Circuit Court for Washington County
Case No. 21-K-16-052397

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1469

September Term, 2017

BRITTANY BARTLETT

v.

JOHN BARTLETT, III

Berger,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: May 23, 2018

This appeal arises from an order of the Circuit Court for Caroline County accepting and ratifying the "Report and Recommendations" of a family division magistrate. Appellant, Brittany Bartlett ("Ms. Bartlett"), appeals the circuit court's decision not to modify an order governing a custody arrangement between her and appellee, John Bartlett, III, with whom she shares custody of their daughter. Ms. Bartlett asks that we review three issues, but we will reach only the first,[1] which we reword as follows: Whether the circuit court erred when it failed to provide Ms. Bartlett notice of the magistrate's written report and recommendations, denying her the ability to file exceptions to the magistrate's complete recommendations.

BACKGROUND & PROCEDURAL HISTORY

The parties' daughter lives primarily at Mr. Bartlett's house, pursuant to an order issued by the circuit court when their daughter was not yet old enough to attend school and Mr. Bartlett worked only part-time. On August 11, 2016, Mr. Bartlett filed a Petition to Modify Child Support. Mother responded with a Counter Complaint to Modify Custody and Support on October 4, 2016. The circuit court scheduled a trial before a family division magistrate for April 17, 2017. At the hearing before the magistrate, Mr. Bartlett sought to end his payment of child support to Ms. Bartlett because the parties' daughter lived primarily with him, and Ms. Bartlett sought shared physical custody on a "week on-

[1] The other two questions Ms. Bartlett raises on appeal were: (1) "Whether the lower court erred and violated Mother's due process rights and fundamental liberty interest in the care, custody, and control of her daughter when it failed to follow the two-step custody modification procedure"; and (2) Whether the lower court abused its discretion when it failed to award the parties' shared custody during the child's school year."

week off" basis during the school year. Ms. Bartlett also argued that Mr. Bartlett regularly neglected to inform her of important details related to their daughter's extra-curricular activities schedule.

Near the end of the hearing, the magistrate advised the parties of the following:

> Mr. Bartlett has said that he does not want child support. And I would say that despite the fact the parties are busy telling me that they're not working together, they're doing a heck of a lot better [than] a whole bunch of people raising children and not being together. I think [Ms. Bartlett's] major complaint is the way that Mr. Bartlett talks to her, which I assume is why you're not married to him anymore. But I don't think that he's going to change. [. . .] [W]e could sit here and, he is abrupt and, it appears to me, . . . short, um, and I guess sometimes a little righteously indignant. But um, bottom line is you have managed to confer and to work out just about everything, except whether or not it should be week on, week off during the school year, . . . that's what this boils down to. I don't have a problem deviating from the guidelines and require[ing] that neither party pay the other child support. I also don't find that there's a basis to change the custodial arrangement the parties have.

The magistrate went on to explain that, when the parties' daughter does not have school on a Monday or Friday adjacent to one of Ms. Bartlett's weekends and Ms. Bartlett is not working, her weekend with their daughter will be extended. The magistrate added, "[O]ther than that, I don't see a need to change anything else." She concluded the hearing[2] with the following statement:

> I think that it is important that you let her know um, if you are signing her up and what the schedule is and ah, if her time with

[2] After the magistrate set forth her recommendations, both of the parties' attorneys asked for clarification regarding when Ms. Bartlett's weekends would be extended, and the magistrate provided it.

> your daughter should supersede any extracurricular activities. **All right, so that's my recommendation. You have ten days from today's date to file exceptions.**

(Emphasis added).

The docket included the following summary of the magistrate's recommendations under the label "Hearing Sheet":

> At conclusion of testimony, Magistrate recommends no basis to change the custodial arrangement; that neither party pay the other child support; that when there is a Friday or Monday holiday and no school, and if Defendant is off from work, the weekend shall be extended to Defendant; Plaintiff shall let Defendant know of any extra-curricular activities and Defendant's visits shall supersede any extra-curricular activities. Parties advised of right to file exceptions. Magistrate to prepare order.

