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124 Md.App. 288 (1998)

FACTS

The trial judge granted custody of the parties' six-year-old child to the mother, but ordered that 30 days after the child completed 5**th** grade (approximately eight years from the date of the final judgment), primary physical custody would automatically switch to the father. The court further ordered the parties not to live more than 45 miles apart, that the father have six weeks of summer visitation and that the parties maintain a custody diary. The mother appealed on the basis that the trial court abused its discretion.

CUSTODY ISSUES

Did the trial court abuse its discretion when it ordered an automatic *in future* change of custody?

Did the trial court abuse its discretion when it ordered that the mother and father not live more than 45 miles apart?

Did the trial court abuse its discretion when it awarded the father 6 weeks summer visitation where the father works long hours and travels on business and may need to place the child with a third party?

Did the trial court abuse its discretion when it required the parties to maintain a custody diary to document the parental time schedule?

HOLDING AND RATIONALE

Yes. The trial court abused its discretion when it attempted to look ahead and determine now that it will be in the best interest of a child who has not yet entered kindergarten to have his custody changed upon completion of 5th grade. To change custody in the future, the court will have no idea how, at that time, the change of custody will affect the child. The principle of requiring a change in circumstances for a change in custody is another indicator of looking at the circumstances as they exist at the time the custody order is passed.

Yes. The trial court abused its discretion when it imposed a 45-mile limit because there was no evidence to support this limit. It would be unreasonable to say that it would be permissible for the parents to live 44 miles apart but contrary to the child's best interest for them to live 46 miles apart. The court held that this issue must be addressed under the best interest of the child standard, which must be evaluated at the time of a relocation, instead of attempting to predict the future and determine now that the best interests of the child required the parents not to live more than 45 miles apart.

No. The trial court did not abuse its discretion by awarding the father 6 weeks of summer visitation despite his long work hours. It is up to the father to work out how he handles care for the child, subject to the approval of the court if necessary.

No. Although a novel concept, there was no abuse of discretion to require each parent to maintain a diary to record the implementation of the parental time schedule, which would provide a basis for refreshing recollection in the event of a dispute.

Ricketts v. Ricketts
393 Md. 479 (2006)

FACTS

The parties were married on June 13, 1981. The parties had three children, one of which was emancipated. The parties resided in the marital household but in separate bedrooms. The Husband alleges the Wife refused sexual relations and thus forced him from the marital bedroom. On July 16, 2002, the Husband filed a complaint for a limited divorce and custody of their two minor children based on constructive desertion, offering the Wife's alleged denial of marital relations. Wife filed a Motion to Dismiss based on the facts that the parties continued to live under the same roof, had not separated and therefore were not "living separate and apart." The Husband filed a Response to the Motion to Dismiss. The Circuit Court for Carroll County held a hearing on the Motion to Dismiss and the Response to Motion to Dismiss. The trial court granted the Wife's Motion to Dismiss, without explanation.

ISSUES

Whether a spouse's complaint for a limited divorce alleging constructive desertion based on lack of marital relations may be maintained when both parties continue to live under the same roof?

Whether, notwithstanding the parties' continued living together under the same roof, a complaint for custody and visitation of the parties' children may be maintained?

HOLDING AND RATIONALE

The Court of Appeals said the case at bar "must be resolved on the pleadings" and the trial court erred in granting the Wife's Motion to Dismiss the complaint. It has been held that there can be a desertion even though the spouses continue to live under the same roof. The true doctrine is believed to be that the statutory term "desertion," as applied to husband and wife, means a cessation of the marital relation; and this doctrine is in accord with the general principles of the divorce law. Desertion implies something more than merely ceasing to cohabit or live together; for as applied to husband and wife, it means the ceasing to live together as husband and wife. *Scheinin* v. *Scheinin.* 200 Md. 282, 89 A.2d 609 (1952). If the Husband could prove his allegations, he would have cause for a limited divorce under *Md. Code Ann., Earn. Law §7-102(a)(3) (2004)* and case law. Similarly, under *Md. Code Ann., Earn. Law § 5-203(d)(1)* states that a court could award child custody if the parents lived apart. However, this statute had to be read in conjunction with *Md. Code Ann., Earn. Law § 1-201(a) and (b),* regarding jurisdiction in divorce and custody matters, and *Md. Code Ann. Earn. Law § 7-102,* regarding grounds for divorce. When so viewed, the statute was ambiguous, and the logic of the result the legislation would effect could be considered when trying to discern legislative intent. As a divorce could be decreed when the parties were living under the same roof, it would be illogical to deny the court the right to determine issues of custody, support and visitation.

Domingues v. Johnson
393 Md. 479 (2006)

FACTS

The separation agreement of John Domingues and Diane Johnson provided that the parties would have joint custody of their two children and that the children would reside primarily with their mother, but with the father on Tuesday and Wednesday of each week and Friday through Sunday on alternate weekends. The mother later married a military officer who was scheduled to be transferred to Texas for a two-year tour of duty. The mother filed a petition for modification of the father's visitation to accommodate her move. The father answered and filed a motion seeking sole custody. After a five-day hearing, the Magistrate found there had been a substantial change of circumstances and recommended that custody be given to the father. The mother filed exceptions. The trial court heard oral arguments, but did not take any additional testimony, and entered an order implementing the Magistrate's recommendations. The mother appealed to the Court of Special Appeals, which reversed on the grounds that the trial court applied the best interest of the child standard rather than determining whether there was sufficient evidence of a change in circumstances affecting the welfare of the children. The intermediate appellate court also held that the record failed to show a demonstrable adverse effect upon the children and that the trial court should have granted custody to the mother. The father petitioned for certiorari.

ISSUE

May the relocation of a custodial parent constitute a change in circumstances sufficient to warrant a change in custody?

HOLDING AND RATIONALE

The Court of Appeals reversed the intermediate appellate court's decision, but nevertheless held that the trial court incorrectly accepted the recommendations of the Magistrate upon a finding that those recommendations were not clearly erroneous instead of subjecting the Magistrate's fact-finding to a clearly erroneous test and then exercising its independent judgment concerning the proper conclusion to be reached upon those facts. The Court explained that the ultimate conclusions and recommendations of the Magistrate are not simply to be tested against the clearly erroneous standard, and if found to be supported by evidence of record, automatically accepted. Consideration should be given to those recommendations, but the decision must be made by the trial court. The Court concluded that in this case, there was sufficient evidence of changes relating to the welfare of the children to justify a full consideration of whether modification of custody was required. The Court emphasized that changes need not have had a demonstrable adverse effect on the children to justify a modification of custody; it is sufficient if the trial court finds that changes have occurred which, when considered with all other relevant circumstances, require that a change in custody be made to accommodate the *future* best interest of the children. It is neither necessary nor desirable to wait until the child is actually harmed to make a change that the evidence shows is required. Thus, changes brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody.

Skunk v. Walker
87 Md.App. 389 (1991)

FACTS

The parties' divorce decree in 1988 awarded custody of their six-year-old child to the father and reasonable supervised visitation to the mother. In 1989, the father moved to Michigan for employment reasons and took the child with him. The mother then filed a motion to modify visitation, a motion to enforce visitation rights, a motion for contempt, and an emergency motion for increased visitation. The court then ordered the father to produce the child for supervised visitation and to appear for a show cause hearing on the motions. At the hearing, the parties entered into a consent order that required the father to have the child evaluated by a psychiatrist in Michigan and to submit the evaluation report within 60 days. The Order also required the court to contact the mother's treating physician to determine whether the need still existed to continue supervised visitation. The father failed to appear for a show cause hearing ordered by the court in response to the father's failure to comply with the visitation order, nor did he produce the child *as* directed by the court. The mother then filed a petition to modify custody an for contempt. The father failed to respond, failed to appear at the hearing, and failed to produce the child. The court then awarded the mother temporary custody based on testimony by the mother's physician that there was no need for supervised visitation, testimony that indicated the father had left the country with the child and was now living in Canada, and a finding that the father's contumacious conduct in failing to appear and produce the child prevented the court from effectively safeguarding the best interests of the child and created a significant change in circumstances that could well affect the welfare of the child.

ISSUE

Can a party's conduct, including, among other things, its failure to appear for a show cause hearing and failure to produce a minor child for visitation pursuant to a court's order, constitute a change in circumstances sufficient to justify a transfer of custody?

HOLDING and RATIONALE

The Court of Special Appeals held that relocation of a custodial parent and conduct that renders visitation impossible, because the whereabouts of the child are unknown, as opposed to merely difficult supports the finding that the custodial parent is not a fit and proper party to have custody and thus constitutes a change of circumstances affecting the welfare of the child. Because the father surreptitiously relocated to Canada with the child and refused to make the child available for visitation, which cuts off the rights of the visiting parent, the Court determined that a modification of custody was warranted.

Marshall v. Stefanides,
17 Md. App. 364 (1973)

FACTS

The parties, Roseanne Marshall and Jon Stefanides, were not married but had two children together and moved to Salisbury. Roseanne left the home in 1972 and shortly thereafter, married

another man in Pennsylvania. She later returned to Salisbury and took the children to Pennsylvania where she enrolled them in school. Jon filed suit for custody in Wicomico County.
During trial, after Jon's testimony and over counsel's objection, the Chancellor decided to interview the children privately in chambers. The parties were excluded. No transcript of the interview was read or provided to the parties. In the trial judge's written opinion, references were made to the children's comments. Roseanne contended that the Chancellor's interview of the children was inappropriate and unjust because she was not given a transcript, rendering her unaware of the children's views and, therefore, unable to respond.

ISSUE

May a trial court conduct an interview of the children involved in a custody dispute without the parents being present and use the statements made by the children in its custody determination?

HOLDING

The Court of Special Appeals held that an interview of a child in a custody case outside of the presence of the parties is proper where the interview is recorded and the court reporter reads it to the parties immediately afterward. The court found that the Chancellor erred in not making the substance of the *in camera* interview known to the parties.

Shapiro v. Shapiro
54 Md App. 477 (1983)

FACTS

Harry Shapiro and Betty Sue Shapiro were married in 1969 and had one child, Lonnie, before they separated in 1976. Harry filed for divorce in 1977 and litigation continued for several years. In 1981, the Chancellor interviewed ten-year old Lonnie regarding his concerns about visitation with his father, privately in chambers with a court stenographer present. After the interview, the Chancellor met with counsel and the transcript of the interview was read to them. The parties then had a discussion and entered into an agreement, including, among other things, that the mother would have *pendente lite* custody, Lonnie would undergo a psychiatric evaluation, the parties would undergo psychiatric therapy, and that reasonable visitation with the father would commence when recommended by the psychiatrist. A subsequent court order awarded permanent custody of Lonnie to his mother and provided that no visitation with the father would occur until the psychiatrist recommended it, and that visitation would be according to the terms of the psychiatrist. Mr. Shapiro appealed.

ISSUE

Mr. Shapiro contended that the Chancellor erred in interviewing Lonnie outside the presence of the parties and their counsel and in ordering that Mr. Shapiro have no visitation until the psychiatrist recommended it and then only upon the psychiatrist's terms and conditions.

HOLDING

The Court of Special Appeals held that the interview with the child in a custody case in chambers were proper with or without consent of the parties and with or without the presence of counsel but, that unless waived, the interview must be recorded and its contents made known following the interview. The court did not reverse on one issue raised in the appeal, finding that

the order vesting authority in the psychiatrist to structure and plan all visitation was an abuse of discretion because it improperly delegated judicial responsibility to a psychiatrist.

Wagner v. Wagner,
109 Md. App. 1 (1996)

FACTS

In 1994, the Circuit Court for Carroll County awarded custody of Erika, the minor daughter of Robin Wagner and Richard Wagner, to Richard. Robin appealed the decision, arguing, among other things, that the trial court abused its discretion in relying on statements made by the parties' children during *in camera* interviews without first questioning the children's competency to testify. The court conducted *in camera* interviews with Erika and the parties' son, Kris, wherein the children revealed how their mother had manipulated them into telling lies about their father, particularly that he abused them and their mother. The first interview took place at the suggestion of Ms. Wagner's counsel and the second interview took place when Ms. Wagner's counsel raised the issue of submitting proposed questions from the parties to the children.

ISSUE

May a court hold interviews with the children in a custody dispute without first determining whether the children are competent to testify as witnesses?

HOLDING AND RATIONALE

The court held that the interviews were proper because the children's competency had not been challenged prior to the interviews. In fact, Ms. Wagner had requested that the trial court conduct the interviews. Furthermore, the court was able to assess whether the children had "sufficient understanding to comprehend the obligation of an oath and to be capable of giving a correct account of the matters which he has seen or heard relevant to the question of issue."

Karanikas v. Cartwright
209 Md. App 571, 61 A.3d 69 (2013)

Father complained about several aspects of the trial court's handling of the interview with the child, including allegations that the court's method was unreasonable, the court was biased, and the court refused to inquire about the child's preference. The Court of Special Appeals rejected each of these contentions in a detailed opinion. The Court reiterated that it is within the Court's discretion to decide whether to interview the child and what questions, if any, to ask.

Kalman v. Fuste
207 Md. App. 389, 52 A.3d 1010 (2012)

In ***Kalman v. Fuste***, No. 1617, September Term, 2011(September 5, 2012), the Court of Special Appeals (Matricciani, J., writing) held that the Montgomery County Circuit Court had not properly analyzed whether "Temporary Emergency Jurisdiction" existed in Maryland pursuant to Fam. Law Art. § 9.5-202, and remanded the case for further proceedings consistent with that

provision. The Court noted that the UCCJEA clearly states that a court may take "emergency" jurisdiction if the child is in the state and:

> . . . has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is **subjected to or threatened with mistreatment or abuse**.[1]

[emphasis supplied]

The CSA analyzed FLA §4-501(a) (the domestic violence statute definition of "abuse"), FLA 5-701(b) (the child abuse and neglect definition of "abuse" for mandatory reporting purposes), and Crim. Law Art. 3-601(a)(2)(definition of child abuse) and concluded that for UCCJEA purposes:

> "abuse" under FL § 9.5-204(a) requires some actual injury or substantially probable threat to the victim's physical or mental welfare.

Lawrence v. Lawrence,
74 Md.App. 472 (1988)

FACTS

When Mr. and Mrs. Lawrence divorced, their two daughters were five and three years old, respectively. Both children were given their father's surname at birth and continued to use that name after their parents' divorce. Mrs. Lawrence was granted custody of the children, with reasonable visitation rights granted to Mr. Lawrence. Mr. Lawrence fully complied with the parties' separation agreement and diligently paid his child support contribution. He maintained regular contact with his daughters and visited them about once per month. Five years after their divorce, Mrs. Lawrence petitioned the court to change her name back to her maiden name, Earhardt, and to change the names of their two daughters to Earhardt-Lawrence. The trial court granted Mrs. Lawrence's request to change her own name, but refused to grant her request to change the names of the children on the grounds that it was in the child's best interest to retain the name they had been given at birth. Mrs. Lawrence appealed.

