Circuit Court for Howard County
Case No. 13-C-17-111878

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1387

September Term, 2021

SHENGLIN WANG

v.

SUI WAI MAK

Wells, C.J.,
Leahy,
Ripken,

JJ.

Opinion by Leahy, J.

Filed: June 27, 2022

Appellant Shenglin Wang ("Mother") appeals from an order of the Circuit Court for Howard County granting the motion to modify child custody filed by appellee Siu Wai Mak ("Father") and adjudging Mother in constructive civil contempt for violating multiple custody orders. Mother presents two questions for our review, which we have reordered and recast as follows:[1]

1. Did the trial court err and/or abuse its discretion in finding a material change of circumstances and granting Father sole legal custody and primary physical custody of the minor child?

2. Did the trial court err by holding Mother in constructive civil contempt without providing a legal purge provision?

We affirm in part and vacate in part. First, we affirm the court's determination that a material change in circumstances had occurred; however, the record on appeal does not reveal whether, in rendering its custody determination, the court applied the requisite *Sanders-Taylor* factors in its best interests analysis. Second, we hold that the portion of the order adjudging Mother in constructive civil contempt fails to impose a proper sanction or purge provision. Accordingly, we vacate the court's order and remand this case to the circuit court for further proceedings consistent with this opinion.

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

"I. Did the trial court err when it altered visitation with the minor child as apparent punishment due to contempt finding without providing a proper presently available purge provision?

II. Did the trial court err when it altered child access without completing a best interest analysis?"

BACKGROUND

Both parties concede that this case has a "complex history of filings" but neither disputes the facts for the purposes of this appeal.[2]

Mother and Father, who were never married to each other, are the parents of J., who was born in 2017. The parties separated soon after—in June 2017—and have been embroiled in unabated contentious litigation ever since.

The court entered its first custody order on March 23, 2018, which granted Mother sole legal custody and primary physical custody of J. Since that date, there have been at least five applications for protective orders and numerous motions for contempt and modification of custody. As the circuit court recognized in a memorandum filed in 2020, the "parties had not been able to establish a peaceful and orderly way of implementing [a custody order] and have continued to engage in activity that involve the Howard County

[2] Despite the issues presented by Mother in this appeal, the record extract contains only: the docket; the magistrate's report and recommendation, filed July 21, 2021; Mother's exceptions to the magistrate's report, filed July 28, 2021; the court's order for modification and contempt, filed October 18, 2021; and the notice of appeal. Missing from the record extract, among other things, are the petitions that were pending before the court as well as the transcripts of the hearings before the magistrate and in the circuit court on the exceptions to the magistrate's report and recommendation. Father also asserts in his brief that the parties' "past history is very relevant to the appeal," referencing multiple protective order applications and prior custody orders that are also not included in the record extract. We have reviewed the original record in order to properly address this appeal; however, we encourage the parties and their counsel in the future to follow Maryland Rule 8-501(c)'s instruction to provide "all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal or cross-appeal." *See also Motor Vehicle Admin. v. Geppert*, 470 Md. 28, 39 n.7 (2020) ("We [ ] note that future litigants will earn the undying appreciation of an appellate court if they can successfully consolidate relevant materials from the record in an agreed-upon record extract, as encouraged by Maryland Rule 8-501.").

police, the Howard County Department of Social Services, Howard County Hospital personnel and the security detail[] at the Columbia Mall."[3] Having noted the parties' acrimonious history in this family law case, we turn to the more recent orders that were in place before the court entered its October 18, 2021 "Order for Modification and Contempt," which is the subject of this appeal.

February 4, 2020 Memorandum and Orders

On February 4, 2020, the circuit court entered orders modifying the custody of J. and adjudicating Mother in contempt. The court set forth its findings in a memorandum, filed on the same day.

In its memorandum, the court found that Mother is the "primary cause of the contention and acrimony that is perpetrated around the custody issues." The court explained:

> Throughout this case, [Mother] has repeatedly alleged that [Father] has been and continues to be engaged in an illegal and deleterious activities. Among the allegations made during the hearing before the court and/or in prior hearings before the [m]agistrates are the following: 1. [Father] with a woman runs an opium drug ring out of Hong Kong[.] 2. [Father] runs various brothels. . . . 3. [Father] brags about being a pimp. 4. [Father] is engaged as a male prostitute. 5. [Father] has sexually abused J[.]. 6. [Father] is teaching J[.] to masturbate. 7. [Father] makes J[.] watch pornography. 8. [Father]'s "girlfriends" abuse J[.]. 9. [Father] owes [Mother] $20,000 which he refuses to pay. 10. [Father] threatened to kill his ex-wife. 11. [Father] is involved with illegal gambling and harboring illegal aliens. 12. [Father] has firearms and suffers from various diseases including syphilis.

[3] The original March 2018 custody order provided for exchanges at the Columbia Mall, but because those exchanges required the intervention of security officers, in August 2019, the court ordered that exchanges take place at the Howard County Police headquarters.

Contrary to Mother's allegations, a "report done by the Custody Evaluator does not show that this 40-year-old man has any criminal record or that there is any credible evidence he is involved in illegal or questionable activity as [Mother] alleges." Despite being the "focus of many investigations, reports, and inquiries by the police and child protective services," those agencies did not find a "basis to take adverse action" against Father. A "Court Evaluator" proposed that the court order a mental health evaluation of Mother, but the court decided against one "given the limited means of the parties" and Mother's "resistance to any suggestion that she has a mental health condition."

Regarding the parties' employment and living arrangements, the court found that Father was employed by UPS as a truck driver and observed that Father had "steady employment and an apartment with a lease." Mother was living at a hotel with "no specific plan for leaving." The court found that her "employment [wa]s frankly a mystery."

