THE DAILY RECORD Maryland Family Law Update

TheDailyRecord.com/Maryland-Family-Law

January 2021 Vol. XXXII, No. 1

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Vol. XXXII, No. 1

TheDailyRecord.com/Maryland-Family-Law

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Baltimore, Maryland 21202
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Maryland Family Law Update (USPS #014-143), published monthly, is a review of events as they affect the practice of domestic relations in law in the state of Maryland published by The Daily Record, 200 St. Paul Place, Suite 2480, Baltimore, Maryland 21202. Annual subscription price $385 (MD residents please add 6% sales tax). Periodicals postage paid at Baltimore, MD. Postmaster, send address change to: The Daily Record, 200 St. Paul Place, Suite 2480, Baltimore, Maryland 21202.

1 Md. Fam. L.U. ___ (2020)

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Tales from the front-lines – COVID-19 and youth in foster care

MARK
STAVE
Child Advocacy

For many of the professionals involved in representing children in foster care, the COVID-19 pandemic has restricted their mobility, social lives, family gatherings and more. Most of these professionals retain their jobs and work from home, collecting sick pay or even disability.

This is not the case for children in foster care. With the pandemic and its associated restrictions, they are weighed down by much heavier burdens.

Here are just a few of their stories as reported by staff who represent them. Their names have been changed to maintain confidentiality.

7 months pregnant needs a bus pass and a Wi-Fi hot spot

Jane, an 18-year-old in the foster care system, is 7 months pregnant and works full time while trying to complete her last year of high school virtually due to COVID-19.

She takes the bus daily to work and attempts to complete her daily homework assignments each night.

She requested her monthly bus pass from her social worker a few months ago and was informed that local department of social services no longer has any bus passes available; she had to pay for the pass herself and await reimbursement, an eight-10 week waiting period.

Jane attempts to complete her homework on her cellphone after requesting the assistance of her caseworker and the school to provide a hot spot.

To this day, she has not received a bus pass, the reimbursement, or the hot spot.

20 years old and profoundly disabled requires educational support services

Prior to the COVID-19 pandemic, Jamal had been receiving services to assist him in his learning program.

Since the pandemic, he has been required to work in his learning program remotely, and has received no additional support services to make online learning a success.

Jamal's disability makes it difficult for him to sit still for more than 15 minutes, interrupting what little value he receives in his remote learning.

While remote learning for someone like Jamal may satisfy technical requirements for his education, his learning disability means he falls significantly further behind every day.

New mother loses five family/friends to COVID-19 or gun violence

Alanna is 19. She gave birth nine months ago. Neither the local department of social services nor her independent living program provide enough funding for herself and her baby.

In April, she lost an uncle to the COVID-19.

The cost of getting to and from the funeral, and the loss of a day's pay reduced by a third the little income that she had saved.

In May, a longtime friend was shot and killed as a bystander; more of her savings were depleted.

After three more family members died of COVID-19 or gun violence in June and July, she was destitute. She sought help from food pantries, and tried to get extra hours of work at her place of employment.

Her case manager attempted to help, but the check that the case manager had requested, would take six-eight weeks.

Friends generously provided money for food and diapers, and her attorney located resources for her deepening sadness and low mood. Despite this assistance, Alanna remains food insecure at the end of each two-week period between stipends.

20-year-old with mental health issues arrested and tests positive for COVID-19

After having been adopted, Charlene was returned to the foster care system as a teenager, as she needed institutional care for mental health services.

After release from the institution, Charlene was returned to treatment foster care. She was subsequently arrested, and while incarcerated, she tested positive for COVID-19.

Now, she is in isolation in the facility without access to mental health services.

21-year-old mother loses job, still waiting for federal funds for unemployment

De'Asia was told that she would be reimbursed by the local department of social services for her training program to be certified as an armed security guard.

After paying for the course, her weapon, and the certification testing, she waited for 11 weeks for her reimbursement. During this period, she was laid off from her current employment due to the Covid-19 Pandemic.

Regular unemployment benefits were not enough to feed herself and her daughter; she needed to use her savings. The promised additional federal funds for unemployment benefits left her hopeful she could replenish her savings.

After three months of repeated calls and emails, she has not received any response or the additional funds.

De'Asia no longer has any savings.

The COVID-19 pandemic has taken its toll on everyone, but for those already vulnerable, such as youth in foster care, the burden has been even greater.

Mark Stave is a staff attorney at Maryland Legal Aid.

Assessing COVID-19's long-term impact on family law practices

By Samantha J. Subin
Special to The Daily Record

SUBMITTED PHOTO
Depositions that once lasted seven hours routinely span two or three hours to prevent Zoom fatigue, says Geoffrey S. Platnick, an attorney and equity shareholder at Shulman Rogers.

In a post-pandemic world, Donna K. Rismiller will offer employees hybrid remote work, while Brian Pearlstein foresees Zoom meetings with clients.

"We'll probably never go back to full time in the office," said Rismiller, a principal at RLG Law.

While far from over, the coronavirus pandemic has altered how family law practitioners are beginning to look ahead at the future of their industry. COVID-19 shifted how practitioners conducted work, pushing meetings, hearings, and trials to video conferencing platforms like Zoom.

While the jury is still out on the overall long-term impact of the pandemic, one thing seems clear: Part-time remote work and video conferencing are here to stay.

Despite early fears, COVID-19 has proven that workers can stay productive within the confines of their homes — in some cases more so than in the office, said Paul Reinstein, a family law attorney at Reinstein, Glackin & Herriott, LLC.

Most of Reinstein's employees came into the office periodically during the pandemic, aside from two workers working seamlessly full-time from home, thanks to technology.

More importantly, these online arrangements benefit busy clients, allowing them to squeeze in meetings between work calls, at-home chores, or a car ride to the grocery store.

"Clients are getting more and more acclimated to having conferences by Zoom," said Reinstein. "It's so much easier than getting in the car and driving to the office."

Online scheduling conferences is another shift attorneys hope to keep in a post-pandemic world. Although courts have yet to rule on the matter, these setups enable clients to save money on attorney fees, which typically included travel and waiting time at the courthouse, said Pearlstein, a family law attorney at Brodsky Renehan Pearlstein & Bouquet.

During COVID-19, these conferences last 10 to 15 minutes, versus an hour or longer pre-pandemic, he added.

"They can put their money toward what really matters in the case rather than spending unnecessary dollars because the attorney is waiting in court," Pearlstein said.

Amid the pandemic, virtual depositions —which have become the norm — are operating more efficiently than they once did, said Geoffrey S. Platnick, an attorney and equity shareholder at Shulman Rogers.

Depositions that once lasted seven hours routinely span two or three hours to prevent Zoom fatigue, Platnick said. Online evidentiary proceedings also require judges, practitioners, and

SUBMITTED PHOTO

"Clients are getting more and more acclimated to having conferences by Zoom," says Paul Reinstein, a family law attorney at Reinstein, Glackin & Herriott, LLC. "It's so much easier than getting in the car and driving to the office."

SUBMITTED PHOTO

Carlo Lastra, a co-chair of Paley Rothman's family law practice, says that not being in court deprives attorneys of picking up clues about how judges handle cases.

SUBMITTED PHOTO

Using video conferencing platforms, attorneys can attend several scheduling conferences in multiple jurisdictions within a day versus two or three statewide pre-pandemic, says Donna K. Rismiller, a principal at RLG Law.

clients alike to be more patient when it comes to technical difficulties.

Because the litigation process takes longer to complete than it did pre-pandemic, parties are also more willing and motivated to reach cooperative resolutions than they once were, he added.

"Too often in the past, family law litigants would get bogged down by the rhetoric and emotionality of

their situations and lose patience for one another; the pandemic has helped ease these tensions," Platnick said. "Now, if we see a judge sitting in a kitchen or the opposing counsel has an Elmo doll on the bookshelf, we can't help but be more tolerant."

Using video conferencing platforms, attorneys can also attend several scheduling conferences in multiple jurisdictions within a day versus two or three statewide pre-pandemic. This setup enables practitioners to accumulate more clients outside of their home base, Rismiller said.

In the long term, remote video conferencing will promote a better work-life balance and allow attorneys — particularly solo practitioners — to check in on minor matters when on vacation without needing to reschedule.

"While it's a slight disruption in their time off, it's a greater disruption if they had to have a continuance of the matter if they aren't available," Pearlstein said.

While attorneys cite the benefits of virtual scheduling conferences, many also say they miss the camaraderie and atmosphere associated with in-person trials.

In court, Carlos Lastra regularly conversed with colleagues and observed how the judge handled matters –– an indicator of how they might rule in his own cases.

"With Zoom calls, you're not being afforded that ability to make those observations," said Lastra, a co-chair at Paley Rothman's family law practice.

Multi-day trials involving cross-examination are also difficult over video conferencing, Pearlstein added.

Although video conferencing hearings generally promote cost-saving for clients, Lasta warns of potential added fees associated with hiring someone to present evidence or exhibits.

While the pandemic forced family law attorneys to reassess court procedures, it also provided a chance to reconnect with employees and start new traditions.

Rismiller, for example, recently began conducting polls and weekly check-ins to gauge employee morale and reflect on lessons learned. She plans to retain this custom in the foreseeable future.

"We've tried to find ways to stay connected, even though we're not all together," she said.

Ohio unveils limited plan to pay relatives caring for kids

By Andrew Welsh-Huggins
Associated Press

AP FILE PHOTO/ANDREW WELSH-HUGGINS

Kimberly Hall, director of the Ohio Department of Job and Family Services, looks over a photo display outside her office, in Columbus, Ohio. A federal lawsuit has been filed seeking to force Ohio to increase the amount of child support payments it provides to people who have taken custody of children they're related to.

COLUMBUS, Ohio — Advocates for Ohio adults caring for related children in their custody insist a new law that raises payments for such caregivers doesn't go far enough, signaling that achievement of a solution that satisfies all parties isn't yet in hand.

At issue are relatives who aren't licensed caregivers but are approved to care for children taken from their parents. The arrangement is often referred to as kinship care.

Advocates have long asserted that the state must follow a 2017 federal appeals court decision ordering equality in payments to kinship caregivers, and in November sued to force adherence to that ruling.

Almost a year after promising a plan was in the works, Gov. Mike DeWine signed a bill into law late last year providing a partial fix. Advocates immediately criticized it as falling short.

The plan essentially provides a financial bridge for caregivers until they become licensed foster parents. It authorizes a $10.20 per child per day payment for kinship caregivers for up to nine months.

At that point, if caregivers don't become licensed they give up the per diem and return to the current system, which provides far lower payments.

As part of the new law, DeWine signed an executive order directing the state human services agency to come up with a plan for making the payments by July 1.

Payments will be retroactive to Dec. 29, the day DeWine signed the bill. The state estimates it will pay about $17 million a year to the state's approximately 2,600 kinship caregivers.

DeWine called such caregivers "an important and essential part of our child welfare system."

As a result of the law and its payment system, the state asked a judge Wednesday to dismiss the federal lawsuit, saying it was now moot.

The new law "provides for the payments plaintiffs have requested," Attorney General Dave Yost, representing the state human services agency, said in a court filing.

The plan is inadequate and won't stop the lawsuit from moving ahead, said attorney Richard Dawahare. He said the promised payments are "a fraction" of what foster parents receive, and he criticized both the nine-month time limit and the fact the payments are contingent on whether the state actually allocates the money.

"These latest efforts, like the long existing inadequate program, are unfair and unequal for these vulnerable children and their relative foster parents," Dawahare said.

The November lawsuit outlined the substantial gaps between payments received by foster parents and kinship caregivers.

For example, one plaintiff in the federal complaint cares for a 1-year-old boy in Cuyahoga County and receives $302 per month in state benefits under the current system. But licensed foster care parents in Cuyahoga County receive much higher amounts — from $615 to $2,371 per month per child — and even more if children have special needs, according to the lawsuit.

The plan doesn't meet the requirements of the 2017 court ruling and doesn't adequately support caregivers, said Barb Turpin, co-secretary of the Ohio Grandparents/Kinship Coalition. She noted that few kinship caregivers want to become licensed foster parents.

The payment issue came to the fore in recent years as more kids were removed from their homes amid the opioid crisis. The caregivers bringing the lawsuit said the economic pressures of the coronavirus pandemic have only made things worse.

The federal ruling that ordered equality in payments applied to Kentucky, Tennessee, Michigan and Ohio, the four states overseen by the 6th U.S. Circuit Court of Appeals. Kentucky, Michigan and Tennessee have all been making the payments, records show.

Md.'s Augmented Estate Law and estate planning and marital agreements

Elizabeth J. McInturff, Esq.

Maryland's recently enacted Augmented Estate Law introduces new protections for dissatisfied spouses taking under an elective share. It also makes it difficult to exclude certain assets from passing through probate.

These changes require estate and family law attorneys to carefully counsel their clients as to the importance of having a valid antenuptial, postnuptial or separation agreement, as well as the design of their estate planning.

Maryland law historically has been designed to prevent a spouse from disinheriting their significant other. Under the previous code, unless the parties entered into a valid waiver, a dissatisfied spouse under a will was entitled to take an elective share of the probate estate.

The elective share was equal to one-third of probated assets or one-half of probated assets if the decedent did not have surviving qualifying descendants.

Nonetheless, creative minds were able to avoid probate, thus keeping assets out of the reach of a spouse, by moving them into vehicles that did not pass probate -– such as to retirement plans, transfer or payable on death accounts, joint accounts, trusts and property which passed via life estate.

Parties with blended families or those on a second or subsequent marriage often requested prenuptial and postnuptial agreements that provided for waivers of estate rights to their current spouse. These efforts typically resulted in decreasing the overall probated estate from which a dissatisfied spouse could take an elective share, thereby effectively disinheriting them.

In October 2020, Maryland's new Augmented Estate Law, codified at §3-404 of the Estates and Trusts Article, went into effect.

The Augmented Estate Law increases a surviving spouse's rights as a beneficiary, expands the assets available to the surviving spouse from which to take, and increases the portion for a surviving spouse from one-third to one-half if there are no other qualifying descendants.

Now, the augmented value of the decedent's estate is calculated by totaling the value of decedent's probated estate, decedent's revocable trusts, all property held by decedent immediately before death, decedent's qualifying joint interests, and decedent's qualifying lifetime transfers.

The overall value is then reduced by certain expenses and claims, trusts, joint interests, lifetime transfers and property, irrevocable transfers, life estates and spousal benefits.

Clearly, the new Augmented Estate Law packs quite a punch, although it is tempered a bit by Md. Est. & Trusts Code §3-404, which provides that a court may modify the calculation of an augmented estate upon a showing of clear and convincing evidence on a number of qualifying factors.

Given the overall strength of the Augmented Estate Law, practitioners would be wise to counsel clients who seek to limit what their spouse may take under their estate, as to the importance of an antenuptial or postnuptial agreement and strong estate plan.

By providing for adequate spousal benefits under an estate plan or having an agreed upon waiver of rights of election, including as to an augmented estate, in a prenuptial or postnuptial agreement clients can reduce the risk of their spouse taking under an augmented value of the estate.

This may be particularly important to a client who is considering or currently in divorce proceedings. Removing assets from the augmented value of the estate also removes the possibility of the soon-to-be ex receiving perhaps more than was bargained for.

Now is the time for both you and your clients to review their estate plans and any signed marital agreements to determine whether they need to be restructured to protect assets and beneficiaries.

Elizabeth J. McInturff, Esq., a partner at JDKatz, PC, represents clients in complex family, civil and commercial disputes. For more information, visit www.jdkatz.com.

Monthly Memo

Colorado Supreme Court revamps common-law marriage rules

DENVER — The Colorado Supreme Court has changed the way common-law marriage is legally defined to allow for more inclusion of same-sex couples.

A trio of opinions issued in early January update the state's three-decade-old legal standard to better reflect today's societal norms, The Denver Post reports.

Colorado is one of only nine states that recognize common-law marriage. The court created a new legal standard for the union that is more flexible and gender neutral.

The justices ruled the key factor courts should consider when determining whether a couple was common-law married is whether they mutually intended to enter a marital relationship and whether the couple's subsequent conduct supported that decision.

The new definition contrasts with the state's former standard, established in 1987, which suggested judges should consider several specific markers to establish a common-law marriage. Those included whether the couple owned property together, filed joint tax returns or a woman took a man's last name.

Associated Press

Lawsuit: Foster kids aren't protected from psychotropic meds

PORTLAND, Maine — The Maine Department of Health and Human Services allowed six foster children and others across the state to be given psychotropic drugs without appropriate safeguards or oversight, according to advocates who filed a federal lawsuit on their behalf.

Child advocates contend in the lawsuit filed earlier this month that kids as young as 5 are being harmed by the powerful drugs and that the state failed to address a problem that it has previously acknowledged.

The state is accused maintaining inadequate medical records, falling short on informed consent and failing to flag prescriptions for secondary review.

"As a result of these failures, hundreds of preschoolers through teens in Maine's foster care system remain at an unreasonable risk of serious harm with each passing day," the lawsuit said.

A Maine health department spokesperson accused New York-based Children's Rights Inc., one of the parties that sued, of being more interested in filing lawsuits than in working with the state to help the plaintiffs.

Associated Press

France launches service to make deadbeat parents pay

PARIS — France is launching a new government service empowered to take money directly from the bank accounts of parents who fail to pay child support, aiming to help many families — the vast majority of whom are headed by single mothers — emerge from precarious financial situations.

President Emmanuel Macron denounced in a tweet unpaid child support as "an unbearable situation for hundreds of thousands of single parents," before visiting a benefits agency Tuesday in Tours, in central France, which is providing the new service.

French authorities estimate that between 30% and 40% of child support amounts are either not paid, only partially paid or paid too late — placing at least 300,000 families in financial insecurity.

Associated Press

West Virginia lawyer who sought sex for services disbarred

BLUEFIELD, W.Va. — A West Virginia attorney has been disbarred after he attempted to barter his services in a woman's divorce case for sex, the Bluefield Daily Telegraph reported.

The mandate from the West Virginia Supreme Court annulling McGinnis E. Hatfield's license to practice law was handed down in late December.

The case dates back to 2013 when Hatfield visited the Cherry Bomb Gentleman's Club and met a stripper identified in court documents as B.W. She later filed a complaint alleging that she asked Hatfield to represent her in a divorce, and he asked for sex because she could not afford his $1,500 fee.

The investigation was put on hold after Hatfield was involved in an accident that caused a traumatic brain injury and was placed on inactive status with the West Virginia State Bar. In July 2017 Hatfield returned to active practice and the investigation was reopened.

Associated Press

Bill would allow domestic violence recordings as evidence

HELENA, Mont. — Montana lawmakers are considering a bill that would allow victims of domestic violence to secretly record phone calls or interactions with the perpetrator and use the recordings as evidence in court.

Under Montana law, it is illegal to record a conversation without the knowledge of all the parties involved. That means such recordings can't be used as evidence in prosecuting domestic violence and other criminal cases.

The bill would create an exception to the privacy law to allow recording of physical or mental abuse against the person or a member of their family.

Domestic violence survivors and retired Supreme Court Justice James Nelson testified in support of the bill. Opponents argued the bill, as written, was too broad in violating privacy.

Associated Press

Family Law Digest

Use the topic and case indexes at the back of this issue to find the full-text opinions that are of most interest to you.

CHILD CUSTODY; TIE-BREAKING AUTHORITY; COOPERATIVE PARENT

Mary R. Honablew v. Christopher D. Holden

No. 2227, September Term 2019
Argued before: Graeff, Arthur, Battaglia (retired, specially assigned), JJ.
Opinion by: Arthur, J.
Filed: Nov. 2, 2020

The Court of Special Appeals affirmed the Talbot County Circuit Court's award of tie-breaking authority to the father, saying the mother was neither willing to share custody nor include the father in important decisions regarding their child. **Page 12**

DIVORCE; VACATING OF DIVORCE JUDGMENT; FRAUD, MISTAKE OR IRREGULARITY

Robert Brian Gardner v. Rica Villa Gardner

No. 2568, September Term 2019
Argued before: Nazarian; Wells; Eyler, James R. (retired, specially assigned), JJ.
Opinion by: Eyler, J.
Filed: Nov. 2, 2020

The Court of Special Appeals affirmed the Anne Arundel County Circuit Court's judgment of divorce, saying it "was entered in conformity with the practice and procedure commonly used by the trial court" and "there was no fraud, mistake or irregularity." **Page 18**

DIVORCE; MOTION FOR RECONSIDERATION; EXPERT TESTIMONY

John Liccione v. Moea Goron-Futcher

No. 3116, September Term 2018
Argued before: Wright, Friedman, Wells, JJ.
Opinion by: Wells, J.
Filed: Nov. 4, 2020

The Court of Special Appeals affirmed the Howard County Circuit Court's denial of the ex-husband's motion to reconsider the judgment of absolute divorce. **Page 25**

CINA; SHELTER CARE; PLACEMENT WITH FATHER

In Re: J.N., Z.N., T.N.

No. 2094, September Term 2019
Argued before: Reed, Shaw Geter, Salmon (retired, specially assigned), JJ.
Opinion by: Salmon, J.
Filed: Oct. 30, 2020

The Court of Special Appeals affirmed the Montgomery County Circuit Court's award of custody to the father, saying it was in the children's best interest. **Page 35**

CINA; CIRCUIT COURT JURISDICTION; PLACEMENT OUTSIDE MARYLAND

In Re: S.N.

No. 2513, September Term 2019
Argued before: Kehoe, Gould, Kenney, JJ.
Opinion by: Kenney, J.
Filed: Oct. 27, 2020

The Court of Special Appeals affirmed the Howard County Circuit Court's finding of the child to be in need of assistance, saying the circuit court had jurisdiction under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act. **Page 42**

CHILD CUSTODY; PARENT'S RIGHT TO TRAVEL; CHILD'S BEST INTERESTS

Nicole M. Skiles v. Aaron J. Saia

No. 32, September Term 2020
Argued before: Fader, C.J.; Nazarian; Adkins (retired, specially assigned), JJ.
Opinion by: Adkins, J.
Filed: Oct. 27, 2020

The Court of Special Appeals affirmed the Anne Arundel County Circuit Court's denial of the mother's request to move with her children to Georgia over the father's objection but reversed the judge's order that she not relocate more than 20 miles from the father. **Page 61**

Family Law Digest

ALIMONY; REHABILITATIVE ALIMONY; MOTION TO MODIFY

Regina M. Thomas v. Michael J. Thomas

No. 1345, September Term 2019
Argued before: Berger, Arthur, Wilner (retired, specially assigned), JJ.
Opinion by: Arthur, J.
Filed: Oct. 22, 2020

The Court of Special Appeals affirmed the Garrett County Circuit Court's rejection of the ex-wife's motion to have her ex-husband's alimony payments be increased after he received a salary increase, saying the former couple's circumstances did not change. **Page 67**

DIVORCE; MARITAL PROPERTY; VALUATION

Christine J. Sommer v. Eric C. Grannon

No. 3197, September Term 2018
Argued before: Graeff, Arthur, Battaglia (retired, specially assigned), JJ.
Opinion by: Battaglia, J.
Filed: Oct. 21, 2020

The Court of Special Appeals affirmed the Anne Arundel County Circuit Court's valuation of the ex-couple's marital property, saying the ex-wife had failed to raise her challenge at the circuit court. **Page 72**

ALIMONY; REHABILITATIVE ALIMONY; MOTION TO MODIFY

Andrew N. Ucheomumu v. Dorothy O. Ezekoye

No. 2234, September Term 2017
Argued before: Shaw Geter, Meredith (retired, specially assigned), Raker (retired, specially assigned), JJ.
Opinion by: Meredith, J.
Filed: Oct. 15, 2020

The Court of Special Appeals affirmed the Montgomery County Circuit Court's denial of the ex-husband's motion to modify his alimony payments, saying the court correctly rejected his claims of fraud and "unclean hands" by his ex-wife. **Page 80**

CHILD CUSTODY; VISITATION; NOTICE REQUIREMENT

Nakia Pope v. Noldon Pope

No. 2005, September Term 2019
Argued before: Graeff, Leahy, Salmon (retired, specially assigned), JJ.
Opinion by: Salmon, J.
Filed: Oct. 14, 2020

The Court of Special Appeals affirmed the Baltimore County Circuit Court's order that the mother give the father 21 days' notice when requesting additional visitation, citing the couple's "well-documented difficulty in communicating effectively." **Page 89**

Cite as 1 MFLU Supp. 12 (2021)

Child custody; tie-breaking authority; cooperative parent

Mary R. Honablew v. Christopher D. Holden

No. 2227, September Term 2019

Argued before: Graeff, Arthur, Battaglia (retired, specially assigned), JJ.

Opinion by: Arthur, J.

Filed: Nov. 2, 2020

The Court of Special Appeals affirmed the Talbot County Circuit Court's award of tie-breaking authority to the father, saying the mother was neither willing to share custody nor include the father in important decisions regarding their child.

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

By order dated November 8, 2019, the Circuit Court for Talbot County entered a judgment of absolute divorce between Mary Honablew ("Wife") and Christopher Holden ("Husband"). In addition, the court gave the parties joint legal custody of their minor daughter ("Daughter"), but awarded tie-breaking authority and primary physical custody to Husband. The court ordered Wife to pay Husband monthly child support and denied her request for rehabilitative alimony. Representing herself, Wife appealed. She presents four questions, which we have recast as follows:

1. Did the circuit court abuse its discretion in awarding Husband primary physical custody of Daughter?

2. Did the circuit court abuse its discretion by granting Husband tie-breaking authority?

3. Did the circuit court err or abuse its discretion by ordering Wife to pay monthly child support?

4. Did the circuit court err or abuse its discretion by denying Wife's request for alimony?[1]

We see no error or abuse of discretion. Consequently, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Marriage

The parties were married on July 8, 2016. At the time of the marriage, Daughter was three years old. During the preceding four years, Husband and Wife had resided in Talbot County in a house owned by Husband.

In December 2016 (approximately five months after the wedding), the marriage had become so strained that the parties separated for a period of approximately four days. At that time, Wife left Daughter with Husband and resided on a farm in southern Prince George's County, which the parties jointly own. During a subsequent six-week separation in the summer of 2017, Daughter resided with Husband three days per week, with Wife two days per week, and with each parent on alternating weekends. During yet another separation in September 2017, Wife again left daughter with Husband while she resided at the farm in Prince George's County.

The parties' final separation commenced on October 22, 2017, after an altercation during which Wife, while intoxicated, struck Husband as he attempted to drive her and Daughter home from a social function. The car was disabled, and Wife was arrested and charged with second-degree assault and reckless endangerment.

As a condition of Wife's pre-trial release, a district court commissioner ordered that she have no contact with Husband. During the ensuing months, Husband coordinated with third parties in an attempt to provide Wife with access to Daughter.

Wife ultimately pleaded guilty to assault and received probation before judgment. The State nolle prossed the reckless endangerment charge.

B. The Custody Dispute

Once the no-contact order was lifted, the parties agreed to an informal custody schedule. Under the schedule, Wife would have custody of Daughter on Sunday and Monday, Husband would have custody from Tuesday through Friday, and custody would alternate between the parties on Saturday.

In March of 2018, the parties discussed the school in which they would enroll Daughter the following fall. Husband expressed a preference that she attend a private parochial school in Easton, while Wife wanted to send her to a more expensive, private institution on the Western Shore. The parties were unable to reach a consensus.

In June 2018, Husband enrolled Daughter in the parochial school. Shortly thereafter, Wife made the unilateral decision to home-school Daughter in Prince George's County, where Wife had moved.

The dispute over schooling culminated when Wife reneged on the custody schedule on which the parties had agreed. When dropping Daughter off with Wife for the Labor Day weekend, Husband requested confirmation that Daughter would be returned to him on Monday, so that she would be prepared for school the following morning. Wife replied, falsely, that her attorney had sent Husband an email addressing the issue. When Husband stepped away to make a call to confirm what Wife had said, Wife put Daughter in her car and drove away. Thereafter, Wife refused to comply with the terms of their custody schedule.

At Wife's request, the Circuit Court for Talbot County held a pendente lite custody hearing on September 28, 2018. Following that hearing, the court ordered that Daughter would remain in Wife's custody in Prince George's County and attend a school of Wife's choosing until 4:30 p.m. on December 24, 2018. The court granted Husband access to Daughter on three weekends per month. The court further ordered that at 4:30 p.m. on December 24, 2018, Husband would assume primary physical custody of Daughter and would determine where she would attend school, "until further order of this court." The court granted Wife access to Daughter on three weekends per month while Daughter was in Husband's custody.

In accordance with the court's order, Daughter participated in a cooperative home-school program in Prince George's County until December 24, 2018. Thereafter, she attended the parochial school in Easton. Daughter remained at the parochial school during the 2019-2020 school year. During that time, she bonded with her teachers and classmates and excelled academically.

C. The Divorce Proceedings

Meanwhile, on June 4, 2018, Wife had filed a complaint for absolute divorce, or in the alternative, limited divorce. In that complaint, she sought primary physical and joint legal custody of Daughter, permanent child support, and rehabilitative alimony. On July 3, 2018, Husband counterclaimed for divorce, primary physical and joint legal custody, and child support.

Following a two-day hearing in October 2019, the circuit court issued a thorough memorandum opinion and order. The court found that the parties had lived separate and apart without cohabitation or interruption for more than 12 months. Accordingly, it granted them an absolute divorce pursuant to Maryland Code (1984, 2019 Repl. Vol.), § 7-103(a)(4) of the Family Law Article ("FL").

After considering each of the applicable statutory factors,[2] the court declined to award Wife rehabilitative alimony. The court reasoned that Husband's monthly expenses exceeded his income, so that he could not pay alimony and still provide for Daughter. The court added that, although Wife claimed to earn only $15,000.00 a year, she had not adequately documented her income and expenses: she had produced only a limited number of bank statements, and she had "failed to file the long-form financial statement to inform the court of her income sources and her monthly expenses." Finally, the court observed that, although Wife had a four-year college degree and was clearly able to work, she was not maximizing her earnings potential.

The court awarded primary physical custody to Husband. In doing so, the court considered an array of factors relevant to Daughter's best interests, including those enumerated in *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 420 (1977). Particularly pertinent to the court's decision was its finding that since she had been enrolled in the parochial school, "[Daughter] has excelled in her education and has made strong friendships with her classmates." Noting that Husband and Wife reside at least two hours apart on opposite sides of the Chesapeake Bay, the court determined that "[if] a custody arrangement would make attending [the parochial school] untenable, there would be a disruption to [Daughter's] current social and school life." Accordingly, the court concluded that Daughter's best interests would be served if she lived with Husband in Talbot County during the school year, while Wife had "parenting time with [Daughter] on the first, second, and fourth weekends of every month during the school schedule." The court ordered that "[t]he summer schedule will be the reverse of the school year schedule." Finally, the court ordered a thoroughly conventional schedule for allocating the parents' access to Daughter on holidays, such as Mother's Day, Father's Day, Thanksgiving, Christmas, and Easter.

In deciding the issue of legal custody, the court analyzed each of the factors enumerated in *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986). In its analysis, the court identified the parties' inability "to communicate in a co-parenting manner for the benefit of the child" as its greatest concern. The court found that Husband was willing to share custody, but that Wife was not. In support of its conclusion, the court cited Wife's decision to renege on the

agreed custody schedule and to enroll Daughter in a home-schooling program. These issues notwithstanding, the court found that Daughter's best interests would be served if she were permitted "to continue to foster . . . close, personal bond[s] with both of her parents." For those reasons, the court granted the parties joint legal custody and awarded tie-breaking authority to Husband.

When calculating Wife's child-support obligation, the court found that the nearly $694.00 per month that Husband had paid for Daughter's tuition and the $16.00 per month that he had paid for her health insurance were additional expenses for which he could be awarded child support under FL 12-204(h)(1) and FL § 12-204(i)(1).[3] Because Wife failed to produce adequate evidence corroborating her claim that she earned only $15,000.00 annually and because the evidence showed that she had made monthly bank deposits in excess of $3,000.00, the court imputed to Wife an annual income of $31,200.00. Applying the Maryland Child Support Guidelines, the court ordered Wife to pay monthly child support in the amount of $492.00.

DISCUSSION

I. Physical Custody

On the issue of physical custody, Wife neither disputes the circuit court's factual findings, nor challenges its interpretation of the applicable law. She principally contends that the court abused its discretion by declining to implement as close to a 50-50 physical custody schedule as possible. In support of her contention, she cites the recommendation of the court-appointed best interest attorney, that the court should "try[] to get [Daughter] as much time with each parent as possible."

A. Standard of Review

"[T]his Court reviews child custody determinations utilizing three interrelated standards of review." *Reichert v. Hornbeck*, 210 Md. App. 282, 303 (2013).

> The appellate court will not set aside the trial court's factual findings unless those findings are clearly erroneous. To the extent that a custody decision involves a legal question, such as the interpretation of a statute, the appellate court must determine whether the trial court's conclusions are legally correct, and, if not, whether the error was harmless. The trial court's ultimate decision will not be disturbed unless the trial court abused its discretion.

Gizzo v. Gerstman, 245 Md. App. 168, 191-92 (2020) (citations omitted).

> An abuse of discretion may occur when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court.

Id. at 201 (citing *Santo v. Santo*, 448 Md. 620, 625-26 (2016)). "Appellate courts 'rarely, if ever, actually find a reversible abuse of discretion on this issue.'" *Id.* (quoting *McCarty v. McCarty*, 147 Md. App. 268, 273 (2002)).

B. The Best Interests of the Child

"The court's primary objective, when deciding disputes over child access, 'is to serve the best interests of the child.'" *Gizzo v. Gerstman*, 245 Md. App. at 192 (quoting *Conover v. Conover*, 450 Md. 51, 60 (2016)). In *Montgomery County Dep't of Social Servs. v. Sanders*, 38 Md. App. 406, 420 (1977), this Court enumerated a non-exhaustive list of factors to guide custodial determinations.

In child custody cases, "'physical custody . . . means the right and obligation to provide a home for the child and to make' daily decisions as necessary while the child is under that parent's care and control." *Santo v. Santo*, 448 Md. at 627 (quoting *Taylor v. Taylor*, 306 Md. at 296). Although "reasonable maximum exposure to each parent is presumed to be in the best interests of the child," *Boswell v. Boswell*, 352 Md. 204, 214 (1998), that presumption does not require that a circuit court set what Wife wants: "as close to a 50-50 [custody schedule] as possible." A bright-line rule of that sort would frustrate the court's ability to assess, on the unique facts of each case, what custodial arrangement would best promote a child's welfare. *See Domingues v. Johnson*, 323 Md. 486, 501 (1991) (noting "the inherent difficulty of formulating bright-line rules of universal applicability in this area of the law"). "Shared physical custody may, but need not, be on a 50/50 basis, and in fact most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights." *Taylor v. Taylor*, 306 Md. at 297.

In this case, the court discussed the *Sanders* factors, as well as other factors relevant to Daughter's best interests. Chief among the court's considerations were Daughter's academic development and her social relationships. The court found that Daughter has excelled educationally and has "made strong friendships" since she began attending the school in Easton. "If a custody arrangement would make attending [her school] untenable," the court continued, "there would be a disruption to the

child's current social and school life." See McCready v. McCready, 323 Md. 476, 481-82 (1991) (identifying stability as an important factor when assessing the best interests of the child). Because of the sheer physical distance between Husband's residence near Easton and Mother's residence at least two hours away in southern Prince George's County, the court recognized that an award of primary custody to Wife would preclude Daughter's continued enrollment at the school in Easton. Based on these considerations, we conclude that the court soundly exercised its discretion in awarding primary physical custody to Husband.

We perceive no abuse of discretion in the court's decision not to award Wife more access than it d*Id.* Had the court ordered as close to a 50-50 custody schedule as possible, it would have eliminated much of Daughter's leisure time with Husband. During the school year, when Husband has primary physical custody, the greater part of Daughter's days are spent not with Husband, but at school. During summer vacation, by contrast, Daughter enjoys a great deal of unstructured time, potentially permitting her to spend a larger portion of each day with Wife than she would spend with Husband during the school year. For these reasons, we cannot come anywhere close to saying that the court abused its discretion.

II. Tie-Breaking Authority

Wife contends that the court abused its discretion in awarding joint legal custody, but granting tie-breaking authority to Husband. Rather than grant Husband tie-breaking authority, Wife asserts, the court ought to have implemented a "Parenting Plan."

"Legal custody" denotes "'the right and obligation to make long range decisions' that significantly affect a child's life, such as education or religious training." *Santo v. Santo*, 448 Md. at 627 (quoting *Taylor v. Taylor*, 306 Md. at 296). "[J]oint legal custody" means that both parents have "'an equal voice in making [long range] decisions [of major significance concerning the child's life and welfare], and neither parent's rights [are] superior to the other.'" *Id.* at 632 (quoting *Taylor v. Taylor*, 306 Md. at 296). By contrast, a parent with "sole legal custody" "has full control and sole decision-making responsibility – to the exclusion of the other parent – on matters such as health, education, religion, and living arrangements." BLACK'S LAW DICTIONARY 484 (11th ed. 2019).

As with physical custody, determinations of legal custody are primarily based on the best interests of the child. In addition to the Sanders factors, the circuit court should consider additional or related factors when assessing whether joint custody is appropriate. *See Taylor v. Taylor*, 306 Md. at 304-11. Of these factors, the parents' capacity to communicate and reach joint decisions regarding the child's welfare is of particular importance. *Id.* at 304.

Nonetheless, "a court of equity ruling on a custody dispute may, under appropriate circumstances and with careful consideration articulated on the record, grant joint legal custody to parents who cannot effectively communicate together regarding matters pertaining to their children." *Santo v. Santo*, 448 Md. at 646. "In doing so, the court has the legal authority to include tie-breaking provisions in the joint legal custody award." *Id.*

We review a trial court's custody determination for abuse of discretion. *Kpetigo v. Kpetigo*, 238 Md. App. 561, 585 (2018). We reverse only when the court's ruling is clearly against the logic and effect of facts and inferences before the court. *Id.* In this case, Wife does not challenge the award of joint custody. Nor does she deny that the parties were unable to communicate effectively with one another, as the court expressly found. Consequently, we see nothing resembling an abuse of discretion in the court's decision to award joint legal custody with tie-breaking authority. The only question before us, then, is whether the court abused its discretion in granting tie-breaking authority to Husband (instead of to Wife).

In reaching its decision to grant tie-breaking authority to Husband, the court cited Wife's unilateral decision to enroll Daughter in a home-school program. The court also cited Wife's breach of the informal custody arrangement when she refused to return Daughter to Husband (just before Daughter was to enter the home-school program). The court inferred that Wife "was neither willing" to share custody nor inclined to "include [Husband] on important decisions like education." By contrast, the court found that Husband was "willing to share custody," because he had "willingly entered in to [sic] a schedule and kept that schedule." In view of those findings, we can hardly say that the court abused its discretion in awarding tie-breaking authority to Husband.

III. Child Support

Wife claims that the circuit court erred in ordering her to pay monthly child support in the amount of $492.00, arguing that it erroneously attributed $31,000.00 in annual income to her.[4] In the alternative, she argues that an award of child support was unnecessary because Husband's salary alone was sufficient to sustain the standard of living Daughter enjoyed during the marriage.

FL § 12-204 sets forth child support guidelines, which allocate child support obligations proportionate to the parents' adjusted actual incomes. When applying those guidelines, a court must first calcu-

late each parent's respective adjusted actual monthly income. "'Actual income' means income from any source." FL § 12-201(b)(3). In general, "adjusted actual income" means actual income, minus preexisting child support obligations that are actually paid and alimony or maintenance obligations that are actually pa*Id.* See FL § 12-201(c).

