Circuit Court for Cecil County
Case No. 07-C-12-000068

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 934

September Term, 2022

SARA S. SHAW

v.

SCOTT R. SHAW

Berger,
Ripken,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: September 7, 2023

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

The appellant, Sara S. Shaw ("S. Shaw"),[1] challenges the order of the Circuit Court for Cecil County which granted Scott R. Shaw's ("R. Shaw") Complaint for Modification of Child Support. The court's order was entered based on the Report, Findings, and Recommendations of a family magistrate. For the reasons discussed below, we shall reverse the court's child support order and remand for further proceedings in accordance with this opinion.

ISSUE PRESENTED FOR REVIEW

S. Shaw presents the following issue for review: Whether the court erred by calculating child support according to the parties' number of actual overnights with their minor child as opposed to the number of nights provided for in the existing custody order.[2]

FACTUAL AND PROCEDURAL BACKGROUND

In April of 2002, S. Shaw and R. Shaw were married in Sussex County, Delaware. During their marriage, the parties had two children: B., born in 2003, and M., born in 2007.[3]

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[1] In order to differentiate between the parties' names, we refer to each party by the first initial of their middle name, followed by their last name.

[2] Rephrased and condensed from:

I. Did the Circuit Court err by utilizing the "primary physical custody" child support guidelines after generally crediting the Appellee with an unknown number of previous, present, and prospective overnights with the parties' minor child arising out of the Appellee's undisputed refusal to follow the operative child custody order in the past?

II. Assuming, *arguendo*, that it was appropriate for the Circuit Court to utilize the "primary physical custody" child support guidelines, did the Circuit Court nevertheless err by deviating from the child support guidelines by failing to preserve the Appellant's "self-support reserve"?

[3] To protect the identity of the children, we refer to the elder child as "B." and the younger child as "M."

In January of 2012, the parties filed for a limited divorce. Subsequently, the court issued a *Pendente Lite* Consent Order, directing the parties to share physical custody of their children. R. Shaw was also ordered to pay S. Shaw $732 per month for child support.

In October of 2013, the parties executed a Marital Settlement Agreement, which maintained the shared custody arrangement and reduced R. Shaw's child support obligation to $600 per month. The court then issued a Judgment of Absolute Divorce, which incorporated the settlement agreement.

In March of 2022, R. Shaw filed a Complaint for Modification of Child Support, contending that there had been a material change in circumstances. The complaint specified that B. became emancipated in 2021 by virtue of graduating high school and reaching the age of 18, and additionally claimed that for approximately two years prior to the filing of the Complaint, M. had primarily resided with R. Shaw and spent few overnights with S. Shaw. Representing herself, S. Shaw filed an answer to R. Shaw's complaint and asserted that she "made numerous attempts to contact [R. Shaw] regarding the care & custody of [their] minor son [M.] but [R. Shaw] ha[d] failed to cooperate." S. Shaw also filed a Petition for Contempt, alleging that R. Shaw had kept M. away from S. Shaw for the past two and a half years, and had also enrolled M. in a new school without informing S. Shaw.

In June of 2022, the parties participated in a child support hearing before a family magistrate. After the hearing, the magistrate issued a report, recommending that R. Shaw's child support obligation be terminated, and that S. Shaw begin making child support payments of $54 per month to R. Shaw. The circuit court subsequently ordered the

modifications to child support consistent with the recommendation of the magistrate. S. Shaw noted a timely appeal. No brief was filed in response by R. Shaw, and he did not appear for oral argument in this Court.

DISCUSSION

"Child support orders are generally within the sound discretion of the trial court." *Richardson v. Boozer*, 209 Md. App. 1, 17 (2012) (quoting *Knott v. Knott*, 146 Md. App. 232, 246 (2002)). "When reviewing a [magistrate]'s report, both a trial court and an appellate court defer to the [magistrate]'s first-level findings . . . unless they are clearly erroneous." *McAllister v. McAllister*, 218 Md. App. 386, 407 (2014). "On the other hand, the reviewing courts give less deference to 'conclusory or dispositional' findings[.]" *Id.* (quoting *In re Priscilla B.*, 214 Md. App. 600, 624 (2013)). "[W]hile the circuit court may be 'guided' by the [magistrate]'s recommendation, the court must make its own independent decision as to the ultimate disposition, which the appellate court reviews for abuse of discretion." *Id.* (quoting *Priscilla B.*, 214 Md. App. at 623) (internal citations omitted).