The court found that Mother "seem[ed] to be unable or unwilling to control herself in pursuing her grievances, perceived or otherwise, against [Father]." For example, the court referenced an exchange on Christmas Eve when Mother followed Father to a restaurant in New Jersey and confronted some of Father's family members in front of J. Ultimately, Mother "was asked to leave by the manager of the restaurant." While Mother testified that the encounter was "coincidental," the court found that "[f]rankly, her testimony [wa]s not credible and her actions in the presence of J[.] was a clear violation of the existing interim custody order." The court determined this violation of the custody order was "not an isolated incident" and also referenced Mother's failure to provide J.'s

birth certificate to Father as ordered. The court found that Mother's explanations "lack[] credibility and leaves the [c]ourt to conclude that she only complies with orders that she agrees with."

The court noted that the "custody evaluator found that both parents provide food and care that is adequate for J[.] when he is in their care" but noted that decisions regarding his care would need to be made. In particular, the court noted that there is "universal agreement that J[.] would benefit from socialization with other children in a daycare setting."

The court then concluded:

> [W]hile the parties should continue to try to make decisions about J[.]'s care together and should consult with each other that to the extent that agreement cannot be reached that [Father] should have authority to make the final decision and thus have the legal custody of J[.]
>
> The physical custody of J[.] should be divided up between the parties in a way that benefits J[.] and ensures the J[.] as a close relationship with each parent. There should not however be an abrupt change in the physical custody and changes should take place gradually as J[.] enters into a daycare program when he turns three years of age.
>
> The order that is entered provides that upon the child entering daycare that the parties develop a plan for approximately equal division of the time with the minor child on a going forward basis and that such plan be filed with the [c]ourt. If [Mother] refuses to cooperate with the development of the plan [Father] shall develop the plan. The plan shall be filed with the [c]ourt. At the time the plan is filed, the [c]ourt will review and consider what the child support obligations, if any, should be going forward for the parties.

Based on the findings in its memorandum, the court entered a custody order that, among other things, granted Father legal custody of J. and directed Father to "arrange for appropriate licensed daycare." The court further ordered that, following J.'s entry in a daycare program, the parties were to "transition to a division of physical custody that

provides approximately equal time with each parent." The order directed the parties to "avoid confrontational behavior" and directed that "transitions would take place at the Howard County Police Headquarters."

The court also entered an order finding Mother "in contempt . . . by failing to turn over to [Father] the documents ordered by the [c]ourt within the time limit set" and offering that Mother "may purge the contempt by immediately providing the documents requested in a proper format" to Father's counsel.

October 23, 2020 Supplemental Order

After the court's February 4, 2020 orders were entered, Father filed multiple contempt motions and emergency hearing requests "in [an] attempt to gain [Mother's] compliance with" the order. A review hearing was held on September 30, 2020, following which the magistrate issued a report and recommendations. The magistrate recommended that "a supplemental order for contempt and custody be entered" directing, "until the child is enrolled in daycare," that Father "have access with the minor child from 9:00 a.m. on Sundays to 8:00 p.m. on Thursdays" and that Mother "have access with the minor child from 8:00 p.m. on Thursdays until 9:00 a.m. on Sundays[.]" The recommendations provided that Father provide the court and Mother with a copy of the daycare contract and verification of J.'s enrollment. Otherwise, the February 4, 2020 orders remained "in full force and effect."

The circuit court entered a supplemental order on October 23 mirroring the magistrate's recommendations, except that it did not mention contempt.

October 18, 2021 Order for Modification and Contempt

Motions to Modify Custody and for Contempt

On January 28, 2021, Father filed a "Motion for Emergency Custody/Relief or in the Alternative for Expedited Hearing." Father averred that the court had issued at least four orders in 2020 in which it cited Mother for not being compliant with the court's orders and directions, and that Mother had repeatedly refused to return J. to Father in accordance with the court schedule. Father alleged that "on January 17, [Mother] didn't return the minor child and [Father] contacted the police to go to the alleged address of [Mother.]" Police officers spoke with the resident at the address, who "indicated that she knows [Mother] but that [Mother] doesn't live at this address." Father averred, "currently there is no known location where [Mother] resides." Father alleged that Mother "is simply unwilling or unable to follow any custody schedule and exchange the minor child without incident" and that the court has "indicated concerns as to [Mother]'s mental health." Accordingly, Father sought sole legal and physical custody of J. and suspension of Mother's visitation "pending a mental health evaluation and issuing an order including [sic] that law enforcement is authorized to assist and use force to retrieve the minor child."

That same day, Father filed a "Petition for Contempt," asserting that Mother "has failed to follow the [February 4, 2020 custody order and October 23, 2020 supplement] by not returning the minor child to [Father] since January 17, 2021." Father further alleged that Mother "still has not provided the Social Security card . . . nor the Birth Certificate" as the court had ordered. Father worried that Mother "ha[d] absconded with the minor

child to an unknown location." Father requested, among other things, sole legal and physical custody with supervised visitation and that the court order Mother "to be in compliance with all court orders," "undergo a mental health evaluation," and be held in contempt.

In response, Mother filed a "Counter-Motion for Modification of Custody, Child Access, and for Other Related Relief" on February 3, 2021. Mother alleged that Father failed "to arrange and enroll the minor child in a licensed daycare" but "made numerous false promises to this effect." According to Mother, Father's "promise to enroll the child in a licensed daycare was the condition upon which [the court] transferred custody," and, correspondingly, his "lack of action is contemptuous." Mother further alleged that Father failed to communicate with Mother about J.'s welfare and "either makes unilateral decisions . . . or, more often, fails to take action to address the child's health, welfare, and needs." Mother averred that a "material and substantial change" had occurred since the entry of the custody orders, and requested primary physical custody as well as sole legal custody or, in the alternative, tie-breaking authority.

