

Circuit Court for Baltimore City
Case No. 24-D-18-003927

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 486

September Term, 2022

REIKO ASANO

v.

MOLEFI ASANTE

Leahy,
Zic,
Ripken,

JJ.

Opinion by Zic, J.

Filed: December 9, 2022

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

Reiko Asano (“Mother”), appellant, and Molefi Asante (“Father”), appellee, are the parents of two minor daughters (the “Children”). The Children are fraternal twins and were born in 2016. Mother and Father’s relationship began in 2015 and ended no later than November 25, 2018. Mother had sole legal custody and primary physical custody of the Children from August 5, 2019 until July 20, 2020. On July 20, 2020, Mother and Father agreed to share physical and legal custody of the Children. Following various filings from both parties, an immediate order (the “Immediate Order”) granted primary physical custody and sole legal custody to Father on April 7, 2022. Mother now appeals the Immediate Order on the basis that there was no material change in circumstances to warrant modification of custody, there were no extraordinary circumstances to warrant entry of an immediate order, and Mother was deprived of due process on several grounds.

QUESTIONS PRESENTED¹

Mother presents four questions,² which we have rephrased and reframed as follows:

¹ Father moved to dismiss various portions of Mother’s appeal, and, on October 5, 2022, this Court granted dismissal of the following issue as “not properly before the Court”: “Whether Mother was deprived of due process when . . . [t]he trial court, in violation of Maryland Rule 9-208(i)(2), postponed the May 31, 2022 Exceptions hearing for a date more than 60 days after the Exceptions were filed.”

We also dismissed the following issue as moot because Mother withdrew the argument: “Whether Mother was deprived of due process when . . . Father, soon after being awarded sole custody, relocated the Children to North Carolina from Maryland in violation of the April 7, 2022 Immediate Order and without giving Mother an opportunity to be heard or contest the relocation and its deleterious impact on the Children and her opportunity for visitation.”

² Mother phrases the remaining questions as follows:

1. Whether the trial court erred in concluding that a material change in circumstances existed as a result of Mother reporting the Children’s allegations of Father’s abuse when she had made the same reports previously.
2. Whether the trial court erred by entering the April 7, 2022 Immediate Order depriving Mother of all access to the Children when there was no evidence that Mother had harmed the Children or that the Children were in any distress as a result of Mother having reported their allegations of Father’s abuse.
3. Whether the trial court erred by finding extraordinary circumstances existed to allow the entry of an immediate order when all the evidence from Father’s witnesses was that the Children were doing well in the shared care of the parties under the September 2, 2020 order.
4. Whether Mother was deprived of fundamental due process and an opportunity to be heard before being denied all access to the Children when:
 - a. The trial court scheduled the hearing on whether to enter an immediate order less than

1. Whether the circuit court erred when it concluded that a material change in circumstances existed to warrant a modification of custody.
2. Whether the circuit court erred when it found extraordinary circumstances existed to warrant entry of an immediate order.
3. Whether the circuit court erred such that Mother was deprived of due process when it held a hearing on April 7, 2022, less than 48 hours after the magistrate entered her Report and Recommendation and entered the Immediate Order prior to considering Mother's exceptions.

BACKGROUND

The parties disagree about the history of their relationship and the history of the Children's care. Mother and Father's relationship began in 2015 and ended no later than November 25, 2018. Mother asserted that even between the Children's birth in 2016 and the end of Mother and Father's relationship, she was the primary caregiver and Father had not participated in caregiving. Father, however, asserted that he has always been, including after separation from Mother, very involved in the Children's lives, and that he contributed to the Children's expenses and provided health insurance for them. Father stated that he maintained a second residence in North Carolina, where his two other

48 hours after the Magistrate's 124-page Report and Recommendation was submitted,

- b. The trial court failed to timely consider Mother's Exceptions to the Magistrate's Report and Recommendation as required by Maryland Rule 9-208(h)(2),
- c. . . .
- d. The trial court forbade Mother from having virtual visitation or telephone calls because Mother, who speaks Japanese to the Children, could be saying things not known to others who do not speak Japanese

children from a previous marriage reside, and he visited them regularly but that he lived in Baltimore City for the majority of the time after the Children’s birth in 2016. He further stated that his name appeared on the lease of the residence he shared with Mother prior to November 25, 2018. Father also asserted that after November 25, 2018, when he and Mother separated and before any court orders, Mother denied him access to the Children for nearly a year.

The magistrate found that, in 2019, Mother first raised allegations that the Children had unexplained injuries after custodial time with Father, which escalated in 2020 and 2021 to allegations that Father and his chosen childcare providers physically and sexually abused the Children and subjected the Children to human trafficking. Father testified that “he is not sure how many times Mother has contacted” Child Protective Services (“CPS”). Father also testified that “he has never abused or hit [the] Children and does not believe in using physical discipline.” The magistrate found that CPS has never found evidence of abuse and has repeatedly ruled-out abuse after investigating the reports. Despite CPS’s conclusions, Mother continued to report suspected abuse. Mother testified that “she has no faith in CPS.” The magistrate provided a detailed account of Mother’s allegations and court filings starting in 2018 when Father accidentally knocked one of the Children over; we now highlight some of those findings.

