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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Thomas McCarthy, Jr., Misc. Docket AG No. 72, September Term 2019, filed May 27, 2021. Opinion by Watts, J.

<https://www.mdcourts.gov/data/opinions/coa/2021/72a19ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed in the Court of Appeals a “Petition for Disciplinary or Remedial Action” against Thomas McCarthy, Jr., Respondent, charging him with violating Maryland Lawyers’ Rules of Professional Conduct (“MLRPC”) and Maryland Attorneys’ Rules of Professional Conduct (“MARPC”) 1.3 (Diligence), 1.4(a)(1) (Informing Client Regarding Informed Consent), 1.4(a)(2) (Keeping Client Reasonably Informed), 1.4(a)(4) (Consulting with Client About Limitation on Attorney’s Conduct), 1.4(b) (Explaining Matter to Client), 1.16(a)(1) (Terminating Representation), 5.5(a) (Unauthorized Practice of Law), 5.5(b)(2) (Misrepresenting that Attorney is Admitted), 8.1(b) (Failing to Respond to Lawful Demand for Information), 8.4(b) (Criminal Act), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct that is Prejudicial to Administration of Justice), and 8.4(a) (Violating the MLRPC or MARPC).

The Court appointed a hearing judge to hear the attorney discipline proceeding. In the disciplinary proceeding, Bar Counsel filed a Notice of Service of Discovery Material, stating that, on August 1, 2020, through a process server, Bar Counsel had served on McCarthy interrogatories, a request for production of documents, and a request for admission of facts and genuineness of documents. Under the Maryland Rules, responses to the discovery requests were due on August 31, 2020, thirty days after the service of the discovery requests. In the request for admissions, Bar Counsel asked McCarthy to admit the genuineness of twenty-eight attached exhibits and to admit to the facts set forth in sixty-nine numbered paragraphs. On September 4, 2020—four days after responses to the discovery requests were due—Bar Counsel e-mailed McCarthy, stating that responses to the discovery requests had not been received and asking when McCarthy would provide them. McCarthy did not respond. In a letter dated September

22, 2020, Bar Counsel advised McCarthy that unless he provided responses to the discovery requests by September 30, 2020, sanctions would be requested. On September 30, 2020, McCarthy e-mailed Bar Counsel, stating that he would try to have the responses completed within a few days. On October 1, 2020, Bar Counsel e-mailed McCarthy, stating that Bar Counsel would move for sanctions because responses to the discovery requests were more than thirty days past due and would consider withdrawing the motion for sanctions if and when McCarthy provided responses to the discovery requests.

On October 5, 2020, McCarthy provided Bar Counsel with a response to the interrogatories and a response to the request for production. In each response, under the heading “General Objection[.]” McCarthy alleged that Bar Counsel had failed to comply with service under Maryland Rule 1-321(a), which governs service of papers filed after the original pleading, and that his response was provided without waiving the objection. McCarthy contended that service of discovery requests via an “external media drive” failed to comply with Maryland Rule 1-321(a). On October 22, 2020, Bar Counsel e-mailed McCarthy concerning some information contained in the responses to the interrogatories and request for production, noted that McCarthy still had not provided a response to the request for admissions, and stated that Bar Counsel would move for sanctions and move to shorten time to respond unless McCarthy responded by October 26, 2020.

On November 4, 2020, Bar Counsel filed with the hearing judge a motion for sanctions and a motion to shorten the time in which McCarthy could respond to the motion for sanctions to within five days of an order granting the motion to shorten time. In the motion for sanctions, Bar Counsel advised that McCarthy had failed to provide any of the discovery materials requested in Bar Counsel’s October 22, 2020 e-mail. Bar Counsel requested that the hearing judge impose sanctions in the form of not allowing McCarthy to present any documents at the disciplinary hearing, not allowing him to testify except as to mitigation, and otherwise precluding him from calling witnesses. Alternatively, Bar Counsel requested that if the hearing judge declined to impose sanctions, the hearing judge issue an order compelling McCarthy to provide the requested discovery materials within five days of the order. In addition, Bar Counsel requested that the hearing judge order that the facts and genuineness of the documents referred to in the request for admissions be deemed admitted pursuant to Maryland Rule 2-424. McCarthy failed to file a response or opposition to the motion for sanctions. On November 6, 2020, McCarthy provided Bar Counsel with a response to the request for admissions.

On November 24, 2020, the hearing judge issued a memorandum opinion and order granting the motion for sanctions. The hearing judge found that McCarthy “failed, after proper service, to timely or properly respond to discovery requests[.]” The hearing judge ordered that the facts and genuineness of the documents referred to in the request for admission were deemed admitted. The hearing judge precluded McCarthy from presenting any evidence that contradicted the facts or the documents referred to in the request for admissions or that contradicted the averments in the Petition for Disciplinary or Remedial Action. The hearing judge allowed McCarthy to testify only about mitigation and precluded him from calling witnesses except as to mitigation.

On November 30, 2020—the date on which the disciplinary hearing was scheduled to occur—before 8:00 a.m., McCarthy filed with the hearing judge “Respondent’s Verified Motion to Reconsider and to Vacate Order of November 24 2020 Imposing Sanctions” and “Respondent’s Verified Motion to Strike Petitioner’s Notice of Discovery Materials[.]” In both motions, McCarthy contended that service of the discovery requests via a “zip drive” or “thumb drive” failed to comply with Maryland Rule 1-321(a), which he argued requires service of paper copies. In the motion for reconsideration, McCarthy argued that, because Bar Counsel failed to properly serve the request for admissions, the hearing judge was not permitted to order that the facts and genuineness of the documents referred to in the request for admissions were deemed admitted. With respect to the interrogatories and request for production of documents, in addition to raising the issue concerning service, McCarthy argued that, under Maryland Rule 2-432(a), which governs motions for sanctions, Bar Counsel was not entitled to seek sanctions because the hearing judge had not issued an order to compel and he had responded to the interrogatories and the request for production. Later that morning, when the hearing began, McCarthy requested that the hearing judge address the motion for reconsideration. The hearing judge denied the motion for reconsideration. The disciplinary hearing proceeded. Bar Counsel’s case consisted of offering into evidence a document that was approximately 900 pages long, and that was comprised of the request for admissions and the twenty-eight attached exhibits. Over McCarthy’s objection, the hearing judge admitted the document into evidence. The only witness at the evidentiary hearing was McCarthy, who testified about mitigation.

On January 20, 2021, the hearing judge filed in the Court of Appeals an opinion including findings of fact and conclusions of law, concluding that McCarthy had violated MARPC 1.3, 1.4(a), 1.4(b), 1.16(a)(1), 5.5(a), 5.5(b)(2), 8.1(b), 8.4(b), 8.4(c), 8.4(d), and 8.4(a) in connection with his representation of View Point Medical Systems, LLC (“View Point”), a company owned by Jonathan B. Radding, which was the appellant in an appeal before the United States Court of Appeals for the Fourth Circuit and in connection with his representation of Radding regarding a foreclosure matter.

On February 9, 2021, in the Court of Appeals, McCarthy filed “Respondent’s Exceptions to Circuit Court’s Findings of Fact and Conclusion[s] of Law[.]” In his exceptions, McCarthy stated that he excepted to the hearing judge’s findings and conclusions because he was denied the opportunity to present a defense. McCarthy requested that the Court designate a new hearing judge and order a new evidentiary hearing, at which he would be permitted to present evidence in defense of Bar Counsel’s allegations. McCarthy contended that, under Maryland Rule 2-432(a), the hearing judge erred in granting the motion for sanctions because Bar Counsel did not file a motion to compel and because he had already responded to the interrogatories and request for production. McCarthy argued that the hearing judge erred in ordering that the facts and genuineness of the documents referred to in the request for admissions were deemed admitted and in granting the motion for sanctions because Bar Counsel failed to provide service with paper copies of the discovery requests, which he contends is required by Maryland Rule 1-321(a). On April 9, 2021, the Court heard oral argument.

Held:

The Court of Appeals denied McCarthy's request for a new evidentiary hearing. The Court of Appeals upheld the hearing judge's conclusions of law, except that, to the extent that the hearing judge determined that McCarthy violated MARPC 1.4(a)(3), the Court did not sustain the violation as Bar Counsel did not charge a violation of the subsection in the Petition for Disciplinary or Remedial Action.

The Court concluded that McCarthy's contention that the hearing judge erred in granting the motion for sanctions in the absence of Bar Counsel having first filed a motion to compel did not warrant a new evidentiary hearing because McCarthy waived or forfeited the contention and because the hearing judge's grant of the motion for sanctions did not result in prejudice. As to waiver or forfeiture, McCarthy failed to file a response or opposition to the motion for sanctions at any time—whether by the due date for filing a response or before the hearing judge granted the motion for sanctions on November 24, 2020. Moreover, McCarthy did not raise with the hearing judge the necessity of a motion to compel until he filed the motion for reconsideration on November 30, 2020, the day of the disciplinary hearing.

In addition to waiver or forfeiture, the Court determined that the hearing judge's grant of the motion for sanctions did not result in prejudice to McCarthy, given that the facts and genuineness of the documents referred to in the request for admissions were automatically deemed admitted pursuant to Maryland Rule 2-424(b) once McCarthy missed the deadline for responding to the request. Any evidence that McCarthy would have presented at the disciplinary hearing but for the hearing judge's grant of the motion for sanctions would not have negated the facts set forth in the request for admissions that were deemed admitted by operation of Maryland Rule 2-424(b).

