

# COURT OF APPEALS CASES & DECISIONS UPDATE



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## About This Update

The Department of Legislative Services, Office of Policy Analysis, reviews the opinions issued by the Court of Appeals of Maryland and reports on those decisions of significance to the General Assembly. The project is led by Douglas R. Nestor. Elizabeth Bayly, Jennifer K. Botts, Amy A. Devadas, April M. Morton, Lauren C. Nestor, and Jennifer L. Young assisted in the preparation of this edition. Warren G. Deschenaux provided editorial direction.

In this edition, the following cases are summarized:

- *Conover v. Conover*, No. 79, Sept. Term 2015: A *de facto* parent has standing to contest custody and visitation and does not need to demonstrate parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis. The previous decision of the Court of Appeals in *Janice M. v. Margaret K.*, (*Janice M.*) 404 Md. 661 (2008), which rejected the recognition of *de facto* parenthood, is overruled.
- *Jackson v. Sollie*, No. 62 (Sept. Term 2015) (Opinion filed July 19, 2016): A trial court is required to consider the parties' actual or anticipated Social Security benefits as a relevant factor in deciding whether to grant a monetary award to achieve an equitable distribution of marital property.
- *Washington v. State*, No. 5 (Sept. Term 2016) (Opinion filed Nov. 1, 2016): Conspiracy to commit murder is not an offense for which a defendant may file a petition for post-conviction DNA testing under § 8-201 of the Criminal Procedure Article and this limit on standing to file a petition does not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution or Article 24 of the Maryland Declaration of Rights.
- *Lockett v. Blue Ocean Bristol*, 446 Md. 397 (2016): For purposes of Maryland's anti-retaliation statute (RP § 8-208.1), the term "rent" denotes periodic charges for the use or occupancy of a rental unit and does not include various other payments that a tenant may owe his or her landlord, even if the tenant's lease characterizes such payments as "deemed rent" or "additional rent."

- *Kiriakos v. Phillips and Dankos, et al. v. Stapf*, 448 Md. 440 (2016): An adult who violates the criminal prohibition on knowingly and willfully allowing an underage person to consume alcohol on the adult's property may be held civilly liable in negligence for the injuries of the underage drinker or the injuries of another person caused by the underage drinker.
- *Jamison v. State*, No. 6 (Sept. Term 2016) (Opinion filed November 15, 2016): A person who has entered an *Alford* plea, where the defendant asserts his or her innocence, but acknowledges that the State's evidence would likely result in a conviction, is not entitled to post-conviction DNA testing under § 8-201 of the Criminal Procedure Article.

## De Facto Parent – Standing

**Case:** *Conover v. Conover*, 450 Md. 51 (2016).

**Decision:** A *de facto* parent has standing to contest custody and visitation and does not need to demonstrate parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis. The previous decision of the Court of Appeals in *Janice M. v. Margaret K.*, (*Janice M.*) 404 Md. 661 (2008), which rejected the recognition of *de facto* parenthood, is overruled.

**Background and Summary:** While the primary goal in custody and visitation cases is to serve the best interests of the child, parents have a fundamental right, protected by the Fourteenth Amendment of the U.S. Constitution, to direct and govern the care, custody, and control of their child. Therefore, as the Court of Appeals held in *McDermott v. Dougherty*, 385 Md. 320 (2005), the custodial rights of parents are generally superior to those of anyone else and a third party seeking custody or visitation must first show parental unfitness or the existence of extraordinary circumstances before a trial court can apply the best interests of the child standard.

In this case, Michelle and Brittany Conover were a same-sex couple who had agreed that in order to have a child, Brittany would be artificially inseminated using an anonymous donor arranged through the Shady Grove Fertility Clinic. The child, Jaxon, was born in April 2010. Brittany was listed on the birth certificate as the mother and no one was identified as the father. The parties married in the District of Columbia when Jaxon was approximately six months old and separated one year later. Michelle visited with Jaxon and had overnight and weekend access beginning with the date of separation through July 2012, at which point Brittany prevented continued visitation. Brittany's complaint for absolute divorce stated that there were no children from the marriage. Michelle's answer and subsequent counter-complaint requested visitation rights with Jaxon, but not custody.

In a hearing in the circuit court for Washington County, Brittany argued that Michelle had no standing because she was not listed as a parent on the birth certificate and could not assert visitation rights as a third party. While the circuit court noted in a written opinion that Michelle was Jaxon's *de facto* parent, it relied on *Janice M.* and concluded that Michelle had no parental standing since Maryland does not recognize *de facto* parent status. In *Janice M.*, *de facto* parenthood was explained to be a phrase generally used to describe a parent "in fact" who claims custody or visitation rights based upon the party's relationship with a nonbiological, nonadopted child. The circuit court also determined that there was no third party standing to contest custody or visitation, as there had been no showing that Brittany was an unfit parent or that exceptional circumstances existed. The Court of Special Appeals affirmed the decision of the circuit court and the Court of Appeals granted Michelle's petition for a *writ certiorari*, in part to determine if the State should reconsider *Janice M.* and recognize the doctrine of *de facto* parenthood.

