UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0249

September Term, 2015

JAMES T. BIRCH

v.

LINDSEY A. BIRCH
A/K/A LINDSEY A. JOHNSON

Wright,
Hotten,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Hotten, J.

Filed: October 26, 2015

Appellant, James T. Birch, and appellee, Lindsey A. Birch, aka Lindsey A. Johnson, were divorced in 2009. Pursuant to the Judgment of Absolute Divorce, appellant was granted sole legal and physical custody of the parties' then five-year-old child (hereinafter referred to as "K.").[1] Years later, on March 24, 2015, a family magistrate made a recommendation for an immediate *pendente lite* order granting sole legal and physical custody of K. to appellee. The following day, the Circuit Court for Frederick County signed an order adopting the magistrate's recommendation, and appellant appealed, presenting three questions for our review, which we re-order as follows:

I. Whether the facts as determined by the magistrate and relied upon by the trial judge [were] sufficient enough to establish "extraordinary circumstances" such as to warrant an immediate order modifying custody of the parties' minor child in this case?

II. Whether the [circuit] court erred as a matter of law in failing to interview the child and ascertain the child's preference as a matter of law?

III. Whether the [circuit] court failed to utilize its independent judgment to determine the best interest of the child?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

By the terms of the parties' Judgment of Absolute Divorce entered on June 23, 2009, there was no visitation schedule between appellee and the minor child, K., and K. was to have no contact with Bruce Waldron ("Mr. Waldron"). Mr. Waldron was appellee's

[1] The child's full name is not used in this opinion for privacy reasons.

significant other at the time of divorce, and had apparently threatened appellee and her family with physical harm unless appellee relinquished custody of K. to appellant.

In May of 2014, appellee sought full legal and physical custody of K. through a Motion to Modify Custody, Access, Child Support, and for Other Appropriate Relief, filed in the Circuit Court for Frederick County. Appellee alleged that "there has been a material change in circumstances since the entry of the Judgment of Absolute Divorce." Specifically, appellee averred that she was no longer in an abusive relationship with Mr. Waldron, that appellant has denied her access to K. in the previous month, that appellant did not allow K. to spend time with her on both Mother's day and Easter, that K.'s attendance and grades at school have suffered significantly during the 2013-2014 school year, that appellant is planning to move K. to Pennsylvania, that appellant has failed to communicate with her about K., and that she was concerned for K.'s wellbeing.

Prior to the beginning of the 2014-15 school year, appellant did in fact move K. from Frederick, Maryland to a house owned by appellant's fiancé, Eileen Harlan, in Windsor, Pennsylvania, outside of York. As a result of this move, ten-year-old K. was removed from Visitation Academy in Frederick County, where she had attended school since Kindergarten.

On September 8, 2014, the court appointed Thomas P. Sinton as best interest attorney for K., and on November 5, 2014, the court ordered that Lynda Mallory perform a custody evaluation.

After two *pendente lite* hearings and multiple consent orders, the parties came before Family Magistrate Richard Sandy for a third *pendente lite* hearing on March 23, 2015. During the first day of testimony, appellant moved to present K.'s preference for custody either through an *in camera* interview with the magistrate or through testimony at the hearing. The best interest attorney and appellee opposed this motion, contending that "the child's already been too involved in this process altogether." The magistrate ruled that the motion would be held in abeyance until he had heard from Lynda Mallory (hereinafter "the custody evaluator"), who was scheduled to testify the following day.

On March 24, 2015, the custody evaluator was qualified as an expert in custody evaluation and examined by the best interest attorney. After meeting with both parents, performing background checks, visiting both homes while K. was present, collecting documents from K.'s school/pediatrician, and interviewing K. at both homes, the custody evaluator recommended that "the physical and legal custody of [K.] be with mom [(appellee).]" According to the custody evaluator, she arrived at this conclusion based on some "pretty serious concerns" surrounding appellant. These concerns included appellant's tendency to undermine appellee's involvement in K.'s life, appellant's presentation of negative information about appellee to K., K.'s "feeling that she has to verbalize dislike of her mother… to preserve her relationship with her father[,]" and appellant's decision "to pull [K.] from the only school she'd known, from the environment where all of her extended family were, [and] moving her to Pennsylvania[.]" The custody evaluator was also concerned about appellant's testimony earlier in the *pendente lite*

hearing that K. had cut herself, and noted that appellant had entirely neglected to mention this to her when she had asked him about any concerns with K. during their interview.

