Circuit Court for Garrett County
Case No. 11-C-14-013831

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1810

September Term, 2022

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KRISTINA LYNN FORD

v.

JAMES GREGORY FORD

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Nazarian,
Reed,
Zic,

JJ.

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Opinion by Nazarian, J.

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Filed: September 5, 2023

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

James Gregory Ford ("Father") and Kristina Lynn Ford ("Mother") were married in 2002 and had two children before they separated in 2014. Since 2015, the Circuit Court for Garrett County has issued orders resolving disputes over child custody and visitation. Most recently, in 2019, Father filed a petition to modify custody on the ground that Mother was moving to West Virginia with one of the children. A family magistrate conducted a hearing, and in August 2022 issued a report detailing her findings of fact and recommendation that the court grant Father sole legal and primary physical custody. In December 2022, the court entered an order following that recommendation.

Mother challenges the court's December 2022 order and requests a remand to the circuit court for further fact-finding and clarification of its order. We affirm the judgment of the circuit court.

## I. BACKGROUND

Mother and Father married in 2002 and had two children: M was born in 2003 and G was born in 2010.[1] The parties separated in 2014, and the court granted the parties an absolute divorce on November 4, 2015. This appeal only concerns custody over G, since M has reached the age of majority.

In 2014, Mother filed for sole physical custody of G and M. The court issued a consent order on January 22, 2015 ("2015 Order") granting custody to Mother and visitation to Father and establishing the visitation schedule and child exchange protocols.

[1] We refer to the children as "M" and "G". These initials are chosen at random, intended to protect the children's privacy, and we mean no disrespect.

The court issued another order on November 29, 2016 ("2016 Order") in response to Mother's complaint to modify visitation and Father's counter-complaint for joint physical custody and modifications to visitation. In that order, Mother retained primary physical custody of the minor children, and the court awarded Mother and Father joint legal custody. The order lifted some restrictions on Father from the 2015 Order and modified his visitation schedule, but "all other terms and conditions of the [2015 Order] remain in effect and unchanged."

In August 2019, Father filed a petition to modify child custody and visitation after learning that Mother had decided to move to West Virginia. Father also accused Mother of attempting to alienate the children from him and of failing to provide for or supervise them. On February 24, 2020, the court issued a *pendente lite* order ("2020 Order") granting the parties joint legal custody over M and giving Father primary physical custody of M so long as she was a minor. Mother and Father retained joint legal custody of G and Mother retained primary physical custody of G. The 2020 Order modified the child exchange protocols and required Mother, Father, and G to "partake in a Mental Evaluation which will be scheduled as soon as possible and results of which shall be shared with all attorneys as soon as available." All issues involving custody and visitation of G were to "be addressed when this matter [wa]s rescheduled" for a hearing. Due to a series of delays, the hearing on Father's petition to modify custody was held on July 27, 2022.

On May 4, 2021, Father filed a petition for contempt against Mother for failing to submit her mental health evaluation. Father also accused Mother of denying him in-person

visitation with G since December 3, 2019. Mother filed a motion to dismiss in response, claiming that she was not served properly with the petition for contempt. The court entered an order on August 27, 2021, denying Mother's motion to dismiss. After a hearing on Father's petition for contempt, the magistrate recommended that Mother's motion to dismiss be denied and that the matter be continued for a hearing before the court. The court entered an order scheduling another show cause hearing before the magistrate and denying Mother's motion to dismiss.

On July 27, 2022, the magistrate conducted a hearing on Father's petition to modify custody and visitation. Both parties, their respective counsel, and the best interest attorney ("BIA") appointed to represent G attended the hearing. Among other witnesses, Mother and Father testified. Mother explained that she tried to notify Father about her move to West Virginia through her attorney since there was a no-contact order in place between Mother and Father. Father testified that he received no notice that Mother was going to move herself and G to West Virginia and enroll him in a new school. Father also informed the court that he hadn't had visitation with G for a period of two years. G did not address the court during the hearing.

