Circuit Court for Howard County
Case No. 13-C-17-111078

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED

No. 1473

September Term, 2019

Nos. 944, 579

September Term, 2020

JARED ROSS

v.

JENNIFER ROSS

Fader, C.J.,
Arthur,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: February 2, 2022

On December 20, 2019, Judge Richard Bernhardt, of the Circuit Court for Howard County, entered a judgment of absolute divorce between Jared Ross ("Husband"), Appellant, and Jennifer Ross ("Wife"), Appellee. Wife received sole legal and physical custody of their three children, and Husband was granted regular visitation. Wife received a monetary award in the amount of $312,936, child support in the amount of $6,000 per month, monthly rehabilitative alimony in the amount of $4,000 for eighteen months and then in the amount of $3,000 for eighteen months. Husband was ordered to pay $80,000 of Wife's attorneys' fees.

In this consolidated appeal,[1] Husband presents this Court with numerous questions. In Number 1473, Husband seeks resolution of his appeal with respect to Questions 5 and 6:

> Question 5: Whether the judge erred by basing his economic findings, the monetary award, and the legal fee award on the father's alleged personality defects, the children's custodial accounts, and marital assets that no longer existed?

[1] Husband's three appeals, Number 1473, September Term 2019, Number 579, September Term 2020, and Number 944, September Term 2020, were consolidated by order of this Court on August 3, 2021.

In this opinion, we shall identify Husband's appeals as "Number 1473," "Number 944," and "Number 579."

> Question 6: Whether the judge erred by not considering the $499,890.90 that the wife's family had contributed to her in its adjudication of the parties' economic circumstances? [2]

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[2] Husband's appeal in Number 1473, September Term 2019, originally included six questions, the first four being:

> Question 1: Whether the judge erred by admitting a custody evaluation without a Frye-Reed hearing that used parental alienation, psychology tests, unsworn witnesses, and the evaluator's credibility findings to conclude that the father had committed spousal abuse, is dishonest, manipulative, malicious, and self-centered, and had alienated the children from their alcoholic mother?
>
> Question 2: Whether the judge erred by deciding custody based on parental alienation, and alleged personality defects of the children's father previously rejected by the judge, that the judge reasoned would cause the children to have "distorted views of reality" if custody were awarded to the father?
>
> Question 3: Whether the judge erred by failing to order liberal visitations, including normal holidays and other events, to a fit non-custodial parent?
>
> Question 4: Whether the judge erred by refusing to hear directly from the children the reasons for their strong parental preferences for their father, including their mother's physical assaults even when sober, her isolation of them, their father's stable parenting, and to rebut her allegations that he had abused and stalked her, and breached the order that had suspended their access with him?

The last two are those that are included in this opinion.

On November 5, 2020, Husband filed a Case in Bankruptcy in the United States Bankruptcy Court for the District of Maryland, which originally triggered an automatic stay of our consideration of questions 5 and 6, because of the dictates of 11 U.S.C Section 362(a), which applies to

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the

(continued . . .)

In Number 579, Husband presents two questions:

> Question 1: Whether the Circuit Court erred in dismissing Jared's petition seeking relief under the Domestic Violence Act?
>
> Question 2: Whether the Circuit Court erred in refusing to hear evidence from the children of their Mother's physical assaults and drunken neglect?

In Number 944, Husband asks five questions:

> Question 1: Whether the trial court lacked jurisdiction to enter the judgment for monetary and attorney fee awards already appealed?
>
> Question 2: Whether the trial court erred by designating custodial accounts of the children as marital assets?
>
> Question 3: Whether the trial court erred by adjudicating marital assets using outdated values from accounts depleted for family needs and custody litigation, and were non-existent by the date of the divorce?

(. . . continued)

> commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

In December of 2020, we issued an unreported opinion, *Ross v. Ross*, 2020 WL 7416734, which addressed Husband's questions 1 through 4.

Husband petitioned the Court of Appeals for a writ of certiorari, which was granted. 471 Md. 201 (March 5, 2021). Following oral arguments, however, the Court of Appeals dismissed Husband's petition as improvidently granted. 474 Md. 124 (June 8, 2021).

In July of 2021, the United States Bankruptcy Court granted Husband's motion to dismiss his case, thereby lifting the automatic stay and queuing up our consideration of questions 5 and 6 herein.

> Question 4: Whether the court erred by not considering $499,890.90 that Jennifer's parents contributed to her scorched earth litigation, alcoholic rehabs, and life-style when it granted her monetary award and related attorney fees?[3]
>
> Question 5: Whether the court erred by reappointing the BIA, and denying her motion to strike her appearance?

For the reasons that follow, we shall affirm the decisions of the Circuit Court for Howard County.

Husband and Wife were married in November of 2003, and their three children were born in 2006, 2007, and 2010. Husband initiated proceedings for a limited divorce in April of 2017, and four months later, Wife also asked for a limited divorce. Wife, however, after the merits trial began, in October of 2018, amended her complaint to seek an absolute divorce, to which Husband responded.

Wife sought sole legal and physical custody of the parties' three children. Husband sought joint legal custody with tie-breaking authority and asked to be granted sole physical custody of the children. The Circuit Court, upon agreement of the parties, in

[3] The issues raised by Husband in Questions 2, 3 and 4 in Number 944 are identical to those raised in Questions 5 and 6 in Number 1473. Husband, in his brief for Number 944, directs us to his arguments in support of Questions 5 and 6 in his appeal in Number 1473. We shall, therefore, address Questions 2 and 3 of Number 944 in our discussion of Question 5 of Number 1473. We shall address Question 4 of Number 944 in our discussion of Question 6 of Number 1473.

April of 2018, appointed Monica Scherer as a Best Interest Attorney ("BIA") to represent the children.[4]

The merits hearing began in October 2018 and continued over many days. In September of 2019, Judge Bernhardt issued a Custody Order, which granted Wife sole legal and physical custody, but also permitted Husband to attend the children's sporting events and school functions and granted Husband visitation with the children every

[4] A trial court, when adjudicating custody as part of divorce proceedings, may appoint a Best Interest Attorney, to represent the interest of a child, pursuant to Section 1–202 of the Family Law Article, Maryland Code (1984, 2019 Repl. Vol.), which provides:

> a) *In general*. — (a) In an action in which custody, visitation rights, or the amount of support of a minor child is contested, the court may:
>
> (1) (i) appoint a lawyer who shall serve as a child advocate attorney to represent the minor child and who may not represent any party to the action; or
>
> (ii) appoint a lawyer who shall serve as a best interest attorney to represent the minor child and who may not represent any party to the action; and
>
> (2) impose counsel fees against one or more parties to the action.
>
> (b) *Standard of care*. — A lawyer appointed under this section shall exercise ordinary care and diligence in the representation of a minor child.

A Best Interest Attorney "advances a position that the attorney believes is in the child's best interest. Even if the attorney advocates a position different from the child's wishes, the attorney should ensure that the child's position is made a part of the record." Rule 19 Appendix 19-D MARYLAND GUIDELINES FOR PRACTICE FOR COURT–APPOINTED LAWYERS REPRESENTING CHILDREN IN CASES INVOLVING CHILD CUSTODY OR CHILD ACCESS, Section 2.2.

In this opinion, all references to the Family Law Article are to Maryland Code (1984, 2019 Repl. Vol.).

Friday evening and video access every Sunday evening.