Abuse Allegations

As summarized in the magistrate’s Report and Recommendation, in 2018, an incident occurred when Father “was trying to hit a cell phone and knocked [one of the Children] down, which was an accident.” CPS investigated the incident and “determined

that it was unintentional,” but Father “agreed to take an anger management class.” In December 2018, Mother “filed a Complaint for Custody indicating that Father should have no visitation with [the] Children.” In September 2019, Mother filed a Petition for Contempt of the August 2019 Consent Order, “alleging that Father took [the] Children to North Carolina twice, [the] Children returned with unexplained injuries each time, and CPS was involved.” In November 2019, “CPS investigated allegations for cuts on [the] Children’s fingers, sexual abuse by Father’s son, . . . and [a] picture of [one of the Children’s] genital area.” The Children underwent a vaginal exam on November 28, 2019 and participated in forensic interviews. CPS ruled-out abuse at this time. In December 2019, the Children’s therapist filed a report after the Children, according to Mother, “created sexualized drawings and exhibited sexual play.” CPS ruled-out abuse based on this report in May 2020.

Mother testified that she “shared her concerns” with the Children’s Best Interest and Privilege Attorney (“BIPA”) in summer 2020 but had not shared concerns with the BIPA since then “because the BIPA believes Mother to have [PTSD], ‘mental defects,’ and is delusional.” In July 2020, Mother told the Children’s pediatrician that Father hit one of the Children on the head. In August 2020, CPS investigated allegations that “Father licked [the] Children’s vaginas and buttocks, [the] Children touched their genital area, and Father hit [the] Children.” CPS, however, “ruled-out any physical and sexual abuse.” Mother next alleged that she saw on her nanny camera the “Children exhibiting

sexualized behavior (placing toys in their vaginas).”³ The Children underwent a second vaginal exam and more forensic interviews as a result of this and related allegations. The exam results were “normal.” In December 2020, Mother contacted the FBI regarding “Father taking [the] Children across state lines to North Carolina, human trafficking, and child pornography.” CPS again opened an investigation and “ruled-out any physical or sexual abuse.”

Between July 2020 and November 2021, Mother contacted the following individuals and entities regarding her abuse allegations: (1) FBI, (2) National Human Trafficking Hotline, (3) Special Agent Paris in the Baltimore FBI Field Office, (4) Special Agent Paris’ supervisor, (5) Director of the FBI, (6) Baltimore City Department of Social Services, (7) Baltimore County Department of Social Services, (8) North Carolina Department of Social Services, and (9) the police. The most recently recorded allegation was that “Father burned [the] Children with marijuana blunts,” which Father denies.

Additionally, Mother testified that “it has never crossed her mind that anyone but Father is sexually abusing [the] Children.” She also testified that “she agreed to Father having more time with [the] Children despite her belief that Father is abusing [the] Children and she really wanted Father to have supervised visitation.”

³ Mother testified that she does not have the footage from August 2020 because the footage auto-deletes after a certain amount of time, and she did not think the footage would be sufficient evidence because there could be alternative explanations for the behavior.

The Children’s therapist, Tara Falcone, testified that “she has no concerns about [the] Children’s behavior in therapy.” Moreover, Janelle Glasser, the owner and operator of the Goddard School’s Bare Hills location, which the Children attend, testified that “her staff are mandatory reporters regarding abuse,” but that “no one from her school has contacted CPS” about the Children. Ms. Glasser also testified that she has not personally seen or heard of anything about the Children “that would warrant her calling CPS.” The Children’s paternal grandfather also has regular contact with the Children, and he testified that “Father has natural, normal interactions with [the] Children and everyone is always at ease.” He “has never seen Father physically discipline [the] Children” and “has never seen [the] Children with any injuries or exhibit sexualized behavior.” Furthermore, one of Father’s nannies, Alesia Devlin, testified that “she has never observed [the] Children be fearful of Father” and that “Father is a caring and doting parent.” Another caretaker, who is also a family friend to Father, Marquita Brown, testified that she has never witnessed the Children “exhibit any sexualized behavior,” the Children “really like school,” and the Children “were excited to see their therapist.” Ms. Brown further testified that the “Children are initially more irritable and quieter after a weekend with Mother, but they brighten up after time passes and when they see Father.”

After considering all the evidence, the magistrate found that, “by clear and convincing evidence, there are not reasonable grounds to believe that Father has abused a child, including [the] Children.”

Procedural History

Mother filed for sole legal and physical custody on December 4, 2018, following Mother and Father's separation. Father filed a Counter-Complaint for Custody. On March 19, 2019, the Circuit Court for Baltimore City entered a temporary consent order granting Father visitation rights with the Children pursuant to a graduated schedule. Additionally, Mother and Father agreed to communicate via text, and Father consented to pay child support. On August 5, 2019, the circuit court entered a Consent Order for Custody and Child Support granting primary physical and sole legal custody to Mother. Father was required to complete anger management and parenting classes prior to visiting the Children. He was then granted unsupervised visitation on a set schedule.

On September 20, 2019, Mother filed a Petition for Contempt of the Consent Order, claiming that Father violated the consent order by picking the Children up early from daycare, failing to exercise the majority of weekend visitations in Maryland, and returning the Children to Mother with unexplained injuries. Father filed an Answer to this petition on December 3, 2019, admitting to picking the Children up from school early⁴ but denying the other allegations. At the same time, Father filed a Petition for Contempt, claiming that Mother had unilaterally suspended Father's visitation with the Children since November 22, 2019. On January 21, 2020, the court dismissed Mother's Petition for Contempt.

