties during the marriage.").

The Alimony Award

Initially, we note that "[t]he factors underlying awards of alimony, monetary award, and counsel fees are so interrelated that, when a trial court considers a claim for any one of them, it must weigh the award of any other." *Kelly v. Kelly*, 153 Md. App. 260, 279-280 (2003). Here, before ordering them, the record reflects that the trial court considered the interrelationship among alimony, a monetary award, and counsel fees. But appellant poses questions solely directed at the calculation of his income for child support and alimony purposes. To the extent, therefore, 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) (the brief shall contain [a]rgument in support of the party's position on each issue); *Fidelity & Deposit Co. v. Mattingly Lumber Co.*, 176 Md. 217, 220 (1939) ("but since the conectness of that ruling was not raised in its brief nor in argument, any objection thereto may, [] be treated as abandoned.").

Appellant contends that the court improperly awarded indefinite alimony. An award of alimony is governed by section 11-106 of the Family Law article. Under section 11-106(b), the court is required to consider twelve factors before awarding alimony. The factors are:

> (1) the ability of the party seeking alimony to be wholly or partly self-supporting
>
> (2) the time necessary for the party seeking alimony to gain sufficient education or training to enable that party to find suitable employment
>
> (3) the standard of living that the parties established during their marriage;
>
> (4) the duration of the marriage;
>
> (5) the contributions, monetary and nonmonetary, of each party to the well-being of the family,
>
> (6) the circumstances that contributed to the estrangement of the parties;
>
> (7) the age of each party;
>
> (8) the physical and mental condition of each party;
>
> (9) the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony;
>
> (10) any agreement between the parties;
>
> (11) the financial needs and financial resources of each party, including:
>
> (i) all income and assets, including property that does not produce income;
>
> (ii) any award made under §§ 8-

205 and 8-208 of this article;

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

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

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

"Although the court need not use formulaic language or articulate every reason for its decision with respect to each factor, [it] must clearly indicate that it has considered all the factors." *Turner v. Turner*, 147 Md. App. 350, 389 (2002) (internal quotations omitted). In its opinion and order, the circuit court discussed, and then applied, the statutory factors.[6]

Pursuant to section 11-106(c), the court may order indefinite alimony where either: "(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 asmuch progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." In this case, appellee was awarded $5,000 per month in 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.[7] "A trial court's finding of unconscionable disparity under subsection (c) is a question of fact, and we review it under the clearly erroneous standard contained in Md. Rule 8-131(c)." *Ware v. Ware*, 131 Md. App. 207, 228-229 (2000). "Additionally, a trial court has broad discretion in making an award of alimony, and a decision whether to award it will not be disturbed unless the court abused its discretion." *Id.*

We are mindful that "Maryland law favors rehabilitative alimony over indefinite alimony." *Dave v. Steinmuller*, 157 Md. App. 653, 673 (2004). "A mere difference in earnings of spouses, even if it is substantial, and even if earnings are the primary means of assessing the parties' post-divorce living standards, does not automatically establish an unconscionable disparity in standards of living." *Simonds v. Simonds*, 165 Md. App. 591, 606 (2005). "To constitute a disparity, the standards of living must be fundamentally and entirely dissimilar." *Id.* Addressing the court's authority to award indefinite alimony, we said in the case of *Francz v. Francz* that:

> [i]n order to exercise its discretion to award indefinite alimony on the ground of unconscionable disparity, under FL section 11-106(c)(2), the equity court must find that, even though the party seeking indefinite alimony can make substantial progress toward becoming self-supporting, at the time that maximum progress reasonably is expected, the standards of living of the parties will be unconscionably disparate. Thus, 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. *See Blaine [v. Blaine*, 336 Md. 49, 64(1994)] (commenting that, because the language of section 11-106(c)(2) is prospective, it "in effect requires . . . the court [to] make a prediction as to the success of the dependent spouse's efforts to become self-sufficient").

157 Md. App. 676, 692 (2004) (internal quotations and citations omitted).

"The burden of proof as to the existence of the prerequisites to entitlement is upon the economically dependent spouse who seeks alimony for an indefinite period." *Thomasian v. Thomasian,* 79 Md. App. 188, 195 (1989). There is evidence in the record pertaining to the economic disparity of the parties. The record contains additional evidence elucidating the fundamentally dissimilar standards of living that the parties will enjoy after appellee has made maximum financial progress. *Simonds*, 165 Md. App. at 606. (2005).

Before concluding that indefinite alimony was appropriate, the trial court found that:

> According to [appellant's] expert, [appellee] will be earning approximately Forty Five Thousand Dollars ($45,000) per year at her maximum earning capacity. [Appellant] will be earning a minimum of Two Hundred Thousand Dollars ($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." *Id*. 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 then credited that testimony in concluding that appellee's potential maximum income is $45,000 per year. In cases where indefinite alimony has been awarded, we note that appellee's potential income (21.21% of appellant's income) creates a proportion of income to income that is within the boundaries of what has been upheld previously.[8] 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 granted is committed to the trial court's discretion. *See* MD.CODE ANN.,FAM. LAW §12-204(d) ("If the combined adjusted actual income exceeds the highest level specified in the schedule in subsection (e) of this section, the court may use its discretion in setting the amount of child support."). 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. The court considered the parties' adjusted actual income of $17,750 per month, arriving at an aggregate support award of $3,999 per month.[9] The court then apportioned the support obligation according to each parties' adjusted actual income.[10]

Additionally, appellant argues that appellee was voluntarily impoverished. Because of her voluntary impoverishment, 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 MD. CODE ANN.,FAM. LAW §12-204(b)(1) ("if a parent is voluntarily impoverished, child support may be calculated based on a deteimination of potential income.") "A parent is voluntarily impoverished whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources." *Petitto v. Petitto*, 147 Md. App. 280, 314 (2002). "In determining whether a parent is voluntarily impoverished, the question is whether a parent's impoverishment is voluntary, not whether the parent has voluntarily avoided paying child support." *Wills v. Jones*, 340 Md. 480, 494 (1995).

During their marriage, the parties agreed that appellee would remain in the home. Appellee relies on that agreement to support the conclusion that she has not voluntarily impoverished herself. Her voluntary decision — that of remaining home, had only the incidental effect of depriving her of wage income. *Wills*, 340 Md. at 495. ("For an action to be "voluntary," we have consistently required that the action be both an exercise of unconstrained free will and that the act be intentional."). Appellant focuses his attention forward in time, and, although he contests the validity of their agreement that appellee remain unemployed, he 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.[11] 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. Here, as we recognized in the case of *Durkee v. Durkee*, "appellant points out, [that] the court did not make an express finding of voluntary impoverishment." 144 Md. App. 161, 185 (2002). In that case, we said "a trial court does not have to follow a script." *Id.* "Indeed, the judge is presumed to know the law, and is presumed to have performed his duties properly." *Id.* Preceding the consideration of potential income must be a finding, even an implicit one, of voluntary impoverishment. That "issue[] [is] left to the sound discretion of the trial judge." *Reuter v. Reuter*, 102 Md. App. 212, 221 (1994). "The court's factual findings will not be disturbed unless they are clearly enoneous, and rulings based on those findings must stand unless the court

abused its discretion." *Id.* (internal quotations and citations omitted). Based on the record here, the court did not abuse its discretion by finding implicitly that appellee was not voluntarily impoverished.[12]

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

FOOTNOTES

1. The questions as posed by appellant are:

(I) Did the [t]rial [c]ourt err when it used its determination of [a]ppellant's gross income in determining alimony?

(II) Did the [t]rial [c]ourt err when it declined to attribute income to [a]ppellee for the determination of child support?

(III) Did the [t]rial [c]ourt err in its determination of [a]ppellant's income for child support purposes?