In December of 2019, Judge Bernhardt entered a Judgment of Absolute Divorce, in which Husband was ordered to pay Wife child support in the amount of $6,000 per month, as well as rehabilitative alimony amounting to $4,000 per month for eighteen months and then $3,000 monthly for another eighteen months. Judge Bernhardt also ordered that the marital home be sold, and the proceeds be divided equally between the parties. Judge Bernhardt also ordered Husband to pay Wife a monetary award of $312,936 and $80,000 in attorneys' fees.[5] Husband timely noted an appeal to this Court, which is referred to as Number 1473.

Number 1473 – Economic Findings and Monetary Award

Husband challenges various economic findings, which were made by Judge Bernhardt in the course of making the determination that Wife was entitled to a marital award in the amount of $312,936. According to Husband, Judge Bernhardt overvalued numerous financial accounts, which, he asserts, he had justifiably depleted of funds prior to the date of the divorce, in order "to pay the massive expenses of this litigation,

[5] The Judgment of Divorce, which was filed on December 20, 2019, decreed Husband would be required to pay the monetary award "within 45 days of the date of the distribution of the net proceeds from the sale of the marital home or as otherwise required by this judgment[.]" With respect to attorneys' fees, the Judgment of Divorce decreed "that the Plaintiff, Jared Ross, shall pay attorneys' fees in the amount of $80,000 to the Defendant, Jennifer Ross, in the same manner provided for in this Judgment for the payment of the monetary award."

including to the BIA, evaluators, therapists, attorneys, support, medical, mortgage, home expenses, taxes, and necessities." Husband also asserts four financial accounts,[6] which Judge Bernhardt had identified as custodial accounts for the children — all of which were titled in Husband's name — were erroneously included in the total value of marital property considered for the purpose of the marital award. Lastly, Husband asserts that Judge Bernhardt erroneously failed to consider $499,890.90 that Wife had received from her parents, during the parties' separation in 2017 through 2019, for attorneys' fees and other expenses, as part of his evaluation of whether to grant her a marital award.

A marital property award is governed by statute. In the determination of a marital award, the trial court must follow a three-step procedure:

> First, for each disputed item of property, the chancellor must determine whether it is marital or non-marital. F.L. §§ 8–201(e)(1); 8–203.[7] Second, the chancellor must determine the value of all marital

[6] Judge Bernhardt identified two E-Trade accounts as custodial accounts, allegedly opened for the benefit of one child. He also identified two TD Ameritrade accounts — one allegedly opened for the benefit of a second child and the other allegedly opened for the benefit of the third child — as custodial.

[7] Section 8–201(e) of the Family Law Article, which defines marital property, provides:

> (e) *Marital property.* — (1) "Marital property" means the property, however titled, acquired by 1 or both parties during the marriage.
>
> (2) "Marital property" includes any interest in real property held by the parties as tenants by the entirety unless the real property is excluded by valid agreement.
>
> (3) Except as provided in paragraph (2) of this subsection, "marital property" does not include property:

(continued . . .)

property. F.L. § 8–204.[8] Third, the chancellor must decide if the division of marital property according to title would be unfair. If so, the chancellor

(. . . continued)

(i) acquired before the marriage;

(ii) acquired by inheritance or gift from a third party;

(iii) excluded by valid agreement; or

(iv) directly traceable to any of these sources.

Section 8–203 of the Family Law Article, entitled "Marital property — Determination," provides:

(a) *Time of court action.* — In a proceeding for an annulment or an absolute divorce, if there is a dispute as to whether certain property is marital property, the court shall determine which property is marital property:

(1) when the court grants an annulment or an absolute divorce;

(2) within 90 days after the court grants an annulment or divorce, if the court expressly reserves in the annulment or divorce decree the power to make the determination; or

(3) after the 90-day period if:

(i) the court expressly reserves in the annulment or divorce decree the power to make the determination;

(ii) during the 90-day period, the court extends the time for making the determination; and

(iii) the parties consent to the extension.

(b) *Consideration of military pension.* — In this subtitle a military pension shall be considered in the same manner as any other pension or retirement benefit.

[8] Section 8–204 of the Family Law Article, entitled "Marital property — Valuation," provides:

(continued . . .)

> may make a monetary award to rectify any inequity "created by the way in which property acquired during marriage happened to be titled." *Doser v. Doser*, 106 Md. App. 329, 349 (1995). *See* F.L. § 8–205(a)[9]; *Long*[*v. Long*], 129 Md. App. [554,] 578–79 [(2000)].

(. . . continued)

> (a) *Determination by court.* — Except as provided in subsection (b) of this section, the court shall determine the value of all marital property.
>
> (b) *Retirement benefits.* — (1) The court need not determine the value of a pension, retirement, profit sharing, or deferred compensation plan, unless a party has given notice in accordance with paragraph (2) of this subsection that the party objects to a distribution of retirement benefits on an "if, as, and when" basis.
>
> (2) If a party objects to the distribution of retirement benefits on an "if, as, and when" basis and intends to present evidence of the value of the benefits, the party shall give written notice at least 60 days before the date the joint statement of the parties concerning marital and nonmarital property is required to be filed under the Maryland Rules. If notice is not given in accordance with this paragraph, any objection to a distribution on an "if, as, and when" basis shall be deemed to be waived unless good cause is shown.

The value of marital property is a question of fact. *Flanagan v. Flanagan*, 181 Md. App. 492, 521 (2008). In establishing valuations of marital property, the trial court relies, in part, on information provided in the Joint Statement of Parties Concerning Marital and Non-Marital Property, filed pursuant to Rule 9–207, *Flanagan*, 181 Md. App. at 528-29. The court also may rely on documentary evidence presented by the parties, *Brown v. Brown*, 195 Md. App. 72, 88 (2010), and testimony, *Collins v. Collins*, 144 Md. App. 395, 413 (2002).

[9] Section 8–205 of the Family Law Article, entitled "Marital property — Award," in relevant part, provides:

> (a) *Grant of award.* — (1) Subject to the provisions of subsection (b) of this section, after the court determines which property is marital property, and the value of the marital property, the court may transfer ownership of an interest in property described in paragraph (2) of this

(continued . . .)

Flanagan v. Flanagan, 181 Md. App. 492, 519-20 (2008) (footnote omitted).

Should a monetary award to one spouse be appropriate, the trial court must engage in a factorial analysis[10] in order to "determine the amount and the method of payment[.]"

(. . . continued)

> subsection, grant a monetary award, or both, as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded.
>
> (2) The court may transfer ownership of an interest in:
>
> (i) a pension, retirement, profit sharing, or deferred compensation plan, from one party to either or both parties;
>
> (ii) subject to the consent of any lienholders, family use personal property, from one or both parties to either or both parties; and
>
> (iii) subject to the terms of any lien, real property jointly owned by the parties and used as the principal residence of the parties when they lived together, by:
>
> 1. ordering the transfer of ownership of the real property or any interest of one of the parties in the real property to the other party if the party to whom the real property is transferred obtains the release of the other party from any lien against the real property;
>
> 2. authorizing one party to purchase the interest of the other party in the real property, in accordance with the terms and conditions ordered by the court; or
>
> 3. both.

[10] In making a determination whether to grant a marital award, the factors that must be considered are delineated in Section 8–205(b) of the Family Law Article, which, provides:

> (b) *Factors in determining amount and method of payment or terms of transfer*. — The court shall determine the amount and the method of payment of a monetary award, . . . after considering each of the following factors:

(continued . . .)