On August 5, 2022, the magistrate issued her report. The magistrate found that Mother didn't inform Father or attempt to inform him of her move to West Virginia until after she and G had moved. Similarly, the magistrate found that Mother didn't inform Father of her decision to enroll G in a different school until after the fact. The magistrate found that before April 1, 2022, and notwithstanding the court-ordered visitation schedule,

G had had no visitation with Father for two years and that Mother had a responsibility to ensure G maintained visitation with Father. Accordingly, the magistrate recommended that the court grant sole legal and primary physical custody of G to Father:

> Thus, based upon these material changes in circumstance and the facts established from the testimony provided by all parties, the Family Magistrate finds it is in the best interest of the minor child for custody and visitation to be modified.
>
> Joint custody is no longer in the best interests of the parties' minor child, [G]. Joint legal custody can no longer be the standard. Nor can joint physical custody be considered. It was proven [Mother] is unable to share decision-making. It was proven [Mother] is unable to communicate effectively. It was proven [Mother] cannot follow agreements unless threatened with incarceration. For all these reasons, the existing Orders should be modified. [Father] should be granted sole legal and primary physical custody of the parties' minor child, [G]. Further, [Mother] should be afforded a set visitation schedule that leaves very little open for interpretation.

The report also included four pages of recommendations regarding visitation and co-parenting protocols.

Mother filed exceptions to the magistrate's report on August 19, 2022, and the court conducted an exceptions hearing on December 2, 2022. Mother argued that the BIA hadn't expressed the child's preferences and, in the absence of this information, a *de novo* hearing was warranted where G's "preference can be stated, clearly on the record, and considering that information, informed decisions could have been made regarding whether to have [G] testify for himself." Mother maintained that the parties had not obtained "real mental health evaluations," as the court had ordered, and that the BIA had a duty to ensure that both parties and G obtained these evaluations before the court made a custody determination.

Finally, Counsel for Mother asserted that new evidence had materialized that required a *de novo* hearing to resolve the custody dispute.

The court held a hearing on December 2, 2022 to address Mother's exceptions. Father argued that the magistrate found, correctly, that despite G's lack of contact with Father for two years, Mother had done nothing to address G's issues with maintaining visitation with Father. Moreover, Father asserted that Mother moved G out of the state unilaterally and enrolled him in a different school without notifying Father, and that her actions had put her "character and reputation at issue." Father expressed concern for G's educational development while in Mother's care since G's school in West Virginia did not implement his Individualized Education Program ("IEP"), a failure Mother did not realize until a year after he started schooling there.

G's BIA argued on G's behalf and concluded that it would be in the best interest of G for Father to have legal and physical custody. While G was under Mother's care, the BIA argued, Mother failed to ensure that G was in counseling or that his IEP was followed at school. In response to Mother's assertion that G's preferences must be stated on the record, the BIA explained that she wasn't required to present the child's position on the matter, and that she didn't state G's position because "in [her] mind the position of [G] wasn't clear," and she wasn't certain that "any amount of questioning . . . would have made it any easier or better."

The court found that there had been a material change in circumstances and denied

Mother's exceptions to the magistrate's report:

> The record and transcript clearly indicate there having been material changes of circumstances since the Order of 2016. In September, 2021, [Mother] moved herself and [G] from Garrett County to . . . West Virginia. She did not personally advise [Father] of this move, although an order of joint legal custody was in place. She unilaterally enrolled the child in the West Virginia school system and did not discuss with [Father] the change in school programs. In April, 2022, the child's grades were apparently quite poor. [Mother] determined the school did not have an IEP in effect, although one had existed when he was enrolled in Garrett County.
>
> Apparently, in 2020, the parties agreed [Mother] would establish needed counseling for the child through the Garrett County Health Department. Upon moving to West Virginia, those services were terminated. A period of time elapsed before counseling was renewed in West Virginia.
>
> At some point the child determined he would no longer visit [Father]. [Mother] allowed the child to make that decision without advising [Father], resulting in a significant period of time with no contact between parent and child. (Visitation was renewed in April, 2022, without any particular problem.)
>
> These actions or inactions constitute a material change in circumstances. It also appears to be in the child's best interest to be in the primary physical custody of [Father]. The change of residence to West Virginia was not due to any need or reason associated with the interest of the child. It resulted in his placement in a new school system that was not advised as to the IEP in place in Garrett County. Necessary counseling was not provided for a significant period of time. The child needs consistency and certainty in his life that for the past few years has been lacking. It appears [Father]'s home can provide that stability including a return to the school system that was the child's until recently. For those reasons, exceptions to the Magistrate's Report and Recommendations are ***denied***.

The court, taking the magistrate's report into account, entered an order ("2022 Order") granting Father sole legal and physical custody of G and ordering Mother to follow the

visitation schedule set forth in section 4 of the magistrate's recommendations.

On December 12, 2022, Mother filed a complaint to modify custody from the 2022 Order, on which, so far as we know, the circuit court has yet to rule. And on December 14, 2022, Mother filed a timely notice of appeal from the 2022 Order.