Regarding the issue of whether K. should participate in an *in camera* interview, the custody evaluator opined that having K. testify "would be extremely detrimental to her[,]" because:

> [K.] wants to be with both of her parents, but feels that she has to articulate what she knows her dad wants and I think that to put her in a situation where she would feel the need to have to articulate one preference or another, it would be extremely difficult for her.

The custody evaluator also noted that "[K.] at [eleven] is unable to differentiate between what are her own formed opinions about her mother for instance versus what are the opinions of her dad and what he shared with her or in her presence." Lastly, the custody evaluator remarked that K. had previously said the following while speaking with the custody evaluator regarding her preference: "Maybe we could go back to what it used to be. I'd be at Lindsey's [(appellee's)] for a week and then at my dad's for a week."

After the testimony of the custody evaluator, appellant renewed his motion to have K. interviewed *in camera* by the magistrate. In support of this motion, appellant argued that K. was intelligent and articulate. Appellant also proffered that talking to the magistrate *in camera* would not be traumatic for K., because she has already spoken to the custody evaluator and a therapist, and was not traumatized. Lastly, appellant pointed out that, under *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977), the court must consider the child's preference when determining the best interest of the child. Appellee

and the best interest attorney responded that having K. give an *in camera* interview or live testimony would be "extremely detrimental" in light of her feelings that "she has to verbalize a dislike of mom to preserve a relationship with [her] father." Appellee and the best interest attorney further argued that K. is without "considered judgment." After considering argument from the parties, the magistrate denied the request to have K. testify in court or speak with the magistrate in chambers.

The parties then gave closing remarks, during which the best interest attorney moved the magistrate to recommend an immediate custody order pursuant to Maryland Rule 9-208(h), which permits a magistrate to recommend that an order be entered immediately in "extraordinary circumstances." After reading factual findings into the record, the magistrate agreed that there were extraordinary circumstances justifying the recommendation for an immediate custody order. Pursuant to this recommendation, appellee was granted sole legal and sole physical custody of K. The magistrate also distributed his factual findings and recommendation to the parties in a 67 page handwritten document.

The following day, on March 25, 2014, the parties appeared before the circuit court for a ruling on the magistrates' findings and recommendation. During the parties' oral argument, appellant renewed his motion for K. to testify or be interviewed *in camera* concerning her preference. In response to this argument, the court stated that it "[s]ounds to me like Magistrate Sandy did decide for himself and decided not to interview the child."

Ultimately, the court reviewed the magistrate's findings, and adopted the magistrate's recommendation for *pendente lite* custody. The court found that there had been a material change in circumstances, allowing the court to revisit the 2009 custody order that was entered as part of the parties' divorce. The court justified this finding as follows:

> Mr. Waldron's gone out of the child's life. Child has a, ah, [K.] now has a baby brother. She's taken out of Visitation [academy] where she attended school from kindergarten through fourth grade. She moved, by, her father moved her an hour and a half away. She's established a relationship with a woman [appellant's fiancé] who I have no doubt is a good woman, it's not her mother, and she's established a, a maternal relationship with someone, and father cut off visitation in April of 2014.

The court next determined that the recommendation of the magistrate to place custody of K. with appellee was in the best interest of K. The court remarked that the evidence before the magistrate had shown a "minimization of the mother in the child's life" by:

> taking the child out of school without talking to the mother about it, moving the child without talking to the mother about it, not sharing with the mother information regarding dentist, doctor, therapist, not allowing her to see her mother on Mother's Day, most importantly cutting off access, and that access was not reestablished until this matter was filed in court.

The court was also very concerned with the evidence that K. had cut herself, and noted that "you gotta [(sic)] take action right away and that's what the [c]ourt's required to do when the best interests of the child are before the [c]ourt." The court then signed an immediate *pendente lite* order adopting the magistrate's recommendations.

