Circuit Court for Prince George's County
Case No.: CAA19-2533

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 240

September Term, 2023

IN RE: ADOPTION OF M.A.

Graeff,
Berger,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: August 22, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

On May 20, 2022, the Circuit Court for Prince George's County granted the petition of appellant Naana Larbi Faakye ("Mother") to adopt M.A. ("Child"), who was born in Ghana on August 29, 2005. Later that same day, Mother moved to retroactively date the adoption order before the Child's sixteenth birthday, in order to make him eligible to apply for permanent residency and citizenship under federal immigration laws, as the adopted child of a naturalized citizen. *See* 8 U.S.C. § 1101(b)(1)(E)(i); *Ojo v. Lynch*, 813 F.3d 533 (4th Cir. 2016).

In this unopposed appeal, Mother challenges the circuit court's denial of her motion seeking an order *nunc pro tunc*. Pointing out that she initiated adoption proceedings on January 15, 2019, when the Child was only 13 years old, but that a series of "delays attributed primarily to COVID and administrative" matters that were "inherent in the court's handling of this case" stretched the adoption timeline over four years, Mother contends that "there was no reason why the Court in this case denied" her motion to make the adoption order of May 20, 2022, effective *nunc pro tunc* to a date before the Child's sixteenth birthday on August 29, 2021, "other than for abuse of its discretion."

Because we are unable to discern the court's rationale from the record before us, we also are unable to determine whether the court abused its discretion. Consequently, we will remand under Md. Rule 8-604(d)(1), without affirming or reversing, for the circuit court to clarify and reconsider its order in light of the principles and questions that follow.[1]

[1] Under this rule, "[i]f the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower (continued)

FACTUAL BACKGROUND

We present pertinent facts, pleadings, and proceedings in the following timeline:

August 29, 2005 The Child was born in Ghana.

January 15, 2019 Mother, by her attorney, filed a PETITION FOR ADOPTION OF A MINOR in the Circuit Court for Prince George's County, accompanied by documents including a certified copy of the Child's entry in the Republic of Ghana's register of births; consents by both natural parents with termination of parental rights; Mother's 2017 federal tax return; a summary of the Child's medical examination on October 2, 2018; advise of rights and consent to adoption form signed by the Child on December 24, 2018; a copy of Mother's certificate of marriage to Yaw Faakye on April 15, 2009; a certified copy of M.A.'s entry in Ghana's register of births; and a certified copy of a Marriage Record for Mother's marriage to Yaw Faakye on October 9, 2002.

In her petition, Mother identified herself as the Child's "Aunty and the cousin to [his] mother." "[W]ith the consent of both parents[,]" the Child had been continuously residing with her "since January 15, 2018[.]" He was attending middle school, where he "has excelled" with "A's and B's on his progress report since his enrollment." Mother asserted that she has no criminal record, has supported the Child since his arrival, and had "the moral and financial ability to" continue doing so.

Mother, stating that she married her husband on October 9, 2002, explained that he did "not join[] in the petition for health reasons and believes [Mother] alone is better suited to adopt the minor child."

February 8, 2019 The circuit court clerk advised counsel for Mother in a typewritten note that he was returning an unprocessed check for $185 "because the amount was incorrect."

court." Md. Rule 8-604(d)(1). When doing so, we must "state the purpose for the remand." On remand, "[t]he order of remand and the opinion upon which the order is based are conclusive as to the points decided[,]" and the circuit court must "conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court."

February 14, 2019 In a handwritten note on the clerk's note, counsel stated, "Sorry for the mix up. Right amount enclosed. 2/14/19[.]"

March 3, 2019 A court stamp on that same document shows it was filed with the court on March 3, 2010. The clerk sent counsel for Mother a "Notice of Filing" stating that her Petition for Adoption was filed on February 8, 2019, but the court's docket shows this as the initial case filing date.

March 25, 2019 A memorandum dated March 22 from the court's Paralegal Manager to counsel for Mother, states that the case was "forwarded to the paralegal unit of the Family Division by the civil clerk's office for the purpose of review" but it appeared to be "lacking certain required documentation which is preventing it from moving forward to be scheduled for a hearing." Without identifying specific deficiencies, the memo states, "**Please note that all documents submitted for an adoption matter must be filed in accordance with Maryland Rule 9-103**."

April 22, 2019 Mother filed an affidavit dated April 15, 2019, from an attorney representing the Child, who "at the time of the signing of the consent form was 13 years old," stating that he "explained" the notice and request for adoption, then "reviewed the consent form thoroughly[.]" According to the attorney, he "believe[s] that the child agreed to the adoption and has signed the consent form knowingly and voluntarily and not due to duress or coercion."

Mother also filed certified copies of both biological parents' entries in Ghana's register of births, a copy of Mother's 2018 federal income tax return; a medical report on Mother; and a certified copy of Mother's certificate of marriage by the circuit court clerk on October 9, 2002.

