

# **FAMILY LAW UPDATE**

## **I. INTRODUCTION**

This course focuses on the legislation passed during the last legislative session and cases decided since January 1, 2007.

## **II. MARYLAND FAMILY LAW UPDATE – 2008 – LEGISLATION**

**A. Editor’s note: the following are summaries of family law legislation passed by the 2008 Maryland General Assembly. All House bills originate in the Judiciary Committee and all Senate bills regarding Family Law originate in the Judicial Proceedings Committee unless otherwise noted. This summary is current through June 21, 2008. “Ch.” designates “Chapter of Laws” number. Thanks to Brad Kukuk and the Maryland Domestic Law Report for allowing the reprint of bill summaries.**

### **1. ADOPTION AND GUARDIANSHIP**

#### **A) HB 90/ SB 57 - CHILD WELFARE - PERMANENCY PLANNING AND INTERSTATE PLACEMENT OF FOSTER CHILDREN - CH. 16**

Altering the factors a juvenile court is required to consider in making specified findings in permanency planning and review hearings. Increasing from 7 to 10, the number of days' notice a local Department of Social Services is required to give to parents before permanency planning and review hearings. Requiring the Court to consult with the child on the record in an age appropriate manner at least every 12 months at a permanency planning or review hearing.

Sponsor: Del. Vallario (By Request - Maryland Judicial Conference)

#### **B) HB 169 / SB 77- EDUCATION - CHILDREN IN INFORMAL KINSHIP CARE RELATIONSHIPS - CH. 362 / CH. 361**

Requiring a Superintendent of schools of a county to allow a child to attend a public school in a school attendance area other than in the area where the child is domiciled with the child's parent or legal guardian if the child lives with a relative in the school attendance area in an informal kinship care relationship due to a serious family hardship.

Sponsor: Del. Jones, et al.

**C) HB 265 - FAMILY LAW - EMERGENCY PLACEMENT OF CHILDREN - CRIMINAL HISTORY RECORDS CHECKS - CH. 263**

Authorizing the local Department of Social Services to request a designated State or local law enforcement agency perform a Federal name-based criminal history records check on individuals if a child is placed in an emergency out-of-home placement. Requiring a local Department of Social Services to submit a complete set of fingerprints to the Dept. of Public Safety and Correctional Services.

Sponsor: (By Request - Dept. of Public Safety and Correctional Services)

**D) HB 910 - DISCLOSURE OF MEDICAL RECORDS - CINA - CH. 300**

Authorizing health care providers to disclose children's medical records without the authorization of persons in interest in accordance with compulsory process in Child In Need of Assistance ("CINA") proceedings if 15 days have passed since notice was sent.

Sponsor: Del. Reznick, et al.

**E) SB 551 - CHILDREN IN NEED OF ASSISTANCE - CUSTODY DETERMINATIONS - PROHIBITION AGAINST CONSIDERATION OF DISABILITIES - CH. 190**

Prohibiting a Court, in a CINA proceeding, in determining whether to grant custody or guardianship to a relative or non-relative, from considering that person's disability unless the disability causes a condition that is detrimental to the child.

Sponsor: Del. Rosenberg, et al.

**F) SB 193 - FAMILY LAW- SOCIAL SERVICES ADMINISTRATION - DEFINITION CH. 158**

Expanding the definition of "Administration," relating to foster care and child care to include other units within the State Department of Human Resources to which the Secretary of Human Resources has delegated responsibilities in writing.

Sponsor: (By Request - Dept. of Human Resources)

## 2. CHILD SUPPORT

### **A) HB 786 - MARYLAND UNIFORM INTERSTATE FAMILY SUPPORT ACT - REVISION - CH. 522**

Revising the Maryland Uniform Interstate Family Support Act and clarifying that the remedies provided under the Interstate Family Support Act do not affect the availability of remedies under other laws, including foreign support orders. Altering provisions concerning the authority of a tribunal to exercise personal jurisdiction over a non-resident individual in a proceeding to establish, modify, or enforce a support order or to determine parentage.

Sponsor: Del. Dumais

### **B) SB 198 - CHILD SUPPORT COLLECTION FEE - REPEAL OF SUNSET- CH. 162**

Increasing the amount of child support payments a family receives to \$3,500 before the Child Support Enforcement Administration may deduct a \$25 collection fee.

Sponsor: (By request - Dept. of Human Resources)

## 3. COURTS

### **A) HB 88/ SB 103 - MARYLAND UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT - CH. 41**

Enacting the Maryland Uniform Interstate Depositions and Discovery Act. Establishing procedures for requesting and issuing a subpoena in Maryland to compel witness testimony at a deposition, document discovery, or inspection of premises in a case filed in a foreign jurisdiction.

Sponsor: Del. Vallario

## 4. DOMESTIC PARTNERSHIP

### **A) SB 566 - HEALTH CARE FACILITY VISITATION AND MEDICAL DECISIONS - DOMESTIC PARTNERS - CH. 590**

Requiring health care facilities to allow domestic partners and relatives of domestic partners to visit a domestic partner. Requiring two adults to be treated as domestic partners in medical emergencies. Providing that a health care agent retains authority to

make medical decisions notwithstanding provisions of this law.  
(Finance) (Effective date July 1, 2008).

Sponsor: Del. Hubbard

**B) SB 597 - RECORDATION AND TRANSFER TAXES -  
EXEMPTIONS - DOMESTIC PARTNERS - CH. 599**

Exempting from recordation tax and state and county transfer taxes instruments of writing transferring property between domestic partners and former domestic partners. Requiring the submission of evidence to qualify for exemptions. (Ways & Means) (Effective date July 1, 2008).

Sponsor: Del. Kaiser, et al.

**5. DOMESTIC VIOLENCE**

**A) HB 182 - DOMESTIC VIOLENCE - PERMANENT  
PROTECTIVE ORDER AFTER CONVICTION AND  
IMPRISONMENT - CH. 398**

Requiring a court to issue a permanent protective order against an individual against whom a final protective order was previously issued if the individual was convicted and served a term of imprisonment of at least five years for the following acts of abuse: attempted murder in the first or second degrees; first degree assault; first or second degree rape; first or second degree sexual offense; or attempted rape or sexual offense in the first or second degree.

Sponsor: Del. Dumais, et al.

**B) HB 183 - ENFORCEMENT OF PROTECTIVE ORDER - CH.  
396**

Authorizing a judge to order a law enforcement officer to use all reasonable and necessary force to enforce a temporary custody provision of a final protective order.

Sponsor: Del. Dumais, et al.

6. FEES

**A) HB 149 - FAMILY LAW - COUNSEL FOR MINOR - PAYMENT OF FEES - CH. 488**

Authorizing a Court to impose against one or more parties, counsel fees for the representation of a minor child in a custody, visitation or child support proceeding.

Sponsor: Del. Dumais

7. JUDGES

**A) HB 1038 - PG COUNTY - MASTER FOR JUVENILE CAUSES - AUTHORITY - CH. 679**

Repealing a provision of law that prohibits a juvenile Master in Prince George's County from conducting an adjudicatory hearing, a disposition hearing, or a peace order proceeding in a delinquency case.

Sponsor: Prince George's County Delegation

8. JUVENILES

**A) HB 75 / SB 238 - JUVENILES - ARRESTS FOR REPORTABLE OFFENSES - EXPANSION OF NOTIFICATION - CH. 376 / CH. 375**

Expanding provisions on the required notification to a local public school Superintendent of the arrest of a public school student for a reportable offense to apply to the notification to a non-public school official of the arrest of a non-public school student for a reportable offense; and providing for the confidentiality of information.

Sponsor: Del. Shewell, et al.

**B. RULES CHANGES**

1. Court of Appeals adopted amendments to Md. Rule 9-206 effective December 4, 2007. Rewrote the Child Support Worksheets.

### III. CASE LAW DEVELOPMENTS

#### A. GROUNDS FOR DIVORCE

1. *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (2007). Harrell, J. Filed September 18, 2007.

##### **A) THE DECISION OF THE CIRCUIT COURT OF BALTIMORE COUNTY GRANTING SUMMARY JUDGMENT TO SAME-SEX COUPLES BASED ON A DENIAL OF CIRCUIT COURT CLERKS DENIAL OF MARRIAGE LICENSES WAS REVERSED BY THE COURT OF APPEALS.**

(1) Held that Md. Code Ann., Fam. Law §2-201, which states that “only a marriage between a man and a woman in this state is valid” did not abridge the fundamental right to marry, did not discriminate on the basis of sex in violation of Md. Const. Decl. Rights Art. 46, and did not otherwise implicate a suspect class or quasi-suspect class.

(2) Held that sexual orientation is neither a suspect nor quasi-suspect class, therefore §2-201 is subject to rational basis review.

(3) Held that the state has a legitimate interest in fostering procreation and encouraging the traditional family structure, which is reasonably related to the means employed by §2-201, and therefore does not discriminate in violation of Md. Const. Decl. Rights Art. 46.

(4) Found that the fundamental right to marry does not extend to include same-sex marriage because it is not so deeply embedded in the history, tradition and culture of Maryland and the nation.

#### B. ADOPTION AND GUARDIANSHIP

1. *In re Shawn P.*, 172 Md. App. 569, 916 A.2d 399 (2007). Davis, J. Filed February 5, 2007.

##### **A) IN JUVENILE DELINQUENCY PROCEEDING, TRIAL JUDGE ABUSED HIS DISCRETION IN DENYING COUNSEL’S REQUEST FOR A CONTINUANCE AND BY REFUSING TO AFFORD COUNSEL AN OPPORTUNITY TO CONFER WITH JUVENILE, THUS DENYING JUVENILE THE EFFECTIVE ASSISTANCE OF COUNSEL.**

2. *In re Ondrel M.*, 173 Md. App. 223, 918 A.2d 543 (2007). Woodward, J. Filed March 12, 2007.

**A) IN JUVENILE DELINQUENCY PROCEEDING FOR POSSESSION OF MARIJUANA, EVIDENCE WAS SUFFICIENT FOR TRIAL JUDGE TO CONCLUDE APPELLANT WAS IN POSSESSION OF MARIJUANA.**

**B) UNDER MD. RULE 5-701, ARRESTING OFFICER COULD OFFER LAY WITNESS OPINION THAT ODOR HE SMELLED WAS MARIJUANA.**

3. *In re Roneika S.*, 173 Md. App. 577, 920 A.2d 496 (2007). Barbera, J. Filed April 3, 2007.

**A) IN A JUVENILE DELINQUENCY PROCEEDING ALLEGING THAT THE JUVENILE MADE A FALSE STATEMENT TO A POLICE OFFICER, THE TRIAL COURT'S FINDING THAT THE PETITION LACKED SPECIFICITY AND SHOULD BE DISMISSED WAS OVERTURNED.**

(1) The Appellate Court concluded that the petition satisfied the requirements of the due process clause of the 14th Amendment and Md. Const. Decl. Rights Art. 21.

4. *In re Nicole B. & Max B.*, 175 Md. App. 450, 927 A.2d 1194 (2007). Adkins, J. Filed July 6, 2007.

**A) IN A CINA PERMANENCY PLAN HEARING INVOLVING POSSIBLE PLACEMENT OF AN AMERICAN INDIAN CHILD, THE TRIAL COURT FAILED TO APPLY THE REQUIREMENTS OF THE FEDERAL INDIAN CHILD WELFARE ACT THAT THE DSS MAKE ACTIVE EFFORTS TO PREVENT THE BREAKUP OF THE INDIAN FAMILY.**

(1) The Appellate Court drew a distinction between the reasonable efforts for reunification requirement under Md. Code Ann., Fam. Law § 5-525(d), and the active efforts requirement under the ICWA. The active efforts standard requires more effort than a reasonable efforts standard.

5. *In re Calvin S.*, 175 Md. App. 516, 930 A.2d 1099 (2007). Meredith, J. Filed August 31, 2007.

