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COURT OF APPEALS

Attorney Grievance Commission of Maryland v. Jeneba Jalloh (Ghatt), Misc. Docket AG No. 2, September Term 2017, filed August 29, 2018. Opinion by Getty, J.

https://www.courts.state.md.us/data/opinions/coa/2018/2a17ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On March 9, 2017, the Attorney Grievance Commission of Maryland ("Commission"), through Bar Counsel, filed with this Court a Petition for Disciplinary or Remedial Action ("Petition") against Ms. Ghatt. The Commission charged Respondent with violating Rules 1.15 (safekeeping property), 3.3 (candor to the tribunal), 8.1 (bar admission and disciplinary matters), and 8.4(a)-(d) (misconduct) of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). The Petition also alleged the Respondent violated former Maryland Rules 16-607 (commingling of funds) and 16-609 (prohibited transactions), as well as Sections 10-306 (misuses of trust money) and 10-606 (penalties) of the Business Occupations and Professions Article of the Maryland Code.

The hearing judge and the Court of Appeals found as follows. Grove Construction Management, LLC, a company that assists clients with designing buildings, wanted to initiate a warehouse building project. The company estimated that they would need a loan of $5 million to complete the project. Grove Construction Management initiated contact with Strategic Capital Enterprises ("Strategic"), which offered to assist the company in obtaining a loan if Grove Construction submitted an appraisal and advanced ten percent of the loan amount: $500,000. Grove Construction reached out to Mr. James Yates, an acquaintance, for help obtaining the advanced ten percent of the loan. Mr. Yates agreed to provide $500,000 in exchange for becoming an equity partner of Grove Construction or for a lump sum fee of $100,000. The company created a limited liability company named Grove Plaza, LLC for the purpose of pursuing the common goals of funding and building the warehouse project.

At approximately the same time Mr. Yates agreed to advance fees for the Grove Plaza, LLC construction loan, Ms. Ghatt entered into two escrow agreements. First, Ms. Ghatt agreed to

serve as escrow agent for Strategic and Zion Capital ("Zion Capital"), both of which purported to be companies that help individuals and companies obtain loans. Her duties as escrow agent included receiving and holding certain amounts in her attorney trust account and then disbursing amounts specified by either Strategic or Zion from her attorney trust account to an account also identified by Strategic or Zion. In exchange for her services as escrow agent, Ms. Ghatt would receive $1,000 each month as well as half-a-percent of any disbursement that required Ms. Ghatt to sign an agreement.

Ms. Ghatt then entered into a second escrow agreement with Strategic and Grove Plaza, LLC. The purpose of the second escrow agreement was to have Ms. Ghatt hold and disburse the $500,000 to be deposited by Mr. Yates into the Ghatt Law Group attorney trust account. The second escrow agreement further provided that after Ms. Ghatt verified that Strategic had deposited $500,000 into a sub-account of the attorney trust account, she would disburse the $500,000 to Strategic. The second escrow agreement also required Ms. Ghatt to complete certain exhibits to the agreement, including a confirmation of deposit and letter of authorization, and send those completed exhibits to the parties. The escrow agreement and exhibits provided that the $500,000 deposited into the Ghatt Law Group for the benefit of Grove Plaza, LLC would be returned after the $5 million loan funded, or upon written request in the event the loan did not fund, or the expiration date of the account.

Mr. Yates wired $500,000 to the Ghatt Law Group attorney trust account on December 3, 2014 to assist Grove Plaza, LLC with the loan for the warehouse building project. Ms. Ghatt then completed the exhibits to the second escrow agreement, albeit incorrectly, and sent them to the parties and Mr. Yates. The completed exhibits, including the confirmation of deposit and letter of authorization, reiterated that Ms. Ghatt had personally verified and confirmed that a sub-account of her attorney trust account was created and Strategic had put $500,000 into that sub-account. However, Ms. Ghatt never verified or attempted to verify that such a sub-account had been created. Despite failing to verify the sub-account as required by the escrow agreement and as she represented in the confirmation of deposit and letter of authorization, Ms. Ghatt disbursed $450,000 of Mr. Yates's funds to Strategic. In addition, Ms. Ghatt disbursed $50,000 of Mr. Yates's funds to Zion in violation of the second escrow agreement and unbeknownst to Mr. Yates.

In addition to violating the second escrow agreement and mishandling Mr. Yates's funds, Ms. Ghatt also used the Ghatt Law Group attorney trust account as a personal bank account after Mr. Yates had wired money for the benefit of a third party into the attorney trust account. Ms. Ghatt also incurred a negative balance on the trust account. Outside of the funds related to Mr. Yates and Grove Plaza, LLC, Ms. Ghatt allowed Strategic and Zion to misuse her attorney trust account in connection with several other transactions.

When the $5 million loan did not fund, Mr. Yates sought assistance of an attorney to submit a written request to Ms. Ghatt to release the $500,000 and to request a full accounting of the $500,000. Ms. Ghatt either avoided Mr. Yates's requests or continually stated that she did not disburse Mr. Yates's. Ms. Ghatt ultimately sent Mr. Yates a screenshot of her her attorney trust account with a linked account holding approximately $3.4 million, suggesting that she had his

funds despite knowing that the linked account was her brother's account and that she did not have access to that account. After Ms. Ghatt refused and failed to return Mr. Yates's funds, Mr. Yates filed a civil lawsuit in Utah. During the civil lawsuit, Ms. Ghatt made multiple knowing misrepresentations to the Utah Court. After entering judgment in favor of Mr. Yates and against Ms. Ghatt in the amount of $500,000, Ms. Ghatt failed to comply with that judgment.

Mr. Yates also filed a complaint with the Attorney Grievance Commission of Maryland ("Commission"). Pursuant to Maryland Rule 19-722, this Court designated the Honorable Krystal Alves of the Circuit Court for Prince George's County to conduct an evidentiary hearing and to provide findings of fact and recommended conclusions of law. During the hearing, the Commission, through Bar Counsel, called Professor James Byrne as an expert in the field of advanced fee schemes. Professor Byrne testified that the exhibits to the second escrow agreement, which were sent to Mr. Yates were not documents used in the commercial banking industry, but resembled documents often used in advanced fee schemes to defraud individuals. Professor Byrne also testified that attorney trust accounts are also often used in advanced fee scams to prove a level of false security to those individuals advancing funds.

Held: Disbarred.

The Court of Appeals held that Ms. Ghatt's conduct violated MLRPC 1.15(a), (b), (d), and (e), 3.3(a)(1), 8.1, 8.4(a), (b), (c), and (d), former Maryland Rule 16-607, former Maryland Rule 16-609, and the Business Occupations and Professions Article of the Maryland Code §§ 10-306 and 10-606.

The Court of Appeals specifically determined that Ms. Ghatt erred when she failed to safeguard Mr. Yates's funds when she did not verify or personally confirm the existence of a sub-account holding $500,000 in her attorney trust account and when she disbursed $50,000 of Mr. Yates's funds to Zion in violation of the second escrow agreement. Ms. Ghatt also erred when she did not provide a full accounting when requested by Mr. Yates. The Court agreed with the hearing judge that Ms. Ghatt erred by failing to keep Mr. Yates's funds separate from her personal funds and using her attorney trust account as a personal bank account.

The Court Appeals further determined that Ms. Ghatt erred when she knowingly made misrepresentations to the Utah court in the civil lawsuit filed by Mr. Yates. In addition, the Court determined that Ms. Ghatt also erred when she sent the screenshot of her attorney trust account to Mr. Yates despite knowing that the account with $3.4 million was not part of the attorney trust account and that she did not have access to those funds. The Court further determined that Ms. Ghatt erred when she misused the $500,000, constituting trust money, in violation of the second escrow agreement and attachments. The Court of Appeals determined that Ms. Ghatt improperly commingled her personal funds with the attorney trust account. Ms. Ghatt further erred when she made cash withdrawal from the attorney trust account and incurred a negative balance on the attorney trust account.

Furthermore, the Court of Appeals determined that Ms. Ghatt engaged in conduct involving dishonest, fraud, deceit, and misrepresentation when she continuously evaded Mr. Yates's request for an accounting and a return of his $500,000 and when she repeatedly stated that she did not disburse Mr. Yates's $500,000 despite the fact that she intentionally and knowingly disbursed the funds to Strategic and Zion. The Court determined that Ms. Ghatt again engaged in conduct involving dishonest, fraud, deceit, and misrepresentation when she sent Mr. Yates the screenshot purporting to be her attorney trust account and misrepresented that she had control of Mr. Yates's $500,000 even though she knew that the linked account was owned by her brother and that she could not access the linked account. The Court of Appeals concluded that Ms. Ghatt engaged in conduct prejudicial to the administration of justice when she continuously evaded questions about Mr. Yates's $500,000, continuously mispresented how she handled the $500,000, and continuously lied that she had control of the $500,000.

Ultimately, the Court of Appeals concluded that the appropriate sanction for Ms. Ghatt's intentionally dishonest conduct and misappropriation of entrusted funds was disbarment. The Court of Appeals considered that Maryland jurisprudence holding that intentional dishonest, misappropriation cases, fraud, and stealing typically result in disbarment. *See e.g., Attorney Grievance Comm'n of Maryland v. Vanderlinde*, 364 Md. 376, 413–14 (2001); *Attorney Grievance Comm'n of Maryland v. Cherry-Mahoi*, 388 Md. 124, 161 (2005) (quoting *Attorney Grievance Comm'n of Maryland v. James,* 385 Md. 637, 666 (2005)); *Attorney Grievance Comm'n of Maryland v. Owrutsky*, 322 Md. 334, 345 (1991). The Court of Appeals considered that the Court only considered the most serious and utterly debilitating mental or physical health conditions as compelling extenuating circumstances for imposing a sanction less than disbarment. The Court ultimately found no compelling extenuating circumstances, and therefore concluded that disbarment was the appropriate sanction.

Attorney Grievance Commission of Maryland v. Roger N. Powell, Misc. Docket AG No. 9, September Term 2017, filed August 28, 2018. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2018/9a17ag.pdf

ATTORNEY DISCIPLINE – SANCTIONS – DISBARMENT

Facts:

On May 5, 2017, the Attorney Grievance Commission of Maryland ("Bar Counsel") filed a Petition for Disciplinary or Remedial Action ("Petition") alleging that Roger N. Powell ("Powell") had violated the Maryland Lawyers' Rules of Professional Conduct ("Rules"). The Petition alleged that Powell, during representation of Charles Wingler in the administration of Charlene Wingler's estate ("the Estate" or "decedent's Estate") and otherwise, violated the following Rules: 1.1 (Competence); 1.3 (Diligence); 1.4 (Communication); 1.5 (Fees); 1.7 (Conflict of Interest); 1.8 (Conflict of Interest); 1.15 (Safekeeping Property); 3.1 (Meritorious Claims and Contentions); 3.3 (Candor Toward the Tribunal); 3.4 (Fairness to Opposing Party and Attorney); 4.4 (Respect for Rights of Third Persons); 8.1 (Bar Admission and Disciplinary Matter); and 8.4 (Misconduct). The Petition also alleged that Powell violated Maryland Rules 16-603 (Duty to Maintain Account), 16-606.1 (Attorney Trust Account Record-Keeping), 16-607 (Commingling of Funds), and 16-609 (Prohibited Transactions).

A hearing judge found the following facts. Powell, while representing the personal representative of the decedent's Estate, failed to submit timely, completed, and accurate inventory of Estate assets and administrative account of the Estate. In addition, Powell failed to submit a petition for personal representative's commissions and attorney's fees before disbursing fees to himself and the personal representative, and, after the issuance of Orphans' Court orders to do so, failed to return estate funds. Powell also filed a lawsuit against the previous personal representative of the estate, which the circuit court and the Court of Special Appeals ruled was without substantial justification. Lastly, Powell failed to properly manage his trust accounts. There was clear and convincing evidence of commingling, use of the accounts for personal matters, and failure to keep complete records.

Held: Disbarred.

The Court of Appeals held that Powell's conduct violated Rules 1.1 (Competence), 1.3 (Diligence), 1.5(a) (Fees), 1.7 (Conflict of Interest) 1.15(a) (Safekeeping Property), 3.1(a) (Meritorious Claims and Contentions), 3.3(a) (Candor Toward the Tribunal), 3.4(c) (Fairness to Opposing Party and Attorney), 4.4 (Respect for Rights of Third Persons), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a), (c), and (d) (Misconduct), and Maryland Rules 19-407, 19-408, and 19-410 (formerly Maryland Rules 16-606.1, 16-607, and 16-609).

The Court of Appeals concluded that the appropriate sanction for Powell's misconduct was disbarment. Powell brought a frivolous lawsuit, failed to file timely or complete documents with the Orphans' Court, made misrepresentations to the Orphans' Court and Bar Counsel, and repeatedly disobeyed Orphans' Court orders, including an order to return attorney's fees. Additionally, Powell previously received two reprimands for substantially the same misconduct found in this matter, including mismanagement of escrow accounts. Although acknowledging Powell's civic and volunteer contributions, the Court of Appeals determined that a reprimand or suspension would not be sufficient to protect the public or serve as a deterrent to other attorneys.

Kyle Blackstone, et al. v. Dinesh Sharma, et al.; *Terrance Shanahan, et al. v. Seyed Marvastian, et al.*, No. 40, September Term 2017; *Laura O'Sullivan, et al. v. Jeffrey Altenburg, et al.*, No. 45, September Term 2017; *Martin Goldberg, et al. Substitute Trustees v. Martha Lynn Neviaser, et al.*, No. 47, September Term 2017, filed August 2, 2018. Opinion by Getty, J.

