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Facts: The Charles County Department of Social Services found respondent, Charles Vann, responsible for "indicated child abuse" pursuant to Maryland Code (1999 Repl. Vol., 2003 Cum. Supp.), §5-701 of the Family Law Article.

The charges of "indicated child abuse" arose from punishment administered by respondent following an incident at his son's daycare center, in which the child brutally punched and kicked a teacher in the stomach. Following this incident, both parents agreed that corporal punishment was the appropriate discipline for their son's misbehavior. To administer this punishment, respondent struck his son with the buckle-end of his belt. The six-year-old attempted to avoid the blows by running away, hiding under the bed, and grabbing the belt from his father. In all, respondent struck his son two or three times with the belt.

After this incident, the daycare provider observed injuries on respondent's son and reported the matter to Child Protective Services. The Charles County Department of Social Services investigated the matter and subsequently charged respondent with "indicated child abuse." Respondent contested the charge before an administrative law judge, who upheld the finding of the Department of Social Services. Respondent then filed a petition for judicial review of the agency decision in the Circuit Court for Charles County. The Circuit Court affirmed the decision.

The Court of Special Appeals reversed the Circuit Court's decision, holding respondent could not be held responsible for indicated child abuse when, in the course of administering corporal punishment, he injured his son inadvertently as the child attempted to escape the punishment. The Court of Appeals granted the petition for writ of certiorari.

Held: Reversed and case remanded with directions to affirm the judgment of the Circuit Court. The Court held that the administrative law judge's decision was supported by substantial evidence. The Court found the Department of Social Services' determination to be an application of law to a specific set of facts, and that therefore, the administrative law judge's decision was entitled to deferential review.

The Court applied the substantial evidence test and held that a reasoning mind could have reached the conclusion, based upon the record, that respondent's actions created a substantial risk of harm toward his son. The Court found that striking his son with the buckle-end of his belt, while the child was trying to evade blows, supported finding respondent responsible for "indicated child abuse," notwithstanding the fact that his son disobeyed an order to stand still.

The Court also noted that absent any statutory or legislative indication otherwise, the meaning of the term "child abuse" was the same in Maryland Code (1999 Repl. Vol., 2003 Cum. Supp.) §§ 4-501 and 5-701. The Court rejected petitioner's argument that § 5-701 defines child abuse to include some forms of reasonable corporal punishment, while § 4-501 excepts from its purview reasonable corporal punishment. The Court determined that there can be no definition of child abuse that includes reasonable corporal punishment, because punishment deemed to be reasonable corporal punishment, is, by definition, not child abuse. The two are mutually exclusive.

The Court determined that petitioner's argument—that a lesser degree of injury on a child is required for a finding of "indicated child abuse" and a higher degree is required for issuing a protective order—defies the plain language of the statute and is foreclosed.

Charles County Department of Social Services v. Charles Vann, No. 87, September Term 2003, filed July 29, 2004. Opinion by Raker, J.

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CIVIL PROCEDURE - LIMITATIONS OF ACTIONS - FACTS NECESSARY TO PUT PARTY ON NOTICE OF POTENTIAL CLAIM FOR WHICH IT SHOULD FILE ACTION.

Facts: In 1993, Prince George's County served as a conduit for the financing of nearly $50 million in revenue bonds on behalf of Greater Southeast Healthcare System (GSHS), a collection of healthcare providers in the District of Columbia (D.C.) and the surrounding Maryland suburbs. As security for repayment, GSHS gave investors a lien on its assets, including accounts receivable. A financing statement was filed by the bond counsel, Piper & Marbury (P&M), in both Prince George's County and with the State of Maryland, thereby perfecting a security interest in both jurisdictions. However, no financing statement was filed in the District of Columbia, site of some GSHS institutions. In 1997, Daiwa-Healthco-2, LLC acquired and perfected a security interest in the receivables of the Greater Southeast Community Hospital in order to help that GSHS-affiliated hospital to overcome financial troubles. The trustee for the 1993 bond investors, Bank of New York (BNY), received materials detailing the terms of the Daiwa transaction.

In May, 1999, after having learned of the Daiwa transaction and attempting to negotiate for new collateral, BNY formally declared a default on the 1993 bonds. Shortly thereafter, some GSHS affiliates, including the Hospital, commenced Chapter 11 bankruptcy proceedings. BNY, joined by some of the bond funds holding the bonds, sued P&M for negligence. The trial court ruled in favor of P&M, in part, on the grounds that BNY and others were barred by limitations because they were on inquiry notice of the fact that no D.C. financing statement was filed for over three years prior to bringing suit. The Court of Appeals subsequently granted *certiorari*.

Held: Affirmed. Under the discovery rule, the statute of limitations begins to run when the potential plaintiff has knowledge of facts that would cause a reasonable person in the plaintiff's position to conduct an investigation which would lead to knowledge of the alleged cause of action. Here, the facts establish that all parties were on inquiry notice more than three years prior to bringing this action against P&M.

Bank of New York v. Sheff, No. 137, September Term, 2003, filed July 28, 2004. Opinion by Wilner, J.

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CRIMINAL LAW - DNA COLLECTION ACT - SEARCHES & SEIZURES - SAMPLES AND TESTS; IDENTIFICATION PROCEDURES - THE MARYLAND DNA COLLECTION ACT, WHICH ALLOWS FOR THE COLLECTION OF DEOXYRIBONUCLEIC ACID (DNA) SAMPLES FROM CERTAIN CONVICTED PERSONS FOR SUBMISSION TO THE STATE DNA DATA BANK, DOES NOT VIOLATE THE FOURTH AMENDMENT.

CONSTITUTIONAL LAW - RETROSPECTIVE AND EX POST FACTO LAWS - RETROACTIVE APPLICATION OF EX POST FACTO LAWS - NATURE AND EXTENT OF PUNISHMENT - THE MARYLAND DNA COLLECTION ACT, WHICH ALLOWS FOR THE COLLECTION OF DEOXYRIBONUCLEIC ACID (DNA) SAMPLES FROM CERTAIN CONVICTED PERSONS FOR SUBMISSION TO THE STATE DNA DATA BANK, BASED ON A QUALIFYING CONVICTION WHICH MAY HAVE OCCURRED BEFORE THE EFFECTIVE DATE OF THE ACT, DOES NOT VIOLATE THE EX POST FACTO CLAUSES OF THE UNITED STATES CONSTITUTION OR THE MARYLAND DECLARATION OF RIGHTS, BECAUSE IT IS A CIVIL STATUTE THAT DOES NOT ADD SUBSEQUENT PUNISHMENT FOR A PRIOR CONVICTION.

Facts: On August 21, 2003, Charles Raines ("Raines") was indicted by a Montgomery County Grand Jury on the charges of first degree rape, second degree rape and robbery. The indictment resulted from DNA evidence obtained on November 8, 1999 from a then-incarcerated Raines by a buccal swab, *i.e.*, a swab of his inner cheek, pursuant to the Maryland DNA Collection Act, Md. Code (2003), § 2-501 *et seq.* of the Public Safety Article ("DNA Act"). Raines' DNA information was thereafter entered into the Maryland DNA data bank. In October 2002, the DNA profile of a 1996 rape victim's attacker (available because of semen left at the scene of the crime) was submitted to the Maryland DNA data bank for comparison in an effort to identify the attacker. The attacker's DNA profile matched the DNA profile obtained via Raines' November 1999 buccal swab. As the Maryland DNA Collection Act provided, the match resulted in probable cause to obtain another DNA sample from Raines. In February 2003, pursuant to a search warrant, the State obtained a saliva sample from Raines for a second DNA profile. The February 2003 DNA profile also matched the DNA profile of the rape victim's attacker. It was determined that the statistical probability of anyone other than Raines being the source of the DNA of the attacker was one in six billion.

Subsequent to his indictment, Raines sought to have the DNA evidence suppressed. On January 29, 2004, the Circuit Court for Montgomery County, the motions court, granted Raines' motion to suppress the physical evidence because it found that the DNA Act was in violation of the Fourth Amendment to the United States Constitution. On February 20, 2004, the State filed an appeal to the Court of Special Appeals and a petition for writ of certiorari to the Court of Appeals. On March 2, 2004, Raines filed a conditional cross-petition, asking whether the DNA Act, as applied

to Raines, violated the *Ex Post Facto* clauses of both the federal and state constitutions. The Court of Appeals granted both petitions on March 11, 2004.

Held: The Court of Appeals held that the DNA Act is constitutional and does not violate the Fourth Amendment or the *Ex Post Facto* clauses of the United States and Maryland Constitutions. In addition to citing numerous appellate courts across the country that have upheld the constitutionality of DNA collection statutes, the Court of Appeals found the buccal swab conducted upon Raines to have been a reasonable search under the Fourth Amendment. The Court stated that Raines, because he was incarcerated at the time of the buccal swab, had a lessened expectation of privacy and the intrusion, which consisted of a quick swab of his inner cheek, was minimal at most. Furthermore, the Court stated that there existed legitimate government interests in such searches and their use in a DNA data bank, *e.g.*, identifying persons involved in crimes, accident victims, "John Doe" bodies, etc. Therefore, the Court held that collection of DNA from Raines via a buccal swab was reasonable in light of the minimal intrusion of the search, an inmate's diminished expectation of privacy and the legitimate government interest.

The Court of Appeals further held that, because the DNA Act is civil in nature, and not penal/punitive, as it functions as a regulatory scheme designed to protect the public safety by providing a means to identify persons, it did not violate either federal or state *Ex Post Facto* laws. The Court stated that the Maryland Legislature specifically enumerated several purposes for the DNA Act, none of which was to punish criminals further for crimes already committed at the time of the enactment of the law. The Court stated that any deterrent effect is secondary to the regulatory nature of the DNA Act. Furthermore, the Court stated that the DNA Act's placement in the Public Safety Article, as opposed to the Criminal Article of the Maryland Code, supported the State's assertion that the DNA Act's purpose is primarily civil in nature and that the provisions of the DNA Act neither make a prior non-criminal act criminal, nor do they change the punishment for any crime.

State of Maryland v. Charles Raines. No. 129, September Term, 2003, filed August 26, 2004. Opinion by Cathell, J.

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CRIMINAL LAW – TERRITORIAL JURISDICTION

CRIMINAL PROCEDURE – CONSTITUTIONAL LAW – *EX POST FACTO* CLAUSE

CRIMINAL LAW – CONSPIRACY, CHILD DETENTION, CHILD ABDUCTION – MERGER

Facts: Afaf Khalifa ("Petitioner") and her adult daughter, Nermeen Khalifa Shannon ("Nermeen"), are citizens of Egypt. In 1989, Nermeen moved to Maryland and, in 1996, married Michael Shannon. On February 9, 1997, Nermeen gave birth to their first son, Adam Shannon. Nermeen and Michael separated in January of 2000, and Nermeen moved from the couple's residence in Millersville to an apartment in Baltimore County. As a result of attempts to reconcile several months later, their second child, Jason Shannon, was born on January 10, 2001. Nermeen and Michael's reconciliation attempts ended in February of 2001.

On February 27, 2001, the Circuit Court for Anne Arundel County granted to Michael "legal and primary physical care and custody" of Adam. Nermeen was afforded visitation with Adam, including up to three non-consecutive weeks of unsupervised visitation during the months of June, July, and August.

On August 18, 2001, Petitioner arrived in the United States and stayed at Nermeen's Baltimore County apartment. Petitioner asked Michael if Nermeen's week of unsupervised visitation with Adam could correspond with Petitioner's visit to the United States. Petitioner explained to Michael that she wanted to take Nermeen, Adam, and Jason to New York to visit a relative, Waeil El Bayar, whose wife had recently given birth. Michael agreed, with the specific condition that Adam and Jason return to Maryland on Sunday, August 26.