## II. DISCUSSION

On appeal, Mother asks us to remand this matter to the circuit court for two reasons:[2] *First*, she says, the mental health evaluations ordered by the court in the 2016 order were never completed and must be included in the record. *Second*, she contends that the circuit court's order excluded portions of the magistrate's recommendations "without explanation," which warrants remand to the circuit court for clarification. She isn't challenging the custody decision directly—her briefs and arguments don't even attempt to argue the merits. Instead, she seeks a do-over, ostensibly to allow her and the court to augment the record with mental health evaluations that, she implies, would compel the circuit court to reach a different outcome.

In reviewing an appeal from a non-jury action, we "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the

[2] In her brief, Mother phrased her Question Presented as follows:

> Should the custody and visitation determination regarding [G], the son of Kristina[] L. Ford and James Gregory Ford . . . by Magistrate Henline, as revised by Judge Leasure in the Circuit Court of Garrett County[,] Maryland, by Order of December 9, 2022 granting sole physical and legal custody of [G] to Appellee, James Gregory Ford, be remanded to the Circuit Court for Garrett County, Maryland for further review.

opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). And in cases where the court's ruling is legally sound and the factual findings are not clearly erroneous, we review a trial court's child custody determination for abuse of discretion. *McCarty v. McCarty*, 147 Md. App. 268, 272 (2002). In this case, we see no reason to remand this case to the circuit court—the record, which all of the parties had ample opportunity to develop, was sufficient for the circuit court to decide the questions begetting the 2022 Order, and we affirm the judgment.

### A. Remand For Completion Of The Parties' Mental Health Evaluations Is Not Warranted.

Mother alleges that because G never spoke directly to the court about his preferences,[3] the court should have considered the parties' mental health evaluations to understand G's position before making a custody determination. Mother emphasizes that safety concerns and mental health issues underlying G's behavior may have been explained by the parties' mental health evaluations. Father responds that a remand on these grounds

[3] It's true that G didn't testify, but he wasn't required to testify in order for the court to assess his preference. The child's preferences are one factor for the court to consider; it isn't dispositive, the decision to speak with the child directly or not lies in the court's discretion. *Lawrence v. Lawrence*, 74 Md. App. 472, 478 (1988). "[T]he purpose of consulting the child's preference as to a custodian is not because of the child's 'legal right to decide the question of custody,' but to assist the court in its exercise of discretion." *Id.* (*quoting Ross v. Pick*, 199 Md. 341, 353 (1952)).

During the hearing on Father's motion to modify custody and support, counsel for Mother requested that G testify, but the BIA explained that it would not be in the boy's best interest to testify because she believed that he was pressured "to say things" to the court, and that if he spoke with the court, no matter what the outcome was, "in [G]'s head, it's always going to be [G]'s fault." Because testifying likely would have had an adverse impact on G's mental well-being, the BIA recommended that G should not speak to the court, and the magistrate and court agreed.

is unnecessary because the evaluations were in fact completed and "no party called, subpoenaed, deposed, or otherwise offered the evaluator or evaluation into evidence before the magistrate." In Father's view, Mother is simply trying to re-open the record to relitigate custody yet again.

"Embraced within the meaning of 'custody' are the concepts of 'legal' and 'physical' custody." *Taylor v. Taylor*, 306 Md. 290, 296 (1986). Legal custody gives the parent "the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." *Id.* Physical custody gives the parent the duty of providing the child with a home and "mak[ing] the day-to-day decisions required during the time the child is actually with the parent having such custody." *Id.*

Trial courts undertake a two-step process to determine whether to modify physical and legal custody. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). The court first must first "assess whether there has been a 'material' change in circumstance," and if so, "proceed[] to consider the best interests of the child as if the proceeding were one for original custody." *Id.* (*quoting McMahon v. Piazze*, 162 Md. App. 588, 594 (2005)). Here, the parties don't dispute that there was a material change of circumstance: Mother moved herself and G to West Virginia and enrolled G in school there.

From there, the court proceeded, correctly, to consider the best interests of G in determining whether and, if so, how to modify custody. "When making a custody determination, a trial court is required to evaluate each case on an individual basis in order

to determine what is in the best interests of the child." *Id.* at 173. Although the court is not limited to a list of factors to evaluate the best interests of the child, *Montgomery County Department of Social Services v. Sanders* sets forth a non-exhaustive list of factors that trial courts must consider and weigh in making a child custody determination:

> The criteria for judicial determination includes, but is not limited to, 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. 406, 420 (1978) (internal citations omitted). "While the court considers all the above factors, it will generally not weigh any one to the exclusion of all others. The court should examine the totality of the situation in the alternative environments and avoid focusing on any single factor . . . ." *Id.* at 420–21.