**A) COURT OF SPECIAL APPEALS REVERSED TRIAL COURT'S DENIAL OF A MOTION TO SUPPRESS BY HOLDING THAT PROBABLE CAUSE TO BELIEVE AN INDIVIDUAL IS COMMITTING A CIVIL OFFENSE DOES NOT PROVIDE A CONSTITUTIONALLY VALID BASIS FOR A WARRANTLESS SEARCH OF THE INDIVIDUAL'S PERSON.**

(1) Held that probable cause to believe an individual is committing a civil offense does not provide a constitutionally valid basis for a warrantless search of the individual's person.

(2) The Court rejected the State's position that the exigent circumstances exception applied based upon the police officers need to search for contraband, because finding that cigarettes possessed by a minor were contraband would be contrary to the statutory interpretation.

(3) Search could not be justified as a stop and frisk under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968) because police officers did not have a reasonable and articulable ground to believe that Calvin was committing or about to commit a crime given that the smoking or possession of tobacco products by a minor is a civil infraction.

(4) Based on the suppression of the evidence obtained through an unreasonable search and seizure, the Trial Court's finding of delinquency was reversed.

6. *Green v. Nassif*, 401 Md. 649, 934 A.2d 22 (2007). Harrell, J. Filed October 15, 2007.

**A) COURT OF APPEALS DID NOT DECIDE ISSUE OF WHETHER A TRIAL COURT MAY ISSUE A WRIT OF PROHIBITION TO AN ORPHAN'S COURT, AND IF SO, WHETHER A WRIT WAS VACATED PROPERLY BECAUSE THE COURT DISMISSED THE MATTER AS MOOT.**

7. *In re Adoption/Guardianship of Rashawn H. & Tyrese H.*, 402 Md. 477, 937 A.2d 177 (2007). Wilner, J. Filed December 11, 2007.

**A) COURT OF APPEALS REVERSED JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMING TRIAL COURT’S DECISION TO TERMINATE PARENTAL RIGHTS TO TWO MINOR CHILDREN BASED UPON MD. CODE ANN., FAM. LAW §5-313 (NOW §5-323) BECAUSE THE TRIAL COURT DID NOT RELATE THE FINDINGS MADE WITH THE STATUTORY FACTORS AND THE PRESUMPTION FAVORING CONTINUATION OF THE PARENTAL RELATIONSHIP.**

(1) In terminating the parents’ rights without consent, a Trial Court must make clear and specific findings with respect to each statutory factor found in Md. Code Ann., Fam. Law §5-323, and state how and why those findings lead to a conclusion that the parents are unfit or exceptional circumstances exist thereby rebutting the presumption favoring the parental relationship.

8. *Battley v. Banks*, 177 Md. App. 638, 937 A.2d 846 (2007). Krauser, J. Filed December 19, 2007.

**A) GUARDIANSHIP OF A DISABLED PERSON – COMPENSATION AND REIMBURSEMENT UPON WARD’S DEATH.**

(1) A guardian of a disabled person who is entitled to compensation and reimbursement from his ward’s assets for the performance of guardianship services may not, upon the death of his ward, pay himself court-approved guardianship fees before transferring the assets of the ward’s estate to the personal representative of the decedent.

(2) Rather, the former guardian’s claims must be submitted to the personal representative of the decedent’s estate to be paid subject to the hierarchy of the claims set forth in the Md. Code Ann., Est. & Trusts Art. § 8-105(a).

(3) Robert Battley, the personal representative of the Estate of Dorothy Battley, appeals from three orders issued by the Circuit Court of Montgomery County sitting as the Orphan’s Court, granting Michael G. Banks, the former guardian of Ms. Battley’s property, guardianship commissions and attorney’s fees. The first order permitted Banks to pay himself “from the former guardianship bank account,” his guardianship commissions before turning over Ms. Battley’s assets to the personal representative. The second order directed Banks “to write himself a check” from

the same bank account for the probate fees he had paid in opening Ms. Battley's estate. And the third order awarded Banks \$300.00 in attorney's fees for his efforts to open Ms. Battley's estate and directed that a check in that amount be sent to Banks "immediately."

(4) The Appellate Court reversed and vacated in full the first and second orders, and as to the third order, it was vacated only to the extent that instructed the appellant to pay the funds immediately and not in accordance with the payment schedule in the § 8-105(a).

(5) Guardianship Fees: The Court found that there is no provision in the Estates and Trust Article or in the Maryland Rules explaining exactly how and when guardianship commissions are to be paid. The Court held that when a ward dies, the assets become the assets of the decedent's estate. The guardian is no longer a guardian. The guardian's duties are reduced to filing a petition to terminate the estate together with a final accounting and proposed final distribution of the ward's property, pursuant to Rule 10-710(b) and Md. Code Ann., Est. & Trusts § 13-221 and thereafter to transfer to the personal representative all of the decedent's property as required by Md. Code Ann., Est. & Trusts § 1-301(a). The Circuit Court may approve the commission, but has no authority to allow the guardian to pay himself the fees. The Court referred to § 1-301(a) "[a]ll property of a decedent shall be subject to the estates of decedents law, and upon the person's death shall pass directly to the personal representative, who shall hold the legal titled for administration and distribution..."

(6) Attorney's Fees: The Court did not have the authority to order that "a check ... be sent to Michael G. Banks Esq. [sic] immediately." The Court could, only, at most, direct the personal representative of the estate to pay Bank's claim, subject to the payment priorities set forth in Md. Code Ann., Est. & Trusts § 8-105(a).

(7) Prospective Application: This Court issued a bright line rule. It held that because of the long standing division among the Courts below as to whether to permit a former guardian to pay himself commissions from a former guardianship account before transferring that account to the personal representative of a deceased ward, because it would be grossly unfair for these guardians who have relied upon the decades-old practices of their localities permitting the pre-transfer collection of such fees and because there are in fact sound reasons for those well established practices, it chose to apply this rule prohibiting such pre-transfer collections to "this case and prospectively to all such causes of

action occurring after the filing of the opinion in this case.” In so doing, the Court applied the holding “selective prospectively,” which “is distinguishable from pure prospectively in that the new pronouncement applies to the case in which it is made and is not solely to a case arising after the pronouncement.”

9. *In re James G.*, 178 Md. App. 543, 943 A.2d 53 (2008). Hollander, J. Filed February 29, 2008.

**A) PERMANENCY PLAN; CINA, REASONABLE EFFORTS; BEST INTERESTS; RELATIVE PLACEMENT; MD. CODE ANN., CTS. & JUD. PROC. § 3-823; MD. CODE ANN., FAM. LAW. § 5-525.**

(1) This was an appeal from a Baltimore City Circuit Court ruling which changed a minor child's permanency plan from reunification with his father (parental reunification) to placement with a relative for custody and guardianship.

(2) Maryland's statutory scheme for child protection derives from Federal law. Under State and Federal law, local Departments of Social Services (with some exceptions) require “reasonable efforts” to accomplish parental reunification.

(3) Additionally, the Court of Special Appeals found that the Circuit Court “erred or abused its discretion” in terminating the permanency plan of parental reunification based on its erroneous finding of reasonable efforts, and because among other things, it didn't address the child's best interests in changing the permanency plan. Instead, the Circuit Court focused almost entirely on length of time the child had been out of the home.

(4) The minor child was born in 1996. The minor child lived with his mother until March 2004. At that time, because of his mother's drug use, she was unable to care for the child. The child went to live with Father. Father then was arrested for violation of probation in August 2004. An August 13, 2004, the Department filed a Petition seeking to have the minor child declared a Child In Need of Assistance (CINA). At a hearing several months later, Father testified that he would be released in October 2004. The child and Father had been living with the Father's girlfriend. The girlfriend lost her Section 8 housing and the Department reported that Father and child had been living a transient lifestyle. At that hearing (September 2004), the parties entered a stipulation that the child be placed in the temporary care of her aunt and to award the aunt limited guardianship. On October 4, 2004, the Court adjudicated the child a CINA and placed him with the aunt. A review hearing

was held on August 25, 2005, where the Court placed the child with his cousin (no reasons he was removed from his aunt were provided). Importantly, that Court established a permanency plan of “reunification with parent or guardian” to be achieved by August 29, 2006. There was another six-month review on May 16, 2006, and pursuant to the Master’s recommendation, the Court entered an order which continued the child’s placement with his cousin and continuing the “reunification” plan. The Court did extend the target date for the reunification until May 16, 2007. At the next six month review, the parties requested a “contested” hearing convening the permanency plan. At that evidentiary Master’s hearing, on February 23, 2007, the Department sought to change the permanency plan from parental reunification to placement with relative for custody and guardianship.

(5) At that hearing, the Department worker testified that except for Father’s lack of more stable employment and lack of housing, there would be nothing to prevent a reunification. The Department worker focused on the child being in the system for more than two years. The Department worker further testified that there were no concerns about Father mistreating the child. The Court of Special Appeals reversed the Circuit Court ruling and remanded the case back to the Circuit Court for Baltimore City for further proceedings consistent with the opinion.

(6) This case is a wonderful text for a complete review of CINA and its statutory basis.

10. *In re Alonza Lynn D. & Shaydon Stevie S.*, 403 Md. 424, 942 A.2d 755 (2008). Per curiam order. Filed February 15, 2008.

**A) CASE WAS REMANDED TO CIRCUIT COURT TO RECONSIDER THE MATTER IN LIGHT OF THE COURT OF APPEALS DECISION IN RE: ADOPTION/GUARDIANSHIP OF: RASHAWN H. AND TYRESE H.**

11. *Burden v. Burden*, 179 Md. App. 348, 945 A.2d 656 (2008). Rodowsky, J. Filed April 3, 2008.

**A) REVERSED CIRCUIT COURT’S DENIAL OF CHILD SUPPORT ORDER DIRECTING HUSBAND PAY WIFE CHILD SUPPORT BECAUSE WIFE’S CHILD WAS NOT THE BIOLOGICAL OFFSPRING OF HUSBAND.**

(1) Operative facts: Wife had child with a third party prior to the parties’ marriage. During parties’ marriage, Husband signed and

filed acknowledgement of paternity with birth records agency in South Dakota.

(2) Md. Code Ann., Fam. Law §5-1048 was found to have no application because no state had made a finding of paternity.

(3) Pursuant to 42 U.S.C.S. § 666 and Md. Code Ann., Fam. Law §5-1028, the Court's decision was reversed and remanded because Husband was unable to challenge paternity within 60 days of acknowledgement or demonstrate fraud, duress, and material mistake of fact.

### **C. CUSTODY AND VISITATION**

1. *Volodarsky v. Tarachanskaya*, 397 Md. 291, 916 A.2d 991 (2007). Wilner, J. Filed February 9, 2007.

#### **A) THE CORRECT STANDARD OF PROOF UNDER MD. CODE ANN., FAM. LAW § 9-101(A) IS PREPONDERANCE OF THE EVIDENCE.**

(1) The Court of Appeals in this matter granted Certiorari from a decision of the Court of Special Appeals reversing the Baltimore County Circuit Court (Judge Kathleen Cox).

(2) The Trial Court was faced with conflicting evidence as to whether the father had sexually abused the child. The Circuit Court applied the preponderance of the evidence standard in making its decision. The Court of Special Appeals held that the Court was required, under Md. Code Ann., Fam. Law § 9-101(a) to use a standard of "reasonable grounds to believe" that abuse occurred, and that a determination of reasonable grounds did not require that the Court believe it more likely than not that the abuse occurred.

2. *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (2008). Bell, C.J. Filed May 19, 2008. (Raker, J. Dissent)

#### **A) DE FACTO PARENT MUST DEMONSTRATE EXCEPTIONAL CIRCUMSTANCES AS A PREREQUISITE TO THE COURT'S CONSIDERATION OF THE BEST INTERESTS OF THE CHILD WHEN AWARDING CUSTODY OR VISITATION.**

(1) Mother filed a Petition for Writ of Certiorari after the Court of Special Appeals (Maryland) affirmed a Baltimore County Circuit Court's finding that Mother's former partner was a *de facto* parent and was entitled to visitation with Mother's adopted child. The Petition was granted to determine whether an exceptional

circumstances standard, rather than a best interests standard, applied to visitation with a *de facto* parent.

