UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1154

September Term, 2015

MICHELLE BOURDELAIS

v.

JOHN DURNIAK

Eyler, Deborah S.,
Kehoe,
Shaw Geter, Melanie M.
(Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: April 8, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This is an appeal from two orders entered by the Circuit Court for St. Mary's County in an on-going child custody dispute between Michelle Bourdelais and her former spouse, John Durniak. Ms. Bourdelais presents the following issues, which we have reworded:

1. Did the circuit court commit procedural error in resolving the parties' petitions for contempt?

2. Did the circuit court err in finding that neither child feared living with Mr. Durniak?

3. Did the circuit court abuse its discretion in declining to appoint a best interest attorney?

4. Did the circuit court abuse its discretion in declining to award Ms. Bourdelais attorney's fees?

We will vacate part of the court's order holding Ms. Bourdelais in contempt, but otherwise affirm the judgment of the circuit court.

Background

The parties resided in Richmond, Virginia, during their marriage. At some point in 2009, Mr. Durniak relocated to St. Mary's County, Maryland. On February 22, 2012, Ms. Bourdelais obtained a judgment of absolute divorce in the Circuit Court for St. Mary's County.

At the time of their divorce, Ms. Bourdelais and Mr. Durniak had two minor children. Initially, the child custody and visitation issues were not litigated in Maryland because there was a separate, on-going custody case in the Juvenile and Domestic Relations Court for Henrico County, Virginia. On August 17, 2012, the Virginia court entered an order granting the parties joint legal and physical custody. This judgment was registered in the Circuit

Court for St. Mary's County in November 2012. By that time, Ms. Bourdelais had moved to Calvert County, Maryland, with the children.

The current litigation began in February 2013, when Ms. Bourdelais filed a complaint in the Circuit Court for St. Mary's County seeking, among other relief, sole legal and primary physical custody. Mr. Durniak filed a countercomplaint seeking legal and physical custody. The court held a modification hearing on August 6, 2013 and granted Mr. Durniak sole physical and legal custody. Ms. Bourdelais appealed and a panel of this Court vacated the judgment and remanded the case to the circuit court for a full evidentiary hearing on legal and physical custody, child support, and attorney's fees. *See Michelle Bourdelais v. John Durniak*, No. 2389, September Term, 2013, filed December 4, 2014 ("*Bourdelais I*").

On remand, the circuit court conducted a trial as to the custody and visitation issues on May 26–27 and June 17–18, 2015. After the hearing, the trial court entered an order dated June 24, 2015 (the "June Order"), awarding Mr. Durniak sole legal and physical custody of the children and setting out a visitation schedule for Ms. Bourdelais. The court denied both parties' requests for attorney's fees.[1]

The June Order did not fully resolve the parties' disputes. Mr. Durniak filed a petition to hold Ms. Bourdelais in contempt for violating the custody and visitation provisions of the June Order and Ms. Bourdelais filed a number of motions, most significantly a petition to

[1] The June Order addressed other issues, e.g., child support, that are not at issue in this appeal.

hold Mr. Durniak in contempt and a petition to modify the June Order. Additionally, Ms. Bourdelais filed a petition for a protective order against Mr. Durniak in the Circuit Court for Anne Arundel County. That court granted a temporary protective order and then transferred the protective order action to the Circuit Court for St. Mary's County.

On July 23, 2015, the trial court conducted a hearing on these motions, as well as other motions filed by Ms. Bourdelais. On that day, the court entered an order (the "July Order"), that:

(1) granted Mr. Durniak's petition for contempt;

(2) denied Ms. Bourdelais's petition for contempt;

(3) denied Ms. Bourdelais's petition to amend the June Order;

(4) ordered the children to reside with Mr. Durniak for the rest of the summer;

(5) ordered Mr. Durniak to install a landline telephone at his residence so that Ms. Bourdelais could speak to the children;

(6) awarded Mr. Durniak "attorney's fees in the amount of $4,783.00 for fees incurred for the filings and responses related to the parties' motions for contempt;" and

(7) dismissed the action for a protective order.[2]

Ms. Bourdelais filed a timely appeal from these orders.