⁴ Father claimed this was not a violation of the consent order.

On December 16, 2019, Mother filed a Motion for Emergency Relief asserting that she pressed charges against Father for suspicions of child abuse because the Children allegedly started to act differently after overnight visitations with Father. Mother requested the court to “suspend Father’s unsupervised visitation with [the] Children.” On December 17, 2019, Father responded to Mother’s Motion for Emergency Relief, denying Mother’s allegations and seeking sole physical and legal custody of the Children. On December 26, 2019, the court denied Mother’s request for emergency relief. On December 30, 2019, Father filed a Petition for Emergency Temporary Restraining Order and Preliminary Injunctive Relief and various motions: Motion for Expedited Scheduling Conference; Motion for Home Study, Custody Evaluation and Psychological Evaluation; Motion for Best Interest Attorney to Represent Children; and Motion for Privilege Attorney for Children. Father asserted that Mother prevented him from seeing the Children and that he was worried that Mother would flee to Japan, where Mother’s family resided. On March 17, 2020, the court denied all six of Father’s motions filed on December 30, 2019.

On May 26, 2020, Father filed an Amended Counter-Complaint for Modification of Custody, claiming that Mother was “no longer a fit and proper caregiver” and had “unilaterally denied Father visitation with the . . . Children for six months.” On July 20, 2020, the circuit court ordered an interim consent order, which ultimately resulted in the Consent Order for Custody and Child Support on September 2, 2020. The parties agreed to share physical and legal custody.

On December 2, 2020, Mother filed a Petition for a Protective Order, asserting that Father was abusing the Children. On December 9, 2020, Father filed a Petition to Modify Custody, seeking sole physical and legal custody of the Children. On December 16, 2020, the court denied Mother’s petition.

Following filings from both parties, the circuit court appointed a BIPA on March 4, 2021. On April 28, 2021, the Children’s BIPA moved for a court-ordered custody evaluation, which Father did not oppose but Mother opposed. A scheduling order issued on May 11, 2021 found that the parties and the BIPA agreed that a “custody and visitation evaluation was necessary before a determination could be made on Father’s Motion to Modify” from December 2020. On May 14, 2021, however, Mother filed an Opposition for a Court-Appointed Custody and Visitation Evaluation with the court-selected doctor.

Discovery closed on October 15, 2021. A trial before a family magistrate in the Circuit Court for Baltimore City took place on November 15 and November 16, 2021. On April 5, 2022, the magistrate issued a 124-page Report and Recommendation based on these proceedings.⁵ The Report and Recommendation identified the facts the magistrate considered and provided recommendations based on those facts and the applicable law. At the end of this Report and Recommendation, the family magistrate included a proposed order. Following a hearing on April 7, 2022, the circuit court adopted this proposed order and issued the Immediate Order, which was entered on the

⁵ This Report and Recommendation was entered on the docket on April 28, 2022.

docket on April 20, 2022. The Immediate Order granted Father’s Motion to Modify Custody and granted Father primary physical custody and sole legal custody of the Children based on the findings made by the family magistrate. The present appeal arises from the Immediate Order.

After the circuit court issued the Immediate Order on April 7, 2022 but before Mother’s appeal on August 19, 2022, Mother filed exceptions to the magistrate’s Report and Recommendation on April 18, 2022, asserting that there was no material change in circumstances to permit entry of an immediate order because she reported Father for abuse both before and after the last order on July 20, 2020. On May 11, 2022, the circuit court granted Father’s request to postpone the exceptions hearing from May 31, 2022 to July 2022. The circuit court denied Mother’s exceptions at that hearing.

STANDARD OF REVIEW

To review child custody determinations, this Court utilizes three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). First, this Court does not set aside factual findings of a trial judge within custody proceedings unless they are clearly erroneous. *Montgomery Cnty. Dep’t of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419 (1977). In child custody cases, the “chancellor’s findings of fact are to be given great weight since he has the parties before him and has the ‘best opportunity to observe their temper, temperament, and demeanor, and so decide what would be for the child[ren]’s best interest.” *Sanders*, 38 Md. App. at 418-19 (quoting *Kartman v. Kartman*, 163 Md. 19, 23 (1932)). Second, we remand for further proceedings if the court “erred as to matters of law . . . unless the error is determined to be harmless.” *In re*

Yve S., 373 Md. 551, 586 (2003). Finally, when the court’s final conclusion rests on sound legal principles and factual findings that are not clearly erroneous, we do not set aside the decision “absent a clear showing of abuse of discretion.” *Gillespie*, 206 Md. App. at 165-66.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT A MATERIAL CHANGE EXISTED TO WARRANT MODIFICATION OF CUSTODY AND THAT A MODIFICATION OF CUSTODY WAS IN THE CHILDREN’S BEST INTEREST.

Mother argues that the circuit court erred in determining that there was a material change in circumstances to trigger modification of the September 2, 2020 Consent Order, which relates back to the June 20, 2020 Interim Consent Order. Mother asserts that her reports that Father was abusing the Children did not amount to a material change in circumstances because her allegations of child abuse against Father began months prior to the July 2020 Interim Consent Order and continued thereafter. Mother also asserts that there were only two vaginal examinations, both of which occurred prior to the entry of the September 2, 2020 Order, and she states that the magistrate’s finding that the Children were harmed by the vaginal examinations and reports of child abuse is not supported by any evidence.