ISSUE

Did the court abuse its discretion in refusing the change the surnames of two minor children of divorced parents to a hyphenated surname consistent with the custodial mother's surname and in refusing to allow the children to testify *as* witnesses?

HOLDING and RATIONALE

The Court of Special Appeals held that the trial court had not abused its discretion in refusing the change the surnames of the two minor children. Appellant argued that Article 46 of the Declaration of Rights of the Constitution of Maryland guaranteed her the right to have her heritage reflected in the children's surname as per *Lassiier-Geers v. Reichenbach.* The Court distinguished *Lassiter-Geers:* in that case the parents had failed to agree on a surname at the time of the child's birth, which occurred after the parents had separated. The .*Lassiter-Geers* court thus

[1] Md. Code Ann., Fam. Law Art., §9.5-204(a).

applied the "best interest of the child" standard in determining whether the child's surname should be changed from that of the mother's maiden name to that of the father's surname. In this case, however, the trial court emphasized that the mother desired to change the surname that the daughters, now 11 'A and 9 V2 years old, respectively, had used since birth. The Court found that there had been no suggestion of any misconduct by the father that would cause embarrassment to his daughters. As such, and because there had been no indication that any preference had been accorded the father based on his sex, the Court concluded that the trial court had not abused its discretion in refusing to grant the mother's request. The Court also concluded that the same weight should be given in a name change determination as that in a custody proceeding; that is, the preference of an intelligent child who has reached the age of reason should be considered but is not controlling. The trial court thus has discretion whether to grant or deny a continuance to enable the children to testify, and unless arbitrary, its action will not be disturbed on appeal.

Cohen v. Cohen,
162 Md. App. 599 (2005)

FACTS

The parties were married on August 17, 1999. The parties had one child, Candace Lee Cohen, born on March 29, 2000. The parties separated in the late summer of 2001. On August 31, 2001, the parties signed a marital settlement agreement in which they agreed to share joint legal custody of Candace. The agreement provided in part: Husband agrees not to consume any alcoholic beverages or use any controlled substances within eight hours prior to a period of physical custody or during the time the Child is in his physical care. On October 31, 2003, Mrs. Cohen filed an Amended Complaint for Absolute Divorce. In her complaint, Mrs. Cohen asked for sole custody of Candace, alleging that circumstances had changed since the marital settlement agreement was signed and that the custody provisions set forth in the agreement were no longer in Candace's best interest. Because of significant evidence of substantial alcohol and drug use which included three arrests for driving while under the influence, an arrest for driving a boat while intoxicated, and the fact that he continued to drink on a regular basis, the court ordered, on its own initiative, for Mr. Cohen to have joint legal custody of Candace, he would have to "completely abstain from alcohol and not use any drugs, whether they be prescription drugs or controlled dangerous substances to any degree." The court further ordered that Mr. Cohen submit to random urinalysis every month. Mr. Cohen filed a Motion to Alter and/or Amend Judgment on September 3, 2004, in which he asked that the court incorporate the Marital Settlement Agreement into the Judgment of Divorce and strike the prohibition against his use of alcohol. The motion was denied on October 7, 2004.

ISSUE

May a court impose a condition on custody/visitation that is not requested by one of the parties?

HOLDING AND RATIONAL

The Court held that the trial court had strong factual evidence supporting its decision to base Mr. Cohen's Joint Legal Custody of his daughter on abstention from alcohol and that the trial court's requirement of such was reasonably related to advancing Candace's best interest. Citing *Kennedy v. Kennedy,* the Court held that the State can regulate a custodial relationship whenever necessary and virtually without limitation when it is in the best interest of the child. A judge may,

within his discretion, impose such conditions upon the custodial and supporting parent as deemed necessary to promote the welfare of the children. *Kruse v. Kruse*, 179 Md. 657, 664, 22 A.2d 475 (1941).

Frase v. Barnhart,
379 Md. 100 (2003)

FACTS

The case involved Deborah Frase, the mother of three-year-old Brett, and Curtis and Cynthia Barnhart. The Barnharts had cared for Brett and decided they wanted custody. Custody was decided in favor of the Mother, and the Barnharts were given access. Ms. Frase was a single mother of three children by three men and was pregnant with a fourth child by a fourth man. At the time of the trial, her oldest son, Justin was twelve. Ms. Frase's mother had legal custody of Justin. For a period of time Justin also lived with Brett and the Barnharts. Tara was eight or nine years old and Brett was two or three. Ms. Frase was *pro se.* At a hearing on June 3, 2002, the Magistrate "recommended that (1) Ms. Frase be awarded custody of Brett, 'provided that she immediately apply for and obtain housing at Saint Martins House (they have indicated that they expect to have a vacancy shortly),' (2) with the permission of the Barnharts, Brett 'spend every other weekend with them for as long as Justin is in their household,' (3) Ms. Frase 'continue to cooperate with the Family Support Center and Caroline County DSS,' and (4) 'this matter be reviewed in ninety days.'" Ms. Frase filed handwritten exceptions. On September 16, 2002, the Court issued three orders. "In those orders, the Court (1) awarded custody of Brett to Ms. Frase, 'provided she make application for housing at St. Martin's House," (2) established 'visitation' between Brett and Justin every other weekend, (3) directed that the visitation occur at Ms. Keys's home, if she agreed, otherwise at the home of the Barnharts. (4) ordered that 'the issue of visitation' be mediated and, to that end, ordered the parties to attend one mediation session, without cost, and directed that the court be advised of the results of the mediation, (5) required Ms. Frase to continue to cooperate with the Family Support Group and the county Department of Social Services, and (6) scheduled this matter for review on November 4, 2002." On October 23, 2002, Ms. Frase filed an "Emergency Motion" to have the conditions stricken and requested a postponement (pregnancy). Her request was denied. A review hearing was held on November 4, 2002. No decisions were made other than to set another review hearing for February, 2003. On November 25. 2003, Ms. Frase filed an appeal.

ISSUE

May a Court include certain conditions as part of a custody award?

HOLDING AND RATIONALE

The Court held. "For good cause the court may hold a case open for a reasonable period to consider additional evidence, not available at trial but which the court finds necessary to a proper decision. What it may not do, however, is to proceed to make findings that would dictate a particular result and then subject the favored party to conditions inconsistent with that result and to continuing review hearings. When it does that, the case never ends; the child and the parties remain under a cloud of uncertainty, unable to make permanent plans. The court seemingly reserves the power to alter the custody arrangement at any time, even in the absence of a new or amended petition, based on a later review of circumstances known or predicted to exist at the time

of the initial determination. That is procedurally impermissible." If a parent is found fit, the imposition of uncertainty is reversible error. Citing Troxel v. Granville, "As in *Troxel*, Ms. Frase was not opposed to visitation between Brett and Justin; she simply wanted to control where it took place and to involve Tara. No deference was given to her view forcing her to transport Brett to another place, occupied by a person or persons who had proved hostile to her, is precisely the kind of interference that *Troxel* prohibits. The implicit requirement that she relocate, with her children to St. Martin's was an even more drastic interference. Ms. Frase explained why she did not want to leave her present place of residence and why, in particular, she did not want to move to St. Martin's; she might have to give up her job and her day care resource and pay over to St. Martin's 30% of her income. As with the visitation issue, the court gave no deference at all to her objection but decided that it knew best where she should live. That too, is the very kind of interference that *Troxel* prohibits. Having found Ms. Frase to be a fit parent in her existing circumstances and having found no exceptional circumstance that would make her custody of Brett detrimental to his best interest, 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."

Flynn v. May,
157 Md. App. 38 (2004)

FACTS

Bryant Austin May was born on August 2, 1996. His parents were never married, but lived together until November 17, 2000. Thereafter, by informal agreement of the parties, the Mother assumed primary physical custody. The minor child saw his Father every weekend from Saturday morning until Sunday evening and Monday and Wednesday evenings from 3:00 p.m. until 8:00 p.m. On August 10, 2003, the Father filed a petition seeking primary custody of the minor child and child support. The Mother, *pro se,* filed an Answer on May 21, 2003 that was returned to her because her pleading did not contain a Certificate of Service. It was the Mother's belief that she had, in fact, answered the Complaint. On June 3, 2003, the Father filed a Request for Order of Default. On the same day, the Circuit Court judge signed the Order of Default. The
Mother received proper notice regarding the Order of Default and informing her of the thirty days she had in which to vacate the Order. The Mother took no action. On July 8, 2003, the Court sent notice to the parties scheduling a Hearing on August in the issues of custody, visitation and child support (Default). The trial judge advised the Mother that she would not be allowed to put on any testimony at the Default Hearing. The judge remained steadfast in his position even after counsel for the father asked him to at least allow both sides to proffer their testimony. At the conclusion of the Hearing, custody of the minor child was transferred to the Father, and the Mother was ordered to pay child support.

ISSUE

As a matter of first impressions, may the Court enter a default judgment in a dispute over custody of a child?

HOLDING AND RATIONALE

The Court goes into great detail about its conclusion that the Circuit Court applied the default judgment too rigorously by failing to consider the flexibility also offered by Maryland Rule 2-613(e) and Maryland Rule 2-613(f). Through the use of Taylor v. Taylor, Ross v. Hoffman. and Montgomery County v. Sanders the Court stressed that a "default judgment cannot substitute for a full evidentiary hearing when a Court, in order to determine custody, must first determine the best interest of the child." Last, prior to its holding, the Court stated that "seven-year-old Bryant had an indefeasible right to have any custody determination concerning him made, after a full evidentiary hearing, in his best interest. He did not lose that right when his Mother failed to file a proper responsive pleading to the Father's complaint." The Court held, "As sorely tempted as we are to hold flatly that the default judgment procedure of Maryland Rule 2-613 is not applicable to child custody disputes, it is not necessary to go so far. We are content to hold that, at the hearing on August 1, 2003, the trial court, in the circumstances of this case, abused its discretion when it ordered a change in the primary physical custody of Bryant without permitting witnesses to testify or other evidence to be offered. We nevertheless note that it is impossible for us to conjure up a hypothetical in which a judgment by default might ever be properly entered in a case of disputed child custody. We are not hereby transforming our dicta into a holding. We are, however, unabashedly adding deliberate weight to the dicta. Our comments are not random, passing, or inadvertent."

Bienenfeld v. Bennett-White,
91 Md.App. 488 (1992)

FACTS

Alice Bienenfeld and Reider Bennett-White married and had three children. At the time they married, both were members of the Episcopal faith. Years later, however, the mother and the children converted to Orthodox Judaism. While the father agreed to the conversion, the parents could not agree on whether the children's religious upbringing would be strictly according to the tenets of Orthodox Judaism or whether they children would also be exposed to the Episcopal faith. The parties filed for divorce, and both sought custody of the children. The day of their hearing, they agreed to the entry of an order providing for joint legal custody, with the mother to have physical custody and the father to have liberal visitation. The agreement also provided that the parents would cooperate with respect to each other's religious activities with the children and that the children could attend a private Jewish school at the mother's expense. Despite the agreement, the parties continued to battle. At the trial on the merits, the court granted physical and legal custody to the father, along with use and possession of the home, because it found that the children did not get along with the mother's fiance, did not enjoy staying at his apartment, and that the mother had attempted to restrict the children's access to their father because she believed their religious upbringing should be exclusively Orthodox Jewish.

ISSUE

May a court consider evidence of the parties' religious views or practices in making a custody determination?

HOLDING and RATIONALE

The Court of Special Appeals held that evidence of the parties' religious views and practices may be considered, along with other factors impacting upon the child's welfare, if such views or practices are demonstrated to bear upon the physical or emotional welfare of the child. The Court emphasized that absent such a demonstration, courts have no business treading on the constitutionally sensitive ground of religion. The Court found that the trial court had not abused its discretion in awarding custody to the father because there was evidence that the mother intended to uproot the children from a very stable, familiar environment and settle them in an unfamiliar and less desirable situation, there was evidence that as a result of the mother's remarriage, the children would be living with a man with whom they had significant difficulties, and there was evidence that the children's ties to the father would be threatened if the mother were given custody. Finally, the Court held that the trial court's decision did not infringe on the mother's right to free exercise of religion because the mother retained unlimited prerogative to direct the children's religious upbringing during visitation periods, and the trial court specifically tailored the mother's visitation rights to coincide with particular religious holidays so that her children would be able to fulfill the religious obligations imposed by her faith.

Davis v. Davis,
280 Md. 119 (1977)

FACTS

After approximately fifteen years of marriage, Mrs. Davis and her youngest daughter, Leigh, left the marital home and moved into an apartment. Mr. Davis filed for divorce on the grounds of adultery and sought custody of their three children. Mrs. Davis also filed for divorce and sought custody of the children. Despite a finding that the mother had engaged in an extramarital affair, the court ordered pendente lite that custody of the two oldest children would be with the father, while custody of Leigh would be with the mother. At the merits hearing, the court granted the parties a divorce, but reserved its ruling on permanent custody of the children. After submission of a court investigator's report and recommendations and an additional hearing, the court ordered that the existing custody arrangements be continued. The father appealed, and the Court of Special Appeals reversed on the grounds that it was not bound by the clearly erroneous rule but must exercise its own independent judgment *as* to whether the conclusion of the trial court was the best one. The Court of Special Appeals held that the mother was required, but had failed, to show that she had repented and that there was little likelihood of a recurrence of her adulterous actions. The Court of Special Appeals concluded that it was not in the best interest of the child to remain in the custody of her mother.

ISSUE

May a court deny custody to a parent based solely on the basis of that parent's adultery?

HOLDING and RATIONALE

The Court of Appeals reversed the decision of the Court of Special Appeals on the grounds that the appellate court had applied the wrong standard and should not have reversed the decision of the trial court unless there was a clear abuse of discretion. The Court further held that although the fact of adultery may be a relevant consideration in child custody awards, no presumption of

unfitness on the part of the adulterous parent arises from it. Rather, it should be weighed, along with all other pertinent factors, only insofar as it affects the child's welfare. The Court based its decision in this case on the finding of the trial court, that even though the mother had engaged in adulterous conduct in the past, there was no showing that it had ever deleteriously affected Light.

Giffin v. Crane,
351 Md. 133 (1998)

FACTS

The parties had two daughters, who initially resided with the father after the parties' separation. When the mother relocated to Kentucky, she filed a motion for modification of custody. The 16-year-old daughter testified that she was better able to communicate with her mother. The trial court awarded custody to the mother solely because the daughter had a particular and specific need to be with her same sex parent. The father appealed on the basis that the sex of a parent is not a legitimate consideration in custody cases. The Court of Special Appeals affirmed. The father petitioned for writ of certiorari.

ISSUE

Did the trial court err as a matter of law when it used gender to decide the issue of custody?