Adkins and McDonald, JJ., dissent.

https://www.courts.state.md.us/data/opinions/coa/2018/40a17.pdf

COLLECTION AGENCIES – MARYLAND COLLECTION AGENCY LICENSING ACT – SCOPE OF LICENSING REQUIREMENT

Facts:

This appeal consisted of two cases consolidated before the Court of Special Appeals as well as two additional actions appealed directly to the Court of Appeals from circuit court foreclosure proceedings. Each of the cases below required the Court to interpret the Maryland Collection Agency Licensing Act ("MCALA" or "the Act"). Md. Code (1992, 2015 Rep. Vol.), Bus. Reg. ("BR") § 7-301, *et seq*. MCALA was first enacted in 1977 to protect Maryland consumers from abusive debt collection practices employed by the collection agency industry. 1977 Md. Laws, ch. 319. The Act specifically defined "collection agencies" as entities engaged in the practice of collecting consumer debts for others, excluding those entities collecting debts they owned. Pursuant to MCALA, these third-party debt collectors were required to obtain a license as well as file a surety bond of $5,000 for the benefit of the State and any member of the public damaged by such collection agencies. BR § 7-301; 7-304. The State Collection Agency Licensing Board ("the Board"), located within the Department of Labor, Licensing, and Regulation ("DLLR" or "Department"), is responsible for enforcing the Act. BR § 7-201.

In 2007, DLLR requested a departmental bill (House Bill 1324) to revise the definition of collection agencies required to obtain the MCALA license. Specifically, the Department submitted a bill request, explaining that the legislation would allow DLLR to regulate actors in the collection industry that employed a loophole in MCALA's licensing requirement by purchasing delinquent consumer debt for goods and services by way of a purchase contract that mirrors a collection agency agreement. When enacted, the departmental bill specifically changed MCALA's definition of "collection agencies" to include a person who engages directly or indirectly in the business of "collecting a consumer claim the person owns, if the claim was in default when the person acquired it[.]" 2007 Md. Laws, ch. 472.

In each of the cases *sub judice*, the respondents obtained a mortgage loan from a creditor to purchase, convey, or refinance their homes. The loans were evidenced by a promissory note and secured by a deed of trust. Eventually, each homeowner missed loan payments, resulting in the banks declaring the loans to be in default. At some point after the respondents defaulted on the

mortgage loans, the banks transferred the loans and all beneficial interest in the deed of trust as part of a securitized pool of mortgage loans to either Ventures Trust 2013-I-H-R ("Ventures Trust") or LSF9 Master Participation Trust ("LSF9"), both of which are foreign statutory trusts organized under Delaware law.

These foreign statutory trusts acted through trustees, which in these cases were other banks. A separate loan servicer was assigned to communicate with the borrowers and collect the monthly mortgage payments. The trustees subsequently appointed substitute trustees, conveying all rights and duties under the deeds of trust, including the power of sale. The substitute trustees subsequently initiated foreclosure actions to enforce the security interest against the defaulting borrowers, meaning that the substitute trustees are the petitioners in each of the cases *sub judice*.

In response, the defaulting homeowners filed counter complaints arguing that the foreign statutory trusts acted as collection agencies as defined under MCALA. To that end, the homeowners contended that the foreign statutory trusts were required to obtain a MCALA license before they obtained defaulted mortgage loans and instituted foreclosure actions. *See* BR § 7-301, *et seq*. The counter complaints further alleged that, by attempting to collect mortgage payments without the required license under MCALA, the foreign statutory trusts violated the Maryland Consumer Debt Collection Act ("MCDCA"). Md. Code (1975, 2013 Repl. Vol.), Com. Law ("CL") § 14-201, *et seq*.

In addition to filing counter complaints, the borrowers in default requested that the circuit courts dismiss or enjoin the foreclosure sales. To support the request, the borrowers argued that the foreign statutory trusts brought the foreclosure action without being licensed as a collection agency, violating MCALA and MCDCA, and that any judgment obtained by an unlicensed entity acting as a collection agency would be void. *See Finch v. LVNV Funding*, LLC, 212 Md. App. 748, 759 (2013). In response, the substitute trustees argued that the foreign statutory trusts were neither doing business in the State nor doing business as a collection agency when they filed foreclosure actions, that MCALA did not apply to the in rem proceedings, that the foreign statutory trusts constituted trust companies exempted from the Act, and that the homeowners failed to specify a relevant defense under Maryland mortgage foreclosure law. *See* Md. Code Ann., Real Prop. ("RP") § 7-101, et seq.; Md. Rules 14-201, *et seq*.; Md. Code Regs. 09.03.12.01, *et seq*.

The circuit courts held motions hearings to consider the various arguments regarding MCALA. In each of the cases *sub judice*, the circuit court issued an order dismissing the foreclosure proceeding without prejudice after finding that the foreign statutory trusts were in the business of collecting consumer debt because the entities indirectly attempted to collect on a defaulted mortgage loan purchased at a discount. The courts also determined that the foreign statutory trusts did not fall under the trust company exemption to MCALA. After determining that the foreign statutory trusts were subject to the MCALA licensing requirements, the circuit courts noted that there was no dispute that Ventures Trust and LSF9 lacked the required collection agency license. As such, the circuit courts concluded that foreign statutory trusts had no right to bring the foreclosure actions, dismissing each of the cases without prejudice.

In two of the circuit court cases, the substitute trustees filed a notice of appeal. The consolidated appeal before the Court of Special Appeals involved two questions: (1) whether a party who authorized a trustee to initiate a foreclosure action needs to be licensed as a collection agency under MCALA; and (2) whether the MCALA licensing requirement applies to foreign statutory trusts. The Court of Special Appeals held that a foreign statutory trust must meet the licensing requirements under MCALA before a trustee or substitute trustee brings a foreclosure action on the trust's behalf unless some other exception in MCALA applies. The Court of Special Appeals further concluded that the exception for trust companies under MCALA does not apply to foreign statutory trust because those entities do not act as a trustee or operate as a commercial bank under the Black's Law Dictionary 10th ed. 2014 definitions. *See* BR § 7-102. As such, the Court of Special Appeals ultimately held that foreign statutory trusts were barred from bringing foreclosure actions without the MCALA license for collection agencies, affirming the judgment of the circuit courts.

Held: Reversed.

The Court of Appeals conducted a legislative intent analysis, looking first to the plain language of MCALA and then to the legislative history, subsequent legislation, and related statutes in order to determine what the General Assembly intended when originally enacting MCALA and when passing the 2007 departmental bill.

The Court of Appeals held that the plain language of MCALA is ambiguous as to whether a foreign statutory trust that owns a defaulted mortgage debt falls under those collection agencies that "engage[] directly or indirectly in the business of . . . collecting a consumer claim the person owns, if the claim was in default when the person acquired it[.]" BR § 7-101(d)(1)(ii). Specifically, the Court found that there was a conflict between the common, ordinary, and popular understanding of "collection agencies," *i.e.*, those businesses with a business model of sending letters to debtors, making collection calls, and filing collection suits for consumer debt, and the language added by the 2007 departmental bill, defining collection agency as any entity that obtains a defaulted consumer claim and then collects that claim. The Court also found a conflict between the nature of the foreign statutory trusts that owned the defaulted mortgage loans and the collection agency definition, which included entities directly or indirectly engaged in business. In the cases sub judice, the foreign statutory trusts did not have any employees or offices, did not have any registered agent, and did not have any specifically identified pursuit in the State. Instead, the foreign statutory trusts acted solely through trustees and substitute trustees. Therefore, the Court found it hard in the first instance to conclude that the foreign statutory trusts engaged, either directly or indirectly, in the business of a collection agency when it was hard to determine if these entities were even conducting "business." Therefore, the Court ultimately concluded that the language of MCALA was ambiguous in the context of foreign statutory trusts owning defaulted mortgage loans.

The Court looked to the legislative history in order to discern the General Assembly's intent. Specifically, the Court of Appeals reviewed the language of the original collection agency

licensing statute, the fiscal and policy note for the original act, written testimony of the bill's sponsor, and amendments to the bill. The Court also considered a report prepared by the Department of Fiscal Services, which evaluated MCALA and the collection agency industry. Overall, the Court of Appeals concluded that the legislative history indicated that the General Assembly intended MCALA's licensing requirement to apply to a limited industry of collection agencies, which largely consisted of small businesses collecting medical and retail accounts by contacting debtors via telephone or mail.

The Court of Appeals also reviewed the legislative history of the 2007 departmental bill. To determine DLLR's intent in requesting the 2007 departmental bill and the General Assembly's intent in passing that bill, the Court reviewed the Department's bill request form, the fiscal and policy note, and the written testimony. Specifically, DLLR stated in its bill request that the departmental bill aimed to license persons who buy the defaulted debt for "goods and services" before engaging in typical collection practices. Secretary James D. Fielder, Proposal for Legislation 2007 Session, Department of Labor, Licensing, and Regulation (Md. 2007). The Court concluded that all of the pertinent legislative history suggested that the Department was attempting to license and regulate certain collection agencies bypassing the licensing requirement by purchasing the debt from their clients, often on a contingent fee basis, so that they would not be a third-party collection agency. In other words, the Court determined that the legislative history revealed that DLLR submitted the bill request to the Governor for his consideration of a departmental bill that would close this loophole. As such, the Court concluded that the Department did not request, and the General Assembly did not intend, to expand the scope of MCALA's licensing requirement to other industries beyond the collection agency industry. Overall, therefore, the Court determined that the legislative history of the 2007 departmental bill revealed that the changes to the collection agency definition did not require the foreign statutory trusts owning defaulted mortgage loans to obtain a collection agency license.

In addition to the legislative history, the Court reviewed subsequent legislation in order to confirm the limited scope of MCALA. The Court of Appeals specifically considered the Maryland mortgage foreclosure law reform that the General Assembly enacted in 2008, 2009, and 2010 to set forth specific procedures and requirements for all parties seeking an *in rem* foreclosure proceeding. The Court found persuasive that the Homeownership Preservation Task Force, which was created specifically to review the Maryland laws relating to foreclosure and suggest changes, did not mention MCALA's licensing requirement. The Task Force explained to the General Assembly that the mortgage marketplace often involves packages of loans, called mortgage backed securities. This Court also considered that previous jurisprudence explained that securitization requires special purpose vehicles, such as trusts, to serve as a repository for the mortgage backed securities. Both this Court and the Task Force recognized that a separate trustee would serve to manage the loans in the mortgage backed securities while a loan servicer would collect payments from the borrowers. *See Anderson v. Burson*, 424 Md. 232, 237 (2011); *Deutsche Bank Nat. Tr. Co. v. Brock*, 430 Md. 714, 718 (2013). The Court found nothing in the legislative history of the Maryland mortgage foreclosure law reform that suggested MCALA was intended to license the mortgage industry actors. Moreover, the Court concluded that it would have been contradictory for the General Assembly to have passed foreclosure reform legislation specifying how mortgage industry entities should purse foreclosure actions without mentioning

the requirement for an MCALA license if the legislature believed that these same parties were included under the scope of the previously enacted 2007 departmental bill.

The Court also reviewed related statutes in order to discern whether the General Assembly intended to license foreign statutory trusts, which owned defaulted mortgage loans, as collection agencies under MCALA. The Court of Appeals considered that the legislature enacted the Maryland Statutory Trust Act in 2010, just three years after enacting the 2007 departmental bill. The Court found persuasive that the legislature specifically decided that statutory trusts were not doing business in Maryland when foreclosing on deeds of trust. *See* Md. Code Ann., Corps. & Ass'ns ("CA") § 12-902(a). Therefore, the Court found a direct conflict between interpreting MCALA in such a way that requires foreign statutory trusts to obtain a license before engaging in the business of a collection agency by instituting a foreclosure action and the Maryland Statutory Trust Act's recognition that foreign statutory trusts are not doing business in Maryland when foreclosing on a mortgage. The Court determined that the consolidated cases presented an instance in which both of the statutes, MCALA and the Maryland Statutory Trust Act, may apply and conflict. The Court reconciled the two statutes and gave effect to both. Specifically, the Court concluded that the legislature intended to license a certain group of actors within the collection agency industry, including those entities that purchased delinquent consumer debt in exchange for a contingency fee, when enacting and revising MCALA. The year after the General Assembly enacted the 2007 departmental bill, the legislature enacted a comprehensive foreclosure reform, addressing the rising number of foreclosures in Maryland by requiring all entities instituting foreclosure proceedings to comply with specific homeowner protection procedures. When enacting the Maryland Statutory Trust Act, the legislature did not require foreign statutory trusts to register with the State when bringing foreclosure actions because the General Assembly appreciated that MCALA was limited to the collection agency industry and the previously enacted foreclosure reform would control the foreclosure proceedings. As such, the Court concluded that the legislative history surrounding MCALA, the Maryland mortgage foreclosure law, and the Statutory Trust Act all confirm that foreign statutory trusts, as an actor in the mortgage industry, do not fall under the scope of MCALA.

The Court ultimately held that the General Assembly did not intend for foreign statutory trusts to obtain a collection agency license under MCALA before its substitute trustees filed a foreclosure action in circuit court. Pursuant to its legislative intent analysis, the Court of Appeals concluded that foreign statutory trusts are outside of the scope of the collection agency industry, which are the actors the legislature sought to regulate and license when enacting and revising MCALA. In each of the cases *sub judice*, the owner of the mortgage loan was a foreign statutory trust serving as a special purpose vehicle. The Court determined that the foreign statutory trusts were not required to obtain a license under MCALA before the substitute trustees instituted foreclosure proceedings on their behalf. As such, the Court of Appeals held that the circuit courts in the cases *sub judice* erred in dismissing the foreclosure proceedings on the basis that the owners of the mortgage loans were foreign statutory trusts that were not licensed as a collection agency under MCALA.