In *Janice M.*, which predated Maryland's authorization of same-sex marriages, one member of a same-sex relationship (Margaret) sought custody and/or visitation with the child adopted by the other member of the relationship (Janice). After concluding that Margaret was a *de facto* parent, the circuit court for Baltimore County relied on a prior decision of the Court of Special Appeals,

*S.F. v. M.D.*, 132 Md. App. 99 (2000), which held *de facto* parental status as sufficient to confer standing to seek visitation without first proving parental unfitness or exceptional circumstances. After granting a *writ of certiorari*, the Court of Appeals held that *de facto* parent status was not a recognized legal status in the State and that *de facto* parents seeking custody or visitation should not be treated differently from other third parties who must first show parental unfitness or exceptional circumstances.

In this case, although the court acknowledged the importance of *stare decisis*, or adhering to legal precedent, it also noted that it is appropriate to depart from *stare decisis* when a prior decision is clearly wrong and contrary to established principles or when the precedent has been superseded by significant changes in the law or facts. The court found both of these grounds applicable in this case. For example, the court noted that *Janice M.* relied on prior decisions involving the rights of “pure third parties” instead of third parties who were in a parental role and “seemingly ignored the bond that the child develops with a *de facto* parent.” The *Janice M.* decision also relied on a U.S. Supreme Court decision, *Troxel v. Granville (Troxel)*, 530 U.S. 57 (2000), which held a Washington State statute authorizing a court to order visitation rights to any person when visitation was in the best interest of the child to be an unconstitutional infringement on the parent’s rights under the Fourteenth Amendment. However, the court in the present case noted that the *Troxel* decision was extremely narrow as the statute at issue was found to be unconstitutional only as applied by the lower courts. It also noted that several state courts of last resort have expressly held that the *Troxel* decision does not prevent the recognition of *de facto* parent status and that no case has interpreted *Troxel* in the same manner as Maryland.

The court next reviewed the four-factor test to establish *de facto* parent status that was established by the Wisconsin Supreme Court in *H.S.H. – K.*, 533 N.W.2d 419 (Wisc. 1995) and adopted by the Court of Special Appeals in *S.F. v. M.D.* Under the test, a third party seeking to establish *de facto* parent status has the burden of proving (1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed parental obligations by taking significant responsibility for the child’s care, education, and development, including contributing towards the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship that is parental in nature.

The court observed in this case that these factors set a high threshold for establishing *de facto* parent status. Because this test would prevent *de facto* parent status from being achieved without knowing participation from the biological parent, a concern that recognizing a *de facto* parent would interfere with the relationship between legal parents and their children is largely eliminated. Accordingly, the court also adopted the multi-part test. The court further observed that although prior decisions recognized that children need good, stable relationships with parental figures, *Janice M.*’s rejection of *de facto* status disregards this concept. The court therefore concluded that the precedent within *Janice M.* was clearly wrong and contrary to established principles.

The court then discussed how evolving events and the passage of time have rendered *Janice M.* obsolete. Specifically, the court observed that *Janice M.* “fails to effectively address problems

typical of divorce by same-sex married couples,” therefore, the State’s recognition of same-sex marriage in 2012 diminished the precedential value of *Janice M.* The court further discussed how family law scholarship and academic literature are supportive of the notion that parenthood can be defined by a functional relationship as well as biology or legal status and how the *Janice M.* decision “deviates sharply from the decisional and statutory law of other jurisdictions.” Finally, the court found it relevant that Maryland’s statutory law is silent on the concept of *de facto* parenthood and rejected Brittany’s argument that any such determination should be left to the General Assembly. The court noted that the State’s statutory scheme regarding custody and visitation is not as comprehensive as in other states and that factors for consideration in determining whether a party’s access to a child is in that child’s best interest are found not in statute but in case law.

A concurring opinion agreed with the recognition of *de facto* parenthood, but raised concerns with adopting the four-factor test as set forth above. Under the test, only one parent needs to consent to and foster a child’s relationship with the potential *de facto* parent. The concurring opinion noted that while appropriate in cases such as this one where there is only one biological or adoptive parent, for situations in which there are two existing parents, permitting a single parent to consent to and foster a *de facto* relationship may result in the other parent having no knowledge that such a relationship has been created. The concurring opinion further stated that although the majority opinion cautioned that multiple *de facto* parents should not be created, it did not include protections to ensure that families are not overburdened by the custody and visitation demands of multiple parents. The concurring opinion set forth additional steps that could be followed in cases where there are two existing parents, including requiring the trial court to ascertain whether the second parent consented to the establishment of a *de facto* parental relationship.

## **Family Law – Divorce – Marital Property**

**Case:** *Jackson v. Sollie*, 449 Md. 165 (2016).

**Decision:** A trial court is required to consider the parties’ actual or anticipated Social Security benefits as a relevant factor in deciding whether to grant a monetary award to achieve an equitable distribution of marital property.