The Court concluded that, similarly, McCarthy was not entitled to a new evidentiary hearing based on his contention that the hearing judge erred in ordering that the matters referred to in the request for admissions were deemed admitted and in granting the motion for sanctions because Bar Counsel failed to effect service as required by Maryland Rule 1-321(a), i.e., Bar Counsel provided service with a thumb drive instead of paper copies of the request for admissions and other discovery requests. As with the argument regarding the need for a motion to compel, McCarthy waived or forfeited the assertion by failing to timely raise it before the hearing judge. McCarthy failed to file a motion challenging the sufficiency of the service of the request for admissions or the discovery requests for that matter at any time in the thirty days between service on August 1, 2020 and the deadline for responding to the request for admissions and other discovery requests. As such, the facts and genuineness of the documents referred to in the request for admissions were automatically deemed admitted by operation of Maryland Rule 2-424(b) after McCarthy's failure to timely respond on August 31, 2020. Under the plain language of Maryland Rule 2-424(b), each matter referred to in a request for admissions is automatically deemed admitted where the party to whom the request is directed misses or ignores the deadline for responding to the request. There is no need for the other party to seek, or for the trial court to issue, an order that the matters referred to in a request for admissions are deemed admitted. Maryland Rule 2-432, which governs motions to compel and motions for sanctions, and Maryland Rule 2-433, which governs sanctions themselves, do not mention admissions, because

no motion for sanctions or court order is necessary for matters referred to in a request for admissions to be deemed admitted.

The Court determined that, as a practical matter, McCarthy had the opportunity to view the request for admissions as soon as the thumb drive was served on him on August 1, 2020. To be sure, in the responses to the interrogatories and the request for production, in the motions for reconsideration and to strike, and at oral argument, McCarthy indicated that he was unwilling to plug the thumb drive into his computer. McCarthy, however, always had the option of doing so, which would have allowed him to immediately view the request for admissions. As the hearing judge pointed out when addressing the motion for reconsideration at the beginning of the disciplinary hearing, McCarthy could have plugged the thumb drive into nearly any computer, and it should have taken him minimal time to view the contents of the thumb drive. Indeed, McCarthy responded to the request for admissions on November 6, 2020, which demonstrates that he was plainly able to access the request for admissions in the form in which Bar Counsel provided it.

The Court concluded that, with regard to both of the preliminary issues that he raised, *i.e.*, the need for a motion to compel and sufficiency of service, McCarthy sat on his hands. Before the hearing judge, he failed to take any timely action whatsoever as to either matter. As such, there was no basis for determining an abuse of discretion on the hearing judge's part in denying the motion for reconsideration.

The Court concluded that McCarthy violated MARPC 1.3 by failing to file an opening brief or an appendix on View Point's behalf by the initial deadline, failing to file an opening brief, an appendix, or a motion to extend time on View Point's behalf by a later deadline, and failing to conscientiously communicate with Radding about the appeal. The Court concluded that McCarthy violated MARPC 1.4(a) and 1.4(b) by not informing Radding of his failures to meet filing deadlines, misstating to Radding that he was drafting a filing a brief and record extract, and knowingly and intentionally misrepresenting to Radding that he was working on reinstating the appeal. The Court stated that knowing of McCarthy's failure to meet filing deadlines and misrepresentations necessarily would have assisted Radding in making informed decisions about the representation, including whether to termination McCarthy's representation of View Point. The Court concluded that McCarthy violated MARPC 1.4(a)(4) by failing to inform Radding of his suspension from the practice of law in Maryland for nonpayment of the annual assessment to the Client Protection Fund.

The Court concluded that McCarthy violated MARPC 1.16(a)(1), 5.5(a), 5.5(b)(2), and 8.4(b). The record demonstrated that McCarthy was suspended from the practice of law in Maryland on March 24, 2016 for nonpayment of the Client Protection Fund's annual assessment. On February 16, 2017, nearly a year later, McCarthy was reinstated to the practice of law in Maryland. The Court determined that McCarthy violated MARPC 1.16(a)(1) by continuing to provide legal advice to Radding and contacting a representative of a mortgage servicing company as Radding's attorney while he was suspended from the practice of law in Maryland for nonpayment of the annual assessment to the Client Protection Fund. Likewise, McCarthy violated MARPC 5.5(a) and 5.5(b)(2) by engaging in the unauthorized practice of law and

holding himself out to be Radding's attorney when he represented and provided legal advice to Radding in the foreclosure case and contacted a mortgage servicer on Radding's behalf while he was suspended from the practice of law in Maryland. Given that Md. Code Ann., Bus. Occ. & Prof. (1989, 2018 Repl. Vol.) ("BOP") § 10-601(a) prohibits practicing law in Maryland without being admitted to the Bar of Maryland, it is evident that by continuing to provide legal advice to Radding and taking action as his attorney, *i.e.*, practicing law, after his suspension, McCarthy violated BOP § 10-601(a) (which is a misdemeanor offense), and, as the hearing judge found, also violated MARPC 8.4(b).

The Court concluded that McCarthy violated MARPC 8.1(b) because, after Radding caused a complaint to be filed against McCarthy, McCarthy failed to respond to requests for information that Bar Counsel made in July 2018, September 2018, October 2018, and November 2018. Additionally, other than confirming that he had received Bar Counsel's letter, McCarthy failed to respond to a request for information that Bar Counsel made in May 2019. Although McCarthy provided Bar Counsel with some information in the form of a partial response in January 2019 and a chronology document that was not responsive to Bar Counsel's requests in April 2019, he never provided Bar Counsel with a complete response to Bar Counsel's questions concerning his representation of View Point and Radding.

The Court concluded that McCarthy violated MARPC 8.4(c) by knowingly and intentionally misrepresenting to Radding that he was "working on reinstating the case and modified briefing schedule." McCarthy's statement to Radding was intentionally dishonest; he plainly failed to draft a motion to reinstate the appeal. Text message exchanges between McCarthy and Radding confirmed that, despite advising Radding that he was working on having the appeal reinstated, this was a knowing and intentional misrepresentation as McCarthy failed to draft or file a motion to reinstate the appeal or take any measures to safeguard View Point's claim even with Radding's continual inquiries. The Court concluded that McCarthy violated MARPC 8.4(d) because, among other things, McCarthy's failures of diligence and communication, as well as his knowing and intentional misrepresentation to Radding, would certainly negatively impact the perception of the legal profession of a reasonable member of the public. The Court concluded that McCarthy violated MARPC 8.4(a) because he violated MARPC 1.3, 1.4(a), 1.4(b), 1.16(a)(1), 5.5(a), 5.5(b)(2), 8.1(b), 8.4(b), 8.4(c), and 8.4(d).

The Court concluded that McCarthy's misconduct caused harm. Because of McCarthy's failure to meet filing deadlines, the Fourth Circuit dismissed View Point's appeal. The dismissal effectively eliminated any chance of reviving View Point's claim for breach of contract, as to which the United States District Court for the District of Maryland had granted summary judgment in the defendant's favor.

The hearing judge found, and the Court agreed, that McCarthy's misconduct was aggravated by seven factors. First, McCarthy had a dishonest or selfish motive, given that he attempted to conceal his failure to make any effort to have the appeal reinstated by knowingly and intentionally misrepresenting to Radding that he was working on reinstating the appeal. Second and third, McCarthy engaged in a pattern of misconduct and multiple violations of the MARPC, including misconduct while representing View Point and Radding and during Bar Counsel's

investigation. Fourth, McCarthy engaged in bad faith obstruction of the attorney discipline proceeding, as shown by his knowing and intentional failure to comply with Bar Counsel's many requests for information during the investigation of Radding's complaint. Fifth, McCarthy refused to acknowledge the wrongful nature of his misconduct and instead attempted to blame Radding for his own failures. Sixth, Radding, who had incurred a brain injury affecting his memory and ability to communicate verbally, which was known to McCarthy, was a vulnerable victim. Seventh, McCarthy had substantial experience in the practice of law, given that he had been a member of the Bar of Maryland for approximately twenty-seven years at the time his misconduct began.

The hearing judge determined that McCarthy's misconduct is mitigated by only two factors: lack of prior attorney discipline and good character and reputation. The hearing judge found that McCarthy failed to prove that his misconduct was mitigated by personal or emotional problems or that he was unlikely to repeat his misconduct, and McCarthy has not excepted to the hearing judge's determination.

The Court concluded that the appropriate sanction for McCarthy's misconduct was disbarment. With the self-serving purpose of concealing his failure to make any effort to have View Point's appeal reinstated after it was dismissed because he failed to file an opening brief, an appendix, or a motion to extend time, McCarthy knowingly and intentionally misrepresented to Radding that he was working on reinstating the appeal. McCarthy engaged in intentional dishonesty absent compelling extenuating circumstances that are generally necessary to preclude disbarment, and, indeed, absent any significant mitigating factors. Making matters even worse, in addition to engaging in intentional dishonesty, McCarthy failed to meet filing deadlines which resulted in his client's case being dismissed. McCarthy also failed to adequately communicate with Radding, engaged in the unauthorized practice of law, and knowingly and intentionally failed to provide timely and complete responses to Bar Counsel's numerous requests for information and documentation. McCarthy's misconduct was aggravated by a dishonest or selfish motive, bad faith obstruction of the attorney discipline proceeding, and other factors. Together, all of the circumstances made clear that disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Alisha Ann Portillo, Misc. Docket AG No. 22, September Term 2020, filed May 27, 2021. Opinion by Biran, J.

<https://mdcourts.gov/data/opinions/coa/2021/22a20ag.pdf>

ATTORNEY MISCONDUCT – DISCIPLINE – DISBARMENT

Facts:

On July 15, 2020, Petitioner, the Attorney Grievance Commission of Maryland, acting through Bar Counsel, filed a Petition for Disciplinary or Remedial Action against Respondent, Alisha Ann Portillo, in connection with two complaints filed by former clients concerning their immigration matters. Petitioner alleged that Ms. Portillo violated Maryland Attorneys’ Rules of Professional Conduct (“MARPC”) 19-301.1 (Competence), 19-301.3 (Diligence), 19-301.4(a) and (b) (Communication), 19-303.3(a)(1) (Candor Toward the Tribunal), 19-308.1(a) (Bar Admission and Disciplinary Matters), and 19-308.4(a), (c), and (d) (Misconduct).

On July 17, 2020, the Court of Appeals designated the Honorable Joan E. Ryon of the Circuit Court for Montgomery County to serve as the hearing judge. The hearing judge entered an order of default on October 21, 2020, after Ms. Portillo failed to comply with discovery requests and to respond to the charges filed against her. Ms. Portillo did not move to vacate the order of default.