Clement Reynolds v. State of Maryland, No. 84, September Term 2017, filed August 27, 2018. Opinion by Hotten, J

https://mdcourts.gov/data/opinions/coa/2018/84a17.pdf

CRIMINAL LAW – CONSTITUTIONAL LAW – SILENCE

CRIMINAL LAW – CONSTITUTIONAL LAW – IMPEACHMENT

Facts:

Clement Reynolds ("Reynolds") was arrested on April 14, 2014 for the November 18, 2002 murder of Wesley King ("King") in Montgomery County, Maryland. An open warrant remained unserved until 2014, when police officers discovered Reynolds was using the name Dennis Graham. After Reynolds's arrest, police officers advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), and began questioning him about the murder. At some point during the interrogation, Reynolds indicated that there was "nothing I have to say." A suppression court determined that Reynolds's indication that he wished to remain silent was sufficient to invoke *Miranda*, and that any questioning after that point was unlawful. However, officers continued to question Reynolds about his whereabouts around the time of King's murder. Reynolds told officers that at the time of King's murder, he lived in the Virgin Islands; later dated a woman named Rose Lopez, and that he sold cars with a man named Byron Matamora.

At trial, Reynolds testified that he and King were friends who sold drugs together. Reynolds testified that on the day of King's murder, Reynolds was in Brooklyn, New York, and picked up his daughter from daycare at 6:00 p.m. According to Reynolds, he arrived home around 6:30 p.m., where a babysitter, Karlene Gill, was present. Reynolds also testified that his wife, Simone Smith, returned home shortly after 8:00 p.m. Reynolds testified that he had an appointment with Caroline George to conduct an estimate for repairs on her home. He left his apartment between 9:30 p.m. and 10:00 p.m. and arrived at George's house around 10:30 p.m. Reynolds left shortly after 11:00 p.m. and arrived home around midnight, where he saw both Simone Smith and Karlene Gill.

On cross-examination, the State highlighted the inconsistencies between Reynolds's statements to detectives and his trial testimony, stating "[s]o, instead of telling the police about Caroline George, or Karlene Gill, who could truly alibi you, you started naming Rose Lopez and Byron Matamora, who isn't even a real person?" Reynolds's objection was sustained. Reynolds noted a timely appeal to the Court of Appeals to determine whether he was denied due process when the trial court permitted the State to question him regarding his alibi defense, even though his statements were taken as a result of his post-arrest, post-*Miranda* silence.

Held: Affirmed.

The Court of Appeals held that a defendant's statements made to police officers in violation of *Miranda* were admissible at trial for impeachment purposes. Reynolds argued that what he did not reveal to officers after he invoked *Miranda* was a product of his silence, and thus, should be examined through the lens of post-*Miranda* silence and not prior inconsistent statements. "Evidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, including impeachment." *Grier v. State*, 351 Md. 241, 258, 718 A.2d 211, 219 (1998) (internal citations omitted). However, affirmative statements taken otherwise in violation of *Miranda* can be used for impeachment purposes. *Miranda*, 384 U.S. at 477, 86 S.Ct. at 1629. Courts may allow the State to question a defendant about inconsistent statements if "the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility…." *Oregon v. Hass*, 420 U.S. 714, 722, 95 S.Ct. 1215, 1221 (1975). Reynolds made affirmative statements about his whereabouts on the night of King's murder, which were inconsistent with his trial testimony. Those affirmative statements were inconsistent details from those ultimately given at trial. Although the statements were taken in violation of *Miranda*, the State's use for impeachment purposes was proper.

Julius Devincentz, Jr. v. State of Maryland, No. 74, September Term 2017, filed August 13, 2018. Opinion by Adkins, J.

Watts, J., concurs and dissents.

https://mdcourts.gov/data/opinions/coa/2018/74a17.pdf

PRESERVATION FOR APPELLATE REVIEW – EXCLUSION OF EVIDENCE – MARYLAND RULES 5-103(A)(2) AND 8-131(A)

EVIDENCE – EXCLUSION OF EVIDENCE – CHARACTER WITNESSES – CJP § 9-115 – MARYLAND RULE 5-608

EVIDENCE – EXCLUSION OF EVIDENCE – HEARSAY – MARYLAND RULE 5-616(B)(3) – NONHEARSAY EVIDENCE OF BIAS

CRIMINAL TRIALS – WITNESS CREDIBILITY – HARMLESS ERROR

Facts:

In 2008, Julius Devincentz, Jr. and Y.D. began a romantic relationship. Y.D., her daughter K.C., and her son S., moved into Devincentz's home in Elkton, Maryland from Pennsylvania. Devincentz's children, Brianna, Joshua, and Kenny also lived at the house. Devincentz and Y.D. lived together with their children as a blended family until the couple separated in November 2015. In September 2015, K.C. told her therapist that Devincentz had sexually abused her when she was 6 or 7 years old. The therapist reported K.C.'s allegations.

The State charged Devincentz with one count of continuing course of conduct against a child, two counts of sexual abuse of a minor, one count of second-degree sexual offense, one count of third-degree sexual offense, one count of fourth-degree sexual offense, and one count of second-degree assault. In 2016, Devincentz was tried in the Circuit Court for Cecil County. At the trial, K.C. testified about Devincentz's alleged conduct.

Joshua, Devincentz's son, testified for the defense. Defense counsel attempted to elicit testimony about an argument that occurred after K.C. stole a cell phone. The State objected on the grounds of relevance. Defense counsel proffered that Joshua witnessed the argument and that "[i]t goes to motive." The trial judge ruled that Joshua could testify about the argument, but not about K.C.'s alleged theft because he lacked first-hand knowledge. Joshua testified that "[K.C.] was unhappy with [Devincentz]'s decision on the argument. And once it was resolved by a third party [, K.C.] was yelling and screaming and saying things that she could do that would get him in trouble." The State objected, and the trial court sustained. Defense counsel did not make a proffer after the trial judge sustained the objection.

Defense counsel then asked Joshua about K.C.'s relationship with other family members. When Joshua indicated that K.C. had problems with the family, defense counsel asked for an explanation. Joshua testified that "[K.C.] would not tell the truth about certain things." Again, the State objected, and the trial court sustained the objection.

The jury found Devincentz guilty of sexual abuse of a minor and second-degree assault but acquitted him of the charge of a continuing course of conduct against a child. The trial court sentenced him to 25 years in prison for the sexual abuse of a minor and a consecutive 10-year sentence for second-degree assault. Devincentz appealed. In an unreported decision, the Court of Special Appeals affirmed his conviction. *See Devincentz v. State*, No. 1297, Sept. Term 2016, 2017 WL 4231583 (Md. Ct. Spec. App. Sept. 25, 2017).

Held: Reversed.

First, the Court of Appeals held that Devincentz had preserved his claim of error for appeal because the trial court heard Joshua's testimony before it sustained the State's objections, and the relevance was apparent from the context. *See* Md. Rule 5-103(a)(2); *Peregoy v. Western Md. Ry. Co.*, 202 Md. 203, 209 (1953).

The Court then held that it was an abuse of discretion for the trial court to exclude Joshua's testimony that K.C. "would not tell the truth about certain things." Md. Rule 5-608(a)(1) permits a character witness to attack the credibility of another witness by testifying either that the "witness has a reputation for untruthfulness," or "in the character witness's opinion, the witness is an untruthful person." A character witness may "give a reasonable basis" for his testimony, but may not, on direct examination, testify to specific instances. *Id.* (a)(3)(B). CJP § 9-115 sets forth two conditions that must be met before opinion testimony is admissible: (1) character evidence must be "otherwise relevant to the proceeding;" and (2) the witness must have an "adequate basis" to form that opinion. *Id.*

For a character witness to have an adequate basis, the testimony must elicit, at a minimum, how long and how well the witness knew the individual. *Booth v. State*, 327 Md. 142, 192 (1992). Here, Joshua had lived with K.C. for over six years. Joshua knew K.C. since she was six or seven years old. The testimony established the length and nature of Joshua and K.C.'s relationship, and that it was the kind of relationship that would lend itself to assessing the character of another for truthfulness. Joshua's opinion about K.C.'s character for truthfulness arose from a time pertinent to trial—when K.C. resided in the Devincentz household. His **current** opinion of K.C.'s veracity was necessarily based on **past** events. Furthermore, K.C.'s credibility was integral to the proceeding—as both the State and Devincentz recognized. For these reasons, the Court held that to the extent the trial court excluded Joshua's opinion for lack of an adequate basis, it abused its discretion.

Devincentz argued that Joshua's testimony that K.C. was "yelling and screaming and saying things that she could do that would get him in trouble" was not hearsay but admissible evidence

of bias. Specifically, he argued that the statement was not hearsay because it was not offered for the truth of the matter asserted. The Court concluded that K.C.'s dislike of Devincentz and the intensity of their arguments was relevant to show that she was biased against him and could have motive to lie. *See* Md. Rule 5-401; *Pantazes v. State*, 376 Md. 661, 692–93 (2003). K.C.'s statement was significant because her implied threat was "evidence of animus that might show a motive for making false allegations . . . ." *State v. Calabrese*, 902 A.2d 1044, 1055 (Conn. 2006). As such, its use for impeachment purposes under Md. Rule 5-616(b)(3) was not hearsay because Devincentz offered it for the fact that K.C. **made** the statement—not for its truth. *Smith v. State*, 273 Md. 152, 161 (1974). The Court held that the trial court erred in excluding Joshua's testimony.

The outcome of the case turned entirely on the relative credibility of the defendant and the accuser. By excluding Joshua's testimony, the trial court limited the jury's ability to assess K.C.'s credibility and potential bias. The Court held that the exclusion of Joshua's testimony was not harmless error, vacated Devincentz's convictions, and remanded the case for a new trial.

State of Maryland v. Phillip James Clements, No. 57, September Term, 2017, filed August 29, 2018. Opinion by Barbera, C.J.

https://www.courts.state.md.us/data/opinions/coa/2018/57a17.pdf

MOTION TO CORRECT ILLEGAL SENTENCE – APPEALABILITY OF AN ORDER GRANTING A RULE 4-345(a) MOTION

Facts:

Respondent Phillip James Clements was seventeen years old in 1989 when he committed and was convicted of three counts of first-degree murder, two counts of attempted murder, and other crimes arising from the same incident. Clements was sentenced to five consecutive life sentences with the possibility of parole for each count of murder and attempted murder, plus a concurrent total of 23 years on the lesser counts. Clements's direct appeal and petition for post-conviction relief were unsuccessful.

In 2016, Clements filed a Maryland Rule 4-345(a) motion to correct an illegal sentence based on recent United States Supreme Court precedent involving life sentences for juvenile offenders. The Circuit Court for Prince George's County granted Clements's motion and vacated his sentence. The court scheduled a new sentencing hearing, which was deferred pending appeal. The State appealed to the Court of Special Appeals, and Clements filed a Motion to Dismiss arguing that the mere grant of a motion to correct an illegal sentence, without imposition of a new sentence, is not an appealable final judgment from which the State may appeal. The Court of Special Appeals granted Clements's motion and dismissed the State's appeal.

Held: Affirmed.

The Court of Appeals first held that the circuit court's order granting Clements's motion to correct an illegal sentence and vacating his five consecutive life sentences was part of the underlying criminal proceeding. The Court was instructed by its statement in *State v. Kanaras*, 357 Md. 170, 183–84 (1999), that "[w]hile a motion under Rule 4-345 may be made at any time, it is part of the same criminal proceeding and not a wholly independent action."

The Court then determined that the State could not appeal the mere grant of a motion to correct an illegal sentence without more, such as the imposition of a new sentence. The Court noted that the State may only appeal in a criminal case as permitted by statute, and found that the relevant statute did not authorize this appeal. The order granting Clements's motion did not meet either of the enumerated categories of Maryland Code, Courts and Judicial Proceedings § 12-302(c)(3), which authorizes the State to appeal in a criminal case. The order was not a "final judgment" that either "[i]mposed or modified a sentence in violation of the Maryland Rules," as the State

had argued, because a new sentence had not yet been imposed. Therefore, the Court of Appeals affirmed the judgment of the Court of Special Appeals dismissing the State's appeal.

Daniel Carter v. State of Maryland, No. 54, September Term 2017; *James E. Bowie v. State of Maryland*, No. 55, September Term, 2017; and *Matthew Timothy McCullough v. State of Maryland,* No. 56, September Term 2017, filed August 29, 2018. Opinion by McDonald, J.

Barbera, C.J., Greene and Adkins, JJ., dissent in Nos. 54 and 55.
Watts and Getty, JJ., dissent in No. 56.

https://mdcourts.gov/data/opinions/coa/2018/54a17.pdf

CRIMINAL PROCEDURE – CONSTITUTIONAL LAW – SENTENCING – PAROLE – JUVENILE OFFENDERS – LIFE SENTENCES

CRIMINAL PROCEDURE – CONSTITUTIONAL LAW – SENTENCING – PAROLE – JUVENILE OFFENDERS – SENTENCES FOR TERMS OF YEARS.

Facts:

Each of the defendants in these three consolidated appeals was less than 18 years old when he committed the offenses for which he is imprisoned.

A jury found Daniel Carter guilty of first-degree murder, use of a handgun in a crime of violence, and possession of a handgun. He was sentenced to life imprisonment with the possibility of parole with a consecutive 20 year term.

Mr. Carter filed a *pro se* motion under Maryland Rule 4-345 to correct an illegal sentence. The motion relied primarily on *Miller v. Alabama*, 567 U.S. 460 (2012), which held the Eighth Amendment forbids sentences of life without parole for juvenile offenders convicted of homicide unless the juvenile is incorrigible. Mr. Carter argued that his sentence was equivalent to life without parole because the governor at the time of sentencing had publicly declared his intent to not grant parole to inmates serving life sentences.