June 26, 2019 Mother filed a "MOTION TO SCHEDULE ADOPTION HEARING [OR] IN THE ALTERNATIVE TO APPOINT PETITIONER AS A TEMPORARY GUARDIAN FOR THE MINOR CHILD PENDING ADOPTION." In support, counsel for Mother reviewed the history of the petition and stated "[t]hat on June 13, 2019, . . . while in court [he] inquired about the status from the court clerk and was informed that this file is before the Judge." Counsel averred that the Child "was about to be thrown out of school due to the lack of proper paperwork and or order confirming and or showing that the adoption and or Guardianship is in place." Attached to the motion was a "NON-RENEWAL LETTER" dated May 14, 2019, from the Prince George's

County Public Schools, stating that unless there was a legal guardianship determination by July 1, 2019, the Child would be withdrawn and unable to re-enroll.

August 16, 2019 Mother filed an "AMENDED PETITION FOR ADOPTION OF A MINOR CHILD AND PETITION FOR TEMPORARY CUSTODY OF THE MINOR CHILD PENDING THE DETERMINATION OF THE CUSTODY IN THIS CASE." The amended petition includes information listed in response to the requirements of specific provisions in Md. Rule 9-103. Mother asserted that she has no other children and was asked to adopt the Child by his "natural mother and father . . . to the extent the natural parents reside in Ghana, West Africa, are unable to care for" him, and that he "has resided with" Mother "since January 15, 2018[.]"

With respect to why Mother's husband "has not joined the petition[,]" Mother stated that she "was married to Yaw Faakye on December 14, 1950 in Accra," and that he was "not joining in the petition primarily for health reasons, and also to the extent [Mother] and spouse are separated from each other and do not reside in the same house." She also attached a certified copy of her certificate of marriage to Mr. Faakye, performed on October 9, 2002, by the Clerk of the Circuit Court for Prince George's County.

Mother filed the Child's signed and witnessed "CONSENT . . . TO INDEPENDENT ADOPTION" stating that he was "13 years old," had met with his lawyer, and "agree[d] to be adopted" by Mother.

Mother also filed a certified copy of her birth certificate and notarized copies of the biological father's and mother's consents to independent adoption with termination of parental rights on November 8, 2018, in the statutorily required form. She resubmitted the Child's and her own medical examination reports and her 2018 federal tax returns, then added her Maryland tax returns.

In addition, Mother filed copies of Memoranda between the court's Paralegal Supervisor and a Law Clerk to the Honorable Sheila R. Tillerson Adams, Chief and Administrative Judge, identifying the attached documents as the "missing" ones requested to be filed in order for the case to be ready to "review for consideration of scheduling[.]"

August 27, 2019 Mother filed a "PETITION FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND EMERGENCY PETITION FOR AN INITIAL ORDER OF GUARDIANSHIP FOR THE PURPOSE OF REGISTERING MINOR CHILD IN SCHOOL," accompanied by notices to the biological mother and father, as well as to the Specialist in Pupil Accounting for the Prince George's County Public School System. In support, Mother filed signed and certified copies of the consents and additional documents.

August 29, 2019 The Child turned fourteen years old.

December 16, 2019 The court filed a "MEMORANDUM" dated December 10, 2019, from the Law Clerk for Judge Adams to the Paralegal Unit, stating that the "case came up . . . for scheduling review and for review for Temporary Guardianship" but was "missing" an "Original or Certified Copy of the Birth Certificate."

The court also filed a "MEMORANDUM" dated December 11, 2019, from the Paralegal Unit to counsel for Mother, stating that "[t]he Petition for Adoption is missing" that document.

December 23, 2019 Counsel for Mother filed a "LINE ATTACHING ORIGINAL BIRTH CERTIFICATE FOR MINOR CHILD," along with a certified copy of the Entry of the Child's birth in Ghana's register of births, stating that "[t]he filing of this certification now paves the way for a hearing on this adoption case."

February 18, 2020 Judge Adams ordered "that the Office of Family Support Services conduct a review and or investigation into the above-noted case and submit a report of the findings to the Court upon completion."

February 25, 2020 The order for a home study was entered onto the court docket. **[E.193]**

March 16, 2020 By order of the Chief Judge of the Court of Appeals of Maryland (later renamed the Supreme Court of Maryland), courts were closed statewide as a result of the COVID-19 public health emergency. *See* https://mdcourts.gov/sites/default/files/import/coronavirus/marylandjudiciarycovid19timeline.pdf; *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 368-69 (2022).

July 20, 2020 Maryland courts reopened, but with limitations that continued to affect court calendars, underlying work supporting judicial operations, and the litigation process generally. *See*

https://mdcourts.gov/sites/default/files/admin-orders/20220301fifthamendedexpandingstatewidejudiciaryoperationsinlightofthecovid19emergency.pdf (Fifth Amended Administrative Order Expanding Statewide Judiciary Operations in Light of the COVID-19 Emergency, reviewing history of restrictions on judiciary operations since March 2020); *Murphy*, 478 at 368-69.