HOLDING AND RATIONALE

Yes. The trial court erred as a matter of law when it assumed that the wife necessarily would be a better custodian solely because she was a female and that the daughter had a particular and specific need to be with her same sex parent. The Maryland Equal Rights Amendment "flatly prohibits gender based classifications, absent substantial justification, whether contained in legislative enactments, governmental policies, or by application of common law rules." *Griffin* at 149. And this Court has abolished the material preference presumption in *Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984), stating that "neither parent shall be given preference solely because of his or her sex." In the dissenting opinion by Judge McAuliffe, he stated that he would have affirmed the lower court because the court was not saying that an adolescent daughter is always better able to communicate with her mother than father, or that there is always an emotional need for the daughter to be with her mother. Rather, the trial court said that in the context of *"this mother and this daughter,"* they were better able to communicate and that there was an emotional need for the daughter to be with her mother.

In re Adoption No. 12612,
353 Md. 209 (1999)

FACTS

Latrena Pixley is the mother of four children, all of which have different fathers: Carlos, whom she gave away to his paternal grandparents, Edward, who was given up to foster care, Nakya, whom she murdered at five weeks of age, and Cornilous, who was the subject of the

adoption and/or custody petition filed by Laura Blankman, his principal care-giver for most of his life. Ms. Pixley was convicted of murder, was incarcerated for a time, and later released on probation. While still on probation and pregnant with Cornilous, she engaged in a scheme of credit card and mail fraud, for which she was also later convicted. Her probation was revoked, she was reincarcerated, and Ms. Blankman was asked to care for Cornilous. Ms. Blankman cooperated in ensuring that Ms. Pixley enjoyed visitation with Cornilous, but over time, the bond between Ms. Blankman and Cornilous increased such that Ms. Blankman decided to keep him. She petitioned for adoption, or in the alternative, for permanent custody. The trial court treated the case *as* an adoption proceeding and heard testimony from numerous witnesses, who reached widely disparate conclusions on whether Ms. Blankman should be allowed to adopt Cornilous and whether Ms. Pixley could adequately care for him given her history and current residential status in a half-way house. The trial court held that Ms. Blankman had failed to meet her burden of showing that it was in Cornilous's best interest to terminate Ms. Pixley's parental rights. The
court did not mention the custody issue nor did it apply §9-101 of the Family Law Article. The Court of Special Appeals affirmed.

ISSUE

Did the trial court err in failing to consider whether Family Law §§9-101 and 9-101.1 applied, and if so, the appropriateness of the request for custody as an alternative to the adoption of Cornilous?

HOLDING and RATIONALE

The Court of Appeals held that §§9-101 and 9-101.1 apply when the abuse is directed against a sibling of the child, in this case, Nakya. The trial court was thus required to determine whether abuse or neglect is likely to occur if custody or visitation rights were granted to Ms. Pixley, and, unless it specifically found that there is no likelihood of further child abuse or neglect by her, to deny custody and unsupervised visitation. The Court explained that the plain meaning of the statute and its legislative history indicates that the focus of these statutes is on the party guilty of the previous abuse, not the particular child that had previously been abused or neglected, and that the goal of these statutes is to ensure that no child whose custody or visitation is subject to the court's control will be placed with such a person unless the court is convinced that there is no likelihood of further abuse or neglect on the part of that person. The Court further held that the trial court had erred in failing to apply these statutes and that its finding that Ms. Pixley posed no threat of death or fatal abused was not sufficient to satisfy the statutory requirement.

John 0. v. Jane 0.,
90 Md. App. 406 (1992)

FACTS

John and Jane 0. were married on April 13, 1963. One child was born of the marriage (but was emancipated at the time of the proceedings) and the parties adopted one minor child. The parties separated on November 29, 1987. Ms. 0. was awarded custody of the minor child by a *pendent lite* order along with exclusive use and possession of the family home and family use personal property in the home. At trial, Ms. 0. was awarded sole custody of the minor child. Mr. O.'s visitation was limited to "reasonable periods of time during the child's summer vacation and on holidays provided, however, that he shall not be permitted overnight visitation at this time."

Mr. 0. appealed the custody ruling contending that, among other things, the counsel appointed to represent the minor child's interests pursuant to Maryland Family Law Code Annotated §1-202 failed to advocate the position adopted by the child. Although the child expressed a desire to be in the custody of Mr. 0., the court had taken testimony with respect to Mr. O.'s pedophilic tendencies and the fact that Mr. 0. had been charged with child sexual abuse. The court appointed counsel for the child did not advocate that custody be granted to Mr. 0., even though the child expressed a desire to be in Mr. O.'s custody. Counsel wrote to the court advising that, based on the evidence presented, counsel did not believe the child's expressed desires were in the child's best interests, because of the father's pedophilic preferences for teenage boys, and the prior report of abuse that the child had made to DSS and later recanted.

ISSUE

Are a child's desires regarding custody controlling for determination of custody?

HOLDING AND RATIONALE

The court held that the child's views are to be considered by court-appointed counsel but are not necessarily controlling and that the child received adequate representation by the court-appointed counsel. The court found that there was overwhelming evidence that the child's own wishes were not in the child's best interest, and affirmed the decision of the lower court.

McCann v. McCann,
167 Md. 167 (1934)

FACTS

The divorce decree of Mr. and Mrs. McCann awarded custody of their minor child to the mother, with the right of the father to see the child at all reasonable times. The father, unsatisfied with the mother's visitation allowance, filed a petition for modification of the decree with respect to the custody of the child. After a hearing, the decree was ratified and confirmed, but on further consideration, the court modified its decree to provide for the mother to have custody of the child during the school year, from September 1 until June 1 of each year, with the father having visitation during this period, and the father to have custody of the child from June 1 until September 1 of each year, with the mother having visitation during this period. The mother appealed.

ISSUE

May a court consider the material advantages and environmental opportunities afforded by each parent in making a custody determination?

HOLDING and RATIONALE

The Court of Appeals found that the child was a girl of tender years and thus needed her mother more than her father for her care, instruction, rearing, and protection. The Court further found that the mother had her own father's comfortable country house in which to raise her daughter, where she enjoyed a healthful and invigorating climate, with opportunity for a public school education and sufficient religious instruction, all of which provided a good home in which to mature and develop her character. By contract, the Court found that the father had established no fixed abode, that he could not fill the place of a mother in the upbringing of a daughter, and that

his occupation would require his absence from his daughter during the day. The Court concluded that throughout the year, the physical, moral, and material advantages are with the home of the mother. The Court thus held that the trial court had erred in dividing custody between the father and the mother.

Montgomery Co. Dept. of Social Services v. Sanders,
38 Md.App. 406 (1977)

FACTS

At age ten (10) months, Christopher Sanders was taken from his mother, Rebecca Sanders, and placed in the care of Montgomery County Department of Social Services (MCDSS) because of physical injuries he had sustained while in his parents' care. The lower court later determined that it was in the child's best interest to remain with his foster parents despite evidence that Mrs. Sanders was not the cause of Christopher's injuries. Ten (10) months later, Mrs. Sanders petitioned to have her son returned to her custody. The MCDSS opposed the petition, not on the grounds that Mrs. Sanders was not fit or able to care for and raise her son, but because of its belief that an award of child custody should be based on the socio-psychological theory called the "psychological parent," which holds that a child's separation from its natural parent for a sufficient length of time saps the bond of love and affection between parent and child while simultaneously forcing a strong psychological link between the child and the surrogate parents. Once this shift of allegiance is completed, a return to the biological parent would result in severe emotional trauma, detrimental to the child's best interests. The trial court rejected this theory and ordered Christopher returned to his mother's custody. The Court of Special Appeals issued a Stay of Final Order pending appeal.

ISSUE

Is it in the best interest of the child for a custody award to be determined based solely on the socio-psychological theory of the "psychological parent," where the psychological parent is the person to whom a child under the age of five (5) becomes inextricably bonded after two (2) months of separation from its natural parents?

HOLDING and RATIONALE

The Court of Special Appeals held that the trial court had not abused its discretion in refusing to award custody of Christopher to the psychological parent and in returning him to his mother. The Court reasoned that the MCDSS approach reduced custody evaluation to a mere mathematical formulation based on the child's age at separation from the natural parents and the length of time of the separation. The Court concluded that custody cases involve too many variables involving people, conditions, and human emotions for such simplistic calculations. The Court set forth ten (10) factors, all of which should be considered, along with the totality of the situation in the alternative environments, when determining child custody: (1) fitness of the parent, (2) character and reputation of the parties, (3) desire of the natural parents and agreements between the parties, (4) potentiality of maintaining natural family relations, (5) preference of the child, (6) material opportunities affecting the future of the child, (7) age, health and sex of the child, (8) residences of the parents and opportunity for visitation, (9) length of separation from the natural parents, and (10) prior voluntary abandonment or surrender.

Robinson v. Robinson,
328 Md. 507 (1992)

FACTS

Mrs. Robinson filed for an absolute divorce from her husband, Mr. Robinson, following their one-year mutual and voluntary separation, and sought child support and permanent custody of their son, William. Mr. Robinson filed a counter-complaint seeking an absolute divorce on the grounds of adultery and desertion, *as* well *as* child support and custody. At trial, Mrs. Robinson was questioned about whether she had engaged in an adulterous affair, to which she refused to respond invoking the Fifth Amendment. The court required her to answer for the period of time outside the statute of limitations that barred prosecution for adultery. Mrs. Robinson then admitted that she had engaged in an adulterous affair prior to a certain date. Despite Mr. Robinson's objections, Mrs. Robinson was permitted to introduce evidence regarding her fitness as a parent. The trial court awarded custody to Mrs. Robinson based on its finding that the proximity and involvement of her extended family created stability and a better environment for William. Mr. Robinson appealed and the Court of Appeals granted certiorari.

ISSUE

May a trial court infer an adulterous relationship, where a parent involves the Fifth Amendment and refuses to admit or deny such a relationship, then allow the parent to present testimony regarding its fitness as a parent, and subsequently award custody to that parent?

HOLDING and RATIONALE

The Court of Appeals held that following the invocation of the Fifth Amendment privilege, a trial court may properly infer that a parent has engaged in an adulterous relationship, yet nevertheless find that the parent is a fit and proper person to have custody. The Court stated that the trial court was not required to strike the testimony regarding the mother's fitness as a parent relating to the factors bearing on the issue of which custodial arrangement would be in the child's best interest. Such a harsh sanction would result in excluding all of that parent's testimony regarding her fitness for custody and would frustrate the primary purpose of the custody proceeding. The proper sanction in such a case was the drawing of the adverse inference of an adulterous relationship without the father having to introduce evidence as to that claim, and the bar to the mother being allowed to introduce evidence in defense of that claim. The Court emphasized that the primary concern in awarding child custody is the best interests of the child. In the instant case, the trial court's award of custody was based on a consideration of all the factors and a determination of what was in the best interests of the child.

Swain v. Swain,
43 Md.App. 622 (1979)

FACTS

Mr. and Mrs. Swain filed for divorce and both sought custody of their minor child. Mr. Swain was granted a divorce based on the mother's adultery, but the court awarded custody of their minor child to the mother. In making its determination, the court considered whether the fact of the mother's adultery had been harmful to the child, and noted that the single factor that would

lead to the possibility that such a condition exists stems from the fact that the mother was then living in open adultery with a man who was also married. The court emphasized that were it not for the adultery of the mother, the court would have had no problem in awarding her custody. The court found that there was no evidence that the child had been harmed by the mother's adultery and refused to speculate on whether any harm might result in the future from the mother's continued living arrangements. The court ultimately found that the mother had done nothing to alienate the child from the father, whereas the father had pursued a course of action that may have the effect of separating the affection of the child from the mother. As such, the court concluded that the mother was entitled to custody. The father appealed.

ISSUE

May a court deny custody to a parent based solely on the basis of that parent's adultery?

HOLDING and RATIONALE

The Court of Special Appeals found that none of the trial court's findings were clearly erroneous and that the trial court properly refrained from engaging in guesswork as to the effect of the mother's affair on the child in the future. The trial court found only a possibility that the child might, at some point in the future, be harmed by the mother's adulterous relationship; however, the child was not presently adversely affected. Relaying on *Davis v. Davis*, the Court held that although the fact of adultery may be a relevant consideration in child custody awards, no presumption of unfitness on the part of the adulterous parent arises from it. Rather, it should be weighed, along with all other pertinent factors, only insofar *as* it affects the child's welfare. The Court concluded that there was no abuse of discretion by the trial court in awarding custody to the mother.

Taylor v. Taylor,
306 Md. 290, (1986)

FACTS

Mr. and Mrs. Taylor separated and each sought temporary and permanent custody of their two children. The parties agreed upon a "visitation schedule," which set forth the days and times each party would have the children. At the pendente *lite* hearing, the court granted temporary "joint custody" based on the agreement of the parties as set forth in the "visitation schedule," with the children to reside with their father at the family home. At the merits trial, the court ordered a continuation of the existing arrangement, which he characterized *as* "a sort of joint custody" and awarded the father use and possession of the home. The Court of Special Appeals affirmed, and the Court of Appeals granted certiorari.

ISSUE

Does a trial court have the authority to order joint custody in Maryland, and if so, did the court abuse its discretion in so ordering in this case?

HOLDING and RATIONALE

The Court of Appeals held that the authority to grant joint custody is an integral part of the broad and inherent authority of the court exercising its equitable powers to deal fully and completely with matters of child custody and that there was no legislative intent to limit this broad

authority by statute. The Court emphasized that the paramount consideration is the best interests of the child, and stressed that the advantages and disadvantages of joint custody must be considered, both to the children and to the parents. The Court set forth the factors to be considered for joint custody, in addition to those factors normally considered when evaluating child custody: (1) the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (2) the willingness of the parents to share custody, (3) the fitness of the parents, (4) the relationship established between the child and each parent, (5) the preference of the child, (6) the potential disruption of the child's social and school life, (7) the geographic proximity of the parental homes, (8) the demands of parental employment, (9) the age and number of children, (10) the sincerity of the parents' request, (11) the financial status of the parents, (12) the impact on State and Federal Assistance, (13) the benefit to the parents, and (14) any other relevant factors. The Court thought it likely that the trial court intended to grant joint physical custody, but nevertheless remanded the case for a full consideration of the issue of child custody because it was unable to ascertain the trial judge's intent with respect to legal custody.