**Background and Summary:** Milton Jackson (“Jackson”) filed for an absolute divorce from his spouse, Gayle Jackson (“Sollie”). Although the parties agreed to divide other assets equitably, they were unable to reach agreement concerning the disposition of their respective pension plans. As an older federal employee, Jackson was a participant in the Civil Service Retirement System (CSRS). On retirement, he would be entitled to a pension, but only limited Social Security benefits. On the other hand, Sollie participated in the Maryland State Retirement Service, and would be entitled to a pension as well as full Social Security benefits. Jackson acknowledged that, under Maryland law, retirement plans are considered marital property (*i.e.*, property, however titled, acquired by one or both parties during the marriage) subject to division in a divorce proceeding, and Social Security benefits are considered non-marital property, not subject to division. However, Jackson argued before the trial court that the marital portion of his CSRS pension should be reduced in order to reflect an offset for an implicit embedded Social Security

element representing the amount of Social Security benefits he would have been entitled to had he not participated in CSRS. By accounting for the offset, Sollie's share of the marital portion of the CSRS pension would be reduced, which, he argued, would be a more equitable distribution of the marital assets. The circuit court for Howard County rejected Jackson's offset argument and ordered the retirement plans to be divided so that each party would receive 50% of the marital share of the other party's retirement plan. Jackson filed both a notice of appeal in the Court of Special Appeals and a petition for a *writ of certiorari* in the Court of Appeals, which the Court of Appeals granted. At issue before the court was the question of whether a court is permitted to consider whether Social Security benefits should be offset against the marital portion of a CSRS pension upon dividing assets as a result of a divorce.

After examining federal law and the Supreme Court's interpretation of the Social Security Act, the court held that in a divorce proceeding, a trial judge is preempted by federal law from dividing Social Security benefits (including its hypothetical value) directly or by way of an indirect offset when determining the equitable distribution of marital property. However, the court stated that the preemption doctrine does not apply to the general consideration of Social Security benefits in determining whether to make a monetary award.

Under Maryland law, a court generally does not transfer ownership of any particular piece of property. Instead, the court employs the mechanism of the monetary award to adjust the rights and equities of the parties concerning marital property. The court is required to undertake a three-step process when determining whether to order a monetary award based on marital property. First, the court must determine which property is marital property subject to allocation. Next, the court must determine the value of the marital property. Finally, under § 8-205(b) of the Family Law Article, the court must consider a list of various factors before fashioning a monetary award (*e.g.*, the contributions of each party to the well-being of the family, the economic circumstances of the parties, the circumstances that contributed to the estrangement of the parties, the duration of the marriage, the age of the parties, *etc*). The court held that a trial court must consider a party's actual or anticipated Social Security benefits as a relevant factor under § 8-205(b) of the Family Law Article when determining whether to grant a monetary award to adjust the equities and rights of the parties concerning marital property, even though those benefits are classified as non-marital property.

In reaching its decision, the court stated that, similar to the consideration of any other economic factor, consideration of a party's actual or anticipated Social Security benefits assists the court in its determination of whether to grant a monetary award and provides a clearer picture of a spouse's financial needs. However, the court noted that, after proper consideration of the statutory factors, which include "any other factor" it deems necessary to arrive at a fair and equitable award, the ultimate decision to grant a monetary award and the amount of such an award are within the discretion of the trial court. Accordingly, the court vacated the judgement of the circuit court and remanded the case for the circuit court to take into consideration the parties' anticipated Social Security benefits.

## **Criminal Procedure – Conspiracy to Commit Murder – Post-conviction DNA Testing**

**Case:** *Washington v. State*, No. 5 (Sept. Term 2016) (Opinion filed Nov. 1, 2016).

**Decision:** Conspiracy to commit murder is not an offense for which a defendant may file a petition for post-conviction DNA testing under § 8-201 of the Criminal Procedure Article and this limit on standing to file a petition does not violate the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution or Article 24 of the Maryland Declaration of Rights.

**Background and Summary:** Section 8-201 of the Criminal Procedure Article grants certain individuals the right to file a petition requesting post-conviction DNA testing of evidence. The original statute limited the right to file a petition to an individual convicted of (1) first-degree murder; (2) second-degree murder; (3) manslaughter; (4) rape in the first and second degree; or (5) sex offense in the first or second degree. Chapter 369 of 2015 expanded the list of eligible offenses to include a crime of violence as defined in § 14-101 of the Criminal Law Article.

Section § 14-101 of the Criminal Law Article defines “crime of violence” by enumerating offenses. Specifically, §§ 14-101(a)(7) and (17) include murder and attempted murder, respectively, as crimes of violence. The statute does not include conspiracy as a crime of violence.

On March 20, 2007, the victim, Ricardo Paige, was found dead in Baltimore, Maryland. Paige had been shot six times. Police recovered a bloody broom and dustpan from the scene of the murder. The broom and dustpan tested positive for blood but were not tested for DNA. The appellant, Trendon Washington, was charged with murder in the first degree, murder in the second degree, conspiracy to commit murder, and other related offenses. In 2009, a jury convicted the appellant only of conspiracy to commit murder.