A trial court's determination of a parent's actual income is a factual finding that we review for clear error. *St. Cyr v. St. Cyr*, 228 Md. App. 163, 180 (2016).

We must affirm such a finding if the record contains competent evidence in support of it. *See id.* Absent a misinterpretation or misapplication of the governing statutes or case law, we review the court's ultimate ruling for abuse of discretion. *Knott v. Knott*, 146 Md. App. 232, 246 (2002). We first address Wife's assertion that the court erred in attributing to her an annual income of $31,200.00 (based on a monthly income of $2,600.00). At trial, Wife testified that she derived her income primarily from marketing jobs, one of which might pay as much as $30.00 per hour. To supplement her income, Wife had obtained employment as a caregiver, earning approximately $13.00 per hour. Although Wife testified that she also worked as an unpaid employee at the farm on which she resides, she admitted that the farm (of which she is a co-owner) receives money through a PayPal account. During her rebuttal closing argument, she also admitted that she had reimbursed herself for expenses incurred in the course of her employment at the farm, such as hotel stays and mileage.[5]

Wife claimed that she earned only $15,000.00 annually, but she did not corroborate her claim, in part because she has not filed a tax return since 2015.[6] On the other hand, Husband introduced two monthly bank statements for Wife's personal checking account, which she had produced during discovery. The first statement reflected deposits totaling $3,181.09 between May 9, 2019, and June 10, 2019. The second reflected deposits totaling $3,489.65 between August 9, 2019, and September 10, 2019. Husband also introduced a record of Wife's transaction history from February 11, 2019, until April 8, 2019. That document reflected deposits totaling $7,269.01. According to those records, Wife deposited an aggregate of $13,939.75 in four months. Based on that evidence, Husband extrapolated that Wife's annual income was between $40,260.88 and $56,000.00.

Because Wife had deposited a total of $13,939.75 over four months (or a third of the year) and had secured supplemental employment earning $13.00 per hour, the court could have reasonably inferred that her actual adjusted income – or, at the very least, her earning potential – was $31,200.00. The court did not abuse its discretion in attributing that level of income to Wife.

Wife goes on to assert that the court erred in ordering her to pay child support because, she says, Husband's income was sufficient to provide for Daughter's needs and "maintain their child's standard of living while the couple was married[.]" As Wife acknowledges, however, the child support guidelines "are premised on the concept that '[children] should receive *the same proportion of parental income*, and thereby enjoy the standard of living, [as they] would have experienced had the [] parents remained together.'" *Allred v. Allred*, 130 Md. App. 13, 17 (2000) (quoting *Voishan v. Palma*, 327 Md. 318, 322 (1992)) (emphasis added). In other words, the guidelines are based on estimates of the percentage of income that each parent in an intact household would typically spend on the children. *Voishan v. Palma*, 327 Md. 322-23.

Every child is "entitled to a level of support commensurate with the parents' economic positions," regardless of whether one parent possesses sufficient resources to support that child without any contribution from the other. *See Smith v. Freeman*, 149 Md. App. 1, 33 (2002). Thus, we reject Wife's contention that a trial court should absolve one parent of the obligation to support a child merely because the other possesses the financial resources necessary to provide for the child's needs.

IV. Alimony

Finally, Wife challenges the court's denial of her request for rehabilitative alimony. Husband counters that, in addition to having failed to file a financial statement as required by Maryland Rules 9-202(e) and 9-203(a), Wife produced insufficient evidence to support an award of alimony.[7]

In divorce proceedings, the party seeking alimony bears the burden of presenting evidence from which the circuit court can render factual findings in support of an award of alimony. *See Walter v. Walter*, 181 Md. App. 273, 288 (2008). "We will not disturb an alimony determination 'unless the trial court's judgment is clearly wrong or an arbitrary use of discretion.'" *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383-84 (2006) (citation omitted).

The principal purpose of alimony is to afford an economically dependent spouse the opportunity to become self-supporting. *St. Cyr v. St. Cyr*, 228 Md. App. at 185. A party is "self-supporting" if his, her, or their "income exceeds the party's 'reasonable' expenses, as determined by the court." *Id.* at 186 (citations omitted).

FL § 11-106(b) enumerates a non-exclusive list of factors that a court must consider when determining whether to award rehabilitative alimony, as well as the amount and duration of any such award.

"[T]he law does not make any of the factors listed in section 11-106(b) determinative or mandate that they be given special weight." *Whittington v. Whittington*, 172 Md. App. 317, 341 (2007).

Here, the circuit court carefully considered each of the relevant factors. In so doing, it found that during their marriage the parties enjoyed a middle-class standard of living. Although Husband "was the main monetary contributor to the family," earning between $95,000.00 and $100,000.00 annually, the court found that Wife's income, coupled with her domestic contributions to the family, made the parties' respective contributions comparable. On the issue of Wife's ability to support herself (FL § 11-106(b)(1)), the court observed that she had suffered from illnesses in the past, but the court found no indication that those illnesses interfered with her ability "to earn a living wage" or "to be self-sufficient." As further evidence of Wife's ability to support herself, the court noted that she had a four-year college degree in agricultural science, had begun a master's program in that field, worked on her own farm, and had marketing jobs. On the issue of Wife's financial needs and resources (FL § 11-106(b)(11)), the court observed that she had failed to furnish adequate evidence of her income. On the other hand, on the issue of Husband's ability to meet his needs while also meeting the Wife's needs, the court observed that, notwithstanding his annual salary, his monthly expenses exceeded his net monthly income. Thus, the court found:

> An award of alimony in this case would not only increase the deficit that [Husband] is experiencing, but it would take away from the care that [Husband] is providing to daughter. Therefore, [Husband] does not have the ability to pay an award of alimony to [Wife] and meet his own or [Daughter's] needs.

On the basis of these findings, the court ruled: "There is insufficient evidence that [Wife] would require temporary support from [Husband] so that she may attain gainful employment."

The court did not abuse its discretion in reaching that conclusion. The court's conclusion, based on its patient analysis of the evidence before it, was far from arbitrary. Moreover, it is almost impossible for a court to be clearly erroneous when it is simply not persuaded of something, which is what occurred here. *See*, *e.g.*, *Bricker v. Warch*, 152 Md. App. 119, 137 (2003).

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

Footnotes

1 Wife phrased her questions as follows:

1. Did the Circuit Court err in not providing as close to a 50/50 schedule as recommended by the Court Appointed Best Interest Attorney for the Minor Child?

2. Did the Circuit Court err in granting final legal authority to Christopher Holden, knowing that he has only recently been active in the child's life, since the separation occurred and not ordering a Parenting Plan instead?

3. Did the Circuit Court err by utilizing an incorrect income of the Appellant, to determine child support and whether child support is even needed and necessary to supplement the child to an upper class income of the current primary custodian while improvising [sic] the other parent?

4. Did the Circuit Court err in denying any form of alimony to the Appellant?

2 FL § 11-106(b).

3 FL 12-204(h)(1) pertains to the "cost of providing health insurance coverage for a child for whom the parents are jointly and severally responsible." FL § 12-204(i)(1) pertains to "expenses for attending a special or private elementary or secondary school to meet the particular educational needs of the child."

4 More precisely, the court attributed an annual income of $31,200.00 to Wife.

5 To the extent that Wife's living expenses were reduced because she reimbursed herself for expenses incurred in the course of her self-employment, those reimbursements count as income under FL § 12-201(b)(3)(xvi).

6 Wife produced IRS-issued wage and income transcripts for 2015, 2016, and 2017, but those documents were not admitted into evidence.

7 Wife ultimately filed a complete financial statement, but not until after the court had issued its memorandum opinion and order.

Cite as 1 MFLU Supp. 18 (2021)

Divorce; vacating of divorce judgment; fraud, mistake or irregularity

Robert Brian Gardner v. Rica Villa Gardner

No. 2568, September Term 2019

Argued before: Nazarian; Wells; Eyler, James R. (retired, specially assigned), JJ.

Opinion by: Eyler, J.

Filed: Nov. 2, 2020

The Court of Special Appeals affirmed the Anne Arundel County Circuit Court's judgment of divorce, saying it "was entered in conformity with the practice and procedure commonly used by the trial court" and "there was no fraud, mistake or irregularity."

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

In June 2017, the Circuit Court for Anne Arundel County entered an order granting Rica Villa Gardner ("Wife"), an absolute divorce from Robert Brian Gardner ("Husband"). The judgment of divorce awarded sole legal and physical custody of the parties' minor child to Wife and ordered Husband to pay child support pursuant to an immediate and continuing earning withholdings order.

Over two years later, on August 19, 2019, the court issued an order vacating the divorce judgment on grounds of procedural irregularity. Wife requested in banc review. The in banc panel ("Panel") concluded that the trial court's order was legally erroneous and reinstated the judgment of divorce.

Husband now appeals from the decision of the Panel, presenting two questions for review, which we have consolidated and rephrased as follows:[1]

> Did the trial court err in vacating the Judgment of Absolute Divorce?

For the reasons that follow, we conclude that the trial court erred. Accordingly, we shall affirm the decision of the Panel.

FACTUAL AND PROCEDURAL HISTORY

The parties were married in the Philippines in 2012. They subsequently resided in Maryland and had one child, R.G., who was born in 2015.

On December 29, 2016, Husband was arrested and charged with first-degree assault of Wife. Husband was released on bail two days later, on the condition that he have no contact with Wife.

On January 25, 2017, Wife, representing herself, filed a complaint for divorce on grounds of constructive desertion and cruelty. Husband was served with the complaint on February 12, 2017 but did not file a response.

According to Husband, he agreed to provide Wife with sole physical and legal custody of R.G. in exchange for her promise to leave the country and not testify for the State at his trial for assault. On February 24, 2017, a consent *pendente lite* custody order was entered on the docket, whereby it was:

> **ORDERED**, that [Wife] shall be granted sole physical and legal custody of [R.G.], and . . . further
>
> **ORDERED** that the parties shall have no contact with one another except to facilitate visitation with [R.G], via email only; and . . . further
>
> **ORDERED** that [Husband] authorizes [Wife] to take [R.G.] and move to the Philippines and remain there indefinitely; and . . . further
>
> **ORDERED** that [Husband] agrees to pay for the airfare for [Wife and R.G.] to return to the Philippines. Within 12 hours of leaving the family home, [Wife] agrees to notify [Husband] that she left, and . . . further
>
> **ORDERED** that the parties agree that unless [Wife] returns to the United States with [R.G.], any custody action for [R.G.] will proceed in the Philippines; and . . . further
>
> **ORDERED**, that the parties agree that if [Wife] does not leave to go back to the Philippines by May 1, 2017, this order shall no longer be val*Id.*

The consent order specifically provided that the above terms were "SUBJECT TO FURTHER ORDER OF THIS COURT."

On March 16, 2017, pursuant to Wife's request, the trial court entered an order of default against Husband for failure to file a responsive pleading to the complaint for absolute divorce. The order provided that an evidentiary hearing to support the allegations in the complaint be held before a magistrate. The order advised Husband of his right to file a motion to vacate the order of default within 30 days of entry. Husband did not file a motion to vacate the order of default.

A hearing on the complaint was held before a magistrate on April 19, 2017. Husband was not in attendance. Wife, who appeared without counsel, testified at the hearing. Following the hearing, the magistrate issued written findings and recommendations. The magistrate found that Husband "engaged in excessively vicious conduct against [Wife] by strangling her on December 29, 2016 and by his attempt to kill her during that incident." The magistrate noted that, pursuant to the *pendente lite* consent order, Wife had sole legal and physical custody of R.G., and the magistrate found that Wife was a "fit and proper parent to have custody[.]" The magistrate found that, at the time the parties were residing together, Husband had a gross income of $4,333 per month. It was noted that Wife could not verify whether Husband was still employed or whether his salary was still the same.

The magistrate made the following recommendations: (1) that Wife be granted an absolute divorce; (2) that Wife be granted sole legal and physical custody of [R.G.], with Wife to determine the terms and conditions of Husband's access to [R.G.]; and (3) that Husband be ordered to pay Wife child support in the amount of $732 per month.

The magistrate's report and recommendation were mailed to the parties along with a notice advising the parties of their right to file exceptions, and further advising that, if exceptions were not filed within 10 days, the recommended order would be submitted to a judge for approval. Husband did not file exceptions to the findings and recommendations of the magistrate. On June 7, 2017, the court entered a judgment of absolute divorce which followed the recommendations of the magistrate. Husband did not file an appeal.

On July 20, 2017, Husband appeared for a trial on the assault charge. In lieu of a trial, Husband entered a plea of guilty to second-degree assault.[2]

The next day, on July 21, 2017, Husband, who has represented himself in the underlying case and on appeal, filed a petition for contempt in the divorce case, asserting that the "original order" was for him to "give up custody" of R.G. in exchange for Wife "dropping all charges in the domestic violence case," but Wife had returned to the United States to testify against him. Husband also claimed that Wife was denying him visitation with R.G. via Skype. The trial court declined to issue a show cause order, stating that the judgment of divorce provided that Husband's access to R.G. was to be "under such terms and conditions as determined by [Wife]."[3]

Also on July 21, 2017, Husband filed the first of several motions to modify custody and support, asserting that the existing custody order was no longer in the best interests of R.G. because Wife "lives in [a] third world country without a job" in a home with dirt floors and "[rabid] dogs and chickens in the yard." Husband also requested a modification in the order for child support. The motion remaining outstanding until it was addressed in the August 19, 2019 order that is the subject of this appeal, as we shall explain below.

In June 2018, Husband filed a second motion to modify custody, visitation, and child support, stating that Wife was in contempt of court for denying him access to R.G., and claiming that Wife had lied to the magistrate about his income. It does not appear that the motion was properly served on Wife.

In July 2018, Husband filed a "Motion to Stay Execution of Child Support Garnishment," claiming that Wife fraudulently misrepresented his income at the hearing before the magistrate, and that the parties had agreed that any custody or support proceedings would be held in the Philippines unless Wife returned to the United States with R.G. The motion was denied in a one-line order on August 22, 2018.

In January 2019, Husband filed a motion for emergency relief, stating that Wife was refusing him visitation with R.G, and requesting that he be granted emergency custody. A hearing was held on February 6, 2019. Wife was not present. The court took testimony from Husband and denied the motion, stating that there was "no evidence to show the child is at risk of harm under the current custody arrangement."

On April 25, 2019, Husband filed an amended petition to modify custody and visitation, reasserting his claim that Wife lied about his income and was denying him access to R.G. Husband also requested that the court terminate over $12,000 in child support arrears. On June 20, 2019, the court ordered a custody evaluation.[4]

On April 26, 2019, the Child Support Enforcement Agency issued a Notice for Support that directed Husband's employer to deduct $915 per month from Husband's wages. On May 6, 2019, Husband filed a Motion to Stay Child Support Garnishment pending the child support modification hearing.

On July 17, 2019, Husband filed a motion to vacate the judgment of divorce. As grounds for the motion, Husband asserted that under the law of the

Philippines, he and Wife will not be granted a divorce in the Philippines unless he, as the "foreign spouse" of Wife, a Filipino national, first files for divorce. Husband requested that the court vacate the judgment of divorce to allow him to file for divorce, because "only then can either party remarry in the United States or the Philippines without facing felony charges of bigamy."[5] Husband further asserted that the order of custody contained in the judgment of divorce violated the terms of the *pendente lite* order providing that any matters concerning custody would be heard in the Philippines, unless Wife returned to the United States with R.G. Wife filed an opposition to the motion to vacate the judgment of divorce. The trial court denied the motion in a one-line order on August 9, 2019.

On July 30, 2019, after Husband filed the motion to vacate the judgment of divorce, but before it had been ruled on, the court held a hearing on Husband's Motion to Stay Child Support Garnishment. The order that was entered as a result of that hearing is the subject of this appeal.

At the hearing, Husband reiterated the claims he had made in the then-pending motion to vacate the judgment of divorce, that is, that he was trying to get the judgment vacated so that he could then file for divorce, and that the *pendente lite* order divested the court of jurisdiction over matters concerning child support. The court noted that the judgment of divorce was entered after the *pendente lite* custody order. In response to the court's questions, Husband confirmed that he had been served with the complaint for divorce but did not file an answer and did not file a timely motion to vacate the order of default. Husband further confirmed that he did not appear at the evidentiary hearing, that he did not file exceptions to the magistrate's findings and recommendations, and that he did not file an appeal from the judgment of divorce.

The court then stated that the only motion before the court on that day was the Motion to Stay Child Support Garnishment and asked Husband what relief he was requesting from the court at that time. Although Husband was no longer employed at the time the hearing took place, he requested an order to "stop garnishing [his] wages at this point until the hearing[,]" apparently referring the hearing on his amended petition to modify custody and visitation, which had not yet been scheduled. Counsel for Wife asserted that, under Family Law Article § 10-134, there was no basis to terminate the earnings withholding order contained in the judgment of divorce.[6]

The court then focused on Husband's jurisdictional argument. Counsel for Wife asserted that the court had jurisdiction over R.G. because R.G. was born in the United States and remained in the country up to and including the date that Wife filed the complaint for absolute divorce. Counsel for Wife pointed out that the court had already ruled on Husband's jurisdictional claim when it denied the motion to stay execution of child support garnishment that Husband filed in July 2018. Husband reiterated that he was only asking the court to stay the wage garnishment order, stating as follows:

> Really all I need the court to help me with is to stop that garnishment while I am re-establishing myself and getting back on my feet. We are going to have a merits hearing anyway. We are going to address that at that time.
>
> To allow me a few weeks here to stay that garnishment is all that I am asking.

On August 19, 2019, the court issued a 12-page memorandum opinion, explaining that it was treating the Motion to Stay Child Support Garnishment and the still-pending July 2017 Motion to Modify Custody as a motion to revise the divorce judgment.[7] The court determined that vacating the divorce judgment was appropriate based on a "procedural mistake or irregularity." Specifically, the court found that (1) the order of default should not have been entered because Husband was "meaningfully participating in the case," as evidenced by the *pendente lite* consent order that the parties entered into prior to the entry of the order of default; (2) it was improper for a child custody dispute to be determined by way of a default judgment; (3) the record does not reflect factual findings to support the custody determination; (4) Husband's assertion that Wife knew that he was unemployed at the time of the hearing on the complaint for absolute divorce "suggests [that Wife] provided false testimony which the Magistrate relied upon in his calculation of child support"; and (5) it was inappropriate for a contested custody matter to be referred to a magistrate. The court further found that Husband acted "in good faith and with ordinary diligence" as evidenced by pleadings that he filed with the court after entry of the judgment of divorce.

The memorandum opinion was accompanied by an order vacating the judgment of absolute divorce, including the orders regarding custody, visitation, child support, and earnings withholding. The order provided that Wife's complaint for absolute divorce was still before the court and should proceed to a trial on the merits, and that a *pendente lite* hearing should be set as soon as possible to address Husband's access to R.G.

Wife filed a notice for in banc review of the order vacating the judgment of divorce. The Panel held a hearing on January 14, 2020 and, on February 13, 2020, issued a memorandum opinion and order reversing the trial court's decision to vacate the judgment of divorce and reinstating same. Specifically, the Panel concluded that the default judgment was not an "irregularity" but was entered in accordance with procedural rules. The Panel explained that Husband's

consent to the *pendente lite* custody order was "neither a substitute for a responsive pleading nor inconsistent with the obligation to file one." The Panel remanded the case to the trial court for hearing and disposition of Husband's outstanding motions to modify custody, support, and visitation; adjust child support arrears; and stay child support garnishment. Husband filed a timely appeal from the decision of the Panel.

STANDARD OF REVIEW

Pursuant to Maryland Rule 2-551, "a party against whom a decision was made by the circuit court [has] a right to in banc review by a three-judge panel of the circuit." *Hartford Fire Ins. Co. v. Estate of Sanders*, 232 Md. App. 24, 36 (2017). "The in banc court functions 'as a separate appellate tribunal[.]'" *Id.* at 37 (quoting *Bienkowski v. Brooks*, 386 Md. 516, 553 (2005)). The in banc court does not reconsider the decision of the trial court, but rather "engage[s] in appellate review of the trial court's decision." *Id.* (citations omitted).[8]

Our role in reviewing an in banc decision is comparable to the role of the Court of Appeals in reviewing a decision from this Court. *Id.* at 38. That is to say, "in most instances, the appellate court ultimately reviews the judgment of the trial court."[9] *Guillaume v. Guillaume*, 243 Md. App. 6, 11 (2019) (citing *Hartford*, 232 Md. App. at 38). Here, the decision under review is the trial court's August 19, 2019, order vacating the judgment of absolute divorce upon a determination that the judgment was the result of "procedural mistake or irregularity."[10]

"[A]fter a judgment becomes enrolled, which occurs 30 days after its entry, a court has no authority to revise that judgment unless it determines, in response to a motion under [Md.] Rule 2-535(b), that the judgment was entered as a result of fraud, mistake, or irregularity." [11] *Thacker v. Hale*, 146 Md. App. 203, 216-17 (2002). "The existence of a factual predicate of fraud, mistake, or irregularity, necessary to support vacating a judgment under Rule 2-535(b), is a question of law." *Peay v. Barnett*, 236 Md. App. 306, 316 (2018) (quoting *Wells v. Wells*, 168 Md. App. 382, 394 (2006)). Questions of law are reviewed *de novo*, without deference to the trial court's interpretation of the law. *Hartford*, 232 Md. App. at 39. If we determine that, as a matter of law, there is factual predicate to support vacating a judgment under Rule 2-535(b), we then review the court's decision on the motion for abuse of discretion. *Peay*, 236 Md. App. at 316; Wells, 168 Md. App. at 394.

DISCUSSION

The question before us is whether the trial court erred in determining that the judgment of divorce was entered as a result of an "irregularity" and, if so, whether the court abused its discretion in vacating the judgment. We conclude, as did the Panel, that there was no irregularity in the proceedings that led to the entry of the judgment of divorce and that, therefore, the trial court erred in vacating the judgment.

"The purpose of limiting a trial court's discretion to revise an enrolled judgment is to promote finality of judgment and thus to insure that litigation comes to an end." *Heger v. Heger*, 184 Md. App. 83, 116-117 (2009) (quoting *Haskell v. Carey*, 294 Md. 550, 558 (1982)). As we have observed, "there is a strong public policy in favor of sustaining the finality of divorce decrees[.]" *Id.* at 117 (quoting *Hamilton v Hamilton*, 242 Md. 240, 243 (1966)). To ensure the finality of judgments, "Maryland courts have narrowly defined and strictly applied the terms fraud, mistake [and] irregularity" that, pursuant to Rule 2-535(b), may provide grounds to revise an enrolled judgment. *Peay*, 236 Md. App. at 321.

"Fraud" in the context of Rule 2-535(b) is limited to "extrinsic fraud," which is conduct that "actually prevents an adversarial trial." *Bland v. Hammond*, 177 Md. App. 340, 351 (2007).[12] "A 'mistake' under the Rule refers only to a 'jurisdictional mistake[,]'" for example, "when a judgment has been entered in the absence of valid service of process; hence the court never obtains personal jurisdiction over a party." *Peay*, 236 Md. App. at 322 (quoting *Chapman v. Kamara*, 356 Md. 426, 436 (1999)) (additional citation omitted).

Here, the trial court determined that the judgment of divorce resulted from a procedural "irregularity."[13] An "irregularity," in the context of Rule 2-535(b) means "a failure to follow required process or procedure." *Thacker*, 146 Md. App. at 219 (quoting *Early v. Early*, 338 Md. 639, 652 (1995)). "Irregularities warranting the exercise of revisory powers most often involve a judgment that resulted from a failure of process or procedure by the clerk of a court," such as "failures to send notice of a default judgment, to send notice of an order dismissing an action, to mail a notice to the proper address, and to provide for required publication." *Id.* at 219-220.

An "irregularity" for purposes of Rule 2-535(b) is "not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged." *Id.* at 219 (quoting *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975)). If a judgment "was entered in conformity with the practice and procedure commonly used by the court that entered it, there is no irregularity justifying the exercise of revisory powers under Rule 2-535(b)." *Id.* at 221.

Based on our review of the record, the judgment of divorce was entered in conformity with common practice and procedure. The record reflects that Husband was served with the complaint for absolute

divorce on February 12, 2017. Pursuant to Rule 2-321, Husband had 30 days, or until March 14, to file an answer to the complaint. Husband failed to file a responsive pleading and, on March 16, pursuant to Wife's written request, the court entered an order of default, as required by Rule 2-613(b).[14] The court then notified Husband, as required by Rule 2-613(c), of the entry of the order of default and of his right to file a motion to vacate the order. When Husband failed to file a motion to vacate, the court held an evidentiary hearing, as required by Maryland Rule 9-209.[15] The court mailed the magistrate's report and recommendations to the parties on April 24, 2017, which included notice of the right to file exceptions within 10 days of service and a notice explaining that, if no exceptions were filed, the magistrate's recommendations would be submitted to a judge for approval. The judgment of divorce was not entered until June 7, 2017, after the expiration of the time for filing exceptions.

None of the reasons cited by the trial court in vacating the judgment of divorce can be characterized as an irregularity that would justify revision of a final judgment pursuant to Rule 2-535(b). Husband's consent to the *pendente lite* order, which addressed the limited issue of custody, did not substitute for or otherwise relieve Husband of his obligation to file an answer to the complaint for divorce. To the extent that Husband believed, as the trial court found, that he was "meaningfully participating" in the case by consenting to the *pendente lite* order, Husband was alerted to the need to take further action when the court sent notice of the order of default and when the court sent Husband the magistrate's report and recommendation.16 *See Thacker*, 146 Md. App. at 217 (stating that a party moving to set aside an enrolled judgment pursuant to 2-535(b) "must establish that he or she act[ed] with ordinary diligence and in good faith upon a meritorious cause of action or defense." (citation and internal quotation marks omitted)).

The second "irregularity" found by the trial court was the resolution of the issue of custody by way of a default judgment. The court relied on *dicta* in F*lynn v. May*, 157 Md. App. 389 (2004), where we questioned whether a judgment by default was ever appropriate in a case of disputed child custody. *Id.* at 411.

Here, as in *Flynn*, we need not decide that issue, nor do we need to decide if such a scenario would amount to a procedural "irregularity" for purposes of Rule 2-535(b). As Wife points out, child custody was not in dispute when the judgment of divorce was entered. Husband had consented to the *pendente lite* order granting sole legal and physical custody to Wife. And, because Husband did not file an answer to Wife's complaint for divorce, in which she alleged that it was in the best interests of R.G. for her to have sole legal and physical custody of R.G., and because Husband did not file exceptions to the magistrate's recommendation that Wife continue to have sole custody, the court had no reason to believe that a custody dispute had arisen. Accordingly, the *dicta* in *Flynn* has no bearing on the issue before us.

Next, the trial court erred when it concluded that an absence of factual findings to support the custody determination was a procedural irregularity that justified vacating the judgment of absolute divorce. Any perceived inadequacy in the custody findings would have been in the nature of legal error, of which Husband was on notice and could have challenged by filing exceptions to the magistrate's findings and then, if such exceptions were overruled, by appealing the judgment of divorce. Similarly, the court's concern that the magistrate may have relied on "false testimony" regarding Husband's income was not a "failure to follow required process or procedure."

Finally, the court erred in exercising revisory power over the judgment of divorce based on its conclusion that it was a procedural irregularity to refer a "contested custody case" to a magistrate. Not only was custody uncontested when the case came before the magistrate, there was an existing consent order granting Wife sole legal and physical custody. Pursuant to Rule 9-208(a)(1)(F) "modification of an existing order or judgment as to custody or visitation" may be referred to a magistrate. *Accord Frase v. Barnhart*, 379 Md. 100, 111 n. 6 (2003). Accordingly, under the circumstances of this case, referring the case to the magistrate was not a "failure to follow required process or procedure."

In sum, we conclude that the judgment of divorce was entered in conformity with the practice and procedure commonly used by the trial court, and that there was no fraud, mistake or irregularity justifying the exercise of revisory powers under Rule 2-535(b). Any dispute as to custody, support, or visitation that has arisen since the entry of the judgment of divorce may be addressed at the hearing on Husband's motion to modify, which is still pending before the circuit court.

JUDGMENT OF THE IN BANC PANEL AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANT.

Footnotes

1 Husband presents the following questions in his brief:

1. Did Maryland have subject matter jurisdiction to hear the case of custody, care, and support of minor child [R.G.], a Filipino national with dual citizenship, when he had moved and was living in the Philippines?

2. Did the court err in awarding a default judgment against [Husband]?

2 Husband was later sentenced to 10 years, with all but 18 months suspended.

3 The petition for contempt was dismissed for lack of jurisdiction in January 2018, apparently because Wife was never served.

4 A 12-page custody evaluation was filed with the court on October 21, 2019, with the following recommendations:

1. That [Wife] be granted sole legal and physical custody of [R.G.]

2. That [Husband] submit to a comprehensive psychological evaluation and substance abuse assessment by court-approved providers, and follow all recommendations for treatment made in the evaluation.

3. That once [Husband] has verification of completion of the above, he may be considered for supervised access with [R.G.]

Husband filed motions challenging the custody evaluation, which the court denied.

5 Husband continues to assert on appeal that the judgment of divorce should be vacated because it is invalid in the Philippines. Whether a foreign court recognizes a judgment of a court of this State is not grounds for revision of a final judgment pursuant to Rule 2-535(b).

6 Section 10-134 of the Family Law Article provides for termination of earnings withholding for child support on the following conditions:

(1) the support obligation is terminated and the total arrearages are paid;

(2) all of the parties join in a motion for termination of the withholding; or

(3) within 60 days of the withholding order being served, the court finds:

(i) no history of child support arrearages; and

(ii) the arrearage which gave rise to the withholding order was the result of a bona fide medical emergency involving hospitalization of the obligor or the death of the obligor's parents, spouse, children, or stepchildren.

7 The court cited *Pickett v. Noba, Inc.*, 114 Md. App. 552, 557 (1997) (stating that "[a] motion may be treated as a motion to revise under Md. Rule 2-535, even if it is not labeled as such.")

8 Pursuant to Maryland Rule 2-551(h), a party who seeks and obtains in banc review has no further right of appeal, however, "[t]he decision of the panel does not preclude an appeal to the Court of Special Appeals by an opposing party [in this case, Husband] who is otherwise entitled to appeal."

9 Issues that do not stem from a trial court decision, but from a legal determination made by the in banc panel, are reviewed without reference to the decision of the trial court. *See Guillaume v. Guillaume*, 243 Md. App. 6, 12 (2019) (discussing *Hartford*, 232 Md. App. at 40).

10 As the Panel noted in its decision, "[t]he striking of an enrolled judgment . . . or the refusal to do so, is in the nature of a final judgment and is appealable. *Estime v. King*, 196 Md. App. 296, 302 (2010) (citation omitted).

11 Maryland Rule 2-535(b) provides that, "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in the case of fraud, mistake, or irregularity."

12 By contrast, "intrinsic fraud," which is "employed during the course of the hearing or trial which provides the forum for the truth to appear[,]" is "not a ground upon which an enrolled judgment may be vacated." Bland, 177 Md. App. at 351. Husband contends on appeal that Wife committed fraud at the hearing by claiming that he earned $1000 a week when she knew that he was unemployed. As an initial matter, we note that Wife told the magistrate that she did not know whether Husband was still employed and earning the same income. Even if Wife had intentionally misrepresented Husband's income, however, that would not be grounds for revising a judgment pursuant to Rule 2-535(b). See Manigan v. Burson, 160 Md. App. 114, 120-21 (2004) ("[a]n enrolled decree will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds which are intrinsic to the trial of the case itself.") (citation omitted).

13 Although the court used the phrase, "procedural mistake or irregularity," the court's rationale for vacating the judgment of divorce focused exclusively on perceived procedural irregularities, and not a jurisdictional "mistake." We note that the trial court specifically found Husband's jurisdictional argument to be without merit. Husband continues to assert on appeal that the court lacked subject matter jurisdiction over issues concerning custody and support of R.G. because R.G. had moved to the Philippines. He is incorrect. Pursuant to § 9.5-201(a) of the Family Law Article ("FL"), Maryland courts have jurisdiction to make an initial child custody determination if Maryland "is the home state of the child within 6 months before the commencement of the proceeding[.]" Husband does not dispute that R.G. lived in Maryland within six months of the filing of Wife's complaint for divorce in January 2017. Moreover, pursuant to FL § 9.5-202(a), a court that has made an initial child custody determination retains exclusive, continuing jurisdiction over custody until there is a determination that:

(1) neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or

(2) a court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

There is nothing in the record indicating that a determination has been made, pursuant to FL § 9.5-202(a), that would divest the trial court of exclusive, continuing jurisdiction over custody.

14 Rule 2-613(b) provides that, "[i]f the time for pleading has expired and a defendant has failed to plead as provided by these rules, the court, on written request of the plaintiff, shall enter an order of default."

15 Pursuant to Rule 9-209 "[a] judgment granting a divorce, an annulment, or alimony may be entered only upon testimony in person before a magistrate or in open court. In an uncontested case, testimony shall be taken before a magistrate unless the court directs otherwise."

16 Husband contends that, in granting the judgment of divorce, the court "ignored" the parties' agreement that was formalized in the pendente lite order. We disagree. The judgment of divorce incorporated the parties' agreement to grant Wife sole physical and legal custody of R.G. Contrary to Husband's suggestion that the pendente lite order addressed child support and visitation, the order does not resolve those issues. Moreover, upon agreeing to the consent order granting custody to Wife, the provision in the same order, by which the parties agreed to litigate any custody action in the Philippines, could only have applied to a subsequent modification of custody. The magistrate's recommendations and the judgment of divorce did not modify the terms of the consent order with respect to custody. In any event, even if the judgment of divorce was somehow inconsistent with the terms of the pendente lite order, Husband failed to file exceptions to the magistrate's recommendations before they were approved by the court.

Cite as 1 MFLU Supp. 25 (2021)

Divorce; motion for reconsideration; expert testimony

John Liccione
v.
Moea Goron-Futcher

No. 3116, September Term 2018

Argued before: Wright, Friedman, Wells, JJ.

Opinion by: Wells, J.

Filed: Nov. 4, 2020

The Court of Special Appeals affirmed the Howard County Circuit Court's denial of the ex-husband's motion to reconsider the judgment of absolute divorce.

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

On June 25, 2018, Moea Goron-Futcher, appellee ("Wife"), filed a complaint for absolute divorce in the Circuit Court for Howard County against her husband, John Liccione, appellant ("Husband"). In addition to requesting an absolute divorce, the complaint sought to enforce the terms of a marital property settlement agreement the parties signed nearly six months earlier in January 2018. That agreement contained specific terms relating to alimony, personal and real property, financial accounts, and certain shares of stock.

Pertinent to this appeal, on July 10, 2018, Wife filed a pleading titled, "Motion to Enjoin [Husband] from Dissipation of Marital Assets." Later, on September 19, 2018, Wife filed what she called "Notices of Adverse Interest" to "alert" various financial institutions of her interest in marital property held within them. Husband moved to strike the Notice of Adverse Interest, moved to strike as untimely an affidavit Wife also filed, and moved for sanctions, all of which the court denied.

On January 7, 2019, the circuit court granted the parties an absolute divorce. Eight days later, Husband filed a motion for reconsideration of judgment of absolute divorce. The circuit court denied that motion after a hearing on March 4, 2019.

Husband filed a timely appeal and asks the following questions, which we have condensed and rephrased for purposes of clarity and brevity:[1]

1. Whether the circuit court abused its discretion when it denied Husband's motion to strike Wife's untimely affidavit?

2. Whether the circuit court abused its discretion when it denied Husband's motion to strike Wife's notices of adverse interest?

3. Whether the circuit court erred when it determined Husband's motion for sanctions was moot?

4. Whether the circuit court abused its discretion when it refused to admit Husband's expert testimony and denied Husband's motion to reconsider the judgment of absolute divorce?

As we will discuss, we perceive no error and affirm the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

This case comes to us after a lengthy and contentious series of legal proceedings. The parties were married for nearly seven years before Husband filed a complaint for absolute divorce on March 10, 2017. On May 25, 2017, Wife was granted a protective order against Husband arising from a physical altercation that occurred between them. Husband was later arrested and incarcerated for criminal assault. After his arrest, Husband was transferred to the Springfield Psychiatric Hospital in Sykesville, Maryland for mental and somatic treatment. On December 1, 2017, the Howard County Circuit Court determined that Husband was mentally competent to stand trial and he was released from the psychiatric facility.

Five days after Husband's release, at a proceeding before the circuit court on December 6, 2017, the parties, through their respective counsel, informed the circuit court that they had reached a marital property settlement agreement ("MPSA"), which resolved all issues arising from the marriage.[2] After being sworn, both parties acknowledged the essential terms of the agreement on the record. This agreement was later reduced to writing and signed by both parties on January 10, 2018. Among other things, the

MPSA required Husband to transfer to Wife 50,000 of 100,000 shares of Tenable, Inc. stock which the couple acquired during their marriage; $75,498.21 was to be transferred to Wife from Husband's Fidelity Investment retirement account via a Qualified Domestic Relations Order ("QDRO"); and all funds held in a 529 college savings plan were to be maintained for the benefit of Wife's daughter.

Another important provision in the MPSA was that Wife would assert her spousal privilege in Husband's pending criminal trial arising from the domestic incident. That trial was scheduled for March 26, 2018. However, because the divorce hearing was scheduled for February 1, 2018, the parties were faced with the fact that Wife would lose the right to assert her spousal privilege, as the parties would no longer be married by the date of the criminal trial. Accordingly, both parties agreed to postpone the divorce hearing, and, if for some reason, Wife could not assert her marital privilege at the criminal trial, the parties agreed to jointly dismiss and refile the complaint for absolute divorce.

That contemplated scenario is exactly what happened; for reasons not fully disclosed, Wife did not assert her spousal privilege, as planned. Consequently, on January 23, 2018, the parties filed a joint line dismissing without prejudice the complaint for absolute divorce, thereby protecting Wife's spousal immunity.

In what might be described as a provocative move, on May 24, 2018, the day the Final Protective Order expired and nearly two months after the conclusion of Husband's criminal case, Husband asked the circuit court to declare the MPSA null and vo*Id.* Husband's motion led Wife to file several pleadings of her own.

On June 25, 2018, Wife refiled a complaint for absolute divorce in the Circuit Court for Howard County and subsequently filed a motion to enjoin Husband from dissipation of marital assets, fearing that Husband would squander her portion of the marital estate before the divorce hearing. Wife also requested that Husband be prohibited from accessing any marital property specified in the MPSA. The circuit court denied that motion on August 1, 2018.

On July 23, 2018, Husband filed a Counter-Complaint for Absolute Divorce, and surprisingly, requesting that the terms of the MPSA be incorporated and made a part of, but not merged in, any judgment of absolute divorce. Three days later, Tenable, Inc. opened with an Initial Public Offering and its stock shares rose drastically. At a September 7, 2018 hearing, Wife attempted to finalize the divorce and to submit a court order transferring her portion of the Tenable stock per the MPSA. Husband opposed both of Wife's attempts, and the court rescheduled the hearing for January 7, 2019.

Meanwhile, on September 19, 2018, Wife filed with the court a renewed Notice of Adverse Interest to Tenable, Inc., and two Notices of Adverse Interest to Fidelity Investments regarding the couple's IRA and 529 college savings plan. Then, on September 28, 2018 and October 4, 2018, Tenable notified Husband of its receipt of Wife's Notice of Adverse Interest and informed him that it refused to lift a restrictive stock legend on the entire 100,000 Tenable shares rather than Wife's one-half marital share. As a result, on October 7, 2018, Husband filed suit against Tenable seeking, among other things, to have the restrictive legend removed from all 100,000 shares.