Petitioner, Nermeen, Adam, and Jason arrived at El Bayar's house in New York on Friday, August 24. According to El Bayar, after spending one night at his house, his visitors, on August 25, traveled to the airport in a rented car and, using airline tickets that El Bayar had purchased for them at Nermeen's request several days earlier, flew to Egypt.

Before leaving Maryland, Nermeen provided Michael with three telephone numbers to reach her and the children while they were in New York. On August 26, the day Michael expected the children to return to Maryland, Michael was unable to reach Nermeen and the children at any of the telephone numbers he was provided. At around 4:00 p.m. that day, Michael drove to Nermeen's apartment and found that it "had been cleaned out."

On Tuesday, August 28, Michael called Petitioner's residence in Cairo, Egypt, and specifically requested the return of the children. Petitioner refused. Although Michael has spoken with Adam by phone consistently, Michael has not seen his oldest son since Adam left the United States.

On August 28, 2001, the District Court of Maryland sitting in Anne Arundel County issued a warrant for the arrest of Petitioner and charged her with child abduction and accessory to child abduction of Adam. The Circuit Court for Anne Arundel County, on August 29, 2001, ordered Nermeen to "immediately return" Adam "to the care and custody of Michael Shannon."

Petitioner was arrested in May of 2002, when she returned to the United States with her husband to visit their property in San Diego, California. In August of 2002, the State of Maryland issued a revised criminal indictment, charging Petitioner in fifteen counts – ten counts of violating Maryland Code, Section 9-305 of the Family Law Article and five counts of conspiracy to violate that statute. All of the counts related to Petitioner's role in the alleged abduction, detention, and harboring of Adam. Because amendments to Section 9-305 and the related penalty provisions of Section 9-307 became effective on October 1, 2001, the State charged Petitioner in separate counts for conduct occurring before and after that date. In particular, of the ten Counts alleging violations of Section 9-305, Counts 1 through 6 charged Petitioner for conduct occurring between August and September of 2001. Counts 11 through 13, alleging conspiracy, also charged Petitioner for conduct that took place between August and September of 2001. The balance of the charges (Counts 7 though 10 and Counts 14 through 15) alleged that Petitioner committed offenses after October 2001.

After waiving her right to jury trial in the Circuit Court for Anne Arundel County, Petitioner was tried and found guilty on ten counts. For purposes of sentencing, the trial judge merged several counts, assessed a $15,000 fine, and imposed a total of ten years of imprisonment, divided among the various counts. A three-judge sentence review panel decreased Petitioner's fine to $5,000 and, by ordering her sentences of imprisonment to run concurrently instead of consecutively, limited the total prison sentence to three years.

The Court of Special Appeals, in an unreported opinion, merged all of the conspiracy counts but otherwise affirmed Petitioner's remaining convictions and sentences. As a result of the all of the proceedings below, Petitioner had convictions with concurrent sentences on four counts: one year of imprisonment on Count 4 (accessory to child abduction outside of this State – August 2001);

one year on Count 5 (accessory to detain a child outside of this State – September 2001 through May 2002); three years on Count 9 (accessory to detain a child outside of the United States – September 2001 through May 2002); and three years on Count 14 (conspiracy to detain a child outside of the United States – September 2001 through May 2002). The Court of Appeals issued a writ of certiorari to address whether Maryland had territorial jurisdiction to prosecute Petitioner, whether the convictions violated the *Ex Post Facto* Clause, and whether the convictions should merge for purposes of sentencing.

Held: Affirmed in part and reversed in part. The State had territorial jurisdiction to prosecute Petitioner for detaining a child outside of the State of Maryland because the intentional deprivation of lawful custody, an essential element of the offenses charged, occurred in Maryland. Furthermore, Petitioner's convictions and sentences for conspiracy and child detention do not violate the *Ex Post Facto* Clauses of the United States Constitution and Maryland Declaration of Rights because the offenses continued through the effective date of the applicable statutory amendments. Finally, the convictions for child detention, child abduction, and conspiracy do not merge under the required evidence test or the rule of lenity. The conviction for accessory to detain a child outside of this State, however, merges into the conviction for accessory to detain a child outside of the United States because the former is a lesser included offense of the latter.

Afaf N. Khalifa v. State of Maryland, No. 133, September Term, 2003, filed August 3, 2004. Opinion by Battaglia, J.

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DOMESTIC VIOLENCE – REPEATED VIOLATIONS OF A PROTECTIVE ORDER

Facts: On September 16, 2001, David Triggs ("Petitioner") made the first of more than fifty calls occurring over a four-day period to his ex-wife, Pamela Triggs, in violation of a protective order prohibiting him from having any contact with her. When he made

many of the calls, Petitioner threatened to rape and murder his ex-wife and murder their three children, who were with him during a scheduled visitation when he called.

Specifically, some of Petitioner's calls included demands to Mrs. Triggs for her to "pick one of the children" to die; threats to beat, torture, and rape his ex-wife; threats to break their daughter's arms and legs; claims he was giving their son a sleeping pill to slow his breathing rate; claims that he was leaving one of the children's bodies at a designated location for his wife to find; and forcing the children to scream and cry on the phone as he told them to "say good-bye to mommy forever." Petitioner also called and threatened his mother, grandmother, sisters, and nieces and nephews, who were escorted to the police department for their own safety.

Petitioner was ultimately located in Ocean City, where officers apprehended him on September 19, 2001. Mrs. Triggs's children were returned to her physically unharmed later that day. While Petitioner was in jail awaiting trial, he sent numerous letters to his children and to his sister that contained disturbing references about Mrs. Triggs.

Following a jury trial, Petitioner was convicted of one count of telephone misuse, four counts of harassment, seven counts of telephone threats, and eighteen counts of violating a protective order. The court sentenced Petitioner to three-years imprisonment for the telephone misuse conviction, consecutive six month sentences for each of the harassment and telephone threat convictions, and consecutive one-year sentences totaling eighteen years for each violation of a protective order conviction. The sentences resulted in a term of imprisonment totaling twenty-six years and six months.

Petitioner appealed, arguing that the eighteen counts of violating a protective order were duplicitous because they constituted a course of conduct instead of "separate incidents." In an unreported opinion, the Court of Special Appeals affirmed the eighteen convictions and sentences for violating a protective order because Section 4-509 of the Family Law Article provides penalties "for each offense" of violating a protective order.

Held: Court of Special Appeals affirmed. The Court held that, when a protective order requires an abuser to have "no contact" with a victim, repeated calls constitute separate acts and therefore separate offenses for the purposes of the sentencing provisions requiring penalties "for each offense" under Section 4-509 of the Family Law Article.

The Court began its analysis by observing that determining whether the Legislature intended multiple sentences for the same offense "turned on the unit of prosecution of the offense [which is] ordinarily determined by reference to legislative intent." Under the rule of lenity, the Court further opined, ambiguous units of prosecution must normally be construed in favor of the defendant, effectively merging the offenses.

The Court held that the rule of lenity did not apply because Section 4-509 plainly and unambiguously contemplates that a person may be subject to multiple convictions for the multiple offenses of violating a single protective order. Furthermore, the Court explained, not only does the statute use the phrase "for each offense," it also establishes subsequent penalties based on the number of times an abuser violates a protective order.

The Court then explained that, under Section 4-506 of the Family Law Article, in order to determine whether an offense has been committed in violation of a protective order, a court must review what the protective order required. In this case, the trial court ordered that Petitioner have "no contact" with Mrs. Triggs "in person or by any other manner, including contact at her residence, place of employment [and the like]." For this reason, the Court concluded that each of Petitioner's calls constituted prohibited contact and, thus, was a separate and distinct "offense" for the purposes of the penalty provisions in Section 4-509.

David Triggs, Jr. v. State of Maryland, No. 118, September Term, 2003, opinion filed on June 16, 2004 by Battaglia, J.

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EVIDENCE - ADMISSION OF A PARTY OPPONENT

Facts: Friends and co-workers, Linda J. Crane ("Crane") and Annie V. Dunn ("Dunn"), were involved in a single vehicle accident on August 19, 1998. Dunn was driving Crane home after an evening

of gambling. Both Crane and Dunn drank alcohol during the course of the evening before the accident. The parties stipulated, however, that the consumption of alcohol was not a cause of the accident and that there would be no reference to alcohol in the civil case. Both parties agree that Dunn left the main traveled portion of the roadway to avoid striking a deer, and that Dunn drove either below or at the posted speed of 50 mph. The parties disagree, however, about the specific details of the accident.

According to Crane, as Dunn drove, a deer ran parallel to the right side of the road and the pickup truck. Dunn swerved sharply to the left to avoid a collision and traveled off the roadway approximately 50 feet. Crane explained that the deer was actually a car length away in front of them before it came across the road in front of the truck. On the other hand, Dunn testified that as she drove Crane yelled, "watch out," and then she saw the deer for the first time, "coming out in front and that's when [she] swerved to the left." According to Dunn the deer did not run parallel with the truck until she swerved left. Dunn pointed out that she, "intentionally drove off the road" into a field "to avoid the deer," and at no time applied her brakes to avoid striking the deer.

Prior to the civil trial in the Circuit Court for Caroline County, Dunn appeared in the District Court of Maryland for Caroline County on December 17, 1998, and pleaded guilty to negligent driving. The additional traffic citations for driving while intoxicated and driving under the influence were abandoned in the District Court proceedings. No transcript of the District Court proceedings was offered into evidence at the civil trial. The parties do not dispute that the alcohol related charge or charges were disposed of in the District Court and that Dunn pleaded guilty to negligent driving.

Crane sued Dunn in the Circuit Court for Caroline County for damages resulting from Dunn's negligent operation of her motor vehicle. Dunn moved, *in limine*, to exclude any reference to her guilty plea to negligent driving. Even though Dunn pleaded guilty to negligent driving, the trial judge did not believe the plea constituted an express acknowledgment of responsibility for the accident and, instead, accepted Dunn's explanation, as recorded in her deposition answers, that she was not admitting guilt when she pleaded guilty, but that she pleaded guilty only to avoid prosecution for more serious charges. The trial judge granted Dunn's motion to exclude the guilty plea from evidence because the judge found that the facts of the District Court traffic proceedings were ambiguous as to whether Dunn admitted guilt.

At the conclusion of the trial in the Circuit Court the jury returned a verdict in favor of Dunn on the issue of liability. The court denied Crane's motion for a new trial. Subsequently, Crane filed an appeal to the Court of Special Appeals. Before argument in the intermediate appellate court, this Court granted Crane's petition for a writ of certiorari. Crane v. Dunn, 379 Md. 224, 841 A.2d 339 (2004).

Held: Reversed and remanded to the Circuit Court for Caroline County for a new trial. It was error for the trial judge to exclude from evidence at a civil trial an admission of a party opponent because the party against whom the evidence was offered had previously pleaded guilty to a traffic offense in open court as part of a plea bargain, compromise, or as a matter of convenience. A guilty plea to a traffic citation is admissible in a civil trial arising out of the same occurrence as the traffic offense and is not inadmissible absent a determination on the record that the prejudicial effect of the evidence outweighs its probative value.

Evidence of Dunn's guilty plea in open traffic court is contained in her answer to interrogatory number 26. In accordance with Maryland Rule 2-421(d), answers to interrogatories may be used for any purpose to the extent permitted by the Rules of Evidence. Under Maryland Rule 5-803(a) an admission of a party-opponent is admissible and is considered an exception to hearsay. Dunn's plea of guilty to negligent driving constitutes an acknowledgment of negligent driving and represents an admission of responsibility for the accident.