On April 6, 2015, appellant filed a notice of appeal in the circuit court. This Court hears that appeal pursuant to Md. Code (Repl. Vol. 2013), § 12-303(x) of the Courts and

Judicial Proceedings Article, which permits an appeal from an interlocutory order "[d]epriving a parent… of the care and custody of his child[.]"

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

When an appellate court reviews factual findings, "the clearly erroneous standard" applies. *Wagner v. Wagner*, 109 Md. App. 1, 39-40 (1996) (citing *Davis v. Davis,* 280 Md. 119, 125-26). "A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996) (citation omitted). "Where a case involves the application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are 'legally correct' under a [*de novo*] standard of review." *Van Schaik v. Van Schaik*, 200 Md. App. 126, 133 (2011) (citing *Clancy v. King,* 405 Md. 541, 554 (2008)). Finally, the court will not disturb a "decision founded upon sound legal principles and based upon factual findings that are not clearly erroneous" unless there is a showing of "a clear abuse of discretion." *Lemley*, 109 Md. App. at 628 (citation omitted). An abuse of discretion occurs where:

> "[N]o reasonable person would take the view adopted by the [trial] court[ ]' ... or when the court acts 'without reference to any guiding rules or principles." An abuse of discretion may also be found where the ruling under consideration is "clearly against the logic and effect of facts and inferences before the court[ ]" ... or when the ruling is "violative of fact and logic."

Wilson v. John Crane, Inc., 385 Md. 185, 198 (2005) (quoting *In re Adoption/Guardianship No. 3598,* 347 Md. 295, 312-13 (1997)).

DISCUSSION

I. Appellee's Motion to Dismiss.

Appellee moves this Court to dismiss appellant's appeal for failure to comply with Maryland Rule 8-501(a), requiring that appellant bear the responsibility of creating a record extract. Appellee also moves to dismiss the present appeal for failure to comply with the Court's briefing schedule because appellant submitted his brief twelve days after the July 30, 2015 deadline. When discussing the sanction of dismissal for failure to abide by the Maryland procedural rules, we have observed that:

> dismissing an appeal on the basis of an appellant's violations of the rules of appellate procedure is considered a "drastic corrective" measure. *Brown v. Fraley,* 222 Md. 480, 483, 161 A.2d 128 (1960). We also are mindful that reaching a decision on the merits of a case "is always a preferred alternative." *Joseph v. Bozzuto Mgmt. Co.,* 173 Md. App. 305, 348, 918 A.2d 1230 (2007). This Court will not ordinarily dismiss an appeal "in the absence of prejudice to appellee or a deliberate violation of the rule." *Id.*

Rollins v. Capital Plaza Associates, L.P., 181 Md. App. 188, 202-03 (2008). We have also previously noted that "[o]rdinarily, an appeal will not be dismissed for failure to file a record extract in compliance with [Md. Rule 8-501(a).]" Md. Rule 8-501(m); *McAllister v. McAllister*, 218 Md. App. 386, 399 (2014) (citation omitted).

In the present case, appellant attached a record extract to his brief, but neglected to consult appellee regarding the contents of that extract. As a result, appellee bore the expense of attaching a Joint Appendix to her answer to appellant's brief. However, aside

from this additional expense, there is no indication that appellee has experienced prejudice as a result of appellant's non-compliance with this court's briefing schedule or Maryland Rule 8-501(a). Furthermore, we do not believe that appellant's non-compliance was purposeful. Accordingly we deny appellee's Motion to Dismiss, but note that the costs to be paid by appellant pursuant to our mandate include those costs incurred by appellee in generating a joint appendix.

II. Were the facts as determined by the magistrate and relied upon by the trial judge sufficient to establish "extraordinary circumstances" warranting an immediate order modifying custody of the parties' minor child?

Appellant contends that the facts found by the magistrate were insufficient to demonstrate "extraordinary circumstances," and the circuit court thus erred in relying on those findings to this effect. For the reasons that follow, we hold that the circuit court did not err in adopting the magistrate's finding of "extraordinary circumstances."

