

Circuit Court for Caroline County
Case No. C-05-FM-20-314

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1689

September Term, 2021

MICHAEL SANCHEZ

v.

RENEE SANCHEZ

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

Opinion by Eyler, James R., J.

Filed: June 30, 2022

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

This appeal arises out of a divorce proceeding involving Michael Sanchez (“Husband”), appellant, and Renee Sanchez (“Wife”), appellee. In December 2020, Wife filed in the Circuit Court for Caroline County a complaint for absolute divorce. She sought primary physical and sole legal custody of the parties’ four minor children. Husband filed an answer and a motion seeking visitation and communication with the parties’ three minor sons. A hearing was held before a magistrate on July 26, 2021. The magistrate recommended that Mother be awarded an absolute divorce and sole legal and primary physical custody of the children. The magistrate also recommended certain conditions pertaining to Father’s contact with the children. Father filed both a motion for reconsideration and exceptions to the magistrate’s report and recommendations. After a hearing on Father’s motion for reconsideration, the magistrate recommended that the motion be denied. Thereafter, the circuit court accepted the magistrate’s recommendations, denied the motion to reconsider, and denied Father’s exceptions. On December 14, 2021, the court entered judgment for absolute divorce in favor of Mother. Fourteen days later, Father noted this appeal.

ISSUES PRESENTED

Father presents three issues for our consideration, all of which challenge the circuit court’s decision to delegate decision-making authority with respect to his contact and visitation with the parties’ three minor sons.¹ For the reasons set forth below, we shall vacate the order of the circuit court and remand the case for further proceedings.

¹ The issues presented by Father, which we have rephrased slightly, are:

(continued...)

FACTUAL AND PROCEDURAL BACKGROUND

The basic facts of this case are not in dispute. The parties were married in 2006. At that time, Mother had two daughters, whom Father adopted. One of the daughters was a minor at the time of the underlying proceedings. After their marriage, the parties had three sons together, all of whom were minors at the time of the underlying proceedings. The parties separated in about 2013 and the children have lived with Mother since that time. According to Mother, the separation occurred because she discovered that Father had “sexual[ly] abused our two oldest daughters” in the family home in Arizona. At all times relevant to this case, Father has been, and is currently, incarcerated in Arizona for those crimes.² At some point, Mother and the children moved from Arizona to Maryland.

In December 2020, Mother filed a complaint for absolute divorce and sought sole legal and physical custody of the four minor children. Father did not contest the divorce,

I. Whether the circuit court’s orders denying Father’s motion for reconsideration/exceptions and adopting the magistrate’s report and recommendation and the circuit court’s judgment operate as a constructive denial of Father’s parental rights;

II. Whether the circuit court unconstitutionally applied Md. Code Ann. Family Law Article §§ 9-101 and 9-101.1(b) to place Father’s parental rights at the whim of Mother and without any guiding principle; and,

III. Whether any of the above issues violates Father’s fundamental liberty interests protected by the Fourteenth Amendment Due Process clause of the United States Constitution as a natural parent to have a relationship with his sons.

² Mother asserted that Father was serving a 50-year sentence. Father explained that he was serving a combined sentence that was split between the State of Arizona and the military, and that his earliest possible release date would be in the year 2060 “something.”

but in a “Motion for Visitation and Communication Rights[,]” he sought visitation and communication with his three minor sons. He argued that although his parental rights had “not been severed[,]” Mother had denied all of his attempts to communicate with his sons since April 2014. Father requested communication with his sons via letter, email, and telephone calls, and one in-person visit a year at the prison where he was incarcerated. He stated that the expenses for that visit would be paid for by his family. Father argued that although he was incarcerated, he did not pose a threat “to the health and wellbeing of his sons[,]” and he noted that all visitation and communication at the prison is “monitored by prison staff.” He did not agree that in-person visits should be conditioned on a recommendation by the children’s therapist.

At a July 26, 2021 hearing before a magistrate, Mother testified that prior to moving to Maryland, the children were receiving counselling and, at that time, their counsellor had advised against telephone communications with Father. The children were not receiving counselling at the time of the hearing, but were on a waiting list for a new therapist. Father had written letters to the children, but Mother did not read them or allow the children to read them. Instead, she “put up” the letters for the children. Mother explained that she wanted to “protect” the children because it was “just such a hard and delicate situation.” According to Mother, the boys were affected by Father’s conduct with the girls. She said that when Father’s name or something about him was brought up, the children “would have weeks of tantrums and it was just really hard for them.” Mother requested the court to require her approval for any communications or visitation between the children and Father.

