

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1647

September Term, 2016

SHANNON A. LEE

v.

CHRISTOPHER L. MARROW

Woodward,
Graeff,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: April 24, 2017

*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.

By written order dated October 11, 2016, the Circuit Court for Prince George’s County accepted the March 16, 2016 recommendation by a magistrate and changed sole legal and physical custody of the biological children of Shannon A. Lee (“Mother”), appellant, and Christopher L. Marrow (“Father”), appellee, from Mother to Father. Mother timely appealed the order of the circuit court, raising the following issues for our consideration, which we have consolidated and rephrased:¹

1. Whether the circuit court erred or abused its discretion in accepting the magistrate’s factual findings and recommendation and in denying Mother’s exceptions to the magistrate’s recommendation based on new facts that had developed since the hearing before the magistrate.
2. Whether the manner in which the merits hearing was conducted violated Mother’s due process rights.

¹ The issues, as posed by Mother, are:

1. Whether the circuit court should have considered the new facts that had developed between the last hearing before the magistrate and the hearing date for the exceptions, in accordance with Md. Rule 9-208(f), namely the mother’s release from incarceration, as that incarceration was the basis for the magistrate’s recommendation.
2. Whether the circuit court could ignore subsequent events and base its determination on the grounds (a) that “at the time of the Magistrate decision” there was “neither error of law nor abuse of discretion” and (b) make a finding, predicated on the father’s allegation alone, which alleged a complete denial of access, that such a dereliction must have occurred and it was a “serious consideration when examining the fitness of a parent,” where there was no evidence to support it.
3. Whether it was a violation of due process to conduct a merits hearing where such a hearing had already been held before a different magistrate and the parties were due to appear for only closing argument before that magistrate without prior notice.

Finding no error or abuse of discretion, we shall affirm the circuit court’s order.

FACTS AND LEGAL PROCEEDINGS

During an on again/off again romantic relationship with Father, Mother gave birth to two children, Ch. in April 2002, and C. in June 2005.² Following the permanent end of the relationship, Mother retained custody of the children.

On May 26, 2005, Mother filed a complaint seeking sole legal and physical custody of Ch., alleging that she was his full-time caregiver, and referencing a protective order then pending against Father. On June 28, 2005, Father filed a counter-complaint seeking joint custody of Ch.; he also requested visitation with the child. On July 8, 2005, Mother amended her complaint for sole custody to reflect the June 2005 birth of C. and to add a request for child support arrearages from Father.

Following a hearing on June 15, 2006, Magistrate Judy Woodall³ recommended that Father be awarded a *pendente lite* order of reasonable visitation with the children and that Mother be awarded \$700 per month in child support. The circuit court approved the magistrate’s proposed order on July 10, 2006.

² Mother and Father were never married. Father requested a DNA paternity test for C., which determined that he was the child’s father with a likelihood of 99.99%.

³ As of October 1, 2015, after some of the pertinent hearings in this case, juvenile court masters became known as magistrates. *See* Maryland Rule 1–501 (effective March 15, 2015). For the sake of clarity, we will employ the term “magistrate” throughout this opinion.

Following a hearing on October 4, 2006, Magistrate Woodall recommended that custody, by agreement of the parties, be awarded to Mother, with reasonable visitation to Father. Father was to increase child support payments to \$800 per month, along with an additional \$25 per month toward an outstanding arrearage in the amount of \$2400. The circuit court approved the magistrate's proposed order on October 25, 2006. A flurry of motions ensued, including Mother's motions for contempt related to Father's continued failure to pay child support, and Father's motion for contempt related to Mother's denial of visitation.

On August 5, 2014, Father filed a motion to modify custody and child support, on the ground that Mother was then incarcerated and there was an additional warrant outstanding for her arrest, which could lead to additional and indeterminate incarceration. In Mother's October 14, 2014 response in opposition to the motion, she asserted that she was not incarcerated, although she admitted that she had been imprisoned briefly. She claimed that Father had not been a part of the children's lives, had not taken advantage of his visitation rights, and had his own issues with the law. Mother also requested a modification of child support, on the ground that C. had special needs and his medical bills had increased. Father filed an amended complaint for sole custody and child support on December 2, 2014, alleging a material change of circumstances, as Mother had denied him any access to the children since late 2013, changed the children's residence without informing him, and engaged in criminal activity with the possibility of incarceration.

A custody modification hearing was scheduled for February 5, 2015, but the court postponed the hearing until March 26, 2015, at Father's request. The hearing was again postponed, at Mother's request, until May 13, 2015.