(IV) Did the [t]rial [c]ourt err in its determination of the value of [a]ppellant's business?

(IV) Did the [t]rial [c]ourt err when it awarded indefinite alimony to [a]ppellee?

2. Appellant argues generally that the court calculated his income incorrectly. He does not specifically assert prejudicial error with respect to the $1,000 miscalculation.

3.The court aggregated appellant's income in the following way:

4. Appellant was asked: Have you ever made an effort to determine how much cash does not hit the books? He answered: "no."

5. "The trial court's determination of appell[ant's] salary is a finding of factand assuch will only be reversed if clearly erroneous." *Tanis v. Crocker*, 110 Md. App. 559, 579 (1996). "So long as there is competent material evidence to support the trial court's finding, it will not be disturbed on appeal." *Id.*

6. Addressing the first and second factors, the court noted that appellee has been "out of the workplace for over eight years, [and] it is unlikely that she will be able to become wholly or partially self-supporting for a period of time." The court discussed factors three and four, noting that the parties lived a comfortable lifestyle during the "relatively short" time that they were married. About the fifth factor, the court said that appellant "was the primary breadwinner in the marriage after 2003 . . . [and] that after 2003, [appellee's] contributions were predominantly non-monetary." The court addressed, at length, the circumstances leading to the estrangement of the parties, thereby giving full consideration to the sixth factor. The court noted that "both parties are in their forties," addressing factor seven. Under factor eight, the court concluded that "both of the parties are in good physical health. Neither has any mental issues." Under factor nine, the court concluded that appellant "is able to meet his own needs while meeting the financial needs of [appellant]." Pursuant to the tenth factor, the court recognized the previous agreement between the parties — that appellant would pay appellee $4,000 per month in alimony. Concerning factor eleven, the court noted that appellee's only source of income was alimony, considered the transfer of title in the marital home pursuant to section 8-205, and generally composed complete financial pictures for each party.

7. A finding of a unconscionable disparity, is a second-level fact, however, that necessarily rests upon the court's first-level factual findings on the factors, listed in FL section 11-106(b), that (so long as they are applicable) are relevant to all alimony determinations, and all the factors, including those not listed, necessary for a fair and equitable award; and upon how much weight the court chooses to give to its various first-level factual findings." *Whittington v. Whittington*, 172 Md. App. 317, 337-338 (2007) (internal quotations omitted).

8. "In ascending order, Maryland cases have found that the chancellor did not err in granting indefinite alimony to a spouse whose potential income, when compared to the non-dependent spouse's income, bore the following percentage relationship: (1) 22.7% - *Blaine v. Blaine*, 97 Md. App. 689, 708 (1993), *aff'd*, 336 Md. 49, (1994); (2) 25.3% - *Ware v. Ware*, 131 Md. App. 207, 230 (2000); (3) 28% - *Tracey v. Tracey*, 328 Md. 380, 392-93 (1992); (4) 30% - *Digges v. Digges*, 126 Md. App. 361, 388 (1999); (5) 34% - *Kennedy v. Kennedy*, 55 Md. App. 299, 307 (1983); (6) 34.9% - *Broseus v. Broseus*, 82 Md. App. 183, 196-97 (1990); (7) 35% - *Bricker v. Bricker*, 78 Md. App. 570, 576-77 (1989); and (8) 43% - *Caldwell v. Caldwell*, 103 Md. App. 452, 464, (1995)." *Lee v. Lee*, 148 Md. App. 432, 448-449 (2002) (internal parallel citations omitted).

9. Appellant argues that the court erred by not reducing his income by the actual cost of providing health insurance for his children. In support, appellant cites the case of *Walker v. Grow*, 170 Md. App. 255 (2006) where we said that "[t]he court [ ] determines adjusted actual income by subtracting the actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible. [Md. Code Ann.,] Fam. Law § 12-201(c)(3)." *Id.* at 285. In that case, we relied on section 12-201(c)(3) of the Family Law Article which said "Adjusted actual income means actual income minus the actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible." Section 12-201(c)(3) was excised from the statute by 2007 Md. Laws 35, 36. Thus it is inapplicable here. The legislature then enacted section 12-204(h)(1) which states "[a]ny actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible shall be added to the basic child support obligation and shall be divided by the parents in proportion to their adjusted actual incomes." The trial court's order noted that "appellant's business pays for the children's health insurance." The record contains virtually no evidence of cost and appellant's argument presents his unsupported contentions only. We decline, therefore, appellant's invitation to predicate error on this basis. *See Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 618 (2011) ("reaffirm[ing] the proposition that appellate courts cannot be expected to either (1) search the record on appeal for facts that appear to support a party's position, or (2) search for the law that is applicable to the issue presented."

10. Appellant's monthly income was calculated by the court for child support purposes as $12,750. The court credited $5,000 per month in alimony to appellee, finding that amount

to be her monthly income. The court then, correctly, ordered appellant to pay $2,871 per month in child support (his 71.8% share of the $3,999 total set by the court, extrapolating from the guidelines.)

11. Some of the factors to be considered in determining whether a party is voluntarily impoverished include:(1) his or her cunent physicalcondition; (2) his or her respective level of education; (3) the timing of any change in employment or other financial circumstances relative to the divorce proceedings; (4) the relationship between the parties prior to the initiation of divorce proceedings; (5) his or her efforts to find and retain employment; (6) his or her efforts to secure retraining if that is needed; (7) whether he or she has ever withheld support; (8) his or her past work history; (9) the area in which the parties live and the status of the job market there; and (10) any other considerations presented by either party." *John O. v. Jane O.*, 90 Md. App. 406,422(1992).

12. In the case of *Dunlap v. Fiorenza*, 128 Md. App. 357 (1999) we upheld the imputation of income where the finding of voluntary impoverishment was implicit only. "In this case, Judge Cawood implicitly found that Dunlap had voluntarily impoverished herself when she quit her managerial position . . . we decline to hold that Judge Cawood was clearly erroneous in determining that $50,000 was an adequate reflection of Dunlap's potential earning capacity." *Id.* at 365-66.

NO TEXT

Cite as 4 MFLM Supp. 87 (2013)

Adoption/Guardianship: termination of parental rights: parental unfitness

In Re: Adoption/Guardianship of Rhianna D.

No. 0432, September Term, 2012

Argued Before: Woodward, Graeff, Salmon, Jams P. (Ret'd, Specially Assigned), JJ.

Opinion by Salmon, J.

Filed: March 5, 2013. Unreported.

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. (hereinafter "Rhianna") was born on February 11, 2008. Her mother, Wartonia D. ("Ms. D."), is the appellant in this case. For most of the time since Rhianna's birth, Ms. D. has lived with her cousin, Tawanna W. Rhianna has, since June of 2009, lived with her foster parents, Mr. and Mrs. M., who want to adopt her.

The Circuit Court for Prince George's County, sitting as a juvenile court, on June 17, 2009, found Rhianna to be a Child in Need of Assistance ("CINA"). On November 1, 2010, Rhianna's permanency plan was changed to adoption by a non-relative. Ms. D. did not appeal the permanency plan change nor did Rhianna's putative father, Timothy S. ("Mr. S.").

The Prince George's County Department of Social Services (hereinafter "the Department"), on January 21, 2011, filed a petition for guardianship with the right to consent to adoption in the Circuit Court for Prince George's County, sitting as a Juvenile Court (hereinafter "the Court"). Ms. D. and Mr. S. filed timely objections to the Petition. The matter was heard in the Circuit Court on September 19, 20, 21, 22, October 25; and November 21 & 29, 2011. The case was taken under advisement and 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 of Rhianna 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 either 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. Moreover, 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 also found, among other things, that neither Ms. D. nor Mr. S. were fit parents. In this appeal, Ms. D. claims that the Circuit Court erred in terminating her parental rights. She makes two arguments in support of that contention. First, she contends that 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 Court's 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."