Also on February 3, 2021, Mother filed a "Petition for Contempt and Other Related Relief." Mother asserted that Father "must be held in contempt for his failure to comply with the requirement to enroll the minor child in a licensed daycare for nearly one year" and for his failure to communicate with Mother and "take action to address the child's health, welfare, and needs." Accordingly, Mother requested that the court strike the access

schedule and revert to the initial custody order, which granted Mother sole legal custody and primary physical custody of J.

July 9, 2021 Hearing

An evidentiary hearing on these four motions commenced on July 9, 2021 before a magistrate.[4] Father testified first. He described the difficulties he encountered having his access periods with J. because Mother either arrived late for scheduled exchanges or failed to show at all. Father explained that the police were called on various occasions to retrieve J.

Father confirmed that he had enrolled J. in daycare on March 25, 2021. He said that Mother did not have problems picking up J. at daycare. However, Mother never brought J. to attend daycare on Fridays, even though J. was scheduled to attend daycare on Friday.

Father also testified that a detective had questioned him concerning allegations that Father was "using J[.] to do child pornography." After Father took a polygraph, the detective did not follow-up further.

Another incident that Father relayed occurred when J. was scheduled to receive an x-ray to review a fracture in his foot. Father had scheduled the x-ray at American

[4] The court treated Father's "Motion for Emergency Custody/Relief or in the Alternative for Expedited Hearing" as a motion for modification of custody/access and set the motion for this date.

In addition, Father filed a motion for modification of child support on April 16, 2021 in a related case, *Howard County Department of Social Services v. Mak*, Case No. 13-c-17-112953. While the magistrate had initially set this motion for the July 9 hearing, Father had only recently served Mother. Accordingly, the magistrate noted that this motion was "not really ripe at this time," and set it for a later date. The motion for modification of child support is not before us in this appeal.

Radiology in Columbia. While there, Father saw Mother recording J. and Father. He waited for Mother to leave and then returned with J. to American Radiology for the x-ray. According to Father, Mother "follow[ed] us back to the facility," and "the front desk ha[d] to ask her to leave." Father then called the police, who arrived after Mother had left.

Later in his testimony, Father explained that J.'s pediatrician and dentist terminated J. as a patient due to Mother's "behavior toward . . . the doctor staff and doctor office." Father believed it was in J.'s best interests if Father made "custodial decisions like medical care and things like that" and had sole physical custody. Father asked the court to consider supervised visitation and only provide overnights to Mother "if she can provide a lease agreement with her name on it."

On cross-examination, counsel for Mother referenced Father's prior conviction for fraud in North Carolina in 1999. Father confirmed that he pled guilty but clarified that the court "didn't like put [him] in jail."

Father did confirm that he did not list Mother in J.'s initial daycare application, although he later called the daycare to correct it. On re-direct, Father testified that he was up to date with child support.

Mother then testified and insisted that she was not a danger to J. She also claimed that she did not "have much anger towards" Father, otherwise, she "would not [have] even let [Father] see the child." Mother believed that she and Father could communicate civilly. She explained that she "used [the] past four years to recover from the hurt [she] experienced" from Father.

Mother explained that she enrolled J. in various activities, including martial arts. She said that Father's allegation that she was teaching J. to utilize violence "twist[ed] it around. Black to white." According to Mother, she wanted J. to learn martial arts "to keep his health," "to protect himself," and to "meet more friends." Mother requested that the court alter custody to "do like the first order for the best interest of the child" but she asserted that she would allow Father "to be in touch with the child and spend more time with the child like what [she] did before."

On cross-examination, Mother stated that she works part-time taking care of children. She did not disclose the address of her employer, because she did not want Father to "go there to bother [her]." She denied receiving a letter from a doctor's office stating that her behavior was unacceptable and that the doctor could no longer provide services.

After the magistrate heard closing arguments, she elected to hold the matter under consideration, and stated that she would "issue a written Report and Recommendation[s] from which anyone who disagrees . . . can file the Exceptions."

Report and Recommendations

On July 21, 2021, the magistrate issued her "Report and Recommendations." First, the magistrate listed her findings of facts. The magistrate found, among other things, that Mother "has not followed the [c]ourt's orders for significant periods of time"; failed to "return the child at the Ordered times"; and that Father "has contacted police numerous times to gain access to the child." The magistrate made numerous findings concerning J.'s daycare, including that Mother had not brought J. to the daycare on Friday when he was

due to attend; that Mother believes the daycare is not appropriate for J.; that Mother failed to present an alternative daycare; and that the pandemic "interfered with Father's ability to enter the child in daycare." The magistrate further found that Mother's "assertions of abuse by Father lack credibility."

The magistrate concluded that, although the "court has held multiple hearings . . . to try to gain [M]other's compliance with the Custody Order so that the court would not have to make further changes[,] . . . [t]here exists a material change in circumstances" because "Mother fails to adhere to the [c]ourt's Orders." The magistrate further found that it "is in the best interest of the minor child that he attend daycare for his social emotional development" and that "[i]t does not appear [M]other will take the child to daycare."

The magistrate recommended "it is in best interest of the minor child that [F]ather have primary physical custody" and to "maintain sole legal custody." She observed that "Father appears to be stable" whereas she found Mother's testimony regarding her address was "not credible" and her testimony regarding her employment was "limited." The magistrate also found that Mother "has interfered with the child's [medical] providers enough that some will no longer serve the child. That is not in the child's best interest." In light of Mother's interference with J.'s medical providers, the magistrate concluded that Father should make all medical decisions but that he also must notify Mother of any decision.