The circuit court denied the motion because Mr. Carter's sentence allowed for parole. On appeal, the Court of Special Appeals dismissed Mr. Carter's appeal for lack of standing, ripeness, and the doctrine of constitutional avoidance. Mr. Carter petitioned the Court of Appeals for a writ of certiorari, which was granted.

James Bowie was convicted of attempted first-degree murder, attempted second-degree murder, and robbery with a deadly weapon. He was sentenced to life imprisonment with the possibility of parole and a concurrent term of 20 years.

Mr. Bowie filed a motion to correct an illegal sentence. In support of that motion, he attached information he had obtained from the Parole Commission that, during the previous 20 years, the

Parole Commission had recommended parole for 27 inmates serving life sentences, that governors had denied 24 of those recommendations, and that three remained pending. In his motion, Mr. Bowie argued those statistics showed there is no relevant distinction between life sentences with or without parole eligibility.

The circuit court denied the motion and cited *State v. Kanaras*, 357 Md. 170 (1999), stating "the acts of the Parole Commission and the Commissioner of Correction, which may have the effect of denying certain inmates parole consideration" do not render a sentence illegal. The Court of Special Appeals affirmed that decision for the same reasons relied on in the case of Mr. Carter. Mr. Bowie appealed, and the Court of Appeals granted certiorari.

Matthew McCullough was charged with various offenses arising from a non-fatal shooting at his school in which several students were injured. He was found guilty of four counts of first-degree assault, although acquitted of attempted murder and related handgun counts. Mr. McCullough was sentenced to four consecutive terms of 25 years, the maximum permitted by statute, for a total sentence of 100 years. Under that sentence, he would be eligible for parole after 50 years.

Mr. McCullough filed a motion to correct an illegal sentence, citing *Graham v. Florida*, 560 U.S. 48 (2010). That decision held that the Eighth Amendment forbids sentencing a juvenile who has not committed homicide to life without parole, and that states must provide such offenders with "a meaningful opportunity for release based on demonstrated maturity and rehabilitation." Mr. McCullough argued that his 100-year aggregate sentence provided no meaningful opportunity for release, in violation of the constitutional prohibition against cruel and unusual punishment.

The circuit court denied that motion without a hearing, and Mr. McCullough appealed. The Court of Special Appeals held that *Graham* does not apply to an aggregate sentence for multiple crimes committed against multiple victims. 233 Md. App. at 704, 716-44. In the alternative, the court held that, even if *Graham* applies to those circumstances, Mr. McCullough's sentence was shorter than life because he will be eligible for parole after 50 years. Id. at 744-45. In addition, the court held that the factors considered by the Parole Commission comply with *Graham*, and that the claim failed under traditional Eighth Amendment proportionality review. Id. at 745-47. Mr. McCullough petitioned for, and was granted, certiorari.

This Court held oral argument for all three cases on February 6, 2018. At issue was whether the inmates had standing to challenge their sentences, whether a motion to correct an illegal sentence was the correct procedure for doing so, and whether the sentences provided a meaningful opportunity for release based on demonstrated maturity and rehabilitation. On February 9, 2018, the Governor issued an executive order that provided that, in deciding whether to grant parole, the Governor is to assess and consider the same factors provided by statute and regulation that the Parole Commission considers. The executive order also provided that the Governor is to consider several principles identified in Supreme Court precedent for juvenile sentencing, and provide a written explanation of his decision if he declines to approve parole for a juvenile offender sentenced to life imprisonment.

Held: Decisions in Mr. Carter's and Mr. Bowie's cases affirmed; decision in Mr. McCullough's case reversed.

In Mr. Carter's and Mr. Bowie's cases, the Court of Appeals held both had standing to pursue a motion to correct an illegal sentence, that such a claim was ripe for decision, and that the canon of constitutional avoidance did not permit the court to decline to decide those claims. The court defined standing in Maryland as depending on whether a party is aggrieved in a way particular to the party, as opposed to a diffuse grievance applicable to society at large. Those imprisoned under allegedly illegal sentences satisfy this test independent of the merits of their claim. To the extent grievances relate to the structure of Maryland's parole system, as opposed to how it operates in practice, the Court held the claims ripe for review. Although the canon of constitutional avoidance cautions to decide constitutional issues only if necessary, this determines *how* to decide a case, not *whether* to decide it.

The Court also held that a motion to correct an illegal sentence under Maryland Rule 4-345 was the appropriate procedural vehicle for some, but not all, of the issues. The Court explained that whether a sentence is illegal depends on whether the alleged illegality is "inherent" in the sentence. Issues of process in determining or executing a sentence may be illegal and remedied in other contexts, such as a habeas proceeding. However, those types of claims are generally not inherent in the sentence. Therefore, the Court did not consider factual issues such as the frequency with which parole is recommended or granted in practice.

The Court held that the Governor's role in the parole process for inmates serving life sentences inheres in a sentence of life with possibility of parole, and is thus cognizable on a motion to correct an illegal sentence. This is because parole eligibility is annexed to the sentence, including the Governor's role in that decision. Whether that renders the sentences illegal depends on the extent to which the Governor's role means the process resembles executive clemency as opposed to parole, as the former was declared inadequate by the Supreme Court.

The Court reasoned the Governor's role here was not akin to clemency as a result of the executive order. Before that order, the Governor had unfettered discretion to deny parole on an *ad hoc* basis without reference to standards or explanation. By issuing the order, the Governor bound himself to exercise discretion in the same manner as the Parole Commission and consistent with Supreme Court precedent regarding juvenile punishment. Because the order has the force of law, Mr. Carter's and Mr. Bowie's sentences are no longer inherently illegal and their motion under Maryland Rule 4-345 failed on the merits. The Court expressed no opinion on the merits of a different cause of action challenging operation of the parole system in practice.

In Mr. McCullough's case, the Court held that his sentence was inconsistent with *Graham* and violated the Eighth Amendment. First, the Court considered whether a sentence to a number of years could be equivalent to a sentence of life without parole for purposes of applying *Graham*. The Court stated that a contrary answer would defy both common sense and the weight of persuasive authority; however, its reasoning was based on *Graham*'s fundamental premise that a sentence lacking any penological justification is by its nature disproportionate. The Court held

that the reasons supporting *Graham*'s holding are equally applicable to a term of years if the term is long enough, and that such sentences could qualify as equivalent to life without parole.

Second, the Court analyzed when a term of years is long enough to qualify as equivalent to life without parole. The Court of Appeals considered several reference points that other courts have used when considering the issue, including: life expectancy, eligibility for parole for a life sentence, the half-century mark, legislative reforms to comply with *Graham* and *Miller*, and the retirement age. The Court also considered the date of parole eligibility for prisoners sentenced to life without parole under a Maryland recidivist statute for violent offenders.

The Court found all these reference points relevant; however, it cautioned that a "meaningful opportunity" must provide "hope for some years of life outside prison walls" to satisfy *Graham*. Although Mr. McCullough's individual life expectancy was not in the record, the Court of Appeals found that his sentence is equivalent to a sentence of life without parole by every other benchmark because he would be nearly 68 years old after serving the 50 years necessary to be considered for parole.

Third, the Court discussed whether consecutive sentences for multiple crimes, so-called "stacked sentences," are different from lengthy sentences arising from a single offense. The Court recognized proportionality review is conducted on a case-by-case basis, and exceptional circumstances may warrant considering a sentence in the aggregate. The Court noted there are many different circumstances under which a juvenile comes to be serving consecutive sentences, with some more deserving of being considered in the aggregate than others. The Court considered Mr. McCullough's sentencing package as if it were a single life sentence because his offenses took place in a relatively short amount of time and his role in the offense was that of an aider or abettor.

The Court vacated Mr. McCullough's sentence and remanded the case for resentencing to a disposition that is not life without parole. At a minimum, that sentence must provide parole eligibility at a point significantly before 50 years.

In re: Adoption/Guardianship of C.E., No. 77, September Term 2017, filed August 13, 2018. Opinion by Hotten, J.

Watts, J. dissents.

https://mdcourts.gov/data/opinions/coa/2018/77a17.pdf

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – BEST INTEREST OF THE CHILD

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – CONSIDERATION OF STATUTORY FACTORS – ABUSE OF DISCRETION

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS – PERMANENCY

Facts:

C.E. ("C.E." or "the child") is a male child, born in May 2014, to C.D. ("Mother") and H.E. ("Father"). Mother's parental rights to four of her six other children were involuntarily terminated, and her other son entered the foster care system through removal by the Baltimore City Department of Social Services ("Department"). Father lives in senior citizen housing, which prohibits child residents. Father's other son also entered the foster care system. When C.E. was born, the Department filed for emergency shelter care in the Circuit Court for Baltimore City.

At a hearing on July 11, 2014, the juvenile court granted the Department's request for temporary care and custody of C.E., and placed him with distant relatives ("Mr. and Ms. B.") while the Department pursued Child in Need of Assistance ("CINA") proceedings. On June 16, 2015, the juvenile court found C.E. to be a CINA and awarded custody to the Department for continued relative placement. The Court of Special Appeals affirmed. *See In re C.E.*, No. 0925, Sept. Term, 2015 (Md. Ct. of Sp. App., December 15, 2015), *cert. denied*, 446 Md. 705, 133 A.3d 1110 (2016).

On April 20, 2016, the juvenile court held a hearing regarding the Department's motion to waive its obligation to continue its reasonable efforts to reunify Mother with C.E. The juvenile court granted the Department's motion, concluding that it lacked discretion to deny the motion under § 3-812(d) of the Courts and Judicial Proceedings Article ("Cts. & Jud. Proc.") of the Maryland Code, in light of the prior involuntary terminations of Mother's parental rights over C.E.'s siblings. Mother appealed. The Court of Special Appeals determined that the juvenile court's decision to waive reasonable efforts for reunification was not appealable and therefore dismissed the appeal. *See In re C.E.*, No. 0464 Sept. Term 2016, 2016 WL 7235560 (Md. Ct. Spec. App., Dec. 14, 2016), *aff'd*, 456 Md. 209, 172 A.3d 476 (2017).

Following this Court's determination on waiver, the Department filed a Petition for Guardianship with the Right to Consent to Adoption or Long Term Care Short of Adoption. The juvenile court considered the statutory factors regarding termination of parental rights ("TPR") pursuant to Md. Code (1984, 2012 Repl. Vol.), § 5-323 of the Family Law Article ("Fam. Law"). Pursuant to Fam. Law § 5-323(d), in order to terminate parental rights, a juvenile court must find unfitness or exceptional circumstances that would make it detrimental to the child's best interest to continue the parental relationship. The juvenile court found that Mother was unfit and that exceptional circumstances existed by clear and convincing evidence, citing specifically that Mother has multiple mental illnesses that render her unable to care for C.E. The juvenile court found that Father was unfit by a preponderance of the evidence, but not by clear and convincing evidence, and that exceptional circumstances existed. However, the juvenile court recognized that C.E. had a relationship with Father that would be detrimental to C.E.'s best interest if terminated. Based on these findings, the juvenile court determined that it was in C.E.'s best interest to change the permanency plan to custody and guardianship to Mr. and Ms. B., C.E.'s relatives who were willing to provide long-term care for him.

On September 1, 2017, the juvenile court denied the Department's petition. C.E. and the Department (collectively "Petitioners") filed petitions for writ of *certiorari*, which the Court of Appeals granted on February 5, 2018.

Held: Affirmed in part and reversed in part.

The Court of Appeals held that the juvenile court abused its discretion by failing to terminate Mother's parental rights, but was reasonable in its decision not to terminate Father's parental rights. To paraphrase the statutory factors that the juvenile court must consider, Fam. Law § 5-323(d) requires assessment of the following considerations to determine unfitness or exceptional circumstances before termination of parental rights:

> (1) The services offered to the parent to achieve reunification;
> (2) The parent's effort to change circumstances to achieve reunification in the parent's home;
> (3) The presence of factors such as abuse, neglect, drug use, criminal convictions against the child, a sibling, or other parent, or if the parent has involuntarily lost parental rights over the child's sibling;
> (4) The child's emotional connection with the parent, siblings, or others who significantly affect the child's best interest.
>
> See Fam. Law § 5-323(d).

Regarding Mother, the Department was not required to offer her reunification services because of the prior TPR proceedings involving four of her other children. However, the Department offered Mother extensive reunification services, including numerous referrals to mental health counseling. Despite the services offered, Mother has been unsuccessful in improving the

circumstances that would make reunification possible. The juvenile court failed to adequately weigh Mother's involuntary termination of the parental rights to her other children. C.E.'s interactions with Mother were infrequently positive because Mother often became frustrated and terminated visitation. Additionally, Mother had a negative relationship with Mr. and Mrs. B, who offer C.E. safety and stability. Collectively, the juvenile court was correct to find that Mother was unfit and that exceptional circumstances existed by clear and convincing evidence. However, the juvenile court erred by declining to terminate Mother's parental rights.

The juvenile court did not abuse its discretion in denying the Department's TPR petition regarding Father. Although the Department offered Father numerous reunification services, Father remained in senior citizen housing, which prohibited child residents. Father did not involuntarily have his rights to his other son terminated, and there was no evidence of abuse or neglect of C.E. Father and C.E. had a close connection that would be detrimental to C.E.'s best interest if terminated. Therefore, the juvenile court did not err in declining to terminate Father's parental rights.

The Court of Appeals determined that permanency, not specifically adoption, effectuates the purpose of the TPR statutory framework. Petitioners argued that indefinite custody of C.E. with Mr. and Ms. B., without termination of parental rights, fails to achieve that permanency. However, "the best interest of the child remains the ultimate governing standard[]" in contested adoption cases, TPR, and permanency plan proceedings. *In re Adoption/Guardianship of Rashawn H*., 402 Md. 477, 496, 937 A.2d 177, 189 (2007). A lack of permanency alone does not equate to unfitness. Conversely, "[p]assage of time, without explicit findings that the continued relationship with [the father] would prove detrimental to the best interests of the child[], is not sufficient to constitute exceptional circumstances." *In re Adoption/Guardianship of Alonza D*., 412 Md. 442, 463, 987 A.2d 536, 548 (2010). Therefore, a decision that C.E. would remain with Mr. and Ms. B., without being adopted, is not an exceptional circumstance or a finding of parental unfitness sufficient to justify termination of parental rights.