For the reasons explained below, we shall affirm the judgment terminating Ms. D.'s parental rights.

I.
FACTS

In the subject case, the trial judge wrote a seventeen page opinion and order. In a commendably thorough fashion, the Court made numerous findings of facts based on the evidence presented at the eight day hearing.

The summary of facts set forth below, is based on the trial court's findings. None of the facts are disputed by Ms. D. or by the appellees, Rhianna and the Department. Much of the wording of the summary that appears below in Part I(A) is taken verbatim, but without attribution, from the trial judge's opinion.

A.

Rhianna was born to Wartonia D. eight weeks prematurely on February 11, 2008 in the home of Tawanna W. Rhianna weighed less than four pounds at birth. Emergency medical personnel responded to Ms. W.'s house and transported mother and child to Greater Southeast Hospital for stabilization and treatment. Ms. D. was unaware that she was pregnant until she gave birth and thus, received no prenatal care. Rhianna remained hospitalized until February 18,

2008. She was discharged to the care of her mother. On March 4, 2008, the District of Columbia Department of Health issued a birth certificate for the minor child. No father's name was listed on the birth certificate.

On August 25, 2008, while investigating a referral concerning child abuse at the home of Irving Nelson and Adriane Bradley-Nelson (hereinafter "the Nelsons"), the Department first came into contact with Rhianna. She was found to be in the care of the Nelsons, who were unrelated to her, having been placed there by her mother sometime around August 2008, when the mother moved from Washington, D.C. to Maryland.

At the onset of the investigation, the minor child was six months old. According to the Nelsons, they planned to adopt Rhianna. The social worker noted that there was no crib for Rhianna in the Nelsons' home and it appeared that the child slept on a mattress on the floor. The Nelsons were unable to produce custody papers or a birth certificate for Rhianna and it was learned that Bradley-Nelson's nine biological children had been previously removed from her care due to physical abuse perpetrated her and had not been returned to her custody. Both Nelsons had a history of "mental health challenges" as well as substance abuse problems.

Thereafter, Prince George's County Social Worker Oluyemisi Ibikunle (hereinafter "Ms. Ibikunle") met Ms. D. to talk to her about why Ms. D. had placed Rhianna in the care of the Nelsons. Ms. D. told Ms. Ibikunle that she placed her child with the Nelsons because she had to move from the District of Columbia, and she wanted the Nelsons to adopt Rhianna. Ms. Ibikunle told Ms. D. about Bradley-Nelson's history of abuse and mental illness, the current homelessness and unemployment of the Nelsons; and the fact that there was no crib for Rhianna in the Nelsons' home.

Ms. D. told Ms. Ibikunle that she had two other children. She also advised that her son, Michael, did not live with her, but that her daughter, Michelle, did reside with her and Tawanna W. Ms. D. also said that Ms. W. provided them with a place to live and helped her care for Michelle, who had special needs.

Ms. Ibikunle warned Ms. D. that it was unsafe to leave Rhianna with the Nelsons. She also asked Ms. D. to take custody of Rhianna and give Rhianna's birth certificate to the Department. A service agreement was signed in which Ms. D. agreed to take the child back into her care by October 7, 2008. Despite the agreement, Ms. D. did not take custody of Rhianna.

Ms. Ibikunle met with Ms. D. again in February, 2009. At that meeting, Ms. D. reiterated that she wanted the Nelsons to adopt Rhianna. As of that date, she had made no attempts to retrieve her baby. In March, Ms. Ibikunle attempted to contact Ms. D. but met with no success. Ms. Ibikunle was told that Ms. D. had moved from Ms. W's household. At that point, the Nelsons continued to have Rhianna in their care.

On March 19, 2009, a Family Preservation Team from the Department met with the Nelsons, who were then residing in the home of Mr. Nelson's mother, Mildred Brown. The Nelsons signed a service agreement with the Department consenting to attend parenting classes and undergo therapy.

A registered letter was sent to Ms. D. by the Department instructing Ms. D. to pick up Rhianna immediately or risk a CINA petition being filed. Ms. D. signed for the letter on April 2, 2009. Despite receipt of the letter, Rhianna remained in the care of the Nelsons.

On April 28, 2009, the Department filed a Child in Need of Assistance petition alleging neglect by the minor child's mother. Ms. D. appeared before the Prince George's County Juvenile Court on May 8, 2009 and was advised that her daughter could be deemed a Child in Need of Assistance by the Court. Ms. D., at that point, provided the Department with the name of the child's biological father.

On June 16, 2009, the Juvenile Court held an adjudicatory hearing at which both biological parents were present. At the CINA hearing, Ms. D. agreed that Rhianna should be placed in a foster home. She also agreed to accept the services provided by the Department regarding parenting education. The Court ordered both parents to submit to DNA testing. The child's mother submitted to the test. The father did not submit to testing due to his inability to produce sufficient identification to the person who was to take the DNA swab.

The Circuit Court sustained the allegations in the Department's CINA petition, finding Rhianna a Child in Need of Assistance based on the fact that her mother was unable to care for her. Rhianna remained in the Nelsons' care until June 19, 2009, when the Department received an emergency call to pick up the child from the home of Mr. Nelson's mother, Mildred Brown. The Department was told that drugs were being used by the Nelsons. Ms. D. was contacted and she stated that the child's siblings were in the care of a relative and there were no other resources for placement. At that point Ms. D. was homeless. A limited custody order was signed on June 19, 2009, and Rhianna was placed in the foster care home of Mr. and Mrs. M.

The court conducted another adjudicatory disposition hearing on July 14, 2009. Ms. D. and Timothy S. appeared. Mr. S. identified himself as Rhianna's father but admitted that he had not submitted to DNA testing. The court authorized paternity testing following the

hearing but Mr. S. never submitted to such testing. In addition, Mr. S. never requested contact or visitation with Rhianna. Moreover, no member of Mr. S.'s family offered to serve as a resource for Rhianna.

Ms. D.'s visits with Rhianna were sporadic and infrequent during the second half of 2009. She visited with her daughter on; July 14, 2009 and August 5, 2009. On each of these visits the Department provided Ms. D. with transportation. At the August 5th visit, Ms. D. refused to submit to the drug testing that the Department requested.

In September, 2009, the Prince George's County Infants and Toddler's Program determined that Rhianna needed language and speech therapy. The Department continued its attempts to arrange transportation and visitation between Rhianna and her mother. On October 22, 2009, Ms. D. availed herself of transportation provided by the Department and saw Rhianna on that date. Ms. D. either cancelled or did not schedule visits at all from October 21, 2009 through December 3, 2009. On December 8, 2009, Ms. D. advised the Department that she lived full time with her relative, Tawanna W. who was assisting her in caring for Ms. D.'s other minor child, eleven year old Michelle. In an effort to further visitation with Rhianna, the Department presented Ms. D. with a service agreement in January, 2011, whereby overnight visitation could occur if Ms. W. completed a background investigation.

In March, 2010, Ms. D. completed a substance abuse assessment and began to attend treatment sessions provided by CAP [Child and Parent's Program Substance Abuse and Mental Health Services]. She attended classes until March 19, 2010. Also, in March, 2010, Mr. D's cousin, Ms. W., expressed an interest in caring for Rhianna. She completed the preliminary paperwork given to her by the Department.

From January, 2010 until April, 2010, the foster parents provided transportation in order to drop Rhianna off for visitation with Ms. D. on Saturdays once or twice a month. These visits were arranged between the minor child's foster mother and Ms. D. After April, 2010, Ms. D. declined all visitation attempts offered by Rhianna's foster mother.

