Circuit Court for Talbot County
Case No. C-20-FM-16-000061

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0014

September Term, 2018

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MICHAEL ALDRICH

v.

JENNIFER ANDREWS

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Meredith,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Shaw Geter, J.

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Filed: May 7, 2019

This is an appeal from a judgment of the Circuit Court for Talbot County determining custody of Jennifer Andrews' and Michael Aldrich's minor child. Following a hearing, a family law magistrate issued a Report and Recommendations awarding joint legal and shared physical custody to the parents. Both then filed exceptions. On February 16, 2018, a judge of the circuit court held that the magistrate erred, and awarded Jennifer Andrews, appellee, sole physical custody of the minor child and upheld the child support payments Michael Aldrich, appellant, was required to pay. Appellant presents the following questions for our review:

1. Did the Circuit Court Judge err when it disregarded the Magistrate's factual findings and credibility determinations without conducting additional fact-finding?

2. Did the Circuit Court Judge improperly apply *Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (1998) as a matter of law when he concluded that the facts of the case at bar supported the restriction of appellant's visitation with [R]?

3. Is the Circuit Court's child support award, calculated based on a sole physical custody award, clearly erroneous pursuant to Md. Code Ann., *Family Law*, § 12-202?

For the reasons discussed below we conclude the circuit court did not err, and thus, shall affirm.

## BACKGROUND

The parties had a nine-year non-marital relationship, which resulted in the birth of R on October 3, 2013. The parties lived together in a home they purchased together until appellant moved out in September 2016. Several months prior, on July 22, 2016, appellee's father—Donald Andrews—went to his wife's—Carol Andrews—and appellant's place of

business to inquire about appellant cutting grass for Donald's father. When Donald arrived, he went to the basement of the business and found appellant and Carol in a state of undress thereby discovering appellant's secret romantic relationship with Carol. The following day, a family meeting took place in the garage of appellant and appellee's home. Present at this meeting were appellant, appellee, Donald, Carol, and appellee's maternal uncle. The parties decided that appellant and appellee would remain in a relationship, and that Donald and Carol would remain married.

However, two months later, in September 2016, appellant moved out of the home he shared with appellee, and moved in with Carol where he currently resides. Appellee, on September 6, 2016, filed an emergency complaint for custody, and requested that appellant's visits with R be supervised and Carol have no contact with R. Two days later, appellee amended the complaint and requested a *Pendente Lite* hearing to establish custody, visitation, and child support of R. On February 2, 2017, both parties appeared for a hearing and consented to the issuance of a *Pendente Lite* Order, which granted them joint legal custody. The *Pendente Lite* Order also granted appellee primary physical custody of R and established visitation days for appellant to see R. Appellant was granted the following visitation schedule: Sundays from 10:00 a.m. until 8:00 p.m. and every Tuesday and Wednesday afternoon until 8:00 p.m.

**March Custody Hearing 2017**

On March 13 and 14, 2017, a hearing was held before a family magistrate. Appellee testified that appellant was a "good father" to R, but maintained that "now it seems like his priority is with Carol not with [R]." She was fearful that R would be harmed if exposed to

Carol. Appellee described the "emotional, psychological, and physical abuse" she suffered from Carol, both as a child and an adult. When appellee was questioned about R having overnight visits with appellant, appellee stated "I do not think that's in her best interests." Appellee stated that at "any point in time [Carol] . . . downed me," and that she never exhibited anything positive towards her.

When appellee was asked if Carol ever hit her, the following conversation ensued:

> Appellee: I was smacked all the time as a child. Whether it was because I had a smart mouth or she just didn't like what I said and I'd get a slap across the face or if she couldn't physically touch me she'd pick something up and throw it across the room at me. One time.
>
> Counsel: Did she ever, did she actually hit you with anything that she threw?
>
> Appellee: Yeah. One time she picked up a ceramic ashtray and threw it across the kitchen and it hit me upside the head.

Appellee also recounted Carol being manipulative, stating that Carol would threaten suicide when she did not get her way. According to appellee, Carol would get in her vehicle and drive away, forcing appellee to then get in her vehicle to search for Carol.