The trial court erroneously determined that Dunn's guilty plea was ambiguous and, thus, inadmissible. In order to reach this conclusion the trial judge either ignored or discounted Dunn's express acknowledgment of guilt. This was not the proper role for the trial court in determining admissibility of evidence. The question of admissibility of evidence is different than the question of credibility. The later issue is reserved for determination by the trier of fact. Even if it is assumed that Dunn's guilty plea to negligence was ambiguous and did not constitute a clear expression of guilt, it was an ambiguity that Dunn created and had the power to correct or explain. The party against whom the evidence is offered is free to explain the circumstances under which the plea of guilty was entered, and the jury decides what weight, if any, to give that explanation.

Maryland Rule 5-403 codifies the inherent powers of trial judges to exercise discretion to exclude relevant, probative evidence that is unduly prejudicial, confusing, or time-consuming. This Rule necessarily requires the trial judge to engage in a

balancing test. The Court held that the trial court erred in granting the motion *in limine* excluding evidence of the guilty plea, and in failing to properly exercise the discretion embodied in Rule 5-403.

Crane v. Dunn, No. 109, September Term 2003, filed July 26, 2004. Opinion by Greene, J.

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FAMILY LAW – CHILD SUPPORT GUIDELINES

Facts: Slavomir Gladis and Eva Gladisova, both citizens of the Slovak Republic, married in that country on February 20, 1993. Their daughter, Ivana, was born on November 4, 1993. In 1994, Mr. Gladis moved to the United States, and he last saw Ivana in April of 1994.

On March 11, 1998, Mr. Gladis filed a Complaint for Absolute Divorce in the Circuit Court for Baltimore City. On April 24, 1998, the Circuit Court entered a Judgment of Absolute Divorce, granting Ms. Gladisova custody of Ivana and Mr. Gladis the right to see Ivana at reasonable times. The decree also charged Mr. Gladis with Ivana's general support and maintenance, but it did not specify the amount.

On June 5, 2002, Ms. Gladisova filed a petition for the establishment of child support in the Circuit Court of Baltimore City pursuant to the Maryland Uniform Interstate Family Support Act. A hearing was held before Master Theresa A. Furnari to establish the amount of child support. Master Furnari issued a "Report and Recommendations," in which she found that Mr. Gladis had a high school education, works as a mechanic, earns $41,773 annually, and has health insurance through his employer. She found that Mr. Gladis lives in Kingsville, Maryland, with his wife, who sells real estate, and their seven month-old child.

Additionally, the Master found that Ms. Gladisova works as a

nurse, earns the equivalent of $430 per month, and pays approximately $2.97 per month for health insurance. She lives in the Slovak Republic with Ivana, her brother, and her parents in her parents' home. According to the Master's Report and Recommendations, Ivana attends 5th grade at a public school and participates in dance and music programs after school, attends summer camp, skis, bicycles, and plays the organ. The Master further determined that Mr. Gladis has provided support for Ivana by sending cash, clothes, and school supplies.

Relying on Ms. Gladisova's financial statements, Master Furnari also found that, including monthly and annual expenses, the total average monthly expense for Ivana's care and support was the equivalent of $275.88 in United States dollars. She recommended that Mr. Gladis pay $300 per month in child support, noting that the amount was a "deviation of $197.00 per month" from the $497 monthly amount that should have been paid under the Maryland Child Support Guidelines ("Guidelines"). She concluded that "the deviation [from the Guidelines] is in the best interest of the child as it strikes a balance between [Mr. Gladis'] obligation to contribute to the support of the child [and his] obligation to contribute and meet the needs of his family in the United States and permits the child to benefit from [his] income in the United States." Master Furnari also proposed that Mr. Gladis pay an additional $50 monthly until an arrearage of $1600 was paid in full.

Both parties filed exceptions to Master Furnari's Report and Recommendations. Judge Edward Hargadon for the Circuit Court for Baltimore City held a hearing to consider the parties' exceptions. The court ordered Mr. Gladis to pay, on an interim basis, $225 in child support, concluding that applying the Guidelines "is inappropriate when there is a wide disparity in the cost of living." Judge Hargadon found that Ms. Gladisova's actual monthly expenses for Ivana equaled $251.75, an amount significantly less than the $497 monthly payment that the Guidelines would require.

Ms. Gladisova filed a Motion to Alter or Amend the Circuit Court's Order, which Mr. Gladis opposed. Judge Joseph McCurdy for the Circuit Court for Baltimore City granted Ms. Gladisova's motion and ordered that Mr. Gladis pay $497 per month in accordance with a strict application of the Guidelines, as well as an additional $50 per month toward arrearages of $8,831.13.

Mr. Gladis noted an appeal to the Court of Special Appeals, and the Court of Appeals, on its own initiative issued a writ of certiorari to consider whether Judge McCurdy erred in strictly applying the Maryland Child Support Guidelines when the cost of

raising a child in the Slovak Republic is significantly less than in Maryland.

Held: Affirmed. A child should receive the same proportion of parental income, and thereby enjoy the standard of living, he or she would have experienced had the child's parents remained together. In this case, the child support award under the Guidelines would allow the child to enjoy an above-minimum standard of living that corresponds to the father's economic position. The child support calculated under the Guidelines, therefore, only serves Ivana's best interests and is the appropriate measure of Mr. Gladis's obligation.

Further, one of the primary purposes of the Guidelines was to limit the role of trial courts in deciding the specific amount of child support to be awarded in different cases by limiting the necessity for factual findings that had been required under pre-guidelines case law. Allowing a deviation from the Guidelines based on the standards of living in different localities would encourage trial courts to examine those circumstances on a case-by-case basis and, no doubt, depart from the guidelines more frequently. This is the very result the General Assembly hoped to avoid in enacting the Guidelines. Consequently, for the sake of continued consistency in child support awards and to ensure that a child enjoys the same standard of living, had the parents remained together, the Court held that the lower cost of raising a child in a different country or state does not justify a downward deviation from the Guidelines. Judge McCurdy, therefore, did not abuse his discretion in ordering Mr. Gladis to pay an amount of child support according to a strict application of the Guidelines.

Slavomir Gladis v. Eva Gladisova, No. 127, September Term, 2003, filed, August 24, 2004. Opinion by Battaglia, J.

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INSURANCE - WAIVER OF PIP BENEFITS– A PIP waiver that by its own terms remains effective until withdrawn in writing by the insured does not violate Section 19-506 of the Insurance Article of the

Maryland Code. Moreover, such a waiver does not become ineffective merely because the insured's policy is renewed and the vehicles covered are changed, causing a difference in potential cost of PIP coverage.

SUFFICIENCY OF PIP WAIVER – A PIP waiver that contains information regarding who is covered by the waiver, the cost of premiums, what happens if there is no waiver, the minimum coverage benefits, what losses are covered, for whom coverage can be waived, and a statement that the insurance company may not refuse coverage if an insured decides not to waive PIP, complies with Section 19-506 of the Insurance Article.

AGENCY INTERPRETATION OF STATUTE – Ordinarily, the Court should give considerable weight to the administrative agency's interpretation and application of a statute which the agency administers.

EVIDENCE OF WAIVER– When presented with the testimony of a GEICO employee, a sample three-page PIP waiver form, and the actual third page of the PIP waiver form signed by the insured, it was not clearly erroneous for the trial judge to conclude that the insured had signed a valid waiver of PIP benefits.

Facts: On February 7, 2003, Richard Nesbit ("Nesbit") was injured in an automobile accident. Nesbit attempted to recover personal injury protection ("PIP") benefits from his insurer, Government Employees Insurance Company ("GEICO"). GEICO rejected the PIP claim because Nesbit had no PIP coverage, having signed a PIP waiver when he obtained his original policy with GEICO on June 15, 1998. Nesbit sued GEICO in the District Court of Maryland sitting for Baltimore County. He argued that the initial PIP waiver signed in 1998 was no longer effective because Nesbit had renewed his policy to cover two different vehicles and the waiver form itself did not comply with the statutory requirements. He argued that Maryland law does not permit a PIP waiver that (by its own terms) remains effective until withdrawn by the insured in writing, even if the insured's policy has been renewed since the signing of the PIP waiver. Nesbit also questions whether the waiver form used by GEICO complied with the statute and whether the court erred by finding that he had received a three-page waiver form from GEICO even though GEICO only produced the one signed signature page of the form at trial.

The parties tried the case on July 3, 2003, and the court entered judgment on behalf of GEICO. Nesbit noted a *de novo* appeal in the Circuit Court for Baltimore County on August 7, 2003. The court held the trial on December 1, 2003. Nesbit did not appear

for the trial, but his attorney attended. After taking testimony and hearing arguments, the court entered judgment in favor of GEICO. Nesbit petitioned this Court for a writ of certiorari, which we granted on March 11, 2004.

The waiver that Nesbit signed on June 15, 1998, included this statement: "I understand and agree that this waiver of coverage shall be applicable to the policy or binder of insurance described below, on all future renewals of the policy and on all replacement policies unless I notify the company in writing to the contrary. . . ." There is no evidence that Nesbit ever notified GEICO in writing or otherwise that he intended to revoke his PIP waiver. Neither is there any evidence that he sought to obtain PIP coverage at any time after the initial waiver or that he ever paid for the PIP coverage he chose to waive in 1998.

The underwriting and sales manager for GEICO testified that GEICO routinely sends out a three-page PIP waiver notice form to insureds, the third page being the signature page admitted to by Nesbit. GEICO offered a copy of a sample form into evidence, which was received. The underwriting and sales manager testified that such a form would have been sent to Nesbit and that GEICO only retained the signature page – the portion of the form that Nesbit returned to them. She also testified that the PIP waiver form used by GEICO has been approved by the Maryland Insurance Administration.

The trial judge found that Nesbit waived his PIP coverage and that the form "clearly and concisely explains in the right type . . . the effect of the waiver, the nature and extent and cost of coverage that would be provided. It did all of that. And as I said, he signed the form and sent it back and the evidence is that the form that was used has been approved by the Maryland Insurance Commission." Regarding Nesbit's legal arguments, the trial judge noted that Maryland law does not require the insurance companies to receive a new PIP waiver every time a policy is renewed. He also found that the form sent to Nesbit was approved and applicable unless Nesbit informed GEICO to the contrary. The Circuit Court entered judgment in favor of GEICO. This appeal followed.

Held: Judgment of the Circuit Court for Baltimore County Affirmed. Section 19-506 (e) of the Insurance Article does not invalidate a PIP waiver containing an automatic renewal provision, stating that it remains effective until withdrawn in writing. In addition, the waiver form used in this case complies with Section 19-506 (d) of the Insurance Article and the proof offered by GEICO at trial regarding the waiver was sufficient evidence on which to decide that Nesbit had signed a valid waiver of PIP benefits.

Nesbit notes that when his policy changed (to remove certain insured vehicles from the policy and to add different vehicles to the policy) the premium costs for PIP would have been different. He argues that GEICO should have been required to notify him of those possible premium changes in order for his waiver to remain effective. Nesbit is unable to provide any statutory support for that argument because Section 19-506 is silent as to when a PIP waiver of someone insured continuously by a company other than MAIF ceases to be effective. Nothing in Section 19-506 prohibits an insured and an insurance company from entering into a contract that includes a PIP waiver containing an automatic renewal provision. In the case at bar, the language of the statute itself certainly does not indicate a public policy that would prohibit a contract providing for an automatic renewal of a PIP waiver. The fact that the policy renewals and changes would have caused a difference in the cost of the PIP coverage does not change what Nesbit agreed to when he signed the PIP waiver. In light of the plain language and legislative history of Section 19-506, Nesbit's argument fails.