Maryland Office of People's Counsel, et al. v. Maryland Public Service Commission, et al. No. 15, September Term 2017, filed August 29, 2018. Opinion by McDonald, J.

Watts, J., dissents.

https://mdcourts.gov/data/opinions/coa/2018/15a17.pdf

PUBLIC UTILITIES – PUBLIC SERVICE COMMISSION – ACQUISITION OF ELECTRIC COMPANY – CONSIDERATION OF ACQUISITION PREMIUM

PUBLIC UTILITIES – PUBLIC SERVICE COMMISSION – ACQUISITION OF ELECTRIC COMPANY – CONSIDERATION OF EFFECT ON ALTERNATIVE GENERATION MARKETS.

Facts:

Exelon is a utility services holding company incorporated in Pennsylvania and headquartered in Chicago, Illinois. Its principal subsidiaries before the merger at issue in this case were Baltimore Gas & Electric ("BGE"), a Maryland public utility and Exelon Generation Company, LLC ("Exelon Generation"). Many of Exelon's generation assets rely on nuclear power.

PHI is a utility services holding company incorporated in Delaware and headquartered in Washington, D.C. It owns two public utilities that operate in Maryland– Pepco and Delmarva. Pepco delivers electricity to customers in Montgomery County and Prince George's County, and Delmarva delivers electricity to the Eastern Shore of Maryland.

On August 19, 2014, Exelon and PHI submitted to the Maryland Public Service Commission an application for approval of a proposed merger between the companies. Exelon proposed acquiring PHI in a cash for stock transaction for $27.25 per share – a total of $6.8 billion. The purchase price exceeded PHI's book value at that time ($3.1 billion) as well as its average market capitalization during the prior year ($5 billion based on an average stock price of $19.94). After the merger, Exelon would provide electricity service to more than 80 percent of Maryland customers through its subsidiaries.

Multiple parties petitioned to intervene, citing potential issues with the merger. Many of these related to Exelon's nuclear assets and market consolidation, which could create conflicts of interest with other methods of delivering or producing electricity, specifically distributed generation and renewable energy. There were also concerns over the price Exelon offered to pay to acquire PHI, which included an "acquisition premium" (i.e., the amount by which the price per share exceeded market or book value) and which some parties described as a "windfall" to PHI's shareholders. Subject to conditions, the Public Service Commission approved the merger by a 3-2 vote.

Several intervenors who had opposed the merger before the Commission sought judicial review of the Commission's decision in the Circuit Court for Queen Anne's County. The Circuit Court issued an opinion affirming the final decision of the Commission and declined to stay the transaction.

People's Counsel and the Sierra Club noted appeals to the Court of Special Appeals, which affirmed the decision of the Circuit Court in an unreported decision several months after the transaction closed. 2017 WL 382886 (2017). People's Counsel and the Sierra Club filed petitions for certiorari, which the Court of Appeals granted.

Held: Affirmed

The Court of Appeals explained that the standard of review that applies to the Public Service Commission is generally more deferential than other agencies. This was because the Commission has its own statutory standard that uses the same criteria as Maryland's Administrative Procedure Act, but which states, by contrast, that Commission decisions are "prima facie correct" unless those same criteria are "clearly" established.

The Court held the Commission was not required by law to consider the acquisition premium as a harm or inconsistent with the public interest. The Court explained that the legislature had provided a list of 11 factors the Commission must consider in a merger application, as well as any other factor the Commission found relevant. Because an acquisition premium was not included among the specifically-named factors, the Commission was not legally required to consider that issue. The Commission had discretion to consider that issue, and its decision whether to do so would be assessed under an arbitrary or capricious standard.

The Court held that the Commission did act arbitrarily or capriciously in how it considered the premium. The Court recognized that this standard is somewhat difficult to articulate, but held the Commission's decision was reasonably consistent with the statutory purpose and the Commission's prior decisions. Because rates for service are not calculated with reference to the price of PHI's stock, the Court rejected the significance of decisions involving the sale of tangible property employed by a utility in providing service.

The Court also held that the Commission's treatment of alleged harms to renewable energy and distributed generation markets was neither arbitrary nor capricious. The Court found that many of the Commission's findings responding to other allegations also applied to distributed generation and renewable energy. Specifically, the Commission had found both Exelon and PHI had similar incentives to oppose renewable power and distributed generation and were currently acting on that motive; however, the Commission also found its existing regulatory powers were sufficient safeguards. The Court held the Commission was not required to repeat its fact findings and analysis when a reasoning mind can readily grasp the connection between related issues, and that it was reasonable for the Commission to consider technological changes in a separate proceeding.

Washington Gas Light Company v. Maryland Public Service Commission, et al., No. 81, September Term 2017, filed August 14, 2018. Opinion by Getty, J.

https://mdcourts.gov/data/opinions/coa/2018/81a17.pdf

PUBLIC UTILITIES – MARYLAND CODE, PUBLIC UTILITY ARTICLE § 4-210 – STATUTORY INTERPRETATION

Facts:

In 2013, the General Assembly passed the STRIDE statute, Public Utility Article ("PU") § 4-210 of the Maryland Code, in response to increasing concerns about threats to public safety posed by aging and deteriorating gas infrastructure throughout the state. In short, the STRIDE statute allows Maryland gas companies more timely cost recovery if they submit plans that increase the pace of natural gas infrastructure improvements.

Washington Gas Light Company ("Washington Gas") filed a STRIDE plan with the Maryland Public Service Commission ("Commission") on November 7, 2013, that was approved by the Commission. The proposed 2013 STRIDE plan consisted of four distribution system replacement programs, all of which were located within the company's Maryland service territory. Subsequently on March 10, 2015, Washington Gas filed an application for approval of a proposed amendment to add four new transmission system programs. While the majority of the assets included in the amended application were physically located in Maryland, three proposals contained individual projects located outside of Maryland. Specifically, Transmission Program 1 contained two projects replacing pipeline in Virginia, Transmission Program 2 contained four infrastructure replacement projects in Virginia, and Transmission Program 4 contained six replacement projects in Virginia or Washington, D.C.

The parties disputed whether Washington Gas could recover costs for infrastructure replacement projects located outside of Maryland through the STRIDE statute because of the statute's statement of legislative intent found in PU § 4-210(b). PU § 4-210(b) states "[i]t is the intent of the General Assembly that the purpose of this section is to accelerate gas infrastructure improvements in the State by establishing a mechanism for gas companies to promptly recover reasonable and prudent costs of investments in eligible infrastructure replacement projects separate from base rate proceedings."

In its decision on the amended application, the Commission concluded that for "an infrastructure replacement project to be an 'eligible infrastructure replacement' under the STRIDE law," and thus qualifying for accelerated cost recovery associated with the project through the STRIDE surcharge mechanism, the project "must be located on pipeline system located in the State and subject to the Commission's jurisdiction." Further, the Commission held that the STRIDE

statute "is clear and unambiguous; the incentive for cost recovery outside a base rate proceeding is available to 'accelerate gas infrastructure improvements in the State.'"

Washington Gas then appealed. On appeal, the Circuit Court for Montgomery County also concluded that the legislative intent section of the STRIDE statute is unambiguous and dispositive of the issue. The matter was then appealed to the Court of Special Appeals. The Court of Special Appeals held that adopting Washington Gas's argument would lead to "a very subtle and very forced construction" in order "to support a judicial conclusion that the Legislature's unambiguously expressed intention that the STRIDE law permits accelerated cost recovery only for infrastructure improvements in Maryland to mean that the General Assembly also intends the law to extend to improvements that are located outside of this state."

In the present matter, Petitioner Washington Gas asserted that the Commission, the Circuit Court for Montgomery County, and the Court of Special Appeals each erred in their statutory analysis that the STRIDE statute provides accelerated cost recovery only for gas infrastructure projects located in the State of Maryland. Respondents Maryland Office of People's Counsel and the Commission argued that the prior tribunals' interpretation of PU § 4-210 was correct. The Court of Appeals was called upon to conduct statutory interpretation, analyzing both the plain language and the legislative history of PU § 4-210.

Held: Affirmed.

In a case of first impression, the Court of Appeals concluded that PU § 4-210 is unambiguous and requires that "gas infrastructure improvements" be located "in the State" in order to promptly recover investment costs separate from base rate proceedings. Finding the guidance found in the *Legislative Drafting Manual* compelling, the Court of Appeals determined that PU § 4-210(b) was an operative section of the STRIDE statute. As such, the Court of Appeals held that the STRIDE statute's unambiguous plain language provides accelerated cost recovery for projects located solely in Maryland. Additionally, the Court of Appeals's independent examination of the applicable legislative history supported its plain language interpretation. For these reasons, the Court of Appeals affirmed the judgment of the Court of Special Appeals

Nancy K. Kopp et al. v. Dennis R. Schrader et al., No. 72, September Term 2017, filed June 21, 2018. Opinion by Wilner, J.

Barbera, C.J., Adkins and McDonald, JJ., concur and dissent.

https://mdcourts.gov/data/opinions/coa/2018/72a17.pdf

STATE GOVERNMENT – GUBERNATORIAL APPOINTMENTS – SENATE CONFIRMATION

Facts:

In 2016, the governor appointed Wendi Peters as secretary of the Department of Planning and Dennis Schrader as Secretary of the Department of Health, and, on the first day of the 2017 session of the general assembly, submitted both names for confirmation by the state Senate.

Before the Senate acted on those nominations, the governor withdrew them and did not nominate any replacement. After the session ended, the governor reappointed Ms. Peters and Mr. Schrader. During the 2017 session, the legislature left intact appropriations for the salaries of the two secretaries included in the FY 2018 budget bill but added language to the bill (§ 30) that effectively precluded any funds in the budget from being used to pay the salaries to Ms. Peters and Mr. Schrader. In accordance with that language, the state treasurer refused to issue payroll checks to them for any period after June 30, 2017.

Held:

Notwithstanding payroll warrants issued by the state Comptroller in an action brought by Ms. Peters and Mr. Schrader, the circuit court declared their reappointment valid and § 30 unconstitutional. The Court of Appeals held (1) that, because the Senate had not rejected the nominations, notwithstanding an opportunity to do so, the reappointments were valid under Art. II, §§ 11 and 12 of the state constitution, and (2) that based on clear language from *Bayne v. Secretary of State*, 283 Md. 560 (1978), § 30 was invalid and unenforceable. The case was remanded for further proceedings in accordance with the appellate opinion.

Kennedy Krieger Institute, Inc. v. Ashley Partlow, No. 82, September Term 2017, filed August 13, 2018. Opinion by Watts, J.

Barbera, C.J., McDonald and Getty, JJ., dissent.

http://www.mdcourts.gov/data/opinions/coa/2018/82a17.pdf

NEGLIGENCE – DUTY OF CARE – FACTORS GUIDING CONSIDERATION OF DETERMINING WHETHER DUTY EXISTS UNDER COMMON LAW – SPECIAL RELATIONSHIP – CLASS OF POTENTIAL PLAINTIFFS

Facts:

From 1993 to 1999, Kennedy Krieger Institute, Inc. ("KKI"), Petitioner, conducted a "Lead-Based Paint Abatement and Repair and Maintenance Study" ("the R&M Study") to investigate the effectiveness of various levels of repair and maintenance interventions, i.e., lead-based paint abatement methods, in reducing exposure to lead in houses and reducing children's blood-lead levels. Shortly after the R&M Study concluded, in *Grimes v. Kennedy Krieger Inst., Inc*., 366 Md. 29, 48-56, 63, 782 A.2d 807, 819-24, 828 (2001), the Court of Appeals discussed the R&M Study at length, and held that a trial court erred in granting KKI's motions for summary judgment in two cases in which the plaintiffs were child participants in the R&M Study by consent agreements. In *Grimes*, *id*. at 48, 782 A.2d at 819, the Court concluded that a duty of care may exist between KKI and a participant in the R&M Study. In *Grimes*, *id.* at 113, 782 A.2d at 858, the Court concluded "that, under certain circumstances, [consent] agreements can, as a matter of law, constitute 'special relationships' giving rise to duties, out of the breach of which negligence actions may arise[,]" and "that, normally, such special relationships are created between researchers and the human subjects used by the researchers."

In this case, Ashley Partlow ("Ashley"), Respondent, filed in the Circuit Court for Baltimore City ("the circuit court") a complaint against KKI alleging negligence and violations of the Baltimore City Housing Code and the Maryland Consumer Protection Act. Unlike the plaintiffs in *Grimes*, however, Ashley was not a participant in the R&M Study, which only included children aged six months to four years. In May 1994, when Ashley's mother, Jacqueline Martin, completed an eligibility questionnaire for the R&M Study, Ashley was five years old, and was ineligible to be a participant. In May 1994, Ashley's younger sister, Anquenette Partlow ("Anquenette"), who was two years old, became a participant in the R&M Study through a consent form signed by Martin. Although Ashley was not a participant in the R&M Study, she lived in the subject property with her family, including Anquenette, during her younger sister's participation in the R&M Study.

In response to Ashley's complaint, KKI filed various motions for summary judgment, including one concerning the claim for negligence, arguing that it did not owe a legal duty to Ashley because Ashley was not a participant of the R&M Study and it did not own, lease, or operate the

subject property. Following a hearing, the circuit court issued an order granting the motions for summary judgment. In a memorandum opinion, the circuit court concluded that KKI did not owe Ashley a duty of care, and that the researcher-subject duty that this Court recognized in Grimes did not extend to Ashley. The circuit court also ruled that KKI did not owe Ashley a duty of care under the Baltimore City Housing Code, and that Ashley had failed to allege facts sufficient to support a claim for violation of the Maryland Consumer Protection Act.