Tarachanskaya v. Volodarsky,
168 Md. App. 587 (2006)

FACTS

After arriving in the United States in August of 1996, Ms. Tarachanskaya left her husband and moved in with Mr. Volodarsky. In January of 1999, Ms. Tarachanskaya and Mr. Volodarsky had a daughter. Soon after Greta was born, Ms. Tarachanskaya reconciled with her husband. On March 15, 1999, Mr. Volodarsky filed a Complaint For Custody and Visitation, alleging a denial of access and visitation. Ms. Tarachanskaya filed a Counter-Complaint for Custody, alleging patterns of abusive behavior. Supervised visitation was put in place for Mr. Volodarsky. Ms. Tarachanskaya resisted any contact between Greta and Mr. Volodarsky. The parties were unable to co-parent Greta and experienced significant levels of conflict. As a result. various actions were filed by the parties against each other. Ms. Tarachanskaya refused to abide by various visitation orders resulting in contempt petitions against her. Independent counsel was appointed for Greta. In May of 2003, Ms.Tarachanskaya appeared without counsel and as the trial was about to proceed, she left the building. The trial proceeded in her absence. Based on evidence from an evaluation requested by Greta's attorney, legal custody was awarded to Mr. Volodarsky with physical custody to be split. Immediately after the Modified Custody Order was entered, Ms. Taranchanskaya filed an Ex Parte Domestic Violence Petition seeking relief for her daughter, based upon allegations of sexual abuse by Mr. Volodarsky. The Petition was dismissed and the custody and visitation continued as ordered in May of 2003. Ms. Taranchanskaya filed another Petition For Relief from Domestic Violence, again alleging sexual abuse of Greta by Mr. Volodarsky. Based on these allegations, Greta's age, and further interviews by Doctors, Greta was placed temporarily in Ms. Tarachanskaya's physical custody with no visitation between her and Mr. Volodarsky pending a merits trial. At the conclusion of the trial, the court awarded sole legal and physical custody to Ms. Tarachanskaya and ordered that Mr. Volodarsky have no visitation but could visit Greta "in a structured, therapeutic setting, under conditions to be explored with the current treating therapist."

ISSUE

Was the trial court's Order regarding visitation an improper delegation of judicial authority?

HOLDING AND RATIONALE

The Court cited the Court of Appeals in *In re Mark* M.365 Md. 687, 707, 782 A.2d 332 (2001) where it vacated the trial court because "it failed to grant or deny visitation but rather declared that 'visitation will not occur until the child's therapist recommends it." The Court held that the trial court's ruling was an improper delegation to a third party of judicial authority to determine visitation. The Court held in the instant case, that on remand, the trial court must first reconsider the facts regarding alleg abuse under the reasonable grounds to believe standard. Then, after doing so, if the trial court orders visitation between Greta and Mr. Volodarsky, the trial court must clearly articulate a visitation schedule between Mr. Volodarsky and Greta, "including the nature of any supervision by a therapist in order to 'assure the safety' and meet the "physiological, psychological, and emotional' needs of Greta."

Volodarsky v. Tarachanskaya,
396 Md. 291 (2007)

In the context of FL § 9-101, which requires that if the court has "reasonable grounds to believe" that a child has been abused or neglected by a party, the court must in certain instances deny custody or visitation rights to that party, the term "reasonable grounds to believe" is no different from "preponderance of the evidence." In this case, the trial court properly used the "preponderance of the evidence" standard in finding that the father had not sexually abused the child. The Court of Appeals reversed an earlier determination by the Court of Special Appeals that the trial court should have used the "lower threshold of reasonable grounds to believe." In this context, "reasonable grounds to believe" is equivalent to "preponderance of the evidence." The Court of Appeals found no reason to suggest that the statute created a standard of proof even lower than "preponderance of the evidence."

Michael Gerald D. v. Roseann B.
220 Md. App. 669 (2015)

The principal issue was what standard of proof is required (preponderance or clear and convincing) when a court makes findings pursuant to Md. Code Ann., Fam. Law §9-101 that abuse or neglect of a child has occurred.

The Circuit Court for Anne Arundel County found that the father had sexually abused his daughter, and awarded custody to the mother, while denying father all rights of visitation. The Court of Special Appeals analyzed the plain language of §9-101, focusing on the phrase "reasonable grounds to believe." Analyzing the holding in ***Volodarsky v. Tarachanskaya***, the intermediate appellate court held that the preponderance of the evidence standard applies in determining whether the trial court has "reasonable grounds to believe" that abuse occurred.

Sumpter v. Sumpter
427 Md. 668, 50 A.3d 1098 (2012)

In ***Sumpter v. Sumpter,***[2] the Court of Appeals discussed the Baltimore City Circuit Court policy regarding access to Court-ordered custody evaluation reports, which allegedly

> . . . limits counsel of record in any child custody proceeding to viewing a single copy of such a report only in person in the Family Division Clerk's Office during normal public business hours. Counsel of record may make only hand-written notes of the contents of the report, yet are forbidden from copying verbatim significant passages.

The Court remanded the matter to the Circuit Court for development of a fuller record, but made it clear that if the policy is as described by appellant, the Court "has reservations about its viability." The Court took the additional unusual step of inviting the Attorney General to address this issue in its capacity as counsel to the Circuit Courts "when the matter returns to the Court of Appeals."

Lapides v. Lapides,
51 Md. App. 248 (1981)

FACTS

Morton Lapides and Saundra Lapides were divorced on September 19, 1978. Pursuant to a separation agreement, they agreed to joint custody of their two minor children. Two years later, legal proceedings resulted in Morton Lapides obtaining full custody of the minor children. The court, out of concern for the children who had become pawns in their parents' legal battle, determined that it was necessary to appoint independent counsel to monitor the legal proceedings on their behalf. The court appointed attorney J. Barry Meinster to represent the minor children and Mr. Meinster participated in the trial, attending hearings, depositions, and conferences; filing pleadings; conducting interviews; and reviewing numerous legal documents, medical records, and other documents related to the case. At the end of the case, Mr. Meinster filed a fee petition alleging that he had spent over 250 hours representing the minor children and requested an award based upon a fee of $100 per hour for his time. He was awarded $10,000 by the Circuit Court for Baltimore City, which represented less than $40 per hour for his services. The award was apportioned in the amount of $7,500 to be paid by the father *and* $2,500 to be paid by the mother. The father argued that the award of counsel fees was excessive. Mr. Lapides also argued that Mr. Meinster had no authority to represent the children in the appeal before the Court of Special Appeals.

ISSUE

Was the attorney's fee award for the Guardian *ad litem* reasonable?

HOLDING AND RATIONALE

The Court of Special Appeals held that the evidence was sufficient to establish that the award was reasonable based on the extensive work involved in the case on the part of Mr. Meinster as representative of the children. The court also found that the children benefited from Mr.

[2] *Sumpter v. Sumpter*, No. 120, September Term 2011 (August 21, 2012).

Meinster's services and that the fee was far from excessive. The Court of Appeals held that the children had a right to representation in the appeal based on the Courts and Judicial Proceedings Article of the Annotated Code of Maryland §3-604', which states: "The court, for good cause, may appoint an attorney to represent a minor in any action brought under this subtitle in which the issue of custody, visitation rights, or the amount of support, is contested and may levy counsel fees against either or both parents as is just and proper under all the circumstances. Any attorney appointed to represent a minor may not represent any party to the action." The court further opined that the statute provided that minors are not only entitled to representation but that their counsel is entitled to compensation from the parents and that the fact that a counsel is appointed indicates the children have standing to do that which is necessary to protect the counsel and themselves.

Family Law Article §1-202, which replaced CJ §3-604, states, "In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may: (1) appoint to represent the minor child counsel who may not represent any party to the action; and (2) impose against either or both parents counsel fees. (CJ§ 3-604; 1984, ch. 296, §2.)

***Meyr v Meyr*,**
195 Md. App. 524 (2010)

FACTS

The Meyrs were married in 1996, and had a daughter in 1998 and twins in 2000. On April 6, 2009, Ms. Meyr filed a Complaint for Absolute or alternatively, Limited Divorce. Mr. Meyr was awarded temporary physical custody of the three children and Mrs. Meyr was granted visitation. In the trial court's initial Order Regarding Custody and Visitation, it ordered that a best interest attorney be appointed to coordinate the family reunification therapy with the children and Mrs. Meyr "for as long as she [best interest attorney] deems said therapy is needed by the family, or until she petitions to the Court to be relieved for said duties." The trial court in the Amended Order Regarding Custody and Visitation ordered that Mr. Meyr pay all costs and fees in conjunction with work performed by the children's best interest attorney. The trial court found that Mrs. Meyr had a minimum wage job, had no car, and had a rented room. Mr. Meyr's lifestyle stayed the same, he had been making $100,000 a year, was receiving free rent and child care, and his standard of living would not be diminished. The trial court also found that Mr. Meyr was a major reason for needing the best interest attorney and that his behavior would play a significant role in how long the best interest attorney's services would be needed.

ISSUE

1) Did the trial court exceed its authority when it delegated to the best interest attorney the decision of how long family reunification therapy should continue?
2) Did it err when it ordered Mr. Meyr to pay for all of the services of the best interest attorney?

HOLDING and RATIONALE

No. While a court can not delegate decisions regarding child visitation and custody, the Court held that the trial court did not delegate its authority as the court's order vested power with the best interest attorney subject to supervision and modification by the court. The Court held that the trial court had resolved the primary issues of custody and visitation and that delegating

authority to the best interest attorney for the coordination of family reunification therapy was appropriate as an ancillary matter.

Yes. F.L. § 1-202 authorizes a court to order one party in a custody dispute to pay the best interest attorney's counsel fees, but it does not identify specific factors for a court to utilize when determining the counsel fee award. However, the Court of Appeals has noted that the factors in F.L. § 12-103(b) are relevant. F.L. § 12-103 allows the court to award counsel fees subject to consideration of each party's financial status and need, and if there was substantial justification for initiating or defending the proceeding. The Court found that the trial court had met these requirements even if the trial court did not specifically list the statutory factors, because the trial court had made previous statements in other rulings that demonstrated that it had considered the factors. The trial court in issuing the order made specific findings of each parties' income and earning potential, financial need and cause for the action. However the Court did find that the order for Mr. Meyr to pay the best interest attorney fees was premature because the attorney had not submitted her fees yet and Mr. Meyr did not have an opportunity to challenge the reasonableness of the fees.

Van Schaik v. Van Schaik,
200 Md. App. 126 (2011)

FACTS

Stephen and Judith Van Schaik divorced in 2001 and were awarded joint legal and physical custody of their children in 2003. On March 14, 2010, Stephen moved with the children to South Carolina without notifying Judith. In a hearing on the modification of child custody and visitation, the trial court awarded Judith sole legal custody and primary physical custody of the children with visitation to Stephen. The order provided that the parties would communicate by e-mail and that any "contentious matters or disputed e-mail issues shall be forwarded to the attorney for the minor children, …, for her review." The order also indicated that if the parties could not agree, the best interest attorney "shall serve as the 'tie-breaker' and resolve the dispute." The trial court also ordered that the parties were jointly and severally liable for all fees and costs by the best interest attorney incurred during their disputes, and permitted the best interest attorney to determine how to apportion her fees in future disputes.

ISSUE

1) Did the court err by designating the minor children's best interest attorney as the "tie-breaker" decision-maker if the parties cannot reach a mutual agreement on future disputes regarding the minor children?
2) Did the court err in holding the parties jointly and severally liable for the outstanding legal fees of the minor children's best interest attorney?
3) Did the court err by delegating authority to the minor children's best interest attorney to apportion between the parties any legal fees that she incurs in resolving future disputes regarding the minor children?

HOLDING and RATIONALE

1) The Court distinguished this case from *Meyr* and found that the best interest attorney's authority to resolve "any disputed matter regarding the minor children" was not an ancillary matter. The Court noted that in *Meyr*, the trial court had resolved the primary custody and visitation issues and the authority delegated to the best interest attorney was limited to the coordination of family reunification therapy, which was considered ancillary to custody and visitation. In addition, the trial court in *Meyr* expressly stated that the best interest attorney's authority was subject to supervision and modification from the court. In the present case, the Court held that the best interest attorney was granted broad authority that was not limited to ancillary matters and the Order did not include any language to make the best interest attorney's authority subject to the court's review or modification. Therefore, the Court vacated the "tie-breaker" part of the order.

2) The Court under F.L. § 1-202(a)(1) upheld a trial's court discretion in using its authority to determine the manner that attorney's fees are paid. That discretion may include ordering that parties are jointly and severally liable for all fees and costs of the best interest attorney.

3) The appellant argued F.L. § 1-202(a)(2) does not permit a non-judicial person to impose and apportion fees. Because the Court vacated the part of the order that would have required future services of the best interest attorney, the Court held that this issue was moot, as no future costs or fees by the best interest attorney would be incurred.

Gillespie v. Gillespie
206 Md. App. 146, 47 A.3d 1018 (2012)

In ***Gillespie v. Gillespie,*** [3] the Court of Special Appeals held that held that a court must consider the factors articulated in FLA§12-103(b) before an award of fees for an expert or a Best Interest Attorney can be made.

McCarty v. McCarty,
147 Md.App. 268 (2002)

FACTS

Husband filed for joint legal and physical custody of the parties' three-year old daughter. Wife filed a counter-complaint seeking sole legal and physical custody. Circuit Court for Montgomery County awarded joint legal custody to the parties and sole physical custody to the wife. Wife appealed.

ISSUE

Was trial court's decision to award joint legal custody an abuse of discretion where the mother is reluctant to share legal custody and the parties' track record for effective communications is marginal?

HOLDING AND RATIONALE

No, the Court's decision to award joint legal custody was not an abuse of discretion despite the Wife's reluctance to share legal custody and the marginal track record of effective communications. The trial judge appointed a Parent Coordinator, Linda Gordon, to work with the

[3] *Gillespie v. Gillespie*, 206 Md.App. 146 (2012).

parents six (6) months before the trial, who testified that the parents had made some progress in their communications. The trial judge ordered a continuation of the Parent Coordinator to resolve disputes between the parents for six (6) months post-trial and improve parent communications. The trial judge concluded that, despite the track record of poor communications between the parents, with the help of a third-party, the parents could "do legal custody." The appeals court found that the trial court engaged in "energetic measures" which were "highly commendable" by the use of a Parent Coordinator before and after trial in an effort to ensure acceptable communications between the parents.

Shenk v. Shenk,
159 Md. App. 548 (2004)

FACTS

The parties were married on November 16, 1996 and voluntarily separated on May 25, 2002. Three children were born of the marriage. Testimony was presented that both parties were good parents, but their relationship with each other was "turmoil". The parties, and a third party witness testified that their communications had improved since they developed a system of writing to each other in a notebook. The Husband advised the Court that his Wife was a good parent, but that he also wanted an opportunity to be involved in making decisions about his children. The following direct inquiry' was made by the Court: "The Court asks if a disagreement related to a minor decision, such as participating in sports, would end up in litigation", and the Husband replied, 'What I would say is to go ahead and sign the children up for that.' He stated that he would make efforts to remain an active parent. The Wife testified that she was concerned about the Husband's inconsistencies and his opinions regarding the children. The Wife felt she knew what was best for the children. The Wife testified she wanted the Husband's input, but if someone needed to make the call, she thought it should be her.