In addition to Nesbit's contention that the waiver in this case is ineffective because his policy has changed since the initial signing of the waiver, he argues that the waiver is ineffective because the form used by GEICO does not comply with Section 19-506 (d) of the Insurance Article. The Court disagreed. The form provided by GEICO contains all of the information required by Section 19-506(d). Furthermore, the Maryland Insurance Commissioner specifically approved the waiver in question. It was not clearly erroneous for the court to determine that Nesbit had signed a valid PIP waiver.

Nesbit v. Government Employees Insurance Company, No. 131, September Term 2003, Filed on July 23, 2004. Opinion by Greene, J.

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SENTENCING AND PUNISHMENT — HABITUAL AND CAREER OFFENDERS — PUNISHMENT — DRUGS AND NARCOTICS — Under Maryland Code (1957, 1996 Repl. Vol., 2001 Supp.) Art. 27 §286(d), a period of home detention

does not meet the statutory requirement of confinement in a correctional institution, and therefore the sentence prescribed by §286(d) may not be imposed where the requisite term of prior confinement was spent in home detention.

Facts: Petitioner, Oscar Louis Deville, was convicted of possession of cocaine with intent to distribute. The State sought application of mandatory enhanced sentencing provisions for Deville, as a third-time recidivist drug offender under Maryland Code (1957, 1996 Repl. Vol., 2001 Supp.) Art. 27 §286(d).

Two prior convictions served as the State's basis for seeking enhanced sentencing. The first occurred in 1990, when Deville pled guilty to possession of cocaine with intent to distribute. For this offense he was sentenced to incarceration for five years, suspended in favor or thirty-six months probation. The second conviction occurred on February 18, 1999, when Deville was sentenced for conspiracy to distribute cocaine. He received a term on incarceration of ten years, all but eighteen months suspended, to be served house arrest, followed by five years probation. He fully served nine months of this sentence in home detention and was subsequently released.

The trial court held that house arrest or home detention was equivalent under the statute to time served in a correctional institution, and that Deville had therefore satisfied the required 180 days confinement under §286(d). Deville noted a timely appeal to the Court of Special Appeals. That Court affirmed, based largely on the basis of *Dedo v. State*, 343 Md. 2, 680 A.2d 464 (1996). The Court of Appeals granted Deville's petition for writ of certiorari.

Held: Reversed and remanded for re-sentencing. The Court held that home detention does not qualify as confinement in a correctional institution under §286(d). Finding the statute ambiguous, the Court applied the rule of lenity and interpreted the statute so as not to increase the penalty contemplated by the legislature. The Court found no clear indication in the legislative history that the General Assembly intended the statute to apply to home detention. Finding the statute ambiguous, the Court applied the rule of lenity and interpreted the statute so as not to increase the penalty contemplated by the legislature.

The Court noted that §286 was not amended to include confinement in a correctional institution until 1988 and that the General Assembly did not enact home detention legislation until 1990. The Court found it unreasonable to include home detention within the habitual drug offender legislation.

Finally, the Court noted that the State's reliance on *Dedo* was misplaced because the relevant legislation in that case was intended for a different purpose. *Dedo's* definition of home detention could not be applied to the current case because the Court found the relevant legislation in *Dedo* was meant to provide credit, whereas the habitual drug offender statute in this case was meant to enhance punishment.

Deville v. State, No. 132, September Term 2003, filed September 23, 2004. Opinion by Raker, J.

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MECHANICS' LIENS – PROCEEDINGS TO PERFECT – NOTICE TO OWNER – WHERE A CONDOMINIUM REGIME LAWFULLY EXISTED LIEN CLAIMANT WAS REQUIRED UNDER REAL PROPERTY ARTICLE § 9-104 TO GIVE NOTICE TO ALL INDIVIDUAL UNIT OWNERS OF ITS INTENTION TO FILE A LIEN BEFORE A MECHANIC'S LIEN COULD BE ESTABLISHED AGAINST THE ENTIRE CONDOMINIUM BUILDING.

Facts: In August 1999, James M. Jost and Company, Inc. ("Jost"), construction manager for Southern Management Corporation ("SMC"), entered into an agreement with Willes Construction Company ("Willes Construction") whereby Willes Construction was to provide demolition and abatement subcontract work both to individual units and to the general common elements of an eight-unit condominium building located at 118 N. Howard Street in Baltimore City ("Lexington Towers"). An entity known as Baltimore Condo 2-8, LLC ("Baltimore Condo") owned seven of the building's units and the remaining unit was owned by RA Baltimore Trust ("RA Trust").

On October 4, 1999, Willes Construction's subcontracting services were terminated according to the terms of the contract. Thereafter, Willes Construction drafted a "Notice to Owner or Owner's Agent of Intention to Claim a Lien" for work during the period from August 1999 through October 25, 1999. This notice was

served upon SMC, Jost and Baltimore Condo on November 23, 1999; RA Trust was not served. On April 20, 2000, Willes Construction filed a Complaint against SMC, Jost and Baltimore Condo seeking to establish a lien against Lexington Towers. Again, RA Trust was excluded.

After more than a year no lien had been established, and on May 12, 2001, Willes Construction was notified that the case was to be dismissed under Maryland Rule 2-507 for lack of prosecution. Willes Construction filed an Amended Complaint supplementing its original allegations with a count for breach of contract. Petitioners then filed an Answer to the Amended Complaint and on August 6, 2001, Baltimore Condo, Jost and SMC filed a motion to dismiss on grounds including that Willes Construction's failure to provide notice of both the Amended Complaint and of the pre-filing notice rendered the Amended Complaint defective and that the claim to establish and enforce a mechanic's lien was made more than a year after the April 20, 2000, filing of the Initial Complaint.

On August 15, 2001, the Circuit Court for Baltimore City denied petitioners' motion, orally concluding that Real Property Article § 9-109 permits the right to the lien to remain in full force and effect until the conclusion of the enforcement proceedings where the Petition, as well as the right to enforce the lien, was filed within the one-year period. The circuit court proceeded with a show-cause hearing. Finding no genuine dispute of material fact, the circuit court on, December 19, 2001, entered a "Final Order Establishing Mechanic's Lien and Directing Sale of Property." The order directed the entire property, including the condominium unit owned by RA Trust who was not a party to the claim or case, to be sold.

Petitioners were largely unsuccessful in their challenge of the circuit court's decision. The Court of Special Appeals held that the notice to SMC both of intention to file a mechanic's lien and of the complaint was sufficient to put all remaining owners on notice. The court also found that petitioners had failed to present evidence establishing that a condominium regime had been created under § 11-102 of the Real Property Article, and thus, the circuit court was not required to make a proportional allocation of each owner's liability to Willis Construction. The intermediate appellate court echoed the circuit court's determination that § 9-109 of the Real Property Article permitted Willes Construction to obtain a lien until such time as the circuit court issued a final ruling on the matter. Petitioners prevailed only on the issue of whether there existed a factual dispute as to the percentage of work that Willes Construction had actually completed. Accordingly, the Court of Special Appeals modified the final order to an

interlocutory order.

Petitioners then filed a Petition for Writ of Certiorari with the Court of Appeals and Willes Construction filed a cross-petition. The Court of Appeals granted both the petition and the cross-petition on December 11, 2003.

Held: The Court of Appeals held that a condominium regime lawfully existed at Lexington Towers at the time Willes Construction gave its notice and later filed its complaint to establish a mechanic's lien. Accordingly, under § 9-104 of the Real Property Article, Willes Construction was required to give notice to all condominium owners and all such owners had to be parties to the case before a mechanic's lien could be established against the entire building. Willes Construction's failure to name RA Trust as an owner rendered its "Notice to Owner's Agent of Intention to Claim a Lien," as well as its Initial and Amended Complaints insufficient to assert a valid claim against Lexington Towers.

Furthermore, the Court of Appeals held that the circuit court had erred in entering an order that established a mechanic's lien where the lien was not allocated among Lexington Towers' individual unit owners according to their percentage interests in the common elements as required under § 11-118 of the Real Property Article.

Southern Management Corporation, et al. v. Kevin Willes Construction Company, Inc. No. 89, September Term, 2003, filed August 20, 2004. Opinion by Cathell, J.

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PARTNERSHIPS - LIMITED PARTNERSHIPS - UNIFORM PARTNERSHIP ACT (UPA) - REVISED UNIFORM PARTNERSHIP ACT (RUPA) - REVISED UNIFORM LIMITED PARTNERSHIP ACT (RULPA) - APPLICATION - RUPA, IN THE ABSENCE OF AN EXPRESS ELECTION, DOES NOT APPLY TO LITIGATION WHERE OPERATIVE FACTS OCCURRED PRIOR TO 31 DECEMBER 2002.

PARTNERSHIPS - LIMITED PARTNERSHIPS - PURPORTED ASSIGNMENT BY GENERAL PARTNER OF HIS INTEREST, CONTRARY TO ANTI-ASSIGNMENT PROVISION IN LIMITED PARTNERSHIP AGREEMENT, DOES NOT OPERATE TO DISSOLVE THE LIMITED PARTNERSHIP.

PARTNERSHIPS - LIMITED PARTNERSHIPS - RULPA'S STATUTORY RIGHT OF A LIMITED PARTNER TO WITHDRAW AND RECEIVE THE FAIR VALUE OF HIS OR HER INTEREST IS NOT TRUMPED BY TERMS OF THIS LIMITED PARTNERSHIP AGREEMENT.

PARTNERSHIPS - LIMITED PARTNERSHIPS - GENERAL PARTNER - FIDUCIARY DUTY - BREACHED BY GENERAL PARTNER'S FAILURE TO INVESTIGATE ALTERNATIVE FINANCING TO PAY MORTGAGE DEBT OF PARTNERSHIP, DESPITE AGREEING TO DO SO, AND BY ACCELERATING DUE DATE FOR RECEIPT OF CAPITAL CALL MADE UPON PARTNERS AS A MEANS TO FRUSTRATE THE ATTEMPTED WITHDRAWAL OF CERTAIN LIMITED PARTNERS.

Facts: East Park Limited Partnership (East Park), a Maryland entity, owned a shopping center which secured a mortgage loan. As the due date of the mortgage payoff approached, the General Partner (Mr. Della Ratta) announced a capital call on all partners in order to make up the difference between East Park's cash reserves and the mortgage debt. The capital call was due on 30 September 2002.

Certain limited partners, for whom the capital call presented a major financial problem, met with the General Partner. In the course of the meeting, the General Partner agreed that he would investigate alternative financing, which was generally available at the time at historically low rates of interest, to pay the imminent mortgage debt. He failed, however, to investigate that avenue.

These certain limited partners gave notice to the General Partner of their intent to withdraw from the partnership, pursuant to § 10-603(b) of the Corporations & Associations Article of the Md. Code. The withdrawals were to be effective on 29 September 2002, the day before the due date for the capital call. The General Partner denied that the withdrawing partners had a right to withdraw, accelerated the due date of the capital call to 1 September 2002, and stated that a failure to meet the revised capital call due date would result in forfeiture of the limited partners' interests.

The withdrawing limited partners filed a complaint in the Circuit Court for Anne Arundel County seeking a declaratory judgment that they properly gave notice to withdraw and were entitled to the fair value of their interests. They sought also an injunction prohibiting enforcement of the capital call.

The withdrawing partners, upon learning information that the General Partner purportedly had transferred his interest in East Park to a family trust for tax reasons, amended their complaint to seek dissolution of East Park and the distribution of its assets. The purported transfer violated an anti-assignment provision in the East Park limited partnership agreement (the Agreement). Concurrent with filing the amended complaint, the withdrawing partners sought summary judgment on the dissolution and statutory right of withdrawal claims, as well as a preliminary injunction against the 1 September 2002 capital call.

The Circuit Court granted a partial summary judgment, holding that the withdrawing partners had a statutory right to withdraw. The Court also enjoined preliminarily the capital call, pending a trial on the merits.