In August 2015, the appellant filed a petition, *pro se*, in the Circuit Court for Baltimore City under § 8-201 of the Criminal Procedure Article requesting DNA testing of the broom and dustpan recovered from the scene. The circuit court dismissed the appellant’s petition without a hearing, holding that the appellant did not have standing to file the petition because the appellant was not convicted of a crime of violence under § 14-101 of the Criminal Law Article.

The appellant filed a direct appeal to the court of appeals where he argued that (1) an individual convicted of conspiracy to commit murder is eligible to file a petition under § 8-201 in the context of the larger statutory scheme and purpose; (2) procedural due process under the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights guarantees an individual convicted of conspiracy to commit murder access to post-conviction DNA testing; and (3) the post-conviction DNA statute violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights by permitting an individual convicted of first-degree murder and attempted first-degree murder to file a petition but excluding an individual convicted of conspiracy to commit murder who has been sentenced to life.

In the alternative, the State argued that a petition under § 8-201 of the Criminal Procedure Article is limited to those offenses specifically enumerated in the statute and because conspiracy to murder is not included, the appellant is not entitled to file a petition for post-conviction DNA testing.

The court of appeals affirmed the judgment of the circuit court. The court of appeals first analyzed the language of § 8-201 noting that the examination is conducted “within the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute.” The court looked to the construction of § 14-101 of the Criminal Law Article and other statutes that reference § 14-101 to determine legislative intent.

Conspiracy was never included in the list of offenses in § 14-101 of the Criminal Law Article. However attempt, one type of inchoate crime, is included in the list. Further, Maryland’s witness-tampering statute in § 9-305 of the Criminal Law Article references “the commission of a crime of violence as defined in § 14-101 of this article, or a conspiracy or solicitation to commit such a crime” and § 10-407 of the courts article provides an exception to wiretapping if, “All parties to the communication were co-conspirators in a crime of violence as defined in § 14-101.” The court found that had the General Assembly intended to include conspiracy in the list of offenses for which a petition for post-conviction DNA is available, conspiracy would have been specifically included in the statute.

The court then analyzed the appellant’s procedural due process rights under both the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights. The court turned to the Supreme Court’s determination that the State has flexibility in deciding procedures for post-conviction relief and goes on to consider how other states’ post-conviction relief statutes have held up to due process challenges. After comparing Maryland’s post-conviction statutes to those in other states, the Court of Appeals concluded that the post-conviction statutory scheme is a policy determination made by the General Assembly that is constitutionally adequate to protect the appellant’s limited liberty interest in post-conviction relief.

Finally, the court addressed the appellant’s argument that the State’s post-conviction DNA testing statute violates the Equal Protection Clause under the Fourteenth Amendment and Article 24. Applying a rational basis standard, the court noted that the purpose of the law is to give access to DNA testing when DNA evidence is likely to remedy a wrongful conviction. Because conspiracy to commit murder does not require the defendant’s presence at the scene of the crime, including conspiracy in the list of offenses eligible for petition would not necessarily further the purpose of the law. As a result, the court found that the State did not violate the Equal Protection Clause when it distinguishes between an individual convicted of murder or attempt murder and an individual convicted of conspiracy to commit murder.

## **Landlord and Tenant Law – Anti-retaliation Statute – Meaning of “Rent”**

**Case:** *Lockett v. Blue Ocean Bristol*, 446 Md. 397 (2016).

**Decision:** For purposes of Maryland’s anti-retaliation statute, § 8-208.1 of the Real Property Article, the term “rent” denotes periodic charges for the use or occupancy of a rental unit and does



not include various other payments that a tenant may owe his or her landlord, even if the tenant's lease characterizes such payments as "deemed rent" or "additional rent."

**Background and Summary:** Maryland's anti-retaliation statute, § 8-208.1 of the Real Property Article, applies only to residential leases. The statute prohibits a landlord from taking certain adverse actions against a tenant for reasons that the law deems improper, such as making a complaint against a landlord or participating in a tenants' organization. Adverse actions covered by the statute include (1) bringing or threatening to bring an action for possession against a tenant; (2) arbitrarily increasing the rent or decreasing the services to which a tenant has been entitled; or (3) terminating a periodic tenancy. If a court determines that a landlord has committed a retaliatory action against a tenant, the court may award the tenant damages in an amount not exceeding the equivalent of three months' rent, reasonable attorneys' fees, and court costs. However, this remedy is only available if the tenant is "current on the rent due and owing to the landlord at the time of the alleged retaliatory action," unless the tenant is withholding rent for various legal reasons.

In *Lockett v. Blue Ocean Bristol*, 446 Md. 397 (2016), the Court of Appeals considered the meaning of the term "rent" for the purpose of determining whether a tenant is entitled to relief under the State's anti-retaliation statute. The petitioner, Felicia Lockett, was a tenant of the Bristol House apartment building in Baltimore City. In 2014, Ms. Lockett's landlord, respondent Blue Ocean Bristol, LLC ("Blue Ocean") decided not to renew her lease. Blue Ocean subsequently filed a tenant holding over action against Ms. Lockett, who refused to vacate the apartment. Ms. Lockett defended on the basis that the non-renewal and tenant holding over action were in retaliation for her participation in a tenants' organization.

