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COURT OF APPEALS

Chateau Foghorn LP v. Wesley Hosford, No. 73, September Term 2016, filed August 28, 2017. Opinion by Getty, J.

http://mdcourts.gov/opinions/coa/2017/73a16.pdf

CONSTITUTIONAL LAW – PREEMPTION – CONFLICT PREEMPTION – LANDLORD-TENANT LAW – MARYLAND CODE (1974, 2010 REPL. VOL.), REAL PROPERTY ARTICLE § 8-402.1

Facts:

Wesley Hosford, the Respondent, is severely disabled and has been wheelchair-bound since 1987. Since 1989, Mr. Hosford has resided at Ruscombe Gardens Apartments, an apartment building in Baltimore City owned by Chateau Foghorn LP ("Foghorn"), the Petitioner. Ruscombe Gardens Apartments provides housing for low-income elderly and disabled tenants that is subsidized through a federal "Section 8" project-based rental subsidy program. See 42 U.S.C. § 1437f. Under federal law governing that program, Ruscombe Gardens was required to have a provision in its lease agreements that "any drug-related criminal activity on or near such premises" conducted by tenants, household members, or guests "shall be cause for termination of tenancy[.]" See 42 U.S.C. § 1437f(d)(1)(B)(iii); 24 C.F.R. §§ 5.850 *et seq*. In 2012, Mr. Hosford renewed his lease with Ruscombe Gardens, and signed a "Drug-Free Housing Policy" addendum to the lease that contained such a provision.

In 2014, two exterminators hired by Ruscombe Gardens Apartments entered Mr. Hosford's unit to perform extermination treatment and saw a marijuana plant growing in a pot in his bathtub. They reported this to the apartment's management office. Thereafter, police were called, and the responding officer confiscated the plant and issued Mr. Hosford a criminal citation for the possession of marijuana. A police chemist later tested the plant found in the apartment and concluded that it was marijuana. Subsequently, Mr. Hosford was charged in the District Court of Maryland sitting in Baltimore City with possession of less than ten grams of marijuana. Ultimately, a *nolle prosequi* was entered as to that charge.

In June 2014, Foghorn gave Mr. Hosford a notice of termination of his lease. When he did not vacate the unit within thirty days of that notice, Foghorn initiated an eviction action pursuant to

Maryland Code, (1974, 2010 Repl. Vol.), Real Property Article ("RP") § 8-402.1 against Mr. Hosford in the District Court of Maryland sitting in Baltimore City. That statute contains a provision mandating that a trial court must "determine[] that the tenant breached the terms of the lease **and that the breach was substantial and warrants an eviction**" in order to grant a judgment of restitution in favor of a landlord. See RP § 8-402.1(b)(1) (emphasis added).

The case was subsequently transferred to the Circuit Court for Baltimore City for a jury trial. Prior to the scheduled date of trial, Foghorn filed a motion for summary judgment, contending: (1) that there was no genuine dispute of fact that Mr. Hosford possessed marijuana, which was illegal under federal law; and, (2) that the requirement in RP § 8-402.1 that a trial court order eviction only if a tenant's breach is "substantial and warrants an eviction" should be held to be preempted by federal law governing the Section 8 project-based housing program. After holding a hearing and hearing argument from both parties, the circuit court granted summary judgment in favor of Foghorn. The circuit court explained that it agreed with Foghorn that Mr. Hosford's marijuana possession was drug-related criminal activity in breach of his lease. And the court concluded that the requirement in RP § 8-402.1(b)(1) that a court must determine that a tenant's breach "was substantial and warrants an eviction" before awarding a judgment of possession "is preempted by federal law to the extent that it would permit a judge or jury either to exercise discretion *de novo* or to review the landlord's exercise of discretion in deciding to proceed with an eviction."

Mr. Hosford noted an appeal to the Court of Special Appeals, which reversed the circuit court's entry of summary judgment and held that RP § 8-402.1(b)(1) was not preempted by federal law. The intermediate appellate court determined that the only applicable federal preemption doctrine was conflict preemption. According to the court, under that doctrine, "[i]n instances where federal law regulates an area traditionally within the domain of state law, the state law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law will be overridden[.]" *Hosford v. Chateau Foghorn LP*, 229 Md. App. 499 (2016) (quoting *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979))). The court determined that landlord-tenant law is within the traditional domain of the states, and that RP § 8-402.1(b)(1) did not do "major damage" to the interests behind the federal statute and regulations at issue. Indeed, the Court of Special Appeals concluded that, based on its analysis of the federal interests and applicable case law, "permitting State courts to exercise discretion and consider equitable factors when deciding whether to rule in a landlord's favor in an eviction action concerning federally-subsidized housing is consistent with federal law and policy." *Id*. at 529.

Held: Affirmed.

The Court of Appeals held that RP § 8-402.1(b)(1) is not preempted under the doctrine of conflict preemption by federal provisions mandating lease terms for Section 8 project-based housing that provide that "any drug-related criminal activity on or near such premises . . . shall be cause for termination of tenancy[.]" 42 U.S.C. § 1437f(d)(1)(B)(iii). The Court agreed with

the intermediate appellate court that the only preemption issue was whether the state law conflicted with federal law. Furthermore, the Court determined that the only conflict preemption issue before it was whether RP § 8 402.1(b)(1) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (internal quotation marks and citations omitted).

The Court determined that the conflict preemption inquiry focuses primarily on congressional intent, but that it must also apply a presumption that Congress did not intend to preempt state law. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The Court also concluded that the presumption against preemption carries greater weight when Congress legislates "in a field which the States have traditionally occupied." *Id.* (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)). The Court of Appeals noted that some courts had adopted the heightened presumption that a state law in a traditionally state law domain must do "major damage" to "clear and substantial" federal interests before it will be overridden, while other courts had applied that standard only in the context of claims that a federal law conflicted with state law governing marriage and marital property. As the Supreme Court has not clarified whether the "major damage" standard applies to a conflict preemption analysis outside of the family law context, the Court of Appeals declined to adopt that standard at this time.

The Court held that RP § 8-402.1(b)(1), which governs eviction actions for breaches by a tenant other than the nonpayment of rent, is part of Maryland's landlord-tenant law. The Court determined that landlord-tenant law is an area traditionally regulated by state and local governments, and one that has never been federalized. Consequently, in this case, the Court held that a heightened presumption against preemption applied.

Turning to the federal law and its enabling regulations, the Court concluded that they express both a broad and specific congressional intent. Broadly, Congress intended to reduce drug-related crime in federally-subsidized housing because such crime threatens resident safety and causes deterioration of the condition of housing that requires significant government expenditures. Specifically, Congress intended to vest landlords with substantial discretion to bring an eviction action against tenants for any drug-related criminal conduct in order to effectuate its broader aim. Then, applying the presumption against preemption previously discussed, the Court held that the requirement in RP § 8 402.1(b)(1) that a court determine that a tenant's breach was "substantial and warrants eviction" does not pose an obstacle to or otherwise frustrate either Congress' broad or specific intent. The Court stated that trial courts applying RP § 8 402.1(b)(1) can balance equitable considerations against the need to protect the safety of others tenants and the integrity of a housing project. And the Court further determined that a tenant's actions that endanger others or cause significant property damages would properly be considered "substantial" and to "warrant[] eviction." Furthermore, the Court stated that congressional emphasis on a landlord's discretion to *bring* an eviction action in state court based on any drug-related criminal activity that breaches a tenant's lease does not imply an intent to circumscribe the discretion of a state court to review that breach for long-standing state law equitable considerations. Consequently, the Court held that RP § 8 402.1(b)(1) is not preempted by federal law. Therefore, the Court affirmed the holding of the Court of Special Appeals, and remanded the case to the circuit court for further proceedings.