The magistrate then reasoned that, given "the only exchange that needs to occur between the parties is on Sunday, and [F]ather does not work on that day, the exchange can

be more centralized" and directed the exchange take place at the Montgomery County Police Station in Silver Spring, although the "parties can mutually agree to a different location." The magistrate finally noted that "[s]hould [M]other adhere to the new order for at least six months straight, additional access . . . may be warranted."

Upon these findings, the magistrate issued recommendations granting Father "sole legal custody of the minor child, subject to [Father] notifying [Mother] of all health, medical, educational, religious, daycare, and other legal decisions being made on the child's behalf by way of an email provided on monthly basis." The magistrate recommended that Father have primary physical custody of J., subject to an access schedule, which generally provided Father with access between Sunday afternoon through drop-off at school on Friday and the "second full weekend of the month" and Mother with weekend access except during the second weekend of the month.

The magistrate further recommended that Mother "be found in contempt for failing to abide by the October 2[3], 2020 and February 4, 2020 Orders" and that Mother "may purge her contempt by abiding by the Order for Modification following this hearing for a period of six (6) months."

Exceptions to Magistrate's Report and Recommendations

On July 28, 2021, Mother filed "Exceptions to Magistrate's Report and Recommendations." Mother, through counsel, asserted that the magistrate, "as a matter of law, erred when she suggested punishing the Mother for allegedly failing to follow [c]ourt Orders by limiting access to the subject child." According to Mother, "[t]his error is made

clear by the [m]agistrate's express indication that additional access for the Mother can be **earned by her** by following the court's orders, *i.e.*, finding additional access is proper **but only** if the Mother follows the [c]ourt's orders for six (6) months." (Emphasis in original). Mother averred that the "material change in circumstances . . . (alleged failure to follow orders) is not sufficient or proper to deny or limit access to the child." Mother further argued that the magistrate "wrongfully found that the child's and mother's access schedule should maximize his attendance at daycare, especially when a caring parent is available, *i.e.*, the Mother."

Next, Mother asserted that the magistrate made "factual errors without substantial evidence or without properly weighing the evidence presented." According to Mother, these errors included: finding Father "more credible without considering his conviction for fraud, his secret audio recording of the Mother, his past lies about his criminal record, and his criminal subterfuge"; "fail[ing] to address that Mother's contention that daycare is not appropriate for the child at his age, that he needs to be in preschool, and that she is available to care for the child at times when [Father] is at work"; and, failing to note that "this entire nightmare is due to [Father]'s desire to reduce his [child support] payments."

Although Mother acknowledged that the circuit court's interaction with her "ha[d] been difficult at times," she argued that the nature of the hearing prevented her from receiving a fair hearing. Mother also provided a litany of errors and other matters on which she sought review. Finally, Mother requested a hearing on Mother's exceptions.

On July 30, 2021, Father filed "Counter-Exceptions to the Master's Report and Recommendations and Request for a Hearing." Although Father reserved "the right to amend these exceptions upon the receipt of the transcript," his sole exception was the magistrate's recommendation that the exchange location be changed from the Ellicott City Police Station to the Montgomery County Police Station. Father also sought a hearing on his exception.

October 4, 2021 Hearing

The parties appeared before the circuit court on October 4, 2021. Although counsel for Mother conceded that his "client is very emotional," he pressed that the magistrate recommended an "inappropriate sanction for [Mother's] failure to follow the Order." Specifically, counsel contended that, "if it's in the best interest and was in the best interest for my client to have the child for four weekends," the court could not sanction Mother in a manner that is against J.'s best interests. Counsel for Mother also requested that the court provide "one order that the parties must follow" and noted that Mother "is available to provide daycare" and "there's no reason why . . . mom couldn't watch the child."

Counsel for Father echoed the suggestion that the court craft one order "setting forth everything." Counsel noted that the court in its prior order had recommended J. attend daycare because he "was not age appropriate with some of his language skills, his social skills, and that's where it came in that daycare or a social setting would be better for him." Regarding Father's exception, counsel asserted that if Mother "continues on her practice of never bringing [J.] on time, [Father] would be about a half an hour to forty minutes away

from the exchange place . . . and wouldn't be able to just up[] and within a couple of minutes be there." Counsel asserted that Mother's failure to follow the court's orders is "not acceptable" and "not right for this child."

Following the arguments by counsel for both Mother and Father, the court summarized that "we're dealing with two parents who love a child and who feel differently about how to raise that child. . . . And that's, that's a very difficult situation for them and for us all." The court then took the matter under advisement.

October 18, 2021 Order

The court entered an "Order for Modification and Contempt" adopting the magistrate's July 21, 2021 report and recommendations. Specifically, the court granted Father sole legal and primary physical custody of J. and largely kept the same schedule but granted Father access on the first weekend of the month (rather than the second). Rather than accept the magistrate's recommendation that the exchange happen in Montgomery County, the court ordered "exchanges shall occur at the Ellicott City police station."

The court further adjudged Mother in contempt for violation of the February 4, 2020 custody order and October 23, 2020 supplemental order. The order provided that Mother "may purge herself of the aforesaid contempt by abiding by this Order, following this hearing for a period of six (6) months; further provide that, upon full compliance with the aforesaid purge provisions, this contempt shall be considered as purged."

Mother noticed a timely appeal on November 5, 2021.

DISCUSSION

I.

Custody Modification

A. Parties' Contentions

Relying on *Kowalczyk v. Bresler*, 231 Md. App. 203 (2016), Mother asserts that the court erred by modifying child access without considering the best interests of the child. According to Mother, the change in custody was "part of the contempt proceeding" and "an ancillary order" meant to facilitate compliance or encourage a greater degree of compliance with court orders. Mother asserts that "if a Court modifies child access as part of a contempt punishment, then it must still complete a best interest analysis. It was error for it to not do so here."