Trial as to liability only was held in January 2003. The Circuit Court concluded that the General Partner's transfer of his interest in East Park triggered East Park's dissolution and ordered the winding up of its business affairs and the distribution of its assets. Also, the Court enjoined permanently the capital call. The final judgment, except as to the injunctive relief, was stayed pending appeal.

The General Partner and the remaining non-withdrawing partners filed an appeal with the Court of Special Appeals. Before the intermediate appellate court could decide the case, the Court of Appeals, on its own initiative, issued a writ of certiorari.

Held: Judgment vacated and case remanded for further proceedings not inconsistent with the opinion. First, the Court of Appeals needed to resolve which statutory provisions governed the case. UPA, in place in Maryland since 1916, governed partnerships generally until 1998. RULPA, which became effective in 1982, governed limited partnerships where its provisions modified or were inconsistent with UPA or its successor; otherwise, UPA applied to limited partnerships as well. Effective 1 July 1998, Maryland enacted RUPA, with the intent that ultimately it would supplant UPA; however, a transition period was provided for where UPA and RUPA would co-exist until 31 December 2002. The provision governing this transition was expressed as:

> (a) *Before January 1, 2003*. - Before January 1, 2003, this title [RUPA] governs only a partnership formed;
>
> (1) On or after July 1, 1998, unless that partnership is continuing the business of a

> dissolved partnership under § 9A-601 of this article; or
>
> (2) Before July 1, 1998, that elects, as provided by subsection (c), to be governed by this title [RUPA].
>
> (b) *After December 31, 2002*. - After December 31, 2002, this title [RUPA] governs all partnerships.
>
> (c) *Election before January 1, 2003.* - Before January 1, 2003, a partnership voluntarily may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be governed by this title [RUPA].

East Park, although under a different name, was formed in 1969. It did not elect to be governed by RUPA in accordance with the transition provision. All of the operational events upon which the present litigation was predicated occurred before 31 December 2002. Thus, unless RUPA was intended to have retrospective effect, UPA/RULPA would apply to the facts of this case, notwithstanding that RUPA had replaced fully UPA as of the time the Circuit Court tried and decided the case. The Circuit Court applied UPA/RULPA and the Court of Appeals agreed with that conclusion. Nothing in RUPA indicated a legislative intent to give it retrospective effect.

As to the issue of whether the General Partner's purported assignment of his interest triggered dissolution of the partnership, the Court disagreed with the Circuit Court's conclusion. RULPA allows assignment of a partnership interest, in the absence of the terms of a particular agreement prohibiting assignment. The East Park Agreement contained such an anti-assignment provision. Giving effect to the clause in the Agreement, as the Court did, rendered the purported assignment invalid and unenforceable from its inception. Because the only relief sought by the withdrawing partners predicated on the purported assignment was dissolution of East Park, the Circuit Court erred in treating the prohibited assignment as a ground for dissolution.

RULPA addresses whether and under what circumstances a limited partner may withdraw from a limited partnership. If the terms of a limited partnership agreement address the timing or events authorizing withdrawal, prior to dissolution of the partnership, withdrawal is governed by those terms. Where an agreement does not specify such timing or events, a limited partner (for purposes of the facts of this case) may withdraw, on six months written notice.

Regarding the capital call, the Court assumed the General Partner had the requisite authority to issue a capital call in the first instance. The Court then accepted as not clearly erroneous the trial judge's factual findings that "a significant motivation for Della Ratta issuing the capital call was to squeeze out some of the limited partners," the advancement of the capital call due date was to "outmaneuver" the withdrawing partners and block the exercise of their statutory right to withdraw, and the General Partner failed to explore "less oppressive" financing alternatives to the capital call as he stated he would do. Based on its legal conclusion that general partners owe a fiduciary duty of utmost good faith and loyalty to inactive partners, the Court agreed with the trial court that Della Ratta's conduct violated such duties.

Joseph M. Della, et al. v. Barbara A. Larkin, et al., No. 126, September Term, 2003, filed 20 August 2004. Opinion by Harrell, J.

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PUBLIC INFORMATION ACT - PRIVILEGES - INFORMATION NOT PRIVILEGED BECAUSE IT IS NOT THE SUBJECT OF HIGH-LEVEL EXECUTIVE DELIBERATIONS, NOT A PRE-DECISIONAL DELIBERATIVE COMMUNICATION AND NOT TIME-SENSITIVE COMMERCIAL INFORMATION.

Facts: Appellant, Stromberg Metal Works, Inc. ("Stromberg") was a subcontractor on the Adele Stamp Student Union renovations contract at the University of Maryland, College Park ("UMCP"). To alleviate its concerns about contract delays and cost overruns, Stromberg requested that UMCP release various contract funding documentation, including monthly reports of the UMCP Architectural, Engineering and Construction (AEC) Department. UMCP released redacted copies of the reports under a claim of executive privilege, redacting all information regarding the contract's projected final cost.

Stromberg subsequently filed suit in the Circuit Court for Prince George's County claiming the redaction was contrary to Maryland's Public Information Act. The Circuit Court ruled in favor

of UMCP on cross motions for summary judgment, concluding that the redacted information was deliberative and protected by executive privilege. Stromberg subsequently appealed. The Court of Appeals granted *certiorari* prior to any proceedings in the Court of Special Appeals.

Held: Reversed, in part. On appeal, both parties challenge only the trial court's decision regarding the forecasted total cost figure. The mandatory language of State Gov't. Art. (SG), §10-615(1) is not really at issue here because it only encompasses the Constitutionally-based executive privilege protecting deliberative communications of high executive officials. No evidence was offered demonstrating the figure was the subject of such deliberations. A broader deliberative process privilege incorporated in SG, §10-618(b) and 5 U.S.C. §552(b)(5) is also inapplicable here because the disputed figure is not a deliberative communication that would not be available to a private party in litigation with the University. Finally, although certain time-sensitive confidential commercial information is protected under SG, §10-618(b), the disputed figure is not such sensitive information. Consequently, that figure should be publicly released.

Stromberg Metal Works, Inc. v. University of Maryland, No. 122, September Term, 2003, filed July 27, 2004. Opinion by Wilner, J.

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STATE ETHICS COMMISSION- LOBBYIST REGISTRATION

Facts: Sections 15-701(a) and 15-703(a) of the State Government Article (SG) require lobbyists to file with the State Ethics Commission (Commission) a registration statement for each client that has employed the lobbyist. Section 15-405(e) authorizes the Commission to revoke lobbying registrations if the Commission determines that, based on acts arising from lobbying activities, the lobbyist has been convicted of bribery, theft, or other crime involving moral turpitude. A complaint charging such

conviction must be initiated within two years after the date the conviction becomes final. That section became effective November 1, 2001. In July, 2000, appellee, Gerard Evans, a registered lobbyist, was convicted on several counts of mail and wire fraud arising out of his lobbying activities. In May 2002, Evans, after serving his sentence, registered with the Commission as a lobbyist on behalf of five clients. Acting pursuant to SG §15-405(e), the Commission issued a complaint against Evans based on his prior conviction, and revoked the registrations. On appeal, the Circuit Court for Anne Arundel County reversed the Commission's order holding that it constituted an impermissible retroactive application of §15-405(e).

Held: Affirmed. Because there was no clear expression of an intent by the General Assembly to permit the revocation of a registration based on conduct that occurred before the effective date of the statute, the statute was impermissibly applied in a retroactive manner.

State Ethics Commission v. Evans, No. 125, September Term 2003, filed July 30, 2004. Opinion by Wilner, J.

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STATES – COMPENSATION OF OFFICERS, AGENTS AND EMPLOYEES – LIABILITY AND CONSENT OF STATE TO BE SUED IN GENERAL – ADMINISTRATIVE AND JUDICIAL REMEDIES — STATE EMPLOYEES CANNOT BRING AN OVERTIME COMPENSATION CLAIM AGAINST THE STATE DIRECTLY IN CIRCUIT COURT BUT ARE REQUIRED FIRST TO EXHAUST ADMINISTRATIVE REMEDIES PROVIDED IN MARYLAND CODE (1993, 1997 REPL. VOL., 2003 CUM. SUPP.) §12-101 *ET SEQ.* OF THE STATE PERSONNEL AND PENSIONS ARTICLE.

Facts: As a condition of employment, airport firefighters employed by the Maryland Military Department are required to maintain membership in the Maryland/United States Air National Guard. The State does not compensate the firefighters for the time they spend engaged in National Guard duties nor does it consider

that time for the purpose of calculating overtime wages. The firefighters receive compensation from the federal government for their military service in the National Guard.

Twenty-three current and former airport firefighters filed suit in the Circuit Court for Anne Arundel County seeking overtime wages from the State for attending mandatory National Guard drills and training. The court dismissed the case, determining that the firefighters could pursue overtime claims only through the administrative grievance procedure set forth in Maryland Code (1993, 1997 Repl. Vol., 2003 Cum. Supp.) § 12-101 *et seq.* of the State Personnel and Pensions Article. The airport firefighters appealed to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals, relying on *Kram v. Maryland Military Department*, 374 Md. 651, 824 A.2d 99 (2003), reversed and held that firefighters can bring suit directly in circuit court. The Court of Appeals granted the State's petition for writ of certiorari.

Held: Reversed. The Court held that the Circuit Court lacks jurisdiction because the administrative grievance procedure set forth in Maryland Code (1993, 1997 Repl. Vol., 2003 Cum. Supp.) § 12-101 *et seq.* of the State Personnel and Pensions Article is the exclusive remedy for adjudication of the firefighters' overtime claims and the firefighters have not exhausted administrative remedies.

The Court determined that the present case is indistinguishable from *Robinson v. Bunch*, 367 Md. 432, 788 A.2d 636 (2002), in which the Court determined that the State has not waived its sovereign immunity from direct judicial actions seeking overtime compensation and that overtime compensation claims must be pursued through the administrative grievance procedure established under the State Personnel and Pensions Article. The firefighters, like the employees in *Bunch*, are or were employees in the State Personnel Management System, subject to the provisions of Title 12 of the State Personnel and Pensions Article. The firefighters therefore were required to exhaust administrative remedies provided by Title 12 before they could seek review of a final administrative decision in circuit court under the Maryland Administrative Procedure Act, Maryland Code (1984, 1999 Repl. Vol., 2003 Cum. Supp.) §§ 10-203 and 10-222 of the State Government Article.

The Court further explained that *Kram* has no bearing on the present case and did not *sub silentio*, or otherwise, overrule *Bunch*. Although *Kram* involved many of the same plaintiffs, the only issue before the Court in *Kram* was whether the firefighters could use the grievance procedure to challenge the

constitutionality of the National Guard requirement. The Court in *Kram* held that they could not do so because the requirement was a non-grievable "classification standard" under § 12-101(b)(2)(v) of the State Personnel and Pensions Article.

Maryland Military Department v. Cherry, No. 98, September Term, 2003, filed July 27, 2004 Opinion by Raker, J.

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UTILITIES - FRANCHISE RIGHTS - ALLOCATION OF COSTS ASSOCIATED WITH RELOCATING UTILITY POLLS LOCATED ON PROPERTY DEDICATED TO PUBLIC USE BECAUSE OF A DEVELOPMENT PLAN CREATED BY A PRIVATE CORPORATION.

Facts: Classic Community Corporation (Classic) developed about 30 acres of property along Travilah Road in Darnestown, Montgomery County, Maryland. As a condition to Classic's development plan, Montgomery County required Classic to dedicate portions of its land to "public use," for the reason that the development required the widening of Travilah road. The dedicated land contained multiple utility poles, owned by the Potomac Electric Power Company (PEPCO), that had to be moved to accommodate the widening of Travilah road (which in turn was needed to accommodate the development plan created by Classic).

