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SUMMARIES OF ALL REPORTED AND UNREPORTED FAMILY LAW CASES

IN BRIEF

FEATURES

Request for prenup put bride-to-be on notice

By Steve Lash
Contributing Writer

A fiancé's failure to disclose his net worth of more than $2 million did not doom the prenuptial agreement he presented to his then-beloved four days before their wedding — and 23 years before their divorce, a Maryland appeals court has ruled.

In its 3-0 decision, the Court of Special Appeals rejected Barbara Stewart's argument that the agreement she signed with James Stewart was invalid because he did not fully and frankly disclose all his assets. The court said Barbara had "adequate knowledge" of James' assets because of his disclosure in the agreement of valuable property interests, including his ownership of a construction business, 50 acres of land and four condominium units.

"In sum, although Ms. Stewart did not receive notice of the specific value of each asset or of their collective worth, she did unquestionably receive what amounted to, for all intents and purposes, just shy of a complete list of those assets via the agreement and knew of the existence, nature and potential worth of the most valuable of Mr. Stewart's assets before she ever signed the prenuptial," Chief Judge Peter B. Krauser wrote for the court.

The very fact that her husband wanted the prenup should have given Ms. Stewart reason to inquire further, Krauser wrote.

"[T]here is no indication, that, had

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Inheritance after divorce? Put it in the will or decree

In a split vote, the state's highest court last month gave the strongest possible interpretation to a Maryland law that provides for automatic revocation of a bequest to a spouse once the marriage ends in divorce. The law says the bequest "shall be revoked unless otherwise provided in the will or [divorce] decree."

The Court of Appeals, in a close case, read that language as removing any possibility of establishing the testator's intent from inferences, requiring express language of the will or decree.

The decision reinstated a Wicomico County Circuit Court judge's 2007 ruling that any bequests in Jesse Suiters' will to his former wife, Virginia Lee Suiters, had been revoked by operation of law when they later divorced.

The Court of Special Appeals had reversed that ruling in 2011, saying Mr. Suiters' intent was shown by the terms of the couple's separation agreement and his will, which was drafted while the couple was separated but before their divorce. The bequest referred to Mrs. Suiters by name, not as Mr. Suitor's wife.

The Court of Appeals agreed to hear the case, and reversed in a 4-3 split.

The three dissenters would have affirmed the 2011 decision. The Estates & Trusts Article does not require a clear statement of the testator's intent to leave an ex-spouse's name in the will, Judge Lynne A. Battaglia wrote; rather the statute requires "only a manifestation of intent," which was made in the set-

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Prenup

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she requested additional information as to the value of the assets, such information would not have been forthcoming," he added. "In short, the agreement plus Ms. Stewart's actual knowledge of Mr. Stewart's principal assets put her on notice that she was, in fact, about to execute a waiver of any claims she might have to substantial assets."

Andrea B. Baddour, counsel for Barbara Stewart, said the court's decision runs counter to prior holdings that placed the onus on the drafter of the prenuptial agreement to provide a full accounting of his or her assets.

"This case says the other party has some duty," said Baddour, of Striegel & Buchheister in Chesapeake Beach. "The other person must be an active participant and find out if the amounts are not given."

The opinion also notes that Barbara Stewart received assets of at least $1.2 million in the property settlement and separation agreement. These assets included the $175,000 James Stewart paid her in return for waiving demands for alimony, maintenance and support and the $387,000 he paid for marital property not subject to the prenuptial agreement.

"When Ms. Stewart and Mr. Stewart met, two years before they married, she was a single, 26-year-old high-school dropout, who was working for minimum wage at a daycare center and whose principal asset was a car worth approximately $500; while he was a married, 24-year-old high-school graduate, with three children, who earned around $100,000 a year and had acquired a net worth of some $2.5 million through his construction business and related investments," Krauser wrote. "They began an extramarital affair which ultimately led to Mr. Stewart's divorce from his first wife."

Despite the Stewarts' disparity in education and income, the Court of Special Appeals upheld a Charles County Circuit Court ruling that the prenuptial agreement was valid, barring Barbara Stewart from any share in the condominiums and the 50 acres.

Barbara Stewart in seeking the agreement's invalidation upon her March 29, 2011, divorce, had also argued that the four days she had to consider the agreement's ramifications were insufficient, particularly in light of James Stewarts' ultimatum that he would not marry her if she did not sign it.

James Stewart's attorney, Thomas E. Pyles, did not return a telephone message seeking comment for this article. Pyles is a Waldorf solo practitioner. The opinion was issued as an unreported opinion in late August and published by the Court of Special Appeals last month, giving it value as precedent.

— *Barbara Stewart v. James Stewart*, CSA No. 0249, Sept. Term 2011. Reported. Opinion by Krauser, C.J. Argued May 3, 2012. Filed Oct. 3, 2013. (Unreported opinion issued Aug. 22, 2013.)RecordFax # 13-1003-00 (26 pages).

Monthly Memo

Pro se not "vexatious"

A notary who spent nearly $40,000 to defeat a pro se lawsuit that stemmed from a divorce thought the trial judge was far too accommodating in denying her motion for sanctions under Rule 1-341.

Shari Acosta, the notary, claimed that Judge Maureen M. Lamasney was clearly erroneous when she "held that [Ellsworth White] did not violate Maryland Rule 1-341 because he was not an attorney, did not have legal representation and one cannot impute knowledge of damages to a lay person."

The Court of Special Appeals disagreed in an unreported opinion. While Lamasney considered White's *pro se* status, it did not deny Acosta's motion on that ground; rather, Lamasney failed to find specifically that White had acted vexatiously in suing the notary for negligence over a deed he said he had not signed.

Acosta v. White, No. 0394, Sept. Term 2012; decided Sept. 12, 2013; motion for reconsideration denied Oct. 29, 2013.

Tell us what you think

This time of year, thoughts naturally turn to resolutions. We'd like to know what resolutions *you* would write for Maryland Family Law Monthly. What do you think of our case write-ups? Are the Unreported Cases in Brief helpful? Would extended headnotes serve you better? Do you use the full-text opinions in the supplement?

Are there topics you would like to see more of — Estates & Trusts, maybe, or legislative proposals? How about our website: Have you had a chance to use the search function and, if so, what was your experience like? This is your newsletter and we'd like to make sure it's meeting your needs. Please drop me a line at Barbara.Grzincic@TheDailyRecord.com and let me know your thoughts.

— *Barbara Grzincic*

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Intent

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tlement agreement, she added.

Writing for the majority, though, retired Chief Judge Robert M. Bell said Section 4-105(4) of the Estates & Trusts Article — and the General Assembly's intent in passing the law — are both clear.

The General Assembly's "intent was to protect a testator who neglects to change his or her will following divorce or annulment" and that "protection is best achieved by an automatic revocation of the relevant provisions of the testator's pre-existing will."

> **It's another reminder that if you want money to go to your ex-wife you better do something after your divorce to make that happen.**
>
> **JASON A. FRANK**
> Frank, Frank & Scherr LLC

The statement in the Suiters' separation agreement, permitting the bequest, may "permit an inference as to the testator's intent [but] it does not establish that intent," Bell added.

Law professor Angela M. Vallario said the top court's interpretation was appropriate, due to the impossibility of questioning the decedent.

"What was his intent?" said Vallario, who teaches estates and trusts at the University of Baltimore School of Law. "We will never know."

The court's "hands are really tied here," she added.

Estates attorney Jason A. Frank, who was not involved in the case, deemed "perfectly reasonable" the court's conclusion that a clear statement is required if someone wants to leave money or property to a former spouse.

"It's another reminder that if you want money to go to your ex-wife you better do something after your divorce to make that happen," said Frank, of Frank, Frank & Scherr LLC in Lutherville. "I can't believe anybody would do that."

Separated for 10 years

The Suiters had been married for 31 years when they separated in 1996 and executed their separation agreement.

They were still separated in June 2003, when Jesse Suiters executed his Last Will and Testament, stating that he would "give, devise and bequeath unto Virginia Lee Suiters" all the rest of his property.

The couple divorced on May 25, 2006, and Jesse Suiters died a few months later.

His nephew, Samuel Nichols, successfully petitioned the Orphans' Court for Wicomico County to be appointed personal representative of the estate.

The Orphan's Court said the separation agreement validly expressed Jesse Suiters' intent that Virginia remain in the will. But on appeal, Wicomico County Circuit Court Judge Donald C. Davis said Virginia's bequest was revoked by operation of law.

The Court of Special Appeals reinstated Virginia to the will in an unreported opinion in February 2011.

Nichols then appealed successfully to Maryland's high court. His attorney, Demetrios G. Kaouris, did not return telephone messages seeking comment. Kaouris is with Miles & Stockbridge P.C. in Easton.

Virginia Suiters litigated the case to the Court of Appeals, which heard arguments on Nov. 7, 2011.

However, she died 14 months later, on Jan. 7, at the age of 76, with the high court's decision still pending.

"We are disappointed that we are on the losing end of such a narrow majority and certainly would have liked to have had a resolution of the case before my client passed away," said attorney Bruce F. Bright, who represented Virginia Suiters and, ultimately, the personal representatives of her estate.

Bright added the court engaged in "an absolute reading" of the Estates & Trusts Article, when the law provided for "a close and narrow reading" that allows for consideration of other indicators' of the decedent's intent, including a separation agreement.

"We think the dissenting judges got it right," said Bright, of Ayres, Jenkins, Gordy & Almand P.A. in Ocean City.

— Steve Lash, contributing writer

WHAT THE COURT HELD

Case:

Nichols v. Baer et al., CA No. 22, Sept. Term 2011. Reported. Opinion by Bell, C.J. (Retired). Dissent by Battaglia, J. Argued Nov. 7. 2011. Filed Oct. 22, 2013.

Issue:

Does divorce automatically delete an ex-spouse's name from the decedent's last will and testament absent an express statement to the contrary in the will or divorce decree?

Holding:

Yes; the legislature intended "to protect a testator who neglects to change his or her will following divorce" and that "protection is best achieved by an automatic revocation."

Counsel:

Demetrios G. Kaouris for petitioner; Bruce F. Bright for respondents.

RecordFax # 13-1022-20 (29 pages).

Due process for children in foster care – at a cost

Ramesh Kasarabada
Guest columnist

Children in foster care won a partial, but important, victory before the Court of Appeals in *In re Ryan W.*, —-A.3d ——, 2013 WL 5354580, Md., September 26, 2013 (CSA Nos. 95 and 101, Sept.Term 2012). The state must now notify children in foster care when it applies for their federal benefits, when it receives those benefits, and of its use of the benefits. This decision still allows the state to be appointed representative payee for the child's benefits and apply those benefits to the cost of that child's foster care. The Court's decision also forces children to obtain relief through the federal administrative process instead of the juvenile court that is responsible for protecting their best interests. Nevertheless, with notice of the state's actions, children may now be able to challenge the state's actions and protect their own future.

Some children in foster care whose parents have died are entitled to a "survivors' benefit," or Old Age Survivors Disability Insurance (OASDI) benefit. This benefit is the child's property under federal law. Federal law requires the representative payee, who receives the benefits on the child's behalf, to exercise discretion when using the benefits in the child-beneficiary's best interests. In Ryan's case, the state as his representative payee automatically applied his benefit that it received to the cost of his foster care. It did not notify Ryan or his attorney of its actions. The state's automatic payments to itself do not demonstrate the discretion that federal law mandates. The state, therefore, creates a substantial risk that it will incorrectly absorb children's funds to which it is not entitled. The state admitted that this occurred in Ryan's case.

One can see the harm to children from the state's practice, especially for children aging out of foster care. Many children aging out often end up homeless, incarcerated, or otherwise entrenched in poverty upon leaving foster care. The survivors benefit could help eligible children as they prepare for life after foster care by serving as a "nest egg" for various services, including educational, vocational training, or, housing. The state's previous clandestine and automatic practice of taking the benefit ensured, however, that a child entitled to a small "nest egg" instead leaves foster care with no funds to support his or her transition into adult life.

In *In re Ryan W.*, the state automatically took more than $31,000 of Ryan's survivors benefit. It also miscalculated the amount it paid for his foster care leading to an overpayment to itself of several thousand dollars. The state's automatic payment practice led to Ryan losing a substantial part of his "nest egg". It likely deprived many other children of their "nest egg" as well.