On April 27, 2017, Ms. Bartlett timely filed exceptions to the recommendations read into the record at the conclusion of the April 17, 2017 hearing. A hearing before the circuit court on Ms. Bartlett's exceptions was scheduled for June 19, 2017, and the parties received no other notice of the magistrate's findings and recommendations. As the parties later learned, however, the magistrate issued a "Report and Recommendation," apparently on May 18, 2017, [3] but it was not served on either party or docketed prior to the exceptions hearing.

At the hearing before the circuit court, the judge began by noting, "Timely exceptions were filed, grounds were filed, I've read the transcript and read the pleadings

[3] As we explain below, the magistrate's Report was not entered on the docket until October 10, 2017.

so, um, [Ms. Bartlett's counsel] sounds like your burden to proceed . . . ." Throughout the hearing, each time the judge referenced the proceedings before the magistrate or her recommendations, he referred only to the transcript and never mentioned the magistrate's Report and Recommendations.

On August 16, 2017, the circuit court in its memorandum opinion prefaced its conclusions with the following:

> Having heard the exceptions on June 19, 2017, and after conducting its own independent review of the case based on the transcript of the hearing before the Magistrate, **the Report and Recommendations of the Magistrate**, and the factual findings by the Magistrate, as well as applicable law, the Court issues the following rule on the exceptions.

(Emphasis added).

Thereafter, the court explained, "The Magistrate did not find, and this [c]ourt would agree, that there was any material change in circumstances that would warrant a modification in the custodial arrangement between the two parties." The court concluded that it "need not consider what is in the best interest of the child as the threshold issue of material change has not been breached."

On August 23, 2017, the circuit court filed the following order:

> This matter was before the Magistrate for a merits hearing on April 17, 2017, Defendant filed exceptions and the Court overruled the exceptions on August 16, 2017[.] It is therefore . . . ORDERED:
>
> 1. That **the Report and Recommendation of the Magistrate is accepted and ratified**.

> 2. That the access schedule of the Defendant shall be extended one day if a holiday and or school closing fall on her weekend on a Friday or Monday and if she is also off on that day.
>
> 3. That neither party shall pay the other child support.
>
> 4. That Plaintiff shall timely apprise the Defendant of their minor child's extracurricular activities and the Defendant's visitation shall supersede any such activity.

After the circuit court issued its order, Ms. Bartlett's counsel requested a copy of the magistrate's Report and Recommendation referenced in the order from the circuit court clerk.[4] On October 10, 2017, after Ms. Bartlett's counsel's second request, the clerk located and docketed the missing Report. The Report was docketed, however, as being filed on May 18, 2017, rather than October 10, 2017. Ms. Bartlett filed a motion to correct the record with this Court and we granted the motion. Thereafter, in an order filed February 13, 2018, the circuit court explained the discrepancy:

> A Magistrate's merits hearing was held on April 17, 2017 and the Magistrate made her recommendations orally on the record at the conclusion of that hearing.
>
> * * *

[4] According to Ms. Bartlett's counsel, in her motion to correct the record, on October 10, 2017, both the circuit court clerk and the magistrate's courtroom clerk present at the trial confirmed that there were no written recommendations and that the magistrate's recommendations were oral, before the circuit court clerk subsequently located and docketed the Report and Recommendations on that same day.

> The Magistrate created and electronically signed her Report and Recommendations on May 17, 2017. The docket entry for the Magistrate's Report and Recommendations is dated May 18, 2017, but the actual docket entry was not *created* on Odyssey [the court's electronic docketing system] until October 10, 2017 (and thereby back-dated to May 18, 2017). The written recommendation is generally mailed out independently of docketing the same in MDEC. However there is no way for the Court to verify whether or not a hard copy was in fact sent circa May 18, 2017.
>
> A hearing on defendant's exceptions occurred before the undersigned on June 19, 2017 and both parties made arguments through their respective counsel. Both parties indicated at that hearing that they had copies of the transcript of the April 17 Magistrate's hearing, which contained the full recommendation. Neither party complained that at the hearing that they were not in possession of a written copy of the recommendation.

It was not clear from the record when the circuit court received the magistrate's Report, but the court appears to have reviewed it prior to issuance of its memorandum opinion and order.