On October 5, 2010, Ms. D. spoke with Emily Zeroth, a social worker employed by the Department, and informed her that she was leaving Ms. W.'s home due to stress, and that she needed to get back on track before she could care for Rhianna. She asked that the minor child be placed in an adoptive home and said that she would agree to adoption at the next hearing.

On November 1, 2010, the Prince George's County Juvenile Court conducted a permanency planning and review hearing, and determined that the appropriate permanency plan for Rhianna was adoption and termination of parental rights based on the following facts: 1) Mr. S. failed to submit to DNA testing and was not attempting to visit the child; 2) the biological mother and her relatives had taken no actions towards reunification; 3) the minor child had been in foster care for seventeen months and was then two years of age; 4) Rhianna had not been in her mother's care since she was two months old; 5) the mother was not actively seeking visitation with the child; and 6) there was no imminent likelihood of reunification between the minor child and either biological parent.

On December 16, 2010, Ms. D. saw Rhianna for the first time since April 2010. About five weeks later, on January 21, 2011, the Executive Director of the Department filed a petition for guardianship with the right to consent to adoption of other planned permanent living arrangement of the minor child. Ms. D. filed a timely opposition to the Department's petition stating that she wanted Ms. W. to adopt her daughter. Mr. S. also filed a notice of objection to the Department's petition. He said that he was the minor child's father, was not giving up his parental rights, and did not want Rhianna adopted because his family was willing to adopt her. Ms. D. attended the eight termination of parental rights hearings, but Mr. S did not attend.

B.

The Trial Court's Consideration of the Factors set forth in Maryland Code (2012 Repl. Vol.), Family Law Article ["FL"] Section 5-323(d).

In cases where trial judges are required to make decisions that arise when a petition for termination of parental rights ("TPR") without the parents' consent is filed, the court is required to consider factors relating to the health and safety of the child, including a host of specific factors. In the subject case, the trial judge carefully considered each of those factors in its written opinion.

Omitting certain findings regarding Mr. S., who does not join in this appeal, and omitting, as well, factors that were found to be inapplicable, the trial court made the following findings, by clear and convincing evidence, which we quote:

> <u>All Services Offered to the Parents before the child's placement, whether offered by a local department, another agency or a professional.</u>
>
> There were no services offered to Wartonia [D.] or Timothy [S.] prior to placement, as the child was not in their care. The child had been physically placed with non-relatives, Irving and Adrianne Nelson[,] by [Ms.] D. While the Department viewed the

placement as risky, [it] did not intervene in the mother's choice but sought to bolster resources available to the Nelsons. Despite their efforts, Ms D. did not pick up her child and the Department was ultimately required to remove the child from the Nelsons because of serious safety concerns. It was unclear whether [Mr.] S. was aware of the arrangement with the Nelsons. He was not residing with Ms. D. at the time of Rhianna's birth.

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

Following removal of . . . Rhianna, the Department immediately began offering services to [Ms] D. on a continual basis, including substance abuse treatment, facilitating visitation and transportation assistance. The Department provided Ms. D. with shelter resources[,] which she declined, indicating that she felt uncomfortable in a shelter. She has been given referrals to the Infants and Toddlers Program, including information on parenting skill classes.

. . .

The Department's efforts were timely and reflected the needs expressed by [Ms.] D. in order to reunify with her baby.

The extent to which a local department and parent have fulfilled their obligations under social services agreements, if any

The Department has fully complied with their obligations under all agreements entered into with [Mr.] S. and [Ms.] D. However, neither parent has fulfilled their obligations. While [Ms. D] appears at times to want to parent, she has not exhibited a sustained interest, desire or ability to parent. . .

The results of the parent's efforts to adjust the parent's circumstances, condition, or conduct to make it in the child's best interest for the child to be returned to the parent's home, including:

the extent to which the parent has maintained regular contact with;

1. the child

2. the local department to which the child is committed and

3, if feasible, the child's care giver;

[Ms.] D. has had a few contacts with her daughter, as the child is now four years of age, and has been out of her mother's care since she was less than six months of age. Since her initial contact with the Department, she has not expressed a desire to parent her child. Contacts with her daughter have rarely been self-initiated and have been sporadic at best. Further, all visits have been facilitated by the Department or the foster parent.

In addition, the Department has made numerous attempts to assist [Ms.] D. with her alcohol abuse problems. She has failed to complete the treatment and parenting skills classes offered to her. She has also failed to comply with the parenting agreements that she willingly entered into with her caseworker. For weeks at a time, the Department has been unable to contact Ms. D. She contended that she was unable to maintain stable housing for herself, and her minor child. However, it appears that she has continuously lived with Tawanna [W]. The Department has made concessions for Ms. D.'s lack of transportation and has provided her with resources in order to facilitate a reunification with her minor child. To no avail, she continues not to maintain visitation.

. . . .

In sum, neither of the minor child's biological parents has vested adequate time and resources into ensuring the mental, physical, and emotional well-being of their daughter. They have not adjusted their circumstances to make it in the best interest of the child to reunify.

The parent's contribution to a reasonable part of the child's care and support if the parent is financially able to do so.

[Ms.] D. is not financially able to provide for Rhianna. Throughout these proceedings, she has not been employed and receives a Social Security subsidy. According to her tes-

timony, she has dyslexia and can only work four hours a week. She has not worked since 1996. [Ms.] D. has provided several small gifts for Rhianna but she is not able to contribute to a reasonable part of the child's care and support.

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

[Ms.] D. has admitted to a long standing alcohol dependency problem, which began when she was thirteen years of age. Her constant battles with sobriety constitute a disability. She has received treatment on many occasions and maintains that she is currently sober. She also admits that she is pregnant with another baby whom she does not plan to raise. Her goal is to allow Ms. [W.] and her fiancé to adopt that baby; when asked for reasons behind this decision, Ms. D. could not articulate any. While she states that she has had periods of abstinence, she has never remained consistent. In addition, she has had several previous bouts with depression and appears to be cognitively impaired.

[Ms.] D. testified that in 2009, after having the baby placed in foster care, she decided that she wanted to "just do me" and thus she did not attempt to regain her child. She wanted to watch television. She admitted to not wanting to see her as she was "going on my binges." During this time frame, she had placed Rhianna with the Nelsons and refused to retrieve her chid even after being advised of the risks.

In 2010, she attended some treatment sessions but was unable to complete because she needed to care for her other daughter. Clearly, the challenges presented by Michelle, were important but her inability to manage and to maintain treatment demonstrates her further inability to care for Rhianna.

Based on the totality of the evidence, it is clear that [Ms.] D. suffers from a disability making her unable to care for her child on a long term basis. Her behavior toward care is sporadic, unstable and indicative of a parent with a disability that makes a lasting reunification impossible.

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

Rhianna has not been in the care of her natural and biological parents for more than twenty-nine months. There are no additional services that would bring about a lasting parental adjustment as neither parent can or will exhibit a sustained interest in her care. The Department has provided a myriad of services to [Ms.] D. but none has had a lasting impact on her ability to parent. [Ms.] D. struggles to care for the child in her care and would falter if White were not available.

Whether the parent has abused or neglected the child or a minor and the seriousness of the abuse or neglect.

[Ms. D.] clearly neglected . . . Rhianna by leaving her in an unsafe environment with the Nelsons. She was advised by the social worker about concerns regarding the Nelsons' previous history of child and substance abuse problems. Despite the information, [Ms.] D. took no steps to retrieve her child from them. The child remained with the Nelsons for months following disclosure about the risks. While the child was not abused, the potential was present. It is clear that [Ms.] D. expressed interest in Rhianna only after the Department had to intervene under emergency circumstances.

. . .

