UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2276

September Term, 2015

JOHNATHAN A. JAMES, SR.

v.

KENDRA BELL

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: August 4, 2016

This case involves a petition to modify an order regarding custody of a minor child. A magistrate recommended that the father's visitation rights be reduced from every weekend to two weekends per month. The father filed exceptions. At the exceptions hearing, the circuit court dismissed his exceptions because he had served them on the mother rather than on the mother's attorney. The father filed a notice of appeal.

The court, however, never issued any order adopting the magistrate's custody recommendation or changing the terms of custody in any way. Consequently, the appeal is premature and must be dismissed. The father has the right to take an appeal by filing a notice of appeal with the circuit court within 30 days after the court actually enters an order adopting the magistrate's recommendations and modifying the terms of custody. The court has not yet done so.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Original Custody Order

Johnathan James ("Father") and Kendra Bell ("Mother") are the parents of a son, J., born in September 2011. The parents are not married to each other.

In February 2012, Father filed a complaint in the Circuit Court for Baltimore City, seeking joint legal and physical custody of the child. He requested access on three or four days per week on a rotating basis. Mother counterclaimed, asking the court to award her sole legal custody and to grant visitation to Father only on Wednesday evenings. Both parents represented themselves in the initial proceedings.

At the custody hearing, Father testified that he was employed as the driver of a propane tanker. Father explained that, in addition to working full time, his work hours

were subject to on-call responsibilities. On the days when he was on call, he would need to be able to leave home on short notice to make emergency deliveries. His on-call assignments were scheduled months in advance, and he had some flexibility to trade assignments with his co-workers.

The court issued a custody order on August 8, 2012. The order granted Mother joint legal and primary physical custody of the child, while granting visitation rights to Father on weekends (from 6:00 p.m. on Friday until 4:00 p.m. on Sunday). The order provided that Father would not have visitation on the weekends on which he was on call. The order also required Father to inform Mother of his work schedule at the beginning of each month.

Father retained an attorney and took an appeal from the custody order. He challenged the court's decision to restrict visitation on weekends when he was on call. This Court affirmed the custody order in an unreported opinion. *Johnathan A. James, Sr. v. Kendra R. Bell*, No. 1676, Sept. Term 2012 (filed June 13, 2013).

B. Father's Petition to Modify Custody

On October 6, 2014, Father (representing himself again) filed a petition to modify custody. Among other things, he alleged that his work schedule had changed. He requested a "consistent visitation schedule" that would allow "both parents to co-parent together." In her answer, Mother stated that the visitation schedule was not consistent because Father had "chosen to work on weekends" when he was scheduled to have visits.

On June 24, 2015, a magistrate conducted a hearing on Father's petition to modify custody. Father appeared without counsel; Mother appeared with counsel.[1]

At the hearing, Father argued that his weekend visits should be extended from Sunday afternoon until Monday morning because his work schedule now permitted him to arrive at work later on Mondays. Father again opposed the condition that he could not have visitation whenever he was on call. He complained that he frequently missed visits on two or three weekends per month because he was either on call or on mandatory or voluntary overtime. He stated that he would often miss entire weekends even though he might not actually be called to make a delivery or might be gone for only a few hours. Father suggested that his wife or his mother could watch J. when he was out on a delivery.

Mother testified that Father regularly canceled his weekend visits even when he was not scheduled to be on call. She offered a set of emails documenting each time Father had canceled a visit. According to Mother, Father had canceled seven visits between February and May 2015 even though he was only scheduled to be on call for three of those weekends. Mother testified that J. sometimes became upset when Father would cancel a visit that J. had been anticipating.

The magistrate announced oral findings at the conclusion of the hearing. He found that the changes in Father's work schedule would enable him to extend weekend visits

[1] In May 2015, Mother, through an attorney, had filed a "Motion for Award of Legal Fees, Suit Money and Costs," which the court denied. The attorney did not enter her appearance until June 24, 2015, the date of the custody modification hearing.

until Monday mornings. The magistrate, however, found that no new circumstances would justify removing the restriction on visitations when Father was on call. The magistrate commented that even though Father nominally had visitation rights every weekend, he often missed three out of four weekends in a month. The magistrate reasoned that the child would benefit from more consistent visitation on a fixed schedule for visits every other weekend.