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[2] The July Order also addressed other matters that are not at issue in this appeal. On August 7, 2015, the trial court issued another order supplementing some of the non-controverted terms of the July Order.

Analysis

Standards of Review

We review the trial court's factual findings for clear error, giving deference to the trial court's opportunity to gauge the credibility of witnesses and acknowledging that it is the role of the trial court to determine the probative weight of conflicting evidence. *See* Md. Rule 8-131(c). We review the trial court's conclusions of law *de novo. See Della Ratta v. Dyas*, 414 Md. 556, 565 (2010).

Several of the trial court's rulings that are at issue in this appeal, for example, the court's rulings on the petitions for contempt, lie within that court's discretionary authority. We will reverse or vacate a trial court's discretionary ruling only if we conclude that the court abused its discretion. In order for us to reach such a conclusion, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994).

I. The Motions for Contempt

On June 2, 2015, and in the midst of the court's four-day custody modification hearing, Ms. Bourdelais filed an "Amended Motion for Visitation Contempt." She alleged violations of custody and visitation orders by Mr. Durniak dating back to September 2013. The trial court did not address this motion in the June Order.

At the close of the proceedings on June 18, the trial court announced its intention to award legal and physical custody of the children to Mr. Durniak. At that time, the children were in Mr. Durniak's physical custody and he had enrolled them in summer day camps. On June 22, 2015, that is, four days after the trial court had indicated that it was awarding legal and physical custody of the children to Mr. Durniak, Ms. Bourdelais removed the children from their camps. Ms. Bourdelais then filed a petition for a protective order in the Circuit Court for Anne Arundel County. Although the relevant court records are not in the record before us, it appears that a judge granted a temporary protective order on an *ex parte* basis and awarded Ms. Bourdelais temporary custody of the children. Shortly after granting the temporary protective order, the Circuit Court for Anne Arundel County transferred the protective order case to St. Mary's County.

As a result of these events, on July 14, 2015, Mr. Durniak filed a "Petition for Contempt and to Modify Visitation." Mr. Durniak also filed a motion to shorten the time for Ms. Bourdelais to respond to the petition. The trial court granted the motion to shorten time on July 15 and, in the same order, scheduled a hearing on both motions on July 20, later rescheduled to July 23. At the same hearing, the court addressed Ms. Bourdelais's motion to modify custody as well as the domestic violence petition.

At the conclusion of that hearing, and as we have related, the court denied Ms. Bourdelais's motion to modify, dismissed Ms. Bourdelais's protective order action, granted

Mr. Durniak's contempt petition, and awarded Mr. Durniak $4,783 for attorney's fees. Ms. Bourdelais raises five contentions on appeal:

> (1) The court failed to provide Ms. Bourdelais with legally sufficient time to file a response, and prepare a defense, to Mr. Durniak's petition for contempt;
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> (2) Civil contempt was not an appropriate mechanism for Mr. Durniak to pursue his complaint that Ms. Bourdelais attained custody of the children outside of her scheduled visitation time;
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> (3) The court erred in awarding attorney's fees to Mr. Durniak in the contempt order;
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> (4) The court erred in awarding Mr. Durniak visitation for the remainder of the summer; and
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> (5) The court failed to hold an evidentiary hearing on her petition for contempt.

(1) and (2)

Ms. Bourdelais contends that the trial court violated Md. Rule 15-206(c) by holding the hearing on Mr. Durniak's petition for contempt within 20 days of its filing. We do not agree.

Md. Rule 15-206(c)(2) states in pertinent part:

> Unless the court finds that a petition for contempt is frivolous on its face, the court shall enter an order providing for (I) a prehearing conference, or (ii) a hearing, or (iii) both. The scheduled hearing date shall allow a reasonable time for the preparation of a defense and may not be less than 20 days after the prehearing conference. An order issued on a petition or on the court's own initiative shall state:
> (A) the time within which an answer . . . shall be filed, which, absent good cause, may not be less than ten days after service of the order[.]