The Circuit Court for Baltimore City ultimately ruled in Ms. Lockett's favor on the question of retaliation. However, the circuit court awarded her damages for only one of two alleged acts of retaliation, concluding that Ms. Lockett was not "current on the rent" as required by the anti-retaliation statute at the time of Blue Ocean's filing the tenant holding over action. Although Ms. Lockett had paid the fixed monthly amount specified as the "rent" under one part of her lease, she was in an ongoing dispute over utility charges and other fees allegedly owed to Blue Ocean and described in another part of her lease as "deemed rent." Consequently, the circuit court awarded damages only for the first alleged act of retaliation – Blue Ocean's failure to renew Ms. Lockett's lease. Ms. Lockett appealed, and the Court of Appeals granted Ms. Lockett's *certiorari* request to address the relevance of the disputed charges to her claims for relief under the anti-retaliation statute. Specifically, the Court of Appeals set out to determine whether the disputed charges should be considered "rent" within the meaning of the statute's requirement that a tenant be "current on the rent due and owing to the landlord at the time of the alleged retaliatory action."

The Court of Appeals began its analysis by rejecting Blue Ocean's reliance on two prior decisions interpreting the meaning of "rent" in the context of commercial leases. In *University Plaza Shopping Ctr., Inc. v. Garcia*, 279 Md. 61, 67 (1977), the court held that "charges which may be definitely ascertained, paid by the tenant, going to [the tenant's] use, possession, and enjoyment of rental commercial premises, are rent if such was the intention of the parties." Similarly, in *Shum v. Guadreau*, 317 Md. 49, 62 (1989), the court stated that "at least under some circumstances the parties intention could determine what was rent." However, the court pointed out that these

two decisions were explicitly limited to commercial leases, which are more likely to be the product of an arms-length negotiation. The court noted that parties to a residential lease are less likely to actually negotiate the definition of “rent” since most residential leases are offered on a take-it or leave-it basis. Deferring to a residential lease’s definition of “rent,” the court argued, would incentivize landlords to characterize all possible debts as “rent” so that it would be more difficult for tenants to obtain relief under the anti-retaliation statute. The court noted, moreover, that Ms. Lockett’s lease did not “speak with one voice” on the subject of rent. One section referred to an annual “rent” for occupancy of the premises, payable to Blue Ocean in equal monthly amounts. A later section, entitled “Definition of Rent” stated that “all payments” owed by the tenant were to be considered “deemed rent.” The court concluded that, even if it was to defer to the definition of “rent” used in Ms. Lockett’s lease, it was not clear what that definition should be.

Because the term “rent” is not defined in statute, the court next considered the ordinary meaning of “rent” as well as how the word is used throughout the Real Property Article. According to both Merriam-Webster’s Collegiate Dictionary and Black’s Law Dictionary, “rent” ordinarily means a periodic sum paid for the use or occupancy of property. The court cited numerous examples from the Real Property Article where the term “rent” appears to be used in this way. For example, in addition to the provision of the anti-retaliation statute requiring a tenant to be “current on the rent” in order to obtain relief under the statute, the term “rent” also appears in provisions describing the damages that may be awarded in an anti-retaliation action. Such damages may “not exceed the equivalent of three months rent.” The court reasoned that these provisions assume that “rent” is a fixed and easily quantified sum, which would not be the case if “rent” was read to include variable charges and fees like those Ms. Lockett owed to Blue Ocean. The court noted that other references to “rent” in the Real Property Article require “similar clarity and definiteness.” For example, § 8-203(b) of the Real Property Article limits security deposits to two months’ rent, while § 8-212.1 of the Real Property Article limits the liability of certain military personnel to 30 days’ rent under certain circumstances.

Turning finally to the consideration of the anti-retaliation statute’s purpose, the court concluded that the interpretation of “rent” advocated by Blue Ocean would undermine the statute’s remedial purpose. Quoting *Pak v. Hoang*, 378 Md. 315, 326 (2003), the court stated “[O]nce we have determined that a statute is remedial in nature ... it must be liberally construed ... in order to effectuate [its] broad remedial purpose.” The goal of Maryland’s anti-retaliation statute is to provide remedies not available at common law to tenants who are subjected to specified retaliatory acts. Thus, the court reasoned, the requirement that a tenant be “current on the rent” in order to be eligible for relief under the statute must be construed narrowly in order to be protective of tenants’ rights. The court stated, “when choosing between a broader, uncertain definition of ‘rent’ that includes more than the periodic sum and a more specific definition that includes only that amount, we will employ the more specific definition.”

Based on the ordinary meaning of the word, statutory context, the remedial purpose of the anti-retaliation statute, the court concluded that “rent,” as used in § 8-208.1, means the periodic sum owed by a residential tenant to a landlord for use or occupancy of the premises. Accordingly, the court found that Ms. Lockett was not ineligible for relief as to the second alleged act of retaliation. The court also held that Ms. Lockett was entitled to an opportunity, in accordance with Rule 2-703, to submit evidence concerning her request for attorney’s fees. The Court of Appeals

remanded the case to the circuit court for Baltimore City for further proceedings consistent with its opinion.