Father responds that the custody modification was not "punishment" of past behavior but a modification based upon a change of circumstances and consideration of the child's best interests. To Father, the "Contempt Petitions seem to be an afterthought rather than the main issue in this case." He asserts that "throughout the Findings of Fact" the court noted that the recommended modifications were "in the minor child's best interest" and "in essence" went "through the numerous factors applicable in this particular matter." Father avers that the "caselaw that has dominated in this area has been mostly replaced by the codification of Md. Rule 9-204.1 and Md. Rule 9-204.2." According to Father, "[i]t is no longer a requirement that the [c]ourt go[] through all factors that were set out in caselaw." Regardless, Father surmises that the court considered the factors and "made

'best interest' determinations throughout the Findings of Fact and Recommendations that were later put down in the final Order of the Court."

B. Framework for Modification of Child Custody

We review a court's child custody determinations utilizing three interrelated standards of review. *In re Yve S.*, 373 Md. 551, 586 (2003). The Court of Appeals described this review as follows:

> We point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second], if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] 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. (cleaned up). "In our review, we give 'due regard . . . to the opportunity of the lower court to judge the credibility of the witnesses'" and recognize the discretion of the trial court to "award custody according to the exigencies of each case." *Gillespie v. Gillespie*, 206 Md. App. 146, 171 (2012) (quoting *In re Yve S.*, 373 Md. at 584, 585-86).

"Embraced within the meaning of 'custody' are the concepts of 'legal' and 'physical' custody." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). "'Physical custody . . . means the right and obligation to provide a home for the child and to make' daily decisions as necessary while the child is under that parent's care and control." *Santo v. Santo*, 448 Md. 620, 627 (2016) (quoting *Taylor*, 306 Md. at 296). The parent with whom a child spends a majority of his or her time has "primary physical custody" of the child. *Reichert*

v. Hornbeck, 210 Md. App. 282, 345-46 (2013). Legal custody, on the other hand, "'carries with it the right and obligation to make long range decisions' that significantly affect a child's life, such as education or religious training." *Santo*, 448 Md. at 627 (quoting *Taylor*, 306 Md. at 296).

When considering a request to modify custody, a trial court engages in a familiar two-step process. *Gillespie*, 206 Md. App. at 170. First, the circuit court must assess whether "there has been a material change in circumstances." *Green v. Green*, 188 Md. App. 661, 688 (2009). "A material change of circumstances is a change of circumstances that affects the welfare of the child." *Gillespie*, 206 Md. App. at 171. The burden remains on the moving party to "show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." *Id.* at 171-72 (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)). A "court's inquiry must cease" if a material change of circumstances is absent. *Braun v. Headley*, 131 Md. App. 588, 610 (2000).

Second, should the court find a material change in circumstances, "the court then proceeds to consider the best interests of the child as if the proceedings were one for original custody." *Gillespie*, 206 Md. App. at 170 (quoting *McMahon v. Piazze*, 162 Md. App. 558, 594 (2005)). The trial court is thus required to evaluate each case on an individual basis to determine what is in the best interests of the child. *Kadish v. Kadish*, __ Md. App. __, __, No. 275, September Term 2021, slip op. at 36 (filed April 27, 2022) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996)).

Despite the broad discretion granted to the circuit court, "there are numerous factors the court must consider and weigh in its custody determination." *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 253 (2021). We recently summarized in *Kadish* the well-established analysis that courts apply in considering the best interests of the child, "guided by the factors articulated in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 420 (1977), and, with particular relevance to the consideration of joint custody, *Taylor v. Taylor*, 306 Md. 290, 304-11 (1986)." *Kadish*, slip op. at 36. In *Sanders*, this Court provided ten non-exclusive factors: (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health, and sex of the child; (8) residences of parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender. 38 Md. App. at 420. In *Taylor*, the Court of Appeals enumerated thirteen specific, non-exclusive factors, including some that overlap with the *Sanders* factors: (1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (2) willingness of parents to share custody; (3) fitness of parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of child's social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents' request; (11)

financial status of the parents; (12) impact on state or federal assistance; and (13) benefit to parents. 306 Md. at 304-11.

"When considering the *Sanders-Taylor* factors, the trial court should examine 'the totality of the situation in the alternative environments' and avoid focusing on or weighing any single factor to the exclusion of all others." *Jose v. Jose*, 237 Md. App. 588, 600 (2018) (quoting *Best v. Best*, 93 Md. App. 644, 656 (1992)). Accordingly,

> there is no litmus paper test that provides a quick and relatively easy answer to custody matters. Present methods for determining a child's best interest are time-consuming, involve a multitude of intangible factors that ofttimes are ambiguous. The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication. The fact finder is called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future. At the bottom line, what is in the child's best interest equals the fact finder's best guess.

Sanders, 38 Md. App. at 419.

C. Exceptions to a Magistrate's Report and Recommendations

"The recommendations of a magistrate inform the trial court's final judgment in certain circumstances." *Barrett v. Barrett*, 240 Md. App. 581, 586 (2019). Rule 9-208 contemplates that "[i]f a court has a full-time or part-time standing magistrate for domestic relations matters and a hearing has been requested or is required by law," the court must refer certain domestic relations matters, including "modification of an existing order or judgment as to custody or visitation" and "constructive civil contempt by reason of noncompliance with an order or judgment relating to custody of or visitation with a minor child" to a magistrate. Md. Rule 9-208(a)(1).