Sadie M. Castruccio v. The Estate of Peter Adalbert Castruccio, et al., No. 79, September Term 2016, filed August 25, 2017. Opinion by Getty, J.

http://www.courts.state.md.us/opinions/coa/2017/79a16.pdf

ESTATES & TRUSTS – VALIDITY OF A WILL – STATUTORY REQUIREMENTS – ATTESTATION

Facts:

Dr. Peter Castruccio died on February 19, 2013, at the age of eighty-nine. He was survived by his wife of sixty-two years, Sadie Castruccio, who was ninety-two years old at the time of his death.

On September 29, 2010, Peter signed a purported will in the presence of three witnesses: his attorney, John Greiber, Mr. Greiber's daughter, Samantha Greiber, and Kim Barclay, the daughter of Peter's longtime employee Darlene Barclay. Peter called the three witnesses into his office and requested that they sign the papers on his desk, which he identified as his will. Peter then signed the Will in the presence of Mr. Greiber, Samantha, and Kim. Next, each of the three witnesses signed the Will in the presence of Peter and each other. On November 17, 2010, Mr. Greiber deposited the Will with the Register of Wills for Anne Arundel County, where it remained until one week after Peter's death.

The 2010 Will consisted of six pages, which were consecutively numbered as pages 1 of 6, 2 of 6, etc. The page numbers were centered on the bottom of each page. The words "Peter Adalbert Castruccio" were centered in large font on the top of page 1 of 6; otherwise, the font and type-size were consistent throughout the document. The Will contained eleven consecutively numbered paragraphs labeled Item 1, Item 2, etc. Some paragraphs were further subdivided into consecutively numbered subparagraphs.

Item 1 named Mr. Greiber as Peter's personal representative for the administration of his estate. Item 7 left cash bequests of varying amounts to three specified individuals, including Darlene. Item 8 left "the rest and remainder" of Peter's estate to Sadie, "should she one, survive [Peter] and two provided she has made and executed a Will prior to [Peter's] death." Item 10, entitled "Residuary Clause," appearing on page 5 of 6, provided that if Sadie had not filed a valid will by the time of Peter's death, then "all the rest and residue of" his estate shall go to Darlene.

Also on page 5 of 6 of the Will, a concluding paragraph stated that Peter had initialed each page of the Will, when in fact none of the pages were initialed. Below this concluding paragraph, Peter signed his full name above the typewritten words "PETER ADALBERT CASTRUCCIO[.]" The last two lines of page 5 of 6 read as follows: "The above named individual, does declare for his Last Will and Testament this instrument, have hereunto subscribed to have witness on the date **last mentioned above**, and at the location, and [. . . .]"

The first two lines of the next page of the Will, page 6 of 6, appeared to be a continuation of the sentence that began on the previous page: "I do hereby attest that the testator to be of sound mind, fully able to understand this instrument, and the testator voluntarily and freely did sign same." Below these words were the signatures of Mr. Greiber, Kim, and Samantha, each appearing under the word "WITNESS:" and above a line that read, "Signature, residing at:[.]" Below each signature appeared the witness' address. No other text appeared on page 6 of 6, other than the pagination at the bottom of the page.

At the time of Peter's death, Sadie had not filed a valid will with the Register of Wills. One week after Peter's death, the Register of Wills appointed Mr. Greiber as personal representative of Peter's estate and admitted the 2010 Will to administrative probate. Sadie filed a Petition to Caveat Will in the Orphans' Court for Anne Arundel County. The Orphans' Court entered an order transmitting seven issues to the Circuit Court for Anne Arundel County for trial.

The Estate filed a motion for summary judgment on all seven issues. Sadie filed a cross-motion for summary judgment as to the issue of attestation, arguing that the 2010 Will did not satisfy the statutory requirement of attestation because the witnesses did not sign on the same page as the testator or on "physically connected pages." Sadie submitted the affidavit of her attorney, who declared that he inspected the 2010 Will at the Register of Wills after it was submitted to probate, and found that it "consisted of six separate, unattached pages, without any staple holes or other evidence of having ever been physically connected together."

The circuit court granted the Estate's motion for summary judgment on all issues and denied Sadie's cross-motion for summary judgment as to attestation. In reaching its decision, the circuit court "proceeded . . . on the assumption . . . that the separate sheets of the Will were not mechanically affixed by a staple or other device" when the will was deposited with the Register of Wills. The court found that the 2010 Will contained a proper attestation clause, and therefore the presumption of due execution attached. The court also found that Sadie had not presented clear and convincing evidence to overcome the presumption.

Sadie appealed to the Court of Special Appeals, which affirmed the judgment of the circuit court. Sadie then petitioned the Court of Appeals for a writ of certiorari, which was granted.

Held: Affirmed.

The statutory requirements for a validly executed will are that it must be "(1) in writing, (2) signed by the testator, or by some other person for him, in his presence and by his express direction, and (3) attested and signed by two or more credible witnesses in the presence of the testator." Md. Code, Estates & Trusts § 4-102. When the testator and the witnesses sign on separate pages of a multi-page will, attestation does not require that the pages be "physically connected" at the time of signing. Furthermore, neither a complete attestation clause nor having the testator initial each page of the will are requirements for valid execution. Therefore, the

absence of these elements in a testamentary document does not serve to invalidate the will, nor prevent the presumption of due execution from attaching to it.

The Estate and Darlene produced "sufficient evidence from the document and/or surrounding circumstances to make a *prima facie* case for the satisfaction of the statutory requirements for execution of a will." *Groat v. Sundberg*, 213 Md. App. 144, 157 (2013). Thus, the circuit court properly found that the presumption of due execution attached to the 2010 Will, and Sadie did not produce clear and convincing evidence to overcome the presumption. Therefore, the circuit court correctly denied Sadie's cross-motion for summary judgment as to attestation, and properly granted the Estate's motion for summary judgment on all transmitted issues. Accordingly, the Court affirmed the judgment of the Court of Special Appeals.

Charles C. Reger v. Washington County Board of Education et al., No. 68, September Term 2016, filed August 4, 2017. Opinion by Getty, J.

http://mdcourts.gov/opinions/coa/2017/68a16.pdf

WORKERS' COMPENSATION ACT – MD. CODE LAB. & EMPL. ART. § 9-610 (1991, 2008 REPL. VOL.) – OFFSET FOR PAYMENT OF BENEFITS THAT ARE "SIMILAR BENEFITS" TO WORKERS' COMPENSATION BENEFITS

WORKERS' COMPENSATION ACT – MD. CODE LAB. & EMPL. ART. § 9-610 (1991, 2008 REPL. VOL.) – OFFSET FOR PAYMENT OF BENEFITS THAT ARE "SIMILAR BENEFITS" TO WORKERS' COMPENSATION BENEFITS – APPLICATION TO ORDINARY DISABILITY RETIREMENT BENEFITS

WORKERS' COMPENSATION ACT – MD. CODE LAB. & EMPL. ART. § 9-610 (1991, 2008 REPL. VOL.) – OFFSET FOR PAYMENT OF BENEFITS THAT ARE "SIMILAR BENEFITS" TO WORKERS' COMPENSATION BENEFITS – APPLICATION TO ORDINARY DISABILITY RETIREMENT BENEFITS – ORDINARY DISABILITY RETIREMENT BENEFITS AWARDED ON THE BASIS OF A PREEXISTING MEDICAL CONDITION

Facts:

Petitioner Charles Reger, Jr., was moving a cafeteria table while working as a custodian for respondent Washington County Board of Education ("Employer"), when the table fell on Mr. Reger, pinning him to the ground. Following the accident, Mr. Reger was diagnosed with significant injuries, primarily to his back and neck, and was unable to perform his custodial work. Mr. Reger thereafter sought and received two different sets of disability benefits from the Employer and respondent Maryland Association of Boards of Education Compensation Self-Insurance Fund ("Insurer"), each awarded by a different state agency: he was granted temporary total disability benefits by the Workers' Compensation Commission ("WCC") and ordinary disability retirement benefits by the State Retirement Agency, the administrative arm of the Maryland State Retirement and Pension System ("MSRPS"). Mr. Reger was denied accidental disability retirement benefits by the State Retirement Agency "since the evidence submitted concerning the accident did not prove that this event caused the permanent disability."