The Court of Appeals in *In re Ryan W.* changes the state's practice by requiring it to respect the child's due process rights. The state must now notify children in foster care of its actions regarding their federal benefit, including its application for benefits, its purported use of the benefit, and when it uses the benefit. This notice allows children to utilize federal administrative remedies to challenge the state's appointment as payee and potentially retrieve benefits that the state takes unjustly.

The Court made it difficult for Ryan and other children in foster care to fully protect their property, however, by holding children may not challenge the state's practices in juvenile court. Children in foster care are already parties in regularly held juvenile court proceedings where the court reviews children's needs and the state's actions regarding the children. Children have appointed attorneys, who are paid for by the state, to represent them in these hearings. As the dissent describes, the juvenile court is "more familiar with Ryan's [or any foster child's] circumstances to determine whether the Department's use of the benefits in such a way was in Ryan's [or any foster child's] best interest." (p. 22). By forcing children to go through the federal administrative process, the Court of Appeals deprives Ryan and other foster children of the advocates who were appointed to advance their legal rights due to their parents' abuse and neglect. Ryan, for example, must now pursue potential state and federal remedies without the guarantee of counsel to assist him. It is entirely possible that he will age out of foster care without the benefit of all of the survivors benefits that his parents left for him. Requiring federal administrative review instead of utilizing the juvenile court review children already are subject to does not further Maryland's policy to "protect and advance the best interests of the child".

In re Ryan W. is a vindication of the due process rights of children in foster care to their property. Requiring children to go through the federal administrative process, however, dilutes their obtaining relief and furthermore creates a gap in representation that potentially harms especially children aging out of state care. Nonetheless, with knowledge of the state's actions regarding their benefits, children have a fighting chance to protect their benefits, albeit in another judicial forum.

Ramesh Kasarabada was a Supervising Attorney at Maryland's Legal Aid while he represented Ryan W.

UNREPORTED CASES IN BRIEF

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

*Yoha B. v. Tania Butler**

VISITATION: PROTECTIVE ORDER: SUFFICIENCY OF THE EVIDENCE

CSA No. 1435, September Term, 2012. Opinion by Zarnoch, J. Filed Sept. 12, 2013. Unreported. Appeal from Montgomery County. Affirmed. RecordFax #13-0912-03, 10 pages.

In deciding whether there was clear and convincing evidence that abuse occurred during supervised visitation, the court could reasonably conclude that a CINA with post-traumatic stress disorder was in fear of imminent serious bodily harm when her mother yelled at her, grabbed her, and hit the social worker who was supervising the visit on the back of the head with a Bible.

"Yoha B. ("Ms. B.") seeks reversal of a 2012 judgment of the Circuit Court granting a final protective order against her. Appellee Tania Butler, a social worker for the Montgomery County Department of Health and Human Services ("the Department"), sought the protective order for Ms. B.'s daughter, Chaida, after a supervised visit between Ms. B. and Chaida resulted in an altercation in a fast food restaurant.

Ms. B. asks this Court to consider the following issue: Was the evidence sufficient to show by clear and convincing evidence that a protective order should issue? We find no error and therefore affirm the circuit court's ruling.

DISCUSSION

Family Law Article § 4-506(c)(1)(ii) provides that a court may issue a protective order if it finds by "clear and convincing evidence that the alleged abuse has occurred." Abuse is defined as "(i) an act that causes serious bodily harm; (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm; (iii) assault in any degree, … [or] (v) false imprisonment," among other definitions. FL § 4-501(b)(1). In its oral ruling, the circuit court relied on three of these grounds: fear of imminent serious bodily harm, assault, and false imprisonment.

Ms. B. challenges the sufficiency of the evidence before the circuit court and the court's subsequent reliance on that evidence in issuing the protective order. She argues that although there was evidence that Ms. B. touched Chaida during the visit, "the evidence was not that the daughter regarded the touching as an impermissive touching." She also challenges the finding of false imprisonment by asserting that there was no evidence that Chaida wanted to leave the restroom at Burger King or that Ms. B. prevented her from leaving. Finally, she contends that there was no evidence that Chaida was in fear of imminent bodily harm when Ms. B. struck Butler with her Bible.

Although Ms. B. has accurately pinpointed certain inconsistencies and omissions in the evidence before the circuit court, she has not shown that the circuit court's decision was not based on clear and convincing evidence. Only the circuit judge is in the position "to determine the credibility of witnesses and come to his own conclusion about what and whom to believe and what he wanted to hear," *Ricker v. Ricker*, 114 Md. App. 583, 602 (1997).

Thus, it was not error for the circuit judge to credit Butler's testimony over Ms. B.'s testimony.

Regarding the finding of assault, which is defined as "any attempt to apply the least force to the person of another," *Spencer v. State*, 422 Md. 422, 431 (2011) (quotation omitted), the circuit court heard testimony that Ms. B. grabbed Chaida by the arm, pushed her head toward her Bible, and attempted to reach past Butler to drag Chaida back into the restroom. There was likewise evidence of false imprisonment, which is the "deprivation of the liberty of another without his consent and without legal justification," *Montgomery Ward v. Wilson*, 339 Md. 701, 721 (1995) (Quotation omitted), as there was evidence that Ms. B. followed Chaida to the restroom, grabbed her by the arm and began shaking her, and refused to let go of her or let her leave the restroom.

Finally, there was sufficient evidence before the circuit court of fear of imminent serious bodily harm. The court heard that Ms. B. yelled at and grabbed Chaida, and hit Butler on the back of her head with her Bible. Chaida left the restroom in tears and was running away from Ms. B. None of these events occurred in a vacuum: Ms. B. has a history of abusing Chaida, and Chaida has been diagnosed with post-traumatic stress disorder. It was reasonable for the court to conclude that someone in Chaida's position would be in fear of imminent serious bodily harm when her mother yelled at her, grabbed her, and hit another person on the head. *See Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 138 (2001) (inquiry into fear of imminent serious bodily harm is an individualized objective standard that "looks at the situation in the light of the circumstances as would be perceived by a reasonable person in the petitioner's position").

For all of these reasons we affirm the judgment of the circuit court."

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

*Sonya Hanna Baier v. Dieter A. Baier**

DIVORCE: MARITAL PROPERTY: RETIREMENT ACCOUNT

CSA No. 0069, Sept. Term 2012. Opinion by Wright, J. Filed Oct. 2, 2013. Unreported. Appeal from Talbot County. Vacated and remanded. RecordFax 13-1002-01, 26 pages.

The ex-husband's use of retirement account funds to pay *pendente lite* alimony was improper because it reduced the amount of marital assets available for distribution and the husband had ample income to pay the alimony, as evinced by the numerous trips he took to visit his paramour.

"This appeal results from Memorandum Opinions and Orders granting appellant, Sonya Hanna Baier, an absolute divorce from Dieter A. Baier and awarding alimony, a monetary award, and attorney's fees.

Wife presented questions which we have consolidated as follows:

1. Did the circuit court err in awarding Wife $5,000 per month for five years instead of indefinite alimony?

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UNREPORTED CASES IN BRIEF *Continued from page 6*

2. Did the circuit court err in its findings regarding Husband's retirement accounts?

3. Did the circuit court err in its grant of attorney's fees to Wife?

We answer no to question one and yes to question two. Because we are remanding this case, we need not address the third question.

Discussion

I. Alimony

Wife argues that the circuit court failed to analyze how her age, lack of employment for 20 years, and difficulty in finding employment would affect her prospects of becoming self-supporting. Wife contends that the circuit court did not consider that an unconscionable disparity would result in five years because Husband would simultaneously be relieved of paying alimony and child support at the same time that she would, as the court found, finally be able to "dedicate her full time and efforts toward her career." Wife further asserts that no comparison between the parties' respective incomes could have been made because the circuit court "did not project her future or prospective income." Wife maintains, as proof that an unconscionable disparity exists despite the alimony award, that Husband is able to continue "liv[ing] in luxury" while she is forced to take out loans to satisfy her monthly obligations.

Wife testified, at both the *pendente lite* and merits hearings, that her goal was to go into the foreign service with the U.S. State Department. Husband's evidence was that Wife could make between $50,000 and $75,000. Wife testified that the only job she sought paid $40,000. She failed to offer any evidence that she did not have the ability to be wholly or partly self-supporting.

The circuit court, taking into account the numerous difficulties that Wife was experiencing in finding employment, concluded that "five years is sufficient time for [Wife] to take said additional steps to become more marketable and to find gainful employment."

The trial court considered the factors contained in FL §11-106. The court found that, in a period of five years, Wife may need additional measures or seek further education beyond her Master's degree to become more marketable in what was a downturned economy. The court believed that five years was sufficient time to take additional steps to become *more* marketable and to find gainful employment. Wife failed to satisfy her burden for indefinite alimony. Accordingly, we affirm the judgment of the circuit court.

II. Dissipation of Assets

Wife contends that Husband used funds from the retirement accounts that were marital property to pay, *inter alia*, back-due alimony and child support payments. According to Wife, as a result, "unless the amount of those payments is deducted from any marital property awarded to [Husband], [Wife] will have effectively paid for one-half (or more) of her own back-due alimony (and paid taxes on the income) and child support, while [Husband] took the alimony deduction on his taxes." Wife avers that the circuit court did not consider that Husband was able to fund his frequent trips to visit his paramour in accepting Husband's contention that he could not afford the support payments and college tuition for the parties' oldest daughter without withdrawing funds from the retirement accounts.

The circuit court expressly found that Husband had dissipated marital funds in the amount of $3,257.62, based on his expenditures to visit his paramour. We find no discussion of dissipation in regards to the retirement or bank accounts in the circuit court's opinion. Husband seems to argue that the lack of reference to those funds equates to a finding by the court that he did not dissipate those funds. Our review of the record, however, indicates that the circuit court did not account for all of the funds about which Wife complains. In addition, the court did not address whether Husband was permitted to expend marital assets, namely retirement accounts, on back due alimony support payments, when Husband had sufficient income to fund those expenditures.

Wife satisfied her initial burden of dissipation. Even accepting the court's finding that Husband was credible, [the] numbers still do not add up and must be clarified on remand.

As to the use of marital assets to make his support payments, Husband argues that *Omayaka* is determinative. We find *Omayaka* factually distinguishable. In *Omayaka*, the wife, accused of dissipation, testified that she had spent $80,000 accumulated during the marriage on household goods, mortgages, clothes, to pay off credit card debt, and to send money to her minor children overseas. *Id.* at 649-50. The case at bar involves the use of marital funds to pay alimony and child support obligations, among other expenditures.

The parties direct us to no authority regarding the use of marital funds to make *pendente lite* support payments, and we have found no Maryland case squarely addressing this issue. However, our sister jurisdictions have held that the use of marital assets to make support payments constitutes dissipation. *See Azizo v. Azizo*, 859 N.Y.S.2d 113, 116 (N.Y. App. Div. 2008); *Goldman v. Goldman*, 589 A.2d 1358, 1362 (N.J. Super. Ct. Ch. Div. 1991); *Grandovic v. Grandovic*, 564 A.2d 960, 964 (Pa. Super. Ct. 1989); *Griffin v. Griffin*, 558 A.2d 86, 92 (Pa. Super. Ct. 1989). *Cf. Collins, supra,* 144 Md. App. at 417 (husband found not to have dissipated funds because, as he was retiring, his retirement account was his sole source of income and he had no other funds from which to pay support); *Allison v. Allison*, 160 Md. App. 331, 338-40 (2004) (husband found not to have dissipated funds when he used marital property to pay for his "reasonable attorney's fee," as well as his wife's attorney's fees, because "[d]ivorcing spouses usually do not have their own separate funds to pay their lawyers").

In the case at bar, Husband admitted to using marital funds from the retirement accounts to make his *pendente lite* support payments. Husband had ample income and received a tax deduction for the support payments while Wife did not. Husband was able to finance his numerous trips to visit his paramour using non-retirement account funds. Husband thereby reduced the amount of marital assets available for distribution. On remand, the circuit court must consider the amount of funds used from the marital retirement accounts to pay *pendente lite* support

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when determining an equitable division of marital property.