Rule 15-206 provides that, if the circuit court orders a prehearing conference on a contempt petition, the court may not schedule a hearing on the petition for a date within 20 days of the prehearing conference. However, nothing in Rule 15-206 requires a prehearing conference, and the rule is otherwise silent as to scheduling other than that the court must "allow a reasonable time for the preparation of a defense[.]" Moreover, Rule 15-206 must be read in conjunction with the other provisions of the Maryland Rules, including Rule 1-204(a) which provides that, for good case shown, a court may shorten or extend the time period for the performance of an "act to be done at or within a specified time[.]"[3]

Whether to grant a motion to shorten or extend time is a discretionary matter. *Maryland Green Party v. State Bd. of Elections,* 165 Md. App. 113, 143 (2005). We do not believe that the trial court abused its discretion in granting Mr. Durniak's motion because the facts alleged in Mr. Durniak's verified petition, in light of the trial court's very recent order awarding legal and physical custody to Mr. Durniak, raised a substantial concern as to the children's welfare. For the same reason, we conclude that Mr. Durniak demonstrated good cause for the hearing to be scheduled within ten days of the service of the order upon Ms. Bourdelais.

We are also not persuaded by Ms. Bourdelais's contention that the contempt hearing was an inappropriate mechanism to address Mr. Durniak's contention that she had removed

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[3] Rule 1-204(a) sets out exceptions to the court's general authority to shorten or extend time. Scheduling a hearing on a petition for contempt is not one of them.

the children from their camps—and his care—in violation of the June Order. She argues that civil contempt is a mechanism to deter future misconduct and her actions occurred before the hearing on Mr. Durniak's contempt petition. The principle she cites is correct, *see Arrington v. Dept. of Human Resources*, 402 Md. 79, 93 (2007), but inapplicable in this case because Mr. Durniak's petition, in addition to seeking an order holding Ms. Bourdelais in contempt, also sought modification of the visitation arrangement.

(3)

We agree with Ms. Bourdelais that the trial court erred in awarding attorney's fees in the contempt order because the order holding Ms. Bourdelais in contempt was defective as a matter of law.

Mr. Durniak's petition sought an order of civil contempt. Civil contempt is a remedy to "coerce **future** compliance" with court orders. *Arrington*, 402 Md. at 93 (emphasis added). Because civil contempt orders are intended to induce future compliance, such an order "must contain a purge provision." *Id*. A purge provision is a mechanism that "permit[s] the defendant to avoid the penalty by some specific conduct that is within the defendant's ability to perform." *Bryant v. Social Services*, 387 Md. 30, 46 (2005). To this end, Md. Rule 15-207(d)(2) provides (emphasis added):

> When a court or jury makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. **In the case of a civil contempt, the order shall specify how the contempt may be purged.** In the case of a criminal contempt, if the sanction is incarceration, the

> order shall specify a determinate term and any condition under which the sanction may be suspended, modified, revoked, or terminated.

Returning to the case before us, the July Order holding Ms. Bourdelais in contempt does not contain a purge provision.[4] A purge provision is an indispensable element of a civil contempt order and the court's failure to include such a provision requires us to vacate that part of the July Order. For the same reason, we must also vacate the award of attorney's fees because the award was clearly premised upon the court's order that Ms. Bourdelais was in contempt. *Cf. Hermina v. Baltimore Life Ins. Co.*, 128 Md. App. 568, 589 (1999) (striking an award of attorney's fees because the contempt order was defective).

(4)

Our conclusion that the July Order was defective insofar as it held Ms. Bourdelais in contempt does not cause us to revisit the trial court's adjustment to the visitation arrangements for the summer of 2015. First, the contention has been rendered moot with the passage of time. *See Suter v. Stuckey*, 402 Md. 211, 219–20 (2007) (A case is moot "when there is no longer an effective remedy the Court could grant."). Second, by removing the children from Mr. Durniak's care on June 22, 2015, Ms. Bourdelais deprived them of the

[4] In his brief and at oral argument, Mr. Durniak suggested that the attorney's fee award and the modification of the visitation arrangements were intended to coerce Ms. Bourdelais to comply with the court's custody and visitation orders. The problem with this argument is that the order did not specify any conduct on Ms. Bourdelais's part that would either relieve her of the obligation to pay the attorney's fee award or cause the court to further adjust the visitation arrangements.

benefits that they would otherwise have realized from spending time with their father. The trial court did not err in attempting to restore the balance.