Section 8–205(b) of the Family Law Article.

Judge Bernhardt performed the first two steps of the analysis, in which he identified each item of marital property, under Section 8–203 of the Family Law Article, and then determined its value, pursuant to Section 8–204 of the Family Law Article. Judge Bernhardt summarized what he had found to be marital property as follows:

(. . . continued)

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

So, for totals: under jointly titled, the Court has found $515,303 for the marital home, $15,000 for the furniture, $165 for the accounts - - for a total of $530,468 under the jointly titled.

Titled under the Plaintiff's name, but marital property: $245,529 in financial accounts, with the understanding that $24,485 will not be used in calculating the marital award.

Retirement accounts of $216,338. Cars of $39,663, but that won't be used in calculating the marital award.

Custodial accounts for the kids, meaning non-529: $188,160. And in 529 accounts: $93,387, not to be used in calculating a marital award.

The total titled in Plaintiff's name is $783,077. $626,072 is to be used in calculating the marital award.[11]

Titled in the Defendant's name: financial accounts of $2,822. The Ford Explorer of $15,000, not to be included when calculating the marital award. Furniture in her residence: $15,000. A retirement account of $26,733. A total of $59,555, of which $44,555 will be considered when calculating the marital award.

The total value of all of the marital property is $1,373,100. The total of the marital property being considered as to the marital award, however, is $1,200,830.

Judge Bernhardt, then, determined that a marital award to the Wife was warranted:

[11] Judge Bernhardt identified the following financial accounts to be marital property titled in Husband's name and considered them in determining the marital award:

- M&T bank account; balance: $24,220.
- Robinhood account; balance: $196,824.
- E-Trade retirement account; balance: $216,338.
- TD Ameritrade custodial account -0432; balance: $62,821.
- TD Ameritrade custodial account -0497; balance: $62,500.
- E-Trade custodial account -8770; balance: $62,444.
- E-Trade custodial account -8789; balance: $395.

> The percent of each, as to the marital property, to be considered in the marital award discussion: . . . . Jointly titled, meaning the house and that section: 44.2%. Titled to the Plaintiff alone: 52.1%. Titled to the Defendant alone: 3.7%.
>
> The Court finds that there is a significant inequity in the value of the marital property titled in the Plaintiff's name, as opposed to the value of the marital property titled in the Defendant's name, and a marital award is necessary.

In so doing Judge Bernhardt, then, detailed the bases for his award, as delineated in Section 8–205(b) of the Family Law Article:

Regarding the first factor, Judge Bernhardt found that Husband's monetary contributions to the family's well-being "far outstripped those of Mrs. Ross. Wife's nonmonetary contributions to the well-being of the children were significant and more substantial than those of Mr. Ross's."

As to the second factor, the value of all property interests, Judge Bernhardt incorporated his findings regarding both parties' property interests.

With respect to the parties' economic circumstances, Judge Bernhardt found that Husband was in a "dramatically" better economic situation than Wife:

> Mrs. Ross is not working. . . . Mrs. Ross has testified that she wanted to obtain a license to sell real estate because she had some experience in that field . . . because there was potential for significant income, and most importantly to her, the work schedule is flexible enough to permit her to have custody of the children.

> After being granted custody of the children, she has since determined that she cannot work[.][12] She relies on her family for a significant amount of support, despite receiving almost $9,000 per month from the Plaintiff
>
> When she left the marital home in October of 2017, she had virtually no belongings, and was obligated to start from scratch. She did not have the benefit of the extent of marital funds that the Plaintiff has had available to him to use for litigation expenses and living expenses. She did not have the income available to her that the Plaintiff had, and has, available to him. . . . The marital assets under her name alone are limited to furniture that she has purchased, and a very small IRA.
>
> The Court rejects the suggestion made by the Plaintiff in his closing that the Defendant's family assistance to her should be viewed as income. The corollary to that idea is that the family's resources should be considered in looking at her economic circumstances in the same way as if they were *her* resources. I am sure the Plaintiff does not want to accept that his parents' assets should be considered by the Court in considering his economic circumstances. The Court does not view that to be the law - - she needs the financial assistance of a marital award to establish herself.
>
> Mr. Ross continues with his current employer. Documents attesting to his income satisfied the Court that 2019 will probably end the same way that many of the previous years have ended - - with him making a substantial amount of money.
>
> Mr. Ross owes money to therapists, but has a substantial income. For Mr. Ross, the decision of how to use his money is dictated by his wishes, and not necessity. He has decided to use his money to fund litigation at the expense of paying therapists that his children need so badly. Mr. Ross is clearly and dramatically economically superior to Mrs. Ross.

(italics in original).

[12] In his discussion of his grant to Wife of monthly rehabilitative alimony in the amount of $4,000 for eighteen months, Judge Bernhardt stated, "Mrs. Ross has conceded an income of $40,000 per year to be imputed to her."

As to the fourth factor, Judge Bernhardt found that, "[b]oth parties bear a significant burden for the demise of the marriage." Judge Bernhardt, in his discussion of this factor, referred to evidence, predominantly in the form of testimony, of Wife's alcohol abuse, as well as the erosion of Husband's support for her attempts at recovery and his eventual decision to reject the possibility of reconciliation.

Judge Bernhardt found that "[t]he parties were married November the 22nd of 2003. There were no separations . . . until October of 2017[.]"

Regarding the sixth factor, Judge Bernhardt found that Husband and Wife "are both approximately forty years old."

With respect to the seventh factor, the physical and mental condition of both parties, Judge Bernhardt found that "both parties are in good physical condition. Mrs. Ross is an alcoholic." Judge Bernhardt addressed Husband's mental condition, explaining that Husband had been diagnosed in the custody evaluations developed in the case as "having a narcissistic personal disorder, and also having other personality traits that cause him to act in a manner that bonds the children to him, at the necessary rejection of their mother." Judge Bernhardt explained that, "Mr. Ross's condition or conditions are not a factor in his financial situation." Wife's treatment for alcoholism, however, necessitated a short-term diminution in her ability to be self-supporting, with a commensurate limited impact on her financial circumstances.

Judge Bernhardt, in addressing the eighth factor, how marital property was acquired, identified with specificity how the marital property was acquired, which is not an issue before us.

As to the ninth factor, contributions of non-marital property to the acquisition of real property for which the parties are tenants by the entirety, Judge Bernhardt found that the family home was marital property and, based on Husband's testimony, that his parents had contributed a gift of $100,000 toward its acquisition.

Judge Bernhardt explained that Wife would receive an award of alimony, which he considered in his determination of the marital award, pursuant to the eleventh factor.

Judge Bernhardt, then, addressed additional factors he considered, including Husband's assertion that he had paid an excessive amount of *pendente lite* alimony and child support, "the lion's share of the BIA fees," as well as other expenses. Judge Bernhardt found that Husband had paid a large proportion of the expenses using marital funds and, as a result, those funds "are no longer available to Mrs. Ross." Judge Bernhardt found that the *pendente lite* alimony and child support amounts were not excessive.

Judge Bernhardt then explained the terms of the marital award:

> As to the jointly-held financial accounts: the TD Ameritrade accounts ending in -7815, -3666, and -3680 - - getting back to Mr. Ross's estimate as of April the 30th, 2018, was they held, respectively, $287,530, $8,463, and $37,120, totaling $333,113. If the accounts were divided equally on April the 30th of 2018, each would have received $166,556.50.