On November 25, 2020, the hearing judge conducted an evidentiary hearing remotely via Zoom for Government. Bar Counsel appeared, but Ms. Portillo did not. Under Maryland Rule 2-424(b), the matters set forth in Petitioner’s request for admissions of facts and genuineness of documents were deemed admitted, and the hearing judge received those admissions and documents in evidence. On January 13, 2021, the hearing judge issued findings of fact and conclusions of law. The hearing judge concluded that Ms. Portillo committed all the violations alleged in the Petition for Disciplinary or Remedial Action. Neither party filed exceptions.

Ms. Portillo’s violations arose from the improper advice she gave to the clients, suggesting that they could decide not to appear for their individual hearings and that they would likely be able to stay in the United States longer if they failed to appear. At the clients’ individual hearings, Ms. Portillo made false statements to the presiding immigration judges about the clients’ whereabouts and her firm’s last contacts with them. Ms. Portillo also provided false and misleading information to Bar Counsel in her responses to the complaints filed by the clients. Ms. Portillo’s deficient advice resulted in the immigration court deeming the clients’ asylum applications abandoned and ordering them removed to El Salvador.

Held: Disbarred.

On March 10, 2021, the Court of Appeals granted Bar Counsel's uncontested request to waive oral argument and to consider the case on the papers. On March 26, 2021, the Court issued a *per curiam* order disbaring Ms. Portillo. The Court later filed an opinion in which it accepted the factual findings of the circuit court and agreed with the hearing judge's recommended conclusions of law that Ms. Portillo violated MARPC 19-301.1 (Competence), 19-301.4(a) and (b) (Communication), 19-303.3(a)(1) (Candor Toward the Tribunal), 19-308.1(a) (Bar Admission and Disciplinary Matters), and 19-308.4(a), (c), and (d) (Misconduct). The Court concluded, however, that Ms. Portillo did not violate MARPC 19-301.3 (Diligence).

The Court also agreed with the hearing judge's assessment of five aggravating factors: (1) a pattern of misconduct; (2) multiple offenses; (3) bad faith obstruction of the disciplinary proceedings; (4) refusal to acknowledge the wrongful nature of the conduct; and (5) vulnerability of the victims.

The Court held that disbarment is the appropriate sanction for Ms. Portillo's numerous and severe violations of the MARPC.

Attorney Grievance Commission of Maryland v. Russell A. Neverdon, Sr., Misc. Docket AG No. 12, September Term 2020, filed May 28, 2021. Opinion by Watts, J.

<https://www.mdcourts.gov/data/opinions/coa/2021/12a20ag.pdf>

ATTORNEY DISCIPLINE – SANCTIONS – SIX-MONTH SUSPENSION

Facts:

On behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed in the Court of Appeals a “Petition for Disciplinary or Remedial Action” against Russell A. Neverdon, Sr., Respondent, charging him with violating Maryland Attorneys’ Rules of Professional Conduct (“MARPC”) 1.1 (Competence), 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Attorney), 1.3 (Diligence), 1.4 (Communication), 1.5(b) and (c) (Fees), 1.7 (Conflict of Interest), 1.8(b) (Conflict of Interest; Current Clients), 1.15(a), (d), and (e) (Safekeeping Property), 1.16(a)(1) (Declining or Terminating Representation), 3.3(a)(1) (Candor Toward the Tribunal), 5.3(b) and (c) (Responsibilities Regarding Non-Attorney Assistants), 5.5(a) (Unauthorized Practice of Law), 8.1(a) (Bar Admission and Disciplinary Matters), 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation), 8.4(d) (Conduct that is Prejudicial to the Administration of Justice), and 8.4(a) (Violating the MARPC) in connection with his representation of relatives of a person who was struck and killed by a motor vehicle in a personal injury (survival action) and an estate matter that arose as a result of the individual’s death.

The Court appointed a hearing judge, who made findings of fact and conclusions of law. Among other things, the hearing judge made the following findings of fact. From April 2015 to March 2018, Neverdon worked full time as the Director of Special Services in the Office of the Secretary of the Department of Public Safety and Correctional Services (“DPSCS”). While holding the position, Neverdon maintained a law practice limited to handling civil cases and already existing criminal cases. While working for DPSCS, Neverdon handled approximately sixteen to twenty cases per month in his law practice, the Law Office of Russell A. Neverdon, Sr., LLC. Neverdon employed Mr. Scherron J. Lee as a paralegal in his law office. Lee is not licensed to practice law in Maryland.

On January 8, 2017, Rodney C. Chase, who was working as a traffic flagger at a road construction site, was struck and killed by a vehicle driven by Jason Disney. Chase had no immediate family and died intestate. Prior to his death, Chase had received treatment for drug dependency that had been paid for by the Maryland Department of Health (“MDH”). Chase was survived by four cousins: Marjorie Purvey, Michael Willingham, Russell Willingham, and Julia Chance (collectively, “the Clients”). Michael arranged for a funeral director to claim Chase’s body and funeral expenses were paid for by Chesapeake Employers’ Insurance Company (“CEICO”), Chase’s employer’s workers’ compensation insurer. On or about January 26, 2017,

Neverdon met with Purvey, Michael, and Russell to discuss possibly representing them. At the end of the meeting, the Clients agreed to retain Neverdon in connection with Chase's death.

The hearing judge ultimately concluded that Neverdon had violated MARPC 1.1, 1.2(a), 1.3, 1.4, 1.5, 1.7, 1.15(a), 1.15(d), 1.16(a), 1.16(d), 3.3(a)(1), 5.3(b), 5.5(a), 8.1(a), 8.4(c), and 8.4(a), but had not violated MARPC 1.15(e), 5.3(c), or 8.4(d) in connection with his representation of the Clients.

Held:

Suspended from the practice of law in Maryland for six months, with the condition that, upon reinstatement to the practice of law in Maryland, Neverdon engage an attorney monitor for a period of one year, with the attorney monitor to be approved by Bar Counsel and paid for by Neverdon.

The Court overruled Neverdon's five exceptions to the hearing judge's findings of fact.

The Court concluded that, among other things, Neverdon violated MARPC 1.1 and 1.3 by failing to negotiate a reduction or waiver of the MDH lien. Neverdon was responsible for representing the Clients with respect to the estate matter as well as the survival action and Neverdon had advised the Clients that he would attempt to negotiate a reduction of the MDH lien. Neverdon violated MARPC 1.1 and 1.3 by failing to adequately investigate the survival action and negotiate the CEICO lien. Overall, Neverdon failed to take necessary and basic steps during the course of the representation to pursue the Clients' case. Neverdon violated MARPC 1.1 and 1.3 by sending two letters to the Clients with incorrect information and violated MARPC 1.1 by failing to recognize a conflict of interest that developed between the Clients. The Court concluded that Neverdon violated MARPC 1.2(a) by not abiding by the Clients' desire to not settle the survival action and the personal representatives' refusal to sign a release and instead proceeding with a course of action meant to coerce the Clients into settling, including having a letter sent to the Clients containing inaccurate legal information.

The Court concluded that Neverdon violated MARPC 1.4(a)(2) and 1.4(b) by failing to inform the Clients concerning the status of his investigation of the case at the time that a settlement offer was presented, providing incorrect legal information to the Clients in two letters, and failing to advise the Clients about how to handle the pending liens. With this conduct, Neverdon did not keep the Clients reasonably informed about the status of the case or provide information that would assist the Clients in making informed decisions about the case. Knowing where the investigation of the case stood and having accurate legal information about the potential settlement of the case would have been necessary for the Clients to make an informed decision about whether to accept the settlement offer.

The Court declined to sustain the hearing judge's conclusion of a violation of MARPC 1.5(a) as Neverdon was not charged with violating the subsection. There was no indication that the

hearing found a violation of MARPC 1.5(b) or (c), the subsections with which Neverdon was charged. Hence, there was no violation of MARPC 1.5 that was sustained.

The Court concluded that Neverdon violated MARPC 1.7, as it was plain that a conflict of interest developed, at the latest, when Michael signed the release in pursuit of settlement and Purvey refused to sign the release. At that point, the Clients' interests were directly adverse with respect to management of the release and settlement. At the time, Neverdon's representation of Purvey would have involved advising her with respect to whether she could or should in fact refuse to accept the settlement and not sign the release; in contrast, Neverdon's representation of Michael involved Michael's desire to have the case settled as soon as possible. Although the conflict of interest existed, notwithstanding the conflict, Neverdon could have proceeded under MARPC 1.7(b) to obtain each Client's informed consent, confirmed in writing if he believed he was able to provide competent and diligent representation to each Client. Neverdon failed to do so. In addition, as the hearing judge concluded, undoubtedly a conflict of interest existed at the time Neverdon filed the emergency petition to remove Purvey as a co-personal representative.

The Court declined to disturb the hearing judge's conclusion that Neverdon did not violate MARPC 1.15(e). Neverdon provided two explanations as to why his conduct did not violate MARPC 1.15(e)—that Purvey did not cash the settlement check and that disbursement of the check to Purvey to deposit in an estate account was in accord with rules of the Orphans' Court. The Court no credence to Neverdon's first explanation that Purvey's failure to cash the check alone negates a violation of MARPC 1.15(e). The circumstance that Purvey did not cash the check did not negate Neverdon's conduct in releasing the funds to Purvey for Purvey to make use of if she chose to despite the lienholders' interest in the funds. It is the second part of Neverdon's explanation—his un rebutted testimony that, in an Orphans' Court case, where there are lienholders, settlement funds should be placed in an estate account and disbursed to lienholders from the estate account—that caused the Court not to sustain Bar Counsel's exception. In his testimony, Bar Counsel's expert raised no concern about the settlement funds potentially going into an estate account, even though there were liens from MDH and CEICO, of which he was aware. MARPC 1.15(e) requires an attorney to not distribute portions of funds/property that are in dispute, but to the extent that Neverdon gave uncontradicted testimony that the settlement funds, including any amounts due to the lienholders, should have been placed in an estate account and Bar Counsel's expert witness's testimony appears not to gainsay this, the Court declined to overturn the hearing judge's conclusion that Neverdon did not violate MARPC 1.15(e). On the other hand, the Court concluded that Neverdon violated MARPC 1.15(a) and (d). The record was clear that Neverdon did not produce a copy of the check that he wrote to himself for his \$10,000 fee and he did not produce records of any notes that allegedly were made in the client file with respect to the receipt or disbursal of funds in the case. The record was also clear that Neverdon did not notify either of the lienholders about the settlement. In other words, he did not provide the lienholders with notice of receipt of the settlement funds.