August 20, 2021 At an eleven-minute hearing, Judge Adams ruled that the "case [was] not in [a] posture to proceed[.]" The court dismissed Mother's petition "without prejudice[,]" but ordered the "[d]ocuments to remain in [the] file for 60 days" and to "be returned" in the event "no motion is filed to reopen the case within" that time. The hearing sheet does not further identify any supporting reasons, and there is no hearing transcript in the record.

August 29, 2021 The Child turned sixteen years old.

October 14, 2021 Mother filed a "MOTION TO REOPEN ADOPTION PETITION" and to set the matter for hearing. [E.197-99] In support, she argued that when she filed her amended petition for adoption in August 2019, "she was still married" but "her spouse" did not join in her petition because he "had some health issues and stayed more in Ghana than in the U.S. further, the parties were at the verge of separating from each other towards a divorce." During the court-ordered home study, Mother explained, she "informed the investigator that she is best friend [sic] with her husband and that they were in a stable relationship," so that "[w]hen this matter came up for hearing . . . on August 20, 2021, the court determined that to the extent [Mother] was still married and the Maryland law required that the Husband join in the petition, and in this case, the Husband did not, . . . that it could not proceed with the hearing."

Yet the court gave Mother 60 days "to file a motion to reopen and provide additional evidence to support a divorce or evidence" of a separation with a divorce petition having "been filed." Mother averred that "[o]n October 14, 2021, simultaneously with this filing, [she] filed a Complaint for Absolute Divorce and an answer filed by the Defendant agreeing to the divorce and not contesting the grounds for Divorce." She attached unfiled copies of those pleadings.

November 23, 2021 The circuit court denied Mother's Motion to Reopen the adoption proceedings, but ordered that "the Petition for Adoption may be reopened, by a subsequent Motion from Petitioner, either at the

conclusion of the Petitioner's Divorce or at the time that the Petitioner's spouse joins the Petition for Adoption."

March 7, 2022 Maryland courts resumed full operations following the Omicron wave of COVID. *See generally* https://mdcourts.gov/sites/default/files/admin-orders/20220301fifthamendedexpandingstatewidejudiciaryoperationsinlightofthecovid19emergency.pdf (Fifth Amended Administrative Order Expanding Statewide Judiciary Operations in Light of the COVID-19 Emergency, recognizing history of restrictions on judiciary operations since March sixteen, 2020, during which Maryland courts were fully open under the Phase V mode only for the periods October 5 to November 15, 2020; and April 26 to December 28, 2021).

March 21, 2022 Mother moved to reopen the adoption case and to set a hearing, averring that her "divorce decree has been signed by the Court" and attaching a copy of that judgment signed on January 10, 2022.

April 11, 2022 The court granted Mother's motion to reopen the adoption case and ordered the matter set for a hearing.

May 20, 2022 In a hearing at which Mother, the Child, and the Child's biological parents appeared, Judge Sheila R. Tillerson Adams signed a Final Order of Adoption "that the Judgment of Adoption be, and is hereby entered," then closed the case "for statistical purposes only."

Later that same day, Mother filed a "MOTION TO ENTER NUNC PRO TUNC ADOPTION ORDER," seeking to make the effective date of the adoption retroactive to August 28, 2021, one day before the Child's sixteenth birthday. In support, Mother asserted that at the end of that day's hearing, she indicated to counsel that as a naturalized United States citizen, she intended to seek "permanent residency for the minor child[,]" but then learned for the first time that such relief may be granted only if the adoption takes place after the child in question has resided with the adoptive parent for two years ***and*** before the child turns sixteen. Because the Child was sixteen years and nine months old on the date of the adoption hearing, Mother asked the court to exercise its "inherent *nunc pro tunc* powers to make an order effective before the date it was actually entered[.]" In support, Mother pointed out that the adoption case had been filed when the Child was just thirteen years old and affected by "delays, COVID, court closures, . . . in addition to a technical correction of the record[.]"

August 29, 2022 The Child turned seventeen years old.

March 9, 2023 In a written order dated March 3, 2023, and entered this date, a different judge denied Mother's MOTION TO ENTER THE ADOPTION NUNC PRO TUNC, without a hearing or comment.

March 31, 2023 Mother filed a timely notice of appeal.

LEGAL BACKGROUND

A preliminary review of pertinent legal standards will aid our review of Mother's challenge to the order denying her request to change the effective date of the Child's adoption. A court has inherent authority to grant relief *nunc pro tunc*, which is a Latin phrase meaning "'now for then, or, in other words, a thing is done now, which shall have the same legal force and effect as if done at time when ought to have been done.'" *Short v. Short*, 136 Md. App. 570, 578 (2001) (quoting *Prince George's Cnty. v. Commonwealth Land Title*, 47 Md. App. 380, 386 (1980) and *Black's Law Dictionary* (5th ed.1979) at 964)). The term has been "'applied to acts allowed to be done after the time they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done.'" *Id.* (quoting citation omitted).