Under Maryland Rule 9-208(h), "[i]f a master finds that extraordinary circumstances exist and recommends that an order be entered immediately, the court shall review the file and any exhibits and the master's findings and recommendations and shall afford the parties an opportunity for oral argument." This Court has infrequently discussed "extraordinary circumstances" within the context of Maryland Rule 9-208(h), but appellate decisions concerning whether a non-parent has made a showing of "exceptional circumstances" – a prerequisite for a non-parent to seek visitation or custody over the objections of a biological parent – provide guidance. In those cases, we have refused to reduce "exceptional circumstances" to a rigid multi-factor test, but rather made the

determination through "an analysis of all of the factors before the court" on a case-by-case basis. *Aumiller v. Aumiller*, 183 Md. App. 71, 84, (2008) (citing *Janice M. v. Margaret K.,* 404 Md. 661, 693 (2008)). The Court has held that "the child's best interest has always been the transcendent standard" when determining whether exceptional circumstances exist, *In re Adoption of Ta'Niya C.*, 417 Md. 90, 106 (2010), and one of the guiding factors in all of these cases is the possibility of "detriment to the child." *Koshko v. Haining*, 398 Md. 404, 445 (2007).

In the case at bar, the magistrate's finding of "extraordinary circumstances" was supported in the record by the expert testimony of the custody evaluator, whose testimony established circumstances detrimental to K.:

> [CUSTODY EVALUATOR]: I, I have concerns for [K.] regarding information that's presented to her primarily by dad. I have concern about dad's reality perceptions, the way dad presents information, recalls information and how that information is then presented to [K]. It, um, is in contrast oftentimes to [K.]'s own personal experiences and creates a lot of difficulty for [K]. As an example, um, dad indicated to me that [K.] until Eileen came in her life had never had a mother figure in her life and [K.] shared with me many instances many memories of time spent with her mother. She very clearly feels that [appellee] is her mother in more than just the word. She was able to relate instances, many instances of connectivity, feeling warmth and love from her mother, whereas she hears from dad that her mother's not been in her life at all, that her mother has not been a mother figure to her, that her mother has not been involved, and this is really confusing to [K]. [K.] is at risk by having this information presented to her regularly at developing her own problems, her own identity disturbance when she's bombarded with information that is contrary to her own personal experiences and that information is presented to her as the truth. I'm also concerned for [K.] that she has learned and feels that she has had to learn to cart, compartmentalize her feelings. She knows that when she's at dad's home she should not have positive regard for her mother. Certainly can't speak positively about her mother. And yet when she's with her mother she

> really enjoys her time with her mother. So she has to almost segment who she is into two different categories. This also puts her at risk and really inhibits her ability to develop healthy relationships moving forward. I'm concerned, Your Honor, with the pervasive tone in dad's home of –
>
> THE MAGISTRATE: The what tone?
>
> [CUSTODY EVALUATOR]: Of – the pervasive tone in dad's home of negativity regarding mom. Upon my arrival at dad's home I was greeted at the door by dad. I walked into the living room. Dad very excitedly asked [K.] to tell me about her most recent grades, which she did. She had done very well and was proud of that fact. And [I]'m, dad immediately said well, her grades are good right now, but she always has grade drops every time [appellee] comes back in the picture, so we're anticipating another drop soon. And I changed the subject. I, I don't know if dad is fully aware of how often he speaks negatively about [appellee] in [K.]'s presence…

The custody evaluator went on to state that:

> I'm concerned that, um, given the current arrangement [K.]'s relationship with her mom is not being supported. It's being undermined. I'm concerned… the challenges that [K.] has had that seem to be in correlation with increased litigation or a change in custodial arrangement are because [K.]'s being told oh, we're back at court again. [Appellee] wants to have more time. Um… things are, are shared with [K.] that increase her confusion, the dilemma that she feels at realizing that her dad doesn't want her to have a relationship with her mom, but she wants to have a relationship with her mom, and I'm concerned that if the current arrangement continues an emotional for K[.] – an emotional crisis for [K.] will be created in an effort to prove that if [K.] gets wind that she may have to spend more time with mom or live with mom it's gonna [(sic)] create an emotional crisis, and, and I, I go back to what I'll call the cutting. Dad never in the entire time that I met with him shared with me that [K.] had ever cut, that there were ever any concerns about her cutting. The first I became aware of it was when I read, and I don't recall off the top of my head whether it was interrogatories or depositions, it's the first I had become aware of it, and then it was repeated today, and, and dad indicated today that he had shared that with me. That is incorrect. And today when he first talked about it he talked about her cutting a few times and then he said well, it was really just once. I, I'm just concerned with a crisis being created for [K.] [(sic)] – or [K.], or dramatized at her detriment to prove something. I'm, I'm very concerned about that.