At the conclusion of the hearing, the magistrate explained her decision with regard to Father's communications with his sons as follows:

[Mother] will have to agree to allow you to speak with the children over the phone. According to the testimony here today, they are in counseling, the Court does defer to that counseling under the circumstances, in as much as you are incarcerated for having sexual[ly] assaulted your adopted daughter while you were married to [Mother] and living with all four children.^{3]} It is in the Court's judgment, um, entirely up to [Mother] to review any telephone calls, any letters that you write, and to give them to the children when she feels it is appropriate after she has consulted with whomever is providing the counseling for the children. The children have been exposed to a traumatic situation which means there may be many years of therapy and trauma which was, as a, directly as a result of the behavior of [Father]. So, I do not feel at this time it is in their best interest to be forced to communicate with [Father]. As the children grow older, they may wish to contact you, that information of course will be made available to them. And [Mother] has indicated that she's keeping any written correspondence until she feels it is appropriate to give the children. I had asked her if she reviewed the letters, um, and she would have the right to read anything that you send before giving it to the children. As far as in person visits are concerned sir, the Court will never require [Mother] to underwrite the cost of an in person visit. At this time you believe your family might help you ah, again such a visit would be predicated on the agreement of any counselor that they might have or the children reaching the age of majority and electing to do that on their own.

The magistrate's written report and recommendation, filed on July 28, 2021, provided that Mother could review Father's correspondence to the children and would have to agree to telephone calls. As for in-person visits, the magistrate recommended that Father would have to pay for them and that agreement from the children's counselor would be required.

³ The facts adduced at the hearing established that Father had adopted both of Mother's daughters and was serving a prison sentence for having sexually assaulted each of them in the family home in Arizona. Father did not request communication or visitation with either daughter. In addition to the two girls, the parties had three boys together. The boys were not receiving counseling at the time of the July 2021 hearing.

Five days later, Father filed a notice of appeal which the circuit court treated as a notice of intent to file exceptions. He also requested a transcript of the July hearing before the magistrate. On August 10, 2021, Father filed exceptions and a “motion for reconsideration and objections.” In his exceptions, Father noted that the copy of the magistrate’s report and recommendations that he received, specifically the portion discussing visitation, was “not legible” and he could not “decipher all of the words.” He requested time to submit additional exceptions after receiving a legible copy of the report and recommendation. In support of the exceptions he filed, Father adopted the arguments set forth in his motion for reconsideration.

In his motion for reconsideration, Father challenged the magistrate’s decision to permit communication and visitation “at the sole discretion of” Mother because doing so constituted a “constructive denial” of his right to communicate with and visit his sons. He argued that the magistrate’s decision was based on Mother’s hearsay testimony that a therapist had recommended against allowing him to have communication and visitation with his sons. Father asserted that he had never abused his sons and that, to his knowledge, the boys had “seen a therapist because of his sudden and prolonged absence from their lives[,]” and no other reason. He stated that his last communication with his sons was “a short phone call a week after his incarceration in June, 2013, eight years ago.” Father maintained that the magistrate’s recommendation failed to consider that prolonging his absence from the boys’ lives “can only cause them to suffer emotional harm” and that reconciliation with his sons would “improve their mental wellbeing.”

A remote hearing on the motion for reconsideration and exceptions was held before the magistrate on October 7, 2021. Father challenged the magistrate’s finding that the boys suffered trauma and argued that Wife’s testimony about statements made by the boys’ prior therapist was hearsay. He maintained that the only detrimental impact on his sons was his absence because he did not commit any offenses in front of them and he was told by Wife that the boys were unaware of the reasons for his incarceration. Father argued that although the boys might be upset to learn he was in prison, he believed they had “a right to know that I care about them and that I love them.” According to Father, prolonging any reconciliation would “be harmful to their mental well-being.” Father acknowledged that at the hearing before the magistrate he did not object to Wife’s testimony about statements made by the children’s therapist.