III. Attorney's Fees

Because of our disposition of the dissipation issue, we must vacate the award of counsel fees. For the guidance of the court and the parties on remand, we find no abuse of discretion based on the circuit court's analysis of the FL §7-107 factors."

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

*Kenneth L. Blackwell Sr. v. Joanne Bisquera et al.**

CHILD SUPPORT: UNIFORM INTERSTATE FAMILY SUPPORT ACT: SERVICE OF PROCESS

CSA No. 2681, Sept. Term 2011. Opinion by Berger, J. Filed Oct. 1, 2013. Unreported. Appeal from Prince George's County. Affirmed. RecordFax #13-1001-05, 14 pages.

The circuit court is owed deference regarding its conclusion that a father was properly served notice in a child support case, despite his claim that the process server had dropped the papers on the ground. The circuit court also had broad discretion to reject the father's request for a continuance.

"Kenneth Blackwell appeals from an order denying his motion to vacate the circuit court's registration of an out-of-state child support order. In July 2008, pursuant to the Uniform Interstate Family Support Act ("UIFSA"), a child support agency in the State of Washington, where appellee, Joanne Bisquera resides, forwarded to Maryland a completed child support enforcement transmittal requesting registration in Maryland of a support order issued by the Superior Court of King County, Washington.

Blackwell presents questions which we have combined and rephrased: Whether the circuit court properly determined that Blackwell was served with the notice of registration of foreign order of support?

DISCUSSION

Service of Process

First, Blackwell argues that the circuit court's decision was clearly erroneous by concluding that Blackwell had been properly served with process on November 1, 2009.

Ms. Perry testified that she followed Blackwell out of the courthouse on November 12, 2009. She explained that Blackwell acknowledged her when she called out his name, and stopped walking. However, when she physically handed the notice of registration to Blackwell, "[T]he paperwork hit him on the right on his right shoulder. He allowed it to drop and hit the ground."

Blackwell confirmed the accuracy of most of Ms. Perry's account, but offered a different account of how the encounter ended. According to Blackwell, "[T]he lady [Ms. Perry] could not approach me because I didn't want to be contacted with her, so I deliberately kept walking. The lady then dropped the paper on the ground and said, 'you've been served.' And I, I continued to walk."

The circuit court was entitled to find Ms. Perry's testimony credible. Based upon that testimony, the trial court reasonably concluded that Blackwell was served with process. The trial judge's conclusion was not clearly erroneous.

Continuance

Next, Blackwell argues that the circuit court abused its discretion when it denied Blackwell's request for a continuance. In support, Blackwell asserts that under "both the United States Constitution and the Constitution of Maryland, a person has a right to compulsory process in order to call witnesses to testify on his behalf."

Md. Rule 2-508(c) contain[s] the provision regarding a motion for continuance on the ground that a witness is absent. Blackwell did not submit an affidavit, and his proffer was not under oath. *See Brooks v. Bast*, 242 Md. 350, 354 (1966) (stating that court can treat sworn testimony as the equivalent of the affidavit required by Rule 2-508(c)).

Even assuming, *arguendo,* that an unsworn proffer could satisfy Rule 2-508, Blackwell claimed only that a woman (whom he described as his friend Ms. Tucker) was with him when he exited the courthouse on November 12, 2009, and would "attest to the fact that I've never received that notice." Based on Blackwell's proffer of the facts to which Ms. Tucker was expected to testify, Ms. Tucker would have added no additional information. Further, Blackwell did not explain why the case could not proceed without testimony that merely duplicated his own description.

In short, Blackwell failed to comply with the requirements in Rule 2-508(c) to request a postponement due to an allegedly necessary witness. Accordingly, it was well within the trial court's discretion to deny Blackwell's request for a postponement. Moreover, Blackwell admitted that he had not been putting his home address on his own pleadings in this case. Rather, he claimed that he used this address only as his "mailing address," to avoid unspecified problems getting mail at his residence, and that he had not received court notices mailed to that address. Blackwell's failure to disclose his home address, while providing an apparently unreliable address on court documents, provides no grounds for holding that the trial court abused its discretion in denying a postponement to obtain the testimony of a witness whose testimony would have added little to Blackwell's claim.

Under the circumstances, we hold that the trial court did not abuse its discretion when it denied Blackwell's request for a continuance.

Ms. Perry's Authorization to Serve Process

Finally, Blackwell claims that the local child support office violated Md. Rule 2- 123(a) by having Ms. Perry, an employee of the local child support office, serve him with the notice of registration. We disagree.

Rule Md. 2-123(a) provides that: "Service of process may be made by a sheriff, or, except as otherwise provided in this Rule, by a competent private person, 18 years of age or older, including an attorney of record, but not by a party to the action." The Court of Appeals has held that an employee of a party can serve process when his or her employer is a party. *Palmisano v. Baltimore Cnty. Welfare Bd.*, 249 Md. 94, 102 (1968).

Ms. Perry was an employee of the local child support

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office when she served process on Blackwell. Under *Palmisano,* Ms. Perry does not qualify as a "party to the hearing." Accordingly, we hold that the circuit court properly interpreted Md. Rule 2-123(a).

We affirm the order of the Circuit Court for Prince George's County."

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

*Kirby Lee Bowling v. Stephanie Michelle Knarr**

CUSTODY AND CHILD SUPPORT: MODIFICATION: VOLUNTARY IMPOVERISHMENT

CSA No. 2511, Sept. Term 2012. Opinion by Wright, J. Filed Sept. 23, 2013. Unreported. Appeal from Carroll County. Affirmed. RecordFax #13-0923-05, 35 pages.

Given the parties' past experience, the determination that reducing the amount of forced interaction between a father and daughter would improve their relationship was not an abuse of discretion; also, the evidence supported a finding that the father voluntarily impoverished himself by choosing to pursue his Ph.D. full time, although he had completed the coursework several years earlier, had no clear time frame for completing his dissertation and no clear job prospect requiring it.

"Appellant, Kirby Lee Bowling, and appellee, Stephanie Michelle Knarr, filed cross-motions seeking to modify the custody and child support order set forth in their divorce decree. On January 23, 2013, the trial court entered its opinion and order granting Knarr sole legal custody and primary physical custody of the parties' minor daughter, Rachel, and instituting a modified visitation schedule for Bowling and Rachel. The trial court also found that Bowling had voluntarily impoverished himself and imputed income to him as part of its modification of the parties' child support obligations. On February 22, 2013, Bowling filed this timely appeal.

Bowling presents two questions for our review, which we quote *verbatim*:

1. Whether the trial court was clearly erroneous when it did not modify custody by granting Appellant sole legal custody of the minor children and primary custody of Rachel.

2. Whether the trial court was clearly erroneous when it found that Appellant had voluntarily impoverished himself and imputed income when calculating child support.

Discussion

I. Modification of Custody

When deciding if a modification of custody is warranted, the court performs a two-step analysis by first determining if a material change of circumstances exists and if so, then considering the best interest of the child "as if it were an original custody proceeding." *Wagner v. Wagner*, 109 Md. App. 1, 28-29 (1996).

The parties do not dispute the trial court's determination that a material change in circumstances warranted a modification. Since 2010, increasing incidents of physical altercations had occurred between Bowling and Rachel, and Rachel had begun refusing to participate in scheduled custody weeks with her father. We agree that a material change in circumstances was shown.

We now turn to physical custody. The MCT noted in a September 6, 2011 report that "Rachel reports that she does eventually want a relationship with [Bowling] but not now and believes it is something that she has to work up to."

The trial court's ultimate determination of what would be in Rachel's best interest was based on past experiences of the parties. In the case at bar, the trial court determined that reducing the amount of time that Rachel was required to interact with Bowling would ultimately be the best way to improve their relationship over time and lead to a willingness in both Rachel and Knarr to increase Bowling's access to Rachel. The court's determination is in line with the evidence in the record, which showed that when Bowling stopped trying to force Rachel to comply with the 50/50 custody schedule and exhibited a respect for her wishes, she became more willing to participate and Knarr began to assist in facilitating visitation. As such, we cannot say that the ruling was an abuse of discretion.

II. Voluntary Impoverishment

Citing no authority, Bowling argues that there was "absolutely no testimony nor any evidence" from which the trial court could infer that Bowling had voluntarily impoverished himself. Bowling asserts that the only testimony on this point was that his work schedule was such that he could devote his time to finishing his Ph.D. Bowling argues that, because he has never been required to pay child support, he could not have made a conscious decision to work less to avoid paying child support.

Knarr responds that the intentions of a parent regarding paying child support are irrelevant. Knarr argues that the trial court properly recognized that Bowling's fluctuations of employment were not "entirely represented by overseas deployment for the military and are also represented by [Bowling]'s choice as to whether or not to engage in full time employment when he is not deployed." Knarr maintains that the record contains substantial evidence to support the finding that Bowling chose to reduce his income by working part-time employment and working full-time on his Ph.D. in 2012 instead of continuing to do the reverse as he had in 2011.

We conclude that the trial court's decision was supported by substantial evidence. Bowling testified that prior to 2012, he worked full-time at regular employment and worked part-time on his Ph.D., but that in 2012, he had decided that because he "didn't make very much progress on [his] dissertation" he was "trying a different approach."

Bowling's new wife, Candice, testified that in 2012, Bowling taught a class, had another job, and earned $1,911.00 per month from the G.I. Bill. Bowling, meanwhile, testified that he had no other source of income other than the part-time consulting and the G.I. Bill. Bowling testified that, in 2012, he sought no additional employment and told the court that "with the GI Bill [sic], I'm able to pay the bills." Bowling testified that he normally earned between $6,000 and $7,000 per year as an Air Force reservist, but had "not been able" to get any hours in during 2012.

Bowling admitted to completing the course work for

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his Ph.D. in 2007 or 2008. Bowling testified that he was working on his dissertation proposal, which had yet to be accepted. Bowling testified that for "various reasons" his prior dissertation proposals had been "dropped." Bowling speculated that *if* his proposal was accepted, he *might* complete his Ph.D. program in Summer 2013 or later. Bowling testified that he hoped to secure a teaching position upon completion of his Ph.D.

The evidence supports the finding that Bowling chose of his own free will to alter his pursuit of his Ph.D. from part-time to full-time and reduce his ability to work. While Bowling testified that his contract work was project dependent, he offered no evidence that he was unable to secure work at the same level as he did in 2011, or that a lack of contract work was the cause of his reduced income. Our review of the record supports the finding that Bowling could have worked more, as he volunteered many hours for Luke's sports and his church, and testified to only spending approximately thirty hours per week on his dissertation. The record demonstrates that Bowling, until 2012, had always pursued his Ph.D. part-time, he had no clear time frame for its completion, no clear job prospect requiring the Ph.D., and chose to spend his time focusing on pursuits that were non-work related.

Therefore, we cannot say that the trial court's finding that Bowling had voluntarily impoverished himself in 2012 was clearly erroneous."

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

*David Marion Connors III v. Kayla Marie Wilkinson**

CHILD SUPPORT: MOTION TO DISESTABLISH PATERNITY: FINAL JUDGMENT RULE

CSA No. 0548, Sept. Term 2012. Opinion by Davis, Arrie W. (Retired, Specially Assigned). Filed Sept. 23, 2013. Unreported. Appeal from Carroll County. Appeal dismissed. RecordFax #13-0923-00, 11 pages.

In an action for child support, neither the denial of a motion to disestablish paternity nor an order denying a motion to reconsider that denial is a final judgment or an appealable interlocutory order; therefore, the appeal is premature.

"David M. Conners, III, appellant, seeks to avoid a child support award, by challenging his previously admitted paternity of a child born to Kayla Marie Wilkinson. The Circuit Court for Carroll County denied Conners's "Motion to Disestablish Paternity and Request for Paternity Test," as well as Conners's motion to reconsider that decision. Conners noted this appeal

Because Conners prematurely appealed non-final orders and then failed to note an appeal from the final judgment, we are constrained to dismiss this appeal.

DISCUSSION

"Whether a matter is appealable is a jurisdictional matter[.]" *Gruber v. Gruber*, 369 Md. 540, 546 (2002).