Employer and Insurer (collectively, "Respondents") subsequently petitioned the WCC to offset Mr. Reger's ordinary disability benefits against his temporary total disability benefits pursuant to the statutory offset provision in Maryland Code (1991, 2008 Repl. Vol.), Labor and Employment Article ("LE") § 9-610. That statute provides, in pertinent part,

> [I]f a statute, charter, ordinance, resolution, regulation, or policy, regardless of whether part of a pension system, provides a benefit to a covered employee of a

> governmental unit or quasi-public corporation . . . payment of the benefit by the employer satisfies, to the extent of the payment, the liability of the employer . . . for payment of similar benefits under this title.

Before the WCC, Mr. Reger's counsel contended that the offset provision did not apply. In his view, the ordinary disability benefits were awarded to Mr. Reger as compensation for a degenerative back condition and not the work accident, and thus were granted for a different injury than the temporary total disability benefits he received from the WCC. Further, Mr. Reger's counsel asserted that as a matter of law LE § 9-610 cannot apply to offset ordinary disability benefits against WCC-issued benefits. The WCC found in favor of the Respondents, ruling that the offset provision applied and that Respondents were entitled to a credit for the ordinary disability benefits already paid to Mr. Reger, to be applied against future awards of indemnity in favor of Mr. Reger that may be assessed by the WCC.

Mr. Reger petitioned for judicial review of the WCC's decision before the Circuit Court for Washington County. After holding a hearing as to cross-motions for summary judgment, at which the parties raised similar arguments to those made before the WCC, the circuit court granted summary judgment in favor of the Respondents. The court found that both sets of benefits were awarded on the basis of the same medical records stemming from the workplace injury. And, the court determined that Mr. Reger's ordinary disability benefits were "tantamount to a wage loss benefit" and thus, in the court's view, were analogous to the WCC benefits received by Mr. Reger. Therefore, the court held that "[a]s a matter of law in this case, the benefits are indeed within the statute similar and therefore the statutory offset applies." Mr. Reger noted an appeal to the Court of Special Appeals from the circuit court's ruling and, in an unreported opinion, the Court of Special Appeals affirmed the judgment of the circuit court.

Held: Affirmed.

The Court of Appeals held that, as previous cases had clarified, the legislative intent behind the benefits offset provision now contained in LE § 9-610 is to prevent employees of a Maryland governmental unit or quasi-public corporation who are covered by both a pension plan and workers' compensation from receiving a double recovery for the same injury. And the Court concluded that the legislative intent behind the specific "similar benefits" language in the statute was that the offset apply only to "comparable" benefits, which are "benefits accruing by reason of the same injury." *See Newman v. Subsequent Injury Fund*, 311 Md. 721, 727 (1988). However, rejecting the "wage loss benefit" rationale applied by the circuit court and the Court of Special Appeals, the Court determined that a benefit that compensates an employee for wage loss is not necessarily a "similar benefit" subject to the statutory offset. According to the Court, the offset provision would not apply if an employee's wage loss benefit was not awarded for the same injury as the workers' compensation benefit.

Applying that holding to ordinary disability benefits, the Court held that, as a matter of law, ordinary disability benefits can be legally similar to workers' compensation benefits, if the

record reflects that the cause of the incapacity for which ordinary disability benefits were awarded was the same workplace accidental injury or occupational disease that was the basis for the workers' compensation benefits.

The Court then turned to the facts of Mr. Reger's case. The Court noted that, while the record was not entirely clear, the State Retirement Agency arguably found that the injury for which it was awarding Mr. Reger ordinary disability benefits was caused by preexisting degenerative back problems, whereas his temporary total disability benefits from the WCC were awarded for his November 12, 2007 accident. However, the Court stated that even if the two agencies had ascribed different causes to Mr. Reger's injury that does not imply that each benefit was awarded for a separate and distinct injury. The Court explained that the State Retirement Agency and WCC apply different legal standards to determine whether a beneficiary is entitled to a disability benefit. Therefore, when a disability claimant suffers an injury involving a preexisting condition that is triggered or exacerbated by a work accident, the two agencies may both award benefits for the same injury but ascribe different causes to that injury. Under those circumstances, in order to determine whether ordinary disability benefits and workers' compensation benefits were awarded on the basis of the same injury, the Court held that the WCC is not bound to prior agency findings as to causation. Instead, the WCC may consider any relevant evidence or argument submitted as to the basis for each benefit, which may include: letters or orders granting a benefit, information stated in a claimant's application for benefits, and evidence submitted to the agency, such as medical records or witness testimony.

Finally, the Court determined that the record reflected that both sets of benefits were awarded to compensate Mr. Reger for the same injuries; Mr. Reger claimed in both applications for benefits that he was seeking benefits for the same back and neck injuries, submitted the same medical records and similar medical expert opinions, and testified before the WCC that the first injury that he had suffered to his back occurred after the November 12, 2007 accident. Therefore, the Court held that the WCC did not err in its determination that the offset provision in LE § 9 610 applies in this case, and that the Respondents are entitled to offset Mr. Reger's ordinary disability benefits against his temporary total disability benefits. Accordingly, the Court affirmed the judgment of the Court of Special Appeals.

COURT OF SPECIAL APPEALS

State of Maryland v. Daniel A. Paynter, No. 257, September Term 2017, filed September 28, 2017. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2017/0257s17.pdf

SUPPRESSION OF THE FRUITS OF AN INVENTORY SEARCH – THE SUPREME COURT AND INVENTORY SEARCHES – A MIXED MOTIVE IS NOT A FATAL FLAW

Facts:

Officer Rohsner conducted a traffic stop of Daniel A. Paynter ("appellee") for traveling 50 miles per hour in a clearly marked 30 mile per hour zone. After running appellee's information through the police department communication system, Officer Rohsner learned that appellee's driver's license and the vehicle's registration had been suspended. He further learned that there was a pick-up order for appellee's license plates, requiring him to remove them and to return them to the M.V.A. After receiving a cautionary code from dispatch alerting him that appellee was possibly armed, Officer Rohsner was joined by Officer Cahill. Officer Rohsner conducted an inventory of the vehicle, which was recorded by his body camera. The search revealed, *inter alia*, 51 grams of marijuana. Though the inventory list included "a blue iPhone in the center console" and "seven Mac computers in the trunk of the car," footage from Officer Cahill's body camera revealed several items within the vehicle which were omitted from the inventory list. These items included a spare tire, a jack, jumper cables, and three pairs of tennis shoes. Appellee was indicted for possession of marijuana with the intent to distribute and related offenses.

Appellee filed a motion to suppress the fruits of the inventory search (i.e., the 51 grams of marijuana). During a hearing on that motion, appellee argued that the inventory was flawed because the inventory list failed to include all items found in the car. The court granted appellee's motion to suppress, finding: "What the video makes clear is that what the police conducted is not an inventory, because an inventory lists everything that is and is not based on a subjective criteria as to what is quote valuable, unquote. The motion to suppress is granted as to the contents of the trunk."