At the May 2015 hearing, Father testified that he had not seen the children since late 2013, as Mother would not reveal to him where she and the children were living. He had also discovered, from a TV news story, that Mother was facing multiple felony charges of burglary and forgery and had been incarcerated for three months. He did not know who had custody of his children while Mother was in prison.

Mother denied that she had refused Father's visitation with the children. Instead, she claimed she had tried to communicate with Father, but he would not respond to her overtures. She insisted that the children had been well taken of care of during her incarceration.

Magistrate Woodall recommended a custody investigation and home study. She therefore reserved on the pending custody modification motions and reset the matter to July 14, 2015 for a review hearing. On May 27, 2015, a judge with the family division of the circuit court ordered the custody investigation.

The court rescheduled the July 14, 2015 hearing to September 21, 2015. Father requested a postponement of that hearing, on the ground that Mother's scheduled criminal sentencing hearing in case number CT141460X had been postponed from September 18, 2015 and no new date had been scheduled. In addition, he stated, Mother had another sentencing hearing scheduled in Charles County on October 29, 2015. The court rescheduled the hearing to December 22, 2015.

After Father failed to appear at the December 22, 2015 hearing, allegedly as a result of his grandmother's death, the matter was postponed until February 2, 2016. Father again requested a postponement, on the ground that his grandmother's will was scheduled to be read in Virginia on that date. The matter was reset for March 16, 2016.⁴

On March 4, 2016, Father filed a motion for emergency hearing seeking temporary custody of Ch. and C., stating that Mother was then incarcerated and the whereabouts of the children were unknown. The court determined that the matter was not an emergency and reaffirmed the March 16, 2016 hearing date.

Magistrate Alisia Ferguson presided over the hearing on March 16, 2016.⁵ At that time, Mother was serving a total prison sentence of 18 months, which, she said, would likely amount to approximately two more months' actual incarceration, given parole considerations and time already served. Father argued that he should be granted sole

⁴Mother sought to advance the date of the March 2016 hearing. In support of her motion and claim that Father had committed fraud upon the court in requesting another postponement, she forwarded to the court a death certificate showing that Father's grandmother had actually passed away in 2004. The court ordered that the hearing date remain March 16, 2016.

⁵ Some confusion arose as to why Magistrate Woodall was not present to hear closing arguments in the pending custody matter. Magistrate Ferguson explained that the court file showed that "a magistrate" had been requested for the hearing, rather than Magistrate Woodall, specifically.

Mother's attorney, who had been retained only days prior to the hearing, stated that it was her understanding that testimony had already been taken, and because she believed that only closing arguments were to be heard, she was unprepared for a full hearing.

Mother requested that Magistrate Woodall be permitted to conclude the matter. After being heard by the continuance judge, however, Mother's request for a continuance was denied, and Magistrate Ferguson heard the matter regarding child support, custody, and visitation, after announcing that one hour had been allotted for the hearing.

custody because Mother was incarcerated, with more criminal charges pending, and she had hidden the children from him since July 2015. Mother countered that she had reached out to Father on numerous occasions, but “he was just always unavailable” to his children.

In her findings of fact, Magistrate Ferguson stated:

The operative issue here, when weighing their credibility, and a lot of it is he said/she said, the mother testified on her own behalf that her conviction was related to fraud, which relates to dishonesty. That is a factor when I have the he said/she said, with dishonesty.

The Court has clearly reviewed the custody evaluation. The custody evaluation does note the concerns about how much access the father had with the children, and who their primary parent has been. It also indicates that if the mother is not incarcerated that they recommend that the children be placed with her. The report also says, if she is still incarcerated that they recommend that Mr. Marrow have custody.

* * *

And the case has dragged on so long. I have to judge it based on how it rests and sits today. Award of future custody is prohibited. I am not allowed to do that. I can’t say in two months or in three months. However, the parents appear today are the factors I need to evaluate.

He testified that he believes it’s eighteen months. She testified that she will have an earlier release. There was no documentation, certified, provided to the Court, to give me any real basis, outside of their own belief system, that she is going to be released in two months, other than her testimony. And even if she was, this is not a vacation. There has been a material change in circumstances. The primary caregiver is incarcerated.

* * *

[Father’s] motion to modify custody will be granted, based on that change in circumstances, because she is unable, unlike a deployment or relocation, to presently provide for the day to day care of the children.

The Court does that in line with looking at the fitness of the parents. I’m not finding that anyone is unfit.

* * *

And I'm not permitted to do review hearings. I have to judge it the way it stands. And if the circumstances change, then the appropriate modification should be filed.