Wilkinson urges this Court to dismiss Conners's appeal from the order denying his motion to reconsider on the ground that it is neither a final judgment nor an appealable interlocutory order.

We agree that neither the order denying Conners's motion to disestablish paternity nor the order denying his motion to reconsider are appealable as final judgments. A "final judgment" is "a judgment, decree, sentence, order, determination, decision, or other action by a court . . . from which an appeal, application for leave to appeal, or petition for certiorari may be taken." CJP § 12-101(f). To be final, a judgment must have (1) been "intended by the trial court as an unqualified and final disposition of the matter in controversy,"

(2) adjudicated all claims against all parties, and (3) recorded by the court clerk. *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 623 (2000).

Here, none of these finality requirements was satisfied. In an action for child support, the final judgment is the child support award and order to pay. *See, e.g., Haught v. Grieashamer*, 64 Md. App. 605, 611 (1985). The orders denying Wilkinson's motions were interlocutory orders, rather than final judgments, because the court did not intend either one to be a final disposition of this child support matter, as established by the fact that the court did not enter the child support award until months later.

As Conners acknowledges, his appeal may proceed only under the collateral order doctrine, a common law principle that "treats as final and appealable a limited class of orders which do not terminate the litigation in the trial court," *Pub. Serv. Comm'n v. Patuxent Valley Conservation League*, 300 Md. 200, 206 (1984), but otherwise "conclusively determine the disputed question; resolve an important issue; [are] completely separate from the merits of the action; and [are] effectively unreviewable on appeal from a final judgment." *Jackson v. State*, 358 Md. 259, 266-67 (2000).

Wilkinson argues that the orders denying Conners's paternity-related motions do not fall within the collateral order doctrine because "[t]he issue of paternity is not collateral to the principle issue of child support," given that "the issue as to Mr. Conners's paternity is directly related to the merits of the action – if he is not [the child's] father, he will not be subject to the court's child support order." We agree.

The question raised by Conners's motions, *i.e.*, whether he is the child's father, is neither "collateral" nor "far removed from the facts" of this child support action. To the contrary, a paternity finding is a necessary foundation for any award of child support because "the legal obligation to support children arises out of parenthood." *Bledsoe v. Bledsoe*, 294 Md. 183, 193 (1982). *See generally* §5-203(b) of the Family Law Article.

Moreover, Conners cannot satisfy the fourth requirement that the contested ruling must be effectively unreviewable on appeal from a final judgment. The Court of Appeals has cautioned that this "fourth prong, unreviewability on appeal, 'is not satisfied except in 'extraordinary situations.'" *Nnoli v. Nnoli*, 389 Md. 315, 329 (2005). Here, the denial of Conners's motions challenging his paternity did not present an extraordinary situation warranting an immediate interlocutory appeal, because such orders easily could have been reviewed in the course of a properly noted appeal challenging the final

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child support award.

Accordingly, we conclude that this appeal was premature because neither the denial of Conners's motion to disestablish paternity nor the denial of his motion to reconsider that ruling were appealable as either a final judgment or an appealable interlocutory order. Although Conners could have obtained appellate review of those orders by simply noting an appeal from the final judgment adjudicating his child support obligation, he failed to do so.

This Court cannot remedy that omission. In these circumstances, we do not have discretion to treat Conners's premature notice of appeal as having been filed after the entry of final judgment. Specifically, the "savings" rule that allows an appellate court to treat a prematurely filed notice of appeal as having been filed after entry of final judgment does not apply when, as in this case, the notice of appeal was taken from an order that was not intended to finally dispose of all claims. *See generally* Md. Rule 8-602(d); Md. Rule 8-602(e).

Because the lack of a final judgment or appealable interlocutory order is a jurisdictional defect, we are required to dismiss this appeal. *Cf. Carr*, 135 Md. App. at 228- 29. Although dismissal may seem to "be a harsh measure," it has been deemed necessary "to promote the judicial system's interest in finality of judgment and confidence in the judicial disposition of disputes.'" *Id.* at 229 (citation omitted)."

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

*Scott W. DiBiasio v. Melissa DiBiasio**

CHILD SUPPORT: MODIFICATION: CHANGED CIRCUMSTANCES

CSA No. 1361, Sept. Term 2012. Opinion by Graeff, J. Filed Sept. 12, 2013. Unreported. Appeal from Anne Arundel County. Affirmed. RecordFax #13-0912-05, 12 pages.

An increase in the father's income was a material change in circumstances that justified a modification of the child support; contrary to the father's argument, there was no evidence that the modification was based on legislative revisions to the support guidelines in 2010.

"Scott DiBiasio appeals from an order increasing his monthly child support obligation for his son, payable to his former spouse, Melissa DiBiasio (now Evans), from $930 a month to $1,074 a month.

Mr. DiBiasio first contends that the circuit court erred in conducting an evidentiary proceeding rather than dismissing the action due to a "multitude of errors" by the County. We agree with the County that this issue is not preserved for review because it is raised for the first time on appeal. Accordingly, we decline to address the issue.

Mr. DiBiasio's next two contentions address the substance of the court's ruling increasing his child support obligation. He argues that the ruling was erroneous because: (1) the "nominal" increase in his salary was not a material change in circumstances to support a modification of child support; and (2) the "only" material change of circumstances that occurred was the revision to the child support guidelines in 2010.

The County argues that the court did not abuse its discretion in modifying Mr. Dibiasio's child support obligation. And it asserts that Mr. DiBiasio's "speculation that the circuit court modified its prior order only because the Maryland [General Assembly] changed the child support guidelines in 2010 is without merit," noting that "Mr. DiBiasio does not, and cannot, point to anything in the record supporting his conjecture that this was the basis for the trial judge's decision." We agree.

Both parties agree that the threshold question in a motion to modify child support is whether a material change in circumstances has occurred since the prior court order. *See Wheeler v. State*, 160 Md. App. 363, 372 (2004). The burden of proving a material change in circumstances is on the person seeking the modification. *See Haught v. Grieashamer*, 64 Md. App. 605, 611 (1985).

A change is "material" when it meets two requirements: (1) the change "must be relevant to the level of support a child is actually receiving or entitled to receive"; and (2) the change must be "of sufficient magnitude to justify judicial modification of the support order." *Wills v. Jones*, 340 Md. 480, 488-89 (1995). Thus, the court must focus upon "the alleged changes in income or support " that occurred after the child support award was issued. *Id.* A change "that affects the income pool used to calculate the support obligations upon which a child support award was based" is necessarily relevant. *Id.* at 488, n.1.

Here, the court specifically found that the $10,000 increase in Mr. DiBiasio's income was a material change in circumstances that justified a modification of the child support. The court made no mention of the legislature's change in the statute, nor did Ms. Evans or the County attempt to justify a modification based on those changes. We perceive no abuse of discretion in the court's modification of child support."

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

*Mary Ann Duke v. Jarlath M. H. Ffrench-Mullen**

CINA: SUSPENSION OF VISITATION: SOBRIETY

CSA No. 2502, Sept. Term 2012. Opinion by Berger, J. Filed Sept. 13, 2013. Unreported. Appeal from Montgomery County. Affirmed. RecordFax #13-0913-03, 23 pages.

In light the mother's documented long-term substance abuse problems and the lack of evidence to support her testimony that she had stopped drinking, the court did not abuse its discretion in suspending the mother's access to her child; nor was it impermissibly vague to structure the denial of access as a suspension, thereby allowing the mother to seek access in the future.

"This case involves a dispute over access to a minor child between appellant, Mary Ann Duke ("Mother") and appellee, Jarlath M. H. Ffrench-Mullen [sic] ("Father"). The child was found to be a Child In Need of Assistance in 2003 due to Mother's need for substance abuse treatment and her inability to properly care for the minor

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child. Father was granted full custody, with liberal visitation to Mother. Beginning in 2006, Mother was subject to various court orders providing for supervised visitation with the minor child. Thereafter, Father filed a motion to indefinitely suspend visitation between Mother and the minor child, as well as a motion to relocate the minor child to Florida. The circuit court held a hearing and ultimately entered an order suspending Mother's visitation with the minor child. This order was based upon findings of fact that Mother had alcohol and drug problems, as well as behavioral and emotional issues which compromised the safety of the minor child during visits. This appeal followed.

DISCUSSION

Failure to Hold a Hearing on Exceptions

Mother argues that, regardless of her compliance with Md. Rule 9-208(g), the circuit court was required to conduct a hearing on the Exceptions because she requested a hearing.

A careful review of Md. Rule 9-208(i) demonstrates that a hearing is required, if requested by a party, only when *deciding* exceptions. Here, the circuit court exercised its authority to dismiss Mother's exceptions for failure to comply with Md. Rule 9-208(g). It follows, therefore, that there were no Exceptions upon which any merits hearing could be conducted pursuant to Rule 9-208(i).

Trial Court Order Suspending Visitation

Mother contends that the circuit court order should be vacated because it "suspended" Mother's access to the minor child, which is impermissibly vague. In the same vein, Mother argues that her visitation should not have been suspended because her alcohol problems have been rectified. Father argues that the circuit court reviewed an extensive history of the custody and access dispute between the parties, which included evidence of Mother's alcohol problems, as well as drug addiction and emotional issues. In Father's view, it was the circuit court's role to weigh the evidence and assess the credibility of the witnesses. We agree with Father.

Mother testified that she "is simply a mother with an alcohol problem." Mother later testified that "I have not drank in quite some time." Mother further testified that she had never had any positive tests for alcohol in over five to six years, and that she had been involved in Alcoholics Anonymous off and on since 2003 or 2004, and that she had a sponsor who was present in the courtroom. The master, however, did not credit Mother's testimony

Moreover, the evidence demonstrated that during the time that Mother was under court orders not to consume alcohol in order to have access to the minor child, Mother arrived at a supervised visit under the influence of alcohol. Mother was unable to remember when she took her last drink. When Mother was questioned whether she had been drinking the first day of the hearing, she refused to answer, citing her continued probationary status and her Fifth Amendment right not to incriminate herself.

There was also ample evidence on the record that Mother was unable to control her behavior and emotions. This evidence included testimony from Mother's former husband, as well as Father's counsel's law partner, and Isabelle's Best Interest Attorney. Some of the incidents occurred in front of Isabelle as well as Mother's other children.

The master ultimately concluded that "[f]or all of these reasons, I do not believe it is in Isabelle's best interest to be subjected to any more scenes as have been described in these hearings. I cannot conceive of any set of restrictions or conditions of supervision that will be adequate to protect her."

In reviewing the circuit court's findings of fact, we reiterate that the "clearly erroneous" standard applies. *See In re Shirley B.*, *supra,* 419 Md. at 18. Here, there was extensive evidence over a period of many years that reflected Mother's alcohol problems, drug addiction, and behavioral issues. The only evidence to the contrary was Mother's testimony at the hearing that she was no longer drinking. As the circuit court readily observed, this testimony was not supported by any evidence. It was the circuit court's role to weigh the evidence and assess the credibility of the witnesses. We hold that the findings of fact were not clearly erroneous.

Next, Mother takes issue with the circuit court's order providing that Mother's "access to [Isabelle] … hereby is *suspended*." (Emphasis added). Mother contends that "[t]he question the word 'suspended' leaves open is when and how the suspension can be lifted." Pursuant to *McReady v. McReady*, 323 Md. 476 (1991), custody orders — and, by implication, access orders — may be changed upon a sufficient showing of a "material change in circumstances which relates to the welfare of the child."

We, therefore, hold that it was appropriate for the circuit court to structure Mother's denial of access as a "suspension," thereby allowing Mother the opportunity to seek access to the minor child in the future. Additionally, in light of the evidence of Mother's problems with not only alcohol, but also with drug addiction and behavioral issues, the circuit court did not abuse its discretion in determining that it would be in the best interests of the minor child to suspend Mother's access."

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

*Christopher Elliott v. Kena Raquel Custage Ellliott**

DIVORCE: PENDENTE LITE ORDER: MOTION TO VACATE

CSA No. 1786, Sept. Term 2012. Opinion by Meredith, J. Filed Sept. 18, 2013. Unreported. Appeal from Baltimore City. Reversed in part, vacated in part. RecordFax #13-0918-00, 15 pages.