(2) The Mother and Partner had been in a committed same-sex relationship for 18 years. When the relationship ended, the Partner filed a Complaint in the Circuit Court, seeking custody of the Mother's adopted child or visitation with that child. The Circuit Court denied custody but found that the Partner was a *de facto* parent and granted her visitation. The Court of Special Appeals affirmed.

(3) The Court of Appeals has found that *de facto* parenthood is not recognized in Maryland. Therefore, the Circuit Court erred in granting visitation to the Partner on the ground that she was a *de facto* parent without first finding that Mother was an unfit parent or that sufficient exceptional circumstances existed to overcome Mother's liberty interest in the care, custody, and control of her child under the Due Process Clause of the Fourteenth Amendment. The Court of Appeals held that in order to overcome the constitutional rights of a legal parent to govern the care, custody, and control of his or her child, even a person who would qualify as a *de facto* parent, who sought visitation or custody, had to demonstrate exceptional circumstances as a prerequisite to a Court's consideration of the best interests of the child as a factor in that decision.

(4) The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property, without due process of law. The Amendment's Due Process Clause includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. It is the Due Process Clause of the Fourteenth Amendment that protects the rights of parents to direct and govern the care, custody, and control of their children.

(5) The Court of Appeals said that the Court of Special Appeals was wrong and that Md. Code Ann., Fam. Law§ 9-101(a)'s reference to "reasonable grounds to believe" did not create a new standard of proof which was less stringent than preponderance of the evidence. The Trial Court found that it was not persuaded that the child had been abused by Father. The Court of Appeals found that that the Trial Court therefore could not find reasonable grounds for believing that the abuse occurred. The Judge correctly used the preponderance of the evidence standard in determining whether reasonable grounds existed.

3. *Maness v. Sawyer*, 180 Md. App. 295, 950 A.2d 830 (2008). Moylan, J. Filed June 19, 2008.

**A) IT IS NOT A CONDITION PRECEDENT THAT THE PARTIES IN THE PAST LIVED TOGETHER IN THE FAMILY HOME TO AWARD USE AND POSSESSION**

(1) Husband appealed the decision of the Anne Arundel County Trial Court's in granting to Wife: use and possession of the marital home, awarded the Wife sole legal and physical custody of the children, ordered the Husband to pay child support, found the Husband in contempt and ordered the Husband to pay attorney's fees. The judgment of the Circuit Court judge was affirmed.

(2) The parties were married in North Carolina in 1994. Two children were born to them, Hayley in 1998 and Sophie in 2001. In 2005, Wife filed her action for limited divorce and immediate custody.

(3) Husband challenged the Trial Court's award of use and possession to Wife. The focus of the challenge was in the term "when they lived together" as set forth in Md. Code Ann., Fam. Law § 8-201. The Court "deemed" it to be a phrase that describes a common circumstance that frequently help to identify the truly critical term "the principal residence of the parties." The phrase, however, does not constitute a necessary condition precedent to the very existence of a "principal residence of the parties." It is "the principal residence of the parties" that is the "family home" and that is, therefore, the proper subject of a use and possession order, whether or not the parties ever actually "lived there together."

**B) THERE IS NO PRESUMPTION OF JOINT CUSTODY – THE STANDARD IS WHAT IS IN THE BEST INTERESTS OF THE CHILD**

(1) Husband further challenges the custody decision of the Trial Court. The standard of review is "abuse of discretion" and the Appellate Court found here that the Trial Court did not abuse its discretion. The Trial Court went through a thorough review of the testimony in making its decision.

**D. CHILD SUPPORT**

1. *Ashley v. Mattingly*, 176 Md. App. 38, 932 A. 2d 757 (2007). Hollander, J. September 13, 2007.

**A) MD. CODE ANN., EST. & TRUSTS § 1-206 APPLIES IN THIS SET OF FACTS IN DETERMINING IF A PATERNITY**

## **CHALLENGE COULD STAND MORE THAN A DECADE AFTER A CUSTODY DECISION WAS MADE.**

(1) In the case at bar, Md. Code Ann., Est. & Trusts § 1-206 applies because although the child was born during the marriage, the child was not necessarily conceived during the marriage. The Court had discretion to order genetic testing to determine paternity if it first determined that it was in the child's best interests to do so. The Trial Court did not recognize that it had such authority and therefore erred. The Court further held that the Trial Court must, on remand, determine whether it is the child's best interests to order genetic testing.

(2) This is an appeal from the Circuit Court for Wicomico County challenging a refusal by the Trial Court to allow paternity testing of a child born to the parties many years ago during a brief marriage.

(3) More than a decade after the parties' divorce, Father challenged paternity of a minor child born during a brief marriage to Mother. Maryland law allows paternity to be established both under the Family Law Article and the Estates and Trusts Article. Under Md. Code Ann., Est. & Trusts § 1-206(a), a child conceived or born during a marriage is "presumed to be the legitimate child of both spouses." Under Md. Code Ann., Fam. Law § 5-1027(c), a man is presumed to be the father of a child conceived during the marriage. Under Md. Code Ann., Fam. Law § 5-1006(a), a proceeding to establish paternity may be initiated at any time prior to the child's eighteenth birthday Md. Code Ann., Fam. Law § 5-1038 governs modification of a paternity judgment.

(4) The parties were married on April 18, 1990. Some 8 months later, on December 11, 1990 a child was born. On January 18, 1991 the parties separated. The Trial Court in Wicomico County issued a Judgment of Absolute Divorce on August 20, 1992, which granted Mother sole custody of the child. Father was awarded visitation and ordered to pay child support. In 2004 Father began to doubt paternity and obtained DNA testing which established that he was not the child's biological father. In December 2004, Father filed pleadings to discontinue child support and for paternity testing.

(5) \*\* Note, the Court was very clear in stating that they were not making any comment regarding the best interests determination, and that the Trial Court was required to make that determination.

2. *Bornemann v. Bornemann*, 175 Md. App. 716, 931 A.2d 1154 (2007). Sharer, J. Filed September 12, 2007.

**A) MOTHER HAD STANDING TO SEEK CHILD SUPPORT FOR 18 YEAR OLD WHO WAS STILL IN HIGH SCHOOL**

(1) After the parties divorced, Mother filed a motion to modify child support that sought to continue child support beyond child's 18th birthday. The Circuit Court for Howard County extended Father's support obligation until child graduated from high school or turned 19, whichever occurred first. Father appealed.

(2) Statutory amendment, which extended, for child support purposes, the age of majority to a child's 19th birthday or graduation from secondary school, whichever occurred first, applied retroactively.

(3) Father did not have a “vested right” in termination of his child support obligation when child turned 18 years old.

i. The obligation to support is a natural and legal obligation of parents to support their children, and exists regardless of whether or not it is referenced in a settlement agreement. In the instant case, the support obligation was fixed by court order, and the retroactive application of Art. 1, § 24, did not impair a right of contract.

(4) Retroactive application of amended statute did not impair Father's contractual rights guaranteed by the Contracts Clause of the United States Constitution.

i. Child support payments vest on the due date of each payment. Rights concerning future child support liabilities, including the termination of support, therefore, do not vest until the due date, and are subject to the continuing jurisdiction of the Courts. This result is consistent with the intent of the Legislature, as well as with the natural and historical obligations of parents to their children. Finally, it is without doubt in accord with the steadfast adherence to the overarching public policy to act in the best interests of the child.

(5) Mother was proper party to file action to modify child support.

3. *Burden v. Burden*, 179 Md. App. 348, 945 A.2d 656 (2008). Rodowsky, J. Filed April 3, 2008.

**A) APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY BY MOTHER WHO CHALLENGED THE EXCLUSION FROM THE TRIAL COURT'S CHILD SUPPORT ORDER OF ONE OF HER SONS, WHO WAS THE STEPSON OF THE FATHER. MOTHER CONTENDS THAT FATHER WAS PRECLUDED FROM DENYING PATERNITY BECAUSE HE VOLUNTARILY ACKNOWLEDGED PATERNITY OF THE CHILD IN QUESTION ON THE SOUTH DAKOTA BIRTH CERTIFICATE.**

**B) WHICH STATE'S LAW APPLIES? MARYLAND OR SOUTH DAKOTA?**

(1) The child in question was born to Mother, then unmarried, on July 23, 1995 in South Dakota. The child's original birth certificate listed the child's last name as Mother's family name. The parties to this action met after child was born and married on April 22, 2000 in South Dakota. In 2000, and in South Dakota, with Wife's consent, Husband signed and filed with the birth records agency a voluntary acknowledgement of paternity of the child. The parties separated in May 2003. Mother then moved to Baltimore. In August 2003, Father moved to Florida. While in Florida, Father was subject to child support proceedings. A child support order for the child in question and a child of the parties was entered in Florida.

(2) The Court conducted an analysis of both the law of South Dakota and of Maryland. The Court found that there is no South Dakota Supreme Court decision that addresses attempted disestablishment of paternity by a non-biological father where the determination of paternity was based on a voluntary acknowledgement. South Dakota treats the presumption of legitimacy (which existed here) as un rebuttable after three years. The Court concluded that the Supreme Court of South Dakota would not decline to apply that State's conclusive presumption statute to a voluntary acknowledgment of paternity, in a case raising no constitutional issues.

4. *Dep't of Human Res., Garrett County Dep't of Soc. Serv., Bureau of Support Enforcement, ex. rel. Duckworth v. Kamp*, 180 Md. App. 166, 949 A.2d 43 (2008). Moylan, J. Filed May 30, 2008.

**A) FATHER CANNOT ACKNOWLEDGE PATERNITY AND THEN REQUEST TO TERMINATE HIS CHILD SUPPORT OBLIGATION (UNDER DIVORCE DECREE) AFTER PATERNITY TESTS SHOWED HE WAS NOT THE BIOLOGICAL FATHER MORE THAN SIX YEARS AFTER ORIGINAL SUPPORT ORDER. LACHES AND JUDICIAL ESTOPPEL BAR SUCH TERMINATION OF CHILD SUPPORT.**

(1) County Department of Social Services filed a motion to increase child support and Father filed a request for paternity. The Circuit Court of Garrett Country granted the request and the results excluded Father as the biological father. Thereafter, Father filed a motion to terminate child support and the Circuit Court granted that motion. DSS appealed.

(2) In the case at bar, the Father was barred from terminating his child support obligation under the equitable doctrines of laches and judicial estoppel.

(3) Laches is a defense in equity against stale claims. The doctrine of laches bars an action where there has been an inexcusable delay AND prejudice to the party asserting the claim. As to laches, the Court said that the Father could have timely contested paternity and if that had been the case, the Mother could have sought child support from the biological Father, at the time the Father contested paternity it was too late.

(4) As to estoppel, there are three elements to judicial estoppel: 1) one of the parties takes a factual position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a Court, and (3) the party who is maintaining the inconsistent positions must have intentionally misled the Court in order to gain an unfair advantage. Maryland has also long recognized the doctrine of estoppel by admission... “[a] man shall not be allowed to blow hot and cold, to claim at one time and deny at another.”

5. *Maness v. Sawyer*, 180 Md. App. 295, 950 A.2d 830 (2008). Moylan, J. Filed June 19, 2008.

**A) NO ABUSE OF DISCRETION TO EXTROPOLATE FROM THE GUIDELINES IN SETTING SUPPORT IN AN OVER THE GUIDELINES CASE.**

(1) Husband challenged the child support award. The Trial Court had made certain that the children would not suffer because of the financial “indiscipline” of the parents. The Court of Special Appeals found no abuse of discretion by the Trial Court in a child support order which sets a party’s financial priorities.