## **Underage Drinkers – Social Host Liability**

**Case:** *Dankos, et al. v. Stapf* and *Kiriakos v. Phillips* 448 Md. 440 (2016).

**Decision:** An adult who violates the criminal prohibition on knowingly and willfully allowing an underage person to consume alcohol on the adult's property may be held civilly liable in negligence for the injuries of the underage drinker or the injuries of another person caused by the underage drinker.

**Background and Summary:** The opinion addresses two cases that were based on similar facts and posed similar legal questions.

Section 10-117(b) of the Criminal Law Article prohibits an adult from knowingly and willfully allowing an individual younger than age 21 to possess or consume an alcoholic beverage at a residence, or within the curtilage of a residence that the adult owns or leases and in which the adult resides. The prohibition does not apply if the adult and the underage possessor/consumer of the alcoholic beverage are members of the same immediate family and the alcoholic beverage is possessed or consumed within the residence or curtilage of the adult's residence or if the adult and the underage possessor/consumer are participants in a religious ceremony.

### *Dankos, et al. v. Stapf*

On the evening of November 28, 2009, 17-year-old Steven Dankos became intoxicated at a party at Linda Stapf's house. Though Stapf arrived home during the party and informed her son Kevin that some of the attendees would have to leave, she allowed other attendees to remain at the house and continue drinking in the garage. Among the attendees were Kelsey Erdman and her 22-year-old brother, David Erdman. Stapf knew that some of the attendees were younger than age 21 and some were younger than age 18. Stapf periodically checked in on the party in the garage. At one point during the evening, Kelsey Erdman told Stapf that she was concerned that her brother would drive home while intoxicated. Stapf did not intervene in the matter. A still intoxicated Steven Dankos left the party early the next morning by riding in the bed of David Erdman's pickup truck. David Erdman, who was also intoxicated, crashed his truck shortly after leaving the party. Steven Dankos was ejected from the bed of the truck and killed. David Erdman pleaded guilty to the commission of a homicide with a motor vehicle under the influence of alcohol and received a five-year sentence with all but 18 months suspended. Stapf was charged with violating § 10-117(b), but the State eventually stetted the charge.

Nancy Dankos, Steven's mother, filed an amended complaint based on various negligence-based claims, including common law social host liability and breach of duties stemming from Maryland criminal law statutes. Stapf filed a motion to dismiss for failure to state a claim, based mainly on an argument that Dankos had failed to allege that Stapf breached a legally cognizable duty. The circuit court for Howard County granted Stapf's motion in substantial part. The Court of Special

Appeals affirmed the trial's court's decision, concluding that while Dankos accurately alleged that Stapf owed a duty to Steven under § 10-117(b), Dankos did not state a cause of action because she could not establish that Stapf's breach of that duty was the proximate cause of Steven's injuries. The Court of Special Appeals noted that (1) violation of a statute is *prima facie* evidence of negligence, not the creation of a substantive cause of action; (2) the Court of Appeals has declined to create a cause of action for social host liability; and (3) the Court of Appeals has held that a person who consumes alcohol is responsible for the person's actions, not the social host who served alcohol to the consumer and the consumption of alcohol, rather than the serving of alcohol, is the proximate cause of injury.

The Court of Appeals granted *certiorari* to determine if the Court of Special Appeals erred when it (1) determined that Stapf owed a duty of care to Dankos based on Stapf's violation of § 10-117(b) but could not establish that Stapf's breach of that duty was the proximate cause of Dankos' injuries and (2) failed to recognize a cause of action arising from the special relationship between Stapf and the youth who attended the party at her home for lack of proximate cause.

The Court of Appeals held that Stapf owed a duty of care to Dankos based on Stapf's violation of § 10-117(b) and Dankos could survive a motion to dismiss on the issue of proximate cause. In its analysis, the Court of Appeals used the Statute or Ordinance Rule, under which a plaintiff can establish that a statute or ordinance imposes a legal duty and a violation of the statute is *prima facie* evidence of negligence. The requirements of the rule are (1) the defendant violated a statute or ordinance that was designed to protect a specific class of persons; (2) the plaintiff is a member of the protected class; and (3) the violation of the statute caused the plaintiff to suffer the type of harm that the statute was designed to prevent. If a plaintiff successfully meets these requirements, the plaintiff's case has successfully met the duty and breach elements of a negligence action and the plaintiff's case may proceed to trial for a trier of fact to determine if the defendant's actions proximately caused the plaintiff's injuries.

The court determined that based on the language and legislative history of § 10-117(b), the statute was designed to protect individuals younger than age 21 from the risks of alcohol consumption, including potential physical harm, risky behavior, and impaired judgment. According to the court, Dankos successfully met the requirements of the Statute or Ordinance Rule by demonstrating that (1) § 10-117(b) was designed to protect individuals younger than age 21; (2) Dankos was a member of that protected class; and (3) Stapf's violation of the statute caused the type of harm the statute was designed to prevent because it allowed Dankos to become so intoxicated that he was unable to make a sound decision about how to leave the party, resulting in his death.