(5)

We turn to Ms. Bourdelais's contention that the trial court erred in refusing to conduct an evidentiary hearing on her contempt petition against Mr. Durniak.

During the July 23 hearing, the trial court specifically asked Ms. Bourdelais:

> Assuming that I let you testify about actions that [Mr. Durniak] took before my [June] Order, what type of sanction would you say that I should impose?

In response, Ms. Bourdelais stated that she had concerns about what she considered to be vague language in the court's June Order that could lead to further litigation between the parties. The trial court engaged in an extended discussion with her regarding her concerns, but at no time, by our reading of the transcript, did Ms. Bourdelais articulate how an order holding Mr. Durniak in contempt would address her concerns. Instead, Ms. Bourdelais appeared to view her petition for contempt as a means by which the court could modify provisions of the June Order. Under these circumstances, the trial court did not err

in declining to grant an evidentiary hearing.[5] *See* Md. Rule 15-206(c)(2) (A court need not schedule a hearing on a contempt petition that is "frivolous on its face[.]").

II. Dr. Truss's Reports

Ms. Bourdelais seeks to have the court's denial of her petition to modify custody vacated. She asserts that the court's decision was based on a clearly erroneous finding of fact. We do not agree. The evidence in question was presented to the court during the July hearing.

At that hearing, Ms. Bourdelais called as a witness Thomas T. Truss, Ph.D., a psychologist who had evaluated each of the children at Ms. Bourdelais's request in March of 2015. Dr. Truss prepared a written report[6] for each of the children, who were respectively eight and twelve years old at the time of his assessments. Dr. Truss testified at the July

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[5] Ms. Bourdelais's petition for contempt alleged contumacious behavior on Mr. Durniak's part, in violation of the Virginia court's order and a subsequent consent order entered into by the parties. Assuming for purposes of analysis that Mr. Durniak had in fact violated either of the earlier court orders, neither of those orders were in effect by the time of the court's contempt hearing and Ms. Bourdelais did not allege that Mr. Durniak had violated the provisions of the June Order pertaining to custody and visitation. Civil contempt is a remedy designed to prevent future violations of orders.

[6] The record transmitted to this Court did not contain the exhibits introduced by the parties at the July 23, 2015, hearing. At oral argument, the panel requested that counsel for the parties provide the Clerk of this Court with Dr. Truss's reports, together with any other exhibits they thought would be helpful to resolution of the issues before us. Counsel agreed to do so and have provided us with copies of Dr. Truss's reports, but no others.

Ms. Bourdelais filed a motion to supplement the record with the exhibits from the circuit court which was pending as of oral argument. We will deny the motion as moot because both parties appear to be satisfied with the record as it is now constituted.

hearing and, as part of his testimony, read portions of each report into the record. The reports themselves were admitted into evidence in support of Ms. Bourdelais's motion to modify custody. At the conclusion of the July hearing, the trial court discussed Dr. Truss's testimony, which closely tracked his reports, in detail. The court noted that Dr. Truss had testified that both children suffered from anxiety arising from the discord between their parents. The court then stated that "it was . . . noted in his report that neither child said that they feared being with their father[.]"

Ms. Bourdelais argues that this finding was clearly erroneous. She points to a portion of Dr. Truss's report regarding the younger of the two children. Dr. Truss related that, during the interview, the child related two incidents involving her father that frightened her.[7] Ms. Bourdelais asserts that "[i]f one does not feel safe, one has fear."

The probative value of this part of Dr. Truss's report is undercut by the fact that Dr. Truss was unable to provide a temporal context to the child's experiences. He testified that the child was relating "a stream of memories, but she did not document to me . . . not when this occurred. She just documented that it occurred and that she was frightened by it." Moreover, Dr. Truss did not testify, nor does his report state, that the child was currently fearful of her father, but rather that she was anxious because of the on-going conflict between her parents.

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[7] As reflected during Mr. Durniak's testimony, and in the court's findings, Mr. Durniak denied that the incidents occurred.