While the husband conceded that he had filed exceptions to the master's report under the wrong case number, he was entitled to the hearing he requested on the exceptions under Rule 9-208(i), and the court's error in denying the hearing was not harmless because it deprived the husband of an opportunity to argue the merits of his exceptions.

"On August 16, 2012, a family law master mailed

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copies of a report and recommendations for a *pendente lite* order to counsel for Christopher Elliott, "Husband" or appellant; and Kena Raquel Custage Elliott, "Wife" or appellee. Husband's counsel timely filed exceptions to the recommendations and requested a hearing, but counsel mistakenly captioned the exceptions with an incorrect case number. On September 11, 2012, the Circuit Court, perceiving no exceptions filed, entered a *pendente lite* order adopting the master's recommendations. Husband filed a motion to vacate the *pendente lite* order, which the court denied. Husband noted this appeal, challenging the denial of his motion to vacate.

For the reasons stated below, we deny Wife's motion to dismiss; we reverse the ruling which denied the motion to vacate the *pendente lite* order; we vacate the *pendente lite* order dated September 11, 2012, and remand the case for further proceedings.

DISCUSSION

Husband contends that the court violated his due process rights in rendering a *pendente lite* order adopting the master's recommendations without first conducting a hearing as to his exceptions pursuant to Rule 9-208(i). He concedes that counsel provided the wrong case number when the exceptions were filed, but argues that this Court "has explicitly and repeated[ly] rejected arguments that favor procedural technicalities over the merits of appellate review."

Husband contends that the court's denial of his motion to vacate was an interlocutory order appealable under CJP §12-303, and disputes that dismissal is justified by any shortcomings in the brief and record extract. We agree.

"[D]ismissing an appeal on the basis of an appellant's violation of the rules of appellate procedure is considered a 'drastic corrective' measure." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 202 (2008). We "will not ordinarily dismiss an appeal 'in the absence of prejudice to appellee or a deliberate violation of the rule.'" *Id.* at 202-03.

Even though Husband failed to comply with numerous provisions of the Rules, we will exercise our discretion and address the merits of the appeal. Wife did not demonstrate that she suffered any prejudice due to Husband's violations of the Rules. Additionally, Husband's counsel did not appear to deliberately violate the Rules, nor was Husband's brief and record extract so rife with errors as to render his appeal unintelligible.

Motion to Vacate *pendente lite* order

Turning to the merits, Husband contends the circuit court should have vacated the *pendente lite* order because he had filed (although under an erroneous caption) exceptions to the master's recommendations and a request for a hearing pursuant to Rule 9-208. Husband asserts that permitting the court to issue an order without holding a hearing on his exceptions would violate his due process rights and elevate "form over substance." Wife contends that Husband has not demonstrated that the circuit court abused its discretion. Furthermore, Wife points out that the court was unaware of Husband's exceptions due to his counsel's clerical mistake.

As noted above, we are not considering the merits of the September 11 *pendente lite* order in this appeal. We express no opinion relative to the substance of the September 11 *pendente lite* order. We nevertheless conclude that the circuit court erred in refusing to grant Husband's request for a hearing after the request was brought to the court's attention in the motion to vacate.

Husband cites *Bond v. Slavin*, 157 Md. App. 340 (2004). In *Bond*, Mr. Bond filed motions for a protective order and a restraining order, but his counsel filed them under a different case caption. The court denied Mr. Bond's motions without a hearing. On appeal, we vacated the judgment and remanded for a hearing. We noted: "We do not know why the circuit court denied these motions, but we refuse to infer that the circuit court would impose such an extreme sanction simply because the wrong case number appears on the motions." *Id.* at 355. "It is for the circuit court to (1) hold the hearing to which the parties are entitled, and (2) provide an explanation for its rulings so that any aggrieved party will have an opportunity for meaningful appellate review." *Id.*

More recently, in *Cave v. Elliott*, 190 Md. App. 65, 75 (2010), a motion had been hand-delivered to a clerk of the circuit court and time-stamped as timely received. We concluded: "The fact that the caption of the motion incorrectly stated the name of the court *and the docket number* does not alter the effectiveness of its filing."

In this case, Husband timely filed exceptions to the master's recommendations and requested a hearing. Additionally, Husband sent a copy of his exceptions to Wife and ordered a transcript of the *pendente lite* hearing. Husband requested — both in the title of the exceptions document and in a separate "Request for Hearing" — a hearing on his exceptions, pursuant to Rule 9-208(i), which states, in pertinent part: "The court may decide exceptions without a hearing, *unless a request for a hearing is filed with the exceptions* or by an opposing party within ten days after service of the exceptions." In the motion to vacate the *pendente lite* order, Husband conceded that the exceptions had been filed under the wrong case number, but asked the court to "[s]et a hearing" on the exceptions he had filed on August 27, 2012. He was clearly entitled to such a hearing under Rule 9-208(i). As the Court of Appeals has stated, if a party timely notes exceptions to a master's recommendations, "the court must hold a hearing on them, if a hearing is requested." *O'Brien v. O'Brien*, 367 Md. 547, 555 (2002).

Once a party proves error on the part of the circuit court, then the party must also persuade us that the error was not harmless in order to merit reversal. An error is not harmless if the complaining party suffered prejudice. *Barksdale v. Wilkowsky*, 419 Md. 649, 658 (2011).

There is no bright line test as to prejudice in cases where the circuit court failed and/or refused to hold a required, properly requested hearing. Having concluded that Husband was entitled to a hearing on his exceptions, we are satisfied that the error was not harmless because Husband was never provided an opportunity to argue the merits of his exceptions at a hearing as contemplated by Rule 9-208."

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

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*Aimee Ellen Gillis v. Mark R. Leslie**

CUSTODY: MODIFICATION: MATERIAL CHANGE IN CIRCUMSTANCES

CSA No. 1461, Sept. Term 2012. Opinion by Thieme, Raymond G., Jr. (Retired, Specially Assigned). Filed Sept. 26, 2013. Unreported. Appeal from Frederick County. Affirmed. RecordFax #13-0925-00, 19 pages.

The mother's improved health and stability, combined with the children's being a little older, were sufficiently material changes to warrant consideration of a custody modification; however, the court did not abuse its discretion in ultimately declining to modify custody but expanding the mother's visitation schedule; nor did it abuse its discretion in denying a motion for a child sexual abuse evaluation in the absence of any objective evidence of sexual abuse.

"Aimee Ellen Gillis appeals from the custody and visitation orders entered on August 4, 2012 and November 28, 2012. The court ordered that Mark R. Leslie, appellee, shall continue to have legal and physical custody of the couple's two minor children and established a summer visitation schedule for appellant. The second order established a school year visitation schedule. We affirm the judgments of the circuit court.

I.

A. Material Change of Circumstances

Neither party disputes that there was a material change of circumstances in this case. Appellant testified that she agreed to the terms of the initial custody arrangement in part, because of her financial situation, her health condition at the time, and the recent death of her father. After hearing testimony from appellant, appellant's oncologist, and the custody evaluator, the court found that appellant's improved health, appellant's increased stability, and the children being a little older, collectively, constituted a sufficient change in circumstances to satisfy the first prong of the test. We conclude that the factors considered by the court were material, in that they relate to significant changes that could possibly affect the welfare of the children, and, therefore the court did not err by finding that there was a material change in circumstances.

B. Modification of Custody and/or Visitation

The judge found that while there was a sufficient change in circumstances to warrant review, a change in custody at that point in time was not in the children's best interest. First and foremost, the court found that there was no evidence that appellee abused either of the children. The court expressed concern that if custody was granted to appellant, there would be no way to know "what [would] come next in terms of those suspicions." In that regard, the judge was not satisfied that he saw good behavior from either parent, but conveyed his belief that children need both their parents and found that it was in the children's best interests to have expanded unsupervised visitation with appellant.

The court heard all the testimony and evidence presented over the course of the two- day *pendente lite* hearing and the three-day merits hearing and had the opportunity to judge the credibility and the demeanor of both parents. In reaching a final custody determination, the court considered numerous factors, which included: the fitness and stability of the parents, the children's current living environment, the influences that each parent would exert on the children, and the moral well-being of the children. The court also noted the volatile history between the parties, which reasonably explains why the court did not grant joint custody. The court substantially increased appellant's visitation with the children from one seven-hour day every Sunday, under the *pendente lite* order, to overnight visits every weekend over the summer and three out of four weekends during the school year.

We conclude that the factual findings were not clearly erroneous and that the court's decision was based on sound principles of law. The court did not abuse its discretion in awarding appellee continued sole legal and physical custody of the children, nor did it abuse its discretion in granting expanded visitation to appellant.

II.

Next, appellant contends that the trial court erred by failing to comply with this Court's 2011 mandate during the remanded custody proceedings. Specifically, appellant argues that based on this Court's mandate, the trial court was "duty-bound" to follow the visitation schedule established by the September 18, 2009 consent agreement.

This Court's mandate in no way directed the trial court to reinstate the provisions of the September 18, 2009 custody agreement. The trial court properly followed this Court's mandate by vacating the protective order and allowing appellant to present testimony of domestic abuse.

III.

Finally, appellant argues that the court abused its discretion by denying her motion for a child abuse and child sexual abuse evaluation. Appellee responds that the court did not abuse its discretion by ordering "an updated custody evaluation rather than ordering another sexual abuse examination." Appellee contends that there was "ample evidence to support that another forensic exam was unmerited" and that Dr. Snyder was qualified to perform the evaluation.

Appellant filed a motion for child abuse and sexual child abuse evaluation on October 4, 2010, before the decision in the previous appeal was rendered and prior to the March, 2011 *pendente lite* hearing. Appellant asked the court to appoint Joyanna Lee Silberg, a specialist in the field of child abuse, to conduct a sexual abuse evaluation of the children. The court considered, but ultimately denied appellant's motion and instead reappointed Dr. Snyder as the evaluator to either complete a new evaluation or update her previous report from 2009. The court explained:

"I'm perfectly content for Dr. Snyder to conduct that evaluation, um, Dr. Snyder is a professional. If she believes there's a sexual component that needs to be looked at beyond her capability, uh, she will refer that, I have no doubt."

Dr. Snyder testified at both the March, 2011 *pendente lite* hearing and at the June, 2012 merits hearing that while she was aware of the allegations that appellee had

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sexually abused the children, she found no evidence of abuse in either evaluation. At the June 2012 trial on the merits, after hearing all the evidence presented in the case, the judge concluded: "Nobody is going to say that the children were abused… I think over the course of time, it's clear to me that I couldn't find it by even a preponderance of the evidence. I can't find a scintilla of evidence."

The court, therefore, did not abuse its discretion in denying appellant's motion for child sexual abuse evaluation when there was no objective evidence of sexual abuse presented to the court."

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

*In re: Abraham K.**

CINA: CHANGE IN PERMANENCY PLAN: VISITATION

CSA No. 0098, Sept. Term 2013. Opinion by Hotten, J. Filed Oct. 1, 2013. UnreportedAppeal from Montgomery County. Affirmed. RecordFax #13-1001-00, 25 pages.

Despite the father's progress, the circuit court did not abuse its discretion by changing the child's permanency plan to non-relative adoption, given concerns regarding the parent-child relationship and the length of time in foster care; also, the court did not abuse its discretion in changing visitation from weekly unsupervised visits to supervised visits every other week, even though the father was not suspected of abuse or neglect.

"This appeal arises from a decision of the juvenile court to change the permanency plan for minor child, Abraham K. from reunification with appellant-father, Crepson K. ("Father"), to adoption by a non-relative and to adjust Father's visitation schedule with Abraham from unsupervised visits once a week to supervised visits twice a month. Abraham was determined to be a CINA shortly after birth and was subsequently placed in foster care. The Montgomery County Department of Health and Human Services ("the Department") eventually recommended adoption by a non-relative because of concerns regarding Father's parenting skills and the length of time that Abraham had been in foster care.

Father noted an appeal.

DISCUSSION

In the instant case, Father's objection to the juvenile court's "reasonable efforts" finding is a preliminary question to whether the juvenile court abused its discretion in changing the permanency plan from reunification to adoption by a non-relative. Therefore, we will review this issue first.