The child's emotional ties with and feelings toward the child's parents, the child's siblings and others who may affect the child's best interests signifi-

cantly.

Rhianna has no ties or feelings toward her parents, especially Mr. S. He has never been in her life. [Ms.] D.'s appearances have been so infrequent that the child does not recognize her as a parent. While she has had visitation with her sibling, Michelle, there has been no sustained relationship. Further, she does not know any other family members who may affect her best interests significantly.

The child's adjustment to:

1. community
2. home
3. placement; and
4. school;

Rhianna has adjusted very well to her placement with . . . [Mr. & Mrs. M]. When she was first placed in foster care, Rhianna was not walking and faced visible language impediments. With significant assistance from . . . Mr. & Mrs. M.], Rhianna is now walking and speaking. Her motor and cognitive skills are thriving in her current environment. She attends preschool and enjoys school and family activities. She has become a part of the larger M. family circle and is a beloved member.

The child's feelings about severance of the parent child relationship. . . .

Rhianna has never known either parent. There is no emotional attachment and thus severance would have no impact on her.

The likely impact of terminating parental rights on the child's well-being.

Terminating the parents' rights would allow for the prospect of integration into a stable and lasting family relationship. Rhianna has several developmental delays and she would finally have a family to rely on and to advocate for her.

Whether the parents are unfit to have a continued parental relationship or whether exceptional circumstances exist that would make a continued parental relationship detrimental to the best interest of the child and thus, it would be in the best interest of the child to grant guardianship.

Based upon the testimony presented, neither biological parent is fit to have a continued relationship with the minor child, Rhianna D. Wartonia D. has admitted alcohol abuse problems, which alone do not bar a parental relationship. However, when such abuse is compounded with a parent who is unable or unwilling to seek treatment for such issues, the parent is unfit to care for a minor child. Ms D.s' housing situation has been unstable and in flux since the birth of Rhianna, four years ago. Further, Ms. D. has another special needs child in her care and is expecting another child. Prior to the Department . . . providing speech and language services to the minor child, she faced significant educational and learning barriers. At present date, Rhianna appears to be mentally and emotionally adjusted for a child of her age. Permitting a forced and erratic relationship between the minor child and her mother would pose an unjustifiable risk to her growth and could possibly cause a regression in her development.

. . .

[Ms.] D.s' inability to complete and participate in free treatment, parenting, and transportation services offered to her, indicate that she is not willing to parent and/or nurture her minor child. Additionally, she seems unaware of the mental and emotional needs or the therapeutic challenges that Rhianna might face. Throughout Rhianna's placement, she has never indicated a sustained interest in caring for her child. Her primary purpose seems to [be having] . . . [Ms. W.] adopt. However, [Ms. W.] has never followed up on any of the opportunities to do so.

[Mr.] S.'s avoidance of establishing the paternity of the minor child compounded with his fleeting communication with the Department of Social Services about the needs and conditions of his child clearly demonstrate that he is a parent who is unwilling to

> parent and nurture the minor child until she reaches the age of majority. Rhianna is seemingly happy and well-developed while under the care of [Mr. & Mrs. M.]; neither of her biological parents can afford her the care, attention and resources she is entitled to.

II.
The Trial Judge's conclusion.

In her written opinion, the trial judge concluded:

> Having considered all of the factors enumerated in Section 5-323(d) of the Family Law Article and the foregoing factual determinations, the Court finds by clear and convincing evidence that the facts demonstrate an unfitness of the parents to have a continued parental relationship with their child. Allowing this child to be placed with her mother or father would pose an unacceptable risk to her future safety. Additionally, exceptional circumstances exist that would make a continued parental relationship detrimental to the best interests of the child and cause it to be in the best interest of the child to grant the Department's petition.

III.
Standard of review.

In reviewing the decision of a juvenile court, "Maryland appellate courts simultaneously apply three different levels of review":

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (emphasis and citations omitted).

In reviewing the juvenile court's ultimate decision, a reviewing court must be "mindful that '[q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.'" *Id.* at 19 (quoting *In re Yve S.,* 373 Md. at 583). An abuse of discretion occurs where "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* 9 quoting *In re Yve S.*, 373 Md. at 583-84 (internal quotations omitted)).

As mentioned previously, the trial judge found that Ms. D. was "not fit to have a continuing relationship with Rhianna." In her brief, appellant does not directly attack that finding. She does, however, at least implicitly, take issue with it. But her only argument in support of that implied contention, 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 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. The court never said, as appellant implies, that it found that Ms. D. struggles to care for Rhianna and that care would falter if Ms. W. was not available. After all, it is undisputed that since Rhianna was six months old, the child has never been in the care of Ms. D. When the court make 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 that Ms. D.'s parental rights should be terminated "because she could only parent with the assistance of Ms. W."

Instead, the court, in evaluating the factors set forth in FL section 5-323(d), found that 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 to Ms. D., 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 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, that is based on the erroneous assumption that the court found that Rhianna could safely return to Ms. D.'s care with the assistance of Ms. W. In that regard, 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 court's 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.] in raising her children, was in error. This argument has no merit because it 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, Mr. 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 for Rhianna. But Ms. W. had been rejected by the Department as a placement resource for Rhianna, 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. cancelled both of the meetings that the social worker had scheduled. Ms. W. did not request any visits with Rhianna. Except for providing her fingerprints to the Department for criminal background check, which she passed, the evidence showed that Ms. W. had done nothing, whatsoever, to obtain custody of Rhianna. Moreover, a termination of parental rights hearing is not a placement hearing; the court's exclusive task in a TPR hearing is to determine whether the parental relationship between the child and parent should be severed. *In re Adoption/Guardianship of Cross H.*, 200 Md. App. 142, 152 (2011), *cert.* granted on other grounds, 418 Md. 588 (2011), (finding that the appropriate focus in a TPR hearing is the fitness of the parent and not the "potential suitability of a relative resource.").

In conclusion, we hold that none of the arguments set forth in appellant's brief concerning Ms. D.'s allegation of error on the part of the trial court have merit. The trial court properly considered Rhianna's best interest and all the factors set forth in FL section 5-323(d). Appellant has failed to show that any of the trial court's findings of facts or conclusions of law were in any way erroneous. Therefore, we affirm the judgment of the Circuit Court for Prince George's County, sitting as a juvenile court.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT

Cite as 4 MFLM Supp. 95 (2013)

CINA: change in permanency plan: expert testimony

In Re: Lucas P.

No. 0729, September Term, 2012

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

Opinion by Graeff, J.

Filed: March 5, 2013. Unreported.

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 Circuit Court for Kent County, sitting as a 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., Lucas' mother,[1] presents the following two questions for our review:

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?

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

FACTUAL AND PROCEDURAL BACKGROUND

Lucas P. was born on February 23, 2011. At that time, his mother, Carrie P., who suffered from a mood disorder and opiate addiction, and had abused methadone while pregnant with Lucas, was in a methadone treatment program. Due to those facts, and because of his parents' lack of compliance in a case involving Lucas' older sister, Ashley,[2] the Kent County Department of Social Services (the "Department") determined that Lucas was at substantial risk of harm and placed him with Mr. and Mrs. N., the foster parents who eventually adopted his sister, Ashley.[3]

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

On February 25, 2011, the juvenile court authorized Lucas' shelter care placement and determined, by stipulation of the parties, that Lucas was a Child in Need of Assistance ("CINA").[4] The court committed Lucas to the Department's custody for continued foster care placement and set an initial permanency plan of reunification with his parents.

A CINA review hearing was held on August 4, 2011. At that time, Carrie P. was in a residential drug and alcohol treatment facility. She appeared late for the hearing, and Peter P. appeared without counsel. The court found that Lucas continued to be a CINA, and it continued his placement with his foster family and scheduled another permanency planning hearing for December 1, 2011.