In addition to the above evidence of detriment to K., the magistrate also found that K. had become more reserved and less out-going since December of 2013, K.'s grades and attendance at school have fallen at the same time, despite K.'s decline in performance at school, appellant has moved K. an hour and half away, while K. is at her father's home, she calls appellant's fiancé "mom" and calls appellee "Lindsey," K. spent Mother's day with appellant's fiancé and appellee was prevented from seeing K. on that day, and all of appellee's access to K. was cut off by appellant in April of 2014.

Accordingly, this Court cannot rule that the magistrate or the circuit court committed an abuse of discretion in finding "extraordinary circumstances." To the contrary, the evidence introduced at the *pendente lite* hearing indicated a real possibility of detriment to K. in appellant's custody. This is especially true where the evidence of "cutting" indicated that the eleven-year-old child had engaged in self-harm.

We further hold that the circuit court did not abuse its discretion in affirming the magistrate's finding of extraordinary circumstances and independently concluding that "this child's crying out for help[.]" The circuit court recited many factual findings of the magistrate – such as moving the child to Pennsylvania, not talking to appellee concerning significant changes in the child's life, appellant's cutting off appellee's access to the child, and the child cutting herself – before reaching its own judgment that "something has to change right now and that's the extraordinary circumstances." *Cf. Wise-Jones v. Jones,* 117 Md. App. 489, (1983) (holding that the circuit court erroneously found extraordinary

circumstances justifying an immediate custody order where the court merely relied on the magistrate's conclusory recommendation that custody should change immediately).

Appellant attempts to discredit the evidence of "extraordinary circumstances" by suggesting that "the [m]agistrate's findings are based upon his own view as to the importance of Mother's day, whether a child may legitimately refer to some third person as 'mom,' and the proper exercise of vacation and travel rights during the school year." As reflected above however, the evidence of circumstances detrimental to the well-being of K. was much more pervasive than appellant indicates. Further, appellant's argument has not convinced this Court that the circuit court committed an abuse of discretion, which requires a showing that no reasonable person could find "extraordinary circumstances" detrimental to K. based on the evidence produced at the *pendente lite* hearing. *John Crane, Inc.*, 385 Md. at 198 (citation omitted).

III. Did the trial court err as a matter of law in failing to interview the child and ascertain the child's preference in determining her best interest?

Appellant's next assignment of error is that the magistrate did not have authority to refuse an *in camera* interview of K., and the circuit court "failed to recognize [its] non-delegable duty to determine the child's competency to testify and/or be interviewed." For the reasons follow, we hold that the magistrate did have authority to decide whether K. would be interviewed, and that the magistrate did not abuse his discretion in declining to interview K. We further note that, to the extent appellant argues that the circuit court

neglected to exercise its independent judgment, that argument was not preserved for our review.

a. Did the Magistrate have authority to decline an *in camera* interview of a child witness?

Under Maryland Rule 9-208(b), a magistrate has the power to "regulate all proceedings in the hearing, including the power to … (3) rule on the admissibility of evidence; (4) examine witnesses … [and] (7) recommend findings of fact and conclusions of law." Inherent in this power to rule on the admissibility of evidence is the power to decide whether the testimony of a child witness should be allowed – either through an *in camera* interview or through in-court testimony.

Were we to accept appellant's position, we would needlessly undermine the interest of judicial efficiency served by referral of the fact-finding process to magistrates. When determining whether a child should testify or be interviewed *in camera*, the court is instructed to consider the child's competency/maturity, the potential harm to the child from becoming involved in the litigation, and also whether the child's preference can be revealed through sources other than the child. *See* part III.b, *infra*. A magistrate who has presided over the fact-finding process in a given case is best suited to balance these considerations, as they are familiar with the record of the hearing over which they preside. However, the necessary consequence of appellant's position is that a circuit court judge, who may be completely unfamiliar with the record, would have to review the record anew to make an informed decision regarding the propriety of an *in camera* interview, despite the fact that

the magistrate is already familiar with that very same record. *See Best v. Best*, 93 Md. App. 644, 653 (1992) ("If a chancellor must essentially duplicate the effort and dedication of time of a master in order to ultimately decide a case, nothing has been gained by referral to the master.") (citation omitted).