I. It is Unclear From the Record Whether the Magistrate Properly Exercised Discretion or Misstated the Law.

During the child support hearing, R. Shaw testified that M. had resided primarily with him during the previous two years and spent an average of one to two overnights with S. Shaw each month. S. Shaw agreed that M. primarily resided with R. Shaw; however, she asserted that the disparity in custody was "[a]gainst [her] will" and noted that she had filed a Petition for Contempt. The magistrate acknowledged being aware of the petition

and explained that, if a show cause order were issued, the petition would be addressed in a separate proceeding. After a recess, the magistrate informed the parties:

> So I did do a child support calculation with [M.] residing with [R.] Shaw. I do understand that there is an issue with that. That will get addressed in the contempt. I go strictly off of what is actually happening, not what is court ordered when it comes to the child support just so people are aware of that, okay.

The magistrate subsequently asked the parties if they had any questions:

> [S. Shaw:] I guess my only question is since this is strictly a child support hearing, why it doesn't go to the amount of time that [M.] is supposed to be staying with me.
>
> [Magistrate:] Because I go with what's actually occurring.
>
> [S. Shaw:] Even though that's against my –
>
> [Magistrate:] Yes. And I do understand that and that will get straightened out in that contempt proceeding[.][4]

The magistrate then informed the parties that she would recommend terminating R. Shaw's child support obligation and, instead, recommend that S. Shaw pay $54 per month in child support to R. Shaw. S. Shaw did not file exceptions to the magistrate's findings and recommendations. *See* Md. Rule 9-208(f) ("[W]ithin ten days after recommendations are placed on the record or served . . . a party may file exceptions with the clerk . . . [which] set forth the asserted error with particularity.").

[4] We note that S. Shaw's Petition for Contempt was heard before a magistrate in May of 2023. Neither party attended the hearing, and the magistrate found that the record lacked sufficient evidence to show that R. Shaw had been served the Summons, Show Cause Order, or Petition for Contempt. The court subsequently dismissed S. Shaw's petition without prejudice. There is no indication in the record that S. Shaw filed a subsequent petition for contempt.

S. Shaw contends that the court erred in declining to apply the child support guidelines according to the extant custody order's shared physical custody arrangement. To support this contention, S. Shaw contrasts this case with *Rose v. Rose*, in which a child's father failed to exercise custody granted to him by a custody order, and subsequently appealed a court's determination of child support. 236 Md. App. 117–20 (2018). Per S. Shaw, this Court's holding in *Rose* indicates that a court has discretion to calculate child support using the "shared physical custody" child support guidelines if there is a good reason for a parent's failure to keep their child for more than 25% of overnights. Furthermore, even though the amount of child support resulting from the guideline's application is presumed correct, S. Shaw posits that the presumption may be rebutted "by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." Md. Code Ann., Fam. Law ("FL") § 12-202(a)(2)(i-ii). S. Shaw emphasizes that she proactively requested R. Shaw to abide by the custody order, that S. Shaw's access to M. was restricted against her will, and that R. Shaw was rewarded for willfully and unilaterally failing to comply with the aforementioned custody provisions. Additionally, S. Shaw contests the determination that she must make child support payments to R. Shaw, despite her earnings falling well below the federal poverty line and contributing less than 4% of the parties' combined income.[5] S. Shaw argues that the court should have adjusted S. Shaw's child support obligation to permit her to maintain a self-

[5] The magistrate determined that R. Shaw's monthly income was $8,700; S. Shaw's monthly income was just $366.

support reserve.[6] *See* FL § 12-201(n). Given her low monthly income, S. Shaw claims that the court should have nullified any child support obligation she would have otherwise owed.[7] Because we reverse and remand based on the first issue concerning the court's calculation of child support, we need not reach S. Shaw's contention that the court's holding violated her entitlement to a self-support reserve.

A. Failure to File Timely Exception

At the outset, we address the preservation of S. Shaw's arguments. Despite failing to file a timely exception to the magistrate's findings and recommendation, S. Shaw claims that her arguments were preserved for appeal, because she is challenging the magistrate's application of law to the facts. Alternatively, S. Shaw contends that this Court has the discretion to consider her arguments, even if they were not properly preserved. Where a party fails to file timely exceptions, "any claim that the [magistrate]'s findings of fact were clearly erroneous" is waived. *Barrett v. Barrett*, 240 Md. App. 581, 587 (2019) (quoting

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[6] "'Self-support reserve' means the adjustment to a basic child support obligation ensuring that a child support obligor maintains a minimum amount of monthly income, after payment of child support, federal and state income taxes, and Federal Insurance Contribution Act taxes, of at least 110% of the 2019 federal poverty level for an individual." FL § 12-201(n).