* * *

I wish you all the best after this very long process that your family has been in. I do find that this is in the children's best interest, based on the facts as they exist today, as I know them. And I am not making a finding that either parent is not a fit parent, it's just that one parent is incarcerated, and I have no certification as to when she will be released, and I have to judge it on what I know today.

Magistrate Ferguson therefore recommended that: 1.) Father's August 5, 2014 motion to modify custody be granted, based on the material change in circumstances, *i.e.*, Mother's incarceration, such that he be awarded sole physical and legal custody of the children; 2.) Mother's October 14, 2014 motion to modify child support be denied; and 3.) Father's obligation to pay child support be terminated as a result in the change in custody. The magistrate's proposed order was filed on April 1, 2016.

On March 25, 2016, Mother filed exceptions to the magistrate's recommendations, stating that she had been unprepared for a full merits' hearing before a magistrate other than Magistrate Woodall and that her constitutional right to notice and opportunity to defend her parental rights had been denied by the magistrate's insistence on a one-hour hearing. Moreover, Mother claimed, Magistrate Ferguson had failed to take into account the best interest of the children and to consider the "exceptional circumstances of the history" of the case, which did not warrant an abrupt change in custody of the children to Father.

On April 13, 2016, Father filed a petition for contempt, claiming that Mother had denied him visitation with the children since August 2015. Unaware where the children were then residing, he requested the court’s assistance in locating them. The court issued a show cause order to Mother, requiring her to file, on or before August 25, 2016, a written response why Father’s requested relief should not be granted.

A hearing on the show cause order and Mother’s exceptions was scheduled for August 31, 2016 but was rescheduled to October 6, 2016. On October 3, 2016, Mother filed a supplemental exception, in which she alleged that the magistrate’s recommended modification of the custody order was based on the fact that Mother would be incarcerated for 18 months, but she had been released from custody and continued to be the primary caregiver to the children. She asked the court to consider that fact as new evidence in “the interest of justice.”

At the October 6, 2016 exceptions hearing, Mother argued that the magistrate’s sole reason for granting custody to Father was the fact of Mother’s incarceration at the time of the March 2016 hearing. As she had since been released from prison, it was in the best interest of the children to return to her custody.⁶ The circuit court acknowledged Mother’s recent release from prison, but, noting that the transcript from the March 16, 2016 hearing

⁶ Apparently, the children did not live with Father during Mother’s incarceration. It is not entirely clear from the record who had physical custody of the children at that time, but it appears that their maternal grandmother may have moved into Mother’s house and cared for them.

was not in the file, reset the exceptions hearing to November 3, 2016. The court granted *pendente lite* custody to Father until then.

Notwithstanding the pending November 3, 2016 hearing, the court filed a written order on October 11, 2016, denying Mother’s exceptions to the magistrate’s recommendations and denying Father’s show cause order as moot. The court ruled that:

At the time of the Magistrate decision, even as presented by the Plaintiff, there was neither error of law nor abuse of discretion. This court would be hard pressed to imagine that the Plaintiff intended to maintain custody of the two children with her in the Department of Corrections. Additionally, placement with the Defendant would be preferable to foster care. Furthermore, given that her period of incarceration was indeterminate, no end date could be set at the hearing before the Magistrate for a termination of the custody order that was proposed. Additionally, had the Magistrate intended to limit the change in custody to just the period of incarceration, it is reasonable to presume the Magistrate would have included such a provision in the Proposed Order. Plaintiff’s proper course of action would have been, upon release, to seek a modification of the custody Order. This she did not do.

Having reviewed the file and accepting Plaintiff’s proffer, the court finds no error of law and no abuse of discretion. Accordingly, the court will deny the Exceptions and the Magistrate[‘]s proposed Order will be signed with even date herewith.

In a second order of even date, the court approved the magistrate’s proposed order awarding sole legal and physical custody of the children to Father, with reasonable rights of visitation to Mother. The court cancelled the pending November 3, 2016 hearing and closed the case “for statistical purposes only.”

Mother timely filed her notice of appeal from the court’s order on October 14, 2016. She filed an emergency motion for stay of the order changing custody the same day. Mother’s emergency motion for stay of the order changing custody was denied by this Court on October 28, 2016.

DISCUSSION

I.

Mother contends that the circuit court erred or abused its discretion in refusing to consider, at the exceptions hearing, the “new evidence” that she had been released from prison since the hearing before the magistrate. Because the magistrate based her recommendation of change of custody from Mother to Father solely on the fact of Mother’s incarceration, Mother continues, the court should have granted her exceptions, and its failure to do so “smacks of bias of the worst sort.”