Furthermore, ruling that only the circuit court can render the decision of whether to hear from a child witness does not afford any additional protections to the proponent of the child's testimony. If the magistrate declines an *in camera* interview with the child, the proponent of the child's testimony is able to raise this issue anew in the circuit court. If the circuit court determines that interviewing the child is appropriate, that court may engage in additional fact finding before ruling on the parties claims. *See Lemley v. Lemley*, 102 Md. App. at 287 (observing that the circuit court may choose to hear additional evidence in its discretion). Accordingly, we hold that a magistrate may decide whether to interview a child witness and/or decide whether to allow the child to testify in a custody dispute.

b. Did the magistrate's abuse his discretion in declining to interview K?

Having determined that the magistrate had authority to determine whether K. would be interviewed, we must further decide whether the magistrate abused his discretion in declining an *in camera* interview in the case at bar.

Under the all-inclusive "best interest of the child" standard, the child's preference to live with one parent "is a factor that *may* be considered in making a custody order, [but] the court is not required to speak with the children." *Lemley v. Lemley*, 102 Md. App. 266,

288 (1994) (citing *Levitt v. Levitt,* 79 Md. App. 394, 403 (1989)) (emphasis in original) (footnote omitted). As indicated by the Court's use of the word "may," the decision whether to consult the child regarding their preference is discretionary, and the court should be guided by (1) the child's knowledge/maturity, *see Leary v. Leary*, 97 Md. App. 26, 30 (1993) ("[T]he child's own wishes may be consulted and given weight if he is of sufficient age and capacity to form a rational judgment."); (2) the potential for emotional distress caused by the child's involvement in a custody dispute, *see Marshall v. Stefanides*, 17 Md. App. 364, 369 (1973) (noting that the courts are confronted "with an attempt to balance the right of the parents to present evidence as to what they deem to be in the best interest of the child as against possible severe psychological damage to the child."); and (3) whether the child's preference for custody can be discovered through sources aside from the child. *See Karanikas v. Cartwright*, 209 Md. App. 571, 595 (2013) ("Although the preference of the child is a consideration for the court, interviewing the child is not the only method by which the trial judge may discern the preference of the child.").

The record in the present case overwhelmingly indicates that, in light of the aforementioned factors, the magistrate did not abuse his discretion in electing not to interview K. During the second day of the *pendente lite* hearing in front of the magistrate, the custody evaluator testified that eliciting K.'s preference would be detrimental, and that K. did not have sufficient judgment to render such an opinion:

> I think that having, um, [K.] testify would be extremely detrimental to her and, and I go back to the dilemma that I talked about previously that she finds herself in, whereby she, it's pretty clear to her that it's safer for her to

> perpetuate dad's agenda than to be true to her own feelings and observations. She, she truly I believe wants to be with both of her parents, but feels that she has to articulate what she knows her dad wants and I think that to put her in a situation where she would feel the need to have to articulate one preference or another, it would be extremely difficult for her. Also I, I don't believe that [K.] is mature enough to handle such a burden and I'm also concerned about the level of influence toward [K.] in what to say and how to say it and that concern comes from all of the information that [K.] has about court hearings and information and depositions and interrogatory answers and, um, I'm concerned with [K.]'s ability to discern what is her own factual information and what information comes from other sources.

The custody evaluator also testified that during her visit with K., K. had already mentioned her preference: "Maybe we could go back to what it used to be. I'd be at Lindsey's [(appellee's)] for a week and then at my dad's for a week."

After hearing the above evidence, the magistrate made the following ruling on appellant's motion to have K. interviewed *in camera*:

> I have listened to two days of testimony and I find pursuant to holdings in *Stefanides,* I think it's also noted in *Koranakis* (phonetic), *Lemley* (phonetic), and other cases citing *Stefanides* that it is purely in the Court's discretion to conduct same before we get to the second tier of the mandated on the record or summary of the report and I am going to deny the request for an in camera interview of [K].