Four days later, on October 11, 2018, Husband moved to strike Wife's Notices of Adverse Interest, and, later, filed a Motion for Sanctions and Request for Hearing on October 30, 2018. In response, on October 15, 2018, Wife filed an Answer to Husband's motion and then submitted an affidavit in support of her answer on November 3, 2018. Husband and Wife filed numerous answers in response[3] and a hearing was scheduled for December 19, 2018.

At the December 19 hearing, the Circuit Court for Howard County took evidence and testimony from both parties regarding Wife's Notices of Adverse Interest and Husband's motion to strike and motion for sanctions. As will be discussed, the circuit court denied Husband's motions to strike and motion for sanctions. Also, at this hearing the circuit court granted the parties a judgment of absolute divorce. Less than one month later, on January 15, 2019, Husband asked the court to reconsider the judgment of absolute divorce in an attempt to re-open the divorce for further proceedings in relation to the parties' settlement agreement. The court denied Husband's motion to reconsider. Further facts and details of the proceedings will be provided, if needed.

DISCUSSION

I. The Court Did Not Err in Denying Husband's Motions to Strike Wife's Affidavit and Wife's Notices of Adverse Interest

A. Wife's Affidavit

Husband first contends that the circuit court erred when it denied his motion to strike Wife's "Notices of Adverse Interest" and the supporting affidavit. Husband posits that the circuit court should have stricken Wife's affidavit because it was untimely. Wife submitted a supporting affidavit nearly three weeks after she filed an answer to Husband's motion to strike. Husband reasons that the plain meaning of Maryland Rule 2-311(d) necessarily requires that an affidavit in support of a response to a motion and the response be filed simultaneously. If the court had stricken the affidavit, Husband argues that the court would not have considered any new facts contained in the affidavit before deciding his motion to strike. In Husband's estimation, because Wife failed to support

her answer/response with a timely affidavit, Wife's opposition lacked the "required proof" and was insufficient to overcome Husband's motion as a matter of law. As such, the court's failure to strike the affidavit was error. We disagree and explain.

The decision to grant or deny a party's motion to strike lies within the discretion of the trial court. *Patapsco Associates Ltd. Partnership v. Gurany*, 80 Md. App. 200, 204 (1989) (citing *Lancaster v. Gardiner*, 225 Md. 260, 207 (1961)). "Absent prejudice to the defendant, the motion to strike ordinarily should be denied[.]" *Patapsco Associates Ltd.*, 80 Md. App. at 204 (internal citation omitted). As such, motions to strike are reviewed for an abuse of discretion on appellate review. *Id.* We find an abuse of discretion when "no reasonable person would take the view adopted by the [trial] court." *Myers v. State*, 243 Md. App. 154, 179 (2019) (internal quotation omitted).

Under Maryland Rule 2-311(d), "[a] motion or a response to a motion that is based on facts not contained in the record shall be supported by affidavit and accompanied by any papers on which it is based." Husband submits that the plain meaning of this rule, which uses the word "shall," necessarily required that Wife submit an affidavit in support of her response/answer with her response. In Husband's estimation, Rule 2-311(d) plainly barred Wife from submitting an affidavit *at any time* other than at the time she filed her response. Consequently, Husband argues, the circuit court had no right to consider any fact set forth in Wife's answer. We find Husband's insistence on strict compliance with the formal requirements in 2-311(d) unconvincing.

First, Maryland Rule 1-201(a) states that, "[w]hen a rule, by the word 'shall' or otherwise, mandates or prohibits conduct, the consequences of noncompliance are those proscribed by these rules or by statute." But, Rule 2-311 does not proscribe any consequences of a party's noncompliance of its supporting affidavit requirements. "If no consequences are prescribed," as is the case here, "the court may compel compliance with the rule or may determine the consequences of the noncompliance in the light of the totality of the circumstances and the purpose of the rule." Md. Rule 1-201(a).

At the parties' hearing on Husband's motion to strike, the court exercised its discretion and made precisely that finding:

> THE COURT: I agree with [Husband's counsel] that an affidavit should be filed with the papers . . . But I don't see anything in [Rule] 2-311 that precludes an affidavit to have been filed supplemental (sic) or separate from the motion. What it says is, ["]a motion or a response to a motion that is based on facts not contained in the record shall by supported by an affidavit and accompanied by any papers on which it is based.["] Now I can see that a plain meaning of that may be, you file the motion, you should file the affidavit with it. [. . .]
>
> ***
>
> Could [Wife's attorney] have filed amended pleading or paper and attach the affidavit? Yes, but it's cured, so I don't find that [Husband's Motions to Strike Wife's Untimely Affidavit are] a viable motion. So those two motions are denied.

As Rule 1-201(a) mandates, courts "may determine the consequences of the noncompliance in the light of the totality of the circumstances and the purpose of rule." Here, the motions judge found that Wife effectively cured her noncompliance with Rule 2-311(d) by filing an affidavit (November 3, 2018) nearly three weeks after she filed her answer (October 15, 2018), but nearly a month and a half before the hearing on the motions (December 19, 2018). The court found that the Wife's omission of an affidavit was cured without prejudice to Husband, given the month between the affidavit's submission and the motions hearing. Under these circumstances, the motions court did not render a decision that "no reasonable person" would have made. *Myers*, 243 Md. App. at 179. The court did not abuse its discretion in not striking Wife's Answer and her supporting affidavit.

B. Wife's Notices of Adverse Interest

Next, Husband, citing language in *Scully v. Tauber*, 138 Md. App. 423 (2001), asserts that if the circuit court had properly stricken Wife's late affidavit, then the court would have been required to make a finding in his favor because "where an opposition alleges new facts and those facts are not supported by an affidavit, then the facts cannot be considered by the Circuit Court in reaching its decision on the motion." *Id.* at 431. However, as we previously discussed, the circuit court did not err in accepting Wife's late affidavit and, therefore, could properly consider any facts presented in Wife's answer and/or affidavit.

As for the Notices of Adverse Interest themselves, Husband posits that Wife "attempted an end-run around [the court's denial of Wife's Motion to Enjoin Husband from Dissipating Marital Assets] by filing and serving the notices of adverse interest" in bad faith.[4] As he sees it, Wife participated in "self-help in the face of an unfavorable judicial decision," which he urges us not to "condone or encourage." However, Husband fails to develop this argument any further. He cites no statute or case law in support of this contention, and, in our view, his argument is circular: Wife filed the Notices of Adverse Interest in bad faith because they negatively impacted Husband, and

because the notices negatively impacted Husband, they must have been filed in bad faith. As Husband has failed to present a sufficient argument, we consider this contention waived, and affirm the circuit court's judgment on this issue. *See Impac Mortgage Holdings, Inc. v. Timm*, 245 Md. App. 84, 117 (citing Md. Rule 8-504(a)(6); *Klauenberg v. State*, 335 Md. 528, 552 (1998); *Beck v. Mangels*, 100 Md. App. 144, 149 (1994)) (affirming the judgment of the circuit court on the ground that appellant failed "to develop his argument [any] further and cite[d] no case law to support it" and thereby waived his challenge to the circuit court's ruling), *cert. granted*, 469 Md. 656 (2020).

II. The Circuit Court Properly Determined that Husband's Motion for Sanctions Was Moot

In concluding that the circuit court did not abuse its discretion when it denied Husband's motions to strike, we also hold that it did not err in finding that Husband's motion for sanctions was moot. We agree with the circuit court's determination that no sanctions could be applied to a motion that had already been denied. Generally, a question is moot "if no controversy exists between the parties or when the court can no longer fashion an effective remedy." *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 351-52 (2019) (internal citations and quotation marks omitted). Considering that the motions court did not abuse its discretion when it denied Husband's motions to strike, we accordingly conclude that there was no longer a controversy between the parties for which the court could fashion a remedy. The motions judge provided Husband's counsel many opportunities to present an argument against mootness, but he failed to do so:

> THE COURT: [. . .] [S]ince I found that the burden was not persuasive, I didn't get over the fifty percent on the Motion to Strike the Adverse Interest, let's just forget the affidavit for a minute, okay? Motion to Strike the Adverse Interest, then what sanctions do I have? I mean what sanctions on what? Do you follow me?
>
> ***
>
> I mean, I just don't know on what the Court would impose sanctions given that the basis for the sanctions is to basically say [Rule] 1-341, against the Plaintiff's (sic), which the Court did not find.
>
> ***
>
> So I don't know what I'm left on which the Court could entertain sanctions. That's sort of where I am, i.e., I think it's moot.
>
> [HUSBAND'S COUNSEL]: [. . .] I would suggest that when the Court looks at again that pair of motions together . . . there is this pattern and trend of skirting what is appropriate under the rules. And it started with the filing, with the communications with these financial services providers and it goes to claiming that these shares should be transferred over to the Plaintiff [Wife], directly contrary to the Separation Agreement. This bullying tactic that is continuing throughout, and it's – I concede that it's on the line, I do.
>
> THE COURT: Well if it's on the line, you have the burden to push me over the line, and I'm not pushed yet.
>
> ***
>
> I mean honestly, I truly think it's moot because I don't know on what the Court would impose sanctions given the Court's ruling.

Because the court did not abuse its discretion in its initial determinations, we conclude that it did not err when it found Husband's motion for sanctions to be moot.

III. The Circuit Court Was Within Its Discretion to Deny Husband's Motion to Reconsider the Judgment of Absolute Divorce

Finally, Husband advances three reasons why the circuit court abused its discretion in denying his motion to reconsider the judgment of absolute divorce. *First*, he argues that he lacked the capacity to enter into the MPSA given that he agreed to the terms on record five days after his release from Springfield Psychiatric Hospital. Accordingly, Husband claims that the circuit court should have re-opened the judgment to allow expert testimony about his mental capacity at the time the MPSA was negotiated.

Second, Husband asserts that, at the hearing on the motion to reconsider, he proffered sufficient evidence that Wife allegedly failed to disclose significant assets she amassed during their marriage, to which, Husband claims, he would have been partially entitled. He also avers that the circuit court erred in denying his motion to reconsider because it refused to admit the reports of a private investigator who allegedly uncovered Wife's supposedly hidden assets. The circuit court, in Husband's estimation, abused its discretion by failing to admit the investigator's reports because, essentially, it set too high of a standard for the admissibility of the expert's testimony.

Lastly, Husband maintains that the court was not required to find that Wife committed fraud when she failed to disclose these assets. As Husband sees it, he invoked the court's authority under both Maryland Rules 2-534, Motion to Alter or Amend Judgment,

and 2-535, Revisory Power. He argues Rule 2-535 permits the circuit court to take any action it could have taken under Rule 2-534. However, because he filed his motion to reconsider within ten days of the judgment's entry, Husband contends that Rule 2-534 applies, thereby not requiring him to demonstrate that Wife committed fraud (or mistake or irregularity) and facially entitling him to an order to reopen the judgment.[5] We disagree with all three of Husband's contentions.

A. Husband had Capacity to Enter Into the MPSA

More than a year after Husband was declared mentally competent to stand trial in his criminal assault case, at the hearing on Husband's motion to reconsider the judgment of divorce, Husband's attorney attempted to present evidence of Husband's mental incompetency at the time the MPSA was signed:

> [HUSBAND'S COUNSEL]: [. . .] And I know that this is a stretch, which is why I'm letting the Court know ahead of time, capacity at time of execution of the agreement.
>
> ***
>
> [HUSBAND'S COUNSEL]: I think the motion for reconsideration referenced both capacity and new assets. Those were the only two prongs of this argument that we had. But I'm intentionally loudly and clearly telegraphing what this witness would testify to.
>
> ***
>
> [WIFE'S COUNSEL]: Well – so, Your Honor, here's my concern with that . . . Judge Tucker, in this case, on December 1, 2017 found that he [Husband] was competent to stand trial. He entered into, on December 7th, the oral agreement that subsequently became the January 10th, 2018 agreement. . . . He was competent at that time.
>
> ***
>
> THE COURT: All right, I also note that I think even in the Defendant's own pleadings, it says he did not stabilize until August of 2018. And, of course, he was released – forgive me now ….
>
> [HUSBAND'S COUNSEL]: In late 2017.
>
> THE COURT: I would think the fact that he was released would be some positive reflection on his mental health.
>
> [HUSBAND'S COUNSEL]: It would, your Honor, although I'd argue that that release would likely only constitute that he's not a danger to himself or others—
>
> THE COURT: Right.
>
> [HUSBAND'S COUNSEL]: -- rather than capacity and competency.
> THE COURT: I'm going to sustain the objection. I think Judge Tucker may have already ruled on this particular issue.

(emphasis supplied).

When reviewing a circuit court's decision "to deny a request to revise its final judgment," we do so under an abuse of discretion standard. *Pelletier v. Burson*, 213 Md. App. 284, 289 (2013). Husband's argument that he lacked the capacity to enter into the MPSA in the first place is [entirely] untenable. It is true, as Husband reasons, that a marriage settlement agreement is, plainly, a contract between the two parties, *Coffman v. Hayes*, 259 Md. 708 (1970), and, as such, both parties must have the legal competency to enter into such a contract. *Hopkins v. Hopkins*, 328 Md. 263 (1992). It is essential to the validity of a contract that its parties possess the mental competence affording capacity to consent. Alan J. Jacobs & Mary Babb Morris, Md. L. Encyclopedia Contracts, *Parties' Ability to Consent*, *In General* § 48 (5th ed. September 2020) (citing *Potter v. Musick*, 247 Md. 39 (1967)). "When a competent person signs a contract or disposes of his property in the absence of fraud, misrepresentation, mistake, undue influence, or fiduciary relations, the contract will be enforced." Md. L. Encyclopedia Contracts § 48 (citing *Julian v. Buonassissi*, 414 Md. 641 (2010)).

For criminal purposes, "[a] defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him." *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (internal citations and quotations omitted) (cleaned up); *see also United States v. Bernard*, 708 F.3d 538 (4th Cir. 2013). To be "competent" to stand trial means that a defendant has the present ability to consult with their lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against them. Md. Code Ann., Criminal Procedure ("CP") § 3-101(f). Once the issue of competency has been raised, a determination that an accused is competent to stand trial must be found beyond a reasonable doubt. *Peaks v. State*, 419 Md. 239, 251 (2011); CP § 3-104.

At a hearing on December 1, 2017, the court declared Husband mentally competent to stand trial for a criminal offense. Six days later, Husband, represented by counsel, entered into the MPSA with Wife. Notably, at the time that he acknowledged voluntarily entering into the MSPA in open court, neither Husband nor his counsel objected to the MSPA on the

grounds of mental incapacitation. In fact, Husband, represented by counsel, engaged in the following colloquy with his attorney at the December 7, 2017 settlement hearing:

> [HUSBAND'S COUNSEL]: Okay, just so it's clear. *Within the last week you were determined by Judge Tucker of this court to be competent; is that correct?*
> [HUSBAND]: Yes.
>
> Q: All right. And you currently are under the care of a psychiatrist; is that correct?
> A: Yes.
>
> Q: And it is Dr. Joshi?
> A: Yes.
>
> Q: Okay. And you are currently on medication?
> A: Yes.
>
> Q: Okay. *Do those medication (sic) that you are taking affect your clarity of thinking?*
> A: No.
>
> Q: Or your memory?
> A: Not at all, no.
>
> Q: *Okay. Do you understand the terms of this agreement?*
> A: Yes, I do.
>
> ***
>
> Q: Okay. Do you understand if you had not entered into an agreement you would have a right to go (sic) trial. And at a trial you could put on evidence and put forth testimony in a court or make a determination with respect to the equitable distribution of your assets. Do you understand that?
> A: Yes, I do.
>
> ***
>
> Q: Okay. Are you satisfied with my services as of today's date?
> A: Yes.

(emphasis supplied).

This colloquy reveals to us that Husband knew what he was doing when he entered into the marriage settlement agreement, especially considering that Husband was represented by counsel prior to and during the settlement proceedings. During the proceedings, neither Husband nor his attorney raised an alarm that Husband might be incompetent to enter into the agreement. As can be seen from the transcript, when Husband's attorney brought up the issue of competency at the beginning of the colloquy, Husband's attorney did not qualify "competency" as Husband attempts to do so here. In fact, Husband's counsel candidly admitted he knew the argument was "a stretch." Our conclusion is that Husband and his attorney believed that the court previously determined Husband was competent for both criminal and civil purposes.

Of equal significance, is the fact that Husband received an important benefit from Wife with the agreement. Immediately after he received that benefit, he tried to wriggle out of the bargain. We speak of the fact that Wife agreed to postpone the divorce proceedings in order to invoke her spousal privilege in Husband's criminal case, and, essentially, gut the criminal prosecution against him for allegedly assaulting her. Once he got Wife to invoke her privilege and get the charges dismissed, Husband then attempted to gut the bargain by claiming mental incapacity. One could easily conclude that Husband's claimed incapacity was strategic and solely to benefit himself.

We further note that Husband does not allege that he should have been found incompetent at the criminal competency hearing on December 1, 2017; he accepted the court's finding that he was competent. But he claims he lacked the capacity to enter into the MSPA six days later. Under these circumstances, we conclude that the circuit court did not abuse its discretion in denying Husband's motion to reopen the judgment of divorce based on his alleged incapacity.

B. The Court Was Within Its Discretion to Exclude the Reports of a Private Investigator

Husband's second argument is that the circuit court improperly refused to admit the reports of his private investigator. At the hearing, Husband called as a witness John Lopes, a private investigator. Husband and Lopes alleged that the latter's reports revealed that Wife concealed marital assets, unbeknownst to Husband, in at least two separate bank accounts. At the hearing, Lopes testified that Husband hired him to investigate Wife's "financials." However, Lopes admitted that his private investigating firm did not itself conduct research into Wife's financial accounts; rather, Lopes said that he hired outside vendors to perform this function. According to Lopes, the vendor's research found bank accounts supposedly belonging to the Wife, which presumably were not disclosed prior to or during the drafting of the parties' MPSA.

Critically, Lopes admitted that the vendor did not provide him with the source of this information, and, therefore, he could not verify anything about the accounts beyond what the vendor provided. Lopes also testified that his company "ha[d] no control over" the standards, practices, or conduct of the third-party in gathering the information. Remarkably, the reports did not contain any account records from the banks themselves. Instead, the reports contained only a

summary of the alleged bank account, "a portion" of the account number, and the account balance. Lopes admitted he never saw Wife's verified banking records. Ultimately, the court sustained Wife's counsel's objections to the reports as hearsay testimony.

Before this Court, Husband argues that Lopes' private investigative reports were admissible because "[a]n expert may give an opinion based on facts contained in reports, studies, or statements from third parties, if the underlying material is shown to be of the type reasonably relied on by experts in the field." *Lamfalfa v. Hearn*, 457 Md. 350, 354 (2018). Apparently, Husband assumes that Lopes was an expert witness. He was not. To qualify as an expert witness, the court must determine "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702. Husband, however, never offered nor qualified the private investigator, Lopes, as an expert witness under Rule 5-702. Accordingly, we conclude that Lopes testified as a lay witness under Rule 5-701.

Maryland Rule 5-701 limits the testimony of a non-expert witness "to those opinions which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." *Lay Opinion Testimony* is therefore admissible when it is "derived from first-hand knowledge, is rationally connected to the underlying facts, is helpful to the trier of fact, and is not barred by any other rule of evidence." Eric C. Surette & Susan L. Thomas, Md. L. Encyclopedia Evidence, *Lay Opinion Testimony* § 154 (10th ed. September 2020) (citing *Robinson v. State*, 348 Md. 104 (1997)). The lay witness, then, "must be possessed of adequate knowledge regarding the subject matter to which his or her testimony relates." *Id.* at § 155. Admission of such testimony lies within the discretion of the trial court, whose decision shall not be reversed unless it constitutes an abuse of discretion. Gordon v. State, 431 Md. 527, 533 (2012); *Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009).

At this motions hearing, the judge was the trier of fact. *Steinberg v. Arnold*, 42 Md. App. 711 (1979). When the trial court acts as the trier of fact, its judgment of the evidence will only be set aside if it is clearly erroneous. *State v. Manion*, 442 Md. 419, 431 (2015) (citing *State v. Raines*, 326 Md. 582, 589 (1992)); *see also In re Timothy F.*, 343 Md. 371, 379-80 (1996). As the trier of fact, the court is required to consider all of the evidence before "rendering" its decision, to evaluate or assess witness credibility, and to determine the weight to be given to the testimony. *Pope v. State*, 284 Md. App. 309 (1979). In this role, the court also possesses the inherent right to disregard testimony of any witness when it is satisfied that the witness is incredible, i.e. not telling the truth, or if the testimony is inherently improbable due to inaccuracy, uncertainty, interest, or bias. *See Steinberg v. Arnold*, 42 Md. App. 711, 712 (1979). The court, then, may accept or reject all, or any portion of the evidence, even if it is uncontradicted. *See Manion*, 442 Md. at 431 (citing *Smith v. State*, 415 Md. 174, 183 (2010)) ("It is simply not the province of the appellate court to determine 'whether the [trier of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.'").

We have also explained that in any trial, the judge is also "the legal referee, sometimes determining what he is permitted to consider as a fact finder and what he is not permitted to consider." *Polk v. State*, 183 Md. App. 299, 307 (2008). In that role, "[w]e trust the judge to compartmentalize," *Id.* at 307, and properly apply the law to the facts. With this in mind, we conclude that the motions court properly exercised its discretion in declining to admit Lopes' testimony and investigative reports.

To begin, Lopes testified that the reports did not contain any verified statements from Wife's banking institution, nor did he ever see such records. At the hearing, Lopes did not testify that reports such as these are "reasonably relied upon" by others in the field. Rather, he merely testified that he had been using this specific vendor for at least thirty years. He also stated that he was unaware of the standards the vendor uses to research and create these reports. As far as Lopes was concerned, there was no way for him to personally confirm the information the vendor provided him. With no way to verify such information to be used against Wife for a potential fraud claim, the court acutely observed that this testimony and related reports were inadmissible:

> THE COURT: [O]n the witness stand here today, [Lopes] was not particularly illuminating. Now, part of that was that he couldn't relate to the Court hearsay from some independent third party over whom he indicates he's got no control, in how or when they may have done something, whether it be surreptitiously or illegally to look at accounts. But, I don't have any real evidence based on anything that Mr. Lopes said that [Wife] engaged in any efforts to conceal assets.
>
> ***
>
> The bottom line is, and I know Counsel has the duty to advance his client's position to the best of his ability but this – the evidence is non-existent of any fraud. I don't think that pleadings are adequate in terms of the

> allegations of fraud and I don't think the evidence here today was nearly adequate to demonstrate fraud. And in fact, it's non-existent.

It was entirely within the court's discretion to weigh the credibility of the witness and any evidence submitted. Given the court's explanation of why it refused to admit Lopes' testimony, we do not conclude that it abused its discretion in excluding the reports.

C. The Circuit Court Committed No Error in Denying Husband's Request to Reopen the Judgment of Absolute Divorce Based on Fraud

Husband filed his motion to reopen the judgment of divorce invoking Rule 2-534, Motion to Alter or Amend Judgment, and Rule 2-535, Revisory Power. He claimed the basis to reopen the divorce proceedings was that Wife had allegedly committed fraud by concealing assets in previously unknown bank accounts, as we have discussed. Husband's surprising final contention is that the court erred in denying his motion because he claims the court required him to prove fraud when he was not required to do so. He argues that because he filed to reopen the judgment within ten days of the entry of divorce, Maryland Rule 2-535 controls, therefore, he was not required to show that Wife committed fraud. As we understand it, Husband's argument is completely misplaced.

Maryland Rule 2-534 states:

> [O]n motion of any party filed within ten days after the entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or reasons, may amend the judgment, or may enter a new judgment.

Maryland Rule 2-535(a) permits a court to exercise its revisory power and control over the judgment upon "motion of any party filed within 30 days after entry of the judgment . . . and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534." However, subsection (b) provides an exception, stating that, "[o]n motion of any party filed *at any time*, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." Md. Rule 2-535(b) (emphasis supplied).

Preliminarily, we note that Husband conflates the elements of both rules. Despite Husband's insistence, Rule 2-535 does not require a finding of fraud, mistake, or irregularity in order for a court to exercise its revisory power if a party files a motion after the ten-day deadline specified in Rule 2-534. In other words, Rule 2-535(a) is not conjunctive with Rule 2-535(b). Instead, subsection (b) merely adds to a court's revisory power, stating that the court may invoke this power *at any time* in the case of fraud, mistake, or irregularity; not, as Husband contends, that if a party files a motion after the 10-day mark in Rule 2-534, a Court may then only invoke its revisory power in the case of fraud, mistake or irregularity.

It is difficult to understand why Husband argues that the court was not required to find fraud in order to reopen the judgment when he specifically asked for that finding in his motion to reconsider. Of the 30 paragraphs in his motion, 12 reference the court's revisory power under Rule 2-535 and Wife's alleged fraud. For example:

> o Para. 19: "That, pursuant to Maryland Rule 2-535, this Court, at any time, may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."
>
> o Para. 20: "That fraud 'is an act of deliberate deception designed to secure something by taking unfair advantage of someone [. It] includes deceit, though the latter may not reach the gravity of fraud.'"] (citing Cohen v. Investors Funding Corp., 267 Md. 537, 540 (1973)).
>
> o Para. 23: "That, upon information and belief, the Plaintiff holds, and acquired during the time of the parties' marriage, approximately $900,000.00 spread across approximately twenty (20) domestic and foreign accounts throughout various financial institutions unbeknownst to the Defendant."
>
> o Para. 24: "That, upon information and belief, based upon the Plaintiff's representations of her sole assets and income upon entering into the parties' marriage, and throughout the parties' marriage, these assets were created and maintained unbeknownst to the Defendant until after the Court's entry of the parties (sic) Judgment of Absolute Divorce."
>
> o Para. 25: "That the Plaintiff **deliberately deceived the Defendant by intentionally failing to disclose the existence of such assets at any time throughout the negotiation and execution of the parties' Martial Property Settlement Agreement or the Plaintiff's testimony, under oath,** at the January 7, 2019 divorce hearing held in this matter."

o Para. 27: "That had the existence of these assets been disclosed to the Defendant prior to the signing of the parties' Marital Property Settlement Agreement, the Defendant would not have entered into the Marital Property Settlement Agreement without the expressed distribution of such assets."

o Para. 28: "That the Plaintiff unfairly took advantage of the Defendant by intentionally failing to disclose the existence of significant marital assets, depriving Defendant of the opportunity to negotiate the distribution of such assets in this matter."

o Para. 29: "That the Plaintiff **defrauded the Defendant by purposefully failing to disclose substantial marital assets.**" (emphasis supplied).

o Para. 30: "That this Court should, **pursuant to its revisory power under Maryland Rule 2-535**, amend its Judgment of Absolute Divorce . . ."

(emphasis supplied). The remaining counts referenced Rule 2-534 regarding Husband's capacity to contract. With these pleadings in mind, together with the (hearsay) evidence provided by the private investigator, we conclude that the motions court acted within its discretion in making a finding on whether there was sufficient evidence to demonstrate fraud on behalf of the wife.

We review the circuit court's decision to grant or deny a motion to revise a judgment under Rule 2-535(b) for an abuse of discretion. *Peay v. Barnett*, 236 Md. App. 306, 315-16 (2018). However, "[t]he existence of a factual predicate of fraud, mistake or irregularity, necessary to support vacating a judgment under Rule 2-535(b), is a question of law." Id. (citing *Wells v. Wells*, 168 Md. App. 382, 394 (2006)). While the denial of such a motion is appealable, "the only issue before the appellate court is whether the trial court erred as a matter of law or abused its discretion in denying the motion." *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997). Here, the only evidence Husband presented as to Wife's alleged fraud was found to be inadmissible, namely, unverified reports by a non-testifying third party. As we explained elsewhere in this opinion, the court did not abuse its discretion in finding this evidence inadmissible.

Finally, we observe that nowhere in the record does it appear to us that the motions court required Husband make a showing of fraud in order to reopen. Instead, as outlined, the court made two distinct findings: 1) that Husband's capacity was not at issue for purposes of Rule 2-534; and 2) that for purposes of Rule 2-535, Husband did not make a showing that Wife had committed fraud in supposedly secreting funds in hidden bank accounts. We conclude that, given the pleadings and the evidence, the court did not abuse its discretion in considering the issue of fraud and denying Husband's motion to reopen the judgment of divorce on that basis.

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

Footnotes

1 Husband's verbatim questions are:

1. Where a party files an answer to a motion, and where the answer alleges new facts, does the law require a supporting affidavit to be filed simultaneously with the answer?

2. Where a party moves to enjoin an adversary from dissipating material assets, but that motion is denied, and where the same party subsequently serves notices of adverse interest on third parties in an effort to achieve the same result as that sought in the motion to enjoin, should the notices of adverse interest be stricken?

3. Where a party causes substantial financial loss to an adversary by servicing a notice of adverse interest with an improper motive, should the party be subject to sanctions?

4. Where an expert personal investigator creates a report, which is based on information provided by third parties that personal investigators commonly rely upon in their field, is the report admissible as an expert opinion?

5. Where a motion to reopen and reconsider a divorce judgment is made within ten days of entry of the judgment and is supported by evidence showing that the plaintiff hid assets from the defendant while the parties negotiated a marital property settlement agreement, should the motion be granted to allow further discovery and a revision of the judgment in light of the hidden assets?

2 At this same proceeding, the circuit court also granted Wife a Final Protective Order, which expired on May 24, 2018.

3 On November 5, 2018, Husband filed a pleading titled, "Motion to Strike [Wife]'s Affidavit in Support of [Wife]'s Answer to [Husband]'s Motion to Strike Notices of Adverse Interest." On November 6, 2018, Wife filed an "Answer to [Husband]'s Motion to Strike [Wife]'s Affidavit in Support of [Wife]'s Answer to [Husband]'s Motion to Strike Notices of Adverse Interest." Finally, on November 14, 2018, Wife filed an answer to the Motion for Sanctions.

4 We note that, in Maryland, a notice of adverse claim, or as it is referred to here, a notice of adverse interest, is typically reserved as a function to protect a party's (usually, a corporation) financial assets, normally, but not always, investment securities. Maryland Code,

Commercial Law Article ("CL") § 8-102(a)(1) defines "adverse claim" as "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset."

5 In his brief, Husband argues that Maryland Rule 2-535 applies, "and he was not required to demonstrate fraud (or mistake or irregularity) in order to be entitled to an order reopening the judgment." However, we believe this was a typing error, and Husband instead intended to state that Rule 2-534 applies.

Cite as 1 MFLU Supp. 35 (2021)

CINA; shelter care; placement with father

In Re: J.N., Z.N., T.N.

No. 2094, September Term 2019

Argued before: Reed, Shaw Geter, Salmon (retired, specially assigned), JJ.

Opinion by: Salmon, J.

Filed: Oct. 30, 2020

The Court of Special Appeals affirmed the Montgomery County Circuit Court's award of custody to the father, saying it was in the children's best interest.

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

In November 2019, the Montgomery County Department of Social Services ("the Department") filed a petition in the Circuit Court for Montgomery County, alleging that J.N. (born July 2007), Z.N. (born July 2009), and T.N., Jr. (born July 2011), the natural children of C.N. ("Mother") and T.N., Sr. ("Father"), were children in need of assistance ("CINA"),[1] and requested that they be removed from Mother's home and placed in shelter care.[2] The circuit court, sitting as a juvenile court, granted the Department's request for shelter care and later approved the children's placement with Father, who lives in Indiana.

Mother noted a timely appeal of the juvenile court's decision to shelter the children with Father. We docketed the appeal as case number 2094, September Term, 2019. Upon Mother's motion to this Court, we stayed the appeal so it could be consolidated with Mother's expected appeal from the juvenile court's decision in the then-pending CINA adjudication and disposition.

Following the adjudication and disposition hearing in January 2020, the juvenile court sustained nearly all of the allegations in the CINA petition but declined to find that the children were CINA because Father remained willing and able to care for them. The juvenile court granted Father sole legal and physical custody and closed the CINA case.

We docketed Mother's timely appeal of the juvenile court's adjudication and disposition order as case number 10, September Term, 2020. Upon Mother's motion, we lifted the stay in case number 2094 and consolidated her two appeals.

Mother asks us to consider whether the juvenile court abused its discretion in granting Father custody when the children's best interest lay in remaining in her custody in Maryland and whether the court erred in admitting hearsay attributed to J.N. into evidence during the adjudication and disposition hearing. For the reasons that follow, we conclude that Mother's appeal from the shelter care orders in case number 2094, September Term, 2019, is moot, and we therefore dismiss that appeal. We otherwise affirm the orders of the juvenile court.

FACTS AND LEGAL PROCEEDINGS

The N. family first came to the attention of the Department in 2016, when it received a report that Z.N. had been physically abused by her maternal uncle. The Department received another report in 2018 that Mother had hit J.N. with a belt, causing injury. The Department completed "alternative responses" related to the two incidents and referred the family for services but took no further action.

In May 2019, the Department opened a child sexual abuse investigation after J.N. reported finding Mother's live-in boyfriend, B.S., masturbating while watching pornography on J.N.'s cell phone; B.S. allegedly showed her the video, continued to masturbate, and told her she would have to wait until he ejaculated before she could have the phone. B.S. also reportedly asked then-11-year-old J.N. if she ever "played" with herself and told her not to tell anyone what she had seen.

Mother was not cooperative during the Department's investigation, blaming J.N. for "barging" into the room and suggesting that J.N. was not telling the truth.[3] Mother did, however, obtain a protective order against B.S. prior to the closure of the case.

On November 15, 2019, the Department opened a new child neglect investigation after receiving a report that B.S. remained in Mother's home, despite the protective order. The Department learned that Mother had rescinded the protective order in July 2019 because she "wanted to" and because she believed B.S. had done nothing wrong.[4] The report also indicated that the children were exposed to

ongoing substance abuse and domestic violence between Mother and B.S., and they felt unsafe in the home.[5] Additionally, B.S. had apparently sold the children's electronic devices to purchase drugs.

On November 19, 2019, Molly Cupid, the Department social worker assigned to the N. family, asked Mother to meet with her about the allegations. Mother was uncooperative, accused the Department of harassing her, denied any physical violence or drug use other than marijuana in her home, and repeatedly told Ms. Cupid, "Just take my fucking kids." Mother expressed unwillingness to do the things that were required to have the children remain in her care.

Ms. Cupid removed the children from Mother's home and placed them in shelter care with a foster family. Upon the children's removal, Mother refused to pack them a bag or provide Ms. Cupid with their prescription medication. She also asked that the children's cell phones be taken from them.

On November 20, 2019, the Department filed a petition requesting that the children be adjudicated CINA and temporarily committed to the Department for 30 days, pending further investigation.

Father, who lived in Indiana with his wife, daughter (the children's half-sister), and stepson, denied any criminal or child-welfare history. Although Father admittedly had not seen the children regularly since his divorce from Mother, allegedly as a result of "some ongoing issues" with Mother, he agreed to be a resource for all three children.

At a November 21, 2019 shelter care hearing, the Department requested that the children remain in foster care or be placed with Father, pending CINA adjudication. Father, a lieutenant with the Indiana Department of Corrections, testified that during the approximately seven years he had lived in Indiana, the children had visited him twice, during the summers of 2014 and 2017.[6] He had sought additional visits, but they had not occurred, mostly because Mother became angry at him and changed her mind about a visit at the last minute or insisted that the children required summer school. Father said he had also attempted phone calls with the children, but Mother placed the calls on speaker phone, and when Father said something she did not like, she denigrated him in front of the children to the point that he ended the calls. He asked the court to place the children with him because of the "extensive abuse that they've endured over the past three years" in Mother's home.

Mother denied that she had stopped Father from seeing the children, insisting that she kept him constantly updated about their progress but that he made no effort to get in touch with them or send them gifts. She did not want Father to take custody of the children because of his lack of involvement in their lives and because all three children (who suffer from depression and/or ADHD) were in therapy and doing well in their current schools.

Mother said she reported B.S.'s alleged sexual abuse of J.N. to the Department the same day J.N. disclosed it to her therapist; she also sent the child to stay at Mother's brother's home, away from B.S. She stated she would sign a safety plan agreeing to have no contact with B.S.

On cross-examination, Mother acknowledged that she had rescinded the protective order against B.S. approximately three months after it was imposed because the protection order was for her, not J.N., and she, personally, no longer felt threatened by B.S. Asked why she let B.S. back into her home after what he did to her daughter, Mother said "it's hard to get rid of somebody. . . that's been in your life and your children's life, which your children call father, to just, literally just disappear[.]" In addition, she said, she needed the financial support he provided the family. Nonetheless, she said that B.S. had moved out of her home on November 19, 2019, the same day the children had been removed to shelter care.

Grandmother and Mother's brother offered themselves as resources for the children. Both agreed to follow any court orders regarding the children's visitation with Mother and Father and restrictions on any interaction with B.S.

In closing, the Department deferred to the juvenile court about whether to shelter the children in foster care or with Father but argued that it was "abundantly clear" that they could not safely stay with Mother. The Department was not fully able to recommend Father, as the Indiana authorities had not yet had time to complete a home visit or background report. Father asserted that he was willing and able to take the children and that the court would have to find good cause not to shelter the children with a biological parent.

The attorney for the children stated that the children wanted to return to Mother's home, but only if B.S. were not there. Mother's attorney pointed out that Ms. Cupid had testified that if Mother had simply agreed to a safety plan and calmly worked with the Department from the start, the children would not have been removed from her care. Although Mother initially had "some trouble accepting the situation with her boyfriend," she was now aware of the situation and would do whatever it took to have the children returned to her home because she feared the harm to them in uprooting their lives to move to Indiana.

The juvenile court ruled that it would continue to shelter the children in foster care, due to concern about sending them to live with Father in another

state when he had not previously been involved in their lives, and about the lack of completion of a study of the appropriateness of Father's home and child welfare history. In light of Mother's previous combative behavior with the Department and her questionable decision to rescind the protective order against B.S. and permit him re-entry to her home, the court declined to return the children to Mother, despite her promises of cooperation.

On November 26, 2019, the Department requested an emergency hearing because the foster parents would be unable to provide care for the children after December 1, 2019, and the children were therefore in need of a change in level of care. Upon the Department's request, the Indiana Department of Child Services had quickly conducted a safety assessment of Father's home, which showed it was of ample size and free of dangers to the children. The Department therefore requested that the children be sheltered with Father, pending the outcome of the CINA adjudication and disposition.

At the emergency hearing held the same day, the Department reiterated that it had "absolutely no evidence or allegations that the father has in any way neglected or abused his children" and that moving them to his care temporarily would preclude having to place them in separate foster homes. Mother argued that it was not in the best interest of the children, who have special needs and were adjusted to school and therapy, to move them out of state with a parent who had not seen them in two years. She requested that the children be returned to her care under an order of protective supervision ("OPS"). The attorney for the children agreed that a return to Mother under an OPS would be appropriate.

The Department did not approve of a return to Mother because Mother's home was "not a safe environment for the children." The Department had obtained evidence that the abuse between Mother and B.S. was not just verbal, as Mother had claimed at the prior hearing, but physical and violent. In addition, Mother's "hostility and lack of cooperation" made the Department "very wary" about returning the children to her, even under an OPS.

And, despite the fact that Grandmother and Mother's brother had offered themselves as temporary resources for the children, the Department was unable to support either placement. It had not yet accessed records regarding Grandmother's previous child welfare involvement, and Mother's brother had become combative with the children's attorney after the November 21, 2019 hearing, ruling him out as a resource.

The court granted the Department's request for change of placement to Father, with the conditions that the children immediately be placed in school, engaged in therapy, and provided insurance and necessary medications. The court issued a written order for limited guardianship to Father, giving him the right to make all caretaking decisions, including educational, medical, and travel. Mother timely appealed the juvenile court's order. We docketed that appeal as case number 2094, September Term, 2019.