Father counters that Magistrate Ferguson “made the only appropriate recommendation possible under the circumstances” of Mother’s incarceration, which created a material change in circumstances warranting a change in custody. Because Mother’s exceptions alleged no erroneous fact-finding by the magistrate, and because the court accepted Mother’s proffer that she had been released from prison, yet nonetheless accepted the magistrate’s recommendation, the court did not err or abuse its discretion in approving the magistrate’s recommendation and modifying custody based on a material change of circumstances.

A circuit court may refer the “modification of an existing order or judgment as to custody or visitation” to a magistrate. Maryland Rule 9-208(a)(1)(F). The magistrate has the power to conduct proceedings and to “recommend findings of fact and conclusions of law.” Rule 9-208(b)(7). The magistrate must “prepare written recommendations, which shall include a brief statement of the magistrate's findings and shall be accompanied by a proposed order.” Rule 9-208(e)(1). If no party files timely exceptions, the circuit court

may enter an order or judgment as recommended by the magistrate. Rule 9-208(h)(1)(B). If, as here, a party does file timely exceptions, the circuit court may issue an appropriate order or judgment after ruling on the exceptions. Rule 9-208(h)(1)(A). Either way, the circuit court must enter an order either adopting or rejecting the magistrate's proposed order.

“When reviewing a [magistrate]'s report, both a trial court and an appellate court defer to the [magistrate]'s first-level findings (regarding credibility and the like) unless they are clearly erroneous.” *McAllister v. McAllister*, 218 Md. App. 386, 407 (2014). “[W]hile the circuit court may be ‘guided’ by the [magistrate]'s recommendation, the court must make its own independent decision” as to any exceptions taken to the magistrate’s recommendation and to the ultimate disposition. *Id.*; *Leineweber v. Lieneweber*, 220 Md. App. 50, 60–61 (2014), *cert. denied*, 441 Md. 668 (2015).

This Court conducts only a “limited review” of a circuit court’s custody decision. *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996). “[A]n appellate court does not make its own determination as to a child's best interest; the trial court's decision governs, unless the factual findings made by the lower court are clearly erroneous or there is a clear showing of an abuse of discretion.” *Gordon v. Gordon*, 174 Md. App. 583, 637–38 (2007). We review the evidence in the light most favorable to the prevailing party, here Father, and if there is any competent, material evidence to support the circuit court's factual findings, we cannot hold that those findings are clearly erroneous. *Hosain v. Malik*, 108 Md. App. 284, 303–04 (1996). With regard to the court’s ultimate decision on the custody matter, an abuse of discretion exists if “no reasonable person would take the view adopted by the

[trial] court[,]” or the ruling is “clearly against the logic and effect of facts and inferences before the court.” *Santo v. Santo*, 448 Md. 620, 625–26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312–13 (1997)).

Based on the record in this matter, we cannot say that the magistrate’s factual findings were clearly erroneous. At the time of the March 16, 2016 hearing before the magistrate, Mother was incarcerated.⁷ Although Mother and her attorney claimed that she would be released from prison approximately two months after the hearing, Mother presented no certified documentation or evidence to the magistrate of a release date, other than what she said she was told by someone in the prison system.

Magistrate Ferguson acknowledged that she was only able to render a recommendation based on the facts as they then existed, and she cited the custody evaluator’s opinion that so long as Mother remained incarcerated, Father should have custody of the children. The magistrate also made clear to Mother that “if the circumstances change, then the appropriate modification should be filed.”

After the hearing before the magistrate, Mother was released from prison. Instead of filing her own motion for modification of custody, however, she filed exceptions to the magistrate’s recommendation. At the exceptions hearing before the circuit court, she proclaimed that the only reason the magistrate had recommended a change in custody from

⁷ Mother does not appear to dispute that incarceration provides a material change in circumstances to warrant a change in custody. *See McMahon v. Piazzese*, 162 Md. App. 588, 594 (2005) (A change with regard to a court’s custody determination is material “when it affects the welfare of the child.”); *Wills v. Jones*, 340 Md. 480, 491 (1995) (Father’s incarceration provided a “temporary material change of circumstances.”).

her to Father was because of her then-incarceration. In her view, her release from prison negated the need for any change in custody, and she demanded that the court grant her exceptions.

The court, however, noted that the transcript of the hearing was not in its file, as required, and, even accepting Mother’s proffer that she had been released from prison, it had only Mother’s word in support of her claim that the magistrate’s recommendation was based solely on Mother’s then-incarceration. In its written order, the court added that had the magistrate intended to limit the change in custody to just the period of incarceration, she likely would have done so. Therefore, the court was unable to find that the magistrate’s factual findings as of the March 2016 hearing were clearly erroneous.