It is the role of the trial court to decide how much probative weight to afford to discrete items of evidence. *See Reichert v. Hornbeck*, 210 Md. App. 282, 304 (2013). In light of the totality of the evidence, the trial court's conclusion that the children were not afraid of being with their father was not clearly erroneous.

III. A Best Interest Attorney

Ms. Bourdelais contends that the court abused its discretion in declining to appoint a best interest attorney to represent the children. According to Ms. Bourdelais, "[t]he proper course . . . would have been to grant [her] request for appointment of a best interests attorney, prior to the inception of the May 26, 2015 hearing, and at least no later than prior to the July 23, 2015 hearing." Ms. Bourdelais asserts that appointment of a best interest attorney would have eliminated "confusion concerning the needs and emotions of the children," as well as what she terms "a discrepancy between what the trial judge reported the children as saying, with reference to where the children desired to live, and what they said." Ms. Bourdelais also asserts that "a best interests attorney would have assisted the court in determining the childrens' preferences, and the significance to be attached to the preferences." Further, Ms. Bourdelais cites to the testimony of Dr. Truss, who opined that ordinarily, the children that he sees who are similarly situated to the children in this case have an attorney representing their interests.

The trial court cannot be faulted for failing to appoint a best interest attorney if it was not asked to do so in a timely manner. Although she claims to the contrary in her brief,[8] Ms. Bourdelais appears to have first mentioned the concept of a best interest attorney to the court on May 26, 2015, which was the first day of the custody hearing. On that day, the court heard her motion for a change of venue. During her colloquy with the trial court, Ms. Bourdelais indicated that, if venue were changed, it would be easier for her to retain a best interest attorney for the children. She did not ask the trial court to appoint a best interest attorney at that time. We will give Ms. Bourdelais the benefit of the doubt and treat the exchange between her and the court as a request for the appointment of a best interest attorney. Even so, whether to appoint a best interest attorney is a matter of the trial court's discretion and we cannot conclude that the court erred in declining to address the issue when the request was made for the first time on the morning of the first day of the hearing.[9]

Ms. Bourdelais did file a written motion for a best interest attorney on July 29, 2015, that is, after the evidentiary hearings were concluded. The court denied Ms. Bourdelais's request in its September 1, 2015, Memorandum and Order of Court. Under these

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[8] Ms. Bourdelais contends that she requested that a best interest attorney be appointed to represent the children as part of a motion for a scheduling conference that she filed in March, 2015. The motion does not request appointment of a best interest attorney.

[9] While we conclude that the court did not abuse its discretion in denying Ms. Bourdelais's request for a best interest attorney on the basis that it was untimely, we do not address whether appointment of a best interest attorney will be appropriate in the future, in the event there are further disputes regarding custody and visitation.

circumstances, the trial court did not abuse its discretion by declining to appoint a best interest attorney.

IV. Attorney's Fees

Ms. Bourdelais's final contention is that the court erred in declining to award her attorney's fees for her successful appeal of the court's initial custody order.[10] Ms. Bourdelais argues that the fact that she was successful in her appeal establishes substantial justification for the proceeding. Moreover, Ms. Bourdelais contends that the court failed to undertake a "proper financial evaluation of the needs and financial status of the parties," in finding that Mr. Durniak did not have the ability to pay her attorney's fees.

Before a court may award attorney's fees in a custody case, it must consider: "(1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b). "Nevertheless, the trial court is vested with wide discretion in deciding whether to award counsel fees and, if so, in what amount." *Malin v. Mininberg*, 153 Md. App. 358, 435-36 (2003) (internal quotation marks and citation omitted).

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[10] Ms. Bourdelais asserts that the trial court's inquiry suggests that it was considering her request for attorney's fees pursuant to Md. Rule 1-341, which authorizes a court to award attorney's fees as a sanction in a proceeding brought or defended in bad faith or without substantial justification. The record does not support this assertion.