The Department filed an amended CINA petition on January 16, 2020, and the juvenile court held an adjudication and disposition hearing on January 17 and 29, 2020. Father, who sought primary physical custody, testified that since picking the children up from the foster parents' home on December 1, 2019, he had enrolled them in school and in therapy and transferred their Individualized Education Programs ("IEPs") to their new schools. He had had issues with insurance because they were still insured in Maryland, but he simply paid for therapy out of pocket.

Reiterating the events that brought the children into care, Ms. Cupid explained that she still did not believe the children would be safe returning to Mother's home. In contrast, Ms. Cupid had spoken with Father numerous times about the children's welfare and had no safety concerns about Father's home or about him as a custodian.

Mother testified that in 2017, despite the plan for the children to spend the summer with Father in Indiana, they had stayed only a month because of Father's alleged work and financial situations and because of an altercation between him and his current wife, which resulted in a child welfare investigation.[7] Upon their return home, J.N. was upset and angry. Since then, Mother said that Father had not asked to see the children, although she had tried to get him more involved in their lives by suggesting he call them on their birthdays and holidays and send regular text messages.

Mother denied telling Ms. Cupid that she thought J.N. was lying about B.S.'s sexual abuse; instead, she said she "really couldn't say anything because [she] was not there" when it allegedly happened. Questioned about her decision to rescind the protective order against B.S., Mother explained that it was the only way she could get his name off her lease and other household bills they shared. Nonetheless, she denied being in, or planning to be in, a relationship with B.S., and she said he had moved out of her house on November 17, 2019, after they got into a fight.[8]

Mother acknowledged having gone to a hospital for suicidal ideation in May 2018 but leaving before receiving treatment. She was, however, in therapy and under the care of a psychologist, which had helped alleviate her angry outbursts. Mother claimed she had stopped using marijuana after the

November shelter care hearing and said that she had been attending NA, AA, and anger management meetings since December 2019.

Mother reiterated that she "would not disagree with anything that [the court] would ask of" her to get the children back to Maryland, including having no contact with B.S., because they had been with her in Maryland all their lives and had friends, family, school, and therapists in the state. In her view, the dearth of time spent with Father and lack of therapeutic support in Indiana should weigh against granting custody to Father.

In closing, the Department argued that Mother's home had been chaotic for the children for three years, partly because of the presence of B.S., and that Mother had "no track record that shows that things are going to be different" in his absence. According to the Department, the sexual abuse of J.N., the domestic violence between Mother and B.S., and Mother's mental health issues put the children at substantial risk of harm in Mother's home. On the other hand, Mother had put forth no evidence to show that Father was unable to parent. The Department therefore asked the court to sustain the findings in the CINA petition, find there was neglect on the part of Mother, rule that the children were not CINA, and dismiss the case in favor of Father. Father and J.N.'s attorney agreed with the Department.[9]

The attorney for Z.N. and T.N. argued that Mother had taken corrective measures, removed B.S. from her home, and gotten herself and the children into therapy, all of which led to a belief that the children would be safe in her home. Mother's counsel agreed.

The juvenile court sustained most of the allegations against Mother in the Department's CINA petition, finding they were proven by a preponderance of the evidence. The court went on to find that Mother had neglected the children and was unable or unwilling to give them proper care and attention, although it acknowledged "that doesn't mean that can't happen" in the future. The court found that Father, having managed the children's needs since they were sheltered with him in November 2019, was able and willing to provide care. The court therefore declined to find the children CINA, awarded Father sole physical and legal custody, with reasonable supervised access to Mother, and dismissed the CINA case.

The court filed its written order memorializing its oral ruling on February 13, 2020. Mother timely noted an appeal from the court's adjudication and disposition order. We docketed the appeal as case number 10, September Term, 2020, and consolidated Mother's two appeals.

DISCUSSION

Standard of Review

We recently set forth the standard of review for CINA matters:

> There are three distinct but interrelated standards of review applied to a juvenile court's findings in CINA proceedings. The juvenile court's factual findings are reviewed for clear error. Whether the juvenile court erred as a matter of law is determined without deference; if an error is found, we then assess whether the error was harmless or if further proceedings are required to correct the mistake in applying the relevant statute or regulation. Finally, we give deference to the juvenile court's ultimate decision in finding a child in need of assistance, and a decision will be reversed for abuse of discretion only if well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

In re J.R., 246 Md. App. 707, 730-31 (2020) (quotation marks and citations omitted).

In reviewing a CINA decision, we must remain mindful that:

> 'only [the juvenile court] sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [it] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.'

Baldwin v. Baynard, 215 Md. App. 82, 105 (2013) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

Appeal in Case Number 2094, September Term, 2019

On November 19, 2019, the juvenile court granted the Department's request for shelter care and placed the children in foster care. When the foster parents advised they would be unable to provide care for the children after December 1, 2019, the juvenile court, at a November 26, 2019 emergency hearing, granted temporary custody of the children to Father, pending CINA adjudication and disposition in January 2020. That decision forms the basis for Mother's appeal in case number 2094.

Following the adjudication and disposition hearing, the juvenile court declined to find the children CINA, granted sole legal and physical custody

to Father, and closed the CINA case. That decision forms the basis for Mother's appeal in case number 10. As argued by the Department and J.N. in their briefs, the final custody order rendered the decision on the temporary custody order in the shelter care matter moot and necessitates the dismissal of Mother's appeal in case number 2094.

"It is a long-held fact that a question is moot if 'at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide.'" *In re J.R.*, 246 Md. App. at 743-44 (quoting *In re Karl H.*, 394 Md. 402, 410 (2006)). And, importantly, "it is well-recognized that once a CINA determination has been made, it supersedes any shelter care orders or orders controlling conduct that directed the transitional care of the child." *Id.* at 744.

Here, the court granted the Department's request for shelter care for good cause in November 2019 and changed the children's placement from the foster family to Father in December 2019, due to their inability to be safe in Mother's home. The shelter care order placed the children in Father's *temporary* care. The January 2020 CINA adjudication and disposition ruling superseded the shelter care order and placed the children in Father's permanent care. *See In re O.P.*, 240 Md. App. 518, 553 (2019),*aff'd in part*, *rev'd in part*, 470 Md. 225 (2020) ("[S]helter care is designed to provide emergency protection for a child only until a juvenile court rules on the merits of a CINA petition[.]").

Therefore, Mother cannot challenge the shelter care order because it is no longer in effect.[10] The issue regarding the merits of the temporary order is moot, as there is no relief this Court can effectively grant Mother in regard to an order that is no longer applicable. *In re J.R.*, 246 Md. App. at 747. We therefore dismiss Mother's appeal in case number 2094, September Term, 2019.

Appeal in Case Number 10, September Term, 2020

A. Grant of Custody to Father

Mother argues that the juvenile court abused its discretion when it granted custody of the children to Father in Indiana, claiming that it was in their best interest to be returned to her in Maryland. Acknowledging that the juvenile court is permitted to determine that children are not CINA if one parent is willing and able to care for them, Mother points out that the court has discretion as to whether to order custody to that parent. Because she alleviated the Department's safety concerns by having B.S. move out of her home, Mother insists that it would be in the children's best interest to return to her care in Maryland, where they would have stability and continuity of care.[11]

The broad policy of the CINA statutes is "to ensure that juvenile courts (and local departments of social services) exercise authority to protect and advance a child's best interests when court intervention is required." *In re Najasha B.*, 409 Md. 20, 33 (2009). The only justification for the direct and continuing supervision of the juvenile court in a CINA case is when the court has determined that intervention is required to protect the child's health, safety, and well-being. *Koffley v. Koffley*, 160 Md. App. 633, 640-1 (2005) (citing *Frase v. Barnhart*, 379 Md. 100, 120-23 (2003)).

If, on the other hand, the juvenile court has no concerns about the child's health, safety, and well-being and believes, after reviewing the evidence, that the child may safely be returned to the care and custody of one or both of her parents, there is no justification for keeping the CINA case open, as the goals of the CINA statutes have been reached. *In re Russell G.*,108 Md. App. 366, 376-77 (1996). Pursuant to CJP §3-819(e):

> [i]f the allegations in the [CINA] petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before, dismissing the case, the court may award custody to the other parent.

Here, although not disputing that the juvenile court sustained facts, as asserted in the CINA petition, against her, Mother avers that the juvenile court "erred when it ordered that the children remain in Indiana in the custody of their father, which was not in their best interest." The juvenile court, in determining that Mother had neglected the children and in granting Father sole legal and physical custody, went through the allegations in the CINA petition paragraph by paragraph. The court specified that its decision centered on the facts that "Mother is not able or willing at this time to give proper care and attention to them," while Father "is able and willing, and he has managed the children's needs since they went to him."

Based on what the court had heard at the adjudication and disposition hearing, it ruled that "custody should be awarded to Mr. N," implicitly finding that custody to Father was in the children's best interest. The evidence adduced at the shelter care and adjudicatory hearings amply supports the court's ruling.

In 2016 and 2018, Mother had two interactions with the Department related to inappropriate physical discipline of the children. Although those incidents apparently did not require Department

interference, other than a referral for services, we have long recognized that a parent's past conduct is relevant as a predictor of future conduct. *See In re Dustin T.*, 93 Md. App. 726, 732 (1992) ("Relying upon past actions of a parent as a basis for judging present and future actions of a parent directly serves the purpose of the CINA statute."); *see also In re Adoption/Guardianship of Quintline B.*, 219 Md. App. 187, 197 (2014) ("[W]here the health and safety of [a] child is of concern, the court may look to past conduct to predict future conduct.").

Then, in May 2019, J.N. disclosed sexual abuse at the hands of B.S., Mother's live-in boyfriend, which Mother initially did not believe and then downplayed to Ms. Cupid, the Department social worker. To her credit, Mother did obtain a protective order against B.S. in relation to those incidents, but she rescinded it less than three months later because she, personally, no longer felt in danger from B.S. and needed his financial contributions to the household. Notably absent in her decision-making was any concern about the children and their interaction with B.S.

Mother admitted to marijuana use with B.S. but denied the use of other illicit substances, despite evidence that B.S. had been convicted of distribution of controlled dangerous substances, was so desperate to obtain drugs that he sold electronic devices belonging to him and the children, and stole Mother's credit card. Mother also denied physical violence between her and B.S., but the children told their school guidance counselors and Ms. Cupid that the violence between the pair was frequent and so bad that J.N. took the younger children and the family pet out of the house when it occurred. In addition, B.S. was prosecuted for assaulting Mother in April 2019.

In November 2019, when the Department learned that B.S. was back in Mother's home with the children, Mother was uncooperative and openly hostile with Ms. Cupid, telling her to just take the children. Learning that the children would be placed in shelter care, Mother refused to pack bags for them and took their cell phones away, leaving them with no way to communicate with her, other family members, or friends.

In contrast, the Department asked its Indiana counterpart to conduct a home safety assessment of Father's home, which yielded no concerns. Father drove through the night to be present in court for the shelter care hearing and repeated the approximately nine-hour drive a few weeks later to take the children back with him to Indiana. Once there, he immediately enrolled them in school, provided information about their IEPs, and started them in therapy, despite being unable to place them on his health insurance plan until they were no longer insured in Maryland. Although he had limited contact with the children while they lived in Maryland, partly due to Mother's interference, Father maintained a positive relationship with them, especially after the two older children were given cell phones they could use to communicate with him more often.

Because the Department recommended, and the juvenile court agreed, that one of the children's parents was willing and able to provide for their welfare in a safe manner acceptable to the Department and the court, the juvenile court acted well within its discretion in determining that it was in the children's best interest to grant custody to that parent—Father—and terminating the CINA case.

B. Admission of Hearsay Statements

Mother also avers that the juvenile court erred by admitting hearsay statements uttered by J.N. into evidence through Father's testimony during the adjudication and disposition hearing. Counsel for J.N. responds that the statements were properly admitted as exceptions to the rule against the admission of hearsay, while the Department, Father, Z.N, and T.N. concede that the statements were erroneously admitted but argue that any error in their admission was harmless.

During the hearing, Father's attorney attempted to introduce into evidence an email Father had written to Ms. Cupid relating to an outburst Z.N. had had. Mother's attorney objected, and counsel for the Department argued that Father should be permitted to explain what Z.N. had said because she wanted to be returned to Mother, so her statement as a party adverse to Father and the Department was admissible as an exception to the rule against the admission of hearsay. The court agreed and permitted Father to testify that Z.N. had told him that "nobody loves her" because when she and T.N. argued, Mother sent her to Grandmother's house.

When Father segued into explaining something J.N. had said to him, Mother's attorney again objected, on the ground that J.N. wanted to remain with Father in Indiana, so her hearsay statements were not against her interest and therefore inadmissible. The court ruled, "I think [Father] is here primarily to give testimony about how it came to pass that the children were with him and what's happened since then. . . . It's almost impossible to talk about this without saying something that the children said. But I would just suggest that perhaps we attempt to do it that way so that we can move a little more quickly." Father was then permitted to explain that J.N. had told him that Mother "gave her edibles" and "promised her that she would be coming home on December 14, 2019," which caused J.N. to throw the phone down and proclaim that she did not want to go home to Mother because Mother calls her a bitch and a whore all the time.

"In general, the rules of evidence, including the rules regarding hearsay, apply in juvenile adjudicatory hearings. *In re Michael G.*, 107 Md. App. 257, 265 (1995). Hearsay, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," is generally inadmissible. Maryland Rules 5-801(c) and 5-802. Typically, "hearsay must fall within an exception to the hearsay rule or bear 'particularized guarantees of trustworthiness' in order to be admitted into evidence." *Marquardt v. State*, 164 Md. App. 95, 123 (2005) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

Assuming, without deciding, that J.N.'s statement to Father comprised hearsay that was not subject to a recognized exception for its admission and that the juvenile court erred by overruling Mother's objection and admitting J.N.'s statement into evidence through Father's testimony, we conclude that any error was harmless. *See In re Yve S.*, 373 Md. 551, 616 (2003) (citing *Beahm v. Shortall*, 279 Md. 321, 330 (1977)) (It is this Court's policy "not to reverse for harmless error.").

Although "there is no precise standard, a reversible error must be one that affects the outcome of the case, the error must be 'substantially injurious,' and '[i]t is not the possibility, but the probability, of prejudice' that is the focus." *In re Adoption / Guardianship of T.A., Jr.*, 234 Md. App. 1, 13 (2017) (quoting *In re Yve S.*, 373 Md. at 618). Harmless error review "must be on a case-by-case basis and must balance 'the probability of prejudice in relation to the circumstances of the particular case.'" Id. (quoting *In re Yve S.*, 373 Md. at 618). The burden is on the opponent of the admission of the hearsay to demonstrate prejudice and a negative effect on the outcome of the case as a result of the court's error. *In re Ashley E.*, 158 Md. App. 144, 164 (2004).

Here, Mother argues only that J.N.'s statements do not fall under any recognized exception to the rule against the admission of hearsay. She provides no argument, and points to no evidence, of any prejudice she suffered from their admission into evidence, nor can she.

The juvenile court, in its ruling following the two-day adjudication and disposition hearing, made no reference to the existence or substance of J.N.'s isolated statements, instead relying on the Department's and Father's ample evidence that Mother had neglected the children and that it was in the best interest of the children to be placed in Father's custody, as explained in detail in section A., above. We find it extremely unlikely that 12-year-old J.N.'s statements that Mother gave her "edibles" (while providing no definition of the term) and that she did not want to return to Maryland because Mother called her names had any direct bearing on the juvenile court's decision to grant custody to Father in light of the overwhelming evidence of Mother's allowance of the children to be exposed to sexual abuse, drug use, and domestic violence. Because we are not persuaded that Mother has met her burden of proving that she suffered any prejudice by the admission of J.N.'s statements, we find any error in their admission harmless.

APPEAL IN CASE NUMBER 2094, SEPTEMBER TERM, 2019, DISMISSED AS MOOT; ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, SITTING AS A JUVENILE COURT, IN CASE NUMBER 10, SEPTEMBER TERM, 2020, AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Footnotes

1 Pursuant to Md. Code, §3-801(f) of the Courts & Judicial Proceedings Article ("CJP"), a "child in need of assistance" means "a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs."

2 Mother and Father, who divorced in 2012, shared legal custody of the children; Mother had primary physical custody.

3 Mother's mother ("Grandmother"), who sought to be a resource for the children, also believed that "[b]ased on what my daughter told me, there was not a sexual abuse case. I believe that was a lie."

4 The Department later determined that B.S. had an extensive criminal history, including charges of possession and distribution of drugs, burglary, and malicious destruction of property. He was also charged with second-degree assault charges in relation to an April 2019 incident involving Mother, but the State nolle prossed the charges because Mother refused to appear as a complaining witness at his trial.

5 J.N. reportedly took the younger children to a friend's house whenever Mother and B.S. fought, as it often became physical.

6 Father had driven through the night from Indiana to be present at the shelter care hearing.

7 The investigation centered on Father's wife as the potential maltreater, not him, and was closed without further action.

8 At the shelter care hearing, she had testified that he moved out on November 19, 2019.

9 J.N. had expressed a desire to remain with Father in Indiana rather than return to Mother in Maryland.

10 We also point out that Mother makes no argument in her brief relating to the juvenile court's shelter care orders.

11 Despite Z.N. and T.N.'s stated preference that they be returned to Mother, it was the opinion of their attorney, based on her conversations with the children and review of the juvenile court's record, that Z.N. and T.N. "do not possess considered judgment" in making that decision and that continued placement with Father was in their best interest.

Cite as 1 MFLU Supp. 42 (2021)

CINA; circuit court jurisdiction; placement outside Maryland

In Re: S.N.

No. 2513, September Term 2019

Argued before: Kehoe, Gould, Kenney, JJ.

Opinion by: Kenney, J.

Filed: Oct. 27, 2020

The Court of Special Appeals affirmed the Howard County Circuit Court's finding of the child to be in need of assistance, saying the circuit court had jurisdiction under the Maryland Uniform Child Custody Jurisdiction and Enforcement Act.

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

Mother and Father, the parents of S.N., appeal the Order of the Circuit Court for Howard County finding S.N. a child in need of assistance ("CINA"), and committing him to the custody of the Howard County Department of Social Services (the "Department") for placement with his maternal aunt, Ms. L.W.B., in San Diego, California.

They present four questions, which we have consolidated and rephrased:[1]

> I. Did the court err in finding that it had jurisdiction in this case?
>
> II. Did the court err by allowing a Department employee to testify to information received from Mother's medical providers?
>
> III. Did the court err by not holding a dispositional hearing separate from the adjudication hearing?
>
> IV. Did the court err in finding S.N. to be a CINA?

For reasons that follow, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are married and reside in Maryland. Their first child was born in June of 2016, their second child was born in December of 2017, and their third child, S.N., was born in January of 2020.

The Department's Past Involvement

In June of 2018, the parents and their children were living in Laurel, Maryland when the Department learned that Mother was tying the second child to her bed. [App. 35, 44]. As a result, the Department entered into a safety plan with Mother, and provided ongoing services until November of 2018. Because Mother had "refused to provide the social worker with information about what she feeds her child[ren], only that [the youngest child] is fed breast mil[k],"[2] she was "educated about the need of children to eat a broad variety of foods rather than just breast milk." In addition, Mother met with a psychologist who explained that the two children did "not need[] 17 hours of sleep."

Two months after services ended, the Department received a report that Mother was again tying the children to their beds. On January 16, 2019, Emmett Woodard, a Department social worker, responded to the home and found both children "tied up and blindfolded." The two-year old's "face was flushed red," and she "was tied tightly to the bed, her arms behind her back, with a cloth[] around her arms and torso." The infant was "bound in a swaddler made for children to sleep on their backs." Mother explained that the infant did not "sleep well at night."

Both children were sheltered to the Department's custody on January 17, 2019 by the Circuit Court for Howard County. At that time, Mother had obtained a protective order against Father for domestic violence, which she allowed to lapse days later. On February 27, 2019, the court determined that Father had "willingly allowed the mother to tie up and abuse" the children, whom it found to be CINAs.[3] They were ultimately placed with their maternal aunt, Ms. L.W.B., in San Diego, California.

The Present Investigation

Upon receiving a report that S.N. had been born on January 6, 2020, the Department initiated a child protective services investigation. The following week, Mr. Woodard learned that the parents were staying at a hotel in Howard County, and went to the hotel.[4] There, he found Mother, but observed no signs of a baby in the hotel room or her car. Mother refused to

tell him "where the baby was or who the baby was with." She also refused to share any photographs of S.N. that could demonstrate that "the baby at least appeared healthy." When Mr. Woodard telephoned Father later that day, Father stated that Mother had not given birth to S.N.

Mr. Woodard then contacted the agent responsible for Mother's pre-release conditions in the criminal case and learned that Mother had a check-in scheduled with the agent on January 17. Mr. Woodard met Mother and Father at that appointment. Mother again refused to identify S.N.'s location, and Father told Mr. Woodard that he "would never find" the child and that "there was no baby." Mr. Woodard presented Mother and Father with a Shelter Authorization Order to produce the child to the Department. When asked why he did so "even though [S.N.] was physically not present," he responded:

> So to kind of put, to put [S.N.] under the court's supervision so that [it was] aware that there was a child, a mother that numerous people knew that was pregnant just by her physical appearance, that she had mental health issues that are very specific to her children and how she should care for them that put her children in harm's way.
>
> I had concerns for [Father] due to his substance abuse history and the DV history between them. And you know, for those kinds of reasons, like I didn't think that it was safe for [S.N.], or for the court not to be aware that this child was born and the whereabouts were unknown.
>
> * * *
>
> To be honest, I lost sleep. Every day that went by after January 6th, I was, quite honestly, I was afraid that the child was dead. I believed and was very concerned that [Mother] had again due to her mental health issues had done something that she thought was safe and accidentally killed her child. And every day I was worried about that.

The Present CINA Proceeding

On January 21, 2020, the Department filed a CINA petition requesting that the court shelter S.N. to its custody and order the parents to produce the child for that purpose. At a Magistrate's hearing on the petition that same day, Mother and Father refused to confirm that Mother had given birth to S.N. or identify his whereabouts:

> [Department's counsel]: [Mother], where is the current location of [S.N.]?
>
> [Mother]: I plead the Fifth.
>
> [Department's counsel]: [Mother], did you give birth to a male child on January 6th of this year, 2020?
>
> [Mother]: I plead the Fifth.
>
> [Department's counsel]: And [Mother], are you listed as the mother for any child born in the United States in the year, 2020?
>
> [Mother]: I plead the Fifth.
>
> * * *
>
> [Department's counsel]: [Mother], when is the last time you saw [S.N.]?
>
> [Mother]: I plead the Fifth.
>
> [Department's counsel]: [Mother], are you currently breastfeeding?
>
> [Mother]: I plead the Fifth.
>
> [Department's counsel]: [Mother], have you gone outside of State to deliver a baby known as [S.N.]?
>
> [Mother]: I plead the Fifth.

When Father was asked if his "wife g[a]ve birth to your son on January 6th, 2020, a child, a male child by the name of S.N.," he too "plead[ed] the Fifth." At the conclusion of the hearing, Mother and Father were ordered to return the next morning with the child.

When Mother and Father did not bring S.N. the next day, the circuit court, sitting as a juvenile court (the "court"), found Mother and Father to be in direct contempt of the January 21 order. In response, Mother's counsel proffered that S.N. was in San Diego, California, in the home of Ms. W, a maternal aunt.[5] And Mother addressed the court directly:

> Just that, just to explain a little bit about my safety fears was that my husband [] when he was in foster care as a child he was molested and I have had concerns and some of my family members have had concerns about inappropriate touching in foster care in certain families and I didn't want that to happen to my son.
>
> And my two older children pretty much every visit that we would go to and see them while they were here, before placed with family there were either fresh bruises on them that usually were unexplained or there were diaper rashes on them that were also unexplained. . . . So I just didn't feel

like they were caring about the well-being of my children and so I don't want the same thing to happen to my newborn.

And then I just wanted to share that my newborn has not been in the State at all. And that my two oldest it was the end of February until the beginning of July the first of July that they had to wait to be transitioned over through the ICPC[6] to California to family. So I didn't want that process to take so long, I just wanted them there with family immediately like my newborn.

* * *

The fact that I don't have custody or possession of the baby is why I could not produce the baby. I have written and notarized and signed with my husband a power of attorney and temporary guardianship document it applies to the State of California so that's why it says in that document that I don't have custody and that my sister is the legal guardian. And I did that and the revoking page I actually wrote down that I'm not the one that's going to be able to revoke that document, my sister's going to be the one to do that.

I'm not trying to put my child in a bad situation or even go against the Court Order that said that I'm not supposed to be around children unsupervised that's why I tried to get him out of here as quickly as I could. And with family and . . . he had to be seven days old before he could fly, that's why it took a few days before he could leave this area.

At the end of that day's proceeding, the court continued the hearing to January 27, 2020. Mother, on January 24, 2020, filed a motion, supported by Father, to dismiss the CINA petition arguing that the court lacked jurisdiction, which the court ultimately denied. Mother and Father did not produce S.N. at the January 27 hearing.

On January 27, 2020, the court proceeded to consider an appropriate shelter care order that would best serve S.N.'s interests. It accepted a proffer from the Department that the California caseworker responsible for S.N.'s siblings' cases had been able to locate S.N., and had visited him, and had determined that he was "safe and well cared for" in Ms. W's home. The court, taking the matter under advisement, continued the hearing to January 29, 2020.

On January 29, 2020, the court continued the shelter order and granted temporary guardianship to the Department with placement of S.N. in the care of Ms. L.W.B. A hearing on the CINA petition was scheduled for February 19, 2020.

The CINA Hearings

The court, on February 19, 2020, convened a hearing, on the amended CINA petition that contained allegations regarding Mother's and Father's conduct since S.N.'s birth. Although both Mother and Father were incarcerated,[7] they were present at the hearing and represented by counsel. S.N. was represented by court-appointed counsel.[8]

At that hearing, the court took judicial notice of its prior orders in the present proceedings, as well as its orders in S.N.'s siblings' CINA cases, and Mr. Woodard and Mother testified.

Mother testified that she gave birth to S.N. in Baton Rouge, Louisiana on January 6, 2020. After being discharged, she and S.N. "headed towards Virginia" to her "dad's cousin's son's house." When asked by her counsel what she did when she arrived at the house, she responded:

So my mom had already spoken to him and he had given consent to watching the baby. So I just asked him, you know, like here is his stuff and like, you know, like can you take care of him, just reassuring like I'm not going to be here to take care of the baby and he's okay with it.

* * *

[Mother's counsel]: Okay. And what did you do after that?

[Mother]: I just left to go back to Maryland, back to the hotel room.

* * *

[Mother's counsel]: Okay, and have you physically been in the presence of your child since then?

[Mother]: No, I have not.

* * *

[Mother]: So we had already planned, like, me, my mom, my sisters had already planned that I was going to give custody to [Ms. W]. And I had filled out the paperwork to get that done. And had it done at a notary like my signature witnessed.

* * *

[Mother's counsel]: Okay. So why had you made the choice to send the child rather than keep the child yourself?

[Mother]: Because one I do know that, and I'm not trying to be disrespectful to the [c]ourt or raise any concerns with DSS, I was trying to pass on my baby to my family as quickly as possible, as I could as the[y]

could release me from the hospital. And I didn't want him going through foster care because of the experiences we had with our two older children that we felt like they were not handled well, like w[e] saw bruises on them that should not have been on them et cetera. So and like my husband's prior experience. So all those things considered we just didn't think it was going to be a good idea to not leave the baby with family.

[Mother's counsel]: But my question is why didn't you believe that you were in a position to keep custody?

[Mother]: Because the [c]ourt doesn't want me to and DSS doesn't want me to and until all of that stuff is litigated, I didn't want to make my situation worse.

[Mother's counsel]: Okay. Did you believe that you had the proper housing and resources for an infant?

[Mother] No, so that's why I don't have my two older children and I was not able to, you know provide the roof over the head of my newborn like I did my other two before we had left our townhouse. So I didn't think it was the best situation for him. So I thought the best situation would be for him to be with my sister.

According to Mother, S.N. went to California on "the 14th or the 15th, no later than the 15th of January."

At the conclusion of the evidence on adjudication, the court, on the record, contemplated delaying disposition to the following week. The Department argued that disposition should not be delayed, and after hearing argument, the court decided to proceed to disposition.

Mother and Father argued that the court should not find S.N. to be a CINA. Mother took issue with Mr. Woodard's testimony about "his concerns regarding these parents . . . because of their mental health," as those "concerns carried over from 2018" and related to Mother's care of her two older children "but there was no basis today for those concerns." And if the court declared S.N. to be a CINA, it was their position that the child should be placed with Ms. W.

When arguments concluded, the court ruled:

All right, the [c]ourt has considered the testimony and mainly the testimony of Mr. Woodard as well as the testimony of [Mother]. *And to be candid based on her responses on the witness stand I made a few little asterisk notes, not credible, not credible, not credible. Especially when answering some of the most basic questions. . . . She would not, she was trying to be too evasive for this [c]ourt to find any of her testimony credible at all.*

What we clearly have here is we have a situation where the two prior children, the [c]ourt has taken judicial notice of the prior orders. That they were in fact, and it was uncontradicted that they were tied up and they were blindfolded which led to them being found CINA.

The Department had concerns when they learned, I guess, that she was pregnant. They did in fact receive notification that a child was born and it was an attempt to place that child which is when DSS became involved. And what also throws up red flags is, when you contact the parent who have already been found to have two children to be CINA and they won't even acknowledge that she was pregnant or even that a child was born. And then you go to the place where they're living and there's no signs, or no indication that there are toys, bassinets, babies. And so when Mr. Woodard pretty much said he believed and it kept him up nights thinking this child was killed because of the history of the mother of tying these children up and blindfolding them and the father being complacent with that. That's really what led to the CINA.

So and the mental health issue, I think, and I disagree with [Father's counsel], the mental health is not she's psychotic, she's walking around and she's insane or in another world. No. The testimony was her mental health issues in caring for the children, thinking that tying them up and blindfolding them are okay. That's what I took from the testimony, not that she's saying, in any form of psychosis. So I don't see where that's being missed.

So clearly when I'm looking at the allegations in the Amended Petition the Court is satisfied by a preponde[rance] of evidence that all of the allegations -- and because of the late hour I'm going to list them, each and every that I find in my written order. But I am finding that the facts contained in the Petition were in fact sustained. That this child based on the parent's conduct and responses to their questions was placed in

substantial harm, was in fact neglected. And I am going to find that he is in fact a CINA.

I mean the mother will go to the extent to where she is willing to violate her criminal conditions of not leaving the State, not being left alone with the child. And she admitted she did this on her own. Drove from Baton Rouge, Louisiana.

(Emphasis added).

In its written order, the court stated:

[S.N.'s] mother has been charged criminally with child abuse and neglect of her older children. It has been alleged that [Mother] has a history of tying up her children in ways that compromise their safety and development. She left the state of Maryland and the surrounding area to deliver [S.N.] in order to avoid the child being placed in care by DSS. The mother admitted that she willfully violated her pre-trial conditions to travel to Louisiana in order to deliver the child and was alone with him while travelling from Louisiana to the Virginia area. With her history, [S.N.] was placed in serious immediate danger. [S.N.'s] father has willingly allowed the mother to tie up and abuse the older children and refused to cooperate with DSS in performing a safety assessment of [S.N.].

The [c]ourt further finds that there is no local parent, guardian, or custodian or other person able to provide supervision and continued placement in the home is contrary to the welfare of the child. Because of the emergency situation, removal from the parental home is reasonable under the circumstances to provide for the safety of the child. Reasonable but unsuccessful efforts were made to prevent or eliminate the need for removal from the child's home, including: Attempts to confirm with [S.N.'s] mother that she was pregnant were unsuccessful as she refused to cooperate with DSS and the father's refusal to confirm that the mother had been pregnant, and had delivered a child and attempts to plan for a safe environment for the child prior to delivery were not successful.

Based on its findings, the court found S.N. to be a CINA, and committed him to the Department's custody for placement with Ms. L.W.B.

Mother and Father filed this timely appeal. Further facts will be added in the discussion of the questions presented.

STANDARD OF REVIEW

As the Court of Appeals recently explained:

> The standard of review applicable to CINA proceedings is well-established: (1) we review factual findings of the juvenile court for clear error, (2) we determine, "without deference," whether the juvenile court erred as a matter of law, and if so, whether the error requires further proceedings or, instead, is harmless, and (3) we evaluate the juvenile court's final decision for abuse of discretion. *In re Adoption/Guardianship of H.W.*, 460 Md. 201, 214 (2018).

In re O.P., 240 Md. App. 518, 546, *cert. granted*, 464 Md. 586 (2019), and *aff'd in part*, *rev'd in part*, *In re O.P.*, 470 Md. 225 (2020).

DISCUSSION

I.

Jurisdiction

In Mother's motion to dismiss the CINA petition, she argued that, under Maryland's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Maryland was not S.N.'s home state:

> [S.N.] never lived in Maryland. He was in fact born in Louisiana. . . . He was then taken to Virginia with relatives, and then was sent to California by his parents, in the proper exercise of their natural guardianship rights, to live with his aunt.

The Department and S.N.'s counsel opposed the motion. S.N.'s counsel argued:

> I would just state that again, over and over again within this [motion] is a statement that the child has literally never lived in Maryland. When there are facts that are not before the [c]ourt, an affidavit is required. There is no affidavit attached to this, stating under oath that, in fact, the child has never lived in Maryland.
>
> We don't have an address in Virginia that supposedly this child was at for a certain period of time. We don't even have the name of the relative in Virginia that they indicate that they took the child to after its birth.

[Referring to the alleged guardianship dispute and that only the court] could revoke it -- but we have nothing to show this document. We don't have a copy of it, we don't have a copy of it from California -- we have no idea what it says. There is absolutely nothing filed in any court that I know of -- either California or here -- that would give that maternal aunt the power to retain that child even if the parents showed up on the doorstep.

Department's counsel argued:

[Mother's] proof that [was] attached to the motion to dismiss -- the only documentation of proof offered to the [c]ourt that in fact, this child was born in Louisiana.
And the parents' assertion -- again, not proven -- that there was a small amount of time in Louisiana for purposes of evading this [c]ourt and having the child out of state. Then there was a small amount of time, according to the parents -- an assertion that they were -- that the baby was in Virginia, and then an assertion that the baby was moved to California on or about January 14th.

It is interesting to me that in the attachments to this motion to dismiss, the only proof that the parents offered about those three facts to support their notion that Maryland is not the home state is that the baby was, in fact, born in Louisiana.

* * *

We know two things: he was born in Louisiana, and he is currently in California. Where he has been in his ensuing days from the time he was born on January 6th in Louisiana, is absolutely not proven before this [c]ourt and there is no documentation that has been provided to this [c]ourt.

How do we know he has not been back in Maryland? The parents are both Maryland residents. They gave to you their current addresses where they have been residing for some time, at the Boulevard Motel.

* * *

There is nothing -- if the [c]ourt would find that this is not the home state and the [c]ourt does not have its right to exercise its subject matter jurisdiction over the parents, there is absolutely nothing to say that one or both of these parents could not leave the State of Maryland today, go to California, and retrieve that boy and bring him back.

There would be nothing other than a court order that would prohibit [Mother] from doing that, but she has proven to this [c]ourt she is more than willing to violate that order. [Father] has no such barriers to his travel, and so there is nothing -- proof. There is no proof, there is no documentary evidence before this [c]ourt that says that that child is to stay in California further.

* * *

Now if you recall, [Mother] claims she did not have any address to provide to this [c]ourt about her sister. Well, the worker in California found it really quick. You know how? Because she looked in her database. Because, in fact, this sister had an old -- absolutely -- an old report made against her that was on file in the database in the San Diego County child welfare system.
That's how they quickly found her address and were able to dispatch their worker.

The court determined:

[W]hen you look at the definition of "home state," as you indicated, as to § 9.5-101(h) -- it looks like (2): "In the case of a child less than six months of age, the state in which the child lived from birth with any of the persons mentioned…" -- meaning the parents or somebody who is acting in their capacity -- "[] including any temporary absence."

"Temporary absence," under *Drexler vs. Bornman*, . . . 217 Md. App. 355 [(2014)], "[t]he proper way to determine if the child's absence from a state is [] 'temporary'. . . is to examine all the circumstances surrounding that absence . . . a totality of the circumstances test," which "[] would encompass both the duration of the absence and whether the parties intended the absence to be permanent or temporary, as well as 'additional circumstances that may be presented[.]'["] This test . . . provides courts with the necessary flexibility in making this determination."
So, what we have is, we have a situation where the siblings have been found CINA. They were removed and they were placed with family in California.
* * *
All right. And as I said, looking at the totality of the circumstances -- and as [Father's counsel] has indicated, when you look at the totality of the circumstances, you have a situation where the mother has had two

-- and the father -- have had two children removed.

The mother is pending criminal abuse charges. A condition of her pre-trial release is that she cannot leave the State of Maryland. And then, even when I asked her on Wednesday about where the child was born -- when she wanted to address the [c]ourt against Counsel's recommendation -- she did, and I even asked her, "Where was the child born?"

And she said, "Well, I'd rather not answer that, but I am allowed to leave the state and stay in the Washington, D.C., and Virginia area," which led this [c]ourt to believe the child was born in either D.C. or the northern Virginia area, based on her comment to the [c]ourt -- because she is allowed to travel there for work purposes because she is an Uber driver.

So, we're now presented with a birth certificate from Baton Rouge, Louisiana, which clearly shows to this [c]ourt she intended on leaving the jurisdiction of this [c]ourt in order to avoid having the child taken away.

* * *

So, it's clearly, by -- under the totality of the circumstances -- she left the jurisdiction of this [c]ourt to deliver this child to be out of the realm of DSS. *And that's all we know.*

* * *

That's why I find that wherever he was -- we know he was in Baton Rouge, Louisiana, because there's -- other than -- nothing else other than her testimony, *assuming this [c]ourt believes it* -- and clearly, based on her conduct in this case, *I don't believe it.* The child was in Baton Rouge, Louisiana, and ended up in California. That's it. So, under the totality of the circumstances -- considering the fact that the parents are residents here, they intentionally left this jurisdiction to avoid the child being taken into custody upon the child's birth based on the history of the abuse, neglect, and the pending criminal charges -- that I find that Maryland -- like I said, I know this is going to Annapolis -- is the home state of the child.

And we do have jurisdiction. Initially, when [the CINA petition] was filed, based on the assertion that the mother is known to tie up the children; she has criminal charges -- she was pregnant, we know the child was born. We exercised -- I would say we would exercise emergency jurisdiction. But I also note: no one has presented to the [c]ourt -- there's any documents concerning custody and guardianship.

* * *

. . . *And no other [c]ourt has seemed to exercise any jurisdiction at all, other than the State of Maryland*, from when this was filed. So, I find this [c]ourt is the home state of the children, and the motion to dismiss for lack of jurisdiction shall be denied.

(Emphasis added).

Contentions

Mother challenges the court's determination that "Maryland was S.N.'s home state because the parents still lived in the state and that S.N.'s absence was a temporary one 'to avoid this child being placed.'" She contends that "Maryland was not S.N.'s home state," because he "never lived in Maryland at all, let alone lived there with a parent or a person acting as his parent." In her view, "[t]he placement of all of [Mother's] children in California with relatives shows that the family's connections are more strongly in California than Maryland." She adds that "[e]ven though [she] was living in Maryland prior to S.N.'s birth in Louisiana and returned to stay there, her situation in Maryland was not a permanent one"; she "was living in a motel" and "could not leave Maryland due to a prerelease condition of her pending criminal case." Instead, "[w]hat was permanent was [her] desire for S.N. to live outside of Maryland, in California, with her family."