Father argues that the parties provided ample and credible evidence for the circuit court to conclude that there was a material change in circumstance since July 20, 2020 warranting the best-interest analysis and modification of custody. Father emphasizes the circuit court’s finding that Mother’s consistent, regular, and continual abuse allegations

against Father are likely to continue and have escalated. The court also found this constituted a material change in circumstance that negatively affected the Children and necessitated a modification of custody. Father maintains that after the September 2, 2020 Consent Order, Mother has consistently tried to interfere with Father’s ability to take care of the Children, and her conduct has affected the Children’s “well-being, education, and social interactions.” Father also asserts that the screenings and interviews of the Children regarding alleged abuse, despite the lack of proof supporting these allegations, negatively affect the Children’s welfare.

A. The Circuit Court Properly Concluded that There Was a Material Change in Circumstances.

First, in custody modification cases, a court must assess whether “there has been a material change in circumstances.” *Green v. Green*, 188 Md. 661, 688 (2009) (citing *Wagner v. Wagner*, 109 Md. App. 1, 28-29 (1996)). A change in circumstance is viewed as material when it affects the best interest of the child. *McCready v. McCready*, 323 Md. 476, 481 (1991); *Kadish v. Kadish*, 254 Md. App. 467, 503 (2022). A “material change” need not have caused identifiable harm to the children. *Domingues v. Johnson*, 323 Md. 486, 499 (1991). It suffices for a court to find “that changes have occurred which, when considered with all other relevant circumstances, require that a change in custody be made to accommodate the future best interest of the children.” *Id.*

A pre-existing condition that worsens can constitute a material change in circumstances. *Gillespie*, 206 Md. at 172. For example, in *Gillespie*, although the mother suffered from mental illness throughout the parties’ marriage and the life of the

child, the circuit court determined that the worsening of the symptoms, and not the mental illness itself, constituted a material change in circumstances that affected the best interest of the child. *Id.* Furthermore, this Court in *Kadish* held that the “chaos” in the child’s life caused by the mother’s failure to abide by the pick-up arrangement established in the agreement and the mother’s calls to CPS to examine and interview the child constituted a material change in circumstances that affected the child’s best interest. 254 Md. App. at 487-05.

In the present case, the magistrate found that Mother’s abuse allegations significantly escalated after July 20, 2020. Mother also testified that “things have significantly escalated since July 2020.” She testified, however, that she reported escalated abuse only to the “Children’s pediatrician and Mother’s primary care physician,” and she has not contacted CPS. The allegations began in 2019, when Mother alleged that the Children had unexplained injuries after custodial time with Father. The allegations then escalated in 2020 and 2021, to Mother alleging that Father and his chosen childcare providers physically and sexually abused the Children and involved the Children in human trafficking and child pornography. Although Mother had raised allegations prior to July 2020, the severity of the allegations increased. Relying upon testimony from Father and his childcare providers, the magistrate also concluded that Mother’s escalating allegations and her “steadfast” belief that Father was abusing the Children despite CPS repeatedly ruling-out physical and sexual abuse did not serve the Children’s best interests. The magistrate further found that the vaginal examinations,

frequent presence of CPS workers in the Children’s homes, and Mother’s attitude about Father was harmful to the Children.

Additionally, in *Wagner*, this Court held that a party’s attempt to discontinue the other party’s visitation of the child established a material change in circumstance that affected the best interest of the child. 109 Md. App. at 33. Similarly, here, the magistrate found that Mother has attempted to interfere with Father’s visitation with the Children since July 2020, which constitutes a material change in circumstance. For example, Mother reported Father for suspected abuse, and he was arrested on the Wednesday before Thanksgiving 2020 at the Children’s school when he arrived to pick them up for the holiday weekend. The warrant upon which he was arrested at that time was based on allegations from August 2020, and Father’s arrest interfered with his custodial time with the Children over Thanksgiving. The charges were dismissed and Father was released soon thereafter, but “the next time that he was able to exercise his custodial time was on December 16, 2020.” For all of these reasons, the magistrate found that there was a material change in circumstances.

The circuit court’s findings, largely based upon the magistrate’s Report and Recommendation, are not clearly erroneous, and the court came to the decision using sound legal principles. Furthermore, the court did not abuse its discretion when it concluded that a material change in circumstances existed.

B. The Circuit Court Properly Concluded that Custody Modification Was in the Best Interests of the Children.

If a trial court finds that a material change in circumstances has occurred, the court then must “consider the best interest of the child as if [the] proceeding were one for original custody.” *McMahon v. Piazze*, 162 Md. App. 588, 594 (2005). A Maryland court may modify custody arrangements “if the modification would be in the best interests of the child.” Md. Code Ann., Family Law Art. § 8-103(a); *Taylor v. Taylor*, 306 Md. 290, 303 (1986). In the present case, after examining each of the relevant factors, detailed below, the magistrate recommended that Father have primary physical and sole legal custody of the Children. The circuit court adopted this recommendation in the Immediate Order.

