Circuit Court for Harford County
Case No. 12-C-11-002150

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 134

September Term, 2022

F. A-H.

v.

A.A.

Beachley,
Shaw,
Ripken,

JJ.

Opinion by Shaw, J.

Filed: September 27, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises out of an ongoing dispute between F. A-H. ("Mother") and A.A. ("Father") regarding the custody of the parties' minor child, "A". In 2019, both parties filed a petition for modification of a custody order that had been entered by the Circuit Court for Harford County in 2017. Following a *pendente lite* custody hearing before a magistrate, the magistrate recommended, among other things, an informal agreement between the parties that modified Father's visitation schedule be formalized in a court order. Mother filed exceptions to the recommendations, in which she claimed that the evidence before the magistrate regarding the details of the modified visitation schedule was inaccurate.

Following a hearing before the court, Mother's exceptions to the recommendation were denied in part and granted in part. The court remanded the case back to the magistrate for further proceedings and entered an order modifying Father's visitation.

Mother filed this interlocutory appeal from the *pendente lite* order, raising three questions,[1] which we have consolidated into one: Did the court err or abuse its discretion

[1] The questions presented in Mother's brief are phrased as follows:

1. Does Md. Family Law Action Section 9-208(b), allows [sic] a Magistrate to issue a report and recommendation to modify an existing custody order, following an assessor hearing, without the Magistrate taking evidence or testimony from the parties at the assessor's hearing/settlement conference and without an agreement between the parties placed on the record?

2. After an assessor [custody evaluator] reads his or her oral report into the record at an assessor hearing/settlement conference concerning custody and/or child access, without any extenuating circumstances. Can a Magistrate issue sua sponte, its own report and recommendation to the custody evaluators report and to modify an existing custody order without the Magistrate taking any evidence or testimony from either party at an assessor's hearing/settlement conference, and without the parties

in issuing a *pendente lite* order modifying Father's visitation schedule? We perceive no error or abuse of discretion and, therefore, we shall affirm the judgment of the circuit court.

BACKGROUND

The parties were married in 2009. A. was born the same year. In 2011, the parties were divorced by order of an out-of-state court. Pursuant to the final order of divorce, Mother was granted primary physical custody of A., and the parties were awarded joint legal custody. Father was granted weekend visitation pursuant to the following schedule:

> [Father] shall have visitation the 1st, 2nd, and 3rd weekends in each month in which there are four (4) weekends[,] from Friday at 7:00 p.m. to Sunday at 7:00 p.m. In each month in which there are five (5) weekends, [Father] shall have visitation on the 2nd and 5th weekends.

The order also provided a schedule for visitation during the summer months and on holidays.

March 2017 Modification

In July 2016, Father filed an amended petition to modify custody in the Circuit Court for Hartford County, seeking sole legal and physical custody. Mother filed an amended

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> waiving their right to have the Magistrate who presided over the settlement conference to now make findings of facts and conclusions of law and submit a proposed order to a Judge, in order to modify the parties existing custody order?

3. Can a circuit court Judge adopt a recommendation from a Magistrate to modify an existing custody order, when the record before the circuit court Judge demonstrates the Magistrate never took any evidence or testimony to support the Magistrate's findings of fact and conclusions of law to issue such a report and recommendation to modify an existing custody order, and is modifying an existing order for custody without prior notice to the party, a violation of the parents right to due process?

counter-petition in which she requested that Father's visitation be reduced, that visitation be supervised, and that she be granted sole legal custody. The court held a hearing on the merits over the course of six days in September and December 2016.

On March 17, 2017, the court entered an order on the parties' respective requests for modification. The order modified Father's weekend visitation such that, during the school year, Father had visitation on alternate weekends "from Friday when [Father] will pick up the minor child at school until Sunday at 7:00 p.m., except that if there is no school on the following Monday, then the visitation shall end on that Monday at 7:00 p.m."

Father was also granted weekday visitation during the school year as follows: "On Tuesdays following [Father's] weekend visitation, [Father] will pick up the minor child from school and keep the child until the following Wednesday morning when [Father] shall drop off the minor child at school." The court did not disturb the previous order for joint legal custody except that tie-breaking authority was granted to Mother during the school year, and to Father during the summer.