At the December 1, 2011, permanency planning hearing, the court received a report from the Department recommending a permanency plan of adoption by Lucas' current foster family. The court ruled that the permanency plan would be determined at a hearing set for February 2, 2012. That hearing was later postponed until March 1, 2012.

At the March 1, 2012, permanency planning hearing, the parties stipulated to the admission of reports prepared by Jonathan Chace, a Court Appointed Special Advocate ("CASA"), and the Department, subject to an opportunity to cross-examine Lisa Bartlett-Kliever, the social worker who authored the Department's report.[5] The CASA reported that Carrie and Peter P. were married, had relocated from Kent County to Edgewood, Maryland, established independent housing for themselves and their daughter Stephanie, and that Peter P. was gainfully employed. Although Carrie P. remained drug free, she unilaterally decided to remove herself from suboxone, a prescribed maintenance drug. She also was laid off from her job at a thrift store. According to the CASA, the parents had not been able to provide "a steady and reliable presence" in Lucas' life, and they "failed to 'show up" for him. Peter P. did not see Lucas during a 56-day period, and Carrie P. "missed six consecutive visits in December and January." "On other occasions, they arrived late, left early, or failed to advise the foster parents in a timely fashion of their inability to make the visit." As a result, "there has been little opportunity for

Lucas to bond with his mother and father." The CASA also noted that Carrie P. was pregnant, expecting twins in the spring of 2012, and that she failed to secure maternal or prenatal care until "well into her second trimester." The CASA wrote that it was "incumbent on [the Department] to establish a permanency plan for adoption, so that Lucas can be secured in a safe and nurturing environment at the [home of his foster parents] with his sister Ashley," stating that it was "not in Lucas' interest to prolong any further plans for his permanent placement."

The Department reported that Lucas was a "well adjusted" and social one-year-old boy who was very attached to his sister, Ashley. He responded to his foster parents as his "parents," and the foster parents "have been vigilant with regards to attending to Lucas's medical and developmental needs."

The Department also noted that Carrie P. was expecting twins, and that during her second trimester of pregnancy, she "detoxified off of Suboxone by her own choice," "without the supervision of a licensed medical [p]hysician or . . . a licensed OB/GYN." She did not begin prenatal care until the first week of February 2012. Carrie P. continued to actively participate in a drug rehabilitation program, and she enrolled in an intensive outpatient substance abuse and mental health program with the Harford County Health Department, but her participation "in these important supports" was in jeopardy because she failed to comply with paperwork requirements for obtaining medical assistance. The Department expressed concern about Carrie P.'s inability to follow through with multiple tasks, such as ensuring medical assistance for herself and her daughter, Stephanie, who had been without medical assistance since November 30, 2011, because Carrie P. had not provided the required paperwork. The Department also noted that Carrie P. failed to show up for six out of eleven visits with Lucas.

The Department reported that Peter P. maintained employment and regular contact with the Department, but he failed to sign and return a service agreement, and he failed to attend visits with Lucas that were important for establishing a bond and attachment. Peter P. claimed that he was unable to make the visits because of his work schedule. The Department stated that, although Peter P. "has good intention[s]," he continues to fail to make significant progress toward reunification with his son. "His efforts to spend face to face time with his son have been poor."

Peter P. was not aware that he and Stephanie had been denied medical assistance for failure to provide required paperwork, or that Carrie P.'s emergency medical benefits were scheduled to expire on March 31, 2012. The Department expressed concern over Peter P.'s "deferral to his wife . . . for the management of their household and decision making around important issues and his clear avoidant and dependent behaviors on her."

The Department's report showed that, between December 4, 2011, and February 16, 2012, Carrie and Peter P. failed to show up for six out of eleven scheduled visits with Lucas, cancelled two visits, and arrived late for or left early from three visits. After Carrie P. was laid off from her job at a thrift store in Edgewood, the Department encouraged her to coordinate additional visits with Lucas during the times she would otherwise have been working. Carrie P. scheduled one visit on January 31, 2012, but she failed to show up at the scheduled time, stating that she was sick as a result of withdrawing from suboxone.

The Department expressed concern about Carrie and Peter P.' s lack of compliance with visitation schedules, and the difficulty they experienced in communicating with the Department, even after an extensive Family Involvement Meeting at which a clear plan for communication was established. The Department reported:

> It appears the learning curve is very slow in terms of [Carrie P.'s] ability to understand the importance of simple things such as learning to use a daytimer to write down a schedule. The Department is concerned that it has taken so long for [Carrie P.] to realize a lot of things in terms of managing her life in a sober and clean manner. She continues to struggle with managing her household and has reported to the Department "this is too much, it is just too much" with regards to the requirements of reunification, attending to her [P]eaceful [W]aters program, caring for her daughter Stephanie, attending to her subox[o]ne treatment and mental health.

On cross-examination, Ms. Bartlett-Kliever, a licensed graduate social worker with the Department, who was assigned to Lucas' case, testified that Carrie P. had initiated all of her own drug and mental health treatment, attended a daily Alcoholics or Narcotics Anonymous meeting, and regularly provided verification, via random urinalysis, that she remained drug free. Carrie P. also obtained housing, as well as employment at a thrift store in Edgewood, where she worked for a short time, until a few months prior to the hearing. Although Peter P. was employed, Ms. Bartlett-Kliever believed that the couple was struggling financially, noting that they had requested assistance in paying their rent to the Peaceful Waters halfway

house, and the Department provided $577.34, which constituted half of their outstanding balance.

Ms.Bartlett-Kliever reviewed the latest service agreement entered into with Carrie P. Carrie P. complied with the requirement that she meet monthly in a face-to-face meeting with Ms. Bartlett-Kliever, that she maintain regular phone contact with the Department to discuss the progress of her case, and that she remain clean and sober and participate in required drug treatment programs, including the Peaceful Waters substance abuse recovery program. Carrie P. was required to participate in outpatient medication management for her mental health and to see a licensed psychiatrist. Carrie P. had a long lapse in her mental health treatment due to the lapse in her medical assistance coverage, but she claimed that she had medication during that period of time, and Ms. Bartlett-Kliever believed that she did.

Notwithstanding that Carrie and Peter P. had shown progress for four months, Ms. Bartlett-Kliever did not believe that the progress was sufficient to place them in a position to be able to care for Lucas. She stated that the couple would need "a lot of mental health [assistance]; continued participation in substance abuse . . . [and] couples counseling; [and] participation in wraparound services."

After this testimony, counsel for Lucas offered Ms. Bartlett-Kliever as an expert in the evaluation of a parent's ability to care for a child. Counsel later amended his request to track the language of Md. Code (2009 Repl. Vol.) § 19-101 of the Health Occupations Article ("HO"), offering Ms. Bartlett-Kliever as an expert in "assessment, formulating diagnostic impressions, planning, intervention, evaluation of intervention plans, and case management in regard to restoring or enhancing social functioning of individuals, couples, and families." After the parties had a chance to voir dire Ms. Bartlett-Kliever, the court accepted her as an expert in "the field of expertise as offered and amended by [counsel] in reading . . . Health Occupation[] Article 19-101 (m)(1)(i-vi)."

Ms. Bartlett-Kliever then opined that she assessed Lucas' parents and their household and formulated the diagnostic impression that Carrie P.'s mental illness and substance abuse "are still very active, even though she is working on it," and that Peter P. had not addressed his mental health issues, with "his work being the barrier to that." She believed that successful completion of the intervention plan, which was designed to remediate those problems, was necessary prior to reunifying Lucas with his parents. Ms. Bartlett-Kliever described the parents' completion of the intervention plan as "sporadic"and "impartial,"and she concluded that the parents were not able safely to resume custody of Lucas.