Mindful that as a general rule, "the purpose of a *nunc pro tunc* entry is to correct a clerical error or omission as opposed to a judicial error or omission[,]" *State v. Johnson*, 228 Md. App. 489, 512 (2016), *aff'd*, 452 Md. 702 (2017) (quoting *Prince George's Cnty. v. Commonwealth Land Title Ins. Co.*, 47 Md. App. 380, 386 (1980)), we recognize that such orders have a specialized role in cases where the effective date of an adoption has immigration consequences, which in turn may impact the best interest of a minor adoptee. When, as in this instance, a court is asked to exercise its authority to change the effective

date of an adoption to a date before the adoptee's sixteenth birthday, that request implicates a significant intersection of adoption and immigration law.

Specifically, in the Child Citizenship Act of 2000, Congress amended the Immigration and Naturalization Act ("INA") to allow a child adopted by a United States citizen to qualify for citizenship if he or she has resided with the adoptive parent for at least two years and the adoption is effective before the child's sixteenth birthday. Under 8 U.S.C. § 1431,

> (a) In general
>
> A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
>
> > (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
> >
> > (2) The child is under the age of eighteen years.
> >
> > (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.
>
> (b) Adoption
>
> Subsection (a) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 1101(b)(1) of this title.

In turn, under 8 U.S.C. § 1101(b)(1)(E)(i), a "child" is defined to include "an unmarried person under twenty-one years of age who is . . . . a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years[.]"

Historically, the Board of Immigration Appeals ("BIA") refused to enforce state court orders that backdated, *nunc pro tunc*, the effective date of an adoption. *See Matter of R. Huang*, 26 I&N Dec. 627, 628-31 (BIA 2015). Under mounting criticism, however, the BIA revised that blanket rule for cases that "meet[] three limited criteria: "the adoption petition was filed before the beneficiary's sixteenth birthday, the State in which the adoption was entered expressly permits an adoption decree to be dated retroactively, and the State court entered such a decree consistent with that authority." *See id.* at 631.

Nevertheless, the Fourth Circuit, in *Ojo v. Lynch*, 540 F.3d 533 (4th Cir. 2016), "rejected the *Huang* test, finding that the statute 'cannot be read to create some power of federal agency review over state court adoption orders,' and holding that 'when an individual has been 'adopted' under § 1101(b)(1)(E)(i) depends on the effective date of the adoption as set forth in the relevant state court instruments.'" Daniel Levy & Charles Roth, *U.S. Citizenship and Naturalization Handbook* § 5:19 (Dec. 2022 update) (quoting *Ojo*, 540 F.3d at 541). In that case, the federal appellate court affirmed the precedential effect of a Maryland circuit court's order *nunc pro tunc* retroactively changing an adoption date so as to meet the sixteenth birthday deadline for qualifying adoptions. *See Ojo*, 540 F.3d at 541. The Court in *Ojo* held that under the statutory framework governing the immigration status of children adopted by United States citizens,

> [t]he term "adopted" . . . carries with it the understanding that adoption proceedings in this country are conducted by various state courts pursuant to state law. Plainly, therefore, a child is "adopted" for purposes of § 1101(b)(1)(E)(i) on the date that a state court rules the adoption effective, without regard to the date on which the act of adoption occurred.

Id. at 540.

Because Mother supports her argument that the circuit court should have granted her motion for a *nunc pro tunc* order by comparing the circumstances of the Child's adoption to the circumstances in which Ojo's adoption was backdated, we examine those in detail. Ojo was born in Nigeria, immigrated to this country as a six-year-old, and lived continuously with an uncle who was a United States citizen. *See id*. at 535. When Ojo was sixteen, the uncle petitioned to adopt him. *See id.* The Circuit Court for Montgomery County granted that petition after Ojo turned seventeen. *See id.*

Years later, while in his thirties, Ojo was convicted of two drug offenses, for which the BIA initiated removal proceedings. *See id*. at 536. After the Department of Homeland Security argued that Ojo was not "adopted" within the statutory definition protecting children of U.S. citizens, because his adoption was not effective until he was 17, an immigration judge, and then the BIA, agreed. *See id.* As a result, Ojo was adjudicated to be removable. *See id.*

At that point, Ojo appealed and requested a remand to the immigration judge, stating

> that his adoptive father would seek a *nunc pro tunc* order from the Maryland state court specifying that Ojo's adoption became effective before he turned sixteen. Ojo asserted that the court would likely grant such an order because—between the time Ojo entered the United States at age six in 1989 and the approval of his adoption in 2001—he had lived continuously as the child of his adoptive father.

Id. The BIA denied the appeal and request for remand. *See id.*

Nevertheless, on October 29, 2014, Ojo obtained an order *nunc pro tunc* from the Circuit Court for Montgomery County, making "Ojo's adoption effective on August 27,

1999, the day before he turned sixteen." *Id*. at 536. When Ojo moved to reopen his removal proceedings, the BIA denied that relief, stating "that it 'does not recognize nunc pro tunc adoption decrees after a child reaches the age limit for both the filing of the adoption petition and decree.'" *Id*. In support, the BIA relied on its decisions in *Matter of Cariaga*, 15 I. & N. Dec. 7sixteen (BIA 1976), and *Matter of Drigo*, 18 I. & N. Dec. 223 (BIA 1982). *See Ojo*, 813 F.3d at 536.