We perceive no abuse of discretion in the above decision, because the record of the *pendente lite* hearing reflects that (1) K. lacked considered judgment; (2) asking K. about her preference would have been psychologically traumatizing; and (3) K.'s preference to be with both parents was already before the court. Notably, this evidence came from the custody evaluator – a neutral party appointed by the court to serve the best interest of K. –

and we refuse to assign error to the magistrate for considering this evidence in declining an *in camera* interview.[2]

c. Did appellant preserve his assignment of error for our review?

Appellant alleges in his brief to this Court that the circuit court erroneously "deferred to the [m]agistrate's ruling and took no independent action to determine the child's ability to testify[.]" However, in the circuit court below, appellant argued that the magistrate neglected to independently consider whether K. should be interviewed, not that the circuit court also had to independently make this determination. Accordingly, appellant's argument that the circuit court failed to take "independent action to determine the child's ability to testify" is not preserved for our review.

According to Maryland Rule 8-131(a), a party may allege that the circuit court was without subject matter jurisdiction regardless of whether the issue was raised in the trial court, but "the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court…" Under this rule, the appellate court's review is generally limited to the grounds relied upon by the objecting party. *Webster v. State*, 221 Md. App. 100, 111 (2015) ("Moreover, '[w]here a party asserts specific grounds for an objection, all other grounds not specified by the party are

[2] Contrary to appellant's assertion, the magistrate's decision does not evidence a lack of independent consideration regarding the issue of whether K. should be interviewed. Rather, the magistrate's ruling reflects a decision reached by applying the holdings of this court in *Stefanides*, 17 Md. App. 364, and *Karanikas*, 209 Md. App. 571, to the evidence produced during the prior two days of the *pendente lite* hearing.

waived.'"). Limiting our review in this manner, helps to fulfill the purpose of the appellate preservation requirement, which has been described by the Court of Appeals as two-fold:

> (a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation.

Maryland State Bd. of Elections v. Libertarian Party of Maryland, 426 Md. 488, 517 (2012) (citation omitted).

In the case at bar, appellant appeared before the circuit court on the day following the *pendente lite* hearing and made the following argument:

> [T]he final thing I want to say to the Court, Your Honor, it's repugnant to the law of the State of Maryland for [the magistrate] and this Court if the Court endorses all of this, fifth requirement of *Saunders* [(sic)] is the preference of the child. Absolutely refused to hear the preferences of the child. Absolutely he refused. Absolutely they tell me we, we're not going to talk to this child because the [custody evaluator] says it may be damaging to her…. I said this is a non-delegable duty. This is a duty that you owe. And based upon them saying no to that, that we don't get a chance to put forth the child's preference, they say if, and so if in fact, and, and this is the kicker, if in fact the child is back in the chambers and the child is talking to you, you would be able to see if the child is being all this manipulated. You would be able to see it for your eyes. You would be able to see through that and you would come back out and say well, here's what the interview shows and you would, you would show yeah, this is exactly right and then you would have every right if you concluded those things from that interview. Interview never gets to happen because the [magistrate] says I'm not going to do it. Now the standard is, that preference is, ah, Your Honor, is if the child, I had written it on my real long paper. "The preference of the child where child is of sufficient age and intelligence to form a rational judgment." We have, we have, [the custody evaluator] say she can't, she can't, she's not mature, she's can't – and that's not her determination, Your Honor. The judge can't rely on her determination. The [magistrate] can't rely on that. Has to decide for himself, herself.

> THE COURT: Sounds to me like Magistrate Sandy did decide for himself and decided not to interview the child.

The above excerpt demonstrates that appellant did not argue that the circuit court must independently consider an *in camera* interview with K. Instead, appellant's argument to the circuit court was that the magistrate erroneously relied upon the opinion of the custody evaluator in considering an *in camera* interview. Had appellant intended to make the former argument, appellant could have easily clarified his positon when the circuit court responded that "Magistrate Sandy did decide for himself and decided not to interview the child." However, appellant responded to the court's remark by once again assigning error to the magistrate's reliance on the custody evaluator. Accordingly, we decline to review appellant's allegation of error on the ground that the circuit court erroneously failed to take "independent action to determine the child's ability to testify[,]" because appellant did not preserve this argument in the circuit court.