DISCUSSION

I.

Ms. Bartlett argues on appeal that she was denied due process of law when the circuit court failed to provide her with the "supplementary" report of the magistrate following the conclusion of the administrative hearing and prior to the circuit court's ruling. Md. Rule 9-208(e) governs the issuance and notice to the parties of a magistrate's recommendations and supplementary report, if one is issued. The Rule provides, in relevant part, the following:

> (e) **Findings and Recommendations.**
>
> (1) *Generally.* Except as otherwise provided in section (d) of this Rule, the magistrate shall prepare written recommendations, which shall include a brief statement of the magistrate's findings and shall be accompanied by a proposed order. The magistrate shall notify each party of the recommendations, either on the record at the conclusion of the hearing or by written notice served pursuant to Rule 1-321. In a matter referred pursuant to subsection (a)(1) of this Rule, the written notice shall be given within ten days after the conclusion of the hearing. In a matter referred pursuant to subsection (a)(2) of this Rule, the written notice shall be given within 30 days after the conclusion of the hearing. Promptly after notifying the parties, the magistrate shall file the recommendations and proposed order with the court.
>
> (2) *Supplementary Report.* The magistrate may issue a supplementary report and recommendations on the magistrate's own initiative before the court enters an order or judgment. A party may file exceptions to new matters contained in the supplementary report and recommendations in accordance with section (f) of this Rule.
>
> (f) **Exceptions.** 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(e)-(f). Whatever recommendations are issued by the magistrate, "[l]itigants in a custody proceeding . . . are entitled to have their cause determined ultimately by a duly qualified judge of a court of competent jurisdiction." *Green v. Green*, 188 Md. App. 661, 674-75 (2009) (quoting *Ellis v. Ellis*, 19 Md. App. 361, 365 (1973)).

We have previously observed that "[t]he question of whether a party is deprived of the right to due process involves an issue of law," and we therefore apply a *de novo* standard of review. *Regan v. Bd. of Chiropractic Examiners*, 120 Md. App. 494, 509 (1998) (Citation omitted).

Ms. Bartlett contends that she was denied due process of law, because the magistrate's failure to notify her of the Report interfered with her ability to file exceptions to the magistrate's complete findings. Mr. Bartlett's arguments in response are that (1) Ms. Bartlett was present and represented at the exceptions hearing, and therefore, not denied due process of law; (2) she "never complained of not having received the Magistrate's written recommendations, despite their mandatory issuance," and therefore, she waived her right to challenge the issue; and finally, (3) even if she were denied due process and did not waive the issue, "not receiving the written recommendations in this case was merely harmless error." The parties disagree on whether the magistrate's "Report and Recommendation" constituted a "supplementary report" under subsection (e)(2) or the mandatory "written recommendations" under subsection (e)(1) of Rule 9-208.

Under both the Fourteenth Amendment to the United States Constitution and the Maryland Declaration of Rights, a person may not be deprived of life, liberty, or property without due process of law. It is well-established that due process requires "notice reasonably calculated . . . to apprise interested parties of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*,

339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940)). A party alleging a violation of his or her right to procedural due process "must demonstrate that [he or she] had a protected property interest, . . . was deprived of that interest [by the State], and . . . was afforded less procedure than was due." *Reese v. Dep't of Health & Mental Hygiene*, 177 Md. App. 102, 152 (2007) (quoting *Samuels v. Tschechtelin*, 135 Md. App. 483, 523 (2000)) (Internal quotation marks omitted) (Citations omitted). Due process "merely assures reasonable procedural protections, appropriate to the fair determination of the particular issues presented in a given case." *Wagner v. Wagner*, 109 Md. App. 1, 24 (1996), *cert. denied*, 343 Md. 334 (1996) (Citations omitted). Regardless of the facts of a particular claim of lack of due process, "there is no requirement that actual prejudice be shown before denial of due process can be established." *Id.* Rather, the most critical question is whether the "departure from procedure results in unfairness." *Id*. at 25. *Wagner*, 109 Md. App. at 25.