[7] S. Shaw, who appeared *pro se*, never raised the argument concerning a self-support reserve before the magistrate and it is therefore not preserved for review. *See* Md. Rule 8-131(a) ("Ordinarily, an appellate court will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). Even so, we note, the provisions of the Family Law Article defining and incorporating the self-support reserve were not in effect when R. Shaw filed his complaint to modify child support in March of 2022. *See* 2020 Sess., Senate Bill 847, Enacted Bill (authorizing courts to consider self-support in determining a party's child support obligation); 2021 Sess., House Bill 1339, Enacted Bill (setting July 1, 2022 as the effective start date).

Miller v. Bosley, 113 Md. App. 381, 393 (1997)). However, even without filing a timely exception, "[t]he party may still . . . challenge the court's 'adoption of the [magistrate]'s application of the law to the facts.'" *Id*. at 587. (quoting *Green v. Green*, 188 Md. App. 661, 674 (2009)). As a result of S. Shaw's failure to file timely exceptions, we may not review the magistrate's factual findings. *See Barrett*, 240 Md. App. at 587. Nevertheless, the magistrate's factual findings are not at issue. Instead, S. Shaw argues that the court erred in adopting the magistrate's recommendation, which calculated child support based on M.'s actual overnights with each parent, as opposed to the number of overnights she was entitled to per the then existing court order. S. Shaw's appeal, which challenges the magistrate's discretionary selection of a method of calculation rather than the resultant factual finding itself, "concern[s] the court's adoption of the [magistrate]'s application of law to the facts[,]" and therefore, her claim was not waived by her failure to file a timely exception. *See id.*

B. Exercise of Discretion

Generally, a court's modification of child support is governed by the child support guidelines.[8] *See* FL § 12-202(a)(1) (". . . in any proceeding to establish or modify child support . . . the court shall use the child support guidelines set forth in this subtitle."). Under the guidelines, a general formula is used to determine each parent's child support obligation

[8] Although the amount of child support resulting from the child support guidelines is presumed correct, "[t]he presumption may be rebutted by evidence that the application of the guidelines would be unjust or inappropriate in a particular case." *See* FL § 12-202(a)(2)(i-ii). Additionally, the court may decline to order child support under certain circumstances which are specified in FL section 12-202(b)(1) but are not at issue here.

where one parent has sole or primary physical custody, and an adjusted formula is applied where the parents share physical custody. *Compare* FL § 12-204(l), *with* FL § 12-204(m).[9] Whereas both formulas account for each parent's individual income, the "shared physical custody" formula also adjusts for "the percentage of time the child or children spend" with each parent. FL § 12-204(m)(2)(i); *see* FL § 12-204(l). The term "shared physical custody" refers to when "each parent keeps the child or children overnight for more than 25% of the year" and "both parents contribute to the expenses of the child or children in addition to the payment of child support." FL § 12-201(o)(1). The statute "*requires* the court to use the shared physical custody formula for child support where a parent has actually kept the children for more than [25]% of overnights." *Rose*, 236 Md. App. at 136. Alternatively, if each parent has not actually kept the children for more than 25% of overnights, "the court may base a child support award on shared physical custody: (i) solely on the amount of visitation awarded[.]" FL § 12–201(o)(2). "In exercising its discretion, the court would

[9] FL section 12-204(l) provides:

> (l)(1) Except in cases of shared physical custody, each parent's child support obligation shall be determined by adding each parent's respective share of the basic child support obligation, work-related child care expenses, health insurance expenses, extraordinary medical expenses, and additional expenses . . .

FL section 12-204(m) provides:

> (m)(1) In cases of shared physical custody, the adjusted basic child support obligation shall first be divided between the parents in proportion to their respective adjusted actual incomes.
>
> (2)(i) Each parent's share of the adjusted basic child support obligation shall then be multiplied by the percentage of time the child or children spend with the other parent to determine the theoretical basic child support obligation owed to the other parent.

likely need to consider why the awarded visitation was not actually exercised by the parent." *Rose*, 236 Md. App. at 137 ("[R]elevant evidence might include: 1) whether the primary custodial parent obstructed the non-custodial parent's overnight visitation . . ."). Notably, the court's exercise of discretion must be clear from the record. *See Maddox v. Stone*, 174 Md. App. 489, 502 (2007); *State v. Alexander*, 467 Md. 600, 620 (2020) ("A failure to exercise discretion – for whatever reason – is by definition not a proper exercise of discretion.").