The Fourth Circuit recounted the ongoing legal dispute over the BIA's position that it need not defer to a state court order backdating the effective date of an adoption.

> In its *Matter of Cariaga* decision, the BIA had established a blanket rule that "[t]he act of adoption must occur before the child attains the age [specified in the INA]," thereby precluding any consideration of a *nunc pro tunc* order entered after the relevant birthday but made effective before that date. *See* 15 I. & N. Dec. at 717. According to the BIA, "[t]hrough the imposition of an age restriction on the creation of the adoptive relationship, Congress has attempted to distinguish between bona fide adoptions, in which a child has been made a part of a family unit, and spurious adoptions, effected in order to circumvent statutory restrictions." *Id*. Thereafter, in *Matter of Drigo*, the BIA relied on its *Cariaga* decision and rejected the contention that "a decree of adoption is fully effective as of the date entered *nunc pro tunc* and is entitled to recognition for immigration purposes." *See* 18 I. & N. Dec. at 224. The BIA's *Drigo* decision emphasized that "[i]t was Congress' intent that the age restriction in [8 U.S.C. § 1101(b)(1)(E)(i)] be construed strictly." *Id*.
>
> In other words, on the premise that its decisions in *Cariaga* and *Drigo* would deter fraudulent and spurious adoptions, the BIA embraced an interpretation of § 1101(b)(1)(E)(i) that flouted the effective dates of adoptions set forth in facially valid *nunc pro tunc* orders entered by the various state courts of this country. Multiple federal courts thereafter cast substantial doubt on the BIA's *Cariaga*/*Drigo* rule. *See, e.g., Cantwell v. Holder*, 995 F.Supp.2d 316

> (S.D.N.Y.2014); *Hong v. Napolitano*, 772 F.Supp.2d 1270 (D.Haw.2011); *Gonzalez-Martinez v. DHS*, 677 F.Supp.2d 1233 (D. Utah 2009).
>
> Only one of our sister courts of appeals has heretofore addressed the viability of the *Cariaga*/*Drigo* rule in a published opinion. In *Amponsah v. Holder*, the Ninth Circuit concluded "that the BIA's blanket rule against recognizing *nunc pro tunc* adoption decrees constitutes an impermissible construction of § 1101(b)(1) and that case-by-case consideration of *nunc pro tunc* adoption decrees is required." *See* 709 F.3d 1318, 1326 (9th Cir. 2013). The Ninth Circuit withdrew its *Amponsah* opinion a few months later, in September 2013, after the BIA advised the court that it was considering whether to overrule or modify the *Cariaga*/*Drigo* rule. *See Amponsah v. Holder*, 736 F.3d 1172 (9th Cir. 2013).

See Ojo, 813 F.3d at 536-37.

The Fourth Circuit then recounted how the unsettled legal landscape continued while Ojo was attempting to enforce the Montgomery County court's *nunc pro tunc* order backdating the effective date of his adoption:

> In support of his motion to reopen his removal proceedings, Ojo invoked several of the federal court decisions discrediting the *Cariaga*/*Drigo* rule. The BIA, however, rejected those decisions across-the-board as "not binding." Specifically addressing the Ninth Circuit's *Amponsah* opinion, the BIA observed that Ojo's "reliance on [*Amponsah*] is misplaced as this decision was withdrawn." The BIA did not acknowledge that the Ninth Circuit withdrew its *Amponsah* opinion because of the BIA's assurance to that court in 2013 that it was revisiting the *Cariaga*/*Drigo* rule—the very rule on which the BIA then relied in January 2015 to refuse to reopen Ojo's removal proceedings.
>
> On February 10, 2015, Ojo filed a timely petition for review of the BIA's decision denying his motion to reopen . . . .

> On July 8, 2015, during the pendency of this proceeding, the BIA modified the *Cariaga*/*Drigo* rule in its precedential decision in *Matter of Huang*, 26 I. & N. Dec. 627 (BIA 2015). The *Huang* decision related that Congress imposed an age restriction in 8 U.S.C. § 1101(b)(1)(E)(i) because it was concerned about "fraudulent adoptions that have no factual basis for the underlying relationship," as well as adoptions that, "despite having the appearance of validity, are actually motivated by a desire to circumvent the immigration laws." *See id.* at 629-30. *Huang* also explained, however, that "the blanket rule [from *Cariaga* and *Drigo*] we have applied for many years is too limiting in that it does not allow us to adequately consider the interests of family unity." *Id*. at 631.
>
> Pursuant to the new *Huang* rule, the BIA will recognize a *nunc pro tunc* order relating to an adoption "where the adoption petition was filed before the beneficiary's sixteenth birthday, the State in which the adoption was entered expressly permits an adoption decree to be dated retroactively, and the State court entered such a decree consistent with that authority." *See* 26 I. & N. Dec. at 631. On July 22, 2015, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, the Attorney General notified our Court of the *Huang* decision and asserted that, "under the new framework set forth in [*Huang*], Petitioner [Ojo] still did not derive citizenship under 8 U.S.C. § 1431."3

Ojo, 813 F.3d at 537-38.