The Court concluded that Neverdon's continued representation, without withdrawal, of the Clients despite the conflict of interest, in violation of MARPC 1.7, constituted a violation of MARPC 1.16(a)(1).

The Court determined that, to the extent that the hearing judge concluded that Neverdon made false statements in a letter to Bar Counsel, while the conduct may have potentially violated MARPC 8.1(a) and 8.4(c), the conduct would not violate MARPC 3.3(a)(1) as MARPC 3.3(a)(1) concerns making or failing to correct false statements of material fact made to a tribunal. Similarly, to the extent that the hearing judge concluded that Neverdon violated MARPC 3.3(a)(1) and MARPC 8.4(c) by making false statements while testifying at the disciplinary hearing, the Court did not sustain the violations. The Court overruled Bar Counsel's exception to the hearing judge's conclusion that Neverdon "should not be held liable" for the forgery of Purvey's signature on an Information Report filed with the Orphans' Court, i.e., that Neverdon did not violate MARPC 3.3(a)(1) or 8.4(c) with respect to the forged signature. The Court stated that, in the conclusions of law, the hearing judge carefully summarized the relevant testimony and concluded that Purvey's signature was, indeed, false but that Neverdon could not be held responsible for the forgery, which was done by Lee.

The Court concluded that Neverdon violated MARPC 5.3(b), as it was clear that he did not adequately supervise Lee and did not ensure that Lee's conduct was compatible with an attorney's professional obligations. Among other things, as determined by the hearing judge, Lee was authorized to issue demand letters and negotiate with insurance companies and lienholders, and Lee was authorized to meet with the Clients at times when legal advice "was imperative," including with respect to the signing of the release. Lee issued a demand letter under his signature without knowing the policy limit amount. Lee was responsible for meeting with Purvey and Michael in an effort to have the release signed, at a time when the need to provide legal advice could have been anticipated, and Lee would have had firsthand knowledge of the conflict of interest that arose between the two, but in the absence of proper supervision from Neverdon failed to recognize it. Lee sent two letters containing incorrect legal advice to the Clients. And, of course, Lee forged Purvey's signature on the Information Report. The hearing judge concluded that Lee had permission to sign Neverdon's name to letters and pleadings and there was very little time in which Neverdon and Lee were even in the office at the same time. All of this led the Court to determine that clear and convincing evidence supported the hearing judge's conclusion that Neverdon violated MARPC 5.3(b) by delegating broad authority to Lee without ensuring that Lee's conduct comported with required ethical standards.

The Court concluded that Neverdon assisted Lee in the unauthorized practice of law in violation of MARPC 5.5(a). The evidence demonstrated that Neverdon not only assisted Lee in the unauthorized practice of law but also put Lee in a position to practice law in his absence.

The Court determined that the hearing judge's conclusion that Neverdon violated MARPC 8.1(a) with respect to two statements made in a letter to Bar Counsel was not supported by clear and convincing evidence. There was not clear and convincing evidence that Neverdon knowingly made a false statement of material fact where, in one instance, he appeared to give an opinion, and, in the second instance, he made an obvious misstatement of fact to Bar Counsel. The Court concluded that Neverdon violated MARPC 8.4(d) in a variety of ways, including, among other things, allowing Lee to run his law office virtually unsupervised and to engage in the unauthorized practice of law, failing to maintain adequate communication with the Clients, and failing to recognize that a conflict of interest between the Clients had developed. The Court

concluded that Neverdon violated MARPC 8.4(a) because Neverdon violated MARPC 1.1, 1.2(a), 1.3, 1.4(a)(2) and (b), 1.7, 1.15(a) and (d), 1.16(a)(1), 5.3(b), 5.5(a), and 8.4(d).

The Court determined that Neverdon's misconduct was aggravated by substantial experience in the practice of law, prior attorney discipline, and multiple violations of the MARPC. The Court sustained Neverdon's exceptions to the hearing judge's findings of the aggravating factors of submission of false evidence during the disciplinary process, refusal to acknowledge the wrongful nature of his conduct, indifference to making restitution. The Court overruled Bar Counsel's exception to the hearing judge's failure to find as an aggravating factor that Purvey was a vulnerable victim. The Court agreed with the hearing judge's determination that no mitigating factors applied.

The Court concluded that the appropriate sanction for Neverdon's misconduct was a suspension from the practice of law in Maryland for six months, and that his reinstatement be conditioned upon the engagement of an attorney monitor for a period of one year following the date of reinstatement to ensure that he practices law in accordance with all applicable rules and regulations. The monitor must be approved by Bar Counsel and shall be engaged at Neverdon's expense. The Court explained that Neverdon violated numerous MARPC, and that, but for the circumstance that the case did not involve intentional dishonesty or knowingly making false statements of material fact in violation of MARPC 3.3(a)(1), 8.1(a), or 8.4(c), Bar Counsel's recommendation of an indefinite suspension from the practice of law would have been warranted.

The Court concluded that, even in the absence of intentional dishonesty and knowingly made false statements, the circumstances of Neverdon's misconduct warranted the sanction of a suspension sufficient to deter other attorneys from engaging in similar misconduct and to protect the public. The Court explained that the Clients entrusted an estate matter to Neverdon at a time when they had incurred the loss of a loved one and relied upon him to handle the case appropriately. Neverdon allowed the matter to be handled, for the most part, by a non-attorney assistant and did not give the matter competent or diligent attention. The Court determined that, given the presence of the aggravating factors of substantial experience in the practice of law, multiple violations, and prior attorney discipline in the form of a reprimand by the Commission and the lack of mitigating factors, a suspension from the practice of law for a period of six months with the condition of engagement of a monitor upon reinstatement was the appropriate disposition.

Nationwide Property & Casualty Insurance Company, et al. v. Selective Way Insurance Company, No. 1, September Term 2020, filed April 1, 2021. Opinion by Getty, J.

<https://mdcourts.gov/data/opinions/coa/2021/1a20.pdf>

CIVIL PROCEDURE – PREJUDGMENT INTEREST – DEFENSE COSTS

Facts:

The Highpointe Business Trust undertook a large construction project in 2001 to build the Highpointe Apartments, in Hunt Valley, Maryland. They hired Questar Builders, Inc. (“Questar”) as the general contractor for the project, and Questar hired numerous subcontractors. Each subcontract required the subcontractor to maintain commercial general liability insurance and to name Questar as an “additional insured” on the policy.

Four of Questar’s subcontractors purchased commercial general liability insurance from Selective Way Insurance Company (“Selective Way”), and each of the policies procured from Selective Way contained provisions promising to indemnify and defend the named insureds against damages arising out of claims covered by the policies. Other provisions in the policies extended this coverage to an additional party if a named insured entered into a written contract promising to provide insurance for that additional party. Taken together, these subcontracts and insurance policies required Selective Way to indemnify and defend Questar as an additional insured for claims arising out of the work performed on the Highpointe Apartments by the four subcontractors.

Construction on the Highpointe Apartments was completed in early 2004. Within two and one-half years, extensive construction defects became evident as water entry repeatedly occurred through exterior walls, interior walls, the roof, and windows.

In 2006, Highpointe Business Trust sued Questar and others alleging defective construction of the apartment complex and seeking to recover \$4.5 million for resulting property damage. Questar’s own liability insurers, Nationwide Property and Casualty Insurance Company and Nationwide Mutual Insurance Company (collectively, “Nationwide”) paid for separate defense counsel for Questar.

In 2008, Nationwide filed a declaratory judgment action in the Circuit Court for Baltimore County seeking a declaration that Selective Way was obligated to defend Questar in the construction defect lawsuit by virtue of Questar’s status as an additional insured under the Selective Way policies and seeking reimbursement from Selective Way for all defense costs incurred in representing Questar. Selective Way denied any duty to defend Questar. Shortly thereafter, the underlying construction defect lawsuit was settled.

In the declaratory judgment action, Nationwide moved for summary judgment against twelve subcontractors' insurers, including Selective Way, seeking to establish the insurers' duty to defend Questar as a matter of law. The twelve insurers filed their own motion for summary judgment asserting that a lengthy delay in notice of the construction defect lawsuit relieved them of any duty to defend Questar and that Nationwide's exclusive control of the defense during the delay left Nationwide with "unclean hands."

In 2014, the court entered an order granting Nationwide's motion for summary judgment in part and denying it in part. The court determined as a matter of law that the subcontractors' insurers had a duty to defend Questar in the underlying construction defect lawsuit but reserved the remaining issues for the jury. Before trial, Nationwide reached settlement agreements with all of the subcontractors' insurers except Selective Way.

In 2016, Nationwide made a second motion for summary judgment on the remaining issues before the court. The court rejected Selective Way's defense of "unclean hands" and thus narrowed the scope of the jury trial to the single issue of whether Selective Way suffered actual prejudice because of the delayed notice.

In a five-day jury trial in March 2017, both Nationwide and Selective Way presented competing expert opinion testimony regarding the fairness and reasonableness of the fees charged. Nationwide did not request any jury instructions on prejudgment interest and did not propose any questions about prejudgment interest on the special verdict sheet it provided to the court. Ultimately, the jury found that Selective Way had received timely notice of the construction defect lawsuit against Questar and Nationwide had proven \$994,719.54 in total damages.

Selective Way filed a premature appeal to the Court of Special Appeals, which was dismissed. Once the case returned to the circuit court, Nationwide made a motion seeking a determination of Selective Way's liability for attorneys' fees and expenses incurred in the declaratory judgment action. Subsequently, the circuit court held a hearing solely pertaining to attorneys' fees and expenses and awarded Nationwide \$810,556.72.