At the conclusion of the hearing, the court ruled, in part, as follows:

> I do think that the Department has made reasonable efforts. As a matter of fact, I think they've made herculean efforts - to coin a phrase. And I do think that, in all fairness to the [P.'s], they've made some progress. Unfortunately, it's not enough progress for the Court to feel that Lucas' best interest would dictate that he go back with them or even that a plan be made for . . . reunification at this point. We've got a lot of unrebutted, uncontroverted expert testimony and factual testimony here. . . .
>
> Mr. Cha[c]e, who is certainly a credible individual, in his report has said visitations by both mother and father have been inconsistent and sporadic and, as a result, there has been little opportunity for Lucas to bond with his father and mother. Rather than rebut that, we've got argument, and that's argument, that some of this is skewed. Well, maybe some of it might be a little bit skewed, but I think, in . . . Mr. Cha[c]e's report, he says Lucas has resided with his foster parents from February 28, 2011, 5 days after his birth. By this CASA's own observations on many occasions, Lucas appears to be well nourished, contented and developing at a normal rate. He is joined by his sister, Ashley, in a loving home cared for by experienced and nurturing foster parents. If the Court can't find from that that he's bonded with the . . . foster parents, I don't know what I should use. That's certainly . . . corroborating Ms. Bartlett-[Kliever's] observations. And I don't think there's any agenda that the . . . Department has. Much opposed to an agenda, I think the . . . Department, from what I've heard in . . . Ms. Bartlett-[Kliever's] testimony, she accepts the word of . . . Ms. [P.] when she tells her something. She believes her. She gives her the benefit of the doubt, if you will, on every occasion that the Court can . . . observe.
>
> The child's been at the [N.'s] for over a year. The setting is certainly

stable. It would not be in his best interest obviously for him to be removed at this point, but I think it would be not in his best interest for me to just continue to leave him in limbo. And the Court is going to go along with the recommendation of the Department that we do have a plan . . . the permanency plan of adoption be accepted. I do think that the Constitutional rights of the [P.s] have been scrupulously observed, and I do not think their Constitutional rights have been tread upon. I think they have tread upon them theirselves [sic]. I think they've made their own noose in which they've hung themselves. They haven't exhibited any real interest in this child. I mean, I, again, would have to be ignoring the uncontroverted facts to think that the Department has some kind of an agenda or is trying to skew this . . . whole sense that they're trying to be. They're not responsible. They haven't been responsible. They simply have not had sufficient contact with the child. It's obvious. When they had the opportunity to visit, they usually didn't take advantage of it. That's . . . the bottom line.

At this point, I'm going to go along with the recommendations that Lucas be found a CINA with commitment of Lucas to the [Kent County Department of Social Services], placed with [the N.s] with the right to consent to such educational, medical, surgical, and hospital care and treatment out-of-state travel. I'm going to accept their plan of adoption with [the N.s]. And I'm going to accept the other four recommendations that are outlined in . . . the report. I accept the report, and I find the facts in both reports to be the facts of this case. I certainly find that they have — they being the Department and Mr. Cha[c]e, by the way - have made absolute herculean efforts . . . to try to accommodate [the P.s], and they have done everything, in my view, to prejudice their own case.

After establishing a permanency plan of adoption, the Court set a secondary plan of reunification with the parents.

DISCUSSION

I.

Carrie P. first contends that the juvenile court erred in admitting testimony by Ms. Bartlett-Kliever that fell outside the scope of her expertise. Specifically, she argues that Ms. 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." (quoting *In re: Adoption CCJ14746*, 360 Md. 634, 644 (2000)).

The Department argues that the juvenile court properly exercised its discretion in admitting Ms. 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 Ms. 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 Ms. 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 Ms. Bartlett-Kliever's expert opinion, asserting that Ms. 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 Ms. Bartlett-Kliever's expert opinion testimony, the admission of the testimony, even if error, was harmless.

The admission of expert testimony is governed by Maryland Rule 5-702, which provides:

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

exists to support the testimony.

The decision to admit expert testimony is left to the sound discretion of the trial judge. *In re Adoption/Guardianship No. CCJI4746*, 360 Md. at 647. "Absent a statute to the contrary, even the lack of particular formal credentials does not disqualify an expert witness, so long as the witness is sufficiently qualified that the witness's testimony would be helpful to the fact finder." *Id.* As we have previously recognized, "[t]he trial court's action in the area of admission of expert testimony seldom provides a basis for reversal." *Id.*

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

> 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 . . . his work being the barrier to that.

Pursuant to HO § 19-101(m)(1), Ms. Bartlett-Kliever, as a practicing social worker, was permitted-to"[a]ssess," 19-10 1(m)(1)(i),"[f]ormulat[e] diagnosticimpressions," 19- 101(m)(IXii), and "[e]valuat[e] intervention plans," § 19-101(m)(1)(v). The court properly accepted Ms. 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 Ms. Bartlett-Kliever's testimony was admitted erroneously, Carrie P. cannot establish prejudice. *See Flores v. Bell*, 398 Md. 27, 34 (2007) (to justify reversal, an error must have been "both manifestly wrong and substantially injurious") (quoting *Crane v. Dunn*, 382 Md. 83, 92 (2004)). Ms. 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 theadmission of Ms.Bartlett-Kliever's testimony was error, it was cumulative to other evidence 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 based upon whether there was a likelihood of abuse or neglect if he were reunified with his mother."

Appellees argue that the court properly exercised its discretion to change Lucas' permanency plan from reunification to adoption. They note that the court's decision was "based on evidence that the parents had not made adequate progress toward a plan of reunification and had not visited Lucas with sufficient regularity to establish a bond with him."

In reviewing the decision of a juvenile court, we apply three different levels of review:

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

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)) (citations omitted) (emphasis omitted). An abuse of discretion occurs where "the decision under consideration [is] well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* at 19 (quoting *In re Yve S.*, 373 Md. at 583-84).

Maryland law requires a juvenile court to review a child's permanency plan at least every six months until commitment is rescinded. CJ § 3-823(h)(l)(i). At each review hearing, the court must determine whether the commitment remains necessary, whether reasonable efforts have been made to effectuate the plan, and the extent of progress that has been made toward alleviating the conditions necessitating commitment. CJ § 3-823(h)(2). The court is required to change the permanency plan if a change would be in the child's best interests. *Id.*

When determining the permanency plan, a juvenile court considers the factors set forth in § 5-525(f)(1) of the Family Law Article, which provides:

> (1) In developing a permanency plan for a child in an out-of-home place-

ment, the local department shall give primary consideration to the best interests of the child, including consideration of both in-State and out-of-state placements. The local department shall consider the following factors in determining the permanency plan that is in the best interest of the child:

(i) the child's ability to be safe and healthy in the home of the child's parent;

(ii) the child's attachment and emotional ties to the child's natural parents and siblings;

(iii) the child's emotional attachment to the child's current caregiver and the caregiver's family;

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

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

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

Md. Code (2011 Supp.) § 5-525 (1) of the Family Law Article ("FL").

Here, the juvenile judge considered the factors set out in FL § 5-525(f). Regarding Lucas' ability to be safe and healthy in his parents' home, the court found that it would not be safe to permit Lucas to "go back" with his parents. Contrary to Carrie P.'s assertion, the record does not show that she and Peter P. were "ready and able to assume custody" of Lucas. Rather, the evidence showed that Carrie and Peter P. had problems with substance abuse and mental health issues that were not fully resolved, and that they were struggling to manage their household and provide adequate care for Stephanie. Carrie P. admitted that 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. She had trouble understanding the importance of simple things, such as how to use a daytimer to write down a schedule. 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 required arrangements.