Along with the above factors, Mother argues that the court also was required to consider the mental health evaluations of Mother, Father, and G before making a custody determination in light of concerns for G's safety. Mother argues that the mental health evaluations might provide insight into what is best for G's well-being, especially since he didn't participate during the hearing.

Mother overstates the court's obligations. She hasn't pointed to any legal authority—and we haven't found any—that requires the court to consider mental health evaluations before making a child custody determination. Indeed, the 2020 Order required

that all parties "partake in a Mental Evaluation which will be scheduled as soon as possible and results of which shall be shared with all attorneys as soon as available"; the parties weren't required to offer them into evidence or submit them to the court.[4]

Regardless, it fell within the circuit court's discretion to determine if mental health evaluations were needed before it modified child custody. And although Mother now claims they were vital to the court's custody determination, neither she nor any other party made any such suggestion to the court, nor did anyone request a continuance to complete the evaluations (perhaps, again, because all but Mother's had been completed). We won't remand this matter to include information that could have been part of the record, but wasn't, either because the parties opted not to offer it or because they failed to obtain it, and we discern no abuse of discretion in the court's decision to modify custody without considering mental health evaluations.

### B. Remand On The Basis That The Court Excluded The Magistrate's Recommendations From Its Order Without Explanation Is Not Warranted.

In addition to seeking a remand to consider mental health evaluations, Mother questions why, aside from the visitation schedule, the rest of the magistrate's recommendations were not included in the court's order. In the absence of an explanation, Mother contends that a remand is necessary to clarify the court's intent. Again, no remand

[4] Although Mother complains that none of the mental health evaluations were completed, the virtual docketing system reflects that both Father's and G's evaluations, noted as "psychiatric diagnostic evaluations," were submitted and docketed on May 4, 2021. These evaluations include diagnoses and are signed by licensed mental health professionals. The only evaluation that appears to be missing is Mother's.

is necessary here.

Magistrates have "the power to regulate all proceedings in the hearing" and "shall 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(b), (e). But a magistrate's findings are "merely tentative and do not bind the parties until approved by the court." *Doser v. Doser*, 106 Md. App. 329, 343 (1995). A party may contest a magistrate's findings by filing written exceptions to the magistrate's report within ten days. Md. Rule 9-208(f). Although the magistrate plays an essential role in fact-finding and forming recommendations, "[i]t is the [court's] responsibility, not the [magistrate's], to determine finally the parties' rights." *Levitt v. Levitt*, 79 Md. App. 394, 399 (1989). It's essential, then, that the court exercises its own "independent judgment concerning the proper conclusion to be reached upon those facts." *Domingues v. Johnson*, 323 Md. 486, 490 (1991). The court's opinion in a case such as this "should reflect consideration of the relevant issues and the reasoning supporting the [court]'s independent decisions on those issues." *Kirchner v. Caughey*, 326 Md. 567, 573 (1992).

And it did. The court issued an opinion in this case that contained factual findings about the material change in circumstances in G's life—most notably his Mother moving him to West Virginia—and the effect on G's overall well-being. The court found that Mother decided unilaterally to move, and that she should have consulted with Father on that decision but didn't. Based on those findings, the court drew the conclusion that G would have "consistency and certainty in his life that for the past few years ha[d] been

lacking" and awarded sole legal and physical custody to Father. In its memorandum and order, the court granted Mother "visitation and holiday visitation as set forth in Item 4 of the Magistrate's Recommendations" and adopted that Item as part of its order. That section of the recommendation ends with the word "and," presumably because the magistrate's report continues with section 5. We don't read this to mean that the court merely "cut and paste[d]" part of the magistrate's recommendations and disregarded the rest of the report. Rather, after careful consideration, the court decided to incorporate into its order the visitation schedule set forth by the magistrate. Although Mother questions the court's intent in declining to adopt the rest of the magistrate's recommendations, the law doesn't permit the court to adopt the magistrate's recommendations reflexively; in fulfilling its role, the court was required to draw legal conclusions on its own, and it did. *Domingues*, 323 Md. at 490.

**JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY AFFIRMED. APPELLANT TO PAY COSTS.**