Similarly, Father contends that "the court abused its discretion by exercising jurisdiction over the child when he was born in Louisiana, stay[ed] in Virginia, lives in California and has never been to Maryland." He argues that the court, in finding that S.N.'s absence from Maryland was a temporary absence, "failed to appropriately and accurately apply the 'totality of the circumstances' test" because S.N.'s absence from Maryland "was clearly meant to be permanent." And that "Mother and Father went to great lengths to prevent S.N. [from] even entering the State of Maryland." He argues that "[e]ven if the [c]ourt determined that the [Mother's] testimony lacked credibility, there was still sufficient independent evidence to substantiate the fact that S.N. did not live in Maryland and that the parents meant for S.N.'s stay in California to be permanent." In support of that argument, he states that Mr. Woodard, "[t]he Department's own witness," testified that "he did not observe any evidence that a child was s[t]aying at the home" when he visited it on January 13, 2020. The Department contends that "Maryland is S.N.'s 'home state'" under the UCCJEA. It argues that the parents did not "introduce[] credible evidence to support

their claim that neither Mother nor Father cared for and lived with S.N. after they returned to Maryland and prior to S.N.'s departure to California." It points to Mother's admission "that she hurriedly arranged S.N.'s departure to California to get him 'out of here as quickly as I could,'" suggesting "that S.N. was 'here'—in Maryland—following his birth." It adds that not a single witness was called "who claimed to have cared for S.N. outside of Maryland prior to his arrival in California." Quoting the circuit court, the Department argues "it must be remembered that S.N. was born in Louisiana for one reason: '[T]o avoid the child being taken into custody.'" And that the parents "should not be rewarded for their attempts to circumvent the jurisdiction of Maryland courts, especially when the natural consequences would be borne by this infant child."

S.N.'s counsel also contends that the court has home state jurisdiction. Citing *In re John F*, 169 Md. App. 171, 181-84 (2006), she argues that "a *prima facie* presumption of jurisdiction arises from the exercise of jurisdiction by the trial court" and the burden was on the parents to rebut it. As she sees it, "[h]ow S.N. ended up in California is unclear unless you believe the statements of the parents whom the trial court justifiably found untrustworthy based on their past actions and their demeanor and testimony at trial." She adds that this case "is not a custody dispute between parents; rather, it is the State acting to protect a vulnerable child whose siblings have been savagely mistreated by their parents who were found to have neglected siblings." Alternatively, she argues that if Maryland was not S.N.'s home state, "there was no 'home state' so the trial court lawfully exercised jurisdiction once a CINA Petition was filed."

Analysis

"The Maryland judiciary may only exercise its authority in cases over which it has both personal and subject matter jurisdiction."[9] *Pilkington v. Pilkington*, 230 Md. App. 561, 578 (2016). Maryland Code (1973, 2019 Repl. Vol.), §§ 3-801(i) and 3–803(a) of the Courts & Judicial Proceedings Article ("CJ") grants exclusive original jurisdiction over proceedings arising from a CINA petition to circuit courts sitting as juvenile courts. And Maryland Code (1984, 2019 Repl. Vol.), Family Law ("FL"), § 9.5–101(e)[10] provides that the UCCJEA applies to all child custody proceedings, including CINA proceedings. It sets forth when a Maryland court may exercise subject matter jurisdiction in child custody proceedings. FL § 9.5–201(a)(1)–(4) provides:

> (a) Except as otherwise provided in § 9.5-204[11] of this subtitle, a court of this State has jurisdiction to make an initial child custody determination only if:
>
> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) a court of another state does not have jurisdiction under item (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 9.5-207 or § 9.5-208 of this subtitle, and:
>
> (i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> (ii) substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) all courts having jurisdiction under item (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under § 9.5-207 or § 9.5-208 of this subtitle; or
>
> (4) no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection.

The determination of jurisdiction and the propriety of its exercise, under the UCCJEA, involves the court in a three-step process:

> *First*, it must ascertain whether it has jurisdiction.
>
> *Second*, it must determine whether there is a custody proceeding pending or a decree in another state which fits the definition of "home state." If so, the court must usually decline its jurisdiction, except in the case of an emergency.
>
> *Third*, assuming the court has jurisdiction and there is not a proceeding pending or a decree, the court must determine whether to exercise its jurisdiction if there is a more convenient forum.

Fader's Family Law §8.5(b) (2019).

Once jurisdiction is exercised, "[i]t is presumed that jurisdiction over the subject matter and parties has been rightfully acquired and exercised." *In re John F.*, 169 Md. App. 171, 180 (2006) (quoting *In re Nahif A.*, 123 Md. App. 193, 212 (1998)). The party challenging jurisdiction bears the burden to rebut that presumption. *Id.* at 181. "[E]very presumption not inconsistent with the record is to be indulged in favor of such jurisdiction, at least when the allegations of the petition show jurisdiction." *Id.* at 180-81.

Under the UCCJEA, the focus in a jurisdiction determination is directed at the child's "home state." Fader's Family Law §8.5(c)(1) (2019). The "home state" of "a child less than 6 months of age" is "the state in which the child lived from birth with any [parent or a person acting as a parent], including any temporary absence." FL § 9.5–101(h)(2).12

In *Garba v. Ndiaye*, 227 Md. App. 162, 173–74 (2016), *cert. denied*, 448 Md. 30 (2016), we explained that:

> courts have developed three tests to determine whether absences are temporary or permanent: duration, intent, and totality of the circumstances. Some courts focus solely on the length of the absence. Other courts consider the intent of the parties, specifically whether parties intended to be away for a limited amount of time and which state they viewed as their place of permanent domicile.

In the more flexible "totality of the circumstances" test, adopted in *Drexler v. Bornman*, 217 Md. App. 355, *Drexler v. Bornman*, 440 Md. 116 (2014),[13] the court:

examine[s] all the circumstances surrounding [the] absence, an analysis that encompasses these considerations: the duration of the absence and whether the parties intended the absence to be permanent or temporary, as well as additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise. We embraced this approach over more rigid tests because it "provides courts with the necessary flexibility" to make child custody jurisdiction determinations, *Drexler*, 217 Md. App. at 363, and to assign the appropriate weight to each factor.

Id. at 173–74 (cleaned up).

In *Garba*, the child had been in Maryland for less than six months and had lived with his mother for less than six months and had lived with his mother in three previous countries for a year at a time during the life on the case. *Id.* at 171-72. The mother, a resident and owner of properties in Maryland, was employed by the United Nations and served for assignments of one year in a country before returning to Maryland. *Id.* at 174. In analyzing the "totality of the circumstances" surrounding the child's extended absence from Maryland, the Court determined that the reasons for the child's absence were more important than the length of the absences, and held that the facts "support[ed] a finding that Mother's and therefore [the child's] absences during the period before filing were temporary, and that Maryland [was] the home state for the purposes of the UCCJEA." *Id.* at 175.

In this case, the circuit court, after noting that no other court appeared to "exercise any jurisdiction at all," concluded:

> I do find Maryland is the home state of this child, just based on the totality of the circumstances in this situation. She intentionally left this jurisdiction to have a child in Baton Rouge, Louisiana, to avoid this child being taken into care. *They have returned here. They live here. So, this -- I think -- is the child's home state.*

(Emphasis added).

Mother asserts that "the court's inference that S.N. was physically present and lived in Maryland is not supported by the evidence." The evidence that she points to is her uncorroborated testimony "that she drove to her cousin's home in Virginia where she dropped off S.N. and did not stay longer than thirty minutes before returning to Maryland alone," and Mr. Woodard's testimony that he did not see any signs of a baby during his January 13 visit to her hotel.[14] The most obvious flaw in that argument is the court's clear finding that Mother "was trying to be too evasive for [it] to find any of her testimony credible at all." As an appellate court, we do not "second-guess the trial judge's assessment of a witness's credibility." *Gizzo v. Gerstman*, 245 Md. App. 168, 203 (2020).

Mother and Father produced no third-party evidence—such as a plane ticket or boarding pass—to establish when and from where S.N. departed for California. Mother testified that it was "approximately early last week, I believe it was Tuesday, give or take a day." S.N. was in Mother's care when they left Louisiana, and no witness claimed to have cared for S.N. outside of Maryland prior to his arrival in California. The only credible evidence was a birth certificate and the report to the Department from the child welfare worker in California on January 22, 2020. After discounting Mother's testimony, the court summarized the remaining evidence: "The child was in Baton Rouge, Louisiana, and ended up in California. That's it."

The only "objective and undisputed facts" indi-

cate that, after S.N.'s birth, Mother left Louisiana with S.N. in her care, returned to Maryland, and that S.N. was in California as of January 22, 2020. *Garba*, 227 Md. App. at 174-75. Simply put, where and with whom S.N. was between his birth on January 6, 2020 and his presence in California on January 22 was not established. That evidentiary void rests squarely on Mother's and Father's refusal to provide any meaningful information as to his whereabouts. Mother's past history, her current legal situation, and both parents' persistent evasiveness as to where and with whom S.N. was between when he left the hospital with Mother to when he arrived in California permitted an inference that S.N. was or had been with her or Father in Maryland at some point in time prior to his arrival in California. And that, in turn, supports the court's home state determination, and its conclusion that any absence of S.N. from Maryland during the period was essentially a "temporary absence." In its temporary absence calculus, the court, as did the *Garba* court, focused on the reason for S.N.'s absence from Maryland, which, based "on the history of abuse, neglect, and the pending criminal charges" and Mother's own admission, was to avoid his being taken into custody. Under the facts of this case, we perceive no error.

Moreover, and alternatively, if Maryland was not S.N.'s home state when the CINA petition was filed, he did not have a home state. In such circumstances, FL § 9.5-201(a)(4)[15] is a "catch-all 'vacuum jurisdiction' provision" that allows "a court in this State to exercise jurisdiction where no other state . . . can." *Toland v. Futagi*, 425 Md. 365, 376 (2012).[16]

Mother, citing In re D.S., 840 N.E.2d 1216 (2005),17 argues that Maryland would not have jurisdiction under this provision because "[t]he placement of all of [Mother's] children in California with relatives shows that the family's connections are more strongly in California than Maryland." In that case, the mother, who had had six children removed from her custody by the Illinois Department of Children and Family Services ("DCFS"), was pregnant with her ninth child and living in Illinois. *Id.* at 1218-19. The father was living in Tennessee with their two youngest children. *Id.* at 1218. In labor, and to keep the State of Illinois from removing the child from her custody, she drove from Illinois in an effort to get to Tennessee. *Id.* at 1219. She was forced to stop in Indiana, where she gave birth to D.S. *Id.* at 1223. The following day, the State of Illinois filed a "petition for adjudication of wardship," and the trial court granted the department custody of the child. *Id.* at 1218. The mother appealed, arguing the trial court lacked subject matter jurisdiction because the child had never lived in Illinois when the petition was filed. *Id.* at 1219. More specifically, she argued Indiana was the child's home state because the child was less than six months old when the proceedings began, the child was born in Indiana, and the child "lived his entire life with his mother within the State of Indiana prior to being brought to Illinois by DCFS." Id at 1221. The Illinois Supreme Court rejected that argument:

> [Mother's] own testimony established that she had no connection to Indiana and no intention of remaining there following D.S.'s birth. On the contrary, [mother] testified that she is a longtime resident of Illinois who, fearful of losing custody of D.S., intended to move to Tennessee. En route, she entered active labor and checked herself into the nearest hospital, which happened to be in Crawfordsville, Indiana. By itself, this temporary hospital stay in Indiana is simply insufficient to confer "home state" jurisdiction upon that state. As importantly, neither party makes any attempt to argue that any other state possessed "home state" jurisdiction over D.S. when the wardship petition was filed. We therefore agree with the State's assessment that D.S. lacks a "home state" for UCCJEA purposes.

Id. at 1223.

The record before us reflects no evidence other than Mother's assertion that the family's connections are more strongly California. Mother and Father have lived in Maryland for some time, and the two other children, who are in the custody of the Department, were placed in California. And S.N. was sent there by the parents to avoid his being taken into custody by the Department in Maryland.

Mother also argues that Ms. W "filed for custody of S.N. in California and a temporary guardianship hearing was scheduled . . . for March 11, 2020" and that Mother "had signed documents consenting to the guardianship of S.N." But, as the Department points out, she "did not produce a copy of the purported guardianship papers and could not disclose Ms. W's address." Because the court discounted the credibility of Mother's testimony, there is nothing in the record before us that any proceeding regarding S.N.'s custody had been filed as of January 21, 2020.

In short, the UCCJEA provides that a forum be available to make child custody determinations when the facts do not fit squarely within the rubrics of FL §§ 9.5–201(a)(1)-(3). Therefore, even if Maryland is not S.N.'s home state, we are persuaded that on this record, it would have jurisdiction under FL § 9.5–201(a)(4).

This case concerns an infant's immediate health and safety. What will serve S.N.'s future best interests is for another day. If, for any reason, that involves multiple tribunals or inconvenient forum issues, FL §

9.5–206 and FL § 9.5–207 may provide guidance.

II.

Procedural Error

At the conclusion of the adjudicatory portion of the CINA proceedings on February 19 2020, the court contemplated scheduling the disposition hearing the following week:

> Okay, and just so you know, this is what I'm thinking and considering only because I have to look up the other two children's cases and review all of those orders. My actual initial thought was to put whatever findings and ruling on the record next week since you all have to be here Wednesday of next week. So I can hear whatever closings you want to make and then look into those other cases and then put my findings on the record and go from there.

Counsel for the Department requested and the court granted her permission to argue that the parties should proceed to disposition that day. And after presenting the Department's arguments related to adjudication, she presented argument for disposition that day:

> Given all of the background that we now know about [S.N.'s] entry into the world, the neglectful manner in which it was handled, the multiple and contemptuous ways that they, parents acted to evade the jurisdiction of the Department and the [c]ourt I am going to ask that in its dispositional finding this [c]ourt indeed find that [S.N.] is a Child in Need of Assistance.
>
> And I'm going to get into sort of these dispositional issues that the [c]ourt, I believe needs to know about. When we were last before you, Your Honor, you issued the Court Order of January 29th. And in that Order, you did direct that [S.N.] be placed with [Ms. L.W.B.] who was the . . . placement for [the two older siblings] under the auspices of the ICPC as the girls remain in the custody of the Howard County Department of Social Services. And the reason that that option was chosen as the [c]ourt recalls is because there would be nominal supervision that could be provided.

At this point, Mother's counsel objected, stating that the Department's information related to disposition was "outside any evidence that was presented to the [c]ourt." The court responded that Department's counsel "is giving me the reasons why that I should not delay disposition until next week." Mother's counsel responded, "Okay, I didn't catch that, all right."

After hearing the Department's argument for not delaying disposition, the court, for different reasons, proceeded with disposition: "All right, and just so you know, my clerk passed me a note. Case time standards, I have to make a decision by . . . . February 21st."

In its arguments related to disposition, the Department asked the court to find S.N. to be a CINA and to direct the California child welfare agency to place S.N. with Ms. L.W.B. In their closing arguments, Mother and Father responded. Mother's counsel argued:

> [W]e object to essentially proceeding to disposition *because we object to a finding that the child has been, this child has been neglected.* There's a series of cases in Maryland which deal with the question of when there's an afterborn child, after the finding of CINA for others, the leading case is In Re Nathaniel A, which talks about circumstances under which there can be a finding of neglect without anyone pointing to anything that was done to this particular child. And their conclusion is that the child may be considered neglected before actual harm occurs as long as there is a fear of harm in the future, fear of harm in the future based on hard evidence and not merely a gut reaction.
>
> * * *
>
> But I understand we want to move this thing along.
>
> * * *
>
> Assuming that you are going to disposition, we do agree that the child should be with the aunt in California. Obviously, which one, my client would prefer [Ms. W].
>
> * * *
>
> So we're asking, first of all that you not find neglect, and therefore not go to disposition. But if you do go to disposition and believe that the child should be in the custody of the Department of Social Services for placement. That you not specify that the child be swooped up by the Department, by San Diego DSS until Ms. L.W.B. is approved.

Father's counsel argued:

> Your Honor, on behalf of [Father], we would be asking from the adjudication perspective that this [c]ourt not find [S.N.] to be a child in need in of assistance.
>
> * * *

> If the [c]ourt were inclined to disagree with me and we proceed to disposition, I would be asking the [c]ourt to leave the child, and I just want to make sure I say the right name. Asking the [c]ourt to leave the child with [Ms. W]. Which is where the child is presently placed.
>
> After hearing arguments on both adjudication and disposition, the court, not "find-[ing] the testimony of [Mother] to be credible based on, based on her demeanor and the way she testified," had "no problem finding this child to be a CINA," and awarded custody to the Department for placement with Ms. L.W.B.

Contentions

Mother and Father contend on appeal that the court erred by making "a disposition without holding a disposition hearing that was separate from the adjudication hearing," as required by Maryland Code, Courts & Judicial Proceedings Article ("CJ"), § 3-819(a).[18] Mother argues that the failure to do so was not harmless because it "prejudiced [her] in her ability to present the court with additional dispositional options." She adds that "[b]ecause the court improperly transitioned directly from closing arguments regarding adjudicatory facts into recommendations regarding what should be done with S.N.'s placement," she was denied "a full hearing about whether [S.N.] was abused or neglected." Therefore, we "should remand the case for a full disposition hearing." Similarly, Father contends that the error was harmful because "the parents were not given an opportunity to present additional dispositional evidence and testimony."

S.N.'s counsel, acknowledging that the court committed procedural error by not having separate adjudication and disposition hearings, contends that the parents were not prejudiced. She points out that the trial court first discussed a separate hearing on disposition, but "moved to Adjudication and Disposition" only because of "the urgency of resolv[ing]" this case. But, all parties were given the opportunity to argue whether S.N. was a CINA. And "[t]here was evidence regarding the current relative placement as well as the proposed relative who was caring for the siblings, for the trial court to consider for dispositional purposes." In addition, she argues that neither parent has offered "what they were prohibited from presenting to the court at Disposition."

The Department contends that it was proper for the court to hold "the dispositional hearing on the same day as the adjudicatory hearing." And it "urg[ed] the [c]ourt not to wait an additional week" before proceeding to disposition. It argues "as a factual matter" that the "court did conduct a separate disposition hearing after announcing its decision on the record," and that Mother's and Father's closing arguments were "dedicated solely to dispositional issues without offering any new dispositional evidence." Because "[n]o party requested the opportunity to submit dispositional evidence," the Department contends Mother and Father "acquiesced to the proceeding and lost the right to challenge the matter on appeal."

Analysis

A. Preservation

Before addressing the merits of Mother and Father's contention that the court failed to conduct a "separate" adjudicatory and dispositional hearing, we must consider whether the issue has been adequately preserved for our review. Md. Rule 8-131(a) provides that if an issue does not "plainly appear[] by the record to have been raised in or decided by the trial court," we "[o]rdinarily . . . will not decide [the] issue."

In this case, Mother made two objections to proceeding to disposition: 1) that the Department's information regarding Ms. W was "outside any evidence that was presented to the [c]ourt," and 2) "to a finding that the child has been . . . neglected." When she made the first objection and was advised by the court that the Department was explaining why disposition should not be postponed, counsel responded "Okay, I didn't catch that, all right." Father, without expressly objecting to proceeding to disposition, argued that "from the adjudication perspective," S.N. was not a CINA but if the court disagreed and "we proceed to disposition" that the court leave the child with the aunt to whom he was sent.

We are not persuaded that Mother and Father adequately preserved their argument regarding the court's failure to conduct separate adjudicatory and dispositional hearings for appeal but, as we explain below, they would fare no better had they done so.

B. The Adjudicatory and Disposition Stages

As recently explained by the Court of Appeals:

> The juvenile court proceeding to determine whether the child is a CINA consists of two stages – an adjudicatory hearing and a disposition hearing.
>
> **Adjudicatory Stage**
>
> As a first stage in resolving a CINA petition, the juvenile court is to hold an adjudicatory hearing to determine whether the department's factual allegations in the CINA petition are true. CJ §§ 3-801(c), 3-817(a); Maryland Rule 11-114. At the adjudicatory hearing, the rules of evidence apply and the allegations in the petition must be proved

by a preponderance of the evidence. CJ § 3-817(b)-(c); Maryland Rule 11-114(e).

Disposition Stage
If the court finds that the allegations in the petition are true, the court then holds a separate disposition hearing to determine whether the child is, in fact, a CINA and, if so, the nature of any necessary court intervention. CJ §§ 3-801(m), 3-819(a). Although the disposition hearing is "separate" from the adjudicatory hearing, the two hearings are ordinarily to be held on the same day. CJ § 3-819(a). At the disposition stage, it is left to the discretion of the juvenile court whether to insist on strict application of the rules of evidence. Maryland Rule 5-101(c)(6). The court may find that the child is not a CINA and dismiss the case. CJ § 3-819(b)(1)(i). Alternatively, the court may determine that the child is a CINA, in which case it may take one of three actions: (1) decide not to change the child's current custody; (2) commit the child to the custody of a parent, relative, or another suitable individual; or (3) commit the child to the custody of the local department of social services or the Maryland Department of Health. CJ § 3-819(b)(1)(iii). If the child is placed out of the home, the court must later hold a permanency planning hearing to determine a permanency plan for the child. CJ § 3-823(b).

In re O.P., 470 Md. 225, 236-37 (2020).

All parties look to *In re J.R.*, 246 Md. App, 707 (2020), for support of their respective positions. In *J.R.*, we determined that "even though the disposition was held on the same day as the adjudicatory hearing," "the hearing was not separate, as required [CJ] § 3-819(a)(1)" because "there is no indication as to where the adjudication hearing ends and when the disposition starts." *Id.* at 756. And that it was harmful because the parents "were not given the opportunity to present evidence as to why they would be able to provide J.R. with the proper care and attention, nor did the court outline specific findings as to why the court felt the need for removal." *Id.* at 757.

Here, unlike in *J.R.*, the record in this case reflects when the evidentiary portion of the adjudication stage had ended and when the disposition stage began. During the adjudicatory hearing, the court heard testimony and received evidence presented by the Department and the Mother. At its conclusion, the court discussed with the parties and their counsel scheduling disposition the following week when it would hear arguments and put its findings on the record "and go from there." Only the Department objected to doing so, and the court ultimately decided to continue with disposition that day. In hindsight, as S.N.'s counsel has stated, "the correct procedure would have been to sustain the proven facts as stated in the Amended CINA petition then hear arguments whether Disposition should be bifurcated and if there was no good cause to bifurcate, move into Disposition."

That said, we are not persuaded that proceeding as the court did was harmful to the parents in this case. Unlike *In re J.R.*, Mother and Father never contended that they were in a position to physically care for S.N. But they were permitted to present evidence and to argue against a finding of neglect because they were providing proper care for S.N. by placing him with Ms. W.[19] They point to medical records and the California social worker's report to support their position that S.N. was receiving proper care and attention from Ms. W. Their closing arguments were dedicated to both adjudication and dispositional issues without offering or attempting to offer any new evidence related to adjudication or disposition, Mother argues that "the court's failure to hold a separate hearing also prejudiced [her] in her ability to present the court with additional dispositional options," but she does not advance any proffers as to what those options might have been, nor did she do so in the circuit court.

Our review of the record indicates that the only dispositional options—short of not finding S.N. to be a CINA—related to placement. The parents' overarching goal was to place S.N. in the care of Mother's family in California. Mother, and presumably Father, preferred that he be with Ms. W but they advanced no cogent objection to his placement with Ms. L.W.B. and his siblings.

In short, we hold that any procedural error was harmless in this case.

III.

Evidentiary Error

At the February 19, 2020 hearing, Mr. Woodard testified about the Department's investigation concerning S.N. It began when he received a January 8, 2020 report "from a treatment foster agency that does . . . respite [] placements" regarding Mother and a child "likely born on January 6th, 2020." And, after learning on January 13, 2020 that Mother and Father "were staying at a hotel on Washington Boulevard" in Laurel, Maryland, Mr. Woodard went to the hotel. There, he "tr[ied] to work with [Mother] to make a safe plan for [S.N.]," but she "refused to tell [the Department] where the baby was or who the baby was with."

Later he:

was able to get records from Signature OB that confirmed that on May 8th, 2019 [Mother] had gone there for treatment in her first trimester with a child. And then on December 30th, 2019 she had discussed with the provider a planned delivery that would have ranged between January 1st and January 6th.[20]

When the Department's counsel asked "did the OBGYN records indicate whether or not [Mother] had gone ahead with that practice and delivered her child," Mother's counsel objected on hearsay grounds. Department's counsel responded that the information in the records was "the basis for what he did next" in his investigation and "inform[ed] the choices that he" took. The court overruled the objection and counsel continued her direct examination:

[Department's counsel]: Did the information that you obtained from OBGYN indicate whether or not [Mother] had gone ahead and delivered her baby with that practice?

[Mr. Woodard]: It did not indicate that.

* * *

[Department's counsel]: Okay, and what did you do next in your investigation after January 13th?

[Mr. Woodard]: So after January 13th was when I requested medical records, that would have been on the 14th. And then on the 15th, January 15th, 2020 I spoke to [Mother's] probation agent or pre-release agent.

In her cross-examination, Mother's counsel questioned Mr. Woodard about obtaining Mother's medical records:

[Mother's counsel]: And you indicated that you got medical records from her OBGYN?

[Mr. Woodard]: Yes.

[Mother's counsel]: And you had first obtained a release from my client, is that correct?

[Mr. Woodard]: No.

[Mother's counsel]: Okay so you are saying that you went there and got records –

[Mr. Woodard]: Yes.

[Mother's counsel]: Without my client's permission?

[Mr. Woodard]: Yes.

Mother's counsel moved to strike any reference to the medical records because they were obtained without Mother's consent. The following exchange resulted:

[Department's counsel]: Your Honor, Mr. Woodard is a CPS worker, and as such is entitled under law to receive those records and he did so and that is why they were permitted to be seen or viewed.

[Mother's counsel]: That makes no sense.

[Father's counsel]: Your Honor, at that time there was no open case, there was no authority by which he would have been permitted to obtain those documents. I mean, she's protected under HIPAA for those records. The court typically would provide an order that would allow persons to obtain records. There was no open case at that time. I'm not certain what authority Counsel is believing that he would have to obtain those records.

* * *

[Department's counsel]: There doesn't need to be an open case, he was investigating a report in the due course of his job and that is the type of thing[] that the investigators routinely do pursuant to a report received by the CAC.[21] This is common practice.

The court, agreeing with the Department, denied Mother's request to strike.

Contentions

Mother contends that "the court erred when it admitted evidence through the Department worker's testimony regarding [Mother's] medical records obtained without consent." She argues that "Maryland Code, Health[-]General Article, § 4-306, describes the compulsory process regarding the disclosure of a medical record of a person in interest by a *health care provider*," that was not followed by Mr. Woodard. And with that information, he sought shelter care of a child on January 17, 2020 "that he had not yet confirmed." She adds that "[e]ven if the neglect report received by [Mr.] Woodard then entitled him to [Mother's] confidential medical information, he, and through him, the [D]epartment, [were] not relieved of their obligation to adhere to a process which requires notice to [Mother] and an opportunity for her to object."

The Department contends that "Mother's

claimed evidentiary error is meritless." It argues that § 4-306 "generally prohibits a *health care provider* from disclosing medical records, except under specific circumstances," but that "Mother cites no rule that required the juvenile court to exclude the evidence provided through the Department's caseworker, who is not a *health care provider*."

S.N.'s counsel contends that "the trial court did not err in allowing testimony by the social worker regarding mother's medical records." She argues that "Mr. Woodard's testimony was he requested medical records" but "there was no follow up testimony as to which records he referenced." In addition, "the only information presented was the fact that a child was born," which Mother testified to later. Therefore, "it can hardly be said that Mr. Woodard's testimony amounted to any harm in this matter." She adds that "much of the information [Mr. Woodard] testified to was contained in the orders to which the trial court took judicial notice and through Mother's testimony," therefore, allowing the testimony was "at worst" harmless error.

Analysis

Maryland Code, Health-General Article ("H.G."), § 4-306, generally prohibits a "health care provider" from disclosing medical records, except under specific circumstances.[22] But the "disclosure" in this case was limited to a first trimester pregnancy and a projected birth date, and came in through Mr. Woodard, who is not a "health care provider."

The records did not come into evidence and Mr. Woodard's testimony regarding the medical records was admitted not for its truth but to explain the basis for his investigation. In addition, the limited disclosure related to delivery and clearly contributed to the investigation of the suspected child of abuse or neglect. Under these circumstances, we are not persuaded that seeking Mother's permission was necessary, but even if it was, we are satisfied that any error was harmless.23 To be reversible, an error must be "substantially injurious" and affect the outcome of the case; "'[i]t is not the possibility but the probability, of prejudice' that is the focus." *In re Adoption/Guardianship of T.A., Jr.*, 234 Md. App. 1, 13 (2017) (citation omitted). In a harmless error review, we balance "the probability of prejudice in relation to the circumstances of the particular case." *Id.* at 13 (citation omitted).

In this case, Mother admits that the actual medical records were not admitted into evidence or even provided to the court.[24] The evidence she challenges on appeal is Mr. Woodard's testimony that he learned that she had obtained prenatal care early in her pregnancy and had been advised as to a delivery date. She argues that it was this information that triggered the "authorization for shelter care of a child that [Mr. Woodard] had not yet confirmed existed." But according to Mr. Woodard's testimony, he had already learned that a child "was likely born on January 6th, 2020" from a January 8, 2020 report "from a treatment foster care agency that does . . . respite kind of placements." And it was Mother who testified that her obstetrician had advised her to deliver S.N. in early January:

> [Department's counsel]: [Mother], you indicate that in response to your Counsel's questions that your son [S.N.] was born in Baton Rouge, Louisiana, is that correct?
>
> [Mother]: Yes.
>
> [Department's counsel]: And that was on January 6th of 2020, is that correct?
>
> [Mother]: Yes.
>
> [Department's counsel]: And you were aware that by going to the State of Louisiana to give birth you were aware that you were violating a Court Order that didn't allow you to do that, isn't that correct?
>
> [Mother]: Yes.
>
> [Department's counsel]: And you were aware that you were approximately forty three weeks pregnant at that time, is that correct?
>
> [Mother]: Yes.
>
> [Department's counsel]: *And that you had been advised by a prior obstetrician in the State of Maryland to give birth two weeks prior to that, isn't that right?*
>
> [Mother]: No, it was actually the Friday. So, I had the baby on Monday, it was that Friday prior, so Friday, Saturday, Sunday, Monday, *so it was three days after she recommended that I have the baby that I had the baby.* But I actually went to the hospital two days after she had recommended. Which she said was not unsafe as long as I had the baby before I reached the forty second week mark, which was going to be on that Wednesday.

(Emphasis added).

In short, any error in admitting Mr. Woodard's testimony regarding Mother's medical records or denying the motion to strike that testimony was not so "substantially injurious" or prejudicial to be reversible error.

IV.

The CINA Determination

Contentions

Mother contends that "S.N. was not at substantial risk of harm, therefore he was not neglected, and he did not require the court's involvement because [she] placed him in California with her sister where he was safe and well-cared for." As she sees it, placing S.N. under the care of her family in California demonstrates her desire "to keep him safe and healthy outside of her care," and that she was "acting in his best interest and the opposite of neglecting him." She argues that "[t]he court's disdain for [her] actions or motives [was not] a sufficient basis for finding that she neglected her child."

Acknowledging that "[t]he purpose of the CINA proceeding is to protect the children and promote their best interest," Father contends that "this must be done within the confines of balancing the best interest of the child with the fundamental liberty interest of the parents." And that in this case, "the court erred in finding the child CINA" because "the Department failed to prove that the child was abused and/or neglected and the child was not placed at substantial risk of harm."

The Department responds that the "court properly found S.N. to be a CINA" because "Mother's history of leaving her children unattended, blindfolded, and tied to their beds, combined with Father's history of willingly allowing Mother's abuse, placed S.N. at a substantial risk of harm and therefore constituted neglect." It argues that "the juvenile court had no obligation to wait for S.N. to suffer an injury before it could find 'neglect'" in light of both parents' refusal "to disclose the baby's location," and "to provide information concerning the child" or to bring the child to court.

S.N.'s counsel also contends that the court "correctly ruled that S.N. was CINA at the disposition hearing based on the sustained facts." She argues that when the parent's past behavior is considered, "along with mental health, substance abuse[,] and other parenting deficiencies" in their totality, it "clearly establishes neglect."

Analysis

"The purpose of CINA proceedings is 'to protect children and promote their best interests.'" *In re Priscilla*, 214 Md. App. 600, 621 (2013) (quoting *In re Rachel T.*, 77 Md. App. 20, 28 (1988)). And because those proceedings "are very often fact-intensive . . . trial courts are endowed with great discretion in making decisions concerning the best interest of the child." *In re Adoption/Guardianship of Amber R.* 417 Md. 701, 713 (2011) (internal citations and quotation marks omitted). "Neglectful behavior toward a child may seem more passive in character, but a child can be harmed as severely by a failure to tend to her needs as by affirmative abuse." *In re Priscilla*, 214 Md. App. at 621.

CJ § 3–801(s) defines neglect:

> (s) "Neglect" means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or individual who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate:
>
> (1) That the child's health or welfare is harmed or placed at substantial risk of harm; or (2) That the child has suffered mental injury or been placed at substantial risk of mental injury.

"In determining whether a child has been neglected, a court may and must look at the totality of the circumstances . . . and must find the child a CINA by a preponderance of the evidence." *In re Priscilla B*, 214 Md. App. at 621 (citations omitted). Neglect can be thought of as "part of an overarching pattern of conduct," *Id.* at 625, that can occur "without actual harm to the child"; a "'substantial risk of harm' constitutes 'neglect.'" *In re Andrew A.*, 149 Md. App. 412, 418 (2003).

The court "need not wait for the abuse to occur and a child to suffer concomitant injury before [it] can find neglect: 'The purpose of [the CINA statute] is to protect children—not wait for their injury.'" *Priscilla B*, 214 Md. App. at 626 (quoting *In re William B.*, 73 Md. App. 68, 77–78 (1987)). For that reason, "'a parent's past conduct is relevant to a consideration of the parent's future conduct,'" and the court's "'[r]eliance upon past behavior as a basis for ascertaining the parent's present and future actions directly serves the purpose of the CINA statute.'" *Id.* at 625-26 (quoting In re Adriana T., 208 Md. App. 545, 570 (2012)). Here, viewing the totality of the circumstances, the court found that S.N. "was in fact neglected" by Mother and Father. The evidence established that Mother had a history of leaving her young children unattended, blindfolded, and tied to their beds. In 2018, the Department provided Mother with psychological and parent-education services over five months. But it was later determined that Mother was continuing to tie her children to their beds, and, as the court had found, that Father "willingly allowed[] [M]other to tie up and abuse the older children."

The older siblings had been sheltered to the custody of the Department and were found to be CINA in January of 2019. Mother was criminally charged for child abuse in June of 2019. When S.N. was born,

Mother was facing criminal charges for child abuse, was barred from having any unsupervised contact with children, and ordered to remain in Maryland, except for employment-related travel to Virginia and Washington, D.C. Mother violated these orders, travelling to Louisiana to give birth to S.N. "to avoid the child being placed in care by [the Department]."

Upon returning to Maryland, Mother and Father "refused to disclose the whereabouts of [S.N.] including any details about his birth" and "refused to present [S.N.] for a safety assessment." During the January 21, 2020 shelter hearing, the court "issued an Immediate Order for the parents to produce the child at a hearing the next morning," but they failed to do so. The court again ordered S.N. be produced at a hearing on January 29, 2020, but S.N. "was not produced." Faced with the parents' past and ongoing conduct and with no credible information as to S.N.'s actual welfare and whereabouts, the court was not required to wait for S.N. to suffer harm before it could find neglect.

Mother argues that her "conduct demonstrates that she was cognizant of the welfare of her child" pointing to her testimony that "she could not provide the necessary care for her newborn son and wanted him to be with his caring family in California." But simply sending an infant to California did not overcome the potential risk of harm. As the Department argued at the January 27 hearing:

> If the [c]ourt does not have its right to exercise its subject matter jurisdiction over the parents, there is absolutely nothing to say that one or both of these parents could not leave the State of Maryland today, go to California, and retrieve that boy and bring him back.
>
> There would be nothing other than a court order that would prohibit [Mother] from doing that, but she has proven to this [c]ourt she is more than willing to violate that order. [Father] has no such barriers to his travel, and so there is nothing – proof. There is no proof, there is no documentary evidence before this [c]ourt that says that that child is to stay in California further.

In addition, the court could not be assured that S.N. would be provided with the proper care and attention in California. When asked "[w]hat's your sister's address?" Mother responded that her sister has "not told me what her address is. Nobody in the family knows her address."

On this record, we are persuaded that the court acted well within its discretion in finding S.N. to be a CINA and committing him to the custody of the Department for placement with Ms. L.W.B.

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

Footnotes

1 Mother asked:

I. Where [Mother] gave birth to S.N. in Louisiana, placed him in California, and he had never lived in Maryland, did the court err in finding Maryland to be S.N's home state so that it could exercise jurisdiction and make a custody determination?

II. Did the court commit error when it allowed the department worker to give testimony about information he received from [Mother's] medical providers in violation of compulsory process protecting her confidentiality?

III. Did the court commit error when it did not hold a dispositional hearing that was separate from the adjudication hearing?

IV. Did the court err in finding S.N. to be a CINA because he was not abused or neglected by [Mother] and did not require the court's intervention when he was safe in California?

Father asked:

I. Did the [c]ourt abuse[] its discretion by exercising jurisdiction over the minor child when he was born in Louisiana, stayed in Virginia, lives in California and has never been to Maryland?

II. Did the [c]ourt err in finding the child to be a Child in Need of Assistance where the Department failed to prove that the child was abused and/or neglected and the child was not placed at substantial risk of harm?

2 Some of the breast milk was "donated and not screened," and came from unregulated online sources. [App 13, 44]

3 On June 6, 2019, Mother was charged with multiple criminal offenses stemming from her abuse of the children. Pending trial, she was ordered to remain in Maryland, except that she was permitted to go to Washington, D.C., and northern Virginia for employment purposes. She was also barred from unsupervised contact with any minor children.

4 Mr. Woodard testified:

[Mr. Woodard]: So upon receiving that report we didn't really have any, like a location of the family at that point. Although we were familiar with the family we also knew that they had been homeless in the past and so that, you know, they hadn't always been in the same location. But then on January 13th, on January 13th we got another call with a location of the family.

[Department's counsel]: So on January 13th from whom did you receive this call?

[Mr. Woodard]: Someone from the courts.

[Department's counsel]: From the Howard County courts?

[Mr. Woodard]: Yes, ma'am.

5 Mother would not disclose Ms. W's address.

6 The "ICPC" is the Interstate Compact on the Placement of Children.

7 Mother's pre-trial release had been revoked on the criminal child abuse allegations regarding the two

older children; Father was incarcerated on unrelated charges.

8 On February 4, 2020, the court appointed counsel to represent S.N.

9 Personal jurisdiction over Mother and Father is not an issue in this case.

10 FL § 9.5–101(e)(1)-(e)(2) provides: (e)(1) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. (2) "Child custody proceeding" includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear.

11 FL § 9.5–204 provides for "temporary emergency jurisdiction" for a child present in the State who has been abandoned or is "subjected to or threatened with mistreatment or abuse."

12 As pointed out in *Garba v. Ndiaye*, "lived" is "generally" construed to "mean the place where the child is 'physically present,'" without regard "for the child's legal residence or domicile." 227 Md. App. 162, 171 (2016) (citing *Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2006)).