After a magistrate has developed findings, the Rules require the magistrate to "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). A party who wishes to contest a magistrate's findings or recommendations must file exceptions within a "narrow timeframe." *Barrett*, 240 Md. App. at 587. Pursuant to Maryland Rule 9-208(f), "[w]ithin ten days after recommendations are placed on the record or served . . . a party may file exceptions with the clerk." The Rule cautions: "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). Even when a party fails to make exception to an issue in a magistrate's report and recommendations, a party is not precluded "from appealing the trial court's adoption of the [magistrate's] recommendation if the issues appealed concern the court's adoption of the [magistrate's] application of law to the facts." *Green*, 188 Md. App. at 674.

D. Analysis

Returning to J., we first consider Father's contention that the court "modified child access as part of a contempt punishment" and hold that the court's decisions to modify custody and adjudge Mother in contempt are separate determinations.

Next, we examine whether the circuit court abused its discretion in modifying custody. Although we conclude that there was sufficient evidence to support the court's conclusion that a material change in circumstances had occurred, and we reject Mother's

contention that the court failed to consider the child's best interests, the record on appeal does not reveal whether the court applied the requisite *Sanders-Taylor* factors in its best interests analysis.

1. Modifying Custody as Part of Contempt Action

Mother contends that the court modified custody as "part of the contempt proceeding" and as "an ancillary order" meant to facilitate compliance with the court's orders. We disagree.

Both Mother and Father filed motions to modify custody, and the testimony at the evidentiary hearing before the magistrate focused primarily on this issue. Consequently, both the magistrate's recommendations and the court's order initially resolve the parties' motions for modification and then consider the issue of contempt. Similarly, the magistrate's recommendations focused on the changes in circumstances since the previous order that impacted J.'s best interests. Although the primary cause of the change of circumstances necessitating the custody modification and the reasons that Mother was placed in contempt are based on the same set of facts, the parties' requests for modification and the court's consideration of contempt are distinct. Having determined that the court's order to modify custody is separate, although related to, its order hold Mother in contempt, we turn to consider the court's custody determination.

2. Custody Determination

a. Material Change of Circumstances

Mother clarified at oral argument before this Court that she does challenge the court's finding of a material change of circumstances,[5] which we review for abuse of discretion. In this case, the magistrate explained in detail the basis for her determination that a material change in circumstances had occurred that impacted J.'s best interests. Specifically, the magistrate referenced the many times Mother failed to comply with various court orders and that her violations were "willful and contemptuous." The magistrate found that Mother had "not brought the child to daycare on Fridays when he is supposed to attend" and that Mother would not take J. to daycare despite finding that it is in his best interest to attend "for his social [and] emotional development." The magistrate concluded that Mother "continuously assert[ed] [F]ather has abused and/or exploited the minor child" without any proof. The magistrate noted that Father had to contact the police "numerous times to gain access to the child." The magistrate finally found that "Mother

[5] Although not so clear in her brief, at oral argument, counsel for Mother clarified that she also asserts that the court did not make an "exact finding of change in circumstances" and that "what's happened here [does not] amount[] to a change of circumstances."

has interfered with the child's [medical] providers enough that some will no longer serve the child. That is not in the child's best interests."[6]

In *Kadish*, we concluded that there was sufficient evidence to support the court's finding that a material change had occurred due to mother's "consistent difficulties in complying" with various travel provisions of a custody order. *Kadish*, slip op. at 38. These difficulties resulted in the child residing with father "for almost twice as long as . . . contemplated" and "impacting [the child's] best interest by forestalling her ability to plan and achieve consistency." *Id.* at 39. We explained that we could "envision few changes more material to a child's best interests than the unilateral action of one parent to disregard a custody arrangement and leave a child with the other parent for an indeterminate period without good cause." *Id.*

Here, viewing the record as a whole, we hold that there was sufficient evidence to support the magistrate's finding, adopted by the circuit court, that a material change in circumstances had occurred. Mother's unilateral violations of the custody arrangement forestalled J.'s "ability to plan and achieve consistency" by depriving Father of his access periods with J. *Id.* We cannot say the magistrate or the circuit court were clearly erroneous

[6] In her "Counter-Motion for Modification of Custody, Child Access, and for Other Related Relief," filed on February 3, 2021, Mother made similar allegations against Father to support her own contention that a "material and substantial change" had occurred since the entry of the custody orders. Mother claimed that Father failed "to arrange and enroll the minor child in a licensed daycare" despite "numerous false promises to this effect" and failed to communicate concerning J.'s welfare.

in finding that Mother's violations impacted J.'s relationship with his Father, his health, and his social and emotional development.

b. Modification of Custody

Turning to the court's custody determination, Mother avers that the court erred by modifying access without completing a best interest analysis. While we recognize the circuit court's broad discretion to "award custody according to the exigencies of each case," *In re Yve S.*, 373 Md. 585-86, as our appellate courts have oft repeated, "there are numerous factors the court ***must consider and weigh*** in its custody determination," *J.A.B.*, 250 Md. App. at 253 (emphasis added); *see also Boswell v. Boswell*, 352 Md. 204, 223 (1998) ("In applying the best interests of the child standard to a custody award or grant of visitation, a court ***is to consider the factors . . . and then make findings of fact in the record*** stating the particular reasons for its decision." (emphasis added)); *Santo*, 448 Md. at 630 ("Consistent with *Taylor*, . . . a trial court should carefully set out the facts and conclusions that support the [custody] solution it ultimately reaches."); *Taylor*, 306 Md. at 303 (noting "major factors that should be considered in determining whether joint custody is appropriate).[7]

[7] Father contends that the "caselaw that has dominated in this area has now been mostly replaced by the codification in Md. Rule 9-204.1 and Md. Rule 9-204.2. (Enacted November 19, 2019, effective January 1, 2020). Father is incorrect. Rule 9-204.1 directs the *parties* to "develop a parenting plan they believe is in the best interest of their child" and lists a number of factors, which largely overlap the *Sanders-Taylor* factors, that the "parties may consider" in developing a plan. Md. Rule 9-204.1(b), (c). "If the parties do not reach a comprehensive parenting plan, they shall complete a Joint Statement of the Parties Concerning Decision-Making Authority and Parenting Time pursuant to Md. Rule (Continued)