The United States Supreme Court has said that "[t]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 64 (2000); *see also In re Samone H.*, 385 Md. 282, 300 (2005) ("A parent's interest in raising a child is, no doubt, a fundamental right, recognized by the United States Supreme Court and this Court."). Maryland Rule 9-208 provides a process in which the parties are fairly notified of the magistrate's findings and recommendations and given the right to file particularized exceptions. *See* Md. Rule 9-208(e)-(f); *see also Green v. Green*, 188 Md. App. 661, 673 (2009) ("[Md. Rule 9-208]

provides an adequate opportunity for parties to take exceptions to masters' recommendations."). Discussing a similar Rule,[5] the Court of Appeals explained that "the right to file exceptions is a required protective provision of litigants' due process right to have his or her matter heard by a duly qualified judge." *In re Marcus J.*, 405 Md. 221, 231 n. 10 (2008) (quoting *In re Kaela C.*, 394 Md. 432 (2006)). Thus, there is no question that Ms. Bartlett's claim involves a fundamental liberty interest, and the procedural safeguards she was entitled to under these circumstances are governed, in part, by Rule 9-208. Regarding Ms. Bartlett's entitlement to due process, the issue is therefore whether Ms. Bartlett "was afforded less procedure than was due." *Reese*, *supra*, 177 Md. App. at 152.

Subsection (e)(1) allows the magistrate to give notice to the parties of its recommendation on the record at the conclusion of the hearing. *See* Rule 9-208(e)(1). If not given at the conclusion of the hearing, however, the magistrate must give notice of its written recommendation to the parties pursuant to Rule 1-321. *Id.* The Rule does not define what constitutes a "supplementary report," but it permits the parties to file exceptions to "new matters" included in a supplementary report, and contemplates that the parties will receive the supplementary report, if the magistrate issues one. *See* Rule 9-208(e)(2). The magistrate's decision whether to issue a supplementary report is not

[5] The issue in *In re Marcus J.* was related to a party's exceptions under Md. Rule 11-111(c), a Rule similar to Rule 9-208, providing that, in juvenile cases heard by a magistrate, "[e]xceptions shall be in writing, filed with the clerk within five days after the magistrate's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be de novo or on the record." 405 Md. at 231.

mandatory; therefore, there is no way for the parties to know of its existence unless they are not provided notice of it. *See id.*, ("The magistrate may issue a supplementary report and recommendations on the magistrate's own initiative . . . .").

The magistrate stated at the end of the administrative hearing, "All right, so that's my recommendation. You have ten days from today's date to file exceptions." The parties could reasonably have inferred from the magistrate's statement that she was providing "noti[ce] [to] each party of the recommendations . . . at the conclusion of the hearing," rather than "by written notice served pursuant to Rule 1-321." *See* Md. Rule 9-208(e)(1). A summary of the magistrate's recommendations given at the hearing appears to have been included in the "Hearing Sheet," but there was no record of separate written findings and recommendations prior to the exceptions hearing. Any written recommendations filed with the clerk, therefore, should have been virtually identical to the magistrate's findings and recommendations announced at the end of the hearing to ensure the parties' adequate notice and ability to file exceptions with particularity.

Despite Mr. Bartlett's argument that Ms. Bartlett should have known of the magistrate's written recommendations, the Rule permits the magistrate to notify the parties of his or her recommendations orally at the conclusion of the hearing. The Rule also permits the parties to except to any new matters raised in the magistrate's written recommendations prior to the circuit court's decision. *See Green,* 188 Md. App. at 673 ("If something that was not mentioned by a [magistrate's] oral recommendation appears in the written recommendation, exceptions to any new matters can be filed . . . ."). Even

Mr. Bartlett concedes that, in this case, the magistrate's Report "set forth the reasoning in additional detail."

Whether the magistrate's Report constituted the routine "written recommendations" under subsection (e)(1), or a "supplementary report" under subsection (e)(2), the Report contained findings of fact and conclusions of law that were not stated by the magistrate at the conclusion of the hearing. For example, the magistrate acknowledged in her Report that "[t]hings have changed since the last Order of the Court," noting that "[Mr. Bartlett] is working full time, [Ms. Bartlett] is splitting her residence between Queen Anne's and Anne Arundel County and the minor child is going to school." Further, the Report recognized that the circuit court's prior order was based on Mr. Bartlett's part-time employment status.