Ultimately, the Fourth Circuit "review[ed] the BIA's denial of a motion to reopen removal proceedings for abuse of discretion" to determine whether it was "'arbitrary, capricious, or contrary to law.'" *Id*. at 538 (citation omitted). The Court rejected the BIA's legal argument that under *Huang*, it was not obligated to give effect to the *nunc pro tunc* order from the Circuit Court for Montgomery County. *See id*. at 538-41. After recognizing that "[a]n order entered nunc pro tunc has 'retroactive legal effect through a court's inherent power[,]'" *id*. at 536 n.1 (quoting *Black's Law Dictionary* 1237 (10th ed. 2014)), the federal

court interpreted the federal statute to prohibit the BIA from disregarding or discounting state court orders changing the effective date of an adoption in order to meet the sixteenth birthday eligibility cut-off for adoptees.

> The dispute presented here between Ojo and the Attorney General centers on the statutory phrase, "adopted while under the age of sixteen years." *See* 8 U.S.C. § 1101(b)(1)(E)(i). More specifically, we must determine whether the term "adopted" plainly denotes the effective date of an adoption, or whether that term is ambiguous and could instead signify the date that the act of adoption occurred. Only if the term "adopted" is ambiguous may we accord *Chevron* deference to the BIA's policy of summarily disregarding *nunc pro tunc* orders relating to adoptions conducted in the various state courts of this country—a policy engendered in the *Cariaga*/*Drigo* rule and recently modified in *Huang*. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).

Ojo, 813 F.3d at 538.

The Fourth Circuit held that federal courts may not disregard a state court order *nunc pro tunc* changing the effective date of an adoption, explaining that it

> discern[ed] no indication from the text of § 1101(b)(1)(E)(i)—or from any other aspect of the statutory scheme created in the INA—that Congress intended to alter or displace the plain meaning of "adopted." The term "adopted" thus carries with it the understanding that adoption proceedings in this country are conducted by various state courts pursuant to state law. Plainly, therefore, a child is "adopted" for purposes of § 1101(b)(1)(E)(i) on the date that a state court rules the adoption effective, without regard to the date on which the act of adoption occurred.

Id. at 539-40.

The Fourth Circuit granted Ojo's petition for review, vacated the BIA's order, and held that the BIA abused its discretion in denying Ojo's motion to reopen the removal proceedings, reasoning that Congress's

> inclusion of an age requirement in the statute—without more—cannot be read to create some power of federal agency review over state court adoption orders. Thus, when an individual has been "adopted" under § 1101(b)(1)(E)(i) depends on the effective date of the adoption as set forth in the relevant state court instruments. *Cf. Carachuri–Rosendo v. Holder*, 560 U.S. 563, 57678, 130 S. Ct. 2577, 177 L.Ed.2d 68 (2010) (explaining that federal immigration court must look to state conviction itself to determine whether state offense is "aggravated felony" under INA).
>
> Put succinctly, the plain meaning of "adopted" in § 1101(b)(1)(E)(i) forecloses the BIA's summary disregard of facially valid *nunc pro tunc* orders relating to adoptions conducted by the various state courts. Although the BIA—in its recent *Huang* decision—has jettisoned the *Cariaga*/*Drigo* rule's absolute prohibition on giving any effect to such orders in immigration matters, the BIA nonetheless has continued to automatically deny recognition to some. The term "adopted" is not ambiguous under *Chevron's* first step, and the BIA's interpretations that circumscribe reliance on *nunc pro tunc* orders are not entitled to deference.
>
> In these circumstances, it was contrary to law for the BIA not to recognize the *nunc pro tunc order* in Ojo's case. As a result, the BIA abused its discretion in denying Ojo's motion to reopen his removal proceedings.

Id. at 541.

Within this legal framework, we address Mother's challenge to the circuit court's denial of her motion for a *nunc pro tunc* order changing the effective date of the Child's adoption to a date before his sixteenth birthday.

DISCUSSION

Citing *Ojo* as "precedent in Maryland for a *nunc pro tunc* adoption order[,]" Mother contends that "[t]his is a case that warrants the exercise of the court's equitable and discretionary powers" to "make its adoption order effective before the date it was actually entered" because of "delays attributed primarily to COVID and administrative delays before the court among others." *See Short v. Short*, 136 Md. App. 570, 578 (2001). Mother compares the favorable circumstances surrounding her adoption of this still-minor Child, who turned sixteen while her petition had been pending for more than two years and is still a minor, to Ojo's *nunc pro tunc* order that was filed after he was in his thirties. Although the issue of backdating the Child's adoption for immigration purposes was not considered before or during the hearing conducted on May 20, 2022, Mother points out that, in further contrast to the request for nunc pro tunc relief in Ojo, her motion was filed later that same day, as soon as counsel learned that Mother intended to seek permanent residency for the Child. In Mother's view, all of the factors and equities bearing on the exercise of judicial authority to issue an order *nunc pro tunc* weigh so heavily in favor of granting such relief in these circumstances, that "there was no reason" for the court's belated and unexplained denial of her request to retroactively date this adoption "by a few months."