> Mrs. Ross removed $149,962, a very short period of time later, in June of 2018 - - an amount that is $16,595 less than if the accounts had been divided equally on April the 30th of 2018.
>
> The amount of $165 remained as the most recent accounting. Dissipation of $16,595 has not been demonstrated, but the Defendant shall receive the full amount of $165.
>
> As to the financial accounts held individually by Mr. Ross, and these would be marital property: M&T Bank, Robinhood, and E-Trade ending in -1761. The accounts are valued at $24,200, $196,824, and $216,338, respectively, totaling $437,382. The Defendant is awarded one-half, or $218,691.
>
> The total custodial accounts for the children - - and again, these are not the 529s, they are not part of the marital award discussion. The total is $188,160. The Defendant is awarded one-half: $94,080.
>
> The total marital award of the marital property titled in Mr. Ross's name is $312,936. That's the marital award. [A]ny remainder of the marital award that has not been paid to Mrs. Ross by Mr. Ross within 45 days after the distribution of the net proceeds of the sale of the marital home may become a judgment.

Husband's allegations before us, in his brief and argument, fail to identify which of the financial accounts included within the marital award was overvalued.[13] For each of the accounts, which factored into the marital award, however, Judge Bernhardt cited specific evidence on which he relied in his valuations, including the 9–207 Statement, bank statements, a financial statement that Husband had filed with the court in October of 2019, as well as his testimony. We discern no error in Judge Bernhardt's fact finding and application of the law with respect to the marital award.

[13] Husband's counsel, during oral argument, failed to identify any testimony before the trial court that supports his overvaluation allegations.

Husband next takes issue with Judge Bernhardt's decision to include $188,160 in four bank accounts in the marital award, which Husband testified that he had opened under his own name with a reference to one of the three children, after Wife had taken money from an account that was jointly held. Husband asserts that the bank accounts in issue were similar to qualified tuition plans, also known as "529 plans,"[14] and, therefore, should not have been included in the marital award, because 529 accounts are excluded from marital awards. Husband, in support, notes that Judge Bernhardt, in the present case, with reference to "three Vanguard 529 accounts[,]" which he found had been opened for the children and had a total value of $93,387, determined that they were marital property titled in Husband's name, but would not be included in the calculation of the marital award.

In *Abdullahi v. Zanini*, 241 Md. App. 372, 411 (2019), we had occasion to address the question of whether a Maryland College Investment Plan account and a Maryland College Trust account should be included in the computation of a marital award. In that

[14] The term "529 plan" refers to a college savings plan that is established by the State for the purpose of enabling families to fund higher education expenses and which satisfies criteria delineated in Section 529 of the Internal Revenue Code, 26 U.S.C. Section 529 (1986). Michael J. Feinfeld, PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES Section 8.49 (4th ed. 2021). Such plans offer tax benefits when the funds are applied to qualified education expenses: "[i]f property utilized, the funds contributed to a Section 529 Plan will grow without any current taxation on income or capital gains and can be used to defray the higher education expenses of the beneficiaries of the Section 529 Plan without the imposition of any income tax when the funds are so used." *Id.*

case, the Wife was custodian of the two 529 accounts, which were opened for the purpose of funding the educational expenses of the parties' son. *Id.* at 411 (alterations in original). The trial court counted the two plans as marital property to be counted as property of the Wife. *Id.*

We agreed with the trial court's conclusion that the accounts were marital property, but disagreed with counting the plans as "Wife's separate assets for the purpose of determining an equitable monetary award." *Id.* We, thus, did not consider the two 529 plans as assets of the Wife in the determination of a monetary award.

The accounts in issue in the instant case have none of the trappings of 529 plans,[15] and, therefore, are assets of the Husband, which should have been included in the calculation of the marital award.

[15] Husband, on cross-examination, was specifically asked whether the funds contained in the custodial accounts had restrictions on their use:

> Q. We can agree that those are unrestricted accounts, correct? They're just custodial accounts that happen to have your name on them?
>
> A. Well, they're currently frozen so they are restricted, but the accounts themselves are custodial accounts so they have my name on them. That's correct.
>
> Q. They weren't restricted until your consent to restrict those following the proceedings in October of last year, correct?
>
> A. I don't remember the exact date, but, Your Honor, froze them. He froze them.

With respect to the $499,890.90 that Wife had received from her family over the course of the divorce proceedings, the record contradicts Husband's assertion that Judge Bernhardt failed to account for those funds in his evaluation of Wife's economic circumstances. During his discussion of the parties' finances, Judge Bernhardt expressly stated that Wife "relies on her family for a significant amount of support, despite receiving almost $9,000 per month from the Plaintiff." It is clear that Judge Bernhardt considered that support as part of his analysis of her economic circumstances.

Husband, though, appears to want a benefit to accrue to him because of Wife's family's financial contributions. It is clear, however, that Judge Bernhardt acted within his discretion when he declined to consider those funds, because gifts from third parties are not marital property under the Statute.[16]

Lastly, Judge Bernhardt's thorough recitation of the analyses on which he relied to determine the marital award to Wife, belies Husband's assertion that Judge Bernhardt

[16] Section 8–201(e)(3), which identifies items that are not to be classified as marital property, provides:

> (3) Except as provided in paragraph (2) of this subsection, "marital property" does not include property:
>
> (i) acquired before the marriage;
>
> (ii) *acquired by inheritance or gift from a third party*;
>
> (iii) excluded by valid agreement; or
>
> (iv) directly traceable to any of these sources.

(emphasis added).

considered any "emotional abuse," "narcissism," or "scorched earth tactics," of the Husband in the marital award calculation. Judge Bernhardt did not, and he did not err.

Number 944 - Entry of Judgment and BIA

Husband, by the terms of Judge Bernhardt's December of 2018 order, was required to pay the monetary award and attorneys' fees no later than forty-five days after the marital home was sold. Husband, in his original appeal in Number 1473, thereafter, challenged the marital award, its amount, and the grant of attorneys' fees.

The marital home was sold on June 19, 2020 and payment of the monetary award and counsel fees were required to have been made by August 3, 2020. Husband, though, did not make the payments. Wife, in September of 2020, filed a Motion for Entry of Judgment (Monetary & Attorney's Fees Awards), in which she requested that a judgment be entered against Husband in the amount of $392,936.

Husband opposed Wife's motion for entry of judgment, citing the pending appeal before this Court, Number 1473, as the only basis for asserting that the Circuit Court lacked jurisdiction to enter the judgment against him. The Circuit Court subsequently granted Wife's motion and entered a judgment against Husband in the amount of $392,936 and ordered that interest would accrue as of the date when payment had been due under the terms of Judge Bernhardt's Order. Husband, then, in Number 944, challenges the entry of the judgment against him, also reiterates his original challenges to

Judge Bernhardt's economic findings, and then challenges the reappointment of Monica Scherer, as the children's Best Interest Attorney.

Husband initially asserts that his appeal, now Number 944, stayed the ability of the Circuit Court to enter a judgment of the monetary award and attorneys' fees to Wife after they remained unpaid, though due and owing. We disagree with Husband.