ISSUE

May the Court award the parties joint legal custody with the Wife having final tiebreaking decision making authority in the event of a future dispute?

HOLDING AND RATIONALE

The Court of Special Appeals held that the trial court acted within its legal authority and did not abuse its discretion when it ordered custody to the parties with the Wife having final tie-breaking decision making authority in the event of a future dispute. The Court included the exact language of the trial judge's Order in its Opinion. The trial judge wrote: "ORDERED. that the parties are awarded joint legal custody of their three children. That is, the parties shall keep one another fully informed regarding the health and general welfare of the children and, with the exception of an emergency, no significant decision regarding any of the children shall be make prior to the matter being thoroughly discussed between the parties. If the parties are unable to reach an agreement with respect to such decision, [the wife] shall have the authority to make that final decision." Citing Taylor as "acknowledging the existence of 'multiple forms' of joint custody and also stated that 'formula' or 'computer solutions' in custody cases are impossible because of the unique character of each case and the subjective nature of the evaluations and decisions that must be made". The Court found the tie-breaking authority as a proactive provision to anticipate a post-

divorce dispute". The Court found the "tie-breaking authority" as a solution to the unique needs of this family. In addition, after reviewing the evidence presented, the Court deferred to the trial court's ability to evaluate the credibility of witnesses. The Court found the Order fashioned by the trial court as to be an appropriate arrangement for joint custody. The Court stated, "The law should never be a prisoner of ideas".

Britton v. Meier,
148 Md. App. 419 (2002)

FACTS

Mother relocated from Illinois with her minor child and sought to enroll and modify an Illinois visitation order granting visitation to the child's grandfather. The father of the child was deceased. The trial court granted the grandfather's motion to dismiss without communicating with the Illinois court. Mother appealed.

ISSUE

Was it reversible error for the trial court to dismiss the custody action without contacting the Illinois court to determine whether that court wished to decline jurisdiction in deference to Maryland?

HOLDING AND RATIONALE

Yes, it was reversible error for the Maryland trial court to dismiss the custody action without contacting the Illinois court to determine whether that court wished to decline jurisdiction in deference to Maryland, as the child's home state. Although Illinois had exclusive jurisdiction in the case under the Parental Kidnapping Prevention Act (PKPA), the trial court in Maryland should have contacted the Illinois trial court before dismissing the Maryland case to determine whether Illinois wished to decline jurisdiction in favor of Maryland. If Illinois declined jurisdiction, the Maryland court could then modify the Illinois order under the Maryland Uniform Child Custody Jurisdiction Act (UCCJA).

Krebs v. Krebs,
183 Md. App. 102 (2008)

Significant connection for determination of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") can be as of the time of the merits hearing. After separating from his wife and children, father moved to the State of Maryland from Arizona. Upon retrieving the children from Arizona for a summer visitation, the father filed for divorce and petitioned the Maryland court for emergency custody of the minor children. After Maryland granted emergency custody to the father, the Maryland court and Arizona court conducted a conference call. As a result of the conference call, Arizona determined that it had home state jurisdiction but declined to exercise jurisdiction citing that Maryland was a more convenient forum. Custody was awarded to father after a final merits hearing and mother appealed. Court of Special Appeals held that Maryland's appellate courts could not determine if Arizona failed to apply the appropriate standard in declining to exercise jurisdiction and the mother should seek review in the State of Arizona. Further, the court held there was no prohibition for a court from

considering facts relevant as of the date of the final merits hearing when a party is trying to establish jurisdiction based upon significant contacts.

Thomas W. Nodeen, et ux. V. Anja Sigurdsson,
408 Md. 167 (2009)

When presented with a *forum non conveniens* argument, the Court must balance the convenience of the parties, witnesses and interests of justice and only when the evidence strongly favors the moving party should the Court grant the motion. After a custody action granting custody to the paternal aunt and uncle and only visitation to the maternal grandmother was decided in Anne Arundel County, the biological mother moved to Calvert County. Eleven months after the case was closed, the mother filed in Calvert County for a modification of custody. The paternal aunt and uncle requested that the case be moved to Anne Arundel County based on an argument of *form non conveniens*. The trial court granted the motion and mother appealed to the Court of Special Appeals. The Court of Special Appeals vacated the order stating that the modification was a new case and therefore, Anne Arundel County was no longer a proper venue. The Court of Appeals held that Anne Arundel County maintained continuing jurisdiction since they issued the original custody order. However, Calvert County had general jurisdiction based on the mother's residency. Since both counties had jurisdiction, the paternal aunt and uncle needed to show that it was more convenient to have the case heard in Anne Arundel County; however, they were unable to meet their burden.

Lemley v. Lemley,
102 Md.App. 266 (1994)

FACTS

Mr. and Mrs. Lemley had two children as a result of their marriage. Mr. Lemley had retired as a firefighter after suffering an injury in the line of duty. He made some efforts to be employed during the marriage, but was unsuccessful. He remained at home and was the primary caretaker of the children. Mrs. Lemley was employed as a legal secretary. The parties separated Mrs. Lemley left the marital home and took the children with her. Mr. Lemley filed a petition for immediate return of the children, custody and child support. Mrs. Lemley filed a cross-complaint for divorce on grounds of constructive desertion. Mr. Lemley supplemented his pleadings with a complaint for divorce on grounds of desertion. During this imbroglio, Mr. Lemley regained possession of the children through self-help, and Mrs. Lemley's visitation rights were bitterly contested. An attorney was appointed for the children, and an interim order for visitation and child support was entered whereby Mrs. Lemley was required to pay $948.00 per month. After a five-day hearing on the merits, the Magistrate issued her report and recommendations, and the court granted Mrs. Lemley's complaint for absolute divorce. Mrs. Lemley was also given custody of the children, and Mr. Lemley was ordered pay $673.22 per month in child support. Mr. Lemley filed a 33-page statement of exceptions, among which included his objection to the Magistrate's recommendations and findings with respect to custody.

CUSTODY ISSUE

Did the trial court err in failing to make specific findings concerning the specific allegations of error set forth in the statement of exceptions and in refusing to permit additional testimony at the exceptions hearing?

HOLDING and RATIONALE

The Court of Special Appeals held that although the trial court was not required to address each and every point raised by Mr. Lemley's rambling exceptions, at a minimum, the trial court should have addressed separately each of the four major findings of fact with which Ms. Lemley took issue, and that the trial court should have stated on the record how it resolved each challenge. The Court further found that although the trial court may receive additional evidence at an exceptions hearing, it was not required to hear such evidence; there is no per se right to present such evidence at the exceptions hearing. The Court explained that the testimony being offered by Mr. Lemley was testimony that was new or that could not have been offered at the Magistrate's hearing.

Miller v. Bosley,
113 Md. App. 381, (1997)

FACTS

The father sued the mother for custody. The Court held an emergency hearing and awarded the mother custody of the child pending its final determination regarding custody. The Magistrate thereafter held a custody hearing. After the custody hearing, the paternal aunt petitioned the Court to be a named party. The record does not reflect whether the motion was ever granted. The Magistrate issued his report which recommended that custody be awarded to the paternal aunt *pendente lite.* The Magistrate did not issue any findings to indicate that an immediate transfer of custody was necessary. However, the Magistrate attached a proposed order which recommended an immediate transfer of custody pursuant to Maryland Rule §74A(f)(2). The trial judge held a hearing, *as* required by §74A(f)(2), and signed the Magistrate's proposed order, altering only the visitation provision. Neither party filed exceptions. The mother appealed, claiming that the Judge erroneously deprived her of custody of her daughter.

ISSUE

Given the findings and recommendations by the Magistrate, was it proper for the Court to enter an immediate *pendente lite* custody order pursuant to S74A(f)(2)?

HOLDING AND RATIONALE

No. Maryland Rule §74A(f)(2) permits the Court to enter an immediate *pendente lite* order under certain, very specific, circumstances. Namely, only when the Magistrate finds "extraordinary circumstances" and recommends immediate disposition. *Miller* at 394. The Magistrate's failure to do either in this case precludes the Court's ability to enter an immediate order under S74A(f)(2). Vacated and remanded for further proceedings.

Wise-Jones v. Jones,
117 Md.App. 489 (1997)

FACTS

The parties' divorce degree granted the mother physical custody of their child and the father reasonable rights of visitation. The father later filed a motion for contempt and a motion to modify the divorce decree so as to obtain custody of the child the grounds that the mother had denied him access to the child. A hearing was held on the modification of custody issue, and another hearing was held on the issue of insurance coverage two days later. The Magistrate made no findings-of-fact, but recommended that the divorce decree be modified to give the father custody of the child and the mother reasonable rights of visitation. The mother promptly filed exceptions and later a motion to extend time to file the hearing transcripts, which motion was granted. The mother filed a transcript of the first hearing by the due date, but the transcript of the second hearing was filed after the due date. Prior to the transcripts being filed, the father filed an ex parte motion for temporary custody on the grounds that the Magistrate had found that the mother had abused the child and the child feared the mother, and because school was about to begin and the father did not want the child to be moved from one school to another mid-term once the custody modification became effective. The court granted the motion and dismissed the mother's exceptions *as* moot, without a hearing, insofar as the transcript of both hearings had not been timely filed.

ISSUE

May a court enter an immediate order transferring custody while exceptions to the Magistrate's recommendations are pending, dismiss the exceptions as moot for failure to file a timely transcript, and modify custody without making findings-of-fact or conducting an independent review?

HOLDING and RATIONALE

The Court of Special Appeals held that the trial court had erred in transferring custody to the father based on the Magistrate's report, which contained no findings-of-fact or extraordinary circumstances, and without conducting oral argument or reviewing the Magistrate's recommendations or the file, and that the mother was not required to file a transcript containing testimony about topics not related to custody. The Court explained that a trial court may enter an immediate custody order while exceptions are pending only where extraordinary circumstances exist and only after the court reviews the file and any exhibits, reviews the Magistrate's findings and recommendations, and affords the parties an opportunity for oral argument. The Court emphasized that the trial court, not the Magistrate, must independently review the Magistrate's fact finding and recommendations and make an independent judgment on the issues. The Court also emphasized that oral argument must be conducted by the trial court, not the Magistrate and is separate from that which occurs at the Magistrate's hearing. The Court concluded that dismissal of the mother's exceptions for failure to timely file the full transcript of both hearings was error because Maryland Rule 2-541(h)(2) clearly provides that only that portion of the transcript necessary to rule on the exceptions need be filed and that the transcript of the second hearing did not contain testimony on custody issues.

Kaufman v. Motley,
119 Md.App. 623 (1998)

FACTS

Dawn Motley filed a Petition for Protective Order pursuant to Maryland's Domestic Violence Act after she suffered threatening and harassing behavior by Geoffrey Kaufman, the father of her two children and in whose custody the children resided pursuant to the parties' Consent Order. At the hearing on the merits, the trial judge found by clear and convincing evidence that Ms. Motley had suffered acts that would place her and her children in fear of imminent serious bodily harm. The court issued a protective order, unlimited in duration that required Mr. Kaufman to refrain from abusing, threatening, harassing, or otherwise contacting Ms. Motley in any fashion. The trial court also awarded custody of the two children to Ms. Motley. Mr. Kaufman appealed, arguing that (1) the protective order was void *ab initio* because the trial court had failed to limit its scope as required by statute and (2) the court had erred in granting custody to Ms. Motley without first finding a material change in circumstances had occurred and that such modification was in the best interests of the children.

ISSUE

Is a protective order issued by a trial court under the Maryland Domestic Violence Act void if the trial court fails to limit its duration *as* prescribed by statute, and may the court modify a child custody order pursuant to the Act?

HOLDING and RATIONALE

The Court of Special Appeals held that a protective order is not void despite the failure to limit its scope, but is limited in its duration to two hundred (200) days (now one [1] year). The Court distinguished between *ex perrte* protective orders and orders issued following a hearing on the merits. The latter imposes safeguards to ensure that both parties have an opportunity to be heard and that the respondent can present defenses against the accusations of the petitioner, safeguards do not exist with ex *parte* protective orders. The Court stated that despite the order being open-ended in duration, the order was supported by clear and convincing evidence at the merits hearing and should be limited according to the statute. The Court further held that a modification of custody under the Maryland Domestic Violence Act is appropriate insofar as the right to be awarded temporary custody of the children is one of the protections afforded by the Act. The Court emphasized, however, that such a modification order was only temporary in nature and limited to two hundred (200) days, rather than a general custody modification.

Koffley* v. *Koffley,
160 Md. App. 633 (2005)

FACTS

The parties were married on May 28, 1988. The parties had three children, ages 16 to eleven. A bitter, contentious divorce, custody, and child support struggle extended over years. The parties were divorced by a Judgment of Absolute Divorce on December 27, 1999. As a result of their failure or refusal to agree on what is in the best interest of their children and the voluminous amount of liti gation, the Father was awarded custody of the three children and the mother's visitation was suspended. The Mother appealed the various orders of the Circuit Court dealing

with the custody award and suspension of her visitation. While the appeal was pending, the mother filed an emergency motion arguing that the best interest of one of the children required an immediate transfer of custody to her. The mother's Motion asserted that, because the present custody and visitation orders were on appeal, the Circuit Court was divested of jurisdiction to change any of the provisions in those orders and thus could not hear the Emergency Motion.

ISSUE

Does an appeal of a custody order divest the Circuit Court of jurisdiction to hear any subsequent matters regarding custody?

HOLDING AND RATIONALE

The Court held that although the general rule is the noting of an appeal divests the lower court of jurisdiction to proceed with regard to the issue appealed, any decision involving custody will be an exception to the general rule. That is, a decision as to the custody of a child is never absolutely final because it is always subject to modification and change under the continuing jurisdiction of the divorce court. Accordingly, if a motion for change in custody is based upon the assertion of a material change in circumstance occurring subsequent to the entry of the original order, the fact that there is an appeal in the matter, will not divest the circuit court of jurisdiction to hear the "new" custody issue.

McCready v. McCready,
323 Md. 476 (1991)

FACTS

Mr. and Mrs. McCready separated, and each sought custody of their daughter, Erin. However, at the *pendente lite* hearing, they agreed to the entry of an order providing for joint legal and physical custody with a specific schedule for shared custody based on the mother's work schedule, which required her to work weekends. The parties agreed that if the mother found work that did not require her to work weekends, they would in good faith renegotiate this arrangement. Shortly thereafter, the mother found work that did not require her to work weekends, but the parties were unable to reach an agreement on an alternate custody arrangement. The mother then sought sole physical custody on the grounds that joint physical custody was causing stress and confusion for her daughter and was not in her best interest. The father answered and filed a counterclaim, agreeing that shared physical custody had not proven beneficial to Erin. The trial court determined that the best interest of the child required a change from joint physical custody to sole physical custody, which the court granted to the father. The mother appealed, arguing that the trial court abused its discretion in applying the best interest of the child standard rather than determining whether a material change of circumstances had occurred that affected the welfare of the child.