IV. Did the circuit court fail to utilize its independent judgment to determine the best interest of the child?

Appellant's last contention on appeal is that the circuit court failed to utilize its independent judgment in determining the best interest of K., thereby erroneously abdicating the role of judge in favor of the magistrate. This allegation of error is without merit.

In *Wenger v .Wenger*, 42 Md. App. 596, 602 (1979), this Court stated that "[c]hancellors as judicial officers may never delegate away a part of the decision-making function to a master a non-judicial officer." We have therefore cautioned that, while the

factual findings of a master should not be disturbed unless clearly erroneous, the conclusions and recommendations of the master based on those facts are not entitled to this same level of deference. *Id.* at 606. Instead, the ultimate disposition of the party's claims must be a product of the judge's independent judgment based on those facts found by the master. *See Domingues v. Johnson*, 323 Md. 486, 493 (1991) (reversing the circuit court's custody decision where the court "accepted the master's recommendations for final disposition upon a finding that they were not clearly erroneous… rather than exercising his independent judgment on those issues[.]"); *In re Danielle B.*, 78 Md. App. 41, 60 (1989) ("While the trial court should apply the clearly erroneous standard and thereby defer to the master's fact-finding, it must reserve to itself the decision of what action to take based on those facts, i.e., the ultimate disposition of the case.").

Within the findings of fact made by the magistrate, we have further clarified that only first-level findings of fact are entitled to deference by the trial judge, whereas second-level findings must be subject to the court's independent judgment:

> Deference will be accorded to the facts as found by the Master, but this only applies to "first-level" facts. First-level facts are those that answer the What?, Where? and How? questions. Deference is not accorded to "second-level" facts or to recommendations. Second-level facts are ultimate conclusions drawn from the first-level facts. Second-level facts are conclusions and inferences drawn from first-level facts. A first-level fact would be that one or both parents used drugs. A second-level fact would be that that use did or did not affect Chad. A recommendation would be a change or lack of change of custody.

Cousin v. Cousin, 97 Md. App. 506, 514-15 (1993).

In the case at bar, the circuit court properly exercised its independent judgment where required. The court relied on the following facts found by the magistrate to reach the conclusion that there has been a material change in circumstances requiring the court to re-evaluate K.'s best interest: Mr. Waldron is out of the child's life, K. now has a brother, K. has been taken out of the school that she attended for five years, K.'s father has moved her from Frederick, MD to York, PA, approximately an hour and a half away, K. has established a "maternal relationship" with her father's fiancé, and appellant cut off appellee's visitation with K. starting in April of 2014.

The facts mentioned above are first level facts directly supported by the evidence in the record, and none of these facts existed at the time that custody was awarded to appellant in 2009. *See Barrett v. Ayres*, 186 Md. App. 1, 18 (2009) (remarking that a material change in circumstances requires is "circumstances affecting the best interest of the child that were not in existence at the time the original order was made[.]"). On the basis of these first level facts, the court concluded that appellee had shown a material change in circumstances affecting the best interest of K. The court thus correctly deferred to the first level factual findings of the magistrate, but exercised its own independent judgment to decide that there had been a material change in circumstances based on those facts.[3]

Appellant proffers that the facts relied upon in finding a material change in circumstances are insufficient, and the court abused its discretion in affirming the

[3] As discussed in Part II, *supra*, the circuit court also exercised independent judgment in deciding that an immediate custody order was justified by "extraordinary circumstances."

magistrate's findings to this effect. Appellant notes that, as sole legal custodian, appellant had the right to change K.'s school, move her to Pennsylvania, and deny appellee access to K., because she did not have court ordered visitation at the time. Appellant, however, fails to acknowledge that relocation of the child by a custodial parent can be a material change in circumstances, notwithstanding the custodial parent's right to change the child's residence. *See Domingues*, 323 Md. at 500 ("[C]hanges brought about by the relocation of a parent may, in a given case, be sufficient to justify a change in custody."); *see also Braun v. Headley*, 131 Md. App. 588, 611 (2000). We therefore hold that the circuit court did not abuse its discretion in finding a material change in circumstances.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.