In divorce proceedings, an appeal of a judgment granting a marital award and attorneys' fees does not automatically deprive the trial court of the authority to enforce that judgment. *Link v. Link*, 35 Md. App. 684, 688 (1977).[17] In *Link*, the parties were divorced in August of 1976 and, as part of that judgment, the Circuit Court granted Ms. Link, *inter alia*, "forty dollars a week in alimony, eighty dollars a week as contribution toward the support of the child, and one thousand dollars in counsel fees." *Id.* at 685. Mr. Link timely noted an appeal of the Circuit Court's judgment. Six days after Mr. Link filed his appeal, Ms. Link "filed a petition for contempt for nonpayment of alimony and counsel fees." *Id.* After a hearing, in October of 1976, the Circuit Court entered a judgment against Mr. Link in the amount of unpaid alimony and attorneys' fees "and ordered the clerk to issue an attachment for the apprehension of [Mr. Link] on the citation for contempt." *Id.* Mr. Link noted an appeal of the judgment itself, in which he asserted

[17] *See* Harry S. Johnson, et al., Staying the Judgment and Supersedeas Bonds, Section I(A), in APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL, Paul M. Sandler, et al, editors (5th ed., 2018).

that, "once an appeal is noted, the court is without jurisdiction to take any further action in the case." *Id.*

In rejecting Mr. Link's argument, we emphasized "the generally understood premise upon which we hold jurisdiction to be founded, i.e., the inherent authority of a court to enforce decrees subject only to an express stay." *Id.* at 686. With respect to that authority in divorce cases, we explained that "Maryland cases have uniformly held that a divorce court has jurisdiction to entertain [a wife's] petition for alimony, child support and counsel fees, even though her petition is filed after an appeal from the grant or denial of a divorce has been noted." *Id.* at 687 (citations omitted).

We explained that, according to the Maryland Rules, an appeal of a judgment in divorce proceedings did not automatically deprive the trial court of the power to enforce its decree: "[w]e find it significant that the Rules of Procedure relating to appeals only permit a stay of execution of judgment in expressly delineated areas (none of which include alimony or divorce), or when a trial judge expressly stays execution as by setting a supersedeas bond." *Id.* Those rules, we reasoned, indicated the Court of Appeals', which had promulgated the Rules, recognition that "judgments must be obeyed despite appeal unless some authority or procedure is propounded to stay them." *Id.* at 688. We then concluded, "If a court is allowed to award and modify alimony, child support and counsel fees pending an appeal, there is no reason why it cannot enforce its decree." *Id.*

In *Gallagher v. Gallagher*, 118 Md. App. 567 (1997), we were confronted with the issue of enforcement of a monetary award and attorneys' fees and determined that an appeal of a monetary award and an award of attorneys' fees did not divest the trial court's jurisdiction to reduce those awards to a judgment. The Gallaghers were divorced in 1996, and Ms. Gallagher was awarded indefinite alimony in the amount of $1,500, a $175,000 marital award, and $20,684.95 in attorneys' fees. *Id.* at 573-74. The terms of the trial court's order required Mr. Gallagher to complete payment of the monetary award by February 28, 1997, and to pay the attorneys' fees by December 23, 1996. Mr. Gallagher noted an appeal to this Court, in which he challenged the granting of indefinite alimony, the monetary award, and the granting of attorneys' fees. *Id.* at 574.

In April of 1997, while Mr. Gallagher's appeal was pending and after the trial court's deadline for paying the monetary award and attorneys' fees, Ms. Gallagher "requested that the [trial] court reduce the marital award and counsel fees to judgment." *Id.* at 574. The trial court, over Mr. Gallagher's opposition, granted her request. Mr. Gallagher added a challenge to the trial court's action to his pending appeal, arguing that "the court was without authority to reduce these amounts to judgment because he had entered a Notice of Appeal to this Court that deprived the circuit court of jurisdiction." *Id.* at 587. We demurred and distinguished the reduction of the monetary award and counsel fees to judgment as a "collateral award," which was not subject to an automatic stay:

> The subject matter of this appeal, as it relates to this issue, is the grant of the monetary award, the amount of the monetary award, and the award of litigation expenses. The later trial court proceeding and judgment did not concern the amount or the award of the monetary award or the amount or the award of litigation expenses. The proceedings at issue involved whether appellant had paid the monetary award and litigation expenses as directed by the trial court's previous order. These amounts, not having been paid by appellant, caused a judgment to be entered against him. As we perceive this case, the subsequent reduction of the monetary award and counsel fees to judgment was a collateral matter.

Id. at 590. We then held that the trial court had "properly reduced to judgment the monetary award then due and owing and counsel fees." *Id.*

Husband, in Number 1473, appealed the marital award, its amount, and the grant of attorneys' fees, as had Mr. Gallagher, but did not request a stay of the judgment enforcing the monetary award, which was a "collateral matter." Husband failed to avail himself of the procedure, set forth in the Maryland Rules, to secure an order to stay enforcement of the judgment while his appeal was pending and failed to file a supersedeas bond, as required under Rule 8–422(a), which provides:

> (a) **Civil proceedings.** (1) Generally. Stay of an order granting an injunction is governed by Rules 2-632 and 8-425. Except as otherwise provided in the Code or Rule 2-632, an appellant may stay the enforcement of any other civil judgment from which an appeal is taken by filing with the clerk of the lower court a supersedeas bond under Rule 8-423,[18] alternative

[18] Rule 8–423, entitled **Supersedeas Bond**, provides:

> (a) **Condition of Bond.** Subject to section (b) of this Rule, a supersedeas bond shall be conditioned upon the satisfaction in full of (1) the judgment from which the appeal is taken, together with costs, interest,

(continued . . .)

security as prescribed by Rule 1-402 (e), or other security as provided in Rule 8-424.[19] The bond or other security may be filed at any time before

(. . . continued)

and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or (2) any modified judgment and costs, interest, and damages entered or awarded on appeal.

(b) **Amount of Bond.** Unless the parties otherwise agree, the amount of the bond shall be as follows:

(1) Money Judgment Not Otherwise Secured. Subject to Code, Courts Article, § 12-301.1, when the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be the sum that will cover the whole amount of the judgment remaining unsatisfied plus interest and costs, except that the court, after taking into consideration all relevant factors, may reduce the amount of the bond after making specific findings justifying the amount.

(2) Disposition of Property. When the judgment determines the disposition of the property in controversy (as in real actions, replevin, and actions to foreclose mortgages), or when the property, or the proceeds of its sale, is in the custody of the lower court or the sheriff, the amount of the bond shall be the sum that will secure the amount recovered for the use and detention of the property, interest, costs, and damages for delay.

(3) Other cases. In any other case, the amount of the bond shall be fixed by the lower court.

[19] Rule 8–424, entitled **Money Judgment Covered by Insurance**, provides:

When an appeal is taken from a judgment entered against an insured in an action defended by an insurer under a policy of insurance, all proceedings to enforce the judgment pending the appeal shall be stayed to the extent of the policy coverage, if the insurer files with the clerk of the lower court an affidavit of one of its officers or authorized agents describing the policy and the amount of coverage, together with a written undertaking that if the judgment is affirmed or modified or the appeal is dismissed, the insurer will pay the judgment, or that part affirmed, to the extent of the limit of liability in the policy plus interest and costs. The insurer shall serve a copy of the affidavit and undertaking on the judgment

(continued . . .)

> satisfaction of the judgment, but enforcement shall be stayed only from the time the security is filed.
>
> (2) When Security Filed After Partial Execution. If a supersedeas bond or other security is filed after partial execution on the judgment, the clerk of the lower court shall issue a writ directing the sheriff who has possession of any property attached to stay further proceedings and surrender the property upon payment of all accrued costs of the execution.
>
> (3) Death of Appellant. A bond or other security filed shall not be voided by the death of the appellant pending the appeal.