The court also found that Dankos could survive Stapf's motion to dismiss for lack of proximate cause. Stapf argued that based on the court's decision in *State for Use of Joyce v. Hatfield*, 197 Md. 249 (1951), a person's decision to drink is the proximate cause of injury. The court rejected this argument, noting that while *Hatfield* involved the actions of an intoxicated person who was underage, the decision predates the enactment of § 10-117(b). According to the court, § 10-117(b) represents a recognition by the General Assembly that individuals younger than age 21 require additional protections from the effects of alcohol consumption and carves out unique protections for underage persons against social hosts who knowingly and willfully serve alcohol. As a result, Dankos' decision to consume alcohol did not render the connection between Stapf's actions and

Dankos' death too remote to prevent Stapf's actions from being considered the proximate cause of Steven's death as a matter of law. Thus, the common law rule in *Hatfield* does not prohibit a claim of social host liability based on § 10-117(b) for injuries to an underage person on an adult's property. The court also found that Dankos met the other components of a legal analysis of proximate cause (causation in fact and legal causation). Also, because the duty imposed by § 10-117(b) requires the knowing and willful behavior of the defendant, contributory negligence is not a defense in this particular cause of action.

### *Kiriakos v. Phillips*

Manal Kiriakos sustained life-threatening injuries when a large sport utility vehicle driven by 18-year-old Shetmiyah Robinson hit her as she walked her dogs on the sidewalk at approximately 6:00 a.m. Robinson had been drinking alcohol at the home of 26-year-old Brandon Phillips during the prior afternoon and evening. Phillips knew Robinson was underage, but served him alcohol anyway. Phillips told Robinson to be cautious about what he was drinking and offered to let Robinson sleep at his home. Robinson declined and struck Kiriakos with his vehicle approximately one hour after leaving Phillips's home.

Kiriakos filed an amended complaint against multiple defendants. The sole count against Phillips was based in negligence and alleged that Phillips owed a duty to the general public not to provide alcohol or drugs to underage persons when he knew or should have known that the underage person would drive under the influence of alcohol or drugs. Phillips filed a motion for summary judgment, arguing that Maryland does not recognize social host liability for serving alcohol. The Circuit Court for Baltimore County granted Phillips motion for summary judgment, which the Court of Special Appeals affirmed.

The Court of Appeals granted *certiorari* to consider (1) whether Phillips's actions establish a *prima facie* claim of negligence under fundamental tort principles, assuming that Phillips owed a duty of care to Kiriakos and (2) whether Maryland should recognize a narrowly tailored form of social host liability when adult hosts serve copious amounts of alcohol to an underage person knowing that the underage person will drive within a short amount of time. The Court of Appeals reversed the decision of the Court of Special Appeals with instructions for that court to reverse the trial court's decision and remand the case to the trial court for further consideration.

Kiriakos contended that though Maryland has not recognized social host liability to third parties, the State established a policy of protecting the public and minors from the effects of alcohol when the General Assembly enacted § 10-117(b) of the Criminal Law Article. Phillips argued that the court's reasoning in *Warr v. JMGN Group, LLC*, 433 Md. 170 (2013) prohibits Kiriakos's cause of action, since there was no special relationship between Phillips and Kiriakos such that Phillips owed her a duty to control Robinson's actions.

The Court of Appeals distinguished its decision in *Warr* from Kiriakos's claim. In *Warr*, the court declined to recognize dram shop liability when an intoxicated patron of a tavern struck a vehicle and killed a young girl while attempting to drive home. Unlike *Warr*, which involved an individual who was of legal drinking age and a licensed tavern, this case involved an underage person who became intoxicated at an adult's home with the adult's knowledge. According to the court, the

public policy behind § 10-117(b) creates a narrow exception to impose social host liability for this type of scenario, and the knowing and willful requirement under the statute is the basis for this type of social host cause of action.

Kiriakos argued that, despite her third-party status, Phillips owed a duty to her to control Robinson's actions under the doctrine of negligent entrustment. Phillips argued that he did not owe Kiriakos a duty because he did not have a special relationship with her. The court agreed with Kiriakos, and pointed to case law in which the court applied the doctrine of negligent entrustment to determine that parents who entrusted their car to their child owed a duty to a third person injured by the child because the parents knew or should have known that their child was an incompetent driver. The court also cited somewhat similar cases in other states and the Restatement of Torts to determine that Kiriakos could maintain a cause of action against Phillips under common law tort principles based on the public policy behind § 10-117(b).

The court also determined that given the facts of the case and the public policy behind § 10-117(b), its decision is consistent with the typical factors it uses to determine whether a duty exists under common law principles – the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the plaintiff's injury, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden on the defendant and the consequences to the community of imposing a duty on the defendant, and the cost and prevalence of insurance for the risk involved.