Likewise, in *Azizova v. Suleymanov*, we observed that "[i]t is well established that custody determinations are to be made by a careful examination of the specific facts of each individual case." 243 Md. App. at 344-45 (2019), *cert. denied*, 467 Md. 693 (2020). While the trial court is not limited in the factors it can consider, "the cases of the Court of Appeals and of this Court, beginning with *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1977) and *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986), have set forth a non-exhaustive delineation of factors that a court ***must consider when making custody determinations***." *Id.* at 345 (emphasis added). We noted:

> The Court of Appeals and this Court have time and time again affirmed custody determinations where the trial judge embarked upon a thorough, thoughtful and well-reasoned analysis congruent with the various custody factors. *See Santo v. Santo*, 448 Md. 620, 646, 141 A.3d 74 (2016) (The decision of the circuit court was "predicated on its thorough review of the *Taylor* factors, deliberation over custody award options, sober appreciation of the difficulties before it, and use of strict rules including tie-breaking provisions to account for the parties' inability to communicate" and "was rational and guided by established principles of Maryland law. No abuse of discretion occurred in this case."); *Reichert v. Hornbeck*, 210 Md. App. 282, 308, 63 A.3d 76 (2013) ("[T]he court 'articulated fully the reasons that support[ed the] conclusion' that joint physical and legal custody was appropriate through an extensive and thoughtful consideration of all

9-204.2." Md. Rule 9-204.1(d). The court is then required to "consider the entire Joint Statement," alongside the "factors listed in Rule 9-204.1(c)." Md. Rule 9-204.2(d). As stated in the report of the Standing Committee on Rules of Practice and Procedure announcing this proposed Rule: "[t]he thrust of the changes is to require the parents to make a reasonable effort to determine for themselves what arrangements are practical and in the best interest of their child(ren), to develop a written parenting plan for considerations by the court, and to give some guidance to them in addressing those issues." Standing Committee on Rules of Practice and Procedure, *Two Hundred and First Report* at 5 (Nov. 12, 2019). These Rules do not replace the well-traveled standard for determining child custody set out in our caselaw.

> suggested factors."); *Hughes v. Hughes*, 80 Md. App. 216, 234 n.5, 560 A.2d 1145 (1989) (stating that the trial judge's decision to deny father's request for joint custody consisted of "thorough and well reasoned analysis").

Id. at 347-48.

Here, the record does not reflect whether the court considered the required *Sanders-Taylor* factors in making its custody determination. Indeed, neither the magistrate nor the circuit court judge referenced *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1977) or *Taylor v. Taylor*, 306 Md. 290 (1986) or itemized the factors that they had considered. Although both made various findings of fact, and noted in some instances that they were in the best interests of the child, we cannot discern how these findings supported the conclusion that "it is in the best interest of the minor child that [F]ather have primary physical custody." And although we could consign some findings to certain *Sanders-Taylor* factors, we cannot assume that the balance of the factors were considered and ruled out. *See Jose*, 237 Md. App. at 600 (requiring a trial court to examine the "totality of the situation" and "avoid focusing on or weighing any single factor to the exclusion of all others" (cleaned up)). Moreover, were we to attempt to assign weight to the findings, we would be, at best, speculating as to how the findings shaped the magistrate and the court's consideration of each factor.

In short, we cannot discern, based on this record, whether the court applied the requisite *Sanders-Taylor* factors in its best interest analysis. Accordingly, we cannot say whether the court abused its discretion in granting Father sole legal custody and primary physical custody of J. Therefore, we vacate and remand to allow the court to issue a

custody determination applying the requisite *Sanders-Taylor* factors. *See Taylor*, 306 Md. at 312 ("Any uncertainty should be resolved by the trial court, and we shall remand for that purpose."). We leave the court with remedial flexibility to determine whether or not an additional hearing is necessary.

II.

Contempt

A. Parties' Contentions

Mother next asserts that "a purge provision must meet certain requirements not met here." According to Mother, her "argument can be succinctly stated as *See Kowalczyk v. Bresler*, 231 Md. App. 203 (2016), as that case so closely matches the facts and proper law of this case." She asserts:

> In the instant matter, just like in *Kowalczyk*, the Mother was penalized without a proper, instantaneously activating, purge provision. She cannot presently purge the contempt and penalty, but instead must endure the penalty for 6 months and then apply for the possible relief of the sanction. Simply put, the [c]ourt's penalty fashioned here was not a proper contempt/purge provision.

Father counters that the finding of constructive civil contempt met the "sanction" and "purge" requirements. According to Father, the "'purge' is compliance for 6 months with the Order of the [c]ourt. Something that is within [Mother]'s ability. Upon [Mother] completing compliance for a period of 6 months the sanction . . . will be removed."

B. Analysis

We "will not disturb a contempt order [on appeal] absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed." *Kowalczyk*,

231 Md. App. at 209. A discretionary decision premised upon legal error is an abuse of discretion because a "court's discretion is always tempered by the requirement that the court apply the correct legal standards." *Jocelyn P. v. Joshua P.*, 250 Md. App. 435, 463 (2021).