1. Physical Custody

Physical custody is the “right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody.” *Taylor*, 306 Md. at 296. When determining the child’s best interest regarding physical custody and visitation arrangements, the court looks at the following factors: (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) material opportunities affecting the future life of the child; (6) preference, age, health, and sex of the child; (7) residences of the parents and opportunity for visitation; (8) length of separation from natural parents; and (9) prior voluntary abandonment and surrender. *Sanders*, 38 Md. App. at 420. Each factor is

important, and courts do not weigh any one of them “to the exclusion of all others.” *Id.* The parties did not provide any evidence or testimony regarding several factors, so we will consider only the following: fitness of the parents; desire of the natural parents and agreements between the parties; potentiality of maintaining natural family relations; material opportunities affecting the future life of the child; preference, age, health, and sex of the child; and the residences of the parents and opportunity for visitation.

Fitness of the parents refers to the parents’ psychological and physical capabilities to take care of the children. *Taylor*, 306 Md. at 308. “[T]he fitness of a person to have custody is of vital importance.” *Barton v. Hirshberg*, 137 Md. App. 1, 25 (2001) (quoting *Hild v. Hild*, 221 Md. 349, 357 (1960)). Courts look to the totality of the circumstances in a parent’s life to evaluate “fitness.” *See, e.g., Gizzo v. Gerstman*, 245 Md. App. 168, 185 (2020) (considering the mother’s relationship status, employment status, housing situation, and prior incarceration in concluding she was a fit parent).

Here, in her Report and Recommendation, the magistrate detailed the history of the parties’ relationship with each other and the parties’ relationships with the Children. Both Mother and Father testified that they enjoy spending time with the Children and have a loving relationship with the Children. Father is a full-time professor at Morgan State University in the English Department and Screenwriting & Animation program. He has held this position since 2006 and testified that his responsibilities and income have not changed since July 2020. Mother completed high school in the United States, then obtained her law degree in Japan and worked in investment banking when she moved from Japan to the United States in 2010. She obtained a Ph.D. from the Johns Hopkins

University in May 2019 and, in April 2022, was completing a post-doctoral fellowship at Georgetown University in Washington, D.C. On November 1, 2021, Mother began working as an assistant professor at the Catholic University of America in Washington, D.C. Mother testified that she works on campus each week from Monday to Friday. Mother also holds a research position at the Johns Hopkins University. Mother started to see a therapist in November 2019 but “has not been diagnosed with any mental health condition,” and she “was never physically or sexually abused” as a child.

Father purchased a Baltimore City home in 2018 with three bedrooms, and he purchased a North Carolina home in 2014 with four bedrooms. He spends the majority of his time in Maryland. Mother lives in Baltimore County in a three-bedroom apartment. Mother goes to a Catholic church with the Children every weekend; she has never discussed taking the Children to Catholic services with Father.

Regarding the parties’ communication, the magistrate found that Mother does not trust Father and often does not share complete information about the Children with him. The parties shared physical custody of the Children between July 2020 and April 2022, during which time they communicated via text or instant message. The parties’ custodial schedule did not change between July 2020 and November 2021, and they “always exchange[d] [the] Children at school or Pepe’s,” a local restaurant. The magistrate concluded that, although they have been able to communicate about physical custody in the past, Mother has frequently withheld information from Father and failed to communicate openly.

The Report and Recommendation also included a recitation of the abuse allegations Mother raised against Father over the years. As stated above in detail, Mother first raised allegations in 2019 that the Children had unexplained injuries after custodial time with Father, and the allegations escalated in 2020 and 2021 to Mother alleging that Father and his chosen childcare providers physically and sexually abused the Children and subjected the Children to human trafficking. All allegations of abuse have been ruled-out by CPS. Father testified that these abuse allegations harm the Children emotionally and mentally and are the reason that the Children are in therapy. After considering the evidence presented, including Mother’s testimony, the magistrate found that the abuse allegations have escalated since July 2020, and Mother steadfastly believes Father was abusing the Children despite such conduct being repeatedly ruled-out.

When considering the desire of natural parents and agreements between the parties, courts look at the “express wishes of the parties and prior agreements between them.” *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 254 (2021). In *J.A.B.*, the court looked at what the parties were requesting and the parties’ prior custody and visitation arrangement. *Id.* Here, both Mother and Father seek sole physical and legal custody. Father testified that “a change in custody is necessary for [the] Children,” and “Mother should have supervised visitation with [the] Children.” Mother testified that a change in custody “will be horrible and not in [the] Children’s best interest” because they “have been with Mother even before they were born.” When Mother and Father separated in 2018, the Children resided with Mother. From March 19, 2019 to July 20, 2020, Mother had sole legal custody and primary physical custody of the Children, and Father was

granted visitation rights on March 19, 2019. On July 20, 2020, the parties agreed to share legal and physical custody. Father testified, however, that immediately following his separation from Mother in November 2018 and prior to any court orders, Mother denied him access to the Children.