**E. ALIMONY**

1. *Whittington v. Whittington*, 172 Md. App. 317, 914 A.2d 212 (2007). Eyler, J. Filed January 4, 2007.

**A) IT IS ERROR FOR A TRIAL COURT TO ORDER THE PAYMENT OF INDEFINITE ALIMONY WITHOUT EXERCISING DISCRETION IN THE DETERMINATION OF SUCH AN ALIMONY AWARD.**

(1) Appeal from the Circuit Court of Anne Arundel County granting Wife a divorce, indefinite alimony, monetary award, an interest in the marital portion of Husband’s pensions, a survivor benefit in one of the pensions (Husband was ordered to maintain the survivor benefit and Wife was awarded an interest in same), and attorney’s fees. The Court also ordered the division of certain jointly held marital property.

(2) The parties married on July 17, 1982, when Husband was 21 and Wife was 23. They had lived together for three years before marriage. In 1985 the parties purchased a marital home in Annapolis and lived there until separating on December 26, 2003. Wife had worked full time until 1999 when she cut her working hours to 30-35 per week due to stress, “excessive overtime” and wrist and elbow problems. She was able to work her hours at her own schedule. Post separation, Wife’s employer asked her to work traditional hours which she refused to do citing that traditional work hours would interfere with her caring for her dog. Wife was fired in June 2004 for refusing to change her work hours.

(3) Husband testified that the parties stopped having marital relations in 1990 and by the next year there was a major rift in the relationship. Wife testified that the parties last had sexual relations in 1996. Wife further testified that in her mind the marriage had ended in 1995 and by 2000 the parties had begun to sleep in

different rooms. In April 2002, Wife went on a business trip and ultimately met and began a romantic relationship with “James.” In 2003, Husband became romantically involved with “Lisa.” By December 2003, the parties had discussed wanting to live with their romantic partners. Husband left the home on December 26, 2003, and in December 2004, Wife moved to Florida and moved in with James.

(4) In Florida, Wife began freelancing for another company. Throughout separation, and until the marital home was sold in April 2005, the parties equally paid the mortgage and utility bills. Husband paid for the maintenance on the home, lawn care and HEL payment. Husband also continued to cover Wife’s health insurance and Wife’s car lease. Wife continued to share in the mortgage and utility payments on the marital home even when living in Florida. Wife also shared the costs of the Florida home with James.

(5) In June 2005, Husband and his girlfriend purchased a new home. In order to do this, Husband took a \$40,000.00 loan from his Toyota 401(k). As of the time of trial, only \$25,218 remained outstanding.

(6) At trial, the parties stipulated that if Husband’s vocational rehabilitation expert testified, he would state that Wife had the ability to earn \$35,000.00 per year. Trial Court awarded Wife \$1,500.00 per month in indefinite alimony, \$7,500.00 in counsel fees and a monetary award in the amount of \$30,531.60.

(7) Wife filed a Motion to Alter or Amend asking for, among other things, an interest in the survivor benefit of Husband’s Toyota pension. Husband opposed and a hearing was held. After the hearing, Wife was granted a 40% interest in the survivor benefit of the Toyota pension, on an if, as and when basis.

(8) Husband appealed.

(9) Court held:

- i. Alimony: The Court of Appeals held that the indefinite alimony award in this case must be vacated because the Trial Court judge seemed not to have exercised any discretion in deciding whether to award indefinite alimony. The Court of Special Appeals spent time reviewing the closing argument advanced for Wife. They indicated that the closing argument advanced for Wife focused on two factors (the length of the marriage and income percentage

differential). The Court of Special Appeals found that the Trial Court erred when it stated “From the language used by the trial court in its memorandum opinion, it appears to have accepted this argument; specifically, the judge stated that, on the facts before it, indefinite alimony not only was appropriate, it was ‘required.’” The Court of Special Appeals went on to review the state of the law - and found that the Court failed to exercise its discretion in the award of indefinite alimony.

ii. The Court, in its opinion, did a review of the state of the law on factors including, but not limited, the issue of unconscionable disparity (citing *Roginsky* as approved by *Solomon*). The issue of unconscionable disparity must be determined by projecting into the future, to a time of maximum productivity of the party seeking the award, and not be looking solely to the past. Second, under *Karmand* and *Simmonds*, a mere different in the parties’ post divorce standards of living, even if the disparity is great, does not, in and of itself, establish an unconscionable disparity. The disparity must be gross, so as to offend the conscience of the Court if not ameliorated. Also, unconscionableness *vel non* must be determined based upon the particular facts of the case –both those that must be considered because they are set forth in the statute and those that justice required be considered in order that equity be done. Third, the Court also reviewed the state of the law that no one factor in Md. Code Ann., Fam. Law § 11-106(b) is determinative.

iii. Monetary Award: When an alimony award is vacated, any monetary award must also be vacated, as the two are interrelated.

iv. Loan from Husband’s 401(k): Husband argued that the Trial Court erred by identifying the outstanding loan against the Toyota pension as extend marital property with a value of \$28,215. The Court found that the Trial Court properly included that sum in determining the value of the 401(k).

v. Survivor Benefit: Since the indefinite alimony award was vacated, this issue had to be revisited on remand.

vi. Counsel Fees: Also remanded as a result of the remand for alimony and monetary award.

## F. MONETARY AWARD

1. *Whittington v. Whittington*, 172 Md. App. 317, 914 A.2d 212 (2007). Eyler, J. Filed January 4, 2007.

### **A) THE TRIAL COURT ERRED IN AWARDING TO THE WIFE A PART OF THE HUSBAND'S SURVIVOR BENEFIT BECAUSE THERE WAS INSUFFICIENT EVIDENCE FOR THE AWARD.**

(1) The Wife requested an award of the survivor benefit attached to the Husband's pension. However, she failed to present any evidence about the survivor benefit.

(2) "The court's award of a part of the survivor benefit did not rest upon sufficient evidence to show its marital portion, its value, or how it would be distributed. On remand, however, the court may exercise its discretion to take additional evidence on this issue." *Id.* at 349.

(3) "[A] survivor benefit that is attached to a pension is property separate and apart from the pension itself. A spouse seeking to recover an interest in the survivor benefit attached to the other spouse's pension must request the survivor benefit in addition to any request for the pension benefit itself. That party bears the burden of proving that the survivor benefit is marital property (or a portion of it is marital property), and its value. If the requesting spouse meets his or her burden, the circuit court then has discretion to award the survivor benefit; the benefit is not a matter of right." *Id.* at 348. (citations omitted)

2. *Gordon v. Gordon*, 174 Md. App. 583, 923 A.2d 149 (2007). Hollander, J. Filed May 18, 2007.

### **A) THE COURT IMPROPERLY GRANTED CREDIT TO THE SPOUSE WHO CONTRIBUTED NON-MARITAL PROPERTY TOWARD THE DOWN-PAYMENT IN PURCHASING THE MARITAL HOME.**

(1) The Lower Court failed to analyze and determine whether a monetary award is appropriate under Md. Code Ann., Fam. Law § 8-205 considering all the factors of this case.

(2) The Wife contributed Thirty Thousand Dollars (\$30,000.00) from her non-marital 401(k) to be used as a down-payment to purchase the parties' marital home, which they owned as tenants by the entireties.

(3) Trial Court determined that the Wife could trace the \$30,000.00 down-payment to non-monetary funds and was entitled to recover those funds. The Court credited her that amount by stating it would grant a monetary award that would come off the top of the proceeds from the sale of the marital home after the use and possession time had run.

(4) The source of funds theory does not apply to an interest in real property held by parties as tenants by the entirety even if non-marital funds were applied to its purchase. *Karmand v. Karmand*, 145 Md. App. 317, 802 A.2d 1106 (2002).

(5) Under the Marital Property Act, a party is entitled to reimbursement for non-marital contribution only if it is consistent with the statutory provisions that permit a monetary award.

**B) A PARTY WHO CONTRIBUTES NON-MARITAL FUNDS TO ACQUIRE PROPERTY HELD AS TENANTS BY THE ENTIRETY IS NOT ENTITLED TO AN AUTOMATIC REFUND UNDER THE FAMILY LAW ARTICLE.**

(1) It is important that Courts not lose sight of the history and purpose of the statute when making decisions about marital property. The history of the statute indicates that the General Assembly was primarily concerned with achieving equity by reflecting non-monetary contributions to the acquisition of marital assets, and this principle should be a major consideration in a Trial Judge's analysis.

(2) If the spouse who contributed non-marital funds has an inferior earning capacity or suffers from an illness, for example, such "reimbursement" might well be warranted, even if the party seeking reimbursement is generally in a better position financially than the other spouse. Similarly, under the statute, the parties' ages or the efforts of the parties to acquire the marital property are relevant considerations, and might justify "reimbursement." The length of the marriage is yet another statutory factor to be considered. "In any event, we express no opinion as to the merits of a monetary award in this case; that is a matter for the court to resolve on remand." *Id.* at 635.

**C) NOT ERROR TO AWARD WIFE CRAWFORD CREDITS.**

(1) The Trial Court did not abuse its discretion in awarding Wife a Crawford credit of 40% of her expenditures. *Crawford v. Crawford*, 293 Md. 307, 443 A.2d 599 (1982).

(2) Following separation, Wife paid virtually all of the expenses on the marital home, including the mortgage payments, homeowner's insurance, and real estate taxes. Yet, Husband claimed a portion of the house related expenses as deductions on his tax returns. It is also salient that the parties had agreed to end the marriage with whatever property was titled in their respective names. The Wife testified that, after the separation, she utilized almost \$17,000.00 in savings from an account held in her name. In effect, then, Wife was forced to deplete a savings account that she otherwise would have retained upon divorce. Furthermore, Husband drew over \$15,000.00 from the home equity line between October 2003 and the fall of 2004 to meet his expenses. Yet, he was not held to account for that money.

3. *Aleem v. Aleem*, 175 Md. App. 663, 931 A.2d 1123 (2007). Rodowsky, J. Filed September 10, 2007.

**A) THE TRIAL COURT DID NOT ERR IN AWARDING THE WIFE HALF OF THE HUSBAND'S PENSION AND REFUSING TO GRANT COMITY TO PAKISTANI LAW.**

(1) Pakistani law in which property rights follow title upon divorce is contrary to Maryland public policy.

**G. CONTEMPT**

1. *Marquis v. Marquis*, 175 Md. App. 734, 931 A.2d 1174 (2007). Barbera, J. Filed September 12, 2007.

**A) HUSBAND'S FAILURE TO SIGN A PENSION ORDER FOR THE AGREED TO AND ORDERED DIVISION OF HIS MILITARY PENSION WAS FOUND TO BE CONTEMPTUOUS.**

(1) A spouse has an obligation to act in good faith, to deal fairly with the other party and to cooperate when necessary to have the appropriate pension order drafted to effectuate compliance with a Judgment of Absolute Divorce.

(2) The pension order did not modify parties' Judgment of Absolute Divorce and only gave the Wife the benefits she bargained for under the Consent Judgment.

(3) The Judgment of Absolute Divorce provided that the Wife would receive 50% of the marital portion of the Husband's retirement benefits on an if, as and when received basis. Upon the Husband's refusal to sign a Constituted Pension Order, (hereinafter "CPO"), the Wife filed for contempt against the Husband. The Trial Court found the Husband in contempt for not cooperating

with the drafting and signing of a CPO, which accurately reflected the Judgment of Absolute Divorce, and ordered that the Husband sign the CPO. The Appellate Court affirmed.

(4) The Appellate Court will only reverse a Trial Court's finding of contempt upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous, or that the Trial Court abused its discretion in finding the behavior to be contemptuous. The burden of proof in civil contempt proceedings is a preponderance of the evidence.

(5) The purpose of a civil contempt proceeding is to preserve and enforce the rights of the parties and to compel obedience to court orders.

(6) A penalty in a civil contempt must provide for purging.

(7) A person may only be held in contempt if they have willfully refused to comply with a court order that is specific enough in its terms for the party to understand what conduct is required by the order.