Husband had to request a stay of the judgment, which he did not, and then post the requisite supersedeas bond, pursuant to Rule 8–423. Husband failed to follow the required procedure and the judgments persevere.

The second issue raised by Husband in Number 944 is his assertion that the Circuit Court abused its discretion when it reappointed the Best Interest Attorney, Monica Scherer.[20]

In May of 2020, the Circuit Court issued an order terminating the services of the Best Interest Attorney, Ms. Scherer, who had been involved in the case since February of

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(. . . continued)

> creditor. The insurer shall also give written notice to the insured that (a) the enforcement of the judgment to the extent of the limit of liability is stayed with respect to the insured and (b) if the limit of liability is less than the amount of the judgment, the insured may obtain a stay of enforcement of the balance of the judgment by filing a supersedeas bond in an amount set pursuant to Rule 8-423, not exceeding the balance.

[20] It is unclear whether the reappointment of a Best Interest Attorney is an appealable issue. We shall, nonetheless, address it, in order to forestall Husband from raising the issue as a continuing defense against payment of the BIA's fees.

2018, because it concluded that the duties associated with the appointment were complete. The order also stated that, "The Court will consider re-appointment should the children need further representation in this matter." Representation of the children was later needed, and Judge Kramer, in July of 2020, reappointed Ms. Scherer as the children's BIA.

Husband subsequently moved the Circuit Court to vacate the order reappointing the BIA and, instead, appoint a Child's Advocate Attorney[21] to represent the children. In the motion, Husband alleged that the BIA had acted contrary to the children's best interest, was biased against him, and had used him as an "ATM."[22]

Wife opposed Husband's motion. Ms. Scherer filed a response to Husband's motion in which she denied the allegations of misconduct and bias, but, nonetheless, requested that her appearance be stricken and that a new BIA be appointed, because of Husband's "continued allegations of 'misconduct' towards [her] which requires time and therefore fees to defend and respond to, and the lack of payment of the retainer and the

[21] A Child's Advocate Attorney "advances the child's wishes and desires in the pending matter." Rule 19 Appendix 19-D MARYLAND GUIDELINES FOR PRACTICE FOR COURT–APPOINTED LAWYERS REPRESENTING CHILDREN IN CASES INVOLVING CHILD CUSTODY OR CHILD ACCESS, Section 2.3. A Child's Advocate Attorney differs from a Best Interest Attorney, in that the former does not make an independent assessment of what is in the child's best interest and then advocate that position in court. *Id.* at Section 2.2. The Child's Advocate Attorney, first ascertains whether her client(s) have "considered judgment," and, upon such a finding, advocates for her client's "wishes and desires." *Id.*, Section 2.3

[22] Husband is, we assume, referring to an Automated Teller Machine.

outstanding Judgment against [Husband] in favor of [her] firm[.]" Ms. Scherer subsequently filed a Motion to Strike Appearance of Best Interest Attorney for Minor Children, in which she alleged that, due to Husband's ongoing failure to pay his portion of her court-ordered retainer she would not be able to continue to serve in that capacity without assurance that she would be compensated.

The Circuit Court, in September of 2020, issued an order denying Husband's motion to vacate the BIA's reappointment. The next month, the BIA's motion to strike her appearance was denied.

Before us, according to Husband, Ms. Scherer failed to act in the children's best interest during the divorce proceedings, and her reappointment created a conflict of interest, because of his longstanding dispute with her regarding her compensation. The Circuit Court, he argues, should have appointed a Child's Advocate Attorney, for the purpose of advancing the children's preferences. Wife urges affirmance of the reappointment of Ms. Scherer, arguing that Husband's opposition to her reappointment constitutes "tactical abuse."

A BIA is "an attorney appointed by a court for the purpose of protecting a child's best interest, without being bound by the child's directives or objectives." GUIDELINES FOR PRACTICE FOR COURT-APPOINTED LAWYERS REPRESENTING CHILDREN IN CASES INVOLVING CHILD CUSTODY OR CHILD ACCESS ("Guidelines"), Section 1.1. A BIA has the responsibility to "advance[] a position that the attorney believes is in the child's best

interest." *Id.*, Section 2.2. The Guidelines caution against a conflict of interest, which would relate to representation of multiple children: "An attorney who has been appointment to represent two or more children should remain alert to the possibility of a conflict that could require the attorney to decline representation or withdraw from representing all of the children." *Id.*, Section 3.

We have explained that, "[b]ecause the BIA must advance a child's best interest in the midst of what are often bitter and contentious disputes between the child's parents, the BIA will frequently displease at least one, if not both, of the parties." *McCallister v. McCallister*, 218 Md. App. 386, 404-05 (2014). Given that reality, "[i]f, . . . a parent merely claims that a BIA should be disqualified from representing the child because the parent disapproves of the BIA's representation, it is appropriate for courts to view the claim with some skepticism." *Id.* at 405. A parent's opposition to the children's BIA is closely scrutinized "because a parent might use the prospect of disqualification as a tactic to deter the BIA from carrying out his or her duty to make 'an independent assessment of what is in the child's best interest' and to advocate that position before the court.'" *Id.* at 404-05. (quoting Guidelines, Section 1.1).

It is clear that Husband opposes Ms. Scherer's reappointment because she, during the divorce proceedings, did not agree with the children's stated preference to reside with him, which Ms. Scherer had made known to the Circuit Court. Ms. Scherer, during the divorce proceedings, ensured that the children's preferences were made part of the record

in February of 2019, after explaining that the children's preference to reside with their father was already on the record, and confirmed to Judge Bernhardt that the children had communicated that preference to her: "I will tell you that the children -- what they've told me is no different than what you've heard from folks on the witness stand." The BIA should make the child's preferences known to the judge, and the Guidelines empower her to "advocate[] a position different from the child's wishes," as long as the attorney believes that the position is in the child's best interest. Guidelines, Section 2.2. Ms. Scherer acted in conformity with the Guidelines.

It is also obvious that Husband, who has not satisfied his financial obligation to the BIA, is attempting to use his failure to pay as a sword to undermine Ms. Scherer's reappointment. We will not countenance Husband's attempt to justify his unwillingness to pay the BIA. There was no error in the decision to reappoint Ms. Scherer as BIA.

Number 579 - Emergency Petition

In April of 2020, Husband filed a petition, which requested a modification in child custody. Husband coupled the petition to modify custody with a second contempt motion,[23] in which he alleged that Wife had refused to make the children available for visitation.

Husband, on May 26th, then, filed "Plaintiff's Emergency Application for

[23] Husband, in February of 2020, filed a contempt motion in which he alleged Wife had violated terms of the custody order, which had been filed in December of 2019.

Pendente Lite Relief and/or for Protection from Domestic Violence/Child Abuse," in which he asserted that Wife and her partner had assaulted the children and that Wife had neglected all three, as a result of her alcohol abuse. Magistrate Lara Weathersbee, who initially reviewed Husband's petition, recommended that the Circuit Court set a one-hour "family law emergency hearing" based on the allegations in Husband's Petition.[24] Magistrate Weathersbee, in her recommendation, stated: "Insomuch as the pleading

[24] The County Administrative Judge of each Circuit Court, pursuant to Rule 16–302(b), is required to "develop, . . . a case management plan for the prompt and efficient scheduling and disposition of actions in the circuit court." Rule 16–302(b). Case management plans, prior to implementation, must be approved by the Chief Judge of the Court of Appeals. *Id.*

According to the Circuit Court for Howard County's Family Law Differentiated Case Management Plan ("DCM"), a request for an emergency hearing must be based on an "emergent situation," which is defined as "one that cannot safely wait for a regular hearing." *Id.*, Section I.7. The DCM defines an emergency as:

> 1. Any risk of substantial, irrevocable harm that will likely occur unless the matter is considered immediately.
>
> 2. Any imminent threat to the health, welfare and safety of a party or a party's child.
>
> 3. Imminent removal of a child from the state without advance notice to the other parent.