The contempt provision in the October 18, 2021 "Order for Modification and Contempt" is for constructive civil contempt, as opposed to criminal contempt. "[T]he purpose of civil contempt is to coerce present or future compliance with a court order, whereas imposing a sanction for past misconduct is the function of criminal contempt." *Dodson v. Dodson*, 380 Md. 438, 448 (2004). Civil contempt is "intended to preserve and enforce the right of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties." *Breona C. v. Rodney D.*, 253 Md. App. 67, 73 (2021) (quoting *Cnty. Comm'rs for Carroll Cnty. v. Forty W. Builders, Inc.*, 178 Md. App. 328, 393 (2008)). Because the purpose of civil contempt is to coerce future compliance and not to punish for past conduct, the penalty "must provide for purging; [meaning] it must permit the defendant to avoid the penalty by some specific conduct that is within the defendant's ability to perform." *Bryant v. Howard Cnty. Dep't of Soc. Servs.*, 387 Md. 30, 46 (2005). In making a finding of civil contempt, the Maryland Rules require a court to "issue a written order" that both "specifies the sanction imposed for the contempt" and "specif[ies] how the contempt may be purged." Md. Rule 15-207(d)

In *Kowalczyk*, a father filed an emergency petition for civil contempt against the mother. The circuit court held the mother in contempt for violating the terms of the court's

custody order "by engaging in unsupervised text messaging" with the parties' minor child. 231 Md. App. at 208. The contempt order allowed for mother to purge herself of contempt by "abid[ing] by the modified provisions of the [visitation orders] as set forth below[.]" *Id.* In the next paragraph, the court modified the existing visitation order "on a temporary basis" by denying mother visitation or any access to or contact with the child "until further order of the Court." *Id.* Mother appealed to this Court and urged that the "circuit court improperly used constructive contempt as a basis to punish her for her alleged prior misconduct." *Id.*

We concluded that the "purge provision was in fact punishment" for mother's "past failures" to comply with the court's orders. *Id.* at 210. We noted that there was "no way for [mother] to perform some act and thereby avoid the sanction" because the "purging provision was the sanction." *Id.* at 210, 211. Because the sanction and purge provision were the same, mother had "no ability to comply with the purging provision and, by doing so, avoid the sanction." *Id.* at 211 (citation omitted). Because "[o]rdinarily, there cannot be a finding of [civil] contempt unless the contemnor has the present ability to comply with a proper purging provision[,]" we vacated the "finding of contempt as well as the sanction." *Id.* at 211.

More recently, in *Breona C.*, this Court again summarized the requirements for a valid order holding a person in constructive civil contempt. 253 Md. App. at 71. There, a father filed a petition for contempt after the mother withheld court-ordered access. *Id.* at 72. By the time of the contempt hearing, however, mother was in compliance with the

custody order. *Id.* Nevertheless, the court found her in constructive civil contempt for her past violation of the custody order by not returning the child immediately. *Id.* "The written contempt order does not identify a sanction but provides that [m]other 'may purge this contempt by strictly following and complying with"' the custody order. *Id.* After recounting the purpose of constructive civil contempt, we summarized:

> [A]n order holding a person in constructive civil contempt is not valid unless it: (1) imposes a sanction; (2) includes a purge provision that gives the contemnor the opportunity to avoid the sanction by taking a definite, specific action of which the contemnor is reasonably capable; and (3) is designed to coerce the contemnor's future compliance with a valid legal requirement rather than to punish the contemnor for past, completed conduct. Moreover, . . . to serve the coercive purpose of civil contempt, the sanction must be distinct from the purge provision and the valid legal requirement the court seeks to enforce. If the sanction imposed is a requirement to take the very action the court says will purge the contempt, then undertaking the purge action necessarily completes, rather than avoids, the sanction.

Id. at 74. We reversed and held that the contempt order was legally deficient because it failed to satisfy any of the three requirements. *Id.* at 75-76. First, the order lacked a valid sanction because the "only obligation" required mother to comply with the custody order. *Id.* As in *Kowalczyk*, "where the purge provision *is* the sanction, there is no ability to purge the contempt and the order cannot be sustained." *Id.* (emphasis in original). "Second, the order lack[ed] a valid purge provision" because mother could not "avoid a defined sanction by engaging in specific conduct." *Id.* "Third, the order punishes past noncompliance rather than compelling future compliance." *Id.* at 76.

Returning to our case, we hold that portion of the order adjudging Mother in contempt suffers from similar defects presented in *Kowalczyk* and *Breona C.* First, as in

those cases, the order lacks a valid sanction. The only obligation imposed on Mother was to comply with the order, which was also the purported purge provision. Here, the trial court "did not impose on Mother a fine, period of incarceration, or any other penalty." *Breona C.*, 253 Md. App. at 75. As we concluded in *Kowalczyk* and reaffirmed in *Breona*, "where the purge provision *is* the sanction, there is no ability to purge the contempt and the order cannot be sustained." *Id.* (citing *Kowalczyk*, 231 Md. App. at 210-11).

Second, the order lacks a valid purge provision because the order does not allow Mother to "avoid a defined sanction by engaging in specific conduct." *Id.* Instead, the order only allows Mother to purge her contempt by complying with the court's order for six months. Mother lacks a present ability to immediately comply with the purging provision and, thereby, avoid the sanction. The portion of the order adjudging Mother in contempt—in the absence of a valid sanction and purge provision—must be vacated. *See Arrington v. Dep't of Human Res.*, 402 Md. 79, 107 (2007) (holding that finding of contempt may stand but the sanction must be vacated because an inappropriate purge provision was imposed).

Our holding should not be read to suggest that Mother was not, in fact, in contempt. On the other hand, more than six months have elapsed since the court entered its order adjudging Mother in contempt, and, had Mother remained in full compliance with the order, she would have "purged" her contempt under its defective order. Accordingly, while we must vacate the portion of the order adjudging Mother in contempt, we again leave the

court with remedial flexibility to reconsider the issue of contempt and, if necessary, to fashion an order that imposes an appropriate sanction and purge provision.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY VACATED; CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.