Held: Reversed and remanded.

Inventory searching and inventory listing are two distinct procedures, and, as such, a defect in the latter does not retroactively invalidate the former.

An inventory is not an exception to the Fourth Amendment warrant requirement, per se. While a Fourth Amendment "search" is necessarily investigative in nature, an "inventory search" is a non-investigatory community caretaking function. Rather than a "search," for Fourth Amendment purposes, an inventory constitutes a prior valid intrusion under the Plain View Doctrine, allowing for the admissibility of evidence (i) in plain view, and (ii) which officers have probable cause to believe is evidence. For purposes of Fourth Amendment analysis, then, we need only determine whether an inventory was, in fact, a *valid* intrusion.

As the Supreme Court established in *South Dakota v. Opperman*, 428 U.S. 364 (1976), an inventory constitutes a valid intrusion if two requirements are met. First, the police must be lawfully entitled to exert custody over the vehicle. Second, the inventorying must be conducted pursuant to "standard police procedure." It is not relevant whether officers conduct the inventory in the least intrusive manner, *Illinois v. Lafayette*, 462 U.S. 640 (1983), nor is an inventory fatally flawed by virtue of its having been conducted in a "'somewhat slipshod' manner." *Colorado v. Bertine*, 479 U.S. 367 (1987).

In this case, it is clear that both of the threshold requirements delineated in *Opperman* were satisfied. As for the first requirement (i.e., lawful police custody of the vehicle), neither appellee (because of his suspended license) nor anyone else (because of the suspended registration) would have been allowed to drive the car away. Appellee nevertheless contends that the police were not authorized to tow the vehicle until they had exhausted all alternatives to doing so. Such an exhaustion of alternatives is not required. *See United States v. Williams*, 777 F.3d 1013, 1016 (8th Cir. 2015) ("'[A]n impoundment policy may allow some latitude and exercise of judgment by a police officer . . . .'"); *United States v. Arrocha*, 713 F.3d 1159, 1164 (8th Cir. 2013) ("Nothing in the Fourth Amendment requires a police department to allow an arrested person to arrange for another person to pick up his car to avoid impoundment and inventory.").

It is also clear from the transcript of the suppression hearing that the search was conducted pursuant to a standardized police policy. At that hearing, the State introduced a seven-page General Order explaining that policy. Further, Officer Cahill offered testimony about the department's inventory policy and his familiarity with it.

Appellee's principal contention seems to be that the inventory list was so fatally flawed as to invalidate the inventory search. In making such argument, appellee erroneously conflates inventory searching and inventory listing. Given that these are two separate procedures, a flaw in the latter does not retroactively invalidate the former. Further, three of the uninventoried items—the jack, spare tire, and jumper cables—bear such a close affinity with the vehicle itself as to render their omission from the inventory list reasonable.

Appellee's final contention is that Officer Rohsner's motive was investigative as evinced by his having been alerted that appellee was possibly armed and dangerous. National caselaw on the subject squarely dispels the proposition that an officer's expectation that an inventory will yield

incriminating evidence *ipso facto* contaminates the parallel inventory purpose of the search. *See, e.g.*, *United States v. Mundy*, 621 F.3d 283, 294 (3d Cir. 2010); *Armstrong v. State*, 754 S.E.2d 652, 654–55 (Ga. App. 2014).

Danyelle Walker v. State of Maryland, No. 2139, September Term 2016, filed September 27, 2017. Opinion by Zarnoch, J.

http://www.courts.state.md.us/opinions/cosa/2017/2139s16.pdf

CRIMINAL LAW – CONSTRUCTIVE CRIMINAL CONTEMPT – FAILURE TO PAY CHILD SUPPORT – SUFFICIENCY OF THE EVIDENCE

Facts:

In August of 2006, appellant Danyelle Walker entered into a consent order to pay $500 per month in child support for his four children. This amount was increased to $700 in 2015. For a 32-month period he ignored the order. Walker worked sporadically. When unemployed for protracted periods, he said he would look for a job two or three times a month. In 2014, he earned money in each quarter, but in one of those quarters he made no child support payment. The Department of Social Services took various steps to obtain Walker's compliance, such as bank garnishment, driver's license suspension and civil contempt. Finally when Walker's child support arrearages reached $68,000, the Department sought his punishment for constructive criminal contempt.

Walker was charged with two counts of criminal contempt and four counts of failure to pay child support. After a jury found him guilty, the Circuit Court for Frederick County sentenced Walker to three years imprisonment with all but 12 months suspended for each count and with the sentences to run concurrently.

Held: Affirmed

Relying on *Ashford v. State*, 358 Md. 552 (2000) and *Dorsey v. State*, 356 Md. 638 (1988), which overturned contempt findings for insufficient evidence, Walker argued that the evidence did not show that he willfully or deliberately failed to comply with child support orders. Rather, all the state had proved was mere noncompliance. The State contended that there was ample evidences of willfulness, pointing to the fact that: (1) Walker earned income during some months but did not pay child support; 2) he made only lukewarm efforts to find a job; 3) he promised repeatedly to pay, but failed to do so; and 4) the Department took increasingly vigorous steps to collect, but such efforts did not work.

The Court of Special Appeals agreed with the State and noted that the above factors distinguished Walker's case from *Ashford* and *Dorsey*. Thus, the Court affirmed his convictions. It also rejected a contention that the contempt and failure to pay counts should have merged for sentencing purposes.

Ibrahim Brown v. State of Maryland, No. 1900, September Term 2016, filed September 27, 2017. Opinion by Nazarian, J.

http://www.courts.state.md.us/opinions/cosa/2017/1900s16.pdf

MARYLAND DNA COLLECTION ACT – USE OF DNA SAMPLES TO ESTABLISH PROBABLE CAUSE – DNA PROFILES FROM CODIS DATABASE – EXTRATERRITORIAL COLLECTION –

Facts:

Police responded to a burglary call in Silver Spring, Maryland in August, 2014. Upon arrival, they were made aware of a smudge of blood on the inside of a basement window left by a burglar. The responding officers took a sample of the blood and sent it to a DNA lab for analysis. The lab returned results of two matching samples from the FBI's CODIS database. Both CODIS samples had been collected from Ibrahim Brown in the District of Columbia. One was collected upon Mr. Brown's previous conviction for misdemeanor sexual assault, and the other was collected during an investigation for first degree sexual assault for which no charges were filed.

Based on the probable cause established by the match between the window smudge and the CODIS hits, state police obtained a warrant to take a buccal swab from Mr. Brown. The DNA from the buccal swab sample matched the sample from the window smudge. On October 22, 2015, the State indicted Mr. Brown on charges of first degree burglary and theft between $1,000 and $10,000.

On April 20, 2016, Mr. Brown filed a motion *in limine* to exclude all DNA evidence at trial. He argued that because neither of the CODIS DNA matches would have been eligible for collection in and use under the Maryland DNA Collection Act had the alleged crimes occurred in Maryland, they could not form probable cause to take the buccal swab. The Circuit Court for Montgomery County denied Mr. Brown's motion on May 19, 2016 and convicted him on June 9. Mr. Brown appealed.

Held: Affirmed.

The Court of Special Appeals affirmed the Circuit Court for Montgomery County's denial of Mr. Brown's motion *in limine*. Responding to Mr. Brown's other challenge on appeal, the Court also held that the evidence presented at trial was sufficient to sustain his conviction.