We do not have a transcript for any of the hearings conducted in the circuit court. Nor was there any hearing during the ten months while Mother's motion was pending. Instead, when a different judge denied the request for nunc pro tunc relief, he did so in writing, without explanation. Mother noted this appeal and filed her brief, but there is no opposing party or brief.

Under these circumstances, the limited record before us does not permit meaningful appellate review. Because we cannot discern the court's rationale, we cannot determine whether it abused its discretion. Mindful that the Child may be at risk of immigration consequences as he approaches his eighteenth birthday on August 29, 2023, we will remand to the circuit court for clarification and reconsideration in light of the record and principles reviewed herein.

It is undisputed that Mother and Child initiated these adoption proceedings two and a half years before the Child's sixteenth birthday. Assisted by counsel, they proceeded to navigate the judicial requirements for this consensual independent adoption, but encountered delays that have now extended over four years. Some obstacles, particularly at the outset, were the result of Mother's insufficient pleadings and documentation, but the record shows that Mother, through counsel, promptly responded and ultimately remedied each deficiency.

After Mother filed an amended petition proffering documents specified by the court, and the court deemed the case sufficiently supported to order a home study regarding the now 14-year-old Child, COVID complications ensued. Eighteen months elapsed until the court next addressed Mother's petition.

During that period, COVID-related restrictions limited both judicial operations and litigation. In *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333 (2022), the Supreme Court recognized that the impact of COVID-related delays extended beyond the courts closed by administrative order, to the broader litigation process:

> As the recitals in the administrative order indicate, at the time the order was issued in the spring of 2020, the pandemic had disrupted access to the courts and the ability of the State Judiciary to operate effectively. *See* Appendix B (text of April 24, 2020 order). In particular, the Chief Judge found that the measures the Judiciary had taken to respond to that emergency, in compliance with directives of the Governor and guidance from the federal Centers for Disease Control and Prevention, had had a "detrimental impact" that "imped[ed] the ability of parties and potential litigants to meet with counsel, conduct research, gather evidence, and prepare complaints, pleadings, and responses." *Id*. As a result, there was a "general and pervasive practical inability" to meet certain deadlines. *Id*. Moreover, the Chief Judge found that the pandemic had affected not only the ability of litigants to file pleadings - a problem addressed at least in part by drop boxes and MDEC - but also the ability to prepare them in the first place.

Id. at 368-69.

By the time the court held a brief hearing on Mother's adoption petition on August 20, 2021, it was only nine days before the Child's sixteenth birthday on August 29, 2021. According to the hearing sheet, Judge Adams dismissed Mother's petition "without prejudice" because the "case [was] not in a posture to proceed[.]" The court ordered the supporting "[d]ocuments to remain in file for 60 days" and that "[i]f no motion is filed to reopen the case within 60 days, documents may be returned."

Mother proffers that the court decided not to grant the adoption unless and until she obtained a divorce from her spouse or he joined in her petition to adopt. Absent any transcript or rationale stated in a court order, we cannot confirm or refute that proffer.

Based on the court's denial of Mother's initial motion to reopen based on her filing of a divorce petition, we do know that the impact of Mother's marital status was of concern to the court. Yet we cannot discern from the sparse record before us whether the circuit

court predicated its dismissal of Mother's petition to adopt on a determination that it lacked authority to grant it as a matter of law or on a determination that it would not do so as a matter of discretion. That gap in the record impedes appellate review. If, as Mother suggests, the court predicated its dismissal on a blanket premise that a married petitioner cannot adopt as a solo parent when her spouse does not join the petition, the record does not reveal the legal basis for that interpretation of the applicable disclosure rule, which merely requires solo petitioners who are married to specify "the reason why the spouse of the petitioner is not joining in the petition[]" without expressly requiring the spouse to join the petition. *See* Md. Rule 9-103(b)(1)(I). If, instead, the circuit court merely exercised its discretion to dismiss Mother's petition because of uncertainties about how her marital relationship might affect the Child, the lack of record and rationale still prevents us from reviewing the factual and legal basis for such concerns.