Although judicial efficiency may perhaps better have been served had the circuit court remanded the matter, pursuant to Rule 9-208, to the magistrate to make additional specific findings related to Mother’s release from prison since the March 2016 hearing and its effect, if any, on her recommendation for a change in custody, the court did not err in its independent assessment of the magistrate’s findings of facts, based on the actual evidence before it.⁸ And, given the highly deferential standard of appellate review of the

⁸ Mother argues, in her brief, that Rule 9-208 *requires* the court, when ruling on exceptions to a magistrate’s recommendation, to consider additional evidence not presented to the magistrate. The plain wording of the rule, however, makes clear that the court shall decide the exceptions on the evidence presented to the magistrate unless the court “determines that the additional evidence should be considered,” in which case “the court *may* remand the matter to the magistrate to hear and consider the additional evidence or conduct a de novo hearing.” Rule 9-208(i)(1) (Emphasis added). Such a remand is within the court’s discretion.

findings by the circuit court, we further find no abuse of its discretion in that court’s ultimate decision to accept the magistrate’s recommendation to change custody from Mother to Father.⁹

Both the magistrate and the circuit court made clear to Mother that her best course of action would be to file her own motion to modify custody based on the material change in her circumstances, *i.e.*, her release from prison. There is nothing to suggest that Mother cannot now undertake that action. *See Frase v. Barnhart*, 379 Md. 100, 121 (2003) (the matter of custody, visitation, and support may always be reopened upon a showing of changed circumstances).

II.

Mother also avers that the manner in which the March 16, 2016 hearing before the magistrate was conducted violated her due process to defend her parental rights. Because she and her newly retained counsel expected only to present closing remarks in the custody matter before Magistrate Woodall, an abbreviated merits hearing, without prior notice, before Magistrate Ferguson left them unprepared to support Mother’s position fully.

As we explained in footnote 5, *supra*, the parties were surprised when faced with a magistrate other than the one who had heard the evidence in the ongoing and oft-

⁹ Mother also advances an argument that the circuit court made a “finding” of parental alienation based entirely on an unsupported allegation contained in Father’s show cause petition. The court made no such finding, instead stating in its October 11, 2016 order that a “denial of access, *if it exists*, is viewed as the denial of the child’s right and is, *though not dispositive*, a serious consideration when examining the fitness of a parent. In this case, however, given the new custody Order in favor of [Father], the issue and [Father’s] Show Cause has become MOOT.” (Emphasis added).

rescheduled custody matter. Magistrate Ferguson explained that the relevant request for a hearing asked only for “a magistrate,” rather than Magistrate Woodall, specifically. Magistrate Ferguson permitted Mother and Father to request a continuance until Magistrate Woodall was available to hear the matter (she was then out of the country), but the continuance judge denied the request and required the matter to proceed as scheduled. Because the hearing had been scheduled for one hour, Magistrate Ferguson asked the parties to present the relevant evidence as expeditiously as possible. Nonetheless, the hearing continued well past its one-hour allotment.

Notwithstanding the change in presiding magistrate and the somewhat attenuated time frame for the hearing, Magistrate Ferguson gave no indication that she was unprepared to rule on the custody matter; she heard extensive testimony and agreed to accept proffers regarding the expected testimony of two other witnesses, in an effort to conserve valuable hearing time.

In *Burdick v. Brooks*, 160 Md. App. 519, 525 (2004), relied heavily upon by Mother in her brief, we explained that “due process does not require procedures so comprehensive as to preclude any possibility of error. Instead, due process merely assures *reasonable* procedural protections, appropriate to the fair determination of the particular issues presented in a given case. Therefore, a denial of due process claim is tested by analyzing the totality of the facts in the given case.” (Internal citations and quotation marks omitted; emphasis in original). Citing *Van Schaik v. Van Schaik*, 90 Md. App. 725, 728-29 (1992), the *Burdick* Court held that the parent was denied due process when he was ““deprived of

being a custodial parent without any notice that a change in custody was sought nor an opportunity to be heard on that issue.’” *Id.*

That is not remotely the case in this matter. Mother was well aware that the matter pending before the magistrate on March 16, 2016 involved a potential change of custody, as it involved a continuation of a previous hearing on that exact issue. Moreover, the change in presiding magistrate and tenor of the hearing actually provided her a greater opportunity to present additional evidence than would have the scheduled closing argument before Magistrate Woodall. In light of the totality of the circumstances, we cannot say that Mother was not provided reasonable procedural protections, and we therefore perceive no denial of her due process in the protection of her parental rights.

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