

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1693

September Term, 2014

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KENT WAY

v.

AMANDA WHEALTON

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Woodward,  
Hotten,  
Sharer, J. Frederick  
(Retired, Specially Assigned),

JJ.

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Opinion by Hotten, J.

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Filed: November 10, 2015

\*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.

Appellee, Amanda Whealton, filed a complaint in the Trial Court for Baltimore County seeking sole physical custody of the parties' one year old daughter, minor child A. Thereafter, appellant, Kent Way, filed an answer to appellee's complaint and a counter-complaint seeking joint physical custody. A family magistrate for the trial court presided over the custody proceedings and recommended an award to both parties of joint legal custody, with appellee having primary physical custody and appellant having visitation. In response, appellant filed exceptions with the trial court. The court overruled all the exceptions and affirmed the magistrate's recommendations. Appellant noted a timely appeal and presents five questions for our review:

1. Was the [t]rial [c]ourt's review of [appellant's] exceptions to the [f]amily [m]agistrate's [r]eport and [r]ecommendation proper?
2. Did the [t]rial [c]ourt exercise the correct standard of review of the [f]amily [m]agistrate's [r]eport and [r]ecommendation?
3. Did the [t]rial [c]ourt improperly delegate its judicial authority to the [f]amily [m]agistrate by failing to render an independent judgment of the facts?
4. Did the [t]rial [c]ourt err in denying [appellant's] request for joint physical custody?
5. Did the [t]rial [c]ourt err in determining [appellant's] income for the purposes of child support?

For the reasons that follow, we shall vacate the judgment of the trial court.

### **FACTUAL AND PROCEDURAL HISTORY**

Appellant and appellee are the parents of minor child A., who was born in February 2013. The parties were never married to each other, but were involved in a romantic

relationship until appellant's alleged infidelity caused them to part. Thereafter, the parties maintained a cordial co-parenting relationship.

In August 2013, the parties reached an agreement in which appellant would have non-overnight visitation every Monday, Tuesday, and Thursday. In September 2013, the parties agreed that appellant would have overnight visitation every other Saturday. Thereafter, on September 4, 2013, appellee filed a complaint seeking joint legal and physical custody. On February 10, 2014, appellant filed a counter complaint requesting joint legal and physical custody. The parties appeared before a family magistrate for a hearing following mediation on June 19, 2014.

The parties agreed, on the record, to joint legal custody and a detailed holiday visitation schedule which included birthdays, Christmas, Thanksgiving, and the Fourth of July. The issues before the family magistrate were limited to physical custody and child support.

On June 20, 2014, the magistrate filed a report of its recommendation and findings of fact in which he recommended enforcement of the agreement regarding legal custody and holiday visitation. Additionally, the magistrate recommended:

Having considered the factors enumerated in *Montgomery Co[.] v. Sanders, Best v. Best[.]* and *Queen v. Queen* and in applying those factors to the facts in the case find that it is [ ] in the best interests of the minor child to be in the primary physical legal custody of the mother[.]

Appellant was awarded visitation on Monday, Tuesday, and Thursday after work until 7:30 p.m., and every other weekend from Friday after work until Monday morning.

Additionally, appellant was ordered to pay child support in the amount of \$716, along with one half of the daycare expenses and medical insurance premiums.

Appellant filed exceptions to the magistrate's report and recommendation. His exceptions were: 1) the magistrate's fact-finding contained material errors and omissions; (2) the magistrate's refusal to apply the *Taylor* factors to appellant's request for joint physical custody is clearly erroneous and an abuse of discretion; (3) the magistrate's failure to articulate the reasons for his recommendation were clearly erroneous; (4) the magistrate's application of the factors enumerated in *Montgomery Cnty. Dept. of Social Services v. Sanders*, *Best v. Best*, and *Queen v. Queen*, to appellant's request for joint custody renders his analysis incomplete and is therefore a clear error and abuse of discretion.

The trial court held oral argument on August 27, 2014. The court issued a written opinion on September 8, 2014 in which it denied each of appellant's exceptions, stating that the record contained ample support for the family magistrate's report and recommendations. Therefore, it stated that appellant failed to show that the magistrate's findings were clearly erroneous. Appellant noted a timely appeal with this Court.

#### **STANDARD OF REVIEW**

"Appellate discipline mandates that, absent a clear abuse of discretion, a chancellor's decision that is grounded in law and based upon facts that are not clearly erroneous will not be disturbed. Where the findings are supported by evidence and therefore not clearly erroneous, the trial judge is left with discretion to determine the proper

disposition of the case.” *Bagley v. Bagley*, 98 Md. App. 18, 31-32 (1993) (citations omitted).

