

Circuit Court for Prince George's County
Case No.: CAD20-11031

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 1011

September Term, 2023

WALTER ALEXANDER ALVAREZ
SERMENO

v.

VILMA ZENAIDA HERNANDEZ GARCIA

Wells, C.J.,
Graeff,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: March 6, 2024

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

Walter Alexander Alvarez Sermeno (“Father”) appeals from an order of the Circuit Court for Prince George’s County granting Vilma Zenaida Hernandez Garcia’s (“Mother”) motion to modify custody. Father challenges the circuit court’s order awarding Mother sole legal custody of the parties’ child (“Child”).

Father presents three issues for our review,¹ which we have consolidated and rephrased as a single issue: Whether the trial court erred or abused its discretion in accepting the magistrate’s factual findings and granting Mother’s motion to modify custody where the magistrate did not send the parties written notice of his findings and recommendations.

For the reasons set forth below, we shall affirm the judgment of the circuit court.

¹ Father’s exact issues were:

- [1.] Whether the Circuit Court erred in granting Appellee’s motion for modification of custody in the form of Sole Legal Custody of the child when the alleged reasons supporting her motion are false and contradictory and even assuming they were true they legally cannot support a modification of custody according to Maryland law[.]
- [2.] Whether the Circuit Court erred in granting Appellee’s motion for modification based on the Magistrate’s opinion of lack of communication between the parties and not the Maryland Common Law regarding custody’s modification[.]
- [3.] Whether the Circuit Court erred in granting Appellee’s motion for modification of custody in the form of Sole Legal Custody of the child by Court order dated June 7, 2023, docketed on June 28, 2023, when at the end of the hearing/trial on June 7, 2023, the Magistrate did not make recommendations, but announced that he had decided the case and that if “Any one of you doesn’t like it can file and appeal. You’ll get something in the mail,” referring to written recommendations by mail which never were provided to Appellant[.]

BACKGROUND

In 2020, Mother filed a complaint for sole legal and primary physical custody and child support. Following discovery and a hearing, the parties reached an agreement on custody. On January 21, 2021, the court entered a Consent Order, awarding the parties joint legal custody and awarding Mother sole physical custody. The Consent Order further provided Father access every other weekend (Friday to Tuesday), and dinner with Child on Thursday evenings during the weeks that Father did not have weekend access.

On December 16, 2022, Mother filed a motion to modify custody and visitation, seeking “full legal and physical custody” of Child. On March 30, 2023, Father filed an answer to Mother’s motion to modify custody and visitation. On April 12, 2023, Father filed a motion to modify custody “so that both natural parents shall have shared custody of the minor child, within a schedule the parties may discuss and agree.” (Emphasis omitted.)

The modification hearing occurred on June 7, 2023 before a family magistrate. Both parties testified through interpreters. Mother testified that she had attempted to enroll Child in school, but the school had required that Father sign certain documents because Father would be responsible for bringing Child to school during his weekday access times. Mother stated that Father refused to sign the documents, and as a result, she was unable to enroll Child in school. Mother testified that Father had also refused to sign paperwork so that Child could obtain a passport and travel to El Salvador to meet her parents. According to Mother, she had never denied Father access to Child. She testified that Father had not attempted to see Child in over a year.

Father’s counsel requested a continuance, arguing that he required additional time to respond to Mother’s allegations and present evidence in support of his request for modification. After the court denied Father’s request for a continuance, Father elected to testify.

Father testified that Mother had blocked his access to the Child beginning in May of 2022. He stated that he arrived at her home to pick up Child, but she refused to answer the door, despite Child’s screams that he wanted to see Father. Father confirmed that Mother had asked him for consent to obtain a passport for Child to travel to El Salvador. Father stated that he did not agree with her request because Mother was not authorized to travel, and the situation in El Salvador is “not favorable” for Child to travel there.

Father recalled speaking to Mother about registering Child for school, but denied that he was ever given registration papers to sign. According to Father, he went to the school with the intent to sign the registration, but he was never given papers to sign.

Father requested that the court modify the custody order to allow him access every weekend. Mother requested that Father’s access schedule remain unchanged.

At the conclusion of the hearing, the magistrate made oral findings and recommendations on the record:

So I’m going to modify the court order. I’ll give her sole legal custody. She already has primary physical custody. He already has every other weekend from Friday to Tuesday. So maybe he’ll show up tomorrow and pick his kid up, bring him back on Tuesday. And then, you know, if the child is eligible evidently to start public school or be in some sort of school program, and I think that the child should be in school.

So it doesn’t change your access, sir. You still have the same amount of access. It’s just that we don’t have to go through this situation where there

is poor communication, no communication and no decisions. So that will be my decision. Any one of you [who] doesn't like it can file an appeal. You'll get something in the mail.

On June 16, 2023, Father filed a request for the court to direct the magistrate to file a report pursuant to Md. Rule 2-541(e). As neither party had filed exceptions to the magistrate's findings and recommendations, the court entered an order on July 13, 2023, adopting the magistrate's findings, granting Mother's motion to modify custody, and denying Father's motion to modify custody. Father noted an appeal on July 19, 2023.