Id. The DCM expressly defines non-emergency situations:

> 1. Non payment of support or other financial obligations.
>
> 2. School transfers.
>
> 3. Visitation disputes.

Id.

references the Domestic Violence statute,[25] counsel is directed that petitions for relief under said statute are to be made in the district court and/or with the county commissioner[,]" reflecting the procedure mandated in an Administrative Order issued by the Court of Appeals, in March of 2020.[26] Judge William V. Tucker subsequently issued

[25] Maryland's Domestic Violence Act is codified as Subtitle 5, entitled "Domestic Violence," of Title 4, entitled "Spouses," of the Family Law Article.

[26] On May 4, 2020, then Chief Judge Mary Ellen Barbera issued a Fourth Amended Administrative Order Expanding and Extending Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency (the "Administrative Order"), in which she, *inter alia*, delineated the matters to be handled by each of the appellate and trial courts in the State. According to the Order, District Court Commissioners were the only forum to entertain initial forays into the following matters:

> (A) new extreme risk protective order petitions
>
> (B) *new domestic violence protective petitions (adult respondents)*
>
> (C) new peace order petitions (adult respondents)
>
> (D) initial appearances
>
> (E) applications for statement of charges
>
> (F) acceptance of bail bonds
>
> (G) bench warrant satisfactions

Administrative Order, Section (i)(5) (emphasis added). The Administrative Order also prescribed various processes for handling other emergency matters:

> (j) For all other emergency matters including those listed below, the administrative judge or his or her designee shall review the petition, determine whether it must be heard in person, or can be heard with remote electronic participation, or can be scheduled after the emergency period has ended, or can be resolved without a hearing, including, but not limited to:

(continued . . .)

an order setting a one-hour hearing on the "emergency" motion, to be held on May 28th.

The parties appeared before Magistrate Stephanie Porter, in a virtual hearing on

(. . . continued)

> (1) CINA matters, consistent with FCCIP Subcommittee of the Maryland Judicial Council recommendations of April 3, 2020, appended hereto
>
> (2) emergency delinquency hearings, including motions related to juveniles who are detained, committed pending placement, or committed, consistent with the Administrative Order Guiding the Response of the Circuit Courts Sitting as Juvenile Courts to the COVID-19 Emergency as It Relates to Those Juveniles who are Detained, Committed Pending Placement, or in Commitments, filed April 13, 2020
>
> (3) emergency Habeas Corpus petitions
>
> (4) emergency issues in guardianship matters
>
> (5) domestic violence protective orders
>
> (6) appeals from peace orders
>
> (7) family law emergencies, including time urgent matters related to special juvenile immigrant status
>
> (8) temporary restraining orders
>
> (9) criminal competency matters
>
> (10) motions regarding:
>
> (A) extreme risk protective orders
>
> (B) domestic violence protective orders
>
> (C) peace orders
>
> (11) contempt hearings related to peace or protective orders
>
> (12) matters involving locally incarcerated defendants, consistent with the Administrative Order Guiding the Response of the Trial Courts of Maryland to the COVID-19 Emergency as It Relates to Those Persons who are Incarcerated or Imprisoned, filed April 14, 2020[.]

Husband's family law emergency petition, during which Husband testified. Following the hearing, Magistrate Porter issued her Report and Recommendations, which included the following findings of fact:

> 1. The parties are the parents of three minor children, namely, Madeline Ross, born in June 2006, Katie Ross, born in December 2007, and Blake Ross, born in June 2010.
>
> 2. BIA participated in the hearing and confirmed with Dr. Carlson that he led a complaint with DSS as a result of what was reported to him.
>
> 3. Jared Ross testified that visitation stopped around the time the Governor's stay at home order based on Jennifer Ross's conclusion that that would happen. The parties communicated via family wizard. Access began again approximately two weeks ago. He had other contact with the children. At the end of March, he did not have phone contact because mother had taken the children's phone. Maddie called him and she broke down crying, she could not get words out at first, she was breathing heavily. She stated that on Sunday, March 29th, Maddie said that mother hit one of the children and so they were in fear. He spoke with Katie and Blake as well. Katie said that mother had struck her on the cheek. He received birthday cards around April 29th and in the card, there were letters. He had a dinner contact on Friday, May 22, 2020. Blake called him but the connection fell out. He had a conversation with Maddie. She was crying and upset during the conversation. She said "Josh" forced the door open and it pushed her up against the wall. Maddie texted after that. Katie and Maddie have stated their concerns regarding mother drinking. This was in April. Father had a sleepover for the girls around March 16, 2020. He did not have concerns regarding Corona virus escalating at that time. One of the children left during the night because the child was sick. He did not know until the morning that the child left.
>
> 4. The children said the events of Memorial Day weekend occurred Friday night and they called on Saturday morning. Mother was in the room with the children and Josh opened the door. The kids called him the next day when mother was not in the home. He suggested the incident may be something else.
>
> 5. Plaintiff called the police to mother's home on a Sunday of the electronic free weekend. He called the police to conduct a welfare check.

> (The weekend of March 30th) He never sought to obtain a copy of the police report. He took no action other than to try to arrange access with mother.
>
> 6. Plaintiff has had significant contact with the children daily.
>
> 7. On Saturday, May 23rd, father called George the counselor. He did not call the police to do a welfare check.
>
> 8. Father has not addressed concerns with mother drinking directly with mother.
>
> 9. The situations alleged by the plaintiff, even if true, do not rise to the level of emergency relief.
>
> 10. The parties should be following the access order as issued.

Magistrate Porter recommended that Husband's petition be denied and that the parties should abide by the custody order.

Husband filed exceptions to the Magistrate's recommendations, including that she had erred by failing to apply the Domestic Violence Act when she evaluated the merits of his petition, by also failing to take testimony from the children, and by also refusing to consider allegations that had been raised in the contempt motion, which Husband had filed contemporaneously with the emergency petition. Wife opposed Husband's exceptions.

The parties appeared in a hearing before Judge Mary Kramer, of the Circuit Court for Howard County, in July of 2020. Following arguments by counsel for both parties, Judge Kramer denied Husband's exceptions. Judge Kramer, in ruling from the bench regarding Husband's first exception, explained that Magistrate Porter had, in evaluating Husband's petition, applied the correct standard and had correctly determined that the

allegations in Husband's petition did not rise to the level of an emergency:

> For emergency hearings there must be an emergent situation, one that cannot safely wait for a regular hearing. That's why Magistrate Porter was focused on is this an emergency, is this something that cannot safely wait until a regular hearing.
>
> So what is an emergency? The DCM tells us any risk of substantial, irrevocable harm that will likely occur unless the matter is considered immediately, and any immediate threat to the health, welfare and safety of a party's child or imminent removal of the child from the State. What is not an emergency, non-payment of support, school transfers, or visitation disputes.
>
> * * *
>
> So when Magistrate Porter is looking at the allegations in this case in that context, what she's deciding is, is this a substantial, irrevocable harm that will likely occur unless the matter is considered immediately. Is there any immediate threat to the health, welfare, and safety of a party or a party's child? I don't find that she used the wrong standard. She was looking at what is an emergency, and all she was doing is an emergency hearing. We were not doing domestic violence cases at that time, there was a way to do that and if Counsel wasn't aware of it from Chief Barbera's order, Magistrate Weathersbee put that in the proposed order granting the emergency hearing. So Plaintiff should have certainly been aware of that.