Mother testified that the children were in therapy when they lived in Arizona, but they had not attended therapy since moving to Maryland. At the time of the hearing, the boys had not had a therapy session in “about six years.” In the six months to a year prior to the hearing, the boys had “started to ask more questions,” so Mother put them on a waiting list for a new therapist. Mother explained that there were fewer therapists available due to the Covid pandemic. According to Mother, in about July 2021, one of her daughters and that daughter’s therapist “decided that it would be a good idea to talk to the boys.” The family met and told the two oldest boys “exactly why their dad was in prison” and “what happened” to their sister. According to Mother, the boys “were confused, angry, upset, disgusted, and hurt.”

At the conclusion of the hearing, the magistrate noted that Father's sudden absence from the family home created a trauma for the boys. The magistrate stated:

Today we learned that the boys have in fact been told what the nature of your offense um, was and I would like to point out to you, that the fact that they are living under the same roof and there is a good possibility that the children who were abused by you, don't share any great love of you at this time and the boys probably have some difficulty trying to figure out why they felt one way and why they were thinking something else. So, that in and of itself is another trauma for the children. And then finally them learning what your infraction was and having to come to grips with the fact that these are their sisters, who are living with them um, to have you super impose yourself in that situation by requiring these children to go [to] Arizona um, creates not only trauma for them but for the girls who have already been traumatized and will likely never get over that regardless of the amount of counseling that they have. The children are old enough to understand that what you did is considered seriously . . . serious enough so that you will not be able to have contact with children again in the State of Maryland. I don't know what the situation is in Arizona um, is trauma all over again. Whatever happens between you and your sons, will have to occur on their watch. The Court cannot um, reverse any recommendation based upon the testimony here today.

The magistrate also explained why communications and visits with Father were not in the boys' interests as follows:

It further buttress[es] the conclusion that the Court made in the first place, and that is, that it is not in these children's best interest to have to travel to Arizona. Again if a counselor felt that ah, or if a counselor comes into this Court, and you're right about that, and says that conclusion is incorrect, then I think you have some kind of basis for it. But until such time as that happens there is no basis to do that, even if you were to pay for ah, the visit, these kids are going to need a lot of support. I don't know at some point you may, [Mother] may allow the boys to communicate with you through the mail. I don't know whether she would want you to have telephone calls. The problem is that everybody is still in the house. And any correspondence from you and you appear to be well spoken and so, that makes me think you can reason this thing out. Anything from you, a telephone call, a letter, would be disruptive to the household, it's a reminder of what happened and why you were not there. Ah, and it is painful[ly] unfair to expect [Mother] to deal with this by herself, which is what she has to do, and try to explain it. So,

it's, all around it's problematic sir. So, we would need to have professionals to advise that your contact with the boys um, would be in their best interest. And so therefore, ah the original recommendation stands[.]

In a written report and recommendation entered on the docket on November 15, 2021, the magistrate denied Father's motion for reconsideration stating, in part, as follows:

The young men were shielded from the details of their father's arrest, no doubt because of their tender age. Now that they know they will certainly have many questions and a variety of emotions and feelings, all of which will require professional help. Without speculating on what [Mother] meant by her testimony it is sufficient to say it does not matter when these children received counselling or therapy. Their siblings were violated by [Father] who disregarded the impact his actions would have on his entire family. He has no understanding of what an inquiry by him, while his daughters are in the household would have on the family dynamic. It is likely that the mere mention of his name creates trauma for his victims. This directly impacts his sons who must have some affection for their siblings.

[Father]'s strongest argument is that any visits at the prison would be supervised. However, it is short sighted and begs [the] question of what effect it would have on the children. The Court cannot say that the [Father] if given the opportunity would not abuse these children. . . . It seems reasonable then to ask what is in the best interest of the minor children, what harm will come to them if they do not see their father? Father has not seen these children for eight years; they have recently been made privy to some horrendous facts at a time in their respective developmental stage. [L]ife is difficult without these added factors. It is very likely that they need time to process this information[,] assess their feelings and grapple with some ambivalent feelings.

[Father] does not present any expert testimony or any compelling reason demonstrating that it is in his sons' best interest to have any contact other than what was specified at the divorce hearing. Accordingly it is recommended that the Motion for Reconsideration be denied.

On November 18, 2021, the circuit court accepted the magistrate's report and recommendation, denied the motion for reconsideration, and denied Father's exceptions. Thereafter, on December 14, 2021, the court again accepted the magistrate's report and

recommendation, granted Mother an absolute divorce from Father, and awarded Mother legal and physical custody of the parties’ minor children.⁴ With respect to Father’s contact and visitation with his minor sons, the court ordered:

That [Father] is incarcerated, he may write to the children with the understanding that all correspondence will be reviewed by [Mother] and if [Mother] expressly agrees he may call the residence. [Father] may have in person visits at the prison if he pays all the expenses associated with the visit, and the children’s counselor/therapist agrees that the visit or visits would be appropriate for the children or if the children emancipate and decide on their own to visit their father while he is incarcerated.