The Court of Special Appeals affirmed the circuit court's denial of Mr. Brown's motion *in limine* because the plain language and statutory scheme of the Maryland DNA Collection Act do not preclude reliance on matches from the CODIS database resulting from legally-collected out-of-

state samples, regardless of whether they could be collected legally in Maryland under the Act. The Court of Special Appeals confirmed its reading of the plain language of the Act by examining the Act's legislative history. The legislative history revealed that the legislature considered access to CODIS separately from DNA collection in Maryland, and the requirements for DNA collection in-state were never intended to apply to DNA profiles or samples obtained from CODIS.

Tavon Fullwood v. State of Maryland, No. 2003, September Term 2015, filed August 31, 2017. Opinion by Raker, J.

http://www.courts.state.md.us/opinions/cosa/2017/2003s15.pdf

CRIMINAL LAW – COUNSEL – ADEQUACY OF REPRESENTATION – STANDARD OF EFFECTIVE ASSISTANCE

CRIMINAL LAW – COUNSEL – ADEQUACY OF REPRESENTATION – STANDARD OF EFFECTIVE ASSISTANCE – STRATEGY AND TACTICS IN GENERAL

Facts:

Petitioner Tavon Fullwood appealed the denial of his Petition for Post Conviction Relief. Fullwood filed this Petition alleging ineffective assistance of counsel. After a hearing, the Circuit Court for Baltimore County denied the Petition. Fullwood was convicted in 2002 of attempted first-degree murder, first-degree rape, first-degree sexual offense, and attempted sodomy.

In his petition, Fullwood claimed that his trial counsel was ineffective because, at trial, he challenged only the criminal agency of Fullwood, and did not challenge whether a sexual assault had occurred. Fullwood's petition included an opinion from an expert on sexual assault challenging the State's investigators' initial findings that a sexual assault had occurred. At trial, before the jury, Fullwood had not addressed the evidence of sexual assault, although he did raise the issue at the motion for judgment of acquittal. At the post-conviction hearing, Fullwood's trial counsel conceded that he had not investigated the sufficiency of the sexual assault evidence, and testified that if he had possessed the expert's testimony, he would have challenged the State's evidence at trial. Fullwood claimed that the failure to investigate the sexual assault evidence and bring in an expert was legally ineffective counsel and justified post-conviction relief.

Held: Affirmed.

The Court of Special Appeals affirmed the circuit court and held that Fullwood failed to establish his claim of ineffective assistance of counsel in that he failed to prove either element of the *Strickland* standard, *i.e.*, that trial representation fell below an objective standard of reasonableness and that pursuit of the claimed strategy would have created a substantial possibility of a different result.

The Court noted that a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Although testimony at a post-conviction hearing often

explains tactical decisions, trial counsel's testimony that he could think of no strategic reason not to use expert testimony if he had obtained it represents hindsight bias that courts should avoid.

The Court quoted from *Trying Cases to Win* by Herbert J. Stern & Stephen A. Saltzburg, noting that "when you add a weak argument to a strong argument, you weaken, not strengthen. The sum in such a case is worth less than the best of its parts. . . . Your advocacy is never stronger than your weakest argument." Trial counsel's decision not to present every single defense to a jury may be a reasonable, strategic decision, and the failure to pursue a particular defense does not amount to ineffective assistance of counsel.

The Court held that, based upon inconclusive testimony by the post-conviction expert witness, combined with the strong circumstantial evidence pointing to sexual assault and undisputed life-threatening injuries suffered by the victim, there was not a substantial possibility that, but for trial counsel's failure to investigate and challenge the State's sexual assault evidence, the result of the proceeding would have been different.

In Re: David P., No. 1039, September Term 2016, filed September 27, 2017. Opinion by Wright, J.

http://www.courts.state.md.us/opinions/cosa/2017/1039s16.pdf

CRIMINAL LAW – MERGER OF OFFENSES

CRIMINAL LAW – LIBERAL OR STRICT CONSTRUCTION – RULE OF LENITY

Facts:

Following a trial in the Circuit Court for Wicomico County, sitting as a juvenile court, David P. was found guilty of attempted first-degree arson and reckless endangerment.

The facts presented at trial indicated that, after thrice causing a ruckus on the porch of Nuzhat Nada that caused Nada to come out of her home, David lit two matches and dropped them on the bricks of Nada's front stoop, about one and a half feet away from her door. He then ran away. A wicker doormat was nearby, and there were quantities of dry leaves around the side of the house. Nada also had "a lot of wood and cones" on her other porch. Nada called the police and, while waiting, stood by the matches and let them burn because she "didn't want to touch them." She testified that she did not extinguish the matches, but watched to make sure they did not fly off "because of the wind," fearing that the matches could ignite the dry leaves at the side of the house. Nada stated that the matches left scorch marks "on the bricks" in front of the home.

David appealed his convictions.

Held: Reversed.

The evidence was not sufficient to support the juvenile court's finding of attempted arson and reckless endangerment. Arson is a specific intent crime, and an attempt to commit a specific intent crime requires the same ultimate specific intent as the consummated crime. The mere striking and laying of a match on an inflammable surface alone does not show intent to start a fire, let alone a fire to cause harm. As to reckless endangerment, the prosecution was tasked with proving the *actus reus* of the crime – conduct that, objectively, creates a substantial risk to another. Where matches are struck but are so overwhelmingly likely to burn themselves out on an nonflammable surface, the action does not create a substantial risk of harm in any meaningful way towards a person.

In the Estate of Howard Lewis Vess and *In Re: Estate of Howard Lewis Vess*, Nos. 372 & 524, September Term 2016, filed September 28, 2017. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2017/0372s16.pdf

OPRHANS' COURT PROCEEDINGS – DE NOVO APPEALS TO THE CIRCUIT COURT

Facts:

Howard Vess executed two wills naming his wife as the principal beneficiary. His wife predeceased him in February 2006. Soon after her death, he executed a third will. He made one specific legacy to his brother, if his brother should survive. He devised the remainder of his estate to his friend Robert Price and nominated Mr. Price to serve as personal representative. Mr. Vess's brother died in 2009, survived by his daughter Claudia Vess and her two siblings.

Mr. Vess passed away on June 10, 2011. Soon after, Mr. Price petitioned for administrative probate of the 2006 will in Prince George's County.

In December 2011, Claudia Vess petitioned in the Orphans' Court for Prince George's County to caveat her uncle's 2006 will. She alleged: that Mr. Vess lacked testamentary capacity at the time of execution; that the instrument was not witnessed properly; that the testator's signature was not genuine; that the instrument was procured by fraud; and that the instrument was procured by the undue influence of Mr. Price, who allegedly maintained a confidential relationship with Mr. Vess. In later submissions, she added an allegation that Mr. Price had served as a financial advisor to Mr. Vess.

Mr. Price responded with a timely motion to dismiss, in which he challenged Ms. Vess's standing. The orphans' court granted his motion, concluding that Ms. Vess lacked standing to challenge the 2006 will because she had not challenged the validity of the two prior wills and she would receive nothing under those prior wills. Ms. Vess took a de novo appeal to the circuit court, which ultimately reversed the dismissal of her caveat petition.

After the remand, Ms. Vess and Mr. Price jointly petitioned the orphans' court to transmit to the circuit court five issues regarding the validity of the 2006 will: (a) testamentary capacity; (b) undue influence; (c) genuineness of the signature; (d) proper attestation; and (e) fraud. Before the court finalized the order transmitting issues, Ms. Vess withdrew her support for the joint petition. She complained that Mr. Price had never filed a formal "answer" denying the allegations from her caveat petition. Mr. Price immediately responded with a verified answer, in which he denied her allegations and affirmed that the 2006 will was properly attested, that Mr. Vess had the requisite testamentary capacity, and that it had not been procured by fraud or undue influence.