ISSUE

In determining whether a change in physical custody is appropriate, should a trial court base its determination on whether a material change in circumstances has occurred that affects the welfare of the child, or should the court apply "the best interest of the child" standard?

HOLDING and RATIONALE

The Court of Appeals held that the proper standard to be applied in determining a change in child custody is the best interest of the child. The Court reasoned that while custody decrees are never final in Maryland, they must be afforded some finality to ensure that unsatisfied litigants are not permitted to relitigate custody arrangements ordered by a court. Thus, any reconsideration of a custody order should emphasize changes in circumstances that have occurred subsequent to a court's previous determination. However, the Court emphasized that deciding whether those changes are sufficient to require a change in custody necessarily requires a consideration of the best interest of the child.

Corapcioglu v. Roosevelt,
2006 Md. App. 219 (2006)

FACTS

The parties' child, Darren, was born on November 8, 1999, in Houston, Texas. The parties were never married to each other. The mother was married to Eric Benck, who resided in Maryland. The mother worked for the father as a research associate in Texas. The mother briefly lived with the father. When Darren was 11 weeks old, the mother left Texas with him and moved back in with her husband in Maryland. For two years, mother allowed father to have daytime visitation with Darren in Maryland. The relationship between mother and father deteriorated and mother filed a complaint for custody and child support on December 20, 2001, in the Circuit Court for Montgomery County, Maryland. Mother continued to allow the daytime visitation with Darren in Maryland. On May 5, 2002, the father and his wife abducted Darren and took him to Turkey. Over the next two years, the mother expended enormous amounts of money in securing Darren's return. On December 16, 2004, the mother filed a motion for child support, asking that she be awarded a lump-sum amount of child support equal to the sums she had spent in securing Darren's return from Turkey. The court awarded mother $ 252,930 but determined that award was for the counsel fees and costs and not child support.

ISSUE

Did the trial court err in holding that an award of $ 252,930 to the mother for fees and costs incurred in securing the return of the parties' son was not an award of child support?

HOLDING AND RATIONALE

The Court held that the trial court did not err by treating the mother's Motion for Child Support as an award of counsel fees and costs, because her Motion, although "titled" a Motion for Child Support was not a request for child support. The court clarified that the mother's motion was a request for an award to reimburse her for the counsel fees and costs she had to incur in securing her child's return, which was not child support. Under Maryland law, counsel fees and costs incurred by a parent in a custody case are not child support, even when they are for the benefit of the child. Whether an award is child support must be determined by application of Maryland's statutory child support scheme. In enacting the child support guidelines and portions of the child support, the Maryland General Assembly decided what specific expenses constitute child support. Those expenses include actual child care expenses incurred due to either parent's employment, pursuant to *Md. Code Ann., Fam. Law §* 12-204(g); extraordinary medical expenses, pursuant to *Md. Code Ann., Fam. Law* § 12-204(h); special or private school expenses,

pursuant to *Md. Code Ann., Fam. Law §12-204(1)(1);* expenses for transportation of the child between the parents' homes, pursuant to *Md. Code Ann., Fain. Law 5C 12-204 (i)(2);* expenses related to medical support, pursuant to *Md. Code Ann., Fam. Law § 12-101(d);* and a requirement that a parent include the child in that parent's health insurance coverage, pursuant to *Md. Code Ann., Fam. Law §12-102(b).* That is the extent of payments that are child support, or are in the nature of child support under Maryland law.

Khalifa et. al. v. Shannon,
404 Md. 107 (2008)

Court of Appeals held that Maryland law does recognize the tort of interference with child custody and visitation rights, that the father was not required to allege economic loss of child's services to maintain action, a noncustodial parent with visitation rights can sue for interference with parent-child relations; and punitive damages awards were not excessive. After entering into a Consent Order in February 2001 regarding the custody and visitation rights of their two minor children, the mother, with the assistance of the maternal grandmother, abducted and absconded with the two (2) minor children to Egypt in August 2001. Father filed a tort action for Intentional Interference with Custody and Visitation Rights resulting in a jury award of $3,017,000.00 against both the mother and grandmother. The Court of Appeals issued a writ of certorari prior to any proceedings and upheld the decision of the trial court. The Court reasoned that based on English common law that Maryland has recognized the tort of abduction and harboring of a child; however, the element of "loss of service" was not applicable with young minor children. The Court further held that the jury award of over three million dollars was not excessive due to testimony of the father as to the Defendant's wealth and the Defendants' particularly heinous conduct.

Brandau v. Webster,
39 Md.App. 99 (1978)

FACTS

Mr. and Mrs. Brandau were the parents of five children. At the time of their divorce, custody of the three youngest children was granted to the father, while the two oldest children, Erin and Elizabeth, were placed in foster care with the Department of Social Services. Approximately one year later, the mother, now remarried and living in Florida, filed a petition to obtain custody of Erin and Elizabeth, now 15 'hand 16%2 years old, respectively. At the hearing, the two girls were interviewed in chambers. The record indicated that Erin preferred to live with her mother in Florida, while Elizabeth preferred to finish her last year of high school in Maryland before moving to Florida to live with her mother. The father preferred evidence as to the purported testimony of several witnesses if they were called to testify regarding a series of abuses by the mother on one of her younger children, Erika, during a visit with her mother. The father also sought to call Erika to testify, who was then five years and ten months of age, but the court refused to conduct any inquiry as to her competence *as* a witness, maintaining instead that because of her age, she could not qualify as a witness. The court awarded custody of Erin to the mother, and Elizabeth remained in foster care. The father appealed.

ISSUE

May a trial court exclude a child of five years and ten months of age from testifying as a witness without conducting a voir dire examination of the child to determine her competency to testify as a witness?

HOLDING AND RATIONALE

The Court of Special Appeals held that the trial court had erred in refusing to conduct the examination of the proposed witness, either in court or in chambers, in order to determine whether she was, in fact, a competent witness. Acknowledging that the decision as to the competency of a witness is within the sound discretion of the trial court, the Court concluded that the trial court must at least conduct such an examination *as* will disclose the factual basis on which its conclusion as to competency rests.

Burdick v. Brooks,
160 Md. App. 519 (2004)

FACTS

The parties were married on July 2, 1993. The parties had three children, ages ten to twelve. In addition, the Husband adopted the Wife's child from a former relationship. On August 14, 2002, the Mother filed a Complaint for Absolute Divorce in the Circuit Court for Howard County. She sought sole legal and physical custody of the minor children. The parties reached a parenting agreement under which the children resided with their Mother and visited with their Father on Wednesday night and alternating weekends. The Court granted an Absolute Divorce on May 6, 2003. That same day, by separate Order, the Court granted *Pendente Lite* custody of the minor children to the Mother and ordered the Father to pay child support. In August of 2003, the Circuit Court appointed a Guardian *Ad Litem* for the minor children. On October 15, 2003, the Circuit Court ordered the parties to cooperate in psychological evaluations. The Guardian *Ad Litem* requested a Status Conference and the same was scheduled for March 18, 2004. The Court sent the parties a letter regarding the Status Conference. The letter advised that the conference would be fifteen minutes long, that it was not to be a hearing or a trial and no witnesses would speak. It was established at the Status Conference that the Mother was not cooperating in the evaluation process. As a result, the Court transferred custody of the minor children.

ISSUE

May a Court award temporary custody of minor children at a status conference without proper notice?

HOLDING AND RATIONALE

Citing Wagner v. Wagner, the Court determined the Mother has a constitutionally protected liberty interest in the care and custody of her children. Next, the Court turned to the question of what process is due. The Court found that due process requirements in the content of custody modification had been discussed in the Van Schaik v. Van Schaik case. "After citing Family Law

Section 9-205, the Van Schaik Court stated that 'it is clear that if the Court is contemplating holding a hearing at which it will, or may, determine custody issues, a parent with custodial rights....must be notified that such an issue may be the subject of the hearing:" The Court found that the Court's reasoning for modifying custody was punitive and on remand instructed the Circuit Court, "to determine what custody arrangement is in the best interest of the minor child, and not to punish a disobedient parent in court."

In re: Roberto d.B.,
399 Md. 267 (2007)

FACTS

On December 18, 2000, the appellant, Robert d. B., an unmarried male, initiated a medical procedure known as in vitro fertilization with the appellee and as a result she delivered twin children on August 23, 2001 at Holy Cross Hospital in Silver Spring, Maryland. Pursuant to Maryland Code (1982, 2005 Repl. Vol., 2006 Supp.) § 4-208 (a)(4)(iii) of the Health-General Article, the medical records department of Holy Cross Hospital provided the name of the appellee, the gestational carrier, as the "mother" of the children to the Maryland Division of Vital Records. The birth certificates were issued for the twins with the appellee's name listed as the mother. Neither the appellant nor the appellee wanted the appellee's name, the gestational carrier, to be listed on the birth certificates as the "mother" of the children. On August 29, 2001, the appellant and the appellee filed a Petition for Determination of Parentage and Issuance of Accurate Certificates of Birth. The appellant's petition asked the court to declare that the appellant was the father of the children, and authorize the hospital to report only the name of the father to the Maryland Division of Vital Records. The Circuit Court denied the Petition. First, the Court noted that there was no existing Maryland case law that would give a trial court the power to remove the mother's name from a birth certificate. Secondly, the Court said that removing the name of the surrogate from the birth certificate is inconsistent with the "best interest of the child" standard, citing, generally, "health reasons."

ISSUE

Whether Maryland's parentage statutes, that allow a man to deny paternity, and do not, currently, allow a woman to deny paternity, are subject to an Equal Rights Challenge?

HOLDING AND RATIONALE

The appellant's primary contention, under the Maryland Equal Rights Amendment, was that the parentage statutes of Maryland did not afford equal protection of the law to men and women similarly situated because the parentage statutes allowed a man to deny paternity and did not allow a woman to deny maternity. The Court of Appeals held that Md. Cod Aim., Health-Gen. § 4-211, did not prevent a court from issuing an order authorizing a birth certificate that did not list the mother's name. "The Maryland Equal Rights Amendment prohibits gender-based classifications, absent substantial justification, whether contained in legislative enactments, governmental policies, or by application of common law rules." The Court of Appeals further held that Circuit Court's implication of the best interest of the child standard was an error, as the gestational carrier (appellee) wanted to relinquish her parental rights, not assert them, and there was no issue of unfitness as to the father (appellant).

Davis v. Wicomico County Bureau of Support Enforcement
222 Md. App. 231(2015)

Father and Mother each signed an Affidavit of Parentage for twin boys. Almost two years later, Wicomico Child Support Enforcement filed a complaint for support from Father. At trial, Father denied paternity and requested testing. The trial court denied his request and determined that, by law, he was the father based on the signed Affidavit. Father was ordered to pay support, and did not appeal the decision.

Another two years passed, then Father filed a second request for a blood test pursuant to §§5-1029 and 5-1038, to strike the earlier finding of paternity and to set aside support order. He argued that a putative father can challenge paternity at any time after a judicial determination of paternity, pursuant to §5-1038, and that the same opportunity should be afforded to an individual who signs an Affidavit of parentage.

The trial court held that the statute was unambiguous – the right to a blood test applies only to set aside a judicial declaration of paternity under §5-1038, and not to paternity established by Affidavit under §5-1028. The trial court also treated the Bureau's motion as one for summary judgment, which it granted.

The Court of Special Appeals agreed with the trial court's res judicata logic and upheld the trial court's finding. The appellate court then went on to an "even if" analysis, to address the trial court's statutory interpretation, agreeing with the trial court that the plain language of the statutes shows that

> [after the 60-day rescission period] the only way for [someone] to set aside the finding of paternity by his affidavit of parentage under FL 5-1028 is fraud, duress, or material mistake of fact, and not by a blood test. . . Md. Code Ann., Fam. Law §5-1038 can be used only to set aside a declaration of paternity, not paternity established by an affidavit of parentage under §5-1028.

As for the "alleged inequities created by the statute, namely that one can challenge an enrolled declaration of paternity at any time through a blood or genetic test, whereas one who signs an affidavit of parentage may not rescind the affidavit after 60 days, except upon a showing of fraud, duress or material mistake of fact," the resolution of such inequities is reserved for the General Assembly.

Sieglein v. Schmidt
No. 2616, September Term, 2013 (CSA, August 25, 2015)

In *Sieglein v. Schmidt*, the Court of Special Appeals held that the husband of a woman, who, with his agreement, became impregnated by artificial insemination using donor sperm, is the resulting child's presumed parent.

Because Mother and Father, during their marriage, willingly and voluntarily agreed to conceive a child through assisted reproductive services using anonymously donated genetic material and that volitional action resulted in the birth of a child, we hold that Maryland Code (1974, 2011 Repl. Vol.), Estates and Trusts Article § 1-206(b) applies to establish that both spouses are the legal parents of the minor child.

Conover v. Conover
No. 2099, September Term, 2013 (CSA, August 26, 2015)

In *Conover v. Conover*, the Court of Special Appeals extended the holdings in *Janice M. v. Margaret K.*, 404 Md. 661, 948 A. 2d 73(2008) and *Koshko v. Haining, 398 Md. 404 (2007)* to same-sex married couples. The child in the center of the controversy was conceived and born before the couple married. They were together as a couple and planned the pregnancy together, married shortly after the birth and were raising the child together. The non-biological parent (Michelle) attempted to invoke Maryland's paternity laws as the basis for parental standing to seek custody or visitation without interfering with the constitutional rights of the natural parent (Brittany), thus alleviating the burden of complying with the "unfitness or exceptional circumstances" standards of *Janice M.* and *Koshko*.

> . . . under the circumstances presented here, absent a change in Maryland's statutory or common law, the non-biological, non-adoptive parent cannot prevail over the objection to custody and visitation by the biological mother.

The Court of Appeals accepted certiorari.

- ADD to and change the name of "Third-Party (including Grandparent) Evidence Standards" to "Third-Party (including Grandparent and Sibling) Evidence Standards."

Mulligan v. Corbett
426 Md. 670, 23 A.3d 895 (2012)

In ***Mulligan v. Corbett***,[4] Mr. and Ms. Mulligan separated and divorced. After the separation but before the divorce, Ms. Mulligan entered into a relationship with Mr. Corbett, and she became pregnant. She reconciled with Mr. Mulligan before the baby was born. The trial court denied Mr. Corbett's request for paternity testing, on the basis of a rebuttable presumption that the baby was the child of Mr. Mulligan because she was *conceived* during the Mulligan's marriage. The CSA reversed. The COA re-instated the trial court's ruling.

The Court of Appeals found that the child, having been *conceived* during the Mulligans' marriage, was not "illegitimate," and Mr. Corbett was not a "putative father." Mr. Corbett could not, therefore, challenge paternity without a best interests analysis. Md. Code Ann., Est. & Trusts §1-206(a) sets forth a presumption of legitimacy for a child *born or conceived* during a marriage.