Efforts at Reunification

As a threshold matter, the Department argues that the issue of whether it made reasonable efforts towards reunification is not properly preserved for appeal. We disagree. This was an issue raised by the Department and decided by the juvenile court. Thus, it is properly preserved for our review.

Father argues that "[a]t trial, the Department, in its presentation, and the [juvenile court], in its findings and written order, did not detail any reasonable efforts made by the Department in furtherance of the sole plan of reunification." Father's contention has no basis in the record.

The juvenile court found that the Department made the following "reasonable efforts" to achieve reunification:

A. Regular face to face contact with Abraham during the visits in his licensed foster home;

B.Transportation of Abraham weekly, often in evenings, to and from visitation with his father;

C. Maintained communication with Abraham's foster parent to coordinate visits and other appointments;

D. Communicated with staff at [St. Luke's] to confirm [Father]'s participation in services and his progress with meeting his goals;

E. Discussed with [Father] the expectations for reunification with Abraham;

F. Frequent contact and attempted contact with [Father] to schedule appointments and visitation with Abraham that fits into his schedule;

G. Arranged for and coordinated a parent-child assessment through the [Center];

H. Provided transportation for [Father] to attend scheduled appointments with the [Center] for completion of the parent-child assessment; and

I. Made arrangements to inspect [Father]'s new residence after he informed the Department of the move to the new residence.

This case is clearly distinguishable from *James G.* While in that case the Department made a single referral, here the Department made numerous efforts to provide direct services to Father and to coordinate with community service providers. Ms. Kelly indicated that she was in continuous contact with St. Luke's, a service that was able to secure both housing and employment for Father. However, the most important distinction between *James G.* and the instant case is that in *James G.,* the services that the Department failed to provide would have addressed its concerns about reunification. Here, the Department's concerns were not as simple as lack of housing or employment. Its reasons for modifying the permanency plan were (1) Father's mental health problems; (2) the worsening attachment between Father and Abraham; and (3) the length of time that Abraham had been in foster care. Regarding the first issue, Father was already receiving individual therapy. The Center's report concluded that the second issue did not have a solution. Finally, the Department was clearly unable to address the last issue. The Department was not able to offer any more services. Thus, the juvenile court did not err in finding that the Department made reasonable efforts towards reunification.

Changing the Permanency Plan

Father contends that the juvenile court erred when it modified Abraham's permanency plan from reunification with him to adoption by a non-relative. His argument is predicated on both the manner in which the juvenile court applied the law and its ultimate conclusion.

— Legal Error

Father alleges that the juvenile court did not afford sufficient weight to his rights as a parent. This contention has no merit.

The record indicates that the juvenile court considered the correct statutory scheme in altering Abraham's

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permanency plan. The juvenile court did not favor ". . . the foster parents' legally unprotected interests in raising the child over the father's liberty interest[,]" as Father avers. Instead, it focused where it was required to: on Abraham's best interests.

Contrary to Father's contention, a juvenile court cannot focus on the parent's interests to the detriment of their child. *In re Adoption of Ta'Niya C.*, 417 Md. 90, 114-15 (2010). "The ultimate focus of the juvenile court's inquiry must be on the child's best interest[,]" instead of what the parent may have done to aid reunification. *Id.* at 116.

Here, the juvenile court acknowledged that Father loved Abraham and was making an effort at reunification. As in *Adoption of Ta'niya C.*, this is a situation where consideration of the parent's efforts at reunification was simply not as important as concern for other circumstances affecting the child's best interests. Therefore, the juvenile court correctly applied the governing statutes in making its determination.

— Error in Ultimate Conclusion

Father further contends that, because he substantially complied with the Department's recommendations, the juvenile court abused its discretion by changing the permanency plan from reunification to adoption by a non-relative. Specifically, he argues that the Department should have assigned more weight to his progress.

By the time of the February 15, 2013 permanency planning hearing, Father had secured employment and housing. This remedied two concerns that the Department had when Abraham was born. However, the Department had developed new concerns: (1) the lack of attachment between Abraham and Father, and (2) the length of time that Abraham had been in foster care. The Center's report concluded that the first issue could not be remedied, while the second issue could only worsen. Again, unlike the case in *James G.*, where the Department was able to provide solutions to the problems preventing reunification, here there were no available solutions. Therefore, the juvenile court did not abuse its discretion by abandoning reunification.

II.

Finally, Father contests the juvenile court's decision to modify his visitation with Abraham from unsupervised visits once a week to supervised visits once every two weeks.

We have established that, although visitation is a privilege that "may [not] be easily denied," it "must yield when inconsistent with the best interest of the children." *In re Barry E.*, 107 Md. App. at 220; *accord In re Billy W.*, 387 Md. 405, 447 (2005). While the legislature has created an affirmative obligation to modify visitation if abuse or neglect is suspected, Fam. Law § 9-101, there is no indication that a juvenile court abuses its discretion if it modifies visitation without such suspicion. Juvenile courts are only required to consider the best interests of the child in determining visitation. *See Billy W.*, 387 Md. at 447.

At the hearing, Father and counsel for Abraham requested that visitation remain weekly, while the Department recommended that it be reduced to once a month. The juvenile court turned to Ms. Kelly and asked for her recommendation. She indicated that supervised visits once every two weeks would be in Abraham's best interests because it would allow him to gradually adjust to less time with Father.

Father alleges that adopting Ms. Kelly's recommendation was improper because the juvenile court did not exercise its discretion. We disagree. The record indicates that the juvenile court considered the positions of each party before receiving Ms. Kelly's recommendation. In adopting her opinion, the juvenile court stated that it was acting in Abraham's best interest, as required by law. Therefore, there was no abuse of discretion."

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

*In Re: Adoption/Guardianship of Landen W. and Hayden H.**

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: CONSENT

CSA No. 2736, Sept. Term 2012. Opinion by Kehoe, J. Filed Sept. 13, 2013. Unreported. Appeal from Anne Arundel County. Affirmed. RecordFax #13-0913-01, 26 pages.

The mother's consent to termination of her parental rights was valid, pursuant to Fam. Law Art. §§5-320 and 5-321, based on the totality of the advice she was given and the terms she consented to in writing and on the record in court. While the statutes do not anticipate a hybrid approach to consent, neither do they prohibit it.

"Tia W., the mother of Landen W. and Hayden H.C., appeals from a judgment of the juvenile court, terminating her parental rights and granting guardianship of Landen and Hayden to the Anne Arundel County Department of Social Services with the right to consent to their adoption.

Because we conclude that Ms. W.'s consent was valid, we will dismiss her appeal because she is not entitled to appeal from a judgment to which she consented. *See In re Nicole B.*, 410 Md. 33, 64 (2009).

DISCUSSION

Section 5-301 et seq. of the Family Law Article governs petitions for guardianship and the adoption of a minor child committed to a local DSS as CINA. One of the purposes of the subtitle, as identified in FL § 5-303(b), is to "protect parents from making hurried or ill-considered agreements to terminate parental rights." FL § 5-303(b)(4).

Sections 5-320 and 5-321 set out procedural safeguards aimed at achieving that purpose. Section 5-320(a)(1)(iii) states that, where parental consent is required for a court to grant the guardianship of a child, a parent can either be deemed to have consented or affirmatively consent. A parent is deemed to have consented to the termination of his or her parental rights upon his or her "failure to file a timely notice of objection after being served

with a show-cause order in accordance with [FL §5-301 *et seq.*]". A parent can affirmatively consent either:

A. in writing; [or]

B. knowingly and voluntarily, on the record before the juvenile court…

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Section 5-321 sets forth specific information which must be disclosed to a consenting parent and procedures which must be followed in order for a consent in writing or a consent on the record to be valid. Specifically, § 5-321(a) provides:

(2) Consent to guardianship entered into before a judge on the record shall include a waiver of a revocation period…

As we see it, the dispositive issue in this case is whether Ms. W. received the information and protections required by FL § 5-321 during the August 22, 2012 hearing. To answer this question, we look to §§ 5-320 and 5-321 of the Family Law Article.

From the plain language of FL §§ 5-320 & 5-321, it is clear that the General Assembly did not contemplate that a parent would use a method of consent combining written and on the record components. Importantly, though, the language of these provisions also does not explicitly prohibit a parent from employing such hybrid consent.

We next conclude that the process employed in this case fulfilled the purpose of §§ 5- 320 and 5-321. As previously discussed, these sections aim to "protect parents from making hurried or ill-considered agreements to terminate parental rights." FL § 5-303(b)(4). The statutes achieve this purpose by setting forth requirements which must be met and which aim to ensure that a parent makes a knowing and voluntary decision as to whether to consent to the termination of his or her rights.

We conclude that, whether in writing or in the open proceeding before the court, Ms. W. received all the information required by FL § 5-321. Before the court's voir dire, Ms. W. received and signed the instruction sheets attached to the front of her written consents for Hayden and Landen.

Ms. W., after receiving advice of counsel, signed both instruction sheets, indicating by her signature that she had read and understood the information contained therein. The signed instruction sheets and consents were introduced as exhibits, such that the court knew that Ms. W. had notice, pursuant to FL § 5-321(a)(3)(iii), of the search rights of adoptees and parents under FL § 5-359, the search rights of adoptees, parents, and siblings under § 5-4B- 01 *et seq*.; and her right to file a disclosure veto under FL § 5-359.

Ms. W. and the Adoptive Parents also entered into a post-adoption agreement, which was also before the court, wherein they specifically agreed that, in order to facilitate a positive relationship between Ms. W. and the Adoptive Parents, Ms. W. and the Adoptive Parents would provide each other with a valid address, telephone number, and email address to facilitate contact and would cooperate to facilitate at least four visits a year between Ms. W. and the children, among other things. Under these "open adoption" circumstances, where Ms. W. and the Adoptive Parents agreed to contact and visitation, Hayden and Landen would not need to search for Ms. W. and there would be, practically speaking, no reason Ms. W. would have filed a disclosure veto. And, the court knew that Ms. W. had made the decision to enter into an open adoption arrangement with the Adoptive Parents.

Finally, the court conducted an inquiry in order to determine whether or not Ms. W. knowingly and voluntarily consented to the termination of her parental rights and the guardianship. Ms. W.'s sworn responses to the court's questions confirmed that she understood the nature of the proceedings, that her parental rights would be terminated as a result of her consent, and that the post-adoption agreement would govern her post-adoption contact with Hayden and Landen. Ms. W. also testified that her decision making ability was not impaired by the effect of any medication, alcohol, other substances, or mental illness. She stated that her consent was not coerced and verified that she had had assistance of counsel to make her decision. Ms. W. also stated that she understood that, by consenting on the record, she waived her right of revocation, satisfying FL § 5-321(a)(2).

The third element of the *Koste* analysis, 204 Md. App. 585-86, requires us to consider the consequences of our proposed construction of FL §§ 5-320 and 5-321. We conclude that the purpose of these statutes would not be served by considering what Ms. W. consented to in writing in isolation from what Ms. W. consented to in open court. Both methods of consent, taken together, formed the whole of Ms. W.'s consent and it is that whole which should be considered. Looking at this whole, Ms. W. received the statutory notice and the benefit of the statutory procedures meant to ensure that her consent was knowing and voluntary. Pending instruction by the Court of Appeals as to this issue, we conclude that Ms. W.'s consent was valid pursuant to FL §§ 5-320 and 5-321."

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

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

ADOPTION/GUARDIANSHIP: TERMINATION OF PARENTAL RIGHTS: EXCEPTIONAL CIRCUMSTANCES

CSA No. 0163, Sept. Term 2013. Opinion by Zarnoch, J. Filed Sept. 25, 2013. Unreported. Appeal from Worcester County. Affirmed. RecordFax #13-0925-01, 11 pages.

In terminating a mother's parental rights, the circuit court properly considered the level of progress she had made in recovering from drug use, her continued inability to provide a safe home for the child, the termination of her parental rights with regard to the child's sibling, and the child's demonstrated bond with her foster parents.

"Jennifer B. appeals from an order which terminated parental rights to her daughter, Lydia. The order also granted guardianship to the Worcester County Department of Social Services with the right to consent to adoption or long-term care.