Two months later, Ms. Vess moved to strike Mr. Price's answer on the theory that it was untimely. She further asked the orphans' court to enter an "order of default" against Mr. Price. She petitioned the orphans' court to use its discretion to apply Rule 2-613(b), a rule from Title 2 of the Maryland Rules that normally would not apply in the orphans' court. Granting her motion, the court stuck Mr. Price's answer and entered what it called an "order of default" against him, subject to his right to move within 30 days to vacate it.

Mr. Price made a timely motion to vacate the order. He pointed to discovery responses showing the existence of an actual controversy. The orphans' court orally granted his motion, and docketed a hearing sheet to reflect that ruling. The orphans' court then entered a written order transmitting the five contested issues to the circuit court for trial.

Ms. Vess did not appeal within 30 days after entry of the order transmitting issues. Instead, on the tenth day (that was not a Saturday, Sunday, or holiday) after the entry of the judgment, she submitted a motion asking the orphans' court to revise its judgment. Her attorney, however, did not deliver the motion to the orphans' court. Instead, her attorney deposited the motion in an after-hours box used by the *circuit court*. The orphans' court did not receive the motion until 15 days after the entry of judgment. The Register of Wills stamped the document on the 15th day after the entry of judgment and made a docket entry stating that it had been filed on that day.

The orphans' court eventually denied her post-judgment revisory motion. Thirty days later, Ms. Vess filed a notice of de novo appeal to the circuit court.

In the de novo appeal, Mr. Price made a motion for summary judgment. Among other things, he contended that Ms. Vess's motion to alter or amend the judgment had been untimely, and that the de novo appeal from that judgment should be dismissed as untimely. In opposition, Ms. Vess asserted that her attorney had submitted the motion on the night that it was due to the orphans' court by placing it "in the overnight box of the Circuit Court." Ms. Vess also made a separate motion asking the circuit court to "correct" the estate docket entries showing the late filing.

The circuit court concluded that docket entry was presumptively correct and dispositive evidence of the filing date. The circuit court announced that it would "dismiss" her de novo appeal as untimely, entered what it called "summary judgment" in favor of Mr. Price, and remanded the case to the orphans' court. The court also denied Ms. Vess's motion to correct the estate docket on the ground that it was "moot." On November 10, 2015, the circuit court entered a written order granting judgment in the de novo appeal in favor of Mr. Price.

Ms. Vess made a timely motion to alter or amend the circuit court's judgment. She asked the circuit court to reconsider its determination about the filing date of her post-judgment motion. She produced images showing that the original version of that document had been stamped as received by the clerk of the circuit court at 8:32 P.M. on the day that it was due to the orphans' court, stamped as filed with the circuit court on that day, and then stamped three days later by the Register of Wills. Based on that evidence, the circuit court found that Ms. Vess delivered the motion to the circuit court on the final day of the filing period, and that the orphans' court

received the motion three days after it was due. On April 12, 2016, the circuit court entered an order denying the motion for reconsideration.

Six days later, on April 18, 2016, the circuit court's civil coordinating judge signed an order directing the orphans' court to "immediately frame the issues" for a trial scheduled to begin in October 2016. The orphans' court attempted to comply by issuing an order on April 20, 2016, which stated that the five issues were being "re-submitted for trial."

On April 28, 2016, Ms. Vess noted an appeal to the Court of Special Appeals from three orders of the circuit court: (1) the order granting summary judgment in favor of Mr. Price; (2) the order denying reconsideration of that judgment; and (3) the subsequent order from the civil coordinating judge. Her notice of appeal gave rise to the first appeal: No. 372, Sept. Term 2016.

On May 4, 2016, Ms. Vess filed a notice of appeal, directly to the Court of Special Appeals, from the orphans' court's order that had "resubmitted" the issues for trial. That notice of appeal gave rise to a second appeal: No. 524, Sept. Term 2016.

The Court of Special Appeals initially denied Ms. Vess's motion to consolidate her two appeals, but ultimately resolved both appeals in a joint opinion.

Held:

Affirmed in Case No. 372, Sept. Term 2016. (Judgment affirmed as to the order of the circuit court entered on November 10, 2015 and as to the order entered on April 12, 2016. Appeal dismissed as to the subsequent order from the civil coordinating judge entered on April 21, 2016.) Appeal dismissed in Case No. 524, Sept. Term 2016.

The Court of Special Appeals declined to decide the issue of whether Ms. Vess had sufficient interest in her uncle's estate to allow her to maintain the caveat action.

In Case No. 372, Sept. Term 2016, the Court of Special Appeals upheld the circuit court's conclusion that Ms. Vess's de novo appeal was untimely as to the order to transmit issues. Ms. Vess did not file a notice of appeal with the orphans' court within 30 days after the entry of judgment (the order to transmit issues). Instead, she filed a revisory motion within that period.

Even if Ms. Vess had made a timely motion to alter or amend the orphans' court's judgment (the order to transmit issues), her motion would not extend the deadline for taking a de novo appeal to the circuit court. When a party files a timely motion to alter or amend within 10 days after a judgment, Rule 8-202(c) extends the time for taking appeal *to the Court of Special Appeals* until 30 days after the withdrawal or disposition of the motion to alter or amend. Rule 8-202, however, does not govern the timing of de novo appeals from the orphans' court *to the circuit court*. Rule 7-503 governs the time for filing a notice of appeal for a de novo appeal from the orphans' court to the circuit court. Rule 7-503 does not extend the 30-day deadline for noting a de novo appeal from the orphan's court to the circuit court. Because Ms. Vess did not file her

notice of appeal within 30 days of the orphans' court's judgment, her de novo appeal was not timely as to that judgment.

Next, even if a timely motion to alter or amend would delay the time period for taking a de novo appeal, Ms. Vess did not file a timely motion to alter or amend. Generally, a motion to alter or amend an orphans' court's judgment is "filed" on the day when it is actually received by or delivered to the register of wills. The circuit court correctly concluded that the docket entry made by the Register of Wills was "presumptively correct" as evidence that Ms. Vess filed her post-judgment motion with the orphans' court on the 15th day after the entry of judgment.

Moreover, independent of the docket entry, the circuit court correctly found that Ms. Vess "filed" the motion with the orphans' court on the 15th day after the entry of judgment. Ms. Vess produced credible evidence showing that her post-judgment motion in the orphans' court was delivered to the circuit court at 8:32 P.M. on the final day of the filing period. She delivered the motion on time, but to the wrong court. In the absence of any evidence that the Register of Wills had authorized the clerk of the circuit court to receive filings on its behalf, a motion to the orphans' court is not considered to be "filed" with that court when it is received by the clerk of the circuit court.

Because Ms. Vess did not file her motion to alter or amend the orphans' court's judgment until 15 days after the judgment, her motion was in substance a motion to revise the judgment under Rule 2-535(a). Her de novo appeal was timely only as to the order denying the motion to revise the judgment. On the merits, neither the orphans' court (on the motion to revise) nor the circuit court (on the de novo appeal from the denial of the motion to revise) were required to revise the underlying order to transmit issues.

Ms. Vess argued that the orphans' court should not have transmitted issues because, in her view, the orphans' court should not have vacated the "order of default" that it had entered against Mr. Price. To the contrary, the orphans' court properly vacated the "order of default" because it never should have entered that order in the first place. Even if the concept of default would somehow apply in the caveat proceeding, Mr. Price was not in "default" when the orphans' court granted the request for the "order of default." The only thing that put him in "default" was the order itself, which struck the answer that he had filed months earlier. The Rule governing defaults does not authorize the court to strike a pleading so as to create a default.