On June 24, 2015, the magistrate issued a written report and recommendation. The report stated that there had been a "substantial change in circumstance in that Father's work schedule has changed" and that it would be "in the minor child's best interest to have a set access schedule with Father." The magistrate proposed that, effective immediately, Father would have access on the first and third weekends of every month "from Friday at 6:00 p.m. though Monday at school drop off." The magistrate also proposed that Father have the option to select either the third or fourth weekend as long as he notified Mother at the beginning of the month. Finally, the magistrate recommended that the restrictions from the original custody order (that Father not have visitation whenever he was working or on call) should remain in effect.

C. Father's Exceptions to the Magistrate's Report and Recommendations

On June 29, 2015, the magistrate mailed copies of the report to Father and to Mother's attorney. The final page of that document included instructions for taking exceptions under Md. Rule 9-208(f). It stated that exceptions must be submitted to the clerk of the circuit court and must include "a certification showing the date that copies were mailed to the opposing counsel or party, if in proper person." The document

included instructions for ordering transcripts. It further provided: "Parties also should note that Rule 9-208(f)[2] requires the excepting party to serve a copy of the transcription on the other side. **The Court may dismiss the Exceptions of a party who has not complied with this section**." (Emphasis in original.)

Father filed exceptions to the magistrate's report and recommendations on July 9, 2015. Father contended that the reduction of his visitation rights did not serve the child's best interests. He asserted that the magistrate "talked down to Father, accused, and made false inference (i.e. – cherry-picking facts) to color his determination."

Father's exceptions included certifications that he had requested a transcript from the Office of the Chief Court Reporter and that he had served a copy of the exceptions by first-class mail upon Mother at her home address. The exceptions and the transcript of the hearing before the magistrate were subsequently entered onto the docket. The court scheduled a hearing on Father's exceptions.[3]

D. Dismissal of Father's Exceptions

The circuit court conducted the exceptions hearing on October 30, 2015. Father, appearing without an attorney, asked for a de novo review of the magistrate's report.

[2] Rule 9-208(f), which governs the filing of exceptions, states that a party may file exceptions with the clerk within 10 days after the magistrate's recommendations are placed on the record or served on the party. Rule 9-208(g) states that "[t]he excepting party shall serve a copy of the transcript on the other party."

[3] Separately, in October 2015, Father filed a motion to recuse the magistrate in any future proceedings, accusing the magistrate of bias. The court later denied that motion.

Mother's attorney argued that Father had been required to serve copies of the exceptions and transcript upon her as Mother's attorney,[4] but that he had not done so. She claimed that the magistrate's recommendation "clearly indicates that the exceptions must have a certification showing that copies of the exceptions were mailed to opposing counsel." She asked the court to dismiss Father's exceptions.

Father responded that he had mailed a copy of the exceptions to Mother on the same day that he filed them. He said: "To my knowledge, I thought that I was supposed to just make them to [Mother]. I've never mailed anything to [Mother's attorney] before, I've always mailed everything to [Mother]."

Mother's attorney argued that, because she had entered an appearance on Mother's behalf, the Maryland Rules required Father to serve the exceptions and transcript on the other party's attorney. She asserted that "there has been no response filed on behalf of my client because we don't have the proper documents."

After reviewing the last page of the master's report, the court concluded that the document was "explicit" about the requirements of Rule 9-208. The court orally granted the motion to dismiss Father's exceptions.

On November 3, 2015, the court entered an order dismissing Father's exceptions with prejudice. The court's order did not, however, include any language actually adopting any of the magistrate's findings or proposed orders.

[4] Under Md. Rule 1-321(a), "[i]f service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court."

With 10 days after the entry of that order, Father filed what he styled as a "Motion to Reconsider Court Proceedings." Among other things, he asserted that his exceptions had been dismissed because of "a clerical error" even though "[Mother's] attorney clearly kn[ew] that an exception hearing was filed since she showed up on court." He asked the court to reschedule a hearing on his exceptions.

On December 21, 2015, Father filed a notice of appeal. A few days later, the court denied his motion for reconsideration.