With respect to Lucas' attachment and emotional ties to Carrie and Peter P., there was ample evidence to support the court's conclusion that the parents' visitation had been sporadic and provided little opportunity for Lucas to bond with them. On the other hand, with respect to Lucas' emotional attachment to his foster family, the length of time he had resided with them, and the potential emotional, developmental, and education harm he might suffer if moved from that placement the evidence was uncontroverted that 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. It found that, although it "would be not in his best interest obviously for him to be removed at this point. . . . it would be not in his best interest for me to just continue to leave him in limbo."

The issue before the juvenile court, ultimately, was whether Carrie and Peter P. should be granted additional time to work toward reunification with Lucas. 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.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

FOOTNOTES

1. Peter P. is not a party to this appeal.

2. At the time of Lucas' birth, his parents, Carrie and Peter P., were involved in a termination of parental rights proceeding regarding Lucas' sister, Ashley. Ultimately, both parents consented to the termination of their parental rights to Ashley.

3. In addition to Lucas and Ashley, Carrie and Peter P. have another daughter, Stephanie, who lives with them. Peter P. also has another daughter, Brittney.

4. A child in need of assistance is a child who requires court intervention because the child has been abused orneglected, or has a developmental disability or mental disorder, and whose parents, guardian, or custodian cannot, or will not, give proper care and attention to the child and the child's needs. *See* Md. Code (2010 Supp.) § 3-801(f)-(g) of the Courts and Judicial Proceedings Article ("CJ").

5. Ms. Bartlett-Kliever's name is spelled both "Kleiver" and "Cleaver" in the record, but for consistency, we shall use "Kliever" throughout.

Cite as 4 MFLM Supp. 101 (2013)

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

Anthony Monk
v.
Debra Monk

No. 2424, September Term, 2011

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

Opinion by Eyler, Deborah S., J.

Filed: March 5, 2013. Unreported.

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

Anthony Monk, the appellant, and Debra Monk, the appellee, were divorced in the Circuit Court for Calvert County.[1] In the divorce judgment the court granted Debra sole legal and physical custody of the parties' two minor children and established a visitation schedule; directed Anthony to pay Debra rehabilitative alimony for a period of five years; directed Anthony to pay child support; directed Debra to transfer her interest in the marital home to Anthony; awarded Debra use and possession of a truck for a period of three years; awarded Debra 50% of the value of Anthony's 401(k) account as of the date of the divorce; awarded Debra attorneys' fees; and found Anthony in contempt of a prior child support order.

Anthony appeals from the judgment, presenting eight questions for review, which we have condensed and rephrased as six:

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

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

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

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

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

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

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

For the reasons to follow, we shall reverse the order of contempt against Anthony, direct the circuit court to amend its child support judgment, and otherwise affirmed the judgments of the circuit court.

FACTS AND PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Debra testified that on October 11, 2008,

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

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

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

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

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

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

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

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

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

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

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

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

claim for indefinite alimony.

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

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

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

Finally, the court reiterated its finding that Anthony was in contempt of the P.L. Order for failure to make timely child support payments. It sentenced Anthony to a 30-day term of incarceration in the Calvert County Detention Center, but suspended that sentence "on the condition that he make all future child support payments as ordered and in a timely manner." All other outstanding motions, including Anthony's motion to reopen the record, were denied.

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

STANDARD OF REVIEW

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

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

DISCUSSION

I.

Alimony

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

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

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

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

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

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

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

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

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

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

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

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

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

II.
Child Support

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

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

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

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

With respect to health insurance, FL section 12-204(h)(1) provides that "[any actual cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible shall be added to the basic child support obligation and shall be divided by the parents in proportion to their adjusted actual incomes." Then, in cases other than shared custody, "each parent's child support obligation shall be determined by adding each parent's respective share of the basic child support obligation, work-related child care expenses, *health insurance expenses*, extraordinary medical expenses, and additional expenses under subsection [12-204(i)]"; the person receiving child support ("the obligee") "shall be presumed to spend that parent's total child support obligation directly on the child or children"; and the person paying child support ("the obligor") "shall owe that parent's total child support obligation as child support to the obligee *minus any ordered payments included in the calculations made directly on behalf of the child or children* for work-related child care expenses, health insurance expenses, extraordinary medical expenses, or additional expenses under subsection [12-204(i)]." FL § 12-204(1)(3). (Emphasis added.)

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

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

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

Pursuant to FL section 12-204(h)(1), this amount should have been added to the $1,800 monthly basic child support obligation of the parties, resulting in a total monthly child support obligation of $2,135. After each parent's child support obligation was calculated, which resulted in Anthony's having a child support obligation to Debra of $1,810 per month before the commencement of alimony *(i.e.*, through December 31, 2011), and $1,486 per month thereafter, the court should have included a requirement in its judgment that Anthony continue making that monthly insurance payment for Jessie and Carlie, and then subtracted that amount ($335) from his monthly child support obligation to Debra under FL section 12-204(1)(3). Thus, Anthony's correct child support obligation should have been $1,475 per month through December 31, 2011, and $1,151 per month thereafter.

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

III.
Attorneys' Fees

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

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

consider:

(1) the financial status of each party;

(2) the needs of each party; and

(3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.

(c) Absence of substantial justification.— Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

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

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

IV.
Denial of Anthony's Motions

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

A. Motion for Contempt

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

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

B. Motion to Reopen

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

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

Debra opposed both motions, challenging many

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

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

C. Motion for Sanctions

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

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

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

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

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

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

V.
Contempt Finding Against Anthony

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

We conclude that it was error for the court to find Anthony in constructive civil contempt of the P.L. Order. As discussed above, that order directed Anthony to pay Debra $300 per month for child support, with that amount coming due on the first of each month. Debra filed her petition for contempton February 11, 2011, following the evidentiary portion of the merits hearing. Debra alleged that Anthony had failed to pay child support in January and February of 2011. The contempt petition was heard on March 24, 2011, prior to closing arguments. Debra's counsel stipulated that Anthony had since made the delinquent payments and was in fact up to date on his child support obligation. She argued that Anthony's child support payments had been late every month for the past nine months.[8]

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

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

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

Rule 15-207(e) governs constructive civil contempt[9] for failure to pay child support. In relevant part, it provides that the moving party has the burden of proving by clear and convincing evidence that "the alleged contemnor has not paid the amount owed, accounting from the effective date of the support order through the date of the contempt hearing." *Id*. This is so because the purpose of constructive civil contempt is to coerce compliance with a court order, not to punish the contemnor for past disobedience. *See Arrington*, 402 Md. at 93. In the instant case, Debra's counsel stipulated that Anthony had made all of his outstanding child support payments prior to the date of the contempt hearing. Thus, the evidence stipulated to before the court precluded a finding that Anthony was in constructive civil contempt. For this reason, we shall reverse the finding of contempt.

VI.
Custody

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

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

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

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

(Citations omitted.)

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

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

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

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

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

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

CONTEMPT ORDER AGAINST THE APPELLANT REVERSED. CASE REMANDED TO CIRCUIT COURT FOR CALVERT COUNTY WITH INSTRUCTIONS TO AMEND ITS JUDGMENT TO REQUIRE THE APPELLANT TO PAY FOR HEALTH INSURANCE FOR MINOR CHILDREN AND TO REDUCE THE CHILD SUPPORT AWARD AGAINST THE APPELLANT TO $1,475 PER MONTH FROM JUNE 7, 2011, THROUGH DECEMBER 31, 2011, AND $1,151 PER MONTH COMMENCING JANUARY 1, 2012. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID ONE-HALF BY THE APPELLANT AND ONE-HALF BY THE APPELLEE.

FOOTNOTES

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

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

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

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

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

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

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

7. Rule 2-431 provides that

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

(Emphasis added.)

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

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

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

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

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

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