As a separate issue in Case No. 372, Sept. Term 2016, Ms. Vess challenged the propriety of the order from the civil coordinating judge directing the orphans' court to "immediately" frame issues for a trial in October 2016. Her challenge to the propriety of that order became moot when she subsequently noted a further appeal to the Court of Special Appeals, the case was consequently stayed, and the scheduled trial date passed without a trial.

The Court of Special Appeals dismissed the appeal in Case No. 524, Sept. Term 2016, which challenged the orphans' court order "resubmit[ing]" issues to the circuit court in compliance with the remand instructions in the de novo appeal. The crux of Ms. Vess's challenge to that order was that it prevented her from exercising her right to appeal from the circuit court's judgment in

the de novo appeal. Her challenge became moot once she notified the orphans' court of that appeal, the orphans' court directed the Register of Wills not to transmit issues to the circuit court, and the Register heeded that direction.

Finally, the Court rejected Ms. Vess's attempt to use her notice of appeal from the May 20, 2016 order "resubmit[ing]" issues as the basis to challenge another order subsequently issued by the orphans' court on September 28, 2016. An order signed and entered five months after the order under review is not a "previous ruling" that can be said to "directly control" or to be "inextricably bound" with an order entered five months earlier.

Samantha Boone v. John Youngbar, No. 465, September Term 2016, filed September 29, 2017. Opinion by Moylan, J.

http://www.mdcourts.gov/opinions/cosa/2017/0465s16.pdf

THE AFFIDAVIT OF PARENTAGE – "THE ROAD NOT TAKEN" – A MATERIAL MISTAKE OF FACT: WHOSE MISTAKE?

Facts:

Though unwed, Samantha Boone and John Youngbar cohabitated for approximately three years. During that period, Ms. Boone gave birth to a child (herein "N."). At the time of N.'s conception, Ms. Boone engaged in a brief sexual relationship with a man other than Mr. Youngbar. She and Mr. Youngbar nevertheless believed that Mr. Youngbar was N.'s biological father. In accordance with this shared belief, the parties executed an Affidavit of Parentage pursuant to § 5–1028 of the Family Law Article (FL). In September 2014, the parties separated. They agreed to joint legal and shared physical custody of N., and Mr. Youngbar remained deeply involved in raising her.

Having come to believe that Mr. Youngbar was not N.'s biological father, Ms. Boone filed a Petition to Disestablish (Mr. Youngbar's) Paternity. In support of that petition, Ms. Boone cited the results of two DNA tests. The first revealed that Mr. Youngbar was not N.'s biological father, while the second affirmatively established the biological paternity of the man with whom Ms. Boone had had a brief sexual relationship. Mr. Youngbar responded with a Motion to Dismiss. Following a hearing, the court granted Mr. Youngbar's motion, thereby dismissing Ms. Boone's petition. Ms. Boone noted this timely appeal of that dismissal.

Held: Affirmed.

The mother of a child may not void legal paternity established by an Affidavit of Parentage executed pursuant to FL § 5–1028 merely because, at the time of the affidavit's execution, the signatories mistakenly believed the putative father to be the biological father.

In support of her Petition to Disestablish Paternity, Ms. Boone relied heavily on the results of the DNA tests. In so doing, she erroneously conflated biological and legal "paternity." Though N.'s biological father was determined at her conception, her legal father was determined when Ms. Boone and Mr. Youngbar executed the affidavit of parentage in compliance with the requirements of FL § 5–1028.

Were it not for the atypical procedural posture of this case (an unwed mother's challenging the legal paternity of the putative father, rather than the putative father's challenging his own legal paternity), we would be forced to confront an area of legal uncertainty. In *Davis v. Wicomico County Bureau of Support Enforcement*, 222 Md. App. 230 (2015), *aff'd*, 447 Md. 302 (2016),

this Court held that, while a judicial declaration of paternity may be challenged on the basis of a DNA test, affidavits of parentage enjoy a greater immunity from challenge. The Court of Appeals granted *certiorari*. While Judge Battaglia's majority/plurality opinion, joined by two judges, concurred with our assessment, Judge McDonald's dissent, joined by Chief Judge Barbera and Judge Watts, rejected it. According to Judge McDonald's dissent, an affidavit of parentage is merely an alternative means, along with a paternity test, for establishing paternity, and, accordingly, both are vulnerable to later challenge. Given the three-to-three divide, Judge Adkins' lone concurring opinion controls. Though Judge Adkins joined with Judge Battaglia's opinion on grounds irrelevant to this case, she expressly agreed with the dissent that an affidavit of parentage enjoys no greater immunity from challenge than does a judicial declaration of paternity. Given, however, that it is the appellee who is challenging the paternity of the appellant, we avoid any precedential uncertainties raised by *Davis*.

Ms. Boone claims the existence of a material mistake of fact, to wit, her mistaken belief that Mr. Youngbar was N.'s biological father. It was, however, Mr. Youngbar who was mistaken in his belief that N. was his progeny. Even if, therefore, a mistaken belief vis-à-vis biological paternity were a "material mistake" within the meaning of § 5–1028(d)(2)(i) (it is not), it is he—and not Ms. Boone—who could invoke the section to rescind his acknowledgement of paternity. Even if Ms. Boone could rescind Mr. Youngbar's acknowledgement of paternity on his behalf, the mistake in this case was not material within the meaning of § 5–1028(d)(2)(i). For the purposes of FL § 5–1028, a mistake is "material" only if it is a "jurisdictional mistake"—i.e., a mistake affecting the court's power to hear the case and enter judgment. A mistaken belief as to biological paternity is not such a mistake.

Ms. Boone's arguments fail for want of semantic precision. A mistake is not always a "material mistake;" a parent is not always a "parent."

In re: Adoption/Guardianship of C.A. and D.A., No. 2234, September Term 2016, filed August 30, 2017. Opinion by Kenney, J.

http://mdcourts.gov/opinions/cosa/2017/2234s16.pdf

TERMINATION OF PARENTAL RIGHTS – BEST INTEREST OF CHILDREN

Facts:

A.C.-R. ("Father") is the parent of D.A. and C.A. (the "Children"), who were born on February 7, 2007 and February 20, 2009, respectively. In 2010, Father, who was in the country illegally, was arrested and eventually deported to his home country of Mexico. In December of 2013, Father again made an illegal entry into the United States and was again arrested, this time for trying to bring others into the country. He was subsequently incarcerated in a federal prison, where he would remain until July of 2017.

The Children were subjected to horrid living conditions while in the care of their mother. In July of 2014, the Anne Arundel County Department of Social Services (the "Department") filed and were granted petitions for shelter care, and the Children were placed in foster care. In September of 2015, the Children were moved into the care of a new foster parent, Melanie R., who provided a stable and healthy environment for the Children and with whom the Children wanted to live. The Department, in April of 2016, filed petitions for guardianship of D.A. and C.A., and the court held a hearing on the Department's petitions in October of 2016.

At that hearing, Father, who remained incarcerated, admitted that he had not seen the Children since 2012 and, in that time, had only minimal phone contact. Father also admitted that he was going to be deported to Mexico upon his release from prison and that it was possible he would not be able to come back to the country legally. Father offered no explanation for how he planned to care for the Children, nor did he provide any viable resources available to him. At the close of the hearing, the court issued a written order terminating Father's parental rights and granting the Department the authority to consent to the Children's adoption.

On appeal, Father argued that the circuit court erred in terminating his parental rights. Father maintained that the record failed to establish that retaining the parental relationship would be detrimental to the children's best interests. He also maintained that, although the Children may have adjusted well with their foster mother, the existence of that bond could neither trump his liberty interest in maintaining the parental relationship nor be a dispositive consideration when evaluating whether parental rights should be terminated.

Held: Affirmed.