Unwilling to bear the costs associated with moving the utility polls, Classic filed a declaratory judgment suit in the Montgomery County Circuit Court against PEPCO and added as defendants, Verizon Maryland, Inc. (Verizon) and Comcast Cable of Maryland, Inc. (Comcast); two companies that had run their wires along PEPCO's poles. The trial court ruled in favor of Classic after finding that PEPCO had a mere license to maintain its poles on the property and that revocation of the license by Classic effectively shifted the costs of relocation to PEPCO. The trial court further ruled that Verizon and Comcast had to remove their lines from PEPCO's poles in light of this holding.

Held: Reversed. The Court of Appeals ruled against Classic, finding that the Circuit Court erred in failing to recognize PEPCO's street franchise which gives it the right to build lines along public streets in any county in Maryland. When a utility has the right to maintain its lines on public property, the utility may only be forced to absorb the costs of relocation if the relocation is required by public necessity. *Balto. Gas Co.* v. *State Roads Comm.*, 214 Md. 266, 270, 134 A.2d 312, 313 (1957). Because the need to relocate the poles in this case was not the product of public necessity, but rather was brought about by Classic's own development plans, the Court of Appeals held that it is Classic that must bear the costs of relocating the utility poles to allow for the widening of Travilah road.

Potomac Electric Power Co. v. Classic Community Corp., No. 101, September Term, 2003, filed August 23, 2004. Opinion by Wilner, J.

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COURT OF SPECIAL APPEALS

CRIMINAL LAW - DISQUALIFICATION OF PROSECUTOR - PRIOR REPRESENTATION OF DEFENDANT

Facts: Appellant, Troy A. Gatewood, was indicted by a grand jury and charged with three counts each of possession and distribution of cocaine. The assistant State's Attorney assigned to try the case had, while serving as an assistant public defender, represented appellant in an earlier case. Appellant sought to disqualify the prosecutor, but the trial court determined that because the prosecutor indicated he remembered nothing about the representation, disqualification was unnecessary.

The case was tried before a jury in the Circuit Court for Cecil County and appellant was convicted of three counts of distribution of cocaine.

Held: Disqualification is not required *per se* in every instance of successive representation. The former representation was not "in the same or a substantially related manner," and there was no evidence the prosecutor acquired information in his earlier role as public defender that would benefit the State; the trial court did not abuse its discretion in determining that the prosecutor could not be regarded as "changing sides" in the matter in question or in denying appellant's request for disqualification.

Gatewood v. State, No. 3063, September Term 2002, filed September 8, 2004. Opinion by Sharer J.

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CRIMINAL LAW - JURY SELECTION - IMPROPER LIMITATIONS ON NUMBER OF PEREMPTORY CHALLENGES

Facts: Appellant, Shawn M. Whitney, was arrested for attempted distribution of cocaine, conspiracy to distribute cocaine, and possession of cocaine, after police observed his involvement in a narcotics transaction. Appellant was tried before a jury in the Circuit Court for Baltimore City. During the jury selection process, the trial court permitted only four peremptory challenges. Defense counsel did not object, even though the Maryland Rules permit ten peremptory challenges. During the selection process, appellant exercised all four of his peremptory challenges and counsel expressed her satisfaction with the panel after the strikes. Appellant was acquitted on the attempted distribution count and convicted on the remaining counts.

Appellant moved for a new trial, challenging the trial court's failure to permit ten peremptory challenges. The trial court denied the motion because appellant failed to demonstrate any prejudice.

Held: Affirmed. Because impairment or dilution of a litigant's peremptory strikes does not rise to the level of presumptive error or structural defect, appellant was required to demonstrate prejudice to establish entitlement to a new trial, which he did not.

Whitney v. State, No. 158, September Term, 2003, filed September 9, 2004. Opinion by Sharer, J.

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CRIMINAL LAW - VOIR DIRE — IN A CRIMINAL CASE, CIRCUIT COURT ABUSED ITS DISCRETION IN NOT INQUIRING OF PROSPECTIVE JURORS WHETHER ANYONE WOULD TEND TO VIEW WITNESSES CALLED BY THE DEFENSE WITH MORE SKEPTICISM THAN WITNESSES CALLED BY THE STATE. COURT ALSO ABUSED ITS DISCRETION, IN CASE INVOLVING HANDGUN CHARGES, IN NOT INQUIRING OF PROSPECTIVE JURORS WHETHER ANYONE HAD BIAS OR PREJUDICE CONCERNING HANDGUNS.

SIXTH AMENDMENT — RIGHT TO COUNSEL — THE DEFENDANT WAS CHARGED WITH CRIMES, ASSIGNED COUNSEL, AND RELEASED ON BAIL. A POLICE OFFICER, WHO ENCOUNTERED THE DEFENDANT BY CHANCE, VIOLATED THE DEFENDANT'S RIGHT TO COUNSEL WHEN THE OFFICER DELIBERATELY ASKED THE DEFENDANT A QUESTION WHICH PRODUCED AN INCRIMINATING RESPONSE, AND THE OFFICER SHOULD HAVE REASONABLY EXPECTED THE RESPONSE.

Facts: Michael Lee Baker, appellant, was the manager of a hair salon owned by Gracia Kubanek, his girlfriend.[1]

On the night of June 22, 2001, Kubanek saw Daniel Gray, whom she knew as a customer of her salon, at a bar, had several drinks with him, and left with him when the bar closed. After spending some time at Gray's house, Gray and Kubanek returned to Kubanek's salon.

Kubanek testified that, while in the salon, Gray began touching her in an offensive manner. She told him no and asked him to leave, but he refused. About five minutes later, appellant came into the store.

Gray testified that after leaving the restroom in the salon, he and Kubanek began kissing and he was touching her. This was consensual. Appellant then entered the salon, very upset, and yelled and screamed at Kubanek and at Gray. Appellant went behind one of the work stations and returned with a gun. He shot Gray in the hand. Appellant put the gun to Gray's head and threatened to kill him. Appellant then locked the door and asked to see Gray's driver's license. Appellant threatened that if he saw him again in the salon or talking to Kubanek, he would kill him. After Gray left the salon, he drove to a police station where he was taken to a hospital.

Appellant testified that he became worried when Kubanek had not returned home by 4:00 a.m. He went to the salon in case she tried to reach him there. When he arrived, he saw Gray in between Kubanek's legs, touching her. Appellant observed that the touching looked forceful, because it appeared that Gray was holding Kubanek down, that she was trying to push him off, and that she seemed exhausted.

According to appellant, he entered the salon and spoke to Gray, asking him to leave. When Gray refused, out of concern for Kubanek's safety, appellant retrieved his weapon. Lest Gray think

[1] Kubanek is from Germany, and runs a salon there as well. She resides part-time in Germany and part-time in Maryland.

the gun was not real, appellant shot him in the hand. Appellant confirmed that he locked the door and asked to see Gray's identification, explaining that, because he had used a handgun, he knew there would be a police investigation. He said that he thought that Gray was a sexual predator. After Gray showed him his driver's license, he told Gray to leave.

According to appellant, after Gray left, he exited the salon, leaving the gun there, drove somewhere to think, passed out for a while, ate breakfast and returned, intending to go to the police station. While he was walking to the police station, an officer arrested him.

Appellant was convicted by a jury of first degree assault, second degree assault, and use of a handgun in the commission of a crime of violence.

Held: The judgments of the Circuit Court for Harford County must be reversed.

Appellant raised five issues on appeal, three of which the Court addressed. First, appellant claimed that the trial court erred in refusing to propound his requested *voir dire* questions. Second, appellant argued that the trial court erred in admitting evidence of an incriminating statement appellant made to police. Finally, although not specifically decided, the Court briefly addressed whether the trial court erred in refusing to compel the State to investigate an allegation against the victim of appellant's assault.

I. - Voir Dire

Appellant objected to the trial court's failure to propound several *voir dire* questions he had requested.

Initially, the Court addressed the issue of waiver, as the State asserted that appellant failed to preserve this issue. The Court held that, as (1) appellant told the trial court that he objected to its failure to ask his requested *voir dire* questions, (2) the trial court asked appellant if he wished to be heard but did not direct him to state his grounds, and (3) the court expressly noted the exceptions, the issue was properly preserved.

With regard to the merits, after setting forth the general rules of *voir dire*, the Court discussed each of appellant's proposed questions individually. With regard to the first two questions, the Court concluded that the trial court essentially asked the questions, although not in the exact words requested by

appellant.

The next question dealt with whether the panel had any bias or prejudice concerning handguns that would prevent them from fairly weighing the evidence. The Court held that it was insufficient to simply ask the panel whether they belonged to an organization that was concerned with victims' rights or law enforcement issues. The Court noted that a person could have strong prejudice against handguns without joining an organization. As this case involved the use of a handgun, the Court held that the trial court should have asked whether any prospective juror had strong feelings about handguns that would have affected his or her ability to weigh the issues fairly.

The next questions that appellant challenged dealt with how the prospective jurors would view appellant's testimony and whether they would tend to view the testimony of witnesses called by the defense with more skepticism than those called by the State, merely because they were called by the defense. The Court agreed that the trial court should have asked about the panel's views on the credibility of the State's witnesses' versus appellant's witnesses' testimony. Having concluded that the trial court should have addressed this issue, however, the Court did not require the additional question regarding the panel's view of appellant's testimony specifically.

Finally, appellant argued that the trial court should have asked whether the panel would draw any inference of guilt based upon appellant's election not to testify on his own behalf. The Court held that the trial court was not required to ask such a question during *voir dire*. In its instructions to the jury, however, the trial court stated that appellant was presumed to be innocent, that the State had the burden of proving appellant's guilt beyond a reasonable doubt, and that appellant was not required to prove his innocence.

II. Violation Of Right To Counsel

After appellant was charged, he was released on bail and assigned counsel. Trial was originally scheduled for January 2002, but was postponed until March 5, 2002. On March 1, 2002, Detective Edward Smith, the lead investigator in the case, went into Kubanek's salon looking for her. She was not there, but appellant was. Smith asked appellant if he knew where Kubanek was, and appellant replied that she was out with friends.

Kubanek did not appear to testify on March 5, 2002. Through various proffers, the court learned that, although Kubanek was

present for the original trial date, she had returned to Germany and decided not to come back. The State thus learned that appellant had lied to Smith about Kubanek's whereabouts three days earlier.

Appellant's trial was, thereafter, postponed and Kubanek eventually returned to Maryland.

At trial, the State attempted to show that appellant had tried to influence Kubanek's testimony and to "hide" Kubanek from the State. Over appellant's objections, Smith was permitted to testify that appellant told him on March 1, 2002 that Kubanek was out with friends.

Defense counsel objected, arguing that Smith's questioning of appellant was a violation of appellant's Sixth Amendment right to counsel. The trial court agreed to hear argument on the issue. Appellant's counsel argued that Smith knew that appellant was represented and that the question about Kubanek was related to this case. The prosecutor proffered that it was not a pre-planned interrogation and that Smith had not gone to the salon seeking to speak to appellant. The trial court concluded that asking appellant about Kubanek's whereabouts was not an interrogation; Smith was asking a question of general knowledge, which did not focus on appellant's guilt or innocence, and appellant voluntarily replied. The court found that the statement was admissible.

The Court found that the trial court's focus on why Smith went to the salon was misdirected. The relevant Supreme Court and Court of Appeals cases on the issue demonstrate that it did not matter what Smith's intentions were for going to the salon, because a knowing exploitation of an opportunity to confront the accused without counsel is as much a breach of the State's obligation as is the intentional creation of such an opportunity. The Court found that Smith exploited the encounter and made a purposeful decision to ask appellant a question. Moreover, appellant's statement was not spontaneous or unsolicited.