In 2018, Nationwide wrote a one-page letter directly to the circuit court with a copy to Selective Way's counsel, seeking an award of \$430,534.82 in prejudgment interest on the damages awarded to Nationwide by the jury. Selective Way objected to the timing and manner in which prejudgment interest had been requested.

The court filed an "Order and Declaratory Judgment" establishing that Selective Way breached its duty to defend Questar in the construction defect lawsuit and was liable to Nationwide in the total amount of \$1,647,659. The total amount included \$430,534.82 in prejudgment interest. After the circuit court denied Selective Way's post-trial motions, Selective Way noted a timely appeal to the Court of Special Appeals.

On October 30, 2019, the Court of Special Appeals filed a reported opinion affirming the circuit court's judgment with respect to Selective Way's duty to pay defense costs incurred by Nationwide in its representation of Questar in the construction defect lawsuit; reversed the circuit

court's judgment with respect to the award of prejudgment interest on those defense costs; and vacated and remanded the circuit court's judgment with respect to the amount of attorneys' fees and expenses incurred in the declaratory action. On the issue of prejudgment interest, the Court of Special Appeals held that the award of prejudgment interest was a triable issue of fact for the jury to decide, not the court to determine as a matter of law.

Held: Affirmed

The Court of Appeals held that damages in the form of defense costs resulting from a liability insurer's breach of its duty to defend are unliquidated, not fixed by agreement, and unascertainable at the time of the breach. Therefore, the Court of Appeals held that such damages are not entitled to prejudgment interest as a matter of right and are instead left to the discretion of the factfinder.

Here, the jury as factfinder was not presented with a claim of prejudgment interest, was not instructed on the issue of prejudgment interest, and did not separately state an award of prejudgment interest in the verdict as required by Maryland Rule 2-604(a), which provides that "[a]ny prejudgment interest awarded by a jury or by a court sitting without a jury shall be separately stated in the verdict or decision and included in the judgment." Therefore, the Court of Appeals held that the circuit court was not authorized to award Nationwide prejudgment interest in the amount of \$430,534.82.

In the Matter of the Honorable Amy Leigh Nickerson, Judge of the Orphans' Court of Maryland for Kent County, Second Judicial District, JD No. 1, September Term 2020. Opinion by Booth, J.

<https://www.mdcourts.gov/data/opinions/coa/2021/1a20jdo.pdf>

JUDICIAL DISCIPLINE – SANCTIONS – REMOVAL

Facts:

On December 8, 2020, the Commission on Judicial Disabilities (the “Commission”) held a hearing to determine whether Judge Amy Leigh Nickerson violated the Maryland Code of Judicial Conduct (the “MCJC”) after Investigative Counsel filed charges alleging Judge Nickerson violated Maryland Rules 18-101 (Compliance with the Law); 18-101.2 (Promoting Confidence in the Judiciary); 18-101.3 (Avoiding Lending the Prestige of Judicial Office); 18-102.16(a) (Cooperation with Disciplinary Authorities); and 18-103.1 (Extra-Official Activities in General). The charges originated from two separate allegations of sanctionable conduct, one of which stemmed from a March 2018 traffic stop that resulted in Judge Nickerson’s arrest (the “2018 Charges”), and the second of which followed a 2019 investigation into an outstanding tax lien and judgment entered against Judge Nickerson in 2013 (the “2019 Charge”).

With respect to the 2018 Charges, Commission fact-finding revealed Judge Nickerson was involved in a traffic stop on March 9, 2018 after Sergeant Harry A. Kettner determined, based on his in-camera radar unit, that Judge Nickerson was speeding. After approaching Judge Nickerson’s vehicle, Sergeant Kettner smelled alcohol emanating from the car, observed a clear cup with liquid in the center console, and noticed Judge Nickerson’s bloodshot and glassy eyes. In light of the foregoing observations, Sergeant Kettner asked Judge Nickerson to exit her vehicle. After completing a phone call, Judge Nickerson complied.

At around the time Judge Nickerson exited her vehicle, she advised Sergeant Kettner that she was “a judge on the Orphans’ Court. So please. I’m serious.” Judge Nickerson would ultimately reference her status as a judge on the Orphans’ Court three more times during the traffic stop. Judge Nickerson also indicated that she had just gotten off the phone with Sergeant Kettner’s superior, Lieutenant Kirby.

With Judge Nickerson out of her vehicle, Sergeant Kettner asked her to rate her level of intoxication on a scale of one to ten, with ten being the highest. Judge Nickerson stated that she was a “five” and admitted that she had a couple drinks before leaving work. Later in the traffic stop, Judge Nickerson stated she actually consumed three or four drinks. Sergeant Kettner also asked Judge Nickerson what was in the clear cup stowed in her center console. Though Judge Nickerson initially stated the cup contained club soda, she later admitted the cup contained vodka.

Sergeant Kettner proceeded to administer a series of field sobriety tests to Judge Nickerson. After performing poorly on each, Judge Nickerson raised a medical condition that she claimed to be the reason for her poor performance. After permitting Judge Nickerson to alleviate the effects of her medical condition, Sergeant Kettner administered additional field sobriety tests. Judge Nickerson fared no better and was placed under arrest and charged with, among other things, impaired driving, speeding, and reckless driving. Following a trial on the merits in the District Court sitting in Kent County, the court found Judge Nickerson guilty of impaired driving and four related offenses and entered a probation before judgment on all charges.

With respect to the 2019 Charge, the Commission found Investigative Counsel initiated an investigation into an outstanding Maryland tax lien and judgment entered against Judge Nickerson for unpaid taxes for the calendar year 2013. The Commission found Judge Nickerson did not assist Investigative Counsel in procuring certain tax documents from the Maryland Comptroller during the investigation, but that Investigative Counsel ultimately obtained these documents pursuant to a subpoena.

Following separate investigations, the Commission agreed to address allegations of misconduct related to the traffic stop through a Conditional Diversion Agreement (“CDA”) and allegations of misconduct related to the tax lien and judgment through a private reprimand, though the Commission conditioned disposition via CDA and private reprimand on Judge Nickerson complying with certain terms and conditions. Judge Nickerson failed to satisfy these conditions, which resulted in the Commission revoking the CDA and proceeding with formal charges. After a hearing, the Commission found Judge Nickerson’s conviction for impaired driving and other related offenses, attempts to use her judicial office and personal connections to influence an officer’s decision to charge her with impaired driving and other related offenses, failure to cooperate with an officer during a traffic stop, failure to cooperate with disciplinary authorities, and failure to comply with the terms of a Conditional Diversion Agreement and private reprimand constituted violations of Maryland Rules 18-101.1, 18-101.2, 18-101.3, 18-102.16(a), and 18-103.1. The Commission unanimously recommended that this Court issue an order removing Judge Nickerson from office.

Held: Removed.

The Court entered a *per curiam* order removing Judge Nickerson from office on March 26, 2021. Shortly thereafter, the Court filed an opinion in which it accepted the Commission’s factual findings and legal conclusions. In adopting the Commission’s legal conclusions, the Court observed that Judge Nickerson’s conviction for impaired driving and other related offenses constituted a violation of Maryland Rules 18-101.1 and 18-101.2. The Court further found that Judge Nickerson’s conduct during the traffic stop, including her references to Sergeant Kettner’s superior and her status as a judge on the Orphans’ Court, violated Maryland Rules 18-101.2, 18-101.3, and 18-103.1. The Court also agreed that Judge Nickerson’s failure to comply with the terms of the CDA and private reprimand violated Maryland Rule 18-102.16(a). Notably, the Court found Judge Nickerson’s violation of Maryland Rule 18-102.16(a) particularly troubling,

as it evidenced a disregard for the Commission, the judiciary, and the public. In light of Judge Nickerson's violations of the MCJC, the Court agreed with the Commission's conclusion that Judge Nickerson engaged in conduct prejudicial to the administration of justice and agreed that removal from office was the appropriate sanction.

Jamel Clark v. State of Maryland, No. 23, September Term 2020, filed May 27, 2021. Opinion by McDonald, J.

<https://mdcourts.gov/data/opinions/coa/2021/23a20.pdf>

CRIMINAL LAW – SENTENCING – MERGER OF CONVICTIONS – REQUIRED EVIDENCE TEST

CRIMINAL LAW – SENTENCING – MERGER OF CONVICTIONS – RULE OF LENITY

Facts:

After a jury trial, Petitioner Jamel Clark was convicted of two offenses defined by separate statutes: (1) possession of a firearm by a person previously convicted of a felony involving a controlled dangerous substance in violation of Maryland Code, Criminal Law Article (“CR”) §5-622 and (2) possession of an assault weapon in violation of CR §4-303. The Circuit Court for Baltimore City imposed the maximum sentence on each charge, to be served consecutively.

This appeal concerned whether convictions of the two statutory offenses must be merged for purposes of sentencing under either the “required evidence test” or the “rule of lenity.”

In a reported opinion, the Court of Special Appeals affirmed Mr. Clark’s sentence. *Clark v. State*, 246 Md. App. 123 (2020). Among other conclusions, the intermediate appellate court concluded the required evidence test did not apply because the statutory offenses were two separate crimes, and that the rule of lenity did not apply to require merger for the purposes of sentencing. *Id.* at 134-38.

Held: Affirmed.

The Court of Appeals held that neither the required evidence test nor the rule of lenity required Mr. Clark’s convictions merged for the purposes of sentencing.

The Court determined that the convictions do not merge under the required evidence test because proof of each offense involves an element that proof of the other does not — CR §5-622 requires proof of a prior drug-related felony conviction, which CR §4-303 does not, and CR §4-303 requires proof that the firearm was an assault weapon, while CR §5-622 does not.