Although Maryland recognizes a substantive presumption that it is in the best interest of children to remain in the care and custody of their parents, that presumption may be rebutted if the parent is deemed "unfit" or if "exceptional circumstances" exist such that continued custody with the parent is detrimental to the best interest of the child. In other words, the controlling factor is the child's best interests, not the natural parent's interest in raising the child. Thus, if a court finds by clear and convincing evidence that the child's best interests are served by a termination of parental rights, the court may terminate said rights.

Here, the juvenile court did not err or abuse its discretion in terminating Father's parental rights. Father exhibited a consistent disregard for the law and a general inability and/or unwillingness to provide a safe and stable environment for the Children. At the time of the hearing, Father was incarcerated and would not be released until July of 2017, nine months after the hearing and almost three years after the Children's date of placement. Father maintained minimal contact with the Children during his incarceration, and any sort of parental bond was virtually non-existent at the time of the hearing.

In addition, Father was to be deported following his release from prison, and there was no indication as to when or whether he would be able to come back to the United States to care for the Children. Father offered no feasible resources available to him in the United States and no explanation of what he would do upon his release to provide and care for the Children. Thus, maintaining Father's parental rights under these circumstances would have placed the Children in a state of suspended animation until a future date that may never occur.

Finally, the court did not terminate Father's parental rights based solely on the Children's relationship with their foster mother, nor did that one factor "trump" his parental rights. Rather, that was but one of many factors that the court considered in determining that it was in the Children's best interests to terminate their relationship with Father.

In Re: Adoption/Guardianship of H.W., No. 2719, September Term 2016, filed September 28, 2017. Opinion by Arthur, J.

http://www.mdcourts.gov/opinions/cosa/2017/2719s16.pdf

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS

Facts:

Appellant is the biological father of a son, H.W., born in April 2012. At the time of H.W.'s birth, H.W.'s father was incarcerated in Connecticut.

At five months old, H.W. was hospitalized after he nearly drowned because his mother left him unattended in a bathtub. H.W. was placed in the custody of the Baltimore City Department of Social Services under an emergency authorization. In December 2012, the juvenile court determined that H.W. was a child in need of assistance, but left H.W. in his mother's custody under an order of protective supervision.

In January 2013, H.W.'s father was released from prison and placed on probation in Connecticut. He lived for some time in a homeless shelter and failed to complete a drug treatment program. He did not obtain permission to move to Baltimore.

In May 2013, the court issued an emergency order authorizing H.W.'s removal from his mother's residence, but in July 2013 returned him to his mother's custody under the order of protective supervision. In December 2013, the court terminated H.W's child in need of assistance case.

In January 2014, H.W.'s mother gave birth to twins, H.W.'s half-brother and half-sister. Five months later, H.W.'s half-brother suffered severe burns when his mother left him in a sink unattended. In June 2014, upon the Department's petition, the juvenile court placed H.W. and his half-siblings in shelter care. The Department placed H.W. and his half-siblings with one foster family.

H.W.'s father learned of a permanency plan review hearing in December 2014. H.W.'s father told the permanency worker that he was on probation in Connecticut. He said that he could not stay for the hearing, and he did not meet H.W. at that time.

During 2015, the permanency worker sent letters to H.W.'s father notifying him of upcoming hearings but she received no response. In August 2015, the permanency worker learned that H.W.'s father had been incarcerated again for violating his probation.

In October 2015, while incarcerated, H.W.'s father wrote to the permanency worker expressing his desire to become a part of H.W.'s life. He suggested that his relatives could be placement

resources for H.W., but those relatives either declined to do so or could not be located. Over the next year, the permanency worker continued to write to H.W.'s father but he did not respond.

In October 2015, the Department petitioned in the juvenile court to terminate the parental rights of both of H.W.'s biological parents. H.W.'s mother consented to the termination of parental rights. H.W.'s father initially gave his consent, but then withdrew it on the following day.

In early 2015, the juvenile court held a hearing on terminating the parental rights of H.W.'s father. The permanency worker testified that H.W.'s foster parents provided him with a stable home environment and gave proper attention to his medical and educational needs. H.W.'s father, who was still incarcerated, participated by telephone. He testified that he intended to return to Baltimore and to attempt to get custody of H.W. upon his release. He acknowledged that he had a history of drug abuse, and claimed that he was educating himself about making better choices. His expected release date was Christmas Day of 2017 and his mandatory release date was in February 2018.

On February 10, 2017, the juvenile court issued an order terminating the parental rights of H.W.'s biological father. The court explained the reasons for its decision in a thorough written opinion. The court did not find clear and convincing evidence that H.W.'s father was unfit to remain in a parental relationship. The court nevertheless found by clear and convincing evidence that exceptional circumstances existed that would make the continuation of the parental relationship detrimental to H.W.'s best interests. In doing so, the court expressly considered factors from *Ross v. Hoffman*, 280 Md. 172 (1977), which concern whether exceptional circumstances exist that would make it detrimental to a child's best interests for a parent to have *custody*.

H.W.'s father appealed from the order terminating his parental rights.

Held: Vacated and remanded.

Md. Code (1984, 2012 Repl. Vol.), § 5-323 of the Family Law Article allows for the termination of parental rights if a juvenile court finds by clear and convincing evidence that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child. The term "exceptional circumstances" carries a different connotation in a termination of parental rights case than it does in a custody case. In a custody case, exceptional circumstances are those that would make parental *custody* detrimental to the child's best interest. In a termination of parental rights case, exceptional circumstances are those that would make it detrimental to the child's best interests for the parent to remain as the child's parent. To justify termination of parental rights, the court's focus must be on the continued parental relationship, not on custody.

In this termination of parental rights case, the juvenile court based its finding of exceptional circumstances in part on factors from *Ross v. Hoffman*, 280 Md. 172 (1977), a case involving a

custody dispute between a parent and a third party. At least some of those factors are consistent with and relevant to the statutory factors for termination of parental rights. But the juvenile court examined at least four factors that expressly refer to custody: the possible emotional effect on the child if custody changed to the biological parent; the possible emotional effect on the child if custody is given to the child's caretaker; stability and certainty as to the child's future in the custody of the parent; and stability and certainty as to the child's future in the custody of the caretaker. The *Ross v. Hoffman* factors that expressly pertain to custody do not belong in an analysis of termination of parental rights.

ATTORNEY DISCIPLINE

*

By a Per Curiam Order of the Court of Appeals dated September 7, 2017, the following attorney has been disbarred:

LANCE BUTLER III

*

By a Per Curiam Order of the Court of Appeals dated September 11, 2017, the following attorney has been disbarred:

LOUISA CONTENT McLAUGHLIN

*

By a Per Curiam Order of the Court of Appeals dated September 12, 2017, the following attorney has been disbarred:

MAURICE MARNEA MOODY

*

JUDICIAL APPOINTMENTS

*

On August 16, 2017, the Governor announced the appointment of **DANIEL WILLIAM POWELL** to the Circuit Court for Somerset County. Judge Powell was sworn in on September 1, 2017 and fills the vacancy created by the retirement of the Hon. Daniel M. Long.

*

On August 24, 2017, the Governor announced the appointment of **DANA MICHELE MIDDLETON** to the Circuit Court for Baltimore City. Judge Middleton was sworn in on September 19, 2017 and fills the vacancy created by the retirement of the Hon. Stephen J. Sfekas.

*

On August 24, 2017, the Governor announced the appointment of **HARRIS PATRICK MURPHY** to the Circuit Court for Kent County. Judge Murphy was sworn in on September 22, 2017 and fills the vacancy created by the retirement of the Hon. Paul M. Bowman.

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UNREPORTED OPINIONS

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

http://www.mdcourts.gov/appellate/unreportedopinions/index.html

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