Most notably, however, the magistrate reached two conclusions in the Report not stated at the conclusion of the proceedings. At the hearing, the magistrate concluded only generally, "I also don't find that there's a basis to change the custodial arrangement the parties have." The Report, however, included the magistrate's specific conclusions that there was not a substantial change of circumstances and that it was not in the best interest of the child to modify the existing arrangement. The circuit court's memorandum opinion states that it need not reach the issue of the best interest of the child, because there was no material change in circumstances. The circuit court's order, however, "adopted and ratified" the magistrate's Report. Even if the order would supersede the court's

memorandum opinion, the discrepancy illustrates the significance of the parties having notice of the magistrate's Report prior to the exceptions hearing.

Ms. Bartlett would have had a limited time period to file exceptions to any matters that were not stated on the record at the conclusion of the hearing. *See* Md. Rule 9-208(f) ("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."); Md. Rule 9-208(e)(2) ("A party may file exceptions to new matters contained in the supplementary report and recommendations in accordance with section (f) of this Rule."); *see also Green*, 188 Md. App. at 673 (Citation omitted) ("[T]he time to file exceptions runs from the date of notice to the parties as to the [magistrate's] recommendations . . . ."). Having accurate notice of the complete findings and recommendations of the magistrate is especially important in light of the Rule's requirement that an excepting party "set forth the asserted error with particularity" or else forfeit the right to except on that issue. *See* Rule 9-208(f).

It appears from the circuit court's memorandum opinion that it relied on the magistrate's Report. The circuit court said that it reviewed "the transcript of the hearing before the Magistrate, the Report and Recommendations of the magistrate, [and] the factual findings by the Magistrate." Indeed, during oral argument, Mr. Bartlett's counsel was asked whether the circuit court judge had the undocketed report when he issued his ruling and he responded, "We believe he did." Without having notice of the magistrate's Report, Ms. Bartlett was deprived of her right to file exceptions to any of the magistrate's

findings and recommendations and to argue that the magistrate erred in reaching certain conclusions based on her findings of fact.

Finally, we disagree with Mr. Bartlett that Ms. Bartlett waived her right to object to not receiving the magistrate's Report, because, as he argues, Ms. Bartlett "knew or should have known that the written recommendations should have been issued, as it is plainly required by the [R]ule." Rule 9-208(e) requires that the magistrate file its written recommendations with the circuit court after providing notice to the parties, which may be on the record at the conclusion of the hearing. Here, she expressly stated, "[S]o that's my recommendation. You have ten days from today's date to file exceptions." The Report that the circuit court relied on contained findings and conclusions of which Ms. Bartlett had no notice. The record indicates that neither party would have known of its existence were it not for the circuit court's clear adoption and ratification of it in its order and Ms. Bartlett's efforts to locate it and have it properly docketed. Under these circumstances, Ms. Bartlett could reasonably assume, as both parties apparently did, that the magistrate did not issue a written report containing findings and recommendations not stated at the conclusion of the hearing. We conclude, therefore, that Ms. Bartlett did not waive her right to object to the absence of a report of which she had no notice.

Ms. Bartlett was entitled to receive notice of the magistrate's Report and Recommendations, file exceptions to the magistrate's findings of fact or other determinations contained in the Report, and review any evidence the circuit court considered in reaching its decision. The parties were not given notice of the magistrate's

Report and Recommendations and it was not docketed prior to the exceptions hearing. This case might warrant a different conclusion if (1) there were no differences between the magistrate's findings and recommendations made on the record at the conclusion of the proceeding; (2) the court as well as the parties did not have the magistrate's Report when it issued its order; or (3) the court's order adopting and ratifying the magistrate's "report" referred only to the findings and recommendations found in the transcript of the proceedings before the magistrate. Nevertheless, the circuit court appears to have relied on the magistrate's written Report and incorporated it into its order. That deviation from Rule 9-208's procedural safeguards requires that we reverse and remand for further proceedings to permit the parties to consider the magistrate's complete findings and recommendations and to file further exceptions, if any, to the magistrate's Report.

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