Mr. Clark argued that the required evidence test applied to his convictions because CR §5-622 is a “multi-purpose criminal statute.” *See Nightingale v. State*, 312 Md. 699 (1988). The Court rejected this argument and concluded CR §5-622 is not a multi-purpose criminal statute. The Court explained that a multi-purpose criminal statute contains different modalities for committing the same offense. Here, however, the list of firearms outlined in CR §5-622(a) did

not describe different modalities, but merely set out a definition of “firearm” in tabular form. The Court also concluded the absence of an anti-merger provision in the statutes did not require the sentences to be merged.

After examining the legislative intent of both statutes, the Court determined the rule of lenity, a rare tool of last resort, did not apply because the statutes were created in response to two distinct concerns and thus allow for two separate sentences — CR §5-622 was created in response to gun use in drug-related crimes, while CR §4-303 was created in response to the use of assault weapons in mass shootings.

Ashley Hector, et al. v. Bank of New York Mellon, No. 10, September Term 2020, filed May 27, 2021. Opinion by Biran, J.

<https://mdcourts.gov/data/opinions/coa/2021/10a20.pdf>

ESTATES AND TRUSTS – TRUSTEES – INDIVIDUAL TRUSTEE LIABILITY

ESTATES AND TRUSTS – TRUSTEES – INDIVIDUAL TRUSTEE LIABILITY – PERSONAL FAULT

ESTATES AND TRUSTS – TRUSTEES – INDIVIDUAL TRUSTEE LIABILITY – PERSONAL FAULT – “STATUTE OR ORDINANCE RULE”

BALTIMORE CITY HOUSING CODE – DEFINITION OF “OWNER”

Facts:

On September 30, 1999, Intercoastal Investment Trust (“Intercoastal”) purchased a two-story rowhouse located at 447 North Linwood Avenue in Baltimore City (the “Property”). That same day, Sharlene Epps-Smith entered into a 99-year lease agreement with Intercoastal. In addition, on the same date, Ms. Epps-Smith executed a Purchase Money Deed of Trust secured by her interest in the Property. Among other provisions, the deed of trust stated that Ms. Epps-Smith, as the “Borrower,” “shall have possession of the Property until Lender has given Borrower notice of default[.]”

The rowhouse at 447 North Linwood Avenue was built in 1900 and contained lead-based paint.

On December 1, 1999, Respondent Bank of New York Mellon (“BNYM”) as Trustee, together with other entities, created a special purpose vehicle in the form of a trust, known as Residential Asset Securitization Trust 1999-A9 Mortgage Pass-Through Certificates, Series 1999-I (the “Trust”). This kind of trust (often called a residential mortgage backed securitization trust) serves as a repository for loans and to hold mortgage collateral and other contract rights for its owners, who are the certificate holders and who hold a beneficial interest in the trust. At the time the Trust was created, BNYM as Trustee executed a Pooling and Servicing Agreement (“PSA”) establishing and governing the rights and responsibilities of the parties in the administration of the Trust. Among other things, the PSA set forth the scope of BNYM’s duties as Trustee, as well as its liabilities to the Trust. Along with many other mortgage instruments, Ms. Epps-Smith’s mortgage on her leasehold interest in the Property became a part of, and owned by, the Trust.

Petitioners Ashley and Alyaa Hector (the “Hectors”) were young children when their parents rented the Property from Ms. Epps-Smith beginning in late 2000 or early 2001. Blood tests taken on Ashley and Alyaa Hector on January 7, 2002, revealed that both children had elevated lead levels. The Hectors’ test results prompted an inspection by the Baltimore City Health Department on or about March 7, 2002, which led to the issuance of a violation notice to Ms.

Epps-Smith on March 13, 2002, and an emergency violation notice and order on April 2, 2002 to remove the “lead nuisance” from the property. The Hectors voluntarily vacated the Property in the spring of 2002.

In November 2001, following Ms. Epps-Smith’s default on her mortgage, BNYM as Trustee caused a foreclosure action to be filed in the Circuit Court for Baltimore City. An auction went forward on December 27, 2001, at which time BNYM as Trustee purchased Ms. Epps-Smith’s leasehold interest in the Property. A judge of the Circuit Court signed an order ratifying the sale on February 5, 2002. BNYM as Trustee filed a motion for possession with respect to the Property on March 11, 2002. The circuit court granted the motion for possession on August 15, 2002. A deed conveying the leasehold interest in the Property to BNYM as Trustee was recorded in Baltimore City’s land records on May 23, 2003.

In June 2016, the Hectors sued BNYM for negligence, alleging severe and permanent brain damage as a result of lead poisoning. The complaint named BNYM in its individual capacity only. After the completion of discovery, BNYM moved for summary judgment. The trial court granted summary judgment in favor of BNYM on the ground that the Hectors had failed to sue the appropriate party, BNYM as Trustee (as opposed to BNYM in its individual capacity).

The Court of Special Appeals affirmed the judgment of the circuit court, but for different reasons. *Hector v. Bank of New York Mellon*, 244 Md. App. 322 (2020). The intermediate appellate court relied on the Restatement (Third) of Trusts for the proposition that the Hectors could sue BNYM in its individual capacity for a tort it allegedly committed while serving as the Trustee of the Trust. Thus, the court disagreed with the circuit court’s initial grant of summary judgment. However, the Court of Special Appeals affirmed the judgment of the Circuit Court on the ground that the Hectors had to produce facts sufficient to generate a dispute as to whether BNYM was “personally at fault” for the alleged tort.

The Court of Appeals granted the Hectors’ petition for a writ of *certiorari* on May 8, 2020.

Held: Affirmed in part, reversed in part, and remanded for further proceedings.

The Court of Appeals held that a tort plaintiff may sue a trustee in its individual capacity for acts or omissions undertaken in the course of trust administration. Although it is well settled that an entity acting in its individual capacity, and the same entity acting as a trustee, are, in law, two distinct persons, a plaintiff may name the entity as a defendant in both capacities in a complaint. As the Restatement (Third) of Trusts § 105 (Am. Law Inst. 2012) explains, although the modern approach concerning trustee liability to third parties allows a plaintiff to assert a claim against a trustee in its representative capacity, a trustee is not insulated from also being sued in an individual capacity.

The Court also held that, as a matter of Maryland common law, in order to obtain a judgment against a trustee in its individual capacity for a tort committed in the course of trust administration, a plaintiff must prove that the trustee is personally at fault. The Court determined

that the General Assembly did not intentionally omit this standard when it passed the Maryland Trust Act, Md. Code, Est. & Trusts (“ET”) § 14.5-908(b) (2017 Repl. Vol.) (the “Trust Act”). Principles of equity, as well as the applicable provisions of the Restatement (Third) of Trusts, support the adoption of this standard for individual trustee liability.

The Court further held that a trustee may be personally at fault if it fails to comply with a duty imposed on it by statute or ordinance. The “Statute or Ordinance Rule” provides that, in order to make out a *prima facie* case in a negligence action, all that a plaintiff must show is: (a) the violation of a statute or ordinance designed to protect a specific class of persons which includes the plaintiff, and (b) that the violation proximately caused the injury complained of. The Court declined to recognize an exception to the application of the Statute or Ordinance Rule where the defendant is a trustee.

Lastly, the Court held that a purchaser of a property covered under the former Baltimore City Housing Code generally became an “owner” of the property, within the meaning of the Housing Code, Balt. City Code (2000 Repl. Vol.), Art. 13, § 105(jj) upon the ratification of the foreclosure sale by the circuit court. Where, as here, the foreclosure purchaser was also the beneficiary of a deed of trust that allowed the beneficiary to obtain possession of the property prior to ratification, then the purchaser became an “owner” as of the date of the foreclosure sale. Until it purchased the property at foreclosure, the beneficiary of the deed of trust was considered a “mortgagee” and therefore exempt from the definition of “owner” under the Housing Code.

COURT OF SPECIAL APPEALS

Denise Potter, et al. v. Ruby Potter, No. 671, September Term 2018, filed May 26, 2021. Opinion by Kehoe, J.

<https://mdcourts.gov/data/opinions/cosa/2021/0671s18.pdf>

THE MARYLAND LIMITED LIABILITY COMPANY ACT – MEMBERSHIP INTEREST IN A LIMITED LIABILITY COMPANY – DEFINITION OF “PROPERTY” FOR THE PURPOSES OF MARY-LAND’S ESTATES AND TRUSTS ARTICLE.

THE MARYLAND LIMITED LIABILITY COMPANY ACT – OPERATING AGREEMENTS – PROVISIONS RELATING TO OWNERSHIP OF A MEMBER’S INTEREST UPON DEATH OF THE MEMBER – COMPLIANCE WITH MD. CODE, EST. & TRUSTS § 4-102

Facts:

James Potter married Ruby Potter in 1984. Sometime thereafter, he acquired a membership interest in TR Steak Pasadena, LLC, a Maryland limited liability company. James’s rights and obligations as a member of the company were defined by TR Steak’s Third Amended Operating Agreement (the “operating agreement”) and the company’s Third Amended Members’ Agreement (the “members’ agreement”).

The operating agreement distinguished between a member’s “interest,” which was defined as “a person’s share of the profits and losses of, and the right to receive distributions” from the company, and a member’s “rights,” which were the rights of a member to participate in the management and control of the company. The operating agreement provided that, if a member died, his or her “living trust, estate, legatee or other successor in interest” would “automatically and immediately” become a the owner of a the deceased member’s membership interest as long as the successor was a member of the “permitted group,” a term defined in the members’ agreement.

Although the members’ agreement did not contain an explicit definition of the “permitted group,” the document was clear that Ruby Potter was designated as James’s successor and that the designation was with the consent of the other members.

James's signature on the operating agreement was not witnessed. His signature on the members' agreement appeared to have been witnessed by one individual, but the signature was indecipherable, and the witness was otherwise unidentified.

James and Ruby separated in 2016 and soon thereafter signed a separation agreement in which Ruby waived "any and all interest" in James's membership interest in the company and promised that James's interest would be "free and clear of any rights, title or interest" that could be asserted by her. However, whether by oversight or de-sign, James never changed his designation of Ruby as the transferee of his interest.

Subsequently, James married Denise. In 2017, he died intestate. Denise opened a small estate in the Orphans' Court for Anne Arundel County and was appointed as personal representative. In a document filed in the orphans' court, Denise identified James's membership interest in TR Steak as an asset of the estate.