Judge Kramer subsequently denied each of Husband's remaining exceptions and issued an order to that effect. Husband then filed his second appeal, Number 579.

Insofar as Husband is challenging the finding by Magistrate Porter and ratified by Judge Kramer, that there was no emergency, we do not discern any error on their part, nor did they abuse their discretion.

With reference to the failure of Husband to gain relief under the Domestic Violence Act, he does not appear to be challenging the legitimacy of the Order of the

then Chief Judge, which required him to file a domestic violence claim in District Court; he, rather, cavalierly asserts that he could choose his forum.

The Chief Judge of the Court of Appeals is the administrative head of the Maryland judicial system. Article IV, Section 18, Maryland Constitution. The Chief Judge has emergency powers in situations, which are defined in Rule 16–1001, which, in relevant part, provides:

> (a) **Generally.** The Rules in this Chapter apply to situations in which the Governor has declared an emergency pursuant to Code, Public Safety Article, Title 14 and the emergency or directives issued by the Governor pursuant to the emergency significantly affect access to or the operations of one or more courts or other judicial facilities of the State or the ability of the Maryland Judiciary to operate effectively.
>
> (b) **Other Events Affecting the Judiciary.** The authority granted specifically by these Rules and by Article IV, Section 18 of the Maryland Constitution generally may be exercised, to the extent necessary, by the Chief Judge of the Court of Appeals in the event of a natural or other event that significantly affects access to or the operations of one or more courts or other judicial facilities of the State or the ability of the Maryland Judiciary to operate effectively.

The Chief Judge has the authority to take numerous actions in emergency situations:

> (1) amend and superintend the implementation of continuity of operations plans adopted pursuant to Rule 16-803;
>
> (2) suspend the operation of Rules that cannot be implemented as intended because of the emergency or event;
>
> (3) identify and direct the use of alternative locations to conduct judicial business in the event that one or more existing locations become inaccessible or otherwise unusable for that purpose;

(4) transfer cases pending in a court that becomes inaccessible or otherwise unusable to any other court having subject matter jurisdiction over the case;

(5) permit cases to be filed in any court having subject matter jurisdiction where no court with venue is reasonably accessible or otherwise usable, subject to transfer, on motion of a party or on the court's own initiative, when the emergency ends;

(6) permit pleadings and papers to be filed and proceedings to be conducted in the manner set forth in Rule 15-1104 (d);

(7) suspend, toll, extend, or otherwise grant relief from time deadlines, requirements, or expirations otherwise imposed by applicable statutes, Rules, or court orders, including deadlines for appeals or other filings, deadlines for filing or conducting judicial proceedings, and the expiration of injunctive, restraining, protective, or other orders that otherwise would expire, where there is no practical ability of a party subject to such deadline, requirement, or expiration to comply with the deadline or requirement or seek other relief;

(8) suspend any judicial business that is deemed not essential by the Chief Judge or close a court entirely when necessary;

(9) triage cases and categories of cases with respect to expedited treatment;

(10) designate and authorize other judges or judicial officials or employees to implement directives issued under this Rule or directives issued by the Governor upon an emergency declared by the Governor;

(11) to the extent necessary to fulfill Constitutional mandates, require that certain courts and judicial facilities remain operational to the extent possible during a state of emergency and resume operations upon termination of a state of emergency;

(12) authorize administrative judges or security personnel to preclude or control entry into courthouses or other judicial facilities by persons who pose a credible threat to the health or safety of members of the public or judicial personnel who are in the courthouse or other facility;

(13) use any means of communication likely to be effective; and

(14) take any other appropriate action necessary to ensure that, to the maximum extent possible, essential judicial business is effectively handled by the courts.

Rule 16–1003.

At the time Husband filed his petition to wrest physical custody of the children from Wife, the Circuit Court, in conformance with the Administrative Order, did not entertain initial filings pursuant to the Domestic Violence Act, which were to be heard by District Court Commissioners. Husband was apprised of the requirement and chose not to follow the mandate. In entering the order of dismissal, then, Judge Kramer did not err.

Husband, finally, takes issue with Judge Kramer's denial of his exception to Magistrate Stephanie Porter's refusal to hear testimony from the children during the emergency hearing. He asserts that "a court may not refuse to hear the child's testimony unless the child is incompetent, i.e., lacks sufficient intelligence to make it worthwhile to hear the witness, or does not understand her duty to tell the truth."

Hearing directly from a child is, however, at the discretion of the judicial actor. *Karanikas v. Cartwright*, 209 Md. App. 571, 590 (2013). In this case, Magistrate Porter explained her position regarding whether the children would testify at the outset of the emergency hearing: "Well, for the record, this is a one-hour hearing. Hearing from the children during the course of this hearing after my review of the record and the nature of these proceedings, the Court does not intend on hearing from the children regardless during today's hearing." Magistrate Porter then gave Husband's counsel an opportunity to explain why the children's testimony was warranted, after which she reiterated her determination: "I'm not going to hear from the children today. This is an hour-long

hearing where first you need to meet the burden of showing me what emergency there is that warrants an immediate order." Husband did not meet his burden of proof of an emergency, which vitiated the need to hear from the children.[27]

[27] During the hearing, Magistrate Stephanie Porter asked the children's Best Interest Attorney, Monica Scherer, to explain her position regarding the children testifying regarding the events alleged by Husband, in his Petition, to have occurred, which resulted in the following colloquy:

> MS. SCHERER: Your Honor, there have been requests previously for the children to testify in prior matters, the Court has ruled that they not be permitted to testify. In this situation, it's my understanding, as I have communicated with Doctor Carlson, that they have communicated with him and anything that they have shared with regard to these incidents, have been, in fact, shared with him. I have waived privilege in the past for Doctor Carlson. Depending on what my role is and/or continues to be, I think that the information can be elicited through Doctor Carlson.
>
> THE COURT: Okay. But for purposes of today, do you have information enough from him that you feel like you can go forward?
>
> * * *
>
> MS. SCHERER: I have spoken to Doctor Carlson, however, given my situation and lack of clarity with regard to my role, I've asked him to do what he would normally do in a situation if acts of abuse or neglect, given his history with this case. I've asked him to act as he would in any other case, not treat this case any differently because of his - -
>
> THE COURT: Sure.
>
> MS. SCHERER: But to treat it with his background, meaning that he has a wealth of history and involvement with this family and the children.
>
> THE COURT: Okay.
>
> MS. SCHERER: So, it's my - - understanding, based on my communication with him, he did reach out to me Saturday, that he did, in

(continued . . .)

In conclusion, we affirm all of the judgments entered by the Circuit Court in Appeals Numbered 1473, 944, and 579.

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

(. . . continued)

> fact, call the Department of Social Services. But from that point, I don't know anything.

Although Magistrate Porter ruled that she would not hear directly from the children, information possessed by them was, nonetheless, available to the Circuit Court.