13 In *Drexler*, we "agree[d] with those state appellate courts that have concluded that the proper way to determine if a child's absence from a state is a 'temporary' one, under the [UCCJEA], is to examine all of the circumstances surrounding that absence." *Id.* at 362. In that case, the child had lived between Maryland and Indiana throughout his life. He had lived in Indiana for a year and five months prior to the custody action, which was filed in Maryland by the maternal grandparents. *Id.* at 357, 359. In the six months prior to the filing, the mother and child had spent a week in Maryland, and we were asked to decide if that absence from Indiana was temporary. *Id.* at 357. Testimony indicated that the mother moved from Indiana because the "relationship with her girlfriend had begun to 'deteriorate,'" and that when the mother and child moved to Maryland, she left personal items in Indiana in storage. *Id.* at 358. The grandmother testified that the mother intended to stay in Maryland at the time of her move. *Id.* When the mother reconciled with her girlfriend after her relocation to Maryland, she returned to Indiana with the child. *Id.* at 358–59. Adopting the totality of the circumstance test, and noting that the mother has taken "no steps to finalize or formalize her intent to stay in Maryland," we held that the child's stay in Maryland was a "temporary absence" from Indiana and, thus, counted as part of the six months for determining the child's "home state" under the UCCJEA. *Id.* at 365.

14 Mr. Woodard's testified that he saw no signs of a baby, and that after his January 13 visit to the motel, he made another attempt to contact Mother to get the location of S.N. to no avail. And when he contacted Father, Father said "that there was no baby that was born." Mr. Woodard's testimony was limited to his observation of the motel room and Mother's car on January 13. It did not eliminate the possibility that S.N. was not somewhere in Maryland or that he had never been in Maryland.

15 FL § 9.5-201(a)(4) provides for jurisdiction when: "no court of any other state would have jurisdiction under the criteria specified in item (1), (2), or (3) of this subsection."

16 As explained in Fader's Family Law § 8-5(c)(3) (2019):

If Maryland is not the Home State, and the significant connection/substantial evidence basis is inapplicable, the [UCCJEA] provides two other bases for Maryland to assume non-emergency jurisdiction. The first is that all other states having jurisdiction pursuant to the Home State or significant connection/substantial evidence tests have declined to exercise jurisdiction because Maryland is the more appropriate forum. *The second is the default basis: if no other state has jurisdiction pursuant to the criteria previously detailed, Maryland may assume jurisdiction.* (Emphasis added). 17 The Department also cites *In re D.S.*, 840 N.E.2d 1216 (2005), to argue that "[a]though Mother gave birth to S.N. in Louisiana, this temporary absence did not negate Maryland's status as S.N.'s 'home state.'" Quoting *In re D.S.*, 840 N.E.2d at 1223, it states "[w]hen people speak of where a mother and a newborn baby 'live,' they do not speak of the maternity ward. Instead, they speak of the place to which the mother and baby return following discharge from the hospital."

S.N. cites *In re D.S.* for the proposition that "there is no home state" when a "mother merely goes to another state just to have the child and has no intention of staying in that State but rather to evade the real 'home state.'"

18 CJ § 3-819(a) provides:

(1) Unless a CINA petition under this subtitle is dismissed, the court shall hold a separate disposition hearing after an adjudicatory hearing to determine whether the child is a CINA.

(2) The disposition hearing shall be held on the same day as the adjudicatory hearing unless on its own motion or motion of a party, the court finds that there is good cause to delay the disposition hearing to a later day.

(3) If the court delays a disposition hearing, it shall be held no later than 30 days after the conclusion of the adjudicatory hearing unless good cause is shown.

19 Mother would not disclose Ms. W's address in her testimony. It was discovered by the California DSS based on a prior complaint against Ms. W in its records. Only then could a social worker visit her residence and assess S.N.'s well-being.

20 He also contacted the former pediatricians for S.N.'s two older siblings to inquire whether they had discussions or information about Mother, but they had no contact with Mother since the two older children "were taken out of their care."

21 CAC presumably refers to the Child Advocacy Center.

22 H.G. § 4–306(b) provides, in pertinent part:

A health care provider shall disclose a medical record without the authorization of a person in interest:

(1) To a unit of State or local government, or to a member of a multidisciplinary team assisting the unit, for purposes of investigation or treatment in a case of suspected abuse or neglect of a child or an adult, subject to the following conditions: (i) The health care provider shall disclose only the medical record of a person who is being assessed in an investigation or to whom services are being provided in accordance with Title 5, Subtitle 7 or Title 14, Subtitle 3 of the Family Law Article; (ii) The health care provider shall disclose only the information in the medical record that will, in the professional judgment of the provider, contribute to the: 1. Assessment of risk; 2. Development of a service plan; 3. Implementation of a safety plan; or 4. Investigation of the suspected case of abuse or neglect; and (iii) The medical record may be redisclosed as provided in §§ 1-201, 1-202, 1-204, and 1-205 of the Human Services Article[.]

23 *In David N. v. St. Mary's Cty. Dep't of Soc. Servs.*, 198 Md. App. 173, 182 (2011), we explained:

The reporting sections of subtitle 7 mandate [of Title 5 of the Family Law Article], with some exceptions, the duties to report suspected child abuse or neglect owed by certain professionals, and then by the population at large. Section 5–704 obligates identified professionals (health care practitioners, police officers, educators, and human services workers) to report suspected child abuse to the local department of social services or the appropriate law enforcement agency and to report suspected child neglect to the local department of social services. It draws no distinction in this reporting duty between child victims living inside or outside Maryland or between suspected abuse or neglect thought to have happened inside or outside Maryland. As long as the victim is a child *and the mandated reporter is acting in his or her professional capacity in Maryland*, the report must be made. The section, which has no exceptions, specifies the manner, timing, and contents of such a report.

24 In her brief, she states:

It is unknown whether the medical information received by [Mr.] Woodard included mental health records, which would be subject to additional confidentiality requirements, or whether it conforms to the requirements of § 4-306(b)(1)(ii). See Maryland Code, Health General Article, § 4-306(b)(6)(i). [Mr.] Woodard testified about what he learned from [Mother's] medical records but the [D]epartment did not provide the medical records to counsel or the court nor did they admit the medical records as an exhibit.

Cite as 1 MFLU Supp. 61 (2021)

Child custody; parent's right to travel; child's best interests

Nicole M. Skiles
v.
Aaron J. Saia

No. 32, September Term 2020

Argued before: Fader, C.J.; Nazarian; Adkins (retired, specially assigned), JJ.

Opinion by: Adkins, J.

Filed: Oct. 27, 2020

The Court of Special Appeals affirmed the Anne Arundel County Circuit Court's denial of the mother's request to move with her children to Georgia over the father's objection but reversed the judge's order that she not relocate more than 20 miles from the father.

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

Again, we are asked to address how to balance a parent's fundamental right to travel against the overall best interests of her children in custody disputes. Although each custody decision turns largely on facts and circumstances of the families involved, legal determinations about parental constitutional rights are also weighty.

After an almost 8-year marriage, Nicole M. Skiles ("Mother") and Aaron J. Saia ("Father") went their separate ways. In doing so, Mother and Father agreed to joint physical and legal custody of their two minor children and adopted a schedule with alternating holidays and weekends. Mother and Father eventually both met new partners, and Mother's new partner lived in the state of Georgia. Mother approached Father several times about the possibility of relocating with the children to the state of Georgia, but Father refused to agree to the move and wanted to keep the current custody arrangement intact.

Eventually, Mother filed a motion requesting the circuit court to award her full physical and legal custody of the children and to approve her relocation to Georgia. Father responded by requesting a modification to grant him full physical and legal custody if Mother relocated to Georgia. After a hearing, the trial court denied Mother's proposed modification and ordered that to retain even her joint custody status, she must live within 20 miles of Father's current residence.

Mother submitted two questions[1] to this Court on appeal, which we rephrased:

> 1. Whether the court's order infringes on Mother's constitutional right to travel and imposes a constitutionally impermissible custody condition.
>
> 2. Whether the court abused its discretion when it imposed a 20-mile radius relocation restriction on Mother.

We answer question one in the negative, and reverse the radius requirement in question two for the reasons below.

FACTS AND LEGAL PROCEEDINGS

Mother and Father were married on June 14, 2008. During their marriage, they had two children, born in 2009 and 2012. On June 5, 2016, after almost 8 years together, Mother and Father physically separated, beginning the process of ending their marriage. They entered into a Marital Settlement Agreement ("MSA") on September 20, 2016, agreeing to "maintain joint legal custody of their minor children," as well as "joint physical custody of the minor children." In this MSA, Mother and Father agreed to a schedule:

> Every Monday & Tuesday, the children will be in [Mother's] . . . physical custody, barring any discussed holiday schedule that might interfere. Every Wednesday & Thursday, the children will be in [Father's] . . . physical custody, barring any discussed holiday schedule that might interfere. Every other Friday, Saturday and Sunday will be switched between [Mother] and [Father] respectfully.

Under this schedule, each parent had approximately half of the time with their minor children. A year later, on August 3, 2017, the parents agreed to the same custody agreement in a second MSA. Later, their

Judgment of Divorce on September 21, 2017 "ratified and incorporated by reference" both prior MSAs, so their shared custody arrangement was reaffirmed once again.

Mother and Father both moved on with their lives after the separation, and found new romantic partners. Mother began dating Georgia resident Christopher Todd Bateman around August 2017. Father knew about Mother's relationship with Bateman, and Mother even brought the children to visit Bateman in Georgia a few times. Around February 2018, Mother expressed to Father that she wanted to move with their two children to Georgia. Father was not in agreement about the move: "I was not going for it. I can't be that far away from my kids."

Mother, pressing on, filed a Motion for Modification of Custody, Visitation, Child Support, and Other Related Relief in November 2018. Mother asserted that "the parties are no longer able to effectively communicate as it relates to legal custody decisions [a]ffecting the minor children." She requested full legal and physical custody, as well as permission to relocate with the children to Georgia. Mother stated concerns about Father's "ability to properly supervise the minor children while in his care," that he "is not involved in the minor children's academics," and that he "refuses to monetarily contribute to the well-being of the minor children."

Father responded in January 2019, saying that the current custody agreement "is working in the best interests of the minor children." His counter-motion asserted that Mother's actions were not in the best interests of the children, but "the personal interests and desires of [Mother]," and requested "primary physical custody of the minor children in the event that [Mother] relocates to the state of Georgia."

Mother and Bateman welcomed a child in April 2019, and married soon after in August. The following month, Bateman bought a house in Georgia close to where he grew up, and where his parents currently live. Mother later found out she was pregnant with their second child together, due in March 2020.

Trial occurred in February 2020. Mother testified about the house Bateman bought in Georgia, and based on her internet research, she described the nearby schools as "four star schools" with high academic levels. Mother also said that there was a "lack of discipline" for the children occurring "[a]t their father's home," causing some behavioral worries in one of the children. Although she would be taking the children several states away, Mother mentioned that she planned to keep Father involved and informed, and welcomed him to visit at his convenience.

Even if her relocation was denied, Mother planned to retire from retail work so she could "put my kids, you know, more in gear." While her plan included leaving her current residence no matter what happened with the relocation approval, she had not looked at anywhere in the area because "there are so many balls up in the air right now determining this case so as soon as this case is determined, that's when we are able to decide." She still wanted the custody schedule to change if she remained in Maryland, so she could have the kids "Monday through Friday" because "the school is going to change."

Father described the current custody arrangement by saying that "it works out good. It gives both parties equal time with the children, with our kids." He expressed that both he and Mother love the kids and are good parents. Despite communication problems between Mother and Father every now and then, he thinks that "for the most part, I do think we do communicate very well." Father was steadfastly against Mother moving with the kids to Georgia from the very beginning: "I felt like I was abandoned by my father when I was about 6 or 7 years old, and just knowing what that is like, not having that other parent around. I didn't want my children to go through that same phase, that same feeling." Father perceived no lack of discipline at his house and thought that he and Mother did not "have much difference in how we want to discipline the children." He did not think moving to Georgia would be in the best interests of the children: "They are excelling in their education. Their friends and family are here. They are not in Georgia. A part of me feels that this is more or less in the best interest of [Mother] than it is the children themselves."

At the end of the trial, the trial judge announced his decision: Mother's "motion to modify will be denied in part and granted in part," while Father's motion "will be denied." He said that they "are both wonderful parents," and found no issue with their parental fitness. Although no one had requested a mileage restriction, the court ruled that Mother "may not establish a residence for the minor children more than a 20-mile radius from [Father's] current home."

After the trial, the trial court released a written order:

> ORDERED, that [Mother] shall not relocate the minor children . . . to a residence more than twenty (20) miles from the current residence of [Father]; and it is further
>
> ORDERED, that the parties shall continue to hold joint legal and physical custody of the minor children pursuant to the physical sharing schedule detailed in the parties' marital settlement agreements as incorporated but not merged in the Judgment of Absolute Divorce dated September 21, 2017.
>
> ***
>
> ORDERED, that either party shall provide advance written notice of at least 90 days to

> the court and the other party of the intent to relocate the permanent residence of the party or the children either within or outside the State of Maryland.

Mother also received tie-breaking authority on "public school district/feeder system" decisions for the children, with the caveat that she would be "solely responsible for all custody exchange transportation" for the schools. This appeal followed.

DISCUSSION

I. Constitutional Right To Travel

Mother argues that the denial of her relocation to Georgia with the children—and the 20-mile radius requirement—infringe on her constitutional right to travel. Father responds that because her right to travel is qualified by the best interests of the children, the trial court's order does not infringe on her constitutionally protected rights.

We perform "an independent constitutional appraisal" because "[a] trial court cannot, in the exercise of its discretionary power, infringe upon constitutional rights enjoyed by the parties." *Braun v. Headley*, 131 Md. App. 588, 596 (2000). The "constitutional right to travel from one State to another is firmly embedded in our jurisprudence." *Id*, at 600 (citing *Saenz v. Roe*, 526 U.S. 489, 498 (1999)). But we bear in mind that "the right to travel is qualified, and must be subject to the state's compelling interest in protecting the best interests of the child by application of the best interests standard." *Braun*, 131 Md. App. at 602–03. As we have said in this context, "there are no absolutes other than the best interests of the child." *Id*, at 609 (cleaned up).

Domingues v. Johnson, 323 Md. 486, 501 (1991) stressed the fact-specific considerations for all custody cases:

> [T]he . . . difficulty of the decision-making process in custody cases flows in large part from the uniqueness of each case, the extraordinarily broad spectrum of facts that may have to be considered in any given case, and the inherent difficulty of formulating bright-line rules of universal applicability in this area of the law.

As the Court of Appeals explained, "[t]he view that a court takes toward relocation may reflect an underlying philosophy of whether the interest of the child is best served by the certainty and stability of a primary caretaker, or by ensuring significant day-to-day contact with both parents." *Id*, In that same vein, when "both parents are interested, and are actively involved with the life of a child on a continuing basis, a move of any substantial distance may upset a very desirable environment, and may not be in the best interest of the child." *Id*, at 502. The *Domingues* court quoted Professor Paula Raines, who wrote that "moving children away from one parent, after a successful joint custody arrangement has been instituted, is rarely in a child's best interest." *Id.* (quoting Paula Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. Fam. L. 625, 630 (1985–86)).

The Court of Appeals also addressed a few additional considerations:

> In the present case, there was evidence that the father had a very close relationship and strong bonds with the children. Although the father did not have equal physical custody, he did have, and regularly exercised, extensive rights of visitation. As a result, the children spent substantial periods of time with each parent. The close relatives of the children, maternal and paternal, with whom the children had enjoyed close contact, reside in this area. Additionally, there was evidence that the attitude and conduct of the mother and her husband were likely to exacerbate the adverse effects of a physical separation of the children from their father, to the detriment of the children.
>
> The issue of stability cuts both ways in this case. Continued custody in the mother, the primary caretaker in fact, certainly offers an important form of stability in the children's lives. However, permitting the children to remain in an area where they have always lived, where they may continue their association with their friends, and where they may maintain frequent contact with their extended family, also provides a form of stability.

Domingues, 323 Md. at 502–03. The Court ultimately reiterated that the issue "is one that cannot be determined as a matter of law." *Id.* at 503.

Later, in *Braun v. Headley*, we addressed a mother's move from Maryland to Arizona, followed by her request to modify visitation, as well as the constitutional right to travel in terms of custody arrangements. *Braun*, 131 Md. App. at 592–93. At trial, the father testified that the mother "substantially and repeatedly interfered with his ability to speak with the child." *Id.* at 595. The trial court awarded custody of the child to the father, "and reserved visitation with [the mother] 'until further order of this court.'" *Id.* at 596 (cleaned up). In her appeal, the mother argued, among other things, that the *Domingues* standard for analyzing a parent's relocation violated her constitutional right to travel. *Id.* at 597.

We agreed "that the constitutional right to travel should not be ignored in custody decisions involving the decision of one parent to relocate." *Id.* at 602. But we rejected the argument that the standard set in *Domingues* violated this right. We observed that cases from other states that "address[ed] the constitutional right of travel, and its interplay with the best interests standard *accord a lower priority to the constitutional right*, and in doing so, apply standards that are consistent with . . . *Domingues*." *Id.* at 603–04 (emphasis added). We acknowledged that *Domingues* did not directly address the constitutional right to travel but pointed out that "it did mention the right to travel in its opinion, and made reference to commentaries discussing the right." *Id.* at 608 (cleaned up).

We ultimately concluded:

> The approach taken by the Court of Appeals in *Domingues* sufficiently protects the constitutional right to travel because *it requires consideration of that right*, and gives the parent choosing to exercise that right an equal footing as the other parent with respect to the burden to show the best interests of the children.

Id. at 609 (cleaned up) (emphasis added).

In the present case, Mother reiterates the issues raised in *Braun*. She claims that prohibiting her "from relocating with the children . . . infringes on . . . her constitutionally protected rights, particularly when the Mother articulated in her testimony the ways in which she would ensure the children will continue to have a meaningful relationship with the Father if she were permitted to relocate."

The circuit court weighed Mother's fundamental right to travel and the best interests standard while making its decision:

> This case involves some concepts of law and some constitutional rights . . . . The Supreme Court of the United States has clearly said that people have a constitutional right to travel; to live where they want, move where they want, et cetera, et cetera.
>
> But that is not an unlimited right . . . . [O]ne of the limitations on that is in the area of children, minor children and their custody, when the Court has the burden . . . to determine and temper [the best interest of the child] against the right to travel.

The court ultimately found that Mother's move to Georgia was "primarily in her interest, and although there are certainly beneficial aspects to the children for that move, it is not primarily for their interests in order to facilitate that."

In reaching its conclusion, the court appropriately addressed factors analyzing the best interests of the children, such as the benefits of joint custody, fitness of the parents, and relationship between the parents and the children. In denying Mother's relocation request, the court assessed the current arrangement to be in the best interests of the children: "[t]he decision is basically that those things that aren't broke you shouldn't try to fix . . . ." The joint legal custody arrangement, which the trial court found had already worked for years, was hampered by "the singular conflict of the relocation . . . ."

We see no violation of Mother's constitutional right to travel in the circuit court's denial of her relocation to Georgia based on its findings that it was not in the best interests of the children. The court adequately addressed Mother's right to travel, and Mother does not challenge the court's findings under the best interests standard.

Mother also challenges the constitutionality of the 20-mile radius (from Father's residence), relying on *Frase v. Barnhart*, 379 Md. 100, 125 (2003). In *Frase*, the Court of Appeals struck down a custody order that required a mother to apply for housing and relocate to a specific building. *Id.* After the circuit court found that the mother was a fit parent, "the court had no more authority to direct where she and the child must live than it had to direct where the child must go to school or what religious training, if any, he should have, or what time he must go to bed." *Id.*

Frase is inapposite. The trial court here did not order Mother to apply for a specific housing, nor did it direct which neighborhood Mother should live in or what kind of house she should have. In any event, as explained below, because we reverse the court's 20-mile radius order on non-constitutional grounds, it is unnecessary to decide its constitutionality.

II. The 20-Mile Radius—Non-Constitutional Challenge

Mother argues that the trial court abused its discretion by restricting her movement to a 20-mile radius because neither party asked for it, and the mile restriction is not reasonable. Notably Father never requested this, or any other specific radius at trial. His brief on appeal defends the restriction—arguing that the court acted within its discretion because Mother sought both relocation and modification of the custody agreement.

"[O]rders concerning custody and visitation are within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion." *Gizzo v. Gerstman*, 245 Md. App. 168, 199 (2020) (cleaned up). A trial court abuses its discretion "when no reasonable person would take the

view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Id.* at 201. A trial court abused its discretion when denying a paternity petition and resolving a custody dispute without considering the biological father of the child to determine the best interests of the child. *See Sider v. Sider*, 334 Md. 512, 534 (1994).

In 2019, this Court overturned a custody order, finding that the trial judge abused her discretion in giving the father primary physical custody of the child. Azizova v. Suleymanov, 243 Md. App. 340, 344 (2019). In vacating the juvenile court's decision, we saw "not one scintilla of evidence . . . that linked the mother's behavior as a part-time worker and student to an adverse impact on [the child] or her development." *Id.* at 373. We rejected consideration of the mother's past behaviors that the child did not observe. *Id.* In remanding, we instructed the trial judge and parties to prove what is in the child's best interest with actual evidentiary support. *Id.* at 373–74.

We addressed mile restrictions in *Schaefer v. Cusack*, 124 Md. App. 288 (1998). In *Schaefer*, the parents were required to live within 45 miles of each other. *Id.* at 303. We reversed that requirement:

> In this case we have no findings or statements relative to the needs of the child in the imposition of this 45-mile limit. It does not necessarily follow that it should be permissible for the parents to be 44 miles apart but against the best interests of the child for them to be 46 miles apart. We hold that the best interest of the child can be determined better at the time a relocation is proposed than in an attempt to look into the future and to say now that the best interest of the child requires a present determination that a separation of the parents by more than 45 miles would have an adverse effect upon the child.

Id. at 307.

We apply similar reasoning here. Mother did not have a residence location selected in case the trial court denied relocation to Georgia. When stating its findings, the trial court did not make "findings or statements relative to the needs of the child in the imposition of this [20]-mile limit." *Id.* Nor did it provide any reasoning for the specific radius requirement. Its order just required that Mother "shall not relocate the minor children . . . to a residence more than twenty (20) miles from the current residence" of Father.

Although we appreciate that the trial judge sought to preserve for the children the lifestyle and stability currently existing, there is no evidence that this exact radius is necessary to do so. As we said in *Schaefer*, "the best interest of the child can be determined better at the time a relocation is proposed . . . ." *Id.* Nothing in the order or the trial court's findings supports an evidence-based conclusion that a specific 20-mile radius is in the best interests of the children.

Finally, by imposing an arbitrary mile limitation, the court placed Mother in an untenable position: even if she found a house located 22 miles away, she would be required to show a substantial change in circumstances—since the date of this order—to justify that location. *See Gillespie v. Gillespie*, 206 Md. App. 146, 171–72 (2012) ("In the custody modification context . . . the burden is . . . on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." (cleaned up)). That is an unreasonable and arbitrary burden to impose on Mother under these circumstances. Therefore, we reverse the 20-mile radius requirement because it was not within the discretion of the trial court.

Under Maryland law, a judge may require parties in a custody order to "provide advance written notice of at least 90 days to the court, the other party, or both, of the intent to relocate the permanent residence of the party or the child either within or outside the State." Maryland Code (1984, 2019 Repl. Vol.), § 9-106(a)(1) of the Family Law Article. The parties included this requirement in both of their MSA's, which were incorporated in earlier custody orders. The trial judge affirmatively reminded the parties of this by telling Mother and Father to "give certain formal notice of their relocation intentions, either inside or outside the state." This requirement in and of itself provides enough oversight for the court on any potential move Mother makes in the future.

CONCLUSION

In making our decision, we do not take the fundamental right to travel lightly and acknowledge its longstanding importance. Nevertheless, under settled law, the right is a qualified one, which is subordinate to the overall best interests of the child. We do not agree with Mother's contention that denying her the right to move the children to Georgia violated her right to travel. We affirm the trial court's decision regarding Mother's relocation to Georgia.

Although we reverse the trial court's order that Mother must relocate within 20 miles of Father, we do not remand for proceedings to determine a specific radius that includes findings supporting it. The requirement to notify the court and other parent at least 90 days in advance provides sufficient safeguards to allow the trial court to determine the appropriateness of a relocation within the area when it is proposed and planned.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE PAID THREE QUARTERS BY APPELLANT, AND ONE QUARTER BY APPELLEE.

Footnotes

1 Mother's questions are as follows:

1. Does the lower court's order denying the Mother's request to relocate with the children to Georgia, and restricting the Mother from relocating the children further than 20 miles from the Father's home, infringe on the Mother's constitutional right to travel, and impose a constitutionally impermissible custody restriction?

2. Did the lower court err and abuse its discretion when it denied the Mother's request to relocate with the children to Georgia, and restricted the Mother from relocating the children from that 20 miles from the Father's home, when the Father had not pled any request for such a restriction, and the record below contains no analysis of the relevant facts and circumstances that resulted in the lower court's restrictive order?

Cite as 1 MFLU Supp. 67 (2021)

Alimony; rehabilitative alimony; motion to modify

Regina M. Thomas
v.
Michael J. Thomas

No. 1345, September Term 2019

Argued before: Berger, Arthur, Wilner (retired, specially assigned), JJ.

Opinion by: Arthur, J.

Filed: Oct. 22, 2020

The Court of Special Appeals affirmed the Garrett County Circuit Court's rejection of the ex-wife's motion to have her ex-husband's alimony payments be increased after he received a salary increase, saying the former couple's circumstances did not change.

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

The Circuit Court for Garrett County granted Regina Thomas ("Wife") and Michael Thomas ("Husband") an absolute divorce in June 2018. After hearing from both parties on the issue of alimony, the court ordered Husband to pay Wife $1,800 per month for six years in rehabilitative alimony.

Three days after the order was entered, Husband was awarded a sizeable year-end bonus. Upon learning of the bonus, Wife petitioned the court to modify the alimony award based on a material change of circumstances.

The court denied Wife's request. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Marriage and its Demise

The parties to this case were married on July 4, 1997. At the start of the marriage, Wife worked in the professional cleaning field. She stopped working outside the home in 1999, shortly after the birth of the family's first child. The family welcomed a second child in 2006.

Wife acted as the primary caregiver to the children and did not return to outside employment. During most of the marriage, Husband served as the family's sole wage earner, working for a mine repair and replacement business as a general manager.

At Wife's request, Husband left the marital home in late March 2017.

In September 2017, Husband filed a complaint for absolute divorce in the Circuit Court for Garrett County. Wife counterclaimed for divorce, custody of the younger child, alimony, child support, equitable division of marital property, use and possession of the family home, and attorney's fees.

The parties reached an agreement on the issues of divorce, custody, and marital property, and on June 8, 2018, the circuit court entered a final judgment for absolute divorce on the grounds of a 12-month separation. The court's order reflected that the issues of Wife's claims for alimony, attorney's fees, and child support would be reserved for further proceedings before a family law magistrate.

B. The Original Alimony Award

1. First Alimony Hearing and Magistrate's Report

On September 24, 2018, the parties appeared for a hearing to discuss the issue of alimony.[1] Therein, the magistrate heard testimony from both parties on their respective financial circumstances. We limit the presentation of facts regarding this and subsequent hearings to those necessary to resolve the issues on appeal.

At the time of the hearing, Wife was 45 years old and acted as a stay-at-home mother to her 12-year-old son. Wife testified that she earned $1,800 per month ($21,600 annually) working part-time managing storage rentals for the family's storage business, which Wife had received in the marital property settlement. Wife acknowledged that she was capable of working full time, but stated that she had no desire to seek further education or training. Wife said that she "intended" to seek employment, but admitted that she was waiting to see how much the court would award her in alimony before finding a job.

Husband, meanwhile, at the age of 50, had an extensive work history. He testified that he had worked at the mine repair and maintenance business for almost 32 years and had held the title of general manager for the past 28 years. According to Husband, his annual income was $170,000 a year, although he agreed that, in addition to his salary, he received an end of year bonus "at times." When pressed for details

about his bonus history, the following colloquy ensued between Wife's counsel and Husband:

> Q: Okay. So the financial statement that you—the bonus [in 2017] was how much?
> A: Uh, I think it was around [$]10,000.
>
> Q: Okay. And do you recall what it was in 2016?
> A: Uh, without going back and looking, I don't know for sure. It's different –
>
> Q: Okay. It's fair to say—I'm sorry?
> A: It was a little more probably at that time. The coal market has failed drastically.
>
> Q: Yeah. In fact, if we go back the last five or six years, your income went anywhere from this [$]170 [thousand] to, I think is was [$]235 [thousand]; is that correct?
> A: That's probably correct, including the storage buildings.
>
> Q: . . . All right. But the financial statement you gave me today is, essentially, your base salary?
> A: Yes.
>
> Q. It doesn't include this bonus?
> A. Bonuses aren't guaranteed.
>
> Q. Okay. And you don't know what this year is going to be.
> A. No, I don't set that.

Husband argued that Wife should receive no alimony, but that if she received any, it should be in the amount of $250 per month for four years. Wife calculated a suggested alimony award of $3,200 per month for an indefinite duration by setting Husband's gross annual income at $170,000 and her own at $21,600 (from the storage rental business). Wife did not argue that the magistrate should consider Husband's bonus history in computing his income.

The magistrate issued a report with findings and recommendations on October 18, 2018. After considering each of the statutory factors pertaining to an alimony award,[2] the magistrate found that Wife's suggested computations were flawed. Concluding that Wife had "purposely chosen voluntary impoverishment," the magistrate imputed to her an additional $21,012 in annual income, assuming that she could work full-time in a job paying the minimum wage of $10.10 per hour. The magistrate used this updated figure and Husband's "admitted known income" of $170,000 to calculate an alimony recommendation of $2,200 per month for 11 years.

2. Circuit Court Exceptions Hearing and Alimony Order

Both parties filed exceptions to the magistrate's findings and recommendations. Among Wife's contentions was that the magistrate had erred in finding that Husband's income was $170,000 per year. According to Wife, "it was undisputed" that Husband's "income was a base salary of One Hundred Seventy Thousand Dollars plus a bonus to be paid at the end of each year." (Emphasis in the original.) Wife's counsel admitted, however, that he "may be responsible for this confusion," as he had used $170,000 as Husband's annual income to calculate Wife's alimony recommendation.

The circuit court heard arguments from Husband and Wife's counsel at an exceptions hearing on December 21, 2018. Thereafter, the court concluded that the magistrate had erred both as to the amount and the duration of the alimony award. On the basis of that conclusion, the court entered an order requiring Husband to pay Wife $1,800 per month for six years in rehabilitative alimony.[3]

Although the order did not specifically address the amount the court had used as Husband's income in its calculations, it indicated that the court had used the "most accurate financial information available" to determine the alimony award.

The order was immediately appealable under section 12-303(3)(v) of the Courts and Judicial Proceedings Article as an order "for the payment of money" (see, e.g., *Frey v. Frey*, 298 Md. 552, 556 (1984); *Pappas v. Pappas*, 287 Md. 455, 462 (1980)), but Wife did not note an appeal.

C. The Motion to Modify Alimony

On March 22, 2019, Wife filed a "Complaint to Increase Alimony" based on a substantial change in circumstances. She alleged that, in preparation for the child support proceedings, she had discovered that Husband was awarded a bonus of $73,195.78 on December 24, 2018, three days after the exceptions hearing in circuit court. In light of what she characterized as a significant increase in Husband's 2018 earnings, Wife argued that alimony should be re-calculated to include his bonus income. Husband requested that the motion be denied.

1. Modification Hearing and Magistrate's Report

Husband and Wife reappeared for a hearing before a magistrate on May 29, 2019. Husband confirmed his prior testimony that he was not aware of what his annual bonus would be at the time of the first alimony hearing. Husband's boss corroborated his testimony that employees are not guaranteed annual bonuses, nor are they made aware in advance of what the bonus, if any, may be.

At the hearing, Wife's counsel reviewed

Husband's earnings history (including bonuses) year-by-year for the past several years based on tax returns—$235,772 in 2010; $253,791 in 2011; $192,016 in 2012; $233,818 in 2013; $261,742 in 2014; $250,268 in 2015; $158,299 in 2016, and approximately $180,000 in 2017. On the basis of that history, Wife's counsel elicited Husband's agreement that, "historically," he made "somewhere in the area of [$]230 [thousand], $250,000[.]" In closing arguments, Wife's counsel explained that his reason for reviewing these figures was "to show that [Husband's] $75,000 bonus, coming three days after the last hearing in this case, wasn't an aberration. . . . [I]t's not something that – that is at all of out of line."

In response, Husband's counsel contended that Wife's "change of circumstances" argument was untenable, given that the information presented to the magistrate demonstrated a clear pattern of bonuses over the years similar to what Husband received in 2018. Furthermore, counsel argued that because Wife had information about Husband's prior bonuses at the time of the original alimony hearing, but did not attempt to use Husband's prior bonuses to calculate the alimony award, she "should be prevented from making that argument today[.]"

The magistrate sided with Wife. The magistrate issued a report in which she found that a material change in circumstances had occurred and recommended that Wife's alimony award be increased. Husband noted exceptions, incorporating his arguments from the hearing.

2. Circuit Court Exceptions Hearing and Ruling on Modification

The circuit court held a second exceptions hearing on August 12, 2019, where both parties maintained their previous positions. After taking the matter under advisement, the court issued an opinion and order on August 27, 2019, denying Wife's motion to modify alimony and reinstating its original award of six years' rehabilitative alimony.

The court found that "[t]he circumstances under which the original alimony award was made have not changed[.]" In the court's view, it was clear from the transcript of the first hearing before the magistrate on September 24, 2018, that Wife had knowledge of Husband's bonuses from the past several years. "With this historical information," the court concluded, "[Wife] had an expectation before the initial alimony proceeding that [Husband] would continue to receive these bonuses." Wife's error, therefore, was "fail[ing] to make any argument at the time of the original alimony determination that future bonuses should be considered in the calculation of alimony."

Wife noted an appeal. Perhaps out of a concern that her appeal might be premature, she noted a second appeal after the court had disposed of all remaining issues in the case by entering an order regarding child support on December 4, 2019. On Wife's motion, we consolidated the two appeals.

Wife presents a single question for review, which we have rephrased as follows: Did the circuit court abuse its discretion in concluding that Husband's receipt of an annual bonus was not a material change in circumstances that would warrant an alimony modification?4

For the reasons stated below, we shall hold that the court did not abuse its discretion. Accordingly, we affirm the judgment of the circuit court.

STANDARD OF REVIEW

In reviewing a circuit court's determination as to the modification of alimony, "we 'defer[ ] to the findings and judgments of the trial court.'" *Ridgeway v. Ridgeway*, 171 Md. App. 373, 383 (2006) (quoting *Simonds v. Simonds*, 165 Md. App. 591, 606 n.4 (2005)). The "trial court has discretion to determine the extent and amount of alimony[] and must consider specific factors in exercising its discretion." *Baer v. Baer*, 128 Md. App. 469, 484 (1999) (internal citation omitted); see Md. Code (1984, 2019 Repl. Vol.), § 11-106(b) of the Family Law Article ("FL"). Accordingly, "[w]e will not disturb an alimony determination 'unless the trial court's judgment is clearly wrong or an arbitrary use of discretion.'" *Ridgeway*, 171 Md. App. at 383-84 (quoting *Blaine v. Blaine*, 97 Md. App. 689, 698 (1993), *aff'd*, 336 Md. 49 (1994)). For the appellate court to find an abuse of discretion, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994).

DISCUSSION

After a court has entered an alimony order, the court "on the petition of either party, . . . may modify the amount of alimony awarded as circumstances and justice require." FL § 11-107(b); *Lieberman v. Lieberman*, 81 Md. App. 575, 595 (1990). The party petitioning for modification bears the burden of establishing that the facts and circumstances of the case justify modification. *Ridgeway v. Ridgeway*, 171 Md. App. at 384. "[T]he doctrine of res judicata applies in the modification of alimony[,] . . . and the court may not re-litigate matters that were or should have been considered at the time of the initial award." *Lieberman v. Lieberman*, 81 Md. App. at 597 (citing Lott v. Lott, 17 Md. App. 440, 444 (1973)); *accord Blaine v. Blaine*, 336 Md. 49, 71 (1994); *Ridgeway v. Ridgeway*, 171 Md. App. at 384.

Wife challenges the court's conclusion that Husband's year-end bonus did not establish a material change in circumstances meriting an increase in

alimony. She contends that the circuit court's original alimony award was based upon an expectation, shared by Wife and the court, that Husband was unlikely to receive an annual bonus in 2018. That this expectation was not borne out by actual events, i.e., that Husband received a sizeable bonus days after the original alimony order, Wife argues, constitutes a significant change of circumstances that warrants modification.

Husband rejects Wife's "erroneous expectation" argument. He argues that Wife was aware of his history of receiving annual bonuses at the time of the original alimony award. He agrees with the court's conclusion that the circumstances regarding his income did not change; rather, Wife simply failed to argue that the court should include Husband's annual bonuses into the first alimony calculation.

In the context of child support calculations, this Court has held that "bonuses already paid to a parent" may be included in an income determination, "even though it is unknown whether such a bonus will be paid in the future." Johnson v. Johnson, 152 Md. App. 609, 622 (2003). Wife argues that Husband claimed not to expect a 2018 bonus when he testified at the initial hearing. Thus, she argues that she would have been required to know that Husband "was testifying in error" if she were to incorporate any bonus into the original alimony calculation. We disagree.

Wife has not accurately characterized Husband's testimony. Husband testified that he had received bonuses, including sizable bonuses, in the past; that his recent bonuses had been comparatively smaller, perhaps because of difficulties in the coal industry; that he was not guaranteed to receive a bonus; and that he would not know the amount of his bonus until he received it. Husband did not testify that he would receive no bonus in 2018. He certainly did not testify that he would never again receive any bonus in any amount.[5]

Wife relies on *Blaine v. Blaine*, 336 Md. 49 (1993), to argue that the discrepancy between her "expectation" (that Husband would receive no bonuses, or perhaps no significant bonuses) and the "reality" (that Husband received a large bonus) demonstrates a change in circumstances. *Blaine* is inapposite.

In *Blaine*, 336 Md. at 58, the Court of Appeals considered Ms. Blaine's motion for an indefinite extension of her alimony pursuant to FL § 11-107(a).[6] Ms. Blaine, who was pursuing a master's degree at the time of her divorce, had expected to earn $40,000 annually in her new position. *Id.* at 58. After receiving her degree, she applied to over 100 jobs, but because of an economic recession, was unable to find a position that would pay more than the several full-time and part-time jobs that she was already working. *Id.* at 59. The circuit court extended her alimony indefinitely, finding that Ms. Blaine's inability to earn the income that she and the court had expected constituted a change in circumstances that would result in a harsh and inequitable outcome. *Id.* at 59-60. Both this Court (*Id.* at 60) and the Court of Appeals upheld that decision. *Id.* at 74-75.

In Blaine, the parties' expectations were dramatically different from what actually happened. Here, by contrast, Wife's claim that she did not expect Husband to receive a bonus is not supported by the record. In Wife's own exceptions to the magistrate's initial recommendation, she argued that "[Husband's] income was a base salary of One Hundred Seventy Thousand Dollars plus a bonus to be paid at the end of each year." (Emphasis in the original.)