The Court also found that the trial court viewed Smith's inquiry too narrowly when it concluded that it was not an "interrogation." The Court noted that a government agent violates a defendant's Sixth Amendment right to counsel if he or she deliberately elicits incriminating information.

The Court explained that, long before Smith's encounter with appellant, the State was alleging that appellant had tried to prevent it from speaking with Kubanek. The judge who granted the postponement was the same judge who presided at trial, and he noted

that the State had been complaining about this issue from the start. Given this, Smith should have reasonably expected that appellant would disavow knowledge of Kubanek's whereabouts or otherwise refuse to help him, either of which could be used to support the assertion that appellant was "concealing" Kubanek.

Finally, the Court held that the trial court viewed appellant's right to counsel too narrowly when it determined that the question did not focus on the defendant's guilt or innocence in this case, but merely asked the whereabouts of another witness, of a witness in this case. Even information that a defendant believes is exculpatory, if used in an incriminating manner, is "incriminating" information.

While it is true that the Sixth Amendment right to counsel is offense specific, in this case, the evidence was used to show consciousness of guilt about the shooting for which appellant was represented. The Court concluded that Smith's question was a violation of appellant's Sixth Amendment right to counsel and that his response should have been suppressed.

III. Investigation Of Kubanek's Complaint

Finally, although it did not decide the issue, the Court briefly addressed appellant's complaint that the trial court erred in failing to note that the State was obstructing justice by refusing to follow up on Kubanek's report that she had been sexually assaulted. Appellant argued that nothing was done about the assault in an effort to focus upon his prosecution.

The Court surmised that appellant was referring to a "Pro Se Motion For Trial Attorney Retainment, Judicial Review of Pre Trial Due Process, And Court Ordered Subpoenas and Disclosure," in which appellant charges, *inter alia*, that the State's Attorney ordered the police not to take a statement from Kubanek.

The Court noted first that it was unclear from appellant's motion what relief he was requesting. In addition, appellant provided no factual support for his allegations and he did not explain what exculpatory evidence an investigation would have produced. Appellant, Kubanek, and Gray, the only individuals with first-hand knowledge of the incident, all testified, and the jury was able to consider each witness's version of events.

Michael Lee Baker v. State of Maryland, No. 681, September Term, 2002, filed July 15, 2004. Opinion by Eyler, James R., J.

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FAMILY LAW - ALIMONY - RESERVATION

The trial court that awarded fixed term alimony for rehabilitative purposes also exercised discretion to reserve jurisdiction over a request for indefinite alimony. That may properly be done when there is present evidence that in the near future circumstances will exist to support an award of indefinite alimony. The wife's petition for indefinite alimony, filed soon after expiration of the rehabilitative alimony award, was a request to the court to exercise the jurisdiction it had reserved, *i.e.*, to decide whether to award indefinite alimony and, if so, in what amount.

In deciding the reserved issue of indefinite alimony, on the basis of unconscionable disparity of standards of living, a court should project the parties' standards of living by looking forward from that time. If the petitioning party did not make reasonable efforts to rehabilitate him/herself during the period of rehabilitative alimony, when the award was granted on that expectation, the court may impute income based on the financial circumstances that would exist if reasonable efforts had been made. In deciding unconscionability *vel non*, the court can take into account how the parties have come to be in their present financial circumstances.

Facts: The appellant sued the appellee for divorce. At trial, the court found that the parties were both 42 years old, had been married 22 years, and were in good health. Considering the issue of alimony, the court also found that the appellant was earning $96,000 per year, with the possibility of earning a bonus of between $5,000 and $10,000. The appellee was earning $6,000 per year and had at that time the ability to earn $12,000 per year. The court imputed that amount of income to her. It also found that, with two years of college, she would be able to obtain a job paying $25,000 to $30,000 per year. The appellant was ordered, *inter alia*, to pay rehabilitative alimony of $1,400 per month for 23 months. The court also ruled that "the issue of indefinite alimony is hereby reserved for later determination." Ten days after the 23-month rehabilitative alimony award expired, the appellee filed a "Petition To Establish Indefinite Alimony," alleging that she had obtained full-time employment at a $9.00 hourly wage; that the appellant was earning at least $96,000 a year; and that she had made as much progress toward becoming self-supporting as reasonably could be expected, but the parties' standards of living nevertheless still were unconscionably disparate. The appellant filed a motion to dismiss the petition, which was denied without a hearing. The appellant then filed an opposition to the petition. The court held a hearing (presided

over by a different judge than the trial judge) and ruled the following day. The court granted the appellee's petition and ordered the appellant to pay $1,000 per month in indefinite alimony. The motion court explained that appellee's petition was not a motion to extend alimony under FL section 11-107(a), because the trial judge, in his oral ruling, had decided to award indefinite alimony at the time of the divorce, and the remaining determination was simply what alimony to award. The court decided that, although the appellee had not made efforts to rehabilitate herself during the period in which she was receiving rehabilitative alimony, and had not "done her part in equity," $1,000 per month was an appropriate amount of indefinite alimony. The appellant filed an appeal.

Held: Reversed and remanded. The motion court incorrectly read the Judgment of Absolute Divorce, and the trial judge's oral ruling from the bench was a then-present decision to award appellee indefinite alimony, in a yet-to-be-determined amount. Language in a ruling or judgment expressly "reserving" on "the issue of indefinite alimony" is not a decision to award indefinite alimony; it is a decision to decide the issue at a later time. Although the trial judge made a factual finding that could have been the starting point to exercise his discretion to make a present award of indefinite alimony, he did not decide whether to make an indefinite alimony award.

An equity court may award alimony for an indefinite period in exceptional circumstances. Deciding a request for indefinite alimony entails projecting forward in time to the point when the requesting spouse will have made maximum financial progress, and comparing the relative standards of living of the parties at that future time. The motion court in this case should have ruled on appellee's petition by making factual findings, applying the law, and exercising its discretion to decide the reserved issues: should indefinite alimony be awarded, and if so, in what amount? Because the motion court erroneously concluded that the trial court had already decided the "whether" aspect of indefinite alimony, the motion court did not address and decide that issue itself. For that reason, the motion court's order was vacated and the case remanded for further proceedings. On remand, the motion court can make its decision on the facts adduced at the evidentiary hearing on appellee's motion. If the motion judge believes it would be necessary or helpful to receive additional evidence, he may reopen the hearing for that purpose. A party seeking an indefinite alimony award bears the burden of proving the existence of a prerequisite for such an award of indefinite alimony. Thus, appellee's evidence must show that at the time of the hearing such a prerequisite exists -- not that it once may have existed. To be

eligible to receive indefinite alimony under FL section 11-106(c)(2), she must show that, projecting into the future *from the present (not from the time of the merits trial)*, even after she will have made as much progress toward self-sufficiency as reasonably can be expected, there will be an unconscionable disparity between her standard of living and appellant's. The comparison to be made is between appellant's post-divorce standard of living and appellee's post-divorce standard of living upon making as much progress toward becoming self-supporting as reasonably can be expected.

Francz v. Francz, No. 1422, September Term 2003, filed July 15, 2004. Opinion by Eyler, Deborah S., J.

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FAMILY LAW - RULES OF EVIDENCE AS APPLIED TO PERMANANCY PLAN HEARING - IN PERMANENCY PLAN REVIEW HEARING, UNDER SECTION 3-823 OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE, JUVENILE COURT HAS DISCRETION NOT TO STRICTLY APPLY THE RULES OF EVIDENCE. THE HEARING IS IN THE NATURE OF A DISPOSITION HEARING, AND NOT AN ADJUDICATORY HEARING, IN WHICH THE RULES OF EVIDENCE MUST BE STRICTLY APPLIED.

Facts: In 2001, the Montgomery County Department of Health and Human Services ("Department") became concerned for the safety of the minor children of the appellant, Toisha B. The Department investigated and found cause to believe that the children were being neglected and sexually abused. The circuit court committed the children to the Department for foster care placement. Thereafter, the Department filed Child In Need of Assistance ("CINA") petitions for the children. The court held adjudicatory and dispositional hearings and sustained most of the Department's factual allegations, including allegations that the appellant had engaged in sexual activity with one of the female children. The court found the children CINA and committed them to the Department's continuing care for foster care placement. The Department's permanency plan for the children at that point was

reunification with the appellant.

At a permanency plan review hearing in October 2003, the Department requested that the permanency plan be changed to Termination of Parental Rights/Adoption. The appellant opposed that request. At the outset of the hearing, as a Department therapist was taking the stand, the appellant's lawyer asked "that the courtroom be cleared of everyone who isn't a party." The court denied the motion, explaining that there was not a problem of "suggestibility," *i.e.*, that any of the other witnesses' testimony would be affected by hearing the therapist's testimony, because he would offer opinions as an expert witness, and was not going to testify as a fact witness; and the witnesses in the courtroom also were "professional" social worker witnesses.

Also at the hearing, the appellant's lawyer objected to the introduction of a number of items of documentary evidence. The court overruled these objections and, at the conclusion of the hearing, granted the change in plan. The same day, the court issued written orders changing the children's permanency plans to TPR/adoption.

On appeal, the appellant argued that the juvenile court erred by denying her motion to sequester witnesses and by denying her various evidentiary objections because it erroneously concluded that the Maryland Rules of Evidence, including Rule 5-615 (sequestration of witnesses), Rule 5-401 (relevancy), and 5-801 through 5-806 (hearsay and exceptions) did not strictly apply to the proceeding. The Department responded that the juvenile court properly reasoned that permanency plan review hearings are dispositional in nature, making application of the Rules of Evidence discretionary; and that the court did not abuse its discretion in denying the sequestration request and in its other evidentiary rulings.

Held: Affirmed. In permanency plan review hearing, under section 3-823 of the Courts and Judicial Proceedings Article, the juvenile court has discretion not to strictly apply the Rules of Evidence. The hearing is in the nature of a disposition hearing, and not an adjudicatory hearing, in which the Rules of Evidence must be strictly applied.

In re Ashley E., Laione D., Matthew B. and Gregory B.-g.. No. 1907, September Term, 2003, filed July 20, 2004. Opinion by Eyler, Deborah S., J.

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INSURANCE – UNINSURED/UNDERINSURED MOTORIST BENEFITS:

Facts: This case stems from a two-car accident that occurred on February 12, 1998, on Route 1 near Chadds Ford Township in Delaware County, Pennsylvania. A vehicle driven by Edgar Leroy Lewis, Jr., a Pennsylvania motorist, struck the rear of a vehicle driven by Mark Kurtz and owned by appellants, Mark and Theresa Kurtz ("the Kurtzes").

The vehicle driven by Mr. Lewis was insured by Allstate Indemnity Company under a $25,000.00 single limit liability policy ("the Allstate policy"). The Kurtzes' vehicle was insured by appellee, Erie Insurance Company ("Erie"), under a policy with $100,000.00 per person and $300,000.00 per occurrence limits for both liability coverage and UM coverage ("the policy").

One month after the accident, appellant Mark Kurtz made a claim for benefits against Erie. Four months later, the Kurtzes informed Erie by letter that there might exist an underinsured motorist claim in light of Mr. Kurtz's injuries and losses. Erie eventually acknowledged receipt of this letter and, by return letter, requested that the Kurtzes inform Erie of the status of their underlying claim against Allstate.

In January 2001, the Kurtzes, by counsel, sent a letter to Erie confirming a conversation that counsel had with a claim adjuster for Erie. The letter includes a reference to Erie's having orally waived its rights to subrogation, and allowing the Kurtzes to sign a general release "in the event we are able to settle with Allstate Insurance Company."

The Kurtzes thereafter negotiated a settlement with Allstate. Allstate agreed to pay the Kurtzes $23,500.00 in exchange for a release of all liability against the alleged tortfeasors.