## **Criminal Procedure – *Alford* Plea – Post-conviction DNA Testing**

**Case:** Jamison v. State, No. 6 (Sept. Term 2016) (Opinion filed Nov. 15, 2016).

**Decision:** A person who has entered an *Alford* plea, where the defendant asserts his or her innocence, but acknowledges that the State's evidence would likely result in a conviction, is not entitled to post-conviction DNA testing under § 8-201 of the Criminal Procedure Article.

**Background and Summary:** William Jamison was indicted in 1990 on 15 charges related to a sexual assault. The charges included first-degree rape, second-degree rape, kidnapping, false imprisonment, first-degree sexual offense, second-degree sexual offense, third-degree sexual offense, attempted murder, robbery, theft, assault, battery, and impersonating a police officer. Jamison entered an *Alford* plea to first-degree rape and kidnapping and was sentenced to life imprisonment plus 30 years.

Section 8-201 of the Criminal Procedure Article permits post-conviction petitions for DNA testing of "scientific identification evidence." If the results of the DNA testing are unfavorable to the petitioner, the court must dismiss the petition. If the results of the DNA testing are favorable to the petitioner, the court must open or reopen a post-conviction proceeding or, if the court determines that the action is in the interest of justice, the court may order a new trial. In 2008, Jamison filed a petition for DNA testing, alleging that newly discovered slides containing cellular material from swabs taken from the victim's vulva, vagina, and endocervix needed to be tested.

The Circuit Court for Baltimore County granted Jamison's motion, and Orchid Cellmark of Dallas, Texas conducted the testing.

Following testing, Jamison filed both a motion to vacate conviction under § 8-201 of the Criminal Procedure Article and a petition for writ of actual innocence under § 8-301 of the Criminal Procedure Article. The State responded on the merits, but also raised the issue of Jamison's *Alford* plea as a defense. Following a hearing, the circuit court denied Jamison's motions.

Jamison appealed directly to the Court of Appeals under § 8-201(k)(6) of the Criminal Procedure Article. Jamison argued that the circuit court erred in holding that a petitioner under § 8-201 must prove that it is "more than likely" that he would have been convicted but for new DNA evidence. The State responded on the merits, but also argued that Jamison could not avail himself of a petition for DNA testing because he entered a plea rather than going to trial.

The Court of Appeals found that § 8-201 is silent regarding whether a person who has entered a plea is permitted or prohibited from pursuing a post-conviction DNA test. Twenty-two states and the District of Columbia expressly permit those who have pled guilty to seek post-conviction DNA testing, and one state statute expressly prohibits those who have pled guilty from accessing post-conviction DNA testing.

The court determined that an *Alford* plea is the functional equivalent of a guilty plea before analyzing the legislative intent behind § 8-201. Originally, § 8-201 required that, "[i]dentity was an issue in the trial that resulted in the petitioner's conviction." The court found this to be significant because other jurisdictions have interpreted similar language in post-conviction DNA statute cases to prohibit a person who has pled guilty from obtaining such testing on the basis that a guilty plea removes any ambiguity regarding the identity of the perpetrator.

In 2003, however, § 8-201 was amended by Chapter 240 to remove the identity requirement. The stated legislative purpose of the changes to § 8-201 was to clarify the definition of "scientific identification evidence" and "biological evidence," as well as clarify "under what circumstances a court may order DNA testing." The court concluded that the removal of the language that identity be at issue at trial, thus, was not an indication that the General Assembly intended to permit those who have pled guilty to file for post-conviction DNA testing.

The court found further support for the conclusion that someone who has pled guilty may not pursue post-conviction DNA testing in the 2008 amendments to § 8-201(i), which added language to what a court may do after results that are favorable to a petitioner are gathered. The added language included two components, the first being an evaluative component requiring that the petitioner show a "substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced," and the second is a trial. See *Yonga v. State*, 446 Md. 183 (2016). Therefore, a person who has pled guilty cannot avail himself of post-conviction DNA testing under § 8-201. And, because Jamison entered an *Alford* plea, which the court determined is equivalent to a guilty plea, he could not avail himself of the post-conviction DNA testing under § 8-201.

The court concluded by indicating that legislative action on this issue might be more appropriate given the numerous variables to be considered in defining the boundaries of post-conviction DNA testing where a petitioner has entered a plea. The court highlighted New York, where a Justice Task Force, considering whether to change a similar New York statute, discussed the efficacy of the application of a statute of limitations in any prospective statute, a limit on post-conviction DNA testing after a guilty plea to certain offenses, and a consideration of whether the petitioner had a prior opportunity for testing, among other issues.

In an opinion concurring with the judgment of the majority, but not the opinion, Judge McDonald and Chief Judge Barbera agreed that the circuit court correctly denied the motions because the DNA results were not favorable to Jamison, but would not have equated an *Alford* plea as equivalent of a guilty plea under for all purposes. The minority therefore, would not have foreclosed the possibility that a court could determine whether there is a “substantial possibility that a petitioner would not have been convicted if the DNA results had been known” under § 8-201 in the case of an *Alford* plea.