While the appeal was pending, this Court granted Father an extension of time to file his appellate brief. When that deadline passed, Mother moved to dismiss the appeal, asserting that she was "severely prejudiced" by Father's failure to file a brief in a timely manner. Father eventually filed his brief, and this Court denied Mother's motion to dismiss the appeal.[5]

QUESTIONS PRESENTED

On appeal, Father seeks to challenge aspects of the magistrate's determination at the hearing on June 29, 2015, as well as the circuit court's decision to dismiss his exceptions at the hearing on October 30, 2015. He asserts that the magistrate and the circuit judge were both biased against him. He requests that the case be remanded for a hearing to consider his exceptions.

In his brief, Father raises four questions, which we quote:

[5] Under Md. Rule 8-602(a)(7), this Court has power to dismiss an appeal for an appellant's failure to meet the deadline for filing of a brief. This Court is not required to dismiss an appeal on those grounds. *See Leavy v. American Fed. Sav. Bank*, 136 Md. App. 181, 191 (2000).

1. Did the Circuit Court commit reversible error by abusing its discretion and granting custody against [the] primary tenet of [the] best interest of child?

2. Did the Circuit Court show gender bias when recommending a parenting plan for [the] minor child?

3. Did the Circuit Court abused its discretion by subliminally collaborating with defendant[']s] attorney in open court?

4. Did the Circuit Court commit[] reversible error by abusing its discretion by [g]ranting a Motion to Dismiss when there was a dispute as to material facts alleged in the verified complaint.

At this time, we cannot address the merits of any of those questions. The appeal must be dismissed because the circuit court has not yet entered an appealable order.

The basic premise of Father's appeal is that the circuit court has changed the terms of custody to his detriment. In fact, however, the court has not yet done so. The magistrate has issued a *proposed* order regarding custody, but the court has not yet issued an order regarding the custody modification. The custody order from 2012 remains in effect until the court itself issues a modification order. If the court adopts the master's recommendations and enters an order changing the terms of custody, then Father can take an appeal in this matter by filing a notice of appeal with the circuit court within 30 days after the circuit court enters that order.

DISCUSSION

Generally speaking, the right of appeal in Maryland must be granted by the legislature. *Gruber v. Gruber*, 369 Md. 540, 546 (2002). In general, a party has the right to appeal only from a final judgment that disposes of all claims in a civil case. *See* Md. Code (1974, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article.

In addition, a party may appeal from an order "[d]epriving a parent . . . of the care and custody of his child, or changing the terms of such an order[.]" *Id.* § 12-303(3)(x).

A judgment or other appealable order takes effect after it is set forth on a separate document signed by the judge or clerk and after the clerk makes a proper docket entry. *See* Md. Rule 2-601. The primary method of securing review in the Court of Special Appeals is by filing a notice of appeal within 30 days after entry of the judgment or other appealable order. *See* Md. Rules 8-201(a), 8-202(a). A premature notice of appeal (that is, a notice filed before the entry of the judgment or order) is "'generally of no force and effect.'" *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 662 (2014) (quoting *Jenkins v. Jenkins*, 112 Md. App. 390, 408 (1996)).

In *O'Brien v. O'Brien*, 367 Md. 547 (2002), the Court of Appeals concluded that a notice of appeal was premature because it was filed after a circuit court ruled on exceptions to a master's recommendation, but before the court entered an appropriate order consistent with its ruling on the exceptions. In that case, the adult sister of a minor child filed a motion seeking custody and support payments from the child's father. *O'Brien*, 367 Md. at 551. The court set the case for hearing before a domestic relations master, who recommended that a judgment be entered against the father. *Id.* at 552. The father filed timely exceptions, and the court issued an order granting his exceptions. *Id.* at 552-53. The court did not, however, issue an order denying the adult sister's motion for relief. *Id.* at 553. "Overlooking that jurisdictional deficiency[,]" this Court ruled on the merits of the adult sister's appeal. *Id.*

The Court of Appeals held that this Court should have dismissed the appeal as premature. *Id.* at 556. The Court explained:

> "[A] master is not a judicial officer, and is not vested with judicial powers." The master serves as an assistant and advisor to the court. Upon referral of a matter, . . . the master is authorized to take testimony and to make a report to the court. The report includes a statement of the master's findings, based on the evidence taken, and a proposed order. The master's report is advisory only, however. His or her findings of fact are to be treated as prima facie correct and are not to be disturbed by the court unless found to be clearly erroneous, *i.e.*, unsupported by substantial evidence in the record before the master, but the master's ultimate conclusions are merely recommendatory and must be reviewed by the court "with an independent exercise of judgment . . . ."