Ashley appealed. In an unreported opinion, the majority of a panel of the Court of Special Appeals reversed the circuit court's grant of summary judgment in KKI's favor as to Ashley's negligence claim, concluding that a "special relationship created by the R & M Study encompassed her as well as her sister." *Ashley Partlow v. Kennedy Krieger Inst., et al.*, Nos. 44 and 530, Sept. Term, 2015, 2017 WL 4772626, *1 (Md. Ct. Spec. App. Oct. 23, 2017). The Court of Special Appeals held that KKI owed Ashley a duty of care under the common law, stating "that KKI owed to Ashley the same duty of care it owed to R & M Study participants who lived in the same dwelling pursuant to the same lease agreement." *Id.* at *7, *9. The Court of Special Appeals held, however, that the circuit court properly granted summary judgment as to the claims for violations of the Baltimore City Housing Code and the Maryland Consumer Protection Act. *See id.* at *9, *10. The Honorable Stuart R. Berger dissented as to the holding that KKI owed Ashley a duty of care under the common law, and concurred with the majority's holdings that the circuit court properly granted summary judgment on the claims for violations of the Baltimore City Housing Code and the Maryland Consumer Protection Act. *See id.* at *10 (Berger, J., concurring and dissenting).

KKI filed a petition for a writ of *certiorari*, raising one issue: "Whether the [Court of Special Appeals], relying on Grimes, erred in imposing a duty on [KKI] to an individual who was not enrolled in the research study at issue[.]" The Court granted the petition. *See Kennedy Krieger Inst. v. Partlow*, 457 Md. 398, 178 A.3d 1242 (2018).

Held: Affirmed.

The Court of Appeals held that a duty of care exists in the limited circumstances where: (1) a medical research institute knows of the presence of a child, who is not a participant in a research study concerning lead-based paint abatement of a property, who resides at a property that is subject to the research study during a participant child's enrollment in the study; (2) the medical research institute has signed a consent agreement with a parent or guardian for a participant child's enrollment in the research study and both the participant and non-participant children reside at a property subject to the study; (3) the medical research institute knows or should know of the presence or suspected presence of lead in the property; (4) the medical research institute determined the level of lead-based paint abatement for the property; and (5) the non-participant child who resided at the property during the research study was allegedly injured by being exposed to lead at the property. The Court held that, under the circumstances alleged in the case, considering the record in a light most favorable to the non-moving party, on the question of duty,

it was error to grant summary judgment in favor of KKI on grounds that KKI owed no duty of care to Ashley under the common law.

The Court of Appeals held that, utilizing the traditional test for determination of a duty of care and considering the seven classic factors that the Court has time and time again used in determining the existence of a duty under the common law—namely, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty, and the availability, cost, and prevalence of insurance for the risk involved—led to the conclusion that Ashley had set forth sufficient allegations to conclude that a cognizable duty of care arose in the case. The Court concluded that the seven-pronged test for balancing the policy considerations necessary to determine whether a duty of care exists under the common law weighed heavily in favor of recognizing such a duty, and, indeed, established that KKI owes Ashley a duty of care. The Court determined that, in short, in a personal injury case, a duty of care may arise without the existence of a direct or special relationship between a plaintiff and defendant, and the Court determined that such a duty had arisen under a traditional tort law analysis in the case.

The Court of Appeals also held that, viewing the record in the light most favorable to Ashley, and construing any reasonable inferences that may be drawn from the facts against KKI, there was sufficient evidence that KKI had a special relationship with Ashley and her family to submit the issue to the trier of fact, *i.e.*, a jury. In other words, the grant of summary judgment in KKI's favor was also improper for this reason. The Court stated that the record reflected that KKI knew that Ashley, then a young child, resided in the subject property, which was subject to the R&M Study. KKI knew that the subject property contained lead, and that Ashley would be exposed to lead in the same manner and under the same conditions as her participant-sister.

The Court of Appeals rejected KKI's contention that recognizing a duty in the case creates an indeterminate class of potential plaintiffs and would expose medical research institutions to unending liability. The Court's primary holding was that KKI owes a duty of care to Ashley and children like her, who were not participants in the R&M Study, but who KKI knew resided with a participant of the study in a property subject to the study. According to the Court, this creates a finite and identifiable group of potential plaintiffs to whom KKI owes a duty of care, and is most likely to encompass siblings or other relatives of participants of the R&M Study who were either too young (under six months old) or too old (over four years old) to be enrolled as participants themselves. The Court concluded that, in other words, there exists an identifiable, limited class of potential plaintiffs, and recognizing that KKI owed Ashley a duty of care did not subject KKI to unlimited liability.

The Court of Appeals held that, in sum, under the circumstances of the case, based on the seven classic factors utilized by courts for determining whether a duty of care exists, KKI owed Ashley a duty of care under the common law. Thus, the circuit court erred in granting summary judgment in KKI's favor. Additionally, because there was sufficient evidence of a special

relationship between Ashley and KKI for the issue to be submitted to a jury, the grant of summary judgment was improper on that ground as well.

COURT OF SPECIAL APPEALS

Kristi Heffington, et al. v. Ronald F. Moser, et al., No. 922, September Term 2017, filed August 30, 2018. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2018/0922s17.pdf

CIVIL PROCEDURE – MOTION TO STAY – PARALLEL CIVIL AND CRIMINAL PROCEEDINGS – FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION – MARYLAND DECLARATION OF RIGHTS, ARTICLE 19, RIGHT OF ACCESS TO THE COURTS

Facts:

Plaintiff sued defendants, including former employer, for defamation and other torts based on defendants' having reported to the police and others that plaintiff stole from their business while she was employed there. Plaintiff gave a lengthy discovery deposition. A few months later, she was indicted for several crimes, including theft of property from defendant former employer. Initially, the trial in the criminal case was set for a date before the trial date in the civil case, which was specially assigned. On the day of the criminal trial, the State sought a postponement, which was granted, and the criminal trial was moved to two months after the trial date in the civil case. The plaintiff filed a motion to stay the civil case until after the proceedings in the criminal case were concluded, arguing that she could not prove her case without her own testimony and she could not testify without running the risk of incriminating herself. The court denied the stay. At trial, the parties agreed to a process whereby the plaintiff would not call any witnesses, would move for a mistrial, and if that were denied, the defense would move for judgment, which would be granted. After judgment was entered for the defense, an appeal was noted.

Held: Vacated.

The plaintiff did not acquiesce in the judgment, as the parties agreed to the process that would be followed. The plaintiff did not waive her Fifth Amendment right by testifying in deposition prior to being indicted. The circumstances existing at the time of the deposition—that it was possible that she would be indicted— were different from the circumstances existing at the time of trial—that she had been charged and was in criminal jeopardy.

In deciding whether to grant a stay, the circuit court should have weighed the plaintiff's Fifth Amendment right to remain silent and suffer no penalty for her silence and her Article 19 right to access to the courts against the defendants' right to a timely resolution of the claims against them without harm to their defense. A proper weighing of these factors only would have supported granting the stay. The case had been pending for a little over a year, discovery was completed, and there had been no postponement of the trial date. There was no showing of prejudice to the defense by granting the stay, and without the stay, the plaintiff would suffer the penalty of losing her cause of action and access to the courts in order to protect her Fifth Amendment right to remain silent.

Montgomery County Office of Child Support Enforcement ex rel. Jessica Cohen v. Andrew Cohen, No. 931, September Term 2017, filed August 29, 2018. Opinion by Zarnoch, J.

https://mdcourts.gov/data/opinions/cosa/2018/0931s17.pdf

STATUTORY CONSTRUCTION – CONSTITUTIONAL LAW – SEPARATION OF POWERS – ADMINISTRATIVE LAW – EXHAUSTION OF ADMINISTRATIVE REMEDIES

Facts:

After the Montgomery County Office of Child Support Enforcement (MCOCSE) certified to federal authorities that the appellee, Andrew Cohen, was more than $2,500 in arrears in child support, the United States Secretary of State declined to issue Cohen a passport so that he could vacation in Greece with his girlfriend's family at her father's expense. Cohen sought relief in the circuit court and the court ordered the MCOCSE to release the hold on the issuance of the passport and turn over the passport to the court when he returned from the vacation. MCOCSE appealed.

Held: Reversed and Remanded

The plain language of federal law and state regulations required the County agency to certify to federal authorities that Cohen was in arrears in his child support and federal law required the United States Secretary of State to deny the passport application. The circuit court's ruling ran counter to these provisions when it granted Cohen the requested relief.

The circuit court's order encroached on an executive branch's authority to enforce the dictates of law and regulation with respect to passport holds and child support arrearages. This action violated the separation of powers doctrine. Cohen failed to exhaust his administrative remedies when he bypassed state procedures established to allow a person adversely affected by a passport hold to challenge the governmental decision.

Thus, the Court of Special Appeals reversed the circuit court's order requiring MCOCSE to remove its hold on Mr. Cohen's passport and remanded the case for further proceedings. The appellate court said that the circuit court must turn over the passport at issue to the agency, and MCOCSE must re-certify Cohen's arrearage to the Federal authorities and arrange to transfer the passport to the Secretary of State. The Secretary of State may decide, under his or her statutory authority, whether to revoke or restrict the passport.

Maurice Mack v. State of Maryland, No. 1627, September Term 2017, filed June 5, 2018. Opinion by Wilner, J.

https://mdcourts.gov/data/opinions/cosa/2018/1627s17.pdf

CRIMINAL LAW – SEARCH AND SEIZURE – REASONABLE ARTICULABLE SUSPICION – ANONYMOUS TIPS

Facts:

Responding to an anonymous tip from a 911 caller that two African-American men were selling drugs from a silver Honda at a certain location, two police officers, in separate patrol cars observed a car with two passengers, one being appellant, matching that description at that location, with the car's motor running. The officers parked their cars in a way that precluded the Honda from being moved. A subsequent investigation, including observation of the two men and furtive conduct on their part, led to a frisking of the men, discovery of narcotics on one of them, a full search of the car, and discovery of a handgun. The trial court denied appellant's motion to suppress the gun.

Held: Reversed.

(1) The immobilization of the Honda prior to any encounter with the passengers constituted a seizure for purposes of *Terry v. Ohio*. The passengers were not free to leave the scene or terminate the ensuing encounter.

(2) At that point, the officers had no knowledge of criminality on appellant's part other than the anonymous tip. Confirmation that a silver Honda with two African-American men in it at the location was insufficient, under *Florida v. J.L.* and *Navarette v. California*, to constitute reasonable articulable suspicion that appellant was engaging, or had engaged, in criminal activity warranting such a seizure.

(3) Under Maryland law, 911 calls are recorded and, at least with respect to calls from land lines, the location and phone from which the call was made also is recorded, which can, but does not necessarily, give an enhanced reliability to the information.

(4) When the State is relying on an anonymous 911 call to provide probable cause or reasonable articulable suspicion, it should, when possible, produce the recording of the call, or explain the absence thereof, so that the court can have the ability to hear what actually was said in order to make a determination of the credibility of the information.

Anthony Greene v. State of Maryland, No. 820, September Term 2017, filed June 8, 2018. Opinion by Alpert, J.

https://mdcourts.gov/data/opinions/cosa/2018/0820s17.pdf

CRIMINAL LAW – SUBJECT MATTER JURISDICTION – LESSER INCLUDED OFFENSE

Facts:

Md. Code Ann., Crim. Law ("CL") § 5-602(2) criminalizes possession with the intent to distribute a controlled and dangerous substance. CL § 5-601(a)(1) criminalizes simple possession of a controlled and dangerous substance, unless obtained by a valid prescription.

Appellant was charged with possession with the intent to distribute clonazepam and oxycodone under §5-602(2). Both are prescribed substances. Appellant, however, was not convicted of those offenses but of simple possession of clonazepam and oxycodone under § 5-601(a)(1).

Appellant argued that the circuit court lacked subject matter jurisdiction to convict him of possession of clonazepam and oxycodone because he was never charged with simple possession of those drugs, only with possession with the intent to distribute those drugs. He argued that simple possession of a medically prescribed drug is not a lesser included offense of possession with the intent to distribute that drug because simple possession of a prescribed drug requires proof of an element that possession with the intent to distribute that drugs does not, the absence of a valid prescription.

Held: Affirmed.

The Court of Special Appeals held that the "unless" clause in § 5-601(a)(1) is not an element the State must prove to secure a conviction for simple possession of a prescribed drug. Rather, the "unless" clause creates an exception that the defendant has the burden of proving. Therefore, possession of a prescribed drug without a prescription is a lesser included offense of possession of the prescribed drug with an intent to distribute.

Gordon Collins v. State of Maryland, No. 1992, September Term 2017, filed August 30, 2018. Opinion by Moylan, J.

Graeff, J., joined in the judgment only.

http://www.mdcourts.gov/opinions/cosa/2018/1992s17.pdf

VOIR DIRE – SIMPLE VS. COMPOUND QUESTIONS –THE COMPOUND QUESTIONS IN CONTEXT – ONE *VOIR DIRE* INQUIRY MAY PINCH-HIT FOR ANOTHER

Facts:

At 11:20 p.m. on March 17, 2017, Juliette Tower heard a noise coming from the downstairs of her home. She woke her husband and said, "I think there's somebody downstairs." Mr. Tower ran downstairs. Before joining him, Mrs. Tower called 911. As the Towers surveilled their ransacked television room, they noticed that several valuables were missing.