Dorian Cummings, appellee's maternal uncle, testified that appellant and R had a great relationship, but that he too was fearful of R's relationship with Carol. Dorian considered Carol to be a "toxic" person, and claimed "[h]er whole demeanor has changed. She has no patience. Angry . . . she's very, very controlling. Everything is her way or no way." When asked whether he could "see the value in [R] having a regular, ongoing relationship with her father," Dorian responded, "yes."

Donald testified that when appellee was either six or seven Carol "threw a hair bush and hit [appellee] in the head." When asked if it would be in R's best interest "to be cared for by Carol," Donald said, "I fear for [R] to be with her at all." Donald stated that in the past he did not fear leaving his children with Carol, but that he currently would not leave young children with Carol given his concerns about her stability. Donald described appellant as a "good parent."

Debbie Esser, appellee's paternal aunt, described the relationship between appellant and R, as follows: "I think they have a good relationship . . . I mean he cares for her and he loves her and he does a lot of stuff with her." She testified that Carol and appellee have a "very toxic" relationship, and "there's a lot of times when [appellee] could never do enough, couldn't do it right, [and was] put down." She described Carol's recent behavior as "very erratic," and stated she had safety concerns. When questioned about the safety of R if left in the custody of Carol, Debbie stated she thought Carol would "injure [R] or that she would make her feel like she wasn't important." Debbie based this belief on how Carol treated her own children when they were young.

Valarie Russ, appellant's sister, testified that appellant's parenting style was "very loving," and that he was good with R. Valarie described Carol's temperament as "always on edge. You never really know what way she's going to go. You never know if she's going to be very easy going or [if] she's going to snap." During Valarie's testimony, the magistrate remarked:

> What everyone has asked so far is whether or not they would leave anyone, [R], or anyone else with [Carol]. And that's, that position has been well established through the witnesses. What no one has asked [is] whether

> anyone would leave their child with [appellant] and whether or not he could protect that child from their concerns with [Carol]. I'm more concerned about that [than] whether or not she would ask [Carol] to babysit.

In response to the Magistrate's inquiry the following conversation ensued:

> Counsel: Do you believe that, that [R], that it would be in [R's] best interest to be left in [appellant's] custody with Carol present?
>
> Valarie: It's questionable. I mean, I guess [sic] depends on Carol's state of mind at that time.
>
> Counsel: Do you believe that Michael would be able to protect [R] from any potential injury from Carol?
>
> Valarie: With [sic] as controlling as Carol is probably not. He seems to go with whatever she wants.

Next, appellant presented his case. His friend of almost twenty-five years, Corey Thompson, testified that he had the opportunity to observe appellant and R's interactions on Sundays when they would come to his home, where R was able to play with his livestock. Corey described appellant as "a very good father," who is "hands on" and "plays with [R]." He expressed his belief that appellant would not allow anyone to cause harm to R.

Appellant then testified he was hiding his romantic relationship with Carol from R and that he told R he lives with Corey rather than Carol so that R "didn't know what was going on." He testified he did so "[t]o protect [R] from the situation." When asked about his relationship with Carol, appellant stated that he did not want to end his relationship with her, but was told to do so during the family meeting held in the garage. Appellant explained he tried to stay away from Carol, but he could not.

When appellant was asked if he would allow Carol to harm R, he responded, "[n]o."

He pointed out that appellee never expressed any concern prior to the end of their relationship that Carol would harm R, and that R was allowed to be alone with Carol. Appellant stated he does not believe his relationship with Carol would be damaging to R, but claimed he would not disclose the relationship to R until she is "ten."

On March 16, 2017, the magistrate issued her written Report and Recommendations (March Report). The March Report recommended that the parties have joint legal custody and that appellee have sole physical custody. The magistrate found appellant to be "a good and loving father," and stated if he "lived other than where he does now, a shared, equal physical custody recommendation would have been made." The March Report established visitation during the week, as well as outlined the holidays R would spend with each party. The report also mandated appellant pay child support to appellee. Lastly, the report explicitly stated that R is "prohibited from being in the presence or company of Carol."