2. *Arrington v. Dep't. of Human Res., et al. McLong v. Oliver*, 402 Md. 79, 935 A.2d 432 (2007). Wilner, J., Retired, Specially Assigned. Filed November 8, 2007.

**A) CONSTRUCTIVE CIVIL CONTEMPT FOR VIOLATION OF CHILD SUPPORT ORDER; COURT MAY NOT INCARCERATE DEFENDANT FOR FAILURE TO MEET A PURGE THAT DEFENDANT IS NOT ABLE TO MEET IN TIME TO AVOID THE INCARCERATION.**

(1) Two separate cases presented on the same day with the same legal issue. In both cases, the fathers failed to pay their regular child support payments and established high arrearages. They were found to be in constructive civil contempt and were given determinate sentences with a purge provision, which neither of the fathers could meet in order to avoid incarceration. On appeal, the court held, as to both cases, that the finding of contempt could stand, but the sanction must be vacated.

3. *Maness v. Sawyer*, 180 Md. App. 295, 950 A.2d 830 (2008). Moylan, J. Filed June 19, 2008.

**A) NO ABUSE OF DISCRETION IN FINDING HUSBAND IN CONTEMPT**

(1) Husband failed to pay *pendente lite* support and offered no evidence as to his failure, and the record as a whole showed his ability to pay.

**H. ATTORNEY'S FEES**

1. *Rhoads v. Sommer*, 401 Md. 131, 931 A.2d 508 (2007). Raker, J. Filed August 27, 2007.

**A) AN ATTORNEY'S LIEN AGAINST HIS CLIENT SURVIVED HIS CLIENT'S BANKRUPTCY DISCHARGE BECAUSE IT WAS AN *IN REM* LIEN, WHICH TOOK EFFECT AT THE START OF THE ATTORNEY'S SERVICES, EVEN THOUGH IT WAS ENFORCED AFTER THE BANKRUPTCY.**

(1) *In personam* claims are discharged in bankruptcy, however, bankruptcy discharge does not affect *in rem* claims, which are created at the time the action begins.

(2) Rhoads retained Sommer, an attorney, for purposes of representing her in a discrimination case. Rhoads filed for Chapter 7 bankruptcy, which stayed the employment discrimination case. In Rhoads' bankruptcy schedules, she listed Sommer as a creditor. Sommer was served with Rhoads' petition, but he did not file a response. The bankruptcy trustee concluded that there was no property available for distribution from the estate and released to Rhoads any interest she might have in the stayed litigation. Rhoads was then granted a discharge under 11 U.S.C. § 727 in bankruptcy court. Subsequently, Sommer withdrew as Rhoads' attorney. Sommer then sent notice of his attorney's lien to Rhoads and to counsel for the Federal Deposit Insurance Corporation. Rhoads filed a Notice of Appeal in the employment discrimination case. The Appellate Court remanded the case for a new trial. Four years after Sommer withdrew as Rhoads' attorney, a Federal jury found in favor of Rhoads and awarded her \$120,006. Rhoads moved for an award of attorney's fees and costs, and in support thereof cited to Sommer's statutory lien. Rhoads' claim and Sommer's Motion to Intervene were denied. The Appellate Court reversed as to Sommer's motion, holding that the lien took effect upon the commencement of Sommer's services, was not lost by Sommer's failure to serve written notice under Md. Rule 2-652

before the bankruptcy petition, was not dependent on the viability of an *in personam* claim, and was not extinguished in the bankruptcy, even though Sommer did not file proof of claim in bankruptcy. Rhoads filed a Petition for Writ of Certiorari. The Court's ruling was affirmed.

(3) The Court held that a bankruptcy discharge releases the debtor from personal liability for pre-petition debts. The attorney's *in personam* claim was discharged after the client's bankruptcy filing. However, the discharge did not affect the attorney's *in rem* claim. The attorney was not obligated to file any proof of claim in the bankruptcy court to make his statutory attorney's lien claim. As a result, an attorney's lien, an *in rem* claim on any judgment or recovery in the client's civil action, survived the client's bankruptcy discharge of her *in personam* debts, even though notice of the lien under Md. Rule 2-652 was not provided until after the bankruptcy.

2. *Friolo v. Frankel*, 403 Md. 443, 942 A.2d 1242 (2008). Bell, J. Filed February 27, 2008.

**A) UNDER MARYLAND'S WAGE AND PAYMENT LAWS WHEN THE LOWER COURT AWARDS COUNSEL FEES AND THE CLAIMANT APPEALS THE AWARD, THE ATTORNEY CAN RECOVER ADDITIONAL FEES FOR THE APPEAL.**

(1) In actions under fee-shifting statutes, the lodestar approach is a proper way to determine a reasonable attorney's fees.

(2) The lodestar approach calculates a fee using the number of hours expended on the litigation multiplied by a reasonable hourly rate, thus providing an initial estimate of the value of the attorney's services. Excessive, unnecessary and redundant hours are excluded from the calculation. The Trial Court has discretion to eliminate specific hours or simply reduce the award to account for the limited success of particular parts of litigation as there is no precise rule or formula for making those determinations. The lodestar formula includes careful consideration of appropriate adjustments in each case, and the Trial Judge must give a clear explanation of the factors used.

(3) The case was remanded for an analysis under the lodestar approach.

3. *De Arriz v. Klingler-De Arriz*, 179 Md. App. 458, 947 A.2d 59 (2008).  
Davis, J. Filed May 1, 2008.

**A) LAW FIRM'S LIEN ON CLIENT'S INTEREST IN MARITAL HOME HELD PRIORITY OVER MONETARY AWARD NOT REDUCED TO JUDGMENT.**

(1) The parties were divorced by Judgment of Absolute Divorce which provided, “[Wife] shall be and is hereby granted a monetary award against [Husband] in the amount of \$110,000...and said award shall be payable upon settlement of the sale of the [marital home].”

(2) Although requested by the Wife, the Trial Court did not reduce the monetary award to judgment.

(3) Prior to settlement of the sale of the marital home, Husband's counsel secured two deeds of trust on Husband's interest in the proceeds from the sale of the marital home for attorney's fees owed in relation to his domestic relations case. The deeds of trust were negotiated between the firm and the clients' independent counsel and the firm reduced its bill in return for the security of the deed of trust.

(4) As a result of judgment liens and the deeds of trusts on his interest in the marital home, Husband did not receive any of the proceeds upon settlement and had no funds to pay the wife her monetary award. Wife objected to the law firm's outstanding lien on the property and filed an Emergency Motion requesting the court revise the Judgment of Absolute Divorce, *nunc pro tunc*, to give the monetary award priority over the firm's lien.

(5) The Trial Court granted Wife's request and entered an order against the law firm, relying on Md. Rules 9-210(b) and 2-648.

**B) TRIAL COURT ERRED IN ENTERING MONEY JUDGMENT AGAINST THE LAW FIRM PURSUANT TO MD. RULE 2-648.**

(1) Md. Rule 2-648 provides that “When a person fails to comply with a judgment prohibiting or mandating action, the court may order the seizure or sequestration of property of the noncomplying person...” and “If property is transferred in violation of a judgment prohibiting or mandating action with respect to that property, and the property is in the hands of a transferee [with knowledge]...the transferee shall be subject to the sanctions provided for in section (a) of this Rule.”

(2) Trial Court erred in entering money judgment pursuant to Md. Rule 2-648 because “[Husband] was not ordered to pay the monetary award from the proceeds of the sale of the marital home, and furthermore, under *Hart v. Hart*, supra, could not have been so ordered.” *Id.* at 475.

**C) JUDGMENT OF DIVORCE DID NOT MANDATE HUSBAND PAY THE MONETARY AWARD FROM THE PROCEEDS OF THE SALE OF THE MARITAL HOME, SO NO EQUITABLE LIEN WAS CREATED.**

**D) WIFE HAD NO EQUITABLE CLAIM TO HUSBAND’S INTEREST IN THE PROCEEDS OF THE SALE OF THE MARITAL HOME AND HAD NO CONSTRUCTIVE TRUST.**

**E) COURT MADE NO DETERMINATION ON ISSUE OF WHETHER PLACING A LIEN AGAINST HUSBAND’S INTEREST IN THE MARITAL HOME CREATED A CONFLICT OF INTEREST.**

## **I. AGREEMENTS**

1. *Hearn v. Hearn*, 177 Md. App. 525, 936 A.2d 400 (2007). Meredith, J. Filed November 30, 2007.

**A) THE COURT HAS THE POWER TO REVISE A CONSENT ORDER IN ORDER TO MAKE IT CONFORM WITH THE ACTUAL MUTUAL INTENT OF THE PARTIES.**

(1) The case was remanded to address the Husband's contention that Civil Service Retirement and Survivor Annuity Benefits Order (CSRS order) failed to reflect the mutual intent and understanding of the parties (a mutual mistake of fact) as to the legal effect of the agreed language and to consider the evidence proffered by Husband as to the subjective intentions of the parties.

(2) The former Husband requested that the Court order that the *pro rata* formula in Civil Service Retirement and Survivor Annuity Benefits Order (CSRS order), which distributed a portion of his Federal pension benefits to his former Wife, be applied to his net annuity rather than the gross amount of the retirement benefit, as that was the parties’ mutual understanding.

(3) If parties enter into an agreement, and through an error in the reduction of it to writing, the written agreement fails to express their real intentions or contains terms or stipulations contrary to their common intention, a Court of Equity will correct and reform the instrument so as to make it conform to the intention of the parties.

(4) Although Husband's burden of proof is high (explaining that evidence of the mistake and the alleged modification must be clear and convincing), findings of fact on this issue should be made in the first instance by the Circuit Court rather than the Appellate Court. On remand, the Circuit Court will have the opportunity to consider the evidence proffered by Husband as to the subjective intentions of the parties, and the Court will be able to make a finding as to whether the CSRS order was, at the time it was entered, at odds with the mutual understanding of the parties.

2. *Allen v. Allen*, 178 Md. App. 145, 941 A.2d 510 (2008). Davis, J. Filed February 6, 2008.

**A) FORMER WIFE WAS ENTITLED TO SHARE OF DISABILITY RETIREMENT BENEFITS THAT FORMER HUSBAND RECEIVED FROM MILITARY.**

(1) Husband was discharged from the military because of a permanent physical disability and Husband did not inform Wife of his status. Husband received \$76,410 during his period of temporary disability and, upon his Honorable Discharge, he took a lump sum payment of \$140,192.77 in disability severance.

(2) A pensioned party may not hinder the ability of the party's spouse to receive the payment that she has bargained for, by voluntarily rejecting, waiving, or terminating pension benefits when they have entered into an agreement which provides for the other party to receive a percentage of pension benefits, on a periodic basis, when they become payable, and when they are already payable and being paid. Husband's disability classification, although not a voluntary act of waiving military retirement benefits, terminated pension benefits thereby frustrating the performance of the parties' contract. For the Court to accept Husband's argument would permit him to exclude Wife from receiving her share of the benefits that Husband accrued as a result of his twenty marital years of service. The Judgment of Divorce contemplated that Wife would share in all retirement benefits accrued as a result of Husband's military service evidenced by the use of the phrase "pension/retirement plans." Moreover, because Husband's disability retirement benefits are paid as pension and retirement benefits and take the place of other pension and retirement benefits, they are subject to the division of "pension/retirement plans." To deny Wife any share of retirement benefits because Husband received severance disability retirement benefits is contrary to the intent of the parties.

(3) Lower Court decision to award Husband's disability payments to Wife on the basis of Maryland contract law was affirmed.

3. *Mills v. Mills*, 178 Md. App. 728, 943 A.2d 677 (2008). Davis, J. Filed March 5, 2008.