FL §5-131(c) and (d)

Ms. B. contends that the court abused its discretion when it assumed that Lydia would be adopted by her foster care providers. She admits that the court properly considered the factors in FL §5-131(c) and (d) but argues that it improperly went beyond what was required in the statute when it compared Lydia's well-being in the custody of Ms. B. with her well-being with the C.'s. Ms. B. argues that it is impermissible to consider potential adoptive resources during a termination of parental rights proceeding. Additionally, Ms. B. contends that the court erred by placing dispositive weight on the length of

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time Lydia had been in the C.'s care and the resulting bond Lydia formed with them. She argues that the length of time cannot be the only factor for determining that a termination of parental rights is in Lydia's best interest, and that the existence of a bond with foster care providers is not dispositive.

Under FL §5-323(b), a court can terminate parental rights if it finds clear and convincing evidence that termination is in the child's best interest. The court must make specific factual findings on the factors listed in this statute, with primary consideration to the child's health and safety. FL §5-323(d). The court must review all the factors and consider them together; it is not required to weigh any above the others.

The factors that Ms. B. argues went beyond the statute are in fact required considerations. Under §5-323(d)(4)(i), a court must consider the child's ties with individuals who may affect the child's best interests significantly, including the child's siblings and others. The court found that Lydia "has a close attachment with her brother Shawn; she has resided with Shawn and the C.'s on a full-time basis for her entire life. Likewise, the child is closely bonded with the three other children residing the C.'s home. The C.'s and their children, including [Lydia's] biological brother, are the only family that Lydia has ever known, and she is fully integrated therein."

The court went on to discuss Lydia's emotional ties to the C.'s, who clearly fall in the category of "others who may affect the child's best interests significantly." The court found that the results of the bonding study, which evaluated Lydia's bond with the C.'s and Ms. B., were relevant to consider the child's ties. The court did not put dispositive weight on a bare comparison between the C.'s results and Ms. B.'s results.

Additionally, under §5-323(d)(4)(ii), a court needs to consider the child's current adjustment to community, home, placement, and school. Here, the court looked to Lydia's current placement to show that she is well-adjusted to her home with the C.'s. The Court did not compare this to Ms. B's circumstances. We agree with the Department and Counsel for Lydia that a court may consider a child's pre-adoptive placement to "assess the reality" of the child's circumstances. *See In re Adoption/Guardianship of Jayden G.*, No. 84, Sept. Term 2012, __ Md. __, slip op. at 60 (July 16, 2013) (Citation omitted). Ms. B. is correct in arguing that the length of time a child spends with a foster family is not sufficient on its own to terminate parental rights. *See In re Adoption/Guardianship of Alonza D.*, 412 Md. 442, 460 (2010). However, the court specifically stated that the "bond has been strengthened not just by the length of time that the child has been in the care of the C.'s, but also by the quality and loving nature of the care."

Exceptional Circumstances

Ms. B. contends the court abused its discretion in finding that exceptional circumstances existed to support the termination of parental rights. She argues that she has addressed or is currently addressing issues that necessitated the removal of her children from her care. She asserts that she has been clean of drugs since June 2011, has completed an intensive outpatient program, currently takes medications prescribed by a psychiatrist and attends various types of therapies. She argues that the court's finding is based on an unfounded fear of relapse.

The Department contends that exceptional circumstances do make a continued relationship with Ms. B. contrary to Lydia's best interest. The Department argues that though there is recent progress, Ms. B. is still unable to provide Lydia with a safe and stable home. The Department points to Ms. B.'s pattern of neglect and lack of credibility concerning her drug use.

Counsel for Lydia similarly contends that there was sufficient evidence to support the finding that Ms. B.'s recovery was not timely enough or likely enough to continue.

Under FL §5-323(b), a court must expressly determine whether unfitness of a parent or exceptional circumstances make a continuation of the parental relationship detrimental to the best interests of the child. *See In re Adoption/Guardianship of Rashawn H.*, 402 Md. at 501. The factors in the statute also serve "as criteria for determining the kinds of exceptional circumstances that would suffice to rebut the presumption favoring continued parental relationship and justify termination." *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. at 104. Notably, the inability to care for other children is probative of the ability to care for the child at issue. *In re William B.*, 73 Md. App. 68, 77 (1987).

The court found that exceptional circumstances existed based on well-reasoned findings relating to each factor of the statute coupled with the demonstrated bond between Lydia and the C.'s. The court acknowledged that Ms. B. had made "reasonable efforts to address her main needs in an earnest attempt to reunify with Lydia," but that "[r]egrettably, the level of adjustment is insufficient and not expeditious enough to make it in Lydia's best interest to be placed with Mother." Additionally, the court found Ms. B. lacked credibility regarding her drug use, relapses, and job prospects. The court pointed to the recent termination of Ms. B.'s parental rights to her son, Shawn.

Under all the circumstances, we conclude that the court did not abuse its discretion in terminating Ms. B.'s parental rights to Lydia."

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

*In Re: Caleb T.**

CINA: CHANGE IN PERMANENCY PLAN: REASONABLE EFFORTS

CSA No. 0221, Sept. Term 2013. Unreported. Opinion by Hotten, J. Filed Oct. 1, 2013. RecordFax #13-1001-02, 20 pages. Appeal from Calvert County. Affirmed.

The change in the child's permanency plan from reunification to adoption by a non-relative was proper when the parent failed to overcome a substance abuse problem and the relatives chosen as prospective guardians did not cooperate in the placement process.

"We are asked to determine whether the juvenile court abused its discretion in changing the permanency plan for Caleb T. from reunification to adoption. We shall

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affirm the judgment.

DISCUSSION

Reunification with Ms. H.

Preliminarily, we note that appellant does not contend that Caleb's permanency plan should be reunification with him. His argument challenges the circuit court's denial of reunification with Ms. H., Caleb's mother, arguing that it erred by changing the permanency plan from reunification with Ms. H. because she demonstrated compliance with the service agreement. In contrast, the Department asserts first, that appellant lacked standing to appeal for reunification with Ms. H. when she herself chose not to appeal, and second, the Department and Caleb, argue that the circuit court properly determined that Ms. H. was not progressing towards reunification.

We will first address the Department's standing argument. In *In Re Nicole B. and Max B.*, 410 Md. 33 (2007) [hereinafter *Nicole B.*], the Court of Appeals addressed an issue similar to the instant case.

In the instant case, like in *Nicole B.*, appellant never sought custody of Caleb at the permanency hearing. He supported the plan of reunification with the mother with a concurrent plan of relative placement. The circuit court found that it was not in the best interest of Caleb to be reunified with Ms. H. because of her failure to comply with the service agreement and her failure to overcome her substance abuse problem. Ms. H. chose not to appeal. She was represented by counsel and if she desired to appeal, she was able to do so. Appellant may not now advance an appeal asserting claims that Ms. H. should have asserted on her own behalf. Accordingly we conclude that appellant does not have standing to challenge the denial of a permanency plan of reunification with Ms. H

Relative Placement Plan

Next, appellant contents that the Department did not make reasonable efforts to achieve the permanency plan of placement with a relative. The Department and Caleb respond that the Department did make efforts for relative placement, but Joyce M. was not a viable and stable option.

When developing an out of home placement, Maryland requires the Department to consider the placements in the order [specified in] §3-823(e) of the Courts and Judicial Proceedings Article.

In *In re Adoption/Guardianship of Cross H.*, 200 Md. App. 142 (2011) this Court held that the circuit court did not err when refusing to place a child with his paternal grandmother.

The instant case is similar. Here, due to substance abuse and failure to comply with the Department's service agreement, neither of Caleb's parents were suitable for placement. At the initial request of Ms. H., the Department considered Joyce M. and subsequently placed Caleb with her. The Department expected Caleb to remain with her, but seven weeks later, she requested he be moved because she could no longer care for him. During the permanency hearing, Joyce M. explained that when Caleb was initially placed with her, Caleb's grandmother, her daughter, was living with her and helping care for him. But her daughter later moved, leaving Joyce M. to care for Caleb alone. At the time, Caleb was an active two year old and Joyce M. was sixty-eight years old. Joyce M. testified that it was overwhelming to care for a child that young.

The Department in the case at bar went further than the department in *Cross H.* Here, not only did it perform an investigation into whether the paternal great grandmother would be suitable, it determined that she was in fact suitable and placed Caleb with her. When Joyce M. requested that Caleb be removed, the Department did so. Furthermore, after Joyce M. was found to no longer be a suitable placement, the Department pursued other family members. The paternal grandfather offered himself as a placement option, however, after he stopped visiting Caleb, he was no longer seen as a suitable placement.

We conclude that the Department made reasonable efforts to achieve relative placement. Within ten days of him being adjudicated a CINA, the Department placed Caleb with a relative, at the request of Ms. H. It was only after Joyce M. indicated that she could no longer care for him that he was placed in a non relative foster home. Later, while continuing to work with both parents, the Department considered and initiated the process of reviewing the paternal grandfather for placement. The paternal grandfather did not cooperate in the process and therefore was not a suitable placement for Caleb. At the permanency hearing, Joyce M. again offered herself as a placement, asserting that her situation had changed. However, there was no certainty that placement with Joyce M. now would be any different than it was the first time.

The Department used reasonable efforts, over the course of sixteen months, attempting relative placement before it recommended that the plan be changed to adoption. As required by the factors outlined in § 3-823 of the Courts and Judicial Proceedings Article, it first attempted reunification with the parents. When the parent's exhibited non-compliance, the Department accepted a plan of reunification with a concurrent plan of placement with a relative. At least two relatives were considered for placement, but neither appeared to serve the best interests of Caleb. Accordingly, the circuit court did not err in changing the permanency plan from relative placement to adoption."

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

*Alaatum V. Nchami v. Prudence A. Mancho**

CHILD SUPPORT: ABOVE-GUIDELINES CASE: EXTRAPOLATION

CSA No. 2112, Sept. Term 2012. Opinion by Krauser, C.J. Filed Sept. 13, 2013. Unreported. Appeal from Prince George's County. Affirmed. RecordFax #13-0913-00, 12 pages.

In an above-guidelines case, the court considered the parties' financial positions and did not err or abuse its discretion in using a computer program that extrapolated the support obligation based on the amounts set forth in the guidelines.

"The Circuit Court ordered Alaatum V. Nchami, appellant, to make monthly child support payments, in the

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amount of $1,939, to the mother of two of his children, Prudence A. Mancho, appellee. After the court denied both Mr. Nchami's motion for reconsideration of that order and his motion for a new trial, he noted this appeal, presenting four issues for our review, which are reducible to one: Did the court abuse its discretion when it ordered him to pay Ms. Mancho $1,939 in monthly child support?

DISCUSSION

The schedule of basic child support obligation set forth in Section 12-204(e), commonly referred to as "the guidelines," is based on a formula using the parents' monthly "combined adjusted actual income" and the number of children due support. Underlying the guidelines is the premise "that a child should receive the same proportion of parental income, and thereby enjoy the standard of living, [that] he or she would have experienced had the child's parents remained together." *Voishan,* 327 Md. at 322.

If the parent's combined adjusted monthly income exceeds $15,000 and thus is "above-guidelines," as here, the statute provides that "the court may use its discretion in setting the amount of child support." Family Law, § 12-204(d). In doing so, the court must bear in mind that "the rationale of the guidelines still applies." *Malin, supra,* 153 Md. App. at 410-411.

Thus, although the guidelines are not strictly applicable in an above-guidelines case, extrapolating from the guidelines is frequently employed as a guide in determining child support where the combined monthly income exceeds the guidelines. The Court of Appeals in *Voishan* elaborated: "Extrapolation from the schedule may act as a 'guide, but the judge may also exercise his or her own independent discretion in balancing 'the best interests and needs of the child with the parents' financial ability to meet those needs.'" 327 Md. at 329 (internal footnote omitted; quoting *Unkle v. Unkle*, 305 Md. 587, 597 (1986)).

The *Voishan* Court further stated that "the 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." 327 Md. at 331-32. "Beyond this," the Court noted, "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." *Id.* at 332.

An award of child support in an above-guidelines case will not be disturbed on appeal absent a legal error or a "clear abuse of discretion." *Id.* at 331. When calculating a child support obligation in an above-guidelines case, "the court may employ any 'rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it.'" *Mailin, supra,* 153 Md. App. at 410.