Sergeant Kenneth Brown responded to Mrs. Tower's 911 call. At around 11:25 Sgt. Brown saw appellant while the former was driving to the Towers' home. He was less a five-minute walk from the Towers' residence, and was walking with a garbage bag slung over his shoulder. Sgt. Brown passed appellant, lost sight of him for about twenty seconds, and made a U-turn. When Sgt. Brown next caught sight of appellant, the latter was returning to the sidewalk from a fenced area. Sgt. Brown detained appellant and recovered the garbage bag, which contained each of the valuables that had been missing from the Taylors'.

During *voir dire* of the venire, the court posed two compound questions:

> 1. Does anyone on this panel have any strong feelings about the offense of burglary to the point where you could not render a fair and impartial verdict based on the evidence?
>
> 2. Does anyone on this panel have any strong feelings about the offense of theft to the point where you could not render a fair and impartial verdict based on the evidence?

On appeal, appellant contends that the court did not cure the prejudice from those erroneous questions by subsequently posing properly phrased "strong feelings" questions.

Held: Affirmed.

Despite the error inhering in the compound "strong feelings" questions initially posed, it was resolved by the court's posing equivalent *voir dire* questions and by the court's posing proper "strong feelings" questions after the jury had been selected.

In a vacuum, compound *voir dire* questions such as those posed in this case frustrate the purpose of *voir dire*—to wit, the *court's* determining whether prospective jurors are able to render a fair and impartial verdict. Such compound questions impermissibly task the prospective jurors with the responsibility of determining whether they are biased. It is for the judge—not the prospective jurors—to determine whether the experiences which may have produced "strong feelings" would hinder prospective jurors' impartiality.

The Court does not, however, review *voir dire* questions in a vacuum. Rather, the Court "review[s] the trial judge's rulings on the record of the *voir dire* process as a whole." *Washington v. State*, 425 Md. 306, 314 (2012). In this case, the court posed three subsequent *voir dire* questions which unearthed whatever bias would have been revealed by proper, non-compound "strong feelings" questions. One of those questions was the essential equivalent of the improperly posed "strong feelings" questions. The court asked, "Has any member of this panel or your immediate family ever been accused of a crime, been the victim of a crime, or [been] a witness to a crime?" The Court of Appeals has held that a *properly phrased* "'strong feelings' *voir dire* question makes the 'victim' *voir dire* question unnecessary by revealing the specific cause for disqualification at which the 'victim' *voir dire* question is aimed." *Pearson v. State*, 437 Md. 350, 360 (2014). As a practical matter, the converse is also true.

After the jury had been sworn but before any evidence had been presented, the court took an additional remedial measure. It asked the jurors the simple—rather than the compound—"strong feelings" questions. None of the jurors answered in the affirmative. Appellant contends that this later curative measure was inadequate, claiming that posing the "strong feelings" question *after voir dire* denied appellant the right to make strategic use of his peremptory challenges. In Maryland, however, the *exclusive* purpose of *voir dire* is to ensure a fair and impartial jury. In Maryland, therefore, the right that appellant asserts does not exist.

Sadie M. Castruccio v. Peter A. Castruccio, et al., No. 2431, September Term 2016, filed August 31, 2018. Opinion by Arthur, J.

https://www.mdcourts.gov/data/opinions/cosa/2018/2431s16.pdf

ESTATES & TRUSTS – WILL CONSTRUCTION – PLAIN MEANING AND CONSIDERATION OF SURROUNDING CIRCUMSTANCES

Facts:

Dr. Peter Castruccio died on February 19, 2013. He was survived by his wife of 62 years, Sadie Castruccio. Shortly after his death, the Castruccios' long-time lawyer sought administrative probate of a will that had been executed in 2010. The will was a six-page document with one codicil.

Item 7 of the will consisted of three cash bequests to be distributed prior to any bequest to Mrs. Castruccio: $800,000 for Darlene Barclay, a long-time employee of Dr. Castruccio; $100,000 for Dr. Castruccio's niece; and $100,000 for the Castruccios' handyman. (The codicil increased the third such bequest to $200,000.)

Item 8 was unlabeled. It read: "To my loving wife, Sadie, excluding the individual bequest made in Item 7, I leave the rest and remainder of my Estate to her should she one, survive me and two provided she has made and executed a Will prior to my death."

Item 10, labeled "Residuary Clause," read as follows: "Should, at the time of my death, my beloved wife not have a valid Will filed with the Register of Wills in Anne Arundel County dated prior thereto these, I hereby give, devise and bequeath all the rest and residue of my Estate . . . to the following individuals share and share alike per stirpes and not per capita to DARLENE BARCLAY, [at Ms. Barclay's street address]."

At the time of Dr. Castruccio's death, Mrs. Castruccio had made and executed a will, but she had not filed any will with the county register of wills. The personal representative communicated to Mrs. Castruccio that it was his opinion that she should not receive the remainder of the estate unless she had a valid will on file with the register of wills.

Mrs. Castruccio challenged the validity of the will by instituting a caveat action in the Orphans' Court for Anne Arundel County. At her request, the orphans' court transmitted issues to the Circuit Court for Anne Arundel County. The circuit court granted summary judgment against her, upholding the validity of the will. Eventually, both the Court of Special Appeals (*Castruccio v. Estate of Castruccio*, 230 Md. App. 118 (2016)) and the Court of Appeals (*Castruccio v. Estate of Castruccio*, 456 Md. 1 (2017)) affirmed.

Meanwhile, Mrs. Castruccio had commenced a separate action in circuit court, seeking a declaration that she was the residuary beneficiary under the will. Ms. Barclay counterclaimed,

requesting a declaration that she, not Mrs. Castruccio, was the residuary beneficiary. In addition, Ms. Barclay invoked the will's no-contest clause, contending that Mrs. Castruccio could take nothing under the will because she had challenged the will in the caveat proceedings. All parties moved for summary judgment.

The personal representative and Ms. Barclay contended that Items 8 and 10 should be read together to impose three conditions to Mrs. Castruccio's right to receive the remainder: (1) she had to survive her husband, as stated in Item 8; (2) she had to have made a will, as stated in Item 8, and (3) she had to have filed a valid will with the Register of Wills for Anne Arundel County before her husband's death, as stated in Item 10. It was undisputed that Mrs. Castruccio did not meet the third of those conditions, as she had not filed or deposited any will with the Register of Wills for Anne Arundel County prior to her husband's death. Under their interpretation, Ms. Barclay would receive the remainder of the estate under Item 10.

Mrs. Castruccio argued that Items 8 and 10 addressed different scenarios and should not be read together. In her view, Item 8 addressed what should happen if she survived her husband, while Item 10 addressed what should happen if she did not. According to Mrs. Castruccio, under Item 8, she would receive the remainder of her husband's estate if she survived him and had made and executed a will before his death. On the other hand, she said, if she did not survive her husband, Item 10 meant that the remainder would go to the beneficiaries named in *her* will, provided that her will was valid and that it had been filed with the Register of Wills for Anne Arundel County in a probate proceeding.

In connection with a summary judgment hearing, the parties disputed the extent to which the court could consider information other than the language of the will itself. Most notably, that information included evidence of Dr. Castruccio's antipathy toward Mrs. Castruccio's nephews, his desire that the nephews receive none of his assets, and his unsuccessful attempts to involve his wife in joint estate-planning activities.

On January 6, 2017, the circuit court ruled in favor of the personal representative and Ms. Barclay and issued a declaratory judgment. The court declared that Mrs. Castruccio could qualify as the residuary beneficiary only if she satisfied three requirements: (1) she had to survive her husband; (2) she had to have made and executed a will prior to her husband's death; and (3) she had to have filed a valid will with the Register of Wills for Anne Arundel County prior to her husband's death. The court concluded that, because she had not filed a will with the register of wills, she had no right to recover under the will. The court determined that Ms. Barclay was the sole residuary beneficiary.

The court issued a memorandum opinion along with its order. The court based its decision both on the "plain and ordinary meaning" of the will and on the "undisputed competent evidence of the background to the execution" of the will. In its opinion, the court identified circumstances that it considered to be relevant. Among other things, the court noted: that since 2008, Dr. and Mrs. Castruccio had been engaged in an effort to divide up their assets for estate planning purposes; that Dr. Castruccio had tried to persuade Mrs. Castruccio to "engage in a joint will-drafting effort" but that Mrs. Castruccio "was not always cooperative" in that effort; and that Dr.

Castruccio "had a distaste" for three of Mrs. Castruccio's nephews, who had obtained loans from the Castruccios and who had involved them in a criminal investigation and other litigation.

The court rejected Ms. Barclay's alternative contention that the no-contest clause barred Mrs. Castruccio's recovery. The court determined that Mrs. Castruccio had had probable cause when she had commenced the caveat proceedings.

Mrs. Castruccio appealed from the circuit court's judgment.

Held: Affirmed.

On appeal, Mrs. Castruccio challenged the circuit court's conclusion that Item 10 of her husband's will required her to have filed a valid will with the Register of Wills of Anne Arundel County in order to receive the remainder of his estate.

Primarily, Mrs. Castruccio contended that the circuit court erred when it interpreted the will in light of certain extrinsic evidence instead of determining its meaning solely from the language of the will. The evidence at issue tended to show that Dr. Castruccio was concerned that Mrs. Castruccio would leave assets to family members of whom he did not approve and that he sought assurances that Mrs. Castruccio would not leave assets to those family members. Mrs. Castruccio contended that the court could consider extrinsic evidence only to resolve a latent ambiguity, which is an ambiguity that is not apparent from the document itself but that becomes apparent from extrinsic evidence. The will here contained no such latent ambiguity.

Ordinarily, under Maryland law, extrinsic evidence is not admissible to prove the testator's intent unless there is a latent ambiguity. Nevertheless, to ascertain the testator's intent, the will must be read in the light of the surrounding circumstances existing at the time of execution. Despite the general prohibition on consideration of extrinsic evidence, a court may still consider the situation of the testator, the testator's relations with beneficiaries, and the circumstances surrounding the execution of the will. Here, the circuit court could properly consider surrounding circumstances including: Dr. Castruccio's antipathy toward Mrs. Castruccio's nephews, his desire that they not receive any portion of his estate, and his attempts to engage Ms. Castruccio in joint estate planning in an effort to prevent or persuade her from leaving assets to her nephews.

As an additional ground for the judgment, the circuit court had concluded that, even based on the literal language of the will itself (and absent consideration of surrounding circumstances), the will imposed three conditions to Mrs. Castruccio's recovery. The Court of Special Appeals agreed with that conclusion as well.

In Mrs. Castruccio's proposed interpretation, Item 10 would take effect only if she did not survive her husband. Under her theory, Item 10 would serve as a kind of anti-lapse provision, under which the gift would be redirected to *her* heirs if she predeceased her husband. In that event, she argued, Dr. Castruccio's estate would go to whomever she had designated as the

beneficiaries of her estate as long as she had a valid will filed with the Register of Wills for Anne Arundel County.

The Court rejected her interpretation, reasoning that it is not at all natural to read Item 10 as the wholesale incorporation of Mrs. Castruccio's estate plan in the event that she predeceased her husband. Changes that Dr. Castruccio made to the 2010 will from a previous will refuted her contention, because Dr. Castruccio had actually deleted language about his wife predeceasing him. Contrary to Mrs. Castruccio's contention, the word "filed" in Item 10 did not express a technical, legal meaning, which is that her will had been filed in a probate proceeding after her death. Because the will had been drafted largely by Dr. Castruccio, a layperson, the word "filed" should have the meaning it would commonly have to a person in his situation.

As a potential additional ground for affirming the judgment, the personal representative argued that the no-contest clause should have precluded Mrs. Castruccio from recovering under the will because of her unsuccessful attempt to invalidate the will in the caveat proceedings. The Court of Special Appeals rejected that argument.

Under section 4-413 of the Estates and Trusts Article of the Maryland Code: "If probable cause exists for instituting proceedings, a provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is void." The statute does not define the term "probable cause." In other civil contexts, Maryland courts have defined probable cause as a reasonable ground for belief in the existence of such state of facts as would warrant institution of the suit or proceeding complained of. The Restatement (Third) of Property (Wills and Other Donative Transfers) states: "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."

The Court concluded that Mrs. Castruccio had had probable cause to institute the caveat proceedings under either standard. When she instituted the proceeding, she attempted to rely on a Court of Appeals opinion (*Shane v. Wooley*, 138 Md. 75 (1921)) which appeared to raise serious questions about whether the will satisfied technical requirements for attestation. Moreover, she relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts.

Prince George's County Office of Child Support Enforcement ex re. v. Michael Lovick, No. 198, September Term 2017, filed August 30, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/0198s17.pdf

FAMILY LAW – AFFIDAVIT OF PARENTAGE/ACKNOWLEDGMENT OF PATERNITY – CHOICE OF LAW/FULL FAITH AND CREDIT

Facts:

On October 4, 2011, Mr. Lovick's girlfriend, Angela Rice, gave birth to twin girls at Georgetown University Hospital in the District of Columbia. Soon after, Mr. Lovick signed an Acknowledgment of Paternity stating that he was the twins' father. As part of the Acknowledgment, Ms. Rice affirmed that Mr. Lovick was the only possible biological father of her children. Mr. Lovick and Ms. Rice are both Maryland residents.

Two years later, the couple separated and Ms. Rice filed a complaint in the circuit court seeking custody of the twins. She and Mr. Lovick later agreed to share legal custody and that Ms. Rice would have primary physical custody. After they entered this agreement, Mr. Lovick contacted the Office to initiate a child support case. A child support action was initiated, and in February 2014, Mr. Lovick agreed to pay $1,500 per month in child support.

In May 2016, Mr. Lovick filed a motion to establish paternity in both cases and requested a court-ordered genetic test. This motion followed Mr. Lovick's discovery that Ms. Rice had been involved sexually with another man around the time the twins were conceived and the results of private genetic testing that revealed Mr. Lovick was not the twins' father. The circuit court denied the motion.