DISCUSSION

A. Preservation

As a preliminary matter, we must determine which issues are, and are not, before us. The evidentiary portion of this case was held before a family law magistrate. In such cases, once the magistrate’s findings of fact and recommendations are served on the parties or placed on the record, a party may file exceptions with the clerk of the court within ten days. Md. Rule 9-208(f). A party’s failure to timely file exceptions forfeits “any claim that the [magistrate]’s findings of fact were clearly erroneous.” *Barrett v. Barrett*, 240 Md. App. 581, 587 (2019) (quoting *Miller v. Bosley*, 113 Md. App. 381, 393 (1997) (In “all cases lacking timely exceptions, any claim that the [magistrate]’s findings of fact were clearly erroneous is waived.”)). The excepting party may still, however, appeal from the trial court’s adoption of the magistrate’s recommendation if the issues appealed concern

⁴ We take note that in awarding legal and physical custody of the minor children of the parties to Mother, the court identified only three of the minor children by name, although the parties have four minor children.

the court’s adoption of the magistrate’s application of law to the facts. *Green v. Green*, 188 Md. App. 661, 674 (2009).

In the instant case, Father filed his exceptions to the magistrate’s report and recommendation after the ten-day filing period had expired. We recognize that five days after the magistrate’s report and recommendation was filed, Father filed a premature notice of appeal that the court treated as a notice of intent to file exceptions, but that filing did not “set forth the asserted error with particularity” as required by Md. Rule 9-208(f). As a result of the late filing of Father’s exceptions, any claim that the magistrate’s findings of fact were clearly erroneous was waived.⁵

In this case, however, Father argues that the circuit court improperly delegated to Mother and a therapist the power to determine his right to contact and visitation with his minor sons. He asserts that the improper delegation of authority operated as a constructive denial of his parental rights, which were subject to the whim of Mother without any guiding principles, and violated his constitutional right as a natural parent to have a relationship with his sons. The issue of whether the court improperly delegated its decision-making authority is a question of law that is properly before us. *See In re Mark M.*, 365 Md. 687, 704-05 (2001) (“[W]here a trial court’s order constitutes an improper delegation of judicial

⁵ Although we take note of Father’s premature notice of appeal, which the circuit court treated as a notice of intent to file exceptions, and the fact that a portion of Father’s copy of the magistrate’s report and recommendations was illegible, the law is clear that the proper times for Father to raise his assertions were at the magistrate’s hearing or by means of exceptions properly filed within ten days of the magistrate’s recommendations. Self-represented parties, like Father, “must adhere to procedural rules in the same manner as those represented by counsel.” *Dep’t of Lab., Licensing & Regul. v. Woodie*, 128 Md. App. 398, 411 (1999).

authority to a non-judicial agency or person, the trial court has committed an error of law, to be reviewed by appellate courts *de novo.*”); *Van Schaik v. Van Schaik*, 200 Md. App. 126, 134 (2011) (“The question whether a court has improperly delegated judicial authority to a non-judicial person is an issue of law subject to *de novo* review.” (quotation marks and citation omitted)). Accordingly, we shall address the issue of whether the circuit court’s ruling constituted an improper delegation of judicial decision-making.

B. Delegation of Decision-Making Authority

In all custody and visitation determinations, the best interest of the child is the “overarching consideration[.]” *Baldwin v. Baynard*, 215 Md. App. 82, 108 (2013). “[W]hile a parent has a fundamental right to raise his or her own child, . . . the best interests of the child may take precedence over the parent’s liberty interest in the course of a custody, visitation, or adoption dispute.” *Boswell v. Boswell*, 352 Md. 204, 219 (1998). “That which will best promote the child’s welfare becomes particularly consequential where the interests of a child are in jeopardy, as is often the case in situations involving sexual, physical, or emotional abuse by a parent.” *In re Mark M.*, 365 Md. at 706. Because a child’s welfare is “a consideration that is of transcendent importance when the child might otherwise be in jeopardy[.]” visitation “may be restricted or even denied when the child’s health or welfare is threatened.” *Id.* (internal quotation marks and citation omitted).