Mr. Nchami contends that the court erred in setting his monthly child support obligation at $1,939 because, he claims, the court failed to "balance the best interests and needs of the child[ren] with the parties' financial ability to meet those needs." He asserts that the court's order "is silent with regard to the issues and factors that must be considered in this above-guideline child support case," including the "reasonable expenses" of the children and the "parties' financial circumstances." Rather than consider "the relevant factors," the court, Mr. Nchami claims, "focused solely on the child support calculation and its extrapolation of the SASI calculation when determining the above-guideline support in this matter." *[fn4: SASI-Calc is a computer software program used to determine child support obligations based on the parents' combined monthly income model. The program is utilized when the parents' combined monthly income exceeds $15,000, which is currently the highest level specified in the schedule of basic child support obligations in Family Law, § 12-204(e). The program "extends" the figures in the statutory schedule to extrapolate what the guideline would be when the parents' combined monthly income is over $15,000. See, w w w .sasi-calc.com .]*

We are not persuaded that the court abused its discretion in awarding Ms. Mancho $1,939 in monthly child support, a figure extrapolated from the statutory child support schedule. In excluding private school tuition from its child support calculations, and in declining to award either party attorney's fees, the court noted that both parties "are struggling to meet their existing financial obligations." Thus, the record is clear that the court was well aware of their financial circumstances and obviously mindful of their adjusted combined monthly income of $19,483.

When determining basic child support, a trial court is not bound by the parents' estimates of the children's expenses; indeed, the guidelines were established, in part, because parents often underestimate the true cost of supporting a child. *Voishan, supra,* 327 Md. at 333 n.6. Thus, the model upon which the guidelines is based includes the amount a typical intact household with a specified income spends on children of that household. *Id.* at 322-23.

Here, having considered the parties financial circumstances, the court, in its words, chose "to use its discretion in using the formula in the SASI to calculate child support." We, therefore, are not convinced that the court mechanically extrapolated from the guidelines to arrive at the child support obligation in this case. Finding no clear abuse of discretion, we affirm."

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

*Mary Staab v. Philip Stanley**

CHILD SUPPORT: ABOVE-GUIDELINES CASE: HALF-SIBLINGS' PRESENCE

CSA No. 2624, Sept. Term 2011. Unreported. Opinion by Sharer, J. Frederick (Retired, spec. assigned). Filed Sept. 12, 2013. RecordFax #13-0912-04, 10 pages. Appeal from Anne Arundel County. Affirmed.

In an above-guidelines case, the court has wide latitude to determine the amount of child support and may use any method that promotes the guidelines' general objectives and

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considers the unique facts of each case. Although a downward departure based solely on the presence of half-siblings is not permitted, the court did not err or abuse its discretion in considering the presence of half-siblings as one factor affecting appellee's ability to pay.

"Mary Staab appeals from an order which directed appellee, Philip Stanley, to pay $2,120 in child support for their child, Catherine Staab. Appellant presents two questions:

1. Did the trial judge commit reversible error by departing from the extrapolated child support guideline amount of $4,620 per month by $2,500?

2. In the circumstances, did the trial judge abuse his discretion by awarding child support retroactive to July 1, 2011, rather than the filing date, March 4, 2011?

DISCUSSION

I.

Appellant argues that the court erred in not ordering appellee to pay $4,620 in child support. Specifically, she argues that the court should have included extraordinary medical expenses in its calculation according to Family Law §12-204 and that an award of child support less than fifty percent of extrapolated guidelines was inequitable.

The court may exercise its discretion in setting the amount of child support in above guideline cases. The court must balance the interests of the child against the parents' financial ability to meet their obligations. *Walker v. Grow*, 170 Md. App. 255, 267, *cert. denied*, 396 Md. 13 (2006). "Several factors are relevant in setting child support in an above Guidelines 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[ ].'" *Id.* at 266.

"Extraordinary medical expenses is statutorily defined to mean uninsured expenses over $100 for a single illness or condition. Such expenses include uninsured, reasonable, and necessary costs for orthodontia, dental treatment, asthma treatment, physical therapy, treatment for any chronic health problem, and professional counseling or psychiatric therapy for diagnosed mental disorders." *Bare*, 192 Md. App. at 312.

We begin our analysis by noting that the trial court found appellant's monthly actual income to be $10,877 and appellee's to be $12,211, which combine to give the parents an actual monthly income well above the upper limit of $15,000 per month listed on the child support guidelines. As such, the trial court was afforded discretion in its award of child support. *Richardson*, 209 Md. App. at 17-18.

The court analyzed the situation, balancing Catherine's needs and appellee's ability to meet those needs. As noted, the court asserted three reasons for its determination: 1) appellee has four additional children for whom he is financially responsible, 2) the court feared appellee would be bankrupt if required to pay at the amount appellant requested, 3) if appellee were to declare bankruptcy, he would lose his security clearance and potentially his job, thus producing a massively negative effect on all parties.

We find neither legal error nor abuse of discretion in the ruling. The court properly weighed Catherine's needs against appellee's ability to pay, taking several factors into account. A downward departure in child support awards solely on the basis of the presence of half-siblings in one parent's home is not permitted. *Beck v. Beck*, 165 Md. App. 445, 452 (2005). However, the court listed several factors, including potential bankruptcy and loss of income, in justifying its order. It is in the obvious best interests of all involved that appellee maintain his employment, and thus his ability to pay child support.

The court's order that the parties collaborate to find an alternative placement for Catherine, in addition to comments made during the hearing, indicates that the court believed the Chrysalis' expense of $5,800 per month was unsustainable. The court did not order appellee to contribute toward its payment, out of concern for catastrophic financial consequences. *Bare*, 192 Md. App. at 312

The court clearly implied that the "extraordinary medical expenses" for Catherine's tuition at Chrysalis are unreasonable. Accordingly, the circuit court did not err in failing to include the cost of Chrysalis tuition as an extraordinary medical expense.

Moreover, "a judge is not bound by any rigid mathematical formula but may exercise discretion in determining the contribution that one parent may be ordered to pay toward a child's exceptional tuition expenses." *Dunlap v. Fiorenza*, 128 Md. App. 357, 372, *cert. denied*, 357 Md. 191 (1999). The court exercised its discretion in refusing to order appellee to pay educational expenses it found to be unreasonable. Such discretion is permitted under *Dunlap*.

II.

Appellant's second contention is that the court abused its discretion in not making its award of child support retroactive to March 4, 2011, the date the paternity action was filed. Appellee counters that this issue is properly analyzed under F.L. § 12-101(a)(3), and thus the court had discretion to determine the date of award.

Appellant bases her argument on F.L. 12-101(a)(1), which makes specific reference to a request for child support *pendente lite*. Appellant urges us to overlook this requirement because this case was initially filed as a complaint for paternity.

However, F.L. 12-101(a)(3), covers "any other pleading that requests child support." While appellant could not seek *pendente lite* support while filing a complaint for paternity, that fact is irrelevant. By definition, a complaint for paternity is "any other pleading that requests child support" within the meaning of F.L. 12-101(a)(3). Section 12-101(a)(3) plainly provides that the court *may* award child support from the date of filing.

While the court had discretion to award child support from the date the complaint for paternity was filed, March 4, 2011, it did not abuse its discretion in awarding support retroactive only to July 1, 2011."

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

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*Michael L. Tinelli v. Volha Titovets a/k/a Volha Butkouskaya**

CUSTODY AND VISITATION: MODIFICATION: MATERIAL CHANGE IN CIRCUMSTANCES

CSA No. 2061, Sept. Term 2012. Opinion by Sharer, J. Frederick, J. (Retired, Specially Assigned). Filed Sept. 23, 2013.

Unreported. Appeal from Worcester County. Affirmed.

RecordFax #13-0923-02, 7 pages.

The circuit court did not abuse its discretion by denying a father's motion to modify a custody and visitation arrangement that had been filed a few months earlier, where nothing in the motion indicated that a material change in circumstances had occurred, and where the asserted violations of the order by the mother were not so egregious as to require the court's immediate intervention to protect the children.

"In this, the next chapter of the ongoing dispute between these parties, Michael Tinelli appeals from the November 14, 2012 Order of the Circuit Court, *inter alia* denying his October 5, 2012 Motion for Enforcement and Modification of the terms of the June 21, 2012 Consent Order between himself and appellee, Volha (née Butkouskaya) Titovets. In his *pro se* appeal, Mr. Tinelli challenges the circuit court's denial of his motion, asserting that the court's actions constituted an error of law. Discerning no legal error or abuse of discretion, we shall affirm the judgments of the circuit court.

HISTORY

Since their divorce, Ms. Titovets has retained sole legal custody and primary physical custody of the parties' two minor children, Michael, age 12, and Elana, age 10. Mr. Tinelli was permitted regular visitation with the children in accordance with the terms of the Consent Order, as modified by the court on June 21, 2012.

On October 5, 2012, Mr. Tinelli filed a *pro se* Motion for Enforcement and Modification of Visitation, asserting that Ms. Titovets had failed to comply with the terms of the June 21, 2012 Consent Order. Mr. Tinelli requested that the court order an inspection of the suitability of Ms. Titovits's new home, require Ms. Titovits to attend anger management classes and a counseling program, and modify the existing

Consent Order to implement terms and conditions that were more favorable to Mr. Tinelli in regard to custody, visitation, and child support.

On October 10, 2012, Ms. Titovits filed, through counsel, a Motion for Clarification of Order, stating the parties' differing interpretations of the terms of the June 21, 2012 Consent Order relating to visitation. Ms. Titovits further sought the court's appointment of a Parenting Coordinator.

On October 17, 2012, Ms. Titovits filed a response and counter-claim to Mr. Tinelli's Motion for Enforcement, denying any breach of the terms of the Consent Order. Additionally, Ms. Titovits re-filed a Petition for Contempt, alleging Mr. Tinelli's willful failure to comply with the terms of the Consent Order, the consideration of which had been previously deferred by the court pending resolution of related criminal charges filed against Mr. Tinelli.

Mr. Tinelli responded, filing a Motion to Dismiss Ms. Titovits's Motion for Contempt. Mr. Tinelli filed his own Motion for Contempt, asserting that during the pendency of the previously filed motions, Ms. Titovits had again acted in contravention of the terms for visitation stated in the Consent Order. Ms. Titovits again denied that she had committed any breach of the terms of the Consent Order.

On November 14, 2012, the circuit court issued an Order denying all of the outstanding motions in the instant case except for Ms. Titovits's motion to clarify the terms of the June 21, 2012 Consent Order. Additionally, in lieu of immediately appointing a Parenting Coordinator as requested by Ms. Titovits, the court ordered the parties to attend two mediation sessions to address all outstanding parenting and visitation issues. Mr. Tinelli timely filed the instant appeal on December 14, 2012.

ANALYSIS

Mr. Tinelli asserts that by denying his Motion to Enforce, the circuit court failed to comply with the requirements of the Maryland Code which provide that all parties are bound by the custody determinations made by the court.

We hold that the circuit court did not abuse its discretion by denying Mr. Tinelli's motion to again modify the custody arrangement. The court was very familiar with these parties and their respective concerns after hearing three days of testimony regarding custody and visitation issues only a few months prior to the filing of Mr. Tinelli's motion. The Modified Consent Order filed on June 21, 2012, represented the court's carefully considered judgment as to what visitation schedule would best serve the best interests of the parties' children. Nothing in Mr. Tinelli's October 5, 2012 motion indicates that a material change in circumstances has occurred necessitating a change in the terms of the established Order. Nor are the asserted violations about which Mr. Tinelli complains in his motion so egregious as to require the court's immediate intervention to protect the safety and well-being of the parties' children. *See e.g. Kalman v. Fuste*, 207 Md. App. 389, 408-09 (2012).

The circuit court's Order of November 14, 2012, clarified the terms of the June 21, 2012 Order about which the parties were arguing. The court further required the parties to engage in two mediation sessions, while reserving the possibility that a Parenting Coordinator could be appointed if the parties continued to be unable to resolve their differences.

We conclude that none of the factual findings in the November 14, 2012 Order were clearly erroneous. Moreover, we are persuaded that the circuit court's ruling was founded upon sound legal principles and cannot in any way be characterized as "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re Yve S.*, 373 Md. at 583–84."

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

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