2019 Modification Requests

In July 2019, Father filed a petition to modify the March 2017 order. Father alleged that there was a material change in circumstances and that it was no longer in A's best interest for Mother to have primary custody. Father requested that he be awarded primary physical custody. In the alternative, Father requested that his alternate weekend access be modified to continue until the following school day. As grounds for his request, Father alleged it was "closer and easier" on A. to be dropped off at school on Monday morning,

instead of on Sunday night at the police station, where exchanges had apparently been taking place.[2]

Father also alleged that Mother had misused her tie-breaking authority to deprive Father of the opportunity to have input in decisions regarding A.'s education and religious affiliation. He requested that he be granted sole legal custody.

Mother filed a counter-petition for modification, seeking sole legal custody. As grounds for modification, Mother alleged that Father had "usurped" her ability to make decisions concerning A. by filing petitions for contempt to challenge her authority to transfer A. from one school to another, and that Father had "retaliate[d]" by refusing to return A. to the custody of Mother at the start of the school year.

The parties were ordered to participate in a custody evaluation.[3] The order for referral, dated February 6, 2020, notified the parties that "the cost of this evaluation and subsequent pendent[e] lite custody hearing before the Magistrate" was to be paid by the parties. The order for referral notified the parties of the hearing date, the right to cross-examine the evaluator and present additional evidence:

> **ORDERED,** that a pendente lite custody hearing, which the Court Evaluator, counsel and parties shall attend, is scheduled for **3/20/2020 at 1:30 p.m. before [a] Family Magistrate, in Courtroom 2-02.** This hearing shall include the Evaluator's oral report subject to cross examination and an opportunity for each party to be heard, in brief. If an

[2] Pursuant to the March 2017 custody order, except when A. was to be picked up or dropped off at school, custody exchanges were to occur at one of three specific locations: a fast-food restaurant, a visitation center, or the parking lot of a police station in Baltimore.

[3] Maryland Rule 9-205.3(c) provides: "On motion of a party or child's counsel, or on its own initiative, the court may order an assessment to aid the court in evaluating the health, safety, welfare, or best interests of a child in a contested custody or visitation case."

> agreement cannot be reached, the Magistrate may recommend an interim order regarding custody and visitation, pending trial; and it is further
>
> **ORDERED,** that if either party requests the opportunity to present additional evidence, the Magistrate may extend the hearing for not more than two additional hours, on that day or at a later date[.]

The hearing did not go forward as scheduled on March 20, 2020, apparently due to the closing of the courts in response to the COVID-19 emergency.

According to the case summary, there were no proceedings before the court between March 2020 and September 2021, presumably due to the ongoing pandemic. On September 15, 2021, the court's Family Law Case Coordinator notified the parties, by letter, that the "Assessor Report hearing" would be held before the magistrate, remotely, on November 9, 2021.

Magistrate Hearing

On November 9, 2021, a hearing was held via Zoom. Both parties and their respective counsel appeared remotely. Both parties were sworn in, along with Moira Ricklefs, who had conducted the custody evaluation. Ms. Ricklefs was the only witness to testify.

Ms. Ricklefs explained that the evaluation process began prior to the closing of the courts in 2020 due to the pandemic. The remainder of the assessment was conducted telephonically and via Zoom. At the time of the assessment, A. was 11 years old. Ms. Ricklefs described the details of the March 2017 custody order at issue. She informed the magistrate that the parties had mutually agreed to extend Father's alternate weekend visitation until Monday morning, with drop off at school. According to Ms. Ricklefs,

Mother "reported that [A.] is doing very well with the current schedule and wants it to remain the same."

Ms. Ricklefs described A. as "delightful" and "very bright." She said that it is evident that A. loves Mother and Father and is "very comfortable" with both parents. A. told Ms. Ricklefs that he enjoys being at Mother's house because he has a younger brother and a stepfather there, and that he enjoys being at Father's house because he has friends there, and they spend a lot of time doing outdoor activities. A. was doing "very well" in school and said that he wanted to remain at his current school, which he likes "very much."