We discussed exceptions to a magistrate’s recommendations in *Kierein v. Kierein*, 115 Md. App. 448, 453 (1997):

Exceptions to the recommendations of a [magistrate] warrant an independent consideration by the trial court. The trial court may consider additional testimony or independently consider the report and recommendations of the [magistrate]. The trial court should defer to the fact-finding of the [magistrate] where the fact-finding is supported by credible evidence, and is not, therefore, clearly erroneous. In doing so, however, the trial court must always independently determine what to make of those facts. In other words, the trial court may not defer to the [magistrate] as to the ultimate disposition of the case.

The ultimate conclusions and recommendations of the [magistrate] are not simply to be tested against the clearly erroneous standard, and if found to be supported by evidence of record, automatically accepted. That the conclusions and recommendations of the [magistrate] are well supported by the evidence is not dispositive if the independent exercise of judgment by the chancellor on those issues would produce a different result.

(internal quotation marks and citations omitted). “Maryland’s appellate courts have concluded that, when faced with exceptions to the [magistrate’s] findings of fact, the trial court must exercise its independent judgment, ‘consider the allegations[,] and decide each such question.’” *Id.* at 454 (quoting *Bagley*, 98 Md. App. at 30).

Additionally, “[t]he guiding principle of any child custody decision, whether it be an original award of custody or a modification thereof, is the protection of the welfare and best interests of the child.” *Wagner v. Wagner*, 109 Md. App. 1, 29 (1996) (quoting *Shunk v. Walker*, 87 Md. App. 389, 396 (1991)). Within this comprehensive framework of authority, the appellate courts of this State practice a limited review of a trial court’s

decision concerning a custody award. As outlined in *Davis v. Davis*, 280 Md. 119, 125-26 (1977), appellate courts employ three distinct methods of review in child custody cases:

When the appellate court scrutinizes factual findings, the clearly erroneous standard of Rules 886 and 1086 [predecessor to the current Md. Rule 8-131(c)] applies. If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

(footnote omitted). Furthermore, the trial court's opportunity to observe the demeanor and credibility of the parties and witnesses is of particular importance. *Wagner*, 109 Md. App. at 39-40.

## DISCUSSION

### I. Custody

Appellant contends that the family magistrate refused to weigh the evidence against the factors enumerated in *Taylor v. Taylor*, 306 Md. 290 (1986), and therefore, the trial court had an affirmative duty to exercise its independent judgment regarding a joint physical custody determination. Additionally, appellant avers that the trial court affirmed the family magistrate's recommendation without elaborating on the relevant facts or factors used to determine that the custody award was appropriate under the circumstances. We agree.

The trial court failed to exercise an independent judgment of the issues that is required when considering exceptions to the recommendations of a magistrate. The

opinion of *Domingues v. Johnson*, 323 Md. 486 (1991), is dispositive. In *Domingues*, the Court of Appeals granted the father's petition for certiorari, to review a decision of this Court, which reversed the decision of the trial court granting sole custody of the parties' two minor children to the father. *Id.* at 489-90. The trial court's decision was based upon the decision of the magistrate, recommending primary custody of the children to the father. *See id.*

The Court of Appeals reversed the judgment of this Court and held, *inter alia*, that the trial judge incorrectly accepted the recommendations of the magistrate upon finding that those recommendations were not clearly erroneous, instead of subjecting magistrate's fact-finding to clearly erroneous test and then exercising his independent judgment concerning proper conclusion to be reached upon those facts. *See Domingues*, 323 Md. at 486.

The Court further concluded, "because the opinion of the [trial judge] in this case suggests that he accepted the [magistrate's] recommendations for final disposition upon a finding that they were not clearly erroneous but were 'well supported by the evidence,' rather than exercising his independent judgment on those issues, the case must be remanded for further consideration." *Id.* at 493.

The Court's reasoning in *Domingues* is relevant to addressing the issues presented in the case at bar. The trial court noted in its decision:

Father is correct in his assertion that the factors recited in *Taylor* apply to a determination of physical custody. Like his argument in his first exception, however, it is of no consequence because the ultimate decision was not clearly erroneous and did include a consideration of all of the relevant custody factors.

The [magistrate] specifically cited in his report the cases of *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1977), and *Best v. Best*, 93 Md. App. 644 (1992), both of which set forth the relevant custody factors to be considered. Moreover, the record contains ample support for [the magistrate's] recommendations as to custody. Accordingly, [appellant] has failed to show that the [magistrate's] findings were clearly erroneous.

The trial court also addressed appellant's exception that the magistrate failed to articulate the reasons for his recommendation, indicating:

[Appellant] points out that the [magistrate's] failure to articulate the capacity of the parents to communicate and reach shared decisions affecting the welfare of the child and the willingness of the parents to share custody. He ignores the fact that there was an agreement to joint legal custody which, in itself, necessitates that the parents have the capacity to communicate, reach shared decisions and share custody. Thus, there was no need to recite those facts in the [magistrate's] [r]eport.