Both parties filed exceptions to the March Report. Appellee raised the following issues: the March Report did not state that appellant would continue to pay R's day care costs; did not require appellee to continue paying for R's medical insurance; did not determine who could claim R as a dependent for tax purposes; and did not include a suggested one-week summer vacation period with R for each party. Appellant excepted to the custody award, claiming the court incorrectly applied *Boswell v. Boswell*, 352 Md. 204 (1998) and that "the magistrate did not consider all of the evidence presented."

In response to the exceptions filed, a hearing was held on May 24, 2017, in the circuit court. On May 31, 2017, the judge issued an order for further fact finding by the magistrate to determine "whether it is in [R's] best interest to have contact with Carol

Andrews and . . . whether any such contact is likely to result in harm to said child." The order also allowed the parties to present additional evidence as well as discuss all properly raised issues so long as "adequate notice [was] given to opposing counsel."

**October Hearing 2017**

On October 2, 2017, the magistrate heard additional testimony. Dottie Kottwiz, a friend of Carol's, testified that she had never seen Carol be toxic or act abusively towards anyone and described her as "fun." Charles Cummings, appellee's maternal grandfather, and Brent Cummings, appellee's maternal uncle—who were both estranged from Carol and appellee during appellee's youth—stated that they had never seen Carol act abusive or inappropriately with R. When Brent was asked if he believed appellant could protect R from harm, including harm from Carol, he responded that "[h]e would." Appellant testified that Carol had been in the presence of R since the initial March hearing, and that she had not been a threat to R.

Jessie Andrews, appellee's brother, testified that he observed Carol criticize appellee and "put her down every way she could." He experienced Carol hitting him as a child, "lose control of herself" when angry, and throw objects at people. Although he claimed he never saw Carol harm R, he said she interacted with R in the same manner she did with others; her temper was short, and when things did not go her way, she would get mad and "storm off."

Appellee reiterated that she did not think appellant could protect R from Carol. She stated that she feared Carol would cause R "verbal, mental and emotional abuse." Appellee testified that when R was younger she would have her visit Carol, but that R was never

alone with Carol because Donald was always present. Appellee stated, "I was never comfortable with her watching R alone. She was never a babysitter or a backup babysitter for me. She never watched her." Appellee began to restrict Carol's contact with R when she was about two years old, approximately nine months prior to the demise of her relationship with appellant. Appellee explained that after attending a baseball game, "[t]he whole way home Carol complained about [R's] behavior and when [they] get home, . . . she looked at [R] and said, never f…ing again am I going take you anywhere because you don't know how to listen and sit still." She claimed that Carol's reaction in that instance reminded her of her childhood and she did not want R to have a similar experience.

On October 12, 2017, the magistrate issued another Report and Recommendations (October Report) and stated that the additional evidence did not "refute the findings regarding Carol's conduct and temperament as made in the [March Report]." The magistrate also found the additional witnesses appellant presented "were without sufficient knowledge to effectively address Carol's conduct and temperament." The magistrate recommended joint physical custody to both parties and that all of R's contact with Carol be supervised. The court noted that appellee allowed Carol to watch R up until appellant left the home, even though Carol was never totally alone with R because Donald was present.

The report declined to address child support because it was not raised in either party's exceptions. While the magistrate stated changing custody from sole physical to joint physical would "alter the amount recommended by the Guidelines, it was not an issue that the Magistrate was ordered to address on remand."

In response to the October Report, both parties filed exceptions. Appellee claimed the October Report did not contain findings of fact regarding whether R's contact with Carol was "likely to result in harm," and that the magistrate abused her discretion when she failed to make those findings. Appellee also claimed the shared custody agreement allowing Carol access to R if it was supervised by appellant was "clearly erroneous" and "not supported by evidence." Appellant claimed the magistrate's failure to amend the child support order was erroneous. An exceptions hearing was held on December 18, 2017.

**February Order 2018**

On February 16, 2018, the court issued a Memorandum Opinion on Exceptions to the Report and Recommendation of the Magistrate concerning Custody and Support (February Order). The judge reversed the magistrate's joint custody determination, finding "that it is not in [R's] best interest to have contact with Carol." The court explained that "the evidence show[ed] that [appellant] [was] not capable of protecting [R] from Carol and the court found R [was] likely to be harmed by having contact with Carol." Further, the court found, there was sufficient evidence to show "that Carol [was] manipulative, toxic, and short-tempered."