**A) THE CIRCUIT COURT PROPERLY EXERCISED ITS REVISORY POWER, EXPRESSLY RESERVED IN THE PARTIES' AGREEMENT, WHEN IT ENTERED AN AMENDED PENSION ORDER WHICH ACCURATELY REFLECTED THE AGREEMENT THE PARTIES ENTERED ONTO THE RECORD.**

(1) The amendment to the order was necessary for the order to be accepted by former Husband's pension plan administrator as a qualified domestic relations order (QDRO), which was required to enforce the parties' original agreement that former Wife would receive 41% of former Husband's pension. The Court had reserved jurisdiction to settle any and all disputes between the parties relative to benefits provided in the original order, and the amended order did not deviate from the parties' original agreement.

4. *Janusz v. Gilliam*, 404 Md. 524, 947 A.2d 560 (2007). Greene, J. Filed May 9, 2008.

**A) A CONSENT ORDER ACCEPTABLE FOR PROCESSING (HEREINAFTER "COAP") MAY BE CONSTRUED TO MODIFY THE PARTIES' AGREEMENT.**

(1) The Court remanded the case for a determination as to whether the COAP is an amendment to the parties' agreement, and then a determination as to whether it was validly executed and whether the Husband's attorney had the authority to bind him to the COAP.

(2) "If the trial court determines that the COAP is an effective modification of the Agreement pursuant to the requirements for modification set forth in the original Agreement, the COAP constitutes an integral part of the judgment itself, and not merely an avenue for enforcement." *Id.* at 539.

(3) The parties entered into a Voluntary Separation and Property Settlement Agreement, which was incorporated, but not merged, into the Judgment of Divorce, in which the Husband would maintain his survivor's annuity with the Federal Civil Service Retirement System for the benefit of the wife. However, pursuant to 5 C.F.R. § 838.802, the Wife became ineligible as a consequence of the parties' divorce, to receive the benefits of the survivor's annuity. Subsequently, the parties' attorneys signed a COAP on their behalf that stated that if the order is unacceptable

for processing by the Office of Personnel Management, the parties will renegotiate the agreement in accordance with their intent and the agencies' requirements. The Wife filed suit requesting that the Court rescind the agreement or find that the Husband was unjustly enriched.

(4) Mutual mistake of law, where the parties know the facts of a case but are ignorant of the legal consequences, is not a basis for rescission or for a claim of unjust enrichment.

(5) The parties entered into Agreement, which was incorporated but not merged into a Judgment of Absolute Divorce, which gave the Wife the right to obtain the Husband's survivor annuity, under the mutual mistake of law, that she would be entitled to those benefits.

(6) The *quasi* contract claim of unjust enrichment may not be brought where the subject matter of the claim is covered by an express contract between the parties, except in the case of fraud or bad faith, a breach of contract or a mutual rescission of the contract, when rescission is warranted, or when the express contract does not fully address a subject matter.

## **J. APPEALS**

1. *Forster v. Hargadon*, 398 Md. 298, 920 A.2d 1049 (2007). Wilner, J. Filed April 11, 2007.

### **A) DISMISSAL OF A WRIT OF *MANDAMUS* REQUEST.**

(1) An extraordinary writ is appropriate only when judicial power has been usurped or if there is a clear abuse of discretion, and will not be issued where the Petitioner has a specific and adequate legal remedy to meet the justice of the particular case.

i. The Public Defender filed exceptions to a Master's report, but the exceptions were dismissed because of the Public Defender's failure to comply with the order issued by the Judge governing exceptions. The Public Defender then filed for a writ of prohibition, *mandamus*, or other relief. The Public Defender had all of the applicable remedies of appeal available, and there was no basis for the Court to issue an extraordinary writ.

(2) The *quasi* contract claim of unjust enrichment may not be brought where the subject matter of the claim is covered by an express contract between the parties, except in the case of fraud or bad faith, a breach of contract or a mutual rescission of the

contract, when rescission is warranted, or when the express contract does not fully address a subject matter.

## K. MISCELLANEOUS

1. *Aventis Pasteur, Inc. et al. v. Skevofilax, et al.*, 396 Md. 405, 914 A.2d 113 (2007). Harrell, J. Filed January 8, 2007.

### **A) THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO PERMIT THE PARENTS TO DISMISS THEIR CLAIMS WITHOUT PREJUDICE WHEN THE DISMISSAL REQUEST WAS CAUSED BY THE SUDDEN WITHDRAWAL OF A CRUCIAL EXPERT.**

(1) “Whether a plaintiff is entitled to voluntary dismissal without prejudice, i.e., the defendant would not suffer plain legal prejudice in the event of dismissal, is resolved traditionally by analysis according to the following four factors: (1) the non-moving party's effort and expense in preparing for litigation; (2) excessive delay or lack of diligence on the part of the moving party; (3) sufficiency of explanation of the need for a dismissal without prejudice; and (4) the present stage of the litigation, i.e., whether a motion for summary judgment or other dispositive motion is pending.” *Id.* at 420.

### **B) THE PARENTS COULD NOT RECOVER IN AN ACTION ABSENT EXPERT MEDICAL OPINION ON CAUSATION.**

(1) Summary judgment was appropriate where the parents' claims fail as a matter of law because they were unable to produce an expert who could testify as to the specific causation within a reasonable degree of scientific certainty.

2. *Hunter v. State*, 397 Md. 580, 919 A.2d 63 (2007). Cathell, J. Filed March 16, 2007.

### **A) IN A CRIMINAL TRIAL, IT IS ERROR FOR THE JUDGE TO ALLOW THE PROSECUTOR TO ASK THE DEFENDANT WHETHER THE POLICE WITNESSES WERE LYING.**

(1) Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law, and encroaches upon the province of the jury to judge the credibility of witnesses, weigh their testimony and resolve the contested facts.

(2) As stated in *American Stores Co. v. Herman*, the Court has held that “were-they-lying” questions are impermissible in civil

cases where the questions were effectively asking a witness to say whether the witness who gave the statement testified falsely.

(3) The Prosecutor asked criminal Defendant if other witnesses, including the police, were lying. The criminal Defendant was convicted.

(4) Where the jury asked four questions during deliberation and the prosecutor questioned the criminal Defendant with five were-they-lying questions, including regarding the police, and such questions were asked in an argumentative manner, the error was not harmless.

3. *Thomas v. State*, 397 Md. 557, 919 A.2d 49 (2007). Raker, J. Filed March 16, 2007.

**A) THE STATE DID NOT COMMIT A DISCOVERY VIOLATION WHEN ONE WEEK BEFORE TRIAL IT DISCLOSED THAT IT WAS GOING TO PRESENT A STATEMENT WHICH THE APPELLANT MADE TO THE ARRESTING OFFICER DURING PROCESSING.**

(1) Following the Appellant's arrest, he stated to an arresting officer, "G-d has forgiven me." The Prosecutor learned about the statement one week before trial. He told the defense counsel of the statement the same day. At trial, the Appellant made a motion *in limine* to exclude the statement on the grounds that the State had violated Md. Rule 4-263 by untimely disclosing the statement.

(2) The Trial Judge properly ruled that there was no discovery violation and denied the motion *in limine* because the statement was relevant, there was no indication that the statement was known to the State prior to a week ago, there was no bad faith on the part of the State, the State promptly reported its intent to use the statement to defense counsel, and the Appellant was not prejudiced by the delay in the disclosure.

4. *Haley v. State*, 398 Md. 106, 919 A.2d 1200 (2007). Raker, J. Filed March 21, 2007.

**A) THE ATTORNEY-CLIENT PRIVILEGE EXTENDS TO INFORMATION PROVIDED BY A CRIMINAL DEFENDANT TO HIS ATTORNEY THAT WOULD LATER FORM THE BASIS OF HIS DEFENSE AT TRIAL AND THE TIMING OF SUCH PROTECTED DISCUSSION.**

(1) Appeal arise out of a criminal case where Defendant was alleged to have committed armed car-jacking, the Defendant suspect was arrested and charged.

(2) At trial, the Defendant asserted that he had had a lover's spat with the complaining witness and they had been involved in an ongoing relationship.

(3) On cross-examination, the Prosecutor questioned when the Defendant had told his counsel about this alleged relationship, and whether he had neglected to tell him until the previous night. The defense counsel asserted attorney-client privilege.

(4) The Appellate Court found that attorney-client privilege applied to the discussions the Defendant had with his counsel regarding the alleged relationship and the Defendant's knowledge about the complaining witness's house, and both the substance and the timing of these discussions were privileged. This privilege was not waived by the Defendant testifying regarding the relationship.

5. *Hall v. Univ. of Md. Med. Sys. Corp.*, 398 Md. 67, 919 A.2d 1177 (2007). Bell, C.J. Filed March 21, 2007.

**A) THE COURT ERRED BY EXCLUDING MEDICAL RECORDS AS HEARSAY. ENTRIES IN MEDICAL RECORDS FALL UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.**

(1) This medical malpractice action was brought by a newborn by her guardian against the hospital, alleging that the hospital was negligent in making the mother wait before performing an emergency c-section.

(2) The Plaintiff attempted to admit into evidence two medical records relating to the time the Plaintiff's mother was admitted and treated in the hospital. Each record was made by a doctor noting information gleaned regarding prior treatment from an outside source.

(3) The Trial Court found that the medical records were not pathologically germane to the suit and excluded the records as inadmissible hearsay because the information contained in the records as the doctors did not have personal knowledge of the events contained in the records.

(4) The Appellate Court held that hospital records are admissible because they fall within the business records exception to the hearsay rule and are pathologically germane if they are relevant to the diagnosis or treatment of the patient's condition.

6. *In re Lakeshia M.*, 398 Md. 551, 921 A.2d 258 (2007). Rodowsky, J., Retired. Filed April 16, 2007.

**A) THE LOWER COURT ERRED WHEN IT REFUSED TO STAY THE ADJUDICATORY HEARING AND ORDERED A COMPETENCY EVALUATION IN THE CASE OF AN ALLEGEDLY BIPOLAR 15-YEAR-OLD WHO ASSAULTED HER STEPFATHER.**

(1) The juvenile Respondent allegedly took a swipe at her stepfather with a butcher knife.

(2) At the hearing, her counsel requested a postponement because the girl suffered from the highest level of bipolar disorder, he did not think she understood his role or the role of a Prosecutor, and he called her competency to be adjudged juvenile into question.

(3) The Court denied the request for postponement and bi-furcated the trial, to determine competency with the agency part of the trial.

(4) The Appellate Court held that juvenile respondent effectively moved for a postponement to conduct a competency evaluation, which pursuant to Md. Code Ann., Cts. & Jud. Proc. § 3-8A-17.1(a), requires the Court to determine if there was probable cause that the juvenile committed the delinquent act and whether there is reason to believe the child may be incompetent to proceed, and at which time, the Court is obligated to stay the proceedings and order a competency evaluation.

7. *In re Roberto d. B.*, 399 Md. 267, 923 A.2d 115 (2007). Bell, C.J. Filed May 16, 2007.

**A) THE COURT ERRED BY REQUIRING THE GESTATIONAL CARRIER'S NAME TO BE LISTED AS THE MOTHER ON THE BIRTH CERTIFICATE.**

(1) Father engaged in *in vitro* fertilization whereby his sperm was used to fertilize the eggs from an egg donor, and an unrelated gestational carrier host brought the fertilized eggs to term. When the children were born, both the Father and the carrier requested that the birth records filed with the Maryland Division of Vital Records (MDVR) list only the Father on the birth certificates, but the hospital refused. The Trial Court refused to order the correction of the birth records.

(2) The Appellate Court held that Maryland's paternity statutes must be construed to apply equally to both males and females.

(3) Md. Code Ann., Fam. Law § 5-1001, outlines steps by which alleged fathers may deny paternity and must now be read to apply equally to women.

(4) The Maryland statute also accommodates, if not contemplates, a situation where a mother is not listed on a child's birth certificate.

(5) It is within a Trial Court's power to order the MDVR to issue a birth certificate that contains only the father's name.