Ruby filed a complaint for a declaratory judgment against Denise, both individually and in her capacity as the personal representative of James's estate. Ruby asserted that she was entitled to James's membership interest in TR Steak because she was listed as his successor in the members' agreement. Denise responded that the membership interest was an asset of James's estate because the relevant limited liability company documents could not, as a matter of law, pass title because they were not executed in compliance with the requirements of the Maryland statute of wills, Md. Code, Est. & Trusts § 4-102.

The parties filed motions for summary judgment; the circuit court granted Ruby's motion and denied Denise's. The court concluded that the separation agreement gave James the "absolute free will" to terminate Ruby's expectancy interest but that James "either chose not to do [so] or overlooked that fact that it would have been incumbent upon him to do it." The court reasoned that the terms of the separation agreement did not constitute a waiver of Ruby's rights under the members' agreement. Finally, the court concluded that because the members' agreement was "a contract where benefits can pass by way of death" the issue of whether it was "a testamentary instrument really is immaterial."

Held: Reversed.

The Court of Special Appeals held:

First, that James's membership interest in the limited liability company constituted a type of "property" that is subject to Maryland's probate and testamentary laws. *See* Md. Code, Est. & Trusts § 1-102(r). Because the operating and members' agreements were not executed with the formalities required by Maryland's statute of wills, Md. Code, Est. & Trusts § 4-102, the critical provision in the operating agreement—providing that James's designated successor "automatically and immediately" became the owner of his membership interest upon his death—was ineffective.

Second, as an alternative argument, Ruby asserted that compliance with the statute of wills is unnecessary because the Maryland Limited Liability Company Act, codified as title 4A of the Corporations and Associations Article, “expressly permits members of a limited liability company to agree that the membership agreement can control the disposition of a member’s interest upon the member’s death.” This argument is not persuasive. Ruby’s proffered interpretation is inconsistent with the plain language of the pertinent provisions on Title 4A, specifically, Corps & Ass’ns §§ 4A-203(15) and -606. Additionally, her interpretation is not supported by the legislative history of the Act.

Zamere Dashawn Purnell v. State of Maryland, No. 355, September Term 2019, filed May 27, 2021. Opinion by Reed, J.

<https://mdcourts.gov/data/opinions/cosa/2021/0355s19.pdf>

FELONY MURDER – PREDICATE OFFENSE OR CONDUCT

FELONY MURDER – CAUSAL RELATIONSHIP BETWEEN OFFENSE AND DEATH

Facts:

The case stems from the killing of Pierre Louis (“Decedent”) at Decedent’s home at night. Decedent was found dead the following day with 22 stab wounds, predominately grouped in vital areas of Decedent’s body. By contrast, Appellant (Purnell) emerged from the encounter with one defensive wound to the hand/forearm area. At trial, a witness – who Appellant spoke with shortly after his commission of the homicide – testified that Appellant told him “I was going to rob this dude and he took a knife out.” On appeal, Appellant did not deny that he entered Decedent’s home to commit a robbery. However, the only item Appellant ostensibly stole from Decedent’s home was Decedent’s cell phone, which Appellant later abandoned on a dirt road.

On appeal Appellant argued that, although his theft of the cell phone constituted a robbery, it was an afterthought robbery. Appellant asserted that he did not go to Decedent’s home to steal Decedent’s phone, but rather, he formed his intent to steal the phone after his commission of the homicide. Thus, Appellant argued that the robbery was an afterthought felony which could not be used as a predicate felony to support a felony-murder conviction.

Held: Affirmed.

The Court of Special Appeals held that the evidence viewed in the light most favorable to the state would permit a rational trier of fact to find that the cell phone was among the potential items Appellant sought to steal from Decedent’s home. Moreover, even if he did not initially intend to steal the phone, his intent to rob decedent was the direct cause of the deadly encounter and is precisely the type of dangerous conduct the felony-murder rule seeks to deter. Finally, even if the robbery of the cell phone was found to be an afterthought robbery, a rational trier of fact could have found that Appellant killed Decedent during an attempted robbery, which may also serve as a predicate offense for felony murder under MD Rule § 2-201(a)(4).

Further, the Court held that the evidence was sufficient for a rational trier of fact to find Appellant guilty of first-degree premeditated murder. Appellant argued that the stab wound to his hand evinced a struggle, during which he acted under the adrenaline of the moment and had no time to deliberate or form the requisite intent to kill Decedent. However, we held that the stark contrast in the number of the stab wounds, along with the numerous vital areas targeted on

Decedent's body, would permit a trier of fact to find that Appellant made a conscious decision, however brief, to kill Appellant during the protracted struggle. The physical evidence indicated that, at the very least, Decedent was disarmed early in the encounter, and Appellant made the conscious decision to continue his assault.

Accordingly, the Court of Special Appeals affirmed Appellant's conviction for first-degree murder under both a theory of premeditation and felony murder.

Sheldon Duke White v. State of Maryland, No. 1232, September Term 2019, filed May 26, 2021. Opinion by Graeff, J.

<https://mdcourts.gov/data/opinions/cosa/2021/1232s19.pdf>

CRIMINAL LAW – SPEEDY TRIAL – *HICKS* RULE – EFFECT OF *NOLLE PROSEQUI* – POSSESSION WITH INTENT TO DISTRIBUTE CDS – MIXTURE OF HEROIN AND FENTANYL – MERGER OF CONVICTIONS – MOTION TO EXCLUDE STATEMENT – RELEVANT EVIDENCE – WITHDRAWAL OF PLEA AGREEMENTS BASED ON AGREED STATEMENT OF FACT – SUFFICIENCY OF THE EVIDENCE

Facts:

In 2018, Frederick County police received information from a confidential informant that appellant was supplying cocaine, heroin, and fentanyl in the Frederick area. On August 21, 2018, police executed a search warrant at a hotel room utilized by appellant. Appellant advised that there were firearms and drugs in the room, and they were his contraband. The police arrested appellant, and the detective transporting appellant to the detention center asked appellant what he would have done if he had the handgun on his person when the police executed the search warrant. Appellant stated: “[N]o disrespect to you, but I would have shot it out with you all.”

On September 18, 2018, a grand jury in the Circuit Court for Frederick County returned a 25-count indictment against appellant for various CDS and firearm offenses. In January 2019, after forensic testing revealed the presence of fentanyl in the seized contraband, the grand jury returned a second indictment against appellant, charging identical counts for the same events, plus an additional four counts related to the fentanyl. The State then entered a *nolle prosequi* (“*nol pros*”) of the charges in the first indictment. The circuit court denied appellant’s motion to dismiss on speedy trial grounds.

On June 4, 2019, appellant pleaded not guilty to the charges, pursuant to an agreed statement of facts, and the court convicted him of possession with intent to distribute heroin pursuant to Md. Code Ann., Crim. Law Article (“CR”) § 5-602, possession with intent to distribute heroin with a detectable amount of fentanyl pursuant to CR § 5-608.1, and possession of a firearm during a drug trafficking crime.

Held: Affirmed.

Md. Code Ann., Criminal Procedure Article (“CP”) § 6-103 (2018 Repl. Vol.), implemented by Md. Rule 4-271(a), provides that a criminal defendant in the circuit court must be brought to trial within 180 days after the earlier of the appearance of counsel or the first appearance of the defendant in the circuit court. Pursuant to this 180-day deadline, unless the defendant consents to

an extension, the charges must be dismissed if the State fails to establish good cause for trying the defendant after the 180-day deadline.

When the State enters a *nol pros* in a circuit court criminal case and later refiles the same charges, however, the 180-day period for trial prescribed by CP § 6-103 and Rule 4-271(a) ordinarily begins to run with the arraignment or first appearance of defense counsel under the second prosecution. An exception to this general rule applies if the prosecution's purpose in filing the *nol pros*, or the necessary effect of the *nol pros*, is to circumvent the requirements of the statute and rule. Under those circumstances, the time period running with the initial prosecution remains in effect.

Here, the State did not *nol pros* the charges after a request for a continuance was denied. Because neither the purpose of the *nol pros* nor the necessary effect was to circumvent Md. Rule 4-271(a) or CP § 6-103, the 180-day deadline ran from the filing of the second indictment. The circuit court properly denied appellant's motion to dismiss based on the requirements of the statute and the rule.

Md. Code Ann., Crim. Law Article ("CR") § 5-602 provides that a person may not distribute or dispense a controlled dangerous substance or possess it in sufficient quantity to reasonably indicate an intent to distribute. CR § 5-608.1(a) provides that a person may not knowingly violate CR § 5-602 with "a mixture that contains heroin and a detectable amount of fentanyl." "A person who violates this section is guilty of a felony and, in addition to any other penalty imposed for a violation of § 5-602 of this subtitle, on conviction is subject to imprisonment not exceeding 10 years." CR § 5-608.1(b). A "sentence imposed under this section shall be consecutive to and not concurrent with any other sentence imposed under any other provision of law." CR § 5-608.1(c).

The plain language of the statute makes clear that CR § 5-608.1 establishes a crime separate from that set forth in CR § 5-602, and a defendant may be separately charged, convicted, and sentenced pursuant to CR § 5-608.1. Accordingly, a trial court has jurisdiction to convict and sentence a defendant on a charge pursuant to CR § 5-608.1. Moreover, a court may impose separate sentences for separate convictions of CR §§ 5-602 and 5-608.1; merger is not required.

Md. Rule 4-242(h) provides that, "[a]t any time before sentencing, the court may permit a defendant to withdraw a plea of guilty, a conditional plea of guilty, or a plea of *nolo contendere* when the withdrawal serves the interest of justice." Rule 4-242(h) does not authorize withdrawal of a plea of not guilty pursuant to an agreed statement of facts. Where there is no suggestion that the plea was anything other than a plea of not guilty pursuant to an agreed statement of facts, the defendant cannot move to withdraw the plea and void the conviction pursuant to Rule 4-242(h).

In re: G.T., No. 1160, September Term 2020, filed May 26, 2020. Opinion by Wells, J.