The court undertook the following analysis of the parties' requests for attorney's fees:

> With regard to the attorneys fees, both sides requested attorneys fees. With regard to the request for attorneys fees, that -- well, with regard to Mr. Durniak's request for attorneys fees, his attorneys fees are substantial.
>
> However, one, I find that Ms. Bourdelais had a good cause, I believe, to prosecute and as well as defend her claim, as well as I don't believe she has the ability to pay the substantial attorneys fees. So that will be denied.
>
> With regard to Ms. Bourdelais's request for past attorneys fees, for the present hearing she is not represented by counsel. I also find that Mr. Durniak had a good faith basis or good cause finding to prosecute and defend his portion of the case.
>
> With regard to -- and because -- also because Ms. Durniak -- Ms. Bourdelais has not been working, and at least since the time -- at least while taking into consideration the fact that she is not working and Mr. Durniak has been -- the children apparently have been primarily in his custody since Judge McKee's initial decision. The Court doesn't find that he has the ability to pay, with his other expenses.
>
> But most importantly, I find that both sides have had a good cause in prosecuting and defending their portions of the case. So both sides' request for attorneys fees will be denied.

If, as Ms. Bourdelais contends, the court failed to undertake a "proper financial evaluation of the needs and financial status of the parties," it was because neither party presented the court with the facts necessary for such an evaluation. Ms. Bourdelais presented the court with very limited testimony regarding her income, and, so far was we can discern from the record, no evidence as to her needs. Thus, any attorney's fee award in her favor would have been based on speculation. Moreover, when the court inquired as to why

attorney's fees should be awarded, Ms. Bourdelais provided no justification. The record presents the following colloquy between the court and Ms. Bourdelais on the matter:

> THE COURT: So tell me why I should award attorney's fees?
>
> MS. BOURDELAIS: Did they come up with a reason?
>
> THE COURT: If you don't want to give a reason, you don't have to.
>
> MS. BOURDELAIS: Oh, well they're asking, I guess. I know you don't like this answer that I [won at] the higher Court [and] that I know you don't find that to be a valid answer, but that would be my answer, if you would accept it.
>
> THE COURT: Why would that entitle you to attorney's fees?
>
> MS. BOURDELAIS: Your Honor, this line of questioning didn't happen with them. I don't know, I'm not a lawyer. I just know I paid a lot of money to try to get my kids, see my kids, get justice, get the fairness back in par here and my kids want to see me, I want to see them. I had to pay an attorney to deal with this guy and all he does is --
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> THE COURT: But he paid an attorney, too, so I'm trying to understand -- I mean really the question goes to both sides, like why, why?
>
> MS. BOURDELAIS: Why can't everyone just pay their own attorneys? I'm doing this because they are.

The court must determine attorney's fees based on the evidence presented by the parties. On the record before us, we cannot say that the court erred in requiring each party to pay its own attorney's fees.

Conclusion

On remand, the trial court should enter an order revising its order dated July 23, 2015, by striking the following provisions:

> ORDERED, that Defendant/Counter-Plaintiff's Petition for Contempt is hereby GRANTED[.]

and

> ORDERED, that Defendant/Counter-Plaintiff is hereby awarded attorney's fees in the amount of $4,783.00 for fees incurred for the filings and responses related to the parties' motions for contempt[.]

We affirm all other portions of the trial court's orders identified in this opinion.[11]

THE JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY IS AFFIRMED IN PART AND VACATED IN PART. COSTS TO BE DIVIDED BETWEEN THE PARTIES: 75% TO BE PAID BY APPELLANT; 25% TO BE PAID BY APPELLEE.

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[11] On March 18, 2016, that is, after briefing and oral argument in this case, Ms. Bourdelais, acting *pro se* and not through her counsel, filed a motion in this Court titled "Request: Venue Sending This Case to Case 1554 Fall Term 2015, Bourdelais v. Durniak." The motion pertains to events that have occurred in this case after the notice of appeal was filed. Ms. Bourdelais asks us to order the Circuit Court for St. Mary's County to transfer this case to the Circuit Court for Anne Arundel County.

This request is not properly before us. Ms. Bourdelais did not raise this issue in her brief and therefore has waived her right to present the argument in this appeal. *See* Md. Rule 8-504(a)(6) (A party's brief must contain an "[a]rgument in support of the party's position on each issue[.]"); *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) (A party's failure to present an argument in his or her initial brief constitutes a waiver of the argument on appeal.).

We deny Ms. Bourdelais's motion without prejudice to her ability to raise the issue before the proper court.