**B) THE LOWER COURT ERRED BY USING THE BEST INTERESTS OF THE CHILD STANDARD WHEN DETERMINING WHETHER IT COULD ORDER THE OMISSION OF A MOTHER'S NAME ON A BIRTH CERTIFICATE.**

(1) The Lower Court held that it was not in the best interests of the minor child to remove the surrogate mother's name from the birth certificate.

(2) In parental dispute cases, the use of the best interests of the child standard is dependent on the circumstances. Where the dispute is between a parent and non-parent, however, the best interests of the child standard is typically not addressed until the parent is found unfit.

(3) In this case, there was no contest over parental rights and no unfitness of the Father, so it was error for the Lower Court to use the best interests standard.

8. *Montgomery Mut. Ins. Co. v. Chesson, et al.*, 399 Md. 314, 923 A.2d 939 (2007). Raker, J. Filed May 23, 2007.

**A) THE LOWER COURT ERRED WHEN IT ALLOWED THE PLAINTIFF'S EXPERT'S TESTIMONY WITHOUT FIRST HOLDING A FRYE-REED HEARING TO DETERMINE WHETHER HIS THEORIES AND METHODOLOGIES WERE GENERALLY ACCEPTED IN THE MEDICAL COMMUNITY.**

(1) Employees filed a workers' compensation action alleging that they had sustained an injury known as "sick building syndrome" as a result of their employment, due to exposure to toxic mold.

(2) The Circuit Court held that a Frye-Reed hearing was not necessary to determine the admissibility of the testimony of the expert-doctor, and to decide whether the doctor's methodologies used for diagnosis and theories regarding the causal connection between mold exposure and certain health effects are generally accepted in the scientific community for that purpose.

(3) The jury found for the employees, finding a causal connection between the mold and their sick building syndrome and the insurance company timely appealed.

(4) The intermediate Appellate Court found this case distinguishable from a case that would invoke a Frye-Reed analysis because the causal connection between the mold and the disease is not novel or controversial, nor is the conclusion personal to the doctor. The Court further stated that the Frye-Reed test had not been extended to medical opinion evidence unless it was presented as a scientific test.

**B) THE FRYE-REED TEST IS MEANT TO APPLY TO EVIDENCE BASED ON SCIENTIFIC OPINION.**

(1) The Frye-Reed test determines admissibility whether the basis of the opinion is generally accepted as reliable within the expert's particular scientific field.

(2) The expert in this case employed medical tests to reach a conclusion that is not so widely accepted as to be subject to judicial notice of reliability.

(3) The expert's testimony was based on scientific opinion regarding the causal link between mold and sick building syndrome, and as such, both his theories regarding causation and the tests he employed to diagnose the employees were subject to the Frye-Reed test.

9. *Dickens v. State*, 175 Md. App. 231, 927 A.2d 32 (2007). Salmon, J. Filed July 2, 2007.

**A) THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE TEXT MESSAGES SENT TO THE VICTIM'S PHONE.**

(1) The Husband shot his Wife, from whom he was separated. Directly after the shooting, the Husband went to a neighbor's home. The next day a cell phone was found near the neighbor's house. Prior to the Wife's death, she received several threatening text messages. The Husband argued that the text messages were inadmissible because they could not be properly authenticated.

(2) The Court held that there was sufficient circumstantial evidence to authenticate the text messages as being sent from Husband's cell phone and to admit them into evidence.

(3) The circumstantial evidence included: one of the text messages showed the sender's phone number to be of a cell phone that a witness testified was in the Husband's possession, which happened to be the same cell phone found near the neighbor's home; the husband made prior threats to the wife; one of the messages referenced the wife's location, which only an exceedingly small number of people knew of; one of the text messages mentioned the parties' daughter; and the text messenger called himself "Doll/M" which is from the 1954 movie and 1981 television remake "Dial M for Murder."

(4) Md. Rule 5-901(b) provides that documents may be authenticated by:

- i. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be; or
- ii. Circumstantial evidence such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

**B) THE TRIAL COURT DID NOT ERR IN ACCEPTING INCONSISTENT VERDICTS.**

(1) The Trial Court did not err when it accepted inconsistent verdicts because the Husband did not object and was not prejudiced by them.

(2) The jury, being instructed to mark guilty or not guilty to each of the charges, found the Husband of first-degree murder, second-

degree depraved-heart murder and involuntary manslaughter. The Husband argues that the Trial Court erred in accepting verdicts for charges which are inconsistent. However, the Husband failed to object to the instructions given to the jury or to the verdicts. In addition, no sentence was imposed for second degree or involuntary manslaughter, so there was no prejudice to the Husband.

10. *Smith v. Danielczyk*, 400 Md. 98, 928 A.2d 785 (2007). Wilner, J. Filed July 25, 2007.

**A) ON APPEAL FROM DISMISSAL FOR FAILURE TO STATE CLAIM, THE COURT OF APPEALS WAS REQUIRED TO ASSUME THAT THE TRIAL COURT CONSIDERED DOCUMENTS ATTACHED TO MOTION TO DISMISS AND FACTUAL AVERMENTS OUTSIDE PLEADINGS, WHERE THE RECORD DID NOT INDICATE THAT THE EXTRANEOUS DOCUMENTS OR AVERMENTS WERE EXCLUDED BY THE TRIAL COURT.**

(1) On appeal from dismissal for failure to state claim, the Court of Appeals will regard exhibits attached to a dismissal motion and additional factual averments outside the pleadings as supplementing the allegations in the complaint and will consider them.

- i. Md. Rule 2-322(c) provides that a motion to dismiss for failure to state a claim may be treated as a motion for summary judgment pursuant to Md. Rule 2-501 if additional evidence is presented at trial.
- ii. When party offers a trial memorandum with attached exhibits in support of its position on a motion to dismiss, such evidence will be treated as part of the evidence presented if not explicitly stated by the court that it was excluded.
- iii. Attached exhibits become part of the record when not excluded.

11. *BAA, PLC v. Acacia Mut. Life Ins. Co*, 400 Md. 136, 929 A.2d 1 (2007). Eldridge, J. Filed July 27, 2007.

**A) THE ACCOUNTANT-CLIENT PRIVILEGE DOES NOT RECOGNIZE AN EXCEPTION FOR FRAUD IN AN ACTION UNDER THE FRAUDULENT CONVEYANCE ACT. SEE MD. CODE ANN., CTS. & JUD. PROC. § 9-110.**

**B) GOODWILL MAY BE CONSIDERED AN ASSET IN ANALYZING SOLVENCY UNDER THE FRAUDULENT CONVEYANCE ACT. SEE MARYLAND UNIFORM FRAUDULENT CONVEYANCE ACT § 15-202 (A).**

12. *John A. v. Bd. of Educ. for Howard County*, 400 Md. 363, 929 A.2d 136 (2007). Wilner, J. Filed July 30, 2007.

**A) THE ADMINISTRATION OF MEDICATION TO DISABLED CHILD CONSTITUTES A “RELATED SERVICE” UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), AND THE FACT THAT A CHILD'S INDIVIDUALIZED EDUCATION PLAN (IEP) DOES NOT ACKNOWLEDGE EXPLICITLY A CHILD'S ENTITLEMENT TO THE ADMINISTRATION OF MEDICATION DOES NOT BAR A CHILD’S PARENTS FROM BRINGING A DUE PROCESS COMPLAINT BASED ON THE PROVISION OF THE RELATED SERVICE.**

(1) It was undisputed that child generally required medications in order to have to function more normally in a classroom setting and attain the benefits of special education, thus meeting the definition of “supportive services.”

(2) The medications easily could be provided by someone other than a trained physician, and therefore were not an excluded “medical service.”

**B) IT IS NOT NECESSARY FOR A RELATED SERVICE TO BE INCLUDED IN THE IEP TO FORM THE BASIS ON WHICH THE CHILD’S PARENTS MAY BRING A DUE PROCESS COMPLAINT.**

(1) When the disputed question is medical or ethical, and not a special education issue, an ALJ has the power under the IDEA and Maryland law to dismiss the complaint for lack of subject matter jurisdiction because it falls outside their power to decide matters “relating to the identification, evaluation, or placement of a disabled child, or the provision of free appropriate public education to such child.”

13. *King v. State*, 400 Md. 419, 929 A.2d 169 (2007). Greene, J. Filed July 31, 2007.

**A) A TRIAL JUDGE WHO ELECTS NOT TO SUMMARILY PUNISH AN ATTORNEY FOR DIRECT CONTEMPT, PURSUANT TO MD. RULE 15-203, AND INSTEAD ISSUES A SHOW CAUSE ORDER AND ASSIGNS A SPECIAL PROSECUTOR TO PROSECUTE THE ATTORNEY FOR CONTEMPT, PURSUANT TO MD. RULE 15-204, MAY NOT VACATE THE ORDER INITIATING CONTEMPT PROCEEDINGS AND CONVERT TO CONTEMPT PROCEEDINGS THAT ARE SUMMARY IN NATURE.**

(1) The Petitioner, an attorney, entered her appearance in a criminal matter. At trial, the Petitioner did not appear. The Trial Judge issued a contempt show cause order for the Petitioner. One month later, a show cause hearing was held in which she was found in direct criminal contempt of court, fined her \$2,500.00, placed her on two (2) years of supervised probation, and ordered her to attend a MICPEL course on professional conduct. The Court offered Ms. King probation before judgment pursuant to the Criminal Procedure Article § 6-220. The Petitioner appealed. The Trial Court was reversed.

14. *Forbes v. State*, 175 Md. App. 630, 931 A.2d 528 (2007). Murphy, C.J. Filed September 7, 2007.

**A) PROSECUTOR CANNOT CROSS EXAMINE A DEFENDANT ABOUT ANYTHING HE SAID OR DID NOT SAY TO HIS ATTORNEY IN PRESENCE OF THE JURY.**

(1) A Prosecutor is prohibited from cross-examining a Defendant about anything that the Defendant said or did not say to his lawyer, unless (1) the Prosecutor expressly requested the Trial Judge's permission to do so, and (2) after inquiring into all of the surrounding facts and circumstances, the Trial Judge has expressly identified the permissible and prohibited areas of inquiry; in a jury trial, both the Prosecutor's request and inquiry must take place out of the presence of the jury.

(2) The Court of Special Appeals found that the Defendant was prejudiced when the Prosecutor questioned the Defendant on cross-examination, whether the Defendant, during attorney-client communications with his attorney, confessed to the robbery and asked his counsel to call a witness who would give false testimony. Judgment was vacated and the case was remanded.

15. *Culver v. Ins. Comm’r*, 175 Md. App. 684, 931 A.2d 537 (2007). Salmon, J. Filed September 7, 2007.

**A) COLLATERAL ESTOPPEL PREVENTS A DISBARRED ATTORNEY FROM RELITIGATING THE FACTS OF HIS DISBARMENT IN A CASE TO REVOKE HIS INSURANCE PRODUCER’S LICENSE.**

(1) An attorney, who had previously been disbarred, did not inform Insurance Commission of disbarment.

(2) Maryland Insurance Administration was authorized to revoke the attorney's insurance producer's license based on his conduct that led to disbarment.

16. *Barrie Sch. v. Patch*, 401 Md. 497, 933 A.2d 382 (2007). Filed October 5, 2007.

**A) PARENTS LIABLE FOR FULL TUITION AFTER UNTIMELY WITHDRAWAL OF STUDENT UNDER ENROLLMENT CONTRACT.**

(1) Parents signed school enrolment contract to pay \$1,000 deposit and \$13,490 to enroll child. Parent had until 5/31 to cancel contract and get the deposit back. 44 days late on 7/14 the parents tried to cancel the contract. The school sued and obtained judgment on the liquidated damage amount.

(2) A clause purporting to provide liquidated damages will be deemed invalid as a penalty where the amount agreed upon is “grossly excessive and out of all proportion” to the damages that might reasonably have been expected to result from such breach of the contract. Here, the amount was valid.

(3) The school is not required to mitigate damages.

17. *Bland v. Hammond*, 177 Md. App. 340, 935 A.2d 457 (2007). Filed November 6, 2007.