When Ms. Ricklefs asked A., in a one-on-one session, what he would change, A. said "to even the amount of time between my parents." A. said that he wanted the judge to know that "his mother has had most of the time and now it is his dad's turn." When Ms. Ricklefs asked A. what he meant, A. explained, "to live with my dad."

Ms. Ricklefs testified that both parents complained of the other's failure to cooperate in decision-making and failure to communicate information regarding A.'s medical, dental, and school issues. According to Ms. Ricklefs, "the major issue is the continued litigation as well as the lack of communication with each other." She explained:

> [A.] is eleven years old and for almost his entire life his mother and father have lived separately from each other. And for most of his life his parents have been involved in the legal system due to one filing or another. He is old enough to know what courts, hearings and trials mean. He also is very aware of the conflict between his [parents], which to me is evident in his desire for everything to be fair; the schedule, the amount of time with each parent, and the fact that he was describing his parents using the same words.
>
> The litigation in this case needs to stop for [A.'s] sake. His solution is to make everything fair and then everything will be okay and there will

> be no more conflict. Unfortunately making the time equal and fair will not change the parents[’] lack of communication and the passing of information back and forth.

Ms. Ricklefs recommended that the custody arrangement “stay the same[,]” which included the parties’ informal agreement to extend Father’s alternate weekend visitation to Monday morning. She stated:

> I think that was a good decision to add the Sunday evening so that father has at least the Sunday night and getting [A.] to school on Monday morning so [Father] has that contact with school as well as he also has an alternating Tuesday overnight. So, he is involved in the school work that way.

She recommended the use of a co-parenting application and interactive calendar to address the communication issue. She also recommended that each parent have access to medical and educational records. After Ms. Ricklefs finished presenting her report, both parties cross-examined her.

Following cross-examination, the magistrate explained to the parties: “I’m sure your attorneys have already talked to you about this, what my job was today was to listen to the report, listen to the questions that your attorneys posed and try to make a recommendation about whether I believe any changes should happen pending trial.” The magistrate asked Father’s counsel whether Father had any objections to the recommendations made by Ms. Ricklefs and a conversation ensued.

The magistrate then asked Mother’s counsel if Mother had any objection to the recommendations, including the recommendation to “keep the schedule the same as what [the parties] have informally adopted[.]” Counsel for Mother responded, “I believe that

[Mother] would like to keep the schedule the same, feels it is in the child's best interest, and it seems [to] have been working for the past year and a half since COVID[.]"

After that exchange, the magistrate explained that she would take the matter under consideration and would issue a written report and recommendation. At that point, Mother became disconnected from the remote hearing. The magistrate paused the hearing to allow Mother to rejoin.

A short time later, the hearing resumed, apparently, without Mother having reestablished her connection. Mother's counsel did not object to the continuation of the hearing in Mother's absence. The magistrate reiterated that she was going to issue a report and recommendations, and that each party would have the right to file exceptions. The magistrate addressed Father directly and asked if he had any questions. Father replied that he had no questions and that he understood the process. The magistrate then turned to counsel for Mother and asked, "anything that I omitted or should have said? I'm sure you will translate to your client quite well. So, anything else?" Counsel for Mother responded, "Nothing else, Your Honor."

Magistrate's Report and Recommendation

On December 22, 2021, the magistrate's report and recommendation was filed with the court. The magistrate reported that "Ms. Ricklefs had no negative comments about either parent[,] . . . [h]owever, she identified the parents' difficulty communicating with one another as the overriding concern for this family." The magistrate noted:

> Ultimately, Ms. Ricklefs concluded that each parent was a valuable part of [A.'s] life and that steps should be undertaken to ameliorate their co-parenting relationship in order to minimize conflict. She recommended

> that they continue to use the modified schedule that had been developed which included adding a Sunday overnight access period to every other weekend access for [Father] in addition to alternating Tuesdays overnight.
>
> The Magistrate does not find that there is any reason to disrupt the current access schedule pending a trial on the merits. [A.] is doing well and has a good relationship with each of his parents. No parenting deficits were reported which impact [A.'s] care. By report, [A.] is a bright young man who is thriving in each of his parents' care. Therefore, the Magistrate recommends that the amended parenting access schedule the parties have been utilizing be memorialized by court order.