O'Brien, 367 Md. at 554-55 (footnote and additional citations omitted).

The Court emphasized that, upon consideration of exceptions to a master's recommendation, the court "must rule upon the exceptions, either by sustaining or overruling them, *and it must then enter an appropriate order consistent with that ruling*." *Id.* at 555 (emphasis in original). The Court explained that, in the context of that case, the next step necessary to terminate the case would have been for the court to issue an order denying the adult sister's underlying motion for relief. *Id.* The Court concluded:

> Merely sustaining, or overruling, exceptions does not end the case in the Circuit Court, and it therefore does not constitute a judgment, even if the parties and the court believe that, for practical purposes, the case is over. It is not over until a judgment, entered in conformance with Rule 2-601, is signed and entered on the docket. As that has yet to occur, [the adult sister's] appeal was plainly premature and it should have been dismissed by the Court of Special Appeals. . . .

O'Brien, 367 Md. at 555-56.

O'Brien dictates the outcome of the present case. The powers formerly exercised by domestic relations masters are now vested in magistrates. *See* Md. Rule 1-501. The

court may refer the "modification of an existing order or judgment as to custody or visitation" to a magistrate. Md. Rule 9-208(a)(1)(F). The magistrate has power to conduct proceedings and to "recommend findings of fact and conclusions of law." Md. Rule 9-208(b)(7). The magistrate must "prepare written recommendations, which shall include a brief statement of the magistrate's findings and shall be accompanied by a proposed order." Md. Rule 9-208(e)(1). If no party files timely exceptions, the court may enter an order or judgment as recommended by the magistrate. Md. Rule 9-208(h)(1)(B). If a party files timely exceptions, the court may issue an appropriate order or judgment after ruling on the exceptions. Md. Rule 9-208(h)(1)(A). Either way, the court must actually enter an order either adopting or rejecting the magistrate's proposed order.

Here, even though the parties may have believed that the dismissal of Father's exceptions ended the case "for practical purposes" (*O'Brien*, 367 Md. at 556), the court has not yet issued an order on the underlying petition to modify custody. The original custody order from August 8, 2012, has not yet been modified by the court, and thus it remains in effect. Father cannot appeal from the modification of custody until the court actually issues an order modifying custody.

At this time, we must dismiss Father's premature appeal. Dismissal of this appeal "will return the case to the Circuit Court, which will have the opportunity either to reconsider the ruling on the exceptions or enter a judgment on that ruling." *O'Brien*, 367 Md. at 556. Thereafter, an aggrieved party may appeal to this Court by filing a notice of appeal with the circuit court within 30 days after the entry of such an order.

Further proceedings are necessary for the court to issue an order on the underlying custody issue. On remand, the court may also reconsider its decision to dismiss Father's exceptions without any consideration of the merits based on his noncompliance with Rules 1-321 and 9-208.[6]

APPEAL DISMISSED. COSTS WAIVED.

[6] The court dismissed Father's exceptions without any consideration of the merits because Father had served copies of the exceptions on Mother but not on Mother's attorney. The court imposed the consequence of dismissal based on its conclusion that the last page of the magistrate's report had "explicitly" instructed him to serve a copy of the exceptions on Mother's attorney when it said: "The Exceptions must have a certification showing the date that copies were mailed to the opposing counsel or party, if in proper person." It is debatable whether a layperson would have understood this technical jargon ("or party, if in proper person") to mean that his exceptions would be dismissed outright if he served them only on the opposing party. Father argues that, under the circumstances, the court should have merely postponed the exceptions hearing. On remand, the court may reconsider its decision to dismiss the exceptions "in light of the totality of the circumstances and the purpose of the rule." Md. Rule 1-201(a).