[4] *Mulligan v. Corbett*, 426 Md. 670, 23 A.3d 895 (2012), overturning *Corbett v. Mulligan*, 198 Md. App. 38, 16 A.3d 233 (2011).

Considering all the facts, the Court essentially found that the presumption had *not* been rebutted. And thus, testing was not required.

The dissent, written by Judge Barbera, asks why, if we have access to modern science and "readily available" methods for definitively determining biological relationships, we don't use them for every child.

Braun v. Headley,
131 Md.App. 588 (2000)

FACTS

Following a paternity suit institute by Leslie K. Braun to establish that Jeffrey Headley was the father of her child, Theresa, custody was awarded to Theresa's mother, Braun, and her father, Headley was ordered to pay child support and granted visitation based on a visitation schedule Braun later moved to Arizona without giving notice to Headley and claimed that the move was for the purposes of improving her health. Braun filed a modification of visitation action, and Headley responded with a counter-complaint for sole custody. The court ordered assessments by the Office of Family Court Services, which recommended that both parties undergo a psychological evaluation. At trial, the court awarded custody to Headley and reserved visitation with Braun until further order of the court based on the evidence presented by the evaluators and the court's own assessment of the demeanor of the parties. Braun appealed, arguing that the change in custody was not in the best interests of Theresa and violated Braun's constitutional right to travel.

ISSUE

Does the Court of Appeals's decision in *Domingues v. Johnson*, 323 Md. 486, 593 A.2d 1133 (1991), which holds that the relocation of a child may constitute a change in circumstances sufficient to trigger a review of custody, apply a standard that violates a custodial parent's constitutional right to travel?

HOLDING and RATIONALE

The Court of Special Appeals held that the standards set forth in *Domingues* do not violate the rights of a custodial parent to travel. In *Domingues*, the Court held that changes brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody. Unlike in *Saenz v. Roe*, 526 U.S. 489 (1999), which found that a discriminatory classification between those who are already residents of a state and those who migrate to that state for residence was violative of the constitutional right to travel, the *Domingues* Court recognized that a determination of custody is a multi-faceted decision and that the best interests of the child must override all other competing interests, including the parent's interest in retaining custody, if a relocation would be adverse to the child. After a thorough review of *Saenz* and of cases in other jurisdictions addressing the constitutional right to travel in the context of child custody cases, the *Braun* Court concluded that the constitutional right to travel is qualified and should not be paramount over the state's interest in preserving the best interests of the child, which the Supreme Court has held is a duty of the highest order.

Goldmeier v. Lepselter,
89 Md.App. 301 (1991)

FACTS

As part of their divorce agreement, Mr. and Mrs. Goldmeier shared the custody of their two children, with Mrs. Goldmeier, now Mrs. Lepselter, as the primary physical custodian of the children. Two years later, Mrs. Lepselter informed Mr. Goldmeier that she and her new family, along with the two children, would be moving out-of-state where her new husband had obtained employment. Mr. Goldmeier filed petitions seeking an ex parte injunction and a change in custody, which were granted, thus enjoining Mrs. Lepselter from moving the two children out of state. Following a two-day evidentiary hearing, the trial court issued an oral opinion in which Mrs. Lepselter was enjoined from moving the children out-of-state until she obtained permission from the Circuit Court. The court also stated its intent to appoint counsel to represent the children to investigate and recommend the appropriate relief. Mrs. Lepselter then moved for a reconsideration based on the ruling in *Johnson v. Domingues*, which held that relocation did not warrant a change of custody absent evidence that it would adversely affect the children. At the hearing, Mr. Goldmeier's petition to enjoin Mrs. Lepselter was denied, and the motion to reconsider was also denied. He then appealed, arguing that relocation constitutes a change of circumstances and that the relocating parent must demonstrate that the move is in the best interests of the children.

ISSUE

Does a divorced spouse who is seeking to relocate the children have the burden of proving that the move is in the best interests of the children?

HOLDING and RATIONALE

The Court of Special Appeals held that the trial judge has the burden to weigh the relocation and all its ramifications, together with the other information the court can garner, in determining what is in the best interests of the children. The Court noted that at the time of Mr. Goldmeier's filing of his petition, the law with respect to relocation was that the trial court was not required to conduct a full evaluation of the best interests of the child, absent a showing that the move would have an adverse effect on the child. However, while on appeal, the Court of Appeals reversed the Court of Special Appeals's ruling in *Domingues* and issued its ruling in *McCready v. McCready*, which held that the relocation itself is a sufficient change in circumstances so as to trigger a full evaluation by the trial court of the future best interests of the child. The Court thus concluded that now each parent has the burden of proving that he or she is a fit and proper person to parent and serve as the primary custodian. The Court thus remanded the case for a reconsideration and full evaluation of the best interests of the children.

Jordan v. Jordan,
50 Md.App. 437, (1982)

FACTS

The separation agreement of Mr. and Mrs. Jordan provided that the mother would have custody of their two sons, with free access and unhampered contact with the children by the father.

The father later married and moved to Connecticut. Christopher, the older child, elected to move to Connecticut to live with his father, while Garrett, the younger child, stayed with his mother. The mother later became engaged and planned to move to South Africa. The father then filed a petition for custody of both children and sought to enjoin the mother from removing the children from their respective homes in Maryland and Connecticut until visitation rights could finally be determined by the court. The trial court signed an ex parte order enjoining the mother from removing the children per the father's request. After a series of hearings, the trial court awarded custody of Christopher to the father, custody of Garrett to the mother, and dissolved the injunction previously granted. The father then noted his appeal and filed a petition to stay the dissolution of the injunction with the Court of Special Appeals, which granted his request and stayed the effect of the dissolution until the visitation and custody issues on appeal were resolved.

ISSUE

Did the trial court err in failing to state specifically on the record that its custody decision was based on the best interests of the child, and did it abuse its discretion in deciding to split the custody of the children and permit the younger child to move with his mother to South Africa?

HOLDING AND RATIONALE

The Court of Special Appeals found that although the trial court did not specifically state that its conclusion was based on the best interests of the child, a review of the record demonstrated with unmistakable clarity its implicit application of that standard. The Court also held that the trial court had not abused its discretion in splitting the custody of the children between the parents and permitting the younger child to move with his mother outside the U.S. The fact that visitation would become more difficult does not amount to such a change in circumstances would justify the trial court in changing custody from the mother to the father. The Court acknowledged that ordinarily, the best interests of the children of the same parents are best served by keeping the children together to grow up as siblings under the same roof, but in this case, the children had been separated for more than two years with one living in Connecticut and the other in Maryland and there was no evidence that the younger child suffered any adverse effects as a result of the separation. The Court noted that should the father avail himself of the 77 days of uninterrupted visitation that was offered by the mother, the contact between the brothers might be greater than that afforded by their present weekend visits.

Aumiller v. Aumiller,
183 Md. App. 71 (2008)

In a grandparent visitation case, there must be a showing of unfitness or exceptional circumstances. The court may consider future harm as well as current detriment as long as there is sufficient evidence, not mere speculation. Prior to the death of the father, the mother refused to facilitate a relationship between the minor children and the paternal grandparents. Following their son’s death, the paternal grandparents sought reasonable grandparent visitation through the court. The trial court granted their request, but while the case was on appeal, the Court of Appeals issued its opinion in Koshko v. Haining, 398 Md. 404 (2007) causing the case to be remanded. On remand, the lower court denied the paternal grandparents visitation; they appealed. The appellants asserted that since the appellee prevented them from having a relationship with the minor children and are

refusing to inform them about their father, the appellee would cause the children future harm. And further, that these factors are tantamount to exceptional circumstances. Court held that the evidence introduced at trial was legally insufficient to show future harm and if the Court adopted the appellants' argument, it would render the holding in Koshko irrelevant.

Sharon Barrett v. Bryan Ayres, Sr., et. ux.,
186 Md. App. 1 (2009)

In a modification of a third party visitation or custody case, the "desire" or decision of a fit parent to modify the order will satisfy the burden of material change in circumstances. In 2006, the mother and parental grandparents entered into a visitation order whereby the grandparents had visitation twice a month. In 2007, the mother filed to modify the visitation order citing the ruling in *Koshko v. Haining,* 398 Md. 404 (2007) and the growing acrimony between the parties. The grandparents filed a response stating that the mother needed to show that there had been a material change in circumstances before she could modify the visitation schedule. The trial court granted the modification, terminating all visitation, and the grandparents sought an appeal. The Court of Special Appeals held that a third party must overcome the constitutional presumption in favor of a biological parent in *any* proceeding regardless of visitation or custody. Further, the third party must make a threshold showing of parental unfitness or exceptional circumstances. "Under *Koshko,* absent a threshold showing by the third party of parental unfitness or exceptional circumstances, the court must presume that the parent's decision concerning visitation is in the best interest of his or her child. That, in effect, renders the parent's decision to modify or terminate visitation a change in circumstance that satisfies the materially requirement."

B.G. v. M.R.,
165 Md. App. 532 (2005)

FACTS

The parties were divorced on September 14, 2000. Under the divorce agreement the parties shared joint custody of their three children, alternating physical custody of the children each week. Prior to and subsequent to the divorce, the maternal grandmother provided day care for the children each day before and after school. Father was diagnosed with HIV and later AIDS in 2001. In 2003, the father was hospitalized for an eye infection requiring surgery and which ultimately caused the father to become legally blind in his right eye. Despite his health issues, the father was able to maintain his employment with Verizon. In 2003, the mother filed a motion to modify custody because of her concerns about the father's deteriorating health and his ability to care for the children. In February 2004, the parties appeared in court and the father orally agreed to sign a consent order giving mother sole legal custody of the children. Father never signed the consent agreement. On February 10, 2004, mother was murdered by her brother's estranged wife. The children were home at time of murder and called their maternal grandmother. The sheriffs office released the children to maternal grandmother's custody. On February 12, 2004, the maternal grandmother filed a complaint for custody and requested an emergency hearing. At this time, the father lived in an assisted living facility. Father leased a two bedroom apartment for appropriate sleeping arrangements for the children. At the conclusion of the trial, the court ruled that the father was "not unfit" but found that there were exceptional circumstances sufficient to rebut the

presumption that the children's best interests were best served in the father's custody and awarded custody of the children to the maternal grandmother.

ISSUE

Whether the court's finding of "exceptional circumstances" was sufficient to rebut the presumption that the children's best interests were served by custody with their biological father over a third person?

HOLDING AND RATIONALE

In Karen P. the court recognized that " the circumstances that will rebut the presumption that a child's best interests are served by being in the custody of his biological parent, as opposed to in the custody of a private third party, must be 'extraordinary, exceptional, or compelling that require the court to remove the child from the natural parent in order to protect the child from harm." In determining whether parental custody will be detrimental to the child, the court cited to factors set forth in Hoffman Those factors include "the [1} length of time the child has been away from the biological parent, [2] the age of the child when care was assumed by the third party, [3] the possible emotional effect on the child of a change of custody, [4] the period of time which elapsed before the parent sought to reclaim the child, [5] the nature and strength of the ties between the child and the third party custodian, [6] the intensity and genuineness of the parent's desire to have the child, and [7] the stability and certainty as to the child's future in the custody of the parent." Only after exceptional circumstances are found, can the court then consider the best interest of the child in determining custody. McDermott makes it clear that the children's best interest do not figure into the exceptional circumstances analysis. The court vacated the judgment and remanded the case back for the trial court to determine whether the grandmother satisfied her burden of establishing exceptional circumstances existed.

Janice M. v. Margaret K,
404 Md. 661 (2008)

The Court of Appeals declined to recognize the concept of *de facto* parents in any type of proceedings holding that *de facto* parents must adhere to the same standard as a pure third party, whether requesting custody or visitation. The parties, two women involved in a same-sex long-term relationship, started a family when Janice M. adopted a child. After several years living together as a family unit, the parties separated. Despite having been apart of the child's life and participating in all parental functions, Janice M. sought to limited and place restrictions on the visitation by Margaret K. After a custody hearing in the circuit court, which granted Margaret K. visitation as a *de facto* parent, Janice M. sought appellate review. The Court of Special Appeals upheld the lower court ruling holding that Margaret K. met the four factors necessary to be deemed a *de facto* parent. However, the Court of Appeals held that in light of recent cases regarding the standard in third parties custody disputes, any third party, whether grandparent, step-parent or psychological parent, must overcome the fundamental presumption in favor of the biological parent by showing either exceptional circumstances or that the natural parent is unfit. Judge Raker filed a dissent.

Karen P. v. Christopher J. B.,
163 Md. App. 250 (2005)

FACTS

Father and Mother became romantically involved in 1992 and moved in together. Parties never married. On March 20, 1996, Sebastian was born. The parties' relationship began to deteriorate and in early 1999 they separated for several months. The parties reconciled and shortly thereafter. Claudia was born on December 4, 1999. Early in the pregnancy, Mother learned that Father was not the biological father. Mother never disclosed to Father that he was not the "biological father." Mother named Father on Claudia's birth certificate. Father believed and treated Claudia as his biological child and bonded as father and daughter as did Claudia and Sebastian as brother and sister. The parties again briefly separated in 2003. Father left the home but moved back in on September 1, 2003. The next day Mother filed a complaint for custody of Sebastian and Claudia. The parties continued to live in the same house. On February 23, 2004, Father filed a counter-complaint for custody of the children. On April 29, 2004, during a heated argument between the parties, Mother revealed to Father he was not the biological father of Claudia. On May 25, 2004, Mother packed up the children to move to Avalon, New Jersey. Mother refused to give any details about the move, refused to give an address or children's whereabouts. On July 8, 2004, the Mother requested a DNA test to determine Claudia's paternity. The court granted Mother's request. Two days before trial, the DNA test results were completed showing that the Father "could be excluded" as the biological father. At the conclusion of the trial, the court found that the Mother was a fit parent but if further found that there were exceptional circumstances that rebutted the presumption that it would be in Claudia's best interest to be in the custody of Mother, her only identified biological parent. The court examined whether the Father met any of the exceptional circumstances and then analyzed the physical custody factors in making its determination. Having found exceptional circumstances in the instant case, the trial court then addressed what custody determination would be in the children's best interests. The trial court found that the mother had acted selfishly, placing her interest above those of the children, treating the Father's role in their lives as unimportant, and attempting to alienate the children from him. The trial court concluded that it would be in the children's best interests for custody to be awarded to the Father, with visitation for the Mother.

ISSUE

Did the Father prove the existence of exceptional circumstances sufficient to overcome the presumption that it was in Claudia's best interest to be in the custody of the Mother, a biological parent?