The magistrate made three recommendations:

> 1. [Father] shall be added to the list of authorized contacts for all medical, educational, or recreation activities.
>
> 2. The parties shall utilize a parenting application such as Our Family Wizard or AppClose for communication. In the event the parties cannot reach a consensus on which application to utilize within 30 days, they shall immediately enroll in and being using Our Family Wizard.
>
> 3. [Father's] parenting access time as set forth in the prior order of this Court dated March 10, 2017 shall extend to Sunday overnight with a return to school on Monday morning.

Mother's Exceptions

On January 2, 2022, Mother, through counsel, filed exceptions to each of the magistrate's recommendations. Mother claimed, among other things: (1) the magistrate had no authority to make recommendations because the hearing on November 9, 2021 was for the sole purpose of presenting the custody evaluation report and no evidence had been taken from the parties; (2) she was denied due process because she was disconnected from the conference prior to its conclusion and therefore did not have an opportunity to consult with counsel and place any objections on the record; (3) there were no "extenuating

circumstances" warranting immediate action by the court; and (4) the parties' agreement to extend Father's alternate weekend visitation to Monday morning (instead of Sunday night) was instead of, and not in addition to, Father's overnight visitation every other Tuesday.

Attached as an exhibit to Mother's exceptions was an email from Ms. Ricklefs to both parties and their respective counsel, stating:

> I was informed by [Mother] right after the hearing that I had misspoken about the weekly schedule. I stated that there was a Tuesday night overnight with [Father]; this is not accurate. [Mother] and [Father] had agreed to increase the weekend time to include Sunday overnight with return to school on Monday morning. In the event there was no school on Monday then [A.] would stay with [Father] until Tuesday morning. This plan was agreed to by the parents to decrease the number of exchanges for [A.] and [Father] would lose no time with [A.]. . . . To be clear, there has not been a Tuesday night overnight with [Father] since they agreed to increase . . . the alternating weekends to Monday morning, or Tuesday if there is no school on Monday.

In response, Father asserted that Ms. Ricklefs's testimony regarding the parties' informal agreement was "largely correct as it relates to the schedule," and that [Mother] had "cowed" Ms. Ricklefs into admitting she was wrong.

Hearing on Exceptions

On March 7, 2022, the court held a hearing on Mother's exceptions. Both parties were present in the courtroom, along with their respective counsel.

Mother argued that the hearing before the magistrate was not a *pendente lite* custody hearing, but only a settlement conference, and, therefore, the magistrate had no authority to issue recommendations. Alternatively, Mother argued that the court should deny the recommendation to modify Father's visitation to formalize the parties' informal

arrangement because Ms. Ricklefs had incorrectly stated that, under the arrangement, Father retained his Tuesday overnight visitation. Mother claimed that, although the parties had informally agreed to extend Father's alternate weekend visitation to Monday morning, the agreement also called for the elimination of Father's overnight visitation on alternate Tuesdays. Mother asserted she did not have an opportunity to inform her counsel of the error because she lost her connection to the hearing prior to its conclusion.

Father disputed Mother's claim that the informal agreement eliminated his Tuesday overnight visitation. Father objected to the court's consideration of the email from Ms. Ricklefs because it was not in the record before the magistrate and was inadmissible hearsay.

The court suggested it take testimony from the parties to resolve the factual dispute. Both parties objected on grounds that the Maryland Rules require advance notice if testimony is to be taken at an exceptions hearing, and that they would be deprived of an opportunity to call witnesses and present other evidence.

At the conclusion of the hearing the trial court denied Mother's exceptions with regard to the overnight visitation on Sunday and ordered that such visitation would be continued. The court granted the exception with regard to the overnight visitation on Tuesday and remanded back to the magistrate to take additional testimony. The court also ruled that Father would have no Tuesday night visitation until the remand hearing before the magistrate.