On September 16, 2016, Mr. Lovick filed a new motion in the child support case to set aside the Acknowledgment on the basis of fraud. After a hearing in December, the circuit court ordered genetic testing and scheduled a follow-up hearing. The test results excluded any possibility that Mr. Lovick was the twins' father. And at the hearing, the circuit court agreed with Mr. Lovick that Ms. Rice had committed fraud by swearing in the Acknowledgment that Mr. Lovick was the only possible father.

On March 28, 2017, the circuit court entered an order setting aside the Acknowledgment of Paternity and striking the February 2014 child support order. The Office filed a timely appeal.

Held: Affirmed.

The Court of Special Appeals affirmed the circuit court's decisions to set aside the Acknowledgment of Parentage and strike the child support order.

First, with respect to the Acknowledgment, the Court addressed whether Maryland or District of Columbia law controlled how, when, and why such an affidavit could be set aside.

Under D.C. law, the Acknowledgment could not be set aside after sixty days, unless the signatory could prove fraud, duress, or material mistake of fact. D.C. CODE ANN. § 16-909.01(b); *D.C. v. D.H.*, 140 Daily Wash. L. Rptr. 2117 (D.C. Super. Ct. 2012). After two years, however, the presumption of paternity became conclusive—even when genetic tests excluded the signatory as a possible father—and could be challenged only on narrow grounds that were not relevant in this case. D.C. CODE ANN. § 16-2342(c). If D.C. law applied, then Mr. Lovick would not have been entitled to request a genetic test to exclude him as the twins' father and set aside the Acknowledgment of Paternity.

Under Maryland law, an affidavit of parentage may be challenged on the basis of fraud, duress, or material mistake of fact after sixty days, MD. CODE ANN., FAMILY LAW ART. ("FL") § 5-1028(d)(2)(i), and may be modified or set aside at any time "if a blood or genetic test done in accordance with § 5-1029 of this subtitle establishes the exclusion of the individual named as the father in the order." FL § 5-1038(a)(2)(i)(2).

The Court concluded that Maryland law controlled, and that the Full Faith and Credit Clause, U.S. CONST. ART. IV; 28 U.S.C. § 1738 (2003), was not implicated because the Acknowledgment of Parentage was not a finding of fact by another state's court. *Dackman v. Dackman*, 252 Md. 331, 336 (1969), *rev'd on other grounds, Eastgate Assoc. v. Apper*, 276 Md. 698 (1976).

Second, the Court held that the D.C. Acknowledgment of Parentage had the same weight and effect as a Maryland affidavit in paternity proceedings under Subtitle 10 of the Family Law Article, but was also subject to Maryland law for terms of modification and rescission. *Compare Burden v. Burden*, 179 Md. App. 348 (2008) (holding that the father's paternity had been determined conclusively because he knew he was not the natural father when he signed the affidavit of paternity and the case arose from divorce proceedings, not Subtitle 10 of the Family Law article). Therefore, under Maryland law, Mr. Lovick was entitled to a genetic test that could potentially exclude him as the twins' father.

Hale Kpetigo v. Rebecca MacVittie Kpetigo, No. 2122, September Term 2017, filed August 30, 2018. Opinion by Nazarian, J.

https://mdcourts.gov/data/opinions/cosa/2018/2122s17.pdf

FAMILY LAW – DE FACTO PARENTHOOD

FAMILY LAW – DE FACTO PARENTHOOD – GENDER

Facts:

While they were married, Parent and Father parented two young boys. L is their biological child and was born during the marriage. F is Father's son from a previous relationship.

From the time he was approximately four months old, F visited Father in the United States. At that point, Father was not yet a U.S. citizen, but he lived here during the time he dated, and then married, Parent. Whenever F visited, both Father and Parent cared for him. They married in 2009, when F was approximately three years old; F lived practically full time with them by that point. Father and F both obtained U.S. citizenship through Parent.

L was born in 2013. According to testimony at trial, L and F had a close relationship, and the couple made no distinctions about who was whose biological child.

Before and during their marriage, Parent cared for F like he was her own biological child and otherwise fulfilled all the roles and duties of a typical parent. When F was abducted by his biological mother during a visit in Africa, Parent and Father both worked to have F returned.

Parent and Father separated in December 2015. Until then, F had resided full-time with Father and Parent. Although both F and L lived with Parent at first, F eventually moved to live with Father. Even after they separated, Parent continued to visit F until Father restricted her access to him. All told, F lived full-time with both for at least six-and-a-half years by the time he turned 11.

Upon separating, Father and Parent agreed to share custody of L. Additionally, Father agreed to allow F to have visitation with Parent. At first, Parent had free access to F and saw him almost every day, but shortly thereafter Father restricted her access.

In March 2016, Parent and Father entered into a Voluntary Separation and Marital Settlement Agreement (the "Agreement") that formalized the arrangements they had been following. The Agreement confirmed that they shared joint legal and physical custody of L. Father agreed to pay Parent $300 per month for L's care. But the Agreement did not address F, or Parent's right to visitation with F.

On October, 13, 2016, Parent filed for a limited divorce. She amended her complaint (the "Complaint") to seek an absolute divorce, enforcement of the Agreement, child support, tie-breaking authority for matters pertaining to L, and visitation with F.

A trial was held in October 2017, and on December 7, 2017, the trial court issued an order granting Parent $1,057 per month of child support for the care of L and joint legal custody of L, with tie-breaking authority for Parent. The court also found that Parent qualified as F's *de facto* parent under the factors set forth in *Conover v. Conover*, 450 Md. 51, 74 (2016), that it was in F's best interests to maintain his relationship with Parent, and that Parent was entitled to visitation with F.

Father appealed. Father argued that Parent was a third party and not a *de facto* parent under the *Conover* holding, because *Conover* was meant primarily to apply to same-sex married couples. Father also argues that the tie-breaking authority granted to Parent for legal decisions regarding L is an extraordinary measure that was improperly granted in this case. Finally, Father argues that the trial court miscalculated the child support owed to Parent for L by using an outdated salary figure.

Held: Affirmed, except as to child support for L, which was remanded for further proceedings.

The Court of Special Appeals held that the circuit court correctly granted *de facto* parent status to Parent and that it was in F's best interests to maintain his relationship with Parent. The Court also affirmed the circuit court's decision to grant tie-breaking authority to Parent in her and Father's joint legal custody of L. Finally, the Court remanded the issue of child support to the circuit court to either recalculate child support per the guidelines or explain its rationale for using Parent's older salary amount.

First, where a biological parent encourages a parent-child relationship between their child and a third party, that third party may attempt to prove that he or she fulfills the other *de facto* parent factors outlined in *Conover v. Conover*, 450 Md. 51 (2016), and may then seek visitation or custody of the child—as long as it is in the child's best interests—without proving unfitness on the part of the biological parent or exceptional circumstances. *De facto* parent status is not limited solely to same-sex married couples.

Second, tie-breaking authority in joint legal custody is not an extraordinary measure that should only rarely be granted. *Santo v. Santo*, 448 Md. 620, 632–33 (2016). Tie-breaking authority is intended to proactively address post-divorce disputes, and is usually granted upon consideration of a child's best interests. If the trial court appropriately considered the child's best interests before granting such authority, then that decision will not be disturbed absent proof of an abuse of discretion. *Petrini v. Petrini*, 336 Md. 453, 470 (1994).

In Re: H.R., E.R., & J.R., No. 1742, September Term 2017, filed August 29, 2018. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2018/1742s17.pdf

TERMINATION OF PARENTAL RIGHTS PROCEEDING – EVIDENCE – RULE 5-803(b)(8)(A) & (B) – PUBLIC RECORDS EXCEPTION TO THE RULE AGAINST HEARSAY – JUDICIAL NOTICE.

Facts:

Mother and Father of the three young children at issue were charged with drug distribution and sexual assault of two teenage girls. Parents' three children were maintained by relatives out-of-state but later were returned to them. Children were declared CINA and removed from home after they were found to be living in squalor and after Father threatened to blow their apartment up. Ultimately, Mother and Father were convicted, and Father served a sentence of over two years in prison. Father did not comply with service agreement and refused to give local department of social services access to his mental health records. Mother consented to termination of her parental rights. After release from prison, Father was homeless, did not secure a job that he disclosed to the department, continued to refuse to disclose his mental health treatment, and was assessed to have mental health diagnoses that would make it dangerous for the children to be in his custody. Children had adapted to their new homes and bonded with their caretakers.

Held: Affirmed.

In TPR trial, the juvenile court did not err by admitting into evidence several reports made by the department to the juvenile court prior to and for the court's use in CINA permanency planning hearings for the children who were the subjects of the TPR. The reports were hearsay but were admissible under Rule 5-803(b)(8), the public records exception to the rule against hearsay. Specifically, the reports were made by a public agency and set forth matters observed pursuant to a duty imposed by law as to which there was a duty to report. Md. Rule 5-803(b)(8)(A). In opposing the termination of his parental rights, Father did not satisfy the burden, under Rule 5-803(b)(8)(B), to show that the reports or the information they conveyed were untrustworthy. To the extent the reports did not merely include facts but also included opinions, there was no error in admitting them because the experts whose opinions were conveyed were present at the hearing and available for cross-examination.

In addition, the juvenile court did not err by taking judicial notice of facts alleged in the amended CINA petition, to which Father had specifically stipulated.

Allen Burks, et al. v. Cynthia Allen, et al., No. 2361, September Term 2016, filed August 30, 2018. Opinion by Eyler, Deborah S., J.

https://mdcourts.gov/data/opinions/cosa/2018/2361s16.pdf

EXPERT TESTIMONY – GENERAL CAUSATION – *FRYE-REED* TEST – EVIDENTIARY HEARING – GENERAL ACCEPTANCE IN MEDICAL COMMUNITY.

Facts:

Decedent was admitted to University of Maryland Medical Center (UMMC) with multi-system diagnoses, including renal and liver failure. When he experienced an episode of bradycardia, Dr. Burks treated him for presumed hyperkalemia, which was later confirmed. The treatment included Kayexalate given in a suspension with sorbitol and hemodialysis. Shortly thereafter decedent developed ischemic colitis which quickly progressed to necrosis of the colon. Surgical intervention failed and decedent died. Survival and wrongful death actions were brought alleging medical malpractice. The plaintiffs' expert witnesses theorized that the decedent's ischemic colitis was caused by the Kayexalate with sorbitol and opined that the standard of care required treatment with dialysis alone. Six weeks prior to trial, defense counsel filed a request for a *Frye-Reed* hearing, arguing that it was not generally accepted in the relevant medical community that Kayexalate with sorbitol, as given in this case, can cause ischemic colitis, and therefore plaintiffs' experts should be precluded from testifying on causation. The plaintiffs filed an opposition and supplements were filed. The assignment office did not schedule a hearing. The request was addressed on the morning of trial, by the judge who had just been assigned the case. The judge held a hearing on whether a *Frye-Reed* hearing should be held and ruled that the causation issue did not warrant a *Frye-Reed* hearing and, alternatively, if *Frye-Reed* was implicated, the *Frye-Reed* general acceptance test was satisfied. The case went to trial and the jury returned a verdict for the plaintiffs. Dr. Burks and UMMC appealed.

Held: Affirmed.

Ordinarily, when the admissibility of proposed expert testimony is challenged under *Frye-Reed*, and *Frye-Reed* is implicated, an evidentiary hearing should be held to decide whether the testimony satisfies the *Frye-Reed* test. The Court of Special Appeals assumed without deciding that *Frye-Reed* applied to the proposed expert testimony and affirmed the trial court's alternative ruling, made without holding an evidentiary hearing, that that testimony satisfied the *Frye-Reed* test. The materials submitted to the court in support of and opposition to the request for *Frye-Reed* hearing comprehensively addressed the substance of the *Frye-Reed* issue. They included medical and scientific articles, FDA warning labels, UMMC Guidelines for Treatment of Hyperkalemia, medical records of the decedent, and deposition testimony of the relevant experts. The arguments made in the written submissions and to the court on the first day of trial focused

not on whether a hearing was needed but on the substance of the *Frye-Reed* issue. In fact, practically nothing was said about what a *Frye-Reed* hearing would include that was not already before the court to consider. In that circumstance, with the trial about to commence, the court did not err or abuse its discretion by deciding the *Frye-Reed* issue without holding an evidentiary hearing. On the merits, the evidence before the trial court, in the request for *Frye-Reed* hearing and opposition, supported a legally correct conclusion that, although the causal connection between Kayexalate with sorbitol and ischemic colitis is not considered definitive, *i.e.*, beyond question, Kayexalate with sorbitol is generally recognized by the relevant medical community as a cause of ischemic colitis in critically ill patients, such as the decedent.

ATTORNEY DISCIPLINE

*

This is to certify that the name of

DANA PAUL

has been replaced upon the register of attorneys in this State as of August 9, 2018.

*

By an Opinion and Order of the Court of Appeals dated August 16, 2018, the following attorney has been indefinitely suspended:

OLAYEMI ISAAC FALUSI

*

By an Opinion and Order of the Court of Appeals dated August 16. 2018, the following attorney has been indefinitely suspended:

STEVEN ANTHONY LANG

*

By an Opinion and Order of the Court of Appeals dated August 29, 2018, the following attorney has been disbarred:

JENEBA JALLOH (GHATT)

*

RULES ORDERS AND REPORTS

A Rules Order pertaining to amendments to the One Hundred Ninety-Seventh Report of the Standing Committee on Rules of Practice and Procedure was filed on August 23, 2018.

https://www.courts.state.md.us/sites/default/files/rules/order/ro197.pdf

UNREPORTED OPINIONS

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

https://mdcourts.gov/appellate/unreportedopinions

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