HOLDING AND RATIONALE

The Court relied on McDermott that in a custody case between a biological parent and a third party, the presumption in favor of the biological parent may be rebutted by finding either, the biological parent unfit or the existence of extraordinary circumstances significantly detrimental to the child, if the child were to remain in the custody of the biological parent. In determining exceptional circumstances, the court reviewed the factors set forth in Hoffman. The Court found the trial court's finding of exceptional circumstances was not clearly erroneous nor an abuse of discretion. The finding of exceptional circumstances was not merely based on the existence of a strong bond between the father and Claudia. The exceptional circumstances included the facts that

the Mother had little respect for the relationship between the Father and Claudia and what that relationship meant to Claudia. Also, the Mother challenged and used the paternity to gain an advantage in the custody case and had moved the children from Maryland, refused to disclose where to, making it impossible for the Father to visit or communicate with them. The Court concluded further: Granting custody to Karen made it more likely that Claudia would lose the only father she had known, and suffer the pain that such loss would entail.
Granting custody to Christopher made it likely that Claudia would continue to have a mother and a father figure in her life, and would not suffer emotionally beyond that which a child ordinarily suffers when the family breaks up. The trial court's finding that these were exceptional circumstances that would make granting custody of Claudia to Karen detrimental to Claudia was not clearly erroneous, and its decision to grant custody of Claudia to Christopher was not an abuse of discretion.

Koshko v. Raining,
398 Md. 404 (2007)

FACTS

This case involves a "bitter familial conflict" between parents and maternal grandparents over visitation of the minor children by the maternal grandparents. Andrea Haining, daughter of John and Maureen Haining, moved out of their home at age 18 to Florida. While in Florida she became pregnant. The father of the child deserted Ms. Haining and she returned to her parent's home where the child, Kaelyn, was born. Andrea met and began dating Glen Koshko. The couple moved in together and eventually married. The Hainings (maternal grandparents) maintained a close relationship with Kaelyn. In June 1999, the Koshkos and Kaelyn moved to Baltimore Maryland for Glen's employment. While in Maryland, the Koshkos had two additional children born to them, Haley and Aiden. Despite the distance between the families, the Hainings continued to maintain a relationship with the Koshkos and the grandchildren. In October 2003, the Koshkos and the Hainings became estranged over family issues. On April 19, 2004, the Hainings filed a petition for visitation in the Circuit Court for Baltimore County. After a two-day trial, the court entered an order granting the Haining's petition, finding that visitation was in the best interests of the grandchildren, that the Hainings had rebutted the presumption in favor of the parent's determination of what is in their child's best interests. The Koshkos unsuccessfully moved for a new trial and then appealed the judgment to the Court of Special Appeals challenging the constitutionality of the Maryland's Grandparent Visitation Statute, Md. Code Ann., Fam. Law § 9-102. The Court of Special Appeals affirmed the judgment of the Circuit Court for Baltimore County. The Koshkos filed a petition for writ of certiorari which was granted by Maryland Court of Appeals.

ISSUE

Whether, under a substantive due process analysis, the Maryland Grandparent Visitation Statute is unconstitutional because it fails to recognize a rebuttable presumption accorded to the propriety of a parent's determination of what is in his or her child's best interest with respect to visitation with a grandparent?

HOLDING AND RATIONALE

The Court of Appeals held, that the Maryland Grandparent Visitation Statue was facially valid and construed the Statute to include the application of the parental presumption so that "it is saved from *per se* constitutional infirmity." The Court went on to further say that although a visitation case may involve a lesser degree of intrusion than a custody case, there is no difference of constitutional magnitude involved in the intrusion in either type of case. The Court held that "[a] proceeding that may result in a court mandating that a parent's children spend time with a third party, outside of the parent's supervision and against the parent's wishes, no matter how temporary or modifiable, necessitates stronger protections of the parental right. The importance of parental autonomy is too great and our reluctance to interfere with the private matters of the family too foreboding, whether it be in matters of custody or visitation, to allow parental decision-making to remain that vulnerable to frustration by third parties. The Court of Appeals further held that "the constitutional right is the ultimate determinative factor in third party custody cases where parents are fit and no extraordinary circumstance are presented.

McDermott v. Dougherty,
385 Md. 320 (2005)

FACTS

On September 8, 2003, the Circuit Court for Harford County awarded the maternal grandparents sole legal and physical custody of Patrick Michael McDermott. The Court found Ms. Dougherty "unfit", and although not finding Mr. McDermott an "unfit" parent, the Court found that his employment in the merchant marines, requiring him to spend month-long intervals at sea, constituted "exceptional circumstances" as that term was defined in Ross v. Hoffman, and the "best interest of the child" and need for a stable living situation thus warranted that custody be placed with the Doughertys. The Court of Special Appeals affirmed the lower court's decision in an unreported opinion on April 5, 2004. A Motion for Reconsideration was denied. The Court of Appeals granted Writ of Certiorari on August 25, 2004.

ISSUE

May the Court, after finding a natural parent fit, grant custody to third parties based on the parent's employment requiring them to be absent for long periods of time?

HOLDING AND RATIONALE

In a 113 page opinion the Court held "that in disputed custody cases where private third parties are attempting to gain custody of children from their natural parents. the trial court must first find that both natural parents are unfit to have custody of their children or that extraordinary circumstances exist which are significantly detrimental to the child remaining in the custody of the parent or parents, before a trial court should consider the `best interests of the child' standard as a means of deciding the dispute. We further hold that under circumstances in which there is no finding of parental unfitness, the requirements of a parent's employment, such that he is required to be away at sea, or otherwise appropriately absent from the State for a period of time and for which time he or she made appropriate arrangements for the care of the child, do not constitute 'extraordinary or exceptional circumstances' to support the awarding of custody to a third party."

After reviewing several cases in several states and discussing Supreme Court cases, the Court wrote, "Where the dispute is between a fit parent and a private third party however, both parties do not begin on equal footing in respect to rights to 'care, custody, and control' of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others. Generally, absent a constitutional statute, the nongovernmental third party has no rights, constitutional or otherwise, to raise someone else's child." The Court then went on to separate standards for custody determination into three categories. Finding themselves in the minority view, the Court clarified what they meant in *Shurupoff* when discussing *Hoffman.* The Court held, "We shall hold, as we indicated in the beginning of our opinion, that, generally, in private actions in which private third parties are attempting to gain custody of children of natural parents over the objection of the natural parents, it is necessary first to prove that the parent is unfit or that there are extraordinary circumstances posing serious detriment to the child, before the court may apply a 'best interest' standard. With this clarification, Maryland will be consistent with the majority view in this country." The Court concluded, -that the circuit court inappropriately found that the absences inherent in Mr. McDermott's job requirements constituted 'exceptional circumstances'.

In re Victoria C.
437 Md. 567 (2014)

In re Victoria C. addressed the question of whether an adult sibling has a right to see her minor siblings, over the objection of the custodial parent. Applying the standard set in *Koshko v. Haining,* 98 Md. 404, 921 A.2d 171 (2007), the Court of Appeals upheld the Court of Special Appeals' reversal of the decision of the Circuit Court for Carroll County allowing sibling visits. The appellate courts held that "*Koshko* applies to adult siblings seeking visitation with minor siblings." Thus, the adult sibling must make a threshold showing of either parental unfitness or exceptional circumstances to warrant consideration for visits over a parents' objection.

A critical factor in the Court's determination was the lack of evidence, expert or otherwise, that the minors suffered any negative effect as a result of the absence of visitation with their sister.

In the Court of Appeals, dissenting judges Adkins and Greene noted that the majority's opinion denies children who are removed from the family without fault of their own the right to maintain a relationship with their siblings.

Garg v. Garg,
393 Md. 225 (2006)

FACTS

The parties were born, raised and married in India. Parties lived in Massachusetts when mother became pregnant. In June 1995, Ms. Garg returned to India to stay with Mr. Garg's parents. On September 23, 2995, Chaitanya was born in India. During the spring of 2002, there

was significant family discord. Without notice to Mr. Garg, Ms. Garg moved to her parent's home with Chaitanya. On April 8, 2002, Mr. Garg filed a custody action in the Indore court seeking the return of Chaitanya. On May 24, 2002, Ms. Garg left with Chaitanya from India to the United States. On July 11, 2002, the Indore court assumed jurisdiction. On February 24, 2003, Ms. Garg filed an action in Baltimore County seeking a limited divorce, custody of Chaitanya, spousal and child support, and ancillary relief. Mr. Garg was then living in Connecticut. Mr. Garg moved to dismiss the entire action on the grounds that first, he had not been properly served with notice and secondly, the court did not have jurisdiction over the custody action because that jurisdiction lay with the court in India. On May 2, 2003 Ms. Garg asked the court to appoint independent counsel for Chaitanya. Ms. Garg's motion to appoint counsel was held in abeyance by the court until the issues of jurisdiction had been ruled upon. On September 23, 2003, the hearing on the jurisdictional issues was held. At no time during that hearing did Ms. Garg ask for a ruling on her motion to appoint counsel. After hearing testimony, the trial court dismissed the entire action keying on the criteria in the UCCJA for a Maryland court to exercise jurisdiction. Ms. Garg appealed to the Court of Special Appeals. The Court of Special Appeals determined that (1) the Circuit Court erred in dismissing the divorce action based on the case pending in the Indore court because the action in that court did not encompass a divorce, and (2) "fundamental fairness suggests" that Chaitanya "should have a lawyer to articulate his interest and to assist on the critical and complex issues that were determinative of his future." The appellate court vacated the entire judgment of the Circuit Court, including the award of expenses and attorneys' fees, and remanded for the court (1) to appoint counsel for the child, (2) to resolve the service of process issue, and (3) to revisit and resolve the jurisdictional issues under the UCCJEA.

ISSUE

Did the Court err in requiring further proceedings on the issue of the appointment of counsel for the child?

HOLDING AND RATIONALE

The Court ruled that the Court of Special Appeals erred in vacating the Circuit Court's judgment. The sole purpose of the hearing was to determine which court should consider and resolve the jurisdictional issues and thus held that it was not abuse of discretion to defer the motion to appoint counsel for the child until after the jurisdictional issue had been in fact decided. The Court said the statute "merely authorizes a court to appoint counsel in those kinds of cases; it does not *mandate* such an appointment." The decision whether to appoint independent counsel for the child is a discretionary. The issue of appointing counsel for Chaitanya was not properly raised by Ms. Garg and therefore, the Court of Appeals should not have addressed that issue. The case was remanded back to the Court of Special Appeals for it to resolve the issues raised by Ms. Garg.

Nagle v. Hooks,
296 Md. 123 (1983)

FACTS

There was a custody battle over the minor child of Mr. Nagle and Ms. Hooks. When the parties were divorced, custody of the child was awarded to the mother and Mr. Nagle appealed, which resulted in the remand of the matter for additional factual proceedings. At that time, the Chancellor supported a continuation of permanent custody with the mother. Mr. Nagle again appealed and the Court of Special Appeals affirmed the Chancellor's decree. At that hearing on Mr. Nagle's last petition, he attempted to have a psychiatrist (who had been seeing the child) testify and the Chancellor refused to allow the witness to testify regarding matters within the psychiatrist/patient privilege because Ms. Hooks had not given her consent to waive the privilege.

ISSUE

Should the Court appoint an attorney in custody cases to assert or waive the child's therapy privilege?

HOLDING AND RATIONALE

Yes, the best interest of the child was found to be the controlling factor and the appointment of an attorney to act as the guardian of the child for purposes of asserting or waiving the psychiatrist/patient privilege at trial was necessary. The Chancellor reasoned that both parents would have to waive the psychiatrist/patient privilege on behalf of the child in order for the psychiatrist to be able to testify. The court found that because Mr. Nagle had requested the Chancellor to appoint a guardian for the child and the Chancellor ultimately denied the request, the Court of Appeals found that the Chancellor erred in refusing to appoint a guardian to act for the child regarding the assertion or waiver of the psychiatrist/patient privilege. The court found that although the custodial parent could argue that he or she alone should qualify as a previously appointed guardian for purposes of asserting or waiving the privilege, the custodial parent has a conflict of interest in acting on behalf of the child.

Van Schaik v. Van Schaik,
90 Md.App. 725 (1992)

FACTS

In their separation and property settlement agreement, Mr. and Mrs. Van Schaik included an arrangement as to custody, visitation, and support of their minor son. It provided for joint legal custody, for the mother to be primary custodian and for reasonable visitation and support for the father. After the agreement had been filed with the court, and after receiving certain information brought to the court's attention, the court appointed an attorney for the child and ordered a hearing on "visitation and child's possessions." Both parties appeared at the hearing without counsel on the understanding that the hearing involved certain minor visitation personal property issues of the child. At the hearing, the court accepted a report submitted by the child's attorney, ordered that the report be sealed, and refused to allow the parents to see the report. The court then terminated the father's joint custody rights, ordered him to deliver his son's bike to Delaware, and ordered him to return $12.00 to his son. The father appealed, arguing that the court did not have the authority to appoint and make him pay for an attorney for his son, that he was entitled to see the report

submitted to the court, that termination of his custody rights based on the contents of the report constituted a due process violation, and that notice of a hearing on "visitation and child's possessions" was insufficient notice that the hearing would involve a custody decision.

ISSUES

May a trial court appoint an attorney for a minor child and make a parent pay the attorney's fees when a divorce is final and there is no dispute as to custody, visitation or support?

May an attorney appointed for the minor child initiate proceedings on behalf of the child with respect to personal property issues in dispute between parent and child?

May the court deny the parents access to a report prepared by the child's attorney and thereafter terminate a parent's custody rights based solely on the contents of that report?

HOLDING and RATIONALE

The Court held that the father had previously consented to the appointment of and payment for an attorney for his son with respect to psychological and orthodontic evaluation, and that he waived his right to object to such an appointment, which waiver extended to raising objections on appeal during the period of post-decree evaluations and recommendations. The Court also held that the child's attorney lacked authority under the statute to initiate a proceeding for the recovery of the child's personal property and that the court erred in ordering the father to deliver the bike and money to the child. The Court further held that the trial court had erred in apparently basing its decision to terminate the father's custody rights solely on the contents of the report and then withholding the report from the father. Such conduct prevented the father from cross-examining witnesses whose testimony related to the report. The Court further held that the parties had not been provided proper notice that matters relating to custody were to be the subject of the hearing at issue. The Court concluded that this lack of notice constituted a denial of due process and itself constituted prejudicial error.

McCallister v. McCallister
218 Md. 386 (2014)

McCallister provides a rare review of the work of a Best Interest Attorney (BIA) in custody litigation. Father was displeased with the BIA's position in the case. The Court of Special Appeals citied the *Maryland Guidelines for Practice for Court-Appointed Lawyers Representing Children in Cases Involving Child Custody or Child Access* and observed that

> If a parent believes (in good faith) that the BIA has injured the child through a breach of the standard of care, then he or she may assert a claim for negligence on the child's behalf. [citations omitted] . . . If, however, a parent merely claims that a BIA should be disqualified from representing the child because the parent disapproves of the BIA's representation, it is appropriate for courts to view the claim with some measure of skepticism. . .