The court determined that the magistrate did not err when she did not adjust the child support order. The court found that the issue was not properly before the magistrate during the October hearing, and that it would have been "beyond the authority of the [m]agistrate to recalculate child support guidelines, when the [m]agistrate [was] only asked to address the issue of custody."

Appellant filed this timely appeal.

## DISCUSSION

### I. The court did not err when it disregarded the magistrate's factual findings and credibility determinations.

"[T]he Master . . . is required to assess the credibility of the witnesses who testify. After establishing the factual record, the Master may then draw conclusions from the first-level facts and use these conclusions to make recommendations, which the Chancellor is free to disregard."[1] *Levitt v. Levitt*, 79 Md. App. 394, 399 (1989). On review, circuit court judges are required to use independent judgment in reviewing a magistrate's recommendations. *Domingues v. Johnson*, 323 Md. 486, 492–93 (1991). When a trial court "chooses to rely exclusively upon the report of the master, . . . he should defer to the fact-finding of the master where that fact-finding is supported by credible evidence and is not, therefore, clearly erroneous." *Wenger v. Wenger*, 42 Md. App. 596, 602 (1979). Unlike appellate courts, trial courts can reserve "unto [themselves] the prerogative of what to make of those facts [and determine] the ultimate disposition of the case." *Id.*

On review, "due regard" is to be given to the trial court's findings of fact and they are set aside only when determined to be clearly erroneous. *Clickner v. Magothy River*, 424 Md. 253, 266 (2012). Trial court custody decisions are reviewed under the abuse of discretion standard. *Santo v. Santo*, 448 Md. 620, 625 (2016) (citing *Petrini v. Petrini*, 336 Md. 453, 470 (1994)). An abuse of discretion occurs when no reasonable person would adopt the view of the trial court, as well as when the ruling being reviewed is "clearly

[1] On October 1, 2015, the title "masters" was replaced with the title "magistrates". Md. Rule 1-501

against the logic" and evidence presented to the court. *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (quoting *Shockley v. Williamson*, 594 N.E.2d 814, 815 (Ind.App.1992)).

Appellant claims that the trial court committed error when it found that he could not sufficiently protect R from Carol. Appellant argues the judge's award of sole custody to appellee was not consistent with the factual findings of the magistrate, and was therefore clearly erroneous and an abuse of discretion. Appellee argues that the evidence adequately supported the trial court's findings. We agree with appellee.

The magistrate's March Report found that both parents were fit and have a sincere desire to be a regular part of R's life, but the magistrate concluded that shared physical custody was not in R's best interest because of exposure to Carol. The magistrate commented that "a shared, equal physical custody recommendation would be made" if appellant did not reside in Carol's home. She noted, "[t]he only home identified as to where [R] and [appellant] would spend nights is at Carol's. The recommendation cannot therefore be for shared physical custody, or even overnights with [appellant]." Carol, appellant's paramour and R's grandmother, was described as an ill-tempered and "toxic" person who mistreated her daughter and others. The magistrate found:

> There was no evidence that Carol is not exactly as described, save three passing points of testimony from [appellant]: a general statement that Carol is a good grandmother; that the parties had used Carol as a babysitter prior to their break-up; and that Carol does not treat [R] in the same way she treats her own children. There was no attempt to contradict, either explicitly or generally, the description of Carol's conduct towards [appellee] and others.

In the October Report, the magistrate stated that the evidence presented at the hearing "did not refute the findings regarding Carol's conduct and temperament made in the [March Report]," and that the evidence "further support[ed] the concerns about [R's] potential exposure to Carol . . . [thus] Carol's demonstrated conduct render[ed] her an inappropriate contact for [R]." The magistrate however, found R had continued to be in Carol's company between the court hearings, and that she did not suffer actual harm. The magistrate concluded "[w]hile it has not been demonstrated the court should fashion its order to completely keep [R] from Carol, the evidence has established that it is in [R's] best interest that any contact with Carol be supervised."