<https://mdcourts.gov/data/opinions/cosa/2021/1160s20.pdf>

CHILD CUSTODY – VISITATION – APPLICABILITY OF FL § 9-101 AND COMAR 07.02.11.05

Facts:

On September 10, 2020, the Baltimore City Department of Social Services (“DSS” or “the Department”) filed a Shelter Care Petition for the appellant, G.T.¹ The Department alleged that G.T.’s mother (“Mother”), had neglected, abused, or been unable or unwilling to give G.T. the proper amount of care and attention. On October 9, 2020, counsel for Mother requested that the court compel G.T. to participate in in-person visitation with her. A family court magistrate recommended that due to the COVID-19 pandemic, she would defer to DSS’s policy regarding in-person visitation and recommended that family therapy address the issue. The recommended order, however, was silent as to specific visitation, but did not discourage supervised visitation with Mother. On November 24, 2020, Mother filed an emergency motion for in-person visitation. A magistrate denied the request without a hearing on December 1, 2020. Counsel for Mother requested an immediate review of the magistrate’s recommendation. After a hearing, the circuit court denied Mother’s request for in-person visitation on December 8, 2020 and Mother appealed.

Held: Affirmed.

First, Mother argued that the circuit court was required to satisfy Family Law (“FL”) § 9-101, by finding that there was no likelihood of future child abuse or neglect if G.T. was returned to Mother, before it denied her visitation. The Department’s response was that because the court found that Mother had neglected G.T. it was required to deny visitation but may approve a supervised visitation arrangement that assures the psychological, physical, and emotional well-being of the child. Further, the Department argued, that Mother had failed to carry her burden of persuasion that there was no likelihood of future abuse or neglect.

The Court of Special Appeals held that FL § 9-101 indeed did apply to situations where a circuit court has found that neglect or abuse has occurred. In such cases, custody or visitation must be denied, except for supervised visitation, unless the court specifically finds there is not a

¹ To protect the privacy of the appellant, a minor, we refer to her by her initials only. For this same purpose, we refer to her family members by either their first name or a random alphabetical letter only.

likelihood of future neglect or abuse. Here, the circuit court ordered supervised visitation, but the unique circumstance presented in this case was that G.T. refused to visit with Mother. Because the circuit court had ordered supervised visitation, the Court of Special Appeals held that FL § 9-101 did not apply, even though Mother and the Department had assumed that it did. Additionally, even if FL § 9-101 applied, the circuit court specifically addressed G.T.'s physical safety, as well as her psychological and emotional well-being by ordering Mother and G.T. to undergo reunification therapy. Finally, Mother did not meet her burden of persuasion that with either unsupervised or supervised visitation there was no likelihood of future abuse or neglect of G.T.

Second, the Court of Special Appeals addressed Mother's contention that the circuit court had delegated its decision about whether Mother should be allowed visitation to G.T.'s therapist or to G.T. Despite Mother's contention, the Court held that G.T.'s wishes, and therapist's recommendations, were factors that the court said it would consider before altering Mother's visitation, not a delegation as Mother had insisted.

In re: D.M., J.M., No. 998, September Term 2020, filed May 25, 2021. Opinion by Arthur, J.

<https://mdcourts.gov/data/opinions/cosa/2021/0998s20.pdf>

FAMILY LAW – CHILDREN IN NEED OF ASSISTANCE – MODIFICATION OF PERMANENCY PLAN

Facts:

In 2018, the Baltimore County Department of Social Services petitioned for court intervention for two children who had lived with their maternal grandmother for the majority of their lives. The Circuit Court for Baltimore County, sitting as juvenile court, found that both children were children in need of assistance (CINA) because both parents had substance-abuse issues that prevented them from providing appropriate care. The court placed the two children with their grandmother and permitted the father to have supervised visitation.

At a permanency planning review hearing in 2020, the Department requested that the juvenile court change the children’s permanency plans from a plan of reunification with a parent to a concurrent plan of reunification and custody and guardianship or adoption by a relative. The father requested that the court continue the sole plan of reunification, citing recent progress he had made in addressing his substance-abuse issues and working toward finding a safe and suitable home.

The juvenile court found that it was in the best interests of the children to adopt a concurrent permanency plan of placement with a relative for custody and guardianship (but not adoption).

The father appealed. The Department moved to dismiss the appeal, arguing that the order changing the permanency plan was not properly appealable.

Held: Affirmed.

The Court of Special Appeals denied the Department’s motion to dismiss the appeal affirmed the juvenile court’s order amending the permanency plan.

Maryland Code, § 12-303(3)(x) of the Courts and Judicial Proceedings Article permits a party to appeal from an order depriving a parent of the care and custody of the parent’s child or changing the terms of such an order. In a CINA case, an order changing a permanency plan of reunification with a parent to a concurrent plan of reunification and placement with a relative for custody and guardianship is appealable under § 12-303(3)(x). The addition of a concurrent plan of placement with a relative for custody and guardianship broadens the permanency plan in a way that could deprive the parent of the care and custody of the parent’s child.

The Court of Special Appeals concluded that the juvenile court acted within its discretion when it decided to change the permanency plan. Although the juvenile court did not recite every factor, the record sufficiently demonstrated that the court had considered the appropriate statutory factors. The court reasonably decided that, despite the significant progress the father had made towards reunification, he had taken two years to begin making that progress, the children's best interests would be served by advancing toward a timely, permanent placement.

Donna Frazelle-Foster v. Preston H. Foster, No. 2716, September Term 2018, filed March 31, 2021. Opinion by Leahy, J.

<https://mdcourts.gov/data/opinions/cosa/2021/2716s18.pdf>

DIVORCE – GROUNDS – CRUELTY OF TREATMENT – EVIDENCE

Facts:

In 2017, after over 25 years of marriage, Donna Frazelle-Foster filed a complaint for absolute divorce or, in the alternative, a limited divorce against Preston H. Foster, Sr. on the grounds of cruelty of treatment and constructive desertion. The Circuit Court for Prince George’s County conducted an evidentiary hearing on Donna’s complaint on January 25, 2018. During the hearing, Donna’s testimony described verbal and psychological abuse inflicted on her by Preston as grounds for divorce. Donna testified that, over the course of the marriage, Preston regularly called her names; belittled and humiliated her; made her feel worthless; intimidated and frightened her; embarrassed her in front of others; tried to turn their son against her; refused to leave her alone with friends; and monitored her calls. Donna claimed Preston demeaned her by withholding money and support in exchange for apology notes or sex. Donna testified that, over the course of their marriage, she has had to beg for small amounts of money for basic necessities, and that, around the time she filed for divorce in 2017, Preston withheld financial support. Donna explained that she had not physically left the family home, despite the circumstances, because she could not afford to do so. Preston disputed some—but not all—of Donna’s allegations.

Following the hearing, the circuit court denied Donna’s complaint for absolute divorce, or, in the alternative, for limited divorce on grounds of cruelty of treatment and constructive desertion. In particular, the court found that Donna did not meet her burden of establishing cruelty of treatment because she did not offer sufficient evidence of a continuing pattern of behavior. Donna filed a timely appeal, claiming that the circuit court erred by denying her complaint for absolute divorce on the ground of cruelty of treatment.

Held: Vacated and remanded.

The Court of Special Appeals concluded that the circuit court failed to consider the more recent and inclusive standards required to prove cruelty of treatment as a ground for divorce under Maryland Code (1984, 2020 Repl. Vol.), Family Law Article (“FL”), sections 7-102(a)(1) and 7-103(a)(6). The Court held that “cruelty of treatment” as a ground for limited or absolute divorce does not require physical violence or the threat of physical violence, and may be based upon verbal and psychological abuse which “is calculated to seriously impair the health or permanently destroy the happiness of the other.” *Das v. Das*, 133 Md. App. 1, 33 (2000)

(quoting *Scheinin v. Scheinin*, 200 Md. 282, 289 (1952)). The Court did not discern a requirement in FL § 7-103(a)(6) that the complaining party must establish, as grounds for an absolute divorce, “more than some inciden[t]s [of cruelty] that are spread out throughout the marriage,” or that the incidents of cruelty must be recent. Rather, the Court concluded, taken together, that Donna’s testimony and the evidence in support thereof may be sufficient, if believed, to establish “conduct [by Preston] . . . which is calculated to seriously impair [Donna’s] health or permanently destroy” her happiness. *Das*, 133 Md. App. at 33 (quoting *Scheinin*, 200 Md. at 289).

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated March 3, 2021, the following attorney has been suspended for sixty days by consent, effective April 2, 2021:

SARAH RUTH BARNWELL

*

By an Order of the Court of Appeals dated May 7, 2021, the following attorney has been indefinitely suspended by consent:

GEORGE HENRY SPANGLER

*

This is to certify that the name of

DEBRA LEE ACKERMAN

has been replaced upon the register of attorneys in this Court as of May 10, 2021.

*

By an Order of the Court of Appeals dated April 7, 2021, the following attorney has been indefinitely suspended by consent, effective May 10, 2021:

BRUCE NICHOLAS DESIMONE

*

By an Order of the Court of Appeals dated May 12, 2021, the following attorney has been disbarred by consent:

CHARLES JOHN NABIT

*

*

By an Order of the Court of Appeals dated May 20, 2021, the following attorney has been indefinitely suspended by consent:

KAMAH MENSELEH GUEH-THORONKA

*

By an Order of the Court of Appeals dated April 26, 2021, the following attorney has been suspended for six months and one day, effective May 26, 2021:

CHARLES ALLAN FINEBLUM

*

By an Order of the Court of Appeals dated May 27, 2021, the following attorney has been suspended:

ERNEST P. FRANCIS

*

By a Per Curiam Order of the Court of Appeals dated May 27, 2021, the following attorney has been disbarred:

JENNIFER LYNN LEATHERMAN

*

By an Opinion and Order of the Court of Appeals dated May 27, 2021, the following attorney has been disbarred:

THOMAS McCARTHY, JR.

*

UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

<https://mdcourts.gov/appellate/unreportedopinions>

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