As to the balance of the factors, the record is clear that they were considered and weighed in favor of the arrangement recommended. As noted above, this [c]ourt perceives no error in that arrangement.

The opinion of the trial court failed to consider the relevant issues and reasoning supporting its independent decision regarding those issues. The court simply adopted the recommendations and conclusions of the magistrate and thus, did not exercise its independent judgment.

The trial court erred by solely testing the ultimate conclusions and recommendations of the magistrate against the clearly erroneous standard, without further elaboration. *See Domingues*, 323 Md. at 491 (stating that “[t]he ultimate conclusions and recommendations of the [magistrate] are not simply to be tested against the clearly erroneous standard, and if found to be supported by evidence of record, automatically accepted[.]”); accord *Kierein*,

115 Md. App. at 453. *See generally id.* at 456 (stating that “once challenges to fact [-]finding have been resolved, if it is apparent from the record that the exercise of discretion to resolve the ultimate issue was done independently [ ] after a consideration of appropriate factors, and if the disposition is supported by the record, the specificity required for resolving challenges to fact[-]finding is not necessarily required to explain the exercise of that discretion[ ]”).

Moreover, because it is fairly debatable whether the magistrate’s fact-finding was, in fact, supported by the record, the deference afforded to the magistrate’s findings under the clearly erroneous standard receded, and thus, made the need for independent judgment more prevalent. *See Bagley v. Bagley*, 98 Md. App. 18, 31 (1993) (stating that “[w]here a party argues that facts found by the [magistrate] have no foundation in the record . . . deference under the clearly erroneous rule recedes[,]” and the trial judge “should, in an oral or written opinion, state how he resolved those challenges[ ]”).

This is particularly the case here, as in *Domingues*, where the evidence is sufficient to support an award of custody to either parent. The record does not demonstrate that either appellant or appellee were not fit to have physical custody of minor child A. *See Domingues*, 323 Md. at 492 (stating that in most instances both parents are entirely ‘fit’ to have legal and/or physical custody of a child, but joint custody is not feasible; yet in such cases, the trial judge must exercise his or her independent discretion to make the decision).

At any rate, if the conclusions and recommendations of the magistrate are well supported by the evidence, it is not dispositive if the independent exercise of judgment by the trial judge on those issues would produce a different result. *See Domingues*, 323 Md.

at 491-92; *Kierein*, 115 Md. App. at 453. Given the trial court's cursory explanation in support of its decision, it is unclear whether the trial court's decision would, in fact, produce a different result.

As with most custody cases, the need for an independent review of exceptions to a magistrate's recommendation is substantial. In *Domingues*, the Court of Appeals opined:

The [trial judge's] decision in a contested custody case, frequently among the most difficult a judge is called upon to make, is of critical importance. It significantly impacts upon the lives of the parents and children involved. It is unlikely to be overturned on appeal. And, once that decision has been entered as a judgment, it will ordinarily not be modified except upon a showing of a change in circumstances justifying a change in custody to accommodate the best interest of the child.

*Domingues*, 323 Md. at 492-93 (footnote with citations omitted) (citation omitted). Accordingly, because the trial judge accepted the magistrate's recommendations and concluded that they were not clearly erroneous and supported by the evidence, rather than exercising an independent judgment on those issues, we shall vacate the order and remand the case for further consideration. *See id.* at 493; *Kierein*, 115 Md. App. at 456 (remanding the case for further consideration because the trial judge failed to exercise independent judgement of the issues).

## **II. Child Support**

Appellant next avers that the family magistrate erred in its calculation of his income for child support, that an award of *pendente lite* child support produced an equitable result, and that there was no evidence to support the family magistrate's recommendation that the child support be paid through a wage lien. In response, appellee contends that appellant's contentions regarding child support were not properly preserved for appeal because they

were not raised in his exceptions. We agree and decline to address appellant's further arguments regarding child support.<sup>1</sup>

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

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<sup>1</sup> Assuming *arguendo*, that appellant preserved these issues for appeal, appellant would still not prevail for the following reasons: 1) there is sufficient evidence to support the magistrate's finding that appellant earns \$5,655 per year from his part time job without evidence of a W-2 because appellant testified that he worked fifteen hours per week and is paid \$7.25 per hour; 2) appellant's arguments against the award of *pendente lite* child support does not rebut the presumption that ordering such an award from the date of initial filing would produce an inequitable result or that the trial court acted arbitrarily in ordering the same; and 3) appellant's argument regarding the impropriety of a wage lien is simply unpersuasive.