In *Rose,* we explained the discretionary application of the shared physical custody guidelines in some detail:

> A few examples based on common family law scenarios will assist in understanding FL § 12–201([o]). If a parent establishes that he or she actually keeps the child overnight for more than [25]% of the year, then the court's analysis should begin and end with FL § 12–201([o])(1). Under that scenario, the parent would be entitled to have child support based on the shared physical custody formula set forth in FL § 12–204(m). If, on the other hand, the parent cannot demonstrate that he or she keeps the child for more than [25]% of the overnights, then that parent may request the court to exercise its discretion pursuant to FL § 12–201([o])(2) to utilize the shared physical custody child support formula based on the amount of visitation *awarded*. The court, however, may only exercise its discretion under FL § 12–201([o])(2) if the amount of visitation awarded exceeds [25]% of the overnights as mandated in subsection ([o])(1). In other words, ([o])(1) *requires* the court to use the shared physical custody formula for child support where a parent has actually kept the child for more than [25]% of the overnights, while ([o])(2) *permits* the court, in its discretion, to use the shared physical custody formula where a parent is awarded more than [25]% of the overnights, but has actually kept the child for [25]% (or fewer) of the overnights.

236 Md. App. at 136.[10]

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[10] At the time that *Rose* was decided, "shared physical custody" was defined in FL section 12-201(n) and depended on whether each parent "ke[pt] the child or children overnight for

In *Rose*, the parties, Andrea and Jonathan Rose, were subject to a custody order granting each parent at least 36% of overnights with their children. 236 Md. App. at 122. Despite the custody order, Andrea presented evidence that Jonathan "had never kept the children for more than 35% of the overnights in any prior year." *Id.* at 136. "Due to time constraints and scheduling concerns, the court refused to hear testimony from Jonathan on this issue." *Id.* at 132. The trial court instead relied on the overnights awarded in the custody order and applied the shared custody formula to calculate child support. *Id.* Upon review, this Court held that the trial court "erred by not making the threshold factual determination under FL § 12-201(n)(1) whether Jonathan actually kept the children for more than 35% of the overnights in a year." *Id.* at 136–37. Had Jonathan presented "legally sufficient evidence that [he] kept the children more than 35% of the overnights, the statutory definition of 'shared physical custody' in FL § 12–201(n)(1) would [have] be[en] satisfied and child support would [have] be[en] calculated accordingly." *Id.* at 137. On the other hand, if "the evidence demonstrated that Jonathan had not met the 35% of actual overnights threshold, Jonathan could request the court to use the shared physical custody child support formula based on the amount of visitation *awarded* in the Consent Custody Order, but *only if* the court determined that the Consent Custody Order on its face gave Jonathan 35% or more of the overnights." *Id.*

more than 35% of the year." 236 Md. App. at 132. Presently, "shared physical custody" is defined in FL section 12-201(o)(1) and applies when each parent keeps a child overnight at least 25% of the year.

Turning to the present case, the court had previously ordered the parties to share physical custody of M. However, the parties agreed before the magistrate that S. Shaw in actuality kept M. for fewer than 25% of overnights during the previous two years. Accordingly, the magistrate was not required to use the shared physical custody formula to calculate child support. *See Rose*, 236 Md. App. at 136; FL § 12–201(o)(1). Instead, the magistrate was to exercise her discretion in determining whether to base child support on each party's actual overnights with M. or the overnights authorized in the custody order. *See Rose*, 236 Md. App. at 136; FL § 12–201(o)(2). However, it is unclear from the record whether the magistrate applied her discretion in *declining* to use the shared physical custody guidelines or failed to exercise discretion due to a mistaken belief that the law *required* her to base her support recommendation on the actual number of overnights S. Shaw received. Both interpretations are plausible, as the magistrate advised the parties, "I go strictly of off what is actually happening, not what is court ordered[.]" The magistrate was aware of S. Shaw's allegation that R. Shaw had been keeping M. from spending more time with S. Shaw. When S. Shaw inquired of the magistrate, why child support would not be calculated according to the time that M. was supposed to spend with each parent under the custody order, the magistrate repeated, "[b]ecause I go with what's actually occurring."

The magistrate's explanation, particularly in the absence of any discussion of evidentiary factors which the court would "likely need to consider," *Rose*, 236 Md. App. at 137, does not allow us to determine whether the magistrate exercised her discretion in denying S. Shaw's request to determine child support under the custody order. *See Maddox*,

174 Md. App. at 502 ("If the judge has discretion, he must use it and the record must show that he used it." (quoting *Nelson v. State*, 315 Md. 62, 70 (1989))). Accordingly, we reserve, and remand for further proceedings in accordance with this opinion.[11] On remand, each party should be provided the opportunity to present evidence relevant to determining the appropriate child support formula under FL section 12-201(o)(2).

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

[11] We note (without concluding) that consideration of the self-support reserve, FL section 12-201(n), could be appropriate in this case.