Two sections of the Family Law Article of the Maryland Code (“FL”) address issues of custody and visitation when there is evidence of abuse or that abuse is likely. Section 9-101 provides:

(a) In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.

(b) Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

Section 9-101.1 addresses cases, such as the instant case, that involve abuse of a child residing in the household other than the child who is the subject of the custody or visitation proceeding. It provides, in part:

(b) In a custody or visitation proceeding, the court shall consider, when deciding custody or visitation issues, evidence of abuse by a party against:

* * *

(3) any child residing within the party's household, including a child other than the child who is the subject of the custody or visitation proceeding.

(c) If the court finds that a party has committed abuse against the other parent of the party's child, the party's spouse, or any child residing within the party's household, the court shall make arrangements for custody or visitation that best protect:

- (1) the child who is the subject of the proceeding; and
- (2) the victim of the abuse.

In Maryland, equity courts are granted jurisdiction to, among other things, direct who shall have custody of a child and determine who shall have visitation rights to a child. FL § 1-201(c). Maryland law does not recognize any authority for the delegation of any portion of such jurisdiction to someone outside the court. *See In re Mark M.*, 365 Md. at 708 (holding, in a CINA proceeding, that where a court is statutorily mandated to make a

specific finding, “[t]he court cannot delegate this determination to a non-judicial agency or an independent party”); *In re Justin D.*, 357 Md. 431, 447 (2000) (noting that jurisdiction over visitation disputes resides solely with courts of equity and “[t]here is no authority for the delegation of any portion of such jurisdiction”); *Van Schaik*, 200 Md. App. at 134 (“Maryland cases have made clear that a court may not delegate to a non-judicial person decisions regarding child visitation and custody.”); *Shapiro v. Shapiro*, 54 Md. App. 477, 484 (1983) (holding that a trial court erred in vesting authority in a psychiatrist to determine when father could recommence visitation).

Here, the trial court’s order that in-person visitation at the prison will not occur unless “the children’s counselor/therapist agrees that the visit or visits would be appropriate for the children” is both facially over-broad and legally incorrect. First, we note the undisputed evidence that the minor boys did not have a counselor or therapist and had not seen a counselor or therapist in about six years. Moreover, the order constitutes an improper delegation of authority to “the children’s counselor/therapist[.]” In *Mark M.*, we held that it “is the province of the court, not the province of the therapist, to determine when or whether visitation is appropriate” and, therefore, “[v]esting the therapist . . . with complete discretion to deny or permit visitation by the petitioner constitutes an improper delegation.” 365 Md. at 709-10. “While ‘[t]he court is entitled to rely on expert opinion in making a decision, . . . the decision must be that of the court, not the expert.’” *Id.* (quoting *In re Justin D.*, 357 Md. at 447). Similarly, although the court permitted Father to write to the children and call the family residence, those contacts were conditioned on permission from Mother. Again, this constitutes an improper delegation of authority to a

non-judicial person. For this reason, we vacate the court’s ruling on Father’s visitation and contacts with the parties’ three minor sons and remand the case to the circuit court for further consideration.

On remand, the court must specifically make the findings necessary under FL § 9.101.1(b)(3). As to any children found to have been abused by Father, the court must follow the procedure set forth in FL § 9-101 and determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to him. Unless the court specifically finds that there “is no likelihood of further abuse or neglect” by Father, the court may only permit supervised visitation pursuant to an “arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.” FL § 9-101(b). Here, it is undisputed that Father abused some of his daughters, but he claims not to have abused or neglected his sons. If the court should determine that Father abused or neglected some of his children but not others, the court shall make arrangements for custody or visitation that best protect both the children who are the subject of the proceeding who were not abused or neglected and the victims of abuse. FL § 9-101.1(c). As we have made clear, the court cannot delegate this duty to anyone who is not a judicial officer. Depending upon the findings, the court may deny visitation but permit Father to file a new motion for visitation with the court if, and only if, he is able to provide medical opinion testimony that such visitation can be conducted in a manner that is consistent with the best interests of the children who were not abused and the children who are victims of his abuse. FL § 9-101.1(c)(1) and (2). Such an order on remand would accomplish the

same result but leave the decision-making where it must be, in the hands of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT
FOR CAROLINE COUNTY VACATED;
CASE REMANDED FOR FURTHER
CONSIDERATION; COSTS TO BE PAID
BY APPELLEE.**