In addition to these uncertainties about the impact of Mother's marital status on the delay attributable to the court's dismissal of this adoption petition, we agree with Mother that the record presents two other questions that are material to meaningful appellate review of whether the court abused its discretion in denying Mother's request to change the effective date of this adoption. Specifically, we cannot discern whether the circuit court considered the impact of COVID-related delays attributable to restrictions on judicial operations while this adoption case was pending. When Mother filed her petition in January 2019, the Child was not quite thirteen and a half years old. By late February 2020, when the Child was fourteen and a half, after Mother had amended and supplemented her petition, the court was sufficiently satisfied to refer it for a home study. But just days later,

in mid-March 2020, COVID-related closures and restrictions on judiciary operations went into effect. *See generally* Maryland Judiciary COVID-19 Timeline of Events, https://mdcourts.gov/sites/default/files/import/coronavirus/marylandjudiciarycovid19timeline.pdf (last visited Aug. 18, 2023); Final Administrative Order on Jury Trials and Grand Juries During the COVID-19 Emergency, at 3 § (f) (Md. Mar. 28, 2022), https://mdcourts.gov/sites/default/files/admin-orders/20220328finalonemergencytollingorsuspensionofstatutesoflimitationsandstatutoryandrulesdeadlines.pdf (summarizing prior orders, including periods of suspended jury trials -- March 16 through October 5, 2020; November 16, 2020 through April 23, 2021; and December 29, 2021 through March 6, 2022 -- and tolling provisions) (last visited Aug. 18, 2023). *See also* https://mdcourts.gov/coronavirusorders (archiving all Administrative Orders related to impact of COVID-19 on the Maryland Judiciary).

The record shows that just days after the court docketed the order for a home study, the COVID-19 pandemic began rewriting court calendars and delaying a wide range of in-person/on-site proceedings. A series of Administrative Orders issued by the Supreme Court of Maryland (then the Court of Appeals) resulted in courts closing, reopening with restrictions, and closing again over the ensuing two years, during which some legal deadlines were tolled, and litigation was frequently delayed. It was not until eighteen months later, on August 20, 2021, that the court next considered Mother's petition – just nine days before the Child's sixteenth birthday.

We will remand for the circuit court to clarify the extent to which it considered COVID-related restrictions on the courts and related social services during the two and half

years this adoption petition was pending before the Child's sixteenth birthday. Specifically, the court should address the extent to which COVID-related consequences contributed to delays extending this adoption case past August 29, 2021, and any resulting prejudice. *Cf., e.g., In re M.*, 251 Md. App. 86, 119-20 (2021) (holding that because evidentiary record refuted father's "contention that 'much of' the four-year period after the 24-month benchmark for resolving CINA proceedings was 'related to the pandemic[,]'" "the juvenile court did not err or abuse its discretion in failing to treat pandemic-related restrictions on visitation as grounds for extending CINA proceedings beyond the six years that M. was in the Department's custody.").

A third matter that calls for clarification is whether and how the circuit court factored into its denial of *nunc pro tunc* relief the prior orders allowing Mother to reopen the adoption case upon her divorce. On August 20, 2021, after determining that the adoption was not in a position to proceed, the court dismissed Mother's petition without prejudice but afforded her a grace period to revive it by moving to reopen the case within 60 days. Before that deadline, Mother filed a motion to reopen, while simultaneously filing her divorce petition along with her spouse's written consent to an uncontested disposition. By order dated November 23, 2021, and entered on December 2, 2021, the court denied Mother's motion without prejudice to reopening the case once she obtained a final divorce decree. After Mother did so in January 2022, she again moved to reopen the adoption and set a hearing. Judge Adams granted the motion and held a hearing on May 20, 2022, during which she granted Mother's petition to adopt the Child. This occurred nine months after the initial adoption hearing, which was held nine days before the Child's sixteenth birthday.

Because Mother did not move for an earlier effective date until later that same day, the judge who reopened the case and granted the adoption did not decide whether it should be backdated. Instead, ten months later, a different judge denied that motion. The record before us has no memorandum or other statement of the grounds for that decision. Because there was no hearing on the motion, we cannot ascertain the court's rationale from any transcript. On remand, the court should clarify whether it reopened the adoption case without prejudice as it existed at the time it was dismissed, which was before the Child's sixteenth birthday.

In light of these unanswered questions about (1) the significance of Mother's marriage to and divorce from a spouse who did not join her petition; (2) COVID-related delays; and (3) prior orders dismissing, then reopening the case, we cannot discern a legal or factual basis for the circuit court's denial of Mother's *nunc pro tunc* order changing the effective date of the Child's adoption. For that reason, we will remand under Maryland Rule 8-604(d)(1), without affirming or reversing, for the court to reconsider its denial of Mother's motion. In doing so, the court must clarify its decision on the record, in light of the record establishing that Mother initiated adoption proceedings when the Child was thirteen years old and that a series of delays, attributed primarily to COVID and other administrative matters, extended the adoption for over four years. We further direct that the Clerk of the Court issue the Mandate commensurate with the filing of this opinion pursuant to Maryland Rule 8-207(a)(6).

CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY PURSUANT TO MD. RULE 8-

604(d)(1), FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL TO BE PAID BY PRINCE GEORGE'S COUNTY. MANDATE TO ISSUE FORTHWITH.