When considering the potentiality of maintaining natural family relations, courts look at the parties' abilities to include each other in the children's lives. *Baldwin v. Baynard*, 215 Md. App. 82, 99 (2013). This can include the parties' abilities "to communicate and reach shared decisions affecting the child[ren]'s welfare." *Id.* This can also include the ease with which the parties can cooperate to change visitation days. *Id.* To evaluate these relationships, a court may look to the parties' historical course of conduct. *Id.* In *Baldwin*, for example, the court noted that the father was previously verbally, emotionally, and physically abusive towards the mother, which resulted in the parties' inability to cooperatively change visitation days. *Id.*

Here, the magistrate reviewed the parties' employment and their weekly schedules when considering whether shared physical custody would be in the Children's best interest. The parties shared physical custody of the Children for nearly two years prior to the circuit court's decision to modify custody in the Immediate Order. During that time, the parties communicated via email and instant message, and they alternated custodial time each week. With respect to changing custodial days, in 2021, Father requested to switch weekends to be with the Children on Father's Day. Mother refused this request and instead offered for Father to video chat the Children on Father's Day. Also, during Father's allotted two-week vacation time with the Children, Mother requested to video

chat with the Children every other night. Father stated that this arrangement was not possible but suggested one video chat per week, which Mother accepted.

Both Mother and Father testified that they support the Children having a relationship with both parents. However, when the parties needed to make decisions about the Children's doctors' visits and school schedule between July 2020 and November 2021, their communication often broke down. For example, the magistrate found that Mother did not provide Father with the Children's health insurance information upon request and provided inadequate notice to Father about the Children's doctors' appointments on several occasions such that he was unable to attend or to voice an opinion regarding their medical treatment.

Additionally, Father testified that Mother's conduct alienates him from the Children, and her comments, such as telling the Children that she is sad and cannot sleep when they are not with her, make the Children feel guilty for being apart from Mother. Also, as stated above, before the court ordered visitation for Father, according to Father, Mother denied Father access to the Children for nearly a year after their separation.

When considering the material opportunities affecting the future life of a child, courts look at the parties' abilities to work and to provide the children with educational and social opportunities as they mature. *J.A.B.*, 250 Md. App. at 255. In *J.A.B.*, the circuit court considered the schools the children would attend when they reached the proper age and whether the parents were financially stable. *Id.* at 257. Here, as stated above, Father is a professor at Morgan State University, and Mother is an assistant professor at the Catholic University of America in Washington, D.C. and holds a research

position at the Johns Hopkins University. Mother also testified that she claimed one of the Children on her income taxes as a dependent in 2020 and Father pays child support. The magistrate also considered the parties' testimony regarding the Children's future schooling. Mother and Father both expressed a preference for private school when the Children reach school age and leave the Goddard School.

Courts also consider the preference, age, health, and sex of the children, but the court is not required to speak with the children. *Karanikas v. Cartwright*, 209 Md. App. 571, 590 (2013). If the child is old enough to make a rational choice, the preference of the child may be properly considered. *Barton*, 137 Md. App. at 25 (citing *Hild*, 221 Md. at 357). Here, Father testified that the Children are healthy and have met all their developmental milestones; Mother likewise testified that the Children are healthy. Mother testified that the Children are doing well in school and do not have any learning issues, and Father testified that the Children are smart, shy, and loving.

When looking at the residences of the parents and opportunities for visitation, courts consider where each of the parties reside and the children's opportunities for education. *Baldwin*, 215 Md. App. at 99. A court may consider geographic distance between the parents, the demands of the parents' employment, and each parent's location compared to the children's educational opportunities. *J.A.B.*, 250 Md. App. at 255-56. Here, as stated above, Father owns a Baltimore City home and a North Carolina home. In addition to the Children, Father has two other children, an eleven-year-old son and a six-year-old daughter, who live in North Carolina. He visits his children in North Carolina regularly, often traveling with the Children, and he testified that all of the

children have a positive, loving, and familiar relationship. Father spends the majority of his time in Maryland, however. Mother lives in Baltimore County in a three-bedroom apartment. Also, as stated above, both Mother and Father expressed that they support a relationship between the Children and both of their parents.

When a trial court bases a custody decision on facts that are not clearly erroneous and on sound legal principles, this Court will not disturb that custody decision absent abuse of discretion. *Barton*, 137 Md. App. at 24. We find that the facts upon which the circuit court relied are not clearly erroneous, and the court thoroughly reviewed the evidence with respect to each of the relevant legal factors.

2. *Legal Custody*

Legal custody is 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.” *Taylor*, 306 Md. at 296. In general, joint legal custody should be awarded only if the parties are able to communicate with each other and reach shared decisions affecting the child’s welfare. *Id.* at 304; *Santo v. Santo*, 448 Md. 620, 628-29 (2016) (clarifying that effective communication is not a prerequisite to joint legal custody but that it is a “weighty” factor to consider). Joint legal custody does not require parties to agree on every aspect of parenting, but the parties’ views should not be so “widely divergent or so inflexibly maintained as to forecast the probability of continuing disagreement on important matters.” *Reichert v. Hornbeck*, 210 Md. App. 282, 306 (2013).