The trial judge, after reviewing the March Report, the October Report, and the transcript, found that joint custody was not in R's best interest. The trial court said, "[t]here [was] an overwhelming [amount] of testimony showing that Carol [was] manipulative, toxic, and short-tempered." In this regard, the court neither disregarded the magistrate's factual findings nor her credibility determinations. In fact, Carol's negative conduct and behavior were express findings by the magistrate in both of her reports. Using his independent judgment as required, the court determined that the magistrate's recommendation was not in accord with the facts. *Bagley v. Bagley*, 98 Md. App. 18, 32 (1993). This ultimate decision of denying appellant shared physical custody was not an abuse of discretion.

**II. The trial court properly applied *Boswell* when it limited appellant's visitation rights.**

Appellant argues that the trial court incorrectly applied the holding of *Boswell*, and therefore, improperly limited his visitation with R. He maintains there was no evidence in the record to support Carol being a danger to R. Appellee counters that the trial court's ruling was in accord with *Boswell* "because it applied the best interest of the child standard after finding that [R] [was] likely to be harmed by having contact with Carol."

"When the trial court's decision involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct." *Clickner v. Magothy River*, *424 Md. 253*, *266 (2012)* (quotation marks and citations omitted). Questions of law are reviewed *de novo*. *Harvey v. Marshall*, 389 Md. 243, 257 (2005).

In *Boswell v. Boswell,* the Court of Appeals examined whether parental visitation should be restricted based upon potential harm to the minor child because of the presence of a parent's significant other. 352 Md. 204 (1998). Following Mr. and Mrs. Boswell's separation, Mr. Boswell began a romantic relationship with another man, Donathan, which resulted in their cohabitation. *Id.* at 210. At the conclusion of their divorce proceeding, the court limited father's visitation with the children and prohibited visitation in the presence of Donathan. *Id.* at 212. The Court of Appeals held "that the correct standard to be applied in evaluating such cases is the best interests of the child, with visitation being restricted only upon a showing of actual or potential harm to the child resulting from contact with the non-marital partner." *Id.* at 209. The Court further held that the trial court made no factual findings of harm when it restricted Mr. Boswell's visitation. *Id.*

When a third-party, non-marital partner's presence is involved, the focus is narrow and courts "are to examine whether the child's health and welfare is [to be] harmed because of visitation." *Id.* at 237. Before the restriction can occur, the court "must make specific factual findings based on sound evidence in the record." *Boswell,* 352 Md. at 237. If there is no present evidence of harm, the court is to "consider a child's future best interest and restrict visitation" rather than "to sit idly . . . and wait until a child is harmed by liberal unrestricted visitation." *Id.*

Here, the trial court carefully weighed the evidence. Acknowledging *Boswell* in its ruling, the court stated, "the best interest of the child standard is always the starting— and ending— point." *Id.* at 236. "Thus, while a parent has a fundamental right to raise his or her own child . . . the best interest of the child may take precedence over the parent's liberty interest." *Id.* at 219. The standard "does not ignore the interest of the parents and their importance to the child," but rather tries to aid in allowing "the child to have reasonable maximum opportunity to develop a close and loving relationship with each parent." *Id.* at 220.

Appellant testified that he did not believe Carol would harm R, even though there was an abundance of testimony to the contrary. Appellee and Jesse disclosed they suffered physical abuse from Carol as children, and that Carol's behavior in the past and present was erratic. Others testified that Carol seemed to be on edge and that it was questionable if appellant could protect R from her. In the October Report, the magistrate noted that even though there were some positive testimony about Carol, "[appellant's] witnesses were without sufficient knowledge to effectively address Carol's conduct and temperament."

Here, the judge decided, based on the holding in *Boswell* and the evidence presented, that visitation should be limited because it was potentially harmful and not in R's best interest. As *Boswell* dictates, a judge does not have to wait for harm to occur before limiting visitation. *Id.*

**III. The trial court did not err regarding the child support award.**

Appellant argues the trial court erred by not calculating the child support agreement based on shared custody. We find no merit in this contention.

Appellant did not raise the issue of child support in his exceptions to the March Report. At the October, hearing the magistrate found any changes in child support was beyond the scope of the hearing since her duty was to determine the danger Carol posed to R. The trial court determined the modification of child support was not properly before it because the issue was not raised before the magistrate previously. Further, during the oral argument of this case, both parties conceded that the issue was not properly before this court. As a result, we decline to address this issue.

**JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**