On March 7, 2022, the court entered a written order reflecting its oral ruling. Mother noted this interlocutory appeal from the court's order.[4]

DISCUSSION

Standard of Review

Appellate review of a trial court's decision regarding child custody involves three interrelated standards. *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 246 (2021). First, any factual findings are reviewed for clear error. *Id.* Second, any legal conclusions are reviewed *de novo*. *Id.* Finally, if the court's ultimate conclusion is "founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.* (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

If there is competent or material evidence in the record to support the court's conclusion, its findings are not clearly erroneous. *Id.* "A decision will be reversed for an abuse of discretion only if it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *In re J.J.*, 231 Md. App. 304, 345 (2016) (citations and quotations omitted).

Parties' Contentions

Mother, a self-represented litigant on appeal, contends that the court's *pendente lite* custody order must be vacated because (1) the hearing before the magistrate was not a

[4] A party may appeal an interlocutory order that deprives a parent of the care and custody of a child or changes the terms of such an order. Md. Code, Cts. & Jud. Proc. § 12-303(3)(x).

pendente lite custody hearing but a settlement conference, and, therefore, it was improper for the magistrate to make recommendations and for the court to accept them; (2) modifying custody without prior notice and an opportunity to be heard deprived her of due process; (3) the magistrate's recommendations were based solely on the testimony of Ms. Ricklefs; and (4) Ms. Ricklefs erroneously stated that the parties' agreement to extend Father's alternate weekend visitation to Monday morning was in addition to Father's alternate Tuesday overnight visitation.

Father maintains that Mother was not denied due process as she was on notice that the parties could present evidence at the hearing before the magistrate and that the magistrate could recommend an interim order regarding custody and visitation pending trial. Father contends that the *pendente lite* order modifying the March 2017 custody order was a proper exercise of the court's discretion.

Analysis

In exercising its jurisdiction over the custody of a child, an equity court may make a *pendente lite* custody determination pending a final resolution of a custody dispute. Md. Code, Family Law Article, § 1-201(c). A *pendente lite* custody order is "designed to provide some immediate stability pending a full evidentiary hearing and an ultimate resolution of the dispute." *Frase v. Barnhart*, 379 Md. 100, 111 (2003). Such an award "is subject to modification during the pendency of the action, as current circumstances warrant, and it does not bind the court when it comes to fashioning the ultimate judgment." *Id*.

Pursuant to Maryland Rule 9-208(a)(1)(F), the court may refer issues regarding *pendente lite* custody of or visitation with children or modification of an existing order for custody or visitation to a magistrate. The magistrate is authorized to regulate all proceedings in the hearing and may recommend to the court findings of fact and conclusions of law. Md. Rule 9-208(b).

"When reviewing a [magistrate]'s report, both a trial court and an appellate court defer to the [magistrate]'s first-level findings (regarding credibility and the like) unless they are clearly erroneous." *McAllister v. McAllister*, 218 Md. App. 386, 407 (2014) (citation omitted). "[W]hile the circuit court may be guided by the [magistrate]'s recommendation, the court must make its own independent decision as to the ultimate disposition, which the appellate court reviews for abuse of discretion." *Id.* (internal citation and quotation marks omitted).

As an initial matter, there is no support in the record for Mother's claim that the hearing before the magistrate was a settlement conference. The court's February 6, 2020, order for a custody evaluation notified the parties that there would be a *pendente lite* custody hearing held before a magistrate, at which the evaluator would present an oral report and would be subject to cross-examination. The order also advised the parties that they would have an opportunity to be heard, and that the magistrate "may recommend an interim order regarding custody and visitation, pending trial[.]"

The hearing did not take place on March 20, 2020, as scheduled. When the hearing before the magistrate was eventually rescheduled for November 9, 2021, it was referred to by the court as an "Assessors Report hearing", rather than a *pendente lite* custody hearing,

but nonetheless, the nature of the hearing was apparent. All potential witnesses, including the parties, were administered an oath at the outset of the hearing. Both parties engaged in cross-examination of Ms. Ricklefs. At the conclusion of the hearing, the magistrate stated she would be issuing a report and recommendation to the court as to whether any changes to the existing order should be made, and the magistrate informed the parties of their right to file exceptions. Mother's counsel did not appear to misunderstand the nature of the hearing and did not object to the proceedings or question the magistrate's proposed course of action.

Mother relies on Maryland Rule 9-205.3(i) in support of her claim that the November 9, 2021, hearing was a settlement conference.[5] That Rule is not applicable here.