Here, the magistrate considered the parties' historical communication; their use of a parenting coordinator; and their ability and willingness to provide notice to one another regarding travel with the Children, family vacations with the Children, and the Children's doctors' appointments. The magistrate concluded that Father has expressed a willingness to share legal custody of the Children, but Mother does not wish to share legal custody. The magistrate also found that Mother does not trust Father and believes Father is manipulative, dismissive, and controlling in their communications. Mother testified that "communication with Father is difficult." The neutral parenting coordinator, however, reviewed the parties' communications and believes that Father's communication was cordial and respectful towards Mother. The magistrate noted that Father reaches out to the parenting coordinator to resolve concerns, but Mother does not because Mother does not believe the parenting coordinator supports her beliefs and contentions.⁶

Mother has often neglected to share information with Father and has been nonresponsive to Father about the Children. In addition to often not providing adequate notice regarding the Children's doctors' appointments, when Mother was in a car accident, Father was informed that the Children were not in the car, but he messaged Mother to inquire about the Children's overnight care while she spent the night in the hospital. Mother responded to the message but did not address Father's concerns about the Children's care while Mother was in the hospital. Also, Mother did not notify Father

⁶ In her review of the parties' use of the parenting coordinator, the magistrate provided a recitation of the times when the parties met with the parenting coordinator and noted the contents of each meeting.

when one of the Children had a scooter accident and sustained a rash and cut on her face. The magistrate found, on the other hand, that Father has consistently sent adequate notice of his travel itinerary when he takes the Children to North Carolina.

In *Baldwin*, this Court determined that the circuit court reasonably concluded that the parties could not communicate well because the father believed that the mother was making false allegations of sexual abuse in order to prevent the father from obtaining access to their child. 215 Md. App. at 111. Similarly, here, Mother believes that Father is sexually abusing the Children. As previously stated, the magistrate found that “Mother is steadfast in her beliefs” that Father is abusing the Children. CPS, however, has repeatedly ruled-out abuse, and Father denies all allegations.

Moreover, the magistrate found that Mother agreed to the September 2, 2020 Consent Order in bad faith because, unbeknownst to Father or the court at the time, Mother had raised new allegations of abuse less than one month prior to the order. The magistrate concluded that the parties have been able to communicate about physical custody and parenting decisions in the past, but Mother has frequently withheld information from Father and failed to communicate openly because she does not trust him. Based on the parties’ prior communications and Mother’s testimony that she does not trust Father, therefore, the magistrate concluded that it is no longer in the best interest of the Children for Mother and Father to share legal custody at this time. The magistrate further concluded that Father is fit and proper to have sole legal custody of the Children.⁷

⁷ The magistrate also noted that sole legal custody does not mean Father can exclude Mother from the Children’s lives.

We find that the facts upon which the circuit court relied are not clearly erroneous, and the court thoroughly reviewed the evidence with respect to the proper legal principles. Because we also find no abuse of discretion, we affirm the circuit court’s award of primary physical and sole legal custody to Father.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING, BASED ON THE MAGISTRATE’S FINDINGS, THAT EXTRAORDINARY CIRCUMSTANCES EXISTED TO WARRANT ENTRY OF THE IMMEDIATE ORDER ON APRIL 7, 2022.

Mother argues that the trial court erred when entering the Immediate Order on April 7, 2022 because the court had not yet ruled on her exceptions, which she filed on April 18, 2022, and because no extraordinary circumstances existed. Mother asserts that Maryland Rule 9-208(h)(1)(A) does not allow a judge to enter an “order or judgment based upon the magistrate’s recommendations until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions.” Father argues that the trial court properly found that extraordinary circumstances existed to warrant the entry of the Immediate Order before hearing Mother’s exceptions.

Maryland Rule 9-208(h)(1) outlines a trial court’s ability to enter an immediate order and hear exceptions:

Except as provided in subsection (2) and (3) of this section, . . . the court shall not direct the entry of an order or judgment based upon the magistrate’s recommendations until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions

Maryland Rule 9-208(h)(2) further provides:

If a magistrate finds that extraordinary circumstances exist and recommends that an order be entered immediately, the court shall review

the file and any exhibits and the magistrate’s findings and recommendations and shall afford the parties an opportunity for oral argument. The court may accept, reject, or modify the magistrate’s recommendations and issue an immediate order. An order entered under this subsection remains subject to a later determination by the court on exceptions.

When a magistrate makes a specific finding as to extraordinary circumstances, a trial court judge may choose to enter an immediate order prior to making a determination on timely filed exceptions; absent extraordinary circumstances, entry of an immediate order is not justified. *Wise-Jones v. Jones*, 117 Md. App. 489, 498 (1997) (citing *Miller v. Bosley*, 113 Md. App. 381 (1997)) (holding immediate order was improper because magistrate made no specific finding of extraordinary circumstances).

Here, the magistrate issued a 124-page Report and Recommendation dated April 5, 2022 and entered on the docket on April 28, 2022. Unlike in *Wise-Jones*, the magistrate in this case concluded that extraordinary circumstances existed, made a specific finding of such, and proposed entry of an immediate order to change primary physical and sole legal custody to Father. The magistrate stated that an immediate order would “prevent Mother from further subjecting [the] Children to abuse screenings and exams and poor decision-making as it relates to [the] Children.” Because the magistrate made such a finding, the circuit court was permitted to enter an immediate order. Md. R. 9-208(h)(2); *Wise-Jones*, 117 Md. App. at 498.

Mother argues that entry of an immediate order was also inappropriate because “there was no evidence that Mother had harmed the Children or that the Children were in any distress as a result of Mother having reported their allegations of Father’s abuse.” It

is not required, however, that evidence of past or present harm support entry of an immediate order; the question is whether extraordinary circumstances exist. Md. R. 9-208(h)(2). Extraordinary circumstances are circumstances that are “significantly detrimental to the child remaining in the custody of the parent.” *McDermott v. Dougherty*, 385 Md. 320, 325 (2005); see *Dillon v. Miller*, 234 Md. App. 309, 315 (2017) (finding extraordinary circumstances where father was voluntarily impoverished and did not have a stable immigration status). The court remains most concerned with the future best interests of the child. *Karen P. v. Christopher J.B.*, 163 Md. App. 250, 265 (2005); *Domingues*, 323 Md. at 499.