In arguing that she and the court expected Husband not to earn a bonus, Wife's reply brief quotes the circuit court's observation that the parties "were in agreement" regarding Husband's salary when the original alimony award was made. This agreement, however, did not result from Wife's "erroneous expectation" that Husband would never receive a bonus. To the contrary, Wife took note of Husband's bonus history in the testimony at the initial hearing and in her exceptions to the initial recommendation, but she failed to argue that the circuit court should consider the bonus history in computing alimony. Presumably, she had access to Husband's bonus history, whether through joint tax returns, or through discovery, or through a subpoena to Husband's employer. As the circuit court observed, however, Wife "chose not to pursue a course of action" that would have led the court to consider the bonuses in computing alimony.

Unlike in *Blaine*, what "actually happened" in this case was not significantly different from what could reasonably be expected based on Husband's established history of receiving year-end bonuses from his employer. Wife's counsel put it best at the modification hearing: Husband's 2018 bonus "wasn't an aberration. . . . [I]t's not something that – that is at all of out of line."

Wife argues that had she attempted to use Husband's history of bonuses in the calculation of the original award, Husband would simply have argued that the amount of any bonus is pure speculation. Perhaps he might have. But Wife did not put his potential argument to the test by stressing that under Johnson v. Johnson, 152 Md. App. 609, 622 (2003), his bonus history supported the conclusion that he would probably continue receive bonuses in some amount in the future. If she had done so, and if the court had agreed that any future bonuses were speculative despite the considerable history of their payment in the past, Wife could have challenged the ruling on appeal.

In summary, the circuit court did not abuse its discretion in concluding that the circumstances under

which the original alimony award was made did not change when Husband received a bonus. The "complaint" or motion to increase alimony was an effort to relitigate matters that had been or could have been litigated when the court initially awarded alimony.

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

Footnotes

1 It was determined at the outset of the hearing that the issue of child support would be reserved for later decision, as a temporary order was already in place and any change to it would depend upon the outcome of the alimony request.

2 See Md. Code (1984, 2019 Repl. Vol.), § 11-106(b) of the Family Law Article.

3 The order also included an arrearage amount or "back alimony" Husband owed from the date of Wife's initial request (in November 2017) through December 2018.

4 In her brief, Wife presented her question as follows: "Does a forty percent (40%) increase in income constitute a material change in circumstances where the income earner testified that such increase was not guaranteed and unlikely to happen[?]" Husband formulates the question differently: "Can a material change in circumstances arise where no actual change in circumstances has taken place"?

5 At times, Wife seems to suggest that Husband testified falsely when he discussed his bonus history at the first exceptions hearing. Yet, in responses to questions from the court during oral argument on motion to increase the amount of alimony because of the alleged change in circumstances, Wife conceded that Husband's testimony was neither dishonest nor deceitful.

6 FL § 11-107(a) provides, in pertinent part: "the court may extend the period for which alimony is awarded, if: (1) circumstances arise during the period that would lead to a harsh and inequitable result without an extension; and (2) the recipient petitions for an extension during the period." Although the present case involves a petition to modify alimony under FL § 11-107(b), we acknowledge that the principles applied in Blaine can be applied here because FL § 11-107(a) and (b) both require a change of circumstances.

Cite as 1 MFLU Supp. 72 (2021)

Divorce; marital property; valuation

Christine J. Sommer
v.
Eric C. Grannon

No. 3197, September Term 2018

Argued before: Graeff, Arthur, Battaglia (retired, specially assigned), JJ.

Opinion by: Battaglia, J.

Filed: Oct. 21, 2020

The Court of Special Appeals affirmed the Anne Arundel County Circuit Court's valuation of the ex-couple's marital property, saying the ex-wife had failed to raise her challenge at the circuit court.

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

Christine Sommer ("Wife"), Appellant, seeks review of a judgment and order of the Circuit Court of Anne Arundel County, granting Eric Grannon, ("Husband"), Appellee, an absolute divorce and, *inter alia*, valuing the marital property, as well as awarding Wife a one million dollar monetary award, and granting Wife $108,000.00 in attorneys' fees from Husband. Wife asserts that Judge Ronald A. Silkworth, the trial judge, erred, because his valuation of marital property relied on "stale" evidence and the monetary award failed to include the value of an end-of-year distribution for 2017 that Husband was to receive in January of 2018. Wife also asserts that her attorneys' fee award was insufficient, because Judge Silkworth failed to consider the sources of funds with which Husband and Wife paid their respective legal bills, to her detriment. Wife presents this Court with three questions, which we have renumbered, as follows:

> 1. Did the Circuit Court err by rendering its memorandum opinion and judgment of absolute divorce on December 31, 2018, without considering all marital assets?
>
> 2. Did the Circuit Court err by determining $1,000,000.00 was the proper monetary award?
>
> 3. Did the Circuit Court err by determining that $108,000.00 was the proper award of counsel fees?

Husband, in turn, urges us to dismiss Wife's challenges to the marital property valuation and monetary award because, he argues, Wife failed to raise her allegations of error with the Circuit Court. Husband, however, also urges us to affirm the award of attorneys' fees.

BACKGROUND

Husband and Wife were married in 2006 and separated in 2016. Husband filed for a limited divorce, followed by Wife filing for an absolute divorce, after which Husband amended his complaint to one for absolute divorce. Both parties sought custody of their two children and child support. Both parties also asked the Circuit Court to determine and value marital property and grant them a monetary award. Wife also requested indefinite alimony, or in the alternative, rehabilitative alimony. Husband and Wife each requested that their attorneys' fees be paid by the other party.

On September 1, 2017, Husband and Wife submitted to the Circuit Court a "Joint Statement of Parties Concerning Marital and Non-Marital Property," ("Joint Statement") on which they identified items as marital or non-marital property and, for each item, provided separate estimates of value.[1] A trial, before Judge Ronald A. Silkworth, began on November 13, 2017, and continued over a total of thirteen, non-consecutive days, until January 5, 2018, the final day of testimony. That day, Husband and Wife submitted an updated Joint Statement to the Circuit Court.

On February 8, 2018, following closing arguments regarding financial issues on January 12, 2018 and a custody proceeding, on January 19, 2018, Judge Silkworth issued a Custody Order, which granted Husband and Wife joint legal custody and physical custody of their two minor children. Twelve days later, Wife asked Judge Silkworth to alter or amend the Custody Order, pursuant to Rule 2-534.[2] After a

hearing on April 25, 2018, Judge Silkworth granted the motion and issued an Amended Custody Order the following day, which is not an issue in this appeal.

On the last day of 2018, Judge Silkworth issued a Judgment of Absolute Divorce, accompanied by a 61-page Memorandum Opinion and Order that addressed financial issues related to the divorce. The Memorandum Opinion documented Judge Silkworth's determinations regarding marital property, valued at $4,407,733.69, as well as his bases for granting Wife (1) a one million monetary award; (2) $7,600.00 per month in rehabilitative alimony for three years; (3) $9,000.00 monthly in child support; and (4) $108,000.00 in attorneys' fees, to be paid by Husband. Wife timely filed a notice of appeal with this Court.

MOTION TO DISMISS

Husband asks us to dismiss Wife's requests for review of the Circuit Court's marital property valuation and monetary award, pursuant to Rule 8-603(c).[3] According to Husband, Wife failed to bring any of the issues underlying her challenges to the marital property valuation and monetary award to Judge Silkworth's attention, so that, under Rule 8-131(a),[4] she is not entitled to review of those claims of error before us, pursuant to Rule 8-602(b)(1).[5]

Dismissal of Wife's claims before us, however, is not the appropriate remedy, because Rule 8-131(a) violations are not grounds for dismissal of an appeal, pursuant to Rule 8-602(b)(1). *Lockett v. Blue Ocean Bristol, LLC.*, 446 Md. 397, 416 (2016) (explaining that "failing to meet the requirements of Rule 8-131 is not grounds for dismissing an appeal under Rule 8-602."). This Court, however, ordinarily will not consider an issue that is raised for the first time on appeal, because to do so would defeat "[t]he animating policy behind Rule 8-131(a)[, which] is to ensure fairness for the parties involved and to promote orderly judicial administration." *McDonell v. Harford Cty. Housing Agency*, 462 Md. 586, 602 (2019) (quoting *Jones v. State*, 379 Md. 704, 714 (2004)). Rule 8-131 ensures fairness by requiring a party to raise issues with "the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings." *Davis v. DiPino*, 337 Md. 642, 647 (1995) (quoting *Clayman v. Prince George's Cty.*, 266 Md. 409, 426 (1972)). We, therefore, must initially determine whether Wife adequately preserved her martial property valuation and monetary award concerns.

Wife's argument that Judge Silkworth's valuation of marital property relied on "stale" evidence is premised on the fact that he valued the marital property as of January 5, 2018, but did not issue his judgment and order until December 31, 2018. According to Wife, the delay resulted in erroneous marital property valuations, especially with respect to various investments titled in Husband's name, which, Wife asserts, could have increased in value after January 5, 2018.[6]

The record, however, confirms that at no time between January 5, 2018 and December 31, 2018, did Wife bring to Judge Silkworth's attention her concern that information reported on the Joint Statement was becoming "stale," nor did she proffer any increase in value of Husband's investments. Wife also failed to avail herself of the Circuit Court's "general and broad revisory power over the judgment[,]" by asking Judge Silkworth to alter, amend, or revise his judgment, pursuant to either Rule 2-534[7] or Rule 2-535(a).[8] *See Wells v. Wells*, 168 Md. App. 382, 393-94 (2006).

Had Wife raised the "specific contention" of staleness, either before or after the Judgment and Order were issued on December 31, 2018, Husband would have had an opportunity to respond and Judge Silkworth would have had the ability to make findings of fact and conclusions of law. *See Hiltz v. Hiltz*, 213 Md. App. 317, 330-39 (2013). We, as a result, are left with an inadequate record with which to test Wife's assertion of "staleness" and thus, exercise our discretion not to address the issue.

Wife, then, argues that Judge Silkworth's decision to grant her only a one million dollar monetary award was in error, because he failed to consider the full amount of compensation Husband earned in 2017, which, she argues included an end-of-year distribution receivable in 2018 that she alleges was marital property. Wife bases her argument on the fact that, on the last day of testimony, Husband testified that a portion of his annual compensation came to him as an end-of-year distribution, which he generally received in January of the following year; Husband also testified that he did not know the amount of end-of-year distribution, which he was to receive in January 2018, as part of his 2017 compensation.

As the party asserting that Husband's 2017 end-of-year distribution was marital property, Wife, however, had "the burden of proof as to the classification of [that] property as marital or non-marital[.]" *Murray v. Murray*, 190 Md. App. 553, 570 (2010); *Potts v Potts*, 142 Md. App. 448, 468 (2002). Wife, though, failed to list Husband's 2017 end-of-year distribution as a marital asset, on either the Joint Statement that she and Husband filed on September 1, 2017, or on an updated Joint Statement, filed on January 5, 2018.

Wife also had the responsibility to produce evidence of the value of Husband's end-of-year distribution, were it to have been determined to be marital property. *Abdullahi v. Zanini*, 241 Md. App. 372, 412-413 (2019); *Newborn v. Newborn*, 133 Md. App. 64, 94 (2000). Although the trial ended without any evidence of the amount of 2017 end-of-year distribu-

tion, Wife could have asked Judge Silkworth to exercise his discretion to keep the case open in order to entertain additional evidence.[9] *See Cooper v. Sacco*, 357 Md. 622, 637-40 (2000) (summarizing a trial court's discretionary authority to reopen a case to allow a party to submit additional evidence). Wife also failed to ask Judge Silkworth to alter, amend, or revise his judgment, pursuant to Rules 2-534 or 2-535(a), as heretofore discussed, in order to consider any additional evidence of the amount of Husband's 2017 end-of-year distribution. As a result, we decline to address Wife's allegation of error that Judge Silkworth omitted not only of the identity of the end-of-year distribution as marital property, but also of its value, to her detriment, because Wife, as the proponent of the evidence, failed to preserve the issue for appeal.

ATTORNEYS' FEES

Wife, finally, challenges Judge Silkworth's order that Husband pay only $108,000.00 of the $450,000.00 in attorneys' fees that she requested. Wife does not assert that Judge Silkworth failed to perform the requisite statutory analysis, but instead argues that he "ignor[ed] the economic disparity between the Parties" by "fail[ing] to entirely address the source of payment for the Parties' fees[.]" (emphasis in original). As a result, Wife argues, the amount of attorneys' fees she received "[wa]s an economic (and equitable) disparity which should be rectified[.]" Husband, in contrast, argues that the attorneys' fee award was based on the requisite statutory analysis and urges us to affirm.

Attorneys' fees may shift between parties in divorce cases, as well as proceedings pertaining to marital property disposition, alimony, and child custody and support. The award of attorneys' fees and costs in divorce proceedings is controlled by Section 7-107 of the Family Law Article, which provides:

> (a) *"Reasonable and necessary expense" defined.* — In this section, "reasonable and necessary expense" includes:
> (1) suit money;
> (2) counsel fees; and
> (3) costs.
> (b) *Award authorized.* — At any point under this title, the court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.
> (c) *Considerations by court.* — Before ordering the payment, the court shall consider:
> (1) the financial resources and financial needs of both parties; and
> (2) whether there was a substantial justification for prosecuting or defending the proceeding.
> (d) *Lack of substantial justification and good cause.* — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party the reasonable and necessary expense of prosecuting or defending the proceeding.
> (e) *Reimbursement.* — The court may award reimbursement for any reasonable and necessary expense that has previously been paid.
> (f) *Counsel fees.* — As to any amount awarded for counsel fees, the court may:
> (1) order that the amount awarded be paid directly to the lawyer; and
> (2) enter judgment in favor of the lawyer.

Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.). The fee-shifting scheme contained in Section 7-107 is replicated in fee-shifting statutes related to marital property disposition and alimony. Compare Section 7-107, with Maryland Code (1984, 2012 Repl. Vol.), Section 8-214 of the Family Law Article[10] (allowing fee-shifting in marital property disposition proceedings), *with* Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.), Section 11-110 of the Family Law Article[11] (allowing fee-shifting in alimony proceedings).

A similar fee-shifting scheme applies to proceedings related to child custody and support, pursuant to Section 12-103 of the Family Law Article, which provides:

> (a) *In general.* — The court may award to either party the costs and counsel fees that are just and proper under all the circumstances . . . .
> (b) *Required considerations.* — Before a court may award costs and counsel fees under this section, the court shall consider:
> (1) the financial status of each party;
> (2) the needs of each party; and
> (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding.
> (c) *Absence of substantial justification.* — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

Maryland Code (1984, 2012 Repl. Vol., 2016 Suppl.). Section 12-103 does not contain the language "reasonable and necessary expenses," as in Sections 7-107, 8-214, and 11-110, but speaks to "costs and counsel fees that are just and proper under all the circumstances[.]" Nevertheless, Sections 7-107, 8-214, 11-110, and 12-103 "comprise one family law scheme[,]" which governs fee-shifting in divorce and related proceedings, and they have been interpreted to have the same meaning. *Henriquez v. Henriquez*, 413 Md. 287, 305 (2010).

Subsequent to the application of the three factors of financial status of the parties, needs of the parties, and substantial justification, a judge also must evaluate the reasonableness and necessity of the legal expenses incurred, based upon "numerous external factors bearing on the litigation as a whole." *Monmouth Meadows Homeowners Ass'n., Inc. v. Hamilton*, 416 Md. 325, 333 (2010). Rule 2-703(f) provides such standards for evaluating reasonableness:

> (f) **Determination of Award.** (1) If No Award Permitted. . . .
> (2) If Award Permitted or Required. If, under applicable law, the verdict of the jury or the findings of the court on the underlying cause of action permit but do not require an award of attorneys' fees, the court shall determine whether an award should be made. If the court determines that a permitted award should be made or that under applicable law an award is required, the court shall apply the standards set forth in subsection (f)(3) of this Rule and determine the amount of the award.
> (3) Factors to be considered. In making its determinations under subsection (f)(2) of this Rule, the court shall consider, with respect to the claims for which fee-shifting is permissible:
> (A) the time and labor required;
> (B) the novelty and difficulty of the questions;
> (C) the skill required to perform the legal service properly;
> (D) whether acceptance of the case precluded other employment by the attorney;
> (E) the customary fee for similar legal services;
> (F) whether the fee is fixed or contingent;
> (G) any time limitations imposed by the client or the circumstances;
> (H) the amount involved and the results obtained;
> (I) the experience, reputation, and ability of the attorneys;
> (J) the undesirability of the case;
> (K) the nature and length of the professional relationship with the client; and
> (L) awards in similar cases.

In determining whether a trial judge erred with respect to counsel fees, we review to determine "whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002). "To determine whether a court abused its discretion, we examine the court's application of the statutory factors to the unique facts of the case." *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 756 (2017). Under this standard, we will accept a trial court's factual findings, unless they are clearly erroneous. *Simonds v. Simonds*, 165 Md. App. 591, 616 (2005).

Judge Silkworth, in his Memorandum Opinion, made the following findings, utilizing the indicated headings:

The financial status of each party.

- Husband's annual income was approximately $1.3 million per year; Wife's annual income was $137,382 per year.

- Wife had the capacity to earn "at least $230,000.00 [per year.]"

- Husband's possession of approximately 75% of the Parties' marital property, which had a total value of $4,407,733.69, justified a monetary award to Wife of $1 million.

- Wife was entitled to a portion of Husband's pension plan, to be awarded on an "if, as, and when basis[;]" Wife was not entitled to survivor benefits from this asset, because "[she] did not request an award of survivor benefits, and that the Joint Statement did not contemplate survivor benefits."

- Wife was awarded rehabilitative alimony in the amount of $7,600.00 per month for three years.

- Husband had no debt; Wife's debts included a $22,161.00 loan against her 401(k) account, $32,814.00 in credit card debt, $130,126.00 in student loans, and $684,000.00 in personal loans.

- As of December 14, 2017, Husband's legal fees were $419,177.81 and Wife's legal fees were $727,405.61.

• Wife financed a portion of her legal expenses with $192,000 in marital property, received from Husband.

• Wife obtained loans from her Aunt and Uncle in order to finance "[t]he rest of her [legal expenses.]"

The needs of each party.

• Husband's monthly expenses were $28,581.57, including $12,000.00 in "undifferentiated support paid to [Wife]."

• Wife operated at a monthly budget deficit of $7,618.97.

• Husband "[wa]s in a financial position to provide a level of support to [Wife.]"

Whether there was a substantial justification for bringing, maintaining, or defending the proceeding.

• "Both parties desired a divorce, and therefore, both were justified in bringing their respective actions and defending the others."

• Wife "received a substantial alimony award, child support amount, and monetary award."

• "While the attorneys' fees in this case are extraordinary, . . . each party pursued the case reasonably in light of the other party's actions. This case presented the perfect storm that lead to runaway attorneys' fees."

• Wife did not act "in bad faith or without substantial justification[,]" when she attempted to litigate custody in Montgomery County.

• Wife was not justified in presenting expert testimony regarding her claim that Husband was abusive, because "[the] Court did not need to reach a clinical conclusion in order to consider testimony relating to the conduct of [Husband] and its impact on [Wife] and the children."

• Wife was not justified in having her financial expert analyze scenarios in which the parties' respective incomes were equal.

Whether the fees requested are reasonable and necessary.

• *The time and labor required:* Husband's and Wife's collective legal expenses represented at least 50% more time and labor than was reasonable and necessary; The parties engaged in "unnecessary adversarial posturing[,]" which resulted in "significant discovery efforts and disputes" that were unnecessary.

• *The novelty and difficulty of the questions:* the case did not present any novel or difficult legal questions, which would have justified Husband's and Wife's collective legal expenses; Witnesses called by Wife to support her claim that Husband was abusive did not provide any testimony in support of that claim.

• *The skill required to perform the legal service properly:* the resolution of the case did not require any exceptional legal skill; An expert witness, called by Wife to support her claim that Husband was abusive, "did not address the facts of this case[or] touch on any of the factors that this Court must consider[;]" Wife's expenditure of $25,000.00 to retain an expert witness, Dr. Berman, was "simply not a reasonable expenditure. Nor was it necessary."

• *Whether acceptance of this case precluded other employment by the attorney:* neither party presented evidence that their involvement in this case precluded their attorneys from accepting additional legal work.

• *The customary fee for similar legal services:* a reasonable hourly rate for the case was $350; Husband's and Wife's legal teams billed at rates between $750 and $1,025 per hour; Wife incurred "tens of thousands of dollars" in legal expenses, because of "multiple billing," in which, multiple attorneys were concurrently billing hours on her case.

• *Whether the fee is fixed or contingent:* both Husband and Wife were billed at fixed, hourly rates.

• *Any time limitations imposed by the client or the circumstances:* neither the case, nor the parties, imposed time limitations on the attorneys.

• *The amount involved and the results obtained:* Wife obtained substantial results, in the form of a monetary award, alimo-

ny, and child support; Husband obtained "the option to buy out [Wife]'s interest in the former marital home[;]" Both parties could have obtained the results that they did, without incurring the legal expenses that they did.

• *The experience, reputation, and ability of the attorneys:* Husband's and Wife's were represented by "highly experienced and talented attorneys."

• *The undesirability of the case:* neither the case nor its issues was undesirable from a legal perspective.

• *The nature and length of the professional relationship with the client:* Husband and Wife had professional relationships with their respective attorneys of at least seventeen months.

• *Awards in similar cases:* a $150,000.00 attorneys' fee award, which was addressed in McCleary v. McCleary, 150 Md. App. 448 (2002), was a "benchmark," because the duration of the litigation and the parties' combined legal expenses in McCleary and this case were similar.

Judge Silkworth then concluded that $108,000.00 was the appropriate attorneys' fee award, based upon application of the statutory authority and Rule, having also taken into consideration that Wife had already applied $192,000.00 in marital funds, which she received from Husband, to her legal expenses:

> Considering all of the factors discussed herein, this Court concludes that some award of attorney's fees is appropriate, primarily because [Husband] has had access to the vast majority of the marital assets, including his income. [T]he attorneys' fees incurred on both sides were not reasonable or necessary for the proper pursuit of the factual and legal issues presented. Both parties are experienced litigators who understand the standards covering an award of attorneys' fees. In consideration of all the factors discussed above, including the $192,000 transfer of marital funds from [Husband] to [Wife] that [Wife] applied to her attorneys' fees, it is appropriate for [Husband] to pay [Wife] $108,000 towards [Wife]'s attorneys' fees.

(emphasis in original).

Our review of the record supports that Judge Silkworth did not err in his findings. He also did not abuse his discretion in his considered application of the factors in the statutes and Rule to the findings of fact.

Wife, however, alleges that the economic disparity between Wife and Husband, which, she argues, resulted in her incurring substantial debt to pay her legal bills, "trumps" Judge Silkworth's statutory and Rule-based analyses, without any reference to any statute, Rule, or case law, and we have found none. As a result, we affirm Judge Silkworth's award of attorneys' fees.

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

Footnotes

1 Husband and Wife were required to provide the Circuit Court with a list of marital and non-marital property, which included each party's estimate of the fair market value of those items, pursuant to Rule 9-207, which provides:
(a) When required. When a monetary award or other relief pursuant to Code, Family Law Article, § 8-205 is an issue, the parties shall file a joint statement listing all property owned by one or both of them;
(b) Form of property statement. The joint statement shall be in substantially the following form: . . .
(1) The parties agree that the following property is "marital property" as defined by Maryland Annotated Code, Family Law Article, § 8-201: . . .
(2) The parties agree that the following property is not marital property because the property (a) was acquired by one party before marriage, (b) was acquired by one party by inheritance or gift from a third person, (c) has been excluded by valid agreement, or (d) is directly traceable to any of those sources: . . .
(3) The parties are not in agreement as to whether the following property is marital or non-marital: . . .
(c) Time for filing; procedure. The joint statement shall be filed at least ten days before the scheduled trial date or by an earlier date fixed by the court. At least 30 days before the joint statement is due to be filed, each party shall prepare and serve on the other party a proposed statement in the form set forth in section (b) of the Rule. At least 15 days before the joint statement is due, the plaintiff shall sign and serve on the defendant for approval and signature a proposed joint statement that fairly reflects the positions of the parties. The defendant shall timely file the joint statement, which shall be signed by the defendant or shall be accompanied by a written statement of the specific reasons why the defendant did not sign.
(d) Sanctions. If a party fails to comply with this Rule, the court, on motion or on its own initiative, may enter any orders in regard to the noncompliance that are just, including:
(1) an order that property shall be classified as marital or non-marital in accordance with the statement filed by the complying party;

(2) an order refusing to allow the noncomplying party to oppose designated assertions on the complying party's statement filed pursuant to this Rule, or prohibiting the noncomplying party from introducing designated matters in evidence.
Instead of or in addition to any order, the court, after opportunity for hearing, shall require the noncomplying party or the attorney advising the noncompliance or both of them to pay the reasonable expenses, including attorney's fees, caused by the noncompliance, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

2 Rule 2-534, which addresses circumstances in which a trial court may alter or amend a judgment, provides:
In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial. A motion to alter or amend a judgment filed after the announcement or signing by the trial court of a judgment but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

3 Husband moves to dismiss portions of Wife's appeal within his Appellee's Brief, pursuant to Rule 8-603(c), which states, in relevant part: "A motion to dismiss based on [Rule 8-602(b)(1)] may be included in the appellee's brief."

4 Rule 8-131(a), which delineates the scope of review by appellate courts, provides:
The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

5 Rule 8-602 identifies circumstances in which an appellate court may properly dismiss an appeal of a trial court's judgment. The Rule states, in relevant part:
(a) On Motion or Court's Initiative. The court may dismiss an appeal pursuant to this Rule on motion or on the court's own initiative.
(b) When Mandatory. The Court shall dismiss an appeal if:
(1) the appeal is not allowed by these Rules or other law; or
(2) the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202.

6 Wife argues that our opinion in Green v. Green, 64 Md. App. 122 (1985), supports her notion of "stale evidence" mandating reconsideration of the value of marital property. In Green, in dicta, we observed that the value of some marital property may be "distorted" by "delays between the close of evidence and the rendering of the judgment" in divorce cases. Green v Green, 64 Md. App. at 141. This commentary, however, albeit a truism, cannot be construed as a per se requirement that judgments must be entered within a defined period of time after the conclusion of evidence, and Wife does not support her argument with any references to statute, Rule, or other case law.

7 See supra note 2. Although Wife, before us, insists that it is speculative to ask whether Judge Silkworth would have granted any relief in response to a Rule 2-534 motion, we note that Wife had previously relied on Rule 2-534 when she asked Judge Silkworth to alter or amend a custody order, which he filed on February 8, 2018, and, despite Husband's opposition, Judge Silkworth had granted Wife's motion and issued an amended custody order on April 26, 2018.

8 Rule 2-535(a), which addresses circumstances in which a trial court may revise a judgment, provides:
(a) Generally. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

9 We note that Wife, on December 20, 2017, had moved to re-open evidence, "to admit certain limited pieces of evidence[]" pertaining to the Circuit Court's determination of child custody. Over Husband's opposition, the Circuit Court granted Wife's motion on January 16, 2018. Wife argues that the outcome of a second motion to re-open would be speculative, although Wife's argument fails because she failed to preserve it.

10 Section 8-214 of the Family Law Article, which authorizes fee-shifting in proceedings related to marital property disposition, provides:
(a) *"Reasonable and necessary expense" defined.* — In this section, "reasonable and necessary expense" includes:
(1) suit money;
(2) counsel fees; and
(3) costs.
(b) *Award authorized.* — At any point in a proceeding under this subtitle, the court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.
(c) *Considerations by court.* — Before ordering the payment, the court shall consider:
(1) the financial resources and financial needs of both parties; and
(2) whether there was a substantial justification for prosecuting or defending the proceeding.
(d) *Lack of substantial justification and good cause.* — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party the reasonable

and necessary expense of prosecuting or defending the proceeding.
(e) *Reimbursement.* — The court may award reimbursement for any reasonable and necessary expense that has previously been paid.
(f) *Counsel fees.* — As to any amount awarded for counsel fees, the court may:
(1) order that the amount awarded be paid directly to the lawyer; and
(2) enter judgment in favor of the lawyer.
Md. Code (1984, 2012 Repl. Vol.).

11 Section 11-110 of the Family Law Article, which authorizes fee-shifting in proceedings related to alimony, provides:
(a) *Definitions.* — (1) In this section the following words have the meanings indicated.
(2) "Proceeding" includes a proceeding for:
(i) alimony;
(ii) alimony pendente lite;
(iii) modification of an award of alimony; and
(iv) enforcement of an award of alimony.
(3) "Reasonable and necessary expense" includes:
(i) suit money;
(ii) counsel fees; and
(iii) costs.
(b) *Authority of court.* — At any point in a proceeding under this title, the court may order either party to pay to the other party an amount for the reasonable and necessary expense of prosecuting or defending the proceeding.
(c) *Required considerations.* — Before ordering the payment, the court shall consider:
(1) the financial resources and financial needs of both parties; and
(2) whether there was a substantial justification for prosecuting or defending the proceeding.
(d) Absence of substantial justification. — Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party the reasonable and necessary expense of prosecuting or defending the proceeding.
(e) *Expenses paid previously.* — The court may award reimbursement for any reasonable and necessary expense that has previously been paid.
(f) *Counsel fees.* — As to any amount awarded for counsel fees, the court may:
(1) order that the amount awarded be paid directly to the lawyer; and
(2) enter judgment in favor of the lawyer.
Md. Code (1984, 2012 Repl. Vol., 2016 Suppl.).

Cite as 1 MFLU Supp. 80 (2021)

Alimony; rehabilitative alimony; motion to modify

Andrew N. Ucheomumu v. Dorothy O. Ezekoye

No. 2234, September Term 2017

Argued before: Shaw Geter, Meredith (retired, specially assigned), Raker (retired, specially assigned), JJ.

Opinion by: Meredith, J.

Filed: Oct. 15, 2020

The Court of Special Appeals affirmed the Montgomery County Circuit Court's denial of the ex-husband's motion to modify his alimony payments, saying the court correctly rejected his claims of fraud and "unclean hands" by his ex-wife.

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

Andrew Ucheomumu, appellant, appeals from a judgment of the Circuit Court for Montgomery County denying his motions to modify or terminate his obligation to pay rehabilitative alimony to his former wife, Dorothy Ezekoye, appellee. Appellant presented four questions for our review, which we have rephrased:[1]

> I. Did the circuit court err in finding that the evidence presented was insufficient to support a finding of a material change in circumstances?
>
> II. Did the circuit court err in refusing to take judicial notice of evidence presented during earlier proceedings in the case?
>
> III. Did the circuit court err in refusing to modify enrolled judgments previously entered regarding alimony and arrearages?
>
> IV. Did the circuit court err in failing to vacate appellant's alimony obligation based upon his claim that his ex-wife acted with unclean hands in obtaining the award?

For the following reasons, we shall affirm.

FACTS AND PROCEDURAL HISTORY

For ease of understanding, we have divided the pertinent facts and procedural history into three periods, pertaining to: (1) the alimony award; (2) Mr. Ucheomumu's first motion to modify his alimony obligation; and (3) Mr. Ucheomumu's second motion to modify or terminate his alimony obligation.

Alimony award

Andrew Ucheomumu, appellant, was born in 1960. He and Dorothy Ezekoye, appellee, married in the United States in 1992. It appears that Ms. Ezekoye did not work outside the home during the marriage, but instead cared for the five children—all now adults—who were born to them during the course of their marriage. For 20 years, Mr. Ucheomumu earned a living by engaging in international joint business ventures, but, in 2009, he graduated from law school, and he subsequently earned two L.L.M. degrees.

In August 2013, Mr. Ucheomumu filed suit for divorce, and Ms. Ezekoye subsequently filed a claim for alimony. A hearing on the complaint for absolute divorce and the claim for alimony was held before Judge Cynthia Callahan on August 18, 2014. On August 26, 2014, the court entered a judgment of absolute divorce and ordered Mr. Ucheomumu to pay rehabilitative alimony to Ms. Ezekoye in the amount of $1,200 a month for 36 months—a total of $43,200 over three years—accounting from June 1, 2014.

Mr. Ucheomumu challenged the alimony order by filing a request for en banc review. See Maryland Rule 2-551. In the statement of reasons filed in support of his en banc appeal, Mr. Ucheomumu argued that "the trial Court err[ed] in not recognizing that[,] when the defendant willfully withheld legitimately requested information, she deprived the court [of] the power to award her alimony." He also claimed that he had been denied due process because of the court's denial of his motion to compel discovery, and that the court erred in evaluating Ms. Ezekoye's "voluntary self-impoverishment." He further argued, inter alia, that Ms. Ezekoye had "willfully withheld legitimately requested discovery information, and then attempted to introduce a fraudulent tax returns [sic] during the trial." By order entered February 13, 2015, the en banc panel ordered that the judgment of Judge Callahan was affirmed.

First motion to modify alimony obligation

On February 6, 2015, Ms. Ezekoye filed a petition to hold Mr. Ucheomumu in contempt because he had not made a single alimony payment. (It appears that as of the date of the judgment that is the subject of the present appeal, Mr. Ucheomumu had paid a total of $40 toward his alimony obligation: a $20 payment in October 2015, and a $20 payment in December 2015.)

Despite the en banc panel's rejection of Mr. Ucheomumu's argument that Judge Callahan's order for rehabilitative alimony should be overturned because it was procured by fraud, Mr. Ucheomumu's March 24, 2015 response to the contempt petition asserted, inter alia, that he "contends the Court's judgment was prejudiced and based in part on fraud and misrepresentation (perjury) by [Ms. Ezekoye] and her attorney, and is therefore void and should not be enforced by any court," and that Ms. Ezekoye "is barred from the relief she seeks under the doctrine of unclean hands."

On the same date (March 24, 2015), Mr. Ucheomumu filed his first motion to modify alimony. He asserted that he had "no means of paying the alimony" and "has never had any means of paying any alimony." He asserted that he had "no money to get an office" for his "fledgling legal practice," and that he "has no home." He said that he "is under severe financial hardship."

On August 18, 2015, a hearing on the motions was held before Magistrate James Bonifant. At the conclusion of the hearing, the magistrate placed several findings on the record. He found: "There has been no significant change in [Ms. Ezekoye's] income and there was no evidence presented regarding her expenses[,] so I cannot find that there has been any material change in her expenses." But the magistrate also found: "There was no evidence produced showing a material change in [Mr. Ucheomumu's] expenses since the entry of the alimony award in 2014." With respect to income, the magistrate observed that, although Mr. Ucheomumu "argued that his health prevented him to earn currently what he earned in 2014[,] I have difficulty accepting this." The magistrate had also reviewed Mr. Ucheomumu's 2014 tax return, and commented: "[H]e has taken as business expenses many expenses which reduce his personal living expenses." The magistrate summed up his analysis: **"I do not believe [Mr. Ucheomumu] has met his burden to show that there has been a material change in circumstances from the August 2014 order[,] and I do not believe that he has met his burden to show that he was incapable of paying the alimony awarded or that he never had the ability to pay."** (Emphasis added.) The magistrate recommended that the court deny Mr. Ucheomumu's motion to modify alimony and grant Ms. Ezekoye's petition for contempt. The magistrate also recommended that "an alimony arrearage be established as of today, August 18, 2015, in the amount of $18,000."

By order entered November 6, 2015, the circuit court held that the petition for contempt was granted, and that Mr. Ucheomumu's motion to modify alimony was denied. The court thereafter denied Mr. Ucheomumu's motion for reconsideration and motion for new trial. On January 15, 2016, the circuit court entered a judgment in the amount of $18,000.00 in favor of Ms. Ezekoye against Mr. Ucheomumu.

In the meantime, Mr. Ucheomumu noted an appeal from the judgment denying his motion to modify alimony and holding him in contempt. (That appeal was eventually dismissed by this Court upon procedural grounds. See Ucheomumu v. Ezekoye, No. 2403, Sept. Term, 2015 (filed December 21, 2016). The judgment denying Mr. Ucheomumu's first motion to modify alimony and holding him in contempt for his failure to make payments of alimony became final.)

Second motion to modify/vacate alimony obligation

While his appeal of the judgment denying his first motion to modify alimony was pending, Mr. Ucheomumu filed his second motion to modify his alimony obligation on January 28, 2016. This is the motion that is the subject of the present appeal. In this motion, he alleged that there were three material changes in his circumstances: (1) he stated he was facing "crushing legal bills" that were incurred subsequent to the August 18, 2015 hearing before the magistrate; (2) he was "now paying rent in the amount of $1,750 per month"; and (3) he had experienced a "sharp drop in clients" since the August 2015 hearing due to a disciplinary action instituted against him by the Attorney Grievance Commission. By order entered April 19, 2016, the circuit court stayed action on Mr. Ucheomumu's second motion to modify alimony "pending the outcome of the appeal [he] has filed before the Court of Special Appeals."

With respect to the disciplinary action referred to in Mr. Ucheomumu's second motion to modify alimony, the Court of Appeals filed an opinion on December 15, 2016, explaining that Mr. Ucheomumu had "engaged in serious, wide-ranging misconduct, and violated numerous MLRPC, two Maryland Rules, and one provision of the Code of Maryland." *Attorney Grievance Commission of Maryland v. Ucheomumu*, 450 Md. 675, 716 (2016). The sanction imposed by the Court at that time was to "indefinitely suspend [Mr. Ucheomumu] from the practice of law in Maryland with the right to apply for reinstatement after 90 days." *Id*, at 717.

On April 7, 2017, Mr. Ucheomumu filed a document captioned "Motion to Schedule This Matter for Trial, Additional Grounds for Modification and Change of Address." In this motion, he reported that

his appeal of the judgment denying his first motion to modify alimony had been dismissed by the Court of Special Appeals "on technicality without reaching the merit of the appeal," and therefore, he said, "this matter is now ripe for adjudication." With respect to his additional grounds for modification of alimony, he stated: "That on December 15, 2016 the Court of Appeals indefinitely suspended [Mr. Ucheomumu] from the practice of law, and [he] is now without income." He prayed for the court to "modify the alimony and vacat[e] the same."

On November 13, 2017, a hearing was held before Judge Kevin G. Hessler on Mr. Ucheomumu's motion to modify and vacate the alimony obligation that had been previously affirmed by an en banc panel, and reaffirmed by the circuit court's adoption of the magistrate's recommendations by order entered November 6, 2015 (as to which Mr. Ucheomumu's appeal was dismissed by this Court on December 21, 2016). At the November 13, 2017 hearing, Mr. Ucheomumu represented himself. He introduced into evidence, among other things, his federal tax returns for 2015 (business income/adjusted gross income of $35,064/$5,535) and 2016 (business income/adjusted gross income of $19,000/-$4,493). He also introduced into evidence: Ms. Ezekoye's tax returns for 2015 (adjusted gross income of $30,478) and 2016 (adjusted gross income of $26,275); a notice from the Internal Revenue Service dated April 24, 2017, stating that he owed unpaid taxes for 2013 in the amount of $4,341.34; and the Court of Appeals's decision on the Attorney Grievance matter (450 Md. 675 (2016).) He testified that he had no income, and that most of his living expenses were provided by friends, most notably his friend "Ester" whom he refused to identify more fully. He provided no information about any efforts to find employment. He called Ms. Ezekoye during his case in chief, and she testified, among other things, that she works for a company as a certified nursing assistant in patient's homes.