[5] In pertinent part, the Rule provides:

> **(i) Report of Assessor**.
>
> (1) Custody Evaluation Report. A custody evaluator shall prepare a report and provide the parties access to the report in accordance with subsection (i)(1)(A) or (i)(1)(B) of this Rule.
>
> (A) Oral Report on the Record. If the court orders a pretrial or settlement conference to be held at least 45 days before the scheduled trial date or hearing at which the evaluation may be offered or considered, and the order appointing or approving the custody evaluator does not require a written report, the custody evaluator may present the custody evaluation report orally to the parties and the court on the record at the conference. The custody evaluator shall produce and provide to the court and parties at the conference a written list containing an adequate description of all documents reviewed in connection with the custody evaluation. If custody and access are not resolved at the conference, and no written report has been provided, the court shall (i) provide a transcript of the oral report to the parties free of charge and, if a copy of the transcript is prepared for the court's file, maintain that copy under seal, or (ii) direct the custody evaluator to prepare a written report and furnish it to the

The court explicitly ordered that the custody evaluator's report be presented at a *pendente lite* custody hearing. That the Family Law Case Coordinator referred to it as an "Assessor Report hearing" in the letter notifying the parties of the hearing before the magistrate on November 9, 2021, does not convert the court's outstanding order for a *pendente lite* custody hearing before a magistrate into a settlement conference.

We also find no violation of Mother's due process rights. It is clear that Mother had proper notice that the hearing before the magistrate was an evidentiary hearing, that she had an opportunity to present evidence, and that, based on the evidence presented, the magistrate could recommend that the existing order for custody and visitation be modified pending a hearing on the merits. To the extent that, due to technical difficulties, Mother was unable to communicate with counsel at the conclusion of the hearing and alert counsel to the alleged error by Ms. Ricklefs regarding Tuesday night visitation, any claimed unfairness was rectified when the court granted Mother's exception on that issue and remanded the matter to the magistrate for further proceedings.

Mother claims that it was improper for the court to modify the alternate weekend visitation schedule while remanding for further proceedings on the issue of Tuesday night visitation. She argues that, by "bifurcating an out of court informal agreement", the court "took away" the "consideration" she received for agreeing to extend Father's weekend

> parties and the court in accordance with subsection (i)(1)(B) of this Rule. Absent the consent of the parties, the judge or magistrate who presides over a settlement conference at which an oral report is presented shall not preside over a hearing or trial on the merits of the custody dispute.

visitation. The issue, however, before the court was not the parties' rights under a contract, but, rather, a child custody determination, where the court's focus was properly on A.'s best interest. Furthermore, nothing has been taken away from Mother at this point. The *pendente lite* order expressly provides that, while Father's alternate weekend visitation is extended to Monday morning, Father's Tuesday night visitation is suspended until the matter is heard on remand. Indeed, the order Mother has appealed from reflects Mother's version of the parties' agreement.

We disagree with Mother's argument that the court erred in modifying custody *pendente lite* without making a finding that there was a material change in circumstance. A *pendente lite* custody determination "is subject to review on the basis of a primary award, not as a modification." *Leary v. Leary*, 97 Md. App. 26, 52-53 (1993) (abrogated on other grounds, 390 Md. 620). "The standard is and continues to be what is in the best interests of the child." *Id.*

On appeal, "the trial court's decision governs, unless the factual findings made by the [trial] court are clearly erroneous or there is a clear showing of an abuse of discretion." *Gizzo v. Gerstman*, 245 Md. App. 168, 200 (2020) (citing *Gordon v. Gordon* (citation omitted)). "The appellate court does not make its own determination as to a child's best interest." *Id.*

Here we perceive no clear error or abuse of discretion in the court's decision to modify visitation pending trial. According to the magistrate's findings, which were not clearly erroneous, the parties had informally agreed to extend Father's alternate weekend visitation to Monday morning; A. was "thriving"; the custody evaluator recommended that

modified schedule be continued; and there was no reason to disrupt the schedule pending trial. The court's decision to issue an order modifying Father's visitation, to preserve stability pending trial on the merits, was based on sound legal principles and factual findings that were not clearly erroneous.

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