On April 7, 2022, the circuit court held a hearing to decide whether to enter an immediate order. After the hearing, the court concluded that extraordinary circumstances existed to warrant entry of an immediate order and accepted the magistrate’s recommendations. The “extraordinary circumstances” here are Mother’s escalating abuse allegations that influenced her interactions with Father and, in turn, with the Children. The magistrate and circuit court also found that Mother’s decision-making regarding the abuse she suspected, such as subjecting the Children to vaginal exams and forensic interviews, constituted extraordinary circumstances. The circuit court then entered the Immediate Order—adopting the magistrate’s proposed order—and granted Father primary physical and sole legal custody of the Children.

We find that the facts upon which the circuit court relied are not clearly erroneous, and the court thoroughly reviewed the evidence with respect to the proper legal

principles. Because we also find no abuse of discretion, we affirm the circuit court’s entry of the Immediate Order on April 7, 2022.

III. THE CIRCUIT COURT DID NOT DEPRIVE MOTHER OF DUE PROCESS.

Mother argues that she was deprived of due process when the court forbade her from having virtual visitation or telephone calls with the Children “because Mother, who speaks Japanese to the Children, could be saying things not known to others who do not speak Japanese.” Mother argues that the appeal as to Mother’s access to the Children is not moot because there has been no final decision regarding her access. Father, however, argues that the issue is moot because Mother has since been granted access, or, in the alternative, is not properly before this Court because Mother’s access will be addressed at a hearing on December 13 and 14, following Mother’s psychological evaluation.

In an Order for Custody and Visitation-Related Assessment issued on April 14, 2022, the circuit court required that Mother submit to a psychological evaluation for the court to decide how to move forward with granting Mother access to the Children. In July 2022, Mother was granted remote access to the Children three times per week for fifty minutes at a time, even though Mother had not yet submitted to a psychological evaluation. In October 2022, Mother’s remote access changed to six times per week for thirty minutes at a time. As of October 2022, Mother’s psychological evaluation was underway, and a hearing was set for December 13 and 14, 2022 to re-evaluate Mother’s access. During or after that hearing, the circuit court will make a determination as to Mother’s access to the Children. Mother’s argument that she has been deprived of due process because her access to the Children was suspended is moot because access has

since been granted. Furthermore, even if the issue were not moot, it is not properly for this Court at this time because a final determination as to Mother’s access will be made at the December hearing.

Mother also argues that the trial court violated her right to due process when it held a hearing to decide whether to enter an immediate order less than 48 hours after the magistrate issued a 124-page Report and Recommendation. She further asserts that Maryland Rule 9-208(h)(1)(A) does not allow a judge to enter an “order or judgment based upon the magistrate’s recommendations until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions.” Father argues that the circuit court properly complied with Maryland Rule 9-208, thereby affording Mother due process.

Due process “requires that a party to a proceeding is entitled to both notice and an opportunity to be heard on the issues to be decided in a case.” *Blue Cross of Md., Inc. v. Franklin Square Hosp.*, 277 Md. 93, 101 (1976). We initially note that Mother’s attorney did not object to the timing of the hearing or request a postponement during the hearing on April 7, 2022. Mother’s argument that she had inadequate notice or opportunity to respond to the Report and Recommendation, therefore, is not preserved. Nevertheless, we also find that Mother was not deprived of due process when the circuit court held a hearing less than 48 hours after the magistrate entered her Report and Recommendation and entered the Immediate Order prior to considering Mother’s exceptions.

Maryland courts have not previously addressed a due process claim in the context of an immediate order entered pursuant to Rule 9-208. As stated above, however, Rule 9-

208(h)(2) provides that a circuit court is permitted to issue an immediate order when a magistrate finds extraordinary circumstances, and “[a]n order entered under this subsection remains subject to a later determination by the court on exceptions.” *See Dillon v. Miller*, 234 Md. App. 309, 316-17 (2017) (stating that, when a magistrate finds extraordinary circumstances, a circuit court may enter an immediate order and a litigant may file exceptions thereafter). As such, the court need not wait until after it makes a determination on exceptions to enter an immediate order.

Here, Mother filed exceptions to the magistrate’s Report and Recommendation on April 18, 2022, after entry of the Immediate Order on April 7, 2022. On May 11, 2022, counsel for the parties and the best interest attorney appeared in the circuit court for a postponement hearing.⁸ The court granted Father’s Motion for Postponement, and the exceptions hearing was rescheduled for July 29, 2022. On July 29, 2022, after the hearing, the circuit court denied Mother’s exceptions. The court complied with the requirements of Rule 9-208(h)(2): because the magistrate found that extraordinary circumstances existed, the circuit court was permitted to enter an immediate order and Mother was not precluded from filing exceptions thereafter. We therefore hold that Mother was not deprived of due process.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**

⁸ Father’s counsel had a family conflict for the original exceptions hearing set for May 31, 2022.