At the conclusion of Mr. Ucheomumu's case in chief, Ms. Ezekoye moved for judgment pursuant to Maryland Rule 2-519. During Mr. Ucheomumu's argument in opposition to the motion for judgment, the judge pointed out shortcomings in the evidence that had been introduced. With respect to Mr. Ucheomumu's assertion that he had experienced a material change in circumstances since the hearing in front of Magistrate Bonifant on August 18, 2015, the following colloquy ensued:

> THE COURT: There's no evidence in this hearing as to what your income was when the matter was in front of Magistrate Bonifant. There's no evidence in this hearing about what that was. So, how am I to sit here – based on the evidence that's been presented right now, how am I supposed to ascertain whether there's been a material change since then or not if you didn't provide the information to me about what your income was then?
>
> * * *
>
> MR. UCHEOMUMU: Your Honor, even if the Court does not have any point of references, prior incomes, looking at the income today on the two evidence that was admitted, it would be inequitable.
>
> THE COURT: But how do I know that that wasn't the same kind of evidence that was before the Court back then, and they simply just didn't believe you?
>
> MR. UCHEOMUMU: Because . . . the record of that hearing is in this court. All the evidence in that hearing is in this court, and the Court should take judicial notice of that.
>
> THE COURT: Well, you haven't asked me to do that, and you didn't as part of your case – and I'm not going to do it now because your case – you said a little while ago that you rested, and I'm here to decide this motion based on the evidence that you've presented thus far.
>
> MR. UCHEOMUMU: Well, the evidence that – to decide this motion, Your Honor, it has to be looked [at] in the light most favorable to me.
>
> THE COURT: But if there's no evidence . . . about what the income was, what your income was, or your expenses, for that matter, back at the time this matter was before Magistrate Bonifant [in August 2015] or at the time of the Court's November 2015 order [adopting Magistrate Bonifant's recommendations and denying the first motion to modify alimony], what is the evidence that I could even look at in the light most favorable to you?
> There's a difference between an absence of evidence and evidence that might be in dispute that I could look at in a light most favorable to you. But if there's no evidence about that, how am I to make a determination about whether there's been a material change in circumstances? The burden of proof, because you're the party asking for the modification or termination or to have that order vacated, is on you. And if you did not provide that, then I'm not sure how it

can be said you met your burden of proof on that issue.

* * *

MR. UCHEOMUMU: The material change of circumstances, Your Honor, is that then I was a practicing attorney making money.

THE COURT: But how do I know that? That's not in – what you were making as a practicing attorney at the time of the hearing that resulted in the current order [for alimony] that you're trying to modify is not before me. So, how am I to determine whether any change that's happened since then is A, related to your – well, related to your cessation of law practice, and B, material from the way things were before the suspension happened?

* * *

THE COURT: From the evidence that's been presented, you can't say that I'm allowed to infer a change in circumstances. I have to decide this based on the evidence that there is, and if you didn't put in – I'll say it again. If you didn't put in evidence of what the baseline amount was, what your financial circumstances were at the time of Magistrate Bonifant's hearing [in August 2015] and the November [2015] order, I can't just infer that they were better or worse or the same, and I can't infer that any change that you're saying occurred is material. I don't have the evidence to just simply infer your way past this motion.

The court also questioned Mr. Ucheomumu about the power of the court to vacate the previously enrolled judgments:

THE COURT: Well, let me ask you this. Were you able to find, or do you have, any authority for me to indicate that I have the ability to vacate the enrolled order for the $18,000 in alimony that you were determined to owe?

MR. UCHEOMUMU: Your Honor, if the Court can take this under advisement, I will find the authority.

* * *

THE COURT: If you don't have it, you don't have it.

MR. UCHEOMUMU: I don't have it, Your Honor.

The court also pointed out that there had been no evidence offered with respect to job applications or efforts to earn income since the time his license to practice law was suspended. The court observed:

THE COURT: . . . Here we are in November of 2017. I don't have any evidence that you made any efforts to become employed, to make money in some other way, to even apply for other jobs. I don't have any evidence that you've been making any job efforts, that you've talked to a vocational assessment person or anything else. And the only thing I've heard is that you're living off your fiancée, girlfriend, whoever – the person you live with, and that – I don't know if you're content to do that or not, but in any event, it seems to be that's what you've been doing.

But I haven't heard any evidence about any efforts that you've made to try to find other employment or to earn something to help pay for your needs, as you claim they are. So, that's another difficulty I have with establishing that you're entitled to the relief that you're requesting or that the alimony should be modified.

* * *

MR. UCHEOMUMU: . . . The fact is this, that looking for employment, I couldn't. In fact, I'm not even in the frame of mind to look for employment at all. I'm not in the frame of mind, I wouldn't – to looking for employment.

THE COURT: You said you're not – the reason you haven't looked for employment is you're not in the frame of mind to look for employment?

MR. UCHEOMUMU: I'm not in the frame of mind to look for employment because I'm still dealing with the remnants of my suspension, dismantling everything I've built, and I couldn't possibly even think of looking for a job now.

At the conclusion of the argument on the motion for judgment at the close of Mr. Ucheomumu's case, he made another reference to judicial notice:

MR. UCHEOMUMU: . . . So, there has been a material change in circumstances, and if the case moves forward, I will ask the Court – if the case moves forward from this motion, I will ask the Court to take judicial notice of the exhibits that were submitted in front of [Magistrate] Judge Bonifant is still in this case and is still here in this court.

After hearing argument from both parties, the court denied the second motion to modify (or vacate) the award of rehabilitative alimony. The court noted that the judgment for $18,000 in alimony arrearages, entered on January 15, 2016, was "an enrolled judgment, and the Court's power to revise an enrolled judgment is set forth in Maryland Rule 2-535, and it does not appear that the prerequisites for that established by that rule are present in this case." "I do not think that the evidence supports the conclusion that the plaintiff has established a fraud, mistake, or irregularity within the meaning of that rule so as to permit the Court to revise it." "[T]he plaintiff has not established either a mistake or an irregularity, and certainly no fraud that would warrant the Court vacating the judgment, the $18,000 judgment against him. So, that part of the plaintiff's claim is denied." And, with respect to the motion to modify or terminate the balance of the rehabilitative alimony obligation, the court concluded that, because Mr. Ucheomumu "did not establish what his financial situation was as of the time of the order that he seeks to modify," the court was "not convinced that . . . any changes that have occurred since [November 2015, when the court denied the first motion to modify] are material."

The court's written order was entered on December 8, 2017. Mr. Ucheomumu filed a motion for reconsideration, which the court denied. This appeal followed.

DISCUSSION

Mr. Ucheomumu contends that the circuit court abused its discretion and committed multiple legal errors in denying his second motion to modify/vacate his alimony obligation. First, he argues that the court erred in not finding a material change in circumstance to warrant modifying/vacating his alimony obligation. Second, he argues that the court erred in refusing to take judicial notice of evidence previously submitted during prior hearings. Third, he argues that the court erred in not vacating his alimony obligation because his ex-wife had acted fraudulently at their divorce/alimony hearing when she presented their daughter's tax returns as her own. Fourth, he argues that we should vacate his alimony obligation because his ex-wife acted with unclean hands in obtaining the award by representing their daughter's tax returns as her own. Ms. Ezekoye disagrees with each of his arguments, as do we.

Standard of Review

In cases such as this, which have been tried without a jury, we "review the case on both the law and the evidence." Md. Rule 8-131(c). We "will not set aside the judgment of the trial court on the evidence unless [it is] clearly erroneous," and we "will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id*, As with an original alimony award, a circuit court's "decision on the question of modification . . . is left to the sound discretion" of the circuit court. *Cole v. Cole*, 44 Md. App. 435, 439 (1979) (citation omitted). "We review a trial court's grant of a motion for judgment under the same analysis used by the trial court." *Barrett v. Nwaba*, 165 Md. App. 281, 290 (2005) (citation omitted). Because this case was not tried to a jury, the trial court was not obligated to consider the evidence in the light most favorable to the non-moving party. Instead, Maryland Rule 2-519(b) provides: "When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence."

A court "may modify the amount of alimony awarded as circumstances and justice require." Md. Code, Family Law Article ("FL"), §11-107(b). But, cases have held that a court may modify an alimony order upon a showing of a material change in circumstances justifying that action. *Tidler v. Tidler*, 50 Md. App. 1, 9 (1981) (citations omitted). "What amounts to a substantial change in the husband's financial circumstances is a matter to be determined in the sound discretion of the chancellor for which there are no fixed formulas or statutory mandate." *Lott v. Lott*, 17 Md. App. 440, 447 (1973) (citation omitted).

A court may terminate alimony "if the court finds that termination is necessary to avoid a harsh and inequitable result." FL §11-108(3). "[T]ermination of alimony to avoid a harsh and inequitable result does not operate as a matter of law and requires a court to examine facts and circumstances to determine whether harsh and inequitable results exist. Whether a result is harsh and inequitable is a subjective determination." *Bradley v. Bradley*, 214 Md. App. 229, 237 (2013).

A party paying alimony "must demonstrate through evidence presented to the trial court that the facts and circumstances of the case justify the court exercising its discretion to grant the requested modification." *Langston v. Langston*, 366 Md. 490, 516 (2001), *abrogated on other grounds by Bienkowski v. Brooks*, 386 Md. 516, 545 (2005). As a result, in a proceeding on a petition to modify alimony, parties "may not re-litigate matters that were or should have been considered at the time of the initial award." *Blaine v. Blaine*, 97 Md. App. 689, 698 (1993) (quotation marks and citations omitted), aff'd, 336 Md. 49 (1994)). Additionally, "a trial court, in its discretion, may modify an alimony award retroactive to a date preceding the filing of a formal motion for modification when the party seeking modification files an appropriate motion with the court and sufficiently demonstrates the need for such modification." *Langston*, 366 Md. at 500. In exercising its discretion "to allow modification,

either retroactively or prospectively, the trial court must balance the needs of the party seeking modification with the interests of the other party." *Id.*

With respect to an enrolled judgment, Maryland Rule 2-535(b) provides: "On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." But, as cases have made plain, only extrinsic fraud will justify revision of an enrolled judgment; an allegation of fraud that is intrinsic to the case must be raised by way of a timely appeal, if at all. *See Oxendine v. SLM Capital Corp.*, 172 Md. App. 478, 492 (2007).

Further, issues decided on appeal in a case generally may not be reargued during later proceedings in the case. Under the law of the case doctrine:

> "[O]nce an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Scott v. State*, 379 Md. 170, 183, 840 A.2d 715 (2004); *see also Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55, 949 A.2d 639 (2008). It is the country cousin to the more ornately named doctrines of res judicata, collateral estoppel and *stare decisis*.

Baltimore County v. Fraternal Order of Police, Baltimore County Lodge No. 4, 449 Md. 713, 729 (2016) (footnote omitted).

I.

Mr. Ucheomumu argues that the circuit court erred in denying his request to modify or vacate his alimony obligation because his December 2016 suspension from the practice of law clearly constituted material change in circumstance. But the trial court did not overlook the fact that Mr. Ucheomumu had been suspended from the practice of law in December 2016, *i.e.*, subsequent to the next most recent date the circuit court had confirmed the amount of alimony. The trial court found that Mr. Ucheomumu had not introduced evidence during his case in chief to give the court a basis to compare his financial circumstances as of the two pertinent dates. We agree with the trial court: the evidence the court needed to make an analysis of whether there had been a material change in circumstances was not introduced. And Mr. Ucheomumu's suggestion that the court should simply take judicial notice of the evidence that had been previously introduced during earlier phases of the litigation was (1) not made until after Mr. Ucheomumu had closed his case and his former wife had made a motion for judgment, and (2) an overly vague description of what the court was being asked to notice and how that information would prove Mr. Ucheomumu's prior financial condition.

A court is not required to modify an award of alimony simply because of a finding of a material change in circumstances. *Cf. Smith v. Freeman*, 149 Md. App. 1, 21 (2002) ("A material change in circumstances does not necessarily compel a modification" of a child support award). Moreover, we have noted that a temporary decrease in income does not necessarily justify a change in alimony. *Cf. Stansbury v. Stansbury*, 223 Md. 475, 478 (1960) (a decrease in the husband's income because of a dip in the income of his firm which appeared merely temporary would not justify a change in alimony).

To support his argument that the circuit court erred in not finding a material change in circumstances, Mr. Ucheomumu has included in his brief a table and several charts he created post-judgment showing the net and gross incomes for him and his ex-wife from 2012 through 2016 based on their respective tax returns for those years. But these charts include facts that were not introduced into evidence at the hearing on the second motion to modify. At that hearing, Mr. Ucheomumu presented his and his ex-wife's 2015 and 2016 tax returns only. Mr. Ucheomumu presented no evidence of his financial situation at the time of the alimony award or the hearing on his first motion to modify. As the circuit court noted during the hearing on Mr. Ucheomumu's second motion to modify alimony, he failed to introduce evidence to establish how suspension from the practice of law had changed his financial situation. Moreover, Mr. Ucheomumu testified that virtually all of his financial needs were being met by his friend Ester, and he admitted to the trial judge that he was simply not in the "frame of mind" to pursue another source of employment income. Mr. Ucheomumu also failed to produce any evidence of the legal bills that he incurred because of the disciplinary hearing, nor did he introduce any documentation regarding his law practice. Under the circumstances, we find no error or abuse of discretion by the court in denying Mr. Ucheomumu's second motion to modify for lack of evidence.

II.

Mr. Ucheomumu argues that the circuit court erred by not taking judicial notice of "facts in the case record of the same case." Ms. Ezekoye responds that the circuit court did not err because Mr. Ucheomumu's request was untimely, and the facts of which Mr. Ucheomumu requested the court to take judicial notice are not properly subject to judicial notice.

Maryland Rule 5-201 addresses judicial notice and states, in relevant part:

> (a) **Scope of Rule.** This Rule governs only judicial notice of adjudicative facts.

Sections (d), (e), and (g) of this Rule do not apply in the Court of Special Appeals or the Court of Appeals.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) *generally known within the territorial jurisdiction of the trial court or* (2) *capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.*

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard.** Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(Italics added.)

"Generally, judicial notice may only be taken of matters of common knowledge or [those] capable of certain verification." *Dashiell v. Meeks*, 396 Md. 149, 174-75 (2006) (quotation marks and citations omitted). "The latter category includes facts which are capable of immediate and certain verification by resort to sources whose accuracy is beyond dispute." *Id.* at 175 (quotation marks and citations omitted).

This Court summarized the parameters in *Abrishamian v. Washington Medical Group, P.C.*, 216 Md. App. 386, 413 (2014): "Trial courts can take judicial notice of matters of common knowledge or [those] capable of certain verification." (Citations and internal quotation marks omitted.) We explained:

> What unites these various classes of information is not so much their nature as public or widely-known, but more their nature as undisputed—as one commentator has described it, falling into either the "everybody around here knows that" category, or the "look it up" category. *See Lynn McLain, Maryland Evidence*, State & Federal § 201:4(b)-(c), at 221, 237 (3rd ed. 2013). Put another way, "[i]f there is no reason to waste time proving a fact, it can be 'judicially noted.' " Joseph Murphy, Maryland Evidence Handbook § 1000, at 489 (4th ed. 2010). But the doctrine does not typically extend to facts relating specifically to the parties involved. *See, e.g., Walker v. D'Alesandro*, 212 Md. 163, 169, 129 A.2d 148 (1957) (finding error where trial court took judicial notice that defendant had taken certain actions in his official capacity as mayor of the City of Baltimore).

Id. at 414.

We apply the clearly erroneous standard to review a trial court's decision whether to take judicial notice of information because we recognize that "there is a legitimate range within which notice may be taken or declined." *Abrishamian*, 216 Md. App. at 413.

After Mr. Ucheomumu rested his case and Ms. Ezekoye moved for judgment, the court pointed out fatal deficiencies in the evidence Mr. Ucheomumu had presented. It was at that late juncture that Mr. Ucheomumu sought to cure the inadequacy of his evidence by asking the court to take judicial notice of evidence presented during previous hearings in the case. The court declined to do so, explaining that the court had been called upon to "decide this motion based on the evidence that you've presented thus far."

Rule 5-201(f) permits judicial notice to be taken at "any stage of the proceeding." "This has been correctly interpreted to mean that judicial notice may be taken [even] during appellate proceedings." *Dashiell*, 396 Md. at 176 (citations omitted). But the facts the court is able to judicially notice must be those of the sort we described in *Abrishamian*, *i.e.*, "falling into either the 'everybody around here knows that' category, or the 'look it up' category." 216 Md. App. at 414. Mr. Ucheomumu's broad and nebulous request for the trial court to "notice" evidence presented during prior proceedings fell into neither of those two categories. And Mr. Ucheomumu never specified what exhibits or facts he was asking the court to judicially notice. Therefore, Mr. Ucheomumu failed to supply the lower court with the "necessary information," as required by Rule 5-201(d). And we conclude that the court's denial of the request was not clearly erroneous.

III.

With respect to the third issue raised by Mr. Ucheomumu, he contends that the trial court erred in failing to void the award of alimony because, he asserts, Ms. Ezekoye perpetrated a fraud on the court by apparently misidentifying a tax return of her daughter as her own. Mr. Ucheomumu posits that Ms. Ezekoye acted fraudulently at the original alimony hearing when she represented their daughter's 2012

and 2013 tax returns as her own.

As noted above, however, in Mr. Ezekoye's en banc appeal from the initial judgment awarding alimony, he raised the issue of this alleged fraud. The en banc panel rejected the argument and affirmed the award of $1,200 per month in rehabilitative alimony. Consequently, that appellate panel's rejection of Mr. Ucheomumu's fraud argument became law of the case, and bars further litigation of the claim. See Rule 2-551(h), stating: "Any party who seeks and obtains review under this Rule has no further right of appeal." *See also State v. Phillips*, 457 Md. 481, 512 (2018), recognizing "the true comparability and compatibility of in banc review with an appeal to the Court of Special Appeals and this Court. The appeal in both situations is from the judgment, which brings before the appellate court all issues that were properly preserved for appellate review, including those determined by interlocutory orders."

Moreover, the award of rehabilitative alimony became an enrolled judgment. Although Rule 2-535(b) provides that, in civil circuit court cases, "[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity," the rule does not contemplate multiple bites at the apple.

Furthermore, as used in Rule 2-535(b), the terms "fraud, mistake, or irregularity" are "narrowly defined and are to be strictly applied." *Early v. Early*, 338 Md. 639, 652 (1995) (citation and footnote omitted). "[A] litigant seeking to set aside an enrolled decree must prove extrinsic fraud and not intrinsic fraud." *Billingsley v. Lawson*, 43 Md. App. 713, 718-19, *cert. denied*, 286 Md. 743 (1979) *cert. denied*, 446 U.S. 919 (1980). As we explained in *Oxendine*, 172 Md. App. at 492:

> It is black letter law in Maryland that the type of fraud which is required to authorize the reopening of an enrolled judgment is "extrinsic" fraud and not fraud which is "intrinsic" to the trial itself. *Hresko v. Hresko*, 83 Md. App. 228, 231, 574 A.2d 24 (1990) (citing *Schneider v. Schneider*, 35 Md. App. 230, 238, 370 A.2d 151 (1977)). *See also Billingsley v. Lawson*, 43 Md. App. 713, 719, 406 A.2d 946 (1979) ("[A] litigant seeking to set aside an enrolled decree must prove extrinsic fraud and not intrinsic fraud.").

In Hresko v. Hresko, 83 Md. App. at 232, 574 A.2d 24, this Court distinguished intrinsic and extrinsic fraud:

> Intrinsic fraud is defined as "[t]hat which pertains to issues involved in the original action or where acts constituting fraud were, or could have been, litigated therein." Extrinsic fraud, on the other hand, is "[f]raud which is collateral to the issues tried in the case where the judgment is rendered."
>
> In essence, "[f]raud is extrinsic when it actually prevents an adversarial trial but it is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, that truth was distorted by the complained of fraud." *Billingsley*, 43 Md. App. at 719, 406 A.2d 946.

Therefore, "an enrolled decree will not be vacated even though obtained by the use of forged documents, perjured testimony, or any other frauds" because these "are intrinsic to the trial of the case itself." *Manigan v. Burson*, 160 Md. App. 114, 120-21 (2004) (quotation marks and citation omitted).

So, even if the question Mr. Ucheomumu raised in his brief regarding the alleged fraudulent use of tax returns during the 2014 hearing on alimony was not barred by the previous appeals, it is not an allegation of extrinsic fraud that would be addressable pursuant to Rule 2-535(b). And, in any event, he presented no credible evidence at the hearing on his second motion for modification alimony that the allegedly fraudulent tax returns were either introduced into evidence, or purposefully used at the original alimony hearing to gain an unfair advantage, or relied upon by Judge Callahan in determining the appropriate amount of rehabilitative alimony.

Accordingly, we conclude that the court did not err in declining to vacate the alimony award due to alleged fraud by Ms. Ezekoye.

IV.

Finally, Mr. Ucheomumu urges us to vacate the original alimony order under the doctrine of "unclean hands." This argument is essentially a variation of his claim that the original award of alimony was tainted by fraud. With respect his claim of "unclean hands," he states in his brief: "As can be seen clearly, Ms. Ezekoye used fraudulent tax returns and assumed the identity of the parties' daughter that was named after her as proof of her income in seeking alimony in this case." He asserts: "This Court must 'safeguard the judicial process,' by revisiting the alimony that was awarded to Ms. Ezekoye, which she obtained by directly introducing into evidence two fraudulent tax returns with incredibly diminished income."

As noted above the only tax returns Mr. Ucheomumu introduced at the hearing on the motion that is the subject of this appeal were from 2015 and 2016. There was no evidence at this hearing to sup-

port the claim of fraudulent use of tax returns during the 2014 hearing at which the court decided to award rehabilitative alimony to the woman who had stayed at home to raise Mr. Ucheomumu's five children to adulthood.

For the same reasons that Mr. Ucheomumu's argument regarding fraud did not provide a basis for the court to grant his second motion to modify alimony, neither did the "unclean hands" variation of the fraud argument compel modification.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

Footnotes

1 The four questions in appellant's brief were framed as follows:

1. Did The Trial Court Err In Finding That There Has Not Been Any Material Change In Circumstance To Modify The Alimony Award To The Appellee?
2. Did The Trial Court Err And Misapplied The Law When Upon Request By The Appellant, The Court Refused To Take The Judicial Notice of Adjudicated Facts In The Same Case File?
3. Did The Trial Court Err And Misapplied The Law In Not Recognizing That Fraud Vitiates Anything It Touches?
4. Did The Trial Court Err And Misapplied The Law In Not Recognizing That Appellee's Alimony That She Procured With Fraud Must Be Vacated Under The Doctrine Of Unclean Hands?

Cite as 1 MFLU Supp. 89 (2021)

Child custody; visitation; notice requirement

Nakia Pope
v.
Noldon Pope

No. 2005, September Term 2019

Argued before: Graeff, Leahy, Salmon (retired, specially assigned), JJ.

Opinion by: Salmon, J.

Filed: Oct. 14, 2020

The Court of Special Appeals affirmed the Baltimore County Circuit Court's order that the mother give the father 21 days' notice when requesting additional visitation, citing the couple's "well-documented difficulty in communicating effectively."

This appeal arises out of an order by the Circuit Court for Baltimore County resolving several motions by Nakia (McKinley) Pope, appellant, and her ex-husband, Noldon Pope, appellee, concerning custody and visitation of their two minor children. Ms. Pope raises the following questions, which we have rephrased for clarity:

> I. Did the circuit court err in denying mother's contempt motion because father relocated with their children to South Carolina from Maryland without her consent?
>
> II. Did the circuit court err in not awarding mother sole legal and physical custody of their children?
>
> III. Did the circuit court's visitation schedule unfairly favor father?
>
> IV. Did the circuit court's visitation schedule place an undue hardship on mother because it requires that mother give father 21 days of notice when requesting additional visitation?

For the reasons that follow, we shall affirm the circuit court's order.

FACTS

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

Mr. and Ms. Pope were married in 2012, and are the natural parents to two children, now aged 6 and 5. On May 5, 2017, the circuit court for Anne Arundel County granted the parties an absolute divorce, at which time the court also determined child custody, visitation, and support issues.[1] The court awarded sole legal custody of the children to father and shared physical custody to both parents. The court also set out a visitation schedule. Father was to have the children during the school year from Sunday to Friday and mother was to have the children on the weekends, from Friday to Sunday. During the summer, the visitation schedule was reversed, with mother having the children from Sunday to Friday and father having the children on the weekends, from Friday to Sunday. The schedule allowed for weekly dinner visits with the parent who did not have the children during the week.[2]

About nine months later, on February 8, 2018, Mr. Pope filed a motion to modify visitation. Although nowhere in the motion did Mr. Pope specifically state his intention to move out of state or where or when he might move, he did relate allegedly inappropriate actions by Ms. Pope and her mother during transfers that distressed the children; that the "children have a very large network of stable family in South Carolina and will benefit from that environment"; and, because he is their primary care giver and provider, the children's "financial needs will be better served by the reduced cost of living in Greenville, South Carolina." He included proposed visitation schedules for mother: one starting May 2018 through August 2019, and another for when school began in August 2019. His schedule suggested transfer points in Henderson, North Carolina and Spartanburg, South Carolina.

On April 16, 2018, Mr. Pope apparently emailed Ms. Pope's attorney, advising of his intention to move with the children permanently to Greenville, South Carolina. Two days later, mother's attorney allegedly responded by email that Ms. Pope did not consent to his relocating with their children to South Carolina. On that day, she also filed a motion for an expedited pendente lite custody and access hearing.

Mr. Pope moved to Greenville, South Carolina

with the children on May 2, 2018. On May 11, Ms. Pope filed a petition for contempt against father, alleging among other things, that father had "refused to communicate with [her] prior to making any decisions regarding the welfare of the children, including, but not limited to, doctor appointments, medication for the children, and relocation of the children out of state[.]" She asked the court, among other things, to temporarily modify the custody arrangement and grant her sole legal and primary physical custody of the children. On that same day, she also filed a counter-complaint for modification of custody and visitation, seeking sole legal and primary physical custody of the children.

A pendente lite hearing was held a month later. Following the hearing, the court issued an immediate temporary visitation order ("temporary order") denying mother's May 11, 2018, contempt petition and providing for a new visitation schedule. During the summer, the children would alternate three weeks with mother and one week with father, and in September, the children would be with father, except on the third Saturday of the month to the fourth Sunday of the month when they were with mother. The order set a pre-trial conference to decide custody for August 21, 2018. Ten days after the temporary order was issued, however, mother filed a motion to change venue from Anne Arundel County to Baltimore County, which was granted on September 12, 2018.

On October 30, 2018, mother filed a second complaint for modification of custody, again seeking sole legal and physical custody of the children. On May 10 and September 30, 2019, she filed contempt petitions against father for violating the temporary order.

On October 22 and 23, 2019, the Circuit Court for Baltimore County held a hearing on the parties' various motions. Ms. Pope, her mother, and Mr. Pope testified at the hearing. Evidence elicited at the hearing included that Ms. Pope currently teaches second grade for Anne Arundel County Public Schools and lives in a four-bedroom home in Pikesville, Maryland with her mother. The deed to the home is in both their names. Mr. Pope is a retired firefighter and rents a three-bedroom rancher in Greenville, South Carolina. Ms. Pope has many family members living within several minutes of her home, and Mr. Pope has many immediate and extended family in Aiken County, South Carolina, about two hours from his home. Both parents are active in their churches, and their children have friends in the respective church youth groups. The parties communicate only through Our Family Wizard, a communication app designed for separated and divorced parents. Mr. Pope has set up a phone line just for Ms. Pope and the children to communicate, which is located on the children's table in their room. He testified that rarely does a day go by that the children do not speak to their mother. She testified that she communicates with the children every other day.

The children, who were almost six years old and four and a half years old at the time of the October 2019 hearing, attend all-day kindergarten at the same school in Greenville, South Carolina. Mr. Pope reported that the children are "thriving" and testified that both children are in the gifted and talented programs in school and are assigned accelerated coursework. He presented the children's progress reports and homework to the court. He also presented photographs of the children at church, at school doing schoolwork and socializing, riding their bicycles to the library, picking vegetables in their backyard garden, at family gatherings and birthday parties, and a video of the children singing and playing Happy Mother's Day on the piano. Ms. Pope testified to the many activities that the children participate in when she has them, including trips to the library, Skyzone, and the zoo.

After hearing testimony and arguments from the parties, the circuit court ruled from the bench and then issued a written order. The court denied mother's contempt petitions filed on May 10 and September 30, 2019 and denied her motions to modify custody and visitation filed on May 11 and October 30, 2018. The court granted Mr. Pope's motion to modify visitation that he filed on February 13, 2018. The court then granted sole legal, and primary physical custody to father and set out a new visitation schedule. Mother subsequently filed a motion for reconsideration of the court's order, which the court denied. We shall provide additional facts below to address the questions raised on appeal.

DISCUSSION

I.

Ms. Pope argues that the circuit court erred when it failed to hold Mr. Pope in contempt for unilaterally moving to South Carolina. She argues that the court erred in not ordering him to move back to Maryland with the children because she was given insufficient notice of his move and the move was without her consent. Mr. Pope responds that the court did not err because Ms. Pope's contempt petition regarding his relocation to South Carolina, which was filed on May 11, 2018, was argued at the pendente lite hearing on June 11, 2018, and denied by the temporary order issued by the court following the hearing, which she did not contest. According to Mr. Pope, because there was no contempt petition before the lower court regarding his move, Ms. Pope's argument is meritless. For the reasons that

follow, we find that Ms. Pope's argument is not properly before us.

Mother filed four contempt petitions against Mr. Pope: February 5, 2018; May 11, 2018; May 10, 2019; and September 30, 2019. Nowhere in her appellate brief, however, does she state which contempt petition she believed the circuit court erred in not granting.[3] The first contempt petition was filed before Mr. Pope's relocation, so that cannot be the contempt petition underlying her argument. Additionally, neither of the 2019 petitions concerned Mr. Pope's relocation. Rather those petitions concerned father's failure to notify her of a doctor's appointment and failure to provide the children for a visitation under the temporary order. The circuit court denied those motions. This leaves only the May 11, 2018 contempt petition that could be the basis of her argument. As Mr. Pope correctly points out, however, that petition was argued at the pendente lite hearing and specifically denied in the court's temporary order issued on June 14, 2018.

In Maryland, "a party that files a petition for constructive civil contempt does not have a right to appeal the trial court's denial of that petition." *Pack Shack, Inc. v. Howard County*, 371 Md. 243, 246 (2002). "[O]nly those adjudged in contempt have the right to appellate review. The right of appeal in contempt cases is not available to the party who unsuccessfully sought to have another's conduct adjudged to be contemptuous." *Becker v. Becker*, 29 Md. App. 339, 345 (1975) (citing *Tyler v. Baltimore County*, 256 Md. 64, 71 (1969)). Therefore, even if Ms. Pope's argument was properly before us, we would have no jurisdictional basis to consider her argument.

II.

Ms. Pope argues that the circuit court erred in not granting her sole legal and physical custody of the children. She recognizes that the court considered the factors enunciated in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1978) when considering this issue. Nonetheless, she argues that the court erred in failing to weigh the factors in her favor. Specifically, she argues that the court erred by: 1) adopting the father's uncorroborated opinion that the children were "thriving" in South Carolina; 2) failing to adequately consider her testimony that the children were "thriving" in her care in Maryland; and 3) failing to recognize that having the children in her "care and custody is the only real option for the children to have a nurturing, stable, loving life[.]" Mr. Pope responds that his move to South Carolina was not a material change of circumstance, but even if it was, he argues that the court did not err in determining that the children were thriving in his care in South Carolina.[4]

Standard of Review

In reviewing child custody determinations, we employ three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012) (citation omitted).

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

Id. (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). A trial court's findings are "not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (citations omitted), cert. denied, 343 Md. 679 (1996). "Additionally, all evidence contained in an appellate record must be viewed in the light most favorable to the prevailing party below." *Id.* (citation omitted). An abuse of discretion exists where "no reasonable person would take the view adopted by the [trial] court or when the court acts without reference to any guiding rules or principles." *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (quotation marks and citation omitted).

Custody Determination

Legal custody confers the "right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Taylor v. Taylor*, 306 Md. 290, 296 (1986) (footnote and citations omitted). Physical custody means "the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent[.]" *Id.* Joint physical custody is shared custody and need not be shared on a 50/50 basis. *Id.* at 296-97. Shared physical custody "most commonly will involve custody by one parent during the school year and by the other during summer vacation months, or division between weekdays and weekends, or between days and nights." *Id.* at 297. Proponents of joint physical custody point out many benefits, including, permitting both parents to function as, and be perceived as, parents, while detractors point out that it may create confusion and instability for children. *Id.* at 302. The Court of

Appeals has noted that "[j]oint physical custody may seriously disrupt the social and school life of a child when . . . the homes are not in close proximity to one another." *Id.* at 308-09.

In *Sanders*, 38 Md. App. at 420, we set out ten non-exclusive factors for a circuit court to consider in child custody determinations: 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) the ability to maintain natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health, and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender. In Taylor, 306 Md. at 304-11, the Court of Appeals reiterated the Sanders factors but set out 14 factors it viewed as particularly relevant in making joint custody determinations: 1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; 2) willingness of parents to share custody; 3) fitness of parents; 4) relationship established between the child and each parent; 5) preference of the child; 6) potential disruption of child's social and school life; 7) geographic proximity of parental homes; 8) demands of parental employment; 9) age and number of children; 10) sincerity of parents' request; 11) financial status of the parents; 12) impact on state or federal assistance; 13) benefit to parents; and 14) other factors.

In any custody determination, the Court of Appeals has stated that the paramount and overarching concern is "the best interest of the child." *Id.* at 303. *See Burdick v. Brooks*, 160 Md. App. 519, 528 (2004) (quotation marks and citation omitted) (In custody cases, the "court's objective is . . . to determine what custody arrangement is in the best interest of the minor children[.]"). Although "[t]he best interest standard is an amorphous notion, varying with each individual case," a fact finder should "evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future." *Sanders*, 38 Md. App. at 419.

Under Maryland law, the relocation of a parent to another state can constitute the material change in circumstances necessary to trigger the best interest analysis. *Braun v. Headley*, 131 Md. App. 588, 613 (2000) (citation omitted), *cert. denied*, 531 U.S. 1191 (2001). "A change in circumstances which, when weighed together with all other relevant facts, requires a court to revise its view of what is in the future best interest of a child[.]" *Domingues v. Johnson*, 323 Md. 486, 500 (1991). Change is not to be lightly made but "[t]he benefit to a child of a stable custody situation is substantial, and must be carefully weighed against other perceived needs for change." *Id.*

Here, the circuit court had the opportunity to observe the witnesses in its custody determination, and specifically reviewed the *Sanders/Taylor* factors. Ms. Pope does not argue to the contrary. The court found both parties to be "very fit parents" and of "fine" character. The court found, however, that the parents had difficulty communicating. The court found that both parents have close family relations and similar material opportunities for the children existed in each home. Because father now lives in South Carolina, the court noted that the opportunity for visitation had changed. The court focused on what was in the best interest of the children and concluded that the children were doing very well in their current environment, and to remove them from this environment would not be in their best interest. In its custody award, the court kept sole legal custody with father, and changed physical custody from shared, to primary physical custody with father.

We cannot say that the circuit court abused its discretion in concluding that there had been a material change in circumstances or that its legal and physical custody determination was not soundly grounded in the best interests of the children in this case. Although the court did not discuss the move to South Carolina and seemed to treat it as a *fait accompli*, Ms. Pope presented the court with no evidence and made no argument in closing about the circumstances of the move. As to Ms. Pope's corroboration argument, it is not necessary that a parent's opinion about his/her children be corroborated in a custody determination. In any event, Mr. Pope's opinion that the children were thriving in his care was corroborated by the progress reports, schoolwork, and pictures he presented at trial of the children engaged in various activities. We disagree with Ms. Pope's argument that the court failed to consider that the children thrived in her care as well, for the court appeared to find her to be an equally fit parent.

As to her last argument, that the best interests of the children were for her to have sole legal and physical custody, we are mindful that the court is in the best position to weigh the evidence presented. Given the distance between the parents' residences, that father is a stay-at-home parent, that the children are doing very well in their new location in South Carolina, and that the parties have difficulty communicating, the court awarded sole legal and primary physical custody to father. The court ruled on the evidence presented, and we find no abuse of discretion in the court's award. *See Lemley*, 109 Md. App. at 627-28 (A trial court's decision in a contested custody case "founded upon sound legal principles and based upon factual findings that are not clearly

erroneous will not be disturbed in the absence of a showing of a clear abuse of discretion.") (citations omitted).

III.

Ms. Pope argues that the circuit court's visitation schedule must be reversed and revised because it is skewed to father's advantage. She argues that the schedule "blindly" follows Mr. Pope's proposed schedule, which benefits only father. She also argues that the transfer point of Oxford, North Carolina, which is four to four and a half hours from both parties' homes, is too long a drive for her and the children and unfairly compresses her time with them. As an example, she directs our attention to her 2020 visitation schedule for Dr. Martin Luther King, Jr., holiday, from Saturday at 2 p.m. until Monday at 2 p.m. She argues that because of the compressed time and the distance to be traveled, she will essentially only have the children for a full day. Mr. Pope responds that the circuit court did not err in its visitation order. He asserts that the court's and his proposed visitation schedules were similar simply because they maximized the amount of time mother could spend with their children and tracked the children's school calendar. We find no error.

"'Decisions concerning visitation generally are within the sound discretion of the trial court [ ] and are not to be disturbed unless there has been a clear abuse of discretion.'" *Meyr v. Meyr*, 195 Md. App. 524, 550 (2010) (quoting *In re Billy W.*, 387 Md. 405, 447 (2005)). As we stated above, an abuse of discretion occurs where "no reasonable person would take the view adopted by the [trial] court," or the trial court acts "without reference to any guiding rules or principles." *Santo*, 448 Md. 620 at 625-26 (quotation marks and citation omitted).

We cannot say that the circuit court abused its discretion in its visitation schedule order. Because of the geographical distance between the parties, it is undeniable that visitations will be more challenging than when the parties lived in Maryland, but the halfway point designated for transfers fairly splits this burden. The court ordered visitation schedule tracks the children's school year resulting in the least disruption possible while giving mother as much time as possible. Accordingly, we find no abuse of discretion by the circuit court.

IV.

The court visitation order states: "Mother will have the option for additional visitation to occur in South Carolina during the second weekend of any month during the school year, provided that Mother gives Father at least 21 days' notice of her intent to exercise this option[.]" Ms. Pope argues that the 21-day requirement "is not logical" because five days' notice would be sufficient and asks us to remand for a revision of the visitation order. Mr. Pope responds that the court did not err in ordering the 21-day notice. He argues that the notice is fair because it gives him time to prepare the children for a change in their schedules and minimizes the disruption that would occur in overbooking or canceling activities for the children, all of which allow Ms. Pope to be the priority for the weekend.

Given the parties well-documented difficulty in communicating effectively, we do not believe that the court abused its discretion in requiring 21-days' notice to change visitation. We agree with Mr. Pope that the 21-days' notice minimizes any disruption to the children's schedule and emphasizes Ms. Pope's scheduled time. We understand that the 21 days of notice is long for Ms. Pope, but given the parties difficulty in communicating effectively, and the fact that both children are getting older, attending school, and will be having more commitments, we find no abuse of discretion in the court's order.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Footnotes

1 Because this appeal does not concern child support, we shall not relate facts concerning that topic.

2 Ms. Pope appealed the circuit court's order. We affirmed on appeal. *See Pope v. Pope*, No. 598, Sept. Term, 2017 (filed April 23, 2018).

3 Ms. Pope provided, for our review, copies of only two of her contempt petitions: May 11, 2018, and September 30, 2019.

4 It is unclear, but it appears that throughout these proceedings Mr. Pope has only sought to change the visitation schedule between the parties and has not sought to change the status of the award of his sole legal, and shared physical custody. Nonetheless, at the hearing the circuit court and Ms. Pope's counsel viewed Mr. Pope's motion for modification as a request to change physical custody, although when announcing its decision, the court specifically recognized that Mr. Pope sought only to modify the visitation schedule whereas Ms. Pope sought modification of all custody provisions.

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