DISCUSSION

Father contends that the circuit court erred in accepting Mother's testimony and concluding that she had established a material change in circumstances to justify a modification of custody. He further contends that the magistrate's finding that the parties lacked the ability to communicate was erroneous and that the magistrate erred in failing to provide written findings and recommendations pursuant to Md. Rule 2-541(e)(1).

Standard of Review

This Court reviews "a trial court's custody determination for abuse of discretion." *Santo v. Santo*, 448 Md. 620, 625 (2016). A court abuses its discretion "when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Gizzo v. Gerstman*, 245 Md. App. 168, 201 (2020). "The trial judge who sees the witnesses and the parties, and hears the testimony is in a far better position than the appellate court, which has only a transcript before it, to weigh the evidence and determine what disposition will best promote the

welfare of the child.” *Id.* (cleaned up). Appellate courts rarely find “a reversible abuse of discretion” in a trial court’s determination of custody. *Id.* (cleaned up).

Analysis

When considering a request to modify an existing custody order, courts engage in a two-step process. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). First, the court must determine whether there has been “a ‘material’ change in circumstance.” *Id.* (quotation marks omitted) (quoting *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)). Second, “[i]f a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody.” *Id.* (quoting *McMahon*, 162 Md. App. at 594).

In this case, Father challenges the magistrate’s finding of a material change in circumstance, arguing that Mother’s reasons for requesting a modification of custody were false and contradictory. Father further contends that the magistrate erred in failing to provide the parties written notice of his findings and recommendations by mail.²

Md. Rule 9-208 governs family law proceedings before magistrates. At the time of

² Father contends that the magistrate was required to serve written findings and recommendations pursuant to Md. Rule 2-541(e)(1). Rule 2-541(b)(1) specifically provides that “[r]eferral of domestic relations matters to a magistrate shall be in accordance with Rule 9-208 and shall proceed only in accordance with that Rule.” We note that Father’s arguments would fare no better under Rule 2-541(e)(1), which also authorizes a magistrate to give notice of his or her findings and recommendations orally at the conclusion of the hearing.

the modification hearing in this case, Md. Rule 9-208³ required that after a hearing, the magistrate “prepare written recommendations, which shall include a brief statement of the magistrate’s findings and shall be accompanied by a proposed order.” Md. Rule 9-208(e)(1). The magistrate must then notify the parties of his or her recommendations “either on the record at the conclusion of the hearing or by written notice served pursuant to Rule 1-321.” *Id.* A party seeking to challenge a magistrate’s findings and recommendations must follow the following procedure:

Within ten days after recommendations are placed on the record or served pursuant to section (e) of this Rule, a party may file exceptions with the clerk. Within that period or within ten days after service of the first exceptions, whichever is later, any other party may file exceptions. Exceptions shall be in writing and shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

Md. Rule 9-208(f).

If a party fails to timely file exceptions, “the court may direct the entry of the order or judgment as recommended by the magistrate.” Md. Rule 9-208(h)(1)(B). In a case where a party fails to timely file exceptions, “any claim that the [magistrate’s] findings of fact were clearly erroneous is waived.” *Dillon v. Miller*, 234 Md. App. 309, 317 (2017) (quoting *Miller v. Bosley*, 113 Md. App. 381, 393 (1997)). “If, however, the basis of appeal is that the circuit court erred in its disposition of the case based upon the facts found by the

³ Md. Rule 9-208 was amended effective January 1, 2024. Relevant to this appeal, the notification provision set forth in subsection (e), providing that the magistrate may notify each party of his or her recommendations “on the record at the conclusion of the hearing” was not amended. See 219th Rules Order, available at <https://www.mdcourts.gov/sites/default/files/rules/order/ro219.pdf> (filed Nov. 28, 2023).

[m]agistrate, this Court, while still bound by the findings of fact, may review the circuit court’s application of those facts in reaching its decision.” *Id.* (citing *Miller*, 113 Md. App. at 393); *accord Barrett v. Barrett*, 240 Md. App. 581, 587 (2019).

In this case, the magistrate complied with Md. Rule 9-208(e)(1) by notifying the parties of his proposed recommendations on the record at the conclusion of the hearing. The parties were required to file any exceptions within ten (10) days of the hearing. Md. Rule 9-208(f). The magistrate’s statement that the parties would “get something in the mail” did not alter his obligation under Md. Rule 9-208(e)(1) to notify the parties either on the record or in writing. Accordingly, Father’s argument that the magistrate erred in failing to provide written notice of his proposed recommendations is without merit.

We conclude that Father’s failure to timely file exceptions waived his challenges to the magistrate’s findings, including the finding that the parties’ lack of communication constituted a material change in circumstances. Though Father did not waive review of the circuit court’s conclusions of law, he did not claim that the circuit court erred in adopting the magistrate’s determination that awarding Mother sole legal custody was in Child’s best interest. Even if Father had raised such an argument, we would conclude that the circuit court did not err in determining that an award of sole legal custody to Mother was in Child’s best interest, and the circuit court did not abuse its discretion in modifying custody.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**