The Kurtzes sent photocopies of the signed release and of the $23,500.00 check to Erie. Four months later, Erie declined by letter to pay the Kurtzes UM benefits, explaining that it did "not feel the value of [Mr. Kurtz's] case exceeds the limit of $25,000.00, which is the policy limit coverage with the underlying carrier, Allstate Insurance Company."

This led the Kurtzes to file a two-count complaint in the Circuit Court for Harford County, alleging that Erie had breached the UM coverage provision of its policy, and that Erie interfered with the Kurtzes' marital relationship. They sought $125,000.00 in damages.

Erie answered, setting forth several affirmative defenses. Erie also filed a motion for summary judgment, arguing that the Kurtzes were not entitled to UM benefits because the Allstate policy had not been exhausted by payment of its limits, and Erie did not give written consent to the Kurtzes to settle their claim against Allstate.

The Kurtzes filed an opposition and the matter came on for a hearing. The court granted summary judgment in favor of Erie, concluding that Erie had no obligation to pay the Kurtzes under the terms of their insurance policy because they had failed to adhere to the terms of the policy by not exhausting all other insurance coverage.

Held: Affirmed. Section 19-509(g) of the Insurance Article establishes the limit of liability of a carrier of uninsured/underinsured (UM) benefits. The section authorizes a UM carrier to require an insured who has been injured by an uninsured/underinsured motorist to "exhaust" the limits of the tortfeasor's liability policy, which means the insured must have been paid the full amount of the tortfeasor's policy; payment of anything less than that entitles the UM carrier to deny the insured's claim for UM benefits.

Kurtz v. Erie Insurance Exchange, No. 1879, September Term, 2002, filed June 1, 2004. Opinion by Barbera, J.

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LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS ("LEOBR") - DEFINITION OF LAW ENFORCEMENT OFFICER - OFFICER "IN A PROBATIONARY STATUS":

A police officer employee of a Department of the State Police, who was within statutory 24 month probationary status, was an officer in a probationary status for purposes of the definition of law enforcement officer under the LEOBR, and therefore was not covered by that law. The fact that the officer held a permanent certification from the Maryland Police Training Commission did not

mean that he could not be in a probationary status, under the operative LEOBR definition.

Facts: Upon graduation from the Prince George's County Police Municipal Academy, in December 1997, Andrew A. Mohan was hired as a police officer by the Town of Edmonston. He was issued a "provisional certification" card by the Maryland Police Training Commission ("MPTC"). In September 1998, Mohan joined the Town of Cheverly Police Department, and was issued a "permanent certification" card by the MPTC.

On January 7, 2002, he left the Town of Cheverly Police Department, upon being appointed by the State Police to the position of "Trooper Candidate." Two days later, he signed a written "Agreement" with the State Police setting forth the terms of his employment, which included a 24-month probationary period.

On July 30, 2003, still during his 24-month probationary period, Mohan was charged with violating rules, policies, and procedures of the State Police. He responded by demanding a hearing and invoking other procedural protections of the LEOBR. He was informed by the State Police Administration that the disciplinary matters were not covered by the LEOBR because he still was a probationary police employee. Mohan then brought an action for injunctive and declaratory relief.

Held: Judgment affirmed. A police officer employee of the Department of State Police, who is within the statutory 24-month probationary period, is an officer "in a probationary status" for purposes of the definition of a law enforcement officer under the LEOBR, and therefore is not covered by that law. The Court concluded that the fact that Mohan held a permanent certification from the MPTC did not mean that he could not be "in a probationary status," under the operative LEOBR definition.

Mohan v. Norris, No. 1634, September Term 2003, filed July 16, 2004. Opinion by Eyler, Deborah S., J.

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MARYLAND PUBLIC INFORMATION ACT - PERSONNEL RECORDS - DISCLOSURE OF POLICE OFFICER'S PERSONNEL RECORDS IN CRIMINAL CASE

Facts: On June 12, 2003, the Circuit Court for Baltimore City held a hearing in which the State asked the court to order that the co-defendants in a criminal trial not be permitted to inquire about an Internal Affairs Division ("IAD") Investigation concerning Baltimore Police Detective Michael Dressel during Detective Dressel's examination. That investigation involved allegations of dishonesty unrelated to the defendants' case.

Counsel for one of the co-defendants opposed the motion and served, pursuant to Maryland Rules 4-264 and 265, a subpoena duces tecum ("the subpoena") upon the Baltimore City Police Department for the production of all IAD files relating to Detective Dressel. The State moved to quash the subpoena. The court initially denied the State's motion and ordered the production and disclosure of IAD files regarding allegations of Detective Dressel's dishonesty and any documents containing sustained findings of misconduct.

After further argument, the court clarified its ruling and ordered the disclosure of "any statement made by a Baltimore City police officer that Detective Dressel engaged in dishonesty in a now completed investigation in which [Detective] Dressel has been exonerated . . . ." Still later, in its written order, the court ordered access to IAD files containing any statement made by a named police witness that [Detective Dressel] engaged [in dishonesty] in the past.

The State appealed from that order.

Held: Reversed. The court failed to employ proper procedure for ordering the discovery of personnel records made confidential by the Maryland Public Information Act ("MPIA"), Md. Code (1984, 1999 Repl. Vol., 2003 Supp.), § 10-616 of the State Government Article ("SG"). When seeking discovery of confidential documents in a criminal case, the burden is on the party seeking discovery to show a need for disclosure and that such disclosure will assist the party's case. If that burden is met, the court should conduct a two-step *in camera* review of those records. First, the court should review the records *in camera* to determine for itself whether those documents are relevant. Thereafter, any non-relevant records should be sealed. The court should then conduct a second *in camera* review of those relevant records that may be discoverable with counsel present as officers of the court.

Baltimore City Polive Department v. State, No. 909, Sept. Term, 2003,filed September 2, 2004. Opinion by Barbera, J.

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REAL PROPERTY- MARYLAND CONTRACT LIEN ACT- FORECLOSURE- EXCEPTIONS

REAL PROPERTY- CONDOMINIUM & COMMON INTEREST ASSOCIATIONS

REAL PROPERTY- FORECLOSURE- INTEREST RATES

REAP PROPERTY- FORECLOSURE- ATTORNEYS' FEES

Facts: Clifford A. Brooks, appellee, owns a condominium unit in Greenbriar Phase One. Appellant is Greenbriar Condominium, Phase I, Council of Unit Owners, Inc., ("Council"). Council sought to foreclose on Brooks's condominium unit because Brooks had failed to pay his monthly condominium charges. A statement of indebtedness for $3,745 was filed with the courtand a lien established. Frank Emig, Council's attorney, was appointed trustee for the sale of the unit. The unit was sold to Council for $2,500, but that sale was later invalidated because the sale price shocked the conscience of the court.

Brooks tendered a cashier's check to Emig in the amount of $3,411 in full satisfaction of the underlying liens. When Emig returned the check, Brooks requested a clarification of the amount due. Before he received a response, Brooks calculated that he owed an additional $162.89. Council, however, filed a supplemental statement of indebtedness, indicating that Brooks owed $31,114.64. Brooks deemed it "fruitless" to send a check in the amount of $162.89. A second foreclosure sale was held on January 15, 1999, where Council again purchased the unit for $21,600. Brooks filed exceptions to the sale.

The circuit court held a hearing on the exceptions and determined that Brooks had lawfully attempted to redeem the property when it tendered $3,411 to Emig. Thus, the court invalidated the sale. Furthermore, it determined that Brooks owed Council $3,411 plus six percent interest as of May 10, 1996. Because Brooks had already deposited $3,411 with the court's registry, only the interest was outstanding.

Thereafter, Brooks filed a motion for attorneys' fee and costs pursuant to a provision in the homeowner's declaration ("GCA Declaration") that provided that the prevailing party is entitled to recover costs and reasonable attorneys fees. The circuit court granted Brooks's motion for attorneys' fees for his involvement in the proceedings after December 17, 1997, for the percentage of the established lien paid to the overall community association, ("GCA").

Held: Vacated in part and affirmed in part. The circuit court

properly invalidated the January 15, 1999 foreclosure, finding that Brooks had attempted in good faith to exercise his right of redemption when he tendered $3,411 to satisfy the lien for the unpaid and accelerated 1995 and 1996 assessments to Council and that Council had wrongly refused to accept this tender. Thereafter, Council indicated that it was unwilling to accept any amount less than $31,114.64. This was sufficient to support a finding that tendering the additional $162.898, which Brooks had calculated was due since the last sale, would be a futile gesture.

The circuit court determined that Brooks owed interest in the amount of 6% on the unpaid assessments. The unit was subject to two sets of governing documents: one attributable to the overarching community association, GCA, and the other attributable to Council. These documents assign different interest rates due on unpaid assessments: the GCA documents assign an 18% interest rate and the Council documents assign a 6% interest rate. On remand, 6% interest should be applied to that portion of the debt attributable to GCA assessments, and 18% interest to the portion attributable to Council assessments.

The circuit court granted Brooks a percentage of his reasonable attorneys' fees for work after December 17, 1997, based on the percentage of assessments collected that represent GCA's assessments. In making its decision, the court relied on a prevailing party provision located in the GCA Declaration. The circuit court erred because attorneys' fees under a prevailing party provision should not be awarded based on success in discrete parts of the proceeding but, rather, on the proceeding as a whole. In this case, the purpose of the proceeding was the collection of unpaid assessments alleged to be due.

Greenbriar Condominium, Phase I, Council of Unit Owners, Inc. v. Brooks, No. 1884, September Term, 2002, filed September 2, 2004. Opinion by Kenney, J.

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WITNESSES - PATIENT - PSYCHOLOGIST PRIVILEGE - WAIVER OR ASSERTION BY CHILD - PARENT'S ABILITY TO WAIVE OR ASSERT - CONFLICT OF INTEREST

Facts: Duane and Renee McCormack filed a personal injury lawsuit against the Baltimore County Board of Education ("the Board") on behalf of themselves and their minor child Ryan when Ryan was injured in a school bus accident. After the Board admitted liability, a trial was held on the issue of damages. The McCormacks sought to introduce the testimony of a psychologist that had treated Ryan and Ryan's psychological and psychiatric records. The Board moved in limine to exclude the evidence, and the circuit court granted that motion concluding that Ryan's parents could not waive his patient-psychologist privilege under Md. Code (1974, 2002 Repl. Vol.), § 9-109 of the Courts and Judicial Proceedings Article.

Held: Vacated and remanded. The circuit court erred in holding that the McCormacks could not waive Ryan's privilege without first making a finding as to whether their interests were in conflict with Ryan's. If the court determined such a conflict existed, the appointment of an independent guardian to assert or waive Ryan's privilege would be required. If no such conflict existed, the McCormacks, as Ryan's parents and previously appointed guardians, could waive or assert his privilege. This case differs from cases that have arisen in the child custody context where a patent conflict of interest exists between the parents and the child.

Duane McCormack, as parent and next of friend of Ryan McCormack et al. v. Board of Education of Baltimore County, No. 1329, September Term, 2003, filed Sept. 2, 2004. Opinion by Krauser, J.

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ATTORNEY DISCIPLINE

By an Order of the Court of Appeals of Maryland dated August 31, 2004, the following attorney has been indefinitely suspended, effective immediately, from the further practice of law in this State:

MELISSA MOYER ADAMS
*

By an Order of the Court of Appeals of Maryland dated September 20, 2004, the following attorney has been indefinitely suspended by consent, from the further practice of law in this State:

JENNIFER L. BEACH
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By an Order of the Court of Appeals of Maryland dated September 22, 2004, the following attorney has been disbarred by consent, from the further practice of law in this State:

JUDITH LENORE FITZGERALD
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