**A) ATTORNEY MALPRACTICE DOES NOT CONSTITUTE EXTRINSIC FRAUD FOR THE PURPOSE OF SETTING ASIDE DEFAULT JUDGMENT IN AUTO TORT CASE.**

(1) Rear end collision suit filed two days prior to statute of limitations and attorney never filed discovery responses and case was dismissed without prejudice. Plaintiffs found out some time later that the case was dismissed and that the attorney was disbarred. They sought to set aside judgment based on the

attorney's fraud in not notifying them of the problems or the dismissal.

(2) Only extrinsic fraud will justify the reopening of an enrolled judgment; fraud which is intrinsic to the trial itself will not suffice.

(3) The case *sub judice* was clearly distinguishable from the few instances in Maryland where extrinsic fraud has been found to support the vacating of an enrolled judgment. Appellant made no allegation that the opposing party deliberately misled her about the status of her lawsuit. Appellate Court found nothing in the facts before them-and before the Circuit Court-to suggest that Appellant's attorney connived to defeat her claim or colluded with opposing counsel.

18. *Hudson v. Hous. Auth. of Baltimore City*, 402 Md. 18, 935 A.2d 395 (2007). Harrell, J. Filed November 7, 2007.

#### **A) COURT OF APPEALS ALLOWED APPEAL FROM DISCOVERY ISSUE.**

(1) Court of Appeals may discuss the merits of a case improperly before it where necessary or desirable to guide the Trial Court on remand or avoid another appeal.

(2) Landlord-Tenant Actions – Md. Code Ann., Real Prop. § 8-402.1, Breach of Lease Action – In Breach of Lease Actions, Md. Rule 3-711 does not exclude the limited discovery permitted in District Court cases under Md. Rule 3-401.

19. *Chambers v. Cardinal*, 177 Md. App. 418, 935 A.2d 502 (2007), Hollander, J. Filed November 8, 2007.

#### **A) A JUDGMENT ATTACHES UPON PROPER ENTRY AS A LIEN.**

(1) In the case of joint tenancy or tenancy by the entireties, the time at which a judgment is entered may differ from the time at which the judgment attaches to the debtor's real property. At the time judgment is entered, a judgment debtor does not hold the kind of property to which a judgment lien can attach. The debtor only comes to hold such a property interest when that interest is created by the act of executing on the judgment, which severs the joint tenancy.

(2) Husband and Wife divorced in 2003. After several months (during which Husband remarried) Wife obtained judgment against

Husband in the amount of \$21,950. Husband and his new Wife owned the subject property as joint tenants.

(3) In October 2004 husband and new Wife sold the subject property.

(4) In June 2006, Wife (Appellant) sued the purchasers of the subject property, seeking a declaratory judgment that she had a valid and enforceable lien on the property.

(5) Because Appellant did not execute the judgment before the property was purchased by the Appellees, her former Husband and his Wife's joint tenancy was never severed, and so the judgment could not attach.

(6) In the leading case of *Eder v. Rothamel*, the Court made clear that "a judgment lien, without levy or execution on the judgment, does not sever a joint tenancy."

(7) "[T]he mere entry of a judgment against one of the joint tenants does not destroy any of the four unities ... and hence, until there is an *execution* on the judgment which will destroy one or more of these unities, there is no severance of the joint tenancy."

(8) The joint tenants hold "*per my et per tout*" and the nature of the tenancy is that a judgment lien cannot attach to the estate in joint tenancy until after severance and the creation of a separate estate in title and possession to which a judgment lien can *then* attach.

(9) The general rule is that a judgment attaches upon proper entry as a lien on the debtor's real property. In the case of joint tenancy (and the related form of marital common ownership, tenancy by the entirety), the time at which a judgment is entered may differ from the time at which the judgment attaches to the debtor's real property. At the time judgment is entered, a judgment debtor who is a joint tenant does not hold the kind of property to which a judgment lien can attach, i.e. a separately held equitable interest in real property. The debtor only comes to hold such a property interest when that interest is created by the act of executing on the judgment, which severs the joint tenancy.

(10) Appellant was awarded a judgment in August 2003. At any time between that point and October 2004, when the Husband contracted to sell the Property, Appellant could have executed on the judgment, thereby severing the joint tenancy, liquidating the property, and satisfying her judgment from the proceeds. Instead, Appellant sat on her rights until June 2006, over a year after the

property had been fully conveyed to Appellees. By that time, Appellant's rights had withered away.

20. *Taylor v. Mandel*, 402 Md. 109, 935 A.2d 671 (2007). Battaglia, J. Filed November 9, 2007.

#### **A) GRANDPARENTS ARE NOT LIABLE FOR GUARDIAN AD LITEM FEES**

(1) Sections 1-202 and 12-103 only authorize the Court to assess guardian *ad litem* fees to a minor's parents, not grandparents or other guardians.

(2) Appellant did preserve her right to appeal the guardian *ad litem* fees because the liability was not fixed at the time she entered her appeal.

(3) Appellant did not waive her rights to challenge the guardian *ad litem* fees because she requested the appointment of the guardian *ad litem* and deposited \$1,000 into her attorney's escrow account to be used for that purpose. Waiver of right must be intentional and the waiving party must unequivocally demonstrate that waiver is intended.

(4) No implied consent – at the time Appellant requested the appointment of the guardian *ad litem*, there was no hearing regarding fees; the original order appointing Appellee as the guardian *ad litem* made no mention of fees and stated that the \$1,000 Appellant had deposited into her attorney's escrow account would be held until the court decided the parties' respective share of responsibility for the fees.

21. *Suter v. Stuckey*, 402 Md. 211, 935 A.2d 731 (2007). Raker, J. Filed November 14, 2007.

#### **A) RIGHT TO APPEAL LOST BY CONSENTING TO A PROTECTIVE ORDER.**

(1) Md. Code Ann., Fam. Law § 4-507 provides for a right of appeal from the entry of a protective order from the District Court to the Circuit Court and the appeal is heard *de novo*.

(2) Appellee filed for a protective order against her fiancé. The District Court for Prince George's County granted the Temporary Protective Order. Five days later, the Court entered a Final Protective Order based on consent.

(3) Appellant then tried to appeal the Final Protective Order. Court affirmed that Lower Court's refusal to hear the appeal, saying that no right to appeal arises from a consent order.

(4) Absent fraud or coercion, a party may not appeal a protective order entered by consent pursuant to the Domestic Violence Protection Act.

22. *Figgins v. Cochrane*, 403 Md. 392, 942 A.2d 736 (2008). Battaglia, J. Filed February 15, 2008.

**A) CONSTRUCTIVE TRUST IMPOSED FOR ESTATE TO SET ASIDE A TRANSFER OF FATHER'S HOME TO HIS DAUGHTER SHORTLY PRIOR TO HIS DEATH, UNDER A GENERAL POWER OF ATTORNEY.**

(1) Confidential relationship existed between Daughter and Father that gave rise to a presumption that the transfer of Father's house to Daughter was the result of Daughter's undue influence.

(2) Daughter was not entitled to convey Father's property to herself for no consideration using power of attorney.

**B) HEARSAY STATEMENTS TO FATHER'S ATTORNEY OFFERED TO SHOW FATHER'S INTENT NOT ADMISSIBLE**

(1) Father's alleged statement to his attorney regarding his future intention to give his Daughter his house was not admissible under the state of mind hearsay exception.

23. *Bereano v. State Ethics Comm'n*, 403 Md. 716, 944 A.2d 538 (2008), Harrell, J. Filed March 19, 2008.

**A) STATE ETHICS COMMISSION IMPERMISSIBLY APPLIED MISSING WITNESS RULE.**

(1) State Ethics Commission impermissibly applied missing witness rule to draw adverse inference where there was no record of hostility between the witness and the Commission, no finding of fact regarding the unavailability of the witness to the Commission or its staff attorney, and the missing witness rule was not mentioned or argued on the record prior to the Commission's final decision.

24. *Khalifa v. Shannon*, 404 Md. 107, 945 A.2d 1244 (2008). Battaglia, J. Filed April 9, 2008.

**A) MARYLAND DOES RECOGNIZE THE TORT OF INTENTIONAL INTERFERENCE WITH PARENT-CHILD RELATIONS, AS PREVIOUSLY ESTABLISHED IN *HIXON V. BUCHBERGER*.**

(1) A parent who has both legal custody and visitation rights under court order at the time of the abduction and harboring of the minor children, does not need to plead or prove that he has suffered an economic loss as a result of the abduction and harboring.

(2) The interference must be “major and substantial.”

(3) Mother, who was the non-custodial parent, took the parties’ two minor sons to Egypt, without the knowledge and consent of their Father, and refused to return them.

(4) Court rejected Appellant’s argument that her taking the kids to Egypt gave rise to no cause of action recognized in Maryland.

(5) Court rejected Appellant’s argument that Appellee must establish economic loss as a result of the children’s absence.

25. *Sigurdsson v. Nodeen*, 180 Md. App. 326, 950 A.2d 848 (2008). Eyler, J. Filed June 26, 2008.

**A) IT WAS LEGAL ERROR, THEREFORE, FOR THE COURT TO TRANSFER THE CASE TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, EITHER ON THE BASIS OF IMPROPER VENUE, OR FORUM *INCONVENIENS***

(1) After paternal aunt and uncle were granted custody of child, whose father had died, Mother sought modification of child custody in the Calvert County where she had moved to. Aunt and uncle filed a preliminary motion to dismiss or to transfer to Anne Arundel County where the original custody case was heard.

(2) When Mother filed her modification complaint in June 2007, the residential status of the parties had changed. Mother no longer was living in Anne Arundel County. Rather, she was residing in Calvert County. The child was in the custody of the Nodeens, by court order, and was residing in northern Virginia

(3) Although the Nodeens are correct that a Circuit Court has broad discretion in deciding whether to transfer a case to another

Circuit Court, on venue grounds, that discretion must be exercised in accordance with established legal principles.

26. *State v. Coates*, 405 Md. 131, 950 A.2d 114 (2008). Greene, J. Filed June 13, 2008.

**A) COURT ERRED IN ADMITTING STATEMENTS MADE BY CHILD SEXUAL ABUSE VICTIM TO A PEDIATRIC NURSE PRACTITIONER, TRAINED IN SEXUAL ASSAULT EXAMINATION.**

(1) Court erred in admitting statements made by child sexual abuse victim to a pediatric nurse practitioner, trained in sexual assault examination, because the child's statements, made 14 months after the alleged abuse, at a time when the child was not experiencing any medical problems, would not have been understood by the child as statements made a medical purpose.

(2) Some of the nurse's questions were not pathologically germane, as they were not relevant to a medical concern and were in the nature of an interrogation.

(3) Where child was interviewed 14 months after the alleged abuse occurred, the child would not have understood those statements to be for the purpose of medical treatment and diagnosis.

(4) Nurse's questions regarding the identity of the alleged abuser were not germane to the medical treatment.

27. *Rivera v. State*, \_\_\_ Md. App. \_\_\_, \_\_\_ A.2d \_\_\_ (2008). WL 261121. Rodowsky, J., Retired, Specially Assigned. Filed July 3, 2008.

**A) PETITION FOR *CORAM NOBIS* RELIEF, CHALLENGING THE VALIDITY OF GUILTY PLEA DENIED.**

(1) The Circuit Court denied petition. The Defendant, a Peruvian citizen, pled guilty to charge of wilfully causing a condition that renders a child a child in need of assistance (CINA), received a suspended sentence, and was placed on supervised probation for two years, subject to certain conditions. Defendant thereafter filed motion to reconsider sentence and following hearing on motion, the Court struck finding of guilt and placed Defendant on supervised probation before judgment (PBJ) for an additional seven months. It was understood at the time that the plea was entered into to hopefully avoid the Defendant's deportation. After, Defendant was subsequently arrested and held for deportation. This was not sufficient reason to vacate the guilty plea.